The Judicial Review of Counter-terrorism Measures: a Comparative Study

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1 Introduction

Counter-terrorism laws are a guide to who's currently winning the never-ending battle between advocates of order and advocates of liberty. Typically they involve a compromise. One reason for this is that most people value both security and liberty. They may disagree in relation to the relative value of security and liberty, and they may disagree about the extent to which a given loss of liberty will in fact yield a degree of added security, but most people want both, and indeed, it is hard to see how one could have one without the other. A second is that those responsible for counter-terror laws are typically involved in a political balancing exercise. There may be votes to be won by offering 'tougher' laws, but governments also stand to lose the support of civil libertarians, and despite their tendency to represent themselves as a beleaguered minority, civil libertarians are a political force to be reckoned with, especially in an age where trust in government is weak, and where civil libertarian rhetoric can draw on a long litany of executive abuses of power. A third and weaker force for compromise rises from the separation of powers. Executives need congressional or parliamentary support in order to secure passage of counter-terror legislation, and even in 'responsible government' systems where the executive may have an almost built-in parliamentary majority, executive proposals are almost invariably watered down in the course of their passage through parliament. Moreover, the political branches of government are typically subject to constitutional or quasi-constitutional constraints. The norms embodied in those constraints may be largely internalised, but regardless of whether this is so, the political arms must be mindful of the way in which the judiciary is likely to react to counter-terror measures. If the political arms want effective counter-terror legislation, they need to draft it with a view to ensuring that it will survive constitutional attack. Moreover, if they believe that effective counter-terror measures require the curtailment of liberty, they must draft their laws so as to make this clear, in which case they must pay the political costs entailed in patent attempts to curtail liberties.

Despite these considerations, counter-terror measures have the potential to provoke conflict between the political arms and the courts. Perspectives are likely to vary. Intelligence services in particular, are likely to be particularly concerned lest they fail to anticipate a serious terrorist threat. They have good grounds for assuming that if an unexpected terrorist attack were to take place, they would be blamed for failure to avert it. They are also likely to over-estimate the likelihood of attacks. In the course of monitoring extremist organisations, they are likely to encounter talk of extremist action, and possibly even plans to give effect to this talk. Terrorist spokespeople may make exaggerated threats, partly because extremists like to exaggerate their capacity to wreak havoc, and partly because such threats may be an inexpensive way of spreading fear. Information about possible threats is more likely to be noted than information which might cast doubt on whether the threat exists. Assessing the degree to which threats coexist with capacity is likely to be difficult. As a result, intelligence agencies are likely to exaggerate threats.[1] Indeed, it would be worrying if they didn't.

Intelligence organisations are also notoriously reluctant to disclose details of their intelligence. There are often good practical reasons for this. If information comes from

[1] J Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (2007) provides a fascinating insight into the way in which US intelligence services came to perceive the terrorist threat in the post-2001 era.

sources within a terrorist organisation, it is obviously undesirable that this fact, or anything which points to this fact should be disclosed. If monitoring a developing plot is yielding information about a steadily increasing number of participants in the plot, there would be a real danger that information about the monitoring could defeat its purpose. Moreover because the consequences of disclosure of information may be unpredictable, risk aversion will encourage erring on the side of non-disclosure. And quite apart from the good reasons for secrecy, there may be bad ones too. Secrecy means that mistakes can be concealed, and since intelligence agencies will inevitably make mistakes, it is understandable that they should be tempted to blur the difference between the protection of national and institutional interests.

Their fears are likely to influence executive perceptions of the threat posed by terrorism, and may in any case be shared by the Executive, given its security responsibilities. In the United States at least, the Bush administration came to believe that the threat posed by terrorists to United States security was not appreciated outside the government and that as a result, the protection of US security interests could be achieved only by disregarding the law as it was understood by Congress and the US courts.[2] It remains to be seen whether this has been the case in other liberal democracies. There is little evidence to this effect, but there is certainly evidence to suggest that the Executive tends to be more committed to erring on the side of security than do the legislative and judicial arms. While this may not entail disregarding non-executive interpretations of the law, it may mean that in situations of legal ambiguity, the Executive will be inclined to act on the basis of interpretations which might subsequently be rejected by the courts.

Legislatures are less supportive of wide-ranging counter-terror laws than Executives. Indeed, if one examines the counter-terror legislation of Australia, Canada, New Zealand, the UK and the US, one finds frequent examples of bills being 'watered down', and none of their being 'toughened'. In only a handful of cases, has there even been an unsuccessful opposition proposal to do so. The scope for conflict with constitutional and quasi-constitutional provisions is limited by concerns to ensure that legislation can survive, and by formal requirements relating to certification, and committee examination for compliance with human rights standards. This does not, however, mean that counter-terror measures will necessarily survive constitutional and quasi-constitutional review.

One reason for this is that the context of legislation may differ from the context within which judicial review takes place. Counter-terror legislation may be a response to a terrorist attack (although there are numerous exceptions to this, including the *Terrorism Act 2000* (UK)). If so, legislators are likely to be influenced by the enormity of the attack, and to over-estimate the threat that it foreshadows. If so, and over time, fears are likely to fade, possibly giving way to fears based on incidents which come to symbolise the threats posed by counter-terror measures. If (as is often the case), challenges to legislation and exercises of powers under the legislation are not finally resolved until years after the enactment of the relevant legislation, courts may resolve them on the basis of a more relaxed assessment of the threat and of what is needed to deal with it.

A related consideration relates to the politics of reactive legislation. In the aftermath of a terrorist attack, the demand for government action is likely to involve a strong emotional component, in which case the legislative response may be symbolic rather than instrumental. This may reflect cynical calculation, but it may also reflect a feeling on the part of the government that terrorism-related activities should be punished regardless of whether this achieves anything other than a feeling that wicked people are getting their just deserts. Symbolic legislation sits uneasily with legally protected liberties. It may be legitimate to interfere with liberties if this yields enhanced security; it is rarely legitimate to do so because it makes people feel good. Moreover, given delay, outrage tends to wane.

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[2] J Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (2007). One reason why this source is particularly important is that it is the work of a scholar who sympathised with many aspects of the Bush administration's counter-terror program.

In any case, courts' reactions are not always easy to predict. If they were, lower court decisions would rarely be overruled on appeal, and higher court decisions would generally be unanimous. Insofar as counter-terror litigation involves balancing security interests against liberty interests, judicial decisions, like executive and legislative decisions will turn on values and assumptions.

Counter-terror laws and their implementation therefore have the potential to generate conflict between the political arms and the judiciary. There are grounds for believing that courts will tend to be more liberal than administrators or legislators. Lawyering requires scepticism and tolerance of ambiguity, both of which are likely to go with appreciation of the value of liberty. The fact that civil libertarians favour bills of rights and strong judiciaries tends to confirm this suggestion. They presumably do not believe that there is a danger that judges will strike down anti-surveillance legislation on the grounds that it is incompatible with an implied constitutional duty to maximise protections for the fatherland. If they did, they would favour strong legislatures.

Moreover, even if judges were no more liberal than politicians or security personnel, it is likely that judging will involve de facto liberalism. Litigation often involves an individual applicant pitted against the government, and this is likely to mean that courts are more likely to see counter-terror measures from the perspective of those directly affected by such measures, rather than from the collectivist perspectives of the political arms.

That said, conflict is likely to be muted. Attitudinal differences between politicians and judges appear to be no more than differences of degree, and this is what one would expect, given the role of politicians in the appointment of judges. Moreover, the obverse of the separation of powers doctrines which underlie judicial independence is judicial respect for the prerogatives of the executive and legislative arms. Respect for law requires acting on the basis that law is sufficiently objective to bind judges, as well as empowering them. Respect for the legislative arm sits uneasily with constitutional limits to legislative powers, but once the constitutional hurdle is overcome, it requires interpretations of the legislation which do not do an injustice to the legislature's probable intentions. Respect for the executive arm involves recognition of the problems faced by an executive which is acting in good faith in order to realise its understanding of what the public interest entails. Respect is sometimes expressed in the language of deference; sometimes it is inherent in statements of the law; sometimes it emerges from judicial observations.

Judicial respect for the political arms of government will always tend to be qualified: acting according to law not infrequently involves frustrating governments, and those about whose opinions judges care most are likely to tend to be legal professionals, whose relative valuation of individual and collective interests is likely to differ from governments'. So in counter-terror litigation, there is likely to be a manageable tension between courts and the political arms.

This paper examines some of the ways in which these considerations have played out in cases involving the judicial review of counter-terror decisions, and is based on a review of cases from four English-speaking liberal democracies: the United States, the United Kingdom, Canada, and Australia. Part 2 provides a brief summary of some of the salient similarities and differences between the four countries. Part 3 examines four areas in which judicial review has involved consideration of important counter-terror decisions, namely (a) a United Kingdom derogation decision; (b) proscription decisions; (c) 'alien terrorist' decisions, and (d) control order decisions. In part 4, I discuss the degree to which courts have succeeded in identifying and administering a coherent balance between the need to recognise the executive's legitimate claims to be afforded deference, and the duty of the courts to hold the executive to its legal obligations.

2 Similar, but different

The legal traditions of the United States, Canada and Australia can be traced back to Britain, and the British ancestry of the current British tradition is self-evident. Predictably, there has been divergence, both by virtue of the growing importance of legislation as compared with common law, the abolition of appeals from Canada and Australia to the Privy Council, and the semi-integration of the United Kingdom into Europe. But there has also been a degree of legal cross-fertilisation, especially between the three Commonwealth countries.

One of the most significant differences between the four counties lies in the degree of constitutional entrenchment of fundamental rights and liberties. The United States Bill of Rights protects most fundamental rights, along with some – such as the right to bear arms – which have yet to find their way into newer bills of rights. Canada's Charter of Rights entrenches some fundamental rights, while leaving others subject to legislative over-ride. The United Kingdom lacks constitutionally entrenched rights, but the European Convention on Human Rights provides sufficient protection for those whose rights are infringed to act as a functional equivalent of an entrenched bill, and the *Human Rights Act 1998* (UK) acts in relation to administrators in much the same way as an entrenched Bill of Rights does in relation to legislators. Despite borrowing heavily from the United States, the Australian Constitution does not incorporate a Bill of Rights, but in important but indeterminate ways, it nonetheless provides a number of substantial protections. Federalism complicates law making, ensuring that some counter-terror measures require commonwealth and state agreement, which normally means bipartisan support. The constitutionally entrenched separation of powers (modelled on, but operating differently to, that in the United States constitution), effectively protects the federal (and possibly the state) courts from legislation which might undermine their capacity to act fairly. And the High Court's jurisdiction over public law cases is constitutionally entrenched.

The systems of administrative law of the four countries share many common features. Administrators may exercise only such powers as are conferred on them. They must afford a fair hearing to those affected by their decisions. Insofar as they act on the basis of the hypothesised existence of facts, they must have at least some basis for believing those facts to exist. Decisions must be reasonable, at least in the *Wednesbury* sense. These are minimum requirements. Some systems require more. Constitutional and quasi-constitutional protections of human rights have been interpreted to mandate stricter standards of administrators than would otherwise be the case. This may require attention not only to the legality of decisions when made, but to the ongoing legality of their operation in the light of changing circumstances. It may require 'proportionality', rather than the less exacting reasonableness required by the *Wednesbury* test. Constitutional protection of the right to due process means that the right cannot be taken away, although it may of course, be interpreted narrowly. One result of this is that, in many ways, Australian administrative law appears to be somewhat more generous to administrators than the administrative law of the other three countries. But in some respects, it seems to be more demanding than United States law. Its standing requirements seem to be more relaxed. It does not accept that foreign policy decisions are non-reviewable. It does not allow administrators to make even reasonable errors of law. It is less forgiving of administrators who fail to afford procedural fairness.

Given these considerations, one might also expect that Australian counter-terror laws would be particularly wide-ranging and their enforcement particularly rigorous. The position is rather more complex. If one were to rank the three Commonwealth countries, Britain's laws would appear to be the most intrusive, with Australia's lagging a little way behind, and Canada in distant third place. Britain has made considerably more overt use of its powers than Australia, and Canada has made almost none. Comparisons with the United States are complicated by the degree to which United States laws and their enforcement are targeted at foreign terrorists, and by the degree to which United States counter-terror measures have not involved the exercise of statutory or, in some respects, any other legal powers. In form, and

once one allows for judicial rulings, United States law seems in some ways to be more liberal than the laws of Britain and Australia. Its enforcement is far less so.

3 Four areas of judicial review

Counter terror laws have generated hundreds of prosecutions in the United States, dozens in the United Kingdom and Australia, and a handful in Canada. Judicial review cases are less common, and have involved four major issues. One involved the legality of a purported derogation from the ECHR by the British government. A handful have stemmed from the proscription of alleged terrorist organisations. A small number have been brought by people facing deportation on the grounds of terrorism, and several have involved challenges to the legality of 'control' orders.

3.1 Derogating from Human Rights Conventions

Even when human rights conventions impose absolute prohibitions, they may allow signatories to exempt themselves from some of those obligations if they face an 'emergency'.[3] Of the four countries considered in this paper, only the United Kingdom has made formal derogations in relation its human rights obligations and, indeed, and it is only in the United Kingdom that the validity of derogations is capable of having important legal implications.[4] Decisions to derogate are necessarily reviewable by the European Court of Human Rights in convention cases, since otherwise convention rights could be rendered nugatory. Since the *Human Rights Act 1998* (UK) provides for derogation and attaches domestic legal consequences to breaches of the European Convention, derogation decisions are also reviewable under United Kingdom domestic law.

A power to derogate is provided by the *Human Rights Act* s 14, and has only been exercised on one occasion. Following the passage of the enactment of the *Anti-terrorism, Crime and Security Act 2001* (UK), the government made the *Human Rights Act 1998 (Designated Derogation) Order 2001* (SI 2001/3644). If valid, and consistent with the ECHR, the order would have meant that Article 5 of the Convention did not apply in relation to the indefinite detention, under the Act, of 'alien terrorists' in cases where the government sought, but was unable, to deport them.

Ten people who had been detained under Act challenged the legality of their detention, The Special Immigration Appeals Commission upheld the derogation, but found that the legislation in question was discriminatory and therefore violated the appellants' rights under Art 14 (which was not covered by the derogation). The Court of Appeal upheld the validity of the derogation decision, and found that the legislation was not discriminatory. Nine of the detainees then appealed to the House of Lords. The issue was not relevant to their detention under domestic law, but a favourable outcome would mean that the government would have to decide what to do in light of the ruling, and it would augur well for any subsequent case the detainees might bring before the ECHR.

The validity of the derogation depended on two conditions. First, there had to be a 'public emergency threatening the life of the nation'. Second, assuming an emergency, the derogation was permitted 'only to the extent strictly required by the exigencies of the situation'. The case

[3] ICCPR Art 5 ('in time of public emergency which threatens the life of the nation'); ECHR Art 15 ('public emergency threatening the life of the nation').

[4] Elsewhere a formal derogation might be of relevance insofar as it determines international legal obligations, and insofar as these are relevant to domestic law. In Australia, where domestic law trumps international law, legislation must be interpreted on the basis of a rebuttable presumption that it is not intended to be contrary to international law. International law may also be taken into account in developing the common law. Derogation from the ICCPR would therefore weaken the force of arguments based on the ICCPR. Given overlap between the ICCPR and common law rights, and the rebuttability of the presumptions in favour of either, it would only be in exceptional cases that derogation could be pivotal to a dispute.

squarely raised the question of how much deference should be accorded the government in national security cases.

