

**The Use of Secret Evidence in New Zealand Court  
Proceedings: Balancing National Security with the Right  
to a Fair Hearing**

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## Introduction

In order to protect its citizens, sometimes a state must limit the rights of others. This paper examines two statutory procedures that allow court proceedings where the Crown is able to give secret evidence to a Judge in the absence of the other party and their lawyers. Appealing the executive's decision-making powers under the Passports Act 1992 and the Terrorism Suppression Act 2002 require such a proceeding where those decisions involve information, the release of which could jeopardise national security. However, these statutes have grave implications on the rights to a fair hearing, which were brought to light in *A v Minister of Internal Affairs*, a judicial review of a decision under the Passports Act.<sup>1</sup> This paper explores the issues raised by the use of classified information in civil court proceedings and its impact on the rights of individual. It concludes that the Passports Act and Terrorism Suppression Act are inconsistent with human rights instruments and should be amended to provide a better balance between the need to protect national security and the rights of the individual.

The paper begins by outlining the decision-making powers that can trigger closed court proceedings if appealed or judicially reviewed and the ramifications these decisions have on the effected parties. Next, it evaluates the manner in which the United Kingdom and Canada have dealt with the use of classified information in civil court proceedings. Some of the safeguards of individual rights that those jurisdictions have developed have been adopted in New Zealand. But whether they actually vindicate an individual's right to a fair hearing is doubtful.

The paper argues that the two statutes are inconsistent with domestic and international human rights instruments. The limits on the right to a fair hearing are a disproportionate means to achieving the purpose of protecting classified information. There are measures available allowing a person to know the case against them and to form a response that still protects classified information from disclosure.

Finally, the paper offers a solution in the form of the Canadian legislation governing the use of classified information in court proceedings, for its close resemblance to the common law

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<sup>1</sup> *A v Minister of Internal Affairs* [2017] NZHC 746; [2018] NZHC 1382.

doctrine of public interest immunity. By virtue of its development through the courts, public interest immunity upholds the common law rights that are fundamental to adversarial justice. Further, since closed court proceedings cannot be reconciled with the premise that national security issues are non-justiciable, this negates objections to expanding the ability of judges to consider such information. Thus, the public interest immunity process allows the courts to fulfil their constitutional function of upholding the rule of law by holding the executive to account, which is fundamental to New Zealand's democratic system of government.

## **Chapter I - Background**

This Chapter will outline the decision-making powers that the Passports Act 1992 (PA) and the Terrorism Suppression Act 2002 (TSA) confer to the executive, and how they can trigger closed court proceedings (CCP) if appealed. Furthermore, it will touch on the important natural justice issues that CCPs raise.

### *I Passports Act 1992*

#### *A Decision-Making Power*

In 2005, the PA was amended by the Labour Government to give a Minister the power to cancel or refuse to issue travel documents on national security grounds.<sup>2</sup>

The newly amended PA allowed the Minister to cancel or refuse to issue travel documents if he/she has “reasonable cause to believe” that a person is a danger to the security of New Zealand because they intend to engage in or facilitate one of three activities:<sup>3</sup>

- A “terrorist act” defined in s 5 of the Terrorism Suppression Act 2002;
- The proliferation of weapons of mass destruction; or
- An activity likely to cause economic damage to New Zealand, carried out for economic gain.

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<sup>2</sup> See Passports Amendment Act 2005.

<sup>3</sup> Passports Act 1992, s 27GA(1)(a).

The Minister can also cancel or refuse to issue travel documents if he/she has reasonable cause to believe that a person is going to commit one of the first two acts in another country.<sup>4</sup>

The ability to make such a decision is qualified by two further considerations. First, the Minister must have reasonable cause to believe that cancelling or refusing to issue the travel documents will “prevent or effectively impede the ability of the person to carry out” those activities. Second, the Minister cannot make such a decision unless the danger to New Zealand or the other country “cannot be effectively averted other than by” cancelling or refusing to issue the travel documents.<sup>5</sup>

The PA gives explicit appeal rights to a person who is affected by the Minister’s decision under s 27GA to the High Court,<sup>6</sup> then Court of Appeal.<sup>7</sup> That person can also judicially review the decision. In all cases the Court can substitute its own discretion for that of the Minister’s allowing the Court to decide the case based on the decision’s merits.<sup>8</sup>

A CCP is triggered if the relevant information that formed part of the Minister’s decision meets the definition of “classified security information” (CSI) in s 29AA(5). At the request of the Attorney-General, if the Court itself is satisfied that it is desirable to do so for the protection of the information, s 29AB requires the Court to hear all or part of the information in the absence of the person subject to the decision, his or her legal counsel and members of the public.<sup>9</sup>

In *A v Minister of Internal Affairs* the claimant is in the process of appealing the decision of the Minister taking away her passport on the basis that she is a terrorist.<sup>10</sup> The High Court has released two preliminary decisions outlining how the CCP is to run. The case will be analysed in more depth later.

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<sup>4</sup> *Ibid*, Section 27GA(2).

<sup>5</sup> *Ibid*, Section 27, sub-sections (1)(a) and (b), and 2(a) and (b).

<sup>6</sup> *Ibid*, s 28.

<sup>7</sup> *Ibid*, s 29.

<sup>8</sup> *Ibid*, s 29AA(3).

<sup>9</sup> *Ibid*, s 29AB(1).

<sup>10</sup> *A v Minister of Internal Affairs*, above n1; Andrew Geddis and Elana Geddis, *Addressing Terrorism in New Zealand’s Low Threat Environment*, (Routledge Chapter, Forthcoming, 2018), at 18.

## ***B “Classified Security Information”***

The definition of “classified security information” in s 29AA(5) was adopted in the 2005 amendments to the PA. It encapsulates information relevant to decisions made under the Act if the information is held by an “intelligence and security agency”. The Police and the head of the Agency or Police must certify in writing that it cannot be disclosed because it is of a certain kind,<sup>11</sup> or its disclosure would likely cause the effects listed in s 29AA(7). These effects include, “to prejudice the security or defence of New Zealand,” or “to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence,” by another country, found in sub-paragraphs (a) and (b) respectively.<sup>12</sup>

In 2015 the Law Commission wrote an issues paper on National Security Issues in Proceedings, which suggested it may be necessary to “disaggregate some of the matters that come within [the] broad concepts” in s 29AA(7).<sup>13</sup> This would prevent the withholding of information that should otherwise be disclosed to the non-Crown party.<sup>14</sup> Each specific risk within the “broad concepts” in s 29AA(7) will have differing levels of seriousness, which will warrant different treatment of the information in court.<sup>15</sup>

However, when the Law Commission released its recommendations paper later that year it decided on a definition containing the provisions in s 29AA(7)(a) and (b).<sup>16</sup> Instead of anything that falls within the ambit of CSI triggering a CCP, the Law Commission favoured leaving it to the Courts to decide how best to protect the information.<sup>17</sup> The Judge would weigh the degree of prejudice to the non-Crown party against the nature of the security interests.<sup>18</sup> This would offer at least some protection to the non-Crown party’s rights rather than always imposing CCPs if information meets the definition of CSI.<sup>19</sup>

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<sup>11</sup> *Ibid*, s 29AA(6).

<sup>12</sup> *Ibid*, s 29AA(7)(a) and (b), respectively.

<sup>13</sup> The Law Commission, *National Security Information in Proceedings*, (NZLC IP38, May 2015), [6.7].

<sup>14</sup> *Ibid*, at [6.7].

<sup>15</sup> *Ibid*, at [6.8].

<sup>16</sup> The Law Commission, *The Crown in Court*, (NZLC R135, December 2015), [5.47].

<sup>17</sup> *Ibid*, at [5.51].

<sup>18</sup> *Ibid*, at [5.56].

<sup>19</sup> *Ibid*, at [5.55].

Despite the Law Commission's recommendations, Parliament did not change the definition of CSI when it amended other parts of the Passports Act 1992 through the Intelligence and Surveillance Act 2017. What constitutes CSI in s 29AA(7)(c) and (d) remains broader than that which the Law Commission recommended. Those sub-paragraphs cover disclosure of information which would be likely "to prejudice the maintenance of the law", or "to endanger the safety of any person" respectively. These are both very wide considerations. Despite the Law Commission's recommendations Parliament did not change the definition when it amended other parts of the Passports Act 1992 through the Intelligence and Surveillance Act 2017.

## *II Terrorism Suppression Act 2002*

The TSA was enacted in the aftermath of the September the 11<sup>th</sup> World Trade Centre Attacks and was the first piece of New Zealand legislation to contain a regime for completely closed court proceedings.<sup>20</sup> That Act allows for the designation of "terrorist entities," which if appealed or judicially reviewed, can involve CCPs. The Act also defines a "terrorist act," which is not in itself an offence but forms the criteria for numerous offences and decisions. Importantly that includes a decision to confiscate a Passport under the Passports Act.<sup>21</sup>

### *A Relevant Decisions*

The Terrorism Suppression Act empowers the Prime Minister to designate organisations as "terrorist entities" and "associated entities," creating certain ramifications for such entities. Sections 20 and 22 of that Act govern the making of interim designations and final designations respectively.

To make an interim designation, the Prime Minister must have "good cause to suspect" that the entity has knowingly carried out or participated in one or more "terrorist acts".<sup>22</sup> In making both interim and final designations, the Prime Minister can also designate an "associated entity".<sup>23</sup> This is an entity which also participates in "terrorist acts" or acts on behalf or at the

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<sup>20</sup> Geddis and Geddis, above n10, at 15.

<sup>21</sup> Passports Act 1992, s 27GA(1)(a); See above at part IA.

<sup>22</sup> Terrorism Suppression Act 2002, s 20(1).

<sup>23</sup> *Ibid*, s 22(2).

direction of the original entity or another associated entity with knowledge that it carries out “terrorist acts”.<sup>24</sup> The Act also captures entities controlled, wholly or in part, by the original entity.<sup>25</sup> A “designated terrorist entity” includes an “associated entity”.<sup>26</sup>

A final designation can be made if the Prime Minister, “believes on reasonable grounds” that the entity is involved in “terrorist acts”.<sup>27</sup> This imports a higher threshold than when making interim designations.<sup>28</sup> The final designation scheme also requires the Prime Minister to consult the Attorney-General and Minister of Foreign Affairs about the proposed designation.<sup>29</sup> Further, s 23 allows final designations to be made even if an existing interim designation is still in force. If a previous final designation has expired or been revoked, another final designation can be made if new information has arisen after expiry or revocation and it is significantly different to that on which the earlier designation was based.<sup>30</sup> The entity is also entitled to notice of the designations.<sup>31</sup>

The most recent designations were made in April 2018 when the Prime Minister designated two terrorist entities. New Zealand currently has 20 organisations listed as designated terrorist entities.<sup>32</sup>

### ***B The Effects of Designations***

It is important that the designation of terrorist entities is carried out in a fair manner and in accordance with the principles of natural justice considering the powers it gives the State. Section 43 of the Terrorism Suppression Act creates a duty to report to the Commissioner of Police if a financial institution or other person suspects that they are in possession or immediate control of property belonging to a designated terrorist entity.

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<sup>24</sup> *Ibid*, s 22(3)(a) and (b), respectively.

<sup>25</sup> *Ibid*, s 22(c).

<sup>26</sup> *Ibid*, s 4, “designated terrorist entity”.

<sup>27</sup> *Ibid*, s 22(1).

<sup>28</sup> *Ibid*, s 20(1).

<sup>29</sup> *Ibid*, s 22(4).

<sup>30</sup> *Ibid*, s 23(c).

<sup>31</sup> *Ibid*, ss 21(d)(i) and 23(f)(i). See s 26 for the content of notices.

<sup>32</sup> <<https://www.beehive.govt.nz/release/new-zealand-adds-list-designated-terrorist-entities>>

Further, s 47A empowers a Customs officer or “authorised person” to seize goods being imported or exported if he/she has “good cause to suspect” that they are the property, including cash, of a designated terrorist entity. Section 55 allows the High Court to order the forfeiture of property upon request of the Attorney-General as long as the order does not cause undue hardship.

Under s 38(3)(b) of the TSA, at the request of the Attorney-General, judicial review of a designation involving “classified security information”, which is defined in s 32 and is very similar to the PA’s definition, must be heard in the absence of the designated entity concerned, their barristers and solicitors and members of the public.<sup>33</sup> Parliament was acutely aware of the limitations on rights this creates but decided that “this strikes the balance between the rights of people to judicial review, and the need to protect classified security information.”<sup>34</sup> However, unlike the PA, the TSA does not contain express appeal provisions which allow the courts to substitute their discretion with the Minister’s.<sup>35</sup> Since the Terrorism Suppression Act only allows for judicial review, designations can only be appealed on procedural grounds and not on the merits of the decision like in the PA.<sup>36</sup>

The Law Commission has expressed concern with the Terrorism Suppression Act’s provision for closed proceedings, particularly since the decision-making powers they relate to are much wider than even the PA.<sup>37</sup> Also, despite the Law Commission’s recommendations that decisions involving classified security information should be subjected to some kind of separate oversight by a judicial officer, Parliament has not amended the Terrorism Suppression Act to reflect those recommendations.<sup>38</sup>

The Prime Minister has very wide discretion when designating terrorist entities, but the decisions still hinge on the definition of “terrorist act”, making it an integral part in decisions limiting rights.

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<sup>33</sup> Terrorism Suppression Act, s 38(3)(b).

<sup>34</sup> (8 October 2002) 603 NZPD 1062.

<sup>35</sup> See Passports Act 1992, s 28(4).

<sup>36</sup> Terrorism Suppression Act 2002, s 33; See Passports Act 1992, s 29AA(3).

<sup>37</sup> The Law Commission, above n13, para 4.31.

<sup>38</sup> The Law Commission, above n16, recommendations at 94-95.

