The Protection of ECHR Rights in UK National Security Law

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I, Daniella Lock, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Contents

Abstract

This thesis assesses the nature and effectiveness of European Convention on Human Rights (ECHR) protections in UK national security law (UKNSL) and their implications for the broader debate on law's role in the national security context. It assesses the manner in which UKNSL protects ECHR rights by way of an in-depth doctrinal assessment of case law concerning the protection of ECHR rights in four core UKNSL contexts. These are: article 3 rights in national security-related deportation; article 6 rights in judicial proceedings reviewing the imposition of 'Terrorism and Investigation Measures' (TPIMs); article 8 rights in UK surveillance; and article 15 derogation by the UK for reasons of counter-terrorism.

The key argument of the thesis is that despite extensive domestic institutional reform to enable substantive review of UK national security powers, including in appropriate contexts fact-finding and assessment of primary facts and evidence by judicial bodies, the manner that UK judges have applied their jurisdiction tends to dissolve into rationality review. As a result, UKNSL is currently failing to protect fully ECHR rights, and the relevant UKNSL regimes have become 'legal grey holes' (LGHs) which are helping to normalise expanding executive national security power. However, as will be argued, the creation of LGHs in this way is not necessarily an inevitability of relying on law to constrain the executive in the national security context, as some political

constitutionalists may argue. Rather, the LGHs examined in this thesis can be linked to a number of factors emanating from UKNSL. The thesis argues that these factors are most likely not inherent features of law but contingent. The analysis identifies several changes that could be made, to the statutory regime and judicial practice, to eliminate them.

Impact Statement

This thesis makes an original contribution to existing scholarship in a number of ways. In the first instance, this thesis represents a significant development in the academic understanding of a complex area of UK law that has been subject to repeated reform in the last two decades. It presents the first extensive analysis of the compliance of all key areas of this reformed law with ECHR rights. In addition to traversing the wide-ranging academic literature pertaining to this area, the thesis has engaged with a range of source material beyond primary legislation and case law. This includes the Hansard debates surrounding the legislation, the ECHR Travaux Préparatoires, and secondary legislation. In setting out and elucidating this body of law, the thesis represents a scholastic tool for academics and practitioners seeking an overview of UKNSL and related ECHR case law.

The thesis makes a further contribution to legal scholarship in its finding of significant commonalities in the legal regimes' protection of ECHR rights in UKNSL, while being sensitive to the differences between these areas of practice. The identification of such commonalities provides an important foundation for further scholarship on both UKNSL, UK human rights law as well as the ECHR. It also clarifies the general direction of a body of law with respect to its protection of human rights, helping in the resolution of an issue that has been the subject of academic dispute over the last twenty years.

Another contribution of the thesis relates to its presentation of applicable theory in the field. The thesis develops a set of categories to identify more accurately the grounds on which judges and scholars object to substantive judicial review in national security law. In doing so, the thesis advances the argument that UK legal reform, made in the name of better protecting human rights in the national security context, has led to the creation of LGHs.

A further contribution of the thesis is the manner in which it identifies specific features of UK legal practice that can explain the prevalence of LGHs in UKNSL. The identification of such features signposts the manner in which the protection of ECHR rights can be significantly improved in UKNSL, as well as at the level of the adjudication by the European Court of Human Rights (ECtHR). The identification of such features has also enabled the thesis to intervene in the normative debate regarding the role that law should play in the area of national security.

The research from this thesis will be disseminated in several different contexts, including in the form of journal articles and a book to engage not only legal academics but also legal practitioners, policymakers, NGOs and oversight bodies. Special efforts will be made to engage oversight bodies, policymakers, and legal practitioners, at both the UK and European levels. This is because

the thesis research makes recommendations for changes in practice that judges and lawmakers could implement to try to improve the protection of ECHR rights in the national security context. Such engagement will take the form of participating in workshops, seminars and conferences and pursuing opportunities to write up policy reports published via non-academic civil society platforms.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ATCSA	Anti-Terrorism, Crime and Security Act 2001
CCA	Civil Contingencies Act
CMP	Closed material procedure
CORG	Control Orders Review Group
CTA	Counter-Terrorism Act 2008
CTSA	Counter-Terrorism and Security Act 2015
CTSEA	Counter-Terrorism and Sentencing Act 2021
CTBSA	Counter-Terrorism and Border Security Act 2019
ECHR/Convention	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FCO	UK Foreign and Commonwealth Office
GCHQ	Government Communication Head Quarters

HRA	Human Rights Act
IPA	Investigatory Powers Act 2016
IPT/The Tribunal	Investigatory Powers Tribunal
IRA	Irish Republican Army
IRTL	Independent Reviewer of Terrorism Legislation
ISC	Intelligence and Security Committee
JCHR	Joint Committee on Human Rights
JIC	Joint Intelligence Committee
JSA	Justice and Security Act 2013
LGH	Legal grey hole
LIFG	Libyan Islamic Fighting Group
MI5	Security Service
MI6	Secret Intelligence Service
MOD	Ministry of Defence
NCND	Neither Confirm nor Deny
NSA	National Security Agency (USA)

PII	Public Interest Immunity
PMOI	People's Mujahedin Organisation of Iran
PRISM	Planning Tool for Resource Integration, Synchronization, and Management (USA)
PTA	Prevention of Terrorism Act 2005
QOT	'Question of Trust' report by David Anderson QC
RIPA	Regulation of Investigatory Powers Act 2000
SA	Special Advocate
SIAs	Security and Intelligence Agencies
SIAC	Special Immigration Appeals Commission
SIGNIT	Signals Intelligence
SR	Special Representative
SS	Secretary of State
SSFCA	Secretary of State for Foreign and Commonwealth Affairs
SSHD	Secretary of State for the Home Department
TA	Terrorism Act 2000

TA2	Terrorism Act 2006
TAFA	Terrorist Asset-Freezing, Etc. Act 2010
TPIM	Terrorism Prevention and Investigation Measures
TPIMA	Terrorism Prevention and Investigation Measures Act 2011
TRA	Terrorism-Related Activity
TRG	Terrorism Prevention and Investigation Measures Review Group
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations

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The Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007, SI 1285/2007

1. Protecting ECHR Rights in the National Security Context

The subject of this thesis is the development of a body of UK law which regulates the UK Government's national security-related activities, in a manner which purports to protect the rights contained in the European Convention on Human Rights (ECHR/the Convention). This swelling catalogue of law is referred to as 'UK national security law' (UKNSL) herein. It has been developed with the explicit aim of ensuring the UK is able to guard its national security while protecting ECHR rights. Such rights make up the core of the legal human rights framework in the UK, after the UK played a crucial role in drafting such rights with other European nations in the aftermath of the Second World War. The Convention rights are developed from rights contained in the Universal Declaration of Human Rights (UDHR), with additional provisions to ensure their effective protection such as through the creation of a regional European Court of Human Rights (ECtHR/the Strasbourg Court) with authority to adjudicate such rights. In balancing the need to respect democracies in Europe, while also preventing violations of rights, the ECtHR has developed principles such as 'subsidiarity' which places strong emphasis on

domestic protections for ECHR rights and reliance on the ECtHR to adjudicate rights violations only as a last resort.

In the UK, a vast body of national security law has been developed with the stated aim of creating domestic protections for ECHR rights in the national security context. 'National security law' is a relatively nascent term in the UK compared to in the US.[1] However, it is increasingly employed in legal academia to refer to UK law related to the protection of national security, made up of statutory provisions and case law. It includes law which does not specifically refer to national security, but the 'prevention of terrorism' and the 'defence of the realm'.[2] As we will see, the development of UKNSL so far has been strongly linked to the prevention of terrorism-related activity, though it also applies to a much broader set of circumstances, such as counter-espionage.[3]

In examining the relationship between UKNSL and ECHR rights, the first part of the aim of this thesis is to understand the nature and effectiveness of the protection of ECHR rights in UKNSL. Notably, UKNSL has been through such extensive and complex reform that the way is ECHR rights are protected in

[1] Paul F Scott, *National Security Constitution* (Hart, 2008), 4.

[2] Ibid.

[3] UK Government, 'A Strong Britain in an Age of Uncertainty: The National Security Strategy' (2010) Cm 7953, 14. A wider example is the prevention of ecological disaster as a result of climate change. Richard A. Matthew, 'The Environment as a National Security Issue' (2000) 12 *Journal of Policy History* 1, 101 – 122.

UKNSL is not readily identifiable. The domestication of ECHR rights by the Human Rights Act 1998 (HRA) has coincided with a significant increase in statutes establishing powers for the UK Government to protect national security within UK law. In placing such powers on statutory footing, the UK has increasingly attached safeguards to protect ECHR rights to such powers.[4] These safeguards have been principally judicial in nature, requiring judges to review the UK Government's use of national security-related powers. This has led to what has been termed a 'constitutional shift' with respect to the role of judges in relation to national security, and a notable expansion of dense national security-related case law.[5] As will be discussed in more detail, scholars and practitioners have repeatedly questioned the extent to which these protections are effective in protecting ECHR rights.

The second part of this thesis' aim is to assess UKNSL's ECHR protections from the perspective of the broader debate on law's role in the national security context. This debate is complex, involving a combination of descriptive and normative claims,[6] and with its principal cleavage defined by the opposition of political and legal constitutionalism.[7] While definitions of the concepts of

[4] For an overview of the scope of such safeguards, which are discussed in full below, see Lorna Woods OBE, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) *MLR* O, 1 – 28, Paul F Scott, *The National Security Constitution* (Hart, 2018).

[5] Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' (2011) 9 *ICON* 1 172 – 199, Paul F Scott, *The National Security Constitution* (Hart, 2018).

[6] Victor Ramraj (ed), *Emergencies and the Limits of Legality* (CUP, 2008), 3.

[7] Fiona de Londras and Fergas F Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *OJLS* 1, 19 – 47, 20.

political and legal constitutionalism vary, in general terms they may be summarised as follows. Political constitutionalism is broadly committed to the view that the ultimate say on constitutional matters, including human rights protection, is the legitimate purview of the legislature and executive.[8] On the other hand, legal constitutionalism upholds the view that the judiciary can have a legitimate role in having the final say on constitutional matters, including in the form of overruling legislation passed by the legislature or a decision made by the executive, where this protects human rights or constitutional principles.[9]

As discussed below, political constitutionalists advance three key arguments against the law giving judges a role in the national security and/or crisis context where they have powers to overrule the executive and legislature. The first states that judges are lacking in the expertise and institutional competence to rule on national security matters without compromising national security itself.[10] This is referred to as the 'security argument'. The second argument is that we ought not rely on judges to hold the executive to account with respect to its national security activity as they are prone to excessive deference to the executive in this context, referred to as 'excessive deference argument'. Political constitutionalists, such as Oren Gross, have provided an account of the

[8] Ibid.

[9] Ibid.

[10] Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (OUP, 2007); Adrian Vermeule and Eric Posner, *The Executive Unbound* (OUP, 2011); Stephen Reinhardt, 'The Judicial Role in National Security' (2006) 86 *Boston University Law Review* 5 1309-1314.

damaging consequences arising as a result of ineffective legal protections in the national security context, in the form of law serving as a normalising and legitimising cover for excessive executive power.[11] The third position is the 'legitimacy argument', which states that judges do not have a legitimate role in making decisions related to national security as they are not democratically-elected.

As will be discussed, legal constitutionalists have advanced several counterclaims to the political constitutionalist arguments laid out above. This includes highlighting that judicial behaviour is not necessarily fixed but responsive to the kind of procedures governing them. At the same time, there is overlap between criticisms of law in the national security context between political and legal constitutionalists. One example of this is David Dyzenhaus' notion of 'legal grey holes' (LGHs), which corresponds to the political constitutionalist model of national security law as legitimising executive action.[12] LGHs are legal spaces where there are 'some legal constraints' on executive action, which renders them 'not a lawless void',[13] though such constraints are 'so insubstantial that they pretty well permit the government to do as it pleases'.[14] While LGHs have the legitimising consequences

[11] Oren Gross, 'Chaos and Rules' (2003) 112 *Yale Law Journal* 1101.

[12] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006); David Dyzenhaus, '*Schmitt v Dicey*: Are States of Emergency Inside or Outside the Legal Order?' (2006) 27 *Cardozo Law Review* 5.

[13] Ibid, 42.

[14] Ibid.

articulated by Gross, they are not necessarily linked to relying on law to constrain the executive in the national security context.

In carrying out the thesis' twofold aim, the thesis assesses the way UKNSL protects ECHR rights by way of an in-depth doctrinal assessment of case law concerning the protection of ECHR rights in four core UKNSL contexts. These are: article 3 rights in national security-related deportation; article 6 rights in judicial proceedings reviewing the imposition of Terrorism Prevention and Investigation Measures (TPIMs); article 8 rights in UK surveillance; and article 15 derogation by the UK for reasons of counterterrorism. It is central to the argument of this thesis that the ECHR requires domestic courts to engage in 'substantive review' of compliance with the mandates of the ECHR. Substantive review means judges engaging in an *independent assessment* of the compatibility of the *outcome* of the primary decision-maker's decision with the Convention. It contrasts with two other types of review: judicial review of the *process* of decision-making by the primary decision-maker and review which tests the *rationality* or *reasonableness* of the decision or conduct rather than making an independent assessment against the requirements of the ECHR. These types of review are referred to as 'deferential' forms of review throughout the thesis. Though, as will be discussed, some elements of deference in the form of assigning weight to primary decision-makers are compatible with engaging in substantive review.

In carrying out its assessment, the thesis reveals two important features of UKNSL. The first is that UKNSL is currently not effectively protecting ECHR rights due to the way UK judges have applied their jurisdiction, which tends to dissolve into a deferential form of review in the form of a process-oriented or rationality review. Such review creates gaps in judicial reasoning that prevents the full application of legal tests required for the protection of ECHR rights. Such dynamics occur despite extensive domestic institutional reform to enable substantive review of UK national security powers, including in appropriate contexts fact-finding and independent assessment of primary facts and evidence.

The second feature is that the adoption of deferential forms of review has led to the creation of LGHs in UK law which are serving to normalise expanding executive power. This stems from two `sources. These are: first-instance judges replicating Strasbourg's adjudicative approach and, where there are gaps in such jurisprudence, developing domestic 'deference-leaning' doctrine, utilising process-oriented and/or rationality review. This reasoning is then often upheld in later stages of judicial review, usually on the inaccurate assumption that decision was the product of substantive, factual analysis. I will argue this has created 'cascades of deference' to the executive across different levels of judicial review of executive action. It will be shown that as more cases have been decided in this way, this has led to the accumulation of procedural and

deferential jurisprudence in UKNSL, which has helped to normalise and expand executive national security power.

The thesis will further argue that the dynamics underpinning the creation of LGHs do not, as might be argued, automatically vindicate political constitutionalists who argue that the law is incapable of constraining the executive in the national security context. Rather, the LGHs examined in this thesis are linked to several factors emanating from UKNSL. These factors are mixed messages regarding the judicial role in the national security context emanating from statutory frameworks as well as judicial doctrine expressed at the level of the Supreme Court/ House of Lords (HOL). They are also linked to procedural development in the courts, such as broad powers given to judges to authorising 'closed material procedures' (CMPs) which enable the public and non-governmental parties to be excluded from cases on grounds that evidence relevant to the case in security-sensitive. It will be argued that these factors are most likely not inherent features of law but contingent, and the analysis identifies a few changes that could be made to the current system to eliminate such factors.

This chapter introduces these core arguments of the thesis and sets out the methodology for the thesis' analysis. Section One of this chapter presents significant aspects of the relationship between the ECHR and national security and outlines the way the UK has domesticated ECHR rights protections in the UK national security context. Section Two argues that assessing this

relationship in more detail is important and can inform the broader debate on law and executive accountability in the national security context. Section Three articulates the methodological approach of the thesis, justifying and clarifying the thesis' starting point that the protection of ECHR rights requires judges to engage in substantive review.

1.1. Background to the ECHR, UK and national security

The ECHR is an international treaty drafted by the Council of Europe, which entered into force in 1953.[15] Article 1 of the Convention creates an obligation for all Member States to 'secure for everyone within their jurisdiction' the 'rights and freedoms' defined in Section 1 of the Convention'.[16] The ECHR contains a number of 'qualified' rights in the sense that they may be lawfully interfered with when certain conditions are met.[17] These are the right to respect for private and family life, home and correspondence,[18] the right to freedom of thought, conscience and religion,[19] the right to freedom of

[15] The Council was formed in 1949 following the signing of the Statute of the Council of Europe in May 1949 by ten European states (Belgium, France, Luxembourg, The Netherlands, UK, Ireland, Italy, Denmark, Norway and Sweden).

[16] ECHR, article 1.

[17] Council of Europe, 'ECHR toolkit: Some Definitions' <https://www.coe.int/en/web/echr-toolkit/definitions> accessed 17 October 2021.

[18] ECHR, article 8.

[19] ECHR article 9.

expression,[20] and the right to freedom of assembly and association.[21] It is possible for states to derogate from their obligations to protect these rights under article 15 ECHR in time of war or national emergency. States may also derogate from additional ECHR rights: the right to liberty and security[22] and the right to a fair trial.[23] The ECHR also contains rights whose obligations states may not derogate from in any circumstances, even in an emergency context. These are the right to life;[24] the prohibition of torture;[25] the prohibition of slavery and forced labour';[26] and the prohibition of punishment without law.[27] The ECHR contains additional rights in accompanying Protocols.[28]

Drafted as part of efforts to ensure peace and stability in the aftermath of the Second World War, the Convention broadly has a tripartite aim of protecting human rights, democracy and the rule of law. As stated in the preamble, in signing the Convention, Contracting States reaffirm their belief that the foundations of 'peace and justice in the world' are best maintained by 'effective political democracy and on the other by a common understanding and

[20] ECHR article 10.

[21] ECHR article 11.

[22] ECHR, article 5.

[23] ECHR, article 6.

[24] ECHR, article 2.

[25] ECHR, article 3.

[26] ECHR, article 4.

[27] ECHR, article 7.

[28] For example, Protocol 1 added three rights to the Convention system, which were the right to property, the rights of parents with respect to the education of their children and the right to free elections.

observance of the Human Rights upon which they depend'.[29] Contracting States further affirm their 'common heritage of political traditions, ideals, freedom and the rule of law' in taking step for the 'collective enforcement' of rights contained in the Convention.[30] While in this way, the rule of law is not mentioned in the 'object and purpose' of the Convention,[31] the ECtHR has clarified that the rule of law is fundamental to the Convention framework.[32] As highlighted by Steve Greer, the hierarchy that exists between the values of human rights, democracy and the rule of law is not clear,[33] partly as the Convention was the result of compromise between states, and does not obviously reflect a 'carefully articulated and theoretically grounded design'.[34] This, of course, creates the seeds for tensions in cases where such values appear to pull in conflicting directions.[35]

[29] ECHR, preamble.

[30] Ibid.

[31] For the purpose of its interpretation according to the principles of treaty interpretation provided for in the Vienna Convention, Article 31, para 1.

[32] *Golder v UK* (1976) 1 EHRR 524, para 34. For background and discussion of the importance of this case see George Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' (2010) 21 *EJIL* 3, 509 – 541, 512 – 520.

[33] Steve Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, 2009), 195 – 196.

[34] Ibid.

[35] Conor Gearty, 'The Impossible Demand: Human Rights and Representative Democracy' in Conor Gearty, *Principles of Human Rights Adjudication* (OUP, 2005). In response to such tensions, scholars have attempted to input greater coherence into the Convention framework and the values that underpin it. For example, see Lawrence R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 (1) *Cornell International Law Journal* 133; C. A. Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview (1993) 52 *CLJ* 1, 89 – 127; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007); Alain Zyssrt, *The ECHR and Human Rights Theory: Reconciling the Moral and the Political Conceptions* (Routledge, 2018).

The creation of the ECHR was also in part a response to the perceived lack of success of the Universal Declaration of Human Rights (UNDHR) in realising effective rights protections.[36] The focus of the ECHR drafters was on the mechanisms for the implementation of the Convention,[37] and the ECHR established various mechanisms in order to ensure the effective protection of rights at the European level, including the ECtHR to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'.[38] A focus on the effective protection of rights has continued beyond the establishment of enforcement mechanisms. The ECtHR has stated its approach 'must be guided by the fact that the object and purpose of the Convention… be interpreted and applied so as to make its safeguards practical and effective'.[39] Moreover, the Court has developed the principle that the ECHR is a 'living instrument' that should be interpreted in 'the light of present conditions'.[40] This has freed the Court from being strictly bound to its previous stances, allowing it to level up rights protections even if this means departing from its earlier case law.[41]

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[36] William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP, 2017), 9; Ed Bates, *The Evolution of the European Convention on Human Rights* (OUP, 2010).

[37] William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP, 2017), 6.

[38] ECHR, article 19.

[39] *McCann v UK* (1995) 21 ECHR 97, para 146. Also see *Soering v UK* (1989) 11 EHRR 439, para 87, and *Loizidou v. Turkey* (Preliminary Objections) App no 15318/89 (ECHR, 23 March 1995), para 72.

[40] *Tyrer v UK* (1979 - 80) 12 EHRR 1, para 31.

[41] George Letsas, 'The ECHR as a living instrument: its meaning and legitimacy' in Andreas Føllesdal, Birgit Peters, Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP, 2013), 107, Stefan Theil. 'Is the 'Living Instrument' Approach of the European Court of Human Rights Compatible with the ECHR and International Law?' (2017) 23 *European Public Law* 1, 587 – 614.

The ECtHR's commitment to democracy is reflected by the subsidiary nature of the ECHR system, referred to as the principle of subsidiarity.[42] The principle of subsidiarity is the view that national authorities should principally develop their own human rights protections due to their democratic legitimacy and proximity to local needs.[43] Linked to the Court's subsidiary role is the principle of the 'margin of appreciation'.[44] While scholars have struggled to define this principle in precise terms,[45] it refers to the 'room to manoeuvre' the Court affords to national authorities in fulfilling their human rights obligations under the ECHR.[46] The margin of appreciation is further linked to a reticence on the part of the Court to determine factual matters. When considering facts already established in national courts, the Court will apply the 'fourth instance principle'.[47] Under this principle, the Court maintains it is not its role to act as an appeal court to national courts (or as a 'court of fourth instance'). Rather, its

[42] *Belgian Linguistic Case* (1979) 1 EHRR 252, para 34. According to the former President of the Court, Rolv Ryssdall, the principle of subsidiarity is 'probably the most important of the principles underlying the Convention'. Herbert Petzold, 'The Convention and the Principle of Subsidiarity', in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, 1993), 41-62.

[43] *Hatton v. United Kingdom* App no 36022/97 (ECHR, 8 July 2003), para 10. The Court further emphasised that in 'matters of general policy, on which opinions within a democratic society may reasonably differ' the role of the domestic policy maker should be 'given special weight'. Ibid.

[44] A principle which was inserted into the ECHR's preamble by Protocol 15.

[45] Guilio Itzcovich, 'One, None and One Thousand Margins of Appreciation: The *Lautsi* Case' (2013) 13 *HRLR* 287; Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP, 2012). See also George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007)

[46] Steven Greer, *Problems, Problems and Prospects* (CUP, 2009), 5.

[47] *García Ruiz v Spain* (1999) 31 EHRR 589, para 28; *De Tommaso v. Italy* App no 43395/09 (ECHR, 23 February 2017), para 170, Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009), 257-76. Maija Dahlberg, 'It is Not Its Task to Act as a Court of Fourth Instance: The Case of the European Court of Human Rights' (2014) 7 *European Journal of Legal Studies* 77.

focus is on determining contentious questions of law emanating from the ECHR.[48]

1.1.1. The ECHR and national security

In understanding the relationship of the ECHR with national security, an important feature of the Convention is that, as mentioned, a key aim of the ECHR is to protect democracy in Europe. The drafters of the Convention were clear that national security powers may serve as a gateway to totalitarianism.[49] Indeed, the concern that national security powers are prone to exploitation for anti-democratic ends was well founded in the history leading to the Convention's creation. Much of the legal reform carried out in Germany in the 1930s, which transferred power away from the Reichstag to Hitler, was instigated on the grounds it was necessary for national security protection.[50] The passing of national security legislation was also a catalyst in the establishment of Stalin's Russia as a totalitarian regime.[51]

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[48] *García Ruiz v Spain* (1999) 31 EHRR 589, para 28.

[49] *Klass v Germany* (1979 - 80) 2 EHRR 214, paras 49 – 50.

[50] For example, following the 27 February 1933 Reichstag fire, a four-year state of emergency was imposed in Germany in the name of protecting national security against Marxist 'terror'. This reform was introduced by the 'Reichstag Fire Decree', self-defined as a 'defensive measure against communist acts of violence endangering the state'. Passed on 28 February 1933. Translated from *Reichsgesetzblatt* I, 1933, 83. The decree suspended sections of the Weimar Constitution which protected personal liberty while explicitly imposing restrictions on civil liberties. Sections 114, 115, 117, 118, 123, 124, and 15.

[51] This includes a law passed on 1 December 1934 on 'terrorist organisations and terrorist acts'. Historian Richard Overy describes the law as a 'recipe for state lawlessness' which helped to crystallise the Stalin's role as an autocrat unaccountable to law or his opponents. Richard Overy, *The Dictators: Hitler's Germany, Stalin's Russia* (Penguin, 2005), 182.

With concerns about history repeating itself being at the forefront of the ECHR, the Convention's drafters considered the issue of national security to be a core element of the treaty. Repeated references to national security in the treaty reflect this central role. The right to a fair trial, protected by article 6 ECHR, which requires cases be pronounced publicly, allows that the press and public may be excluded from a trial for a number of different purposes, including this being 'in the interests of national security in a democratic society'.[52] The rights to private and family life, freedom of expression and association contained in articles 8, 10 and 11 ECHR each contain an explicit reference to national security as a legitimate purpose for interfering with such rights.[53]

Moreover, article 15 envisages the existence of extreme national security threats in the form of emergencies or other circumstance threatening the life of the nation.[54] Other ECHR rights refer to concepts linked to national security. The right to life enshrined by article 2 ECHR does not mention national security.[55] Yet, national security considerations are relevant to the right's exceptions. Article 2 (2) (c) provides that a state may rely on the use of force 'in action lawfully taken for the purpose of quelling a riot or insurrection'. This

[52] ECHR, article 6 (1).

[53] This departure is not explicitly referred to as an 'interference' which is consistent with article 6 being an absolute right within the Convention. Though in practice it is often treated as a form of interference, for example see *Tariq v UK* App nos 46538/11 and 3960/12 (ECHR, 3 April 2018), para 86.

[54] Mohamed M, El Zeidy, 'The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations' (2003) *Santiago International Law Journal* 277 217 – 318, 280; Frederick Cowell, 'Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR' (2013) *Birkbeck Law Review* 135.

[55] This is despite the United Kingdom having proposed that it should during the drafting of the ECHR. ECHR Travaux Préparatoires, vol. III, 186.

may include acts related to terrorism or other national security-threatening events.

Articles 17 and 18 ECHR are also loosely related to national security. Article 17 prohibits any 'group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' contained in the ECHR. The ECtHR has clarified that the 'general purpose' of article 17 is to 'prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles inundated by the Convention'.[56] Article 18 is also intended to prevent the abuse of power for totalitarian ends. The article states that the 'restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'. This means that it is a violation of the ECHR for a state to restrict a listed human right for any reason other than the one formally given and allowed under the Convention. In this way, articles 17 and 18 of the ECHR are intended to prevent the abuse of state power for totalitarian means, and this must include the state powers related to protect national security. However, the ECtHR case law with respect to both articles are yet underdeveloped and they have not yet been specifically linked to states abusing national security powers.[57]

[56] *Norwood v United Kingdom* (2004) 40 EHRR SE11, para 4.

[57] Corina Heri, 'Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights' (2020) *European Convention on Human Rights Law Review* 1, 25 – 61, Aikaterini Tsampi, 'The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of *contre-pouvoirs* within the State after all?' (2020) 38 *Netherlands Quarterly of Human Rights* 2, 134 – 155.

The core ECHR principles applied in the national security domain more generally are necessity[58] and proportionality.[59] While conceptual uncertainty exists around these principles,[60] they broadly require that state interferences with qualified rights are necessary in the interests of national security and proportionate to the needs of national security in that context.[61] References to necessity state that interferences must be necessary 'in a democratic society', which reflects the manner in which the Convention is tailored to prevent the abuses of national security powers that had previously led to democratic-backsliding prior to the World War Two. An additional condition is that such interferences must also be 'in accordance with the law', reflecting the treaty's commitment to upholding the rule of law.

The drafters of the ECHR also established bright lines against state action by identifying certain types of actions that the Convention sought to absolutely

[58] ECHR, article 6 (1), article 8 (2), article 10 (2), article 11 (3). For background on the necessity tests in the EHCR in the abstract, see Janneke Gerads, 'How the improve the necessity tests of the European Court of Human Rights (2013) 11 *International Journal of Constitutional Law* 2, 466 – 490, 466 – 473.

[59] ECHR, article 6 (1), article 8 (2), article 10 (2), article 11 (3). Jeremy McBride, 'Proportionality and the European Convention on Human Rights' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart, 1999), 23-35; M A Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in Ronald St. J. Macdonald, Franz Matscher, Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Nihjoff, 1993), 125-146, Michael Fordham & Thomas de la Mare, 'Identifying the Principles of Proportionality, in Understanding Human Rights Principles' in Jeffrey Jowell & Jonathan Cooper (eds), *Understanding Human Rights* Principles (Hart, 2001), 27, 53.

[60] Janneke Gerads, 'How to Improve the Necessity Tests of the European Court of Human Rights (2013) 11 *International Journal of Constitutional Law* 2, 466 – 490, 466 – 490.

[61] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *MLR* 62, 671-696.

prohibit, referred to as absolute rights.[62] For example, the drafters were clear that torture would never be permitted under the Convention even for national security reasons. In drafting the treaty, the UK Representative, Mr Cocks, said of torture that '[n]o cause whatsoever – not even…the safety of an army or the security of the state – can justify its use or existence' adding that if a state must be 'built on a torture chamber' it should 'perish'.[63]

At the same time as seeking to prohibit certain state action, the Convention's drafters specifically tailored the Treaty to enable Contracting States to respond to the needs of national security while operating within the Convention framework. As discussed, the treaty provides discretionary space for states to choose how they protect national security, insofar as interferences with qualified rights are permitted on national security grounds. Moreover, the Court has been clear that its task is not to review what 'might be the best policy' for dealing with national security matters.[64] Indeed, the Court frequently applies the margin of appreciation in national security-related cases,[65] and has emphasised this applies both in assessing the existence of a pressing social

[62] Natasa Mavronicola, "What is an 'Absolute rRght?' Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights" (2012) 12 *Human Rights Law Review* 4, 723 – 758.

[63] Statement by Mr F.S. Cocks (United Kingdom) at the first session of the Consultative Assembly of the Council of Europe, in *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (Martinus Nijhoff, 1975-85) Vol. II, 40.

[64] *Klass v Germany* (1979 - 80) 2 EHRR 214, para 49.

[65] Though it is generally not applied by the Court when it considers potential violation of absolute rights.

need in the form of national security and in choosing the means for achieving the legitimate aim of national security.[66]

Alongside providing states with this discretionary space, as mentioned above, the ECtHR has not sought to define the concept of national security in any precise terms and does not impose strict limitations on Contracting States' definitions of the concept. The European Commission on Human Rights (the Commission)[67] emphasised that national laws are not required to include a complete definition of the concept of 'the interests of national security'.[68] Moreover, while the Court approved of the definition of national security provided by the UK's Interception of Communications Commissioner in *Kennedy,* [69] the Court has highlighted that threats to national security may vary in character and may be unanticipated or difficult to define in advance.[70]

The ECtHR's deferential approach to matters of national security is linked to two chief factors. First, early-modern European political thought considered the protection of national security to be a fundamental expression of state

[66] *Leander v Sweden* (1987) 9 EHRR 433, para 59.

[67] The Commission was part of the original ECHR institutional framework, established to investigate the admissibility of applications before they were then adjudicated by the ECtHR. The Commission was abolished in 1998.

[68] *Esbester v UK* (1994) 18 EHRR CD 72, page 9.

[69] *Kennedy v UK* (2011) 52 EHRR 4, para 159.

[70] *Al Nashif v Bulgaria*, (2003) 36 EHRR 37, para 121. More recently affirmed in *Zakharov v Russia* App no 47143/06 (ECHR, 22 October 2009), para 247.

sovereignty.[71] Indeed, Hobbes considered the ability to protect national security to be the very basis of state sovereignty.[72] Partly out of respect for such sovereignty, and to avoid restricting states from protecting their vital interests, international law has been prone to constraint in its regulation of national security matters.[73] Secondly, the ECtHR is not procedurally equipped to rigorously review national security powers, as the Court itself has conceded.[74] The ECtHR does not have any established means to access evidence states claim to be security-sensitive in adjudicating ECHR rights. This includes having access to intelligence material which could justify national security measures, or the ability to call state witnesses, such as those working in security and intelligence agencies (SIAs), who could provide operational information surrounding national security measures. These factors contribute to the Court being particularly deferential to Contracting States with respect to ECHR rights in the national security domain.

While the ECtHR is limited in this way, the ECtHR has also asserted its role in supervising national security measures and emphasised that 'Contracting States may not…adopt whatever measures they deem appropriate' for the purpose of protecting national security.[75] The ECtHR has demonstrated its

[71] Dominik Eisenhut, Sovereignty, National Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with regard to 'Security Exceptions' (2010) 48 *Archiv des Völkerrecht* 4, 431 – 466.

[72] Ibid, 432.

[73] Ibid.

[74] *Yam v UK* App no 31295/11 (ECHR, 22 June 2020), para 56.

[75] *Zakharov v Russia* App no 47143/06 (ECHR, 22 October 2009), para 247.

supervision extends to several different areas in the national security context. First, the Court has stated that where it does not have access to the relevant national security material, it will 'scrutinise the national decision-making procedure to ensure that it incorporated adequate safeguards to protect the interests of the person concerned'.[76] The Court's supervision in this area has also taken the form of the Court judging whether there was a sufficient factual basis to justify a Contracting State's case that an individual represents a threat to national security.[77] Moreover, it has applied the principle of 'evolutive interpretation' to broaden the reach of the Convention to new technologies relied on by Governments to protect national security.[78] The Court has also asserted that Convention principles apply extra-territorially even in a national security context.[79]

[76] *Yam v UK* App no 31295/11 (ECHR, 22 June 2020), para 56.

[77] *Kaushal and others v. Bulgaria* App no 1537/08 (ECHR, 2 September 2011).

[78] For example, such as digital surveillance carried out by wiretapping fibreoptic cables carrying online communications. See *Big Brother Watch and ors v UK* App nos 58170/13, 62322/14, 24960/15 (ECHR, 25 May 2021).

[79] The Court set out clear limits on state activity in an extraterritorial context in *Al-Jedda v UK,* concerning the preventive detention of an Iraqi national by the British forces in Iraq on the basis of a UN Security Council resolution. *Al-Jedda v UK* (2005) 42 EHRR 1. Moreover, the Court has held that even where the detention of the Iraqi national was considered necessary due to the security risk posed by the individual, the UK still has an obligation to protect the article 5 rights of the individual. *Al-Skeini v UK* (2011) 53 EHRR 18 and *Hanan v Germany* App no 4871/16 (ECHR, 16 February 2021).

1.1.2. The ECHR in the UK

The domestication of ECHR rights began under New Labour Government, via the passing of the HRA.[80] The Act gives effect to articles 2 to 12 and 14 of the Convention,[81] and 3 articles contained in the Convention's protocols, in a number of different ways.[82] First, the Act makes it unlawful for public authorities, with the exception of Parliament,[83] to 'act in a way which is incompatible with a Convention right'.[84] Individuals or groups who consider a public authority 'has acted (or proposes to act) in a way' which is incompatible with the ECHR may bring proceedings against that body in a UK court.[85] Second, as 'far as it is possible to do so', primary legislation and subordinate legislation must be 'read and given effect in a way which is compatible with the Convention rights'.[86] Importantly for later analysis, judges have determined that this provision requires they follow Strasbourg jurisprudence 'no more, but certainly no less'.[87] This principle is known as the 'mirror principle' in UK human rights law. As we will see in later chapters, the practice of mirroring

[80] The HRA received Royal Assent in November 1998 and came into force across the UK on 2 October 2000.

[81] HRA, s 1.

[82] Ibid.

[83] HRA, s 6(3).

[84] Ibid, s 6(1).

[85] Ibid, s 7(1).

[86] Ibid, s 3(1).

[87] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, [20] per Lord Bingham.

has overlaps with a form of replication of Strasbourg's approach to adjudication. The mirror principle is subject to several exceptions. For example, the principle has been held not to apply where Strasbourg jurisprudence is 'fundamentally at odds' with UK law.[88]

Third, in determining a question 'which has arisen in connection with' an ECHR right, a court or tribunal must 'take into account' case law deriving from the ECtHR and other decisions or opinions made by the Council of Europe.[89] Fourth, where a court is 'satisfied' that a particular legal provision deriving from either primary or subordinate legislation is 'incompatible' with an ECHR right, it may make a 'declaration of incompatibility'.[90] This has no legal effect but signals there is an incompatibility to the other branches of state. The HRA also provides the executive with legislative powers to correct for incompatibilities between ECHR rights and primary legislation.[91]

In creating a domestic system to protect ECHR rights, the HRA established a system of human rights protection requiring that branches of state share

[88] *Alconbury v Secretary of State for the Environment* [2001] UKSL 23; [2001] 2 WLR 1389, [26] per Lord Slynn. More recently, in *AB*, the Supreme Court emphasised that some departures from Strasbourg case law may be justified in developing the law in relation to Convention rights based on how the ECtHR might decide the case based on principles it has already established. *AB v Secretary of State for Justice* [2021] UKSC 28; [2021] 3 WLR 494, [59] per Lord Reed.

[89] HRA, s 2(1).

[90] Ibid, s 4(1).

[91] Ibid, s 10(2).

responsibility for protecting ECHR rights, referred to as a 'shared responsibility model'.[92] Any 'declaration of incompatibility' issued by a court stating that a particular piece of law violates the ECHR, 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'.[93] Rather, judicial scrutiny establishes 'dialogue' with Parliament which enables courts to flag incompatibilities with the HRA for Parliament decide how to address them.[94] Furthermore, should Parliament consider it appropriate, a judicial interpretation of legislation can be reversed by passing primary legislation. In addition to preserving constitutional balance by ensuring Parliament has ultimate say on how ECHR rights are protected in law, the HRA also exists as a constitutional statute in the UK and cannot be repealed impliedly.[95] This reflects the central importance of the ECHR to the UK as its principal source of legislative human rights protection.

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[92] David Kinley, 'Is there a democratic deficit in human rights respect, protection and promotion?' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart, 2015), 31. Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4 *International Journal of Constitutional Law* 1, 1 – 38, 2 -3.

[93] HRA, s 4(6)(a).

[94] Richard Clayton, 'Judicial Deference and "Democratic Dialogue": the Legitimacy of Human Rights Intervention under the Human Rights Act 1998' (2004) *PL* 33; Janet L. Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *MLR.* 7; Tom R Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' (2005) *PL* 306, Tom Hickman, *Public Law After the Human Rights Act* (Hart, 2010), Chapter Two, Alison L. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, 2009), Chapters Five and Six, Roger Masterman, 'Interpretations, Declarations and Dialogue: Rights Protections under the Human Rights Act and the Victorian Charter of Rights and Responsibilities' (2009) *PL* 112.

[95] *Thoburn v Sunderland City Council* [2002] EWHC 195; [2003] QB 151, [62].

1.1.3. The UK and national security

National security has no precise statutory definition in the UK.[96] However, the ruling in *Kennedy* records no disapproval of the UK Government with respect to the definition of threats to national security presented by the Interception of Communications Commissioner. Such threats were described as 'activities which threaten the safety or well-being of the State and activities which are intended to undermine or overthrow Parliamentary democracy by political, industrial or violent means'.[97] Moreover, the HOL has held that national security refers to the 'security of the United Kingdom and its people',[98] the protection of which may be undermined by the promotion of terrorism in another country.[99] Related to the concept of national security is 'terrorism', which has a basic definition in the Terrorism Act 2001 (TA),[100] which refers to a set of defined actions, including creating a 'serious risk to the health or safety of the public or a section of the public'.[101] This action must be designed to influence the government, an international governmental organisation or the

[96] Eric Metcalfe, 'Terror, reason and rights' in Esther D. Reed and Michael Dumper (eds), *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspective* (CUP, 2012), David Feldman, 'Human rights, terrorism and risk: the roles of politicians and judges' (2006) *PL,* 364 – 384.

[97] *Kennedy v UK* (2011) 52 EHRR 4, paras 33 & 159.

[98] *SSHD v Rehman* [2001] UKHL 47; [2003] 1 AC 153, [50].

[99] Ibid, [53].

[100] TA, s 1 (1), amended by the Terrorism Act 2006 (TA2), s34 and the Counter-Terrorism Act 2008 (CTA), s75. Judges have described this definition as broad. *R v Gul* [2013] UKSC 64; [2014] AC 1260, [28] per Lord Neuberger. For a discussion as to how the Supreme Court's treatment of the concept fits a 'one-size-fits-all' approach to defining terrorism, see Alan Greene, 'The quest for a satisfactory definition of terrorism: *R v Gul*' (2014) 77 *MLR* 5, 780 – 793. Scholars have echoed these sentiments.

[101] TA, s 1(2)(d).

public for the purpose of advancing a 'political, religious, racial or ideological cause'.[102]

Following terrorist attacks[103] and in responding to a perceived persistent threat of terrorism,[104] as mentioned above, the UK has sought to develop new powers to respond to that threat. In developing such powers, the UK Government has sought to ground these powers in statute. This reflects adherence to the Convention requirement that any interference with qualified rights must be 'in accordance with the law'. The Government now relies on legislation as the principal means of regulating national security powers.[105] This tendency on the part of the UK Government to pass law as a means of ECHR compliance can be traced back to the Interception of Communications Act 1985 (ICA), which was a response to the ECtHR's ruling in *Malone v UK*.[106] In this case, the interception of telephone communications was found to be in violation of article 8 ECHR's 'in accordance with the law' requirement due to the lack of any statutory framework for the interception of telephonic communications.

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[102] TA s 1(1)(b) & (c).

[103] The UK has experienced terrorist attacks carried out by a number of different terrorist groups including the IRA, Islamic fundamentalist groups, and far-right groups.

[104] Since its establishment in 2006, the Joint Terrorism Analysis Centre (JTAC), has consistently classified the threat of terrorism in the UK as either 'substantial' (meaning that an attack is a strong possibility), 'severe' (an attack is highly likely) or 'critical' (an attack is expected imminently). Threat level history', Security Service available at https://www.mi5.gov.uk/threat-levels (accessed 5 November 2021).

[105] *Klass v Germany* (1978) 2 EHRR 214. In the UK context, this requirement was significant in the ECtHR finding in *Malone v United Kingdom*. In this case the ECtHR held that the UK had been in violation of the ECHR requirements largely due to the law governing surveillance being 'obscure'. *Malone v United Kingdom* (1984) 7 EHRR 14, para 79.

[106] *Malone v United Kingdom* (1984) 7 EHRR 14, para 79. Simon Chesterman 'Britain and the Turn to the Law' in Simon Chesterman, *One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty* (OUP, 2013), 143 – 144.

Since passing the ICA, and particularly since the introduction of the HRA, the Government has sought to place more of its national security-related apparatus on statutory footing. This includes having placed the UK SIAs on a statutory basis. Up until then, the SIAs had no statutory authority and no obvious forms of statutory accountability.[107] The UK's three SIAs refer to Government organisations with primary responsibility for protecting national security. The Security Service Act 1989 (SSA) principally regulates the activities of the Security Service, also known as MI5.[108] The function of the Security Service is 'the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.[109] The Secret Intelligence Service, also known as MI6, is responsible for obtaining and providing 'information relating to the actions or intentions of persons outside the British Islands' and 'to perform tasks relating to the actions or intentions of such persons'.[110] This must be carried out in the interests of 'national security, with particular reference to the defence and foreign policies' of the UK

[107] Keith Ewing, Joan Mahoney, Andrew Moretta, *MI5, the Cold War, and the Rule of Law* (OUP, 2020), 3. From 1952, the Security Service had been given recognition in the 1952 Maxwell Fyfe Directive. However, this was set out under just six paragraphs and lacked any legal mechanism to deal with complaints about abuses of powers and violations of rights. See Simon Chesterman, *One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty* (OUP, 2013),132 – 134.

[108] SSA, s 1.

[109] Ibid.

[110] ISA, s 1(a).

Government[111] or the 'economic well-being' of the UK[112] or 'in support of the prevention or detention of serious crime'.[113] The Government Communications Headquarters (GCHQ) is responsible for collecting signals intelligence from digital communications[114] and to provide 'advice and assistance' with respect to different languages and forms of cryptography to the UK Government.[115] This must be carried out for the same purposes as MI6. MI6 and GCHQ are regulated by the Intelligence Services Act 1994 (ISA).[116] .

Each of the specialist legal regimes examined in this thesis have been grounded in statutory law, as part of ensuring that the relevant national security powers meet ECHR requirements. This was the case with respect to the Special Appeals Immigration Commission (SIAC), which reviews immigration decisions, including deportation decisions, made on national security grounds. SIAC was created by the Special Appeals Immigration Act 1997 (SIACA) after the previous (non-statutory) procedure in place to review such decisions was found incompatible with ECHR requirements in *Chahal v UK*.[117] SIAC was established to provide as 'effective a remedy as possible' for those challenging immigration decisions involving information with a public interest element,

[111] Ibid, s 1(2)(a).

[112] Ibid, s 1(2)(b).

[113] Ibid, s 1(2)(c).

[114] Ibid, s (3)(1).

[115] Ibid, s (3)(1)(b).

[116] ISA, s 3.

[117] *Chahal v UK* (1996) 23 EHRR 413.

including deportation decisions made on grounds of national security.[118] SIAC was also responsible for reviewing emergency powers derogating from the ECHR, in the form of powers for indefinite detention of foreign nationals who could not be deported without violating Convention requirements, established by section 23 of the Anti-Terrorism Crime and Security Act (ATCSA). ATSCA was the emergency legislation passed by the Blair Government in response to the 9/11 attacks.

Following the HOL's finding that section 23 of ATCSA was incompatible with the UK's ECHR obligations, in the *Belmarsh* case,[119] the UK Government passed the Prevention of Terrorism Act (PTA) creating 'control orders', now repealed. These were special civil measures imposed on individuals to limit the capability and improve the monitoring of individuals who could not be prosecuted for their terrorism-related activities.[120] TPIMs – similar though slightly less restrictive civil measures - then replaced control orders regime after Parliament passed the Terrorism and Investigation Measures Act 2011 (TPIMA). This reform was linked to the efforts of the Liberal Democrats in the newly established Coalition Government to establish an unambiguously Convention-compliant system of 'control orders-lite'.[121] After the creation of

[118] *RB (Algeria) and others v SSHD* [2009] UKHL 10; [2010] 2 AC 110, [10] per Lord Phillips.

[119] *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68.

[120] IRTL report 2019 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972261/THE_TERRORISM_ACTS_IN_2019_REPORT_Accessible.pdf> accessed 17 October 2020, para 8.23.

[121] Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' (2017) *PL* 4, 609-626, 612.

both control order and TPIM regimes, special powers were given to judges in the Administrative Court to review the imposition of such measures, and potentially quash them if the UK Government had imposed them without meeting certain conditions.[122]

The UK reformed its surveillance regime under ICA to ensure its compliance with the ECHR. This reform first took place in 2000 following the passing the Regulation of Investigatory Powers Act (RIPA). RIPA was introduced 'to ensure that law enforcement and other operations' were 'consistent with the duties imposed on public authorities by the European convention on human rights and by the HRA.[123] In addition to establishing a legal regime to govern the collection and storage of communications data,[124] RIPA created the Investigatory Powers Tribunal (IPT), and assigned its judges exclusive jurisdiction in adjudicating article 8 and surveillance claims.[125] The Investigatory Powers Act 2016 (IPA) reformed the system again, following disclosures attached to the Snowden leaks which raised concerns that the RIPA regime did not meet article 8 requirements. The IPA provided explicit statutory footing for the powers which had previously been avowed by the UK Government, but many felt were not

[122] PTA, s 3, TPIMA, s 6-9.

[123] HC Deb 6 March 2000, vol 345 col 768.

[124] Communications data is defined as data surrounding specific communications, also known as the 'who, what, where and when' of communications.

[125] RIPA, s 65.

clearly signposted in legislation previously.[126] The IPA created the role of the Investigatory Powers Commissioner (IPC), who is responsible for providing oversight of investigatory powers and head of the 'Investigatory Powers Commissioners' Office (IPCO).[127]

As part of incorporating ECHR requirements in the UK national security context, necessity[128] and proportionality[129] tests have been expressly incorporated into statutory provisions governing national security powers. The role of the Independent Reviewer of Terrorism Legislation (IRTL) and the parliamentary body, the Intelligence and Security Committee (ISC) – responsible for oversight of UKNSL more generally – have also been given statutory authority.[130] The specialist national security legal regimes mentioned above have incorporated special procedures to enable judges to apply necessity and proportionality tests with access to all evidence that may be relevant to reviewing the UK Government's decision. The most prominent procedure is CMP, which enables the Government to present judges with security-sensitive

[126] David Anderson QC, 'A Question of Trust' (2014) available at: <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf> accessed 17 October 2021, Chapter 8.

[127] IPA, Part 8, Chapter 1.

[128] The Secretary of State may only impose TPIMs on an individual if certain conditions are met including that the Secretary of State reasonably considers that it is 'necessary, for purposes connected with protecting members of the public from a risk of terrorism' for TPIMs to be imposed on the individual. TPIMA, s 2 (1). Conditions A to E are included in TPIMA, s 3.

[129] With respect to surveillance powers provided for by the IPA, the exercise of which must be both necessary and proportionate. IPA, s 23(1).

[130] CTSA, s 44 (IRTL), ISA, s 10 & JSA, Part One (ISC)

evidence in closed proceedings.[131] As mentioned, the proceedings are closed in the sense that the public, including press, and non-governmental parties in the case are unable to attend.[132] Judges are assisted in closed proceedings, either by a Special Advocate (SA) who represents the interests of the non-governmental party,[133] or in the IPT context a 'Counsel to the Tribunal', representing the interests of the IPT itself.[134] Notably, SA proceedings were first introduced into the UKNSL context in SIAC, following references by the ECtHR to closed procedures used in Canada when discussing alternative measures to the UK's ECHR-violating procedures for reviewing immigration and national security decisions.[135]

Prior to the introduction of closed proceedings into national security cases, when national security issues arose in the context of litigation judges applied 'Public Interest Immunity' (PII) procedure to the material the Government claimed was security-sensitive.[136] The result of applying PII procedure was that the security-sensitive evidence could not be relied on by either party in the case and the judge would not view this material. In authorising the use of this

[131] Civil Procedure Rules (CPR), Rule 82.

[132] CPR, Rule 82.

[133] Ibid, Rule 82.6

[134] Ibid, Rule 82.9.

[135] *Chahal v UK* (1996) 23 EHRR 413, para 144.

[136] PII procedure was first applied in *Duncan v Cammell Laird and Co* [1942] UKHL 3; [1942] AC 624. See also Paul F Scott, 'An Inherent Jurisdiction to Protect the Public Interest: from PII to "Secret Trials"' (2016) 27 *King's Law Journal* 259, 265-266.

procedure, judges must form their own view as to whether PII applies,[137] via an assessment which specifically balances the public interest in favour of PII against the public interest in publication of the relevant evidence, referred to as the *Wiley* balance.[138] The application of PII in a national security context occurred most famously in recent years in *Binyam Mohamed*.[139] Not long after the UK Government's PII certificate was partially rejected by the Court of Appeal in this case, the Government introduced the Justice and Security Act 2013 (JSA) to Parliament, which enables the Government to apply for CMPs in all civil proceedings concerning involving security-sensitive evidence. In introducing the JSA, the Government argued CMPs would enhance the accountability of the SIAS by enabling judges to examine all evidence of relevance in national security cases without risking harm to national security.[140]

As mentioned above, providing judges with such extensive powers represents a remarkable shift from the traditional position of judges with respect to national security. Historically, political theorists doubted whether legal frameworks could ever be applied in the context of national security crises or

[137] *Conway v Rimmer* [1968] UKHL 2; [1968] AC 910.

[138] *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1994] UKHL 8; [1994] 3 All ER 420. See also Tom Hickman, 'Turning out the Lights? The Justice and Security Act 2013' (11 June 2013) *UK Constitutional Law Association.*

[139] *R (Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs) (No 2)* [2010] EWCA Civ 2048 (Admin); [2011] QB 218.

[140] Kenneth Clarke, then Secretary of State for Justice, stated that the use of CMPs 'strengthens the accountability of our intelligence agencies and GCHQ to the courts' and to Parliament. HC Deb 18 December 2012 vol 555 col 729.

emergencies.[141] Moreover, it was considered part of the constitutional role of the executive that it had exclusive control of national security protection. Judges themselves have traditionally considered questions of national security to be non-justiciable, due a lack of expertise and democratic legitimacy on their part.[142] Traditionally the courts did not even require national security decisions to be reasonable, as judges considered that such questions could only be asked by Parliament.[143] As mentioned, for the judicial role to have developed from this traditional deferential position to one which has principal responsibility for reviewing executive national security powers represents a 'constitutional shift'[144] in the role of judges within the UK constitution.

1.2. Assessing the effectiveness of ECHR rights protections in UKNSL

The effectiveness of ECHR protections in UKNSL is an important topic for in-depth analysis for a number of reasons. First, there has not yet been a systematic, doctrinal assessment of both UK and ECHR regimes in the national

[141] For example, John Locke emphasised that law could not apply in a crisis context as they often were 'impossible to foresee, and so by make laws to provide for all accidents and necessities that may concern the public'. Ian Shapiro (ed), *Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press, 2003), 172. See also Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (first published 1922, University of Chicago Press, 2005). For background on Hobbes' influence in this regard, see Conor Gearty, 'Escaping Hobbes: Liberty and Security for Our Democratic (Not Anti-Terrorist) Age' (2010) *LSE Law, Society and Economy Working Papers* 3/2010.

[142] *Liversidge v Anderson* [1942] UKHL 1, [1942] AC 206 (*Liversidge*), *Hosenball* [1977] 1 WLR 766; [1977] 3 All ER 452, *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9; [1985] AC 374 per Lord Diplock.

[143] Ibid, *Liversidge.*

[144] Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape' [2011] 9 *ICON* 1 172 – 199.

security context as they exist in the post-HRA era. Ian Cameron carried out a comprehensive study of the protection of ECHR rights with respect to national security.[145] However, this was in 2000 before the creation of the majority of foundational ECHR national security case law and the majority of UKNSL considered in this thesis. More recent human rights and national security studies have focused on human rights more broadly in the national security context rather than on ECHR rights specifically.[146] Other recent analysis in this area has been restricted to one particular regime within national security law.[147] Alternatively, the focus of other studies has been on doctrinal analysis of UKNSL as a whole, rather than specific assessment of the manner in which human rights are protected in this context.[148] There is therefore a gap in the academic landscape, addressed by this thesis.

The second reason this topic is important is that the UK Government relies on the effectiveness of the model of judicial scrutiny examined in the regimes considered in the thesis when seeking further national security powers.[149] Currently the effectiveness of this model is in dispute. There have been positive accounts of the protection of ECHR rights in the UKNSL context. It has been

[145] Iain Cameron, *National Security and the European Convention on Human Rights* (Brill, 2000).

[146] Conor Gearty, *Liberty and Security* (Polity, 2013).

[147] For example, Fiona de Londras has carried out an in-depth study of the effectiveness of the protection of human rights focused on counter-terrorist detention. Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP, 2011).

[148] For example, see Helen Fenwick, *Fenwick on Civil Liberties and Human Rights* (5th edn, Routledge, 2017), Chapter 15; Paul F Scott, *The National Security Constitution* (Hart, 2019).

[149] Lorna Woods OBE, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) *MLR* O, 1 – 28, 4 – 14.

argued that while ECHR rights protection in the UKNSL context may have flaws, the development of human rights law surrounding counter-terrorist detention demonstrates that judges have been able to effectively push back on the worst excesses of executive national security power.[150]

Adam Tomkins has argued that judges in the lower UK courts, in the specialist regimes examined in this thesis, have become more robust in scrutinising national security arguments than the general judicial approach previous to the HRA.[151] Others have cited the famous *Belmarsh* decision, referred to above, as an example of the powerful role the judiciary can play in asserting the rule of law in times of crisis.[152] Furthermore, Conor Gearty has recently contended that the role of judges in scrutinising British engagement in torture as part of counter-terrorism operations has shown marked improvement in holding the executive to account, since the height of British counter-terrorism operations in Northern Ireland and in the post-HRA counter-terrorism environment.[153]

At the same time, scholars have raised concerns about ECHR protections in UKNSL. Keith Ewing has argued that the HRA has done little to curb an ever-

[150] Helen Fenwick, 'Terrorism and the Control Orders/TPIMs saga: a Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' (2017) *PL* 609 – 626; Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP, 2011). See also Fiona de Londras' argument that UK judges have at times displayed a 'muscular' approach to asserting human rights law in Fiona de Londras and Fergal F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism' (2010) 30 *OJLS* 1, 19 -47, 43.

[151] Adam Tomkins, 'National Security and the Role of the Court: A Changed Landscape?' [2010] *LQR* 543

[152] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006).

[153] Conor Gearty, 'British Torture, Then and Now: The Role of the Judges' (2021) 84 *MLR* 1, 118-154.

expanding executive power in the domain of counter-terrorism, which has led to a systemic undermining of civil liberties and human rights in the UK.[154] Helen Fenwick and Gavin Phillipson have argued that while judges show signs of improvement in approaching national security, they have been complicit in the UK Government redefining the meaning of liberty in the UK, through the creation of control orders, now TPIMs.[155] While Dyzenhaus praised *Belmarsh*, he has described the record of UK judges along with judges in other common law countries protecting the rule of law in the national security context as 'at worst dismal, at best ambiguous'.[156] Conor Gearty has also raised significant concerns regarding the development of UKNSL in the post-HRA context, arguing that it has favoured the rights and security not of all but merely some people in the UK.[157] Moreover, Lorna Woods OBE, Lawrence McNamara and Judith Townend have argued that accountability mechanisms in UKNSL are 'flawed', and reflect a 'deeper, unspoken re-shaping of contemporary constitutional functions and powers'.[158]

Additionally, scholars have raised broader concerns that have implications for UKNSL. Such concerns include skepticism regarding the effectiveness of the

[154] Keith Ewing, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (OUP, 2010).

[155] Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56 *McGill LJ* 863.

[156] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006), 17.

[157] Conor Gearty, *Liberty and Security* (Polity, 2013).

[158] Lorna Woods OBE, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) *MLR* O, 1 – 28, 4.

HRA on several grounds.[159] Concern has been expressed that the HRA gives judges excessive power which results in their illegitimate interference with activity of the democratic branches of state,[160] as well as on the grounds that it does not equip judges with sufficient powers for effective rights protection.[161] The ECHR framework has also been subject to extensive criticism. Eric Posner has argued that the ECtHR lacks the resources to provide justice 'for more than a tiny fraction of people',[162] and highlights that the persistence of Russian authoritarianism while Russia remains a signatory of the Convention is evidence of the treaty's failure.[163] Moreover, Ewing and Gearty have emphasised the vagueness of the Convention, and the indeterminate nature of its chief concepts.[164]

In addition to assisting in determining the effectiveness of the current model of ECHR rights protection in the UK national security context, the thesis analysis will also inform the long-standing debate regarding law and national security. As mentioned, the principal cleavage in this debate is defined by the opposition

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[159] Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP, 2001), Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' 72 *MLR* 6, 883 – 908, Keith Ewing, 'The Futility of the Human Rights Act' (2004) *PL* 829, Adam Tomkins, 'The Rule of Law in Blair's Britain' (2009) *University of Queensland Law Journal* 255.

[160] Keith Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79; Danny Nicol, "Law and Politics After the Human Rights Act" [2006] *PL* 722.

[161] Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' 72 *MLR* 6, 883 – 908, 892.

[162] Eric Posner, *Twilight of Human Rights Law* (OUP, 2014), 48.

[163] Ibid, 50.

[164] Keith Ewing and Conor Gearty, *Freedom and Thatcher: Civil Liberties in Modern Britain* (OUP 1990), 14, Conor Gearty, 'Tort Law and the Human Rights Act' in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP, 2001), 252.

of political and legal constitutionalism.[165] As mentioned, political constitutionalists advance three key arguments against the law and judges being given a significant role in the national security and/or crisis context. The first type of arguments is made up of descriptive claims regarding the capacity and effectiveness of the judiciary. Scholars have argued that judges are lacking in the expertise and competence to rule on matters as complex as national security, without compromising national security itself – the security argument.[166] The perceived judicial limitations in this regard are often linked to the judiciary not being exposed to the day-to-day realities of national security protection, including regular briefings by the SIAs and advice from civil servants.[167] Mark Tushnet has referred to the 'differential resources' available to the political branches as compared to the courts. He has argued that this results in judges 'rarely' having the 'background or the information' to allow them to make 'sensible judgments' about 'whether some particular response to a threat to national security imposes unjustifiable restrictions on individual liberty or is an unwise allocation of decision-making power'.[168]

[165] Fiona de Londras and Fergas F Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *OJLS* 1, 19 – 47, 20.

[166] Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (OUP, 2007); Adrian Vermeule and Eric Posner, *The Executive Unbound* (OUP, 2011); Stephen Reinhardt, 'The Judicial Role in National Security' (2006) 86 *Boston University Law Review* 5 1309-1314, Mark Tushnet, 'Controlling the Power of the Executive' (2005) 8 *Harvard Law Review* 118, 2769.

[167] Stephen Reinhardt, 'The Judicial Role in National Security' (2006) 86 *Boston University Law Review* 5 1309-1314.

[168] Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 *Harvard Law Review* 2673, 2679.