The European Court of Human Rights had interpreted first requirement narrowly, but had afforded states a 'margin of appreciation' in relation to the question of whether a given emergency falls within the narrow definition.[5] The House of Lords adopted a similar approach, albeit, in some cases, with reluctance.[6] In part, it considered that European cases provided sufficient authority for the proposition that the post 9/11 situation could constitute an emergency. In part, it was influenced by 'deference' – or, to use what Lord Bingham (at [29] regarded as a preferable phrase, 'relative institutional competence':

> … great weight should be given to the judgment of the Home Secretary, his colleagues and parliament on the question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the worked might or might not do, and why (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings … is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety.[7]

Of the nine Lords, only Lord Hoffman dissented on this issue. Addressing the question of what was meant by a threat to the life of the nation, he said:

> The "nation" is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses it own political and moral values.[8]

Seen thus, terrorism did not threaten the life of the nation:

> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threatened our institutions of government or our existence as a civil community.[9]

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[5] Its decisions are reviewed in *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56, at [16]-[18] (Lord Bingham)

[6] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56, [16]-[29] (Lord Bingham (who was 'not without misgivings': [26]), [85] (Lord Nicholl, agreeing) [109]-[112], [115]-[120] (Lord Hope); [165]-[166] (Lord Scott (albeit with graver doubts, and observing: 'judicial memories are no shorter than those of the public and the public have not forgotten the faulty intelligence assessments on the basis of which United Kingdom forces were sent to take part and are still taking par, in the hostilities in Iraq: [154]); Lord Rodger (not without concern: [165]); [209] (Lord Walker); [227]-[231] (Baroness Hale). Lord Carswell agreed with Lord Bingham: at [240].

[7] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56 [29] Lord Bingham; see too Baroness Hale at [226]: '… any sensible court, like any sensible person, recognises the limits of its expertise. Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government and its advisers. They may, as recent events have shown, not always get it right. But courts too do not always get things right. It would be very surprising if the courts were better able to make that sort of judgment than the Government.'.

[8] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56, [91] (Lord Hoffman).

[9] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56, [96] (Lord Hoffman).

And he concluded with the suggestion that it was in fact the British government and parliament which constituted a threat to the life of the nation:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.[10]

But having overcome the 'emergency' hurdle, the government failed at the 'proportionality' hurdle. First, the alleged need for the measures was undermined by the lack of similar measures in relation to non-alien terrorists, a far from non-trivial population. Second, if those detained were indeed threats to British security, it was not clear why they should be detained only until some other country would accept them. Third the legislation permitted the detention of alien terrorists, regardless of whether they were associated with terrorist groups who threatened the United Kingdom.[11] Lord Bingham suggested that the objects of the legislation and the derogation could be better achieved by what were to become known as control orders.[12] Claims for deference could not carry much weight: it was for the courts to determine whether the proportionality requirement was satisfied.[13] Finally, their Lordships held that the differential treatment of domestic and alien terrorists constituted impermissible discrimination.[14]

3.2 Proscription decisions

In all four jurisdictions, counter-terrorism legislation provides for official declarations that organisations are terrorist organisations for the purposes of particular bodies of legislation. The implications of designation vary. In each of the four countries, there are at least two different listing regimes, which have different implications for listed organisations and those who assist them. The more punitive regime lays the basis for the imposition of heavy penalties on those who impermissibly associate with, or contribute to, listed organisations. As a corollary, the procedures for the listing of relevant organisations are relatively formal, and listing decisions are subject to congressional or parliamentary disallowance. The less serious regimes, which have typically been enacted to give effect to United Nations resolutions, tend to impose less serious sanctions on organisations and those who assist them. In three of the four jurisdictions, special legislation governs the judicial review of disallowable proscription decisions.

The United States legislation governing the designation of organisations as 'Foreign Terrorist Organizations' (FTO) provides for limited judicial review of such decisions. Applications may be made to the United States Court of Appeals for the District of Columbia Circuit within 30 days of notification of a designation, an amended designation, or a determination in response to a petition for reconsideration. They are to be based solely on the administrative record, supplemented by any other classified information submitted by the government which

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[10] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56, [97] (Lord Hoffman).

[11] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56, [30]-[44] (Lord Bingham); [76]-[78] (Lord Nicholls, and at [85] (agreeing with Lord Bingham); [108], [121]-[133] (Lord Hope); [155]-[156] (Lord Scott); [167]-[189] (Lord Rodger); [227]-[231] (Baroness Hale). Lord Carswell agreed with Lord Bingham [240]. Lord Walker dissented [209].

[12] Discussing bail orders with conditions similar to those later attached to control orders, he said at [35]: 'The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.'

[13] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56 [37]-[42] (Lord Bingham); [81] (Lord Nicholls); [91], [96], [97] (Lord Hoffman); [114] (Lord Hope); [176] (Lord Rodger). Lord Carswell agreed with Lord Bingham [240].

[14] *A v Secretary of State for the Home Department* [2005] 2 AC 68; [2005] UKHL 56 [45]-[70] (Lord Bingham); [85] (Lord Nicholls agreeing with Lord Bingham); [134]-[138] (Lord Hope); [157]-[159] (Lord Scott); [189] (Lord Rodger); [232]-[238] (Baroness Hale). Lord Carswell agreed with Lord Bingham [240]. Lord Walker dissented [210].

was used in making the relevant decision. Both the content of the record and the other classified information are provided to the court ex parte and in camera.[15]

The legislation does not expressly preclude judicial review other than in the form for which it provides. However, there would be little point to its restrictive provisions if those aggrieved by proscription decisions could seek judicial review through less onerous channels. In litigation relating to the interpretation of the legislation, courts have reluctantly interpreted it as purporting to limit the right to judicial review to that for which § 1189(c) makes provision. This is subject to one proviso: if a challenge to a designation decision is based on a challenge to the constitutionality of § 1189, § 1189 cannot operate to protect itself against such challenges.

Otherwise, § 1189 has been interpreted to preclude collateral attack. Offences involving contributions to designated FTOs have been interpreted as being conditioned on the organization being one which has been designated as a FTO, regardless of whether it has been properly designated. A fortiori, applications for review may be made only to the DC Court of Appeals, and their success depends on making out one or more of the listed grounds for success.

Challenges to designation decisions have been rare and largely unsuccessful. An early petition of review involved two challenges to proscription decisions, one by the People's Mojahedin Organization of Iran (PMOI) and the other by the Liberation Tigers of Tamil Ealam (LTTE). Each was an application for review under the legislation. The Court noted that in some respects the legislation resembled that in the US *Administrative Procedures Act of 1946*. But it differed in other important respects:

> … unlike the run-of-the-mill administrative proceeding, here there is no adversary hearing, no presentation of what courts and agencies think of as evidence, no advance notice to the entity affected by the Secretary's internal deliberations. … Any classified information on which the Secretary relied in bringing about these consequences may continue to remain secret, except from certain members of Congress and this court … There is provision for "judicial review" confined to the material the Secretary assembled before publishing the designation. … Because nothing in the legislation restricts the Secretary from acting on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities, the "administrative record" may consist of little else.
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> We will give the details of the governing provisions in a movement. At this point in a judicial opinion, appellate courts often lay out the "facts". We will not, cannot, do so in these cases. What follows in the next two subsections may or may not be facts. The information recited is certainly not evidence of the sort that would normally be received in court. It is instead material the Secretary of State compiled as a record, from sources named and unnamed, the accuracy of which we have no way of evaluating.[16]

The Court noted that the cases involved an issue similar to that in *Joint Anti-Fascist Refugee Committee v McCrath* 341 US 123 (1951), in which the United States Supreme Court struck down the purported designation of the organisation as communist, four justices doing so on the basis that the Committee had been denied due process. However, the petition was rejected on the grounds that they had no United States presence: 'A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'.[17] Their rights were therefore limited to their statutory rights.

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[15] 18 USCS § 1189(a)(3), 1189(c).
[16] *People's Mojahedin Organization of Iran v United States Department of State* 182 F 3d 17, 19 (DC Cir, 1999).
[17] *People's Mojahedin Organization of Iran v United States Department of State* 182 F 3d 17, 22 (DC Cir, 1999).

The question of whether the organizations' terrorist activities threatened the security of the United States was non-justiciable:

> For all we know, the designation may be improper because the Secretary's judgment that the organization threatens our national security is completely irrational, and devoid of any support. Or her finding about national security may be exactly correct. We are forbidden from saying. That we cannot pronounce on the question does not mean that we must assume the Secretary was right. It means we cannot make any assumption, one way or the other.[18].

The court was, however, empowered to inquire into the findings that the organizations were foreign organisations, which engaged in terrorism. LTTE's objection that it was not a foreign organization, but a foreign government failed: recognition of foreign governments was a matter for the political branches and not for the courts, and the United State had not recognised the LTTE. The record provided support for the Secretary's findings that the organisations engaged in terrorist activities. The Court dismissed the petitions, but only after reiterating, once more, that they made no judgment as to whether the findings were grounded in fact. The United States had won, but there were strong hints that its victory was a pyrrhic one: if the organizations had had property in the United States, it could have been seized, in which case they could have argued that their constitutional rights had been infringed, and the Court's judgment suggested that such an argument would have succeeded.

The constitutional issue arose two years later, following a decision to designate the 'National Council of Resistance of Iran' and 'National Council of Resistance' (NCRI, NCR) (as alter egos of the PMOI). PMOI challenged a 1999 redesignation decision, and NCRI challenged its designation as an alias.[19] The challenge to the decision that the NCRI, NCR and the PMOI were effectively the same organization failed: there was adequate support for it on the record, and the power to designate an organization necessarily empowered the power to designate its alter egos. However if the two organizations were one, and if (as was the case) the NCRI had a United States presence, it followed that the PMOI necessarily had a United States presence. It was therefore able to assert its consequential constitutional rights. Since it was at least arguable that it had property rights which were threatened, it had a right to due process, and it may have had a right based on other interests too. The right to due process was, however, only a right to such process as was 'due' and this could vary with the circumstances. There were two issues. The first was whether due process required advance notice, and the second related to the kind of hearing that was required. In the instant case, the Court held that the Secretary was obliged to give prior notice. It recognised that there might be circumstances where doing so 'might work harm to this country's foreign policy goals in ways that the court would not immediately perceive'.[20] But it was for the Secretary to demonstrate that this was so, and she had made no attempt to do so. Notice should be given of the administrative record on which the Secretary will rely, but need not be given of classified information to be presented to the court in camera and ex parte. The organizations must then be given the chance to present, 'at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations'.[21] This constitutional minimum was more than was required under the legislation. It followed therefore, that the designations in question (and numerous other designations) were nullities. The Court could not, however, accept the logic of its reasoning.

> … we also recognize the realities of the foreign policy and national security concerns asserted by the Secretary in support of those designations We further recognize the

[18] *People's Mojahedin Organization of Iran v United States Department of State* 182 F 3d 17, 23 (DC Cir, 1999).
[19] *National Council of Resistance of Iran v Department of State* 251 F 3d 192 (2001).
[20] *National Council of Resistance of Iran v Department of State* 251 F 3d 192, 208 (2001).
[21] *National Council of Resistance of Iran v Department of State* 251 F 3d 192, 209 (2001).

> timeline against which all are operation: the two-year designations before us expire in October of this year.[22]

It therefore declined to vacate the orders and remanded the questions to the Secretary to be considered according to the standards it had laid down. On reconsideration, in accordance with the Court's orders, she provided the organizations with the unclassified record, and considered their replies, along with the unclassified and classified material. Despite the additional information, she redesignated the organisations. PMOI petitioned for review, arguing inter alia (and notwithstanding the court's earlier decision) that in relying on secret and undisclosed information, the Secretary had denied PMOI due process. The court disagreed, saying, once more that 'under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has a '"compelling interest" in withholding national security information from unauthorized persons in the course of executive business'.[23] In any case, the decision was supported by the unclassified material, and indeed by admissions made by the PMOI itself. It also rejected the argument that 'the attempt to overthrow the despotic government of Iran which itself remains on the State Department's list of state sponsors of terrorism, is not "terrorist activity," or if it is, that it does not threaten the security of the United States or its nationals'.[24] Its rationale (as in previous cases) was that the Secretary's finding to the contrary was non-justiciable.

Following redesignation of the NCR and NCRI as an alter ego of the PMOI, there was a subsequent de novo review of the redesignation decision, based on material including material submitted by the organizations in support of their case. Following the reconsideration, the Secretary decided to leave the designations in place. NCRI and NCR argued that they were not mere aliases for the PMOI, and should not have been found to be such. The court agreed that they were not mere aliases, but held that this was immaterial. It would suffice that they were agents, agency being established 'at least when one organization so dominates and controls another that the latter can no longer be considered meaningfully independent from the former'.[25] The support for the Secretary's decision was substantial (it not otherwise being for the court to second-guess the Secretary). Once more, the court rejected any suggestion that the Secretary's reliance on classified and undisclosed information constituted denial of procedural fairness.

Kahane Chai v Department of State[26] involved a challenge to the designation of a number of Jewish groups (and a website). The petitioners argued that there was insufficient evidence to support the designations, that they had been given inadequate notice, that the designations were discriminatory and interfered with first amendment rights. The petition was denied. Even the non-classified material on which the Secretary had relied provided substantial support for the decisions. There was therefore no need to consider whether the legislation impermissibly permitted reliance on classified information as well. The notice given to the organizations[27] was not altogether adequate since it has not included access to the administrative record. (The government had withheld it on the grounds that at relevant times, it was unclear about the actual authority of the lawyer purportedly acting for the organizations.) This, however, was not fatal to the decision. On reconsideration, the Secretary had given the organizations access to the record, and in response to their submissions had

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[22] *National Council of Resistance of Iran v Department of State* 251 F 3d 192, 209 (2001).
[23] *People's Mojahedin Organization of Iran v Department of State* 327 F 3d 1238, 1242 (DC Cir 2003).
[24] *People's Mojahedin Organization of Iran v Department of State* 327 F 3d 1238, 1242 (DC Cir 2003)1244.
[25] *National Council of Resistance of Iran v Department of State* 373 F 3d 152, 158 (DC Cir 2004)
[26] 466 F 3d 125 (DC Cir 2006), rehearing denied 2007 US App LEXIS 1419; rehearing en banc denied 2007 US App LEXIS 1416; cert denied 127 S Ct 3010; 168 L Ed 2d 727.
[27] Notice of the intent to redesignate had been given by letter to five persons whom the State Department though might represent Kahane Chai: *Kahane Chai v Department of State* 466 F 3d 125, 127 (DC Cir 2006)

made the same decision as before. This demonstrated that the error was harmless. The first amendment did not protect terrorism, and while the Kahane web-site was the only web-site to have been designated, the relevant universe was organizations and not web-sites. Numerous non-Jewish organizations had been designated.

The PMOI decisions made no reference to their implications for those charged with offences based on giving assistance to PMOI or any other designated FTO.[28] The issue was canvassed tangentially in *United States v Hammoud*[29] - a case which involved contributions to Hizbollah. As part of his constitutional challenge to his conviction, the defendant argued that § 1189 was unconstitutional because it precluded collateral attack on the decision to designate Hizbollah as a FTO. This meant that he was deprived of his right to a jury determination in relation to each element of the offence with which he was charged. The court dismissed this argument: the element of the relevant offence was not that Hizbollah was a terrorist organization, but that it had been designated as such. It was the fact and not the legality of the designation that mattered.[30]

Meanwhile, in California, Hossein Afshari and eight[31] others had been charged with knowingly and wilfully conspiring to provide material support to the Mujahedin-e Khalq (another name for PMOI) between 1997 and 2001. The defendants argued that the DC Circuit had effectively found that the MEK designation was a nullity, and therefore incapable of serving as a predicate to a charge based on contributing to a designated foreign terrorist organization. His argument succeeded at first instance, but not on appeal.[32] The 9th Circuit agreed that § 1189(a)(8) precluded collateral attack:

> Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organization, and to keep such policymaking authority out of the hands of United States attorneys and juries. Under § 2339B,[33] if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.[34]

However, it did not preclude collateral constitutional attack. Had the DC Circuit set the designation aside, Afshari would have had a defence (although he could have been re-tried in relation to any contributions made after the non-problematic 'redesignation' in 1999). But the designation had not been set aside, and therefore appeared to have legal force, notwithstanding that the designation had been constitutionally defective. The Court rejected arguments that § 1189 required the DC Circuit to set the decision aside if it found it was relevantly flawed, and it had failed to do so. First, it was bound by the DC Circuit's decision, regardless of whether it was correct or not. Second, in any case, there was authority to the effect that courts could remand for reconsideration, without setting flawed decisions aside.