### *C “Terrorist Acts”*

The definition of “terrorist act” under the TSA is very similar to the definition in the UK’s Terrorism Act 2000, s1. It is an act that:

- is carried out for the purpose of advancing an ideological, political or religious cause;
- with the intention to induce terror in the civilian population or to unduly compel or force a government or international organisation to do or abstain from doing an act; and
- meets an outcome listed in sub-section (3) which includes serious bodily injury, serious risk to health or safety or endangering the life of one or more people.<sup>39</sup>

The definition of “terrorist act” is designed to draw a distinction between normal criminal offences and offences committed for a political purpose.<sup>40</sup> This distinction is made in order to justify larger infringements on political and human rights for those who harm civilians for a particular purpose, rather than “normal” criminals.<sup>41</sup>

In *R v Gul (Mohammed)*, the UK Supreme Court held that the purpose of the legislation and the design of the definition must be given a “concerningly wide meaning” since there are good reasons for capturing as many acts as possible under it.

The Solicitor-General has refused to apply the TSA to charge people with offences due to its complex and incoherent nature.<sup>42</sup> However, *R v Gul (Mohammed)* demonstrates the width Courts will give the definition of “terrorist act”. This is concerning because that definition forms the criteria for decisions under the PA and TSA that, if appealed, can result in CCPs and severe limitations on the rights of the effected parties.

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<sup>39</sup> Terrorism Suppression Act 2002, s 5.

<sup>40</sup> *R v Gul (Mohammed)* [2014] 1 Cr. App. R. 14.

<sup>41</sup> M. Palmer, *Counter-Terrorism Law*, (2002) NZLJ 456 at 458.

<sup>42</sup> Geddis and Geddis, above n10, at 10.

### *III Denial of Natural Justice*

Natural justice envisages that every party has a right to know the full case against them and the to test and challenge that case fully.<sup>43</sup> The Canadian Federal Court of Appeal in *Gold v Canada* stated that justice cannot be said to be done if a litigant, “even by reason of compelling public interest, is prevented from fully making out its case or answering the opposing case”.<sup>44</sup> If a person does not know the case against them they will have no way of responding to it, which is problematic because the adversarial element is being completely removed from the proceedings.<sup>45</sup> However, the Crown must do its utmost to protect the security of the realm. Under the guise of national security it has seen fit to limit the right to natural justice.

## **Chapter II – Developments in Other Jurisdictions**

Due to the heightened threats the United Kingdom and Canada face to their security compared with New Zealand, they both have adopted generalised legislative regimes dictating how to deal with the use of classified information in civil and administrative contexts. This chapter will traverse the development of the closed material procedure (CMP) in the UK, the origin of the CCPs in the PA and TSA. Further, it will examine Canada’s system, which differs significantly to the UK’s. It will find that Canada’s strikes a much better balance between the need to protect national security and procedural fairness rights, which is representative of the differing political climate to the UK’s. This will be relevant to my overall argument about what direction I think New Zealand should move in when it comes to conflict between national security and fair hearing rights.

It is important at this stage to draw a distinction between legislative regimes that provide for closed court proceedings in immigration cases and closed proceedings for judicial review of other types of administrative action. While the administrative decisions that can be made under the PA and TSA can result in serious constraints on an individual’s rights, immigration cases tend to go further, resulting in deportation to unstable countries.

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<sup>43</sup> *Bank Mellat v HM Treasury* [2013] 4 All ER 495, at [3].

<sup>44</sup> *Gold v Canada* [1986] 2 F.C. 129, per Mahoney J at [10].

<sup>45</sup> Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, (3<sup>rd</sup> ed, Sweet & Maxwell, London, 2013), at [19.92].

New Zealand, the UK and Canada all have uncontroversial legislative regimes for dealing with deportation or refusal of entry based on national security grounds.<sup>46</sup> However, this is not to say that immigration cases under these various regimes are not useful to this analysis. Pre-September 11<sup>th</sup>, immigration cases arising out of deportation decisions in the UK began the development of CCPs. After September 11<sup>th</sup> the use of CSI in court proceedings spread from deportation, to laws focussed on combating domestic terrorism. Hence the immigration cases are useful in outlining the issues faced during the genesis of the CCP. Those cases have impacted the manner in which each country now deals with judicial review and statutory appeal cases involving CSI.

### *I The United Kingdom*

The decision of European Court of Human Rights (ECtHR) in *Chahal v United Kingdom*<sup>47</sup> began the development of CCPs in the UK.<sup>48</sup> The case concerned a deportation on national security grounds, where the country the appellant was to be deported to was known to abuse human rights.<sup>49</sup>

Upon judicial review of the decision, the Court of Appeal found that determination of the facts was up to the Home Secretary. Since he made all the relevant considerations, the decision was upheld despite the national security evidence not being available to the Court.<sup>50</sup>

On appeal to the ECtHR, the Court held that the UK had breached Article 5(4) of the European Convention on Human Rights (ECHR), viz. the right to have the lawfulness of a decision to deprive an individual of liberty and freedom tested in court.<sup>51</sup> Since national security was

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<sup>46</sup> See; Special Immigration Appeals Commission Act 1997 (UK); Immigration and Refugee Protection Act 2001 (S.C. 2001, c. 27); Immigration Act 2008 (NZ).

<sup>47</sup> *Chahal v United Kingdom* (1996) ECHR 413.

<sup>48</sup> Sameer Rohatgi, *Secret Courts, Justice and Security: Is the use of CMPs a double-edged sword?* (2015), 6 QMLJ 29, at 30.

<sup>49</sup> *Chahal v United Kingdom*, above n 48, at [24]-[27].

<sup>50</sup> *Ibid*, at [41].

<sup>51</sup> *Ibid*, at [132].

involved in the decision, the UK's domestic courts had no way of testing the legality of the decision.<sup>52</sup>

The ECtHR highlighted that effective means of judicial control were available for this type of case under the Canadian Immigration Act 1976, which allowed Governmental decisions involving national security to be scrutinized by domestic courts.<sup>53</sup> In Canada, the Judge hears all the evidence against the non-Crown party and provides them with a summary of the allegations against them.<sup>54</sup> Further security cleared counsel assists the Court to test the Crown's case.<sup>55</sup> These measures accommodate the "legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."<sup>56</sup>

### *A The Closed Material Procedure*

In response to *Chahal*, the Closed Material Procedure (CMP) came into existence in the UK through the Special Immigration Appeals Commission Act 1997.<sup>57</sup> Now the CMP is available in a very wide range of situations.<sup>58</sup>

*Al Rawi v Security Service* defined the CMP as a procedure in which a party has obligations not to disclose certain information, but can still rely on pleadings, oral and written evidence without disclosure, if disclosure of that information to the other parties would be contrary to the public interest.<sup>59</sup> Disclosure of such evidence is to be made to special advocates and, where appropriate, the court. The court must ensure that such evidence is not disclosed to the public or the non-Crown party unless satisfied that disclosure would not be contrary to the public interest.<sup>60</sup>

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<sup>52</sup> *Ibid*, at [130].

<sup>53</sup> *Ibid*, at [131].

<sup>54</sup> *Ibid*, at [144].

<sup>55</sup> *Ibid*, at [144].

<sup>56</sup> *Ibid*, at [131].

<sup>57</sup> Cf. Immigration Act 2009 (NZ).

<sup>58</sup> See **B** below.

<sup>59</sup> *Al Rawi and others v Security Service and others* [2011] UKSC 34, per Lord Dyson at [1].

<sup>60</sup> *Ibid*, at [1].

That case concerned civil proceedings by ex-detainees of Guantanamo Bay against the Crown.<sup>61</sup> The Crown sought to defend the proceedings using evidence that could not be released publicly.<sup>62</sup> Hence, the Crown wanted the Court to use its inherent jurisdiction to control its own proceedings to substitute the settled doctrine of public interest immunity (PII) for a CMP.<sup>63</sup> Delivering separate judgements, in a six-three majority decision the Court held that allowing a CMP without undertaking the common law balancing exercise was a matter for Parliament, not the courts, due to the fundamental common law principles at stake including the right to a fair trial.<sup>64</sup>

Later in his judgment when justifying why extending CMPs is a matter for Parliament, Lord Dyson reiterated:<sup>65</sup>

“The closed material procedure excludes a party from the closed part of the trial. He cannot see the witnesses who speak in that part of the trial; nor can he see closed documents; he cannot hear or read the closed evidence, or the submissions made in the closed hearing; and finally he cannot see the judge delivering the closed judgment nor can he read it.”

### ***B Extending the Application of CMP***

Parliament responded with the Justice and Security Act 2013 (JSA). The JSA opened all “relevant civil proceedings” involving “sensitive material”, in both civil claims and judicial review proceedings, to the possibility of being conducted in closed court at the request of any party to the proceedings or the Secretary of State.<sup>66</sup> All that is necessary is the satisfaction of two conditions.<sup>67</sup> The first condition is split into two parts.<sup>68</sup> A CMP is available where:

- (1) A party to the proceedings would be required to disclose sensitive information to another party; and

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<sup>61</sup> *Ibid*, at [3].

<sup>62</sup> *Ibid*, at [4].

<sup>63</sup> *Ibid*, at [8].

<sup>64</sup> *Ibid*, per Lord Dyson at [69], per Lord Hope at [76], per Lord Brown at [87], per Lord Kerr at [88], per Lord Clarke at [188], per Lord Phillips at [192], per Lord Roger at [198].

<sup>65</sup> *Ibid*, at [35].

<sup>66</sup> Justice and Security Act 2013 (UK), s 6.

<sup>67</sup> *Ibid*, s 6(3).

<sup>68</sup> *Ibid*, s 6(4).

- (2) A party would be required to make a disclosure but for being absolved from doing so by, among other things, public interest immunity, and any other enactment preventing the party from doing so.

The second condition requires that it is in the interests of the fair and effective administration of justice for a court to declare a CMP.<sup>69</sup>

1. “*Sensitive Information*”

Section 6(11) of the JSA imports a very wide definition of “sensitive information” being “material the disclosure of which would be damaging to the interests of national security”. Thus, there is a very low threshold for what information will warrant a CMP.

### ***C Safeguards***

In order to mitigate what Parliament has seen as the unavoidable abrogation of fundamental procedural rights in some cases, CMPs employ a special advocate or a security-cleared lawyer to represent the interests of the other party.<sup>70</sup>

Further, in *Secretary of State v AF (No. 3)* the UK Supreme Court held that in order to produce a fair trial where a CMP has been adopted, the Judge will have to provide as much information as possible as to the essence of the allegations against the other party.<sup>71</sup> Otherwise the person cannot be said to have been given a fair trial.

The efficacy of these safeguards in protecting fair trial rights will be analysed in more depth below.<sup>72</sup>

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<sup>69</sup> *Ibid*, s 6(5).

<sup>70</sup> *Ibid*, s 9.

<sup>71</sup> *Secretary of State for the Home Department v AF (No. 3)* [2009] 3 All ER 643, at [67], this was in order to comply with the ECHR.

<sup>72</sup> See Chapter III.

## II Canada

In Canada, there is a generic judicial process for court proceedings involving “sensitive information” or “potentially injurious information” contained in the Canada Evidence Act 1985,<sup>73</sup> (CEA) referred to as the “executive override model”.<sup>74</sup> The process is very similar to a claim of PII, where a Judge reviews the evidence considering the competing public interests and decides whether it should be disclosed or not.<sup>75</sup> However, the wide discretion the CEA provides judges with could result in the imposition of a CCP. Canada also has CMP type regime for immigration issues.<sup>76</sup>

### A *The Executive Override Model*

After September 11<sup>th</sup>, the CEA, s 38 amended to allow the government to withhold information they deemed too sensitive to be disclosed to participants in judicial processes.<sup>77</sup>

#### 1. *“Sensitive Information” and “Potentially Injurious Information”*

“Sensitive Information” is defined broadly as information relating to international relations, national defence or national security. It must also be in possession of the government of Canada and be of a type of information the government is taking measures to safeguard. The information is ‘sensitive’ regardless of the country of origin.<sup>78</sup>

“Potentially injurious information” is simply defined as information “of a type that,” if disclosed to the public, could injure “international relations or national defence or national security”.<sup>79</sup>

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<sup>73</sup> Canada Evidence Act 1985, R.S.C., 1985, c. C-5.

<sup>74</sup> The Law Commission, above n13, at p65.

<sup>75</sup> *Canada (Attorney General) v. Khawaja (F.C.)*, [2008] 1 F.C.R. 547, at [77].

<sup>76</sup> Immigration and Refugee Protection Act 2001, above n46.

<sup>77</sup> Justice Jeremy Patrick, *Section 38 and the Open Courts Principle*, (2005), 54 U.N.B.L.J 218, at 219.

<sup>78</sup> Canada Evidence Act 1985, above n73, s 38 “Sensitive Information”.

<sup>79</sup> *Ibid*, s 38 “potentially injurious information”.

The broadness of these definitions, particularly the reference to “international relations, national defence or national security,” means that it is very easy to trigger the s 38 procedure.<sup>80</sup>

## 2. *The Mechanism*

Any “participant” or “official” in a “proceeding” who is required to disclose “sensitive information” or “potentially injurious information,” or believes that such information is about to be disclosed in the course of proceedings must raise the matter to the Attorney-General.<sup>81</sup> If the proceeding has already commenced, the person or official must inform the Attorney-General and the person presiding over the proceeding.<sup>82</sup>

Once the Attorney-General is notified, he or she will decide the extent to which the information is disclosed in the proceedings, if at all.<sup>83</sup> He or she can authorise disclosure of all or part of the information subject to any conditions the Attorney-General considers appropriate. Further, the Attorney-General can enter into an agreement for the disclosure or partial disclosure of the information, subject to conditions, with the person who notified them.<sup>84</sup>

## 3. *Judicial Scrutiny*

If the Attorney-General does not authorise disclosure of the information, only allows partial disclosure or imposes conditions, a person who wants the information to be released can apply to the Federal Court to review the Attorney-General’s decision.<sup>85</sup> The Federal Court can then hold a private hearing to determine whether the information should be disclosed.<sup>86</sup> In the course of that hearing the Attorney-General or the person seeking disclosure of the information can make submissions *ex parte*, meaning without the other party.<sup>87</sup> The court can substitute its

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<sup>80</sup> Justice Jeremy Patrick, above n77, at 230.