An alternative version of the security argument was advanced as far back as Locke, which states that legal institutions do not have the capacity to respond as urgently as may sometimes be required in order to protect national security. For Locke, law-making power is 'too slow for the despatch requisite to execution' of certain state responses in the national security context.[169] Locke also argued that law can be too inflexible to enable the executive to respond to many unpredictable situations as may arise in the emergency context.[170] This inflexibility, linked to the impossibility of formulating legal rules preempting all future circumstances, is also seen as providing dangerous constraint on the executive, by limiting its ability to respond fully in protecting national security.

Others have argued that we ought not rely on judges to hold the executive to account with respect to its national security activity as they are prone to excessive deference to the executive in this context, which leads to an undermining of the integrity of legal systems as a whole. This is referred to as the excessive deference argument as the emphasis on excessive deference here is used to justify the view that judges are not capable of holding the executive to account. This position states that history shows that judges are ineffective at safeguarding rights in the national security context. This is insofar as it shows that where national security matters are concerned, judges have most

[169] Ian Shapiro (ed), *Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press, 2003) 172.

[170] Ibid. See also Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (OUP, 2007); Adrian Vermeule and Eric Posner, *The Executive Unbound* (OUP, 2011).

often opted to defer to the executive.[171] Relatedly, it has been argued that judges are ineffective in this context as the common law is too indeterminate to represent an effective resource for judges to rely on in pushing back against excessive executive national security power.[172] On the periphery of this debate are questions about whether human rights law more generally can ever be effective, on the grounds that its rules are vague and without sufficient content to effectively guide and restrain states.[173]

Political constitutionalists have also presented an account of the damaging consequences that may arise where ineffective legal protections are relied on in the national security context, referred to here as the legitimisation argument.[174] Gross has argued that the law in the national security context could serve as a cover for increasingly excessive executive power, through a

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[171] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2007); Mark Tushnet, 'The Political Constitution of Emergency Powers' (2007) 91 *Minnisota Law Review* 1451; Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 *Harvard Law Review* 2673; Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 *International Journal of Constitutional Law* 247 – 274, 261; Oren Gross, 'Chaos and Rules' (2003) 112 *Yale Law Journal* 1101. See also Fergal F Davis' position as set out in Fiona de Londras and Fergal F Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *OJLS* 1, 19 – 47.

[172] Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 *International Journal of Constitutional Law L* 247 – 274, 261.

[173] Eric Posner has argued that the failure of human rights law 'reflects a kind of rule naivete -the view that the good in every country can be reduced to a set of rules that can then be impartially enforced. Rule naivete is in part responsible for the proliferation of human rights, which has made meaningful enforcement impossible'. Eric Posner, *Twilight of Human Rights Law* (OUP, 2014), 13. See also Costas Douzinas, *The End of Human Rights* (Hart, 2000). M-B. Dembour, *Who Believes in Human Rights. Reflections on the European Convention* (CUP, 2006).

[174] Oren Gross, 'Chaos and Rules' (2003) 112 *Yale Law Journal* 1101; Oren Gross, 'Stability and flexibility: A Dicey business' Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (CUP, 2006), Oren Gross and Fionnuala D. Ní Aoláin, *Law in Times of Crisis* (CUP, 2006), Chapter Three. See Fergal Davis' discussion of 'extraconstitutionalism' in in Fiona de Londras and Fergal F Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *OJLS* 1, 19 – 47; Mark Tushnet, 'Defending Korematsu? Reflections on Civil Liberties in Wartime' (2003) *Wisconsin Law Review* 273-307, 305-06.

process in which exceptional national security measures are normalised, becoming permanent features of a legal system.[175] Gross has argued that this process of normalisation has the potential to undermine the overall integrity of legal systems, with exceptional law becoming the norm. Consequently, according to Gross, holding the executive to account in the national security context is best left to political processes.[176] Adrian Vermeule has made a similar argument with respect to US national security-related administrative law.[177] He has argued that law plays a legitimising role in this context, which is inevitable as it is filled with gaps and loopholes that the US Congress would never agree to close, and which judges would never adjudicate in a robust manner.[178]

Another political constitutionalist argument, linked to the 'political question doctrine', is that judges do not have a legitimate role in making decisions related to national security as they are not democratically-elected – the legitimacy argument. The political question doctrine draws a line between 'political' and 'legal' questions based on the constitutional separation of powers, and where such questions are deemed political it is constitutionally

[175] Oren Gross, 'Chaos and Rules' (2003) 112 *Yale Law Journal* 1101, Oren Gross, 'Stability and flexibility: A Dicey business' Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (CUP 2006), Oren Gross and Fionnuala D. Ní Aoláin, *Law in Times of Crisis* (CUP, 2006), Chapter Three.

[176] Ibid.

[177] Adrian Vermeule, 'Our Schmittian Administrative Law' (2009) 122 *Harvard Law Review* 1095 – 1149.

[178] Ibid. See also Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (OUP, 2007), 27; Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (OUP, 2011), 2.

inappropriate for judges to adjudicate them.[179] As mentioned above, national security has been traditionally deemed a 'political' question in UK law, partly on the grounds that national security decisions have such significant implications for society that they should only be made by those who can be held to account by the electorate. One view related to this position stems from Carl Schmitt, who argues that political sovereignty is in fact defined by control of decisions concerning what constitutes a threat to national security.[180] However, this view is more descriptive of Schmitt's conceptual understanding of the role of state institutions rather than a prescriptive statement as to the relationship law *ought* to have with national security.

There are a number of different positions that have been advanced in response to the political constitutionalist arguments. In contrast to security and legitimacy arguments, some scholars have argued that judges' unelected status is precisely the reason they ought to be given a significant role in holding the executive to account.[181] They argue that by being removed from political discourse and the reliance on public approval to maintain power,[182] as well as

[179] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2007), Graham Gee and Grégoire Webber, 'What Is a Political Constitution?' (2010) 30 *OJLS* 2, 273 – 299, JAG Griffith, 'The Political Constitution' (1979) 42 *MLR* 1 – 21. See also Paul Daly, 'Justiciability and the 'Political Question' Doctrine' [2010] *PL* 160.

[180] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (first published 1922, University of Chicago Press, 2005.

[181] Eric Metcalfe, 'Terror, Reason and Rights' in Esther D Reed and Michael Dumper (eds), *Civil Liberties, National Security and Prospects for Consensus: Legal, Philosophical and Religious Perspective* (CUP, 2012) (Metcalfe); David Feldman, 'Human rights, Terrorism and Risk: The Roles of Politicians and Judges' (2006) *PL* 364 – 384.

[182] Ibid, Metcalfe, 154.

being bound by obligations to give reasons in decision-making,[183] judges are more immune to panic that impairs rational decision-making in times of national security crises.[184] Moreover, Dyzenhaus has argued that judges have a significant role insofar as the common law represents an important moral resource for pushing back against panic-driven action from the other branches of state.[185]

In response to excessive deference arguments, legal constitutionalists have highlighted that judicial behaviour is not necessarily fixed but responsive to the kind of procedures governing them. David Scharia has argued that judicial warrants signed in 'real time' in Israel provide robust challenge to the idea that the judges are ill-suited to provide urgent responses in an emergency or crisis situation.[186] As discussed above, a number of scholars have made arguments that judges have shown signs of more assertiveness in UKNSL.[187] Similar arguments have been made with respect to US judges in the national security context.[188] In this context, Ashley Deeks has noted an 'observer effect' in (US)

[183] David Feldman, 'Human rights, terrorism and risk: the roles of politicians and judges' (2006) *PL* 364 – 384, 374 – 375.

[184] Ibid.

[185] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006).

[186] David Scharia, *Judicial Review of National Security* (OUP, 2014).

[187] Fiona de Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (CUP, 2011); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006); Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference' (2011) 56 *McGill Law Journal* 863, 915 – 917; Conor Gearty, '11 September 2001, Counter-Terrorism and the Human Rights Act' (2005) 32 *Journal of Law and Society* 1, 18 – 33, Conor Gearty, 'British Torture, Then and Now: The Role of the Judges' (2021) 84 *MLR* 1, 118.

[188] David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 *Michigan Law Review* 8.

national security law, by which the prospect of judicial review in the national security context encourages self-regulation on the part of the executive.[189] In this way, examples from legal practice have been cited to show that judges are more capable of ensuring the executive is held to account in the national security context than the excessive deference argument acknowledges.

While scholars have highlighted what they see as progress in national security law, many of them are alive to the significant problems that can arise as a result of ineffective law in this context. Indeed, such scholars have advanced a non-political constitutionalist version of the legitimisation thesis. An example of this is Dyzenhaus' notion of LGHs.[190] As mentioned, LGHs are broadly speaking[191] legal spaces where there are 'some legal constraints' on executive action, which renders them 'not a lawless void',[192] though such constraints are 'so insubstantial that they pretty well permit the government to do as it pleases'.[193] Thus, in the case of a detainee being subjected to a LGH, the detainee has 'some procedural rights' but they are 'not sufficient for him

[189] Ashley S Deeks, 'The Observer Effect: National Security Litigation, Executive Policy Changes and Judicial Deference' (2013) 82 *Fordham Law Review* 827.

[190] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006).

[191] Dyzenhaus' account of LGHs in *The Constitution of Law* is not always consistent. On the one hand, they are presented in solely negative terms, as they are in the references above. In another part of *The Constitution of Law*, LGHs are presented as less dire. This is based on a brief comment in his writing, which implies that judges may be able to overcome attempts by the government to create LGHs. Dyzenhaus has stated this can happen as long as judges 'can use legal protections provided as a basis for trying to reduce official arbitrariness to the greatest extent possible'. In doing so, according to Dyzenhaus, judges challenge the government either to make clearer its intentions that the law should not apply or to come up with some better way of fulfilling its claim that the rule of law is being protected'. Ibid, 205.

[192] Ibid, 42.

[193] Ibid.

effectively to contest the executive's case for his detention'.[194] The critical point about LGH's is that there are legal rights but these rights 'cloak the lack of substance' in the judicial scrutiny.[195] In this way, LGHs enable a government to 'do what it wants while claiming the legitimacy of the rule of law'.[196]

Other important models of legitimisation have been developed with respect to the US national security context. This includes the use of 'rule of law tropes' by the executive, developed by Shirin Sinnar, whereby the executive relies on the adoption of rule of law and constitutional language, in a manner which persuade courts that excessive national security measures are in fact compatible with international law.[197] Rebecca Sanders has similarly referred to a culture of 'plausible legality' in the US by which the executive has learnt to frame its excessive powers in the legal language of constitutional and international law, asserting the legality of such powers in a manner which is sufficiently plausible to divert judicial scrutiny.[198] In contrast to the political constitutionalists' accounts of law as legitimisation, such scholars have not argued that this process is an inevitable consequence of relying on judges to safeguard rights in the national security context.

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[194] Ibid, 50.

[195] Ibid.

[196] Ibid, 39.

[197] Shirin Sinnar, 'Rule of Law Tropes in National Security' (2016) 129 *Harvard Law Review* 1566.

[198] Rebecca Sanders, *Plausible Legality* (OUP, 2018).

In basic terms, these characteristics of the non-political constitutionalist legitimisation argument, referred to as the creation of LGHs as a shorthand, can be summarised as follows. The three features of LGHs that I will take as representative, and in any event as providing a critical framework for this thesis are: First, there is a legal framework that contains some protections of the individual against the state. Secondly, these protections are insufficient for effectively challenging the executive's case. Thirdly, the legal regime gives the appearance of providing robust review and that the relevant national security powers comply with the rule of law, which affords the executive legitimacy while it exercises national security powers which are substantially under-reviewed. For the purposes of this thesis 'effective' can be tested by reference to the question of whether the ECHR rights are adequately protected via substantive review, discussed in more detail below.

Of most significance for the analysis in this thesis is the debate between legal constitutionalists and advocates of the excessive deference argument. This is because, as this thesis contends, the security and legitimacy arguments are limited in their relevance in the context of the UKNSL regimes examined. This is most clear with respect to the legitimacy argument, on the basis that in the UKNSL regimes examined, Parliament has explicitly required that judges review the necessity and proportionality of specific national security powers in these regimes. That judges do this therefore represents an expression of the

democratic will of Parliament. In such a context, an argument against judges in engaging in review due to their lack of democratic legitimacy cannot hold.

Also of relevance to both the legitimacy argument and the security argument is the fact that in asserting human rights protections judges are not 'deciding' how national security must be protected in the UK. Rather, as discussed above, they are signaling to the other branches of state where a particular measure encroaches upon ECHR rights protections.[199] As mentioned, the HRA establishes a model of shared responsibility for rights protection and judges have no powers to strike down legislation or to provide direction as to how a particular matter should be responded to by the other branches of state.[200] It is true that judges in the specific regimes are provided with statutory powers to quash particular exercises of national security powers. However, where this occurs, there is nothing to stop the executive imposing alternative measures, including by fast-tracking new national security legislation which has been a regular feature of law-making in the UK in recent years.[201] Consequently, it is

[199] Tom Hickman, *Public Law after the Human Rights Act* (Hart, 2010), 113 – 116.

[200] Notably some political constitutionalists appear to conflate the legal constitutionalist position that judges have a significant role in human rights protection with the notion that judges should be given the only role in human rights protection. Thomas Poole describes Dyzenhaus' position as being one 'in which common law is capable of providing a framework from which to assess governmental action in situations of emergency' (Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 *International Journal of Constitutional Law* 247 – 274, 261). Yet, Dyzenhaus makes room for judges to work with the legislature in responding to an emergency (For example, see Chapter Two of *The Constitution of Law*. In this chapter, Dyzenhaus defends the position that the common law can *also* be authoritative in the case of emergencies, disagreeing with the positivist stances that statute is the only authoritative source of law - rather than claiming that the common law is *the* authoritative source of law. In this way, Poole appears to conflate the position that the common law may play a role in holding the executive to account with the idea that the common law is *the* framework upon which the executive can be legally held to account, rather than *part* of the framework. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006), Chapter Two.

[201] House of Lords Select Committee on the Constitution, 'Fast-track legislation: Constitutional Implications and Safeguards' (7 July 2009) 15th Report of Session 2008 – 2009, HL Paper 116 – 1, para 21.

a stretch to portray judges as though they are usurping the role primary decision-makers illegitimately directing the way the UK's national security is protected in the UKNSL regimes being examined in this thesis. Moreover, given the range of civil national security and criminal measures available to the executive, the idea that judges determining one measure to be incompatible with ECHR obligations is going to put the UK's national security at risk is doubtful.

Another reason the security argument has limited application in the UKNSL examined is that the relevant regimes have been specifically tailored to provide judges with national security expertise. In the first instance, in regularly adjudicating national security matters, judges in these regimes build national security expertise in this context by regularly being exposed to national security intelligence and advice. Moreover, in all the regimes examined bar one, judges have special procedures to access relevant national security expertise. In the surveillance context, the IPT has access to expertise in the form of IPCO,[202] and SIAC has an individual with experience working at a senior level in the SIAs or FCO sat on its adjudicative panel.[203] It is also true that judges adjudicating in such courts may draw on expertise in the form of witnesses presented by the parties. This significantly mitigates against any expertise deficit on the part of courts, which, in any case, they can compensate for by the assigning of weight to individuals with relevant expertise. In this way, judges

[202] IPA, s 232(1).

[203] SIACA, Schedule 1, s 1. HC Deb 26 November 1997, vol 301 col 1038.

have access to national security expertise in the UKNSL regime examined, qualifying the claims of security-focused argument.

Due to these specific circumstances, it is the disagreement between advocates of the excessive deference argument and legal constitutionalists which has most relevance to the analysis in this thesis. To the extent that ECHR protections are not effective in UKNSL, this has potential to vindicate the excessive deference argument. However, this is only to the extent that this lack of effectiveness can be linked to fixed or long-standing features of the judiciary and UK law in general. As mentioned above, some legal constitutionalists have argued there may be many flaws in UKNSL, however it is the potential for judges to become increasingly robust which is significant for assessing effectiveness in this context. Legal constitutionalists may well argue that this is particularly the case considering the judicialisation of ECHR protections in the national security context being a relatively recent, as well as radical, shift in the way in which the UK seeks to protect human rights in this context. In this way, flaws in UKNSL are insufficient in themselves to inform this broader debate. Rather, what would inform the debate is consideration of the specific nature of such flaws, to the extent they exist, and what they can tell us about their inevitability. This provides further justification for an in-depth assessment of UKNSL in this regard.

1.3. Approach taken in assessing the protection of ECHR rights

The overall approach of the thesis is doctrinal. In other words, the protection of rights is judged by reference to the legal doctrine attached to the ECHR, at both the UK and European levels. In employing a doctrinal approach, the thesis provides an internal critique of the ECHR system in the UK national security context. This means that the system is judged by reference to its own standards, rather than standards which may exist outside of the system. The thesis does not consider whether the system conforms to some objective notion of justice or protects human rights as they may exist in some universal sense. Nor does the thesis seek to measure the practical impact of rulings or judgments, either on the individuals concerned, or more generally on patterns of conduct, operations or systems in the UK. The thesis judges the protection of human rights as they are defined by the ECHR itself, in law derived from both the ECtHR and UK law.

This thesis' analysis focuses on four areas of UKNSL, rather than providing an exhaustive analysis of all national security law in the UK. The approach taken has been designed to select core areas of modern UKNSL, which provide examples of incorporation of a range of ECHR rights and have generated a significant volume of case law. The types of ECHR protections considered are an absolute right (article 3), a qualified right (article 8) and a right which may be limited on national security grounds (article 6) and derogation from certain ECHR requirements (article 15). Article 15 is an exception insofar as it has

generated only one domestic case, that of *Belmarsh*.[204] It also represents a means of rights disapplication rather than referring to a specific right. However, the article is considered as the principle of derogation is central to the way the ECHR addresses national security, by regulating the treatment of ECHR rights in an archetypal national security context – that of the public emergency. Moreover, *Belmarsh* represents one of the most important UK cases on incorporation of ECHR rights in UKNSL generally. It is therefore justified to include article 15 as part of this thesis analysis.

The thesis' analysis focuses on judicial scrutiny of national security issues, in relation to ECHR rights, where that scrutiny involves judges acting judicial capacity whether in more conventional forms of *inter partes* proceedings or in forms of *ex parte* processes. The analysis does not include inquiries in which judges are asked to examine, though not technically adjudicate, national security issues related to ECHR rights. Such inquiries include the Baha Mousa inquiry, chaired by the judge, Sir William Gage, which considered British engagement with torture and mistreatment during the occupation of Iraq by British troops.[205] Another example is the Hutton inquiry, chaired by Lord Hutton, which examined the circumstances around the death of British biological warfare expert, Dr David Kelly, in the lead up to the British invasion of Iraq. Also related to Iraq was the Scott inquiry, in which Sir Richard Scott

[204] *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68.

[205] For an overview and analysis of these inquiries, see Conor Gearty, 'British Torture, Then and Now: The Role of the Judges' (2020) 84 *MLR* 1, 118 – 154.

investigated previously restricted arms sales by British companies to Iraq. Notably, the inquiries can at times be required by articles 2 and 3 ECHR. However, in this context, judges are not acting in a judicial capacity as such, in the sense of adjudicating the legality of the issues raised. Such inquiries therefore raise a different set of issues with respect to ECHR rights and national security and are thus outside the scope of the thesis.

A basic principle running through the core of the thesis is that effective protection of ECHR rights in UKNSL requires UK courts to engage in substantive review of the compatibility of national security measures with the Convention. The precise nature of substantive review has been the subject of disagreement among legal scholars.[206] However, it is uncontroversial that substantive review requires judges to make an *independent* assessment of the compatibility of the *outcome* of the primary decision-maker's decision with the Convention.[207] As articulated by Lady Hale in *Miss Behavin'*, this type of review means that the relevant court must decide whether the human rights of the claimant have 'in fact' been infringed, rather than whether the administrative decision-maker 'properly took them into account'.[208]

[206] Jonathan T H Lee, 'Substantiating Substantive Review' (2018) 3 *PL* 632 – 648. There has been significant disagreement as to the extent to which substantive review, in the form of proportionality analysis, is reliably distinguishable from reasonableness review. Mark Elliott, 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in Hannah Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review* (Hart, 2015).

[207] Rebecca Williams, 'Structuring Substantive Review' (2017) 1 *PL* 99 – 123, 100; Jonathan T H Lee, 'Substantiating Substantive Review' (2018) 3 *PL* 632 – 648, 633. Tom Hickman, 'Adjudicating Constitutional Rights in Administrative Law' (2016) 66 *University of Toronto Law Journal* 1, 121 -171, 148 – 154.

[208] *Belfast City Council v Miss Behavin Ltd* [2007] UKHL; [2007] 1 WLR 1420, [31] per Lady Hale.

Assessing whether substantive review has been carried out in UKNSL will depend, in the first instance, on asking what standard the relevant ECHR right imposes. As Lord Steyn emphasised in *Daly* when articulating the differences between adjudication under the HRA and traditional judicial review, 'context is everything'.[209] As will be seen in the article 3 context, judges are required to carry out an independent assessment as to whether persons, the Government seeks to deport, face a 'real risk' of treatment contrary to article 3. In the context of article 6, judges must ensure that TPIM proceeding are fair and subject to full review by an independent tribunal. This means, in the TPIM context, deciding for themselves whether the relevant TPIM conditions have been met, including if the TPIM subject has engaged in terrorism-related activity. In the articles 8 and 15 contexts, judges must decide for themselves whether the relevant national security measures are *in fact* necessary and proportionate to the national security threat alleged to be in existence. With respect to article 15, the ECHR requires that judges form their own view as to, both, whether a public emergency exists for the purpose of meeting article 15 requirements and if measures are strictly required to meet the exigencies of the emergency.

[209] *Daly v SSHD* [2001] UKHL 26; [2001] 3 All ER 433, [28] per Lord Steyn.

That substantive review is a requirement is reflected in the wording of the ECHR tests generally, as well as article 1 and 13 ECHR. Article 1 states that states, who are signatories to the ECHR, 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention'. Article 13 states that '[e]veryone whose rights and freedoms as set forth in [the] 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'. As articulated by the ECtHR, article 13 requires that domestic authorities have remedies in place that are intended to guarantee 'not theoretical or illusory rights', but rights that are 'practical and effective'.[210] With respect to specific ECHR rights, the ECtHR has also made clear that substantive review is required. In *Smith & Grady v UK*, the ECtHR ruled, with respect to applying proportionality tests attached to ECHR rights, that review must go beyond that of heightened reasonableness review.[211] The ECtHR issued a similar ruling in *Chahal v UK* that review, without 'due regard' to 'all the relevant issues and evidence', is insufficient for determining whether deportation breaches article 3.[212]

The approach set out in the ECHR has been accepted by domestic courts. In *Miss Behavin'*, Lord Bingham highlighted that the question of compatibility

[210] *Scordino v Italy* [2006] 45 EHRR 207, para 192. See also Annabel Lee, 'Focus on Article 13 ECHR' (2015) 1 *Judicial Review* 20.

[211] *Smith & Grady v UK* [1999] 29 EHRR 493, para 138.

[212] *Chahal v UK* [1996] 23 EHRR 413, para 117.

with the ECHR must be 'judged objectively' by courts[213] and that the courts must 'confront these questions, however difficult'.[214] In particular, UK judges have explicitly asserted the idea that substantive review is a judicial approach which goes 'beyond that traditionally adopted in judicial review in a domestic setting'.[215]

Traditional forms of judicial review in administrative law are focused on the *process* of decision-making. In examining the process of judicial decision-making, a judge will consider the way that the primary decision-maker made their decision. As emphasised by Lord Hoffmann, traditional judicial review will consider 'whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer'.[216] Whether the decision-maker made their decision in the right way will turn on considerations related to the process of making the decision, such as what factors were considered and the fairness of the decision.

The *outcome* of the primary decision-maker's decision is examined only by reference to whether that decision was *irrational* or *unreasonable*. Rationality

[213] Ibid, [30] per Lord Bingham. See also *Huang v SSHD* [2007] UKHL 11; [2007] 2 AC 167, [11] in which the Appellate Committee emphasised that the 'appellate immigration authority must decide for itself whether the impugned decision is lawful'. This position has been echoed in more recent cases. See *Re B (Secure Accommodation Order)* [2019] EWCA Civ 2025; [2020] Fam 221, [121], *R (Law Society) v Lord Chancellor* [2018] EWHC 2094; [2019] 1 WLR 1649, [38].

[214] Ibid.

[215] Ibid, [30] per Lord Bingham.

[216] Ibid, [68] per Lord Bingham.

review is defined by an assessment of whether the primary decision-maker's decision has a rational basis in the sense of being logically sound.[217] Reasonableness review is concerned with whether the decision-maker was *reasonably entitled* to arrive at that decision, and there are 'different degrees' of unreasonableness of a decision by a public authority.[218] '*Wednesbury* unreasonableness' refers to a standard of review which requires a public decision to display an extreme level of unreasonableness to be unlawful.[219] More modern incarnations of reasonableness review have established more stringent criteria for the decisions of public authorities to meet, including that the decision was 'properly directed' in terms of examining relevant factors and giving them appropriate weight.[220]

In contrast, substantive review requires a different form of scrutiny than that provided in ordinary judicial review, as judges must move beyond a consideration of the decision by the primary decision-maker and decide compatibility with the ECHR for themselves.[221] For example, the relevant court must not ask whether a decision by a Minister, that deportation does not give rise to a real risk that a deportee would be mistreated in their home country,

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[217] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9; [1985] AC 374, per Lord Diplock, *R (Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, [75]. per Lady Hale. See also Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2020) 84 *MLR* 2.

[218] *Daly v SSHD* [2001] UKHL 26; [2001] 3 All ER 433, [32] per Lord Cooke.

[219] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

[220] *In Re Duffy* [2008] UKHL 4; [2008] NI 152, [28] per Lord Bingham.

[221] *Daly v SSHD* [2001] UKHL 26; [2001] 3 All ER 433, [26] – [27] per Lord Steyn.

was reasonable or rational, or whether they properly took into account the Convention right in play. The court must find the facts and determine for itself whether there is a real risk to the deportee.

Deciding whether a Convention right has been infringed is not to be equated with the application of a proportionality standard, or a 'heightened scrutiny' standard, or other such standards as developed in ordinary judicial review. This does not mean that the Courts stand in the shoes of the primary decision-making and takes their decision for them. Rather, the courts apply substantive review to one, discrete, element of the decision, namely, its compatibility with the ECHR.[222] On this issue, judges do stand largely in the shoes of the decision-maker, because the decision as to whether the ECHR is complied with belongs to the courts, but only with respect to this aspect of the decision.

Since courts must decide for themselves whether Convention rights are infringed, they must engage in factual assessment, where facts are in dispute.[223] In *Tweed v Parades Commission for Northern Ireland*, Lord Bingham emphasised that adjudication of ECHR rights 'tend[s] to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts'.[224] Similarly, in *R (Kiarie) v SSHD*, Lord

[222] Tom Hickman, *Public Law After the Human Rights Act* (Hart, 2010), 114.

[223] Paul Craig, *Administrative Law*, 7th edn (Sweet &Maxwell, 2012), paras 21–24.

[224] *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 2 WLR 1, [3].

Wilson emphasised that in the context of human rights adjudication, the 'residual power of the court to determine facts…needs to be recognised'.[225]

In referring to non-substantive forms of judicial review, the thesis makes reference to UK judges being 'deferential', also termed exercising 'judicial restraint'.[226] The concept of deference has also been the subject of disagreement in scholarly literature.[227] However, it is generally accepted that judicial deference involves the 'assigning of weight' to the assessment of the other organs of state e.g. the executive or legislature, and that this occurs 'out of respect for their superior expertise, competence or democratic legitimacy'.[228] The extent to which weight is assigned to primary decision-makers can be hugely variable and the assigning of weight is not in itself incompatible with substantive review. Substantive review does not mean that appropriate weight cannot be given to the views of decision-makers, when these are informed and relevant to judicial decision at hand. This can take the form of a 'broad power of judgment entrusted to local authorities' as articulated by Lord Hoffmann in *Miss Behavin'*.[229] It can involve giving due weight to the judgments of decision-makers, in considering the outcome of the decision from the perspective of its

[225] *Kiarie v SSHD* [2017] UKSC 42; [2017] 1 WLR 2380, [47] per Lord Wilson.

[226] Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 3, 409 – 441.

[227] See disagreement in Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (CUP, 2009), 169; 'Chapter Five: Weight and Deference' in Tom Hickman, *Public Law After the Human Rights Act* (Hart, 2010); T R S Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review (2010) 60 *University of Toronto Law Journal* 41 – 59; Mike Taggart, 'Proportionality, Deference, *Wednesbury*' (2008) *New Zealand Law Review* 423; Alison Young, In Defence of Due Deference' (2009) 72 *MLR* 554.

[228] Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (CUP, 2009), 169.

[229] *Belfast City Council v Miss Behavin Ltd* [2007] UKHL; [2007] 1 WLR 1420, [46].

compliance with Convention rights, where there is good reason to do so. However, importantly, affording weight should not reintroduce rationality or process review by a backdoor. Judges should not assign weight without reference to the specific facts and circumstances, as a means of distancing the Court from the decision they are reviewing as a matter of principle. Where judges do assign weight in this way, this is described as 'deferential' in the thesis. The term is also reserved to refer to rationality, reasonableness or process review.

To the extent that UKNSL regimes adjudicate the compatibility of national security powers with ECHR rights, the review required in this context must also be substantive. It is important to recall that there is no specific national security exception in the ECHR. Rather, national security is expressly identified alongside other public interests as a limitation on qualified rights. Therefore, a different approach taken to ECHR rights purely on the ground that it is national security-related would not be justified. As we will see, this principle is also reflected by the fact that the specialist regimes examined in this thesis have been created with procedural tools tailored precisely to carry out substantive review. UKNSL regimes examined have been designed to enable judges to engage in substantive review, while protecting national security. CMPs enable judges to examine all factual evidence of relevance for making their own assessment of the protection of ECHR rights, without risking disclosure which harms national security. They also have access to specific

expertise and the support of special counsel to assist them in forming their own judgment on the necessity and proportionality of the relevant national security powers, rather than being confined to scrutinising the UK Government's decision.

Jurisprudence emanating from the appeal courts has rarely concerned the standard of review to be applied when adjudicating ECHR rights within specialist national security regimes. The reasoning of upper appeal courts in UKNSL has instead largely concerned non-ECHR adjudication or ordinary judicial review where judges do not have access to closed material. A number of statements regarding the role of judges with respect to national security appear to argue for a deferential approach which echoes the legitimacy-focused argument in non-ECHR contexts or where judges do not have access to closed material. At the same time, UKNSL jurisprudence also contains clear statements that first-instance judges in specialist regimes must approach the adjudication of ECHR rights by way of substantive review.

One significant national security case concerning ECHR adjudication, but within an ordinary judicial review context, is *Carlile*.[230] The Supreme Court in this case largely confirmed that adjudicating ECHR rights in the national

[230] *R (on the application of Lord Carlile of Berriew and others) v SSHD* [2014] UKSC 60; [2015] AC 945.

security context requires judges to decide for themselves whether ECHR rights have been violated. Lord Sumption stated in clear terms that nothing which is relevant to reviewing the compatibility of executive decisions with the Convention can be a 'forbidden area'.[231] Lord Sumption emphasised that, as far as Convention rights were concerned, there could be no absolute constitutional bar to any inquiry which is both relevant and necessary to enable the court to adjudicate'.[232]

There was disagreement between their Lordships in *Carlile* as to how to approach questions related to future risk, which is a central problem in UKNSL. This is because the ECHR tests of necessity and proportionality require judges to balance the interference with ECHR rights, as against the risk to national security, when assessing the compatibility of a national security measure with an ECHR right. Lord Sumption made significant statements with respect to judicial scrutiny of risk in the national security context. He suggested that are some human rights and national security cases in which the courts should not opt to make an independent assessment, but defer to the Secretary of State.[233] He stated there were cases 'where the rationality of a decision is the only criterion which is capable of judicial assessment', and this was 'particularly likely to be true of predictive and other

[231] Ibid, [22] – [34].

[232] Ibid.

[233] Ibid, [32].

judgmental assessments, especially those of a political nature'.[234] Responding to Lord Sumption's statements on risk in *Carlile*, Lord Kerr in his dissenting opinion stated that all human rights adjudication required the courts 'not only to examine the reasons given for the interference but also to decide *for themselves* whether that interference is justified'.[235] Moreover, Lord Kerr disagreed with Lord Sumption's statement regarding 'judgmental assessments', arguing that the courts have particular competence to balance different public interests.[236] In response to this, Lord Sumption described Lord Kerr's reasoning that courts ought to decide if the Secretary of State's view was 'right', as 'nothing less than a transfer to the courts of the constitutional function of the Home Secretary, in circumstances where the court is wholly incapable of performing it'.[237]

As mentioned, the ruling in *Carlile* was not concerned with specialist UKNSL regimes in which judges have been assigned explicit powers to adjudicate ECHR rights in the national security context, nor was there a CMP used in the case. Therefore, it is not binding to such specialist regimes. However, the general statements of principle articulated in ruling such as *Carlile* are likely to inform courts in such contexts. This includes the ruling in *Belmarsh*, concerning article 15 derogation originally adjudicated by SIAC. In giving the

[234] Ibid.

[235] Ibid, [152] (emphasis not added).

[236] Ibid, [157].

[237] Ibid, [49].

lead judgment in this case, Lord Bingham emphasised that judgments involving 'factual prediction' were examples of a 'pre-eminently political judgment' while stating that 'the greater the legal content of any issue, the greater the potential role of the court'.[238] In making this broad statement, Lord Bingham did not distinguish between the role of appeals courts and SIAC.

Another significant case is *Rehman*, decided soon after the HRA was passed, which concerned the standard of review in SIAC, but in a non-ECHR context.[239] In this case, Lord Hoffmann made statements resembling both the security and legitimacy arguments, and which later formed the basis of the Lord Sumption's deferential statements in *Carlile*. He emphasised that with respect to national security matters, judges lack expertise on the basis that the Government has the 'advantage of a wide range of advice from people with day-to-day involvement in security matters' which provides it with expertise that cannot be matched by the courts, even specialist national security tribunals such as SIAC.[240] He further stated that the question of whether something was in the 'interests of national security', was a matter of 'judgment and policy' for the executive.[241]

[238] *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68, [29].

[239] *SSHD v Rehman* [2001] UKHL 47; [2003] 1 AC 153.

[240] Ibid, [57].

[241] Ibid, [58].

At the same time, Lord Hoffmann stated that it was important 'neither to blur nor to exaggerate the area of responsibility entrusted to the executive.[242] He added that judges had a legitimate role in testing the 'adequacy of the factual basis claimed for decision', which speaks in favour of the courts engaging in substantive review.[243] He also highlighted that for the purpose of adjudicating article 3, whether a 'sufficient risk exists is a question of evaluation and prediction based on evidence' and that in answering this question 'the executive enjoys no constitutional prerogative'.[244] As with Lord Bingham, Lord Hoffmann did not distinguish between the role of the appeal courts and that of SIAC in making such statements.

Finally, Lord Reed has echoed Lord Hoffmann's account of the standards of review in ECHR cases, in the recent unanimous Supreme Court ruling in *Begum*.[245] He stated plainly that if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights' the relevant judicial body in the case, SIAC, must 'determine that matter objectively on the basis of its own assessment'.[246] This consistent with other statements made in the HOL regarding SIAC's role (outside of *Belmarsh*

[242] Ibid, [54].

[243] Ibid.

[244] Ibid.

[245] *Begum v SIAC* [2021] UKSC 7; [2021] 1 WLR 556.

[246] Ibid, [37].

and *Rehman*).[247] Moreover, the importance of judges approaching scrutiny of TPIMs by way of independent assessment has been emphasised by the Court of Appeal.[248] Thus, there is jurisprudence in UKNSL emphasising the assigning of weight in particular contexts in UKNSL. However, there are also clear statements that first-instance judges in specialist regimes must engage in substantive review on the matter of ECHR-compliance.

1.4. Conclusion

The chapter has set out several features of the thesis, which provide the building blocks for the analysis that follows. It has set out the subject matter of the thesis, and the scope of the research within it, and shown how the integration of ECHR rights protections in UKNSL has led to the creation of specialist UKNSL regimes to protect ECHR rights. The case has then been made that the effectiveness of protections of ECHR rights in UKNSL warrants more detailed academic attention. The chapter has also set out how such issues will be investigated in the broader context of the theoretical debate between political and legal constitutionalists. Finally, the chapter has articulated the methodology of the thesis in assessing the effectiveness of ECHR rights

[247] *RB (Algeria) and others v SSHD* [2009] UKHL 10; [2010] 2 AC 110, [253] per Lord Brown, [66] per Lord Phillips; [194], per Lord Hoffmann.

[248] *MB v SSHD* [2006] EWCA Civ 114; [2007] QB 415, [57] – [60].

protections in UKNS and shown that substantive review is a requirement of adjudicating ECHR rights.

As will be seen in the chapters that follow, the standard of review in the areas of law examined fall short of substantive review. It will be shown that this is due to a range of factors that combine to limit the standard of review to rationality review. These factors include the procedures adopted in the specialist regimes examined, the manner in which such regimes apply doctrine derived from the ECtHR, and the doctrine developed at the domestic level where there are gaps in the jurisprudence developed in Strasbourg. Then, in the final chapter, it will be explained how the prevalence of rationality review in UKNSL has led to the creation of LGHs. However, based on an analysis of the common factors which appear to have led to this phenomenon, it will be argued that the reliance on this review is not necessarily an inherent feature of national security law. The thesis will finish by discussing the prospect of changing current practice to eliminate LGHs in UKNSL going forward.

2. Article 3 ECHR and National Security-Related Deportation Cases

This chapter begins the thesis analysis of UKNSL, and its protection of ECHR rights, by examining UK protections of article 3 rights in the deportation context. Specifically, the chapter assesses article 3 protections applying to individuals the UK Government seeks to deport from the UK, on grounds they are a threat to national security. Article 3 obliges states not to deport individuals where 'substantial grounds' have been shown for believing that the person in question would face a 'real risk of being subjected to treatment contrary to article 3 in the receiving country'.[1] Individuals deported on national security grounds are at particular risk of such mistreatment due to the increased prospect of return states perceiving them as a threat to the national security of that state. SIAC has primary responsibility for adjudicating article 3 claims in the deportation and national security context in the UK.

[1] *Chahal v UK* (1996) 23 EHRR 413, para 74.

The chapter argues that while SIAC possesses many features which in theory enable it to conduct independent factual analysis of whether deportation would expose the deportee to a real risk of mistreatment, executive advantages in such cases lead to SIAC largely applying rationality review in practice. As will be shown, this standard of review is not sufficiently rigorous to assess accurately whether there are substantial grounds for believing there is a 'real risk' a deportee may suffer treatment contrary to article 3. This has the consequence that article 3 rights are not subject to full protection in this area of UKNSL. Moreover, this area of law may be seen to vindicate those who argue that the law is not capable of fully restraining the executive to protect human rights where national security matters are at stake. Though whether this should be seen to vindicate such arguments which be discussed in the final chapter of this thesis.

In all but one of the article 3 cases heard by SIAC, the UK Government has sought diplomatic assurances from the country of return that the deportee would not be subject to treatment contrary to article 3 following deportation.[2] As we will see, such assurances are instrumental in reducing SIAC's ability to review the UK Government's case to a form of rationality review. A 'Memorandum of Understanding' (MOU) represents the most common form of

[2] There was no formal diplomatic assurance involved in a case concerning deportation of individuals to Pakistan, though SIAC hints there may have been an informal assurance presented in closed proceedings. However, SIAC also states that assurances in closed are not admissible. *Abid Naseer & ors v SSHD* [2010] SC/77/80/81/82/83/09.

diplomatic assurance reached between the UK Government and the Government of another country. MOUs are not legally binding but general agreements between the UK Government that the rights of deportees will be protected on return. To date, the UK Government has negotiated five MOUs[3] in Jordan,[4] Libya,[5] Lebanon,[6] Ethiopia,[7] Morocco.[8] The UK Government has also obtained diplomatic assurances from Algeria, on the basis of an exchange of letters,[9] as the Algeria Government was not prepared to enter into a MOU.[10]

While cases involving diplomatic assurances are prominent in the chapter, the focus of the analysis in this chapter is not on the justifiability of using assurances themselves. The idea that diplomatic assurances are unreliable, as a means of preventing a deported individual being subject to treatment contrary to article 3, has been repeatedly given voice in scholarly literature[11]

[3] David Anderson QC and Clive Walker QC, 'Deportation with Assurances' (July 2017) Cm 9462, para 1.3 (Deportation with Assurances).

[4] 10 August 2005, later supplemented by a Mutual Legal Assistance Treaty signed on 23 March 2013.

[5] 18 October 2005.

[6] 23 December 2005.

[7] 12 December 2008.

[8] 24 September 2011.

[9] 11 July 2006.

[10] Deportation with Assurances, n 3, para 1.3.

[11] Rumyana Grozdanova, 'The United Kingdom and Diplomatic Assurances: A Minimalist Approach toward the Anti-torture Norm (2015) 15 *International Criminal Law Review* 517 – 543; Aristi Volou, 'Are Diplomatic Assurances Adequate Guarantees of Safety against Torture and Ill-Treatment? The Pragmatic Approach of the Strasbourg Court' (2015) 4 *UCL Journal of Law and Jurisprudence* 1, 32 – 54; Andrew Jillions, 'When a Gamekeeper Turns Poacher: Torture, Diplomatic Assurances and the Politics of Trust (2015) 91 *International Affairs* 3, 489 – 504; Lena Skoglund, 'Diplomatic Assurances Against Torture – An Effective Strategy? A

and by international organisations.[12] While diplomatic assurances feature in the analysis, the focus of this chapter is on the nature of review that SIAC carries out with respect of real risk in article 3 cases, as part of an assessment as to whether this review meets the substantive standard required as set out in the previous chapter.

Through a comprehensive analysis of the range of cases SIAC has considered, the chapter identifies three principal sets of advantages enjoyed by the UK Government which combine to insulate its case from substantive scrutiny. These are categorised as follows: 1. Doctrinal advantages; 2. Procedural advantages; and 3. Epistemic advantages. These advantages restrict the appellant's ability to challenge the Government's factual assessments and limits SIAC's capacity to test the facts relevant to determining real risk.

The chapter is divided into four sections. Section One presents an overview of article 3 and its development in the deportation and national security context. As we will see, article 3 rights represent a bright line rule prohibiting specific conduct by states in all circumstances, even where national security interests

Review of Jurisprudence and Examination of the Arguments' (2008) 77 *Nordic Journal of International Law* 4, 319 – 364.

[12] JUSTICE, 'Deportation with Assurances: Call for Evidence' (February 2014) <https://justice.org.uk/wp-content/uploads/2015/01/JUSTICE-DWA-Review-2014-FINAL.pdf> Amnesty International, 'Diplomatic Assurances against Torture – Inherently Wrong, Inherently Unreliable' (2017) IOR 40/6145/2017 <https://www.amnesty.org/download/Documents/IOR4061452017ENGLISH.pdf> both accessed on 17 October 2021.

are at stake. Section Two considers the UK system created to protect article 3 rights in the deportation and national security context. The section sets out the particular features of SIAC which empower it to make findings of fact with respect of 'real risk' in article 3 claims.

Section Three examines SIAC's article 3 cases and presents the three sets of advantages enjoyed by the Government in such cases: Doctrinal; Procedural and Epistemic. It argues that such advantages prevent SIAC from carrying out an independent factual analysis on the question of real risk. Section Four examines the scrutiny applied to real risk cases after SIAC adjudication, by the UK appeal courts and the ECtHR and makes the case that it is necessarily limited and unable to compensate for SIAC's avoidance of independent factual analysis. The section concludes the chapter with an analysis of the system as a whole, and how it relates to the overall thesis analysis.

2.1. Article 3 as a Bright Line against Torture

Article 3 ECHR states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. For state conduct to fall within article 3, the Court has held that it must attain a 'minimum level of severity'.[13] Such

[13] *Ireland v UK* (1978) 2 EHRR 25 para 162. Article 3 rights also impose positive obligations on the state, such as a duty to carry out effective investigations with regards to allegations of torture such as participating in the inquiry. *Jordan v UK* (2003) 37 EHRR 2.

treatment is considered a form of 'severe pain or suffering, whether physical or mental'[14] inflicted on a person and may be 'associated with 'sufficiently serious humiliation of the victim'.[15] Article 3 ECHR is an absolute right, not subject to a general limitation clause, and must be respected in all circumstances.[16] It is also a non-derogable right so states may not derogate from their article 3 obligations under article 15 ECHR.

During the drafting of article 3, the absolute nature of article 3 was forcefully advocated by United Kingdom delegate,[17] who argued that 'if a State, in order to survive, must be built on a torture chamber, then that State should perish', and that it is the '[s]tates which are built upon torture chambers which will perish, as Nazi Germany perished'.[18] The reference by the UK delegate to Nazi Germany reflects one of the overall aims of the ECHR to prevent totalitarianism resurfacing again in Europe.[19] As the Court has repeatedly emphasised, the Convention's prohibition of torture is seen as a defining

[14] Borrowed from Article 1 United Nations Convention Against Torture (UNCAT).

[15] *Selmouni v France* (2000) 29 EHRR 403.

[16] Though there is a wealth of academic debate as to the further implications of article 3's absolute nature, in particular whether it applies absolutely in practice. For example, see Natasa Mavronicola and Fancesco Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK* (2013) 76 *MLR* 3, 589 – 603.

[17] The UK delegate, Mr Seymour Cocks made an unsuccessful attempt to amend article 3 so that it listed specific actions constituting torture. While the amendments were not passed the drafting Committee spoke in support of Mr Cocks general statements.

[18] Travaux Préparatoires to the ECHR, 'Preparatory Work on Article 3 of the European Convention on Human Rights', 22 May 1956 DH (56) 5, 5.

[19] Discussed in detail in Chapter One, 51 - 55. Indeed, the tendency of fascist European states in the twentieth centuries to engage in torture practices was widely seen as a defining feature of authoritarianism and a crucial tool for wielding autocratic power by fascist leaders.

feature of democratic nations, enshrining 'one of the fundamental values of the democratic societies making up the Council of Europe'.[20]

The principle that states may not send individuals to countries, where there are 'substantial grounds' for believing there is a 'real risk' they may be subject to treatment contrary to article 3, was first developed in *Soering*.[21] The Court justified this position on the basis that it would 'hardly be compatible with the underlying values of the Convention…were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed'.[22]

In *Chahal*, the Court clarified that this responsibility holds in the deportation context, even where national security is at stake. The Court emphasised that this principle applies 'irrespective of the victim's conduct'.[23] This means that the activities of the individual in question, however 'undesirable or dangerous', cannot be a 'material consideration' when determining violations of article 3.[24] Moreover, article 3 was held to be 'equally absolute' in the extra-territorial

[20] *Soering v UK* (1989) 11 EHRR 439, para 88.

[21] Ibid.

[22] Ibid, paras 81-91.

[23] *Chahal*, n 1, para 79.

[24] Ibid, para 80.

context of deportation on national security grounds, so may not be limited under any circumstances including when deportation is considered necessary by states to protect national security.[25] Efforts by some states, including the UK, to reverse this case law, to allow states to balance national security against article 3 rights, have been forcefully rejected by the ECtHR.[26]

2.2. SIAC as a Fact-Finding Body

The UK Government created SIAC after *Chahal* to provide as 'effective a remedy as possible' for those challenging immigration decisions involving classified information, including deportation decisions made on grounds of national security.[27] The ECtHR had found that the attempted deportation of Mr Chahal by the UK Government on national security grounds was in violation of article 5(4) ECHR, article 3 ECHR and the right to non-discrimination under article 14 ECHR. This was due to the inability for Mr Chahal to effectively challenge his deportation decision in UK courts. Prior to *Chahal*, those wishing to challenge an immigration decision related to national security had to pursue a non-statutory advisory procedure referred to as the 'three wise men procedure'.[28] This involved making representations to an

[25] Ibid.

[26] *Saadi v Italy* (2009) 49 EHRR 30 (UK intervening).

[27] *RB (Algeria) and others v SSHD* [2009] UKHL 10; [2010] 2 AC 110, [10] per Lord Phillips.

[28] Select Committee of Constitutional Affairs, Seventh Report, Session 2004 - 2005, para 110.

advisory panel, without legal representation and with the Home Secretary having discretion to decide how much information is disclosed regarding the case against the individual. The ECtHR held that this procedure did not meet the standards required by article 5(4) ECHR for individuals to appeal national security-related decisions. SIAC was established as an ECHR-compliant judicial body to hear such appeals.

SIACA created SIAC with jurisdiction to hear appeals on a range of immigration decisions that would usually be dealt with by mainstream courts or tribunals but have been certified under section 97 of the Nationality, Immigration and Asylum Act ('NIAA').[29] Certification under this provision is made on the basis that the Secretary of State's decision has been 'wholly or partly' in reliance on information which 'in his opinion should not be made public'. This is on the grounds that non-disclosure of such information is 'in the interests of national security' or in the interests 'of the relationship between the United Kingdom and another country' or 'otherwise in the public interest'. SIAC's full jurisdiction for appeals is laid out in section 2 of SIACA. The main matters the Commission adjudicates are appeals by individuals either facing deportation, exclusion or the denial of British citizenship, on grounds related to national security. In Parliament, the Home Secretary described the role of

[29] Under s82 (1) of the Nationality, Immigration and Asylum Act 2002 ('NIAA') but that have been certified by the Secretary of State under section 97 of NIAA.

SIAC as a tribunal that would 'ensure that the right to a proper process of those suspected of terrorist activity will be safeguarded'.[30]

Procedure in SIAC is primarily governed by SIACA and the SIAC (Procedure) Rules 2003 rules ('the 2003 rules'). To bring an appeal against a deportation to SIAC, notice must be given in accordance with the 2003 rules.[31] A person may bring an appeal to SIAC if he or she would have been able to appeal the decision under section 82(1), 83(2) or 83A(2) of the NIAA but for it having been certified under that Act[32] or but for the decision having lapsed under section 99 of that Act by virtue of a certificate of the Secretary of State under section 97 of that Act.[33] Appeals against deportation decisions[34] may be brought on grounds including that the decision is 'unlawful' under section 6 of the HRA.[35]

[30] Hansard HC 30 October 1997, Vol 317 col 1057.

[31] SIAC 2003 Rules, rules 9 - 12. The notice for appeal/application for review must include the grounds on which proceedings are being brought. Provided the Secretary of State opposes the appeal or application for review, a directions hearing will be held at SIAC. Following the directions hearing, an appeal must be determined at a hearing before SIAC.

[32] SIACA s 1(a).

[33] SIACA s 1(b).

[34] Governed by s 2(2) of SIACA as substituted by paragraph 20 of Schedule 7 to the NIAA. Note the statutory framework governing the grounds upon which appeals of deportation decisions may be brought before SIAC has been subject to repeated amendment since SIACA was first passed. For a full description of these amendments see *Begum v SIAC* [2021] UKSC 7; [2021] 2 WLR 556, [32] – [37] per Lord Reed (*Begum*).

[35] NIAA, s 84 (b), as amended by the Immigration Act 2014.

SIAC's role in determining HRA-related appeals was recently clarified by the Supreme Court in *Begum*.[36] Lord Reed stated that in considering an appeal on this ground SIAC's task 'is not a secondary, reviewing, function dependent on establishing that the Secretary of State misdirected himself or acted irrationally, but that SIAC must decide for itself whether the impugned decision is lawful'.[37] SIAC has a number of features to enable it to carry out this role in providing an independent factual analysis in its adjudication of deportation appeals on human rights grounds.

In the first instance, proceedings before SIAC are heard by a panel of three members, appointed by the Lord Chancellor.[38] As mentioned in the Chapter One, the third member is usually an individual with experience working at a senior level in the SIAs or FCO.[39] Brian Barder, former third member of SIAC and British diplomat, has stated that the role of the third member is to 'advise his judicial colleagues on how much weight should be given to the various kinds of secret information submitted in evidence'.[40] In this way, the lay member can

[36] *Begum*, n 34, [37] per Lord Reed.

[37] Ibid.

[38] SIACA, Schedule 1, s 1.

[39] Chapter One, 86. As noted, there is no statutory requirement that this is the case, however it was accepted by the Government in in Parliament that this would be the case during the passing of SIACA. HC Deb 12 November 1997, vol 301, col 1038. At least one of the members must hold or have held judicial office or have been a member of the Judicial Committee of the Privy Council, while another member must be or have been a judge of the First Tier Tribunal or of the Upper Tribunal assigned to the Immigration and Asylum Chamber.

[40] Brian Barder, 'On SIAC' (2004) 26(6) *London Review of Books* 40 – 41 <https://www.lrb.co.uk/the-paper/v26/n06/brian-barder/on-siac> accessed 17 October 2021.

assist the other panel members as to how to make sense of the factual evidence presented before it. As Barder has emphasised, the type of analysis described above represents an area which 'few serving judges have much, if any, direct knowledge of'.[41]

Another feature to enable SIAC to make determinations of facts is its ability to examine closed evidence. The Commission must satisfy itself that the material available to it enables it properly to determine proceedings.[42] In considering evidence, SIAC can hear live evidence and call witnesses.[43] Furthermore, SIAC may direct any disclosure it considers necessary to determine the proceedings.[44] At the same time, the Commission must secure that information is not disclosed contrary to the interests of national security, among other public interest grounds.[45] If the Secretary of State is of the view that there is material relevant to the case that, if disclosed, would be contrary to public interest, they must serve on SIAC and the Special Advocate a number of documents.[46] These include a copy of closed material and a statement of reasons for objecting its disclosure.[47] This assists SIAC in fact-finding as it ensures the

[41] Ibid.

[42] SIAC Rules 2003, rule 4 (3).

[43] Ibid, rule 39.

[44] Ibid, rule 39 (5) (c) (i).

[45] SIAC Rules 2003, rule 4 (1).

[46] Ibid, rule 37.

[47] Ibid.

judges on the panel can examine all evidence that was available to the Secretary of State in making their decision, without risking national security.

In addition to being able to examine closed evidence, SIAC is assisted by a 'Special Advocate', present in closed proceedings to scrutinise the Government's evidence and represent the appellant.[48] The functions of the Special Advocate include making submissions to the Commission in closed proceedings, and adducing evidence and cross-examining witnesses at any such hearings.[49] After Special Advocates have been served with the closed material, the Special Advocate must request directions from SIAC in order to be able to communicate with the appellant or persons representing them.[50] Having a Special Advocate present is meant to assist SIAC in achieving a more balanced assessment of the factual case presented to it. The Court of Appeal has stated that 'it is possible by using Special Advocates to ensure that those detained can achieve justice'.[51]

A further feature of SIAC proceedings which empowers it to make factual findings is the duty of the Secretary of State to serve exculpatory material on

[48] The Secretary of State may not rely on closed material unless a Special Advocate is appointed. SIAC Rules, n 42, rule 37 (2).

[49] Ibid, rule 35.

[50] Ibid, rule 36 (4).

[51] *M v SSHD* [2004] EWCA Civ 324; [2004] All ER 862, [34] per Lord Woolf CJ.

the appellant.[52] In exercising this duty, the Secretary of State is taken to 'be aware' of any material relevant to a decision she has considered and material 'which is or has been in the possession or control of' the Home Office, SIAs and the Foreign and Commonwealth Office.[53] Furthermore, the duty of candour that exists in judicial review proceedings applies in SIAC.[54] This has the consequence that there is 'a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanation of all the facts relevant to the issue the court must decide'.[55] As with the availability of closed material, this aspect of SIAC procedure is designed to ensure SIAC can examine all factual material relevant to the case.

SIAC's general doctrine with respect to article 3 makes an express commitment to independent fact-finding. SIAC has clarified its general approach when reviewing the Secretary of State's decision is not 'to review or second guess the decision of the Secretary of State but to come to its own judgment'.[56] SIAC's doctrine with respect to adjudicating article 3 has also emphasised a commitment to factual analysis. SIAC has emphasised that an assessment of risk for the purpose of article 3 is 'fact-specific' and the task of the Commission

[52] SIAC Rules 2003, rules 10 and 10A.

[53] Flaux J, Practice Note for Proceedings Before SIAC, 5 October 2016 https://www.judiciary.uk/wp-content/uploads/2014/12/practice-note-for-proceedings-before-siac-from-5-oct-2016.pdf accessed 17 October 2021, para 10.

[54] *SIAC v SSHD* [2015] EWHC 681 (Admin); [2015] 1 WLR 4799.

[55] *R (Quark Fishing Limited) v SSFCA* [2002] EWCA Civ 1409; [2002] 10 WLUK 792, [50] per Laws LJ.

[56] *Zatuliveter v SSHD* SC/66/2008, [8].

is to 'determine whether or not there are substantial grounds for believing that there is a real risk that this applicant will be subjected to treatment' contrary to article 3 if returned.[57] Such relevant 'substantial grounds' may be established by different forms of assessment which refer to factual evidence, including country reports produced by the UK Government, and NGO reports.[58] The questions SIAC has stated it will consider in relation to the specific individual are also factual ones and include asking the extent to which the individual is likely to be of interest to the authorities in the deported country.[59]

The Commission has also established four conditions, not to be 'prescriptive for all cases',[60] to scrutinise the adequacy of a diplomatic assurance to mitigate the risk on return.[61] They refer additionally to issues of a factual nature. The first test is whether the 'terms' of the assurance are 'such that, if they are fulfilled, the person returned will not be subject to violations under article 3 of the ECHR'.[62] The second test is that there must be a sound objective basis for believing that the assurances will be fulfilled. The third test is whether the assurance has been given in good faith. The fourth test is whether the assurances are capable of being verified. SIAC has stated that an 'assurance,

[57] *BB v SSHD* [2006] SC/39/2005, [3].

[58] Ibid.

[59] Ibid, [13].

[60] *BB v SSHD* [2006] SC/39/2005, [5].

[61] Ibid.

[62] Ibid.

the fulfilment of which is incapable of being verified, would be of little worth'.[63] SIAC has also acknowledged the extended list of factors for scrutinising diplomatic assurances established by the ECtHR in *Othman v UK*, though SIAC does not analyse each of these factors in turn in its analysis of the two cases it examined subsequent to this ruling.[64]

The UK appeal courts have also emphasised SIAC's fact-finding capacity. In *AS & DD*, the Court of Appeal stated it was SIAC's 'responsibility' to 'determine the facts, including the key questions of fact, namely what risks the respondents would be exposed to on return'.[65] In providing this reasoning, the Court of Appeal specifically confronted the idea that 'it might be said that such questions are not justiciable because…their resolution depends upon the exercise of judgment of a kind which lies beyond the expertise of the court'.[66] The Court of Appeal clarified that this position was not tenable in light of the ECtHR's forceful assertion of the absolute nature of article 3.[67] In reviewing SIAC's decision in *RB*, Lord Brown described SIAC as 'custom-built for the challenging and sensitive tasks involved in deciding these expulsion cases and vested with particular powers and procedures—above all the use of closed

[63] Ibid.

[64] *WW and others v SSHD* [2016] SC/39/2005, SC/34/2005, SC/54/2005, SC/32/2005, SC/36/2005, SC/37/2005 (*W and others*) and *N2 v SSHD* [2015] SC/125/2015.

[65] Ibid.

[66] Ibid, [41].

[67] Ibid.

material under the Special Advocate scheme—which make its determinations peculiarly inappropriate for further factual reappraisal and appeal'.[68] As mentioned in Chapter One, the Supreme Court has recently affirmed in *Begum* that where SIAC considers appeals concerning lawfulness of an immigration decision on human rights grounds, as is the case in deportation and article 3 appeals, SIAC must decide 'for itself' whether the decision is lawful.[69] The Supreme Court stated this involves SIAC determining matters 'objectively' and 'on the basis of its own assessment'.[70]

2.3. Executive Advantages in Article 3 Cases

SIAC has considered the article 3 rights of nineteen individuals.[71] In relation to all but two deportees, SIAC has considered safety on return in a context where diplomatic assurances have been provided by the Government of the home state.[72] All appeals of SIAC decisions relating to article 3 – in the Court

[68] *RB (Algeria) and others v SSHD* [2009] UKHL 10; [2010] 2 AC 110, [253]. The other Lordships present in the case made similar statements regarding SIAC's ability to make findings of fact. See [66], per Lord Phillips; [194], per Lord Hoffmann (*RB*).

[69] *Begum v SIAC*, n 34, [37],

[70] Ibid, [69]. The ECtHR has also emphasised SIAC's ability to make its own findings of fact. In *Othman v UK*, the Court referred to the Memorandum of Understanding which formed the basis of a diplomatic assurance provided by the Jordanian Government as having 'withstood the extensive examination' carried out by 'independent tribunal, SIAC, which had the benefit of receiving evidence adduced by both parties, including expert witnesses who were subject to extensive cross-examination'. *Othman v UK* (2012) 55 EHRR 1, para 194 (*Othman*).

[71] *BB* SC/39/2005; *G* SC/02/2005; *Abu Qatada* SC/15/2005; *DD* SC/42/2005; *AS* SC/50/2005; *Z* SC/37/2005; *W* SC/34/2005; *U* SC/32/2005; *Sihali* SC/38/2005; *VV* SC/59/2006; *Y* SC/32/2005; *Abid Naseer* SC/77/2009; *Ahmad Faraz Khan* SC/80/2009; *T* SC/31/2005; *XX* SC/61/2007; *T6* SC/95/2010; *J1* SC/98/2010; *PP* SC/54/2006; *B* SC/09/2005 (at the time of writing in November 2021).

[72] *Abid Naseer & ors v SSHD* [2010] SC/77/80/81/82/83/09 (*Naseer*).

of Appeal, the HOL/Supreme Court and the ECtHR – have involved cases involving diplomatic assurances.[73] The appeals brought to SIAC by the nineteen individuals have yielded mixed results. SIAC has allowed appeals concerning the deportation of individuals to Libya, Pakistan and Algeria, while the remaining appeals were dismissed. The appeals of 'AS' and 'DD' were brought by two Libyan nationals whose appeals were allowed by SIAC in 2007.[74] AS and DD were the first appellants to have their appeals allowed on the basis that the diplomatic assurances, in this case provided by the Libyan Government, were insufficient to mitigate against the 'real risk' that the individuals faced of treatment contrary to article 3 on their return. Appeals against the Secretary of State's decision to deport two Pakistani individuals Abid Naseer and Ahmad Faraz Khan, in the absence of diplomatic assurances, were allowed.[75] The appeals of six Algerians – 'BB' (also known as 'RB'),[76] 'PP',[77] 'W',[78] 'U',[79] 'Y'[80] and 'Z'[81] – were allowed in 2016 after the Court of Appeal

[73] For example, *Othman*, n 70.