Nor was it the case that a prosecution could not be based on an 'unconstitutional' predicate. There was precedent to the contrary, and while this was distinguishable, in the circumstances of this case, the distinctions were immaterial. In any event, the predicate for the § 2339

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[28] In the Kahane litigation, the court did advert to this issue, noting that while the 2004 designation had superseded the 2003 designation, the validity of the 2003 designation had not thereby been rendered moot: it would be of continued relevance in relation to anyone prosecuted for a for giving material support to any of the organizations: *Kahane Chai v Department of State* 466 F 3d 125, 133 (DC Cir 2006).

[29] *United States v Hammoud* 381 F 3d 316 (4th Cir, 2004).

[30] *United States v Hammoud* 381 F 3d 316, 331 (4th Cir, 2004).

[31] Nine defendants were charged with a variety of activities related to the activities of MEK, but only seven were charged under § 2339B, and parties to the Californian litigation surrounding MEK's designation.

[32] *United States v Afshari* 426 F 3d 1150 (9th Cir, 2005).

[33] 18 USCS § 2339B makes it an offence to make a material contribution to a designated FTO.

[34] *United States v Afshari* 426 F 3d 1150, 1155 (9th Cir, 2005).

offence was not aiding a legally designated FTO, but aiding an organization which had been apparently designated as an FTO.

An application for a rehearing by a Full Court failed on a 6-5 vote, over a spirited dissent by Kozinski J.[35] The minority agreed that § 1189 precluded collateral attack on designation decisions, and that it did not preclude collateral attack based on the unconstitutionality of the legislation.[36] The constitutionality issue turned partly on the impact of § 2339B on First Amendment rights, and partly on the due process issue. In relation to the latter issue, Kozinski J argued that given the first amendment interests at stake, § 1189 provided a totally inadequate judicial review regime. There was no provision whereby a prospective criminal defendant (as opposed to the organization) could challenge a designation. The time limit for challenges was a mere 30 days following proscription. There was no provision for the organization to make submissions in relation to its designation, much less for a judicial hearing. He dismissed suggestions that deference was called for, and treated the designation in question with barely disguised contempt:

> … the entire purpose of the terrorist designation process is to determine *whether* an organization poses a threat to national security. Under the Constitution, the State Department does not have a carte blanche to label any organization it chooses a foreign terrorist organization and to make a criminal out of anyone who donates money to it. … The Supreme Court hasn't hesitated to take a close look at the constitutionality of certain war on terror-related procedures – especially procedures that are still being tested and developed. … We should be no less vigilant.[37]

And earlier:

> The simple fact is that Rahmani [the lead defendant] is being prosecuted – and will surely be sent to prison for up to 10 years – for giving money to an organization that no one other than some obscure mandarin in the bowels of the State Department had determined to be a terrorist organization.[38]

The Supreme Court passed up the opportunity to be vigilant in relation to this case, denying certiorari.[39]

Regulations made pursuant to the International Emergency Economic powers Act[40] also provides for the listing of various categories of entities and individuals. Contributions to such organisations do not, per se, constitute offences under § 2339B of Title 18 of the United States Code, but criminal and other consequences nonetheless attach to dealings with listed entities and persons. There is limited provision for the administrative review of listing decisions, but no special provisions governing judicial review. Listing decisions are judicially reviewable under the *Administrative Procedures Act*, and they are also reviewable collaterally.[41] Cases involving challenges to listing decisions are rare. Global Relief Foundation failed in an application for interim injunctive relief in connection with a challenge to its designation, its constitutional challenge to the use of classified information, and to lack of a pre-seizure hearing being contemptuously dismissed:

> The Constitution would indeed be a suicide pact … if the only way to curtail enemies' access to assets were to reveal information that might cost lives.
>
> Nor does the Constitution entitled HLF to notice and a pre-seizure hearing, an opportunity that would allow any enemy to spirit assets out of the United States. Although

[35] *United States v Afshari* 446 F 3d 915 (9th Cir, 2006).
[36] As to this, see too *United States v Al Arian* 308 F Supp 2d 1322, 1341 (Fla DC 2004).
[37] *United States v Afshari* 446 F 3d 915, 922 (9th Cir, 2006).
[38] *United States v Afshari* 446 F 3d 915, 920 (9th Cir, 2006).
[39] *Rahmani v United States* 2007 US LEXIS 43 (SCt Jan 8 2007).
[40] 50 USCS §§ 1701ff.
[41] *United States v Al Arian* 308 F Supp 2d 1322, 1332 (Fla DC 2004)

pre-seizure hearing is the constitutional norm, postponement is acceptable in emergencies.[42]

In *Holy Land Foundation v Ashcroft*[43] both the district and circuit courts dismissed a challenge to the plaintiff's designation. Review was based on the 'arbitrary and capricious' standard, which meant that the plaintiff needed to demonstrate that it was not supported by the material on the administrative record. There was ample supporting material in the record. It did not matter that the material included intelligence data and hearsay evidence. Nor did it matter that the designation was based on material which ante-dated HLF's initial designation. Relying on its decision in PMOI, the court held that HLF had not been relevantly denied due process. While the initial designation 'arguably violated HLF's due process rights', the redesignation decision was not flawed. There had been notice, and due process did not preclude reliance on classified material. Since the first amendment does not protect the funding of terrorism,[44] HLF's first amendment rights had not been violated.

In *Islamic American Relief Agency v Gonzales* the Court once more emphasised that 'our review – in an area at the intersection of national security and administrative law – is extremely deferential',[45] and consistent with this, found that the record was sufficient to support the blocking of the plaintiff's assets on the grounds that it was a branch office of a SDGT.

United Kingdom law provides special procedures for appeals against decisions to proscribe organisations. The first step involves an application to the Home Secretary seeking the removal of the organisation from the list of proscribed organisations: s 4(1). The application may be made either by the organisation or a person affected by the organisation's proscription: s 4(2). If the application is refused, the applicant may appeal to the Proscribed Organisations Appeal Commission, a body to be created under the Act: s 5(2). This means that, in contrast to the US position in relation to § 1189 decisions, people who wish to contribute to proscribed organisations can have standing to challenge proscription decisions. The POAC must allow the appeal if it concludes that the refusal to de-proscribe was flawed, 'when considered in the light of the principles applicable on an application for judicial review': s 5(3). Appeal from the POAC lies to the English Court of Appeal (or its Scottish or Northern Irish equivalent), but only with leave from either the POAC or the appeal court: s 6. The Act did not prescribe the procedures to be followed by the POAC, but Schedule 3 provided that the Lord Chancellor might make rules governing the Commission's procedures, and that such rules might provide that proceedings be determined without an oral hearing, and might govern evidence in Commission proceedings: Sch 3, cl 5(1). In making the rules, the Lord Chancellor was required to have regard both to the need for proper review and the need to ensure that information not be disclosed if this would be contrary to the public interest: Sch 3 cl 5(2). Rules have now been made.[46] Unlike United States law, the British legislation provides that if an appeal succeeds, and a refusal of an application is quashed, any person convicted of an offence postdating the refusal and relating to the organisation may, if convicted on indictment, appeal to the Court of Appeal, which shall quash the conviction: s 7.

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[42] *Global Relief Foundation v O'Neill* 315 F 3d 748, 754 (7th Cir 2002).
[43] 333 F 3d 156 (DC Cir 2003).
[44] The court pointed out that the district court had erred in making this finding, since the motion was for dismissal on the basis of the inadequacy of the pleadings, not for summary judgment . It held, however, that the plaintiff had not produced any evidence to show that it had been thereby disadvantaged, and the evidence before the court provided no basis for concluding that this was so: at 165-166. Concerned lest the case constitute a precedent for procedural sloppiness, the court observed that 'this is not a general case. This is a specific case involving sensitive issues of national security and foreign policy. In addition to the classified evidence that we have reviewed, all evidence from the government that is unclassified and otherwise discoverable is in the record before us, as is the evidence HLF produced in an effort to create a genuine factual dispute.': at 166.
[45] 477 F 3d 728, 734 (DC Cir 2007). It concluded that the evidence in the unclassified record was sufficient while not overwhelming, but that the classified evidence was considerably stronger.
[46] *The Proscribed Organisations Appeal Commission (Procedure) Rules 2007* (UK).

The legislation does not on its face exclude resort to normal judicial review procedures. In this respect, it contrasts with legislation governing cases within the jurisdiction of the UK Special Immigration Appeals Commission. Nonetheless, in *R (on the application of the Kurdistan Workers' Party and others) v Secretary of State for the Home Department*[47] Richards J dismissed an application for judicial review on the grounds that the POAC was the appropriate forum for considering proscription decisions. He acknowledged some of the complications associated with this, noting that the POAC's jurisdiction was to review decisions to refuse to deproscribe, rather than the initial decision to proscribe. Nonetheless, he concluded that there were powerful reasons for the court to decline to entertain the judicial review application.

> POAC is … specialist tribunal with procedures designed specifically to deal with the determination of claims relating to proscription, a context heavily laden with issues of national security … The special advocate procedure and the existence of extensive powers in relation to the reception of evidence, including otherwise non-disclosable evidence, place POAC at a clear advantage over he Administrative Court in such an area. …
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> …[P]roceedings before POAC are expressly excluded from the prohibition on the disclosure of intercepted communications, potentially a very important area of evidence; and although it was submitted for the claimants that the same or a similar result could be achieved in the Administrative Court …, this is at best very uncertain and would again be a less satisfactory route.[48]

The judicial review application had been made by or on behalf of three organisations: the Kurdistan Workers' Party (KPP), the People's Mojahedin Organisation of Iran (PMOI), and Lashkar e Tayyabah (LeT). In 2001, prior to the outcome of the judicial review application, PMOI had also lodged an appeal with the POAC. This was scheduled for 2003. In a preliminary ruling, the POAC considered whether the decision to proscribe was unlawful on the grounds that PMOI had not been given a prior opportunity to make representations. The Commission had ruled against it. Since, under UK legislation, proscription was a legislative, rather than a quasi-judicial or administrative decision, there was no basis for such a duty in the absence of express legislative provision, and there was no such provision, express or implied, in the legislation. Fairness did not require that an opportunity be given to make representations and be consulted. This would often not be feasible, given the problems of communicating prospective decisions to some organisations, and the difficulties of putting them on notice as to the basis of the case against them, given the need to protect classified information. Insofar as there was a duty of fairness, it was satisfied by the requirement of parliamentary approval as a condition for the operation of a ban, along with the provision for post-proscription judicial review in the POAC.[49]

While the appeal was pending, PMOI made a second application for de-proscription. This was refused. There was no appeal against the second refusal and in June 2003, the appellants withdrew their application for review of the first refusal.[50] Despite Richards J's finding that they had had an arguable case for judicial review, LeT and KPP appear to have taken no further action.

In 2006, three members of parliament wrote to the Home Secretary, asking, yet again that the PMOI be deproscribed. Following his refusal of their application, they exercised their right to appeal to POAC. The ultimate question related to the legality of the refusal to deproscribe, but this raised prior questions including whether the Secretary was required to consult with the

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[47] [2002] EWHC 644.

[48] *R (on the application of the Kurdistan Workers' Party and others) v Secretary of State for the Home Department* [2002] EWHC 644, [76]-[77].

[49] Relevant excerpts of the judgment are quoted in: *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [61].

[50] The history of this litigation is set out in *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [1]-[11].

organisation prior to refusing to deproscribe, the standard of review to be applied by the POAC, and the reliance the POAC might attach to evidence which was 'available' but not considered by the Secretary.

The applicants failed on the fairness issue. Consultation was not required by the legislation, and would be difficult to achieve, given the tight timetable set for consideration of applications for deproscription. There were, moreover, procedures establish to ensure that the overall process was fair, namely an ongoing duty to reconsider whether proscriptions should remain in force, the right to apply for deproscription, and the procedures for review of refusal decisions.[51] On the standard of review issue, the Secretary was less successful.

The Commission pointed out that proscription was conditioned on a belief that the relevant body was involved in terrorism. This required more than a suspicion that it might be, and given the nature of the power, parliament could be presumed to intend that its exercise should be subject to strict scrutiny.[52] Moreover since there was no requirement that the Secretary consult with the organisation prior to deciding whether to deproscribe, it was reasonable to assume that the organisation should be able to adduce material not before the Secretary in order to support their case.[53] Following earlier cases, it stated that 'we have to determine whether there were reasonable grounds for the Secretary of State's belief that the PMOI *"is concerned in terrorism"*. This is an objective judgment which … involves a value judgment as to what is properly to be considered reasonable in the circumstances of the present case.'[54]

The concept of an objective judgment which involves a value judgment borders on the oxymoronic, but it involves distinguishing between two questions. The first relates to the confidence with which the belief must be held. This clearly involves value judgments, and depends on context. The second relates to whether, given the answer to the first question, there is enough evidence to warrant the belief. This is the objective question. Deference was appropriate where assessments of national security and foreign policy issues were involved; it was not appropriate where simple questions of fact were being assessed.[55]

The outcome did not in fact turn on 'standard of review' questions. Even applying traditional administrative law criteria, the Secretary had erred. The commission concluded that the Secretary had misdirected himself on the law, asking whether PMOI had engaged in terrorism, not whether, at the time, it was still doing so. He failed to consider all the relevant material which was constructively before him. There was, moreover, no evidence that PMOI had been 'concerned in terrorism' after 2002. The decision therefore failed even the relaxed *Wednesbury* test.

Given this decision, it was not necessary to consider whether the legislation was inconsistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Commission nonetheless considered the issue briefly, finding that while the provisions limited the appellants' rights they did so in a manner which was legitimate and proportionate. National security was the foundation for democracy and human rights, and the law could contribute to it. It did nothing to hinder peaceful and democratic attempts to achieve political change in other states. It did not matter that the government of Iran was undemocratic and repressive. The Secretary of State was entitled to conclude that

[51] *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [62].
[52] *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [105]-[109].
[53] *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [110].
[54] *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [115]
[55] *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [118]-[119].

this was not enough to justify terrorism. It was the clear intention of the legislature to support foreign states in the fight against terrorism.[56]

The Secretary's application for special leave to appeal to the Court of Appeal was unsuccessful. It concluded that the POAC might have erred in one respect. Its view of what was meant by 'otherwise concerned in terrorism' was unduly narrow, and seemed incapable of catching a body which for strategic reasons had decided to refrain from engaging in terrorism, while keeping in place its capacity to do so, in preparation for the eventuality that the need for, and practicability of, terrorism might arise at some time in the future.[57] It nonetheless agreed with the approach the POAC had taken to the review. This was not a case where deference was due:

> The question of whether an organisation is concerned in terrorism is essentially a question of fact. Justification of significant interference with human rights is in issue. We agree with POAC that the appropriate course was to conduct an intense and detailed scrutiny of both open and closed material in order to decide whether this amounted to reasonable grounds for the belief that PMOI was concerned in terrorism.[58]

The fact that it did not take some of the government's evidence (a newspaper report) at face value was not an error but a proper exercise of its role. Its conclusions were fully justified on the evidence before it, and the outcome would not have differed had it approached the question on the basis of a correct interpretation of the legislation.

