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THE TREATMENT OF CLASSIFIED INFORMATION
BEFORE THE EUROPEAN COURT OF JUSTICE

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*Al professore Antonino Ali, che mi ha seguito passo dopo
passo;
alla mia famiglia, che ha reso possibile tutto ciò che ho fatto;
ai miei amici, che non hanno mai dubitato;
a Edoardo, che ha reso la fatica più dolce.*

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INTRODUCTION

“There is reason to think that as a general matter in times of crisis, we will overestimate our security needs and discount the value of liberty”.¹

In the post 9/11 context of global terrorism and global counter-terrorism, the question of secrecy, usually grounded in national security-related concerns, has become one of the most interesting legal issues.² Today, counterterrorism is characterized by an extensive and ever-increasing reliance on classified intelligence information in order to grant an effective response to an increasingly sophisticated form of transnational terrorism.³ While it may be argued that an effective counterterrorism response may require a certain degree of secrecy,⁴ the use of classified information as grounds for imposing severe legal consequences on individuals or entities, with the preservation of its inherent secrecy, has raised numerous constitutional concerns. When targets started to challenge these measures in courts, the thorny issue of balancing (inter)national security concerns and due process rights inevitably surfaced.⁵ The increased involvement of intelligence services in the policing of terrorism prevention entails that in judicial proceedings, most governments employ confidential information taken from intelligence agencies without fully disclosing this information to the persons concerned.⁶ This has paved the way for the admission of secret information as evidence in court,⁷ which while protecting the confidentiality of intelligence information from security-threatening disclosure, notably reduces the defense rights of the person concerned.⁸ Secret evidence is deemed to be inherently unfair, unreliable, undemocratic and liable to undermine the same value it strives to protect- national security. Secrecy claims have sparked tension within the European Union framework, between the highest levels of the Executive and judicial authorities, culminating in trials at European Union Courts and inspiring the development of a set of supranational legal standards.⁹ A comparative analysis of the methods deployed by different Member States in dealing with classified material in judicial proceedings will then be necessary in order to evaluate whether their regimes are compliant with the standards set out at the EU level. Specific focus shall be placed on two

¹ David Cole, “Enemy Aliens”, (2002) 54 *Stan.L.Rev.*, p.955

² Martin Scheinin, “Foreword” in *Secrecy, National Security and the Vindication of Constitutional Law*, (Cheltenham; Northampton: Edward Elgar Publishing: 2013), p.ix

³ See Scheinin, *supra* note 2, p.ix

⁴ See Scheinin, *supra* note 2, p.ix

⁵ Gavin Sullivan, “Secret Justice inside the EU courts”, (2014) available at <http://www.aljazeera.com/INDEPTH/OPINION/2014/04/SECRET-JUSTICE-INSIDE-EU-COURT-2014417143255779945.HTML>

⁶ Craig Forcese and Lorne Waldman, “Seeking Justice in an Unfair Process. Lessons from Canada, the United Kingdom, and New Zealand on the Use of ‘Special Advocates’ in National Security Proceedings”, August 2007, University of Ottawa, Faculty of Law (Common Law Section), p.5

⁷ The so-called ‘secret evidence’

⁸ Policy Department, “National security and secret evidence in legislation and before the courts: exploring the challenges”, Study for the LIBE Committee, (2014), p.12

⁹ See Policy Department, *supra* note 8, p.58

opposite regimes for dealing with confidential information in courts. The UK system, where a specific mechanism has been devised, enabling the formal use of secret information as evidence in civil courts, and the Italian system, where neither legislation nor judicial practices dealing with national security cases recognize the probative value of secret information.¹⁰ From this comparative analysis, it will appear on the one hand that in Italy, where the only court with access to documents covered by the State secret privilege is the Constitutional Court, the balance scale too often tilts towards the interests of public security, without the establishment of proper counterbalancing mechanisms to prevent abuses of secrecy by the Executive branch. On the other hand, as it currently stands, the United Kingdom system, where sensitive intelligence material is systematically discussed in closed hearings, is rife with shortcomings when safeguards aimed at avoiding security – threatening leaks of information are examined in the light of the most basic standards of procedural fairness. Thus, it will be interesting to analyze how two regimes (the UK and Italy), which have adopted opposite approaches to the treatment of confidential information in courts, sit uneasily with the rule of law standards elaborated at the EU level. Nonetheless, it should be possible to build up a fully developed procedural system for handling secret evidence whilst safeguarding procedural fairness, through the combination of the emerging EU security jurisprudence and some positive aspects of the UK national experience.

¹⁰ See Policy Department, *supra* note 8, p.20

Chapter I: COUNTERTERRORISM MEASURES: NATIONAL SECURITY V. PROCEDURAL FAIRNESS

1. The growth of administrative counterterrorism measures

The fight against terrorism is characterized by a widespread increase in the use of administrative measures.¹¹ Some new measures have been designed specifically for the purpose of countering terrorism, such as asset freezing and travel bans.¹² Other traditional administrative measures have also been used to contribute to the fight against terrorism, such as the rejection of the application for residence permits or citizenship by the competent agency when the applicant is deemed to represent a threat to national security. Further examples of administrative measures used as tools to counter terrorism are represented by control order proceedings and different forms of administrative detentions.¹³

Unlike criminal measures, administrative measures, which rapidly became a cornerstone in countering terrorism both at a national, regional and global level, are mainly proactive and preventive in nature rather than repressive. They target the facilitating factors usually exploited by terrorist groups in order to limit the opportunities for terrorists to carry out their activities thus reducing incentives for them.¹⁴ For instance, freezing of assets aims to deny “listed individuals, groups, undertakings and entities the means to support terrorism” and ensures “that no funds, financial assets or economic resources of any kind are available to them for so long as they remain subject to the sanctions measures”.¹⁵

There are several inherent characteristics which explain why administrative measures have been favored as a tool for preventing and countering terrorism. First of all, administrative measures can be deployed at a much earlier stage than is allowed within any criminal justice system. In fact, these measures can be adopted without initiating court proceedings, nor is there a need for accusation of a criminal nature:¹⁶ “only a few propensity for terrorism, or that there may be links to suspected terrorist groups or individual terrorists, can be sufficient to justify the adoption of an administrative measure,

¹¹ Federico Fabbrini, “Global sanctions, state secrets and supranational review: seeking due process in an interconnected world” in *Secrecy, National Security and the Vindication of Constitutional Law*, (Cheltenham; Northampton: Edward Elgar Publishing: 2013), p.284

¹² UN Security Council Resolution 1267 (1999), S/RES/ 1267, clause 14(b) created the so-called targeted, or smart sanctions which only target specific individuals or organizations.

¹³ Tuomas Ojanen, “Administrative counter – terrorism measures – a strategy to circumvent human rights in the fight against terrorism?” in *Secrecy, National Security and the Vindication of Constitutional Law*, (Cheltenham; Northampton: Edward Elgar Publishing: 2013), p. 250

¹⁴ See Ojanen, *supra* note 13, p.251

¹⁵ Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, ASSETS FREEZE: EXPLANATION OF TERMS (Updated in Oct 2011 and approved by the Committee on 30 December 2011), paragraph 4, 14 June 2012

¹⁶ See Ojanen, *supra* note 13, p.252

such as putting individuals or groups on a blacklist and having their assets frozen”.¹⁷

Second of all, the standard of proof for concluding that someone represents a threat to the public security for the purpose of issuing restrictive administrative measures is often lower than the standard applying to criminal trials for finding someone responsible for a criminal offense.¹⁸ The different evidentiary rules that apply to administrative proceedings permit the submission of types of evidence which in criminal trials would largely be regarded as inadmissible:¹⁹ lesser evidence compared to criminal convictions can be relied upon when issuing an administrative measure.²⁰

In addition, some founding principles on which the whole criminal system is built are often not valued with the same importance within administrative proceedings. The presumption of innocence, for example, usually does not represent an obstacle to the application of these restrictive measures²¹ and only a ‘lighter’ version of the principle of equality of arms applies to administrative procedures, where the procedural setting of an individual versus public authority implies an inherent asymmetry between the parties.²²

Finally, the judicial review often suffers from some important restrictions: on the one hand, judicial oversight usually only comes into play once the measure has already been adopted, on the other, courts have often no power to replace the contested administrative measure but can only quash or annul it.²³ Moreover, some dimensions of the measures may be left immune to judicial scrutiny so that great discretion is left to the administrative authorities as to what should be taken into account during the administrative decision – making process preceding the adoption of the measure.²⁴

1.1. The blurring of the distinction between administrative and criminal sanctions

The use of these measures in countering terrorism has gradually blurred the traditional distinction between measures governed by administrative law and criminal sanctions.²⁵ In fact, although administrative measures are said to be preventive in nature rather than punitive, their effects may have very severe impacts on the liberty of those targeted and their family members.²⁶ Restrictions on both private and professional life deriving from asset freezing and travel bans as well as the privation of liberty in the event of administrative detention are surely no less intrusive than criminal sanctions.²⁷

¹⁷ See Ojanen, *supra* note 13, p.252

¹⁸ Valentina Azarov and Franz Christian Ebert, “All done and dusted? Reflections on the EU standard of judicial protection against UN blacklisting after the ECJ’s *Kadi* Decision”, (2009) 5(1) *Hanse L.Rev.*, p.111