[74] *DD & AS v SSHD* [2007] SC/42/2005 & SC/50/2005.

[75] *Naseer*, n 72.

[76] *BB* SC/39/2005.

[77] *PP* SC/54/2006.

[78] *W* SC/34/2005.

[79] *U* SC/32/2005.

[80] *Y* SC/32/2005.

[81] *Z* SC/37/2005.

remitted the matter of safety of return back to SIAC for it to reconsider in 2015 in *BB.*[82]

The litigation heard in SIAC regarding the six Algerian nationals was long-standing. Between 2006 and 2010, SIAC issued further rulings in the appeals of the Algerian nationals, which were brought on the basis of new evidence or in light of new precedent issued by the UK appeals courts. The HOL had previously dismissed the appeals of RB and U in 2009.[83] However, in 2012, the Supreme Court directed SIAC to accept further evidence on the situation in Algeria for deportees by providing an absolute guarantee that the identity of a potential witness would remain confidential to SIAC and the parties in the case.[84] After consideration of this evidence SIAC dismissed these appeals once more, save for G's appeal due to a deterioration in his mental health which SIAC considered would result in his article 3 rights being violated should he be deported (due to the lack of special arrangements in place to manage his suicide risk).[85] The appeals were heard by the Court of Appeal who remitted the matter back to SIAC after which the appeals were allowed.[86] Not all of the Algerian nationals whose appeals were initially dismissed between 2007 and 2010 were

[82] *BB and others v SSHD* [2015] EWCA Civ 9; [2015] 1 WLUK 501 (*BB*).

[83] *RB* , n 68.

[84] *W (Algeria) (FC) and BB (Algeria) (FC) v SSHD* [2012] UKSC 8; [2012] 2 AC 115.

[85] *W and others*, n 64, [56].

[86] *BB*, n 82.

involved in the later appeals - SIAC did not redecide the cases of 'T',[87] 'T6',[88] and 'Sihali' as they had already been deported to Algeria.[89]

In 2007, SIAC also dismissed the appeals of two individuals being deported to Jordan, that of 'VV' and Abu Qatada. The litigation resulted in a number of appeals and culminated in an ECtHR ruling in *Othman v UK*.[90] The appeals in this case upheld SIAC's findings that Abu Qatada's article 3 rights would not be violated on return to Jordan, while its findings that article 6 rights would be violated on return were upheld. In response to this, the UK Government negotiated and ratified a Mutual Legal Assistance Treaty (MLAT) in 2013 with the Jordanian Government requiring that Qatada's rights would not be violated on return. Abu Qatada ended up leaving voluntarily that same year and was then acquitted from criminal charges against him in Jordan. In 2010 and 2011, SIAC dismissed the appeals of Ethiopian nationals 'XX' and 'J1' respectively.[91] However, the Government did not deport either man for reasons which are not in the public domain.[92]

[87] *T* SC/31/2005.

[88] *T6* SC/95/2010.

[89] *Sihali* SC/38/2005.

[90] *Othman*, n 70.

[91] *XX* [2010] SC/61/2007; *J1* [2011] SC/98/2010.

[92] Deportation with Assurances, n 3, para 2.60 (c).

As we will see, the UK Government enjoys a number of advantages in deportation and national security cases considering article 3. These take three key forms: 1. Doctrinal; 2. Procedural; and 3. Epistemic. Doctrinal advantages refer to those advantages the Government enjoys due to doctrine developed by SIAC to scrutinise whether an appellant's article 3 rights will be violated if deported. These doctrinal advantages are standards that SIAC has principally developed as a means to scrutinise the reliability of diplomatic assurances. Procedural advantages refer to those advantages enjoyed by the Government as a result of procedure adopted in SIAC hearings. Epistemic advantages refer to those advantages enjoyed by the Government due to its privileged access to information and expertise with regards to issues considered central to determining safety on return.

2.3.1. Doctrinal advantages

A number of advantages the UK Government enjoys in SIAC cases are linked to the specific doctrine SIAC has developed for the purpose of scrutinising diplomatic assurances. As set out in Section Two, the Commission has established four conditions to scrutinise the adequacy of a diplomatic assurance to mitigate the risk on return.[93] In practice SIAC is flexible when applying these tests, which we will see works to the advantage of the Government. The

[93] *BB,* n 82.

second and third tests are assumed by the Commission to be met unless the appellants can provide evidence SIAC finds persuasive that they are not. SIAC has never explicitly applied the tests, though it has on occasion noted if it thinks an assurance has been given in good faith.[94] As is set out below, the first and fourth tests can be met with relative ease by the Government once a diplomatic assurance has been provided to SIAC.

Diplomatic assurances are not legally binding and SIAC does not subject them to the same standards of precision as a legal document. Indeed, SIAC has stated that the 'political realities in the country' will 'matter far more than the precise text' because 'it is the probable attitudes of those in power or having dealings with the individual case that are at stake rather than the legal enforcement of that which is inherently not legally enforceable'.[95]

SIAC's flexibility concerning the terms of an assurance extends to its not requiring that an assurance is explicit in ruling out the torture of a deportee. In *BB,* the most relevant statement in the assurance for ruling out treatment contrary to article 3 was that BB's 'human dignity will be respected in all

[94] For example, it stated it considered that an assurance provided by the Libyan Government had been given in good faith, while finding that it did not meet the criteria set with regarding to the remaining tests. *DD & AS v SSHD* [2007] SC/42/2005 & SC/50/2005, para 428.

[95] *Y v SSHD* [2006] SC/36/2005, [391].

circumstances'.[96] The fact that SIAC does not require diplomatic assurances to be explicit in ruling out treatment contrary to article 3, is indicative of a lenient approach to the terms on the part of the Commission in light of the fact that preventing such treatment is the main purpose of such assurances in SIAC proceedings. Such a flexible approach also places strain on the ability of the appellant to challenge the reliability of diplomatic assurance on the basis of their terms. As long as the country of return makes a general statement claiming that it will treat the deportee well this will be sufficient to meet SIAC's requirement regarding the terms of an assurance.

The standards SIAC has set in relation to verification are also lenient. While most diplomatic assurances refer to monitoring bodies within the country of return to verify that a deportee has not been subject to ill treatment, the presence of such bodies is not required by SIAC. In the Algerian cases, the role of monitoring was to be carried out by the British Embassy in Algiers. The weakness of SIAC's approach in this context is evidenced by the inability of the British Embassy to carry out a monitoring role in practice, discussed in more detail below.

SIAC has also taken the position that verification need not be achieved by 'official means', which is also suggestive of flexibility towards the

[96] *BB*, n 82, [14]

requirement.[97] According to SIAC, NGOs such as Amnesty International and other non-government agencies who 'object to reliance on assurances as a matter of principle' can be relied upon in real risk cases to 'find out if [assurances] are breached and publicise that fact'.[98] Since this statement was made in 2005, Amnesty International has strongly rejected the suggestion that it can be relied upon to verify or monitor assurances given to the UK government.[99] The NGO even sent a letter to SIAC emphasising that its sources of information in Algeria 'are, in the main, indirect' and that NGOs 'cannot be relied upon to "monitor" compliance with assurances given to the British government by the Algerian government'.[100] Even despite such protestations, SIAC has reiterated the 'indirect means' of verification NGO reporting can fulfil in Algeria in the 2012 appeals of *W and ors*.[101] The fact that SIAC considered NGOs who have explicitly stated they are not able to monitor treatment of deportees an appropriate means of monitoring (albeit not in cases where they would constitute the only means of monitoring) provides further evidence of the undemanding approach SIAC takes to verification.

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[97] *BB*, n 82, [392].

[98] Ibid.

[99] To assume so misrepresents the type of work Amnesty International undertakes and the conditions, frequency, privacy, and degree of access the organization has to detainees returned in such circumstances. UNITED KINGDOM: SUBMISSION FOR THE REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS, EUR 45/015/2010. This is a point highlighted by Simon Crowther in Simon Crowther, 'The SIAC, Deportation and European Law' (2010) 6 *Cambridge Student Law Review* 1, 277 – 237, 235.

[100] *W and others*, n 64, [42].

[101] Ibid.

SIAC is also not prescriptive in its requirements of monitoring bodies. This is evidenced in its approach to Adaleh Centre in Jordan, the body responsible for monitoring the treatment of Abu Qatada on his return.[102] The Centre was a profit-making body with limited resources and expertise.[103] Despite this, the monitoring body was found to be adequate. The lack of expertise required by SIAC on the part of the Centre is significant from the perspective of assessing SIAC's standards. Bodies such as the International Committee of the Red Cross and Amnesty International argue that a high degree of expertise is necessary to effectively monitor torture.[104] This is due to the fact states that have developed sophisticated techniques of torture which leave no recognisable marks. Creating an environment in which prisoners feel comfortable being open about treatment they have experienced without fear of reprisals from the state also requires expertise.

In addition the former United Nations Special Rapporteur on Torture (2004 – 2010) has emphasised the need for testimonies by alleged torture victims to corroborated by forensic experts in accordance with the 'Istanbul Protocol' as part of a proper process of independent fact-finding in monitoring torture.[105] In

[102] *Othman v SSHD* [2007] SC/15/2005.

[103] Ibid, [195].

[104] For example, see Amnesty International, 'Dangerous Deals: Europe's Reliance on Diplomatic Assurances against Torture' (April 2010).

[105] Recommended by the General Assembly Resolution 55/89 of 4 December 2000. The Protocol provides a set of guidelines for the effective investigation and documentation of torture, in particular by making use of forensic medical expertise. See Manfred Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention' (2009) 1 *Journal of Human Rights Practice* 101 – 119, 106.

light of the necessity of such expertise to fulfil effectively the function of monitoring torture, the lack of requirements for established expertise on the part of the Centre by SIAC is indicative of its taking a broad approach to verification.[106]

This broad approach is also reflected by the fact that SIAC does not require that monitoring bodies are fully independent from the Government of the country of return. It is true that SIAC requires a degree of independence between the authorities in the country of return and the body responsible for monitoring the treatment of deportees. SIAC allowed the appeal of two Libyan nationals in *DD & AS* partly due to a lack of independence between the Libyan monitoring body and the Libyan Government. In this case, the monitoring body was managed and run by Colonel Gaddafi's son.[107] However, SIAC does not require monitoring bodies to be completely independent from the Government of the country of return. For example, the body assigned to monitor the treatment of returnees in Ethiopia was held to be sufficiently independent from the Ethiopian Government, despite its funding being dependent on the Ethiopian Parliament which was heavily controlled by the Ethiopian Government.[108] Given the interest that a Government of the country of return may have in covering up allegations of torture, the lack of strict requirements

[106] David Anderson's report makes clear that the Centre did build up expertise over time following SIAC's ruling. Deportation with Assurances', n 3, para 2.35.

[107] *DD and AS*, n 54.

[108] *XX v SSHD* [2010] SC/61/2007, [23].

imposed by SIAC with regards to independence is further evidence of the lenience of SIAC's verification standards.

This approach on the part of SIAC leaves appellants in a difficult position with regards to establishing that an assurance is not possible to verify. The verification standards SIAC imposes indicate that most practical obstacles appellants might highlight with respect of verification will not be considered by SIAC to be prohibitive of verification taking place.

2.3.2. Procedural advantages

i. Closed evidence

Closed evidence in SIAC affords the UK Government a substantial advantage in relation to ECHR compliance. Material regarding the Secretary of State's case that the appellant is a national security threat is often heard in closed proceedings. But critically for our purposes, SIAC takes the position that evidence related to safety on return may also be heard in closed.[109] This is despite such evidence being heard in open proceedings in non-national security

[109] *Y and Othman v SSHD* [2006] SC/36/2005 SC/15/2005.

related deportation appeals heard in the Immigration Appeals Tribunal. This is also contrary to assurances given to Parliament by the Government which suggested closed material would not be used in safety on return assessments.[110] SIAC has justified its position that closed material can be used in this context principally on the grounds that information relating to international relations is capable of being covered by the Commission's broad duty under Rule 4 of the 2003 Rules to prevent information being disclosed which may be contrary to the 'public interest'.[111]

SIAC has one doctrinal condition that mitigates this position. In cases involving diplomatic assurances, SIAC has held that assurances provided by authorities of the country of return must be provided in open proceedings. SIAC has explicitly stated that it 'could not put weight on assurances which the giver was not prepared to make public'.[112] This position was of great assistance to an appellant referred to as 'Naseer' in a SIAC judgment scrutinising the Secretary of State's decision to deport (or in some cases exclude) five Pakistani nationals.[113] In allowing Naseer's appeal against the Secretary of State's decision to deport him, SIAC noted that evidence presented in closed proceedings might suggest that some form of assurance had been provided by

[110] *RB,* n 68, [80].

[111] Ibid.

[112] *Y & Othman v SSHD* [2006] SC/36/2005 & SC/15/2005 [58] approved by Lord Philips in *RB*, n 68, [102] and reiterated in *Naseer*, n 72, [36]

[113] *Naseer*, n 72.

the Pakistani Government that Naseer's rights would be respected. However, SIAC was clear that it could not interpret that evidence as constituting an assurance as it was presented in closed.[114] With assurances being published in open, the appellant is at least afforded the opportunity to scrutinise the terms in which the assurance has been provided to the UK Government.

While SIAC's position ensures that the appellants are able to scrutinise the terms of the assurance, this does not prevent the appellant from suffering significant disadvantages when the rest of the material related to safety on return – such details regarding the negotiations leading to that assurance – may be presented in closed. In open proceedings, the exclusion of the appellant from closed proceedings precludes them from responding to or challenging all of the evidence presented to the Commission. This disadvantage is exacerbated by the fact that the *AF (No 3)* principle does not apply to SIAC immigration proceedings, as the courts have found that article 6 (1) ECHR protections do not apply in the adjudication of immigration matters.[115] This means that the appellant is not entitled to a minimum level of disclosure from the UK Government which would enable the appellant to attain a 'gist' of the Government's case.

[114] Ibid, [37].

[115] This was confirmed by the Court of Appeal in *W (Algeria) v SSHD* [2010] EWCA Civ. 898; [2010] 7 WLUK 897.

CMPs then create disadvantages through insulating the Government's factual case from effective challenge during the closed proceedings themselves.[116] Such disadvantages are exacerbated within the closed proceedings themselves due to Special Advocates representing the appellant experiencing significant difficulties in challenging the Government's case. In the first instance, Special Advocates are hampered by their inability to freely communicate with the appellants whom they represent in closed proceedings.[117] They are only able to communicate with appellants before having seen the closed material,[118] or in the case that SIAC authorises a communication to take place in which case the Secretary of State is also notified as to this communication.[119]

[116] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64 *Current Legal Problems* 215, 253, 217 – 219; John Ip, 'The Rise and Spread of the Special Advocate'(2008) *PL* 717, 732 - 736 Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial (2010) 73 *MLR* 836, Martin Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 *CJQ* 314, Martin Chamberlain, 'Update on Procedural Fairness in Closed Proceedings' (2009) 28 *CJQ* 448; Martin Chamberlain, 'Special Advocates and *Amici Curiae* in National Security Proceedings in the United Kingdom' (2018) 68 *University of Toronto Law Journal* 496; Tom Hickman and Adam Tomkins, 'National Security Law and the Creep of Secrecy: A Transatlantic Tale', David Cole and Stephen Vladeck, 'Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence', and Ryan Goss, 'To the Serious Detriment of the Public: Secret Evidence and Closed Material Procedures' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), Reasoning Rights: Comparative Judicial Engagement (Hart, 2014); Lewis Graham, 'Statutory Secret Trials: The Judicial Approach to Closed Material Procedures under the Justice and Security Act 2013' (2019) 38 *CLJ* 189; David Jenkins, 'The Handling and Disclosure of Sensitive Intelligence: Closed Material Procedures and Constitutional Change in the 'Five Eyes' Nations' in Clive Walker and Genevieve Lennon (eds), *Routledge Handbook of Law and Terrorism* (Routledge 2015); John Jackson, *Special Advocates in the Adversarial System* (Routledge 2019).

[117] See also Simon Crowther, 'The SIAC, Deportation and European Law' (2010) 6 *Cambridge Student Law Review* 1, 277 – 237, 233.

[118] SIAC Rules 2003, rule 36 (2).

[119] Ibid, rule 36 (4).

In evidence given to the JCHR in 2007, four Special Advocates stated that SIAC's power to give permission for questions is 'rarely used in practice'.[120] This is 'partly because such permission was unlikely to be forthcoming in practice if the purpose of the meeting was to discuss anything to do with the closed case'.[121] It is also partly because the SIAC Rules require any application for such permission to be served on the Secretary of State, which is not considered 'tactically desirable'.[122] The impact of such limits to communication 'precludes communication even on matters of pure legal strategy'.[123]

It is true that Martin Chamberlain QC has argued that when it comes to determining risk on return, the limitations imposed on communications mean that Special Advocates may be 'only marginally less well equipped than the excluded party to challenge the government's case'.[124] This is due to the fact that the majority of the relevant factual matters relate to the home state, rather than the appellant. However, in approaching any factual matter related to the appellant that may not have been anticipated by the Special Advocate prior to going into closed proceedings, the Special Advocate has to engage with it on the basis of guesswork.

[120] JCHR, 19th Report, 2006-2007, HL 157/HC 790, para 201.

[121] Ibid.

[122] Ibid.

[123] Ibid.

[124] Martin Chamberlain, 'Special Advocates and Amici Curiae in National Security Proceedings in the United Kingdom' (2018) 68 *UTLJ* 3, 495 – 510, 507.

A second difficulty experienced by Special Advocates is that they are effectively unable to obtain security-cleared witnesses to comment on the closed material presented by the Government.[125] Special Advocates have stated that they have 'no access to any such experts' or access to 'independent interpreters to provide translations of material of which the original source is in a foreign language'.[126] In particular, there is difficulty in finding experts with the necessary access to intelligence materials and experience of diplomatic relations between the UK and other states, and who are sufficiently independent from the Government to provide evidence challenging its case.

In 2007, there was an amendment to the SIAC (Procedure) Rules 2003 to enable Special Advocates to adduce evidence,[127] however Special Advocate Martin Chamberlain argued this 'has had no effect'.[128] This is partly due to the required vetting procedures experts must undertake to give evidence in a closed hearing, and the persisting problem of finding individuals with the necessary experience and independence.[129] This has left Special Advocates principally having to 'rely on experts and interpreters provided by the Secretary of State'

[125] Deportation with Assurances, n 3, para 2.42.

[126] Martin Chamberlain, 'Update on Procedural Fairness in Closed Proceedings' (2009) 28(3) *CJQ* 314 - 326, 318 (Martin Chamberlain Update).

[127] SIAC Rules 2003, rule 44 (5A)

[128] Martin Chamberlain Update, n 126, 319.

[129] Ibid.

a situation which, according to the Special Advocates, 'gives rise to a potentially serious inequality of arms in closed proceedings'.[130]

This limitation also hampers Special Advocates in challenging the Government's arguments regarding the need for secrecy surrounding evidence it presents in the first place. As Chamberlain has argued, without access to independent expert evidence, Special Advocates 'have no means of gainsaying the Government's assessment that disclosure could cause harm to the public interest'.[131] Chamberlain stated that 'unless the Special Advocate can point to an open source for the information in question' Government assessments about what can and what cannot be disclosed are 'effectively unchallengeable'.[132]

ii. Exculpatory Evidence

A further procedural advantage enjoyed by the Government relates to the Government's duty to provide exculpatory evidence. In the first instance, it is clear that the procedural rules governing exculpatory evidence provide the Secretary of State with a certain degree of leeway for avoiding disclosure of

[130] Ibid, 318.

[131] Ibid, 320.

[132] Ibid, 453.

such evidence. The rules specify that the Secretary of State must disclose the exculpatory material of which they 'are aware'.[133]

On a sceptical reading of this rule, the inclusion of this qualification incentivises the Secretary of State to avoid examining any material not supportive of their decision in too much detail, so as to not be 'aware' of such material. It is true that the rules clarify that the Secretary of State must make a 'reasonable search' for exculpatory material.[134] However, the rules also note a number of factors which are 'relevant' in 'deciding the reasonableness of a search'.[135] These include: the 'number of documents involved', the 'nature and complexity of the proceedings' and the 'significance of any document which is likely to be located during the search'.[136] Such factors refer to relatively subjective criteria in relation to which it is difficult to establish that a particular view on them is conclusively wrong. Moreover, the rules are not clear regarding what might render a factor relevant. For example, it is not clear whether a case being 'complex' imposes a greater or lesser duty on the Secretary of State's search. In this way, the rules establish a broad scope for the Secretary of State to justify not having presented a particular piece of exculpatory

[133] SIAC Rules 2003, rule 10 (1)

[134] Ibid, rule 10A (2)

[135] Ibid.

[136] Ibid.

material in the case that they are exposed as having withheld any exculpatory evidence.

An additional issue with the system was articulated by former Special Advocate Ian MacDonald QC[137] in evidence presented to Parliament in 2005.[138] MacDonald QC stated that one of the problems with exculpatory material is that 'you may not know that it is exculpatory'.[139] This is linked to the fact of not being able to communicate with the appellant after having examined closed material, which prevents the Special Advocate being able to corroborate with the appellant whether a piece of information may be exculpatory. MacDonald QC described this as follows: 'you are a two-person band without any available resources and it is very difficult even to recognise what might be very, very important exculpatory material because you never get the chance to marry the two bits of information up'.[140]

[137] Who resigned from SIAC in 2004 in protest at indefinite detention under the Anti-Terrorism, Crime and Security Act 2001 and SIAC's role in presiding over this system. See Garden Court Chambers, 'Ian MacDonald QC resigns from SIAC' (1 November 2004) < https://www.gardencourtchambers.co.uk/news/ian-macdonald-qc-resigns-from-siac> accessed 17 October 2021.

[138] House of Commons Constitutional Affairs Committee, 'The operation of the Special Immigration Appeals Commission (SIAC) and the use of the Special Advocates', Seventh Report of Session 2004 -5 HC 323-II (House of Commons Report).

[139] House of Commons Report, n 138, Examination of Witnesses: Neil Garnham QC, Martin Chamberlain, Gareth Peirce and Ian MacDonald QC (22 February 2005) < https://publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/5022202.htm> accessed 17 October 2021, response to Q5.

[140] Ibid.

2.3.3. Epistemic advantages

The standards SIAC has used to scrutinise the reliability of diplomatic assurances generate epistemic advantages enjoyed by the Government. This is linked to the fact that SIAC considered that whether a country engages in systematic human rights violations is not in itself considered determinative of the assurances being unreliable.[141] Notably, this is a departure from *Chahal v UK*, in which the Court refuses to accept the reliability of the assurances provided by the Indian Government against a background in which 'violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem'.[142]

This principle is most clearly reflected in the case of *VV*, concerning the deportation of a Jordanian national. In this case, both SIAC and the Government's 'Special Representative' in the case acknowledged that the country was at the time engaged in widespread torture and ill treatment within the scope of article 3. The Special Representative is the UK Government's expert witness with experience working as a diplomat for the UK Government -The role is not prescribed in statute or procedural rules but is a unique feature

[141] Ibid, [394]

[142] *Chahal*, n 1, para 105. See also Lena Skoglund, 'Diplomatic Assurances Against Torture – An Effective Strategy? A Review of Jurisprudence and Examination of the Arguments' (2008) 77 *Nordic Journal of International Law* 4 319 – 364, 346.

of proceedings in SIAC. In *VV*, SIAC referred to a 2007 account by the UN Special Rapporteur on Torture indicating conditions in Jordan to be 'utterly deplorable'.[143] The Special Representative, Mr Layden stated that the picture painted of prison conditions by Human Rights Watch (HRW) after visiting detainees and their families made the same year was 'frankly horrific'.[144]

The account provided by HRW referred to hundreds of prisoners being subject to beatings by the Jordanian authorities, and some 350 prisoners 'slashing themselves' during the HRW visit 'to draw attention to their plight'.[145] Such conditions were not in themselves sufficient in SIAC's eyes to establish 'real risk' for the purpose of article 3 in light of a diplomatic assurance being in place. For SIAC, the conditions in Jordan meant that the 'Secretary of State's case 'stands or falls' by an assessment of the reliability of the Memorandum of Understanding provided by the Jordanian Government on 20 August 2005.[146]

This position is of significance due to the impact it has on the target of legal inquiry in proceedings involving diplomatic assurances. As diplomatic assurances are capable of mitigating real risk even where there is firm evidence

[143] *VV v SSHD* [2007] SC/59/2006, [14].

[144] Ibid, [16].

[145] Ibid, [15].

[146] Ibid, [18].

of systemic treatment of individuals contrary to article 3, there is little point in parties to the case exerting energy in drawing SIAC's attention to the general conditions in the country of return. The issue at hand is ultimately whether the assurances may be relied upon or not, and this depends on political and diplomatic relationships and facts. As part of applying the four-stage test referred to above to determine the issue of reliability, SIAC made a background general assessment as to the reliability of the assurances based on the diplomatic relationship between the UK and the country of return. The importance of assessing the diplomatic relationship between the UK and the country of return was emphasised in the case of *Othman* where SIAC described this relationship as 'the key' to whether or not the assurances would be effective.[147]

Indeed, the closeness of the relationship between the UK and the country of return played a prominent role in the dismissal of appeals by SIAC in relation to individuals being deported to Algeria, Ethiopia and Jordan. In *BB*, concerning an Algerian diplomatic assurance, SIAC emphasised that it is 'barely conceivable, let alone likely' that the Algerian Government would put its interest 'at risk by reneging on solemn assurances'.[148] This assessment was

[147] *Othman v SSHD* (2007) SC/15/2005, [495].

[148] *BB*, n 82, [18].

also cited in later SIAC decisions dismissing appeals concerning Algeria such as in *Sihali*.[149]

In *Othman*, one of SIAC's principal findings for the purpose of finding Jordan's assurances to be reliable was that the 'depth and range of interests which form the long standing and friendly bilateral relationship' between Jordan and the UK meant that 'the two Governments each have an interest in preventing a breach, to avoid reducing those interests or making co-operation more difficult'.[150] It is also true that in *VV* (also concerning Jordan) SIAC referred to diplomatic sanctions potentially being imposed in the case of terms of the MOU between the UK and Jordan being broken.[151] However, SIAC also emphasised that the Governments in neither country anticipated that such sanctions would be needed.[152]

Similarly in *XX* concerning Ethiopia, in dismissing XX's appeal, SIAC stressed that it would be 'perceived by the Government of Ethiopia to be in its interests to ensure that the assurances' were fulfilled and 'it would have nothing to gain and much to lose if it did not do so'.[153] SIAC also emphasised that this would

[149] *Sihali* [2007] SC/38/2005, [40].

[150] *Othman v SSHD* (2007) SC/15/2005, [503].

[151] *VV v SSHD* [2007] SC/59/2006, [30].

[152] Ibid.

[153] *XX v SSHD* [2010] SC/61/2007, [22].

be the case with regards to 'any government dominated by the successors of those now in office'. It stated that was 'primarily for that reason, rather than because of the arrangements which have been put in place for monitoring compliance' that it was satisfied there was no real risk of XX being subject to treatment contrary to article 3.[154] Such examples serve to demonstrate the way diplomatic assurances shift the focus away from conditions in the country of return and towards diplomatic relations.

The shift in the target of legal inquiry towards diplomatic relations also has the effect of privileging the role of the Special Representative in SIAC proceedings, due to their background in diplomacy and foreign relations. Two of the most prominent Special Representatives, Mr Oakden and Mr Layden, worked for the UK Foreign and Commonwealth Office, and were involved in the negotiation of the assurances which feature in the cases they acted in. Having first-hand experience of diplomacy and foreign relations related to the specific country of return in question provides Special Representatives with an inherent epistemic advantage compared to independent experts whose evidence is submitted by the appellant.

The epistemic advantage of Special Representative's is particularly valuable for the UK Government since international relations is usually a subject that

[154] Ibid.

judges shy away from due to a concern that adjudicating such matter takes them beyond their constitutional role.[155] SIAC has often emphasised the important role it considers Special Representatives to play in SIAC proceedings. In *DD & AS*, SIAC described the Special Representative as an 'impressive witness – forthright, completely honest, realistic, with a commitment to truth and fairness, and to the upholding of the UK's international human rights obligations'. [156] This is despite the fact that Mr Layden had claimed in proceedings that the prospect of Libya breaching the conditions of the MOU he had negotiated was 'well nigh unthinkable'. While SIAC acknowledged that this claim is 'very strong indeed', SIAC maintained that this view commanded 'considerable respect'.[157]

Often the views of the Special Representative will play a determinative role in SIAC reasoning. In *Othman*, SIAC considered the prospect that both the UK and Jordan would have an incentive not to explore the existence of any breaches were allegations to be made.[158] SIAC reasoned that this would only be true if the UK Government has no real interest as such in human rights as an end in themselves.[159] The privileged position of the Special Representative is also

[155] *R (Lord Carlile of Berriew QC and others) v SSHD* [2014] UKSC 60, [2015] AC 945.

[156] Ibid.

[157] Ibid. These statements have aged particularly poorly in light the political developments in Libya following this case, and provide strong evidence that Mr Layden was not 'realistic' in his assessment of Libya.

[158] *Othman v SSHD* (2007) SC/15/2005, [504].

[159] Ibid.

enhanced by often having been present in negotiations between the UK government and the country of return for the purpose of obtaining the diplomatic assurances. In *BB*, SIAC 'agreed with Mr Oakden', citing that he had been present in negotiations with the Algerian Government, that British Embassy officials were able to maintain contact with anyone returned who was not in detention.[160] As mentioned, this turned out to be an inaccurate assessment as the Embassy was not able to access such information.

It is true that SIAC is evidently aware of the lack of independence of the Special Representative. This is evidenced in *Y*, concerning the deportation of an Algerian national. SIAC stressed that Mr Oakden was 'certainly not an independent person'.[161] However, SIAC also emphasised that 'such a person would have lacked the knowledge, at times first hand, of what he gave evidence about'.[162] It is also true that SIAC's position is not to 'defer' to the evidence provided by the Special Representative, but to merely 'give weight' to their expertise.[163] Indeed, SIAC does not approach the evidence presented by the Special Representative very uncritically. In *W and others* SIAC expressed scepticism regarding the 'very firm view' of Special Representative Dame Anne Pringle that families of deportees who were informed by their relative that they

[160] *BB*, n 82, [21].

[161] *Y v SSHD* [2006] SC/36/2005, [319].

[162] Ibid.

[163] *DD and AS*, n 54, [321].

had been subject to mistreatment would 'always complain, such would be their concern for their relative'.[164] Presumably due to the fact that this opinion overlooks the significant fear families might experience in this context which could preclude them from complaining, SIAC described this view as 'definitely too sanguine'.[165]

While SIAC has been prepared on occasion to offer criticism of the opinion expressed by the Special Representative, it is not clear how this can effectively mitigate the advantage the executive gains in this context. As was touched upon in the discussion above of Special Advocates, finding an individual with sufficient experience of political dynamics between senior officials but who is also independent and willing to present evidence against the UK Government - his or her employer - is difficult. Also, most officials who have expertise related to the country of return may often travel to or work in that country and so are likely to be unwilling to give a negative assessment of its government. The reality is that most often the non-Governmental party will have to rely on independent evidence provided by academics, whose experience will be less relevant for SIAC's analysis.

[164] Ibid.

[165] Ibid.

The contrast between the position of the Special Representative as against an independent expert is highlighted in *W and others* with respect to Dame Ann Pringle and an academic expert in Algerian political history, Dr Spencer, representing the appellants. SIAC emphasised that Dame Anne Pringle was a 'very senior former British Diplomat' whom 'as would be expected, has an immense capacity for diplomatic and political judgement and has had the advantage of access to sources of information, in terms of documents and people'.[166] SIAC went on to highlight that such advantages were 'not available to an academic such as Dr Spencer, however distinguished'.[167] Such comments reflect the manner in which the appellant's expert's view on the official relationship between the UK and the country of return will be usually be considerably less valuable to SIAC than that provided by someone with diplomatic experience.[168] Where Dr Spencer's evidence on Algeria diverged from that provided by the Government's Representative, SIAC did not accept that evidence.[169]

While SIAC has described Special Representatives in such positive terms, it has praised certain independent experts and taken up their position on occasion. In *Naseer,* SIAC disagreed with Special Representative on the

[166] *W and others*, n 64.

[167] Ibid.

[168] Ibid.

[169] For example, ibid, [19], [23].

reliability of assurances provided by the Pakistani Government regarding the treatment of Abid Naseer and Ahmad Faraz Khan.[170] In this case SIAC described the appellant's expert, Mr Ali Dayan Hasan, to be an 'impressive and knowledgeable witness'.[171] SIAC highlighted that his sources were not identical to the British Government, but they were 'extensive', and 'include first hand reports from participants, on both sides, in interrogations of terrorist suspects by the ISI, frequently given on condition of anonymity'.[172] SIAC ended up agreeing with the view of Mr Hasan on the assurances provided by the Pakistani Government.

At first sight, SIAC's engagement with Mr Hasan would seem strong evidence of SIAC's open-mindedness in approaching evidence provided by the appellant. However, a close reading of this case reveals that SIAC's view was not so much persuaded by the appellant's expert, but factors related to Mr Layden's evidence. SIAC noted that in closed proceedings Mr Layden had accepted 'two propositions', which were that 1. An individual suspected of terrorism by the Pakistani security services, referred to as 'ISI', would be at a 'high risk of torture or inhuman or degrading treatment but for factors particular to this case'; and 2. ISI is in the category of intelligence and security agencies who do

[170] *Naseer*, n 72.

[171] Ibid, [32].

[172] Ibid.

not share 'our standards'.[173] After having noted this acceptance, SIAC only engaged with Mr Hassan's evidence with the proviso that 'if justification' for Mr Layden answers was 'required', implying that Mr Layden accepting these answers was sufficient in itself to undermine the Government's case with regards to real risk.[174] Moreover, SIAC noted that nothing in the 'large volume of published material' which had been supplied to the Commission contradicted the picture painted by Mr Hasan but provided 'substantial support for it'.[175] This suggests that the extent to which Mr Hasan alone influenced SIAC's decision-making was limited. Therefore, the example does not stand to challenge the view that Special Representatives usually hold much more sway over the Commission than independent experts the appellant presents in proceedings.

2.3.4 Impact of executive advantages on the standard of review

The combination of these advantages has the effect that the standard of review imposed on the Government's case in SIAC is reduced to rationality review rather than a substantive review in which SIAC conducts an independent assessment of the factual case pertaining to real risk is carried out, which SIAC

[173] Ibid, [31].

[174] Ibid, [32].

[175] Ibid, [33].

was designed to carry out. With the Government having almost sole access to the information pertaining to the main factual matters at issue in cases involving diplomatic assurances, the challenges that may be directed towards the Governments are largely confined to highlighting irrationalities or logical errors in its case.

The manner in which these factors combine reduce the standard of review to a rationality review can be set out in clear terms in *VV*.[176] The UK Government sought to deport VV to Jordan on grounds that VV was a threat to national security. The Government sought to deport VV despite the appellant's representatives submitting evidence showing conditions in Jordan to be 'utterly deplorable' for detainees,[177] SIAC ruled that the Secretary of State's case stood (or fell) by an assessment of the reliability of the MOU provided by the Jordanian Government.[178] This meant that evidence presented in the case was relevant only insofar as it related to the assurance, and the UK and Jordan's diplomatic relationship. With the assurance having been negotiated by the UK Government, and only those having worked for the UK Government having first-hand experience of the diplomatic relationship between the UK and Jordan, this position isolated the Secretary of State's evidence from challenge

[176] *VV v SSHD* [2007] SC/59/2006.

[177] Ibid, [14].

[178] Ibid, [18].

by the appellant and severely limited the evidence available for submission by the appellant.

The UK Government's epistemic advantages in the case are clear in SIAC's reasoning in its application of the last two stages of the *BB* test. The evidence for whether there was a sound objective basis was primarily contained in three substantial witness statements provided by the UK Government's Special Representative, Mr Layden.[179] SIAC described Mr Layden as a 'forthright witness with a deep knowledge and experience of the Middle East and North Africa', whose answers were given 'not only in the light of his own experience, but also that of the institution, the Foreign and Commonwealth office, in which he worked for 38 years'.[180] Notably, there was no question as to whether the amount of time Mr Layden had worked for the Government could have affected his view in anything other than a positive way. SIAC accepted Mr Layden's evidence 'without reservation'[181] and it formed the 'bedrock' of SIAC's position that there was an objective basis for believing the assurance would be fulfilled. This was on the basis that there were 'close and friendly relations which have existed in the governments of both countries, from reigning monarchs downwards, for many decades; and in the general coincidence of interests of the

[179] Ibid, [22].

[180] Ibid.

[181] Ibid.

two countries in those aspects of international affairs which affect them both'.[182]

In SIAC's reasoning on this matter, references to the appellant's evidence were notably absent. Whilst the appellant's factual evidence was mentioned in SIAC's reasoning as a whole, it referred to the general circumstances in Jordan for detainees rather than the relationship between the Jordan and the UK. Indeed, the only factual evidence cited by SIAC in the judgment is a witness statement by a witness who had carried out extensive research of torture in Jordanian prisons.[183] That this is the only factual evidence cited indicates that the appellant simply had no access to alternative evidence on the diplomatic relationship between the UK and Jordan.

The appellant's lack of factual evidence considered relevant by SIAC is further evident in the application of the second stage of the *BB* test, regarding whether the assurance was given in good faith. SIAC merely noted that the representative of the appellant accepted that the promise of the Jordanian Government was given in good faith.[184] SIAC did not make any reference to alternative evidence having been presented by the appellant on this matter.

[182] Ibid.

[183] For example, ibid, [15].

[184] Ibid, [21].

The appellant's lack of relevant factual material is also evident in SIAC's consideration of whether the assurance was capable of being verified. Such verification was due to take place by the then recently established 'Adaleh Centre'.[185] The appellants, in highlighting a logical error in the Government's case, contended that the Centre was a body with limited resources and experience.[186] However, in response to this issue SIAC emphasised that the Government was in direct contact with the Centre, and deemed the Centre to be capable of verifying the assurances. In this way, it is clear that Government's assessment of the centre is seen by SIAC to be authoritative on the nature and reliability of the Centre as a verification mechanism.[187] Examined so far, it is clear that in *VV*, legal doctrine on diplomatic assurances shifted the focus of inquiry in the case so there was little realistic prospect of the appellant having access to evidence which could constitute a serious challenge to the Government's case. This confines the appellant and SIAC to examining any logical contradiction or omission in the Government's evidence.

The limitations imposed on the ability of the appellants to challenge the Government's factual case was significantly increased when the procedural advantages enjoyed by the Secretary of State are factored in. It is clear from

[185] Ibid, [28].

[186] Ibid.

[187] Ibid.

the judgment that closed evidence played a pivotal role in numerous stages of SIAC's reasoning. SIAC referred to closed evidence having reinforced its conclusions that the relationship between Jordan and the UK was sufficiently strong to ensure that there was an objective basis to consider that the assurance was capable of being fulfilled.[188] SIAC also stated that it was on the basis of closed evidence that, in determining the assurance's reliability, it felt able to discount the fact that the Jordanian Ministry of the Interior had openly wished to have VV returned 'otherwise than under the terms of the Memorandum'.[189] No details were provided as to the kind of evidence this was. While SIAC was not legally required to provide such details, the practical result of their absence was that the appellant was excluded from further factual analysis of relevance for his case, and even prevented from highlighting logical errors with respect of a significant part of the evidence. As a result of the Government's case being insulated from factual challenge in this way, the only standard of review that was available to SIAC to apply in this case was a rationality review, focused on whether the Government's case was reasonable rather than substantively made out on the facts.

SIAC has effectively engaged in a rationality review on the question of real risk even in cases where appellants have won appeals. Appellants have only won appeals where the evidence so strongly favours the existence of real risk such

[188] Ibid, [22].

[189] Ibid, [20].

that the Government's position appears obviously illogical. In the final round of the Algerian cases, in which SIAC allowed the appeals, there was evidence of British Ambassadors being explicit about there being no prospect of monitoring anyone deported to Algeria within the terms of the diplomatic assurances.[190] While it was only following repeated litigation in SIAC that such evidence came to light, the email exchange between British diplomats in the case suggests that the failure of such monitoring arrangements could have been predicted at the outset. An email from the British Ambassador in Algeria to his successor sent on 13 November 2014 stated that '[i]n an Algeria context, there was never a realistic prospect of being able to monitor the whereabouts and well-being of the DWA deportees. That runs into sensitivities about sovereignty'.[191]

Notably in the original Algerian cases, it had been the perceived willingness of the Algerian Government to work with the British Government, including in the form of the British Embassy, which had been a significant factor in SIAC's reasoning when dismissing appeals. SIAC had concluded that it was 'barely conceivable, let alone likely, that the Algerian Government would put [the deportees] at risk by reneging on solemn assurances'.[192] Such a positive assessment suggests SIAC must not have applied searching scrutiny of the

[190] *WW and others v SSHD* [2016] SC/39/2005, SC/34/2005, SC/54/2005, SC/32/2005, SC/36/2005, SC/37/2005.

[191] Ibid, [110] - [113].

[192] *BB*, n 82, [18].

Government's claims regarding the reliability of the assurances provided by the Algerian Government.

Unfortunately, by the time SIAC had concluded that the diplomatic assurances provided by the Algerian Government were not sufficiently reliable to mitigate against a real risk, it had already dismissed the appeals of a number of Algerians who had not been involved in the later appeal stage. These were T',[193] 'T6',[194] and 'Sihali'[195]– and nine other men had been deported to Algeria. Anderson's report stated that the men deported to Algeria had been 'provided with a contact number at the Embassy'; however, 'contact had been very limited' and the Embassy state 'it did not know where any of the men were'.[196] A previous IRTL, Lord Anderson, noted in his report on diplomatic assurances that 'in the circumstances, no effort or resource was or could be devoted by the Embassy to checking up on them'.[197]

Such circumstances expose the superficiality of SIAC's review in the previous Algerian cases. Despite evidence of mixed views existing as to the reliability of Algerian assurances at the time the assurances were first given, SIAC had

[193] *T* SC/31/2005.

[194] *T6* SC/95/2010.

[195] *Sihali* SC/38/2005.

[196] Deportation with Assurances, n 3, para 2.37.

[197] Ibid.

repeatedly upheld the assurances as reliable and even formed the view that it was 'barely conceivable' that the Algerian authorities would not adhere to the assurances. These circumstances also expose how powerful the appellant's evidence has to be against a diplomatic assurance for it to be taken seriously. SIAC considered that the assurances were not reliable only once the appellants' representative cited statements by the UK Government's officials that assurances were not reliable, alongside presenting concrete proof that the assurances were not followed in previous deportations to Algeria. In effect, this is an irrationality challenge – as the evidence contradicts the Government's official position.

The comparatively high bar that the appellant's case has to meet for SIAC to consider that there may be substantial ground for real risk is also consistent with SIAC's findings in Libyan cases. This is contrary to claims by Special Representative Kate Jones that SIAC's findings in these cases are evidence of SIAC's ability to make an independent assessment of real risk faced by potential deportees.[198] The extreme circumstances surrounding the Libyan assurances, as in the Algerian cases, meant that SIAC was left with little choice but to find in favour of the appellants. SIAC allowed the appeal of two Libyan nationals in *DD & AS* partly due to the fact that the body which would be responsible for verifying that no torture had been carried out was managed and

[198] Kate Jones, 'Deportations with Assurance: Addressing Key Criticisms' (2008) 57 *International and Comparative Law Quarterly* 183, 185.

run by Colonel Gaddafi's son.[199] Such a close familial relationship is evidently incompatible with the body serving as a reliable source of independent scrutiny. Moreover, both SIAC and the Government's representative agreed with the appellant's case that the assurances had been provided by an individual who had a global reputation for unpredictable behaviour and flouting Western standards.[200] In this way, the reasons for SIAC's decision were based on an internally incoherent strand of the Government's case (i.e. that there could be independent monitoring carried out by Gaddafi's son) and observations regarding Gaddafi's character which were more a matter of general common knowledge than evidence specifically gathered by the appellant. Thus, SIAC's approach in this respect is also compatible with the Commission approaching the case via rationality review. Moreover, its allowing of an appeal in this context provides an indication of the extent to which a situation need be extreme in order for the Government's position to be rejected.

i. Cases where diplomatic assurances are not determinative

The analysis above shows that in cases in which diplomatic assurances are at the heart of SIAC's assessment of 'real risk', the Commission's scrutiny is, in effect, limited to a rationality review, although in form it is engaging in deciding for itself whether real risk of article 3 treatment is present. However,

[199] *DD and AS*, n 54.

[200] Ibid.

XX demonstrates that even where a diplomatic assurance is not central to the court's reasoning, the executive advantages set out in this chapter can still combine in a way that results in SIAC engaging in a superficial review of risk rather than deciding the case of its merits. *XX*, decided in 2010, concerned an Ethiopian National whom the UK Government sought to deport on the grounds that 'XX' represented a threat to national security.[201] The national security case against XX was not challenged, however his deportation to Ethiopia was challenged on the basis that there was a real risk that XX would on return be subject to treatment contrary to article 3 ECHR. An important difference between *XX* and the previous cases discussed is that SIAC made an initial assessment that XX was not at a risk of treatment contrary to article 3 even before assessing the diplomatic assurance.

SIAC came to its initial conclusion that XX was not at real risk of treatment contrary to article 3, despite the appellant presenting a great deal of evidence of the prevalence of torture of detainees by Ethiopian state authorities. The appellant's representatives submitted the 2009 US Department of State Human Rights Report which cited 'unlawful killings, torture, beating, abuse and mistreatment' of detainees by security forces in Ethiopia.[202] This statement was consistent with evidence presented by the Secretary of State's own witness, Mr Debebe, who described torture of detainees as 'common

[201] *XX v SSHD* [2010] SC/61/2007.

[202] Ibid, [14].

practice' in Ethiopia'.[203] It was also consistent with legislative reform in Ethiopia implemented around the time of the hearing. Only the previous year, the Ethiopian Government had passed the Charities and Societies Proclamation Act of 2009, which effectively prohibited 'internal activity by any human rights organisations which receives more than ten percent of its income from outside Ethiopia.[204] Given the role that international human rights organisations had played in identifying and speaking out against state torture in Ethiopia, these restrictions could well have been linked to a willingness on the part of the Government aim to evade accountability for its torture practices.

The appellants also offered evidence from a witness expert in Ethiopian politics, which SIAC stated it accepted 'unreservedly'.[205] The evidence asserted that the Ethiopian Government was likely to react to its opponents in an 'authoritarian and forceful' manner, and that its opponents were represented by a number of armed groups including from Somalia.[206] The appellant's representatives argued that XX would likely be seen as an opponent to the Ethiopian Government. First, this was on the basis that the British Embassy had formally notified the Ethiopian Ministry of Foreign Affairs that it intended to deport XX for reasons including that he had been assessed to have

[203] Ibid.

[204] Ibid.

[205] Ibid, [17].

[206] Ibid, [17].

participated in terrorist training in Somalia.[207] Second, the training camp that XX had attended was run by the first leader of a separate terrorist group that had claimed responsibility for double suicide bomb attacks in Ethiopia earlier that year.[208] In light of such links, the appellant's representatives argued, XX was likely to be seen as a threat to Ethiopia, and would therefore be treated in an 'authoritarian and forceful' manner.

Yet, SIAC held that none of the evidence presented was sufficient to establish for SIAC that there was a 'real risk' of XX being subject to treatment contrary to article 3 on being deported. This was even with the assurance provided by the Ethiopian Government put to one side. Two reasons were cited by SIAC in drawing this conclusion. First, SIAC stated that the Ethiopian Government had already been aware of the training in Somalia when it interviewed XX in Ethiopia in 2006.[209] This is due to comments made in XX's witness statement.[210] While SIAC was not explicit in saying this, the implication of this was that if XX had not been mistreated in 2006 on the basis of this information, SIAC questioned whether he would be likely to suffer mistreatment in 2010. One reason to suggest that he would suffer mistreatment is that the training in Somalia would have taken on extra significance due to the newly established

[207] Ibid, [19].

[208] Ibid.

[209] Ibid.

[210] Ibid.

link between XX and another, active, terrorist organisation operating in Ethiopia.

In response to this issue, SIAC gave its second reason for finding against real risk. It stated that if XX had been mistreated on the basis of this link, this would be based on a 'chain of reasoning so stretched as to be fanciful'.[211] The chain of reasoning it cited as being 'fanciful' was 'because he was trained at a camp which was run by a man who later became the declared leader of a group which later fought against Ethiopian troops and which might now support another group which threatens Ethiopian interests, so he must be regarded as a current threat.[212] SIAC then stated that this reasoning might have provided an '*excuse*' (italics not added) for detaining and prosecuting him, but it could not provide a 'sensible *reason*' (italics not added) for the Ethiopian authorities to do so.[213]

This second line of reasoning is key to understanding the weakness of the scrutiny SIAC was willing to apply to the Government's case, and the insurmountable nature of the task XX faced in establishing a real risk of article 3 treatment with factual evidence. It was not sufficient for the appellant to put

[211] Ibid.

[212] Ibid.

[213] Ibid.

together a factual case setting out the 'commonplace' torture by the Ethiopian authorities particularly in relation to its opponents. This was despite the fact that XX was directly linked to a leader of a terrorist group which had that year claimed responsibility for double suicide attacks in Ethiopia. Rather, SIAC required that the factual evidence ought to have established a more concrete link between XX and the Ethiopian Government's opponents than that they had trained in the same terrorist camp together.

SIAC also required that the facts also established that there was a 'sensible reason' for the Ethiopian Government to detain and prosecute XX. This was despite the fact that, presumably, in none of the evidence of the prevalence of torture and mistreatment of detainees by the Ethiopian authorities was it ever mentioned that such treatment was carried out on the basis of a 'sensible reason'. That the appellant's factual evidence was meant to have met such strict standards to establish a 'real risk' (rather than guarantee) of mistreatment serves to convey the practical impossibility of XX being able to successfully challenge the UK Government's case using factual evidence.

While SIAC made the assessment that there was no real risk of article 3 treatment, notably it did not refer to this assessment in the summary of its reasoning in the conclusion and still proceeded to apply the *BB* test to the

diplomatic assurance in the case.[214] In applying this test, the same executive advantages as described in *VV* are evident SIAC's reasoning. Moreover, the doctrinal advantages linked to diplomatic assurances were also present, as the subject matter of SIAC's reasoning was the diplomatic relations between the UK and Ethiopia. As mentioned above, the scrutiny applied with regards to whether the assurances provided with respect of XX were capable of being verified was superficial. SIAC acknowledged that the relevant monitoring body was under the strong control by the Ethiopian Government via the Ethiopian Parliament which was responsible for funding the monitoring body.[215] SIAC went so far as to explicitly acknowledge that the body was not at the time of reasoning a 'respected and reasonably independent-minded body'.[216]

Moreover, in dismissing XX's appeal SIAC stressed it would be 'perceived by the Government of Ethiopia to be in its interests to ensure that the assurances are fulfilled' and it 'would have nothing to gain and much to lose if it did not do so'.[217] SIAC further emphasised that this would be the case with regards to 'any government dominated by the successors of those now in office'. SIAC stated that it was 'primarily for that reason, rather than because of the arrangements

[214] Ibid, [32].

[215] *XX v SSHD* [2010] SC/61/2007, [23].

[216] Ibid.

[217] Ibid, [22].

which have been put in place for monitoring compliance' that it was satisfied there was no real risk of XX being subject to treatment contrary to article 3.[218]

In reaching this view, SIAC accepted the view of Special Representative, Mr Layden, who had informed SIAC that the course of negotiations with Ethiopia had been 'smooth when compared with similar negotiations with other governments'.[219] Again, the subject matter of the interests of the Ethiopian Government and the course of negotiations were inevitably ones in which the appellant would not have been able to successfully challenge with alternative factual evidence. The evidence presented by the Government official who had been involved in the negotiations for the assurance will in all but the most extreme cases, be seen as the authoritative perspective.

As with *VV*, the procedural advantages in *XX* further diminished the prospect of the appellant being able to challenge the Government's case with factual evidence. The reasoning in the case suggests that closed evidence was determinative at a number of significant junctures of SIAC's reasoning, and no gists were (voluntarily) given to the appellant as to the content of that material. For example, the reasoning makes clear that the 'reasons' underpinning SIAC's refusal to accept the testimony of one of the appellant's principal witnesses,

[218] Ibid.

[219] Ibid, [21].

Salim Awadh Salim - who gave his account of treatment at the hands of the Ethiopian authorities, was only presented in closed.[220] Moreover, the reasoning cited that when Mr Layden, 'considered closed material which he had not previously seen', his view was consistent with SIAC's that XX would not be subject to mistreatment on return to Ethiopia.[221] No details are provided as to what kind of evidence this was. On these matters, it is not clear how the appellant's representatives in open proceedings would have even been able to posit the existence of logical errors in the Government's case, let alone present an alternative factual account. Taking a step back and examining the case as a whole, it is clear that XX was not in a position to provide factual evidence capable of successfully challenging the Government's case in relation to any of the matters considered by SIAC. The inability of the appellant to provide an alternative factual picture in this way means that he was left to challenge the logicality and sufficiency of the Government's argument.

As we have seen, SIAC's assessment of substantial grounds for real risk in deportation cases involving diplomatic assurances, even where they are by no means a central feature of the case, is limited to a form of rationality review rather than a substantive review. Rather than representing a 'forensic approach' to scrutiny assurances, as Jennifer Tooze has described it, SIAC has largely avoided providing an independent assessment of real risk for article 3's

[220] Ibid, [15].

[221] Ibid, [19].

purposes.[222] Notably one factor Tooze relied on to justify her statement that SIAC subjects the Government's case as to real risk to the 'very closest of scrutiny' is that SIAC's open judgments exceed '100 pages in length'.[223] Yet as this analysis has shown, despite the length of SIAC's judgments, executive advantages in article 3 and deportation cases prevent SIAC from independently probing the Government's factual case in significant detail. In this way, rationality review inevitably results in an analysis based on a one-sided factual case, that cannot be relied upon to accurately determine real risk.

2.4. Overall Impact on Article 3 Rights

As has been shown, executive advantages in SIAC reduce the standard of review article 3 cases to rationality review of whether there is a real risk of mistreatment on return. This is despite SIAC's tailored design to enable independent assessment and fact-finding. In employing this standard of review, SIAC is not fully protecting article 3 rights. Rationality review implicitly reframes what is meant to be an objective test as to real risk, to one which asks whether the Secretary of State's case rationally hangs together. As we saw in the first section of this chapter, article 3 establishes a bright line against states engaging, in or enabling, individuals to be subject treatment

[222] Jennifer Tooze, 'Deportation with Assurances: The Approach of the UK Courts' (2010) *PL* 362 – 386, 385.

[223] Ibid.

contrary to article 3. Moreover, in *Chahal,* this principle was held to be article 3 was held to be 'equally absolute' in the extra-territorial context of deportation on national security grounds.[224]

The relevant test for SIAC to apply is whether there are *in fact* substantial grounds believing there is a 'real risk' that they may be subject to treatment contrary to article 3 was first developed in *Soering*.[225] In the case that there are substantial grounds, SIAC must rule against that individual being deported. Article 3 is absolute right that explicitly prohibits concrete actions by states, rather than imposing procedural requirements on the decision-making of Contracting States. On this basis, whether substantial grounds exist is an assessment SIAC must make independent to an assessment made by the UK Government. Yet, rationality review limits SIAC's assessment to determining the merits of a one-sided factual case made by the Secretary of State. Instead of asking whether there are substantial grounds to believe an individual will face a real risk of mistreatment on being deported, SIAC essentially focuses on whether the Secretary of State's case logically hangs together. This inevitably results in a limited assessment that appellants cannot relied on to accurately determine real risk.

[224] Ibid.

[225] Ibid.

What's more, the scrutiny provided of SIAC decisions by the higher UK courts is necessarily limited due to the statutory framework governing SIAC appeals. There is a right of appeal to the Court of Appeal against a final determination of SIAC, 'on any question of law material to that determination'.[226] A further appeal may be brought to the Supreme Court, formerly the Appellate Committee of the HOL, if it considers that the proposed appeal raises an arguable point of law of general public importance. The HOL emphasised that the Court of Appeal is 'expressly, a secondary, reviewing function limited by questions of law' when examining SIAC decisions,[227] and that by restricting appeals to questions of law Parliament has deliberately circumscribed the review of SIAC's decisions that the Court of Appeal is permitted to undertake'.[228] This means that SIAC decisions can only be subject to challenge on appeal on the basis that they 'failed to pay due regard to a particular rule of law, had regard to irrelevant matters, had regard to irrelevant matters, or were otherwise irrational…[or]… failed to meet requirements imposed by law'.[229] The HOL/Supreme Court is limited to reviewing SIAC decisions on these grounds.

[226] SIACA, s 7.

[227] *RB*, n 68, [69] per Lord Phillips.

[228] Ibid, [66] per Lord Phillips.

[229] Ibid, [73] per Lord Phillips.

In *RB (Algeria)*, the Appellate Committee of the HOL considered an appeal from the Court of Appeal on two sets of SIAC decisions, one in relation to the deportation of Abu Qatada, the other in relation to decisions made on the deportation of two Algerians. In addition to affirming that diplomatic assurances were an acceptable means of mitigating a risk of mistreatment, the HOL clarified the role of appeal courts in reviewing SIAC decisions on 'real risk' and article 3.

Their Lordships emphasised that article 3 decisions of real risk were founded on questions of fact, which SIAC was best placed to determine. They also highlighted that review of SIAC decisions by appeal courts on the facts was limited to whether such decisions were irrational, akin to considering whether 'no reasonable tribunal, properly instructed as to the relevant law, could have come to the same conclusion on the evidence'.[230] In finding that SIAC's reasoning was rational, the Lordships noted SIAC's 'carefully balanced finding'[231] based on the evidence, and 'paid careful regard to all relevant matters and applied to them the proper test of whether they amounted to substantial grounds for believing that RB and U would be at real risk of inhuman treatment if returned to Algeria'.[232] In addition to affirming that diplomatic assurances were an acceptable means of mitigating a risk of

[230] Ibid, [236] per Lord Hope.

[231] Ibid, [194] per Lord Hoffmann.

[232] Ibid, [123] per Lord Phillips.

mistreatment, the HOL highlighted that review of SIAC decisions by appeal courts was limited to considering whether 'no reasonable tribunal, properly instructed as to the relevant law, could have come to the same conclusion on the evidence'.[233] In finding that SIAC's reasoning was rational, the Lordships noted SIAC's 'carefully balanced finding'[234] based on the evidence, and 'paid careful regard to all relevant matters and applied to them the proper test of whether they amounted to substantial grounds for believing that RB and U would be at real risk of inhuman treatment if returned to Algeria'.[235] As we know, SIAC's decision on this matter was later discredited.

It is true that UK appeal courts have identified errors in SIAC decisions. This most notably occurred in *BB* in which the Court of Appeal found that SIAC's previous decision in *WW* was irrational and remitted the case back to SIAC to reconsider.[236] In this case, SIAC had 'erred in law' by placing reliance on some sources of verification [of the effectiveness of Algerian assurances as to proper treatment of returnees] when the evidence did not permit it to do so'.[237] SIAC had placed reliance on the ability for the deportee's wellbeing to be monitored via telephone calls between the British Embassy and family members of the

[233] Ibid, [236] per Lord Hope.

[234] Ibid, [194] per Lord Hoffmann.

[235] Ibid, [123] per Lord Phillips.

[236] *BB and others v SSHD* [2015] EWCA Civ 9; [2015] 1 WLUK 501.

[237] Ibid, [26].

deportees. According to the Court of Appeal, SIAC had failed to consider that such telephone calls are likely to be monitored by the Algerian security services, which would likely intimidate the families in a way which might restrict their ability to communicate openly with the British Embassy. This case shows that where SIAC has acted hastily on the evidence or very clearly missed certain important facts, there is scope for the appeal courts to remit matters back to SIAC. However, it is largely in cases whereby SIAC's decision is effectively irrational that the appeals courts have leeway to remit a matter back to SIAC to reconsider its decision and such courts have no scope to make their own findings on the subject of 'real risk'.

The only decision in which Strasbourg has reviewed a UK deportation decision on grounds of national security following *Chahal v UK* is in *Othman v UK*.[238] This case concerned the UK Government's decision to deport Abu Qatada to Jordan.[239] In this case, despite finding in *Chahal* that a diplomatic assurance could not mitigate risk on return, the ECtHR upheld the findings by the UK courts that the diplomatic assurance provided by the Jordanian Government was sufficient to mitigate against the real risk that Abu Qatada may be subject to treatment contrary to article 3. The Court found in favour of the UK Government on the issue of article 3 on the basis of a number of grounds,

[238] Though notably, the ECtHR reviewed an exclusion case in its admissibility decision in *IR & GT v UK* App nos 63339/12 & 14876/12 (ECHR, 28 January 2014).

[239] *Othman*, n 70.

including that the diplomatic assurances had the 'approval and support of senior officials' of the Jordanian Government,[240] and the MOU was superior in its detail and formality to assurances the Court had previously examined.[241]

As mentioned, the Court also laid out a long list of factors that courts should have regard to in assessing the quality of a MOU.[242] Moreover, the Court was explicit that it will examine all evidence it needs to make its own determination on risk,[243] and its examination in this context must necessarily be a 'rigorous one'.[244] However, in *Othman v UK,* the scrutiny it was prepared to provide was similarly light touch review as that of the UK appeal courts. This is partly due to Court's adherence to the principle of subsidiarity.[245] In finding that the MOU was reliable, the Court emphasised it had 'withstood the extensive examination that has been carried out by an independent tribunal, SIAC'.[246] The Court also upheld SIAC's weak standards on verification and monitoring which were applied to the Jordanian Adaleh Centre discussed above. This is despite the Court acknowledging the 'relative inexperience' of the Centre and the family ties between the management of the Centre and the Jordanian

[240] *Othman*, n 70, para 195.

[241] Ibid, para 194.