3.2.1 Canada and Australia

In Canada, proscription decisions are reviewable by the ordinary courts, but applications for review may be made only by the organisation. (In this respect Canada resembles the United States and differs from Britain.) Otherwise, the Canadian procedural provisions closely resemble the United Kingdom's, but are set out in primary rather than subordinate legislation. The judge hearing the application is to examine in private any security or criminal intelligence reports considered in making the proscription decision, and to hear other evidence and information from the Solicitor-General. On application, the judge may consider this material in the absence of the applicant or the applicant's lawyer, if of the opinion that disclosure would endanger any person or would be injure national security.[59] Material which would not normally be inadmissible as evidence is admissible provided that it is 'reliable and appropriate'.[60]

The judge is obliged to provide a statement to the applicant, summarising the information before the judge, subject to the duty not to disclose information which would injure national security or endanger any person.[61] Applicants must be given a reasonable chance to be heard.[62] A judge who decides that the decision was not reasonable must order that the applicant no longer be a listed entity.

Other pieces of Canadian legislation provide for the listing of organisations for the purpose of giving effect to United Nations decisions. These listing decisions do not attract a special judicial review regime.

Australian legislation is silent in relation to the judicial reviewability of proscription decisions, and in relation to the procedures governing such review. Reviewability and the

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[56] *Lord Alton v Secretary of State for the Home Department* (Proscribed Organisations Appeal Commission, unreported, 30 November 2007), [355]-[358].
[57] *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443, [33]-[38].
[58] *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443, [33]-[43].
[59] *Criminal Code* RSC 1985, C-46, s 83.05(6)(a).
[60] *Criminal Code* RSC 1985, C-46, s 83.05(6.1).
[61] *Criminal Code* RSC 1985, C-46, s 83.05(6)(b).
[62] *Criminal Code* RSC 1985, C-46, s 83.05(6)(c).

procedures for such reviews are therefore governed by the general principles of Australian administrative law. Australia has made relatively sparing use of the proscription powers. Like Canada, it has not proscribed PMOI and its associates. It does, however, maintain an extensive list of entities and individuals who are subject to sanctions under decisions made pursuant to the *Charter of the United Nations Act 1945* (Cth). There have been no applications for review of either Canadian or Australian proscription and listing decisions.

3.3 Decisions that immigrants are security risks

Migration legislation generally includes processes for the exclusion, expulsion and interim detention of non-nationals whose presence or continued presence in the country may constitute a threat to its national security.[63] Much of this legislation was in force prior to the enactment of general counter-terrorism measures. The statutory regimes vary considerably. However, there are striking similarities between the relevant regimes. Each effectively makes what could loosely be called involvement in terrorism grounds for refusing admission, and for removal of those who have been admitted to the country. In each country, 'terrorists' can be removed or deported either using ordinary procedures, or following a process which involves certification that the person is a security risk. Detention pending removal is permitted. Problems arise, however, if removal is impossible because no country is willing to accept the deportee, or if the only countries which are prepared to do so might well subject the person to torture. Deportation to torture is not permitted, but indefinite detention pending better behaviour on the part of possible recipient governments poses problems of its own, and the possibility of this has been, and is, handled in different ways in different jurisdictions.

3.3.1 United States

Under United States law, involvement in terrorist activities normally makes a person ineligible for admission. The relevant forms of involvement are broadly defined, and include involvement both in designated foreign terrorist organizations and in organisations which, while not designated, nonetheless engage in terrorists activities.[64] A non-reviewable discretion

[63] This coexists with legislation which provides for the deportation of immigrants unlawfully in the country, regardless of whether or not they are suspected security risks, and which provides for their arrest pending deportation. In the aftermath of the 9/11 attack, the United States relied used this legislation as the basis for the arrest and detention of hundreds of 'suspect' immigrants, the case against most of whom was based on nothing better than their demographic attributes: Karen C Tomlin, 'Suspect First: How Terrorism Policy is Reshaping Immigration Policy' (2004) 92 *California Law Review* 340. Australian government spokesmen occasionally equated unlawful immigrants with potential terrorists, but this seems to have been for the purposes of political point-scoring. ASIO (which one would expect to err on the side of caution in such cases) reported in its 2003-2004 Annual Report that of 1297 unauthorised arrivals whose original security assessments had lapsed or been resubmitted, none were the subject of adverse reassessments: at 26. By contrast with the US, there seem to have been very few, if any, cases where the Australian government detained immigrants who wished to, and were able to, leave the country, for longer than was necessary.

[64] 8 USCS § 1182(a)(3)(B). Proscribed forms of involvement include past activities, a likelihood of future post-entry activities; incitement to such activities with a view to causing death or bodily harm, being a representative or member of a terrorist organization (subject to demonstrating reasonable ignorance of the nature of the organization); endorsement of terrorist activity; and receipt of military training from a terrorist organization: § 1182(a)(3)(B)(i). Terrorist activity is broadly defined (but does not include attacks aimed at causing no more than economic harm): § 1182(a)(3)(B)(iii). 'Engage in terrorist activity' is broadly defined to include not only committing or inciting to commit terrorist activities, but also planning and assisting, as well as raising money for terrorist organizations: § 1182(a)(3)(B)(iv). Terrorist organization also includes organizations designated on the basis that they engage in terrorist activities (in contrast to 'Designated Foreign Terrorist Organizations, which must also constitute a threat to the security of the United States): § 1182(a)(3)(B)(vi). The section also provides that aliens are inadmissible if they have been determined to have associated with a terrorist organization and intend, while in the United States, to engage in behaviour which could endanger the United States: § 1182(a)(3)(F).

exists whereby classes of aliens can be exempted from the operation of § 1182(a)(3)(B).[65] Involvement in terrorism makes aliens deportable, even if they had not initially been inadmissible.[66] Involvement in terrorism also makes a person ineligible for asylum,[67] withholding of removal,[68] or for mandatory withholding of removal where removal is likely to entail torture.[69] In such cases, removal will be deferred, but the person must have established that it is more likely than not that, if returned, they will be tortured. Decisions by the Attorney-General that an alien is not eligible for asylum are not reviewable if based on the person's terrorist activities.[70] This restriction does not apply to withholding of removal decisions, nor to Convention on Torture decisions.

Alleged terrorists may be removed either under the general rules governing deportation or under special procedures. Most 'terrorist deportation' cases are dealt with under the general law. Most of these cases appear to involve terrorism which is directed largely against the petitioner's country of citizenship, and which bears only tangentially on United States interests. Many of the cases involve groups which have not been designated as Foreign Terrorist Organizations.[71] Cases where removal decisions have been based on alleged terrorism are striking for the ease with which the government was able to satisfy its burden of proof.[72] In the small number of 'terrorism'-based cases to reach federal courts, the opinions suggest that the government rarely if ever relied on confidential information to justify its decision.[73] Indeed in a substantial number of cases, evidence of the alien's involvement in terrorism appears to have come from the alien.[74] Moreover, in matters before the federal

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[65] 8 USCS § 1182(d)(3)(B).
[66] 8 USCS § 1227(a)(4)(B).
[67] 8 USCS § 1158(b)(2)(A)(v).
[68] 8 USCS §§ 1231(b)(3)(B)(iv), 1227(a)(4)(B).
[69] 8 USCS § 1231(b)(3)(B)(iv); 8 CFR § 1206.16(d)(2).
[70] 8 USCS § 1158(b)(2)(D).
[71] *Avila v Rivkind* 724 F Supp 945 (Fla DC, 1989) (anti-Castro terrorist, but his threats included threats against non-communist European countries which allegedly supported Castro); *Kelava v Gonzales* 434 F 3d 1120 (9th Cir 2006) (violent anti-German terrorism, done to advance Croatian cause); *Sor v Attorney General of the United States* 152 Fed Appx 231 (3d Cir 2005) (solicited members for Cambodian Freedom Front); *Choub v Gonzales* 245 Fed Appx 618 (9th Cir 2007) (supplying information to Cambodian Freedom Fighters); *Davinder Singh v Mukasey* 262 Fed Appx 45 (9th Cir 2007) (shelter for people engaged in violent struggle for independent Khalistan, and in particular for members of the Khalistan Commando force); *Harjit Singh v Gonzales* 487 F 3d 1056 (7th Cir 2007) (possible involvement in Sikh terrorism). But cf *Alafyouny v Gonzales* 187 Fed Appx 389 (5th Cir 2006) (petitioner had solicited funds for the PLO, but before legislation enabling its designation); *In re Soliman* 134 F Supp 2d 1238 (Ala DC 2001) (appeal dismissed and order vacated on the grounds of mootness: *Solimon v United States* 296 F 3d 1237 (11th Cir, 2002) (alleged member of al-Jihad (a designated FTO) and allegedly involved in assassination of Sadat); *Perinpanathan v Immigration and Naturalization Service* 310 F 3d 594 (8th Cir 2002) (involvement in LTTE); *Bellout v Ashcroft* 363 F 3d 975 (DC Cir 2004) (member of, and participant in the Armed Islamic Group, a designated FTO; *Arias v Gonzales* 143 Fed Appx 464 (3d Cir 2005) (reluctant payment of 'taxation' to FARC, a designated FTO); *Housseini v Gonzales* 471 F 3d 953 (9th Cir 2006) (material support for MEK, a designated FTO).
[72] *Alafyouny v Gonzales* 187 Fed Appx 389 (5th Cir 2006) (proof that the PLO was a terrorist organization between 1983 and 1986 was provided by a 1987 Congressional finding, and a 1992 State Department report; proof of his contributions (soliciting funds) appears to have been based on admissions).
[73] The opinions often throw little light on the evidential basis for the primary decision, but none of the cases I have read makes any reference to reliance on confidential information.
[74] One of the reasons seems to have been that the basis for claims for asylum withholding of removal, and non-deportation to torture is involvement in a group which has incurred the displeasure of an unsavoury government. Since oppositional groups faced with unsavoury governments may well resort to terrorism as a political strategy, proof of exposure to a danger of persecution may involve proof of involvement (albeit, often, relatively minor involvement) in terrorism. See eg: *Perinpanathan v Immigration and Naturalization Service* 310 F 3d 594 (8th Cir 2002) (admission at initial interview, modified later); *Bellout v Ashcroft* 363 F 3d 975 (DC Cir 2004) (admission at hearing); *Sor v Attorney*

courts, the courts' role is typically to review findings of fact according to relatively relaxed standards.[75]

Since 1996, the United States has made special provisions for the deportation of 'alien terrorists'. Relevant cases are heard by a special removal court, whose members include five federal judges, from five different US circuits, designated by the United States Chief Justice, who may designate judges who have also been designated under FISA § 103(a).

To activate these procedures the Attorney General makes an application to the 'removal court', certifying that the requirements of the section are satisfied and including a statement of the facts and circumstances relied on to establish that the alien is a terrorist alien, present in the United States, whose removal under the standard procedures would pose a risk to national security.[76] In camera, and ex parte, the judge considers the application, other information presented on oath, and testimony. The judge must grant the application on a finding of probable cause to believe that the subject of the application is correctly identified and is an alien terrorist, and that the special procedures are necessary for national security.[77]

If the application is granted, a substantive hearing takes place. Aliens must be given notice of the nature of the charges against them and of the time and place of the hearing.[78] They are entitled to legal representation, and may introduce evidence. They may, with leave, subpoena witnesses, but they have no right of access to classified information.[79] The government is entitled to use the fruits of searches and surveillance under FISA, and discovery is not permitted if it would present a risk to national security. It may also rely on whatever rights it has under the general law to protect classified information from disclosure. If the Attorney General contends that disclosure of information would endanger national security, the judge examines the information ex parte and in camera. The government must provide an unclassified summary of such evidence, sufficient to enable the alien to prepare a defence. The judge determines sufficiency. If the initial summary is inadequate, the government is given a second chance to correct the deficiencies in the summary. Failure to do so normally terminates the proceeding.

There are, however, exceptional circumstances in which the hearing may proceed without the summary. These apply only if 'the continued presence of the alien … would likely cause serious and irreparable harm to he national security or death or serious bodily injury to any

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General of the United States 152 Fed Appx 231 (application for asylum rejected on the grounds that the applicant's evidence was not credible, and that, if it were to be believed, it would mean that the applicant was inadmissible since she had engaged in terrorism); *Pathak v Gonzales* 203 Fed Appx 829 (9th Cir) (admissions of material assistance to terrorists by petitioner for asylum, withholding of removal); *Jagdeep Singh v Gonzales* 225 Fed Appx 706 (admissions of having materially assisted terrorists); *Harjit Singh v Gonzales* 487 F 3d 1056 (7th Cir 2007) (petition had initially failed on the grounds of a finding that Singh had engaged in terrorism; on appeal it ultimately failed on the grounds that his conflicting accounts of his political activities meant that there was insufficient evidence that he had engaged in political activities likely to expose him to a danger of deportation if removed); *Davinder Singh v Mukasey* 262 Fed Appx 45 (9th Cir 2007). Sometimes, however, evidence of low level involvement in terrorism has helped the petitioner: see *Housseini v Gonzales* 471 F 3d 953 (9th Cir 2006); *Choub v Gonzales* 245 Fed Appx 618 (9th Cir 2007) (finding that the alien had been engaged in some form of terrorist activity precluded asylum but also precluded removal to the alien's country of citizenship, since the findings might well expose the alien to torture on his or her return: see *Housseini* at 958-961).

[75] Review of factual findings of the Board of Immigration Review is on the basis of whether substantial evidence existed. Such review 'is extremely deferential, setting a '"high hurdle by permitting the reversal of factual findings only when the record evidence would compel a reasonable fact finder to make a contrary determination"': *He Chun Chen v Ashcroft* 376 F 3d 215, 223 (3d Cir 2004), cited *Arias v Gonzales* 143 Fed Appx 464, 468 (3d Cir 2005).

[76] 8 USCS § 1533(a).

[77] 8 USCS § 1533(c).

[78] 8 USCS § 1534(b).

[79] 8 USCS § 1534(c).

person' and the provision of the summary would likely cause this.[80] In such cases, the judge must appoint a special attorney to assist the alien by reviewing the classified information and challenging the veracity of evidence contained therein.[81] The Federal Rules of Evidence do not apply. It is for the government to prove by the preponderance of the evidence that the alien is subject to removal because of being an alien terrorist.[82] If the government satisfies that burden, the judge must order the alien's removal and detention pending removal.

Appeal lies to the DC Court of Appeals. On questions of law, the appeal is heard de novo. Findings of fact will be set aside only if clearly erroneous, except when the appeal is from a decision made in the absence of a summary, in which case, the Court of Appeals is to consider facts de novo.[83] Once appeal rights are exhausted, and assuming that the removal order remains in force, detention may continue until such time as the person is deported. It is the Attorney General's duty to make efforts to find a country which will accept the deportee, insofar as treaty obligations and United States foreign policy interests permit this.[84]

Insofar as these powers have been used, they appear to have generated no reported decisions.

3.3.2 United Kingdom

In the United Kingdom, the Secretary's power to make deportation orders is governed by the *Immigration Act* 1971 (c 77), s 3(5). Special procedures govern appeals from exclusion or removal decisions based on national security grounds if the Secretary of State certifies that exclusion or removal is in the interests of national security or in the interests of the relationship between the United Kingdom and another country, and appeals where, for similar reasons, the Secretary considers that the information should not be made public.[85] In such cases, appeals must be made to the Special Immigration Appeals Commission (SIAC),[86] a body which has been given the status of a superior court.[87] The SIAC must allow an appeal if there has been an error of law, and it must also do so if it considers that a discretion reposed in the Secretary 'should have been exercised differently'.[88] This could look like an invitation to engage in merits review. However, SIAC has treated 'should' to mean 'legally should', and this approach has been endorsed by the Court of Appeal.[89]

Appeal lies to the Court of Appeal on the grounds of error of law.[90] Like the POAC, its rules provide for the admissibility of evidence which would be inadmissible in a court,[91] for the appointment of a special advocate, and for the use of material which may be disclosed to the

[80] 8 USCS § 1534(e)(3)(D).
[81] 8 USCS § 1534(e)((3)(F).
[82] 8 USCS § 1534(g).
[83] 8 USCS § 1535.
[84] 8 UCSC § 1537(b)(2).
[85] *Nationality, Immigration and Asylum Act 2002* (UK) (c 41), s 87.
[86] *Special Immigration Appeals Tribunal Act 1997* (UK) (c 68), s 2(1) (as amended).
[87] As to some of the implications of its constitution, see *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; [2001] UKHL 47, Lord Steyn at [30]
[88] *Special Immigration Appeals Commission Act 1997* (UK), s 4(1)(a).
[89] *A v Secretary of State for the Home Department* [2004] EWCA Civ 1123, [47]-[48] (Pill LJ); (SIAC could rightly conclude that there could be reasonable grounds for a belief or suspicion even if it did not entertain the belief or suspicion) (rev'd on other grounds: *Secretary of State for the Home Department* [2007] UKHL 46)
[90] *Special Immigration Appeals Commission Act 1997* (UK), s 7. This, needless to say, has given rise to questions in relation to what constitutes error or law. It has also been argued that in cases involving potential refoulement to torture, the legislation should be read so as to permit examination of factual as well as legal issues. The Court of Appeal has rejected this contention. For its reasons and for a discussion of what constitute questions of fact for the purposes of SIAC appeals, see *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA CIF 808.
[91] *The Special Immigration Appeals Commission (Procedure) Rules 2003* (UK) SI 2003/1034, r 44(3).