¹⁹ See Ojanen, *supra* note 13, p.256

²⁰ See Ojanen, *supra* note 13, p.252

²¹ See Ojanen, *supra* note 13, p.252 - 253

²² See Ojanen, *supra* note 13, p.253

²³ See Ojanen, *supra* note 13, p.253

²⁴ See Ojanen, *supra* note 13, p.253

²⁵ See Ojanen, *supra* note 13, p.254

²⁶ See Ojanen, *supra* note 13, p.254

²⁷ See Azarov and Ebert, *supra* note 18, p.107

As a result, targeted people often suffer from the effects of nominally administrative measures which bear great resemblance to criminal sanctions without however enjoying the full range of fair trial rights usually made available to criminal defendants:²⁸ administrative “sanctions offered national executives a powerful (...) tool for disrupting the lives of terrorist suspects without due process constraints”.²⁹ Severe concerns relating to the lack of the necessary procedural protection were bound to emerge in the nexus of these administrative measures.³⁰

Many governments, in the name of national and international security, have resorted to the administrative approach profiting of the leeway that it grants for unilaterally justifying exceptions to fundamental human rights without the necessity to meet the same demanding procedural fairness standards required in criminal trials.³¹

2.The importance of intelligence information in fighting terrorism and the need for secrecy

2.1.National security as the main rationale for classifying information

In the aftermath of 9/11, most governments reinforced official justifications for a greater involvement of their intelligence services in fighting terrorism.³² The security-threat represented by terrorism is certainly not new and neither is the constant attempt to protect national security without sacrificing other competing fundamental constitutional values.³³ After 2001, however, it became increasingly urgent to repress these threats and, consequently, to resort to intelligence information as a means to prevent another 9/11.³⁴

Intelligence is a secret information gathered by intelligence agencies³⁵ and then supplied to policymakers and administrative authorities in order to provide them with the necessary assistance when taking measures in the name of national security.³⁶ Intelligence information usually relates to individuals or

²⁸ See Ojanen, *supra* note 13, p.255

²⁹ See Sullivan, *supra* note 5

³⁰ See Ojanen, *supra* note 13, p.256

³¹ See Ojanen, *supra* note 13, p.257

³² See Policy Department, *supra* note 8, p.12

³³ Roberto Bin, “Democrazia e Terrorismo”, (2007) *Forum dei Quaderni Costituzionali*, available at:

http://www.forumcostituzionale.it/wordpress/images/stories/pdf/nuovi%20pdf/Paper/0027_bin.pdf
f_p.1

³⁴ Gus Van Harten, “Weaknesses of adjudication in the face of secret evidence”, (2009) 13 I.J.E.P., p.4. See also Lech Garlicki, “Concluding remarks” in *Secrecy, National Security and the Vindication of Constitutional Law*, (Cheltenham; Northampton: Edward Elgar Publishing: 2013), p. 328: “ In brief, the necessities of the ‘war on terror’ encourage the creation of a parallel ‘secret state’ that gathers its own secret information, is ruled by its own secret regulation, and uses its own secret procedures and institutions. In consequence, secrecy takes a new dimension; we are not even supposed to know what is going on and we can only feel that ‘something’ is encroaching upon fundamental rights of some, or most, of us”.

³⁵ See Policy Department, *supra* note 8, p.17

³⁶ See Ojanen, *supra* note 13, p.257

entities deemed to be potential perpetrators of national security-threatening acts.³⁷

As explained by the UK Government in its Justice and Security Green paper (2011)³⁸ “in every democracy, security and intelligence agencies play a central role in safeguarding (...) safety and stability. We owe an enormous debt of gratitude to these brave men and women who work tirelessly to protect us, particularly in response to the increased security challenges that this country has faced in the years following the attacks of 11 September 2001. They are a vital part of our nations’ security and they must be a source of great national pride”.³⁹

National security is thus the traditional rationale for classifying information. Secret information “can be used to prevent terrorist attack, disrupt serious crime networks and to inform decisions such as deportations and asset freezing”,⁴⁰ and it “allows the government to disrupt individuals, networks and events that pose a threat to national security and the economic well-being of the country”.⁴¹

Sovereign States have always enjoyed a wide margin of discretion in determining what is in the best interest for the State. However, from a comparative investigation it emerges that profound legal uncertainties surround the concept of national security in the majority of the States, where only nebulous definitions can be found.⁴² With regard to the European Union framework, the few definitional features that can be found across the legal regimes and doctrinal practices of the States of Union certainly fail to meet the legal certainty and rule of law standards. As a result, national Executives are too often left with a nearly unfettered margin of appreciation in the determination of what represents a threat to national security.⁴³

In the United Kingdom for instance, in *SSHD v. Rehman*,⁴⁴ on the one hand the House of Lords defined national security as the “security of the United Kingdom and its people”,⁴⁵ which includes military defense, protection of democracy and of “the legal and constitutional systems of the State” as well as actions against another State.⁴⁶ On the other hand, it added that “decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the Executive”.⁴⁷

Likewise, within the Italian legislative framework, mention is made of the “security of the Republic” under Law 124/2007⁴⁸ which, in disciplining the State secret status of certain information, refers to the “integrity of the Republic, including in relation to international agreements, the defense of its underlying

³⁷ See Ojanen, *supra* note 13, p.249

³⁸ HM Government, “Justice and Security”, Green Paper, October 2011 [hereinafter Green Paper]

³⁹ See Green Paper, *supra* note 38, p.vii

⁴⁰ See Green Paper, *supra* note 38, p.xi

⁴¹ See Green Paper, *supra* note 38, p.3

⁴² See Policy Department, *supra* note 8, p.7

⁴³ Policy Department, *supra* note 8, p.7 - 8

⁴⁴ *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153

⁴⁵ *Ibid.* para.50

⁴⁶ *Ibid.* para.16

⁴⁷ *Ibid.* para.50

⁴⁸ Law 124/2007, ‘Intelligence System for the Security of the Republic and new Provisions governing secrecy’

institutions established by the Constitution, the State's independence vis à vis other States and its relations with them, as well as its military preparation and defense".⁴⁹ At the same time however, the Italian Constitutional Court left to the Executive branch a broad, or rather unfettered, power to determine at its discretion which measures should be taken to protect national security.⁵⁰ This choice is "a political one- belonging as such to the Executive branch and not to the ordinary judiciary".⁵¹

The nebulosity of this concept often led national authorities as well as European institutions to invoke the principle of national security as a trump card not only to legitimize unlawful restrictions on fundamental human rights but also to limit the judicial oversight (as well as the democratic oversight by the national parliaments) of their own wrongdoing and of those of their intelligence services.⁵²

2.2.The inherent secrecy of intelligence information

While some aspects of intelligence may be accessible to the person targeted by the intelligence activities as well as to the public more broadly, the essence of intelligence information is traditionally protected by a veil of secrecy:⁵³ sensitive information "must be protected appropriately, as failure to do so may compromise investigations, endangers lives and ultimately diminish" the State's ability "to keep the country safe".⁵⁴

Secrecy reflects the need to protect the sources of information, including the identities of undercover agents, and the methods of intelligence gathering (such as methods of interception or details and locations of technical facilities used for observation or for intercepting communications) from disclosure which may undermine the continued collection of intelligence.⁵⁵

If "a hostile individual or group – for example a foreign intelligence service or terrorist group – were to become aware that they were the subject of interest to the Agencies, they could not only take steps to thwart any (covert) investigation or operation but also attempt to discover, and perhaps reveal

⁴⁹ Article 39(1) Law 124/2007

⁵⁰ Constitutional Court, Judgment 106/2009, 11 March 2009 at para.3

⁵¹ Ibid. para.3

⁵² See Policy Department, *supra* note 8, p.72

⁵³ See Ojanen, *supra* note 13, p.258. Security service members are often tasked with performing actions which cannot be disclosed. On this ground, for a long time it has not been accepted that they could be subject to judicial prosecution for their wrongdoings. A strong culture of secrecy and a deep sense of loyalty is also traditionally shared among intelligence agency members.

⁵⁴ See Green Paper, *supra* note 38, p.xi

⁵⁵ See Ojanen, *supra* note 13, p.258; See also C-27/09 *French Republic v People's Mojahedin Organization of Iran*, Opinion of Advocate General Sharpston of 14 July 2011 [hereinafter Sharpston Opinion], para. 228: "Those involved in monitoring and pursuing terrorist activities, particularly those operating on the ground, may be exposed to personal danger in the form of torture or even death, should information be disclosed that may give a clue as to their activities or identities. As a rule, therefore, Member States will legitimately wish to insist that effective restrictions on divulging material that may lead (directly, indirectly or accidentally) to the identification of sources or unmasking of particular surveillance techniques must be maintained".

publicly, the methods or techniques used or the identities of the officers or agents involved". This would obviously compromise not only the individual investigation in question but potentially also any other future operation, as well as the safety of the informants.⁵⁶ "Conversely, if a hostile individual or group were to become aware that they were not the subject of Agency interest, they would then know that they could engage or continue to engage in their activities with increased vigor and increased confidence that they will not be detected".⁵⁷

In addition, non-disclosure often derives from the necessity to maintain international relations in particular with regard to the increasingly tight international cooperation in information-sharing. In a context where the threat posed by terrorism has gained a transnational dimension, there has been an increasing expansion of intelligence cooperation among States as a means to strengthen the counterterrorism response.⁵⁸

In this framework of extensive international exchange of information between intelligence agencies of different countries, important questions of mutual secrecy arise when States come to international security agreements setting up a system of mutual respect for the intelligence information shared.⁵⁹ Under the so-called 'third party' rule intelligence information originated from the intelligence activities of a foreign country cannot be disclosed without the consent of the agency that provided the information in question.⁶⁰ This phenomenon, which led to a multiplication of government secrecy, is known as 'ORCON creep', acronym for 'originator control'.⁶¹ The ability of governments, as well as of international organizations, such as the United Nations, and of regional organizations, such as the European Union, to engage in these forms of cooperation with other States relies entirely on their partners' confidence that the information they decide to share with them will not be divulged.⁶²

3. The reliance on intelligence information as grounds for restrictive measures

In the aftermath of 9/11 no one could reasonably contest that secret services play a fundamental role in securing the country against transnational threats. However, specific constitutional concerns have emerged from the fact

⁵⁶ See Green Paper, *supra* note 38, p.50

⁵⁷ See Green Paper, *supra* note 38, p.50

⁵⁸ See Policy Department, *supra* note 8, p.8. However, this international cooperation is asymmetrical due to the prominent role played by US intelligence agencies.