<sup>81</sup> Canada Evidence Act 1985, above n73, s 38.01(1)-(4).

<sup>82</sup> *Ibid*, sub-sections (2) and (4).

<sup>83</sup> *Ibid*, s 38.03(1).

<sup>84</sup> *Ibid*, s 38.03(1).

<sup>85</sup> *Ibid*, s 38.04.

<sup>86</sup> *Ibid*, s 38.11.

<sup>87</sup> *Ibid*, s 38.11(2).

decision with that of the Attorney-General.<sup>88</sup> The applicant can appeal the Federal Court's review of the Attorney-General's decision as far as the Supreme Court.<sup>89</sup>

#### 4. *The Override*

Should the Federal Court order disclosure, the Attorney-General can override that decision by issuing a certificate preventing disclosure of the information.<sup>90</sup>

The decision by the Attorney-General to issue a certificate can also be judicially reviewed.<sup>91</sup> To be successful and have the certificate varied or cancelled by the court, an applicant must prove that the information does not relate to international relations, national defence or national security.<sup>92</sup>

#### 5. *In Practice*

In s 38 proceedings, the courts apply a three-step test to traverse the legislative framework.<sup>93</sup> In *Canada (Attorney General) v. Khawaja* the Federal Court outlined the test, which was later endorsed by the Supreme Court of Canada.<sup>94</sup>

The first step is to determine whether the withheld information is reasonably useful to the non-Crown party.<sup>95</sup> The second step places a burden on the party opposing disclosure to show the reasonableness of the Attorney-General's claim that disclosure will harm national security, national defence or international relations. A mere assertion is not enough; the Attorney-General must have an evidential basis for the claim.<sup>96</sup> The third step involves deciding whether the public interest in disclosure outweighs the public interest in non-disclosure.<sup>97</sup>

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<sup>88</sup> *Ibid*, s 38.06.

<sup>89</sup> *Ibid*, s 38.09 to 38.1.

<sup>90</sup> *Ibid*, s 38.13.

<sup>91</sup> *Ibid*, s 38.131(1).

<sup>92</sup> *Ibid*, s 38.131(8) to (10).

<sup>93</sup> *Canada (Attorney General) v. Ribic*, [2005] 1 F.C.R. 33, at [17]-[22], cited in [60] of *Canada (Attorney General) v. Khawaja*, above n75.

<sup>94</sup> *R. v. Ahmad*, [2011] 1 S.C.R. 110, at [44].

<sup>95</sup> *Canada (Attorney General) v. Khawaja*, above n75, at [62].

<sup>96</sup> *Ibid*, at [63]-[66].

<sup>97</sup> *Ibid*, at [67].

The Act gives a very broad discretion to Federal Court judges dealing with s 38 proceedings. This is so the non-Crown party still receives a fair trial even despite this “division of judicial responsibilities”.<sup>98</sup> *Khawaja* provided an example of this discretion increasing fairness. The Supreme Court of Canada ordered the release of a summary of the information describing the subject matter, and the Attorney-General’s reasons for withholding it.<sup>99</sup> In addition to that, the Supreme Court considered that if requiring non-disclosure will “significantly and irreparably impact trial fairness,” the Crown should enter a stay of proceedings.<sup>100</sup> Further, the Court suggested appointing special advocates in these situations, which already occurs in immigration proceedings.<sup>101</sup>

### *III Conclusion*

Both the UK and Canada have enacted legislative procedures for closed court proceedings. However, under Canada’s general procedure for dealing with sensitive information, the executive override model, follows a public interest immunity type path requiring a balancing of public interests. In practice, the closed proceedings are heard by the Federal Court and are heard to determine whether evidence should be disclosed publicly, fully or partially, or remain secret.

This is in stark contrast to the UK where the legislature has decided to protect all sensitive information from public hearings through the JSA, which has a very low threshold to cross for a CMP to be conducted.

The Canadian system gives a considerable amount of procedural power to Judges to scrutinise the Attorney-General prior to allowing parts of the evidence to remain confidential. McLachlin CJ in *Charkaoui v Canada (Citizenship and Immigration)* stated that the CEA makes no provision for the use of information that has not been disclosed.<sup>102</sup> Since the s 38 procedure does allow for limited disclosure if the Court sees fit, she was asserting that this wide discretion

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<sup>98</sup> *R. v. Ahmad*, above n94, at [45].

<sup>99</sup> *Canada (Attorney General) v. Khawaja*, above n75, at [187].

<sup>100</sup> *R. v. Ahmad*, above n94, at [46].

<sup>101</sup> *Ibid*, at [47].

<sup>102</sup> *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, at [77].

given to the Courts means that they will only limit disclosure if the non-Crown party is able to know the allegations against them and defend them accordingly.

## Chapter III – Attempts to Safeguard Fair Trial Rights

The two main safeguards that attempt to minimise the negative effects CCPs have on procedural fairness are special advocates and the provision of a summary of the allegations against the non-Crown party. This chapter will outline the special advocate as it exists in New Zealand and conclude that the status quo does not improve procedural fairness in the manner it is intended to. This is due to a number of procedural and ethical issues. Further, while providing a summary of allegations is a positive step, it is not likely that it will do enough to inform the non-Crown party of the case against him or her.

### *I Special Advocates*

In general, a special advocate is an experienced lawyer who holds an appropriate security clearance to deal with CSI.<sup>103</sup> Therefore, unlike the non-Crown party and their legal representative, a special advocate has access to all the CSI the Crown puts forward.<sup>104</sup>

The reliance on special advocates to mitigate the potentially unfair effects of a CMP on the other party has been met with strong criticism in the UK, including by the special advocates themselves.<sup>105</sup> This is partly because the special advocate is not responsible to the person whose interests he/she represents<sup>106</sup> and cannot communicate with that person.<sup>107</sup>

The PA and TSA make no provision for special advocates as a safeguard of a person's right to a fair trial.<sup>108</sup> Despite this, the Court in *A's Case* appointed a special advocate to represent A's interests in the closed parts of the proceedings.<sup>109</sup>

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<sup>103</sup> Immigration Act 2009, s 264.

<sup>104</sup> John Ip, *The Rise and Spread of the Special Advocate*, [2008], Public Law 717, at 717.

<sup>105</sup> M. Fordham, *Secrecy, Security and Fair Trials: The UK Constitution in Transition*, (2012) 17 JR 187 at [5].

<sup>106</sup> Justice and Security Act 2013 (UK), s 9(4).

<sup>107</sup> Sameer Rohatgi, above n48, at 43.

<sup>108</sup> The Law Commission, above n13, table at p45.

<sup>109</sup> *A v Minister of Internal Affairs* [2018] NZHC 1328, at [5].

## *A Special Advocates in New Zealand and A's Case*

In *A's Case* the Court used its inherent power to control its own proceedings to appoint a special advocate.<sup>110</sup> Special advocates exist in a variety of different forms, in both statute and common law, depending on where they are being utilised. Depending on the individual rights at stake, their ability to represent the interests of the non-Crown party can be severely constrained. In order to effectively evaluate the effectiveness of the special advocate system in *A's Case*, the scope of the limits placed on their ability to communicate with the non-Crown party, represent them and advocate for them must be determined.

New Zealand currently has three statutory special advocate regimes.<sup>111</sup> In addition to those statutory schemes, the courts have also appointed special advocates on occasions where the withholding of national security information is being challenged.

In *Zaoui v Attorney-General*, the New Zealand Security Intelligence Service issued a certificate that deemed Mr Zaoui as a security risk and had to be detained and potentially deported under the Immigration Act 1987.<sup>112</sup> When Mr Zaoui judicially reviewed the decision to issue the certificate, the Inspector-General appointed two special advocates.<sup>113</sup>

This was the first-time special advocates had been used in New Zealand and the Inspector-General decided that they were to have the same functions as special advocates under the UK's system.<sup>114</sup> That is significant because in the UK, once a special advocate has become privy to the classified information they are no longer allowed to communicate with the non-Crown party or their lawyer.<sup>115</sup> The Immigration Act 2009, which was enacted after *Zaoui*, prohibits the same communications unless authorised by the Court at the request of the special advocate.<sup>116</sup>

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<sup>110</sup> The Law Commission, above n13, at [5.10]; see also Ip, above n104, at 736.

<sup>111</sup> The Law Commission, above n16, at [9.8]; The Immigration Act 2009; The Telecommunications (Interception Capability and Security) Act 2013; The Health and Safety at Work Act 2015.

<sup>112</sup> *Zaoui v Attorney-General* [2003] 7 HRNZ 494.

<sup>113</sup> John Ip, *The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill*, [2009], N.Z.L.Rev 209, at 217.

<sup>114</sup> Ip, above n104, at 729.

<sup>115</sup> *Ibid*, at 729.

<sup>116</sup> Immigration Act 2009, s 267.

Also, under the Immigration Act 2009, it is unclear what role special advocates have in arguing for greater disclosure of classified evidence.<sup>117</sup> The special advocate can only argue that information should be declassified at the preliminary hearing.<sup>118</sup> However, he or she is barred from arguing for greater disclosure of CSI in the form of a summary of information provided to the non-Crown party.<sup>119</sup>

That appears to be consistent with the parameters placed on Mr Keith, the special advocate appointed in *A's Case*. From the second preliminary hearing it is evident that Mr Keith is undertaking to challenge the CSI status of a number of documents.<sup>120</sup>

The Court in *A's Case* identified its role in preliminary stages as satisfying itself that a CCP must take place to protect CSI in the manner that Parliament envisaged.<sup>121</sup> The Court is effectively outlining the approach that the PA requires it to take whilst trying to ensure the proceedings are as fair as possible. This allowed Mr Keith to make arguments in general terms purporting to remove CSI status over certain classes of information, such as information that is already in the public domain.

There is no reason to believe that a special advocate appointed by the Court in a PA or TSA CCP will have any additional powers and functions to those in the Immigration Act. Therefore, assuming that the Court in *A's case* is applying that model, the following discussion will be aimed at highlighting the major pitfalls in the status quo special advocate regime the Court is applying in *A's Case*.

## ***B Issues***

The special advocate system was created as a means of minimising the natural justice implications flowing from the hearing of classified information in the absence of the non-

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<sup>117</sup> The Law Commission, above n13, at [6.73].

<sup>118</sup> *Ibid*, at [6.73].

<sup>119</sup> Immigration Act 2009, s 242(7).

<sup>120</sup> *A v Minister of Internal Affairs*, above n109, at [7].

<sup>121</sup> *Ibid*, at [13].

Crown party and their lawyers.<sup>122</sup> The task of the special advocate is therefore to represent the non-Crown party's interests, ameliorating the inherent unfairness of CCPs.<sup>123</sup>

However, there are numerous arguments that the constraints that are placed on special advocates preclude them from carrying out their task effectively.

### 1. *Inability to Communicate with non-Crown Party*

Special advocates are given access to all the classified information that is being used in the proceedings in order for them to represent the non-Crown party by challenging the information.<sup>124</sup> However, a major issue under the Immigration Act is that after gaining access to this information the special advocate is no longer allowed to communicate with the non-Crown party or their lawyers.<sup>125</sup> This is in order to prevent the inadvertent disclosure of CSI.<sup>126</sup>

This stops the special advocate from being able to take on instructions from the non-Crown party on how to respond to the allegations against him or her. In a terrorism context, this intelligence material could contain:<sup>127</sup>

“second-or third-hand hearsay, information from unidentified informants, information received from foreign intelligence liaisons, data mining and intercepted communications, not to mention the hypotheses, predictions and conjecture of the intelligence services themselves.”

The non-Crown party is best placed to respond to the Crown's allegations, and could readily provide a perfectly reasonable explanation demonstrating that he or she is not a security risk.<sup>128</sup>

Without instruction from the non-Crown party, the special advocate is relegated to taking “shots in the dark” at the Crown's case.<sup>129</sup> For this reason, Lord Dyson in *Al Rawi* Lord Dyson

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<sup>122</sup> Ip, above n104, at 717.

<sup>123</sup> Ip, above n113, at 218.

<sup>124</sup> *A v Minister of Internal Affairs*, above n109, at [5].

<sup>125</sup> The Law Commission, above n13, at [6.76]-[6.77].

<sup>126</sup> Ip, above n104, at 219.

<sup>127</sup> Aileen Kavanagh, *Control Orders and the Right to a Fair Trial*, (2010), 73(5) Mod.L.Rev. 836, at 842.

<sup>128</sup> Ip, above n113, at 219.

<sup>129</sup> *Ibid*, at 220.

in *Al Rawi* expressed doubts as to the ability of special advocates to mitigate the weaknesses in CMPs.<sup>130</sup> This results in “a phantom hearing only,”<sup>131</sup> because the special advocate’s ability to effectively respond to the Crown is severed. For these reasons, in *Al Rawi* Lord Dyson doubted the ability of special advocates to mitigate the weaknesses in CMPs.<sup>132</sup>

Both the Law Commission and numerous other commentators see the ability to communicate with the non-Crown party as being essential to creating a workable special advocate model.<sup>133</sup> Due to the limitation, it has been argued that the special advocate procedure in the Immigration Act 2009 is inconsistent with s 27 of the NZBORA.<sup>134</sup>

## 2. *Arguing for Greater Disclosure*

Another issue that has been raised is whether special advocates should have the ongoing ability to press for greater disclosure of CSI to the non-Crown party.<sup>135</sup> This could involve them advocating for the publishing of parts of a document over which CSI status is claimed.<sup>136</sup>

Under the PA and TSA, the Crown decides what documents should be given CSI status. However, in *A’s Case* it was held that if the Court was to find that protecting the CSI did not warrant a CCP taking place, the Crown can withdraw these documents as evidence.<sup>137</sup> Hence the courts seem to be taking the responsibility of deciding what information in particular must not be released upon themselves.