Commission and the special advocate, but not to anyone else.[92] In some respects, the rules are silent in relation to the role of the special advocate. Special advocates who gave evidence to a House of Commons committee said that they receive instructions from the government,[93] and initially receive open material relevant to the appeal. They then consult with the appellant and (if applicable) the appellant's lawyers, in order to know the nature of the appellant's case. (The appellant has no say in who is appointed as advocate.) Only then do they receive closed materials, following which they may no longer communicate with the appellant except with the permission of the Commission. (The appellant may, however, send them unsolicited information). At the closed session, one of their functions is to test the Secretary's case for non-disclosure, with a view to the possible release of additional documents. The other is to make as strong as possible a case for the appellant, based on the material which cannot be disclosed.[94] Their ability to do so is obviously limited by the prohibition on communications with the advocate, and even in the absence of such a prohibition, the requirement to maintain confidentiality would impose a considerable constraint on such communications. Further complicating the advocate's role are resource constraints (which affect the degree to which the advocate can explore the ramifications of the closed materials) and the fact that even the advocate may not call witnesses.[95] The pool of special advocates needs constant replenishment. Once a person has seen a particular body of confidential material, that person may not act in any subsequent case in which that material is relevant. Moreover, the strains associated with the role have caused resignations.[96]

The Committee's Report noted several respects in which the SIAC procedure differs from that employed by conventional courts where public interest immunity claims are made. In courts, immunity involves both an assessment of both the public interest in favour of non-disclosure and that in favour of disclosure. If evidence attracts public information immunity, it is inadmissible.[97]

People may be detained pending removal, but this power presumes that removal is possible. In some cases, it may be impossible to deport a person who would otherwise be deportable, either because no other country will accept the person, or because the only countries prepared to do so, would also be likely to torture them. To deal with such people, the *Anti-terrorism, Crime and Security Act 2002* (UK) created a special regime to apply when the person was an

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[92] *The Special Immigration Appeals Commission (Procedure) Rules 2003* (UK) SI 2003/1034 (as amended), rr 34-38A. The institution of the special advocate was established in 1997, in response to a European Court of Human Rights decision finding that the UK's security deportation decisions provided inadequate protection to the prospective deportee. The Court referred approvingly to the Canadian use of Court-appointed, security-cleared counsel: House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals committee (SIAC) and the Use of Special Advocates* (Seventh Report of Session 2004-2005, 2005), vol 1, [20].

[93] The appellant has almost no say in who is appointed as advocate, save for their being able to object if they can show good cause why a particular person should not act on their behalf: House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals committee (SIAC) and the Use of Special Advocates* (Seventh Report of Session 2004-2005, 2005), vol 1, [70].

[94] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals committee (SIAC) and the Use of Special Advocates* (Seventh Report of Session 2004-2005, 2005), vol 1, [56]-[58].

[95] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals committee (SIAC) and the Use of Special Advocates* (Seventh Report of Session 2004-2005, 2005), vol 1, [75]-[77] –[79]; *The Special Immigration Appeals Commission (Procedure) Rules 2003* (UK) SI 2003/1034, r 35.

[96] House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals committee (SIAC) and the Use of Special Advocates* (Seventh Report of Session 2004-2005, 2005), vol 1, [68].

[97] House of Commons Constitutional Affairs committee, *The Operation of the Special Immigration Appeals committee (SIAC) and the Use of Special Advocates* (Seventh Report of Session 2004-2005, 2005), vol 1, [59]

international terrorist.[98] There was provision for certification by the Home Secretary that the person's continued presence was contrary to national security and that the person was a terrorist, whereupon the person could be detained, even if deportation was impractical. There was provision for bail. The legislation, which was the subject of a purported derogation, discussed above, was held to be contrary to the ECHR, and has been repealed.[99]

United Kingdom case law relating to the Home Secretary's exercise of the deportation power antedates the *Terrorism Act 2000* and the 9/11 attack. *Secretary of State for the Home Department v Rehman*[100] arose from a deportation notice based on national security grounds. The SIAC considered that the term 'national security' should be construed narrowly, such that foreign terrorism could be treated as a threat to national security only if were likely to provoke retaliation by its target against British interests. The House of Lords dismissed an appeal from a Court of Appeal decision which had held that this definition was too narrow. Lord Slynn of Hadley favoured a broader definition:

> It seems to me that, in the contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and in attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional system of the state, need to be projected. I accept that there must be a real possibility of an adverse affect on the United Kingdom, for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate.[101]

He also addressed the question of he standard of proof to be required before the making of an order:

> … when specific facts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof. But that is not the whole exercise. The Secretary of State, in deciding whether it is conductive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is provided, and his conclusion is justified, to a "high degree of probability".[102]

In concluding, he also stated that:

> even though the Commission has powers of review both of fact and of the exercise of the discretion, the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of

[98] ss 21-32.
[99] *Prevention of Terrorism Act 2005* (UK) (c 2), s 16(2).
[100] [2003] 1 AC 153; [2001] UKHL 47
[101] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; [2001] UKHL 47, [16]
[102] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; [2001] UKHL 47, [22]

> Government policy and the means at his disposal of being informed of an understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review.[103]

Lord Slynn's approach to the definitional and proof issues was either specifically or effectively endorsed by Lords Steyn, Hoffman, Clyde and Hutton. While stating that he agreed with Lord Slynn's reasons, Lord Steyn appeared to less inclined to urge deference.[104] Lord Hoffman, on the other hand, argued that in exercising its powers, the SIAC was acting as a court, and was therefore obliged to accept the Secretary's opinion on questions such as whether 'the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security'.[105] Lord Clyde agreed with Lord Hoffman. Lord Hutton did not address the issue.

The considerable level of deference apparent in this decision is reflected in Court of Appeal decisions under the now-repealed Part 4 of the *Anti-terrorism, Crime and Security Act 2001* in relation to degree of scrutiny required of the Secretary in relation to the making of certificates. In *Secretary of State for the Home Office v A*,[106] the Court saw no problems with the legislatively prescribed 'belief' and 'suspicion' grounds for the certificates, recognised that they were to be understood as a response to the difficulty of obtaining 'hard' evidence of involvement in terrorist activities, and treated common law and Human Rights Act based presumptions as an inadequate basis for reading the legislation down so that certificates might be issued only on the basis of material supporting the requisite belief and suspicion to a high level and at least on the balance of probabilities. Reasonableness was to be assessed taking account of the seriousness of the danger to be averted as well as the seriousness of the harm to those indefinitely detained.[107] Laws LJ interpreted the legislation taking account of the consideration that 'it will as I have indicated very often, be impossible to prove the past facts which make the case that A is a terrorist. According a requirement of proof will frustrate the policy and objects of the Act.'[108]

The fairness of SIAC procedures was examined in *MT (Algeria) v Secretary for the Home Department* [109] where the appellants argued that the SIAC's procedures were unfair insofar as they carried with them the risk that people could be deported to torture on the basis of a hearing, part of which might take place in their absence. This contention failed: the legislation was clear, and could not be read down. Nor could or should the SIAC have acceded to suggestions which would have involved the applicant being given more access to confidential information.[110]

3.3.3 Canada

In Canada, foreign nationals and permanent residents are 'inadmissible' if (inter alia) they have engaged in terrorism or been members of an organization which, inter alia, engages in terrorism.[111] They are, however, admissible if they can persuade the Minister that they do not

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[103] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; [2001] UKHL 47, [26]
[104] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; [2001] UKHL 47, [27], but cf [30].
[105] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; [2001] UKHL 47, [53]
[106] [2004] EWCA Civ 1123, rev'd on other grounds *A v Secretary of State for the Home Office* [2005] 2 AC 68; [2004] UKHL 56.
[107] *A v Secretary of State for the Home Office* [2004] EWCA Civ 1123, [28]-[52] (Pill LJ); [229]-[238] (Laws LJ); [360]-[371] (Neuberger LJ).
[108] *A v Secretary of State for the Home Office* [2004] EWCA Civ 1123, [231].
[109] [2007] EWCA 808.
[110] In a subsequent decision, relating to control orders, the House of Lords held, overruling a Court of Appeal decision, that if information and evidence is withheld, a fair trial at least requires that the person whose rights are at stake be given information about the gist of the relevant material: *Secretary of State for the Home Department v JJ* [2007] UKHL 45.
[111] *Immigration and Refugee Protection Act* SC 2001, c 27, s 34(1)(c), (f).

constitute a threat to the security of Canada.[112] An immigration officer who believes a person is inadmissible may prepare a report, setting our relevant facts, and transmit it to the Minister. If the Minister considers the report is well-founded, the report may be referred for an admissibility hearing.[113] If the Board finds the person to be inadmissible, the Minister may order the person's removal.

Challenges to decisions made under these powers have typically involved challenges to findings that the person had engaged in terrorism or been a member of a terrorist organisation, rather than challenges to the Minister's assessments of the dangers this posed to Canada. They have turned on non-confidential information. Deference to the executive plays little role in the decisions, except insofar as this was inherent in the ordinary standards of administrative law.

In cases where removal is based on a finding of inadmissibility rather than on a certificate, the standards are the correctness where questions of law are involved and patent unreasonableness in relation to questions of fact.[114] Questions in relation to whether an organization falls within the legislation, and whether a person is a member are treated as mixed questions of fact and law, and therefore, as requiring the reasonableness standard.[115]

Reasonableness requires more than mere suspicion, but less than proof on the balance of probabilities.[116] In deciding whether an organization is a terrorist organization the decision-maker must analyse reports on which the conclusion is based, and must specify acts which are the basis for the conclusion that it engages in terrorism. A report which identified one faction of a group as terrorist was not conclusive as regards a different faction, in the absence of further evidence.[117] Conversely a decision (relating to the same organization and faction) based on reports from Amnesty International, US Country Reports, and the UN Reporter, and which referred to specific acts of terrorism, satisfied the standard.[118] In determining whether a person is a member of an organization, what counts is not formal membership, but the nature and voluntariness of the person's contributions to the organization.[119]

There is also provision for removal and detention, following the issue of a ministerial certificate. The Ministers of Citizenship and Immigration and of Public Safety and Emergency Preparedness may issue a certificate stating that a foreign national or a permanent resident is inadmissible on the grounds that the person is a threat to national security or to the safety of any person. These certificates must be filed with the Federal Court, which must determine whether the certificate was made lawfully.

As enacted, the legislation provided that, upon a certificate being issued, immigrants who are foreign nationals must then be detained. Permanent residents could be detained if the ministers issued a warrant. Cases were to be heard by 'designated judges', whose decisions were non-appealable and judicially reviewable only on the narrow jurisdictional error grounds applicable to review of judicial decisions.[120] In hearing the case, the judge was obliged to 'ensure the confidentiality of the information on which the certificate is based, and any other evidence … if in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person'.[121] Evidence falling within this category was to be

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[112] *Immigration and Refugee Protection Act* SC 2001, c 27, s 34(2).
[113] s 44.
[114] *Mugasera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, [37]-[38].
[115] *Kanendra v Canada (MCI)* 2005 FC 923, [11]-[12].
[116] *Mugasera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100, [114].
[117] *Ali v Canada (Minister for Citizenship and Immigration)* [2004] FC 1174, [58]-[68]
[118] *Omer v Canada (Minister of citizenship and Immigration)* [2007] FCJ No 642.
[119] *Omer v Canada (Minister of citizenship and Immigration)* [2007] FCJ No 642, [12]-[14]
[120] *Immigration and Refugee Protection Act* SC 2001, c 27, s 80(3). While s 80(3) purported to preclude all forms of judicial review, it was been held not to apply where the decision was contrary to the constitution, or involves bias: *Chakaoui v Canada (Citizenship and Immigration)* [2007] SCJ No 9, [136], McLachlin CJ
[121] *Immigration and Refugee Protection Act* SC 2001, c 27, s 78(b) (as enacted).

heard in camera and ex parte, and could be considered in the determination of the reasonableness of the certificate.[122]

The judge was to provide the applicant with a summary of the grounds for the certificate, but the summary is not to include any information whose disclosure would, in the judge's opinion, damage national security or threaten any person's safety.[123] There was no provision for a special advocate, nor was there any provision for security-cleared counsel to represent the applicant in closed hearings.

If the court found that the certificate was reasonably issued, the certificate operated as a removal order. Immigrants subject to certificates might no longer apply for refugee status and, if already found to be refugees, might be refouled if in the Minister's opinion, they constituted a danger to Canadian security.[124]

The legislation also provided that detention was reviewable on an ongoing basis, but that foreign nationals did not acquire a right of review until they had been imprisoned for 120 days.

The ministerial certificate scheme was used against a small number of suspected terrorists, and has generated a considerable body of litigation, culminating in a successful challenge to the legislation governing hearings and detention. . In *Chakaoui v Canada (Citizenship and Immigration)* the Supreme Court unanimously held that s 78 of the Act infringed s 7 of the Canadian Charter of Rights and Freedoms, which provides that people may be deprived of life, liberty and security only in accordance with the principles of fundamental justice. The Court began its judgment by affirming the importance both of security and liberty:

> One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.[125]

The passage foreshadows its decision. It held that, in permitting the judge to make decisions on evidence which was not to be shown to applicants or their legal representatives, the act fundamentally abridged due process rights. This did not mean that applicants were entitled to access to the evidence, but it did mean that there should be provision for someone to make representations to the court on the applicant's behalf in such matters. The model suggested was the special advocate. The court suspended its order to give the legislature 12 months to legislate accordingly.

Chakaoui also involved a challenge to the detention provisions. First, it was argued that the 120 day limit fell foul of the Charter prohibitions against arbitrary detention (s 9), and the Charter's protection of the right to seek judicial review of detention (s 10(c). Second, it was contended that it violated the rights to a fair trial and to protection from cruel and unusual punishment (ss 7, 12). Finally, it was argued that it was discriminatory (s 15).

The first argument succeeded. A brief period of detention was not arbitrary: the danger allegedly posed by the person constituted a rational justification for detention. There was some justification for a short moratorium: 'Confronted with a terrorist threat, state officials may need to act immediately, in the absence of a fully documented case. It may take some time to very and document the threat. Where state officials act expeditiously, the failure to meet an arbitrary target of a fixed number of hours should not mean the automatic release of

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[122] *Immigration and Refugee Protection Act* SC 2001, c 27, s 78(e), (g) (as enacted).
[123] *Immigration and Refugee Protection Act* SC 2001, c 27, s 78(h) (as enacted).
[124] *Immigration and Refugee Protection Act* SC 2001, c 27, s 115.
[125] *Chakaoui v Canada (Citizenship and Immigration)* [2007] SCJ No 9, [1].

the person, who may well be dangerous.'[126] But permanent residents had a right to automatic review after 48 hours, so there could be no rational basis for saying that security concerns justified detention without hearings for 120 days for foreign nationals.