⁵⁹ See Policy Department, *supra* note 8, p.20. As discussed below, in the United Kingdom, the adoption of the Justice and Security Act (2013) extending the use of closed material procedures in any civil proceedings was mainly driven by the necessity to secure intelligence information provided by foreign allies, in particular the United States, from being disclosed before the courts.

⁶⁰ See Ojanen, *supra* note 13, p.258

⁶¹ Deirdre M. Curtin, "Top Secret Europe", (2011) Inaugural lecture on appointment to the chair of Professor of European Law at the University of Amsterdam, available at: <http://dare.uva.nl/document/2/103309>, p.18. Traditionally, governments tend to make the sharing of sensitive information conditional upon the application of the 'third party' rule. This rule enables the originator government, institution or agency to retain control over the disclosure of the information or over its declassification or reclassification.

⁶² See Green Paper, *supra* note 38, p.50

that restrictive administrative measures are often adopted on the basis of intelligence information obtained by intelligence agencies. Thus, it is often intelligence information that provides the decisive basis for determining whether in relation to specific individuals or groups there are sufficient reasons for having their assets frozen, for putting them on the blacklist or for refusing to grant them the requested residence permit or citizenship.⁶³

However, due to its secrecy, the extensive reliance (or maybe over – reliance), both at a national and international level, on intelligence information as grounds for restrictive measures poses a special legal challenge to the rights of the defense of those affected. It is quite a typical situation that neither the persons concerned nor their lawyers are informed of the security-sensitive information underpinning the restrictive measure although that information may have played a decisive role in imposing the measure.⁶⁴

In addition, in line with the ‘originator control’ principle, when it comes to UN Security Council’s listing decisions, the UN Security Council itself may not ever have full access to the confidential information if the State seeking the listing wishes to retain control over it.⁶⁵ “In other words, the practice of listing individuals by the UN may be serially taking place on the basis of secret and undisclosed intelligence”.⁶⁶ This entails that when the European Union implements UN measures into its own legal order, it often does so without being in full possession of the underlying information against the individual or entity concerned.⁶⁷

3.1. The blurring of the distinction between intelligence and evidence

The reliance on intelligence information as ground for restrictive measures facilitated at all levels of governance a general trend of not revealing the sources that in judicial proceedings allegedly prove that the person targeted by the contested measure represents a real threat to national security and to the safety of others.⁶⁸ As a means to prosecute terrorism offenses by putting forward the necessary evidence whilst preserving its confidentiality,⁶⁹ governments started to resort to the use of intelligence information as secret evidence in support of the contested measures.⁷⁰ Secret evidence is the material that is produced by one party and that is used by the court to determine certain issues at stake in a case but which is not disclosed to neither the opposing party nor his/her lawyer.⁷¹ As one of the many fall-outs from 9/11, intelligence has therefore been endowed with new evidential significance and

⁶³ See Ojanen, *supra* note 13, p.257

⁶⁴ See Ojanen, *supra* note 13, p.258

⁶⁵ Deirdre M. Curtin, “Top Secret Intelligence in Europe: A Tipping Point in Luxembourg?”, 21 October 2012, available at <http://acelg.blogactive.eu/2012/10/21/top-secret-intelligence-in-europe-a-tipping-point-in-luxembourg/>

⁶⁶ See Curtin, *supra* note 65

⁶⁷ See Curtin, *supra* note 65

⁶⁸ See Policy Department, *supra* note 8, p.12

⁶⁹ JUSTICE, « Secret Evidence », June 2009, available at <http://www.statewatch.org/news/2009/jun/uk-justice-secret-evidence-report.pdf>, p. 236

⁷⁰ See Policy Department, *supra* note 8, p.12

⁷¹ See JUSTICE, *supra* note 69, p.9

the traditional distinction between intelligence and evidence has started to blur.⁷²

One important implication of this blurring distinction is represented by the slow convergence between the work of regular police forces and the work of intelligence agencies⁷³ as, in terrorism investigations, intelligence agencies are increasingly tasked with duties which require officials to engage in police-like activities.⁷⁴

However, from an operational point of view, the activities carried out by the police forces and by the secret services respectively should not be confused. Secrecy is the principle guiding intelligence services in gathering useful information “for the safeguarding of the independence and the integrity of the State externally and for the protection of the State and its democratic institutions internally”.⁷⁵ Publicity is the principle guiding police forces in exercising their general power of prevention and their competence in enforcing security measures.⁷⁶ In acquiring useful information aimed at facilitating the management of national security, secret services should thus carry out an activity preparatory to the work of the other security agencies.⁷⁷

The convergence between intelligence and evidence and consequently between the activities of the intelligence services and those of regular police forces cannot be without difficulties.⁷⁸ In the light of the crucial importance of the reliability of information used in courts for the impact it has on the outcome of a trial, the resort to sensitive information in judicial proceedings raised several concerns with respect to the quality of intelligence information as evidence.⁷⁹

These concerns derive from the fact that the methods of intelligence collection do not follow the same evidentiary standards that govern the police investigation in the collection of evidence for criminal proceedings.⁸⁰ The priority for intelligence services is the prevention or disruption of terrorist activities rather than the collection of evidence in the view of subjecting the targeted persons to criminal prosecution:⁸¹ intelligence focuses on “threats, risk, associations and suspicion”, while evidence under a criminal law mindset focuses on “acts, accomplices and guilt”.⁸²

On the one hand, the evidence paradigm rests on the adversarial criminal justice model which is based on the need to prove a guilty act in a public trial in which the State is required to produce all the relevant evidence, including

⁷² Kent Roach, “The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations”, (2010) available at: https://www.researchgate.net/publication/228192313_The_Eroding_Distinction_between_Intelligence_and_Evidence_in_Terrorism_Investigations, p.1

⁷³ See Roach, *supra* note 72, p.2

⁷⁴ Tommaso F. Giupponi and Federico Fabbrini, “Intelligence agencies and the State secret privilege: the Italian experience”, (2010) 4(3) *Int'l J. Constit. L.*, pp.445-446

⁷⁵ See Fabbrini and Giupponi, *supra* note 74, p. 444

⁷⁶ See Fabbrini and Giupponi, *supra* note 74, p.445

⁷⁷ See Fabbrini and Giupponi, *supra* note 74, p.446

⁷⁸ See Roach, *supra* note 72, p.2

⁷⁹ See Policy Department, *supra* note 8, p.15

⁸⁰ See Ojanen, *supra* note 13, p.259

⁸¹ Nik de Boer, “Secret evidence and due process rights under EU law: ZZ”, (2014) 51 *C.M.L. Rev.*, p.1246

⁸² See Roach, *supra* note 72, p.2

evidence which may favor the accused. Under this model, the manner in which the evidence has been gathered is also relevant to its admissibility: there are rules excluding the possibility to resort to hearsay evidence, bad character evidence and improperly obtained evidence. All evidence presented has to be subject to adversarial cross-examination and must be measured against demanding standards of proof.⁸³

On the other hand, intelligence paradigm is based on the work of the intelligence services whose aim is to identify security risks and suspect acts rather than guilty minds. In order to protect the sources of information and the methods of intelligence gathering, intelligence is not subject to the external check of adversarial cross-examination so that knowing how the information has been collected may result impossible.⁸⁴

Moreover, the increasing information sharing trend between foreign countries makes it even harder to assess the accuracy and the lawfulness of the information when its origin has to be traced back to the work of foreign intelligence agencies.⁸⁵ In this context, the risk that evidence is obtained by means of unlawful practices, including torture or other grave forms of ill-treatment, has increased:⁸⁶ “information that originates in a dark torture cell in one part of the world can instantly be transmitted and cause secrecy-based legal and political problems in Washington and London”.⁸⁷

As a result, “intelligence material may contain second – or third-hand hearsay, information from unidentified informants, information received from foreign intelligence liaisons, data-mining and intercepted communications, not to mention hypotheses, predictions and conjecture of the intelligence services themselves”.⁸⁸

In addition, unlike the police forces who have a mandate to collect both incriminating and exculpatory evidence, intelligence services are bound to collect information only about security risks.⁸⁹ The poor quality of secret evidence has so allowed that suspicion alone is enough to justify loss of liberty, loss of income, loss of one’s home and so forth.⁹⁰

⁸³ See Roach, *supra* note 72, p.5

⁸⁴ See Roach, *supra* note 72, p.5. With this regard, Kent Roach adds that the information processing practices adopted by the intelligence agencies “may be more similar to those used by the media which routinely relies on hearsay, sources of unknown reliability, evidence of past bad character and bad acts and opinions from who may not be qualified as experts than the practices of courts subject to the rules of evidence”.