[242] Ibid, paras 187 – 191.

[243] *Saadi v Italy* (2008) 47 EHRR 17, para 128.

[244] Ibid.

[245] Chapter One, 39.

[246] *Othman*, n 70, para 194.

security services, in addition to reports that the management was relatively ill-informed about the monitoring task they were due to be assigned.[247] The Court further emphasised in *Othman* it had 'not received the additional closed evidence that was before SIAC, nor has it been asked to consider that evidence'.[248] This limited its ability to consider the judicial scrutiny applied in SIAC and confined to rationality review of SIAC's decision.

As a result of the standard of review applied to SIAC's decisions both at the level of appeal courts in the UK, and in Strasbourg, any errors in SIAC's assessment of real risk are not likely to be compensated for. What is most likely is that SIAC's assessment on real risk will be upheld, regardless of any such errors. Given that SIAC's assessment may not be accurate due its reliance on rationality review, and that this assessment is not likely to be corrected at higher levels of judicial assessment, there can consequently be no confidence that 3 rights are currently being fully protected in the UK national security and deportation context. Ultimately, under the current legal framework, individuals may be deported on national security grounds, even in circumstances where there is real risk that they be subject to treatment prohibited by article 3.

[247] Ibid, para 203.

[248] Ibid, para 190.

As will be explored in more detail in the concluding chapter of the thesis, the system fails to ensure individuals are provided with the minimum article 3 protections required, despite what would appear to be extensive safeguards existing from the outside. In this way, the system mirrors that of a LGH, as articulated by David Dyzenhaus. Moreover, vague doctrine related to article 3 and deportation in this area of law has carved out discretion for judges to accept UK Government's claims with respect to real risk even where it may exist. That the system enables such extensive power on the part of the UK Government would suggest this area of law serves to vindicate the excessive deference thesis, and in particular the model of normalisation advocated by Oren Gross.[249] However, the extent to which the models are in fact accurate representations of this area of law is an important question for the analysis in the final chapter of the thesis. It is also central to the overall thesis purpose to assess the protection of ECHR rights in UKNSL and consider how such protection may inform the broader debate on national security law and executive power.

2.5. Conclusion

This chapter has shown how a number of executive advantages – related to SIAC's procedures, its doctrine and the Government's epistemic authority with

[249] Chapter One, 78 - 79.

respect to diplomatic relationships – had dissolved the standard of review SIAC applies in article 3 and deportation cases to rationality review. It has also set out how rationality review in this context falls short of making the independent assessment required by article 3. As will be clear going forward, issues with procedure, doctrinal choices on the part of first-instance judges, and a perception of the Government as having epistemic authority, are repeating themes in encouraging rationality review in UKNSL. We will continue to see how this undermines ECHR rights protections and creates legal dynamics that increasingly degrade such protections over time.

3. Article 6 ECHR Rights in TPIM Cases

This chapter assesses the protection of article 6 ECHR rights of individuals subject to TPIMs. Article 6 ECHR enshrines the right to a fair trial and sets out a number of requirements in court proceedings, including that they are procedurally fair and determined by an independent tribunal.[1] The Administrative Court has primary responsibility for reviewing the imposition of TPIMs and ensuring that article 6 rights are protected. The chapter explores the legal safeguards in the Administrative Court to protect article 6 rights, including protections for procedural fairness and independence. These include, first, a judicial commitment to engaging in independent, substantive review of the imposition of the TPIM, referred to as the '*MB* principle'. Secondly, this includes the '*AF (No 3)* principle', which sets out disclosure requirements to protect article 6 rights where the UK Government relies on closed evidence. The chapter argues that despite the Administrative Court having distinctive powers available to it to prevent article 6 rights being violated, article 6 rights are not sufficiently protected in TPIM proceedings. This argument is based on

[1] ECHR, article 6 (2).

two observations. First, despite being statutorily required to carry out a substantive review as part of its assessment in TPIM proceedings, the Administrative Court has, in recent years, departed from the *MB* principle. Consequently, there is an increasing dominance of judges treating substantive review as disposable in TPIM case law. The second observation is that the '*AF (No 3)* principle' has not been applied in full in the majority of TPIM cases decided so far. The combination of these shortcomings means that TPIM proceedings are lacking in reliable protections for article 6 ECHR and the form of review applied is effectively that of rationality review. In presenting the argument, this chapter goes beyond existing literature on TPIMs in several ways.[2] This is by providing an assessment of the application of the *AF (No 3)* principle in all substantive TPIM cases so far decided as well as an in-depth analysis of the statutory framework governing TPIM procedure. The chapter does not contain analysis of ECtHR jurisprudence, as the Court has not yet heard any cases concerning TPIMs.

Article 6 has an important role in the national security context for two primary reasons. First, there is a tendency for most national security decisions to be taken by the executive, which are not independent decisions as they pursue

[2] Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' (2017) *Public Law* 609 – 626; Helen Fenwick, 'Redefining the Role of TPIMS in Combatting 'Home-grown' Terrorism Within the Widening Counter-Terror Framework' (2015) *European Human Rights Law Review* 1, 41 -56; Adrian Hunt, 'From Control Orders to TPIMS: Variations on a Number of Themes in British Legal Responses to Terrorism' (2014) *Crime, Law and Social Change*, 289 – 321; Ben Middleton, 'Terrorism Prevention and Investigation Measures: Evolution, not Revolution?' (2013) 77 (6) *Journal of Criminal Law* 562; Helen Fenwick, 'Preventative Anti-Terrorist Strategies in the UK and ECHR: Control orders, TPIMs and the Role of Technology' (2011) *International Review of Law, Computers & Technology* 25, 129 – 141; Clive Walker and Alexander Horne, 'The Terrorism Prevention and Investigations Measures Act 2011: One Thing but Not Much the Other' [2012] *Criminal Law Review* 421.

executive policies and the Government is a party to legal proceedings having made such decisions. Secondly, article 6 plays an important role because of the limitations on the use of confidential material, which is both prevalent in the national security context and serves to impede procedural fairness. Moreover, while the imposition of TPIMs by the UK Government is relatively infrequent,[3] it represents a chief component of the Government's 'preventative' approach to counter-terrorism and has been a consistent part of the UK counter-terrorism machinery over the last two decades.[4] The measures also show no sign of disappearing - a second round of reform of TPIMs measures was passed by Parliament in 2021 to loosen requirements attached to their imposition.[5] The measures have also been transplanted to other jurisdictions, such as Australia and Canada.[6] Most importantly, the procedural framework governing TPIM proceedings is now incorporated into a different type of UK counter-terrorism

[3] As of 28 February 2021, three TPIMs are currently in force. See 'Terrorism Prevention and Investigation Measures (1 December 2020 to 28 February 2021), (20 April 2021), HC Statement UIN HLWS920. Over the years, only handfuls have been in force at a given time. See Independent Reviewer of Terrorism Legislation, 'The Terrorism Acts in 2019' (2021), Chapter Eight available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972261/THE_TERRORISM_ACTS_IN_2019_REPORT_Accessible.pdf.

[4] For important discussion on prevention in UK counterterrorism and analysis on control orders (similar liberty-restricting measures enacted prior to TPIMs and whose case law applies in the TPIM context) see Lucia Zedna, 'Preventative Justice of Pre-Punishment? The Case of Control Orders' (2007) 60 (1) *Current Legal Problems* 174, see also Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray'* (2008) 36 *Federal Law Review* 209.

[5] CTCSA, Part 3.

[6] For example, see div 104 of the Australian Criminal Code. See also Arturo J Carrillo, The Price of Prevention: Anti-Terrorism Pre-Crime Measures and International Human Rights Law (2020) 60 *Va. J. Int'l L.* 571; Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) *37 Melbourne University Law Review* 143; Tamara Tulich, 'Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom' (2012) 12 (2) *Oxford University Commonwealth Law Journal* 341; Sascha-Dominik Bachmann and Matthew Burt, 'Control Orders Post-9-11 and Human Rights in the United Kingdom, Australia and Canada: A Kafkaesque Dilemma?' (2010) 15 (2) *Deakin Law Review* 131.

measure, namely that of Temporary Exclusion Orders (TEOs).[7] The purpose of a TEO is to control the manner of a British Citizen's return to the UK, and to provide a limited measure of control over that individual thereafter, as well as to exclude non-citizens from the UK. The procedural rules governing judicial scrutiny of TEOs mirror those governing such scrutiny of TPIMs. Moreover, in the one TEO case decided so far,[8] the court ruled that TPIM case law was applicable in the TEO context.[9] Therefore, failures to protect procedural fairness in the TPIM cases will apply to TEO cases.

The chapter has four Sections. Section One presents the principal requirements of article 6 ECHR and its role within the ECHR framework. Section Two considers the development of TPIMs in the UK and the mechanisms created to protect the article 6 rights of individuals subject to TPIMs during court proceedings reviewing such measures. Section Three shows that article 6 requirements are not currently being met in the TPIM context. This is based on there being insufficient protections to ensure that judges form their own view as to whether the relevant TPIM conditions are met, and TPIM proceedings are procedurally fair. Section Four argues that the lack of proper

[7] CTSA 2015, Chapter Two. Helen Fenwick, 'Terrorism Threats and Temporary Exclusion Orders: Counter-Terror Rhetoric or Reality?' (2017) 3 *European Human Rights Law Review* 247 – 271.

[8] *QX v SSHD* (No 1) [2020] EWHC 1221 (Admin); [2021] QB 315 and *QX v SSHD* (No 2) [2020] EWHC 2508; [2020] 9 WLUK 218.

[9] In proceedings reviewing the imposition of TEOs, the courts are bound by the same procedural rules as in TPIMs proceedings. See CTSA, Schedule Three.

protections for independent assessment and procedural fairness in this way results in article 6 rights not being fully protected.

3.1. Article 6 ECHR, Independence and Procedural Fairness

Article 6 ECHR enshrines the right to a fair trial. The right to a fair trial was described in the Convention's Travaux Préparatoires as a means to secure 'freedom of defence, and procedural safeguards, because those safeguards are the very expression of individual liberty and of individual rights'.[10] As with other ECHR rights, the protection of the right to a fair trial represents a crucial component of democracy in Europe and prevents the resurgence of authoritarianism.[11] Sham trials - in which individuals are subjected to coercive state powers during legal proceedings without procedural safeguards to enable them to effectively defend their cases - were a persistent feature of authoritarian governments in Europe in lead up to the Second World War.[12]

[10] Travaux Préparatoires to the ECHR, 'Preparatory Work on Article 6 of the ECHR, 8 October 1956 DH (56) 11.

[11] Chapter One, 50 – 51.

[12] For example, in Nazi Germany, the Government established a large number of 'Sondergerichte', special courts in which defendants were provided with little in the way of procedural safeguards, to prosecute those who challenged the regime. It is estimated that 12,000 Germans were killed on the orders of these special courts. See Peter Hoffmann, *The History of the German Resistance 1933 – 1945* (Macdonald and Janes, trns by Richard Barry, 3rd Edn, 1977). See also George H. Hodos, *Show Trials: Stalinist Purges in Eastern Europe, 1948–1954* (Praegers Publishers, 1987).

Article 6 is a limited right and its scope may be limited in the contexts referred to in the text of article 6 (1), including for reasons of national security.[13] The right applies in the determination of civil rights and criminal trials, but is not applicable to other proceedings, such as employment cases[14] or immigration proceedings.[15] In recent decades, the ECtHR has applied the civil aspect of article 6 to cases which 'might not initially appear to concern a civil right' but which may have 'direct and significant repercussions' for a private right.[16] Importantly for the TPIM context, legal proceedings classified domestically as relating to public law can fall within the 'civil' aspect of article 6 ECHR if the outcome was 'decisive for private rights and obligations'.[17]

In civil and criminal cases, everyone is 'entitled to a fair and public hearing'.[18] The fairness guaranteed by article 6 is procedural and distinguishable from a 'substantive fairness'.[19] Procedural fairness in the article 6 context requires that there are adversarial proceedings in which submissions are heard from

[13] ECHR, article 6 (1).

[14] *Tariq v UK* App nos 46538/11 & 3960/12 (ECHR, 26 April 2018).

[15] *Chahal v UK* (1996) 23 EHRR 413. The ECtHR has held that the concept of 'civil rights and obligations' must not be interpreted solely by reference to national law but has an autonomous meaning within article 6 ECHR, see *Ferrazzini v Italy* (2001) 34 EHRR 45, para 24.

[16] *De Tommaso v Italy* (2017) 65 EHRR 19, para 151.

[17] *Ferrazzini v Italy* (2001) 34 EHRR, para 27.

[18] ECHR, article 6 (1).

[19] *Deweer v Belgium* (1979 – 80) 2 EHRR 439, para 44.

the parties and placed on an equal footing before the court.[20] Parties to the proceedings have the right to present the observations which they regard as relevant to their case.[21] This right must be 'effective', which requires that observations are 'heard' in the sense of being duly considered by the trial court.[22] This means that courts have a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties.[23] Other procedural safeguards set out by the text of article 6 include that legal judgments must be pronounced publicly, but the press and public may be excluded from all or part of a trial for a number of different purposes including 'in the interests of national security in a democratic society'.[24] The ECtHR has held that fairness of proceedings is assessed by examining them in their entirety, so an isolated irregularity may not be sufficient to render the proceedings as a whole unfair.[25]

Alongside requiring procedural fairness, article 6 necessitates that a fair hearing must be carried out by an 'independent and impartial tribunal

[20] *Borgers v Belgium* (1993) 15 EHRR 92.

[21] *Donadze v. Georgia* App no 74644/01 (ECHR, 7 March 2006), para 35.

[22] Ibid.

[23] *Perez v. France* (1995) 22 EHRR 153, para 80.

[24] ECHR, article 6 (1). The International Covenant on Civil and Political Rights (ICCPR) mirrors the ECHR in providing that the press and public may be excluded from all or part of proceedings 'for reasons of…national security in a democratic society'. See ICCPR, articles 14, 15 & 16. Specific restrictions that may be imposed on the right to a fair trial are not referred to equivalent provisions in the United Declaration on Human Rights (UNHR). See UNHCR, articles 8, 10 & 11. See also the American Convention on Human Rights (ACHR), articles 7 & 8.

[25] *Miroļubovs and Others v. Latvia* App no 798/05 (ECHR, 15 September 2009), para 103.

established by law'.[26] Independence in this context refers to independence from the other branches of state (the executive and legislature) as well as from the parties in the case.[27] The ECtHR has held that where a judicial body does not satisfy the requirements of independence – particularly in relation to the executive - it may not be characterised as a tribunal for the purpose of satisfying article 6.[28] In order for the requirement of independence to be met when the court reviews a decision of the executive, they must have 'full jurisdiction' over the administrative decision'.[29]

3.2. Article 6 Protections and TPIMs

The TPIM regime was initially introduced to replace the control order regime.[30] Control orders were developed as a response to two persisting problems in counterterrorism, particularly highlighted following 9/11. The first problem was the prevalence of individuals whom the UK Government considered a threat to national security but could not be prosecuted due to a lack of evidence admissible in criminal proceedings. This was partly due to the UK Government's assessment of threat posed by an individual often being based

[26] ECHR, article 6 (1).

[27] *Ninn-Hansen v Denmark* App no 28972/95 (ECHR, 18 May 1999).

[28] *Guðmundur Andri Ástráðsson v. Iceland* (App no 26374/11 (ECHR1 December 2017) paras 232 – 233.

[29] *Bryan v United Kingdom* (1995) 21 EHRR 342, para 40.

[30] Created by the PTA.

on intelligence, intercept material and/or hearsay which could not be disclosed in a criminal trial.

The second, related, problem was many of those considered to pose a threat were foreign nationals who could neither be deported[31] nor detained indefinitely[32] due to constraints imposed by the ECHR. Control orders were considered a solution to this problem as they provided a means of disrupting the activities of individuals who were considered a threat but could not be detained or deported.[33] Control orders also enabled the Government to respond to the threat without having to go to a criminal trial, in which there was no option to go into closed proceedings and national security intelligence in the form of intercepted material would not be admissible. Rather, the Government could impose control orders based on a civil standard of the balance of probabilities and evidence given in closed proceedings.

TPIMs replaced the control order regime in 2011 following recommendations for reform of the control orders regime in a report produced by Lord

[31] Due to a 'real risk' of their suffering treatment contrary to the requirements of article 3 ECHR.

[32] Following the HOL ruling in *A and others* which held such detention, as authorised by the Anti-terrorism, Crime and Security Act 2001, was in violation of the UK's obligations under the ECHR. *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68.

[33] Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37 *Melbourne University Law Review* 143.

MacDonald.[34] Helen Fenwick has emphasised that the creation of TPIMs was linked to efforts of the Liberal Democrats in the newly established Coalition Government to establish an unambiguously Convention-compliant system of 'control orders-lite'.[35] In previous years, several control orders had been found to be in violation of the ECHR. This occurred in *JJ*, in which the HOL held that the length of the curfew imposed by the control order amounted to a violation of article 5 ECHR.[36] As had been the intention with control orders, TPIMs were developed as an ECHR-compliant means to disrupt the activities of those suspected of carrying out terrorism-related activity. Their purpose is to 'control the terrorist risk presented by individuals still at liberty in the community where criminal prosecution is not an option'.[37] The measures differed from control orders insofar as they are limited to imposing overnight curfews and do not include powers to relocate the TPIM subject.[38] They could also initially only be imposed for a maximum of two years, though now they can be imposed for five.[39] The other measures that may be imposed by TPIMs mirror many of the previous control order measures, including overnight residence requirements;

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[34] Lord Macdonald of River Glaven QC, 'Review of Counter-terrorism and Security Powers: A Report' Cm 8003. See also Review of Counter-terrorism and Security Powers: Review Findings and Recommendations' Cm 8004.

[35] Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' (2017) *PL* 4, 609-626, 612.

[36] *SSHD v JJ and others* [2007] UKHL 45; [2008] 1 AC 385. See also *SSHD v AP* in which the Supreme Court found that AP's control order violated his rights under article 8 ECHR.*SSHD v AP* [2010] UKSC 24; [2011] 2 AC 1.

[37] Independent Reviewer of Terrorism Legislation, 'The Terrorism Acts in 2018' (2020) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/03/Terrorism-Acts-in-2018-Report-1.pdf> accessed 17 October 2021, para 8.3.

[38] TPIMA, Schedule One.

[39] Following amendment of s 5 of TPIMA by s 35 of CTSEA.

police reporting; an electronic monitoring tag; exclusion from specific places.[40] Breach of any measure is a criminal offence.[41] In this way, TPIMs are similar to control orders.

Several conditions must be met to lawfully impose a TPIM. The Secretary of State can only impose TPIMs if the Secretary of State 'reasonably believes' the individual 'is, or has been, involved in terrorism-related activity' (Condition A).[42] The Secretary of State must also 'reasonably consider' it is 'necessary, for purposes connected with protecting members of the public from a risk of terrorism' for TPIMs to be imposed on the individual (Condition C).[43] Condition B is that some or all of the relevant activity is new terrorism-related activity.[44] Condition D is that the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity. Condition E is that (a) the court gives the Secretary of State permission under section 6, or (b) the Secretary of State reasonably considers that the urgency of the case requires the TPIM to be imposed without obtaining such permission.

[40] TPIMA, Schedule One.

[41] TPIMA, s 23.

[42] TPIMA, s 2 (1) & 3, as amended by CTSEA, s 34. Though between 2015 and 2021, the test had been amended so that the Secretary of State must be 'satisfied, on the balance of probabilities' that an individual has been involved with terrorism-related activity. CTSA, s 20.

[43] Ibid.

[44] *SSHD v AM* [2012] EWHC 1854 (Admin); [2012] 7 WLUK 162, [13].

There are different roles provided for judges to scrutinise the imposition of TPIMs. Condition E[45] requires the Administrative Court to give the Secretary of State permission to impose the TPIM, except in urgent cases.[46] In giving such permission, the court must consider whether the Secretary of State's decision that the necessary conditions are in place is 'obviously flawed'.[47] Provided the court grants permission, the TPIM must then be subject to a mandatory review 'as soon as is reasonably practicable'.[48] In reviewing a TPIM, the court must 'review the decisions of the Secretary of State that the relevant conditions were met and continue to be met'.[49] In reviewing such decisions, the court must 'apply the principles applicable on an application for judicial review'.[50] This particular provision will be of importance in the analysis to follow, as it contributes to TPIMA sending mixed messages with respect to the type of review judges are supposed to apply in this context. As discussed in Chapter One, ordinary judicial review is traditionally associated with process-based and/or rationality review rather than substantive review.[51] If the court finds these conditions are not met, the court may quash the TPIM, or measures

[45] In such cases, the Secretary of State must have to reasonably consider that the urgency of the case requires TPIMs to be imposed without obtaining such permission. TPIMA, s 3(5)(b).

[46] TPIMA, s 3(5)(e).

[47] TPIMA, s 6.

[48] TPIMA, s 8(5).

[49] TPIMA, s 9(a).

[50] TPIMA, s 6(6) & 16(6).

[51] Chapter One, 93 - 94.

associated with the TPIM, or alternatively provide the Secretary of State with specific directions.[52]

In TPIM proceedings, courts are subject to a 'general duty' to 'secure that disclosures of information are not made where they would be contrary to the public interest'.[53] To ensure that judges had access to all evidence necessary to carry out a robust review of the imposition of control orders, then TPIMs - including security-sensitive factual evidence - the Civil Procedure Rules were amended to provide judges access to closed evidence.[54] As a result, the UK Government's national security case is often withheld from the individual to whom the TPIM has been imposed. In the absence of protections which are discussed below, the use of closed evidence when imposing TPIMs could lead to a situation in which an individual has restrictive measures imposed of him or her without ever knowing the reasons for which they were imposed and therefore without being able to challenge the basis for the imposition. The prospect of such circumstances reflects the significant threat to procedural fairness posed in TPIM proceedings due to the reliance on closed material.

[52] TPIMA, s 9(5).

[53] TPIMA, Schedule 4, para 4.

[54] CPR, parts 76 and 80.

3.2.1. Article 6 protections and *MB*

When introducing the Bill which gave the Government powers to impose TPIMs on suspected terrorists, the Home Secretary stated it would 'assure individuals subject to TPIM notice of a significant and appropriate level of judicial oversight of their cases', which she later described as 'rigorous consideration' by the courts.[55] As we will see, the TPIM regime was established with several mechanisms to enable judges to rigorously consider the imposition of TPIMs, rather than being confined to a superficial form of review. Moreover, there are three main safeguards applied in TPIM proceedings to with article 6 ECHR in cases where the Secretary of State relies on closed material in bringing their case against an individual. First, a Special Advocate must be appointed to represent the interests of the TPIM subject, who plays the same role as those Special Advocates in SIAC, discussed in Chapter Two.[56] Secondly, there is the application of the *MB* principle.[57] The third safeguard is the *AF (No 3)* principle, which states that the individual must be 'given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations'.[58]

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[55] HC Deb 7 June 2011, vol 529 col 7.

[56] Ibid, para 10. Chapter Two, 117 - 119.

[57] *SSHD v MB* [2006] EWHC 1000 (Admin); [2006] 4 WLUK 353.

[58] *SSHD v AF and another* [2009] UKHL 28; [2010] 2 AC 269, [59] per Lord Phillips who gave the leading speech. Lord Roger and Lord Walker agreed with Lord Phillips, while Lord Hope, Lord Scott, Lord Brown and Baroness Hale agreed with Lord Phillips while providing their own explanation. See also Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 5 *MLR* 73, 836 – 857.

i. The '*MB* principle

Despite the control order statutory regime containing article 6 protections, these were ruled to be insufficient for protecting article 6 rights in the first control orders case, *MB*.[59] MB was a British citizen, born in Kuwait, who had been subject to a control order imposing relatively light restrictions in 2005 by the Secretary of State on the grounds that he intended to travel to Iraq to fight against coalition forces.[60] The control order imposed on MB was initially reviewed by Ousely J to consider whether the Secretary of State's case was 'obviously flawed' for the purpose of giving permission for the control order to be imposed, as required under section 3 (2) (b) of the PTA. Ousely J found that the Secretary of State's case was not obviously flawed but he did make amendments to the obligations imposed on MB.[61]

With the control order having been imposed on MB, it was then subject to a mandatory review under section 3 (10) of the PTA, also carried out by Sullivan J. In the judgment, Sullivan J ruled that the review of the control order was incompatible with the protection of MB's article 6 ECHR rights. This was for the principal reason that the statutory provisions restricted judicial scrutiny of the Secretary of State's case to such an extent that the hearings under section 3 (10), in Sullivan J's view, violated MB's rights under article 6 ECHR. He

[59] *SSHD v MB* [2006] EWHC 1000 (Admin); [2006] 4 WLUK 353.

[60] Ibid, [17].

[61] Ibid [51].

found that this restriction in judicial scrutiny precluded judges from carrying out an independent assessment in the case, as is required by article 6.

In reaching these conclusions, Sullivan J drew on previous UK rulings considering Strasbourg's requirement that in reviewing administrative decisions, an independent tribunal must have 'full jurisdiction'.[62] A ruling elucidating this requirement was *Begum v Tower Hamlets* in 2003.[63] Lord Hoffmann, with whom the remainder of their Lordships agreed, stated that full jurisdiction did not mean courts are always expected to carry out a merits review, but it does mean they must have 'jurisdiction to deal with the case as the nature of the decision requires'.[64] He added that in certain cases 'of which the paradigm examples are findings of breaches of the criminal law and adjudication of private rights', the rule of law 'rightly' required that such decisions be 'entrusted to the judicial branch of government', as opposed to cases largely involving policy, such as planning decisions.[65] In engaging with this doctrine, Sullivan J reasoned that a consideration as to whether an individual had been engaged in terrorism-related activity 'even if it is not within' was as 'close as it is possible to be' to Lord Hoffmann's paradigm examples.[66] On this basis, according to Sullivan J, it was clear that an

[62] *Bryan v United Kingdom* [1995] 21 EHRR 342, para 40.

[63] *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430.

[64] Ibid.

[65] Ibid, [42] per Lord Hoffmann.

[66] Ibid, [47] per Lord Hoffmann.

independent assessment in section 3 TPIM proceedings was required.[67] In the appeal of this decision, the Court of Appeal agreed with Sullivan J's interpretation of article 6(1).[68]

Sullivan J reasoned that several features of the PTA restricted judicial scrutiny to the point of undermining the courts' ability to carry out an independent assessment. First, Sullivan J clarified that sections 3 (10) and (11) of the PTA made it clear that the court was 'purely supervisory' and was making its decision in the absence of the totality of the evidence available at the time of the hearing.[69] Instead, the role of the judge under section 3 (10) was to consider whether the Secretary of State's decision at the time he or she made the decision to impose a TPIM was flawed. As a consequence, any information coming to light following this decision, including anything contained in the witness statement of the respondent, MB, was 'irrelevant' for the judge in making a decision in accordance with section 3 (10).[70] Such restrictions, according to Sullivan J, meant that judges under the PTA were restricted to merely reviewing the Secretary of State's decision rather than forming its own view as to the merits of the case.[71] This bar on independent assessment was

[67] Ibid, [48] – [49] per Lord Hoffmann.

[68] *SSHD v MB* [2006] EWCA Civ 1140; [2007] QB 415, [55] – [56].

[69] Ibid, [28].

[70] Ibid, [29].

[71] Ibid.

reinforced, in Sullivan J's view, by the reference to judges having to approach their review using principles applicable in judicial review.[72]

Sullivan J further emphasised that the restriction on judicial scrutiny was compounded by a 'very low' standard of proof the judge was required to apply, which was whether the Secretary of State had 'reasonable grounds of suspicion' that the respondent had been involved in terrorism-related activity.[73] Sullivan J reasoned that this test meant applying a 'traditional *Wednesbury* irrationality test' which did not ask what a reasonable person would have thought was necessary at the relevant time, but 'was the Secretary of State entitled to consider that the order and the obligations contained within it were necessary?'.[74] Applying this rationality test, according to Sullivan J, would 'in practice, place an impossibly high hurdle in any respondent's path, not least because of the very broad subjective area of judgment to be applied'.[75]

Sullivan J stated it was the 'combination and cumulative effect' of the features set out above which resulted in a procedure which was 'uniquely unfair' and undermined the ability of the courts to carry out an independent assessment.[76]

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[72] Ibid.

[73] Ibid, [52].

[74] Ibid, [84].

[75] Ibid.

[76] Ibid, [85].

In finding that such a procedure resulted in a violation of article 6, he stated that to find that PTA did not give the respondent a fair trial would have been an 'understatement', and that the court would be failing in its duty if it did not say 'loud and clear' that the relevant procedure was 'conspicuously unfair'.[77] Sullivan J further reasoned that the 'thin veneer of legality' provided by section 3 PTA could not disguise the fact that the controlee's rights were being determined by 'executive decision-making, trammeled by any prospect of effective judicial supervision'.[78]

Such statements encapsulate well the unambiguous terms in which Sullivan J found the 'purely supervisory' role of the courts in section 3 (10) hearings to be incompatible with article 6. The strength of this statement, alongside the declaration of incompatibility issued, posed a significant problem for the UK Government. As mentioned above, the introduction of control orders was the product of a complete redesign of the Government's counter-terrorism regime, brought forward due to a previous declaration of incompatibility issued in relation to the indefinite detention of foreign nationals enshrined under section 23 of ATSCA. Thus, it is no surprise that the UK Government appealed Sullivan J's ruling. MB's case was brought to the Court of Appeal, which overturned the ruling on article 6 ECHR based on reading in article 6 protections to the PTA, relying on s 3 of the HRA.[79] The requirements set out

[77] Ibid, [103].

[78] Ibid.

[79] *SSHD v MB* [2006] EWCA Civ 1140; [2007] QB 415.

by the Court of Appeal became the definitive requirements of judicial scrutiny of control orders. The Court of Appeal reaffirmed the approach set out in *MB* in a later case of *BM*.[80]

In understanding the Court of Appeal's decision, it is important to note that Sullivan J's decision was overturned not on the basis that the Court of Appeal disagreed that section 3 (10) hearings were incompatible with article 6. Rather, the Court of Appeal ended up reading down the provisions governing section 3 (10) hearings to enable a more rigorous form of judicial scrutiny so that the hearings would comply with article 6.[81] The reading down of section 3 (10) was justified by the Court of Appeal on several grounds. First, the Court of Appeal emphasised that control orders proceedings would inevitably be ones in which human rights were at issue. For example, all parties to *MB* agreed that article 8 ECHR, the right to private and family life, was engaged in the imposition of control orders. Considering human rights issues being at stake, it was possible to employ a less restricted interpretation of section 3 (10) under the authority of section 3 of the HRA, which provides that judges must 'as far as is possible' interpret statutory provisions in a way which is compatible with the Convention rights.[82]

[80] *BM v SSHD* [2011] EWCA Civ 366; [2011] EWCA Civ 366.

[81] Ibid.

[82] HRA, s (1), ibid, [40].

The Court of Appeal stated that where human rights issues were at stake, section 3 (1) could not be read so as to restrict the court to considering whether the Secretary of State had reasonable grounds for their decision.[83] It further reasoned that it followed that Sullivan J should have considered whether the relevant criteria for imposing a control order was met at the time of the section 3 (10) hearing.[84] The Court of Appeal then held that while it was 'theoretically possible'[85] that a particular control order may not interfere with a Convention right, it would be 'manifestly unsatisfactory' for more than one approach to be employed in control order cases.[86]

The Court of Appeal then held that the duty imposed on the Secretary of State by section 7 of the PTA, to keep the decision to impose a control order under review, created legitimate scope for a purposive interpretation of section 3 (10) - enabling the court to consider whether the 'continuing' decision of the Secretary of State was flawed.[87] It asserted that such an approach would be consistent with ordinary judicial review principles.[88] It also disagreed with

[83] Ibid.

[84] Ibid.

[85] Ibid, [42].

[86] Ibid, [43].

[87] Ibid, [44].

[88] Ibid, [45].

Sullivan J that a 'full merits review' was not possible on the basis that a 'court conducting a judicial review has all the powers it requires, including the power to hear oral evidence and to order cross-examination of witnesses'.[89]

The Court of Appeal then sought to elucidate the necessary approach to judicial scrutiny to ensure section 3 (10) hearings were compatible with article 6 ECHR.[90] In doing so, it articulated different approaches to the two elements of the Secretary of State's decision in relation to TPIMs and control orders.[91] These are, first, whether there are reasonable grounds for suspecting that the relevant person is or has been involved in terrorism-related activity. Secondly, whether it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make the order.

With regards to the first element, the Court of Appeal stated that whether there are reasonable grounds for suspicion is an 'objective question of fact'.[92] It required a court to decide for itself 'whether the facts relied on by the Secretary

[89] Ibid, [48].

[90] The use of s3 of the HRA in this context, as opposed to the issuing of a s4 declaration of incompatibility has been subject to criticism by Ben Middleton on the grounds that a declaration would have provided the political impetus for legislative revision and increased certainty. On the basis of the treatment of *MB* as set out later in this chapter, it is clear Middleton's argument has been bolstered by recent practice which demonstrates a lack of certainty regarding the status of *MB* in TPIM proceedings. Ben Middleton, 'Control Order Hearings: Compliance with Article 6 ECHR' (2009) 73 *Journal of Criminal Law* 1, 21 -25, 24.

[91] These two elements are drawn from the PTA, ibid, [57].

[92] Ibid.

of State amount to reasonable grounds for such suspicion'.[93] The Court of Appeal further emphasised that on the issue of reasonable grounds, a court 'must make up its own mind'.[94] It is this aspect of the judicial scrutiny required by the Court of Appeal which firmly established the need for judges to carry out an independent assessment of at least part of the Secretary of State's case in order for article 6 ECHR to be complied with.

With regards to the second element, whether the measure was necessary for the purpose of protecting the public from a risk of terrorism, the Court of Appeal stated that the question of necessity was said to involve the 'customary test of proportionality' and an assessment as to what is necessary to impose on the individual depending on the 'nature of the involvement in terrorism-related activities'; the 'resources available to the Secretary of State'; the 'demands on those resources' and potentially 'arrangements that are in place or that can be put in place, for surveillance'.[95] The Court further stated that the Secretary of State is 'better placed' to determine such matters, which meant that the courts must pay a 'degree of deference' to the Secretary of State's decision.[96]

[93] Ibid, [60].

[94] Ibid [58].

[95] Ibid, [63].

[96] Ibid, [64]

While the Court of Appeal reasoned that in deciding necessity judges must pay some deference to the Secretary of State, it required judges to carry out an independent assessment of necessity in the form of a proportionality assessment. In considering proportionality, judges must weigh a number of factors in arriving at their decision on the matter of necessity, rather than merely reviewing the Secretary of State's decision. This is compatible with the assessment being one which affords weight to the view of the Secretary of State. In this way, the Court of Appeal established a requirement for substantive review, by stating that the Administrative Court must decide for itself if a control order was necessary and proportionate to ensure control order proceedings are compatible with article 6 ECHR.

i. Adoption of *MB* requirements

The '*MB* principle' was explicitly adopted in the TPIM regime. The statutory provisions accompanying the TPIM regime include the express provision that the function of the court is to review the decisions of the Secretary of State 'that the relevant conditions were met and continue to be met'.[97] In expressly requiring that judicial scrutiny included an assessment of whether the relevant conditions continue to be met, TPIMA departed from the PTA in necessitating

[97] TPIMA, s 9 (1).

judges to form their own independent assessment as to the conditions being in place at the time of the review hearing. The explanatory notes accompanying TPIMA expressly refer to the applicability of *MB* and its requirements that reviews of TPIMs apply a 'particularly high level of scrutiny'.[98] Moreover, the statutory framework is explicit that 'nothing…in the rules of court…is to be read as requiring the relevant court to act in a manner inconsistent' with article 6.[99] In this way, *MB* jurisprudence was transferred to TPIMA.

MB was held to apply in the first public TPIM ruling, *BM*.[100] *BM* also added dictum stating it was 'rare for specific facts to have to be found' and that '[t]he case will usually turn on whether the information collected from whatever sources when looked at as a whole justifies a reasonable belief that the subject has been or is involved in TRA and a TPIM is necessary'.[101] *BM* added that it was 'not necessary for underlying facts to be found to exist to any particular standard' as 'all will be added together to see whether a TPIM is needed'.[102] In light of this, there is an argument to be made that *BM* may have weakened the standards in *MB*. This is insofar as *MB* explicitly stated that in relation to facts concerning the threat posed by an individual, facts must be found to a

[98] TPIMA Explanatory Notes, paras 79 – 80.

[99] TPIMA, Schedule 4 para 5.

[100] *BM v SSHD* [2012] EWHC 714 (Admin); [2012] 1 WLR 2734, [31].

[101] Ibid, [32].

[102] Ibid, [32].

'particular standard'.[103] However, *BM* maintained the general notion judges are required to provide an objective and independent assessment of whether an individual had been engaged in terrorism-related activity.

3.2.2. The use of closed evidence and the *AF (No 3)* principle

We will return to the *MB* principle later in the analysis, but we first need to examine the second principle in this area: the *AF (No 3)*, also known as 'gisting', or providing the 'gist' of the allegations against an individual in particular cases. The gist refers to the information, regarding the 'allegations made against' the individual, which will enable them to provide 'effective instructions' in relation to those allegations. The principle was established initially to ensure procedural fairness as required by article 6 ECHR in control order cases in which the Secretary of State relied on closed material in their case against the controlee. The HOL held that provided proceedings complied with the *AF (No 3)* principle, there could be a fair trial 'notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations'.[104] The principle was then held to apply in the TPIM context in *BM*,[105] and in establishing whether there has been an

[103] *MB v SSHD* [2006] EWCA Civ 114; [2007] QB 415, [60].

[104] *SSHD v AF & Anor* [2009] UKHL 28; [2009] All ER 643, [59] per Lord Phillips.

[105] *SSHD v BM* [2012] EWHC 714 (Admin); [2012] 1 WLR 2734, [4].

'abuse of process' by the Secretary of State when imposing a control order/TPIM.[106]

The principle was developed in *AF* on the basis of the HOL's consideration of the ECHR requirements of procedural fairness as set out by the ECtHR in *A and others v UK*.[107] In this case, the ECtHR examined the procedural fairness requirements of article 5 (4) ECHR in relation to proceedings brought to SIAC by individuals detained under the ATCSA. Despite this, and the fact that the case concerned detention, the HOL held that such procedural fairness requirements should hold in control order cases due to the impact of control orders on an individual's liberty.[108]

The HOL emphasised a number of features of gisting articulated by the ECtHR in developing the *AF (No 3)* principle.[109] These features include, first, that while the amount of disclosure required in a case must generally be decided on a case-by-case basis, where the evidence was 'to a large extent disclosed' and the open material 'played the predominant role in the determination', the applicant

[106] *CC & CF v SSHD* [2014] EWCA 559; [2014] 1 WLR 4240.

[107] *A and Others v UK* (2009) 49 EHRR 29.

[108] However, the principle has been held not to apply in a number of other types of cases. For a recent summary of its application in particular UK contexts, see *R (on the application of Reprieve and others) v The Prime Minister* [2020] EWHC 1695 (Admin); [2020] 6 WLUK 425. See also Angus McCullough QC & Shaheen Rahman QC, 'Disclosure in Closed Material Proceedings: What Has to be Revealed?' (2019) 24 *Judicial Review* 3, 223 – 242.

[109] *SSHD v AF and another* [2009] UKHL 28, [2010] 2 AC 269, [51] per Lord Phillips.

would have had the opportunity effectively to challenge the case against them.[110] Secondly, in cases where 'all or most of the underlying evidence' remained undisclosed, if the allegations contained in the open material were 'sufficiently specific', this should be sufficient to enable the individual to effectively refute the case against them without 'having to know the detail or sources of the evidence which formed the basis of the allegation'.[111] The ECtHR referred to an individual being provided with an allegation that they had attended a terrorist training camp at a 'stated location between stated dates' as an example of the required specificity of allegation such that an individual could provide exonerating evidence to effectively defend their position.[112] Lastly, and importantly for the analysis to come, the ECtHR emphasised that where the open material 'consisted purely of general assertions' and the relevant decision was based 'solely to a decisive degree on closed material', the requirements of procedural fairness would not be satisfied.

3.3. Protection of Article 6 Rights in TPIM Cases in Practice

Let us move to the main body of analysis in this chapter, which is an examination of the protection of article 6 rights in TPIM cases in practice. As

[110] *A and Others v UK* (2009) 49 EHRR 29, para 20.

[111] Ibid.

[112] Ibid.

stated in Chapter One, the principal argument of this chapter is that article 6 rights are not adequately protected in TPIM cases. This is due to the treatment of *MB* and *AF (No 3)* principles in such cases.

3.3.1. Retreat from the *MB* principle

The first feature of TPIM proceedings in practice, which has resulted in article 6 rights not being adequately protected, is that the courts in recent years have retreated from the *MB* principle. In recent TPIM cases, judges have increasingly interpreted their role as one which is required to carry out a rationality rather than an independent review of the Secretary of State's case. This shift in approach followed a statutory amendment to the TPIM regimes by CTSA, which amended Condition A from the Secretary of State must 'reasonably believe' an individual is engaged in terrorism-related activity to the Secretary of State must be 'satisfied, on the balance of probabilities'.[113] Notably, it is not clear why a change in TPIM jurisprudence would follow this amendment, as it sets more stringent conditions for the Secretary of State to meet in order to impose TPIMs.

[113] CTSA, s 20.

This altered judicial approach to TPIMs was first established in *EB.*[114] In this case, Mitting J emphasised that the court is not the 'primary fact-finder' and that courts were only entitled to quash the Secretary of State's decision if they were:

> 'satisfied either that she did not decide on the balance of probabilities that the individual is or has been involved in terrorism-related activities' or that her decision was 'irrational or took into account matters which she should not have taken into account or failed to take into account matters which she should have taken into account'.[115]

Mitting J added that the Secretary of State's decision 'is in principle susceptible to review' if based on 'an established potentially determinative mistake of fact'.[116] In referring to a 'mistake of fact', Mitting J referred to the Court of Appeal judgment in *E*, which established that a 'mistake of fact' was a separate head of challenge in an appeal on a point of law giving rise to unfairness.[117] However, Mitting J did not refer to *MB* in articulating this approach.

[114] *SSHD v EB* [2016] EWHC 1970 (Admin); [2016] 7 WLUK 858.

[115] Ibid, [9].

[116] Ibid.

[117] *E v SSHD* [2004] EWCA Civ 49; [2004] QB 1044, [66].

MB's 'objective' approach to questions of threat posed by individuals to national security was not taken up again in *EC*. [118] The judge, Collins J, held that the applicant's decision that Condition A was and continued to be met could 'only be overturned if, applying the *Wednesbury* test' it could not be supported.[119] Collins J further articulated the circumstances in which the Secretary of State's decision could be overturned as being limited to 'failure to have regard to matters that should have been taken into account or having regard to matters which should not have been taken into account' and 'if the decision was one which could not reasonably have been made'.[120] Collins J added that a decision which based on a 'particularly determinative error of fact' may also constitute grounds for quashing the Secretary of State's decision.[121] Collins J made no mention of the *MB* principle.

The approach established in *EC* and *EB* was followed in *LG*,[122] and *LF*.[123] In *LG*, Nicol J cited Mitting J's statement in *EC* as well as Collins J's reference to *Wednesbury* review and stated that it may not be legally necessary for judges to form their own decision on whether the relevant individual had been engaging in terrorism-related activity.[124] Nicol J stated 'it was not necessary

[118] *SSHD v EC* [2017] EWHC 795 (Admin); [2017] 4 WLUK 240.

[119] Ibid, [7].

[120] Ibid.

[121] Ibid.

[122] *SSHD v LG* [2017] EWHC 1529 (Admin); [2017] 6 WLUK 666.

[123] *SSHD v LF* [2017] EWHC 2685 (Admin); [2017] 10 WLUK 702.

[124] *SSHD v LG* [2017] EWHC 1529 (Admin), [2017] 6 WLUK 666, [39] – [46].

for the SSHD, and it is not necessary…[for the judge in this case]…to make more specific findings of fact as to the precise nature of any terrorism-related activity in which a Respondent is or was involved'.[125] A similar approach was taken by Laing J in *LF*,[126] and Nicol J's ruling was expressly cited as the approach to be taken with respect to Condition A and Condition B in *JM*.[127]

A theme in these cases is that while the judges stated they were only required to impose a rationality review of the Secretary of State's decision, they nonetheless decided to make their own independent assessment of the Secretary of State's case. In *EB*, Mitting J stated that 'it would be desirable, even if not legally necessary' to satisfy himself 'on the balance of probabilities, whether or not' EB had been involved in terrorism-related activity and, moreover, having done so, to compare his decision and the material underlying it with the decisions and material underlying the decision of the Secretary of State.[128] In *LG*, Nicol J opted to make his own assessment as to whether the relevant individual had engaged in terrorism-related activity, following the approach of Mitting J.[129] This method was also adopted by Laing J in *LF*.[130]

[125] Ibid, [44].

[126] *SSHD v LF* [2017] EWHC 2685 (Admin); [2017] 10 WLUK 702.

[127] *SSHD v JM, LF* [2021] EWHC 266, [2021] 2 WLUK 151, [21].

[128] *SSHD v EB* [2016] EWHC 1970 (Admin), [2016] 7 WLUK 858, [10].

[129] *SSHD v LG* [2017] EWHC 1529 (Admin), [2017] 6 WLUK 666, [42].

[130] *SSHD v LF* [2017] EWHC 2685 (Admin), [2017] 10 WLUK 702.

While judges opted to provide their own assessment in these cases, the position they established is still problematic from the perspective of ensuring that independent review is carried out and article 6 requirements are complied with. First, the position frames the protection provided by independent assessment as an act of judicial charity rather than the minimum protection which is required in order to protect article 6 rights. Second, the position effectively reverses the established requirements of *MB*, with no explicit acknowledgement that this is what has been done. This decision is not accompanied by any reasoning or justification, or engagement with the significance of this change in approach.

Thirdly, and most importantly, that independent assessment is referred to as matter of discretion means that there can be no guarantees that article 6 rights will be protected in future TPIM cases. It is true that there is one recent TPIM case in the form of *QT*, in which *MB* was cited and correctly applied.[131] However in the majority of cases since *EC*, the idea that judges are not legally required to move beyond a rationality review has been noted and upheld. Moreover, notably, no independent assessment was made in *EC.* Therefore, there can be no certainty that such an assessment will be carried out in the future.[132]

[131] *SSHD v QT* [2019] EWHC 2583 (Admin); [2019] 10 WLUK 844, [88].

[132] *SSHD v EC* [2017] EWHC 795 (Admin); [2017] 4 WLUK 240.

3.3.2. Inappropriate application of *AF (No 3)* principle

A second feature of TPIM proceedings undermining article 6 rights is the failure in many TPIM cases to properly apply the *AF (No 3)* principle.[133] Before we explore this, it is acknowledged applying the principle is not a straightforward task.[134] What may be disclosed based on the principle is a matter of interpretation and is case-specific. Nonetheless, it will be shown that even when exercising a cautious approach to assessing the TPIM cases, there is a significant problem of judges avoiding reasoned engagement with the *AF (No 3)* principle in TPIM rulings.

In some rulings, there is evidence to suggest that judges are misinterpreting the principle and its purpose. Taking such an approach is particularly inappropriate in light of the importance of the principle for protecting procedural fairness and article 6 rights. Lord Bingham highlighted this importance in *AF (No 1)*,[135] and *AF (No 3)*.[136] He reasoned that the principle could only be evaded in the case that the UK Government had instituted an official derogation from article 6 ECHR. Where the principle is evaded, not only

[133] See also David Kelman, 'Closed Trials and Secret Allegations: An Analysis of the Gisting Requirement' (2016) 80 (4) *Journal of Criminal Law* 264 – 277.

[134] The difficulties inherent in judging appropriate disclosure when applying *AF (No 3)* has been set out in detail in John Jackson, 'Justice, Security and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?' (2013) *PL* 720 – 736. Moreover, the difficulties and lack of clarity surrounding non-*AF (No 3)* disclosure with respect to JSA CMPs has been set out in Lewis Graham, 'Statutory Secret Trials: The Judicial Approach to Closed Material Procedures under the Justice and Security Act' (2019) 38 *Civil Justice Quarterly* 2, 189 – 211.

[135] *SSHD v MB and AF* [2007] UKHL 46; [2008] 1 AC 440, [43] per Lord Bingham.

[136] *SSHD v AF & Anor [*2009] UKHL 28, [2010]2 AC 269, [12] per Lord Phillips.

does this result in TPIM proceedings being unfair. It also ends up leaving review of the facts to be carried out in closed proceedings, where Special Advocates are usually unable to submit any factual evidence, as discussed in Chapter Two.[137] Therefore, another consequence of *AF (No 3)* not being applied in its full form is that it confines the standard of review that can be applied in closed to a form of rationality review.

Moving to the main analysis, since TPIMA was passed there have been fourteen judgments published, containing nineteen overall 'full' reviews of the imposition of TPIMs.[138] These reviews concern fifteen individuals.[139] A full review here refers to a review of a decision of the Secretary of State that the relevant conditions were met and continue to be met in relation to a TPIM, which may be carried out in a review of a TPIM under TPIMA, section 9, or an

[137] Chapter Two, 134 - 137.

[138] These are full reviews of TPIMs in relation to the following individuals: 'BM' (*BM v SSHD* [2012] EWHC 714 (Admin); [2012] 1 WLR 2734); 'BF' (there are two substantive reviews of TPIMs imposed on this individual - *SSHD v BF* [2012] EWHC 1718 (Admin); [2012] 6 WLUK 551 and *BF v SSHD* [2013] EWHC 2329 (Admin); [2013] 7 WLUK 934); 'AM' (*SSHD v AM* [2012] EWHC 1854 (Admin); [2012] 7 WLUK 162); 'AY' (*SSHD v AY* [2012] EWHC 2054 (Admin); [2012] 7 WLUK 582); 'C'/'CC'/'Mohamed Ahmed Mohamed' (*SSHD Department v CC* [2012] EWHC 2837 (Admin); [2013] 1 WLR 2171, note there was also an appeal of the High Court's ruling heard by the Court of Appeal, but this was largely related to a procedural matter concerning the scope of the *AF (No 3)* principle and the substantive review of the TPIM was remitted back to the High Court, therefore it has not been counted as a substantive review in this context. See *CC v SSHD* [2014] EWCA Civ 559; [2014] 1 WLR 4240); 'F' (*SSHD v CC* [2012] EWHC 2837 (Admin); [2013] 1 WLR 2171, *CF v SSHD* [2013] EWHC 843 (Admin); [2013] 4 WLUK 228); 'CD' (*SSHD v CD* [2012] EWHC 3026 (Admin); [2012] 11 WLUK 73); 'D'/'DD' (*D v SSHD* [2014] EWHC 3820 (Admin); [2015] 1 WLR 2217, *DD v SSHD* [2015] EWHC 1681 (Admin); [2015] 6 WLUK 650); 'EB' (*SSHD v EB* [2016] EWHC 1970 (Admin); [2016] 7 WLUK 858); 'EC' (*SSHD v EC* [2017] EWHC 795 (Admin); [2017] 4 WLUK 240); 'EG' (*SSHD v EC* [2017] EWHC 795 (Admin); [2017] 4 WLUK 240); 'LG' (*SSHD v LG* [2017] EWHC 1529 (Admin); [2017] 6 WLUK 666); IM (*SSHD v LG* [2017] EWHC 1529 (Admin); [2017] 6 WLUK 666), 'JM' (*SSHD v LG* [2017] EWHC 1529 (Admin) ; [2017] 6 WLUK 666), *SSHD v JM, LF* [2021] EWHC 266 (Admin); [2021] 2 WLUK 151); 'LF' (*SSHD v LF* [2017] EWHC 2685 (Admin), *SSHD v JM, LF* [2021] EWHC (Admin); [2021] 2 WLUK 151); 'QT' (*SSHD v QT* [2019] EWHC 2583 (Admin); [2019] 10 WLK 844).

[139] 'BM', 'BF", 'AM', 'AY', 'C'/'CC', 'F', 'CD', 'D'/'DD', 'EB', 'EC', 'LG', 'IM', 'JM', 'LF', 'QT'.

appeal brought with respect of a TPIM, brought under TPIMA, section 16. It does not refer to the review carried out during the prior permission stage of judicial scrutiny, under the authority of TPIMA, section 6. The majority of rulings relate to reviews of TPIMs rather than appeals of modification decisions,[140] and one case considers both a review and an appeal of a TPIM in one ruling.[141] In one of the cases containing full reviews, that of *D*, the closed evidence in the case was held to be inadmissible due to timetabling issues related to disclosure.[142] Therefore, this case is not considered in relation to disclosure.

The analysis below introduces a number of categories for the approach taken to disclosure in TPIM cases, summarised in Figure One on the next page. Notably, these categories are not mutually exclusive - some of the substantive reviews listed involved more than one type of approach to disclosure. For example, the approach to disclosure in the full review of AY's case stated that the conclusions drawn were based on the open material in the case, and so was 'open-focused', but also emphasised there had been a large amount of disclosure in the case and so included an 'alternative disclosure assessment'.[143] Moreover, there might be unreported rulings on *AF (No 3)* disclosure not captured below.

[140] *BF v SSHD* [2013] EWHC 2329 (Admin) and *DD v SSHD* [2015] EWHC 1681 (Admin) are appeals.

[141] *SSHD v EB* [2016] EWHC 1970 (Admin).

[142] The judgment is described as engaging in a 'preliminary issue' considering whether the impact of the TPIM on 'D's' mental health constituted a violation of his article 3 rights, however a review of the national security case for the imposition of the TPIM is included in this analysis so it has been included as a full review as has the subsequent ruling made on this issue in *DD v SSHD* [2015] EWHC 1681 (Admin); [2015] 6 WLUK 650.

[143] *SSHD v AY* [2012] EWHC 2054 (Admin); [2012] 7 WLUK 582.

The analysis that follows is drawn from reported judicial reasoning upholding TPIMs. The *AF (No 3)* assessment must be ongoing and therefore be reconsidered at the point at which the judge makes his or her decision on the legality of the TPIM. At this point, the judge will have seen all closed evidence and know what evidence is determinative to their decision. One would therefore expect reasons at this stage even if there was a prior *AF (No 3)* ruling unreported.

Figure 1: Table of approaches to *AF (No 3)* disclosure in TPIM cases

Approach to disclosure		**Features**	**Substantive reviews**[144]
AF (No 3) assessment included in ruling	Reasoned application of *AF (No 3)*	Accurate disclosure assessment	*EB*, *LF*
		Accompanied by reasons	
	Proper application of *AF (No 3)*	Accurate disclosure assessment	*CD*, *BM*
No proper *AF (No 3)* assessment included in ruling	Open-focused reasoning	Emphasis on conclusions having been drawn from open material	*DD*, *AY*, *LF*
	Alternative disclosure assessment	Assessment of disclosure by reference to volume	*AY*, *DD*, *JM*, *LF*
		Assessment of disclosure by reference to whether closed evidence was decisive	
	Explicit contradiction of *AF (No 3)*	Reference to determinative conclusions having been drawn on closed material	*EC*, *EG*
	No disclosure assessment	No assessment made of the level or type of disclosure	*BF*, *BF (No 2)*, *AM*, *LG*, *JM*, *IM*, *QT*, *EC*, *EG*

[144] Full citation of the cases in which these reviews occurred can be found in n 138.

3.3.2.1 *AF (No 3)* assessment included in ruling

An assessment as to whether the *AF (No 3)* test has been met is included in the judgments of three substantive reviews in TPIM cases.[145] These reviews fall into two categories as presented below.

i. Reasoned application of *AF (No 3)*

The first type of approach to disclosure in TPIM cases is the 'reasoned application' of the *AF (No 3)* principle. This approach involves a review which not only accurately described the *AF (No 3)* assessment (i.e., that there had been sufficient disclosure for the relevant individual to provide effective instructions to refute allegations made against them), but also reasoning was provided as to the basis upon which this assessment was made.

A reasoned application of *AF (No 3)* was provided in two substantive TPIM reviews, in the case of *EB*[146] and *LF.*[147] *EB* was alleged to have been engaged in terrorism-related activity by the Secretary of State in the form of travelling to Syria to engage in terrorist training and planning a terrorist attack in the

[145] 'EB' *SSHD v EB* [2016] EWHC 1970; (Admin)); 'CD' (*SSHD v CD* [2012] EWHC 3026 (Admin)); 'BM' (*BM v SSHD* [2012] EWHC 714 (Admin).

[146] *SSHD v EB* [2016] EWHC 1970; [2016] 7 WLUK 858.

[147] *SSHD v JM, LF* [2021] EWHC 266 (Admin); [2021] 2 WLUK 151.

UK.[148] The consideration of *AF (No 3)* disclosure is contained in the following section from the case:

> 'Although EB has not had disclosed to him the intelligence and evidential material on the basis of which I have decided that assessment B is made out, he has had sufficient details of the allegations to be able to give effective instructions to the Special Advocates about it and to give and call evidence in support of his account which, if true, might rebut it for example, an account of when and where and under whose auspices he provided help to refugees; and some supporting documentary evidence from the organisation or organisations for which he was working'[149]

Contained within this passage is not only an assessment that there had been sufficient disclosure for the purpose of EB being able to defend his case. The judge also accurately described the purpose of the disclosure in this context, i.e., to be able to rebut the Secretary of State's allegations. The passage also contains examples as to how the information provided might have assisted EB's case - by pointing to the kind of evidence he could have cited to rebut the allegations against him, such as by providing evidence of activity he was engaged in while in Syria. In pointing to such examples, *EB* stands as an exception in TPIM cases. In no other TPIM case is an *AF (No 3)* assessment accompanied by reasoning as to the basis upon which disclosure is considered

[148] *SSHD v EB* [2016] EWHC 1970; [2016] 7 WLUK 858, [12].

[149] Ibid, [45].

sufficient to enable the individual to provide effective instructions to their legal representative.

While *EB* represents the strongest version of the application of *AF (No 3)*, it is still limited. The reasoning provided is brief, presented over one paragraph. Moreover, it is not clear that the judge in this case has said 'as much as can properly be said' about the closed evidence. However, in providing such reasoning when applying the *AF (No 3)* test, *EB* was at least directly responsive to the difficulties the *AF (No 3)* principle is formulated in response to.

A more limited form of reasoned *AF (No 3)* assessment was also made in the recent ruling *JM, LF*.[150] In this case, the principal disclosure assessment the judge made was in rejecting claims by LF's legal representative that *AF (No 3)* disclosure had not been provided. The Secretary of State had justified the unusually frequent reporting requirements attached to LF's TPIM on the basis that during the previous TPIM, LF had engaged with individuals whom he was seeking to radicalise.[151] However, no information was provided in open evidence as to whom such individuals were or when and in what way LF had interacted with them. The judge rejected LF's lawyer's assertion that this undermined the *AF (No 3)* principle. In rejecting this submission, the judge stated that *AF (No 3)* disclosure had been provided because the Secretary of State's case on this issue did not depend 'solely or decisively on closed material'.

[150] *SSHD v JM, LF* [2021] EWHC 266 (Admin); [2021] 2 WLUK 151.

[151] Ibid, [180].

Moreover, there was 'no need for LF to be provided with further material for the purpose of giving instructions to the Special Advocates or for the purpose of rebutting the case against him'.[152]

Notably, not only is this reasoning brief but this description of the *AF (No 3)* principle is lacking. There is no mention that the purpose of *AF (No 3)* disclosure is to ensure the individual can provide *effective* instructions to their representative. Moreover, the closed material does not need to be 'decisive' for a summary to be required, but as demonstrated, the emphasis is on whether the material is 'determinative'. The difference between these two words is of significance from the perspective of disclosure. For the closed evidence to be 'decisive', it must be the evidence representing the crucial factor deciding the case. Whereas determinative evidence is a much looser term and can refer to evidence which contributes to the decision. Therefore, the scope of evidence in relation to which a summary is required is potentially much narrower where the judge considers that it is only 'decisive' evidence which must be included in *AF (No 3)* disclosure. This reasoned application of *AF (No 3)* is therefore much less effective from the perspective of protecting procedural fairness than in the case of *EB.*

[152] Ibid, [183].

ii. Other applications of the *AF (No 3)* principle

There is explicit and accurate reference to the *AF (No 3)* principle in a further two substantive reviews, insofar as the judgments contain an assessment that there had been sufficient disclosure to allow for the respondents to challenge the case. These are *BM*,[153] the first public TPIM ruling, and *CD*.[154] In these rulings, the judges assert that there has been sufficient disclosure for *AF (No 3)* purposes.[155] However, no reasoning is provided as to the basis for this assessment, as was provided in *EB*.[156]

3.3.2.2 No explicit *AF (No 3)* assessment included in ruling

In the remaining full TPIM reviews heard so far - which make up fifteen reviews,[157] considered over twelve judgments[158] and concerning twelve individuals[159] - there is no reference to whether there has been sufficient

[153] *BM v SSHD* [2012] EWHC 714 (Admin); [2012] 1 WLR 2734.

[154] *SSHD v CD* [2012] EWHC 3026 (Admin); [2012] 11 WLUK 73.

[155] Ibid, [14].

[156] *SSHD v EB* [2016] EWHC 1970; [2016] 7 WLUK 858, [45].

[157] 'BF' (*SSHD v BF* [2012] EWHC 1718 (Admin) and *BF v SSHD* [2013] EWHC 2329 (Admin)); 'AM' (*SSHD v AM* [2012] EWHC 1854 (Admin)); 'AY' (*SSHD v AY* [2012] EWHC 2054 (Admin)); 'C'/'CC'/'Mohamed Ahmed Mohamed' (*SSHD v CC* [2012] EWHC 2837 (Admin)); 'F' (*SSHD v CC* [2012] EWHC 2837 (Admin), *CF v SSHD* [2013] EWHC 843 (Admin)); 'D'/'DD' (*DD v SSHD* [2015] EWHC 1681 (Admin)); 'EC' (*SSHD v EC* 2017] EWHC 795 (Admin); 'EG' (*SSHD v EC* 2017] EWHC 795 (Admin)); 'LG' (*SSHD v LG* [2017] EWHC 1529 (Admin); IM (*SSHD v LG* [2017] EWHC 1529 (Admin); 'JM' (*Secretary of State for the Home Department v LG* [2017] EWHC 1529 (Admin); 'JM' (*SSHD v LG* [2017] EWHC 1529 (Admin); 'LF' (*SSHD v LF* [2017] EWHC 2685 (Admin); 'QT' (*SSHD v QT* [2019] EWHC 2583 (Admin)).