It is hard to see what makes the courts better placed to make such decisions than lawyers with security clearances. Regardless, the inability of special advocates to argue for the release of parts of documents that do not need CSI status further restricts the ability of the non-Crown party to know the case against him or her. The more information provided to non-Crown

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<sup>130</sup> *Al Rawi and others v Security Service and others*, above n59, at [36].

<sup>131</sup> *Roberts v Parole Board* [2005] UKHL 45, per Lord Steyn dissenting, at [88].

<sup>132</sup> *Al Rawi and others v Security Service and others*, above n59, at [36].

<sup>133</sup> The Law Commission, above n13, at [4.58]; John Jackson, *The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition*, (2016), 20(4), Int’l J.Evidence & Proof, 343, at 353.

<sup>134</sup> Lani Inverarity, *Immigration Bill 2007: Special Advocates and the right to be Heard*, (2009), 40 V.U.W.L.R., 471, at 504-505.

<sup>135</sup> *Ip*, above n113, at 230; see also The Law Commission, above n6, at [9.26].

<sup>136</sup> The Law Commission, above n16, at [9.27]

<sup>137</sup> *A v Minister of Internal Affairs*, above n109, at [43]

parties, the fairer the proceedings will be. If release of parts of documents that will not harm national security is prohibited, there is less scope to challenge the Crown and the Court's view of what needs to be kept confidential.

### 3. *The Ethics of the Special Advocate*

Although special advocates represent the non-Crown party's interests, they do not owe them the same duties as a lawyer owes a client. This is partly due to the limits on communication discussed above, which would breach lawyer's ethics requiring full disclosure to one's client.<sup>138</sup> Thus, the special advocate is said to occupy "an interstitial space somewhere between an *amicus curiae* and an ordinary legal representative".<sup>139</sup> An *amicus curiae* is a lawyer appointed to assist a Court on particular points of law, by presenting arguments for the benefit of the Court, not one of the parties.<sup>140</sup>

Special advocates are exempt from the from any charges of misconduct or unsatisfactory conduct under the Lawyers and Conveyancers Act 2006, as well as the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.<sup>141</sup> In the UK, the Justice and Security Act 2013 stipulates that the special advocate is not responsible to the party to the proceedings whose interests they represent.<sup>142</sup>

This imposition of neutrality through exemption from the Rules of Conduct and Client Care makes the role of the special advocate more akin to that of an *amicus*. It is unclear to what extent a special advocate can act in the best interests of the non-Crown party, especially since they cannot communicate with him or her.<sup>143</sup> Further the special advocate is not accountable to the non-Crown party.<sup>144</sup>

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<sup>138</sup> Andrew Boon and Susan Nash, *Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems*, (2006), 9 Legal Ethics 101, at 115.

<sup>139</sup> Ip, above n104, at 735.

<sup>140</sup> The Law Commission, above n16, at [9.4].

<sup>141</sup> Ip, above n113, at 224.

<sup>142</sup> Justice and Security Act 2013 (UK), s 9(4).

<sup>143</sup> Jackson, above n113, at 353.

<sup>144</sup> Boon and Nash, above n138, at 111.

Hence, along with the characteristics that make a special advocate an advocate, their efficacy is removed, along with the ability to creating fair proceedings. An “even-handed” advocate who is “assessing the credibility” of the non-Crown party’s story because they are concerned about the risks that person may pose cannot be said to be preserving a fair process.<sup>145</sup> Evidence must be able to withstand challenge otherwise it “may positively mislead”.<sup>146</sup> I argue that the special advocate should advance the non-Crown party’s case as if they were their own client, which means advancing arguments even if they doubt their credibility.

## *II Summaries of Information*

In *Zaoui v Attorney-General*, the High Court held that Mr Zaoui was entitled to a summary of the national security information upon which the allegations that he was a security risk were based.<sup>147</sup> The “fundamental tenets of natural justice” required that Mr Zaoui knew at least the outline of the allegations against him.<sup>148</sup> The PA also requires a summary of allegations to be presented to the non-Crown party.<sup>149</sup> I argue that in practice summaries will only be of limited effectiveness in preserving natural justice.

In *A’s Case*, the Court reserved the right to control the extent to which a summary will detail the allegations against the non-Crown Party, rather than simply being bound to release what the Crown comes up with. It stated:<sup>150</sup>

“The overriding interests is to inform the affected person as fully as can reasonably be achieved to enable an effective rebuttal to the case against him or her.”

Justice Dobson considered that s 29AB(2)(b) of the PA contemplated that the Court has discretion to propose amendments to the summary proposed by the Crown, prior to approving its dissemination.<sup>151</sup> If the Crown views the summary as revealing too much, the Crown has

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<sup>145</sup> *Ibid*, at 115.

<sup>146</sup> *Al Rawi and others v Security Service and others*, per Lord Kerr at [93].

<sup>147</sup> *Zaoui v Attorney-General*, above n112, at [172](a)(i).

<sup>148</sup> *Ibid*, at [172](a)(ii).

<sup>149</sup> Passports Act 1992, s 29AB(2)(a).

<sup>150</sup> *A v Minister of Internal Affairs*, above n109, at [78].

<sup>151</sup> *Ibid*, at [75].

the option of removing the relevant CSI from the proceedings.<sup>152</sup> The key will be to provide as much information possible whilst minimising the prejudices outlined in s 29AA(6) and (7).<sup>153</sup> The Court reserved the right to determine the extent of such prejudice.<sup>154</sup>

I am sceptical as to whether the provision of a summary will have the desired effect. To do so it would have to arm the non-Crown party with sufficient information to determine and then challenge the allegations against him/her, whilst not divulging aspects of the information that warrants its status as CSI. Based on the experience in the UK, Ip asserts that, in practice, the requirement of providing a summary of the allegations contained in the classified information has provided the non-Crown party with “no meaningful disclosure”.<sup>155</sup>

Encouragingly, the Court in *A’s Case* stated that, should the Crown not heed the Court’s directions to provide greater disclosure, “the Court should be firm in requiring content of the summary that affords the reasonable gist”.<sup>156</sup> If this is not possible due to the nature of the information’s need for protection then the Court may be less ready to rule that a CCP must take place for the desirability of protecting the CSI.<sup>157</sup>

But there remains a strong argument that a special advocate should have an ongoing role in the summary-making process, which relates to the argument that special advocates should be able to argue for greater disclosure throughout the proceedings. The Immigration Act 2009 explicitly ousts this role from the special advocate’s mandate.<sup>158</sup> I argue that it is undesirable to leave the summary making process just to the Court and the Crown. It can be expected that the Crown will overclaim what needs to be kept confidential.<sup>159</sup> Allowing the special advocate to participate at this stage in this process will provide the Court with a more balanced argument as to what can be released.

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<sup>152</sup> *Ibid*, at [75].

<sup>153</sup> *Ibid*, at [76].

<sup>154</sup> *Ibid*, at [76].

<sup>155</sup> Ip, above n113, at 230.

<sup>156</sup> *A v Minister of Internal Affairs*, above n109, at [76].

<sup>157</sup> *Ibid*, at [78].

<sup>158</sup> Immigration Act 2009, s 242(7).

<sup>159</sup> *A v Minister of Internal Affairs*, above n109, at [24].

### *III Conclusion*

While the Court's imposition of these safeguards in *A's Case* are a step in the right direction I consider that they do not do enough to ensure the non-Crown party is given a fair hearing. I argue that the special advocate system should include greater ability for the special advocate to communicate with the non-Crown party after they have viewed the CSI. Legislative distinction from an *amicus curiae* will also give their advocacy more potency along with their ability to improve fairness. Further, they should be able to challenge the secrecy of information at any time during the proceedings, with particular emphasis on their involvement in the summary making process. Otherwise these safeguards will act as a box-ticking exercise by the government, containing no actual substance.

## **Chapter IV – Human Rights**

This part of my analysis will canvas the human rights issues that CCPs raise under the New Zealand Bill of Rights Act 1990 (NZBORA) and the International Covenant on Civil and Political Rights (ICCPR) which New Zealand is a signatory of.<sup>160</sup> I will place particular focus on the ongoing saga of *A's Case* and the PA, since human rights issues are relevant in those proceedings and indeed, have already been discussed in them. I argue that the CCP mechanisms in the PA and TSA are inconsistent with the NZBORA. Parliament has given the statutes a clear meaning, creating little room for an alternative interpretation of the statutory provisions, which cannot be invalidated under that Act. This makes it unlikely that a court would refuse to apply a CCP if they were found to breach a person's human rights. I will also explore whether the provisions could be held to be in breach of the ICCPR and find that there is a strong argument that they do. Further, the ICCPR could award a better remedy than the NZBORA. Regardless, a human rights analysis forms part of the normative discussion this dissertation is trying to facilitate: whether it really is desirable to allow these proceedings in New Zealand in their current form.

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<sup>160</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

## *I New Zealand Bill of Rights Act 1990*

A literal interpretation of the text of the PA leads to numerous prima facie inconsistencies with the NZBORA.<sup>161</sup> However, s 4 NZBORA prevents the Court from invalidating legislation inconsistent with the PA. Section 5 NZBORA recognises that rights are not absolute and limits can be “demonstrably justified in a free and democratic society”. In practice this requires a separate analysis to determine whether a right can be demonstrably justified even if Parliament’s intended meaning is clear.<sup>162</sup> If a right is not demonstrably justified, s 6 NZBORA requires the Court to adopt a less rights-inconsistent meaning if possible.<sup>163</sup>

Section 27(1) of the NZBORA states that “every person has the right to the observance of the principles of natural justice”. In *A’s Case*, Dobson J said that the CCP is undoubtedly a “flagrant breach of the fundamental right recognised in s 27 of NZBORA”.<sup>164</sup>

The White Paper to the NZBORA elaborated that the purpose of the provision is to recognise the pervasive nature of the powers of public authorities and that the principles of natural justice ensure they are exercised fairly.<sup>165</sup> Further, “the principles of natural justice” are essentially equivalent to those found in the common law.<sup>166</sup>

Natural justice is a flexible concept, the content of which will vary according to the nature of the public power being exercised, the circumstances of its use and the effects of the decision on personal rights and interests.<sup>167</sup> When it comes to the process by which a decision is made, natural justice envisages that the parties be given adequate notice and the opportunity to be heard, all before an unbiased decision maker.<sup>168</sup> This is also referred to as the principle of

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<sup>161</sup> Interpretation Act 1999 s 5(1), Passports Act 1992 ss 29AA and 29AB.

<sup>162</sup> Butler & Butler, *The New Zealand Bill Of Rights Act: A Commentary*, (2<sup>nd</sup> ed, LexisNexis, Wellington, 2015), at para [6.6.6]-[6.6.10].

<sup>163</sup> See *R v Hansen* [2007] NZSC 7, per Tipping J at [92], which outlines how courts will analyse NZBORA issues.

<sup>164</sup> *A v Minister of Internal Affairs* [2017] NZHC 746, at [41].

<sup>165</sup> Butler & Butler, above n162, at [25.2.2] citing the White Paper at [10.168]. See for example *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130.

<sup>166</sup> *Ibid*. See also *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] 2 NZLR 56 at [50].

<sup>167</sup> Joseph, *Constitutional and administrative law in New Zealand*, (4<sup>th</sup> ed, Brookers Ltd, Wellington, 2014), [25.1] at p1023.

<sup>168</sup> *Ibid* at p1024, *audi alteram partem* – hear the other side.

equality of arms which envisages that all parties to litigation should be in the same position as each other, including the Crown.<sup>169</sup>

Section 29AB of the PA is clear in that should the need to admit CSI as evidence of a Minister's decision arise, the Court “*must*” hear the evidence in the absence of the non-Crown party, that party's barristers and solicitors and members of the public.<sup>170</sup> This is regardless of whether the proceeding is a statutory appeal or judicial review.<sup>171</sup> Parliament has been unequivocal in its intent to limit natural justice.<sup>172</sup> Further the PA and TSA do not contain the additional procedural safeguards that other pieces of New Zealand legislation containing CCP mechanisms do.<sup>173</sup>

Thus, agreeing with Dobson J, I argue that s 29AB of the PA and its sister section – s 38(3)(b) of the TSA – breach s 27(1) of the NZBORA *prima facie*. The non-Crown litigant has no way of hearing the case against them or responding to the specific allegations against them.<sup>174</sup>

Further, s 27(3) of the NZBORA affirms the right to bring civil proceedings against the Crown and have those proceedings heard as if between individuals. This could potentially act as another avenue to challenge the fairness of a CCP. The Crown's ability to give evidence to a judge virtually unopposed is not equivalent to a proceeding being conducted “as if between individuals”. This can be contrasted with PII which does not trigger s 27(3) since it is warranted by what is in the “public interest” according to the courts, and is not a “Crown power”.<sup>175</sup>

The Telecommunication (Interception Capability and Security) Act 2013 (TICSA) underwent a s 7 NZBORA vetting process but was found to be consistent.<sup>176</sup> The TICSA provides for CCPs but gives the Court much more discretion as to what evidence will be withheld.<sup>177</sup> It also

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<sup>169</sup> The Law Commission, *The Crown in Court*, above n16, at [5.30].

<sup>170</sup> Passports Act 1992, s 29AB(1).

<sup>171</sup> Passports Act 1992, s 29AA(1).

<sup>172</sup> (8 October 2002) 603 NZPD 1062.

<sup>173</sup> The Law Commission, *National Security Information in Proceedings*, above n13, at [4.31]-[4.56].