⁸⁵ See Policy Department, *supra* note 8, p.8

⁸⁶ See Ojanen, *supra* note 13, p.259

⁸⁷ Kent Roach, “Managing secrecy and its migration in a post – 9/11 world”, in *Secrecy, National Security and the Vindication of Constitutional law*, (Cheltenham; Northampton: Edward Elgar Publishing: 2013), p.116

⁸⁸ See JUSTICE, *supra* note 69, p.217

⁸⁹ See Roach, *supra* note 72, p.5

⁹⁰ See JUSTICE, *supra* note 69, p.221

3.2. Secret evidence is unreliable, liable to weaken national security, undemocratic, unnecessary and inherently unfair

In the light of the considerations made above, serious doubts about the reliability of intelligence evidence were bound to emerge:⁹¹ “intelligence is ‘patchy’ and ‘circumstantial’ information about perhaps remote risks to national security. It can be contrasted with hard evidence that can withstand adversarial challenge in court”.⁹² Indeed, while the adversarial testing represents one of the most effective ways to test the reliability and accuracy of the evidence adduced, when secret evidence is presented, not all the parties involved will be given the opportunity to challenge it in the substance.⁹³ In fact, it is a rational conclusion that the evidence which has been tested by both parties is more likely to lead to an accurate resolution of the case than a one-sided account: “no better instrument has been devised for arriving at truth than to give the person in jeopardy of serious loss notice of the case against him and the opportunity to meet it”.⁹⁴ Until both parties are allowed to put forward their side of the case, it will be impossible to assess the credibility of the evidence in the round.⁹⁵

Moreover, while the most common justification for the recourse to secret evidence by the Executives is the protection of national security, it may be said that the use of secret evidence in judicial proceedings also weakens security. In fact, procedures which involve the use of secret evidence that has not been properly tested are more likely to be erroneous and therefore to lead to inaccurate conclusions.⁹⁶ This endangers security in two ways. Firstly, by punishing those who are actually not involved in terrorist activities, inaccurate conclusions breed a sense of resentment in innocents and the community from which they come. Secondly, they allow those guilty to escape conviction.⁹⁷

In addition, the use of secret evidence raises severe democratic concerns.⁹⁸ Traditionally, judicial proceedings are also a way to inform the public about the government’s actions. Secrecy instead, “prevents the public from being informed about government policies, from subjecting these policies to public debate, and from holding the government accountable”.⁹⁹ The defendant’s interest in disclosure is, in fact, coupled with the broader public interest in holding the government accountable for its decisions against

⁹¹ See Roach, *supra* note 72, p.5

⁹² See Roach, *supra* note 72, p.1

⁹³ See de Boer, *supra* note 81, p.1246

⁹⁴ *Joint Anti-Facist Refugee Committee v McGrath* 341 US 123 (1951) 171 - 2

⁹⁵ See JUSTICE, *supra* note 69, p.218

⁹⁶ See de Boer, *supra* note 81, p.1248

⁹⁷ See JUSTICE, *supra* note 69, p.226

⁹⁸ Geoffrey Stone and William Marshall, “Secrecy, the Enemy of Democracy”, *The Chicago Tribune*, 17 December 2006, available at: http://articles.chicagotribune.com/2006-12-17/news/0612170458_1_secretcy-enemy-cripples: “Excessive government secrecy is the enemy of democracy. Secrecy cripples public debate. Citizens cannot understand, monitor, and evaluate public policies if they are kept in the dark about actions of their elected representatives. Secrecy is the ultimate form of censorship because the people do not even know they are being censored. Excessive secrecy is also the enemy of competence. We make better decisions when we know we have to justify our judgments and know we will be held accountable for our mistakes. Secrecy undermines all these values”.

⁹⁹ See de Boer, *supra* note 81, p.1247

individuals or entities¹⁰⁰ and democratic oversight as a means to restrain Executive's abuses of State secrecy is premised on the supply of a sufficient amount of information on the government's actions.¹⁰¹

The recourse to secret evidence is also often overplayed at the expense of procedural fairness and transparency.¹⁰² It happens, in fact, that governments claim the need for confidentiality in respect of information which later turns out to be already publicly available. Similarly, there are instances of gross exaggeration by the government of the security-threat potentially posed by the disclosure of certain material that does not cause any significant harm, once of public domain.¹⁰³

Most importantly, the use of secret evidence in trials is deemed to infringe severely the overall fairness of the judicial procedure. It is self – evident that the possibility to adduce secret evidence utterly opposes the most basic standards of procedural fairness which represent the foundation of any democratic justice system¹⁰⁴ and core rights in international human rights law.¹⁰⁵

Fair trial does not only imply each party being heard on an equal footing before an independent and impartial tribunal but also each party being able to

¹⁰⁰ See de Boer, *supra* note 81, p.1247

¹⁰¹ Rahul Sagar, "On Combating the Abuse of State Secrecy", (2007) 15(4) *J.Polit.Philos.*, p. 421. See also p.405: "Democratic accountability requires publicity, but democratic governments may legitimately claim the need for secrecy".

¹⁰² See Ojanen, *supra* note 13, p.265

¹⁰³ See JUSTICE, *supra* note 69, p.227. In the United Kingdom in particular, there are instances of material that the Government has claimed to be so secret that it could not be disclosed to the defendant then found available on Google or already published in other countries or that by error had already been served on the person concerned in the past. The overall success rate of special advocates operating in the UK system in arguing for increased disclosure also gives proof of the Government's tendency to over-classify information. See also Adam Tomkins, "National Security and the Due Process of Law", (2011) *Current Legal Problems*, p. 38: "I recall an episode from the Scott Inquiry into arms-to-Iraq. A minister had signed a PII certificate in which he had claimed that were certain material to be disclosed, it would cause 'unquantifiable damage' to national security. When the material subsequently came into the public domain, and when no discernible harm to national security appeared to result, Sir Richard Scott (as he then was) asked the minister to justify his claim. The minister replied, apparently straight faced, that unquantifiable could mean 'unquantifiably large' or 'unquantifiably small'".

¹⁰⁴ See for example, Ch. 39 Magna Carta (1215): "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equal or by the law of the land"; Article 111 Constitution of the Italian Republic (1948): "Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. "; s.7 Canadian Charter of Rights and Freedoms (1982): "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" ; Sixth Amendment of the United States Constitution (1787): "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense".

¹⁰⁵ Article 10 Universal Declaration of Human Rights (1948); Article 6 European Convention on Human Rights (1950); Article 14(1) International Covenant on Civil and Political Rights (1966); Article 47 Charter of Fundamental Rights of the European Union (2000).

effectively challenge the evidence adduced by the other side.¹⁰⁶ The government instead, by deploying secret information obtained by intelligence agencies without revealing it in full form to the person concerned, inhibits named persons' right to know and confront the case against them by calling evidence of their own.¹⁰⁷

Acute tensions have inevitably emerged between the ever-increasing need to protect the public from terrorism threats, which requires more secrecy, and the fundamental procedural rights of the individuals concerned, which militates in favor of more openness.

With this regard, it is widely recognized both at the legislative and judicial level that the right to disclosure of the evidence and of the grounds for restrictive measures is not an absolute right. Overriding security concerns, such as the fundamental rights of another individual or other public interests, may legitimately preclude the communication of certain grounds.¹⁰⁸

Nonetheless, reliance on secret evidence curtails the ability of the individuals concerned and of their lawyers to challenge the substance of counterterrorism measures and to have their lawfulness subject to a thorough judicial oversight before an independent court.¹⁰⁹ On the one hand, the persons concerned are often deprived of the necessary information which would enable them to mount an effective challenge against the contested decision.¹¹⁰ On the other hand, claims of secrecy severely obstruct the judiciary's role of adjudicating justice.

Within the European Union framework in particular, not only EU institutions and national authorities often withhold relevant information from the judicial authority itself,¹¹¹ but also in the event of judicial authorities having full access to the information, the courts have showed a great deference to the assessments of the governments and of intelligence communities in determining whether intelligence information sufficiently substantiates the need

¹⁰⁶ See JUSTICE, *supra* note 69, p.25

¹⁰⁷ See Forcese and Waldman, *supra* note 6, p. 5

¹⁰⁸ ECtHR *Edwards and Lewis v the United Kingdom*, Appl.Nos.39647/98 and 40461/98, Judgment of 27 October 2004 at para. 46: "The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisal or keep secret police methods of investigations of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defense so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defense which are strictly necessary are permissible under Article 6(1) [European Convention of Human Rights]. Furthermore, in order to ensure that the accused receives a fair trial, any difficulties caused to the defense by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities".

¹⁰⁹ See Ojanen, *supra* note 13, p.258

¹¹⁰ See Ojanen, *supra* note 13, p.258

¹¹¹ As it will be discussed below, when it comes to the EU implementing the so-called autonomous EU sanctions, intelligence information underlying EU listings are supplied by the States of the Union. Thus, in theory, the EU courts can demand to have access to the information. However, in line with the originator control principle, it happens that Member States may refuse to share the information with the EU Courts.

for restrictive measures as well as for excluding the party concerned from access to the supporting intelligence information.¹¹²

Therefore, it is clear that when secret evidence is admitted without counterbalancing measures, the mismatch between the parties is unavoidable. Lack of fairness is not only an affront to the adversarial principle (which requires that both parties are given an equal opportunity to present evidence and to comment on the evidence presented by the opposing party),¹¹³ but it also damages the integrity of the justice system itself when courts deliver judgments which are perceived to have been adopted in an unfair process.¹¹⁴

Many believe that secret evidence breaches the general principle stating that “justice must not only be done but seen to be done”.¹¹⁵ Some went even further in arguing that when secret evidence is used, “it is not merely that justice is not being seen to be done, it is actually that justice itself is not being done”.¹¹⁶

4. Overview of the treatment of secret evidence at the international and EU level

4.1. International good practices

The role of intelligence agencies in countering terrorism and their oversight have been addressed also at the UN level when in 2009 the Human Rights Committee mandated the Special Rapporteur ‘on the promotion and protection of human rights and fundamental freedoms while countering terrorism’, Martin Scheinin, to produce a compilation of good practices in this area. The resulting report, ‘Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight’,¹¹⁷ aims to contribute to the promotion and respect for the rule of law and human rights in the work of intelligence agencies.¹¹⁸

At the outset, the Special Rapporteur recognizes the importance of the role performed by intelligence services in enabling States to protect the individuals under their jurisdiction against the security threat posed by terrorism.