The other two arguments failed. While indefinite detention with no prospect of release might constitute cruel and unusual punishment, this was not the case when there was provision for review, release on conditions, and review of those conditions. The court specified criteria which should guide release and condition decisions and concluded that so long as review was conducted in accordance with guidelines which the court had laid down, detention would not constitute cruel and unusual punishment.[127] Nor could the discrimination argument succeed: the Charter expressly permits discrimination between citizens and non-citizens in relation to deportation, and deportation-related matters.[128]

The issue was similar to that which arose in *A*, but was resolved in a slightly different way, and one which involved greater deference to the government. The Court pointed out that the issues were different. They involved the interpretation of different legislation and different instruments. The United Kingdom legislation provided for indefinite detention, whereas the Canadian legislation did not. The United Kingdom decision was governed by the ECHR and the *Human Rights Act*. The Canadian decision was governed by the Charter.[129] The former distinction probably overstates the differences between the two regimes. Indefinite detention remains a possibility in Canada, and there would certainly have been circumstances in which British detainees could have successfully sought judicial review of their detention. Moreover while s 15 of the Charter does not apply to deportation matters, the House of Lords had treated discrimination as relevant for another reason: if the preventive detention of dangerous citizens was not necessary to protect the national interest, why was the detention of non-citizens necessary for this purpose?

In the light of the *Chakaoui* decision, the Canadian Parliament enacted Bill C-3, 'An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act'. The legislation provided that at the Minister's request and on the judge's own motion, evidence would be heard in camera and in the absence of applicants and their counsel if the judge considered that the disclosure of information could be injurious to national security or the safety of any person.[130] However, and in accordance with the Supreme Court's suggestion, the legislation made provision for the appointment of a Special Advocate, whose role was to protect the interests of the applicant in proceedings where information or evidence was heard in the applicant's absence, and who could challenge the admission of, and claims to confidentiality in relation to, the evidence, and cross-examine witnesses in closed session.[131] Rules relating to communications with applicants and counsel were almost identical to those operating in Britain.[132] Decisions continued to be unappealable and a finding that the certificate was reasonable continued to operate as a removal order.

Amendments to the detention legislation assimilated the positions of foreign nationals and permanent residents. Warrants could be issued by the ministers on national security or safety grounds, in which case, review would begin within 48 hours, to be followed by further regular

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[126] *Chakaoui v Canada (Citizenship and Immigration)* [2007] SCJ No 9, [93].
[127] The considerations to be taken into account were: the reason for taking the person into custody; length of detention (which could be relevant to matters such as whether the detainee continued to be a threat, and the standard of evidence which might reasonably be expected of the government); reasons for the length of detention (including whether deportation has been delayed by the deportee's litigation); the probable length of time before deportation, and whether this can be ascertained); and the availability of alternatives to detention: see at [[110]-[116].
[128] *Chakaoui v Canada (Citizenship and Immigration)* [2007] SCJ No 9, [129].
[129] *Chakaoui v Canada (Citizenship and Immigration)* [2007] SCJ No 9, [126]-[127].
[130] *Immigration and Refugee Protection Act* RSC 2001, s 83(1)(c).
[131] *Immigration and Refugee Protection Act* RSC 2001, ss 83(1)(b), 83(1.2), 85-85.2.
[132] *Immigration and Refugee Protection Act* RSC 2001, s 85.4.

reviews.[133] Detention was to be continued only if security or safety could not be protected by conditional release, and orders could be modified on application in the event of change of circumstances.[134]. Appeals were permitted only on judicial certificate that an important question of law was involved.[135]

Lower courts had generally assumed that the legislation was valid, had some sympathy with claims for confidentiality, but appear to have imposed rigorous demands on those relying on it as evidence. The strict scrutiny standard which they employed also involved a not particularly deferential to decision-makers.

In disclosure of information cases, courts sometimes expressed considerable sympathy for governmental reluctance to disclose information. In the course of a first instance judgment given in the course of the *Chakaoui* litigation, Noël J observed that:

> National Security is essential for the preservation of our democratic society. We live in an era when threats to our democracy frequently come from unconventional acts that cannot be detected by unsophisticated investigations or traditional means. The methods used to obtain protected information must not be revealed. Indeed, the protection of our democratic society demands continuous efforts and cannot be guaranteed merely by conducting one-time investigations.[136]

However, in *Beraki v Canada (Minister of Citizenship and Immigration)*, (where the outcome did not turn on confidential information)[137] the trial judge took it for granted that security personnel over-estimated the need for secrecy:

> … the Court issued an order identifying those portions of the tribunal record which would not be injurious to national security, despite the deponent's initial assertions to the contrary. The deponent is an experienced SISI intelligence officer. Her professional training as a member of Canada's intelligence service, generally speaking, is to keep information secret. It would have been helpful to the deponent and to the section 87 process if she had been assisted by someone within government with a different professional background prior to her deciding on which portions of the tribunal record should be redacted. The over-assertion of secrecy, done in good faith, could have been avoided with the input of a person, such as an openness advocate from within government, whose different perspective, working together with the deponent, would result in a more balanced outcome.[138]

Moreover, respecting confidentiality required that confidential information be subjected to rigorous analysis. In a decision dismissing an application to be released from detention, Lemieux J summarised the approach as follows:

> Such evidence must be rigorously and critically scrutinized for relevance, reliability and weight. The sources of the information must be carefully examined for reliability, credibility and the conditions under which that information was provided. Corroboration is essential in many cases. The existence of any exculpatory information in the possession of the [Canadian Security Intelligence] Service must be explored.[139]

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[133] *Immigration and Refugee Protection Act* RSC 2001, ss 81-82.
[134] *Immigration and Refugee Protection Act* RSC 2001, ss 81(5), 82.1.
[135] *Immigration and Refugee Protection Act* RSC 2001, s 82.3.
[136] *In the matter of a certificate and its referral* [2003] FC 1419, [70].
[137] The application succeeded on the grounds that the grounds that the immigrations officer's failure to indicate her understanding of 'terrorism' meant that her decision to exclude the applicant could not stand.
[138] *Beraki v Canada (Minister of Citizenship and Immigration)* [2007] FCJ No 1770; 2007 FC 1360, [11].
[139] *Almrei v Canada (Minister of Citizenship and Immigration)* [2007] FCJ No 1292; 2007 FC 1025, [71]. See too *In the Matter of a Certificate and its Referral* [2003] FC 1419, [101] (Noël J); *Harkat*

Discussing evidence from human sources, Dawson J stated:

> I believe that, generally, if any confidential information is provided by a human source, some relevant inquiries and areas for examination by the Court of one more witnesses under oath may include matters such as the following: the origin and length of the relationship between the Service and the human source; whether the source was paid for information; what is known about the source's motive for providing information; whether the source has provided information about other persons, and, if so, particulars of that; the extent to which information provided by the source has been, or is, corroborated by other evidence of information; the citizenship/immigration status of the source and whether that status has changed throughout the course of the source's relationship with the Service (to the extent that such status touches upon the source's security within Canada and their vulnerability to duress); whether the source has been subject to any pressure to provide information, and if so, why and by whom; whether the source was or is under investigation by the Service or any other intelligence agency or police force; whether the source has a criminal record or any outstanding criminal charges in Canada or elsewhere; the nature of any relationship between the source and the subject of the investigation; whether there is any known or inferred motive for the source to provide false information or otherwise mislead the investigation in any way.[140]

He continued:

> Similarly, if any confidential information is provided from another intelligence agency, some relevant inquiries and areas for examination may include: the manner in which the Service assesses the reliability of information provided by that agency and its conclusion as to the reliability; to what extent has, or is, information from such agency corroborated; is there any suggestion the agency may have a motive for colouring the information provided; what is the human rights record of the agency and the agency's home country; how does the foreign agency itself assess the reliability of the information it has provided; is the agency a mere conduit for information originating from a less reliable agency.
>
> If any confidential information is provided that is obtained through technical sources such as electronic surveillance, relevant inquiries may include: the accuracy of any document that records intercepted information; the accuracy of any translation (if applicable); the objectivity or bias of any summary made of intercepted information; and how the parties to any conversation are identified.[141]

In judicial review cases, the logic of this approach is to require a similar standard of diligence from the decision-maker.[142]

3.3.4 Australia

Australian migration law makes virtually no reference to terrorists. Insofar as terrorists are inadmissible it is because they fall foul of the character test. 'Good' terrorists are therefore admissible.[143] The Migration Act permits the refusal and cancellation of visas for failure to

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(Re) 2005 ACWSJ LEXIS 2009, 50, [93] (Dawson J); *Chakaoui v Canada (Citizenship and Immigration)* [2007] SCJ No 9, [38]-[41], McLachlin CJ.

[140] *Harkat (Re)* 2005 ACWSJ LEXIS 2009, 51-52, [94] (Dawson J).

[141] *Harkat (Re)* 2005 ACWSJ LEXIS 2009, 53-54, [95]-[96] (Dawson J).

[142] *Almrei v Canada (Minister of Citizenship and Immigration)* [2005] ACWSJ LEXIS 1744.

[143] The relevant Australian powers, and legislation governing certificates is contained in the *Migration Act 1958* (Cth). The only reference to terrorism is in relation to visa class 768 (temporary (humanitarian concern)) which requires that the applicants declare that they are not terrorists. Applicants must satisfy the requirements for a visa. Each class of visa has requirements which are specified in Sch 2 of the *Migration Regulations 1994* (Cth), and for each class of applicant there are public interest requirements, the nature of which is specified in Sch 4. Criterion 4001 (which is standard in relation to visas for non-dependents) requires satisfaction of the 'character test'. This in turn is defined in the *Migration Act 1958* (Cth) s 501(6). The definition makes no reference to

pass the test. Decisions may be made either by the Minister or a delegate. If made by the Minister they do not attract a duty to afford procedural fairness. While such decisions would normally attract a common law duty to afford procedural fairness, the presumption in favour of the existence of this right has been ousted by legislation.[144] Such legislation would be contrary to the US and Canadian due process clauses, and would also be incompatible with the ECHR. However, while the Commonwealth Constitution protects the procedural rights of parties to judicial proceedings, it does not protect the due process rights of those affected by administrative decisions. In addition, unlike decisions of delegates, Ministerial decisions are not appealable to the Administrative Appeals Tribunal (the AAT). The Minister may also set aside decisions by a delegate or the AAT on the grounds that the Minister considers that the person does not pass the character test.[145] However, as we shall see, while Ministerial decisions do not attract a duty to afford procedural fairness, if they are based on security assessments, *these* attract a (very attenuated) right to procedural fairness. Moreover, while Ministerial decisions are not appealable to the AAT, security assessment decisions may be appealable. The Commonwealth Constitution entrenches the right to judicial review. Applications for judicial review of Ministerial decisions and security assessments are heard by the Federal Court, a court with a general administrative law jurisdiction.

It is rare for visa applicants to fail the character test. [146] Moreover while Australian ministers have made considerable use of their powers to issue ministerial certificates, these appear to have almost invariably been issued in relation to convicted criminals, rather than on the grounds of suspected or actual involvement in terrorism. There is, in consequence, little relevant case law. The procedures for the judicial review of 'character cancellations' are the same as those governing the review of migration decisions generally, decisions being reviewable on the grounds of jurisdictional error, a ground readily established if any of the standard grounds for judicial review can be made out.

Australia does not make special provision for the detention of terrorists whose deportation is practically or legally impossible. However, under Australian law, all immigrants subject to deportation orders are liable to detention, regardless of whether they are terrorists, and regardless of whether there is any realistic short term prospect of their release. An argument that this constituted an impermissible usurpation of the Commonwealth's judicial power was unsuccessful.[147]

A guide to the approach of courts in security matters is provided by *Leghaei v Director-General of Security.*[148] The applicant, the holder of a bridging visa, sought review of an adverse security assessment made pursuant to s 37 of the *Australian Security Intelligence Organisation Act 1979* (Cth), s 37 (the ASIO Act). The assessment had been the basis for denying a request by Mansour Leghaei and members of his family for permanent residency visas. The basis for the adverse assessment appears to have been that the applicant had engaged in 'acts of foreign interference'. Such acts include clandestine intelligence activity for a foreign power, and activity for a foreign power which involves a threat to any person.[149] The ASIO Act provides citizens and permanent residents with a presumptive right to a

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terrorism, but a person fails the test if the person has a substantial criminal record or represents a danger to the community.

[144] *Migration Act 1958* (Cth), s 501(6).

[145] *Migration Act 1958* (Cth), s 501A.

[146] ASIO, *Annual Report to Parliament 2005-06* (2007), 4 (12 out of 53, 147 in 2005-6; 12 out of 52,417 in 2004-5. In previous years the number of adverse reports did not exceed eight. It is not generally clear from Annual how many (if any) of these adverse reports were based on suspected involvement in terrorism, and how many on grounds such as suspected espionage. Between 2001 and 2006, 41 passports were cancelled on security grounds: ibid, 31, and ASIO, *Annual Report to Parliament 2004-05* (2006), 21.

[147] *Al-Kateb v Godwin* (2004) 219 CLR 562.

[148] [2005] FCA 1576.

[149] *Australian Security Intelligence Organisation Act 1979* (Cth), s 4.

statement of grounds for an assessment, and notification when the assessment is furnished to a Commonwealth agency.[150] The application for judicial review was that the assessment decision and decisions based on it were flawed by jurisdictional error,[151] namely denial of procedural fairness; failure to consider whether the applicant's alleged conduct fell within the legislation; and taking account of irrelevant considerations by virtue of misconstruction of the definition of 'security'.

Madgwick J rejected the argument that the ASIO Act must be construed as having unambiguously removed the applicant's presumptive right to procedural fairness. Nor did he consider that national security considerations necessarily precluded procedural fairness. One consideration was that sometimes it was in the national interest that decisions be exposed to effective scrutiny:

> … decision-makers in Australian agencies concerned with national security are unlikely to be less prone to mistakes than those decision-makers and (and final givers of advice) in our larger and longer practised allies, or in non-security agencies of many kinds. … Lord Hoffman commented … on the 'widespread scepticism which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction'. Indeed, the capacity for avoiding error may be thought to grow in the sunlight of the opportunity for correction by affected persons (and, where possible, of public scrutiny), and to wither where secrecy and unreviewability reign.[152]

A second consideration was that security assessments need not be based on confidential information:

> Some foreign powers are strident about their ambitions even when Australia might regard them as nefarious. Some ideologically motivated individuals who advocate and are prepared to promote revolution, insurrection, terror or communal violence likewise do not hide their light under a bushel. At least where public conduct of a security-assessed person is relied on, there is no point, based on protection of confidential materials or sources, in denying a right to be heard.[153]

These considerations meant that 'an obligation positively to consider what concerns and how much detail might be disclosed to the subject visa holder to permit him/her to respond , without unduly detracting from Australia's national security interests, is minimally necessary to ensure a fair decision-making process'.[154] The question was: how was the court to determine whether this had been done? His Honour noted that counsel for the applicant had raised the question of the appointment of an independent expert, but had not pressed the issue. Courts were ill equipped to evaluate intelligence. While not obliged to take evidence from the Director-General at face value, they were obliged to give 'recognition and respect … to the degree of expertise and responsibility held by relevant senior ASIO personnel in relation to the potential repercussions of disclosure'.[155] Having reviewed the confidential information, he had concluded that even a summary of the reasons for the assessment could not have been given without also compromising national security. The procedural fairness argument therefore failed,[156] and so, for reasons which could not be disclosed, did the other two arguments.