[158] The judgments are listed above.

[159] 'BF', 'AM', 'AY', 'C'/'CC', 'F', "D'/'DD', 'EC', 'LG', 'IM', 'JM', 'LF', 'QT'.

disclosure for the purpose of the respondent being able to provide effective instructions to their representatives. There is also no *AF (No 3)* assessment in interlocutory judgments attached to the relevant cases.[160] The significance of this will now be considered in relation to the different categories of alternative disclosure (or non-disclosure) present in these cases.

i. Open-focused reasoning

While there is no explicit *AF (No 3)* assessment in certain TPIM rulings, there are references to the Secretary of State's case having been made out on the open evidence. In *AY* the judge stated that the conclusions in the judgment were based 'solely on the open evidence'.[161] In *LF*, the reasoning stated that there was 'additional support in the closed material' for the conclusions reached in the open judgment, however the conclusions were 'based wholly on the open material'.[162]

ii. Alternative disclosure assessment

In other TPIM reviews, while there is no explicit *AF (No 3)* assessment, there are references to disclosure. However, there are references to the *volume* of

[160] *BF Re* [2012] EWHC 2125 (Admin), *SSHD v CC & CF* [2012] EWHC 2837 (Admin), *D v SSHD* [2014] EWHC 3820 (Admin), *SSHD v M* [2017] EWHC 376 (Admin), *SSHD v CC* [2012] EWHC 1732 (Admin).

[161] Ibid, [45].

[162] Ibid, [3].

disclosure, rather than the extent there was disclosure which would assist the respondents in providing instructions to their representatives.[163] I borrow this phrase from David Kelman who has made a forceful case that some judges (in control order and TPIM cases) have misinterpreted the requirements of *AF (No 3)* as imposing a 'volume requirement'.[164] This is in contrast to a requirement that open material is relevant to the closed material which is determinative in a case for the purpose of the individual providing effective instructions. A good example is *DD*, in which the only assessment of disclosure provided was that the Government's open statements gave the appellant 'very considerable detail of the material relied on against him'.[165] A similar assessment was provided in *AY*, in which the judge merely refers to 'considerable disclosure' provided in the case.[166]

An assessment of the volume of disclosure is not the same as making an *AF (No 3)* assessment, which assesses whether disclosure has been sufficient for the purpose of enabling effective challenge of determinative points in the Government's closed case. The importance of there being a direct link between the disclosure and the specific core of determinative allegations against an individual has been clarified in the Court of Appeal ruling in *AT*.[167] This was

[163] David Kelman, 'Closed Trials and Secret Allegations: An Analysis of the Gisting Requirement' (2016) 80 (4) *Journal of Criminal Law* 264 – 277.

[164] *DD v SSHD* [2015] EWHC 1681 (Admin), *SSHD v AY* [2012] EWHC 2054 (Admin).

[165] *DD v SSHD* [2015] EWHC 1681 (Admin); [2015] 6 WLUK 650, [19].

[166] *SSHD v AY* [2012] EWHC 2054 (Admin); [2012] 7 WLUK 582, [123].

[167] *SSHD v AT* [2012] EWCA Civ 42. David Kelman, 'Closed Trials and secret allegations: An Analysis of the Gisting Requirement' (2016) 80 (4) *Journal of Criminal Law* 264 – 277.

an appeal of a control order review by the High Court, which was allowed on the basis that the open material provided had been insufficiently specific, and there was not a clear link between the material which had been disclosed and the material which must have been determinative in the case.[168] Thus, those cases which merely refer to the volume of disclosure, without making an assessment as to whether there has been sufficient disclosure of the material which is determinative of the case, are not in fact applying the *AF (No 3)* principle but making a different form of assessment regarding disclosure.

iii. Explicit contradiction of *AF (No 3)*

In *EC*, there is no reference to or evidence of any disclosure despite the closed evidence being determinative in the court's reasoning.[169] *EC* concerns the lawfulness of the imposition of TPIM on two men, referred to as 'EC' and 'EG'. Both EC and EG were alleged to have been planning to carry out a terrorist attack inspired by the murder of Fusilier Lee Rigby. However, the Government had not secured a criminal conviction against the men. The Secretary of State had applied to impose a TPIM on the men in the case that convictions were not secured in their retrial. It was found that the imposition of the TPIMs on EC and EG were lawful. In making this ruling, Mr Justice Collins, made no reference to the *AF (No 3)* principle. The ruling included no assessment as to

[168] Ibid, [51].

[169] Decided in the single judgment of *SSHD v EC* [2017] EWHC 795 (Admin); [2017] 4 WLUK 240.

whether the non-governmental parties to the case had received sufficient disclosure for the purpose of making effective instructions. Moreover, it stated that in forming an assessment on the imposition of the TPIM, Mr Justice Collins was 'provided with material' dealt with in his closed judgment and which had 'not been disclosed' to EC and EG and which the judge had taken 'into account' in reaching his decision.[170] Thus, the judge here appears to have been open about taking into account evidence which was closed and in relation to which no gist had been provided to EC and EG, contradicting the requirements of *AF (No 3)*.

iv. No disclosure assessment

Almost half of substantive rulings regarding TPIM judgments do not state whether there has been sufficient disclosure in any sense.[171] In certain cases there is reference to disclosure, but no articulation as to what kind of disclosure had been provided. In *QT* there are a number of references to national security statements provided by the Secretary of State and the Security Service, referred to as the 'OPEN case' against QT.[172] However, no information regarding the relationship between these statements and the closed evidence is provided, or the relationship between these statements and the case against

[170] Ibid, [10].

[171] *BF*, *AM*, *LG*, *QT*, *BF (No 2)*.

[172] *SSHD v QT* [2019] EWHC 2583 (Admin), [2019] 10 WLK 844, [25].

QT as a whole. Moreover, it is not clear whether the statements are a 'gist' in the sense of being evidence provided to protect QT's article 6 rights.

3.3.2.3 Impact of these varied approaches on procedural fairness

With the exception of the first category of cases, in which there is reasoned application of the *AF (No 3)* principle, each approach described has the effect of undermining procedural fairness in TPIM proceedings. Even in cases where an *AF (No 3)* assessment has been provided without any accompanying reasoning, this approach diminishes procedural fairness in the case. As a result, procedural fairness meant to be preserved by the *AF (No 3)* principle is lost in the majority of TPIM cases.

A lack of reasoning accompanying an *AF (No 3)* assessment creates a number of problems from the perspective of ensuring procedural fairness. The first problem it raises is that without such reasoning, the non-governmental party will not know the extent to which the *AF (No 3)* principle has been considered and the reasoning for not receiving further information. This is a serious issue as without being made aware of the reasoning underpinning a lack of disclosure, the non-governmental party will not be in a position to challenge it. Moreover, the Special Advocate may also feel unable to challenge the decision, due to not being able to communicate with the non-governmental party, after going into closed as highlighted in Chapter Two, to assess how such a challenge

would interact with the party's overall litigation strategy.[173] A lack of reasoning in this context also restricts the prospect of a challenge to be made at the level of the Strasbourg Court. As we know, the Court is unable to examine closed material and so can only determine such appeals on the basis of open reasoning. Moreover, the lack of ability to challenge *AF (No 3)* rulings in this way is particularly problematic in the context of gisting, which involves guesswork on the part of judges. Judges are required to make a judgment as to which of the UK Government's closed allegations may be determinative, to assess whether the summary of closed material is adequate or not. This involves the judge having to determine this without the evidence having been subject to challenge in open proceedings.

The second, related, problem is that due to the inability of the non-governmental party to challenge the application of the *AF (No 3)* principle, there is no concrete means to ensure proper compliance with it. Yet, compliance with the principle is crucial as it is the only means of guaranteeing that factual evidence is not completely shielded in closed proceedings. Where evidence is presented in closed, in practice it most often cannot be challenged with alternative factual evidence. This is due to the fact that it can only be challenged by the Special Advocate, who cannot ask for evidence from the individual once closed evidence has been examined. As a result, this shielding leads to a form of rationality review by the backdoor.[174] As has been forcefully

[173] Chapter Two, 134 – 137.

[174] Ibid.

expressed by Sedley LJ, in proceedings which eventually led to the *AF (No 3)* ruling, without hearing both sides of an argument in relation to evidence, it can be impossible to know the significance of the material itself.[175] The structure of the legal system in the UK reflects this view insofar as it is - at its heart - an adversarial system. This view has also been expressed in strong terms by Lord Kerr in *Al-Rawi*. [176] In this opinion, Lord Kerr clarified that evidence which is shielded from challenge may 'positively mislead' a judge in arriving at a fair assessment of the legal matter at hand.[177] This statement highlights the manner in which the accuracy of judicial perceptions of the truth of an allegation is highly dependent on the ability of judges to consider evidence which has been subject to challenge by both sides of a case.

The uncertainty created by a lack of compliance with *AF (No 3)* is enhanced in light of the subject matter grappled with in the TPIM context. Any argument making a serious case as to the reasonable belief of an individual having been involved in terrorism-related activity will be built on the basis of a complex matrix of facts regarding the individual, and potentially many other factors, that will hang together in a number of overlapping ways. It may not be possible to predict with any certainty which, if any, facts may or may not be established. This is in a manner analogous to Fuller's account of 'polycentricity', whereby some policy decisions may affect so many people in different interconnected

[175] *SSHD v AF and others* [2008] EWCA Civ 1148; [2009] 2 WLR 423, [113].

[176] *Al-Rawi and others v Security Service and others* [2011] UKSC 34; [2012] 1 AC 531.

[177] Ibid, [93].

ways that it is impossible for a judge to predict in advance what impact a ruling on that policy may have.[178] Moreover, as Sedley LJ has emphasised, those facts which may be considered to form a solid strong part of a case can fall apart in a matter of minutes when subject to adversarial challenge.[179] It may well be that with certain factual allegations ruled out, the most significant elements of the Secretary of State's case changes entirely. Thus, if the *AF (No 3)* principle is not properly applied, this will have potentially dramatic consequences for the individual's ability to challenge the Government's case.

The second, related, problem is that the lack of reasoning included in these cases precludes judges in future TPIM cases being provided with important guidance to improve the application of *AF (No 3)*. Such reasoning could serve as a crucial guide for navigating the difficult task of applying the *AF (No 3)* principle in practice. Such difficulty was acknowledged in the *AF (No 3)* case itself. Lady Hale highlighted that while the principle was clear, it would be 'by no means easy to apply in particular cases'[180] and would leave judges having to 'grapple with precisely how much disclosure is necessary to enable the controlled person to mount an effective charge'.[181]

[178] Lon Fuller, 'The Form and Limits of Adjudication' (1978 – 79) 92 *Harvard Law Review* 353.

[179] *SSHD v AF and others* [2008] EWCA Civ 1148; [2009] 2 WLR 423, [113].

[180] *SSHD v AF and another* [2009] UKHL 28; [2010] 2 AC 269, [106] per Baroness Hale.

[181] Ibid.

The third problem with this approach is that it also undermines open justice, which requires that judicial decision-making is public in order that judges themselves may be subject to scrutiny.[182] Without reasoning being attached to an *AF (No 3)* assessment, the assessment cannot be publicly held up to scrutiny. This lack of reasoning is also hard to reconcile with the general adjudicative duty to 'give reasons',[183] which courts have explicitly emphasised are applicable to decisions concerning procedural fairness.[184]

Open-focused reasoning also raises issues of procedural fairness in TPIM proceedings. As set out above, in some TPIM cases, judges have not included a disclosure assessment but have emphasised that their decision was based on the evidence provided in open proceedings. In *AY*, the judge did not explicitly refer to *AF (No 3)*, but stated that the conclusions in the judgment were based 'solely on the open evidence'.[185] In *LF*, the reasoning stated that there was 'additional support in the closed material' for the conclusions reached in the open judgment, however, the conclusions were 'based wholly on the open

[182] Open justice is the principle that 'judicial processes should open to public scrutiny', *Kennedy v The Charity Commission* [2014] UKSC 20; [2015] AC 455, [110]. See also *Scott v Scott* [1913] AC 417; [1913] AC 417, which famously stated that '[i]n a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal pro-cess. Open justice lets in the light and allows the public to scrutinise the workings of the law'.

[183] *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, [2000] 1 All ER 373, 381 B, which stated that 'today's professional judge owes a general duty to give reasons'.

[184] *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71; [2017] 1 WLR 3765, [14].

[185] Ibid, [45].

material'.[186] The manner in which the reasoning in these cases downplays the role of closed material is suspect from the perspective of the application of *AF (No 3).* The lack of acknowledgement of *AF (No 3)*, in combination with an emphasis that the closed material was not determinative in the case, suggests that the 'makes no difference' principle has been applied in such cases.

The 'makes no difference' principle states that disclosure to a party may be avoided in cases where it is considered by a court to 'make no difference' to that party's case.[187] Therefore, for example, in a case where a judge considers that the disclosure of information will not assist a party as the open case against them is so strong, the 'makes no difference' principle might be applied. Applying the principle in judging the adequacy of *AF (No 3)* disclosure would be inappropriate as the application of the principle was denounced in the *AF (No 3)* ruling itself.[188] The principle is problematic as it assumes that the impact of evidence can be determined prior to being subject to adversarial testing.[189] It also misses an important feature of procedural rights, which relates not to their instrumental value but their symbolic importance from the perspective of respecting an individual's dignity.[190] If the principle had been applied in *AY* and *LF*, and, admittedly, this is not clear due to the lack of discussion of

[186] Ibid, [3].

[187] *SSHD v AF and another* [2009] UKHL 28, [2010] 2 AC 269, [19] per Lord Phillips.

[188] Ibid, in particular [62] – [64] per Lord Phillips.

[189] In manner similar to the decision-making process described by Sedley LG in *SSHD v AF and others* [2008] EWCA Civ 1148; [2009] 2 WLR 423, [113].

[190] Conor Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83 *MLR* 6.

disclosure in both cases, then this would be inappropriate for the reasons just mentioned. Moreover, the lack of clarity about whether the 'makes no difference' principle was applied in itself undermines procedural fairness by undermining legal certainty. The way such uncertainty undermines procedural unfairness is discussed in more detail below.

It is true that the lack of reference to both the *AF (No 3)* principle and disclosure does not mean the judge did not apply it. It is most likely the judge considered the issue to be merely procedural, in the sense of being more suitably considered in a directions hearing rather than a judgment considering the lawfulness of a TPIM. This argument is particularly supported by the ruling in *QT*, which, as mentioned, contains several summaries of information provided in the form 'Open National Security Statements' issued by the Secretary of State.[191] Such statements are referred to in other cases which contain no assessment of disclosure.[192]

While the lack of reference of *AF (No 3)* should not be considered evidence that the principle was not applied, this does not mean the lack of reference here is not problematic. First, without an explicit assessment by the court as to whether there was sufficient disclosure in a case, there is no way of being certain that the principle was applied – as we have no access to closed material

[191] Ibid.

[192] For example, see *SSHD v BF* [2012] EWHC 1718 (Admin); [2012] 6 WLUK 551, [29].

and are therefore unable to make an assessment about the relationship of the disclosed material with the Secretary of State's case in closed. It is precisely due to this uncertainty that an explicit assessment by a judge is necessary in TPIM cases.

To the extent we can assume that the relevant reasoning on *AF (No 3)* was reported, the idea that judges in TPIM cases would consider *AF (No 3)* to be not necessary to consider in an open judgment suggests a lack of close reading in the previous case law governing the principle. The need for *AF (No 3)* disclosure is expressly discussed and assessed in the first TPIM case, setting out the general approach to TPIMs, in *BM*.[193] This approach is also hard to reconcile with Lord Neuberger's direction in *Bank Mellat* that judges should also say 'as much as can properly be said' about the closed material relied on as those excluded from the proceedings 'should know as much as possible' about the court's reasoning and the evidence it is based on.[194]

In at least a one of these cases, it is clear from the reasoning provided that the *AF (No 3)* was not applied in any meaningful form. This is the case in *BF (No 1)*, concerning the extension of a TPIM on BF.[195] BF previously had a control order imposed on him in 2009, due to suspicion that he had been engaged in

[193] *BM v SSHD* [2012] EWHC 714 (Admin); [2012] 1 WLR 2734.

[194] Ibid.

[195] *SSHD v BF* [2012] EWHC 1718 (Admin); [2012] 6 WLUK 551.

terrorism-related activities which were unspecified in the TPIM judgment.[196] BF has also been charged with criminal offences relation to terrorism but had been acquitted. At this point a second control order was imposed on him, which was then replaced with a TPIM.[197] The TPIM had been imposed principally on the basis that he had travelled to Pakistan in 2009 'when others known to him, properly assessed as linked to terrorism-related activities were also there'.[198] A 'highly incriminating' letter was also found in his bag at his residence in 2009, written to his family saying he had to 'go for the sake of Allah' and asking their forgiveness.[199] In proceedings to determine whether BF's TPIM should be extended, there were two sets of disclosures in the case, neither of which conformed to the requirements of *AF (No 3)*. The first was the initial disclosure of the gist that was provided to BF regarding the case against him in closed proceedings.[200] The Secretary of State's position was summarised as follows:

> 'a) BF is a long-term, committed and historically well-connected extremist and his close associates continue to be involved in ongoing extremist activities;
>
> (b) BF maintains a desire to travel overseas and he would seek to travel after restrictions are removed and he would seek to engage in terrorist-related activities;

[196] Ibid, [1].

[197] Ibid.

[198] Ibid, [15].

[199] Ibid.

[200] Ibid, [18].

(c) His second wife V is likely to encourage BF to conduct terrorist activities overseas in the light of her mindset; and

(d) Given the activities of his "close extremist associates, BF would seek to engage in terrorism related activity overseas. One possible destination would be Syria'[201]

Even at the outset, such statements resemble the 'general assertions', the ECtHR had described as undermining procedural fairness in *AF (No 3)*, and which won AT his appeal in 2012.[202] In this statement we are given no information as to the basis for the assertions made in the first three statements. There is no information given which supports the assessment that the Government considers that BF maintains a 'desire to travel overseas'. As to the last statement, although some justification is provided for its main assertion - the Government justifies its position that BF would seek to engage in terrorism- related activity overseas on the basis of the activities of 'close extremist associates' of BF. However, no information is given as to identity of these associates and on what basis they were considered extremist.

Following this disclosure, BF requested further disclosure to identify the individuals he was accused of associating with who were extremists. The Secretary of State issued an 'Amended Extension Statement' referring to an individual, 'A', whom BF was said to be associated with, but the Secretary of

[201] Ibid.

[202] *SSHD v AT* [2012] EWCA Civ 42; [2012] 2 WLUK 195.

State did not allege was engaged in terrorism-related activity with BF.[203] A request for more information than the reference to 'A' was refused by the Secretary of State. BF's legal representative stated that this failure of the Secretary of State to give further details prevented 'sensible submissions from BF's Open advocate'.[204] In response the judge stated he did not place 'decisive weight on any other current association or associations' in his closed judgment. This formed part of his assessment that the Secretary of State was entitled to reasonably consider it was necessary for purposes connected with protecting the public of terrorism to impose a TPIM on BF (i.e., that Condition C was met).[205]

The resolution of an absence of disclosure in this way is lacking for several reasons. First, it is not clear that the statutory safeguards to be applied when the Secretary of State refuses to provide sufficient disclosure were in fact applied. The statutory framework governing TPIM proceedings states that the judge must not consider the evidence in this context as the court is required to 'direct' that the Government is not to rely on that evidence or to 'make concessions or take other steps as the court may specify'.[206] There is no reference to either of these options having been taken, despite the judgment noting the objection of BF's lawyers. Moreover, the judge expressly stated he

[203] *SSHD v BF* [2012] EWHC 1718 (Admin); [2012] EWHC 1718, [27].

[204] Ibid.

[205] Ibid, [37].

[206] TPIMA, Schedule Four, para 4, ss (2) & (3).

would not give the relevant evidence 'decisive' weight as opposed to no weight at all. As discussed above, not placing decisive weight on evidence is compatible with a judge placing significant weight on it. Indeed, an analysis of the additional evidence considered by the judge in forming his conclusion that Condition C was met, supports the idea that this is what occurred with respect to BF. The overall assessment by the judge is thin, based on observations principally drawn from previous judicial assessments considering the imposition of a control order on BF in previous year.[207] The additional evidence the judge considered was vague, focused on the fact that BF made no response to allegations that he and his wife hold extremist views[208] and a basic assessment by the SIAs that BF would travel abroad to engage in terrorism-related activities were a TPIM not imposed on him.[209]

Even if the Secretary of State had applied the statutory framework fully, this would still be a problematic response. The statutory framework governing disclosure in TPIM cases is lacking insofar as it frames the application of *AF (No 3)* in a manner which is ambiguous and could be read as voluntary.[210] The framework is in this way flawed insofar as it is misleading – the application of

[207] *SSHD v BF* [2012] EWHC 1718 (Admin); [2012]6 WLUK 551, [30] – [31].

[208] Ibid, [34] – [35].

[209] Ibid, [38].

[210] The rules governing closed material in TPIMs cases state that if permission is granted for closed proceedings, then the court 'must consider requiring the Secretary of State to provide a summary of the material to every party to the proceedings' There are also rules in places allowing for the Secretary of State to refuse requests for disclosure. TPIMA, Schedule Four, para 4.

AF (No 3) is not voluntary (while the decision as to whether to disclose information in accordance with the *AF (No 3)* principle is voluntary).

The communication that the judge would choose not to give the closed evidence with regards to BF's associations decisive weight stands as a concession that the evidence was part of the core of the Secretary of State's allegations against BF, and that there had not been sufficient disclosure for BF to effectively refute such allegations. However, contrary to the impression given by the statutory framework governing TPIM cases, the application of the principle is not voluntary but a requirement of article 6 ECHR. It is on these grounds that the judge would have been able to order disclosure from the Secretary of State. However, this was not done, thus leaving BF's article 6 rights having been violated. Moreover, the impact of the judge's decision on BF's rights was not acknowledged in the ruling, and without BF having gone to appeal (and indeed having the resources to bring the case to the Court of Appeal), there was no chance of BF receiving justice. Given the observations in this chapter regarding the application of the *AF (No 3)* principle in this way, one might expect to see several appeals on the scope of this principle. However, there are very few appeals in control order and TPIM cases since *AF (No 3)*.

i. The standard of review in TPIM cases

The judicial treatment of both *MB* and *AF (No 3)* principles, in conjunction with the prevalence of closed proceedings in TPIM cases, obstruct substantive

review in a number of ways. The most visible is the retreat from the *MB* principle, which treats independent assessment by judges as voluntary while raising the prospect of judges explicitly adopting rationality review in TPIM cases. The second obstruction is the interaction between closed proceedings and the judicial treatment of the *AF (No 3)*.

As we have seen, the judicial treatment of the *AF (No 3)* principle does not give confidence that judges have fully observed it. In particular, the possibility of effectively challenging the way the *AF (No 3)* principle is being applied is removed in over half of TPIM cases due to the absence of any explicit disclosure assessment contained in the relevant rulings. This has dissolved the prospect of enforcing proper compliance with the *AF (No 3)* requirements and ensuring that factual evidence is not completely shielded from substantive scrutiny. Moreover, there is also evidence of judges failing to apply the *AF (No 3)* principle, insofar as alternative disclosure assessments are given in rulings.

Where *AF (No 3)* is not in fact provided, judges in TPIM cases cannot scrutinise the Secretary of State's case other than by reliance on submissions from the Special Advocate. Moreover, Special Advocates cannot take instructions or present alternative factual evidence on any issue that is not subject to *AF (No 3)*, as the TPIM subject is not in position to counter arguments made by the Secretary of State that are presented in closed and not disclosed. There may be fortuitous moments where evidence the Special Advocate obtained prior to entering into closed proceedings is relevant. However, there is no guarantee

that this will happen as a Special Advocate will collect evidence before going into closed proceedings without knowledge of the case that will be presented against the individual by the Secretary of State. This case could be made upon any detail of the individual's life and activities which cannot be reliably predicted at this stage of evidence-collecting. In this way, where *AF (No 3)* disclosure is not provided, this essentially confines the Special Advocate's task to highlighting logical errors in the Secretary of State's case. This in turn limits SIAC's ability to make an independent assessment of the TPIM subject's engagement in terrorism-related activity.

We have also seen that when some form of *AF (No 3)* disclosure has been provided, the judicial assessment as to what must be disclosed appears to be conservative. This is in the sense that disclosure can involve presenting the TPIM subject with broad statements, lacking in specific detail for the TPIM subject to rebut with concrete evidence. This constitutes an obstruction to substantive review. It places the TPIM subject at a noticeable disadvantage in presenting factual evidence, compared to the Government which can provide all evidence that might be requirement to defend its case. This imbalance also undermines SIAC's ability to subject the Government's case to factual scrutiny and arrive at an independent, facts-based assessment of the TPIM subject's conduct.

3.4. Overall Assessment of Article 6 Protections in TPIM Proceedings

It is clear that TPIM proceedings are currently at risk of undermining article 6 rights of TPIM subjects. Most clearly, this is via slippage in the application of principles which are required to protect article 6. The need for effective article 6 protections applies in TPIM cases, regardless of the national security-related subject matter of such proceedings. As we know, article 6 is not a qualified right but a limited one. This means that it applies in all circumstances once the limits of that right have been established. The limits of article 6 have already been defined in terms of how the interests of national security should be weighed against the interests of the individual. Thus, the positions in *AF (No 3)* and *MB* establishes the boundaries as to the extent to which national security interests should be prioritised over that of the individual. The apparent moving away from, or lack of regard for, such principles therefore represent a failure to properly protect the article 6 rights of TPIM subjects.

As we saw in the first section of the chapter, article 6 necessitates that a fair hearing must be carried out by an 'independent and impartial tribunal established by law'.[211] Where the Administrative Court is obstructed from exercising an independent assessment of whether the TPIM subject has engaged in terrorism-related activity, its role as an 'independent and impartial'

[211] ECHR, article 6 (1).

court can be undermined. We have seen that such independent assessment is obstructed in several ways in TPIM cases, and to such an extent that article 6 protections have been jeopardised. The first is via an upholding of rationality review as the only required standard of review when assessing the Government's national security case in favour of imposing a TPIM.

The second obstacle is a lack of disclosure to the non-governmental party which stifles factual challenge of the Government's case. Notably, this approach to disclosure strongly contrasts to the more assertive approach taken by the CJEU in *Kadi II*.[212] The case concerned the decision to deprive Mr Kadi of his assets and other economic resources pursuant to Council Regulation (EC) No 881/2002. This was an EU measure implementing a United Nations Security Council resolution on the freezing of assets of the organisations, entities and persons identified by the United Nations Sanctions Committee as associated with Osama bin Laden, the Al-Qaeda and the Taliban. By the time the CJEU heard the appeal of *Kadi II*, the sanctions had been imposed on Mr Kadi for ten years and he had not been provided with any evidence justifying the decision to impose them.

[212] Case T-85/09 *Kadi v Commission* [2010] ECR II-5177. See also Conor Gearty, 'In Praise of Awkwardness: *Kadi* in the CJEU' (2014) 10 *European Constitutional Law Review* 15 – 27, Zahra Al-Rikabi, 'Kadi II: the right to effective judicial review triumphs again' (Case Comment) (2013) 6 *EHRLR* 631 – 636. For a wide-ranging assessment of the case, see Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial* (Routledge, 2014).

In its ruling on the case, the CJEU explicitly acknowledged the importance of factual evidence for the purpose of protecting rights even in the national security context.[213] This included the right to an effective remedy and a fair trial, as provided in article 47 of EU Charter of Fundamental Rights - which is drafted to correspond to article 6 ECHR.[214] The CJEU also asserted that where it did not have sufficient evidence provided, it would opt to protect the rights of the individual rather than uphold the state measure – demonstrating a presumption in favour of the rights of the individual in contrast to the general approach of the ECtHR with respect to national security.[215] Having insisted upon a reasonable degree of open factual material in support of the measure, the CJEU was prepared to engage in factual scrutiny of the evidence supporting the imposition of sanctions on Mr Kadi. Indeed, Gearty has described the final sections of the ruling as a 'devastating critique, allegation by allegation, of the unsubstantiated nature of the claims that had led to the listing of the applicant'.[216] Such a ruling evidently represents a far more robust judicial approach in ensuring that an individual receives sufficient disclosure to effectively defend themselves in the counterterrorism context. This is despite the CJEU being a supra-national court and therefore subject to similar institutional constraints to the ECtHR.

[213] Ibid, para 100.

[214] Official Journal of the European Union, 'Explanations (*) Relating to the Charter of Fundamental Rights' (2007) C 303/17, 13 – 14.

[215] Ibid, para 123.

[216] Conor Gearty, 'In Praise of Awkwardness: *Kadi* in the CJEU' (2014) 10 *European Constitutional Law Review* 15 – 27, 23.

As a result of the dynamics with respect to TPIMs, identified in this chapter, we see this area of law continuing the trend observed in the previous chapter - concerning deportation in the national security context. In the first instance, despite several safeguards in being in place, and an initial commitment on the part of the relevant judiciary body to substantive review, the standard of review has begun to dissolve into a form of rationality review. This has resulted from a combination of judicial doctrine, including surrounding the treatment of closed evidence. In this way, the system in place resembles an LGH, whereby the system appears to have safeguards in place from the outside, but in fact the system is currently incapable of ensuring rights are being fully protected. The system also emulates the behaviour of judges as predicted by the excessive deference argument. However, as is suggested by *Kadi II* and will be argued in the final chapter of this thesis, this behaviour is not necessarily an inevitability of relying on judges to constrain the executive where matters of national security are at stake.

3.5. Conclusion

This chapter has set out and examined article 6 protections in TPIM proceedings. It has shown that the combination of closed proceedings and the judicial treatment of the *MB* and *AF (No 3)* principles are impeding substantive review in TPIM cases. In particular, judges in the Administrative Court are

currently limited in their ability to carry out a full substantive review of whether a TPIM subject has been engaged in terrorism-related activity. The consequence of this is that article 6 rights of such TPIMs subjects are not being adequately protected in UK law, despite safeguards being in place. We will see such themes continue in the next chapter, in the context of surveillance and article 8 ECHR rights.

4. Article 8 and Surveillance

This chapter examines the protection of article 8 ECHR rights in relation to UK surveillance powers in the national security context. Article 8 in the surveillance context requires that state surveillance is carried out only when this is necessary and proportionate to the relevant national security threat. As we will see, in its adjudication of article 8, the ECtHR has emphasised that domestic surveillance oversight regimes must carry out robust review of surveillance powers to protect article 8 rights. In recent decades, UK surveillance law has undergone extensive reform to establish a domestic oversight regime that conforms to the requirements of the Convention. This led to the creation of the IPT which, as discussed in Chapter One, has given UK judges powers specifically tailored to enable substantive, fact-finding scrutiny of national security-related surveillance powers, including to ensure that they are not abused and are used when necessary and proportionate.[1]

This chapter engages with an area of state activity that has posed a number of challenges for human rights adjudication. These include: particularly high

[1] Chapter One, 65 - 71.

levels of secrecy surrounding surveillance regimes justified on grounds of ensuring the effectiveness of such regimes,[2] the increasing technological complexity of surveillance powers[3] and the changing nature of surveillance powers due to the development of communications technology.[4] Moreover, there has been a noticeable distance between the public understanding of surveillance powers on the basis of statutory wording and the manner in which these provisions have been interpreted and applied in practice by the SIAs.[5] As we will see, the development of human rights law in this area has been a process of experimentation, and both the ECtHR and the IPT have adapted their approaches to scrutiny with a view to trying to ensure that judicial scrutiny can be applied to surveillance regimes despite the challenges outlined above. The focus of this chapter is to carry out an in-depth assessment of UK surveillance case law to examine the impact of these adaptations on article 8 protections.

The main argument of this chapter is that despite reform in the UK to enable judges to respond to the challenges of surveillance adjudication in this context,

[2] Sudha Setty, Surveillance, 'Secrecy, and the Search for Meaningful Accountability' (2015) 51 *Stanford Journal of International Law* 69.

[3] Maria Helen Murphy, 'Technological Solutions to Privacy Questions: What is the Role of Law?' (2016) *Information and Communications Technology Law* 25.

[4] Théodore Christakis, Katia Bouslimani, 'National Security, Surveillance and Human Rights' in Robin Geiß, Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP, 2021), 701.

[5] Carly Nyst, 'Secrets and Lies: The Proliferation of State Surveillance Capabilities and the Legislative Secrecy Which Fortifies Them – An Activist's Account' (2018) 7 (1) *State Crime Journal* 8 -23, Paul F Scott, 'Secrecy and Surveillance: Lessons from the Law of IMSO Catchers' (2018) 33 *International Review of Law, Computers & Technology* 3, 349 – 371, 349.

UK judges largely do not apply substantive, fact-finding scrutiny to surveillance powers and thus do not ensure such UK surveillance powers are only used when this is necessary and proportionate. This is due to the IPT largely replicating Strasbourg's approach to adjudication. This is in the form of its process-oriented and rationality review of domestic surveillance powers, which reflects the Court's particular institutional limitations as an regional court. The result of the IPT imitating Strasbourg is that there are gaps in the IPT's scrutiny, including of the substantive necessity and proportionality of general surveillance powers, and manner in which the SIAs interpret their statutory powers in practice. As will be shown, the weakness of the IPT's scrutiny of surveillance powers is linked to the IPT's own procedure, particularly its reliance on an 'assumed facts' procedure in determining article 8 claims. The combination of these factors reduces the standard of review to a form of process-oriented and rationality review. The chapter argues that the IPT's reliance on this standard of review leaves the UK surveillance system vulnerable to exploitation, and article 8 rights not fully protected. In this way, the system surrounding surveillance continues the theme of the regimes considered in the previous chapters of this thesis – in which ECHR rights are not being adequately protected despite safeguards being place, and the practice appears to vindicate the excessive deference argument.

This chapter's argument is made across four sections. Section One considers the role of article 8 in the surveillance context. It highlights the inherent tensions faced by the Court in adjudicating in this area of state activity, and

the ways in which the Court has adapted its approach to manage such tensions. Section Two presents the development of article 8 protections at the UK level, in particular the creation of the IPT. Section Three examines the IPT as it operates in practice. The section argues that the review carried out by the IPT is more limited than a full substantive review. The final section, Section Four, elaborates on the manner in which the gaps in judicial scrutiny of UK surveillance powers undermine article 8 protections.

4.1. Article 8 and Protections Against the Abuse of Surveillance Powers

Article 8 ECHR enshrines a right to 'respect' for a person's 'private and family life…home and…correspondence', also referred to as the right to privacy.[6] Article 8 is a qualified right, and may be interfered with by a public authority when the interference is 'in accordance with the law' and 'necessary in a democratic society' for a number of legitimate purposes related to the public interest.[7] The provision draws a line between the 'public' and 'private' spheres of an individual's life, and creates protections for an individual's private life from state observation.[8] This line is broadly drawn by the text itself which refers to protection of a person's physical space in the form of the 'home', a

[6] ECHR, article 8 (2).

[7] Ibid. The legitimate purposes referred to are in the interests of 'public safety', 'the economic wellbeing of the country', 'national security', 'for the prevention of disorder or crime', 'for the protection of health or morals.

[8] David Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) *EHRLR* 265.

person's immediate relationships in the form of 'family' and 'private life', and their communications in the form of 'correspondence'.[9]

National security-related surveillance carried out by states party to the ECHR is in principle compatible with article 8 as the right to privacy may be interfered with 'in the interests of national security'.[10] Insofar as there is explicit scope for such interference, article 8 contrasts with equivalent provisions in other regional human rights treaties - there are no specific grounds for limitation set out in the provisions referring to a right to privacy in the UNDHR,[11] the ICCPR,[12] and ACHR.[13]

Neither surveillance nor investigatory powers are defined in the UK's current principal surveillance legislation, the IPA. However, RIPA defines surveillance as including the: (a)monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications; (b)recording anything monitored, observed or listened to in the course of surveillance; and (c)surveillance by or with the assistance of a surveillance

[9] ECHR, article 8 (2).

[10] Ibid.

[11] UDHR, article 12.

[12] ICCPR, article 17.

[13] ACHR, article 11.

device.[14] While this definition is not exhaustive, as has been emphasised by the IPT, it will be relied on as a working definition in this chapter.[15]

Intelligence refers to information obtained covertly, without the consent of the person or the entity that controls the information.[16] It takes at least three forms: intelligence obtained in person from individuals referred to as 'human intelligence' or HUMINT, intelligence comprising communications intercepts and other electronic intelligence referred to as 'signals intelligence' or SIGNIT'; and photographic or imagery intelligence, referred to as IMINT. Signals intelligence in the form of interception of communication is the focus of this chapter. Two types of interception are of relevance in the analysis that follows. The first is 'targeted' interception in which such interception target - such as known individuals or a particular set of premises.[17] The second is 'bulk' interception which collects large amounts of data with no anterior target in mind. The purpose of bulk interception is to carry out open-ended investigations in order to gain intelligence.[18]

[14] Defined as 'any apparatus designed or adapted for use in surveillance'. RIPA, s 48 (1).

[15] *Re: a complaint of surveillance* IPT/A1/2013, [12] – [15]. See also Simon McKay, *Covert Policing: Law and Practice* (OUP, 2011), Chapter One, para 5.40

[16] Simon Chesterman, *One Nation Under Surveillance* (OUP, 2011), 7.

[17] David Anderson QC, 'A Question of Trust' (2014) available at: https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf, 6 (QOT).

[18] David Anderson QC, *Report of the Bulk Powers Review* (Independent Reviewer of Terrorism Legislation, CM 9326, 2016), available at: https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/08/Bulk-Powers-Review-final-report.pdf.

Article 8 is designed to ensure that states do not arbitrarily interfere with an individual's right to privacy in the sense of using surveillance powers for purposes other than in the public interest and/or in a manner which goes beyond that which is necessary and proportionate for that purpose. This reflects one of the overall purposes of the ECHR to protect democracy and prevent the resurgence of totalitarianism.[19] The exploitation of surveillance powers is a chief means by which totalitarian states have maintained control over their citizenry. For example, surveillance was an important tool for control in Nazi Germany, carried out by the German Secret Service, the Gestapo and vital to the repressive state apparatus of Mussolini's Italy.[20] Conversely the right to privacy is widely seen a 'constitutive element' of democracy,[21] which 'fosters and encourages the moral autonomy of the citizen'.[22] This is by providing a 'space in which ideas (particularly controversial ideas) can be formed, developed, explored and expressed', as well as protecting minorities who have in dictatorships been the most likely to be subject to privacy-invading measures.[23]

[19] Chapter One, 51 - 55.

[20] Kevin Passmore, *Fascism: A Very Short Introduction* (OUP, 2007); Ana Antić, *Therapeutic Fascism: Experiencing the Violence of the Nazi New Order* (OUP, 2016); Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP, 2008).

[21] Spiros Simitis claims that privacy is a 'constitutive element of a democratic society' in Spiros Simitis, 'Reviewing Privacy in an Information Society' (1987) 135 *University of Pennsylvania Law Review* 707, 732.

[22] Ruth Gavison writes that privacy is "essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy" in Ruth Gavison, 'Privacy and the Limits of the Law' (1980) 89 *Yale Law Journal* 421, 45.

[23] Kirsty Hughes, 'Mass Surveillance and the European Court of Human Rights' (2018) *EHRLR* 5, 589 – 599, 598.

The text of article 8 sets outs a number of conditions which serve as limitations on the kind of surveillance that may be carried out.[24] In the first instance, surveillance may only be carried out to the extent that it is 'in accordance with the law'.[25] The second limitation is that the interference with privacy initiated by surveillance must be 'necessary' for a legitimate purpose, which, as mentioned, includes being in the interests of national security. A third limitation is that the interference with privacy must be necessary in a 'democratic society' rather than any society, so specifically a society which is committed to protecting civil and political freedoms.

The concept of 'abuse' of surveillance powers exists at the core of article 8 protections. In its first ruling on article 8 and surveillance, *Klass*, the Court stated it 'must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse', and this has been the consistent message of the Court since this ruling.[26] Though the Court has not systematically defined what would constitute an abuse of surveillance powers, it has provided some guidance as to the different forms of abuse which may exist in the surveillance context.[27] The Court has emphasised that a system with adequate safeguards against abuse is one which protects against

[24] Chapter One, 52 – 53.

[25] ECHR, article 8 (2).

[26] *Klass v Germany* (1979) *2 EHRR 214,* para 50 (*Klass*).

[27] It is true that the concept of abuse of power has been generally difficult to define in precise terms in public law. For example, see TRS Allen, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' (2002) *Cambridge Law Journal* 61, 87 – 125.

'arbitrary interference' with a person's rights.[28] In *Zakharov*, in finding Russian surveillance law to be in violation of article 8, the Court noted that the surveillance system in place was not capable of ensuring that surveillance measures were not 'ordered haphazardly, irregularly or without due and proper consideration'.[29] The Court has also identified abuse it considers to be outside of the protection of the Convention. This is the 'improper action by a dishonest, negligent or overzealous officially' which the Court stated 'can never be completely ruled out whatever the system'.[30]

4.1.1. The development of article 8 protections in surveillance

The development of article 8 protections against the abuse of surveillance powers began early on in the Strasbourg Court's history, beginning with *Klass* in the late seventies.[31] These protections have been developed and updated in article 8 and surveillance case law, particularly as state surveillance capabilities have expanded and changed over time. The ECtHR has faced significant challenges in developing effective Convention protections in the area of surveillance. This is due to several features of state surveillance regimes which render scrutiny by international courts particularly difficult.

[28] *Malone v UK* (1984) 7 EHRR 14.

[29] *Zakharov v Russia* App no 47143/06 (ECHR, 22 October 2009), para 267.

[30] *Klass,* n 26, para 59.

[31] For a historical account of the Court's case law, see David G Barnum, 'Judicial Oversight of Communications in the United Kingdom: An Historical and Comparative Analysis (2016) 44 *Georgia Journal of International and Comparative Law* 2, 237 – 304.

The first challenge faced by the Court is the high levels of secrecy surrounding such regimes, widely recognised to be necessary in order for such surveillance regimes to effectively function.[32] There needs to be sufficient levels of secrecy such that individuals seeking to cause harm to national security cannot pre-empt surveillance for the purpose of shielding their activity.[33] That there should be a sufficient level of secrecy to prevent this from occurring has been acknowledged and accepted by the Court as far back as *Klass v Germany*.[34] How to manage the need for secrecy to protect the effectiveness of a surveillance regime clearly poses a challenge for an international court wishing to scrutinise that regime. This is because that regime needs to be additionally sufficiently transparent for that court to be able to check whether the regime is effectively protecting against the abuse of surveillance powers.

The second challenge posed by surveillance regimes is the fact that surveillance increasingly plays a pre-emptive role in national security protection. States assert they have now come to rely on surveillance, particularly bulk surveillance, as a means of detecting where threats to national security may exist, rather merely investigate a source of threat.[35] In playing this increasingly

[32] QOT, n 17, para 5.20.

[33] Paul F Scott, 'Secrecy and Surveillance: Lessons from the Law of IMSO Catchers' (2018) 33 *International Review of Law, Computers & Technology* 3, 349 – 371.

[34] *Klass,* n 26, para 55.

[35] This was made clear in the recent case of *Big Brother Watch*, in which France, Norway and the Netherlands intervened on behalf of the UK Government to make the case for the necessity of bulk surveillance. *Big Brother Watch and ors v UK* App nos 58170/13, 62322/14, 24960/15 (ECHR, 25 May 2021), para 9. See also the David Anderson QC, *Report of the Bulk Powers Review* (Independent Reviewer of Terrorism Legislation,

pre-emptive role, the necessity and effectiveness of surveillance becomes increasingly hard to judge. Where terrorist attacks do not occur, this can be argued to prove the success of bulk surveillance. Where such attacks do occur, this can be argued to confirm the need for further bulk surveillance to combat threats. This adds complexity when analysing the necessity and proportionality of surveillance powers. It also gives rise to greater scope for collateral intrusions of privacy, as the search is not focused on particular suspects but finding suspects, which inevitably involves surveillance of people who do not represent a threat to national security.

The third challenge the area of surveillance poses to the Court is that state surveillance capabilities are constantly changing, as are the platforms in which we communicate and interact with in our private lives.[36] In the last two decades, the increased reliance on the internet, smart phones and social media has altered the way we communicate with each other and conduct our private lives. It has also altered the way that those seeking to harm national security can communicate with each other. This has been accompanied by development in new technologies for state surveillance, which are not only shrouded in secrecy but technologically complex, making the implications of their use in

CM 9326, 2016), available at: https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/08/Bulk-Powers-Review-final-report.pdf., para 2.7.

[36] Théodore Christakis and Katia Bouslimani, 'National Security, Surveillance and Human Rights' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP, 2021), 701.

practice difficult to gage.[37] Such developments have created further distance between the Court and its ability to judge the manner in which surveillance regimes operate in practice, to judge their compatibility with article 8.

4.1.2. Enabling of 'general' challenges to surveillance regimes

In responding to these challenges, the Court has opted to adapt its approach to adjudication in a number of ways. In the first instance, the Court has weakened its requirements as to who may claim to be a victim of an ECHR violation in relation to surveillance regimes. In recognising that state secrecy means individuals will usually be unable to prove that they were victims of a surveillance regime, as well as the importance of ensuring effective supervision of such regimes, the ECtHR has permitted 'general challenges' to the relevant legislative regime governing surveillance in states.[38] This approach was laid out in *Klass and Others v Germany,*[39] which highlighted that the 'secrecy of the measures objected to' left the applicant unable to 'point to any concrete measure specifically affecting him'.[40] Consequently, under certain conditions, it was held that applicants could 'claim to be a victim of a violation occasioned by the mere existence of secret measures or legislation permitting secret measures, without

[37] For a discussion on technological complexity in surveillance, see David Cole, 'Preserving Privacy in a Digital Age: Lessons of Comparative Constitutionalism' in Fergal Davis, Nicola McGarrity and George Williams, *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge, 2014), 96.

[38] Ibid.

[39] *Klass*, n 26.

[40] Ibid, [34].

having to allege that such measures were in fact applied to him'.[41] In this way, the usual constraints of the Convention framework have been adapted to ensure that applications concerning surveillance can still be brought to the Court, while also enabling states to maintain a high degree of secrecy around their surveillance apparatus.

4.1.3. A procedural approach

Another adaptation made by the Court, at least partly in recognition of the secrecy surrounding surveillance, is to adopt a 'procedural approach' in its adjudication of the compatibility of surveillance regimes with the Convention. This refers to a type of scrutiny of surveillance powers whereby the Court's focus is on the safeguards attached to such powers, rather than their substantive necessity and proportionality.[42] The Court's case law, even beyond the national security context, has been increasingly associated with a procedural approach.[43] Oddný Mjöll Arnardóttir has argued that the Court has shifted its focus away from assessing necessity and proportionality, when adjudicating qualified rights, as a means of responding to calls from states for greater emphasis on the principle of subsidiarity within the Convention

[41] Ibid, [35].

[42] Maria H Murphy, 'A Shift in the Approach of the European Court of Human Rights in Surveillance Cases: A Rejuvenation of Necessity' (2014) *EHRLR* 5. I take the term from Lydia Morgan and Fiona de Londras, 'Is there a Conservative Counter-Terrorism?' (2018) *King's Law Journal* 29, 196 – 197.

[43] Oddný Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15 *ICON* 9.

system.[44] By shifting its focus towards procedural safeguards attached to specific powers, rather than considering whether the exercise of such powers is justified, the Court is better able to steer clear of scrutinising substantive policy of states, and so afford more respect to state sovereignty, according to scholars supportive of this 'procedural turn'.[45]

Observations regarding a procedural turn in the Court's general approach have arisen fairly recently. However, in the surveillance context, the Court has opted to take a procedural approach as early as *Klass*.[46] In this case, the Court stated that, in constructing its surveillance system, the domestic legislature enjoys a 'certain discretion',[47] and that it was 'certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field'.[48] In considering necessity within these parameters, after citing the relevant German legislation, the Court stated that the aim of the G 10, which was the Parliamentary Committee to oversee the powers, was 'indeed to safeguard national security and/or to prevent disorder or crime'.[49] The Court then considered whether the means provided' under German legislation for the achievement of protecting national security

[44] Ibid.

[45] Ibid.

[46] *Klass*, n 26.

[47] Ibid, para 49.

[48] Ibid.

[49] Ibid.

remained in 'all respects within the bounds of what is necessary in a democratic society',[50] noting that 'technical advances made in the means of espionage and, correspondingly, of surveillance',[51] and the 'development of terrorism in Europe'.[52] The Court held it must 'accept' that Germany's surveillance powers were 'under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime'.[53] This reasoning represents the extent of the Court's consideration of the necessity of the powers from the perspective of whether they are in principle required for protecting national security. The Court merely checked whether the formal conditions – in the form of law containing restrictions on discretion and existence of the G10 – were in place. The remainder of the Court's consideration of this issue turned to an examination of the procedural safeguards attached to such powers.[54] In this way, the Court did not itself attempt to determine whether particular exercises of surveillance powers were necessary and proportionate.

Maria Helen Murphy has highlighted the long-standing tendency of the Court to avoid substantive questions of necessity of surveillance power across its

[50] Ibid.

[51] Ibid

[52] Ibid.

[53] Ibid

[54] Ibid.

surveillance case law.[55] As Murphy has noted, this approach is to some extent pragmatic.[56] It enables the Court to avoid assessing highly sensitive and complex matters, involving the balancing of rights and national security.[57] It is also convenient in light of there being very little publicly available information surrounding surveillance systems, and where information is available it is often very technical or abstract. A procedural approach enables the Courts to focus its scrutiny on the rules and institutional measures that are accessible and in the public domain, and which the Court may realistically have some tangible influence over.

The Court's approach to adjudicating article 8 and surveillance cases has become more sophisticated as it has developed standards that are more demanding. The ECtHR now requires that surveillance powers are accompanied by a specific set of statutory safeguards. These were most fully set out in *Weber and Saravia v Germany*, which established a minimum set of safeguards to be set out in statute for the interception of communications to be 'foreseeable' and therefore in accordance with the law.[58] These are that: (1) the nature of the offences which may give rise to an interception order; (2) a definition of the categories of people liable to have their telephones tapped; (3)

[55] Maria Helen Murphy, 'A Shift in the Approach of the European Court of Human Rights in Surveillance Cases: A Rejuvenation of Necessity' (2014) *EHRLR* 5.

[56] Ibid, 511.

[57] Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62(5) *MLR* 671, 677. B. Ruiz, *Privacy in Telecommunications. A European and an American Approach* (Kluwer Law International, 1997) 181.

[58] *Weber and Saravia v Germany* (2008) 46 EHRR SE5.

a limit on the duration of telephone tapping; (4) the procedure to be followed for examining, using and storing the data obtained; (5) the precautions to be taken when communicating the data to other parties; and (6) the circumstances in which recordings may or must be erased or the tapes destroyed'.[59]

The Court has continued to develop further standards regarding safeguards. In the recent Grand Chamber ruling in *Big Brother Watch*, discussed in more detail below, the Court set new standards for bulk interception of communications.[60] This includes the requirement that such interception is subject to an independent authorisation process.[61] Moreover, the selection of intercepted material for examination must now be accompanied by a specific safeguard in the form of 'robust independent oversight' of the selection and search criteria used to filter intercepted communication.[62] The Court has also developed jurisprudence to scrutinise bodies responsible for ensuring the implementation of procedures and safeguards which operate in surveillance regimes. In *Zakharov v Russia*, the Court carried out an assessment of the process of judicial authorisation of surveillance warrants. The Court found that the inability of Russian judges to examine all the material underpinning the decision to issue the warrants deprived them of the power to assess 'whether

[59] Ibid, para 95.

[60] *Big Brother Watch and ors v UK* App nos 58170/13, 62322/14, 24960/15 (ECHR, 25 May 2021).

[61] Ibid, para 377.

[62] Ibid, para 292.

there is a sufficient factual basis to suspect the person in respect of whom' the surveillance measures were requested.[63]

Additionally, the Court has tightened its general requirements for states to establish that their surveillance regimes are compliant with article 8. In *Szabó and Vissy v Hungary*, the Court stated that 'it is for the Government to illustrate the practical effectiveness' of its supervision arrangements with 'appropriate examples.[64] The Court further stated that the requirement 'necessary in a democratic society' must be interpreted in this context as requiring 'strict necessity' in 'two aspects'.[65] The Court held that a secret surveillance measure is in compliance with the Convention only if it is strictly necessary, first, 'as a general consideration, for the safeguarding the democratic institutions' and, secondly, if it is 'strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation'.[66] Such developments have assisted the Court in applying more exacting scrutiny of domestic regimes. In particular, the emphasis on domestic oversight and safeguards represents a means to ensure indirectly that surveillance powers meet necessity and proportionality requirements. This is by requiring that independent processes are in place to carry out the

[63] *Zakharov v Russia* App no 47143/06 (ECHR, 22 October 2009), para 61.

[64] *Szabó and Vissy v Hungary* [2016] ECHR 579, para 88.

[65] Ibid, para 73.

[66] The Court further stated that 'any measure of secret surveillance which does not correspond to these criteria will be prone to abuse by the authorities with formidable technologies at their disposal'. Ibid.

substantive necessity and proportionality assessments that the Court is unable to do itself.

This evolving approach has not included a departure from the procedural approach. The standards articulated by the Court are principally concerned with procedures surrounding surveillance, including those associated with the assessment of surveillance by oversight bodies. The Court is still prone to avoiding consideration as to whether surveillance powers are substantively necessary (in both senses articulated in *Szabó and Vissy*).[67] A procedural approach was taken in two recent Grand Chamber rulings of *Centrum för rättvisa v. Sweden* which considered the compatibility of Sweden's bulk interception regime with article 8,[68] and *Big Brother Watch,* concerning article 8 and the UK's bulk interception regime (as it existed under RIPA).[69] The reasoning for these cases was published on the same day and the relevant assessments are almost identical.

In the first instance, the Court emphasised that in relation to bulk interception, states have a 'legitimate need for secrecy which means that little if any information about the operation of the scheme will be in the public domain, and such information as is available may be couched in terminology which is

[67] For example, see Maria H Murphy, 'A shift in the approach of the European Court of Human Rights in surveillance cases: A rejuvenation of necessity' (2014) *EHRLR* 5.

[68] *Centrum för rättvisa v. Sweden* App no 35252/08 (ECHR, 25 May 2021) (*Centrum*).

[69] Ibid, para 236. *Big Brother Watch and ors v UK* App nos 58170/13, 62322/14, 24960/15 (ECHR, 25 May 2021) (*Big Brother Watch*), para 322.

obscure and which may vary significantly from one [s]tate to the next'.[70] In the course of a single paragraph, after generally referring to potential threats states currently face, including from 'global terrorism', the Court described bulk interception as a providing a 'valuable technological capacity to identify new threats in the digital domain'.[71] However, the Court did not seek to justify this statement, it was provided by way 'preliminary remarks'.[72] In considering whether an interference under the signals intelligence regime was 'necessary in a democratic society', the Court emphasised that 'as to the question whether an interference was "necessary in a democratic society" in pursuit of a legitimate aim', the Court has 'recognised that the national authorities enjoy a wide margin of appreciation in choosing how best to achieve the legitimate aim of protecting national security'.[73] It further emphasised that its task in assessing whether the regime was necessary in a democratic society rested in determining 'whether the procedures for supervising the ordering and implementation of the restrictive measures are such as to keep the "interference" to what is "necessary in a democratic society"'.[74] The rest of its ruling was then concerned with an examination of the safeguards associated with both the Swedish and UK regimes, thus representing a procedural approach.

[70] *Centrum*, n 68, para 236, *Big Brother Watch*, n 69, para 323.

[71] *Centrum*, n 68, para 237, *Big Brother Watch*, n 69, para 323.

[72] *Centrum*, n 68, para 236, *Big Brother Watch*, n 69, para 322.

[73] *Centrum*, n 68, para 252, *Big Brother Watch*, n 69, para 338.

[74] *Centrum*, n 68, para 253, *Big Brother Watch*, n 69, para 339.

4.1.4. A flexible approach

A final adaption made by the Court is that it is flexible in requiring surveillance practices to be 'in accordance with the law'.[75] The Court recognises a number of different sources of standards binding the executive, such as non-statutory requirements, internal codes and procedures, when considering whether a regime complies with the requirements of article 8. Employing this flexibility has the benefit that the states are not required to published detailed safeguards in primary legislation that may disclose what states consider to be sensitive information regarding the operation of surveillance regimes.

This flexible approach was initially established in *Silver v* UK, concerning the monitoring of UK prisoners' communications with those outside of prisons.[76] In considering whether this surveillance practice was 'in accordance with the law', the Court found that the relevant legal basis must have accessibility and foreseeability, and cannot be regarded as a 'law' unless 'it is formulated with sufficient precision to enable the citizen to regulate his conduct'.[77] However, in articulating how the foreseeability requirement may be met, the Court stated that 'orders and instructions' which are not legally binding could be taken into

[75] ECHR, article 8 (2).

[76] *Silver v UK* (1980) 3 EHRR 475.

[77] Ibid.

account,[78] and that safeguards protecting against the abuse of surveillance powers did not have to exist within legislation.[79]

This flexible approach was echoed in *Malone v UK*.[80] In examining the issue of foreseeability, the Court emphasised that 'detailed procedures and conditions which define the scope of the surveillance powers 'do not necessarily have to be incorporated in rules of substantive law'.[81] The Court has continued to employ this more flexible approach in recent cases. In the national security context, the *Weber* standards represent the safeguards required in statutory law. However, the Court has repeatedly clarified that the detailed rules associated with surveillance powers to prevent their abuse are not required in statute or even the public domain.[82] In *Zakharov*, the Court emphasised that the requirement of 'foreseeability' of the law did not go so far as to compel Contracting States to enact legal provisions 'listing in detail all conduct that may prompt a decision to subject an individual to secret surveillance on "national security" grounds'.[83]

In *Big Brother Watch,* the Court again took a flexible approach. In assessing safeguards surrounding the regime of bulk interception of communications

[78] Ibid, para 88.

[79] Ibid.

[80] *Malone v UK* (1984) 7 EHRR 14.

[81] Ibid.

[82] For example, see *Zakharov v Russia* App no 47143/06 (ECHR, 22 October 2009), para 247.

[83] Ibid.

under RIPA, the Court's principal focus was the Interception of Communications Code of Practice, published in 2016 pursuant to section 71 of RIPA.[84] While the Court did not consider the enforceability of the Code, RIPA was explicit that there was no legal requirement for the Government to abide by it. The legislation stated that a 'failure on the part of any person to comply with any provision of a code of practice for the time being in force under section 71 shall not of itself render him liable to any criminal or civil proceedings'.[85] The only requirement was that, in exercising investigatory powers, the Government must 'have regard' to the provisions in the code.[86] No guidance was provided as to what this means. Thus, this represented a flexible approach as the Court was prepared to accept the Code as a legal safeguard, despite its not being legally binding directly. Another indication of this flexible approach is that the Court was prepared to consider a Code of Practice coming into force three years after Big Brother Watch first submitted its application to the Court, and 16 years after the RIPA regime was created, in determining whether the regime was in accordance with the law.[87] The Court also referred to safeguarding arrangements that existed in secret, or 'under the waterline' as it is described by the IPT.[88]

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[84] Interception of Communications Code of Practice 2016 available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/496064/53659_CoP_Communications_Accessible.pdf. *Big Brother Watch*, n 69, paras 322 – 426.

[85] RIPA, s 72 (2).

[86] Ibid, s 72 (1).

[87] The application was lodged on 4 September 2013.

[88] *Big Brother* Watch, n 69, para 97.

4.1.5. Gaps in the ECtHR's scrutiny

While the Court's approach to developing article 8 protections represents a pragmatic response to the challenges it faces as a regional court, it is an approach which has a number of limitations from the perspective of ensuring that a surveillance regime effectively protects against the abuse of surveillance powers. While such limitations may be unavoidable, they create gaps in the Court's scrutiny, which prevents it from conducting a full assessment as to whether a state's surveillance regime is vulnerable to abuse.

In the first instance, while the Court's adaptation of victim status ensures that surveillance claims are generally accessible, this approach is linked to the Court adjudicating in the absence of any information regarding a specific exercise of surveillance powers. In focusing on the general features of a surveillance regime, and in the absence of any information regarding specific exercises of surveillance powers, the Court misses a crucial line of inquiry from the perspective of assessing whether a surveillance regime possesses adequate article 8 protections. An assessment of the specific exercise of surveillance powers is crucial insofar as it provides insight into the extent that safeguards against abuse of surveillance powers are adhered to.

Secondly, the Court's procedural approach creates a gap in scrutiny as in taking this approach, the Court avoids assessing whether surveillance powers are in

fact necessary and proportionate.[89] As each new surveillance power is developed, the Court's procedural approach means that the Court does not question if this surveillance power is in itself necessary for the purpose of protecting national security, or the necessity and proportionality of any specific exercises of the power. Instead, states are given a wide margin of appreciation to choose which surveillance powers they need, and the Court is only concerned to ensure that there are sufficient safeguards surrounding those powers to ensure they are not abused.

It is true that in taking a procedural approach, the Court is concerned to check that safeguards are in place to ensure that the relevant powers are used only when necessary and proportionate. However, as we have seen, the Court will never be in a position to check that these safeguards *in fact* ensure this – as it does not assess the individual exercise of surveillance powers but examines the regime as a whole. Consequently, the Court's jurisprudence results in an approach in which the Court avoids making an in-depth assessment as to the necessity of particular surveillance powers. This creates a significant gap from the perspective of scrutinising a surveillance regime's vulnerability to abuse: as without meaningful scrutiny of necessity, states are given discretion to develop new surveillance powers without having to properly justify that such

[89] Kirsty Hughes, 'Mass Surveillance and the European Court of Human Rights' (2018) *EHRR* 5, 589 – 599, Maria H Murphy, 'A Shift in the Approach of the European Court of Human Rights in Surveillance Cases: A Rejuvenation of Necessity' (2014) *EHRLR* 5.

powers are indeed necessary. This gap can only be filled by domestic courts, tribunals and oversight bodies.