¹¹² See Ojanen, *supra* note 13, p.260

¹¹³ See JUSTICE, *supra* note 69, p.220

¹¹⁴ See JUSTICE, *supra* note 69, p.224

¹¹⁵ See JUSTICE, *supra* note 69, p.224

¹¹⁶ See JUSTICE, *supra* note 69, p.224

¹¹⁷ ‘Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight’, UN document A/HRC/14/46 (2010). See p.4: “The compilation is distilled from existing and emerging practice from a broad range of States throughout the world. These practices are primarily derived from national laws, institutional models, as well as the jurisprudence and recommendations of national oversight institutions and a number of civil society organizations. The compilation also draws upon international treaties, resolutions of international organizations and the jurisprudence of regional courts (...). It is not the purpose of this compilation to promulgate a set of normative standards that should apply at all times and in all parts of the world. Hence, the elements of good practice presented in this report are formulated in descriptive, rather than normative, language”.

¹¹⁸ UN document A/HRC/14/46, p.2

At the same time however it remarks that “effective performance and the protection of human rights can be mutually complementary goals for intelligence services”¹¹⁹.

In the light of the considerations made above about the blurring distinction between the work carried out by the intelligence services and by the regular police forces, it is noteworthy that the first good practice is limited to a mere description of the core tasks performed by intelligence agencies. These core functions are centered on the “collection, analysis and dissemination of information” for the purpose of assisting “policymakers and other public entities in taking measures to protect national security”.¹²⁰ The reason why this description represents a good practice is that it prevents members of intelligence agencies from undertaking activities which fall within the competence of other public bodies and which would not guarantee the same measure of human rights protection if carried out by intelligence services.¹²¹

The report proposes also that any person who believes to be a victim of illegal actions of the intelligence services has the possibility to bring action before a court or an oversight institution¹²² which, among others, has “full and unhindered access to all relevant information” in order to grant to the person concerned an effective remedy.¹²³

A set of good practices has been outlined by the report in the area of personal data protection,¹²⁴ also dealing with the possibility to limit access by the concerned individuals to data related to themselves.¹²⁵ The report admits that access to personal data *can be restricted* “for reasons such as safeguarding ongoing investigations and protecting sources and methods of the intelligence services”¹²⁶ but it is good practice that any possibility of restriction is prescribed by the law and limited to the *strictly necessary* in compliance with the principle of proportionality.¹²⁷

A more specific guidance on the treatment of intelligence information as evidence can be found in good practice 6 of ‘The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector’,¹²⁸ redacted in 2012 by the Criminal Justice Sector/Rule of Law Working Group of the Global Counterterrorism Forum. These good practices¹²⁹ are based on the principle that terrorism should not be addressed to the detriment of the fundamental human rights of those accused.¹³⁰

¹¹⁹ UN document A/HRC/14/46, p.4

¹²⁰ Practice 1, UN document A/HRC/14/46

¹²¹ UN document A/HRC/14/46, p.5

¹²² Practice 9, UN document A/HRC/14/46

¹²³ Practice 10, UN document A/HRC/14/46. Emphasis added.

¹²⁴ Practices 23-26, UN document A/HRC/14/46

¹²⁵ Practice 26, UN document A/HRC/14/46

¹²⁶ Practice 26, UN document A/HRC/14/46. Emphasis added.

¹²⁷ UN document A/HRC/14/46, p.23. Emphasis added.

¹²⁸ ‘The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector’, Global Counterterrorism Forum, Criminal Justice Sector/Rule of Law Working Group (2012)

¹²⁹ See The Rabat Memorandum, *supra* note 128, p.2: “In formulating these recommended good practices, the Working Group has drawn on existing United Nations conventions, as well as the experience, analysis, and publications of the United Nations and its specialized agencies”.

¹³⁰ See The Rabat Memorandum, *supra* note 128, p.2

Good Practice 6¹³¹ outlines the legal safeguards which, once enacted, may allow the use of intelligence information as evidence as long as both the confidentiality of the information and the due process rights of the person concerned are protected, as imposed by both national and international law. In particular, it prescribes that States have at their disposal appropriate legal safeguards that permit to protect intelligence sources as well as methods of intelligence gathering while granting a fair trial to the one accused “including the right to be informed of the nature and cause of the charge against him”.¹³² It recognizes that there are a number of methods which could be deployed to this aim such as “a) holding a closed hearing; b) having the judge review the intelligence or other information to determine whether it should be disclosed; or c) other appropriate procedures”.¹³³ States are then invited to adopt the method more consistent with their national law as long as it is compliant with the applicable international law.¹³⁴

Two years later the adoption of the Rabat Memorandum, in response to the difficulties encountered by several States during the implementation of Good Practice 6, the Criminal Justice Sector/Rule of Law Working Group developed seven non-binding ‘Recommendations for Using and Protecting Intelligence Information In Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions’.¹³⁵ As a general principle at the basis of these recommendations, the mandate of intelligence services should be accurately and comprehensively defined by the law in order to make their actions accountable to their citizens.¹³⁶

Under Recommendation 1,¹³⁷ States should implement procedures which ensure that intelligence information is effectively used in criminal prosecutions without at the same time compromising the rights of the defense of those accused. To this aim, effective oversight mechanism governing the cooperation between intelligence services and law enforcement should be put in place in order to make sure that “investigations are not being ‘outsourced’ to intelligence agencies” for the purpose of circumventing “specific legal restrictions imposed on law enforcement”.¹³⁸

Moreover, in enacting protective measures for intelligence information, States should ensure that “the essence of the case is disclosed to the accused allowing for an effective defense”, “that the same protective measures are, where appropriate, available to the defense when it needs to use intelligence information” and “that the imposition of protective measures for witnesses or information does not affect the ability to conduct a fair and impartial investigation and adjudication of reported violations of human rights related to

¹³¹ Good Practice 6: “Enact Measures to Protect Sensitive Law Enforcement and Intelligence Information in Terrorism Cases”.

¹³² See The Rabat Memorandum, *supra* note 128, p.8

¹³³ See The Rabat Memorandum, *supra* note 128, pp.7 - 8

¹³⁴ See The Rabat Memorandum, *supra* note 128, p.7

¹³⁵ ‘Recommendations for Using and Protecting Intelligence Information In Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions’, Global Counterterrorism Forum, Criminal Justice Sector/Rule of Law Working Group (2014)

¹³⁶ See Recommendations, *supra* note 135, p.2

¹³⁷ Recommendation 1: “Respect for the rule of law and human rights”.

¹³⁸ See Recommendation, *supra* note 135, p.3

the witness or information”.¹³⁹ States should also not base a conviction exclusively on the information provided by anonymous witnesses nor on evidence that has been produced in a redacted or summarized form. They should also address the problems posed by ‘tainted’ intelligence information “that is, information that may have been obtained by means that may violate international human rights law, in particular the prohibition of torture”.¹⁴⁰

Under Recommendation 2, mechanisms which allow intelligence service to share terrorism-related information with law enforcement personnel should be created.¹⁴¹ Such procedures should be designed to accommodate both national security concerns of the Executive branch and procedural rights of the accused.¹⁴²

Recommendation 3 prescribes that “where appropriate, intelligence agencies should be informed on how intelligence information gathered and material captured might impact a criminal investigation or prosecution”.¹⁴³ For instance, States should consider to establish mechanisms that enable intelligence services personnel to familiarize with the standard rules of evidence which apply to judicial proceedings.¹⁴⁴

Under Recommendation 4, upon receipt of intelligence information relevant to the investigation, law enforcement personnel should examine the *authenticity* and *reliability* of the information received in order to assess how it could best be used, if at all, to guide the investigation or to support a prosecution as a evidence.¹⁴⁵

Recommendation 5 specifically deals with the need to preserve the confidentiality of intelligence information, when at the same time the use of that information as evidence may generate on the law enforcement or judicial officials an obligation to disclose the information to the defendant.¹⁴⁶ There are several legal regimes, which may be implemented to reconcile these opposite demands. However, regardless of the regime in place, some additional practices should be adopted in order to allow a better balance between the

¹³⁹ See Recommendations, *supra* note 135, p.3. Emphasis added.

¹⁴⁰ See Recommendation, *supra* note 135, p.3

¹⁴¹ Recommendation 2: “States should have mechanisms and procedures which allow intelligence information relevant to terrorism threats to be shared, where appropriate, with authorized law enforcement personnel”.

¹⁴² See Recommendations, *supra* note 135, p.4

¹⁴³ Recommendation 3: “Where appropriate, intelligence agencies should be informed on how intelligence information gathered and material captured might impact a criminal investigation or prosecution, especially when such information is intended to be used in proceedings. For example, in accordance with the defendant’s right to due process, such information may be disclosed to the defendant or the information might be useful to the government as evidence in criminal proceedings”.

¹⁴⁴ See Recommendations, *supra* note 135, p. 5

¹⁴⁵ Recommendation 4: “Upon receipt of intelligence information, law enforcement personnel should evaluate the authenticity or reliability of the information and determine how it may best be used under their legal system, if at all, to support an investigation or as evidence in a prosecution”.