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[150] *Australian Security Intelligence Organisation Act 1979* (Cth), ss 37(2), 38, qualified by s 36(b)
[151] Decisions under the *Australian Security Intelligence Organisation Act 1979* (Cth) are not reviewable under the *Administrative Decisions Judicial Review Act 1977* (Cth): Sch 1(a).
[152] *Leghaei v Director-General of Security* [2005] FCA 1576, [80].
[153] *Leghaei v Director-General of Security* [2005] FCA 1576, [81].
[154] *Leghaei v Director-General of Security* [2005] FCA 1576, [82].
[155] *Leghaei v Director-General of Security* [2005] FCA 1576, [87].
[156] There had been an earlier assessment which had also been the subject of a judicial review application. This had been settled, when the earlier assessment was withdrawn, and visas cancelled in consequence of this were reinstated. There are hints in the judgment in the cost proceedings that the first order might have been procedurally flawed, which raises the question of whether there had been

An addendum describes the special arrangements which had been made for handling the confidential material. At the instigation of counsel for ASIO, the applicant's solicitor and counsel had obtained security clearances, and had given undertakings of confidence, in consequence of which they had full access to all the confidential material before the Court.[157]

The Full Federal Court dismissed the applicant's appeal, and in its published judgment, it agreed with Madgwick J's published reasons.[158] The decision is to be contrasted with Canadian and United Kingdom cases where have held that the right to a fair trial necessarily entails parties either having some access to information about the case against them, or (in Canada), at least having a special advocate to act on their behalf in relation to confidential material. The High Court refused special leave.[159]

Parkin v O'Sullivan[160] was an application for discovery which arose from a number of cases in which immigrants whose visas were cancelled following adverse security assessment sought review of the adverse assessments. At issue was the duty of ASIO to include details of documents containing confidential information in its affidavit of documents relating to the assessment. Normally, the position in relation to discovery in such cases is straightforward: the document must be listed, and privilege claimed in relation to the document. The question of whether the document is privileged is only dealt with if the party seeking discovery demands to see the document. ASIO argued first that discovery would be contrary to the ASIO Act and second that, in the context of the applicants' claims, it would constitute 'fishing' in that it would be seeking the information for the purposes of determining the kind of case they could make, rather than for the purpose of being better able to assess whether their could be supported by evidence. These arguments failed. While the ASIO Act gave people no more than a limited right to their security assessments, it did not preclude order for their discovery. The 'fishing' objection was less persuasive than it would once have been, given the evolution of relevant law, and discovery would yield evidence relevant to their case (which was effectively that since they were not security threats, the decision to the contrary must have been flawed). The parties were ordered to agree on orders for discovery, failing which there should be a further hearing. The applicants were warned that applications for production of the listed documents might well prove unsuccessful. The parties did not reach agreement, and the further hearing did not take place. Nonetheless, leave to appeal was granted. On appeal, the matter was remitted to the trial judge on the grounds that the appeal had been made against orders which had never been made.[161]

ASIO later agreed, inter alia, to the production of the adverse assessments, documents relied on in making these, and other documents that ASIO intended to rely on at trial. In relation to disputed claims, the court ordered the production of several other documents, subject to any submission that ASIO might make in relation to material it wanted blacked out.[162] The Director-General's appeal against this ruling was dismissed. The Full Court pointed out that this was a matter of practice and procedure, which meant that the decision could be set aside only on the basis of a clear error of law. There was no evidence of clear error. Indeed, the tone of the judgment suggests that the Full Court would have not have exercised the discretion differently.[163] After almost two years of interlocutory skirmishing, it still remains to be seen whether the Director-General will actually be required to disclose any documents and if so, on what terms.

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no consideration given to the question of whether it was possible to provide the applicant with at least some reasons for the first decision: *Leghaei v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1118, [10].

[157] [101].

[158] *Leghaei v Director-General of Security* [2007] FCAFC 37.

[159] *Leghaei v Director-General of Security* [2007] HCA Trans 655.

[160] [2006] FCA 1413.

[161] *O'Sullivan v Parkin* [2007] FCAFC 98.

[162] *Parkin v O'Sullivan* [2007] FCA 1647.

[163] *O'Sullivan v Parkin* [2008] FCAFC 134.

Minister for Immigration & Citizenship v Haneef [164] involved a person who was a distant relative of a person apparently involved in an attempted terrorist attack in Britain, and was acquainted with others who had been involved. He was arrested shortly after the attempted attack, while attempting to leave Australia on a one-way ticket, and charged with terrorism offences. The case against him unravelled, and a magistrate released him on bail. Almost immediately, the Minister cancelled his visa, and he was arrested and detained.[165] The case did not turn on confidential information, and it did not turn on whether the Minister had acted for an improper purpose or unreasonably (although both were pleaded). The Minister had justified his decision on the grounds of Haneef's association with people reasonably suspected of having been involved in criminal activity. It was clear that the relevant people could be reasonably suspected of criminal activity and that Haneef had associated with them. The question was whether more was required. Both at first instance and on appeal, the Federal Court held that for the purposes of s 501(3), 'association' required association, having some knowledge of the associates' criminal activities. Since there was nothing before the Minister to suggest such knowledge, it followed that his decision had to be quashed.[166]

Traljesic v Attorney-General of the Commonwealth[167] arose out of a challenge to the validity of a decision to cancel the applicant's passport, but the application related to a decision made in the course of an appeal to the Administrative Appeals Tribunal against the relevant security assessment and against the passport cancellation. The *Administrative Appeals Tribunal Act 1975* (Cth) provides a procedure whereby, in security appeals, the Attorney-General may issue a certificate, whose effect is to preclude the Tribunal from considering evidence, submissions or documents in the presence of the applicant or (except with the Attorney-General's leave), the applicant's legal representative.[168] The applicant's legal representative had been security cleared to secret document level. Nonetheless the Attorney-General refused to allow him access to a body of material listed in a schedule to the certificate, arguing that while he did not doubt the solicitor's integrity, he was concerned by the possibility that the solicitor would inadvertently disclose confidential information. These concerns were based partly on the fact that the solicitor represented a considerable number of clients in cases involving security issues. The application for review was based on two grounds: that the Attorney-General took into account an irrelevant consideration, namely a mere and unsubstantiated risk of inadvertent disclosure, and that the decision was *Wednesbury* unreasonable.

Rares J dismissed the application. Counting in the applicant's favour was a presumption that the public interest requires disclosure, and the principle that laws should be treated as abrogating common law rights only if they do so on their face or by necessary implication. Counting against was that

> Necessarily, considerations which are present to the mind of the member of the Executive of the Commonwealth at ministerial level to whom [the responsibility for

[164] [2007] FCAFC 203. The report leaves open the question of whether this case should be treated as involving the judicial review of a terrorism decision, since the Ministers certificate also precluded the disclosure of the nature of the relevant public interest on the grounds that this would prejudice Australia's security: see at [8].
[165] Consideration of whether his visa should be cancelled on character grounds had, however, begun several days before Haneef was released on bail.
[166] At first instance, Spender J stated that confidential information before him could have provided grounds for the Minister's decision, but since the Minister's decision was flawed by virtue of his having asked himself the wrong questions, there had been jurisdictional error, so the decision was a nullity, even if it would have been open to the Minister on a correct interpretation of the test. He did not expressly consider whether he should nonetheless have declined to make an order quashing the decision, but the Full Federal Court considered that his decision to quash was correct, especially given that subsequent to the decision to cancel, the DPP had dropped the terrorism charge against Haneef: *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203, [139].
[167] [2006] FCA 125.
[168] Sections 36A, 36B.

certification] is confided are difficult to judge of in a forensic contest, particularly where an issue of public interest immunity or matter of state immunity arises.[169].

It was not an irrelevant consideration 'for the Minister to have regard to an assessment of risk, even of remote risk, in circumstances where the person who is applying , as in this case, to have information revealed to him or her could be put in the position where, inadvertently and through no design of his or her own, he or she will unconsciously reveal something of importance which may be of no meaning to him or her'.[170] This was the case even when the disclosee is a legal practitioner:

> Experience in forensic contexts in which it is sought to reveal, even under conditions of strict confidentiality, limited material to one or more legal advisers or representatives of a party, while excluding those persons from communicating with others in the same interest, can create great difficulties for the adviser. It is even harder where that information is communicated to a person such as Mr Hopper who, accepting the highest ideals of the legal profession to act for those who need assistance, acts for other persons who are in a similar situation of potential, perceived or real, risk to security or in litigation involving the question of whether or not their security classification or other civil rights have been affected by decisions taken in the interests of national security.[171]

This had been recognised not only in the context of security issues, but also in the context of litigation in which access to commercially sensitive information is sought.

The relevant sections conferred on the Minister 'an unconfined discretion to have regard to what he, as a high officer of the Executive, considers is in the public interest and may prejudice the security of Australia'.[172] It could not therefore be said that taking account of an unsubstantiated risk involved taking account of an irrelevant consideration, especially in relation to Ministerial claims for confidentiality 'for, what are not challenged in these proceedings to be, good reasons'.[173]

In some respects, this is a disquieting decision. The suggestion that the Minister's discretion in relation to the public interest is unconfined involves a very high level of deference. Read in the light of observations which suggest that in this case the Minister did have at least some grounds for his belief, it is unexceptionable, given the breadth of the power. Nonetheless, it points to the difficulties which confront anyone who seeks to challenge security assessments in the AAT.

His Honour's concerns about possible inadvertent disclosure were quite probably justified, but insofar as they were justified, this was because the relevant solicitor had an unusually large 'security' practice. If the case had been a one-off case for a particular lawyer, the problem would presumably have been less acute, and the case for access correspondingly stronger. But this means that lawyers whose knowledge of the relevant law is greatest and who presumably are best able to serve their clients effectively are most likely to be deprived of access to the material they need to do so. Moreover, this may be the case even if the information for which confidentiality is claimed is not in fact such that it is in the public interest that it not be disclosed since lack of access to the material may seriously limit a lawyer's capacity to challenge confidentiality claims. In *Traljesic* this appears not to have been a problem: there had been no challenge to the confidentiality of the relevant information, but from the report it is impossible to know whether this is because the applicant's lawyers had good grounds for believing that the information was probably confidential, or because they had made a strategic decision to attack the decision to refuse access on the basis of easily

[169] *Traljesic v Attorney-General of the Commonwealth* [2006] FCA 125, [19].
[170] *Traljesic v Attorney-General of the Commonwealth* [2006] FCA 125, [23].
[171] *Traljesic v Attorney-General of the Commonwealth* [2006] FCA 125, [24].
[172] *Traljesic v Attorney-General of the Commonwealth* [2006] FCA 125, [26].
[173] *Traljesic v Attorney-General of the Commonwealth* [2006] FCA 125, [27].

proven facts (the reliance on a small unsubstantiated risk) rather than on the basis of a much more costly procedure.

If litigation was a costless activity, some of these problems would disappear. A person affected by an adverse security assessment also has the right to seek judicial review of the assessment and decisions based on it. The review would be governed by the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). While this legislation possibly expands the circumstances in which security-sensitive evidence is not to be given in federal proceedings,[174] it provides that, for the purposes of disputes about whether and how the legislation applies the relevant material may be disclosed to security-cleared lawyers, regardless of their clientele. In any case, AAT decisions are subject to appeal, albeit only on questions of law. If the security assessment was legally flawed, it could be quashed. Again, access to the information would depend not on the AAT Act, but on the NSI Act.

But the availability of these procedures is of only limited assistance. First, people may be able to vindicate their legal rights only by resort to procedures so costly that they cannot afford them. Second, people whose security assessments are factually flawed, but legally correct are in a position where the only body capable of affording them merits review is in danger of making its decision in ignorance of information which the applicant might have been able to present had they known it was relevant.

In a subsequent case,[175] the applicant unsuccessfully challenged a passport cancellation decision based on an adverse security assessment before the AAT, and appealed to the Federal Court. Had the Tribunal forwarded all the material before it, the Court would have been able to consider whether its decision was, as the appellant maintained, 'against the evidence and the weight of the evidence'. However, for reasons which were not apparent from the judgment, the applicant's legal advisers had not taken steps to require the production of this material and the appeal. Nor had there been an application for the judicial review of the decision to issue the certificate. The practical effect of this was that the applicant could succeed only if he could succeed on an argument that sections 39A and 39B were unconstitutional. The basis for the argument lay in the fact that under the AAT legislation, the three-person panel which hears security appeals could include a federal judge among its members. The effect of the sections was to prevent a tribunal from disclosing information, even if it were to be of the view that fairness required disclosure. The effect of this restriction would be to undermine public confidence in the integrity of Chapter III courts. It would therefore fall foul of the law as expounded in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[176] and *Kable v Director of Public Prosecutions*.[177] The argument failed. The Court accepted that the sections could operate in an unfair manner. (Indeed counsel for the Commonwealth conceded this). However, even in judicial proceedings, there were circumstances in which procedural fairness might have to yield to competing considerations.

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[174] In determining whether and to what extent security-sensitive evidence may be given, the court is take account of 'whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security' if the information were disclosed, whether the order 'would have a *substantial* adverse effect on the substantive hearing', and 'any other matters the court considers relevant': s 38L(7) (my italics), and see s 31(7) which is similar. Security interests are to be given the greatest weight: ss 31(8), 38L(8). Prejudice requires that the risk be real and not merely remote: s 17. But once this threshold is overcome, the risk seems to trump any adverse effect on the hearing short of an adverse effect which is substantial. By comparison, the traditional public interest test requires balancing, and seems to attach more weight to fair trial interests. That said, the difference is relevant only in the narrow range of circumstances outlined above, in which case a real risk to national security might normally be expected to prevail over a non-substantial adverse impact on the hearing, even under traditional principles. In any case, the legislation preserves the right of courts to stay criminal proceedings on the grounds that an order would have a substantial adverse effect on a defendant's right to a fair trial: s 19(2).

[175] *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128.

[176] (1996) 189 CLR 1.

[177] (1996) 189 CLR 151.

Denial of procedural fairness was not, of itself, sufficient to demonstrate the requisite incompatibility. Nor were the sections were bad on the grounds that they constituted instructions to the Tribunal (and therefore to any judge who was a member of the tribunal). While they limited the Tribunal's capacity to afford a fair hearing, the tribunal was nonetheless independent of the executive in that it was empowered to overturn both the assessment decision and the cancellation decision. While similar legislative provisions might be unconstitutional in relation to courts, 'greater latitude' is to be accorded judges acting in the capacity of personae designatae.

The Court's decision was partly influenced by the nature of the legislation:

> …the rules of procedural fairness had been specifically abrogated by the legislature, but for reasons that the legislature must clearly have regarded as compelling. The Security Appeals Division deals with matters of great importance and sensitivity. It should not be forgotten that the Attorney-General, as first law officer of the commonwealth, is charged with the vital task of protecting the community from the threat of terrorism, and that much of the information relevant to that task will be highly confidential. …
>
> [167] The solution adopted by Parliament represents a compromise. Like all compromises, it is imperfect. Reasonable minds may differ as to the desirability or otherwise of provisions such as ss 39A and 39B.
>
> [168] There is much to be said for having a judge exercise the vital task of reviewing ASIO assessments and decisions by the relevant Minister to refuse or cancel passports. The only alternative is to have the task performed by those who may not have the same level of experience or skill in evaluating evidence. Worse still, they may be beholden to the Government in some way while judges are secure in their tenure and remuneration.[178]

But in exercising its decision to refuse to order costs against the unsuccessful applicant, concluded that the decision to appeal was reasonable, the unfairness of the relevant decisions, and their serious impact being among the considerations taken into account.[179]

3.4 Control orders

The decision in *A* effectively forced the United Kingdom Parliament to devise an alternative to its detention of non-deportable terrorists regime. It was clear that measures aimed at possible terrorists had to be non-discriminatory, applying to citizens and non-citizens alike. They also had to be less intrusive than detention orders. The result was the introduction of 'control orders'. While Lord Bingham had suggested the concept, their introduction was controversial and the subject of long and bitter debate. Australia followed the British example. Canada did not, although its use of conditional bail for those who would otherwise be detained under immigration legislation detention is functionally similar, albeit applicable only to non-citizens.