<sup>174</sup> Law Commission, R135, above n16, at [7.9].

<sup>175</sup> Butler & Butler, above n162, at [25.4.24].

<sup>176</sup> Orr, *Consistency with the New Zealand Bill of Rights Act 1990: Telecommunications (Interception Capability and Security) Bill*, Office of Legal Counsel, (3 May 2013).

<sup>177</sup> Telecommunications (Interception Capability and Security) Act 2013, s 104. Section 104(1)(a) and (b) allows the withholding of a particular report, or the name of a witness respectively.

explicitly provides for special advocates.<sup>178</sup> Thus, the New Zealand government's position on CCPs is that, despite infringing the right to justice, the limit is demonstrably justified by the national security concerns at hand.<sup>179</sup> However, the Human Rights Commission, along with other commentators, disagree.<sup>180</sup>

### ***A Section 5 NZBORA***

New Zealand courts have adopted the following test when undergoing a s 5 justification analysis.<sup>181</sup> The first step of the inquiry is to discern whether the limit on the right serves a sufficiently important purpose to justify it. Then it must be decided whether the curtailment is proportionate to that objective, which is split into three sub-questions:<sup>182</sup>

- (i) Is the limiting measure rationally connected with its purpose?
- (ii) Does it impair the right no more than is reasonably necessary for the achievement of its purpose?
- (iii) Overall, is the limit proportionate the importance of the objective?

Since Parliament's position is that CCPs are a justified limitation on rights, in practice a high degree of deference must be given to their decision. In *R v Hansen*, Tipping J cautioned that courts must ensure they perform a review function rather than substituting their own views for Parliament's.<sup>183</sup> Thus, the intensity of the Court's review can be likened to a "spectrum," with the more political decisions receiving less scrutiny.<sup>184</sup> National security sits at the higher echelons of policy. Thus, in *A's Case* Dobson J avoided weighing the values of the rights that the PA denies by accepting that Parliament had seen fit to limit them.<sup>185</sup>

*New Health New Zealand v Taranaki District Council* dealt with whether fluoridation of water breached the NZBORA.<sup>186</sup> The Supreme Court viewed its task in a s 5 analysis as being to

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<sup>178</sup> Telecommunications (Interception Capability and Security) Act 2013, s 105.

<sup>179</sup> Geddis & Geddis, above n10, at 16.

<sup>180</sup> *Ibid.*

<sup>181</sup> *R v Hansen*, above n163, [103]-[104], citing *R v Oakes* [1986] 1 SCR 103.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*, at [116].

<sup>184</sup> *Ibid.*

<sup>185</sup> Geddis & Geddis, above n10, at 21.

<sup>186</sup> *New Health New Zealand v Taranaki District Council* [2018] NZSC 59.

undertake a broad assessment of whether, on the balance of probabilities, the evidence provides a proper basis for the limitation.<sup>187</sup>

### 1. *Sufficiently Important Purpose*

I consider that the safety of the state and its citizens is a sufficiently important purpose to warrant the limiting of disclosure rights.<sup>188</sup>

### 2. *Rational Connection*

The connection between limiting the right to justice in order to prevent harm to national security is a rational one. Releasing information revealing the inner workings of intelligence agencies would nullify their ability to benefit society.

### 3. *Minimal Impairment*

In *Hansen*, Tipping J held that “the limit must impair the right as little as possible.”<sup>189</sup> This analysis involves considering whether Parliament could have achieved the same objective in a less rights infringing way.<sup>190</sup> It is arguable that the minimal impairment test is not met for CCPs. In other words, Parliament could have chosen a means of protecting national security which is less rights infringing.

In *Ministry of Health v Atkinson*, the Court of Appeal considered the test as being whether the final policy decision fell within “a range of reasonable alternatives” open to policy makers.<sup>191</sup> Despite human rights scrutiny, Parliament must remain responsible for making policy decisions. I argue that the CCPs that the PA and TSA employ to protect CSI do not limit s 27 as little as possible. Canada’s executive override model found in s 38 of the Canada Evidence Act does a much better job of ensuring that the limits on a person’s right to justice are as little as possible whilst ultimately offering the same protection over CSI.

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<sup>187</sup> *Ibid*, at [122].

<sup>188</sup> *Huang v Canada (Attorney General)*, [2017] F.C.J. No. 1049, at [49].

<sup>189</sup> *Ibid*, at [126]; *R v Oakes*, above n181.

<sup>190</sup> *Ibid*.

<sup>191</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, at [154].

Rather than a CCP taking place while the Court is considering the CSI in coming to its decision, s 38 of the Canada Evidence Act requires a separate hearing. The Federal Court scrutinises the Government's claim of privilege over all the evidence separately using a public interest balancing test, deciding whether it can be released, and if not, what conditions could be imposed to allow its use in court.<sup>192</sup> If the government remains uncomfortable with a court order to disclose evidence, it can override the order. As with the Canadian Charter there is a strong political presumption against override.<sup>193</sup>

The Canadian system allows the courts much more scope to consider how harmful the CSI is and how exactly it is to be used in proceedings. The CEA therefore is said to strike "a sensitive balance between the need for protection of confidential information and the rights of the individual."<sup>194</sup>

In *Canada (Attorney-General) v Khawaja*, the Canadian Federal Court of Appeal found that the CEA s 38 limits on the fair trial rights were found not to be in breach of the Canadian Charter.<sup>195</sup> Chief Justice Richard held that the limit on fair trial rights was demonstrably justifiable under s 1 of the Charter.<sup>196</sup> Due to the careful balance struck by Parliament in s 38, the right was limited as little as possible.<sup>197</sup>

Therefore, there is a strong argument that the New Zealand legislation is not within the range of reasonable alternative policies that were open to Parliament. The Canadian system protects sensitive information from disclosure, whilst not allowing it to be used against the non-Crown party unless they can be made aware of the allegations against them, so they can effectively respond. Conversely the New Zealand CCP system automatically allows the use of CSI against the non-Crown party without the undertaking of a balancing process by a separate court. The information must only fall within the wide definition of CSI. Thus, I argue that the CCP is

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<sup>192</sup> *Canada (Attorney General) v Khawaja (F.C.A.)*, [2008] 4 F.C.R. 3, at [8]; citing *Canada (Attorney-General) v Ribic*, above n93.

<sup>193</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice*, (Cambridge University Press, New York, 2013), at 36.

<sup>194</sup> See Chapter II.

<sup>195</sup> *Canada (Attorney General) v Khawaja (F.C.A.)*, above n192, at [48].

<sup>196</sup> *Ibid*, at [49].

<sup>197</sup> *Ibid*, at [51].

outside of the acceptable range of policies because it achieves the same policy goal as the Canadian legislation whilst imposing larger limits on human rights. Section 27 cannot be said to be limited as little as possible.

#### 4. Overall Proportionality

Parliament likely viewed the national security-centric measures limiting the fair trial rights of persons as being proportionate. Despite being hotly debated in the House of Representatives,<sup>198</sup> neither Bill attract s 7 reports.<sup>199</sup> No advice about how the Bill was consistent with the NZBORA was published either.<sup>200</sup> Further, the amendments of the PA in 2005 also received no NZBORA scrutiny through s 7.<sup>201</sup>

In Canada, s 38 of the CEA was enacted a few months after 9/11.<sup>202</sup> At the same time, the TSA was being drafted in New Zealand.<sup>203</sup> It seems as though the language of the TSA was adopted by the PA when it was amended in 2005. Although the s 38 CEA existed during the time of passage of the PA and TSA Parliament did not appear to consider it as an alternative model.<sup>204</sup>

Under the PA for example, one can see why the government may want to prevent someone from travelling in order to prevent training for, or the carrying out of a terrorist act. However, the right to a fair trial is fundamental. A person could have a perfectly acceptable explanation with which they could rebut the Crown's allegations. Not knowing the allegations against them multiplies the chances of injustice.

Thus, I argue that the CCP provisions in the PA and TSA limits s 27 in a manner which is disproportionate to the ends sought by Parliament.

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<sup>198</sup> (8 October 2002) 603 NZPD 1062.

<sup>199</sup> <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/section-7-reports/>.

<sup>200</sup> <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/advice-publications/>.

<sup>201</sup> See weblinks at n199 for s 7 reports and n200 for NZBORA consistency.

<sup>202</sup> J. Patrick Justice, above n77, at 219.

<sup>203</sup> Hill, *Balancing Problems and Remedies: Anti-Terrorism Legislation and Rights*, (2004), 10 Auckland U.L.Rev. 256, at p268 onwards.

<sup>204</sup> Government Administration Committee, *Identity (Citizenship and Travel Documents) Bill*, (19 November 2004).

## ***B Section 6***

Despite a lack of submissions on the issue by the parties in *A's Case* Dobson J considered whether a more-rights consistent interpretation of provisions of the PA was possible, as per s 6 NZBORA.<sup>205</sup> He considered that perhaps CSI status may not be justified on national security grounds if there was not threat to New Zealand's security, but that releasing the information could prejudice the reciprocal exchange of information with other countries.<sup>206</sup>

I agree with Dobson J that to do this would be reading down the definition of CSI.<sup>207</sup> Section 6 NZBORA must not be used as a tool to rewrite statutes. As Dobson J accepted, "Parliament's intention is expressed in unambiguous terms".<sup>208</sup> That intention, I argue, is not a limit on s 27 that can be justified, making the CCP inconsistent with the NZBORA. However, even if a Court were to agree, s 4 of the NZBORA means that a statute's inconsistency with the NZBORA can only have political consequences. Thus, adding the argument that the current CCP system is undesirable and should be changed.

## ***II International Human Rights Law***

Sub-paragraph (b) of the long title to the NZBORA states that it is an Act to affirm New Zealand's commitments under the ICCPR, to which New Zealand is a signatory. Article 14 of the ICCPR affirms that, "all persons shall "be entitled to a fair and public hearing". Article 14 also envisages that it may be in the interests of national security to exclude the press and the public from a trial.

Article 28 of the ICCPR establishes the UN Human Rights Committee (HRC). The purpose of treaty bodies such as the HRC is to monitor compliance and implementation of treaties.<sup>209</sup> Article 1 of the First Optional Protocol of the ICCPR allows the HRC to hear complaints from individuals about breaches by state parties of the human rights found in the ICCPR if the state

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<sup>205</sup> *A v Minister of Internal Affairs* [2017], above n164, at [41].

<sup>206</sup> *Ibid*, at [44].

<sup>207</sup> *Ibid*, at [46].

<sup>208</sup> *Ibid*, at [46]; See also *A v Minister of Internal Affairs* above n109, at [40].

<sup>209</sup> Margaret Bedggood, Kris Gledhill and Ian McIntosh, *International Human Rights in Aotearoa New Zealand*, (Thomson Reuters, Wellington, 2017), at p180.

party recognises the competence of the HRC to deal with such matters. However, the individual must have exhausted all available domestic remedies prior to making a complaint to the HRC.<sup>210</sup>

New Zealand has recognised the competence of the HRC to hear complaints from individuals.<sup>211</sup> I consider that there is a strong argument that the CCPs in the PA and TSA infringe on the rights art 14 guarantees.

Twelve complaints have been made by individuals to the ICCPR alleging New Zealand's breach of human rights, with three being successful.<sup>212</sup> In at least one successful communication by an individual to the HRC, the New Zealand Government responded by providing a practical remedy such as damages.<sup>213</sup> If a person were to successfully argue that the CCP breaches their ICCPR rights, they may be able to get a tangible remedy that they would not be entitled to under the NZBORA. Further if a state party is found to be in breach of the ICCPR by the HRC cessation of the violation is essential.<sup>214</sup> This may require changes to the state party's law.<sup>215</sup>

### ***A Article 14 ICCPR***

In the view of the HRC, art 14 affirms that each party must be given a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.<sup>216</sup> In civil proceedings this means that each side must be given the opportunity to “contest all arguments and evidence adduced by the other party”.<sup>217</sup> Article 14

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<sup>210</sup> International Covenant on Civil and Political Rights, above n160, art 5.2(b).

<sup>211</sup> Margaret Bedggood, Kris Gledhill and Ian McIntosh, above n209, p184.

<sup>212</sup> *Ibid*, at p184.

<sup>213</sup> *Ibid*.

<sup>214</sup> HRC *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004), at [15].

<sup>215</sup> *Ibid*, at [13].

<sup>216</sup> *Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213 (ECHR), at [32]; see also *Kennedy v United Kingdom* (App. No. 26839/05) [2010] ECHR 26839/05, at [184].

<sup>217</sup> HRC *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* CCPR/C/GC/32 (2007), at [13].

is a “key element of human rights protection and serves as a procedural means to safeguard the rule of law”.<sup>218</sup>

National security is a recognised limit on the right to a fair hearing. In *Kennedy v United Kingdom*, the ECtHR outlined importance of the right to a fair trial under art 6 of the ECHR.<sup>219</sup> They recognised that even in a criminal trial, a strong countervailing public interest such as national security may warrant a restriction on the right to a fully adversarial procedure.<sup>220</sup>

In practice this will mean that the limit on the right to a fair hearing must be exercised proportionally. In *Secretary of State for the Home Department v MB*, the House of Lords held that in order to limit fair hearings to be exercised in compliance with international law, the it must be “sufficiently counterbalanced” by the judicial authorities in each case.<sup>221</sup> In these situations the question becomes whether there were procedural safeguards in place that preserved the adversarial elements of the proceedings as much as possible.<sup>222</sup>

In the context of CCPs, the state could argue that the need to protect national security allows the derogation of the right to a fair trial. Further, A’s Case illustrates that special advocates are able to be appointed through the Court’s inherent power. Coupled with the provision of a summary of information required under the PA, there is a tenable argument that the adversarial element of the proceedings is preserved as far as possible despite the countervailing interest. However, this depends on the efficacy of those measures.<sup>223</sup>

The Universal Periodic Review (UPR) of Great Britain, by the United Nations Human Rights Council, states that the Justice and Security Act 2013 allows CMPs to be used in any civil proceedings involving sensitive information which could prejudice national security.<sup>224</sup> It is simply stated that the “process contains strong judicial safeguards and is closely monitored by

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<sup>218</sup> *Ibid*, at [5].