¹⁴⁶ Recommendation 5: “States should have mechanisms and procedures for guaranteeing that relevant sources and methods that underlie intelligence information provided to law enforcement or judicial officials – the disclosure of which would jeopardize national security, as well as any witnesses who are linked to or give evidence related to that intelligence – are sufficiently protected”. Emphasis added.

competing interests at stake. In particular, “(1)providing *security clearances* to defense counsel to enable the government, where appropriate, to discuss, and provide such counsel with, relevant intelligence information” and setting up “(2)mechanisms that ensure the review of *all* evidence and resolution of any issues related to that evidence occur and are resolved before double jeopardy attaches to the proceeding”.¹⁴⁷

Lastly, while Recommendation 6¹⁴⁸ aims at enhancing the protection of intelligence information shared between States, Recommendation 7¹⁴⁹ stresses the importance of training and capacity building as means to support the development of the appropriate technical capabilities that will enable intelligence services and law enforcement officials to undertake a stronger cooperation.¹⁵⁰

4.2. European Union secrecy regulations

Within the European Union framework, if on the one hand the right to access can now be considered a fundamental right of EU citizens,¹⁵¹ on the other, questions of secrecy are not new. The European Union is quietly growing as a security actor in its own right which gathers and analyzes information autonomously. Even though national security remains under the sovereign domain of competence of each Member State, with much of the organized crime threats originating beyond the European borders,¹⁵² the adoption of a number of legislative measures and policy initiatives at the EU level, in particular in the last decade, witnesses that the EU has been developing its own

¹⁴⁷ See Recommendations, *supra* note 135, p. 7. Emphasis added. The other practices listed under Recommendation 5 are: “(3) where applicable, rules of procedure that ensure all evidentiary rulings involving the handling of intelligence information in criminal proceedings are immediately appealable to a higher court without the need first to proceed to trial; and (4) rules of procedure which make it clear that a prosecution cannot be ordered by any judicial official or court to proceed to trial where such a proceeding will require an unacceptable risk of disclosure of intelligence or other national security information”.

¹⁴⁸ Recommendation 6: “To facilitate international intelligence-sharing with regard to countering terrorism, States should develop processes and mechanisms to permit the sharing of relevant intelligence where appropriate, while ensuring the source State maintains control over how that intelligence is used by the receiving State”.

¹⁴⁹ Recommendation 7: “Training and Capacity Building”.

¹⁵⁰ See Recommendations, *supra* note 135, p.9

¹⁵¹ First under Declaration No. 17 on the right of access to information, annexed to the Final Act of the Treaty on European Union in G.U.CE., C 191 of 29 July 1992: “The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions”; then under Article 255 TEC and now under Article 15 TFEU which replaced Article 255 TEC: “1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. (...) 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph”.

¹⁵² See Curtin, *supra* note 61, p. 9-10

internal security policy.¹⁵³ The action of the Union in the defense and security field is largely driven by security-related information classified either by the Member States or at the supranational level.¹⁵⁴

In broadening its activities into sensitive areas of policy, the EU had to avail itself of a secrecy regulation as a means to achieve its policy objectives in the security dimension.¹⁵⁵ The first EU classification system dates from the 1958 when the Euratom Classified Information (ECI) has been established as well as a security vetting infrastructure.¹⁵⁶ The security grading was based on four categories: Top Secret, Secret, Confidential and Restricted.¹⁵⁷ This classification applied from the very beginning of the European integration to both information communicated by the Member States and information acquired by the Community.¹⁵⁸ The area of application of these rules was confined to the defense-related aspects of nuclear safety under Euratom Treaty.¹⁵⁹

Almost forty years later, a proposal of a Council regulation on the security measures for the protection of classified information produced or transmitted within the EEC or EURATOM activities¹⁶⁰ was shot down by the European Parliament.¹⁶¹ In response, the Council and the Commission decided to treat the issue of security measures for classified information as a matter of their internal organization.¹⁶² The rationale for adopting new security rules for the protection of classified information was that in the new EU framework of a

¹⁵³ Policy Department, “Developing an EU Internal Security Strategy, fighting terrorism and organized crime”, (2011), p.16. See for instance The Stockholm Program (– ‘An open and secure Europe serving and protecting the citizens’, Official Journal of the European Union, C 115, 11 May 2010) which in setting out the Union’s priorities for the Area of Freedom Security and Justice (AFSJ) for the period 2010 – 2014, recommended in particular the implementation of a comprehensive internal security strategy for the Union.

¹⁵⁴ Deirdre M. Curtin, “Secrecy regulation by the European Union inside out”, in *Secrecy, national security and the vindication of constitutional law*, (Cheltenham; Northampton: Edward Elgar Publishing: 2013), p.304

¹⁵⁵ David Galloway, “Classifying Secrets in the EU”, (2014) 52(3) J.C.M.S., p. 668. See also p.672: “not all the information held by the EU institutions that is not publicly available is classified, it is either subject to rules on personal data protection or relates to documents covered by the obligation of professional secrecy”.

¹⁵⁶ Regulation No.3 implementing Article 24 of the Treaty establishing the European Atomic Energy Community, Official Journal of the European Union, L 17, 1958, p. 406-416

¹⁵⁷ Article 10 Regulation No.3 (1958): “*Eura — Top Secret*: where unauthorized disclosure of the information would have extremely serious consequences for the defense interests of one or more Member States; 2. *Eura — Secret*: where unauthorized disclosure of the information would have serious consequences for the defense interests of one or more Member States; 3 . *Eura — Confidential*: where unauthorized disclosure of the information would be harmful to the defense interests of one or more Member States ; 4. *Eura— Restricted*: where unauthorized disclosure of the information would affect the defense interests of one or more Member States but where a lesser degree of security is required than in the case of documents classified as *Eura — Confidential*.”

¹⁵⁸ Article 1(1) Regulation No.3 (1958)

¹⁵⁹ See Galloway, *supra* note 155, p.668

¹⁶⁰ Proposal for a Council regulation on the security measures applicable to classified information produced or transmitted in connection with European Economic Community or Euratom activities, COM (92) 56 final, submitted by the Commission on 26 February 1992

¹⁶¹ Resolution on the proposal for a Council regulation (EEC) on the security measures applicable to classified information produced or transmitted in connection with EEC or Euratom activities, Official Journal of the European Union, C 176, 1993

¹⁶² See Curtin, *supra* note 61, p.14

common security policy, confidential information was bound to be produced and circulated¹⁶³ not only within the EU but also with third States or international organization disposing of a full-fledge security classification system¹⁶⁴ which would have raised the same problems of mutual secrecy outlined above: “failure by the EU to safeguard classified information would render it a less than credible actor in the eyes of national governments, its international partners and the wider public”.¹⁶⁵

In 2001, the Council adopted its own internal rules on classification of documents,¹⁶⁶ just two months before the adoption of the new EU legislative rules on public access to documents.¹⁶⁷ In December of the same year, the Commission followed the Council’s lead by adopting its own internal security rules.¹⁶⁸ At the same time, the new EU access regulation laid out a definition of ‘sensitive material’¹⁶⁹ providing that this material “shall be subject to special treatment”.¹⁷⁰ Article 9 of the Regulation provides that sensitive material can be disclosed “only with the consent of the originator”.¹⁷¹ Great discretion is thus left to the originator authority in refusing disclosure of the information, especially in the light of the nebulosity of the concepts recalled by the Regulation in defining ‘sensitive material (such as “essential interests” or “public security, defense and military matters”)’.¹⁷²

There are three categories included in the security grading under the regulation: top secret, secret and confidential.¹⁷³ Restricted documents instead, which are those at the lowest level of classification, entirely fall within the scope of the EU access regulation.¹⁷⁴ Under the new Council’s internal security rules Member States were also required to adopt appropriate measures “to ensure that, when EU classified information is handled” the Council’s rules are complied with.¹⁷⁵

¹⁶³ See Curtin, *supra* note 61, p.14

¹⁶⁴ See Galloway, *supra* note 155, p.670

¹⁶⁵ See Galloway, *supra* note 155, p.681

¹⁶⁶ Council Decision 2001/264/EC of 19 March 2001 adopting the Council’s security regulations, Official Journal of the European Union, L 101, 2001.1; See also Curtin, *supra* note 61, p.14: “The Council staged a ‘coup d’état’ by adopting its own new security rules just two months prior to the new fundamental public access legislation”.

¹⁶⁷ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of the 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal of the European Union L 145/43 (31 May 2001)

¹⁶⁸ Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 amending its internal Rules of Procedures, Official Journal of the European Union, L 317, 3 December

¹⁶⁹ Article 9(1) Regulation (EC) No. 1049/2001: “Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organizations, classified as ‘TRÈS SECRET/TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIEL’ in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defense and military matters”.

¹⁷⁰ Article 2(5) Regulation (EC) No. 1049/2001

¹⁷¹ Article 9(3) Regulation (EC) No. 1049/2001

¹⁷² Arianna Vadeschi, “Il segreto di Stato tra tradizione e innovazione: novità legislative e recenti evoluzioni giurisprudenziali”, (2012) 3 *Dir.pubbl.comp.eur.* p.982

¹⁷³ Article 9(1) Regulation (EC) No. 1049/2001

¹⁷⁴ See Galloway, *supra* note 155, p. 671

¹⁷⁵ Article 2(2) Council Decision 2001/264/EC

In March 2011, the following generation of security rules has been adopted by the Council and the EU classified information (EUCI) was formally launched.¹⁷⁶ Under these new rules, classification of documents could be justified by simply invoking in general terms “the interests of the European Union and its Member States”.¹⁷⁷ The area of application of this secrecy regulation turned out to be multiplied: “these new rules are much more far reaching in terms of scope and width of application than their 2001 counterpart and constitute an excellent illustration of the expanded scope of supranational executive activity in the EU context”.¹⁷⁸

Even though these rules were not enshrined in a legislative act, it is self-evident that the Council did not intend to limit the domain of these rules to its own internal organization. Rather, its explicit strategy consisted in outlining a general and comprehensive framework for the protection of EU Classified across all its policy fields¹⁷⁹ by obtaining the commitment also of the Commission, the Member States and other EU actors to adopt equivalent provisions.¹⁸⁰ Less than two weeks after the adoption of the Council Decision, Member States signed an agreement guaranteeing, in a legally binding fashion, that they would give primacy to the protection of classified information “originating in European Union institution, or in agencies, bodies or offices established by the latter and provided to or exchanged with the Parties”.¹⁸¹ As a result, the EU classification system, disciplined by the Council as a matter of its internal organization, is now legally binding also for the States of the Union.¹⁸²

Due to the multiplication and accumulation of a secrecy culture at all levels of governance, international, supranational and national, the issue of secret evidence was bound to arise before the Courts of the European Union. In the wake of the global threat posed by international terrorism, the European courts are more and more often required to resolve the tensions that inevitably arise between security considerations (and the concomitant secrecy claims) on the one hand and the protection of the rights of the defense enshrined in the Charter of Fundamental rights of the European Union (EU Charter) on the other.