With regards to the Court's flexibility in relation to the 'in accordance with the law' requirement, it is worth noting this approach is not exclusive to surveillance cases. It is well established in ECtHR case law that the 'law' for the purpose of the 'in accordance with the law' requirements across the Convention can encompass a range of measures beyond statutory law.[90] However, this flexible approach also has potential to result in gaps in scrutiny on the part of the Court in the surveillance context, as guidance, policies and practices are likely to be secret. The Court effectively consents to certain relevant surveillance safeguards being shielded from its scrutiny. This is due to high levels of secrecy around surveillance practices. Where safeguards are not contained in statutory rules or codes which are publicly accessible, they are largely likely to exist in secret and beyond the scrutiny of the Court. In this way, the Court's flexibility in this regard helps to shield parts of the surveillance regime that are relevant for determining article 8 compliance. A second problem is that without scrutiny of specific exercises of powers, the Court does not know the extent to which such policies are followed or are required to be followed within the SIAs themselves.

[90] *De Wilde, Oooms and Versyp* App no 101761 (ECHR, 18 June 1971), *X v the Netherlands* (1986) 8 EHRR 235.

It is, as mentioned, an acknowledgement of its own limitations that the Strasbourg Court has increasingly emphasised the importance of domestic oversight which is capable of monitoring secret activities and material relevant to surveillance practices. The Court has highlighted that, in order to minimise the risk of the bulk interception power being abused, the Court considers that the process must be subject to 'end-to-end safeguards', meaning that 'at the domestic level, an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken'.[91]

In recent case law, the Court has provided further detail on the manner in which these 'end-to-end safeguards' are to be applied. The Court has articulated certain standards that oversight bodies must meet. These are that supervision should be 'sufficiently robust to keep the interference to what is necessary in a democratic society'.[92] The Court has further emphasised that the supervising body should 'be in a position to assess the necessity and proportionality of the action being taken, having due regard to the corresponding level of intrusion into the Convention rights of the person likely to be affected'.[93] Moreover, the domestic system must ensure there is an 'effective remedy' to anyone who suspects they may have been subject to arbitrary interference with their right to privacy.[94] It is implicit that oversight bodies must have access to all material

[91] *Big Brother Watch*, n 69, para 350. Emphasis added.

[92] Ibid, para 356.

[93] Ibid.

[94] Ibid, 357.

of relevance to determining necessity and proportionality in this way. Such requirements place a significant burden on domestic oversight bodies to carry out robust, substantive review of surveillance powers. As we will see in the next section, a specialised network of oversight has been established in the UK in response to such requirements.

4.2. The UK Surveillance Oversight Regime

As set out in the previous section, the Court's limited scrutiny of surveillance powers places a heavy burden on domestic authorities to carry out a robust review of the necessity and proportionality of surveillance powers, to fill in the ECtHR's gaps in scrutiny. This section explores the UK legal regime developed to carry out such review. It sets out the substantial reform carried out in the UK in the name of promoting robust review of UK surveillance powers, which has been met with approval by the ECtHR. The section argues that, at least from a distance, the domestic system possesses the kind of features that would enable it to carry out robust review and fill in the gaps of scrutiny evident in the Court's review of surveillance powers.

4.2.1. The evolving role of judges with respect of UK surveillance

The UK surveillance regime was first subject to judicial scrutiny in the case of *Malone*, and subsequently has been subject to three stages of legislative reform.

Mr Malone brought a case against the UK Government on the grounds that such interception had no basis in UK law and was contrary to the UK obligations under article 8 of the ECHR after Strasbourg's ruling in *Klass*.[95] At the time, there was no statutory authority for telephone tapping by the state, and the SIAs were not yet recognised to exist in law. The case was then brought to the ECtHR.[96] The Court held that the UK surveillance regime did not comply with article 8 requirements, as the law governing surveillance did not 'indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on public authorities'.[97] Following *Malone v UK*, the UK passed the Interception of Communications Act 1985 (ICA), which represented the first time the interception of communications had been placed on statutory footing, and created 'the Tribunal' responsible for investigating 'contraventions' of the ICA in the exercise of investigatory powers, rather than human rights claims.[98] The UK later reformed the regime under the ICA in 2000, passing RIPA, which was introduced 'to ensure that law enforcement and other operations are consistent with the duties imposed on public authorities by the European Convention on Human Rights and by the Human Rights Act 1998'.[99] In addition to creating more safeguards establishing a legal regime to govern

[95] *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

[96] *Malone v UK* (1984) 7 EHRR 14.

[97] Ibid, para 79.

[98] ICA, s 7.

[99] HC Deb 6 March 2000 vol 345 col 768.

the collection and storage of communications data,[100] RIPA largely replicated the warrantry system for interception of communications set out in ICA and brought other forms of surveillance under the legal regime.[101] It also created the IPT, replacing the previous Tribunal, and assigned its judges exclusive jurisdiction in adjudicating article 8 and surveillance claims.[102]

UK judges are now involved in the authorisation of the interception of communications. This followed extensive legal reform of surveillance powers after the leaking of National Security Agency (NSA) official documents by NSA contractor Edward Snowden.[103] The documents exposed two surveillance programmes implicating the SIAs in bulk interception of communications and accessing data from US intelligence agency, the NSA. Following the leaks, the UK Government made disclosures regarding further surveillance activities it had been engaged in under RIPA and other statutory frameworks. These included: the bulk interception of communications under RIPA;[104] the acquisition of communications data first avowed in November 2015;[105] the use of Computer Network Exploitation (CNE) colloquially known as hacking in

[100] Communications data is defined as data about communications, also known as the 'who, what, where and when' of communications.

[101] RIPA, s 8(1) and 8 (4).

[102] RIPA, s 65.

[103] For a full account of the allegations as they unfolded, see QOT, n 17, 330. Telecommunications Act 1984, s 94.

[104] RIPA, s 8(4).

[105] Ibid.

February 2015;[106] the use of thematic warrants under provisions for targeted surveillance under RIPA;[107] and Bulk Personal Datasets (BPDs) under the authority of MI5 and GCHQ's general statutory purposes in SSA and ISA.[108] These powers, as well as the powers exposed by the Snowden leaks, were subsequently the subject of domestic litigation, discussed in more detail later in the chapter.

The extensive powers under the above legal provisions gave rise to concerns that the UK was not protecting article 8 rights in the surveillance context. Three independent reviews of RIPA and its operation recommended reform of the legal frameworks governing surveillance.[109] This included a review by a former IRTL, David Anderson, whom the UK Government requested to carry out a review of surveillance powers under RIPA. The report produced provided an in-depth analysis of the UK surveillance system and issues surrounding the law and surveillance.[110] It was entitled 'A Question of Trust' and made the case that trust is one of the core issues upon which the foundations of surveillance and law is built. It argued that after the controversy of the Snowden leaks, '[i]f

[106] Ibid, 137. Containing, admittedly, unclear distinctions between bulk and targeted powers.

[107] RIPA, s 8(1).

[108] Intelligence and Security Committee, 'Privacy and Security' (12 March 2015), paras 151-163. SSA, s1 and ISA, s 1.

[109] Carried out by David Anderson QC, the Intelligence and Security Committee and the Royal United Services Institute. See QOT, Intelligence and Security Committee, 'Privacy and Security: A modern and transparent legal framework' (12 March 2015) HC 1075; RUSI, 'A Democratic License to Operate: Report of the Independent Surveillance Review' (July 2015) <https://data.guardint.org/api/files/1594905967474nm0f1didp9g.pdf> accessed 17 October 2021.

[110] QOT, n 17.

one thing is certain, it is that the road to a better system must be paved with trust'.[111] Partly due to the necessary secrecy surrounding surveillance, Anderson argued that it was for the Government to instil trust in the public that had been so damaged by Snowden, by creating clear laws enshrining surveillance powers, attached to effective safeguards against abuse.[112] Indeed, Anderson stated that '[t]rust in powerful institutions depends not only on those institutions behaving themselves (though this an essential prerequisite), but on there being mechanisms to verify that they have done so'.[113]

It was partly due to Anderson's recommendations that a new surveillance regime, created by the IPA, was built. The IPA provided explicit statutory footing for the powers which had previously been avowed by the UK Government, but many felt were not clearly signposted in legislation previously. The system of warranty for interception of communications,[114] and a number of other surveillance powers in the Act,[115] were the same as RIPA. It required that the Secretary of State must consider the warrant is 'necessary' on a specific set of grounds including the protection of national security, and that the conduct authorised by the warrant is 'proportionate to what is sought

[111] Ibid, 13.3.

[112] Ibid, Chapter 13.

[113] Ibid, para 13.4.

[114] Both targeted and bulk interception warrants.

[115] Equipment interference (targeted and bulk).

to be achieved by that conduct'.[116] However, the IPA also required that such warrants are authorised by senior judges referred to as 'Judicial Commissioners'.[117] In establishing a system for the judicial authorisation of warrants in this way, the IPA created the role of the Investigatory Powers Commissioner (IPC), who is responsible for providing oversight of investigatory powers and head of the 'Investigatory Powers Commissioners' Office (IPCO).[118] Notably, RIPA provisions governing the IPT remained in force, though the IPA added a right to appeal the IPT's ruling in limited circumstances.[119]

IPCO has a number of duties with respect to surveillance powers authorised by the IPA. In addition to authorising surveillance warrants, IPCO provides oversight in relation to broad aspects of the UK surveillance regime and is supported in this function in several ways. The principal oversight function of IPCO is to 'keep under review' which is 'by way of audit, inspection and investigation' the exercise of public authorities of 'statutory functions' relating to: the interception of communications; the acquisition or retention of communications data; the acquisition of secondary data or related systems data; and equipment interference.[120] IPCO may also be directed by the Prime Minister to keep under review the carrying out of any aspect of the functions of

[116] IPA, s 19 (1).

[117] A Judicial Commissioner must have held a 'high judicial office' within the meaning of Part 3 of the Constitutional Reform Act 2005. IPA, s 227.

[118] IPA, Part 8, Chapter 1.

[119] Ibid, s 242. An appeal may be granted on grounds that this would 'raise an important point of principle or practice' or 'there is another compelling reason for granting leave'. RIPA, s 67A (8).

[120] IPA, s 229.

an SIA or the armed forces and Ministry of Defence as far as they are engaging in intelligence activities.[121] As part of providing such oversight, IPCO is empowered to carry out the investigations, inspections and audits as the IPC 'considers appropriate for the purposes of the Commissioner's functions'.[122]

When carrying out investigations, IPCO is supported by statutory provisions which require public authorities to disclose to IPCO 'all such documents and information as the Commission may require for the purposes of the Commissioner's functions'[123] as well as 'provide a Judicial Commissioner with such assistance as the Commissioner may require' in its investigation.[124] This includes providing access to apparatus, systems or other facilities or services as the Judicial Commissioner may require.[125] This is meant to ensure that IPCO is not obstructed in its investigations and can be provided with all access and support as it considers necessary to review the exercise of investigatory powers. IPCO is also assisted in its investigations and authorising role by a number of advisory bodies which includes a 'Technical Advisory Board' (TAB),[126] and 'Technology Advisory Panel' (TAP).[127] This provides IPCO with access to technological expertise to interpret changes to surveillance techniques

[121] Ibid, s 230.

[122] Ibid, s 235.

[123] Ibid.

[124] IPA, s 235 (3)

[125] IPA, s 235 (4)

[126] IPA, s 245.

[127] IPA, s 246.

and scrutinise arguments in relation to necessity and proportionality with background knowledge of the surveillance technology that may be available in the relevant circumstances.

IPCO is also required to provide an annual report to Parliament.[128] The report must include a wide range of information including statistics on investigatory powers, information about the operation of safeguards attached to such powers, numbers of warranted issues, information on any errors discovered, description of its funding, staffing and other resources.[129] The three reports published so far contain much detail about its work, and includes all statutorily required information.[130]

4.2.2. The IPT as a fact-finding body

When creating the IPT, the New Labour Government informed Parliament that it was to be a 'serious and powerful' tribunal for those concerned that surveillance powers had been abused.[131] As mentioned above, the Tribunal has exclusive jurisdiction in adjudicating article 8 and surveillance claims, as well

[128] IPA s 234.

[129] Ibid, s 234(2).

[130] IPCO, 'Annual Report 2017' (2019) HC 1780; IPCO, 'Annual Report 2018' (2020) HC 67, IPCO, 'Annual Report 2019' HC 1039.

[131] HC Deb 6 March 2000 vol 335 col 768.

as claims made regarding the conduct of the intelligence services.[132] Indeed, as a judicial body responsible for making determinations on the compatibility of the UK surveillance regime with the ECHR, the IPT has many features to enable it to carry out a more rigorous review of the UK surveillance regime when compared to the ECtHR. In the first instance, the Tribunal is a specialist judicial body, established by the RIPA to deal with complaints brought in relation to investigatory powers under RIPA, including human rights claims.[133] It is also the body responsible for adjudicating complaints brought in relation to the SIAs.[134] As a specialist body with responsibility for adjudicating such matters, it is able to build specific expertise related to surveillance and the SIAs, which does not get diluted by the Tribunal having to adjudicate claims relating to alternative matters. The Tribunal is also able to access expertise in the form of assistance from IPCO.[135] However, as with judges examining TPIMs, judges in the IPT are required to apply the 'principles applicable on an application for judicial review' when determining proceedings in this context.[136] This requirement does not technically prohibit the IPT from fact-finding and substantive review. However, as will be discussed in Chapter Six, this

[132] RIPA, s 65.

[133] RIPA, s 65. The Tribunal replaced the Interception of Communications Tribunal Service Tribunal, the Intelligence Services Tribunal and the complaints provision of Part III of the Police Act 1997 (concerning police interference with property).

[134] Ibid.

[135] IPA s 231 (1). For the procedures entailed in accessing this assistance, see *Privacy International and others v SSFCA and others* IPT/17/86 & 87/CH (21 October 2021).

[136] RIPA, s 67 (2).

requirement does stand as evidence of mixed messages having been afforded to judges in this context as to the precise nature of their reviewing role.

The Tribunal is subject to procedural rules published by the Government,[137] but also has power to develop its own procedure.[138] This equips the IPT to adapt its adjudicative approach to the specific needs of surveillance cases, and complaints regarding SIAs. In exercising the power to develop its own procedure, the Tribunal has developed its own innovative technique for upholding secrecy while at the same time promoting legal accountability of the UK Government in the form of holding public hearings. This technique involves relying on 'assumed facts' when conducting hearings in open proceedings.[139] These are factual premises used in legal proceedings, whose veracity is explicitly unconfirmed, which are presumed to be true in the course of legal reasoning for making a determination in a case. They are 'now well established procedure' in the IPT,[140] which the Tribunal has justified partly by reference to open justice.[141] In spite of Rule 9 (6) of the IPT Rules 2000 expressly stating that oral hearings must be held in private, the IPT in the *Kennedy* held it could hold hearings in public.[142] Sitting in public for the first time, the IPT concluded

[137] IPT Rules 2000, IPT Rules 2018.

[138] IPT Rules 2000, Rule 9(1).

[139] Also referred to by the IPT as: 'agreed facts', 'agreed premises', 'hypothetical premises'. See *Liberty v GCHQ* (No 1) [2014] IPT/13/77/H.

[140] *PI and Greennet and others v SSFCA and the GCHQ* [2016] IPT/14/85/CH [2].

[141] *Kennedy and Other Ruling* [2003] IPT/01/ 62 & 77 [75] – [76], [84].

[142] IPT Rules 2000, Rule 9 (6).

that hearings of 'preliminary issues of law'[143] and 'legal arguments on pure points of procedural law'[144] should be conducted in public, despite the existence of Rule 9(6).

The IPT has described assumed facts as 'assumptions as to the significant facts in favour of claimants and to reach conclusions on that basis'.[145] The Tribunal went on to state that 'only once it is concluded whether or not, if the assumed facts were established, the respondent's conduct would be unlawful' would it consider the position in full 'thereafter in closed session'.[146] The IPT also stated that the use of assumed facts means that 'without making any finding on the substance of the complaint, where points of law arise the Tribunal may be prepared to assume for the sake of argument that the facts asserted by the claimant are true and then…decide whether they would constitute lawful or unlawful conduct'.[147] Here we see that, schematically, the role of assumed facts comes to light as the Tribunal asks: if a given surveillance practice was occurring, would this be unlawful? If the Tribunal has established that the given surveillance practice would be unlawful, it will consider in closed session whether the claimants have in fact had their rights violated by this practice. This means that its adjudication as to the lawfulness of surveillance powers is

[143] *Kennedy and Other Ruling* [2003] IPT/01/ 62 & 77, [171].

[144] Ibid.

[145] *PI and Greennet and others v SSFCA* [2016] IPT/14/85/CH, [1].

[146] Ibid.

[147] IPT Report 2011-2015 (2016) <https://ipt-uk.com/docs/IPT%20Report%202011%20-%202015.pdf> accessed 17 October 2021, 8.

limited to that which can be readily inferred in open about a surveillance regime. However, the use of assumed facts in this way does enable the Tribunal to carry out public proceedings while preserving secrecy around surveillance. In *Liberty*, the use of assumed facts enabled the Tribunal to carry out five-sixths of the proceedings in public.[148] This stands as another feature that suggests the IPT is equipped to carry out substantive review of surveillance powers and ensure that the exercise of investigatory powers protects ECHR rights.

The Tribunal is empowered to examine security-sensitive material through the holding of closed proceedings. The IPT is statutorily required to 'carry out its functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary' or prejudicial to a number of public interests, including national security.[149] The ability to go into closed sessions establishes a means by which Tribunal can have access to the internal aspects of the surveillance regime, in particular the internal procedures associated with surveillance powers and the internal nature of the powers themselves.

In closed sessions, the Tribunal is assisted by a 'Counsel to the Tribunal', who is a security-cleared lawyer present in closed proceedings and responsible for advising the Tribunal on the evidence presented by the Government.[150] In

[148] *Liberty v GCHQ* (No 1) [2014] IPT/13/77/H.

[149] Investigatory Powers Tribunal Rules 2000, Rule 6(1).

[150] *Liberty v GCHQ* (No 1) [2014] IPT/13/77/H, [10].

carrying out this role, the Counsel is able to make submissions to the Tribunal as to closed material they think the government should disclose in open proceedings.[151] In both *Liberty* and *Privacy International*, the Government made disclosures following closed sessions, some of which had been on the advice being given by the Counsel.[152] Importantly, the Counsel is also able to make submissions against the SIAs in closed proceedings.

As is discussed in more detail below, the Tribunal has, by its own determination, converted surveillance regimes to being foreseeable and therefore in compliance with article 8 requirements on the basis of disclosures that have occurred in the course of IPT proceedings. The IPT judgments themselves, by containing details from disclosures in proceedings regarding internal safeguards surrounding surveillance powers, have been found to transform the status of two surveillance regimes from being unforeseeable and unlawful to being 'sufficiently signposted' and therefore lawful. These regimes are the UK intelligence-sharing regime with the US, and the collection of BCD.[153] This transformative function of the IPT is described by the ECtHR in *Big Brother Watch* as its 'elucidatory role', which the Court has praised as an important means of enhancing transparency surrounding the UK surveillance

[151] Ibid.

[152] For example, see *PI and Greennet & Others v the SSFCA and GCHQ* [2016] IPT 14/85/ CH, [11].

[153] *PI (No 3)* IPT/15/110/CH 23 July 2018.

regime and provides 'invaluable assistance' to the Court in making its own determinations.[154]

4.3. Gaps in the IPT's Scrutiny

As we have just seen, the combination of oversight and review is in principle capable of filling in the gaps in scrutiny that operate at the European level and providing 'end-to-end' scrutiny of the necessity and proportionality of surveillance powers, to protect article 8 rights. However, as this section demonstrates, in practice the UK system falls short by not carrying out a substantive necessity and proportionality assessment. This is due to the IPT employing a form of rationality review in relation to the majority, if not all, of the issues relevant to adjudicating article 8. This is principally linked to the Tribunal largely imitating the approach taken at the European level, which replicates the gaps in scrutiny already discussed. Moreover, the IPT's open rulings strongly suggest that the Tribunal does not substantively scrutinise whether the relevant safeguarding procedures are adhered to in practice and applies rationality review to its scrutiny of the specific exercise of surveillance powers. Other bodies responsible for surveillance oversight in the UK do not fill in these gaps in scrutiny for the purpose of protecting article 8 rights,

[154] *Big Brother Watch v UK* App no 58170/13 (ECHR, 13 September 2018), para 256.

4.3.1. Replication of the ECtHR's procedural approach

The IPT replicates the ECtHR's procedural approach in applying article 8 necessity tests in surveillance cases, which has the effect of replicating the gaps in scrutiny at the European level. Indeed, the Tribunal has never made a formal assessment of the necessity of a surveillance power in an open judgment. It has never decided for itself whether a surveillance power is *in fact* necessary for the protection of national security. It has merely noted formal features of the surveillance regime, as an indirect means of determining necessity. This is even when considering new surveillance powers, avowed by the UK Government or disclosed on the basis of leaks, and whose necessity had not been debated in Parliament as their legal basis was not explicitly provided for in statute. In all such rulings considering newly avowed surveillance powers – such as in the cases of *Liberty*,[155] *Privacy and Greennet*[156] and *Privacy International*[157] – the Tribunal began its rulings with a general background to the powers. It provided a formal assessment of the powers by considering whether they are 'in accordance with the law', while citing that this is the

[155] *Liberty v GCHQ* (No 1) [2014] IPT/13/77/H; *Liberty v GCHQ* (No 2) [2015] IPT/13/77/H; *Liberty v GCHQ* (No 3) [2015] IPT/13/77/H.

[156] *PI and Greenet v SSFCA* [2016] IPT/14/85/CH.

[157] *PI v SSFCA and others* [2016] IPT/15/110/CH (17 October 2016); *PI v SSFCA and others* [2017] IPT/15/110/CH (8 September 2017); *PI v SSFCA and others* [2017] IPT/15/110/CH (18 December 2017); *PI v SSFCA and others* [2018] IPT/15/110/CH (23 July 2018); *PI v SSFCA and others* [2018] IPT/15/110/CH (26 September 2018); *PI v SSFCA and others* [2019] IPT/15/110/CH (14 April 2019) *PI v SSFCA and others* [2019] IPT/15/110/CH (20 December 2019).

approach the Tribunal must take on the basis of the ECtHR's approach to adjudicating surveillance, as established in *Klass* and *Weber*.[158]

The IPT has further taken a procedural approach to its consideration of the proportionality of general surveillance powers. On the one occasion it explicitly considered the proportionality of general surveillance powers, the Tribunal did not consider proportionality for itself, but, as with its indirect assessment of necessity, the Tribunal merely highlighted formal features of the UK surveillance regime. This was in relation to an assessment of the compatibility of two bulk data surveillance regimes with article 8 obligations. On the question of the proportionality of bulk powers of surveillance, the Tribunal stated its task was to see whether it was 'satisfied that what has occurred in the past, while supervised by the Commissioner,[159] and always subject to the suggestions of improvements, which…have regularly been made, has been proportionate or…appropriately calibrated to the circumstances'.[160] The Tribunal stated that an 'important part of such consideration' was to 'see whether, when the Commissioner or his team makes recommendations, such recommendations are suitably and timeously complied with.[161] Using this

[158] For example, in *Privacy and Greennet* 'Issue 1' begins by considering whether there is a legal basis for CNE powers. *PI and Greenet v SSFCA* [2016] IPT/14/85/CH, [12]. In *Liberty (No 1)* the reasoning starts by considering the statutory framework governing the bulk interception of communications and does the same when it assesses intelligence sharing. See *Liberty v GCHQ* (No 1) [2014] IPT/13/77/H.

[159] At the time of the judgment, this was referring to the Interception of Communications Commissioner, which was the oversight body for a number of aspects of surveillance prior to the establishment of IPCO.

[160] *PI v SSFCA and others* [2018] IPT/15/110/CH, [89]

[161] Report of the Investigatory Powers Tribunal 2011 – 2015 (2016) 8, paras 2.7 – 2.8 <https://ipt-uk.com/docs/IPT%20Report%202011%20-%202015.pdf> accessed 17 October 2021.

approach, the IPT examined proportionality through an assessment of the response of the SIAs to recommendations made by the Surveillance Commissioners. This is a procedural approach as the Tribunal avoided considering the substantive proportionality of such powers but focused on the procedures surrounding the exercise of such powers.

The IPT's open rulings also indicate that the necessity and proportionality of a general surveillance power is not considered in any substantive sense in closed proceedings held by the IPT. The Tribunal's own descriptions of closed proceedings refer to the necessity and proportionality of surveillance powers only as exercised directly in relation to the claimants. In *Liberty (No 3)*, the two issues the Tribunal stated it considered in closed proceedings was: '[w]hether in fact there has been…soliciting, receiving, storing and transmitting by UK authorities of private communications of the Claimants' and '[w]hether in fact the Claimants' communications have been intercepted' in a manner which was unlawful.[162]

The Tribunal's conclusions, based on closed evidence in relation to BCD and BPD powers, similarly only considered the specific exercises of these powers, and whether they were necessary.[163] As is discussed below, there is one occasion in which the Tribunal considered more general features of the regime

[162] *Liberty v GCHQ* (No 3) [2015] IPT/13/77/H, [2]. The Tribunal does also mention it having been enabled to 'take into account questions relating to both generic (or 'systemic') questions and those relating to the individual claimant and its communications', however this is never properly explained by the Tribunal and nothing else in its judgment suggests it considered the necessity of the powers generally.

[163] *Privacy International v SSFCA* [2018] IPT/15/110/CH (26 September 2018).

surrounding bulk data in closed, related to data-sharing with 'industry partners'. However, this consideration did not involve making any assessments as to the necessity and proportionality of bulk data powers. The ruling is therefore consistent with the argument made here, that the Tribunal replicates Strasbourg's procedural approach despite its capacity to carry out a substantive review.

4.3.2. Replication of the ECtHR's flexible approach

The IPT also replicates the ECtHR's flexible approach to applying the 'in accordance with the law' article 8 requirement. In considering the issue of foreseeability and the safeguards attached to legal powers, the IPT has been flexible in taking into consideration standards and safeguards from a range of sources, the majority of which are not legally binding. The manner in which the IPT has employed this flexibility is visible as far back as one of its earliest public judgments in *British Irish Rights Watch*.[164] The case principally concerned the compatibility of the interception of communications under RIPA with article 8.

In this case, the IPT ruled the surveillance powers were compatible with article 8 requirements, partly as it considered the surveillance powers were in accordance with the law and sufficient safeguards existed to ensure that

[164] *British-Irish Rights Watch and others v Security Service and others* [2003] IPT/01/77.

surveillance powers were only exercised when necessary and proportionate.[165] In making this finding, the Tribunal referred to a witness statement provided by the Director General of the Organised Crime, Drugs and International Group of the Home Office.[166] This witness statement contained references to 'internal agency manuals' with 'comprehensive instructions and refer in detail to specific techniques and processes'.[167] The Director General described the instructions as having a level of detail 'required precisely in order to ensure' that the safeguards are 'properly understood by staff and fully effective in practice'.[168] However, the statement also emphasised that such manuals could not be put into the public domain without risking national security.[169] Notably, the IPT did not examine the manuals, as it did not go into closed proceedings. Instead, it ruled on the entire case as a 'preliminary issue of law', on the basis of assumed facts.[170] Moreover, the IPT explicitly stated it was not part of the requirements for accessibility and foreseeability that such safeguards should be published.[171] Instead, the IPT emphasised that foreseeability could be satisfied by the criteria governing surveillance powers laid out in statutes and 'knowledge of the existence' of safeguards.[172] In this way, the IPT imitated

[165] Ibid, [39].

[166] Ibid, [14].

[167] Ibid.

[168] Ibid.

[169] Ibid.

[170] Ibid, [1].

[171] Ibid, [36].

[172] Ibid, [37].

Strasbourg's flexibility in upholding safeguards without considering their enforceability or the manner in which they operate in practice.

The IPT has continued to employ Strasbourg's flexible approach in its more recent cases. In *Liberty (No 1),* the Tribunal stated that for the purposes of fulfilling *Weber* requirements, it was sufficient that, in relation to surveillance powers, '[a]ppropriate rules or arrangements exist and are publicly known and confirmed to exist, with their content sufficiently signposted, such as to give an adequate indication of it' and that they are 'subject to proper oversight'.[173] In examining rules or arrangements which were 'sufficiently signposted', the Tribunal was prepared to accept a range of different documents and statements as 'evidence' that such arrangements are both accessible and foreseeable. This included recognising witness statements and internal policies published within its own judgments as constituting 'arrangements' which were 'sufficiently signposted'.[174] Of particular significance for the IPT's ruling was a witness statement from Charles Farr Director-General of the Office for Security and Counter Terrorism at the Home Office since June 2007.[175]

In the statement, Mr Farr referred to having reviewed such safeguards and that he was 'satisfied' that they could not 'safely be put into the public domain

[173] *Liberty v GCHQ* (No 1) [2014] IPT/13/77/H, [14].

[174] Ibid.

[175] Ibid, [15].

without undermining the effectiveness of interception methods'.[176] The IPT considered this statement to be sufficient evidence of the existence of internal safeguards to make such safeguards accessible and foreseeable.[177] This was despite the fact that the non-governmental party had not been given the opportunity to cross-examine Mr Farr. In other words, the Tribunal considered that in setting out Charles Farr's statement that such arrangements existed but were not possible to disclose in its judgment, the existence of such arrangements were sufficiently public such that the powers, which had previously not complied with article 8 requirements, were now lawful. In this way, Farr's statement, which had not been subject to cross-examination, was the tipping point for such powers to become 'in accordance with the law'. This represents a remarkably flexible approach on the part of the IPT.

In replicating Strasbourg's flexible approach, the IPT has reproduced the gaps in its scrutiny in open proceedings. Notably, unlike Strasbourg, the IPT is also able to examine any internal arrangements referred to by the Government in closed proceedings. However, the scrutiny that the IPT can realistically apply in closed is limited. This is due to the inherent disadvantage of the Tribunal in being able to exert scrutiny on the procedures in closed, despite being assisted by the Counsel to the Tribunal in such proceedings. In a similar manner to the position of judges considering closed evidence in SIAC, and in relation to TPIMs, the IPT is unable to consider opposing evidence when considering the

[176] Ibid, [77].

[177] Ibid, [55].

Government's internal arrangements in closed. This is partly because unlike a Special Advocate, the Counsel to the Tribunal does not formally represent the interests of the claimant but is there to assist the Tribunal. Moreover, due to the blanket secrecy surrounding the practice of the SIAs, it is not clear how the Counsel could obtain any factual evidence to challenge the Government that such internal safeguards are insufficient or not applied properly. As a result, the Government is able to present its case to some extent unopposed in closed proceedings. This must necessarily limit the Tribunal's scrutiny of the adequacy of such arrangements to rationality review, barely filling in the gap of scrutiny created by the ECtHR's approach.

4.3.3. Further gaps in scrutiny and weak rationality review

In addition to the gaps in the Tribunal's scrutiny resulting from its replication of the Strasbourg Court's procedural approach, there appears to be a risk of further gaps, which arise as a result of procedure it has adopted in making its own adaptation to challenges raised by surveillance adjudication. In the first instance, these arise in relation to its assumed facts procedure. As discussed above, this procedure was adopted by the Tribunal to hold public proceedings while maintaining secrecy surrounding the UK's surveillance regime. The manner in which assumed facts can create potentially significant gap in scrutiny is most clear when viewed in relation to the Tribunal's 'elucidatory

role'.[178] As mentioned, in carrying out this role, the Tribunal becomes a site for disclosures regarding the operation of the UK surveillance regime, to make the regime both accessible and foreseeable in line with article 8 requirements. As we will see, the fact that such disclosures occur in the context of open proceedings relying on assumed facts has the effect of shielding the contents of such disclosures from proper scrutiny by the non-governmental party.

As discussed in the previous section, the Tribunal often refers to factual evidence in its open rulings, without having subjected it to any form of scrutiny. Indeed, this has extended to statements by the Government, such as from Charles Farr, referring to arrangements which have ended up playing a crucial role in establishing the compliance of the UK's surveillance regime with article 8. We know that, due to the Tribunal conducting open proceedings on assumed facts, the non-governmental party is left with no opportunity to challenge the Government's evidence regarding the existence of safeguards. This has included there having been no opportunity to cross-examine Charles Farr to ask of him questions such as 'how long have these safeguarding arrangements been in place?' or 'what is the procedure if these safeguards are not adhered to?' This is despite such questions seeming crucial for establishing precisely how effective the safeguards are at ensuring that surveillance powers are in practice only exercised when this is necessary and proportionate.

[178] This in itself has been subject to criticism for undermining the independence of the Tribunal by Bernard Keenan who has stated that the Tribunal's own rulings, establishing legality of the UK Government's surveillance regime, undermines the separation of powers. This seems particularly true in light of the Tribunal not being able to order disclosure, enabling the IPT acting as a conduit for curated information to be published by the Government. See Bernard Keenan, "Going 'below the waterline': the paradoxical regulation of secret surveillance in the UK' (2015) LSE Policy Briefing 9.

Another potential gap in the Tribunal's scrutiny relates to its examination of 'internal arrangement' in closed proceedings. While there is no way to know for sure what goes on in such proceedings, there are hints in the Tribunal's open judgments that its scrutiny in this context is no more rigorous than rationality review. Specifically, there are two clues in the IPT's open rulings. The first is contained in the Tribunal's open assessments of internal arrangements, which have ended up being disclosed in open proceedings. The Tribunal's assessments of these arrangements indicate it has a very low bar as to what constitutes adequate arrangements for safeguarding against the abuse of surveillance powers.

A good example of this is the Tribunal's positive assessment of internal 'handling arrangements' attached to the authorisation of BPD powers within the SIAs which ended up being disclosed in the *Privacy International* case.[179] The Government's disclosed procedures for authorisation would not ensure that SIAs make the kind of assessment that would ensure article 8 compliance. The Government's guidance initially stated that the authorisation process required a judgment that 'the level of interference with the individual's right to privacy is justified by the value of the intelligence that is sought to be derived by from the data and the importance of the objective to be achieved'.[180] Despite this guidance, an examination of the 'formal internal authorisation procedure'

[179] *PI v SSFCA and others* [2016] IPT/15/110/CH (17 October 2016), from [31] of Appendix B of the judgment.

[180] Ibid, [39].

disclosed by the UK Government in the case shows that the procedure does not require staff to include an assessment as to why on balance access to BPD would be justified. Staff are merely required to log an 'operational and legal justification' for access, made up of an 'assessment of the level of intrusion into privacy', 'the extent of political, corporate, or reputational risk' as well as a description of the required dataset.[181]

It can clearly be seen that this procedure will not provide officials with the tools required to carry out an adequate proportionality assessment to comply with article 8. Such an assessment does not involve merely noting the public interest reasons to exercise a measure while at the same time noting the impact that this would have on a right. An assessment of proportionality involves a *balancing* of interests as the UK Government's guidance itself states. The guidance describes it as a judgment that 'the level of interference with the individual's right to privacy is *justified* by the value of the intelligence that is sought to be derived by from the data and the importance of the objective to be achieved'.[182]

Despite this deviation from principle, the IPT praised the procedures, describing them as a 'rigorous formal internal authorisation procedures'.[183] Moreover, the IPT explicitly described the regime as having built into it the

[181] Ibid, [40].

[182] Ibid, [39].

[183] Ibid, [40].

relevant safeguarding processes needed to consider the 'key matters' associated with necessity and proportionality.[184] That the IPT would make an assessment such as this, which does not enforce the basis standards of the Convention, suggests it is prone to applying at most a weak rationality review in scrutinising such procedures generally. In the *Privacy International* case, it seemed that the appearance of procedures being in place was sufficient for the IPT's standards, regardless of the substance of such procedures being flawed.

A second clue that the Tribunal employs a weak form of scrutiny, in assessing the procedures surrounding a surveillance regime, is that it has not acknowledged in any of its open rulings that a crucial feature of effective safeguarding procedures is that they are adhered to in practice. This is despite the Tribunal itself having found several instances of the Government mishandling of a claimant's data in its proceedings. In *Liberty (No 3)*, in relation to the handling of data of two out of ten claimants in the form of Amnesty International and the 'Legal Resources Centre', the Tribunal found that the proper procedures had not been adhered to by the SIAs.[185] Despite the Tribunal having evidence of a lack of adherence to procedures in relation to the few NGOs considered, no question was raised by the Tribunal as to if there should be an investigation as to the adherence to procedures in general – such as by IPCO. Again, this suggests the Tribunal's scrutiny of procedures is light touch, and that there may well be a gap or several gaps in its scrutiny of

[184] Ibid, [41].

[185] *Liberty v GCHQ* (No 3) [2015] IPT/13/77/H.

safeguards, including through not considering the extent to which they are applied in practice.

At this stage, it must be mentioned that there is one instance in which the Tribunal appeared diverge from rationality review. However, notably this divergence occurred in exceptional circumstances. Such circumstances arose when a controversial surveillance power was disclosed in *Privacy International* proceedings.[186] The practice was the sharing of bulk data by the SIAs with unspecified 'industry partners'. When this matter arose, the Government issued a response as to how this practice operated and the internal safeguards attached to this practice to prevent its abuse. The claimants were then allowed to cross-examine a Security Service witness with regards to this practice,[187] and the Tribunal stated that it has considered the way that the system 'operated in practice' in closed proceedings.[188]

In the abstract, this example may be seen as evidence that IPT proceedings involve substantive, robust, review. While some form of substantive review was present in this case, principally due to the ability of the non-governmental party to cross-examine the witness, it should be noted that this is exceptional practice on the part of the Tribunal. What's more, it is a response to an extreme

[186] *Privacy International v SSFCA and others* [2018] IPT/15/110/CH (23 July 2018), Appendix 1 and Appendix 2.

[187] Ibid.

[188] Ibid, [92].

set of circumstances. The exposure of a policy to share bulk data with 'industry partners', in the absence of any explicit statutory power authorising this practice, could have had potentially explosive consequences. The secret existence of such a practice has the potential to undermine parliamentary sovereignty, by creating a significant data-sharing regime in the absence of explicit legal authority or article 8 protections. It may well have also attracted negative media attention. In light of this, the Tribunal in many ways had no choice but to ensure that there was a means for further information on this practice to be provided in open, if only to rule out people's worst suspicions as to what had been occurring. In this way, the more robust approach taken in this case should not be seen as anything other than exceptional.

A final potential gap in the Tribunal's scrutiny relates to its assessment of the specific exercise of surveillance powers. While the Tribunal examines this in closed, there is a clue in its open rulings that it approaches its examination by adopting rationality review. In the first instance, the Tribunal has said itself that its task is to apply judicial review principles in its general approach its scrutiny, which is to avoid deciding the 'merits' of the case, which it considers to be 'distinct' from considering lawfulness.[189] Importantly, this approach is indirectly encouraged by the IPA, which clarifies that Judicial Commissioners are to apply the 'same principles as would be applied by a court on an application for judicial review' in deciding whether surveillance warrants are

[189] *B v Security Service* [2004] IPT/3/1/CH, [34].

necessary and proportionate.[190] Moreover, in the Tribunal's open reasoning describing its scrutiny of the specific exercise of surveillance powers, it emphasised it had taken into account the deferential doctrine of Lord Hoffmann and Lord Sumption, discussed in Chapter One.[191]

The IPT's reliance upon such jurisprudence includes referring to the statements echoing legitimacy argument by Lord Sumption in *R (Lord Carlile)*, citing Lord Hoffmann in *Rehman*, adding that decisions relating to national security are 'pre-eminently an area in which the responsibility for a judgment that proves to be wrong should go hand in hand with political removability'.[192] The Tribunal also quoted similar statements by Lord Bingham in *A and others,* that 'great weight' should be given to the judgment of the Government and Parliament on questions regarding threat to national security, as this is a 'pre-eminently political judgment'.[193] That the Tribunal quoted these statements in isolation is problematic insofar as it amounts to cherry-picking from the jurisprudence of the appeal courts. As we saw in Chapter One, the statements emanating from the appeal courts in UKNSL are not binding on specialist regimes.[194] Moreover, *Carlile* is a ruling concerned with the standard of review in ordinary judicial review as opposed to the standard of review to be applied

[190] IPA, s 23 (a).

[191] Chapter One, 95 - 100.

[192] *R (on the application of Lord Carlile of Berriew and others) v SSHD* [2014] UKSC 60; [2015] AC 945, [32] per Lord Sumption.

[193] *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68, [29] per Lord Bingham.

[194] Chapter One, 100.

in specialist national security regimes, which have been procedurally equipped for judges to engage in substantive, fact-finding review. It is also true that these statements contradict the requirements of adjudicating ECHR rights established in the (unambiguous) core jurisprudence of UK human rights law, which is clear that as far as ECHR rights are concerned, judges must decide on questions of ECHR compatibility for themselves, and on the facts. Most importantly, statements from Lord Bingham and Lord Sumption emphasised that judges are required to approach matters relating to national security with high levels of deference, without justifying this need for deference with reference to any specific features of a case beyond being related to national security threats. The IPT's adoption of such broad-ranging doctrine when considering specific instances of surveillance suggests it is prone to apply rationality review when examining the necessity and proportionality of the specific exercise of surveillance powers.

4.4. Impact of Judicial Scrutiny on Article 8 Protections

At this stage, the damaging effects of the approach to judicial scrutiny, outlined above, might be questioned in light of the existence of other surveillance oversight bodies existing in the UK. At the forefront of surveillance oversight is IPCO. In light of IPCO's extensive functions, it might be suggested that the gaps in the IPT's scrutiny could be compensated for by IPCO, which must be able to make assessments as to the substantive necessity and proportionality of general powers as well the general adherence of the SIAs to safeguards in

light of its powers. It could be argued that IPCO doing this work would ensure that article 8 protections are in fact adequate. However, IPCO is not a reliable alternative to the IPT in this context. Even though IPCO is made up of Judicial Commissioners, it has no power to made legally binding judgments.[195] Moreover, there is no statutory requirement that IPCO consider the necessity and proportionality of surveillance powers in general, or the adherence of the SIAs to safeguards. It is true that adherence to policies is a fact which IPCO has considered in reports.[196] However, this has been in relation to Law Enforcement Agencies and Police, not SIAs. In truth, the oversight body is only required to determine necessity and proportionality of specific warrants as part of its authorisation process and to generally 'keep under review' the exercise of surveillance powers.[197] Thus, even as the principal body responsible for surveillance oversight, IPCO cannot do the work of scrutiny that the IPT avoids to ensure UK surveillance complies with article 8 requirements. IPT is the only designated body statutorily required to examine all issues for relevance for determining the compatibility of surveillance powers with the ECHR.

Examining the system as a whole, there is an irony in the framing of the former IRTL's report that the UK surveillance regime ought to be based on trust. The failure of the current system appears precisely linked to *too much* trust in the

[195] Though notably, and regrettably from the perspective of securing maximum accountability of the UK Government, the IPT has no power to issue declarations of incompatibility but is at least able to make legally binding rulings.

[196] For example, see IPCO, 'Annual Report 2019' HC 1039, para 12.6.

[197] Ibid. With respect to adherence by the SIAs with the Code of Practice.

system. In replicating Strasbourg's procedural approach, the IPT can be seen as essentially trusting that the UK Government's general surveillance powers are necessary and proportionate to threat the UK faces to national security. In only applying a light touch review to the procedures and safeguards associated with such powers, it seems the Tribunal also largely takes the notion that the relevant procedures are properly adhered to in practice at face value. As Anderson himself emphasises in his report, a system built on high levels of trust of powerful institutions is vulnerable to abuse. Indeed, the IPT's apparent high levels of trust in this context is linked to a risk of systemic abuse of UK surveillance powers, in the form of their being used when no necessary or proportionate. This risk takes two forms.

The first is that the IPT's avoidance of the substantive necessity and proportionality of surveillance powers means that the UK Government relies on secret interpretations of statutory provisions which involve exercising far more intrusive surveillance powers than might be expected based on the statutory provisions alone. Indeed, this risk is far from abstract in light of the fact that the IPT has found on several occasions that the UK Government's historic, secret interpretations of its surveillance powers were not foreseeable based on the statutory provisions alone. For example, the Tribunal has made such findings in relation to the bulk interception of communication[198] and the use of BPDs.[199] Notably, the exposure of such secret interpretations has never

[198] *Liberty v GCHQ* (No 2) [2015] IPT/13/77/H.

[199] *PI v SSFCA and others* [2016] IPT/15/110/CH (17 October 2016).

come from the Tribunal itself, but as the result of leaks i.e., the Snowden leaks, or avowal by the Government itself. Indeed, there is little prospect of the Tribunal coming into contact with such secret interpretations as long as its focus is merely on the procedures attached to surveillance powers.

The second form of abuse the UK surveillance regime is vulnerable to, is that the internal safeguards, which establish the legality of the UK Government's surveillance powers, are merely symbolic. That is to say, their principal purpose may be merely to establish legality and they are not enforced in practice. As we have seen, the extent to which the current oversight system is in a position to check adherence to internal procedures is limited. Therefore, the SIAs have the opportunity to treat the internal procedures as tokenistic, with little consequence from the perspective of exposure by UK oversight bodies.

With such risks inherent in the system, it is clear that despite the extensive safeguards present in the UK surveillance system, the protection of ECHR rights in this context bears resemblance to the treatment of such rights documented in previous chapters. As with deportation and TPIMs, the safeguards established have not been adequate to ensure that UK judges are scrutinising the question of compatibility of the UK Government's national security decisions, with the UK's obligations under the ECHR. In this way, the regime examined appears to both be a form of LGH and support the excessive deference argument. As we move on to consider the final area of UKNSL in this

area – the regime underpinning ATSCA and article 15 derogation in relation to indefinite detention of foreign nationals - similar dynamics will continue to occur.

4.5. Conclusion

This chapter has argued that article 8 rights are not being fully protected in the UK surveillance context. There are many gaps in the scrutiny of domestic review of surveillance powers by the IPT. This is despite that fact that the system in place possesses features which suggest it is capable of robust, substantive review of UK surveillance powers. The gaps we have seen in judicial scrutiny follow a number of features of the Tribunal's reasoning. In the first instance, we have seen that the Tribunal imitates Strasbourg in taking a procedural approach in considering whether a surveillance regime complies with article 8. This means that the substantive necessity and proportionality of surveillance powers are not directly considered. Secondly, the IPT has employed the Court's flexible approach in applying the in accordance with the law test. This approach has insulated many of significant features of the UK surveillance regime from scrutiny. Thirdly, there is strong evidence that insofar as the Tribunal considers the necessity and proportionality of a specific exercise of a surveillance power, this is also approached by way of rationality review. It has been further argued that the IPT's approach fails to ensure that article 8 rights are fully protected, and to ensure that there are reliable protections against the abuse of powers.

5. Article 15 Derogation From the ECHR

This chapter examines the legal regime underpinning article 15 and its application in the UK context. Article 15 of the ECHR permits Contracting States to derogate from certain obligations under the ECHR in times of emergency.[1] This is on the basis of a three-limbed test. The first limb of the test is that there must exist a 'time of war or other public emergency threatening the life of the nation' in the state intending to derogate.[2] This limb is referred to herein as the 'existence test'. The second limb of the test is that the relevant derogation must be 'strictly required by the exigencies of the situation', referred as the 'strictly required test'. The third condition is that the derogating measures relied on by states are not inconsistent with the Contracting States' obligations under international law.[3]

[1] Specifically articles 5, 6, 8, 9, 10, 11, 12, 13 and 14.

[2] ECHR, article 15 (1).

[3] Ibid.

There is no explicit provision in UK law to facilitate judicial scrutiny of article 15. The article is not given effect in UK law by section 1 of the HRA. However, UK judges did scrutinise the UK's derogation, and related emergency powers, following 9/11 in the case of *Belmarsh*.[4] Notably, article 15 is central to the protection of ECHR rights in the national security context and highlights particularly well the need for substantive view to be applied in adjudication in this area. This is because article 15 is specifically directed to an archetypal context in which national security is at threat, i.e., an emergency context. Moreover, if it is invoked, it diminishes the need for states to comply with rights governing important norms in the national security context – including articles 6 and article 8 examined in the previous chapters. As a consequence, the conditions for its exercise need to be subject to substantive review, to ensure that the protections provided in this context are not written off without proper justification.

This chapter assesses the effectiveness of article 15 for preventing the exploitation of UK emergency powers. The chapter's main conclusion is that the legal regime so far established around UK derogations is currently unable to protect against such exploitation. This is due to two features of the regime. The first is that the ECtHR has consistently applied a wide margin of appreciation in applying the existence test to the UK's derogations, made with respect to the conflict in Northern Ireland. This has resulted in a broadening

[4] *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68 (*A and others* HOL).

of standards that the Court applies as to the circumstances constituting an emergency and the measures that may be used in response to it. The breadth of these standards has, in turn, created a heavy burden for domestic courts to develop their own robust criteria in applying the existence test. However, while the UK courts in *Belmarsh* took a more robust approach than the Court in applying the strictly required test, they established a precedent for UK judges to apply the existence test by way of rationality review, thereby replicating the approach taken by the ECtHR. As will be argued, this approach is insufficiently robust to protect against the exploitation of emergency powers.

An additional conclusion of the chapter is that as a result of the Court's broadening standards, and without substantive review of the UK Government's emergency powers occurring in at least one stage of judicial review, article 15 case law in relation to the UK is stuck in a 'vicious cycle' of law. This concept is drawn from David Dyzenhaus, who identifies two contrasting 'cycles of legality' that may arise in an emergency context.[5] While one cycle of law leads to greater accountability of the executive in emergencies, the alternative cycle results in the law being understood in an 'ever more formal or empty manner'.[6] I term this a 'vicious cycle of law'. The chapter argues that the development of article 15 jurisprudence in the UK context represents an example of a vicious cycle of law. That such dynamics are taking place serves as further indication that the

[5] David Dyzenhaus, 'The Compulsion of Legality' in Victor V. Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008), David Dyzenhaus, 'Cycles of Legality in Emergency Times' (2007) 18 *Public Law Review* 165.

[6] David Dyzenhaus, 'The Compulsion of Legality', n 5, 56.

legal doctrine currently underpinning article 15 cannot serve as a reliable protection against the exploitation of emergency powers in the UK.

In presenting these arguments, the chapter is divided into five sections. Section One sets out article 15's role and its associated mechanisms, before situating the provision as a response to a long-standing and complex debate regarding the role of law in emergencies. Section Two considers the development of the article 15 regime at the European level with respect to derogations issued from the ECHR by the UK in relation to Northern Ireland. Section Three examines the scrutiny of UK derogation at the domestic level, which provides a close analysis of the famous *Belmarsh* case. Section Four then assesses article 15 case law in relation to the UK, as a whole, and sets out the manner in which the development of the law in this area represents a vicious cycle of law.

5.1. Article 15 and the Abuse of Emergency Powers

Article 15 creates a framework which permits certain state behaviour, in an emergency setting, that would otherwise be prohibited. However, there are a number of ECHR rights that may not be derogated from by triggering article 15. Such non-derogable rights include the right to be free from torture under article 3 ECHR, and the right to life enshrined by article 2. The presence of non-derogable rights reflects the view that some actions carried out by the state

are never justifiable, even in an emergency context.[7] Article 15 also prohibits the abuse of emergency powers by states, either by using emergencies as a false pretext for expanding their power or employing excessive force in response to genuine emergencies.[8] The drafters of the provision emphasised it was 'important that [s]tates parties should not be left free to decide for themselves when and how they would exercise emergency powers' because it was 'necessary to guard against [s]tates abusing their obligations under the covenant'.[9] In justifying this position, the drafters made reference to emergency powers having been invoked to supress human rights and set up dictatorial regimes'.[10]

As discussed above, article 15 sets a number of conditions on derogation, to prevent the exploitation of emergency powers by Contracting States. These are represented, first, by the existence test, which precludes states from merely asserting that an emergency for the purpose of article 15 exists. Secondly, the strictly required test, which demands that there is a robust connection between emergencies and the measures that states employ in response to them, to

[7] For example, as discussed in Chapter Two, the drafters were clear that torture would never be permissible under the Convention even an emergency context. Chapter Two, 110 - 111. Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective on Non-derogable Rights' (2001) 12 *European Journal of International Law* 5, 917 – 941.

[8] Mohamed M, El Zeidy, 'The ECHR and States of Emergency: Article 15 – A Domestic Power of Derogation from Human Rights Obligations' (2003) *Santiago International Law Journal* 277 217 – 318, 280; Frederick Cowell, 'Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR' (2013) *Birkbeck Law Review* 135.

[9] Travaux Préparatoires to the ECHR, 'Preparatory Work on Article 15 of the ECHR', 22 May 1957 DH (56) 4; CDH (77) 5, para 37.

[10] Ibid.

prevent states using an emergency as a pretext for expanding power or disproportionately interfering with human rights. Thirdly, Contracting States must comply with their international obligations in resorting to derogation measures. This sets a further constraint by requiring that states do not take measures which contradict their obligations under other international human rights conventions, and norms of customary international law.[11]

Article 15 establishes scope for states to bypass their usual set of ECHR obligations in order to respond to an emergency. This offers states a legitimate means to be free of certain human rights obligations in exceptional circumstances and is aimed at preventing states from being forced to act outside of the constraints of the ECHR in order to respond to an emergency. There are also procedural requirements attached to article 15. In derogating, Contracting State must 'keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore'.[12] Moreover, article 15 requires that the state informs the Secretary General of the Council of Europe 'when such measures have ceased to operate and the provisions of the Convention are again being fully executed'.[13]

[11] Such as, for example, the Geneva Conventions and their Additional Protocols.

[12] ECHR, article 15 (3).

[13] Ibid.

Notably, article 15 represents an innovative response[14] to a long-standing debate regarding the role of the state in times of emergency, referred to here as the 'emergencies and law debate'.[15] The debate is labyrinthine, with many positions within it made up of 'complex combinations of descriptive and normative claims'.[16] Positions in the debate vary from the historically dominant position that the executive's power should be entirely unconstrained in the case of an emergency,[17] to the view that states should only ever act in emergencies within the ordinary constitutional order,[18] with all manner of theories existing between these two positions.[19]

[14] Since the creation of the Convention, derogation provisions have been included in other human rights treaties. For example, the International Convention on Civil and Political Rights (ICCPR) contains a derogation clause largely mirrors article 15 ECHR. However, it refers to the public emergency being 'officially proclaimed' and that adds that states may take measures derogating from their obligations 'provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin' ICCPR, article 4.

[15] While also representing a compromise in response to a number of different tensions – namely the tension between the international protection of human rights and states' control over domestic affairs, and between the protection of individual rights and the protection of national needs in times of crisis. See Joan F Hartman, 'Derogation from Human Rights Treaties in Public Emergencies' (1981) 22 *Harvard International Law Journal*, 1.

[16] David Dyzenhaus, 'The Rule of Law Project: Responding to Shirin Sinnar, *Rule of Law Tropes in National Security*' (*Harvard Law Review,* 8 April 2016) <https://harvardlawreview.org/2016/04/the-rule-of-law-project/> accessed 17 October 2021. See n 23 for a list of key literature in this debate.

[17] For example, Locke argues it is necessary for the executive to depart from law and rely on prerogative power in order to effectively respond to emergency situations. See I. Shapiro (ed), *Two Treatises of Government and a Letter Concerning Toleration* (Yale University Press, 2003) 172.

[18] Kent Roach, 'The ordinary law of emergencies and democratic derogation from rights' in Victor V. Ramraj (ed), *Emergencies and the Limits of Legality* (CUP, 2008).

[19] For example see Oren Gross, 'Chaos and Rules' (2003) 112 *The Yale Law Journal* 1101; Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (OUP, 2007); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006); Tom Sorell 'Morality and Emergency' (2002) 103 *Proceedings of the Aristotelian Society* 21-37; David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003)101 *Michigan Law Review* 8; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, 2007); Mark Tushnet, 'The Political Constitution of Emergency Powers' (2007) 91 *Minnisota Law Review* 1451; Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (CUP, 2009) Ch 5; John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* 210, Alan Greene, *Permanent States of Emergency and the Rule of Law* (Hart, 2018); Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (CUP, 2015); Evan J Criddle (ed), Human Rights in Emergencies (CUP, 2016); Michael Ignatieff, *The Lesser Evil: Political Ethics in an age of Terror* (Princeton University Press, 2004); Michael Head, *Emergency Powers in Theory and Practice:*

By enabling states to respond to emergency situations in a manner which requires a loosening of ECHR obligations to ensure ECHR compliance, article 15 stands as a concession to the view that some emergency situations might require states to act beyond their normal apparatus to effectively respond, including to significantly weaken or downgrade rights protections.[20] Thus, article 15 is a rejection of the 'business as usual' model.[21] Under this model, a state of emergency does not justify a deviation from the 'normal' legal system, which is presumed to provide the necessary answers to any crises without the need to resort to extraordinary governmental powers.

The ECHR, via article 15, also seeks to uphold the rule of law in an emergency context, and therefore serves as a rejection of a historically dominant position in the debate referred to as the 'Extra-Legal Model' (ELM).[22] Proponents of the ELM argue that state security power falls solely under the purview of the executive branch of state. For example, Carl Schmitt offers a descriptive account of state responses to emergencies as necessarily being extra-legal.[23]

The Long Shadow of Carl Schmitt (Routledge, 2015); Oren Gross and Fionnuala D. Ní Aoláin, *Law in Times of Crisis* (CUP, 2006).

[20] Tom Hickman, *Public Law after the Human Rights Act* (Hart, 2010), 333.

[21] This definition is provided in Oren Gross and Fionnuala D. Ní Aoláin, *Law in Times of Crisis* (CUP, 2006), 252 – 254. Also see Kent Roach, 'The Ordinary Law of Emergencies and Democratic Derogation from Rights' in Victor V. Ramraj (ed), *Emergencies and the Limits of Legality* (CUP, 2008).

[22] As defined by Oren Gross and Fionnuala D. Ní Aoláin, *Law in Times of Crisis* (CUP, 2006).

[23] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (first published 1922, University of Chicago Press, 2005). See also David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar Republic* (OUP, 1997); George Schwab, *The Challenge of The Exception: An Introduction to the Political Ideals of Carl Schmitt Between 1921 and 1936* (Greenwood Press, 1989). Schmitt's decisionist standpoint rests on a notion of sovereignty as pre-legal, whereby the sovereign's authority is derived from a political rather than legal constitution. Schmitt's justification for the claim that

Article 15 rejects the ELM and establishes a means by which executive action can be subject to legal standards, even in the case of an emergency.

5.2. The ECtHR's Limited Scrutiny of Northern Ireland Derogations

Following the UK's ratification of the ECHR, the UK, which has a long history of employing emergency powers,[24] made several article 15 derogations with respect to the conflict in Northern Ireland. The UK Government sent an initial notice of derogation to the Secretary-General of the Council of Europe on 27 June 1957. The timing of the derogation coincided with the Irish Republican Army's (IRA) 'Border Campaign', lasting from 1956 to 1962.[25] In carrying out this campaign, the IRA engaged in repeated bombing of targets around the Northern Irish border, including at Army barracks. The 'Troubles' then began in the mid-sixties, involving violent attacks and bombings carried out by both republican and loyalist militaries, which resulted in the deaths of thousands of people, the majority of which were civilians.[26]

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such authority must be pre-legal relates to a conception of the law as unable to cope, on its own, with issues of contested interpretation of under-determination of legal rules and norms. Such difficulties cannot be resolved, according to Schmitt, using the law itself, but only by a sovereign whose authority is prior to the law, who decides how the general legal norms can be applied to specific cases.

[24] Most notably in response to the two Worlds Wars, civil unrest in its former colonies and Northern Ireland and in response to the threat posed by al-Qaida following the 9/11 attacks. Such powers have also been used in response to industrial and political unrest, such as the General Strike of 1926 and industrial strikes taking place from 1970 – 1974.

[25] Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (OUP, 2010), Chapter One.

[26] Ibid.

In response to the Troubles, the Government issued several more derogation notices as the conflict became increasingly bloody throughout the sixties and early seventies, leading to the introduction of internment in Northern Ireland in 1971, and then direct rule by the British Government in 1972.[27] The violence of the conflict reached its peak in the seventies, deaths due to the conflict were significantly fewer by the early eighties and mass bombings had substantially reduced.[28] In 1984, the UK's derogation with respect to Northern Ireland was withdrawn, then, in 1988, a further derogation was imposed. This derogation was not withdrawn until the passing of the TA, which came into force in February 2001.[29] However, much of the violence had dissipated by the early nineties. By the early 2000s, the numbers of deaths recorded as conflict-related were fewer than twenty each year.[30] Several cases were brought to the ECtHR with respect to the UK's Northern Ireland derogations. In relation to each of the cases brought against the UK in which these derogations were scrutinised by the ECtHR, the Court applied a particularly weak form of rationality review in relation to the existence test and article 15 standards became broader and more 'state-focused' as a result.[31]

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[27] The notices were issued on 25 September 1969, 20 August 1971, 23 January 1973, 16 August 1973 and 19 September 1975.

[28] 'Deaths in the Northern Ireland conflict since 1969 (10 June 2010) *The Guardian Datasets* <https://www.theguardian.com/news/datablog/2010/jun/10/deaths-in-northern-ireland-conflict-data> accessed 17 October 2021.

[29] Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (OUP, 2010), 69.

[30] 'Deaths in the Northern Ireland conflict since 1969', n 28.

[31] Fionnuala Ni Aolain, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 *Fordham International Law Journal* 101.

The observations that follow are limited to the Court's consideration of UK derogations only. As other scholars have noted, the Court has tended to impose clearer limitations when scrutinising derogation of countries that are considered less robust democracies.[32] The Court has articulated more stringent limits on emergency measures in cases involving Turkey. For example, with respect to Turkish emergency measures, the Court emphasised that emergency measures must be 'lawful' and implemented 'in accordance with a procedure prescribed by the law'.[33] While this type of principle does not necessarily add a great deal to article 15 case law, that they were articulated represents a different approach to the one taken with respect to the UK courts, as we will see. The analysis of the Court that follows is therefore limited to UK derogations.