<sup>219</sup> *Kennedy v United Kingdom* (App. No. 26839/05) [2010] ECHR 26839/05

<sup>220</sup> *Ibid*, at [184].

<sup>221</sup> *Secretary of State for the Home Department v MB* [2007] UKHL 46, at [63].

<sup>222</sup> *Ibid*, at [63].

<sup>223</sup> See Chapter III above.

<sup>224</sup> For information on a Universal Periodic Review, see Margaret Bedggood, Kris Gledhill and Ian McIntosh above n209, at p167-168; *Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland A/HRC/WG.6.27/GBR/1* (2017), at [29].

the [UK Government]”. Further the UPR of New Zealand states that the TSA also contains adequate procedural safeguards to guarantee human rights.<sup>225</sup>

However, I consider that there is a strong argument that fair trial rights are being limited in contravention of art 14. This is due to the inability of the safeguards New Zealand has in place to guarantee a fair trial.

In *Ahani v Canada* the HRC the claimant sought admission to Canada as a refugee.<sup>226</sup> Government officials found the claimant to be inadmissible to Canada on the basis of intelligence reports giving them reasonable cause to believe that he would engage in terrorism.<sup>227</sup> The Claimant argued that his unsuccessful appeals within Canada were procedurally deficient because he did not know the case against him.<sup>228</sup>

The HRC held that the domestic proceedings satisfied the art 14 guarantees since the Claimant, “knew the case he had to meet, [and] had a full opportunity to make his views known and to make submission throughout the proceedings”.<sup>229</sup> This was because in the domestic proceedings, despite the intelligence reports being read by the Judge *in camera*, or in private, the Court provided the Claimant with summary of information that reasonably informed him of the allegations against him, then invited his submissions on those allegations.<sup>230</sup>

It is strongly arguable that the CCPs in the TSA and PA would not afford the same level of procedural protection as the Claimant received in *Ahani*. In a case such as *A’s Case*, whether the CCP in the PA adheres to art 14 depends in on whether the summary of information allows the claimant to know the case against her. Further, in *A v United Kingdom*, the ECtHR held that a special advocate system could not counterbalance limits on an adversarial hearing unless the aggrieved party was provided with sufficient information on the allegations against them, and able to give effective instructions to the special advocate.<sup>231</sup> As I have argued, the special

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<sup>225</sup> *Report of the Working Group on the Universal Periodic Review: New Zealand* A/HRC/WG.6/18/NZL/1 (2014), At [97].

<sup>226</sup> *Ahani v Canada* Communication No 1051/2002, 15 June 2004, CCPR/C/80/D/1051/2002, at [2.1].

<sup>227</sup> *Ibid*, at [2.2].

<sup>228</sup> *Ibid*, at [3.2]-[3.3].

<sup>229</sup> *Ibid*, at [4.17].

<sup>230</sup> *Ibid*, at [2.3].

<sup>231</sup> *A v United Kingdom* (App no 3455/05) [2009] ECHR 3455/05, at [220].

advocate system under the PA does not do this.<sup>232</sup> Unless the summary provided to the claimant is detailed enough to allow them to effectively challenge the Crown's case, which is doubtful, then there is a strong case to take to the HRC that New Zealand is in breach of art 14 of the ICCPR.

### *III Conclusion*

The NZBORA provides the biggest scope to challenge a CCP on a human rights basis. While CCPs do *prima facie* breach the NZBORA, whether that limit is justifiable is very contentious. Under the NZBORA, I consider that the CCPs in the PA and TSA do not impair the right to justice as little as possible. Further there is a strong argument that they are inconsistent with the ICCPR as well. Also, if a claimant were to pursue a case to the HRC this would have a more tangible effect on the PA and TSA regimes, since the government would have an international obligation to amend the legislation. Regardless, this reinforces the need to amend those statutes to ensure that there are appropriate safeguards to balance the infringement on the right to a fair trial.

## **Chapter V – Public Interest Immunity: A Solution**

This chapter explores the viability of PII as an alternative to the CCP. In order to evaluate the two systems, the purpose of having a working judiciary must be discerned. That purpose is to uphold the rule of law, in part by holding the government to account. The emergence of the need to use national security information in court proceedings has made balancing the fulfilment of that purpose with upholding the rights of individual litigants gradually more difficult. The CCP was created in an attempt by Parliament to strike this balance. Due to its creation through the common law, I argue that PII better guarantees the fundamental common law rights to a fair trial that have emerged through the courts' realisation of their role. Also, in practice CCPs require courts to evaluate national security information in a manner that was previously thought to be non-justiciable under PII. This removes a barrier to the effectiveness of PII at allowing the courts to keep the executive in check. Hence, PII better allows courts to fulfil their constitutional function whilst still protecting national security information and the

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<sup>232</sup> See Chapter III.

fair trial rights of litigants. Since the Canadian system of dealing with sensitive information has many similarities with the common law PII system, I argue that it should replace the CCPs in the TSA and PA.

### *I The Role of the Courts*

New Zealand inherited its constitutional makeup from Great Britain. Their “constitution is founded on the rule of law”;<sup>233</sup> the idea that, “no one is above the law, and all are subject to the same law administered in the same courts”.<sup>234</sup>

In order to govern effectively under the rule of law, a system of independent and impartial courts must exist to administer justice.<sup>235</sup> Thus, the judicial function under the constitution involves settling disputes according to law, upholding the rule of law and protecting individuals from arbitrary interference.<sup>236</sup>

One key aspect of the rule of law is being able to hold the government to account if it does break the law.<sup>237</sup> A means of doing this is judicial review of executive action, which stops government ministers and public authorities from exceeding their powers.<sup>238</sup> Another is by being able to sue the Crown directly in civil matters.<sup>239</sup>

The applicant in *A’s Case* is attempting to judicially review the Minister of Internal Affairs’ decision to confiscate her passport under the PA.<sup>240</sup> The task of the High Court in this instance is to ensure that the Minister acted within the ambit of the decision-making power delegated to

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<sup>233</sup> William Wade & Christopher Forsyth, *Administrative Law*, (10<sup>th</sup> ed, Oxford University Press, New York, 2009), at 17.

<sup>234</sup> Tom Bingham, *The Rule of Law*, (2010), London, New York: Allen Lane at 4.

<sup>235</sup> Philip Joseph, above n167, at 788.

<sup>236</sup> *Ibid*, at 788.

<sup>237</sup> *Ibid*, at 212.

<sup>238</sup> *Ibid*, at 212.

<sup>239</sup> Joseph, above n167, at 181; New Zealand Bill of Rights Act 1990 s 27(3).

<sup>240</sup> *A v Minister of Internal Affairs*, above n109, at [1].

him by the Parliament through the PA.<sup>241</sup> This represents one of the functions of the courts being to prevent abuses of such power.<sup>242</sup>

But a conflict arises in court proceedings where the Minister has based his decision on confidential information. The Crown asserts that disclosure of that information it will do more harm to the interests of the public than keeping it confidential, even though this may deny litigant of his/her rights.<sup>243</sup> In these situations, the Court's ability to carry out its judicial function and administer justice is strained.

## *II Public Interest Immunity*

The doctrine of public interest immunity (PII) was developed at common law to deal with that conflict.<sup>244</sup> By virtue of its common law origins, PII has developed through the exercise of the powers that flow from the inherent jurisdiction of the courts to hear and determine matters at first instance.<sup>245</sup> In order to fulfil its function, a court has, “the power to maintain its authority and to prevent its process being obstructed and abused”.<sup>246</sup> The PII process represents the courts attempt to protect sensitive information where necessary, whilst also ensuring that people can have access to all the evidence they need to effectively challenge the legality of the Crown's actions.<sup>247</sup>

Claims for PII take place during the discovery process, where all the parties to the litigation disclose all their evidence in advance of the trial.<sup>248</sup> That process occurs so that all parties have a chance to present their cases and are not taken by surprise at trial.

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<sup>241</sup> Wade & Forsyth, above n223, at 745-746; See also Chapter I for a breakdown of the powers contained in the Passports Act 1992.

<sup>242</sup> Wade & Forsyth, above n223, at 18.

<sup>243</sup> Wade & Forsyth, above n223, at 717.

<sup>244</sup> *Al Rawi and others v Security Service and others*, above n59, per Lord Clarke at [140].

<sup>245</sup> Joseph, above n167, at 844.

<sup>246</sup> Joseph, above n167, at 844 citing Sir Jack IH Jacob “The Inherent Jurisdiction of the Court” [1970] 23 CLP 23.

<sup>247</sup> Zuckerman, above n45, at [19.6]-[19.7].

<sup>248</sup> R McGechan, *McGechan on Procedure*, (Thomson Brookers, Wellington, 1985-2018), HR8.26.02, p1-1570.

All ministerial certificates claiming PII used to be regarded as conclusive. In other words, the Minister's assertion that it is in the public interest to withhold the information, would be taken at face value.<sup>249</sup> *Conway v Rimmer* changed this, when the House of Lords held that it was within the inherent power of the courts to decide whether to uphold a Minister's claim to immunity or order disclosure.<sup>250</sup> In each instance where PII is claimed, a Court must undertake a balancing exercise between the public interest, as expressed by a Minister, in withholding certain information, and the public interest in the administration of justice.<sup>251</sup> This may require inspection of the documents by a Court in private prior to ordering their disclosure.<sup>252</sup>

In New Zealand, the Court of Appeal adopted the approach from *Conway* in *Konia v Morley*, which has been followed in subsequent cases.<sup>253</sup> McGechan considers that a Court has the power to inspect documents over which PII is claimed because the Court does not consider that, "the interests of the government exhaust the public interest."<sup>254</sup>

However, the courts have always been cautious when the documents are withheld on the basis of national security. The *Conway* decision came with the caveat, "if the Minister's reasons are of a character which judicial experience is not competent to weigh then the Minister's view must prevail".<sup>255</sup> National security is a highly political issue and has therefore been viewed by the courts as non-justiciable.<sup>256</sup>

In *EDS v South Pacific Aluminium* the Court of Appeal rejected a ministerial certificate over cabinet documents as conclusive, ordering judicial inspection.<sup>257</sup> This was in light of two key overseas decisions allowing similar courses of action for cabinet documents.<sup>258</sup>

The Court was unanimous, and stated that they will always reserve the right not only to order judicial inspection of documents, but to order disclosure to the parties to litigation despite a

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<sup>249</sup> *Duncan v Cammell Laird & Co Ltd* [1942] 1 All ER 587.

<sup>250</sup> *Conway v Rimmer* [1968] 1 All ER 874, per Lord Morris at 900, per Lord Reid at 888.

<sup>251</sup> *Ibid*, per Lord Reid at 888

<sup>252</sup> *Ibid*, per Lord Morris at 900

<sup>253</sup> *Konia v Morley* [1976] 1 NZLR 455, see *Tipene v Apperley* [1978] 1 NZLR 761.

<sup>254</sup> R McGechan, *McGechan on Procedure*, (Thomson Brookers, Wellington, 1985-2018), HR8.26.04, p1-1571.

<sup>255</sup> *Conway v Rimmer*, above n250, per Lord Reid at 888.

<sup>256</sup> *Curtis v Minister of Defence* [2002] 2 NZLR 744.

<sup>257</sup> *Ibid*.

<sup>258</sup> *EDS v South Pacific Aluminium* [1981] 1 NZLR 153 (CA).

ministerial objection.<sup>259</sup> But in cases of documents concerning national security, the Court confirmed the approach that it is “highly unlikely that the Court would ever go so far” as to order disclosure.<sup>260</sup>

### *A Public Interest Immunity and National Security*

When it comes to national security, one problem is that such cases are very rare. The above propositions, namely that the judiciary holds the final say, but that national security information will, in general, not be admitted when the Crown claims PII, are seldom tested.

In *Choudry v Attorney-General*,<sup>261</sup> the Court of Appeal confirmed the approach in *EDS*. Mr Choudry was challenging a covert entry by the New Zealand Security Intelligence Service onto his premises under the New Zealand Bill of Rights Act 1990, s 21 and an action for trespass. The Crown sought to withhold 70 documents invoking public interest immunity.<sup>262</sup>

In the first Court of Appeal hearing (*Choudry I*), the Court outlined the competing principles.<sup>263</sup> The argument against judicial inspection focused upon the multitude of judicial statements positing the need for deference when dealing with the withholding of documents on the grounds of national security. However, this had to be considered against the contemporary movement towards a more open government, signified by the passage of the Official Information Act 1982.<sup>264</sup>

Further, while ministers of the Crown are generally better placed to evaluate the real harm that could result from disclosure of such evidence, public interest immunity claims must attract proper judicial scrutiny.<sup>265</sup> Hence, “[t]he Court cannot be beguiled by the mantra of national security into abdicating its role in the balancing exercise.”<sup>266</sup>

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<sup>259</sup> *Ibid*, Cooke J at p156 line 27.

<sup>260</sup> *Ibid*, line 33.

<sup>261</sup> *Choudry v Attorney-General* [1998] 16 CRNZ 278; [1999] 3 NZLR 399.

<sup>262</sup> *Choudry v Attorney General* [1999] 3 NZLR 399, at [2].

<sup>263</sup> *Choudry v Attorney General* [1998] 16 CRNZ 278 at 290.

<sup>264</sup> *Ibid* at 290.

<sup>265</sup> *Ibid* at 291.

<sup>266</sup> *Ibid* at 291.

In order to provide an appropriate level of scrutiny the Court held that the Minister’s certificate had to, so far as possible so as to maintain confidentiality:<sup>267</sup>

“identify and describe each document; explain why immunity is being claimed for that document; and state why appropriate editing will not be sufficient to protect the security interests involved.”