¹⁷⁶ Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, Official Journal of the European Union L 141, 2011

¹⁷⁷ Recital 5 Council Decision 2011/292/EU

¹⁷⁸ See Curtin, *supra* note 154, pp.309 – 310

¹⁷⁹ See Curtin, *supra* note 61, p.16

¹⁸⁰ Declaration by the Council and the Commission on the protection and handling of classified information, Brussels, 23 March 2011, available at: <http://www.statewatch.org/news/2011/mar/eu-council-classified-information-8054-add1-11.pdf>:

“The Council and the Commission consider that their respective security rules, and the Agreement between the Member States, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, together constitute a *more comprehensive and coherent general framework* within the European Union for the protection of classified information originating in the Member States, in institutions of the European Union or in EU agencies, bodies or offices, or received from third States or international organizations”. Emphasis added.

¹⁸¹ Article 1(a) Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, Official Journal of the European Union C 202, 2011

¹⁸² See Curtin, *supra* note 61, p.16

In this context, the EU courts play a key role in consolidating and promoting an effective implementation of the rule of law principles on which the European Union has been built without interfering with the Member States' national sovereignty in national security matters.¹⁸³

¹⁸³ See Policy Department, *supra* note 8, p.9

Chapter II: EUROPEAN LEGAL STANDARDS

1. Secret evidence under the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights: due process rights and their exceptions

The difficult relationship between national security, intelligence information and human rights has to be examined in the light of Article 47 (right to an effective remedy and to a fair trial) and Article 48 (presumption of innocence and right of defense) of the Charter of Fundamental Rights of the European Union and in the light of the rights to a fair trial and to an effective remedy respectively affirmed in Article 6 and 13 of the European Convention of Human Rights (ECHR). Implications for other rights are also relevant. In particular for Article 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life) and 10 (freedom of expression) ECHR. Particular attention should now be focused on Article 6 ECHR and on Article 47 of the EU Charter.

The right to a fair hearing under Article 6 ECHR, as a core human right, is actually a complex right which consists of different components. Most of the guarantees stemming from this right acquire relevance in relation to the use of secret evidence.¹⁸⁴ Article 6(1) of the Convention provides that “in the determination of his civil rights and obligation or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Everybody is therefore entitled to a fair trial in both civil and criminal case. No exceptions to this fundamental right are contemplated. However, it is well established that the procedural requirements of a fair hearing may vary according to the concrete circumstances of the case.¹⁸⁵ For example, even though the proceedings should generally be open to the public, *in camera* hearings may sometimes be accepted if this appears strictly necessary in the interest of justice.¹⁸⁶

According to the teleological interpretation that so far has been given to this first paragraph, while it is for the national law to adopt the rules governing the admissibility of evidence and it is for the national courts to evaluate the evidence admitted, three are the implied requirements that need to be met in order for a trial to be considered fair within the meaning of Article 6: adversarial principle, equality of arms and presence.¹⁸⁷

In particular, the issues related to non-disclosure of material can be tackled both from the standpoint of the adversarial principle and of the equality of arms. The first requires that the applicants be given the opportunity to know and to contest the evidence produced against them:¹⁸⁸ “the right to an adversarial trial means the opportunity for both parties to have knowledge of

¹⁸⁴ See JUSTICE, *supra* note 69, p.14

¹⁸⁵ « Article 6: The right to a fair trial », (2012) H.R.R., available at http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_6.pdf, p. 218

¹⁸⁶ See « Article 6: The right to a fair trial », *supra* note 185, p. 221

¹⁸⁷ Dovydas Vitskauskas & Grigory Dikov, “Protecting the right to a fair trial under the European Convention on Human Rights”, Council of Europe 2012, available at www.coe.int, p.45

¹⁸⁸ See Vitskauskas & Dikov, *supra* note 187, p.48

and comment on the observations filed or evidence adduced by the other party”.¹⁸⁹ The second requires that the applicants be given the opportunity to know and to contest the evidence produced against them on equal condition with the other party.¹⁹⁰ equality of arms requires that “each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage *vis-à-vis* his opponent”.¹⁹¹ These two requirements often overlap also in the European Court of Human Rights’ (ECtHR) case-law concerning the use of undisclosed material.¹⁹²

However, the ECtHR narrowed the range of cases to which Article 6 is applicable. From the Court’s case-law it emerges in fact that not all the proceedings fall under Article 6 of the Convention but only those relating to the determination of a criminal charge or of civil rights and obligations.¹⁹³ In particular, in the Court’s view, immigration and asylum proceedings do not fall under Article 6 because “the decisions regarding the entry, stay and deportation of aliens do not concern the determination of their civil rights or obligations or of a criminal charge against them”.¹⁹⁴

Additional components of the right to a fair trial are then made explicit with specific regard to criminal cases. In particular, the second paragraph of Article 6 lays out the principle of presumption of innocence until “proved guilty” in accordance with the law.¹⁹⁵ Further guarantees are then listed under the third paragraph: the right of the accused to be promptly informed in detail of the allegations against them; the right to have sufficient time and resources for an effective preparation of their defense; the right to defend themselves in person or through a lawyer of their choosing; the right to have the witnesses examined under the same conditions as the other party and the right to have the assistance of an interpreter if they do not understand the language used in the proceedings.¹⁹⁶

In short, the obligations stemming from Article 6 are twofold: a negative obligation not to convict anyone without a fair hearing and a positive obligation to lay out procedural rules which make a fair trial possible.¹⁹⁷

Other procedural obligations reflecting the guarantees under Article 6 can be found throughout the whole Convention. For example, a close connection can be found between the right to a fair trial under Article 6 and the right to liberty and security under Article 5.¹⁹⁸ The latter gives protection to any person deprived of his/her liberty by arrest or detention. Its fourth paragraph in particular, together with Article 6, protects the right to a fair hearing for anyone challenging the legality of his/her detention: “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings” in order to verify if the procedural and substantive conditions for the legality of their

¹⁸⁹ ECtHR *Ruiz-Mateos v Spain*, Appl. No. 12952/87, Judgment of 23 June 1993, para.63

¹⁹⁰ See *Vitskauskas & Dikov*, *supra* note 187, p.48

¹⁹¹ ECtHR *Foucher v France*, Appl. No. 22209, Judgment of 18 March 1995, para.34

¹⁹² See *Vitskauskas & Dikov*, *supra* note 187, p.48

¹⁹³ See de Boer, *supra* note 81, p.1256

¹⁹⁴ ECtHR *Raza v Bulgaria*, Appl. No. 31465/08, Judgment of 11 February 2010, para.82

¹⁹⁵ Article 6(2) ECHR

¹⁹⁶ Article 6(3) ECHR

¹⁹⁷ See « Article 6 : The right to a fair trial », *supra* note 185, p.222

¹⁹⁸ See « Article 6 : The right to a fair trial », *supra* note 185, p.222

detention have been met.¹⁹⁹ If their detention is then found unlawful, they shall be entitled to be released.²⁰⁰ The particular relevance of Article 5(4) derives from the fact that it guarantees procedural fairness in cases where Article 6 does not apply. Article 6 is also strictly linked to Article 13 ECHR which set forth the right to an effective remedy:²⁰¹ an effective remedy before a national authority shall always be provided in case of violation of the guarantees laid out in the Convention.²⁰²

The second paragraph of Article 47 of the EU Charter transposes the content of Article 6(1) ECHR into the EU law.²⁰³ This paragraph provides that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”. Moreover, “everyone shall have the possibility of being advised, defended and represented”.²⁰⁴

However, from the analysis of the Article 47(2) of the EU Charter, it emerges that the degree of legal protection provided under the EU law is more extensive than the one under Article 6 ECHR. The explanations of Article 47 clarify in fact that, unlike Article 6(1), the right to a fair trial under Article 47(2) is not exclusively applicable to disputes involving civil law rights and obligations.²⁰⁵

This broader applicability of the guarantees in question is a consequence of the conclusion drawn by the European Court of Justice (ECJ) in *Les Verts v European Parliament*.²⁰⁶ In this occasion, the ECJ held that the “EU is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”²⁰⁷. Therefore, it appears that the EU law extends the standards flowing from Article 6(1) ECHR to proceedings that the ECtHR would normally not determine on the basis of that provision.²⁰⁸

The provision under the first paragraph of Article 47 instead recalls Article 13 ECHR²⁰⁹ when it states that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.²¹⁰

However, when it comes to national security concerns, also Article 52(1) of the EU Charter has often been invoked for the fact that it allows limitations on the exercise of the rights enshrined in the Charter, as long as such limitations are “provided for by the law and respect the essence of those rights and

¹⁹⁹ Article 5(4) ECHR

²⁰⁰ Article 5(4) ECHR

²⁰¹ See « Article 6 : The right to a fair trial », *supra* note 185, p.223

²⁰² Article 13 ECHR

²⁰³ Explanatory Memorandum from the Convention, CONVENT 49 of 11 Oct. 2000, available at http://www.europarl.europa.eu/charter/pdf/04473_en.pdf, p.41