5.2.1. The ECtHR's approach to the existence test

The Court's application of the existence test with respect to the UK's Northern Ireland derogations had three features. First, the Court maintained a strong reliance on the margin of appreciation, second, avoided factual scrutiny and, third, broadened its standards as to what kinds of circumstances could constitute an emergency for article 15's purposes. The first application lodged

[32] Stephen Tierney, 'Determining the State of Exception: What Role for Parliament and the Courts?' (2005) 68 *MLR* 4, 668 – 673, 667.

[33] *Mehmet Hasan Altan v. Turkey* App no 13237/17 (ECHR, 20 March 2018), paras 140, 213.

in relation to a UK derogation in relation to Northern Ireland was brought by the Irish Government in 1971, in *Ireland v UK*.[34] At first sight, the ruling, and its application of the existence test, might appear thorough. It makes repeated reference to an in-depth report written by the European Commission of Human Rights, which had undertaken significant fact-finding for the case. The Commission had heard 119 witnesses on behalf of the UK and Irish governments and produced a report running to 584 pages, 208 of which related to detention without trial.[35] However, despite such thorough investigations having taken place, the Court did not exert any scrutiny in applying the existence test.

In applying the existence test, the Court emphasised the need to afford national authorities a 'wide margin of appreciation'.[36] The Court justified this position on the grounds that 'by reason of their direct and continuous contact with the pressing needs of the moment' national authorities were 'in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it'.[37] The Court also emphasised that states 'do not enjoy an unlimited power in this respect' and that the Court was responsible for 'ensuring the observance of the

[34] *Ireland v UK* (1979-80) 2 EHRR 25. It should be noted that Strasbourg recently revisited this ruling in a recent judgment in 2018, following an application for it to revise its treatment of article 3 in the case. The application was unsuccessful. See also Michael O'Boyle, 'Torture and Emergency Powers under the European Convention on Human Rights: *Ireland v UK*' (1977) 71 *American Journal of International Law* 4, 674 – 706.

[35] Ibid, para 210.

[36] *Ireland v UK* (1979-80) 2 EHRR 25, para 207.

[37] Ibid.

[s]tates' engagements' with the ECHR.[38] The Court then held that the existence of an emergency was 'perfectly clear' from the facts summarised at the beginning of the ruling and 'was not questioned by anyone before either the [European Commission of Human Rights] or the Court'.[39]

In light of the existence of an emergency not being disputed, and the fact that this was an inter-state case, which makes the Court's findings more politically charged than with respect to determining individual applications, it is understandable that the Court would avoid providing a lengthy and in-depth analysis as to whether an emergency existed. However, merely including a reference to the earlier paragraphs in the judgment, without highlighting the particular factors the Court considered relevant, represents a complete avoidance of any independent or factual scrutiny. The Court essentially treated the existence of an emergency as self-evident. This meant it avoided providing any reasoned independent assessment or factual scrutiny that could constitute substantive review. Moreover, the Court's reference was to forty-seven previous paragraphs containing a great deal of information. The Court provided no indication as to which were the relevant factual circumstances for the purpose of establishing that an emergency existed. This meant that no factual elements underpinning the emergency were established, in order to judge the circumstances in which the emergency would be considered to end and for the derogation to be withdrawn. The lack of any analysis in this regard, coupled

[38] Ibid.

[39] Ibid, para 205.

with its statements regarding the margin of appreciation referred to above, established precedent for the Court to approach the existence test by way of rationality review.

The Court next scrutinised a UK Northern Ireland derogation in *Brannigan and McBride v UK*, decided in 1993.[40] The case concerned the detention of two individuals in Northern Ireland, suspected to be members of the IRA by the British Government, for extended periods of time without being brought before a judge. The ECtHR considered that the detention would, in ordinary circumstances, be in violation of article 5 and so the lawfulness of the UK's actions depended on whether it had validly derogated from article 15. The Court's overall assessment in this case was that there could be 'no doubt' that there existed a public emergency for article 15 purposes and that the measures relied on to detain the applicants were strictly required by the exigencies of the emergency.[41]

In applying the existence test, the Court followed a similar approach to the one it had taken in *Ireland v UK*, despite this ruling not representing an inter-state dispute.[42] Its reasoning primarily consisted of quoting an earlier part of its judgment as evidence of the 'impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom', which was the principal factor it cited

[40] *Brannigan & Mc Bride v UK* (1994) 17 EHRR. 439.

[41] Ibid.

[42] *Ireland v UK* (1979-80) 2 EHRR 25.

as existence that an emergency existed.[43] The Court additionally noted that, in mid-1980s, the number of deaths was 'significantly lower than in the early 1970s' while adding 'but organised terrorism has continued to grow'.[44] The Court did not refer to any factual evidence by way of support for this position.

The Court's reasoning in *Brannigan* established particularly broad standards when examining whether an emergency existed. In the first instance, the case established definitively that emergencies need not be temporary and can exist indefinitely over many years. As highlighted by Oren Gross, this position subverted the view of emergencies as exceptional, which forms the backbone of the justification for states being able to derogate in the first place.[45] Secondly, the Court refused to take up the suggestion by Liberty, Interights and the Committee on the Administration of Justice who submitted that if states are to be allowed a margin of appreciation at all, it should be 'narrower, the more permanent the emergency becomes'.[46] In response to this suggestion, the Court merely quoted the deferential precedent established in *Ireland v UK* that 'national authorities are in principle in a better position than the international judge' to decide on emergency measures and so should be offered a 'wide margin

[43] The Court had previously considered measures taken by the British Government in Northern Ireland during its break from derogation in the *Brogan v UK*. In this case, the Court had found the UK to have been in violation of the ECHR, the UK Government subsequently issued a new derogation. *Brannigan & Mc Bride v UK* (1994) 17 EHRR. 439, para 47.

[44] Ibid, para 12.

[45] Oren Gross, 'Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437, 480 – 483.

[46] *Brannigan & Mc Bride v UK* (1994) 17 EHRR. 439, para 42.

of appreciation'.[47] In this way, *Brannigan* helped to establish broad article 15 standards position, by setting a precedent for states not to be under additional pressure in the case that an emergency continues for a long period of time.

The Court's next consideration of the UK's derogation concerning Northern Ireland occurred in *Marshall v UK*.[48] This was an admissibility decision issued by the fourth section of the Court in 2001. The case was the final examination of the situation in Northern Ireland, from the perspective of determining the validity of the UK's derogation from the ECHR with respect to the conflict. The Fourth Section concluded it saw 'no reason' to depart from the finding that a public emergency existed as established in *Brannigan* eight years earlier.[49] In upholding the UK Government's derogation, the Court highlighted an 'outbreak of deadly violence', which had preceded Mr Marshall's detention.[50] The Court stated that this confirmed that there had been 'no return to normality since the date of the *Brannigan and McBride* judgment such as to lead the Court to controvert the [UK] authorities' assessment of the situation'.[51]

The Court's application of the existence test in *Marshall* reflected an avoidance of close factual scrutiny and reticence to make an independent assessment, as

[47] Ibid.

[48] *Marshall v UK* App no 41571/98 (ECHR, 10 July 2001).

[49] Ibid, Section B.

[50] Ibid.

[51] Ibid.

is required in substantive review. The Court's description of the circumstances underpinning the 'outbreak of deadly violence' does not engage closely with the facts of the case. On the basis of the cross-referencing in the decision, it is clear the 'outbreak' referred to thirteen murders and 'numerous bombing incidents' having taken place in the province of the applicant in the seven-week period leading up to his detention.[52] Such factual circumstances could just as well refer to a spate of serious crime as it could an emergency. No information was provided by the Court as to in what way the murders were connected to terrorism in Northern Ireland. It is possible they were only weakly connected to terrorist acts and were more a product of gang violence in the region. Moreover, the meaning of a 'bombing incident' is also not clear and plausibly may refer to bomb scares as well as occasions in which bombs have been set off. The lack of clarification here is evidence of a general avoidance of factual scrutiny on the part of the Court, and a tendency to defer to the UK's assessment of the emergency rather than engage in independent scrutiny.

A second significant feature of the reasoning was that a public emergency was equated with a situation in which there had not been a 'return to normality'.[53] This raised the prospect of states being able to point to 'non-normal' circumstances in order to establish that a public emergency exists in order to derogate from the ECHR. The range of circumstances that might be acceptable in this context is exceptionally broad, essentially dissolving the prospect of the

[52] Ibid, Section A.

[53] Ibid, Section B.

Court being able to make its own independent assessment as to whether an emergency fitting the emergency test's description really does exist. In this way, the Court in this ruling established precedent for even broader article 15 standards than had been developed in *Brannigan* and was representative of a greater willingness on the part of the Court to accommodate the UK's assessment of emergencies.

From the cases examined, it is clear the Court's approach to the existence test with respect to the Northern Ireland derogations had implications for both the nature and degree of review it carried out. First, the Court largely avoided factual scrutiny while emphasising that the national authorities are better placed to assess whether an emergency exists. In this way, the Court's approach has represented a form of rationality review. Secondly, the Court's broadening standards as to what kinds of circumstances will constitute an emergency threatening the life of the nation has resulted in weakening the review which can be applied, as many different circumstances could meet the broad criteria set by the court.

5.2.2. Broader impact of the Court's approach to the existence test

The Court's reliance on rationality review in applying the existence test did not merely have the consequence that the existence test was easily met. It significantly limited the degree of scrutiny the Court could apply with respect to the strictly required test. A deferential approach taken to the emergency test

undermines the basis on which judges can find facts with respect to the nature of that emergency in its later reasoning in an article 15 rulings. Notably, the claim here is not that there cannot be any prohibition on fact-finding with regards to the nature of an emergency when applying the strictly required test. Yet, factual analysis of the kind of emergency at hand is crucial in this context as it provides the foundation upon which scrutiny can be applied as to whether the derogating measures are 'strictly required' by the emergency. This is a point acknowledged by Lord Hope in *Belmarsh,* who stated that '[o]ne cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency' (though Lord Hope provided no further detail as to what he meant by this).[54] Importantly, the Court with respect to the Northern Ireland derogations did not acknowledge this point. There is also scant acknowledgement of this in the academic literature in this area. The close relationship between the two tests has so far merely been asserted by David Dyzenhaus in his analysis of the *Belmarsh* case, without explanation.[55]

The nature of the emergency occurring will clearly impact what types of measures may be strictly required. This is because 'emergency' may refer to events as divergent as a spate of terrorist attacks or a particularly serious terrorist attack in a particular location, a pandemic or some form of natural disaster. Indeed, understanding the nature of an emergency is necessary to ask

[54] *A and others* HOL, n 4, [116].

[55] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006), 180 -181.

even the most basic questions of emergency measures, such as whether the measures are targeted at the appropriate groups of people, and are in place for a suitable duration of time. For example, those who live in a particular location where there are high infection rates in a pandemic might be targeted for the purpose of liberty-restricting measures. In contrast, those who have provided practical assistance to known terrorists – rather than those tied to a particular location - might be the subject of liberty-restricting measures in a terrorism-related emergency. More specifically, the importance of factual analysis of an emergency for determining what may be strictly required extends well beyond requiring facts to establish a broad 'type' of emergency.

Even once the broad type of emergency has been established factual details regarding the specific emergency at hand will provide crucial evidence as to whether certain measures are strictly required. For example, if the emergency is an armed insurgency, factual information regarding the location of the insurgency and its source of funding and weapons may assist in answering the question as to geographical areas in which liberty-restricting measures may be imposed for the purpose of shutting it down. In the case of terrorism, information regarding the general operational tactics of the terrorist groups at hand may offer crucial insight into whether broad powers of digital surveillance of the general population are temporarily required, or whether the use of 'thematic warrants' for surveillance are sufficient. In *Marshall* above, more specific factual details explaining the relevant violent outbreak may well have had implications for an assessment of what measures were strictly required. If

that outbreak had been linked to a local vigilante group rather than a centrally organised terrorist group, this would impact the proportionality of nationwide surveillance and detention measures rather than targeted measures.

In this way, the factual details of an emergency directly impact the level of scrutiny that can be applied with respect to the strictly required test.[56] In the case that factual scrutiny of an emergency is avoided, due to the Court approaching the existence text by way of rationality review, the Court will be severely limited in considering what measures are strictly required in relation to that emergency. The limiting impact of the Court's approach to the existence test on its strictly required analysis is supported by the Court's reasoning in the Northern Ireland derogation cases just considered. In addition to applying a weak scrutiny in applying the existence test, the Court confined itself to rationality review in applying the strictly required test in these cases. In applying the strictly required test in *Ireland v UK*, the Court merely noted the arguments by the applicants as to the ways the UK's response had not been strictly required, before asserting it could not 'accept the argument'.[57] Rather than providing reasons as to why the Court could not accept these arguments, the Court went on to discuss the need for it to take a deferential approach in

[56] It is true that generally speaking this then raises the question as to how specific states should be expected to be in detailing the nature of the emergency, particularly in light of national security concerns that may be raised in providing specific information. There will be some limits on the Court's ability to engage in close factual scrutiny, which can likely only be determined on a case-by-case basis rather than on the basis of a general principle. However, it is important to note that the problem in the cases just examined was not the Court's access to facts, but its scrutiny of the facts. In *Ireland v UK* that the Court had access to a great deal of factual information, however it did not cite any of the specific facts in making its findings. It is also true that the Court did not justify its approach on the basis of the need for secrecy surrounding the relevant facts of the emergency.

[57] Ibid, para 214.

its scrutiny.[58] It stated that it was 'certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism'.[59]

The Court's conclusion in applying the strictly required test was that the 'limits of the margin of appreciation' had not been overstepped by the UK.[60] In drawing this conclusion, the Court noted that an overall examination of the measures revealed that they had 'evolved in the direction of increasing respect for individual liberty'.[61] The Court then stated that as to the question of whether the UK's measures should have been 'attenuated more', it was not able to give an affirmative answer on the basis that 'must not be forgotten that the crisis experienced at the time by the six counties was serious and, hence, of a kind that justified far-reaching derogations'.[62] Examining the reasoning, as a whole, the only identifiable reason for the Court's conclusion that the measures were strictly required was that the measures had become less restrictive over time. In focusing its scrutiny on the evolution of the measures, the Court avoided any substantive engagement with the content of the measures

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Ibid, para 220.

[62] Ibid.

themselves. In this way, the Court limited itself to rationality review of the measures in applying the strictly required test.

In *Brannigan*, the Court engaged in closer factual scrutiny when applying the strictly required test, though its focus was not on the impact of the measures themselves but on the safeguards attached to such measures. In the first instance, the Court's assessment in applying the strictly required test focused on noting the different arguments of the applicants.[63] One argument of the applicants was that the UK Government's derogation was merely a response to its measures in Northern Ireland having been recently found to be incompatible with article 5 of the Convention.[64] In response to this claim, the Court stated that the 'validity of the derogation' could not be called into question. This was for the sole reason that the Government had decided to examine whether, in the future, a way could be found of ensuring greater conformity with the Convention's obligations.[65] The Court also repeated its stance that it was not its role to 'substitute its view as to what measures were most appropriate or expedient at the relevant time for that of the Government'.[66]

In finding that the UK had not exceeded its margin of appreciation, the Court highlighted that certain protections had remained in place with regards to the

[63] *Brannigan & Mc Bride v United Kingdom* (1994) 17 EHRR 439, paras 48 – 59.

[64] Ibid, para 49.

[65] Ibid, para 54.

[66] Ibid, para 59.

detention measures, in the form of Habeas Corpus, the right to see a solicitor within forty-eight hours, and entitlements to inform a friend or relative about detention and to have access to a doctor.[67] In light of these 'basic safeguards' against abuse, the Court found that the UK Government had not exceeded its margin of appreciation.[68] In this way, this brief reasoning represents the kind of procedural approach, as seen in Chapter Four, whereby the Court avoids engaging with the substance of the powers, but focuses on the safeguards attached to such powers.[69] The Court thereby evaded the question as to whether the measures were in fact strictly required by reference to the emergency situation.

As with the existence test, the ruling in *Marshall* essentially deferred to the ruling in *Brannigan*.[70] The Court quoted its reasoning on safeguards in *Brannigan* and reiterated their importance, stating it saw no reason to depart from them.[71] The Court also noted the annual review of the measures by Parliament, and the fact that the Government had withdrawn its derogation, before finding the application to be manifestly ill-founded.[72] As with *Brannigan*, this reasoning follows a procedural approach where the focus is on

[67] Ibid, para 64.

[68] Ibid, para 66.

[69] Chapter Four, Section 4.1.3.

[70] *Marshall v UK* App no. 41571/98 (ECHR, 10 July 2001).

[71] Ibid, Section B.

[72] Ibid.

safeguards rather than the substantive necessity of the measures in light of the exigencies of the situation.

The fact that the Court engaged in rationality review when applying the strictly required test in the Northern Ireland derogation cases reflects the broader impact rationality review of the existence test can have on article 15 scrutiny. It also demonstrates the significant burden that the Court's approach in these cases placed on the UK courts to ensure robust review of article 15 derogations. Specifically, the willingness of the Court to broaden its standards with respect to the existence test, and offer the UK a wide margin of appreciation, meant that the only means by which robust review would be possible at the UK level would be if the UK courts developed their own much stricter standards, departing from the Court's approach. As we will see in the next section, the UK courts did engage with more robust scrutiny of the strictly required test in *Belmarsh*. However, at the same time, they replicated the Court's deferential approach to the existence test.

5.3. UK Scrutiny of Article 15 Derogation

Despite the ECtHR's emphasis on the role of domestic authorities in determining whether the relevant article 15 conditions are in place, there is currently no explicit legal system in place in the UK to facilitate judicial scrutiny of article 15 derogations. A peculiarity of the HRA is that it does not include article 15 in the list of rights and freedoms given effect in section 1(1)

of the Act. At the same time, the HRA states that Convention rights are to have effect 'subject to any designated derogation'.[73] The HRA also gives the UK Government power to make a 'designated derogation order', designating a derogation for the purpose of the Act.[74] The HRA also clarifies that a designated derogation, unless withdrawn, has effect for five years.[75] However, the HRA does not set out how a designated derogation may be subjected to scrutiny by the UK courts.[76]

Despite there being no explicit legal regime to facilitate judicial scrutiny of article 15 derogations, the UK courts did subject a derogation order to scrutiny. This was in the *Belmarsh* case, which scrutinised emergency powers passed in derogation of article 5 (1) ECHR following 9/11 attacks.[77] These powers were contained in the ATCSA. Section 23 of the Act enabled the UK Government to indefinitely detain foreign nationals, considered harmful to national security, but whom could not be deported to their country of origin due to restrictions imposed by the ECtHR in *Chahal v UK*.[78] The *Belmarsh* case was brought by a

[73] HRA, s 1 (2).

[74] HRA, s 14.

[75] HRA, s 16 (1).

[76] Notably, the 'Independent Human Rights Act Review', an independent panel which reviewed the operation of the HRA at the request of the Boris Johnson Government, asked the question as to what system of remedies should be available to UK judges in considering challenges to designated derogation orders. Independent Human Rights Act Review, 'Terms of Reference' available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962423/Call-for-Evidence.pdf.

[77] Human Rights Act 1998 (Designated Derogation) Order 2001.

[78] *Chahal v UK* (1996) 23 EHRR 413. In its derogation order the UK Government emphasised that this extended power of detention in ATSCA was 'strictly required' while also highlighting that it was a temporary

number of individuals who had been indefinitely detained under section 23 of ACTSA.[79] The case represented the first opportunity for the UK courts to make a ruling on the validity of a UK derogation from the ECHR, as well as for the ECtHR to review decisions of domestic courts adjudicating article 15 ECHR. The case was initially heard by SIAC, which was assigned responsibility for reviewing section 23 detention,[80] as well as reviewing the 'derogation matter; in section 30 of ATSCA.[81] Notably, section 30 was lacking in clarity as to role of the courts in reviewing the derogation. It merely stated the role of SIAC was to hear proceedings which 'questioned' the derogation matter.[82] The UK courts proceeded on the basis that in finding that the derogation order was not compliant with article 15 requirements, this would be *ultra vires*, and this was accepted by the parties in the case.

Before presenting the findings in *Belmarsh*, it is worth noting that assigning to SIAC responsibility to review the derogation order, the system underpinning ATSCA was, in theory, capable of enabling robust, substantive review of article 15 protections. In Chapter Two, we saw that SIAC's design is compatible with carrying out substantive review in the national security context, even if it is

provision in force for an initial period of 15 months and would be repealed by the Government if 'at any time' it assessed that a public emergency no longer existed. See Human Rights Act 1998 (Designated Derogation) Order 2001.

[79] Initially 7 individuals and then 11 by the time the case got to the ECtHR.

[80] ACTSA, s 25 -26.

[81] Ibid, s 30.

[82] Ibid, s 30 (2).

precluded from doing so in certain contexts because of judicial doctrine.[83] The Commission can examine security-sensitive information in the form of closed evidence presented to Special Advocates. It is also equipped with security expertise due to having an individual with experience working at a senior level in the SIAs or FCO sat on its adjudicative panel.[84] The Commission has also generally expressed commitment to deciding national security matters for itself. Such factors are commensurate with a system which provides the robust and substantive scrutiny of emergency powers that has been argued here as necessary to provide an effective check on the abuse of emergency powers. The next section presents an overview SIAC's reasoning in *Belmarsh*, and the reasoning provided in subsequent rulings in the case.

5.3.1. *Belmarsh* rulings

On 30 July 2002, SIAC issued a judgment ruling that ATSCA did not comply with article 15 requirements.[85] In the first instance, the Commission considered that the threat from al-Qaeda constituted a public emergency for the purposes of article 15.[86] SIAC stated this was on the basis of open material 'confirmed' by the closed evidence.[87] SIAC stated this evidence indicated the

[83] Chapter Two, Section 2.2.

[84] SIACA, Schedule 1, s 1. HC Deb 26 November 1997, vol 301 col 1038.

[85] *A v Secretary of State for the Home Department* [2002] H.R.L.R. 45 (*A and others* SIAC).

[86] Ibid.

[87] Ibid, [35].

risk in the UK had been 'heightened since September 11, 2001' with the UK being a 'prime target' and that the 9/11 attacks showed that if 'one attack were to take place it could well occur without warning and be on such a scale as to threaten the life of the nation'.[88] In assessing the 'strictly required' limb of the article 15 test, SIAC held there was a rational connection between the measures and the emergency and the UK's derogation from article 5 was thus a lawful one.[89]

On the question of whether section 23 was strictly required, SIAC held the measure to be proportionate. SIAC emphasised that the question as to whether the UK Government might have employed 'less intrusive means', in responding to threat posed by al-Qaida,[90] should be approached with the 'greatest of caution'.[91] It also rejected the possibility of inquiring as to whether the measures adopted may be seen as 'more closely tailored' to an objective other than that claimed by the Government.[92] Despite these conclusions, SIAC found the ATCSA measures to be in violation of the ECHR on the grounds unjustifiably discriminated against foreign nationals in breach of article 14 of

[88] Ibid.

[89] Ibid, [37] – [53].

[90] A test associated with proportionality review. For example, see *Bărbulescu v. Romania* App no 61496/08 (ECHR, 5 September 2017), para 121.

[91] *A and others* SIAC, n 85, [42].

[92] Ibid [46].

the ECHR.[93] SIAC found this discrimination to be unjustifiable as the al-Qaida threat was not confined to foreign nationals but extended to UK nationals. Therefore, the difference in treatment between the two groups had no clear rational basis.[94] SIAC quashed the derogation order of 11 November 2001 and issued a declaration of incompatibility in relation section 23 of ATSCA.

SIAC's ruling was appealed and brought before the Court of Appeal, which overturned SIAC's judgment on 25 October 2002.[95] The Court of Appeal held that the discrimination between nationals and foreign nationals was justifiable and therefore the emergency measures were proportionate due to its being 'strictly required' within the meaning of article 15 ECHR.[96] The case was appealed a further time and heard by the HOL who issued a ruling on 16 December 2004, with the majority upholding the initial findings by SIAC.[97]

The HOL held by a majority of eight to one that there did exist a public emergency threatening the life of the nation.[98] Lord Bingham, leading the reasoning of the majority, stated there were three 'main reasons' for finding the

[93] Ibid, [79] – [96]. Note that while the consideration of whether the measures are discriminatory was considered separately in the SIAC judgment and subsequent judgments in the case, this formed part of an overall assessment of the proportionality of section 23 as part of applying the 'strictly required' article 15 test.

[94] Ibid, [95].

[95] *A v SSHD* [2002] EWCA Civ 1502; [2]- [4] QB 335.

[96] Ibid [45] – [64] per Lord Woolf CJ; [91] – [133] per Brooke LJ; [145] – [153] per Chadwick LJ.

[97] With the exception of Lord Hoffmann. *A and others* HOL, n 4, [26] – [29] per Lord Bingham; [79] – [80] per Lord Nicholls; [107] – [108], [115] – [120] per Lord Hope; [168] – [190] per Lord Scott; [192] – [208] per Lord Walker; [226] per Lady Hale; [165] – [166] per Lord Roger; [240] per Lord Carswell; [88] – [97] per Lord Hoffmann dissenting.

[98] *A and others* HOL, n 4, [27] per Lord Bingham.

first limb of article 15 to have been met.[99] The first was that the appellants had not shown that 'SIAC or the Court of Appeal misdirected themselves' in determining whether an emergency existed.[100] Lord Bingham inferred that because the Attorney General 'expressly declined' for the HOL to consider closed material presented to SIAC, such material must not 'alter the essential character and effect' of the open evidence.[101] The implication provided here was that SIAC's reasoning could be fully assessed by the HOL, without access to closed evidence. Therefore, it was open to their Lordships to state with confidence that SIAC had not erred overall in its findings. The second was that the ECtHR offered a broad margin of appreciation to states regarding the existence of an emergency.[102] The final reason offered was that the question as to the existence of an emergency was 'very much at the political end of spectrum',[103] and that it is 'the function of political and not judicial bodies to resolve legal questions'.[104] Lord Bingham concluded that the appellant had 'shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question'.[105] Notably, Lord Scott expressed 'very great doubt' about whether the public emergency threatening the life of

[99] Ibid.

[100] Ibid.

[101] Ibid.

[102] Ibid, [28].

[103] Citing the case of *Rehman* as authority for this. Ibid, [29].

[104] Ibid.

[105] Ibid

the nation existed. He stated he was prepared to allow the Secretary of State 'the benefit of the doubt on this point'.[106]

Lord Hoffmann dissented on this point arguing that the threat posed by al-Qaida was not so great that a threat to the life of the nation for the article 15 purposes had been established.[107] He stated that he did not find the 'European cases particularly helpful' for his reasoning, highlighting that the 'wide margin of appreciation' meant that UK judges had to decide the matter for themselves.[108] Lord Hoffmann accepted the Home Secretary's evidence that there existed a terrorist threat, but questioned whether this threat constituted a 'threat to the life of the nation'.[109] He reasoned that while the Government has a duty to protect the lives and property of its citizens, it must discharge this duty 'without destroying our constitutional freedoms'.[110] He went on to emphasise what he considered to be the resilience of the UK, which he described as having 'survived physical destruction and catastrophic loss of life'.[111] Lord Hoffmann also highlighted that Spain had not derogated from the ECHR after the Madrid bombings, stating its 'legendary pride' would not allow it.[112] On this basis, he held that SIAC had made an error in law in finding that

[106] Ibid, [154].

[107] Ibid, [86] – [97] per Lord Hoffmann.

[108] Ibid, [92].

[109] Ibid, [93].

[110] Ibid, [95].

[111] Ibid, [96].

[112] Ibid.

there was such an emergency, while highlighting that the 'real threat to the life of the nation' came 'not from terrorism but laws such as [ATSCA]'.[113]

On the question as to whether indefinite measures were strictly required, a majority upheld SIAC's finding that the measures were in violation of the Convention requirements.[114] In the first instance, their Lordships held that evidence presented in SIAC and the Court of Appeal supported the idea that the national security threat 'did not derive solely from foreign nationals', confirming a lack of rational basis for the discrimination between nationals and foreign nationals.[115] Secondly, it was highlighted that there was a discrepancy in the measures which related to fact that those detained under ATCSA were free to leave the UK, despite their apparently representing a significant threat to national security.[116]

The majority further disagreed with SIAC's conclusion as to the general proportionality of the measures (outside of their discriminatory application).[117] This was partly on the basis that the appellants highlighted that less intrusive measures had been applied with respect to 'G', one of the Belmarsh detainees,

[113] Ibid, [97].

[114] Ibid, see [30] – [73] per Lord Bingham; [80] – [85] per Lord Nicholls; [121] – [139] per Lord Hope; [155] – [160] per Lord Scott; [227] – [239] per Lady Hale; [174] – [190] per Lord Roger; [240] per Lord Carswell; [97] per Lord Hoffmann;

[115] Ibid, [32] per Lord Bingham.

[116] Ibid, [33].

[117] Ibid, [44].

following his release.[118] Such measures closely resembled what later became control orders -requiring G wear an electronic monitoring tag, and was subject to curfews and was deprived on computer equipment and a mobile phone.[119] The appellants argued that if such measures were 'strictly enforced' as an alternative to section 23, this would 'effectively inhibit terrorist activity'.[120] Responding to this suggestion, Lord Bingham stated '[i]t is hard to see why this would not be so'.[121] Lord Walker dissented on this part of the majority's ruling, holding that the discrimination was not disproportionate as it had sound, rational grounds, and was accompanied by sufficient safeguards.[122]

In their reasoning on the 'strictly required' test, their Lordships took a much firmer stance with respect to their reviewing role. Lord Bingham reasoned that the Attorney General was 'wrong to stigmatise judicial decision-making as in some way undemocratic' and that judges had a 'very specific, wholly democratic, mandate' to review the proportionality of the measures by the HRA.[123] Lord Hope decided that, in his view, SIAC 'fell into an error' of law when it reasoned that the standard of scrutiny it must apply was that established by the ECtHR.[124] In drawing this conclusion, he emphasised that,

[118] Ibid, [35] per Lord Bingham.

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] Ibid, [209] – [218] per Lord Walker.

[123] Ibid, [42].

[124] Ibid, [131].

in this way, SIAC had 'set too low a standard for the scrutiny' that national courts must apply in relation to the strictly required test.[125] This was due to the 'fact that the European Court will accord a large margin of appreciation' to states and so 'cannot be taken as the last word on the matter so far as the domestic courts are concerned'.[126] Lord Hope highlighted that the Court's position here was predicated on the idea that the strictly required assessment 'will at the national level receive closer scrutiny'.[127] Moreover, UK courts had a particular duty to apply closer scrutiny in this context in which section 30 of ATCSA recognised that 'the derogation may be reviewed by the judiciary'.[128]

The Government withdrew its derogation notice on 16 March 2005. *Belmarsh* was then brought before the ECtHR. The Grand Chamber issued a judgment on 19 February 2009, upholding the rulings of both HOL and SIAC.[129] On the question of whether a public emergency satisfying article 15 existed, the Court emphasised the 'wide margin of appreciation' it afforded to 'national authorities' to determine a threat.[130] The Court took the view that in the 'unusual circumstances', whereby the highest domestic court had adjudicated article 15 issues, the Court would only be justified in reaching a contrary

[125] Ibid, [114].

[126] Ibid, [131].

[127] Ibid.

[128] Ibid.

[129] *A and others* (2009) 49 EHRR 29 (*A and others* ECtHR).

[130] Ibid, para 180.

conclusion if it was satisfied that it had 'misinterpreted or misapplied [a]rticle 15 or the Court's jurisprudence under that [a]rticle' or 'reached a conclusion which was manifestly unreasonable'.[131] The Court 'accordingly' shared the view of the majority of the HOL that 'there was a public emergency threatening the life of the nation'.[132] On the proportionality of the measures, the Court stated it had not been provided with 'any evidence which could persuade it to overturn the conclusion' of the HOL that the difference in treatment was unjustified'.[133]

5.3.2. Rationality review in *Belmarsh*

The *Belmarsh* ruling has been hailed by some scholars as a victory for the rule of law.[134] In many ways, the *Belmarsh* rulings was a victory. With the benefit of hindsight, it is easy to forget the horror and shock precipitated by the attacks on the World Trade Centre and the image it presented of a new force of terrorism, international and highly organised.[135] The 9/11 attacks must have deeply shocked decision-makers in the UK, including those judges sitting on the panel in SIAC only months since the attacks which had killed near to three

[131] Ibid, para 174.

[132] Ibid, para 181.

[133] Ibid, paras 189 – 190.

[134] For example, see Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the courts: Changes in the British Constitutional Landscape' (2011) 9(1) *ICON* 172, 191.

[135] Kanishka Jayasuriya's analysis of 9/11 highlights the transformational nature of the attacks in precipitating a sense of an international emergency which challenged traditional ways of conceiving of crisis at the global stage. Kanishka Jayasuriya, 'Struggle over Legality in the Midnight Hour: Governing the International State of Emergency' in Victor V. Ramraj, *Emergencies and the Limits of Legality* (CUP, 2008).

thousand individuals. Considering this, it might well be argued that the fact that SIAC's and the HOL's conclusion, that emergency measures passed by the UK were not 'strictly required' on grounds of disproportionality, represents a robust approach on the part of the court, unprecedented in the judicial history in the UK. This view is supported by the fact that the focus of the case was not on the administrative measures imposed on the appellants in the case but on section 23 of ATSCA itself, in relation to which their Lordships issued a declaration of incompatibility. That the HOL was prepared to make a finding of incompatibility in relation to primary legislation, representing the democratic will of Parliament, reflects a particularly robust approach on the part of the UK courts.

There are two further specific features of the Lords' reasoning which demonstrate strength in the ruling. First, the majority were prepared to depart from the ECtHR's approach with respect to applying the strictly required test. The reasoning of the majority amounted to much more in-depth scrutiny of whether the section 23 of ATSCA was strictly required, compared to the scrutiny of the Court in the Northern Ireland derogation cases. The HOL's finding as to the discriminatory nature of the section 23 did involve some form of factual analysis in order to establish that the discrimination against foreign nationals. This is in the form of drawing on evidence regarding the nature of

the threat, i.e., that it was not only confined to foreign nationals but extended to British nationals.[136]

The second feature is that their Lordships made statements challenging the legitimacy argument.[137] Lord Roger stated that '[d]ue deference does not mean abasement…even in matters relating to national security…the legitimacy of the court's scrutiny role cannot be in doubt'.[138] Even Lord Walker, who dissented on the majority's ruling with respect to the strictly required test, emphasised that a 'portentous but non-specific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government'.[139] As highlighted by Kavanagh, such statements amount to an 'emphatic rejection' of the idea that the 'courts should adopt a completely hands-off approach'.[140]

In light of the *Belmarsh* case displaying such features, it represents a significant shift from past judicial practice with respect to national security, as many scholars have argued.[141] Notably, as discussed in Chapter One, past

[136] *A and others* HOL, n 4, [32] per Lord Bingham.

[137] Chapter One, 79 - 80.

[138] *A and others* HOL, n 4, [176].

[139] Ibid, [193].

[140] Aileen Kavanagh, 'Constitutionalism, Counterterrorism, and the courts: Changes in the British Constitutional Landscape' (2011) 9(1) *ICON* 172, 183 – 184.

[141] Tomkins argues the decision stands starkly at odds with earlier British case law concerning measures taken in the interests of national security. Adam Tomkins, 'Readings of *A v Secretary of State for the Home Department*' (2005) *PL* 259, 118; Helen Fenwick, 'Recalibrating ECHR Rights, and the Role of the Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the 'War on Terror'? (2011) 64 *Current Legal Problems* 153; David Feldman described the ruling as 'perhaps the most powerful judicial defence of liberty since *Leach v Money* (1765) 3 Burr 1692 and *Somerset v Stewart* (1772) 20 St Tr 1' and

judicial practice in this regard had set a low bar for judicial scrutiny of national security matters to meet.[142] However, while the ruling was robust in comparison to the past practice of UK judges, the standard of review applied in *Belmarsh* was largely confined to rationality review overall.

Many legal scholars have argued that the HOL's application of the existence test was excessively deferential.[143] Dyzenhaus has argued that while *Belmarsh* was in some sense a victory for the rule of law, the majority failure to require the government to provide a detailed proper justification, on the question of the existence of the public emergency, made this victory 'both qualified and unstable'.[144] Tom Hickman's analysis of Lord Bingham's reasoning as to the existence of a public emergency serves to highlight the extent to which the majority's approach to this question established a low bar for the Government to meet in establishing the existence of an emergency in domestic courts. Hickman has drawn attention to the fact that the inference drawn by Lord Bingham, with regards to the UK Government declining to present closed evidence, meant that 'by his own tactical decision not to show his hand, the Attorney-General was thus relieved from justifying his decision to the standard

claimed that it 'will long remain a benchmark in public law', David Feldman, "Case and Comment: Proportionality and Discrimination in Anti-Terrorism Legislation' (2005) *Cambridge Law Journal* 271, 273.

[142] Chapter One, 71.

[143] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006); Alan Greene, *Permanent States of Emergency and the Rule of Law* (Hart, 2018); Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (CUP, 2015); Tom Hickman, *Public Law after the Human Rights Act* (Hart, 2010); Thomas Poole, 'Courts and Conditions of Uncertainty in Times of Crisis' (2008) *PL* 234; Adam Tomkins, 'Readings of *A v Secretary of State for the Home Department*' (2005) *PL* 259.

[144] David Dyzenhaus, 'Deference, Security and Human Rights' in Liora Lazarus and Ben Goold (eds), *Security and Human Rights* (Hart, 2007), 128.

required by SIAC'.[145] Hickman has further argued that this placed an 'extraordinarily light burden' on the Government to establish an emergency, whereby all that was required was to identify an organisation 'with the capacity and will to commit an atrocity in the UK', while leaving it to the appellants to show grounds to displace the Secretary of State's decision.[146] As a consequence, according to Hickman, it is difficult to 'envisage circumstances' in which individuals would ever be able to disprove the Government's view that an emergency exists 'not least because the relevant evidence' would 'be in the hands of the Government'.[147]

The placing of such a heavy burden on the appellants is a firm indication of the HOL adopting its own form of rationality review with respect to the existence test. Their majority expressly avoided engaging in an independent assessment as to the existence of emergency and avoided factual scrutiny as to the nature of the emergency claimed to be in existence - beyond noting a few basic features of the emergency, such as statements from the Government that the most serious threats to the UK emanated from 'foreign nationals'.[148] Moreover, in holding that the existence of an emergency was 'very much at the political end of spectrum',[149] and that it is 'the function of political and not judicial bodies to

[145] Tom Hickman, *Public Law after the Human Rights Act* (Hart, 2010), 339 – 340.

[146] Ibid.

[147] Ibid.

[148] *A and others* HOL, n 4, 182 per Lord Roger.

[149] Citing the case of *Rehman* as authority for this. Ibid, [29].

resolve legal questions',[150] the majority endorsed statements which echoed the legitimacy argument[151] incompatible with robust review. Karin Loevy has argued that, in taking this stance, the majority revealed themselves as 'largely influenced by the government's claim for control over all that is so uncertain, all that is a matter of differing opinion and essentially a high -risk prediction that it must be political'.[152] Meanwhile Alan Greene has stated that the courts' refusals to review the decision to declare a state of emergency 'effectively endorsed its existence'.[153] Another important criticism of the ruling has come from Conor Gearty, who highlighted that Lord Bingham's 'fairly relaxed attitude' helped to pave the way for the creation of the control order regime by the PTA.[154] Finally, Dyzenhaus has highlighted that in upholding the appeal, Lord Hoffmann hardly mentioned the HRA or ECHR and instead emphasised the common law as sufficient to find against the Government.[155] Dyzenhaus argued this was not a useful contribution from a rule of law perspective.

All the aforementioned criticisms of the HOL's approach serve to emphasise the extensive problems resulting from the majority ruling's deferential application of the existence test from the perspective of preventing the

[150] Ibid.

[151] Chapter One, 79 - 80.

[152] Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (CUP, 2015), 79.

[153] Alan Greene, *Permanent States of Emergency and the Rule of Law* (Hart, 2018), 139.

[154] Conor Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 *Current Legal Problems*, 36.

[155] David Dyzenhaus, 'An Unfortunate Outburst of Anglo-Saxon Parochialism' (2005) 68 *MLR* 4, 673-676.

exploitation of UK emergency powers. However, even with the ruling have been subject to such extensive academic analysis, there remain further problems yet to be articulated. There are two features of the HOL ruling that provide additional evidence of the way the UK courts fell short of fell short of applying substantive review to the question of whether the conditions for derogation under article 15 were met.

The first feature is that while the application of the strictly required test was more robust than that of the Strasbourg Court - and represented an example of the courts engaging in an independent assessment in applying the relevant test - factual scrutiny is largely absent from the reasoning. The factual evidence engaged with by the HOL, regarding the nationality of individuals considered a threat, was originally described by SIAC as 'beyond argument' and was derived from publicly available information regarding the numbers of British nationals detained abroad because of being suspected international terrorists.[156]

The lack of factual analysis by their Lordships contributed to an approach which is superficial. This is in the sense that in finding that the measures were disproportionate, little analysis was provided as to the ways section 23 was disproportionate beyond its discriminatory effect and based on the emergency the UK faced. Moreover, as argued by Conor Gearty, Lord Bingham essentially

[156] Ibid.

endorsed the application of control orders as a legitimate alternative to section 23.[157] This was without articulating any grounds on which this might be an appropriate course of action considering the kind of emergency the UK faced. The lack of factual analysis in this regard provides further support for the argument advanced above, that rationality review with respect to applying the existence test, encourages superficial analysis of article 15 scrutiny as a whole.

The second feature of the HOL's ruling, which indicates a much deeper deference than has previously been acknowledged, is its treatment of SIAC's ruling. In its adjudication, the HOL was also assessing SIAC's application of the existence test. The majority ruling held that SIAC's reasoning in this regard was not misdirected. Moreover, the manner that SIAC had reached its conclusion that an emergency existed, including through examining closed evidence, formed a justification for the majority's finding that an emergency existed.[158] However, what is missing in the majority ruling, is any acknowledgement that SIAC had approached the question of whether a public emergency existed by way of rationality review.

A close reading of SIAC's open ruling exposes its reliance on rationality review, despite SIAC having stated in the ruling that it did not adopt the approach that 'because the Secretary of State has said it is therefore it is' and emphasised

[157] Ibid, [35] per Lord Bingham. Conor Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 *Current Legal Problems*, 36.

[158] *A and others* HOL, n 4, [27] per Lord Bingham.

that it must 'consider the material' for itself in making its decision.[159] However, SIAC was also clear that its standard of review was to ask whether the conclusion by the Secretary of State was 'reasonable'.[160] SIAC further emphasised it did 'not accept' it should make the *decision* for itself despite having all material available to Secretary of State. Its reasoning contained echoes of the security argument, and emphasised that the Commission did not have the 'specific advice and expertise in this area of enormous importance for all the citizens of this country which was and is available to the Secretary of State'.[161] Thus, SIAC was explicit that it was approaching the question of whether there was an emergency threatening the life of the nation by means of a rationality review and assigning significant weight to the views of the Secretary of State.

What established SIAC's approach as a particularly weak form of rationality review was its explicit approach to the appellants' arguments. The Commission refused to engage with factual evidence presented by the appellants against the Government. In the first instance, SIAC stated that articles or commentaries by persons 'however eminent', submitted as evidence regarding the 'propriety of derogating or upon the nature or extent of any risk to the United Kingdom from terrorists linked to [al-Qaida]', are 'not of any real assistance'.[162] SIAC

[159] *A and others* SIAC, n 85, [21]. The security argument is discussed in Chapter One, 75 – 77.

[160] Ibid.

[161] Ibid.

[162] SIAC commented that while such views are 'entitled to respect', they are 'not founded upon the full extent of the evidence available to the Secretary of State and SIAC itself'. Ibid, [32].

also asserted it was not prepared to engage with arguments regarding potential 'errors of fact', posed by the appellants in relation the Secretary of State's argument regarding the existence of an emergency.[163] SIAC stated it was 'not in a position to decide such issues of fact'.[164] This was before moving to 'note' that the Secretary of State in reply produced material which 'on its face does refute the claims made by the applicants' and shows 'an apparently respectable case that the situation is as the Secretary of State assert[ed] it to be'.[165] SIAC then reasoned that the Secretary of State's views 'were indeed reasonable' and that 'nothing' placed before it persuaded it 'to a contrary view'.[166]

SIAC further confirmed that challenges made, regarding the factual basis of the Government's evidence, would be dismissed where they related to specific individuals concerned in the case.[167] Moreover, SIAC further refused to take into account evidence of 'past failures' of the SIAs as evidence that their assessment in the *Belmarsh* case was wrong.[168] The combination of these factors in this way suggest that there was in reality *no* factual evidence which could have been presented against the Government, by the appellants, that

[163] In citing attention drawn by the appellants to 'errors of fact' made by the UK Government with respect to organisations such as the GIA and the GSPC (Algerian based) and the EIJ (Egyptian based) and their links with al-Qaida, SIAC stated it was 'not in a position to decide such issues of fact'. Ibid, [33].

[164] Ibid.

[165] Ibid (emphasis added).

[166] Ibid.

[167] This was on the basis that they would be dealt with in the individual appeals. Though evidence was given to support arguments made by the appellants that the fact that some of the evidence regarding the individuals was 'clearly wrong' reflected a lack of reliability in the Secretary of State's assessment regarding an emergency. Ibid, [34].

[168] Ibid, [32].

SIAC would have been prepared to engage with. SIAC largely confined itself to scrutinising the Government's evidence for logical flaws and gaps on the assumption that it was factually accurate. This assumption imposed severe limitations on the rigour of SIAC's review of the Government's case in applying the existence test.

Despite the refusal of SIAC to engage with alternative factual evidence being clear from SIAC's open ruling alone, the HOL deferred to the ruling as though it was the product of robust, substantive review. The HOL did not acknowledge the deferential nature of SIAC's review and set no standards for first-instance courts to engage in robust article 15 scrutiny. As a result, the precedent set by the *Belmarsh* rulings is a form of replication of the Strasbourg Court's approach, by applying the existence test by way of rationality review. In this way, the approach of the UK courts in the *Belmarsh* rulings was more robust than that adopted by the ECtHR, in the Northern Ireland derogation cases, with respect to applying the strictly required test. However, the UK courts failed to establish precedent for substantive review of article 15 derogation in the UK.

5.3.3. Rationality review by the ECtHR

SIAC and the HOL justified deference to the Government partly by reference to the deference the Strasbourg Court usually pays to the UK Government. The Strasbourg Court then, subsequently, applied deference partly on the grounds

that domestic courts had examined the Government's case. Indeed, in its consideration of the *Belmarsh* case, the Court took the view that in the 'unusual circumstances' whereby the highest domestic court has adjudicated article 15, the Court would only be justified in reaching a contrary conclusion if the national court had 'misinterpreted or misapplied [a]rticle 15…or reached a conclusion which was manifestly unreasonable'.[169] In this way, the Court was explicit that it was applying a rationality or reasonableness review to the rulings of the HOL and SIAC out of respect for the rulings of UK courts.

In applying this standard of review, the Court provided no guidance as to the factors that may determine manifestly unreasonable in this context. It also made no move to correct the false equivalences by the UK courts with respect to its approach and the domestic approach. The Court also avoided engaging with the weaknesses in SIAC's approach. While some limited criticism of SIAC was offered by the HOL, the Court barely engaged with SIAC's reasoning or that of the HOL. This is significant as it meant the Court could bypass any acknowledgement of how weak the standard of review was in both these courts. The Court also chose not to provide guidance as to how domestic courts must approach these issues in the future, even though providing such guidance would have strengthened its ability to take a subsidiary role in future.

[169] *A and others* ECtHR, n 129, para 174.

5.4. A Vicious Cycle of Law

Based on the previous analysis, article 15 jurisprudence is stuck in a 'vicious cycle of law'. This concept is drawn from David Dyzenhaus, who identifies two contrasting 'cycles of legality' that may arise in an emergency context.[170] In one cycle, the institutions of legal order cooperate in devising controls on public actors, which ensure that their decisions comply with the principle of legality as understood as a substantive rule of law. This will be termed a 'virtuous' cycle of law. In the second cycle, the content of legality is understood in an 'ever more formal or empty manner' and may result in the 'subversion of constitutionalism', where constitutionalism is the 'project of achieving government in accordance with the rule of law'. This will be termed a 'vicious cycle of law'. Article 15 jurisprudence represents a vicious cycle of law in two important ways. First, a vicious cycle can be observed with regards to the development of article 15 jurisprudence in relation to the UK as a whole. We have seen that, with respect of each consideration of a UK derogation, the ECtHR has broadened article 15 standards, such that it is easier for the UK to meet the requirements of article 15.

A vicious cycle can also be observed within the *Belmarsh* case. As we have seen, in reviewing emergency measures in *Belmarsh*, SIAC reviews such measures by way of rationality review. Rationality review is then repeatedly applied as

[170] David Dyzenhaus, 'The Compulsion of Legality' in Victor V. Ramraj (ed), *Emergencies and the Limits of Legality* (CUP, 2008), David Dyzenhaus, 'Cycles of Legality in Emergency Times' (2007) 18 *Public Law Review* 165.

the case is further appealed. The result is a 'cascade of deference', whereby deference runs through cases and builds momentum as the case is exposed to further review. One consequence of this is that, as the stages of review increase, the standard of review applied to the UK Government's case is weakened. However, the consequence is that the UK Government's emergency measures are never at any stage exposed to close scrutiny, despite being subject to multiple stages of review. This is the precedent which has now been set by the *Belmarsh* rulings with regards to the domestic consideration of emergency measures, implicitly endorsed by the ECtHR in its consideration of the case. Going forward, states will be able to take the *Belmarsh* rulings as a cue for derogation under article 15 to be subject to weak scrutiny by domestic courts. As a result of this, the current protections in reviewing article 15 protections are lacking from the perspective of preventing the abuse of emergency powers. In particular, the dominance of rationality review in this context will encourage superficial scrutiny as to whether emergency measures are strictly required and proportionate. This precludes reliable protections being in place to ensure that emergency measures which are not strictly required or proportionate are not passed.

The vicious cycle of law in this context bears strong resemblance to the model of normalisation, discussed in Chapter One.[171] Moreover, to the extent that the legal precedent surrounding UK derogations does not secure reliable protections, it follows in the footsteps of doctrine examined in the previous

[171] Chapter One, 78 - 79.

chapters. The legal regime underpinning article 15 in the UK is less developed. This is because there is no fixed legal regime established to adjudicate derogations. However, the way review in this context has fallen short of substantive review, despite the apparent safeguards, such as the availability of closed material at first-instance judicial decision-making, carries across the central themes of the regimes examined in previous chapters. In particular, and as will be explored in more detail in the next chapter, the lack of reliable protections evident in this regime reflects the model of LGHs.

5.5. Conclusion

This chapter has considered the protections provided by article 15 ECHR in relation to UK emergency derogations. The chapter has argued that judicial approaches in the Strasbourg Court's case law on the Northern Ireland derogations, ends up dissolving into rationality review. This has meant that the standards states must meet to establish the existence of an emergency have become increasingly broad and not tested on the facts. This in turn has limited the scope for review as to whether emergency measures are 'strictly required'. As result of these developments, there has been no substantive judicial determination of whether the conditions for derogation are met, and therefore whether the UK's bypassing of ECHR obligations has been legally justified.

6. Conclusion

Having examined four core areas of UKNSL, this chapter revisits the issues raised in Chapter One. The chapter presents three arguments. First, the chapter argues that the legal regimes examined in the thesis are LGHs to varying degrees. It will be shown that the creation of such LGHs initially stems from two sources. These are first-instance judges replicating the Strasbourg Court's focus on process and safeguards over substantive assessment of questions related to ECHR compatibility. Where the ECtHR has not established a precedent for adjudication in a particular area, first-instance judges have developed domestic 'deference-leaning' doctrine. This has led to a judicial approach in first-instance reasoning that tends towards judges adopting a secondary reviewing role in the form of carrying out process-oriented and rationality review. Often the reasoning in first instance judgments is then deferred to by appeal courts and the Strasbourg Court, while emphasising that the decision was the product of substantive review. It will be shown that as more cases have been decided in this way, this has led to the accumulation of jurisprudence in UKNSL based on rationality and process review. This has helped to normalise and expand executive national security power. These dynamics, I will suggest, have pitted UKNSL with LGHs.

While the creation of LGHs in this way may be seen by political constitutionalists[1] to vindicate aspects of their position, the second argument of this this chapter is that a close examination of the practice of UKNSL suggests that these tendencies are not inevitable features of UKNSL. There are a number of plausible explanations for the judicial tendencies identified as leading to the creation of LGHs which not reflective of *inherent* limitations on the institutional competence of courts. These are set out in the second section of this chapter.

The chapter's final section reflects on the question of how the creation of LGHs in UKNSL can be avoided in future. It is acknowledged that there are entrenched political and legal dynamics surrounding UKNSL's creation of LGHs. However, it is significant that the problems leading to the creation of LGHs are so far largely unacknowledged, both in legal practice and academic literature. Moreover, to the extent that the LGHs in UKNSL are in fact linked to the explanatory factors set out in the analysis, I argue there are a number of changes which might be made in the practice to help to minimise the risk of LGHs occurring.

[1] Chapter One, 75 - 80.

6.1. The Creation of LGHs in UKNSL

The legal regimes examined in this thesis are LGHs. It will be recalled that, on my definition, LGHs broadly have three features.[2] First, they are legal frameworks that contain some protections of the individual against the state. Secondly, these protections are insufficient for effectively challenging the executive's case. Thirdly, such frameworks also give the appearance of providing robust review, which serves to legitimise the executive's national security activity. Another relevant dynamic is the process of normalisation. Normalisation refers to the tendency for national security powers, developed to meet exceptional circumstances, to be normalised, and then seep into other non-national security related areas of the law.[3] As will be seen, the legal regimes examined in this thesis reflect these features to varying degrees.

First, each national security power examined is attached to measures designed to protect ECHR rights by enabling robust, substantive judicial review, as required by the ECHR.[4] Such review takes place within specialist legal regimes tailored to the national security context.[5] These regimes include statutory

[2] Chapter One, 75 - 80.

[3] Ibid.

[4] Chapter One, 86 - 92.

[5] Ibid, 63 - 70.

provisions explicitly requiring judges to apply ECHR necessity and proportionality standards with respect to the relevant national security power. Moreover, judges in these regimes have unprecedented powers to ensure the merits of the Government's national security case are justiciable and can be subject to rigorous factual scrutiny. These powers include the ability to access all evidence of relevance to the Government's national security case, through use of CMPs and Special Advocates or Counsel to the Tribunal. Moreover, SIAC and the IPT have special access to expertise to enable review of substantive aspects of the relevant legal tests: SIAC has access to intelligence expertise on its panel and the IPT has access to the TAP and IPCO. In this way, the legal regimes examined contain significant protections for ECHR rights.

Secondly, obstacles to the effective challenge of the executive's national security case exist within these regimes. Judicial scrutiny has gaps, where process-based review is prioritised over substantive engagement with the compatibility of the overall outcome of national security measures with ECHR rights. Moreover, where judges have focused on the outcome of measures, they have tended to avoid conducting an independent assessment of the Government's factual case, merely focusing on the rationality of the case for the relevant measure.

It is clear that these tendencies have two principal sources in the first-instance decision-making in each respective regime. The first is the manner in which

they have replicated the Strasbourg Court's approach to adjudication, particularly its reliance on process-based review, but also rationality review, which, as we have seen, is linked to the Court's limitations as a regional court.[6] In the national security contexts considered, first-instance UK judges have replicated the Strasbourg Court's approach in this way, despite not being subject to the same limitation which justifies this approach. This has contributed to gaps in scrutiny on the part of the UK courts. Most prominently, the IPT's replication of the Strasbourg Court's process-based approach has led to gaps in the open scrutiny of the necessity and proportionality of new surveillance powers.[7] Moreover, the UK courts' reproducing of the ECtHR's weak rationality review in applying the existence test in article 15 Northern Ireland derogation cases contributed to SIAC's, and then the superficial scrutiny of HOL of the existence of an emergency in the *Belmarsh* case.[8] In this case, a majority in the HOL ended up deferring to the Government on the question of whether a national emergency threatening the life of the nation existed, and the scrutiny that was applied as to the nature of that emergency was lacking in depth. This meant that the nature of the emergency was not established for conducting a searching examination of the necessity and proportionality of section 23 of ATSCA. This led to the UK courts' analysis being conducted at a necessarily general level, approached by way of rationality review.

[6] Chapter One, 57 – 58.

[7] Chapter Four, Section 4.3.1.

[8] Chapter Five, Section 5.3.2.

More generally, UK courts have followed the Strasbourg Court in its procedural approach, which focuses scrutiny on safeguards rather than the substantive questions related to the relevant national security powers. This is visible in the article 3 context insofar as SIAC has concentrated its inquiry on the safeguarding role of the diplomatic assurance to mitigate against real risk of article 3 treatment rather than directly confronting the question of overall risk.[9] Moreover, in the article 6 context, the Administrative Court has directed its attention to referring to the *AF (No 3)* principle, over an independent, substantive assessment as to whether there has been sufficient disclosure to ensure the Government's case can be effectively challenged.[10]

Where the Strasbourg Court has not adjudicated matters of relevance, we have also seen that UK judges have tended to develop 'deference-leaning' domestic jurisprudence. This jurisprudence is here described as 'deference-leaning' as it is not explicitly advocating deference to the Government, though it has the effect of encouraging a deferential approach to it, to the point that it implicitly advocates a secondary reviewing role. The most prominent example of this is SIAC's decision to recognise diplomatic assurances as a sufficient safeguard against real risk, and its development of the '*BB*-safeguards'.[11] While this

[9] Chapter Two, 140 - 142.

[10] Chapter Four, Section 3.2.2.

[11] Chapter Two, Section 3.3.3.

decision is consistent with the Strasbourg Court's general focus on procedural safeguards, it represents a home-grown approach to adjudicating real risk in the national security context, focused on process and safeguards, despite the ability of domestic courts and tribunals to engage with the substance in a manner that the ECtHR cannot. This domestic doctrine has served to divert scrutiny away from a factual analysis of risk and towards an analysis of the diplomatic relationship between the UK and country of return. This in turn has isolated the Government's case from factual scrutiny due to the Government having a significant epistemic advantage on the subject matter of diplomatic relations.

Domestic TPIM doctrine developed by the Administrative Court is deference-leaning with respect to article 6 protections. The doctrine developed around the application of the *AF (No 3)* principle encourages a deferential approach to scrutiny as it affords a great deal of discretion to the individual judge in deciding whether gisting has been sufficient to meet article 6 requirements.[12] As we have seen in the vast majority of TPIM cases, gisting has been treated as an adjunct, merely procedural matter insofar as judges have not provided open reasoning in concluding that sufficient gisting has taken place. In some cases, judges have described the *AF (No 3)* standard in a narrow and inaccurate way. In this way, the loose nature of the doctrine has led to an approach to gisting which has undermined its role as protection for article 6 rights in TPIM

[12] Chapter Three, Section 3.3.2.

cases. Such an approach favours Government secrecy, which in turn has diminished the opportunity TPIM subjects have had to engage in factual scrutiny of the Government's national security case. The same is true of the Administrative Court's doctrinal turn from *MB*, which has also had the effect of enabling a more deferential approach to the Government by treating substantive review of the Government's national security case as merely optional.[13]

Once the first-instance judicial body has made an initial decision in the core UKNSL context, this decision is then likely to be legitimised in later litigation as higher courts defer to the decision while emphasising it to be the product of robust review. In some cases, this has led to what I have termed a cascade of deference, as discussed in Chapter Five, as the initial deferential approach of the first-instance decision is impliedly endorsed and then replicated as the decision is subject to further litigation.[14] Notably, this further litigation may take place in UK appeal courts and/or the ECtHR. The result is that robust scrutiny of the executive's national security is ultimately avoided.

Cascades of deference are visible in a number of different contexts in the areas of law explored in the thesis. As shown in Chapter Five, they occur in the article

[13] Ibid, Section 3.2.1.

[14] Chapter Five, Section 5.3.2.

15 context, where there was a cascade of deference on the question of the existence of an emergency in the UK in 2001. SIAC initially deferred to the UK Government on the question of whether an emergency existed for the purpose of article 15. The UK appeal courts then deferred to SIAC on this question on the basis that SIAC had the adjudicative tools to carry out a factual assessment of the existence of an emergency. The Strasbourg Court then deferred to the UK courts assuming the UK had made an independent assessment of the UK Government. In this way, a deferential approach passed from court to court and the UK Government evaded substantive scrutiny of its argument as to whether an emergency existed.

Another significant example of a cascade of deference is in the article 8 context. IPT has imitated the approach of the Strasbourg Court in avoiding open substantive scrutiny of the general necessity of surveillance powers.[15] We also saw that the ECtHR has avoided considering the general necessity of surveillance powers while emphasising the role of the IPT as an 'effective remedy' for adjudicating article 8 rights and highlighting its procedural features which enable it to carry out a rigorous review.[16] Consequently, a procedural approach was passed from the IPT to Strasbourg and then back from Strasbourg to the IPT. There has not yet been a domestic appeal or judicial review of an article 8 IPT ruling. However, there is little reason to conclude

[15] Chapter Four, Sections 4.3.1 – 4.3.2.

[16] Ibid, Section 4.1.3.

that the approach of the appeal courts would differ in their deferential approach to SIAC in approaching IPT rulings as far as article 8 ECHR is concerned. Thus, the regime provides a further example of a cascade of deference occurring in UKNSL.

Cascades of deference are also visible in the article 3 context. While both the Court of Appeal and the HOL have on occasion challenged SIAC, generally the appeal courts will defer to SIAC with respect to its assessment relating to substantive matters.[17] Indeed, in considering the role of appeal courts with respect to SIAC, the HOL explicitly emphasised that the Court of Appeal undertakes 'expressly, a secondary, reviewing function limited by questions of law' when examining SIAC decisions.[18] It has been further highlighted that by restricting appeals to questions of law, Parliament has deliberately circumscribed review of SIAC's decisions that the Court of Appeal is permitted to undertake'.[19] Notably, because of the role of legislation in this context, judges have less choice in the manner in which they adjudicate. However, the end result is the same, which is that the ruling of the first-instance court is upheld unless it is found to be irrational. The ECtHR has been inclined similarly to defer to SIAC with respect to its rulings on article 3 risk, while at the same time emphasising that SIAC has carried out robust review. In *Othman v UK*,

[17] Chapter Two, 170 – 173.