This is because different national security risks will call for different treatment. This can be likened to a spectrum.<sup>268</sup> Protection of “national security” can encompass less serious threats such as those to economic well-being, or more serious ones like threats to the safety of citizens from terrorism.<sup>269</sup> The more serious the threat, the more likely it is that the courts will defer to the Minister’s judgement.<sup>270</sup> Therefore, the Court needs to know the kinds of issues the Crown has with disclosure in order to properly balance the competing public interests.<sup>271</sup>

Once the Crown had revised the certificates and added more detail to the reasons they were claiming PII, the Court re-examined the issue in *Choudry II*.<sup>272</sup> Despite not following the Court’s directions from the first hearing to the letter, the Crown did provide much more information on the nature of the national security concerns that opposed disclosure.<sup>273</sup> However, for some documents, the Prime Minister had declared that to provide further information would jeopardise the interest being protected.

The Court chose to respect the Crown’s position and not inspect the documents. This was mainly because the Court did not see itself as being the appropriate arbiters of the particular national security issues, which were viewed as being “hardly justiciable”.<sup>274</sup> They were concerned that a judge could in-avertedly reveal sensitive information not obvious to the untrained eye, the so-called “jigsaw effect”.<sup>275</sup> This reason will form part of my analysis below.

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<sup>267</sup> *Ibid* at 293.

<sup>268</sup> *Ibid* at 292.

<sup>269</sup> *Ibid*, at 292.

<sup>270</sup> *Ibid*, at 293.

<sup>271</sup> *Ibid* at 294.

<sup>272</sup> *Choudry v Attorney-General*, above n262.

<sup>273</sup> *Ibid* at [27].

<sup>274</sup> *Ibid* at [30].

<sup>275</sup> *Ibid* at [30].

Inspection would be immaterial to the conclusion reached because courts are indeed not well placed to properly evaluate the public interest in the security of the realm. This is chiefly for the Executive.

Thomas J dissented, arguing in favour of judicial inspection. He attempted to debunk each aspect of the majority's argument, arguing that the Court was shirking its duties by simply trusting the executive.<sup>276</sup>

The decision in *Choudry II* sets a low threshold for the government to be able to claim PII over national security concerns and sets a dangerous precedent for cases involving the SIS potentially overstretching their power. This could allow future claims to go unchecked.<sup>277</sup>

### *III Public Interest Immunity and Closed Court Proceedings*

I argue that PII is a better alternative to CCPs in cases where evidence contains CSI. By virtue of its origins at common law, PII has developed in a manner that gives effect to fair trial rights that are fundamental to common law adversarial proceedings.<sup>278</sup> In cases where evidence must be kept confidential due to national security concerns, the court will use its inherent power to control its own proceedings, and will not exercise that power in a manner which will deny those fundamental rights.<sup>279</sup> Furthermore, in practice, CCPs contradict the rationale behind the constitutional restrictions that the Crown has attempted to place on the PII process when information is withheld because of national security. This allows the courts to fulfil their constitutional function, to act as a watchdog over the executive.

#### *A Common Law Adversarial Principles*

CCPs are anathema to the fair trial rights that are fundamental to the common law adversarial trial. Those principles include equality of arms in litigation, the right to natural justice, and the

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<sup>276</sup> *Ibid* at [68].

<sup>277</sup> Astrid Sandberg, *Keeping a Watch on Big Brother: The SIS and the Court of Appeal*, (2000), 9 *Auckland U. L. Rev* 257 at 264-266.

<sup>278</sup> *Al Rawi and others v Security Service and others*, above n59, per Lord Dyson at [10].

<sup>279</sup> *Ibid*, per Lord Dyson at [54].

right to have proceedings conducted in public or open justice.<sup>280</sup> Their abrogation in a CCP has consequences not only for the ability of the courts to hold the executive to account,<sup>281</sup> but to be accountable for their decisions themselves.<sup>282</sup>

### 1. *Natural Justice*

The right to natural justice envisages that parties to litigation hear the case against them.<sup>283</sup> In *Al Rawi* Lord Kerr stated that, “the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial”.<sup>284</sup>

Despite the measures that have been put in place to combat the unfairness inherent in CCPs,<sup>285</sup> CCPs still deny the non-Crown party of this right, which is “fundamental to our system of justice”.<sup>286</sup> By denying natural justice “there is simply no way of assessing the validity of unchallenged evidence in a legal process”.<sup>287</sup> Therefore the decision’s authenticity can be called into question because one party’s views are absent.<sup>288</sup>

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<sup>280</sup> Zuckerman, above n45, at [19.92].

<sup>281</sup> See above, at Part I.

<sup>282</sup> Zuckerman, above n45, at [3.109].

<sup>283</sup> See Chapter I, Part III above.

<sup>284</sup> *Al Rawi and others v Security Service and others*, above n59, at [93].

<sup>285</sup> See Chapter II above.

<sup>286</sup> *Al Rawi and others v Security Service and others*, above n59, at [10]-[12].

<sup>287</sup> Zuckerman, above n45, at 19.93.

<sup>288</sup> *Ibid.*

## 2. Open Justice

There is a lot to be said for the workings of court proceedings being completely transparent. Indeed, in the time of *Duncan*, courts viewed with utter disgust the notion of a judge dealing with one litigant without the presence of the other:<sup>289</sup>

“It is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other.”

In *Dotcom*, the Court discussed the process of discovery whereby each litigant releases all its evidence to the other. Not only does it allow each litigant to evaluate each other’s arguments ensuring an adversarial trial, but also provides an opportunity to be satisfied with the decision of the Court following trial.<sup>290</sup> Justice must be seen to be done.<sup>291</sup>

The principle of open justice also ensures the judiciary is held to account.<sup>292</sup> As Thomas LJ stated in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, courts sit in public to prevent, “judicial arbitrariness, idiosyncrasy or inappropriate behaviour and the maintenance of public trust, confidence and respect for the impartial administration of justice”.<sup>293</sup> This promotes public confidence in the administration of justice.<sup>294</sup>

Further, requiring court proceedings and the decisions to remain public facilitates public debate that shapes the democratic shaping of moral and legal rules.<sup>295</sup> CCPs frustrate open justice by keeping the reasons behind a judicial decision secret, undermining confidence in the judiciary’s ability to dispense justice.

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<sup>289</sup> *Duncan v Cammell Laird*, above n249, at p594 G.

<sup>290</sup> *Dotcom v Attorney-General* [2017] NZHC 1621, at [39].

<sup>291</sup> *Burmah Oil Co Ltd v Bank of England* [1979] 3 All ER 700, at 720.

<sup>292</sup> Zuckerman, above n45, at [3.109].

<sup>293</sup> *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 152 (Admin), at [36].

<sup>294</sup> Zuckerman, above n45, at [3.109].

<sup>295</sup> Zuckerman, above n45, at [3.109].

### 3. *Equality of Arms*

The equality of arms principles seeks to neutralise disparities in information and resources that could otherwise present themselves in court proceedings.<sup>296</sup> By being able to present evidence to the Court in the absence of the non-Crown party and their barristers and solicitors the Crown is afforded a substantial advantage in court. They alone hold the evidence that could implicate the non-Crown party and cannot be said to be on an equal footing to the other party.

### 4. *Public Interest Immunity and Common Law Principles*

In *Al Rawi*, Lord Dyson held that “a closed procedure is the very antithesis of a PII procedure” because the PII procedure respects all the above principles.<sup>297</sup> This is one reason why in my opinion the statutory CCPs in the PA and TSA should be replaced with the PII type processes of Canada.

PII either results in the availability of the information to both parties, or its exclusion from the proceedings altogether.<sup>298</sup> Since the PII balancing process occurs at the discovery stage of the trial, the evidence is only withheld from the other party while the Court decides whether it is in the public interest to order its disclosure or not. This is in stark contrast to CCPs where information over which CSI status is claimed can be used in the substantive hearing that will determine the issues of the case.

As Lord Kerr stated in *Al Rawi*, to be valuable evidence must be able to be challenged, and without such a challenge it may “positively mislead”.<sup>299</sup> The CCP completely prevents the scrutiny of the evidence against the non-Crown party. As Zuckerman asserts “there is simply no way of assessing the validity of unchallenged evidence in a legal process,” even going as far as to argue that a case of mistaken identity could occur under a CCP.<sup>300</sup>

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<sup>296</sup> Zuckerman, above n45, at [15.2].

<sup>297</sup> *Al Rawi and others v Security Service and others*, above n59, per Lord Dyson at [41].

<sup>298</sup> *Ibid*, per Lord Dyson at [41].

<sup>299</sup> *Al Rawi and others v Security Service and others*, above n59, at [93].

<sup>300</sup> Zuckerman, above n45, at [19.93].

## ***B Public Interest Immunity as an Alternative to Closed Court Proceedings in Practice***

There is a strong argument that in practice, the limits CCPs place on the fair trial rights of individuals do not justify their use instead of PII.

Since *Conway*, courts in New Zealand have maintained that they hold the ultimate decision-making power when confidentiality over documents is claimed.<sup>301</sup> This is because, should a court order the inspection or disclosure of documents withheld due to national security, the Crown can withdraw the evidence rather than risk its disclosure. Through the enactment of the CCP the Crown has sought to be able to use CSI in proceedings without risking the information's disclosure being ordered.

In *A's Case*, Dobson J held that "should the court not accept the desirability of withholding the CSI for its protection then the Crown can withdraw such documents."<sup>302</sup> I consider that Dobson J is indicating that when the Crown declares CSI status over information and requires a CCP, the Court will continuously evaluate whether the Crown is justified in using the information in court whilst withholding it from the non-Crown party.

In *Choudry*, the Court did not order judicial inspection of the sensitive documents because they viewed national security as non-justiciable. In coming to that decision, the Court stated that the gravity of national security issues can be likened to a spectrum, with some concerns being more serious than others, requiring the Court to exercise more deference to the executive's decision.<sup>303</sup> Hence, implicit in the Court's reasoning was that the matters in that case, some which could not even be disclosed on the certificate, were at the higher end of the spectrum, making it inappropriate for the Court to make decisions in light of it.

The CCP requires the courts to undertake an analysis of matters that the Court in *Choudry* viewed as belonging to the higher echelons of executive decision makers.<sup>304</sup> National security decisions have traditionally been left to the executive since they hold the requisite expertise

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<sup>301</sup> *Tipene v Apperley*, above n253, at 764.

<sup>302</sup> *A v Minister of Internal Affairs*, above n109, at [43].

<sup>303</sup> *Choudry v Attorney-General*, above n263, p292 line 22.

<sup>304</sup> *Choudry v Attorney-General*, above n262, at [30].

and are democratically accountable to Parliament, whereas judges are not.<sup>305</sup> But, the Court's argument as to the non-justiciability of the documents in *Choudry* that precluded judicial inspection cannot be reconciled with the CCP.

CCPs require the Courts to evaluate evidence of a national security character anyway. When deciding an appeal under the PA against a Minister's decision to confiscate a passport, the Court can substitute its own discretion for the Minister's.<sup>306</sup> Since the Court will also be evaluating whether the information is justified in holding CSI status, it is effectively carrying out the judicial inspection function that the Court in *Choudry* refused to undertake. The difference being that under a CCP the inspection function is being carried out when the information is being used against the non-Crown party, denying them of their common law fair trial rights, as opposed to during discovery as in PII.

Further, in *Choudry* the Court was very concerned about the "jigsaw effect," as a reason against judicial inspection of documents through a PII process. The jigsaw effect posits that a distinction can be made between the informed reader and uninformed reader, of classified security information, with the latter being equated to a judge. The former is knowledgeable regarding security matters or a person who is trying to threaten the security of the state. The latter could miss crucial information which should remain classified allowing the former to fit a piece of apparently innocuous information into the bigger picture, arriving at some damaging deductions.<sup>307</sup>

Indeed, in his dissenting opinion in *Choudry*, Thomas J attacked that type of reasoning. He argued that a judicial inspection of documents under a PII procedure would not be unaided due to the ministerial certificate accompanying the documents.<sup>308</sup> Not only could it direct how the documents are to be understood, but also reveal how a document could be harmful in a wider context, rather than in its seemingly innocuous isolation.<sup>309</sup> Further, he argued that a Judge is in a similar position to make these decisions as a minister in terms of national security expertise.

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<sup>305</sup> *Ibid*, at [30].

<sup>306</sup> Passports Act 1992, s 28(4).

<sup>307</sup> *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229, at 242-243.

<sup>308</sup> *Choudry v Attorney-General*, above n262, at [79].

<sup>309</sup> *Ibid* at [79].

Effectively armed with the same information as a government entity provides a minister, the courts are apt to carry out the same task.<sup>310</sup>

From the Crown's point of view, a CCP does not raise the possibility of the jigsaw effect creating negative repercussions since it allows full disclosure of the sensitive information to a judge without the risk of that information being made public. But Dobson J's statement that a judge can remove CSI status forcing the Crown to withdraw it, means judges are undertaking a similar exercise to a PII proceeding. By continuously evaluating whether the CSI status of the information at issue is justified and being involved in the process of releasing a summary to the non-Crown party, CCPs require judges to do precisely what the jigsaw effect warns against; namely evaluate whether the withholding of evidence due to national security is justified.

In *Khawaja*, the Court did not view the jigsaw effect as usually constituting a conclusive reason to withhold an apparently innocuous piece of evidence, without a further reason against disclosure.<sup>311</sup> Arguably judges should be able to inspect documents under a PII procedure and that this is a more favourable alternative to the procedural rights infringing CCP.