In the United Kingdom, control orders may be derogating or non-derogating. The former, which may be made in response to an emergency, and may operate notwithstanding that their operation would otherwise be incompatible with the ECHR. The latter, which – to date – are the only orders to have been made,[180] are 'non-derogating' orders, which are subject to the ECHR. Urgent non-derogating orders may be made without the permission of the court, but must be referred to the High Court within 7 days.[181] Otherwise, the Secretary may make the

[178] *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128, [166]-[168].
[179] *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128, [183].
[180] See *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 2006 at [7] (stating that no derogating order had been made to date; there appear to have been none since.
[181] *Prevention of Terrorism Act 2005* (UK), s 3(1)(b).

order only with the permission of the court.[182] In either case, the court must decide whether the order is obviously flawed, in which case, the order must be quashed (if urgent) or not made (if permission is sought).[183] Otherwise it must confirm the order or grant permission.[184] The relevant hearing may be ex parte, and without notice, but on granting the order, the court must give directions for a timely inter partes hearing in relation to the order,[185] and at the hearing the court must once more consider whether the order and its conditions are flawed (as opposed to 'obviously flawed').[186] A decision is flawed if it would not survive judicial review.[187] There is provision for renewing, modifying, revoking, refusal to revoke and refusal to modify orders, and there is provision for appeals against these decisions, on the grounds that the decision or the conditions are flawed.[188] The Secretary is also under an ongoing obligation to consider whether the order and its conditions continue to be necessary, and a court which is considering the validity of a control order is therefore entitled to consider its validity on the basis of the facts as they exist at the time of its decision, rather than on the basis of those which existed when the decision was first made.[189]

Since the justification for control orders may depend on confidential information, courts are required to adopt a procedure similar to that which governs POAC and SIAC appeals. Some material must be considered in the absence of the person affected. A special advocate must be appointed to test such evidence, and ensure that, as far as possible, the gist of its content are communicated to the person affected.[190] In exceptional circumstances, it may not be possible to do this, and this entails an obvious danger to anyone who might be affected by an order. Nonetheless, the right to know the case against one is not an absolute right, and in exceptional circumstances, security interests may trump the right to be well-informed.[191] The *Prevention of Terrorism Act 2005* provides for the making of rules to govern control order cases, and rules have duly been made.[192]

A control order may be made only if the Secretary (a) has reasonable grounds for believing that the person has been or is involved in terrorism-related activity and (b) considers that the order is necessary to protect members of the public from a risk of terrorism. Satisfaction of the first condition requires that the facts relied on by the Secretary constitute reasonable grounds for the Secretary's suspicion. When reviewing the Secretary's decision, 'the court must make up its own mind as to whether there are reasonable grounds for the necessary suspicion'.[193] In doing so, the court is not obliged to act only on the basis of facts proven to a civil or, a fortiori, a criminal standard. Rather, it may involve

> Considering a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion. The court has to consider whether this matrix amounts to reasonable grounds for suspicion and this exercise differs from that

[182] *Prevention of Terrorism Act 2005* (UK), s 3(1)(a).
[183] *Prevention of Terrorism Act 2005* (UK), ss 3(2), 3(3)(b), 3(6)(a).
[184] *Prevention of Terrorism Act 2005* (UK), s 3(6)(b), (c).
[185] *Prevention of Terrorism Act 2005* (UK), s 3(2)(c), 4(5).
[186] *Prevention of Terrorism Act 2005* (UK), s 3(10).
[187] *Prevention of Terrorism Act 2005* (UK), s 3(11).
[188] *Prevention of Terrorism Act 2005* (UK), s 10.
[189] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 2006, [40]-[46].
[190] This has not always proved possible. In *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 2006, The special advocate had agreed with the Secretary's counsel that it would be impossible to serve a summary of the closed material that would not include information whose disclosure would be contrary to the public interest: see at [27].
[191] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 2006, [68]-[87], rev'd on other grounds: *Secretary f State for the Home Department v MB* [2007] UKHL 46.
[192] *Civil Procedure Rules* (UK) Part 76.
[193] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 2006, [58]

of deciding whether a fact has been established according to a specified standard of proof.[194]

Satisfaction of the second involves a value judgment, and in deciding whether the Secretary's decision is flawed, courts must afford the Secretary a degree of deference, given that '[t]he Secretary of State is better placed that the court to decide the measures that are necessary to protect the public against the activities of a terrorist suspect'.[195] Nonetheless, the court must strictly scrutinise each obligation placed on the controllee, and in the case of obligations that are 'particularly onerous or intrusive' 'the court should explore alternative means of achieving the same result'.[196]

Orders may be made by the Secretary of State for the Home Department, last for a period of up to 12 months, and are renewable. They may place the subject of target of the order under a variety of constraints which may include curfews, limits on place of residence and contacts, and the requirement to wear bracelets which will enable monitoring of their movements. indicate their movements.

Control orders have generated considerable litigation, and considerable inter-curial disagreement. In United Kingdom legislation, three questions have divided the courts. First, to what extent do control orders constitute an impermissible deprivation of liberty? Second, to what extent are the procedures governing the non-disclosure of confidential information incompatible with the *Human Rights Act* and the ECHR? Third, does the validity of a control order end if prosecution becomes a serious possibility, and if the Secretary fails to give consideration to this possibility?

In relation to the first question, trial courts and the Court of Appeal were generally of the view that the relevant orders constituted deprivation of liberty. Curfew periods of 14 hours were far too long, and, when considered in conjunction with other constraints on normal social relations, orders including 12 hour curfew periods in conjunction with other constraints, also constituted impermissible deprivation of liberty.[197] The House of Lords, citing Strasbourg jurisprudence, disagreed: these orders involved the restriction of liberty, not deprivation of liberty.[198] However, again following Strasbourg jurisprudence, it accepted that the terms of a control order might be so rigorous that it effectively deprived the controlee of liberty. An order imposing a curfew period of 18 hours was quashed on this ground in *Secretary of State for the Home Department v JJ*, but even in that case, Lords Hoffman and Carswell dissented, and Lord Brown indicated (at [105]) that a 16 hour curfew would be acceptable.[199]

On the fairness of the statutory procedure, the House of Lords has been more protective of human rights than the Court of Appeal. In *JJ v Secretary of State for the Home Office*, Sullivan J ruled that the statutory procedures were incompatible with the *Human Rights Act*. The Court of Appeal held that even if application of the procedures meant that the applicant was not entitled even to details of the gist of the Secretary's reasons for the order, this did not constitute an impermissible denial of fairness. In an appeal from this decision, the House of Lords split three ways.[200] Lord Bingham considered that the legislation was incompatible with the *Human Rights Act*. Lord Hoffman held that the legislation was consistent with the Act. Baroness Hale, Lord Carswell and Lord Brown ruled that on its face the legislation was incompatible with the Act, but that it could and should be read down so as to require disclosure of sufficient detail to enable controlees to know what kind of evidence they would need to produce if their case was to succeed. The decision means that control orders may not

[194] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 2006, [67].
[195] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 2006, [64].
[196] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; [2007] QB 2006, [65].
[197] *Secretary of State for the Home Department v E* [2006] EWHC 233 (Admin), PTA 5/2005
[198] *Secretary of State for the Home Department v E* [2007] UKHL 47.
[199] [2007] UKHL 45.
[200] *Secretary of State for the Home Department v JJ* [2007] UKHL 45.

be made if the only evidence to justify their making is such that not even its gist can be disclosed. Some probative evidence can be relied on by the court, notwithstanding that it is withheld from the controlee, but only if its gist is so effectively communicated that the controlees know the case they have to meet: 'unless, at a minimum, the Special Advocates are able to challenge the Secretary of State's grounds for suspicion on the basis of instructions from the controlled person which directly address their essential features, the controlled person will not receive the fair hearing to which he is entitled'.[201]

The third issue is of rather less significance, although it was crucial to the outcome in *E*, once the House of Lords had held that the relevant control order did not constitute a deprivation of liberty. In holding that there was an ongoing duty to consider the possibility of prosecution, Beatson J had relied partly on a statutory requirement that the Secretary consult about the likely success of a criminal prosecution prior to making an order, and partly on the Court of Appeal's conclusion that, once an order had been made, the Secretary was under an ongoing duty to consider whether it should continue.

In control order cases, courts have attached little weight to executive claims that it is in the national interest that evidence and information be kept confidential. In *MB*, Baroness Hale was not worried about the possibility that her decision could endanger national security, stating that '[t]here is ample evidence from elsewhere of a tendency to over-claim the need for secrecy in terrorism cases',[202] and later: 'When the court does not give the Secretary of State permission to withhold closed material, she has a choice. She may decide that, after all, it can safely be disclosed (experience elsewhere in the world has been that, if pushed, the authorities discover that more can be disclosed than they first thought possible).'[203]

Courts also closely scrutinise the evidence in order to assess whether the Secretary's suspicions can be justified. But if the Secretary can overcome the 'reasonable suspicion' hurdle, deference (albeit 'appropriate deference') must be paid to the Secretary of State's assessment of the need for an order and for an order of a particular kind.[204] In keeping with their statements of the relevant principles, courts have subjected control orders to very close scrutiny. Notwithstanding this, they have rarely found flaws in the Secretary's decision that there is a need for an order.[205]

While Australian law also makes provision for control orders,[206] the only sustained litigation in relation to such orders relates to their constitutionality. The first such order[207] was an interim order, which was the subject of a High Court appeal. *Thomas v Mowbray*[208] involved rather different issues to those canvassed in United Kingdom challenges based on the *Human Rights Act*. The objection to the legislation was not that it was invalid on the grounds that the procedures were unfair, but on separation of powers and federalism grounds. The separation of powers argument involved the claim that the orders involved the impermissible conferral of executive powers on the judiciary. The federalism argument was to the effect that if there was a power to enact the legislation, it lay with the states and not the Commonwealth. While the states had referred to the Commonwealth the power to pass counter-terrorism legislation, this legislation did not fall within the powers conferred. Both arguments failed.

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[201] *Secretary of State for the Home Department v AN* [2008] EWHC, [9], reaffirmed *Secretary of State for the Home Department v AH (proceedings under the Prevention of Terrorism Act 2005*) [2008] EWHC 1018 (Admin) (Mitting J).
[202] *Secretary of State for the Home Department v MB* [2007] UKHL 46, [66].
[203] *Secretary of State for the Home Department v MB* [2007] UKHL 46, [72].
[204] *Secretary of State for the Home Department v AH (proceedings under the Prevention of Terrorism Act 2005*) [2008] EWHC 1018 (Admin) (Mitting J), [27].
[205] *Secretary of State for the Home Department v E* [2006] EWHC 233 (Admin), PTA 5/2005; *Secretary of State for the Home Department v AH (proceedings under the Prevention of Terrorism Act 2005*) [2008] EWHC 1018.
[206] *Criminal Code* (Cth), Div 104.
[207] *Jabbour v Thomas* [2006] FMCA 1286.
[208] [2007] HCA 33.

The only other control order, involving the former Guantanamo Bay detainee, David Hicks, was not contested.[209] Both orders were far less intrusive than their British counterparts.

4 Conclusions

Legislatures have no choice but to permit judicial review of counter-terrorism decisions. In the United States, Canada and Australia, constitutions demand it, and in the United Kingdom, the ECHR performs a similar role. Politics would probably demand it in any case, although not to the same degree and not with the same degree of enthusiasm. However the form taken by judicial review reflects both a legislative and curial assessment that security considerations must carry particular weight, even if this involves some costs to liberty interests.

This is reflected in legislation which often attenuates judicial review rights. It does so in several ways. First, in conferring powers which can be exercised on the basis of belief and, a fortiori, suspicion, legislatures complicate the task of people seeking to review the relevant decisions. A degree of curial deference to the executive is demanded (albeit with appropriate subtlety). Such powers are, of course, familiar ones, but their consequences in the counter-terror area may be particularly costly to liberty interests. Second, procedural fairness rights in relation to the decision are sometimes limited expressly or by necessary implication. Third, special regimes are established to deal with the use of confidential information in certain kinds of security cases. Fourth, statutory standing rules may make it difficult for those who most want to challenge particular decisions to do so. However, while review rights are attenuated, legislation often includes provisions aimed at heightening political controls, and creating arrangements designed to minimise their adverse effects.

The effectiveness of such legislation is heavily dependent on courts being willing to treat it as not falling foul of constitutional and quasi-constitutional limits. (It goes without saying that legislation will be drafted with a view to minimising the danger of this eventuality.) This depends partly on the nature of the limits, and partly on the way in which they are interpreted. In the United States, Canada and the United Kingdom, due process is constitutionally required at both the decision-making and, of course, the curial level, at least in cases involving liberty interests. In Australia, it is demanded only at the curial level, although there is very strong presumption, albeit one which is rebuttable that it also apply at the decision-making level.

Substantive constitutional and quasi-constitutional protections of liberty also vary. The ECHR provides extensive protections to immigrants (whether resident or non-resident) than do the United States, Canadian and, especially the Australian constitutions.

The nature of constitutional limits is, of course, only partly dependent on the wording of the constitutions, especially where balancing is involved, as it is in this area. On the whole, courts have accepted that legislatures may limit the effective scope of judicial review in terrorism cases. However, legislative debates about where the balance should be drawn are reflected in judicial differences of opinion, Courts in the United States, the United Kingdom and Canada have all found that some counter-terrorism legislation has gone too far. Typically, such cases have involved dissents. Conversely, cases where the constitutionality of relevant measures has been upheld, there have often been minorities who have disagreed.

Consistent with this pattern has been widespread, but qualified, judicial endorsement of the need for deference in relation to the evaluation of executive decisions. Such statements should sometimes be read carefully, and in their legal context: after all, the logic of administrative law (although, not necessarily constitutional law) is that, while subject to law, repositories of discretion must enjoy some freedom in relation to the exercise of that discretion. Deference sometimes seems to mean accepting the logic of institutional separation of powers; sometimes it seems to mean recognition that there are things that some arms of government can do better

[209] *Jabbour v Hicks* [2008] FMCA 178 (confirmation); *Jabbour v Hicks* [2007] FMCA 213 (interim).

than others. Sometimes it may be express; sometimes implicit. Sometimes express deference may coexist with evident scepticism. Deference is heavily contingent on context.

Deference seems strongest in the United States, and weakest in the United Kingdom, although in each jurisdiction, one can find exceptions to this generalisation. At its weakest, it is reflected in cynicism about executive claims. Lord Hoffman's judgment in *A* comes close to treating the Blair government as more dangerous than Al-Qaeda. The circumstances leading up to British involvement in the Iraq war have been cited by British judges as grounds for not always taking executive claims too seriously; British, Canadian and Australian judges have noted that when allegedly confidential information is eventually disclosed, it invariably turns out to be harmless. Memories of past repression which has turned out to be unwarranted inform some judicial opinions.[210]

Some of these observations are tactless, and an invitation to legislators and administrators to retaliate in kind. Arguably too, judges may be apt to focus unduly on the self-evident plight of the applicant, while not being as sensitive to less visible and less immediately salient collective interests. But even if one takes a moderately sympathetic attitude to counter-terror legislation, it is hard to find examples of decisions which could be said to have impeded a government's capacity to combat terrorists. Indeed decisions which have gone against the government often seem to have been decisions where the judicial insistence on a basic level of evidence and rationality has meant the correction of patently flawed administrative decisions. When one reads the SOAC's *PMOI* decision, one cannot but wonder how many other decisions are based on the assumption once a terrorist, always a terrorist. Discovery cases suggest that governments' natural desire to keep security information secret leads to over-protection of documents. These cases are salutary. They evidence cases where it is impossible to see how the measure could contribute to national security, but where it clearly involves a cost to liberty. They put governments on notice that little brother is watching them. They are a reminder to governments that deference is a form of moral capital which can be dissipated.

[210] See eg *Chakaoui v Canada (Citizenship and Immigration)* [2007] SCJ No 9, [26] (citing the recent case of Mr Arar, a Canadian citizen, who had been detained in the United States in reliance on unfounded reports from the RCMP) and deported to Syria where he had been tortured and detained for almost a year).