[18] *RB (Algeria) and others v SSHD* [2009] UKHL 10; [2010] 2 AC 110, [69] per Lord Phillips.

[19] Ibid, [66] per Lord Phillips.

the Court deferred to SIAC's assessment that a Jordanian diplomatic assurance was sufficiently reliable to mitigate against real risk of article 3 treatment.[20] This was while emphasising that the assurance had withstood the 'extensive examination' carried out by 'independent tribunal, SIAC, which had the benefit of receiving evidence adduced by both parties, including expert witnesses who were subject to extensive cross-examination'.[21]

There is also evidence of normalisation having taken place. Rights protections in the regimes examined have been prone to degrade over time, which has served to normalise expanding executive national security power. This degradation has occurred as deferential jurisprudence has accumulated and broadened the scope for the Government to meet rights requirements. This trend is evident to varying degrees in each of the regimes examined. There has been a clear trend of increasingly deferential jurisprudence in TPIM cases, as a result of the recent turn in the case law towards upholding rationality review as a legitimate means of scrutinising necessity.[22]

Similarly, in the deportation context, SIAC's broad interpretations of the *BB*-test have also accumulated to widen the scope for the Government to mitigate

[20] *Othman v UK* (2012) 55 EHRR 1.

[21] Ibid, para 194.

[22] Chapter Three, Section 3.3.1.

against real risk of treatment contrary to article 3.[23] Article 15 standards with respect to the existence of an emergency in the UK have also broadened over time.[24] The broadening of standards in this way has depleted the ability of judges to challenge the executive and assert the rule of law over time, causing greater executive power to be normalised.

Normalisation is also evident at the European level. Due to deferring to the UK courts, the Strasbourg Court has weakened its standards in finding in favour of the UK Government. In upholding SIAC's approach to diplomatic assurances, the ECtHR departed from its position in *Chahal* that a diplomatic assurance is insufficient to mitigate against real risk where a state has engaged in systemic human rights violations.[25] Moreover, the Court repeatedly broadened its article 15 standards with respect to UK derogations, including ruling that the relevant emergencies do not need to be temporary.[26] In this way, the normalisation process has extended from the domestic to the European level.

[23] Chapter Two, Section 2.3.1.

[24] Chapter Five, Section 5.2.1.

[25] Chapter Two, 173.

[26] Chapter Five, Section 5.2.1.

Normalisation is linked to legal reasoning in the regimes examined becoming increasingly self-referential. As we have seen, the safeguards attached to national security powers are principally legal ones. Therefore, an assessment of safeguards by judicial bodies will often turn the focus of legal scrutiny onto themselves and the protection they provide. This approach has resulted in legal reasoning in UKNSL becoming increasingly circular and thin in its engagement with substantive matters. This has added a bureaucratic layer to the development of human rights law in this area, in which UKNSL is increasingly removed from the Government's national security practice itself and, paradoxically, onto the role of the courts, tribunals and judicial oversight regimes.[27] This self-referencing, and a consequent 'bureacratisation' of human rights law as we may refer to it, occurs in several areas of UKNSL examined in the thesis.

The phenomenon is particularly clear in adjudication of article 8 in the surveillance context. In adjudicating article 8, the IPT has often assessed its own ability to protect against the abuse of surveillance powers, in determining whether such powers meet article 8 requirements.[28] This includes citing the ECtHR's previous dictum that the Tribunal is an 'effective remedy' for article

[27] Indeed, the bureaucratic aspect of rights protection in this area evokes a procedural environment not dissimilar to sociologist Max Weber's depiction of bureaucracy, whose rule-based approach loses sight of the real-life human elements of governance, which may ultimately lead to an 'iron cage' of detached and expansive control by officials in society. Max Weber, 'Bureaucracy' in Hans Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (OUP, 1946).

[28] Chapter Four, Section 4.3.1.

8 purposes. Moreover, the Tribunal has repeatedly ruled that its own rulings have rendered surveillance powers 'public' for the purpose of such powers meeting article 8 requirements of legality. Much of its additional scrutiny has been concerned with the work of the relevant Commissioners and other safeguards in providing oversight of the exercise of surveillance powers. When the ECtHR has then considered the article 8 issues, the Court has spent much of its time assessing the IPT, and the Commissioners, before referring to its own previous rulings that the IPT is an effective remedy, in finding in favour of the UK Government.[29] Then when the IPT has come to rule on a new article 8 issue, it has cited the Strasbourg Court's ruling and the cycle continues. As a result of this self-referential approach to reasoning, the case law in this area has developed in a way which has become so focused on the safeguarding role of judicial and other forms of oversight, that article 8 surveillance case law is increasingly detached from the operation of the surveillance powers themselves.

This self-referential approach is also visible in other UKNSL contexts examined. With respect to ruling on article 6 in TPIM cases, judges have inevitably judged whether they themselves have ensured that sufficient protections are in place for procedural fairness to satisfy article 6 requirements.[30] There is also self-referencing in the article 3 context. SIAC has

[29] Ibid, Section 4.1.3.

[30] Chapter Three, Section 3.3.2.

ended up referring to its own previous assessments of the risk posed by Governments in countries of return, when considering whether diplomatic assurances are sufficiently reliable to mitigate the risk of mistreatment on return.[31]

These different forms of judicial engagement and disengagement with the issues create legal regimes which are severely hampered in their ability to effectively challenge the executive with respect to its national security activity. As a result, ECHR rights are not being subject to the direct, confrontational and searching scrutiny they require to be fully protected. Another consequence is that UKNSL challenges scholarly accounts which claim the effectiveness of the HRA has been proven in its operation in particular areas of law the national security context.[32] Chapter Three challenges Helen Fenwick's analysis that the development of law in relation to control orders/TPIMs has vindicated the HRA.[33] The legal practice examined also supports those scholars who have expressed general scepticism regarding the effectiveness of current UKNSL in its protections of rights.[34]

[31] Chapter Two, 140 -144.

[32] Chapter One, 72 - 73.

[33] Helen Fenwick, 'Terrorism and the Control Orders/TPIMs Saga: A Vindication of the Human Rights Act or a Manifestation of "Defensive Democracy"?' (2017) *PL* 4, 609 - 626.

[34] Chapter One, 73 - 74.

6.2. LGHs as Not Necessarily Inevitable

The conclusion that the protection of human rights in UKNSL is, in fact, characterised by the creation of LGHs, would appear to support the excessive deference argument that judges are inherently incapable of robust review in the national security context.[35] Such political constitutionalists would consider LGHs to be evidence that judges serve as inherently inadequate safeguarding mechanisms against the excesses of executive power. They may further argue that UKNSL comes as far as any practice can to proving the excessive deference argument. This is because the UK regime appears to provide ideal circumstances for judges to engage in substantive review. The UKNSL regimes examined represent ones in which judges have been required to adjudicate the substance of the compatibility of ECHR rights with national security powers. This is at the same time as being given unprecedented powers specifically to adjudicate national security powers with access to relevant factual evidence and support to examine it. Yet, a detailed analysis of the case law reveals that it is characterised by their failure to fully do so. In light of this, some political constitutionalists may well argue that if judges are not able to engage in robust review in such a context, this stands as clear evidence that they are inherently unable to do so in all contexts.

[35] Ibid, 77 -79.

Such a conclusion would be too quick, when the practice of this thesis is viewed as a whole. This is because it contains features which support the view that the behaviour of judges is not fixed but responsive to a range of factors - including, the procedures and statutory framework that govern them. Indeed, from the practice examined in the thesis, it is possible to build a strong case that the creation of LGHs is *not* inevitable, as political constitutionalists have claimed. Let us consider the evidence in more detail.

In the first place, the political constitutionalist position is challenged by that fact that it is human rights law itself that has driven huge reform in UKNSL.[36] It has served as a catalyst for the creation of safeguards specifically tailored to enable judges to carry out robust review in the national security context. That such extensive reform has taken place in direct response to requirements established in human rights law, leading to a 'constitutional shift', suggests that the judicial role with respect to national security is capable of change. As we have seen, these changes have involved national security powers which were previously largely secret and the sole purview of the executive. Human rights law has resulted in such powers being increasingly specified in statute, in some cases narrowed by statute, and accompanied by a range of safeguards to ensure they are ECHR compliant.

[36] Ibid, Section 1.1.3.

Secondly, judicial behavior examined in this thesis reveals itself to be mixed. While the thesis has made the case that there is a general tendency towards rationality review in the specialist regimes examined, this is a tendency rather than uniform practice. What is equally important is that there are examples where judges have visibly engaged in substantive review. Judges have substantively reviewed at least parts of TPIM cases, despite claiming this was voluntary.[37] In *EB*, Mitting J stated that 'it would be desirable, even if not legally necessary' to satisfy himself 'on the balance of probabilities, whether or not' EB had been involved in terrorism-related activity.[38] In *LG*, Nicol J opted to make his own assessment as to whether the relevant individual had engaged in terrorism-related activity, following the approach of Mitting J.[39] In particular, Nicol J engaged in an independent analysis of factual evidence underpinning the Secretary of State's national security case against LG, IM and JM. This took the form of testing the Secretary of State's claim that the individuals' involvement with the proscribed West London group 'Al Muhajiroun' (ALM) justified the imposition of their TPIMs, with reference to statements given in evidence.[40] These included from LG's 'Intervention

[37] Chapter Three, 209 – 210.

[38] *SSHD v EB* [2016] EWHC 1970 (Admin), [2016] 7 WLUK 858, [10].

[39] *SSHD v LG* [2017] EWHC 1529 (Admin), [2017] 6 WLUK 666, [42].

[40] Ibid, [85] – [151].

Provider' assigned to mentor LG,[41] LG's wife[42] and consultant psychiatrist,[43] IM's wife,[44] psychiatrist,[45] and social worker.[46]

Judges have also engaged in substantive review in considering the individual obligations attached to a TPIM, such as in *EC*.[47] In this case, the imposition of individual obligations was considered from the perspective of how they affected EC's personal life, including his studies.[48] The impact of the hours around EC's curfew was considered in relation to his ability to socialise with fellow students at his college. The judge in the case, Collins J, ended up requiring that the obligations were amended to allow EC better access to meetings with his students. In requiring this change, Collins J carried out an independent assessment as to the extent that the original obligations were required due to the threat posed by EC. Collins J made these findings while explicitly citing *MB*'s dictum that 'intense scrutiny' must be applied to individual obligations.[49]

[41] Ibid, [106].

[42] Ibid, [84].

[43] Ibid.

[44] Ibid, [153]

[45] Ibid.

[46] Ibid.

[47] *SSHD v EC* [2017] EWHC 795 (Admin), [2017] WL 01291445.

[48] Ibid, [32] – [35].

[49] Ibid, [8].

There are similar examples of substantive review in control orders cases, such as in *NN*.[50] In concluding that a control order was no longer required for national security reasons, the Court referred to the factual aspects of the case, including claims made by NN that his behaviour had been misinterpreted by the Security Service due to apparent misunderstandings regarding important aspects of Iraqi Kurdish culture.[51] There is also evidence of substantive review in *M*.[52] In this case, the judge rejected the need for a control order on M, on the basis that the Government's case against him was based on a 'consistent exaggeration of the extent that the documentary evidence relied on supported the links between the appellant [M] and the al-Q'aida linked extremists'.[53] The rejection of the Government's national security case, while explicitly referring to it as 'exaggerated', does not represent an approach of a judge cowed by the executive with respect to national security matters.

There are further examples of substantive review in the article 3 context in SIAC. For example, SIAC has been consistently clear that it will judge the question of 'real risk' for itself, and its position is not to 'defer' to the evidence provided by the Special Representative, but to merely 'give weight' to their

[50] *SSHD v NN & GG* [2009] EWHC 142 (Admin); [2009] 2 WLUK 314.

[51] Ibid, [12].

[52] *M v Secretary of State for the Home Department* SC/17/2002.

[53] Ibid, [10].

expertise.[54] This has extended to disputing factual evidence presented by the Government, particularly in cases not involving diplomatic assurances. For example, in *Naseer,* SIAC disagreed with the Special Representative on the reliability of assurances provided by the Pakistani Government regarding the treatment of Abid Naseer and Ahmad Faraz Khan.[55] We have seen that SIAC placed reliance on witness and documentary evidence that contradicted the Government's case and SIAC ended up agreeing with the opinion of the defendant's expert witness on the reliability of assurances provided by the Pakistani Government. Additionally, there is evidence of SIAC engaging in some form of factual review in cases involving diplomatic assurances. In *W and others*, SIAC expressed scepticism regarding the 'very firm view' of Special Representative Dame Anne Pringle that families of deportees who were informed by their relative that they had been subject to mistreatment would 'always complain, such would be their concern for their relative'.[56]

That judges were able to engage in robust scrutiny of the Government's national security case, in this way, challenges the political constitutionalist conceit that judges are inherently incapable of robust review in the national security context. While the examples of substantive review presented here by no means represent the norm, they are evidence of judges independently

[54] *DD and AS v SSHD* [2007] SC 42 & 50/2005 (*DD and AS)*, [321].

[55] *Naseer*, n 72.

[56] *DD and AS*, n 54, [321].

assessing the substance of the Government's national security case and engaging in factual analysis. Moreover, judges in these cases were considering questions of risk, and were required to engage in factual analysis. These cases suggest that judges can provide independent, robust review in certain contexts.

While such cases stand as evidence that judges are capable of substantive review in the national security context, they have several features that seem encouraging of robust review. First, while judges were required to consider risk, the risk related to a single, specific, individual in relation to an administrative decision. The impact of judicial decision-making in this context is therefore much narrower in scope, compared to adjudicating ECHR-compatibility of a statutory provision referring to a non-specific group of individuals falling under a particular category.

It is also true that in determining the compatibility of an administrative decision with the ECHR, judges are not faced with the prospect of being seen to undermine parliamentary sovereignty. Their scrutiny is on the executive, and such scrutiny has been required by Parliament in statute. Furthermore, judges are faced with a decision concerning an individual case, rather than a category of cases. This lends the decision to a specific set of factual assertions – particularly to the extent that the Government claims the individual has previously been engaged in activity making them a threat to national security. Moreover, in adjudicating risk on return, judges are considering risk to an

individual rather than national security as a whole. Again, the factual matrix associated with this decision-making is likely to be narrower and more specific, so easier to adjudicate with confidence. It may also be associated with less political pressure, as fewer lives are potentially at risk.

Conversely, the adjudication of matters related to risk to national security not related to specific individuals, and in particular future risk or 'predictive assessments', as referred to by Lord Bingham, is inherently more challenging.[57] Where grappling with such questions, judges may find it particularly appropriate to assign weight to intelligence assessments from the SIAs. Notably, this is not the same as avoiding substantive review. As discussed in Chapter One, such review requires that judges independently assess the compatibility of a relevant decision with ECHR rights. For example, in the surveillance context, an independent assessment must be made as to whether interception of communications constituted a lawful interference with the right to privacy. This is in the sense of being necessary and proportionate in the interests of national security. In making this independent assessment, judges are entitled to assign weight to particular expertise, where there is good reason to do so. This includes, for example, assigning weight to intelligence experts' views on the level of future threat to national security posed by an individual to whom interception powers had been directed, as part of independently assessing whether such interception had been necessary and proportionate.

[57] Chapter One, 99 - 102.

Importantly, assigning weight in this context relates to just one part of the overall assessment. In relation to the other parts of the assessment, the judge may not need to assign weight at all. In this way, future risk is merely one issue of many that may arise in a national security context, which vary in the challenges they pose to judges.

Another reason to resist the characterisation of the phenomenon uncovered by this thesis as an endorsement for the political constitutionalist position is that there are plausible explanations for the aspects of judicial deference identified, that are not related to any inherent institutional limitation. One important feature of the tendency to dereference identified relates to the prevalence of UK judges replicating the Strasbourg Court's approach to adjudication, which is one of two principal sources of deference in the UKNSL regimes, as discussed above. This replication of the ECtHR's approach is a practice which overlaps with 'mirroring', discussed in Chapter One.[58] However, mirroring involves the application of the Strasbourg Court's jurisprudence, in the form of applying the ECtHR standards which determine the scope of ECHR rights in a particular context. By contrast, as seen in Chapters Four and Five, replication involves imitating the ECtHR's own *approach* to applying such standards, which are shaped by its adjudicative limitations as a regional court.[59] This approach includes focusing on process and safeguards over the substantive assessment

[58] Chapter One, 59 - 60.

[59] Chapter Four, Sections 4.3.1 – 4.3.2, Chapter Five, 5.3.2.

of ECHR rights. The practice examined in the thesis shows that UK courts imitating the ECtHR is inappropriate in the national security context. This is because the attenuation of the Strasbourg Court's review in the national security context, in the form of focus on process and safeguards, reflects that Court's specific institutional limitations, which are particularly pronounced in that context. These include the subsidiary nature of the Court and its limited ability to ascertain the facts, due to national security issues being closely tied to state sovereignty, and the Court's lack of access to closed evidence.[60] Judges in the specialist regimes are, by contrast, given specific statutory powers and responsibilities by the UK legislature to adjudicate national security matters. They are therefore in a position to develop their own, more robust approach to adjudicating ECHR rights in the national security context. Indeed, as we have also seen, the ECtHR has taken a deferential approach to the UK, partly on the premise at the domestic level, UK judges will take a more robust approach.

While the practice of UK judges replicating the ECtHR's approach to adjudication has undermined the prospect of substantive review in UKNSL, the practice is in itself a contingent feature of the practice. That UK judges have imitated the Strasbourg Court in the manner described in this thesis is not an inherent function of adjudication. Furthermore, that UK judges would be inclined to replicate the ECtHR's approach is also explainable by contingent aspects of judicial behavior. First, section 2 of the HRA requires that judges

[60] Chapter One, 56 - 58.

'take into account' the 'relevant' jurisprudence of the Strasbourg Court.[61] As many scholars have noted, this provision is ambiguous.[62] This is particularly the case as the provision is silent as to what 'relevant' jurisprudence is, provides no guidance as to adjudicating matters not so far consider by the ECtHR, and offers no answer as to whether it is permissible for a domestic court to refuse to follow such jurisprudence.[63] This includes containing no explicit recognition that while UK judges must apply the ECtHR's jurisprudence, they must also be careful not to replicate the Strasbourg Court's adjudicative approach in a manner which diverts review on ECHR compatibility away from substantive review. As a result of this lack of guidance, judges have discretion in interpreting the way they are to engage with Strasbourg case law. Most importantly, what counts as a required standard that UK judges must apply, and what is an approach developed by the Strasbourg Court considering its own limitations is not always straightforward to determine. For example, the *Weber* standards developed with respect surveillance discussed in Chapter Four seem to straddle both categories.[64] Such standards are at once an integral feature of Strasbourg jurisprudence on surveillance, as well central to Strasbourg's focus

[61] HRA, s 2.

[62] Richard Clayton QC, 'Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law' (2012) *PL* 639 – 657, 640, Lewis Graham, 'The Modern Mirror Principle' (2021) *PL* 523 - 541, 523, Alan Greene, 'Through the Looking Glass? Irish and UK Approaches to Strasbourg Jurisprudence' (2016) 55 *Irish Jurist* 112 -133, Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, 2009), 1-5; Eirik Bjorge, 'The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence' (2013) 72 *CLJ* 2 289- 300, Sir Philip Sales, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' (2012) *PL* 253, 257, Roger Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a Municipal Law of Human Rights under the Human Rights Act' (2005) 54 *ICLQ* 4 907 -932, 909.

[63] Lewis Graham, 'The Modern Mirror Principle' (2021) *PL* 523 - 541, 523.

[64] Chapter Four, Section 4.1.3.

on procedural safeguards around surveillance rather than the substantive necessity and proportionality of such surveillance. Therefore, the lack of clear guidance that taking into account Strasbourg ought not to be conflated with drifting from substantive review, is liable to blur judicial requirements in this area.

It is also true that UK courts taking directions which depart away from Strasbourg, in the form of its jurisprudence, can have negative connotations from the perspective of ECHR rights protection. The mirror principle, associated with section 2 HRA, states that courts should follow Strasbourg jurisprudence 'no more, but certainly no less'.[65] While the principle is seen to go further than is required by section 2 HRA,[66] departures outside of already established exceptions are associated principally with legal reasoning that weakens ECHR rights protections and the coherence and integrity of ECHR rights protection as a whole.[67] As a result, following Strasbourg's approach to adjudication is often seen as a minimum standard to achieve robust rights protections, while departing from it may represent an avenue towards less

[65] Chapter One, 92 - 93. *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323, [20] per Lord Bingham. See also *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 at [26] per Lord Slynn.

[66] Lord Irvine, 'A British Interpretation of Convention rights' [2012] *PL* 237, *AF (No 3)*, *SSHD v AF & Anor* [2009] UKHL 28, [2010]2 AC 269, [70] per Lord Hoffmann; Sir Philip Sales, 'Strasbourg Jurisprudence and the Human Rights Act: a response to Lord Irvine' [2012] *PL* 253, 261. Lewis Graham, 'The Modern Mirror Principle' (2021) *PL* 523 - 541, 523.

[67] Sir Philip Sales, 'Strasbourg Jurisprudence and the Human Rights Act: a response to Lord Irvine' [2012] *PL* 253, 261. Lewis Graham, 'The Modern Mirror Principle' (2021) *PL* 523 - 541, 523.

stringent protections of rights.[68] This is reflected in judicial reasoning in *SSHD v JJ*, in which Lord Bingham ruled that it was 'inappropriate' to align the *JJ* case with the 'least dissimilar' of Strasbourg cases.[69] Moreover, similar reasoning was provided in *RB*, in which the approach to adjudication of the Court of Appeal was contrasted with that of the ECtHR.[70] Lord Phillips highlighted that review of SIAC decisions by appeal courts was limited to whether such decisions were irrational, akin to considering whether 'no reasonable tribunal, properly instructed as to the relevant law, could have come to the same conclusion on the evidence'. His Lordship contrasted the review remit to that of the ECtHR which he reasoned could make a 'different assessment of the relevant facts or because additional relevant facts have come to that court's attention'.[71] Such connotations may encourage UK courts towards imitating the Strasbourg Court closely, including potentially in its focus on process and safeguards.

[68] Lewis Graham has highlighted that while there have been occasions in which a departure from Strasbourg might sometimes lead to great levels of rights protections (citing *McLaughlin* [2018] 1 W.L.R. 4250; [49]), this is rare in practice. Lewis Graham, 'The Modern Mirror Principle' (2021) *PL* 523 - 541, 539.

[69] *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68, [92] per Lord Hoffmann.

[70] *RB (Algeria) and others v SSHD* [2009] UKHL 10; [2010] 2 AC 110.

[71] Ibid, [66] per Lord Phillips.

Notably, other judges have taken a different perspective on the role of the ECtHR with respect to national security, as evidenced in *Belmarsh*.[72] In agreeing with the majority ruling, Lord Hope highlighted that affording Contracting States a wide margin of appreciation with respect to article 15 was predicated on the idea that the strictly required assessment 'will at the national level receive closer scrutiny'.[73] Moreover, Lord Hoffmann stated that the UK was given a wide margin of appreciation as to whether an emergency for derogation purposes existed meaning that UK courts had to decide the matter for themselves.[74]

While Lord Hope and Lord Hoffmann made the connection between the Court's deferential approach in the national security context, there is no other judicial reasoning of this kind in the national security cases examined in this thesis. It is also true that Lord Hoffmann later discussed the UK's obligations to follow jurisprudence in contrasting terms in *AF (No 3)*.[75] In this case, while Lord Hoffmann emphasised that the UK courts were not bound to follow Strasbourg jurisprudence due to HRA section 2, he reasoned they were bound to follow Strasbourg rulings as a matter of international law. He stated that to depart from the ECtHR rulings would 'almost certainly' put the UK in breach of its

[72] *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68.

[73] Ibid, [131] per Lord Hope.

[74] Ibid, [92] per Lord Hoffmann.

[75] *SSHD v AF & Anor* [2009] UKHL 28, [2010]2 AC 269, [70] per Lord Hoffmann.

international obligations, which there was 'no advantage' in doing, without recognising any groups on which departure may be appropriate.[76] Thus, in this context, Lord Hoffmann appears to advocate at least the mirroring of the Strasbourg Court's national security rulings, and potentially its adjudicative approach in such cases, as he makes no distinction between mirroring Strasbourg and replicating its approach.

That judicial discourse with respect to the role of Strasbourg in the national security context is mixed in this way makes sense. First, without the ECtHR's limitations clearly in view, there would seem something paradoxical about the idea that enhancing ECHR rights protections would involve departing from the approach taken by the ECtHR. Secondly, as discussed in relation to cascades of deference above, the Court has never explicitly raised any issue with this tendency in the domestic jurisprudence. Indeed, procedural, deferential features of Strasbourg case law has been present throughout its case-law. However, as discussed below, it is only recently that the Court has self-consciously acknowledged it and distinguished its approach from the robust substantive review it requires from domestic courts.[77] In this way, little work has been done at the European level to distinguish its approach from the substantive review that the UK courts must engage in. This has helped to preserve what seem to be blurred lines in UK practice. Such lines concern when

[76] Ibid.

[77] *Yam v UK* App no 31295/11 (ECHR, 22 June 2020), para 56. Discussed in Section 6.3.1, 417 – 418.

it is appropriate to follow the Strasbourg Court in the form of the standards it develops, and when it is appropriate for domestic courts to pave their own way in recognition that the relevant standards are not fully developed to ensure substantive review, due to Strasbourg's own limitations.

6.2.1. Deference-leaning domestic doctrine

A good explanation for the prevalence of deference-leaning doctrine in UKNSL, which is again unrelated to any universal characteristic of judges, is that it results from the combination of several features of UKNSL that came to light in the preceding chapters. The first feature is the relevant statutory frameworks governing the regimes examined, which may be interpreted as compatible with deferential review. This is due to the breadth of their provisions. In each regime, the ECHR tests of necessity and proportionality have been inserted into the statutory frameworks without any further clarification as to the meaning of the wording, which already suffers from significant vagueness.[78] Such vagueness can lead to a host of problems, including blurring the lines of authority between the branches of state and encouraging judges to afford the executive a wide latitude in meeting the legal standards.[79]

[78] Chapter One, 68.

[79] Stephen Cody, 'Dark Law: Legalistic Autocrats, Judicial Deference, and the Global Transformation of National Security (2021) 6 *University of Pennsylvania Journal of Law and Public Affairs*, 661.

The relevant statutory frameworks we have examined are also ambiguous as to the judicial role. On the one hand, these frameworks appear to provide judges with procedural tools to engage in substantive review.[80] On the other hand, the statutory frameworks governing TPIM proceedings and article 8 surveillance claims contain provisions emphasising the need for judges to apply judicial review principles when reviewing the relevant national security power.[81] As we know, judicial review principles have traditionally been associated with rationality review[82] (although in a human rights context the courts adopt substantive review as discussed in Chapter One).[83]

With ambiguity surrounding the role of judges in the UKNSL cases examined, that judges shy away from substantive assessment and towards light-touch review is understandable in light of the second feature of UKNSL potentially of relevance to explain deference-leaning jurisprudence. This is that the UK appeal courts and executive have repeatedly commented about the lack of legitimacy of judges exerting robust review in the field of national security,[84] and which discourage substantive in the ECHR context.

[80] Chapter One, Section 1.1.3.

[81] Chapter Three, 189, Chapter Four, 282.

[82] Paul Craig, *Administrative Law* (Sweet and Maxwell, 8th edn, 2016), Chapter 16.

[83] Chapter One, 90 – 98.

[84] Chapter One, 98 - 102.

As we know, the legitimacy argument draws a line between 'political' and 'legal' questions, and states that where questions are 'political' they should defer to the political branches of state.[85] As discussed at the beginning of the thesis, doctrine on national security emanating from appeal courts is clear that as far as ECHR rights are concerned, judges must make their own assessments at to the treatment of those rights.[86] However, it is also true that judges ruling on national security matters in the upper appeal courts have articulated versions of the legitimacy argument.[87] This has often correlated with moments of rationality review at first-instance level examined above.

The echoes of the legitimacy argument by the HOL/Supreme Court have two themes which map onto the areas in which first-instance judges have avoided robust scrutiny when applying ECHR tests. This framing has been provided principally in the judicial review context rather in relation to the specialist regimes. Though, notably much of it is derived from *Rehman* in which the HOL was reviewing a SIAC decision. This is significant in itself, as *Rehman* represents the first appeal brought in relation to a newly established specialist UKNSL regime, in which SIAC's substantive approach was subject to criticism. Its framing of a form of legitimacy argument is therefore likely to have been

[85] Ibid, 79 – 80.

[86] Ibid, 98 – 102.

[87] Ibid.

particularly influential. Moreover, it is notable that when such judicial commentary derives from standard judicial review cases, some judges have described the judicial role in monolithic terms related to the separation of powers without acknowledging that the judicial role inevitably varies across different specialist national security law regimes. The framing in *Rehman* has in turn been quoted in specialist regimes. For example, as discussed in Chapter Four, the IPT referred to *Rehman* in determining how to adjudicate whether Liberty and others had had their privacy rights violated as a result of the UK Government engaging in interception of communications under RIPA.[88] This increases the likelihood that it will be interpreted it to apply more broadly.

In the first instance, a strong theme in such judicial reasoning has been the idea that while the meaning of national security is a 'legal' question, 'decisions as to whether or not something is or is not in the interests of national security' represent a political question and 'are not a matter for judicial decision'.[89] When Lord Hoffmann referred to this distinction in *Rehman*, he also emphasised that even at first instance decisions-making, judges 'must recognise the constitutional boundaries between judicial, executive and legislative power'.[90] As is now clear, if applied in the ECHR context, this distinction between law

[88] Chapter Four, 300.

[89] Ibid. *SSHD v Rehman* [2001] UKHL 47; [2003] 1 AC 153, [50] per Lord Hoffmann, cited in *R (on the application of Lord Carlile of Berriew and others) v SSHD* [2014] UKSC 60; [2015] AC 945, [21] per Lord Sumption, *Begum v SIAC* [2021] UKSC 7; [2021] 1 WLR 556, [56] per Lord Reed (delivering the unanimous ruling).

[90] *R (on the application of Lord Carlile of Berriew and others) v SSHD* [2014] UKSC 60; [2015] AC 945, [49] per Lord Hoffmann.

and politics would shut judges out of scrutinising the majority of decision-making attached to the principal ECHR tests in the UKNSL regimes examined. Deferring to the executive on the question of what is in the interests of national security would result in deferring to the executive on the substance of what is necessary and proportionate in the interests of national security. As we know, judges are required to ask for themselves whether the particular national security measures are necessary and proportionate *in the interests of* national security. This is different from deference in the form of assigning of weight to the assessments of policymakers in the process of deciding what is in the interests of national security. In this context, the judge will make an independent assessment as to the overall question as to what is in the interests of national security but will give special regard to the views of policy-makers with respect to particular questions relevant to making this assessment. For example, the judge may well assign weight to a policymakers' assessment as to what different types of threats the UK currently faces, as part of determining what would be in the interests of UK national security. Assigning weight does not therefore intrude on the overall independent assessment judges are required to make in this context, in contrast to avoiding substantive questions of necessity and proportionality – which is precisely a key aspect of the deferential approach taking in the regimes described above.

Another theme in judicial reasoning has been advocating deference specifically with respect to the question of a future national security risk. In *Rehman*, Lord

Hoffmann stated that even if SIAC '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'.[91] The framing of risk as a 'political' question to be deferred to, subject only to rationality review, was extended to all 'predictive and other judgmental assessments' both in *Belmarsh* and *Carlile*.[92] In *Carlile*, Lord Sumption stated 'there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment' and that this is 'particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature'.[93] This type of review clearly contrasts with the independent assessment of the compatibility of the outcome of a measure with ECHR rights, as referred to in relation to assigning weight to risk assessments. Again, when applying this approach in the ECHR context, deference to risk assessments maps onto the deference-leaning jurisprudence examined above. For instance, it is a risk assessment in the form of 'real risk' in relation to which SIAC takes a light touch approach to scrutinising.[94] Moreover, through their own doctrine, judges have turned away from examining the substance of whether TPIM subjects represent a risk, choosing to focus on scrutinising the necessity of particular TPIM obligations.[95] In this way, this framing, which resembles the legitimacy

[91] *SSHD v Rehman* [2001] UKHL 47; [2003] 1 AC 153rr, [57] per Lord Hoffmann.

[92] Chapter One, 90 - 97.

[93] *R (on the application of Lord Carlile of Berriew and others) v SSHD* [2014] UKSC 60; [2015] AC 945, [32] per Lord Sumption.

[94] Chapter Two.

[95] Chapter Three.

argument, corresponds with significant areas of deference in the UKNSL examined.

It is notable as well that while the UK Government has made statements to Parliament reassuring it that judges would act as robust safeguards when advocating for new national security powers, it has also repeatedly voiced legitimacy arguments in high profile national security cases, as well as in public statements. In *Belmarsh*, Lord Bingham described the Government as having argued it was 'not for the courts to judge the response necessary to protect the security of the public'.[96] The Government further argued that national security matters 'fall within the discretionary area of judgment properly belonging to the democratic organs of the state' and it 'was not for the courts to usurp authority properly belonging elsewhere'.[97] The Government made similar submissions in *MB*, arguing that as far as national security was concerned, the Government 'was the decision maker' and the role of the court was to review the 'legality of his decision, according him a substantial measure of discretion having regard to the fact that the subject matter of the decision was national security'.[98] In this way, the executive has served to reinforce a version of the legitimacy argument, which in its substance is incompatible with

[96] *A and others v SSHD* [2004] UKHL 56; [2005] 2 AC 68, [37] per Lord Bingham.

[97] Ibid.

[98] *SSHD v MB* [2006] EWCA Civ 1140; [2007] QB 415, [55].

judges carrying out substantive review of ECHR rights in the national security context.

6.2.2. CMPs as supportive of rationality review

The practice examined in the thesis suggests that CMPs are supportive of rationality review. As will be shown, secret evidence is linked to every stage of the creation of LGHs as outlined above. In the first instance, Strasbourg's lack of access to closed material partly explains its engagement in procedural review of domestic national security regimes which, as we have seen, is then replicated by UK courts - a source of significant deference in UKNSL.

Secondly, the presence of CMPs also encourages the creation of domestic deference-leaning doctrine. CMPs create a conflict for judges whereby in choosing to engage in factual analysis in UKNSL, the price judges must pay for this is they must consider the most determinative evidence in closed proceedings. This means that they will be forced to consider evidence within a context where there is little prospect of alternative factual evidence being submitted by the Special Advocate. This leaves judges and Special Advocates largely forced to pick apart the rationality of the Government's case rather than scrutinise the factual aspects of its case. Conversely, in choosing more

deference-leaning doctrine in the regimes examined, judges have been able to examine much more of the case in open proceedings.

An example of how deference-leaning doctrine can encourage open proceedings relates to the IPT and its distinction between law and facts. The Tribunal's first open proceedings followed a ruling that the original IPT rules were *ultra vires* on the basis that requiring all IPT hearings to be private excessively undermined open justice.[99] In so ruling, the Tribunal went to pains to explain that there were some questions – 'questions of law' – that could be determined in open as they did not require factual analysis. As with SIAC, the Tribunal is bound by a statutory duty to ensure its proceedings do not disclose security-sensitive information.[100] The manner in which the Tribunal drew this distinction favoured open proceedings, as it meant that the necessity and proportionality of surveillance powers—in the abstract—were treated as questions of law which the Tribunal was able to decide in open. Then only if it determined that the surveillance power in the abstract did not meet ECHR standards would it go into closed proceedings. This enabled the Tribunal to engage in a review of surveillance powers in open, but precisely because of the lack of factual analysis as to the way surveillance safeguards operate in practice, it was essentially a rationality review.[101] In this way, the IPT's

[99] Chapter Four, 283.

[100] Ibid.

[101] Chapter Four, Section 4.3.3.

deference-leaning doctrine is linked to its decision to adjudicate a significant proportion of its cases to be held in open rather than purely in closed.

The reasons why judges would tend towards doctrine that would enable them to adjudicate the majority of cases in open are clear. Judicial distaste for closed material and the damage it does to common law constitutional principles of open justice, equality of arms and access to justice has been repeatedly vocalised.[102] Indeed this brings us to the next means by which CMPs serve to encourage rationality review – which, as we have seen, is through insulating the Government's factual case from challenge during the closed proceedings themselves. This is because Special Advocates can only challenge the Government's closed factual case when there is evidence available to rebut it. As we saw in previous chapters, the probability that such evidence exists which the Special Advocate can both anticipate needing before going into closed and is able to access in order to present in closed, is low. With respect to article 3, we saw the Special Advocates were precluded from presenting alternative factual evidence in fundamental ways.[103] This included rarely being able to obtain security-cleared witnesses to comment on the closed material presented by the Government.[104] In this context, Special Advocates have also stated they

[102] In *Bank Mellat*, Lord Kerr stated that the 'peril' CMPs presents to the fair trial of contentious litigation is 'both obvious and undeniable'. *Bank Mellat v HM Treasury (No1)* [2013] UKSC 38, [74]. In *Al-Rawi,* Lord Neuberger described CMPs as 'inherently unfair' *Al-Rawi and others v The Security Service and others* [2011] UKSC 34, [42] per Lord Neuberger. Lord Bingham in *Roberts v Parole Board* equated CMPs with 'taking blind shots at a covered target'. *Roberts v Parole Board* [2005] UKHL 45, [18] per Lord Bingham.

[103] Chapter Two, Section 2.3.2.

[104] David Anderson QC and Clive Walker QC, 'Deportation with Assurances' (July 2017) Cm 9462, para 2.42.

have 'no access to any such experts' or access to 'independent interpreters to provide translations of material of which the original source is in a foreign language'.[105]

In relation to article 6 in the TPIM context, the process of gisting is limited in providing individuals with information required for effectively challenging the Government's case.[106] In particular, being able to judge whether appropriate gisting has taken place is limited by the fact that it is difficult to ascertain which parts of the Government's case might be the most central for the purpose of gisting, when it is isolated from challenge. The restrictions on communications between Special Advocates and TPIM subjects have also undermined the Special Advocate's ability to meaningfully challenge the Government's national security case. As discussed with respect to both article 15 and article 8, there is little evidence that judges have engaged in robust review in closed proceedings.[107] Rather than this being the result of inherent judicial incompetence, this evidence might instead serve as vindication of the

[105] Martin Chamberlain, 'Update on Procedural Fairness in Closed Proceedings' (2009) 28(3) *CJQ* 314 - 326, 318.

[106] Chapter Three, Section 3.3.2.

[107] Chapter Four, 301 - 303, Chapter Five, 352 - 355.

many judges,[108] scholars,[109] and Special Advocates themselves,[110] who warned that closed evidence fundamentally obstructs the adversarial process. In an interview with John Jackson, one Special Advocate is recorded as having stated the following:

> 'I've not done a single case where I haven't sort of felt that it's like having a bit of plaster over a broken arm. Sticking a plaster over a broken arm is not a proper solution'[111]

To the extent that this is an accurate description of the role Special Advocates can play, the level of secrecy in the UK context hampers the ability for alternative factual evidence to be presented to a judge to challenge the Government's national security case in the legal regimes examined. This limits the ability of judges to engage in substantive review of the Government's case.

In the IPT context, there are also examples which highlight the difference participation of the non-governmental party can make to the levels of scrutiny

[108] *Al Rawi v The Security Service* [2011] UKSC 34; 3 WLR 388, [93] per Lord Kerr, *Roberts v Parole Board* [2005] UKHL 45, [19] per Lord Bingham, *SSHD v AF and others* [2008] EWCA Civ 1148, [113] per Lord Justice Sedley.

[109] See the list of scholars in n 116 of Chapter Two.

[110] 'Justice and Security Green Paper: Response to Consultation from Special Advocates' (16 December 2011) available at: https://adam1cor.files.wordpress.com/2012/01/js-green-paper-sas-response-16-12-11-copy.pdf, para 39.

[111] John Jackson, *Special Advocates in the Adversarial System* (Routledge, 2019), 195.

imposed on the executive compared to when evidence is just examined by the Counsel for the Tribunal. It was a disclosure regarding the Government's practice of third-party data-sharing that led to specific challenge on this point, and subsequent open cross-examination of a Security Service agent.[112] As this was the non-governmental parties pushing for further scrutiny rather than the Counsel to the Tribunal, this represents an example of how the non-governmental party has been willing to push for further scrutiny than the Counsel. It is also notable that much of recent IPT litigation has been grounded in either leaks or government disclosures, rather than based on scrutiny provided of UK surveillance regimes carried out in closed IPT sessions.

6.3. The Prospect of Change

The existence of LGHs in UKNSL might not be inevitable in the manner some political constitutionalists might claim. This is due to contingent factors, which are: the prevalence of UK courts replicating Strasbourg's approach to adjudication, mixed messages given to first-instance judges by statutory frameworks and doctrine from appeal courts, and the widespread reliance on closed material. However, a significant proportion of the problems leading to LGHs have arisen within a background entrenched culture that makes establishing a robust system of UKNSL a significant challenge. The first aspect

[112] Chapter Four, 300.

of this culture is the high levels of executive dominance maintained within the UK constitution, which have enabled the executive to obstruct accountability in UKNSL.[113] While the constitution is in a permanent state of flux,[114] the executive and the limits of its power is poorly defined within the UK constitution.[115] Secondly, as the government requires the confidence of parliament, the executive's political party usually has a majority in the House of Commons.[116] A further feature of the dominance of the executive within the UK constitutional system is the government's control over the parliamentary timetable, including control over the time allotted for legislative debates and when such debates are scheduled. Parliamentarians have expressed concern that the executive is 'in general too dominant over parliamentary proceedings',[117] and 'possesses an untrammeled power to decide the topics for general and topical debates'.[118] Such dominance is also reflected by the fact that research on parliamentary amendments shows that non-governmental amendments have made up less than one percent of the overall amendments made to legislation.[119]

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[113] Keith Ewing and Conor Gearty, *Freedom under Thatcher* (OUP, 1990), 317.

[114] Sir Jeffrey Jowell and Colm O'Cinneide, *The Changing Constitution* (9th Edn, OUP, 2019).

[115] Adam Tomkins, 'The Struggle to Delimit Executive Power in Britain' in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (OUP, 2005) (Tomkins), 16. Meg Russell and Daniel Gower, *Legislation at Westminster* (OUP, 2017), 14.

[116] Ibid, Tomkins, 17.

[117] House of Commons Reform Committee, 'Rebuilding the House: First Report of the Session 2008 -09' (2009) HC 1117 available at: https://publications.parliament.uk/pa/cm200809/cmselect/cmrefhoc/1117/1117.pdf, para 22.

[118] Ibid, para 162.

[119] While this research emphasised informal aspects of parliamentary influence, this largely referred to the influence of backbenchers of the party in power. Meg Russell and Philip Cowley, 'The Policy Power of the

So far, the executive has acted in ways which have actively obstructed robust review in UKNSL. Research shows that the Government is prone to ignore its statutory duties in reporting on a range of national security-related matters. As highlighted by Woods, McNamara and Townsend, this has occurred with respect to the Government's previous reporting duties to report on the operation of section 94 of the Telecommunications Act 1984.[120] There have also been delays in Government reporting on the operation of CMPs, as is required by the JSA.[121] It was not until February 2021, eight years after the JSA passed, that the Government announced it was conducting the review.[122]

The lack of timely reporting in this way is a further indication of Parliament's inability to exercise robust oversight with respect to UKNSL, and suggestive of a reluctance on the part of the executive to ensure rights are protected in the national security context. This lack of cooperation is evident in Andrew Defty's

Westminster Parliament: The 'Parliamentary State' and the Empirical Evidence' (2016) 29 *Governance: An International Journal of Policy, Administration and Institutions* 1, 121 – 137, 129.

[120] Which provided the Government with powers to make 'directions of a general character' to any person in the interests of national security or international relations, which could include a requirement that the person not disclose the existence or content of those directions. Telecommunications Act 1984, s 94. Lorna Woods OBE, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) *MLR* O, 1 – 28, 5 -9.

[121] JSA, s 12 -13.

[122] 25 February 2021. See also Angus McCullough QC, "'Secret Justice": An Oxymoron and the Overdue Review' (28 January 2020) *UK Human Rights Blog* at https://ukhumanrightsblog.com/2020/01/28/secret-justice-an-oxymoron-and-the-overdue-review/.

recent study of executive oversight of the SIAs.[123] This study suggests that the executive has not prioritised accountability in the SIAs or made any serious attempt to exert effective executive control over the activities of the agencies.[124] This lack of executive control is further consistent with the recent revelations that the Security Service has been engaged in 'persistent' illegality with respect to the storing of data.[125] This lack of executive cooperation in the UKNSL represents a significant challenge in reforming UKNSL and to ensuring there is sufficient executive accountability to protect fully ECHR rights.

Many of the flaws in UKNSL examined above can be traced to the ongoing general struggle to balance the ECHR's core principles of the protection of human rights and democratic government at both the domestic and European level.[126] At the European level, the Court's concern to respect UK democracy while protecting human rights is linked to its reliance on the margin of appreciation and proceduralism. At the domestic level, the UK courts' concerns with regarding to the separation of powers and their role with respect to the other branches of state is reflected in judicial statements echoing the legitimacy argument, which encourages the development of deference-leaning doctrine. In

[123] Andrew Defty, 'Familiar but not intimate': Executive oversight of the UK intelligence and security agencies' (2021) *Intelligence and National Security* (forthcoming).

[124] Ibid, 12- 13.

[125] Investigatory Powers Commissioner, Generic Warrants Decision, 5 April 2019 [REDACTED] available at: https://privacyinternational.org/sites/default/files/2020-05/04.-IPCs-decision-5-April-2019.pdf.

[126] Chapter One, 47 - 48.

this way, some of the key flaws of UKNSL have their roots in matters of significant normative and philosophical complexity, which may not be possible or desirable to resolve in any concrete way in the foreseeable future.[127]

While entrenched dynamics may exist in the background of LGHs, the current system can still be changed to try to prevent their creation. Based on this thesis' analysis, judges are capable of great change in their approach, even if this change has not led to the full protection of human rights. There is some evidence of substantive review in UKNSL so far, not just in the practice examined in this thesis but also in other UKNSL contexts such as national security-related judicial inquiries.[128] There is also evidence that courts in other jurisdictions, such as the US and Israel, have on occasion approached national security matters with enhanced rigour.[129] Shirin Sinnar has identified a number of cases in which lower courts in the US were prepared to scrutinise the merits of national security issues underpinning former President Trump's order banning citizens of multiple, largely Muslim, countries from entering the

[127] Regarding the normative/philosophical tensions underlying the ECHR, Conor Gearty has argued that 'power of the idea of human rights is driven by a paradox: it both craves a basis in truth but at the same time it needs to fail to have one in order to maintain its hegemonic power as the progressive ideal of the post-political age'. Conor Gearty, 'Human rights: the necessary quest for foundations' in Costas Douzinas and Conor Gearty, *The Meaning of Rights: The Philosophy and Social Theory of Human Rights* (CUP, 2014), 38.

[128] See Conor Gearty's recent discussion of the role of judges in relation to British torture, in which he argues that judges shown clear signs of progress in terms of holding the executive to account in this context. Conor Gearty, British Torture, Then and Now: The Role of the Judges (2021)84 *MLR* 1, 118, 154.

[129] Shirin Sinnar, 'Procedural Experimentation and National Security in the Courts (2018)106 *California Law Review* 4 (Sinnar). Michael J Sherman, 'Military and National Security Deference in Judicial Decision Making: The Differing Cases of Israel and the United States' (2019) 87:2 *University of Missouri, Kansas City Law Review* 367 – 410.

United States.[130] These shifts in judicial approaches to national security context have coincided with procedural experimentation aimed at enhancing judicial scrutiny.[131]

While procedural experimentation has been a notable theme in UKNSL, many of the specific problems leading to the creation of LGHs are so far largely unacknowledged in the UKNSL, and there is scope for further change why may minimise the risk of LGHs. Such change is important not only to try to improve the judicial protection of rights in the national security context, but to prevent further degradation of human rights protections. As discussed, the LGHs created in UKNSL do not remain static but work over time to erode human rights protection and enable the continual expansion of executive power. Moreover, without such reform there is also a danger that flaws become a political constitutionalist's self-fulfilling prophecy and are seen automatically to vindicate the position that judges are inherently incapable of ruling on national security matters without creating LGHs. This could lead the UK to revert to a more political constitutionalist model of UKNSL, which results in erasing important progress made so far in protecting rights in UKNSL and potentially other areas of human rights law. It would also mean shifting the responsibility for protecting human rights to a branch of state that has been

[130] Ibid, Sinnar, 994.

[131] Ibid.

somewhat passive insofar as holding the executive to account in the national security context, which could lead to weaker rights protections.

6.3.1. Towards Eliminating LGHs in UKNSL

Despite the systemic nature of the problems outlined in this thesis, there are promising options for reform to target the specific legal dynamics leading to the creation of LGHs in the UK. While it is not the main object of the thesis to engage in practical law reform or identify changes in judicial practice which might help to dissolve LGHs, a selection of options is presented below to support the position that there are sound reasons to consider that the system problems identified are not necessarily inevitable. Considering the complexity of such dynamics, such reform must be multi-pronged and target the legal system from a number of different angles. This includes via statutory amendment, and policy intervention aimed at changing institutional cultures within the three branches of state, and at the level of the ECtHR. While such reform measures are set out, the section also identifies specific doctrinal shifts for the courts to engage in that to eliminate LGHs.

As outlined above, the weakness of judicial scrutiny at both the level of the UK and the ECtHR is linked to several features of judicial practice. In the first instance, the tendency for UK judges to fall short of substantive review is

consistent with mixed messages emanating from statutory frameworks as to the precise nature of judges' reviewing role with respect to national security.[132] Statutory amendment could address this. References to the need for judges to apply 'judicial review principles' could be removed from the TPIMA and RIPA. Specifically, sections 6(6) & 16(6) of TPIMA and section 67(2) of RIPA could be removed from the statutory schemes. As discussed in Chapter One, ordinary judicial review is associated with rationality or reasonableness review.[133] Therefore, the removal of such provisions will help to clarify that judges are required to engage in substantive review. Further clarification could be effected through the inclusion of a provision in specialist national security regimes that explicitly requires judges to decide that the relevant national powers and their use are necessary and proportionate, or meet other legally mandated standards required by the ECHR. For example, section 23(1) of the IPA should be amended. Currently, section 23 (1) states that Judicial Commissioners must 'review' the relevant official's 'conclusions' as to the whether a surveillance warrant is necessary and proportionate. The reference to reviewing an official's conclusions could be removed, so that the provision more clearly requires that Judicial Commissioner must be satisfied themselves that the warrant is both necessary and proportionate. Moreover, similar amendments could be made to the TPIMA. Ideally section 9 (1) of TPIMA, which sets out the judicial role in assessing decisions to impose TPIMs, would be substantially amended. Rather than requiring judges to review the Secretary of State's decision to impose a

[132] Chapter Three, 189; Chapter Four, 282.

[133] Chapter One, 93.

TPIM to ensure the relevant conditions are met, judges would simply be required to ensure that the imposition of a TPIM is both necessary and proportionate. This amendment, and the others set out above, would send judges a more direct message that their role is to engage in substantive review, rather than to confine their scrutiny to the primary decision-maker's decision.

Another important step towards encouraging judges to carry out substantive review involves amending procedures surrounding CMPs. As has been shown, despite providing judges with access to security-sensitive evidence, CMPs encourage rationality review as they limit factual analysis both within the closed sessions (in which the Special Advocate is most likely to have no competing factual evidence) and in open sessions (in which the Government will avoid presenting factual evidence on national security grounds). One strategy for boosting greater factual scrutiny in open proceedings is imposing tighter controls on the executive's ability to present evidence in closed proceedings. Again, this could be through statutory amendment. Currently, the legal frameworks examined in the thesis are framed to create a presumption in favour of judges authorising closed proceedings when requested by the executive. They contain strong obligations on judges to prevent the disclosure of security-sensitive information through the use of closed material but no requirement to balance the need to protect national security with either the protection of an individual's ECHR rights or the needs of preserving a democratic society, including openness and transparency. In this way, the

procedure contrasts with traditional PII assessments, as discussed in Chapter One,[134] which require judges to explicitly balance the public interest reasons in favour of disclosure as against the public interest reasons against it.[135] As confirmed by *Binyam Mohamed,* in which a balancing approach was adopted in a case with a non-statutory CMP, balancing the public interest in this way could lead to greater disclosure than when applying the statutory frameworks governing CMPs.[136] In this case, judges applied a balancing of interests approach expressly based on PII principles that resulted in the disclosure of significant information into the public domain on the basis that this was necessary for the protection of freedom of expression and identification of State involvement in wrongdoing.[137] This was despite there being a potential national security interest in non-disclosure (held to be outweighed by the public interest in disclosure). Amending the statutory frameworks to require judges to consider reasons beyond the protection of national security would therefore represent an important step towards reducing the prevalence and breadth of CMPs.

[134] Chapter One, 69 – 70.

[135] PII procedure was first applied in *Duncan v Cammell Laird and Co* [1942] UKHL 3; [1942] AC 624. See also Paul F Scott, 'An inherent jurisdiction to protect the public interest: from PII to "secret trials"' (2016) 27 *King's Law Journal* 259, 265-266.

[136] *R (Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs) (No 2)* [2010] EWCA Civ 2048 (Admin); [2011] QB 218.

[137] Ibid. See also Tom Hickman and Adam Tomkins, 'National Security Law and the Creep of Secrecy: A Transatlantic Tale' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds) *Reasoning Rights: Comparative Judicial Engagement* (Hart 2014).

Judges should also be able to consider other means of protecting security-sensitive information beyond closed proceedings that enable greater engagement with facts by those subject to national security measures. They might consider whether the use of confidentiality rings is appropriate, while treating CMPs as a last resort should no other options be available.[138] In the TPIM case of *SSHD v AM*, there is a brief reference to disclosures having been provided to AM and his legal team 'which they undertook to keep confidential and which became the subject of the confidential, but not closed judgment of Wilkie J'.[139] This was the disclosure required to be provided to comply with *AF (No 3)* requirements. Nonetheless, in principle such a form of restricted disclosure could be extended across all UKNSL specialist regimes to support a presumption against using CMPs.[140] It is true that the use of confidentiality rings is not a panacea, as emphasised by the former IRTL.[141] This procedure was described as 'wrong in principle' in the HOL in *Somerville*.[142] Notably however, this description was given in a non-national security context and there was no prospect at that time of a CMP being employed, thus the relevant comparator was normal procedure or PII. Importantly, when viewed in

[138] This was a point raised by the JCHR with respect to the tests for introducing CMPs contained in the JSA. See JCHR, Eighth Report, 'Legislative Scrutiny: Justice and Security Bill (second report)' (26 February 2013), paras 79 – 81.

[139] *SSHD v AM* [2012] EWHC 1854 (Admin), [2].

[140] Notably in *BB*, SIAC ruled against confidentiality rings on the basis it was not compatible with the SIAC Rules. *BB v SSHD* SC/39/2005, [32] – [34]. The SIAC Rules therefore could be amended to explicitly allow for the imposition of confidentiality rings.

[141] David Anderson QC, 'Memorandum for the Joint Committee on Human Rights (26 January 2012) available at: https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/memorandum-for-jchr.pdf, 7.

[142] *Somerville v Scottish Ministers* [2007] UKHL 44; [2007] 1 WLR 2734, [152] – [153].

comparison with CMPs, it is clear that confidentiality rings are more inclusive of participants in a case than CMPs. They are therefore more likely to provide an adversarial environment in which evidence can be subject to robust challenge and judges will feel more comfortable engaging in factual scrutiny.

SAs themselves have made a number of suggestions as to how they could be better equipped to represent their clients to challenge factual evidence.[143] SAs have made two suggestions for improvement of the JSA system that could also make a difference to their ability to adduce evidence in closed sessions in UKNSL regimes.[144] The first is to introduce explicit requirements for SAs to be given advance notice of precisely what evidence the UK Government proposes to adduce in support of their case in closed proceedings.[145] This would provide the SA with more opportunity to consider whether any factual evidence may be relevant. The second is that where a state witness is to give oral evidence, there should be a provision requiring service of a witness statement setting out that evidence, in open and to the extent suggested to be necessary in closed.[146] Such a provision could be particularly crucial for maximising the prospect of the non-

[143] See the submission of evidence by SAs to the five-year review of the CMPs operating under the JSA as required by s 13 of the JSA. See SPECIAL ADVOCATES' SUBMISSION (8 June 2021), available at: https://ukhumanrightsblog.com/wp-content/uploads/2021/06/THE-OUSELEY-REVIEW-SAs-Submission-FINAL.pdf. See also Angus McCullough QC, 'Secret Justice – The Insider's View' (27 June 2021) *UK Human Rights Blog*, the SPECIAL ADVOCATES NOTE: Response to the HMG submission, Angus McCullough QC, 'The Special Advocates respond to the Government's submission' (14 December 2021) *UK Human Rights Blog*.

[144] Ibid, paras 82 – 86.

[145] Ibid, para 85.

[146] Ibid, para 86.

governmental party to provide the SA with factual evidence to rebut assertions made by the oral witness.

As we have seen, another feature of UK judicial practice linked to the creation of LGHs is the manner in which UK judges replicate the Strasbourg Court's adjudicative approach. There is no reason why a doctrinal shift on the part of UK courts could not take place to avoid this. This is particularly in light of judicial willingness to carve out exceptions to the, adjacent, mirror principle, such as where Strasbourg jurisprudence is 'fundamentally at odds' with UK law.[147] Instead of replicating Strasbourg's approach to adjudication, the courts could adopt a more purposive approach to ECHR rights. In essence, this would mean that the courts would consider the role of that particular ECHR right in the context of the Convention as a treaty, which is designed to protect human rights, democracy and the rule of law. In the case of article 8 rights, the IPT ought to depart from the procedural approach taken by Strasbourg and consider the substantive necessity and proportionality of surveillance powers in the UK. Additionally, the IPT should consider safeguards in surveillance legislation from the perspective of whether they *in fact* provide effective protections against the abuse of surveillance powers. Framing its reasoning in this way would naturally lead to a more holistic approach to scrutinising

[147] *Alconbury v Secretary of State for the Environment* [2001] UKSL 23; [2001] 2 WLR 1389, [26] per Lord Slynn.

procedures attached to surveillance, including whether they are in practice adhered to.

Specific changes, particularly with respect to judicial doctrine, may also be helpful at the level of the ECtHR for the purpose of eliminating LGHs. As discussed above, judgments of the ECtHR have at times served to legitimise LGHs created in the UK. They have done so by deferring to UK judges' assessment of necessity and proportionality of UK national security powers, which have themselves been based on a deference to state authorities, without providing any assessment as to the strength of the review by UK judges. The Court has also upheld a procedural approach to scrutinising ECHR rights which has the potential to encourage an avoidance of factual scrutiny in national security cases at the domestic level. Only recently, in the case of *Yam v UK,* has the Court started to be more explicit about the impact of not possessing factual evidence on the scope of review it is able to carry out.[148] In this case, the Court stated that where it does not have access to the relevant national security material, it will 'scrutinise the national decision-making procedure to ensure that it incorporated adequate safeguards to protect the interests of the person concerned'.[149] In the light of the analysis in this thesis, this signals a shift in judicial doctrine and reasoning that is welcome.

[148] *Yam v UK* App no 31295/11 (ECHR, 22 June 2020), para 56.

[149] Ibid.

It may be that the manner that the ECtHR can legitimise LGHs could also be reduced by following the more assertive approach taken by the CJEU in *Kadi II*, as discussed in Chapter Three.[150] To the extent that the ECtHR was able to follow a similarly robust approach to factual scrutiny, this may serve to curtail the legitimising function it is prone to playing with respect to the UK courts. It is also worth noting that if it was unable to do this due to concerns about subsidiarity, continuing the approach in *Yam* may also curtail the legitimising impact of the Court's rulings by more sharply drawing a distinction between its assessment and the merits of rulings by the UK courts.

6.4. Conclusion

In examining the nature and effectiveness of ECHR rights protections in UKNSL, this thesis has identified significant problems with respect to the protection of human rights in the UK national security context. Importantly, the existence of LGHs in this context is suggestive of a systemic problem with human rights protections existing in the UK currently. Such problems are resulting in a system which fails to fully protect ECHR rights, and in which ECHR rights protections are set to decline further the more time goes on. These problems are hidden under layers of legal process, which obscure their existence and make it seem from the outside that the legal safeguards so far

[150] Chapter Three, 241 – 242.

established are working adequately. In this way, the UK system is one which may well give rise to violations of ECHR rights, while at the same time as concealing such violations. From the outside, that human rights law associated with the ECHR could in practice function so as to *obscure*, rather than straightforwardly *prevent* human rights violations, is suggestive of a system operating in ways which are opposed to the intentions of the drafters of the ECHR.

This thesis has not examined the impact of the HRA as a whole, but its operation in relation to core areas of UKNSL. However, it is notable that the legal regimes examined are symbolic of a system that is suffering more from a *deficit* of judicial intervention, than an *excess* - which some UK political actors claim the HRA prompted. Where ECHR rights have been identified as not being adequately protected in the thesis, this has been specifically linked to judicial caution in relation to the UK Government, rather than judges being too intrusive or imposing of executive actions. Research assessing the extent to which this caution is a trait that extends beyond the national security context, to other areas of UK human rights law, therefore represents a welcome yardstick by which to further assess the legal dynamics captured in this thesis.

Finally, while such dynamics are liable to embed a legal system which not only fails to prevent but conceals ECHR rights violations, there are features of these dynamics which the thesis has identified as contingent and which, if removed,

may yet halt and even reverse this process. There have been plenty of examples of judicial behaviour examined in this thesis which suggest that judges have greater potential in acting as a robust bulwark against violations of ECHR rights, rather than judicial deference being set in stone as far as national security is concerned. While the inevitability of judicial weakness in this regard has not yet been ruled out, there are identifiable aspects of current practice which may be subject to change. Such changes could help UK judges to deliver a genuine and full safeguarding role with respect to ECHR rights, even when national security is urgently under threat.

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