The CCP allows judges to do what the court in *Choudry* cautioned against. Therefore, Thomas J's dissent becomes relevant by showing how Judges can evaluate national security evidence. Further, The Court's objections to judicial inspection in a PII proceeding cannot be reconciled with how judges will conduct a CCP in practice. This makes the main practical difference between a CCP and PII the denial of the non-Crown party's common law fair trial rights, since the classified information can be used whilst they are excluded from the proceedings. This has grave consequences for the rule of law, discussed in the next section.

### *1. Holding the Executive to Account*

I have argued that the CCP breaches a person's common law fair trial rights and that there no practical differences between what the CCP requires of judges when compared to the PII

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<sup>310</sup> *Ibid* at [71].

<sup>311</sup> *Ibid* at [136].

process. Due to the flagrant breaches of rights CCPs allow, they prevent the courts from being able to effectively carry out their constitutional function.

By denial of a person's common law rights, the executive becomes unable to be scrutinised by the courts. As Lord Clarke held in *Al Rawi*,<sup>312</sup>

“the rule of law and the democratic requirement that governments be held to account mean that the case for disclosure will always be very strong in cases involving alleged misconduct on the part of the state”

There is a strong argument that the CCP does not allow the need for the Government to be held to account to be balanced against the need to protect national security, which is very undesirable. In *Secretary of State for the Home Department v AF* Lord Hope stated that the CMP “negates the judicial function”.<sup>313</sup> Hence, the Crown cannot be said to be subject to the rule of law because their decisions under the PA and TSA cannot be challenged effectively by the non-Crown parties, offering them no protection from arbitrary interference.

If Courts do always regard a ministerial certificate claiming PII on national security grounds as conclusive without inspecting it, then whether they are fulfilling their function as a watchdog over the executive can be called into question. Clear and convincing grounds must be shown before a Court will accept a claim to PII.<sup>314</sup> The Court must be seen to be effectively supervising the Government's exercise of power.<sup>315</sup> It can only accept a claim to PII without inspection if it is likely that inspection will be immaterial to the conclusion reached.<sup>316</sup> In other words since the Court lacks expertise in such matters, inspection definitely not result in them ordering disclosure

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<sup>312</sup> *Al Rawi and others v Security Service and others*, above n59, at [184].

<sup>313</sup> *Secretary of State for the Home Department v AF*, above n71, per Lord Hope at [84].

<sup>314</sup> *Brightwell v ACC* [1985] 1 NZLR 132, at 139.

<sup>315</sup> *Choudry v Attorney-General*, above 263, at 293-294.

<sup>316</sup> J. Stephen Kós, *Crown privilege: recent developments in New Zealand*, (1979), 10 V.U.W.L.R. at 121.

## ***C The Solution***

After the enactment of the JSA in the UK, to my knowledge, the Crown has stopped claiming PII over national security information in civil proceedings. This is because they can use the information against the non-Crown party without risking its disclosure. Based on this experience, I argue that New Zealand should follow a Canadian path to ensure that the rights denying CCPs do not become common practice. The Canadian system is similar to the PII process which imposes more stringent limits on the use of classified information in court proceedings.

It has been argued that CCPs are fairer than PII because they allow the bringing of proceedings that would otherwise be impossible if under a PII analysis the public interest weighed against disclosure.<sup>317</sup> However, in *Al Rawi* Lord Dyson cautioned against viewing this rare issue so narrowly since the risk of injustice in such a case cannot be compared to the injustices CMPs would create.<sup>318</sup>

The PA and TSA regimes contain broad statutory definitions of CSI that, if met, require that information to be used against the non-Crown party in private automatically. The Canadian system on the other hand requires a separate Federal Court hearing to determine whether information flagged by the Attorney-General should be disclosed, and to what extent, based on a public interest immunity balancing exercise.<sup>319</sup>

I argue the Canadian system strikes the best balance. In *R v Ahmad* the Supreme Court of Canada commented on the flexibility the s 38 CEA procedure provides by permitting conditional, partial and restricted disclosure in various settings.<sup>320</sup> Since the procedure leaves wide discretion to the courts, it will only be applied in adherence to the above common law fair hearing rights. Non-disclosure will only be permitted if the non-Crown party will be able to know the case against them through a summary, and respond accordingly.<sup>321</sup>

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<sup>317</sup> Foreign Affairs, Defence and Trade Committee, Terrorism (Bombings and Financing) Suppression Bill, (23 March 2002, at 13.

<sup>318</sup> *Al Rawi and others v Security Service and others*, above n59, at [50].

<sup>319</sup> See Chapter II above.

<sup>320</sup> *R v Ahmad*, above n94, at [44].

<sup>321</sup> See Chapter II above.

#### *IV Conclusion*

I consider that New Zealand should enact a generalised system of dealing with classified information similar to the Canadian s 38 procedure due to its close proximity to PII. Placing the decisions on how national security information is to be used in court in the hands of judges will guarantee that the rights fundamental to the common law and the rule of law are upheld. Further, this would clear up the ambiguity between allowing judges to evaluate national security in a CCP whilst having to be cautious in undertaking the same activity in a PII proceeding. The Canadian PII type system will enhance the ability of the courts to hold the Government to account, giving greater effect to principles that are fundamental to democracy.

### **Conclusion**

The right to a fair hearing is sacrosanct. Whether it can be limited at all has sat uneasily with courts in common law jurisdiction throughout time. However, a stage has been reached where the threats New Zealand faces to its national security must warrant some limits on adversarial court proceedings. Parliament sought to address that conflict with the passage of the PA and the TSA. But, as this paper has argued, the procedures that those statutes impose on courts do not protect those rights. The procedural safeguards that exist in New Zealand fail to provide a person with the basic tenets of natural justice: to know the case against them so as to be able to effectively respond.

Though the international human rights law realm is less clear-cut and formalistic than New Zealand's domestic framework, a person who has been aggrieved by the PA or TSA should pursue a case to the HRC. This would be the most effective way to induce a change to two legislative regimes that this paper argues infringe the right to a fair hearing.

It is not desirable for New Zealand, a stable democratic country, to allow the removal of the adversarial element from court proceedings. The CCP statutes should be reformed. Canada's model should be followed because of its similarities to public interest immunity, which uphold the common rights that guarantee a fair trial. As I have argued, the reasons for not allowing judges to weigh national security issues are out of date. Amending those statutes will allow the

government to be held to account, strengthening the rule of law, one of the fundamental pillars of our democracy.

## Bibliography

### A Cases

#### 1. New Zealand

*A v Minister of Internal Affairs* [2018] NZHC 1328.

*A v Minister of Internal Affairs* [2017] NZHC 746.

*Brightwell v ACC* [1985] 1 NZLR 132.

*Choudry v Attorney General* [1999] 3 NZLR 399.

*Choudry v Attorney General* [1998] 16 CRNZ 278.

*Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] 2 NZLR 56.

*Curtis v Minister of Defence* [2002] 2 NZLR 744.

*Dotcom v Attorney-General* [2017] NZHC 1621.

*EDS v South Pacific Aluminium* [1981] 1 NZLR 153 (CA).

*Konia v Morley* [1976] 1 NZLR 455.

*Ministry of Health v Atkinson* [2012] NZCA 184.

*New Health New Zealand v Taranaki District Council* [2018] NZSC 59.

*R v Hansen* [2007] NZSC 7.

*Tipene v Apperley* [1978] 1 NZLR 761.

*Zaoui v Attorney-General* [2003] 7 HRNZ 494.

*R v Hansen* [2007] NZSC 7.

#### 2. Canada

*Canada (Attorney General) v. Khawaja (F.C.)*, [2008] 1 F.C.R. 547.

*Canada (Attorney General) v Khawaja (F.C.A.)*, [2008] 4 F.C.R. 3.

*Canada (Attorney General) v. Ribic*, [2005] 1 F.C.R. 33.

*Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

*Gold v Canada* [1986] 2 F.C. 129.

*Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229.

*Huang v Canada (Attorney General)*, [2017] F.C.J. No. 1049.

*R. v. Ahmad*, [2011] 1 S.C.R. 110.

*R v Oakes* [1986] 1 SCR 103.

### 3. United Kingdom

*Al Rawi and others v Security Service and others* [2011] UKSC 34.

*Bank Mellat v HM Treasury* [2013] 4 All ER 495.

*Burmah Oil Co Ltd v Bank of England* [1979] 3 All ER 700.

*Conway v Rimmer* [1968] 1 All ER 874.

*Duncan v Cammell Laird & Co Ltd* [1942] 1 All ER 587.

*R v Gul (Mohammed)* [2014] 1 Cr. App. R. 14.

*R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 152 (Admin).

*Roberts v Parole Board* [2005] UKHL 45.

*Secretary of State for the Home Department v AF (No. 3)* [2009] 3 All ER 643.

*Secretary of State for the Home Department v MB* [2007] UKHL 46.

## **B Legislation**

### 1. New Zealand

The Health and Safety at Work Act 2015.

Interpretation Act 1999.

New Zealand Bill of Rights Act 1990.

Passports Act 1992.

Passports Amendment Act 2005.

Terrorism Suppression Act 2002.

Telecommunications (Interception Capability and Security) Act 2013.

Immigration Act 2009.

2. Canada

Canada Evidence Act 1985, R.S.C., 1985, c. C-5.

Immigration and Refugee Protection Act 2001 (S.C. 2001, c. 27).

3. United Kingdom

Justice and Security Act 2013.

Terrorism Act 2000.

Special Immigration Appeals Commission Act 1997 (UK).

**C Other Official Sources**

1. Parliamentary Materials

(8 October 2002) 603 NZPD 1062.

2. Government Publications

Foreign Affairs, Defence and Trade Committee, Terrorism (Bombings and Financing) Suppression Bill, (23 March 2002)

Government Administration Committee, *Identity (Citizenship and Travel Documents) Bill*, (19 November 2004).

Orr, *Consistency with the New Zealand Bill of Rights Act 1990: Telecommunications (Interception Capability and Security) Bill*, Office of Legal Counsel, (3 May 2013).

The Law Commission, *National Security Information in Proceedings*, (NZLC IP38, May 2015).

The Law Commission, *The Crown in Court*, (NZLC R135, December 2015).

**D Books and Chapters in Books**

Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, (3<sup>rd</sup> ed, Sweet & Maxwell, London, 2013).

Andrew Geddis and Elana Geddis, *Addressing Terrorism in New Zealand's Low Threat Environment*, (Routledge Chapter, Forthcoming, 2018).

Butler & Butler, *The New Zealand Bill Of Rights Act: A Commentary*, (2<sup>nd</sup> ed, LexisNexis, Wellington, 2015).

Joseph, *Constitutional and administrative law in New Zealand*, (4<sup>th</sup> ed, Brookers Ltd, Wellington, 2014).

Margaret Bedggood, Kris Gledhill and Ian McIntosh, *International Human Rights in Aotearoa New Zealand*, (Thomson Reuters, Wellington, 2017).

Philip Joseph, *Constitutional and administrative law in New Zealand*, (4<sup>th</sup> ed, Brookers Ltd, Wellington, 2014).

R McGechan, *McGechan on Procedure*, (Thomson Brookers, Wellington, 1985-2018)  
Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice*, (Cambridge University Press, New York, 2013).

Tom Bingham, *The Rule of Law*, (2010), London, New York: Allen Lane.

William Wayde & Christopher Forsyth, *Administrative Law*, (10<sup>th</sup> ed, Oxford University Press, New York, 2009).

### ***E Journal Articles***

Aileen Kavanagh, *Control Orders and the Right to a Fair Trial*, (2010), 73(5) Mod.L.Rev. 836.

Andrew Boon and Susan Nash, *Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems*, (2006), 9 Legal Ethics 101.

Astrid Sandberg, *Keeping a Watch on Big Brother: The SIS and the Court of Appeal*, (2000), 9 Auckland U. L. Rev 257.

John Ip, *The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill*, [2009], N.Z.L.Rev 209.

John Ip, *The Rise and Spread of the Special Advocate*, [2008], Public Law 717.

J. Stephen Kós, *Crown privilege: recent developments in New Zealand*, (1979), 10 V.U.W.L.R. 115.

Justice Jeremy Patrick, *Section 38 and the Open Courts Principle*, (2005), 54 U.N.B.L.J 218.

Lani Inverarity, *Immigration Bill 2007: Special Advocates and the right to be Heard*, (2009), 40 V.U.W.L.R 471.

M. Fordham, *Secrecy, Security and Fair Trials: The UK Constitution in Transition*, (2012) 17 JR 187.

M. Palmer, *Counter-Terrorism Law*, (2002) NZLJ 456.

Sameer Rohatgi, *Secret Courts, Justice and Security: Is the use of CMPs a double-edged sword?* (2015), 6 QMLJ 29.

## ***F Internet Materials***

“New Zealand Adds to List of Designated Terrorist Entities” (4 April 2018) beehive.govt.nz  
<<https://www.beehive.govt.nz/release/new-zealand-adds-list-designated-terrorist-entities>>

“Advice on Bills with the Bill of Rights Act Publications, Bill of Rights Compliance Reports” justice.govt.nz <<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/advice-publications/>>

“Constitutional Issues & Human Rights, Section 7 Reports” justice.govt.nz  
<<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/section-7-reports/>>

## ***G International Materials***

### 1. Treaties

International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

### 2. United Nations Materials

*Ahani v Canada* Communication No 1051/2002, 15 June 2004, CCPR/C/80/D/1051/2002.

HRC *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* CCPR/C/GC/32 (2007).

HRC *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004).

*Report of the Working Group on the Universal Periodic Review: New Zealand* A/HRC/WG.6/18/NZL/1 (2014).

*Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland* A/HRC/WG.6.27/GBR/1 (2017).

### 3. European Court of Human Rights Cases

*A v United Kingdom* (App no 3455/05) [2009] ECHR 3455/05.

*Chahal v United Kingdom* (1996) ECHR 413.

*Dombo Beheer BV v Netherlands* (1994) 18 EHRR 213 (ECHR).

*Kennedy v United Kingdom* (App. No. 26839/05) [2010] ECHR 26839/05.