²⁰⁴ Article 47(2) EU Charter

²⁰⁵ See Explanatory memorandum from the Convention, *supra* note 203, p.41

²⁰⁶ Case C-294/83 *Les vertes v European Parliament*, Judgment of 23 April 1986

²⁰⁷ *Ibid.* para.23

²⁰⁸ See de Boer, *supra* note 81, p.1256-1257

²⁰⁹ See Explanatory Memorandum from the Convention, *supra* note 203, p.40

²¹⁰ Article 47(1) EU Charter

freedoms”. Moreover, the same Article provides that “subject to the principle of proportionality”, limitations are allowed “only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”.²¹¹

The objective consisting in the protection of national security can be linked to Article 4(2) TEU under which the Union shall respect the “essential State functions [of Member States], including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security”. The same paragraph then explicitly states that “national security remains the sole responsibility of each Member State”.²¹² In connection with this provision, Article 346 TFEU prescribes that “no Member States shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security”.²¹³ This latter provision seems to be meant to confine the nebulous and ambiguous concept of national security into the narrower concept of “essential interests” of the security of the State.²¹⁴

Similarly, “in time of war or other public emergency threatening the life of the nation”, Article 15 ECHR admits derogations from most of the obligations under the Convention provided that two conditions are met: any measures shall be “strictly required by the exigencies of the situation” and in compliance with the other obligations undertaken by the State under international law.²¹⁵ The same Article lists also some fundamental rights protected under the Convention in absolute terms and that therefore cannot be weighed against even the most pressing national security concerns: right to life, “except in respect of deaths resulting from lawful acts of war” (Article 2), prohibition of torture (Article 3), prohibition of slavery and forced labor (Article 4 paragraph 1) and no punishment without law under Article 7.²¹⁶

The European Court of Human Rights granted national authorities a wide margin of appreciation in availing themselves of the right to make these derogations: “it falls in the first place to each Contracting State, with its responsibility for the life of its nation to determine whether that life is threatened by a public emergency and if so how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”.²¹⁷ It is worth noting that, in the view of the Strasbourg Court, also the

²¹¹ Article 52(1) EU Charter

²¹² Article 4(2) Treaty on European Union (2007)

²¹³ Article 346(1)(a) Treaty on the Functioning of the European Union (2007)

²¹⁴ Antonino Ali, “Il diritto dell’Unione Europea e la tutela della sicurezza nazionale degli Stati membri. Osservazioni a margine di alcuni casi esaminati dalla Corte di Giustizia dell’Unione Europea”, in *Intelligence e interesse nazionale* (Roma: Aracne editrice, 2015), p.593

²¹⁵ Article 15(1) ECHR

²¹⁶ Article 15(2) ECHR

²¹⁷ ECtHR *Ireland v. United Kingdom*, Appl. N. 5310/71, Judgment of 18 January 1978, para.207

threat posed by international terrorism may represent “a public emergency threatening the life of the nation” within the meaning of Article 15 ECHR.²¹⁸

Nonetheless, while the determination of whether national security is imperiled is largely left to the national governments, it is also clear from the settled case-law of both the Courts of Union and of the Strasbourg Court that national authorities have no power to resort at their discretion to secret evidence by simply invoking the existence of national security concerns. It is therefore extremely important to examine how these Articles have been interpreted and applied by the European courts in dealing with the ever-increasing tension between State secrets and national security on the one hand and the protection of the rights of defense on the other.

Over the last thirty years in fact, serious concerns regarding the compatibility with the ECHR and with the EU Charter of some national procedural rules on the use of closed material have often been taken to the Courts’ attention. In response, the European Courts have gradually laid out clear legal standards which determine the extent to which the claimed need for confidentiality can be preserved in proceedings without at the same time unduly compromising the procedural rights of the persons concerned.

2.The European Court of Human Rights’ case-law

2.1.Restrictions of the rights of the defense and the need for counterbalancing procedures

The European Court of Human Rights addressed the issues arising from the use of closed evidence in several cases in which the compliance with the ECHR standards of some national security-based measures was put under question. In these cases, the Court stressed that the right to a fair trial under Article 6 of the Convention entails not only the opportunity to know the allegations and the evidence put forth by the other party but also the right to effectively challenge them. At the same time, it is also clear from the same case-law that the right to disclosure of evidence as an essential component of the rights of the defense is not considered by the Court as an absolute right: restrictions to this right are in fact admissible as long as sufficient counterbalancing procedures are provided.

In *Doorson*,²¹⁹ for example, the Court found no breach of Article 6 ECHR in the use of anonymous witnesses. This is a particular form of secret evidence adopted in order to obtain information from witnesses while at the same time protecting their life, security or liberty from possible reprisal by the applicant. In

²¹⁸ See for example ECtHR *A and Others v the United Kingdom*, Appl. No. 3455/05, Judgment of 19 February 2009 [hereinafter *A*], para. 216: “the Court takes as its starting point that, as the national courts found and it has accepted, during the period of the applicants’ detention the activities and aims of the Al-Qaida network had given rise to a ‘public emergency threatening the life of the nation’. It must therefore be borne in mind that at the relevant time there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack and, although the United Kingdom did not derogate from Article 5(4), a strong public interest in obtaining information about Al-Qaida and its associates and in maintaining the secrecy of the sources of such information”.

²¹⁹ ECtHR *Doorson v the Netherlands*, Appl.No.20524/92, Judgment of 26 March 1996

the present case, the Court concluded that the difficulties faced by the applicant in carrying out his defense were “sufficiently counterbalanced by the procedures followed by the judicial authorities”.²²⁰ The defense counsel was in fact enabled to ask questions to the anonymous witnesses and was put in a position to efficiently challenge the reliability of their statements.²²¹ The ECtHR then stressed that even when adequate procedures are adopted in order to counterbalance the restrictions under which the defense acts, “a conviction should not be based entirely or to a decisive extent on anonymous statements”.²²² This means that “evidence obtained from witnesses under conditions in which the rights of the defense cannot be secured to the extent normally required by the Convention should be treated with extreme care”.²²³

Also in *Jasper*,²²⁴ the ECtHR recognized that the right to full disclosure of the relevant evidence is not an absolute right but a right which must be weighed against other competing interests such as the need to protect national security or vulnerable witnesses or the need to keep police methods of investigation secret. The Court held, in fact, that “in some cases it may be necessary to withhold certain evidence from the defense so as to preserve the fundamental rights of another individual or to safeguard an important public interest”.²²⁵ However, the Court further specified that these restrictions can be considered compliant with Article 6(1) of the Convention only if two conditions are met. On the one hand, Article 6 only allows restrictions to applicant’s procedural rights which are strictly necessary²²⁶ (the so-called ‘strict necessity test of non-disclosure’)²²⁷. On the other, adequate procedures shall be put in place by the judicial authorities in order to counterbalance the difficulties that these restrictions might cause to the defense.²²⁸

In numerous judgments, the ECtHR also stressed the importance of allowing the trial judge to rule on questions of disclosure. In *Rowe and Davis*,²²⁹ the Court found a breach of Article 6 in the prosecution’s decision to keep some relevant evidence secret on the grounds of public interest without notifying the judge: the applicant was therefore not provided with a sufficient remedy for “the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge”.²³⁰ This latter principle was then reaffirmed in *Dowsett*.²³¹ This case originated from the national authority’s decision to withhold, on the grounds of public interest immunity, some information not only from the defense but also from the national court. The national court was therefore denied the opportunity to examine the appropriateness of the claimed

²²⁰ Ibid. para.72

²²¹ Ibid. paras.73-75

²²² Ibid. para.76

²²³ Ibid. para.76

²²⁴ ECtHR *Jasper v the United Kingdom*, Appl. No. 27052/95, Judgment of 16 February 2000

²²⁵ Ibid. para.52

²²⁶ Ibid. para.52

²²⁷ See *Vitskauskas & Dikov*, *supra* note 187, p.47

²²⁸ Ibid. para. 52

²²⁹ ECtHR *Rowe and Davis v the United Kingdom*, Appl. No 28901/95, Judgment of 16 February 2000

²³⁰ Ibid. para.65

²³¹ ECtHR *Dowsett v the United Kingdom*, Appl. No. 39482/98, Judgment of 24 June 2003

non-disclosure. The ECtHR, in finding a violations of Article 6 of the Convention, reiterated “the importance that material relevant to the defense be placed before the trial judge for his ruling on questions of disclosure at the time when it can serve most effectively to protect the rights of the defense”.²³²

What emerges from the latter judgments is that the question of non-disclosure of some material cannot be left to the prosecution alone. On the contrary, it is for the court to approve the non-disclosure by way of balancing the competing interests and continuing to assess the need for transparency at every level of jurisdiction.²³³

2.2.The system of special advocates as a possible counterbalancing mechanism: the scope of ‘A-type’ disclosure and its difficult application

In *Chahal v United Kingdom*,²³⁴ the ECtHR recognized that there are examples of techniques which accommodate security concerns and yet accord the persons concerned a substantial measure of procedural fairness. In this case, the Court found a violation of Article 5(4) ECHR in a case of detention for deportation purposes. This detention was justified by the Secretary of State on the grounds of national security. In particular, the applicant was deemed to be involved in terrorist activities in support of Sikh separatism. The Court reiterated that “the use of confidential material might be unavoidable where national security [is] at stake”.²³⁵ However, “this does not mean that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved”.²³⁶

On this basis, the Strasbourg Court found, *inter alia*, that in the deportation process in question, no adequate procedural safeguards meeting the standards under Article 5(4) had been put in place. First of all, the domestic courts were unable to effectively scrutinize the Secretary of State’s decision to deport the applicant. No full access to all the relevant facts relating to the alleged threat to national security posed by Mr Chahal was in fact given to the courts.²³⁷ Secondly, since national security elements were involved, no right of appeal against the deportation could be exercised by the applicant and the only available “safeguard against arbitrariness”²³⁸ was represented by an advisory panel. However, although this panel had full access to the evidence relied upon by the Secretary of State, the ECtHR concluded that “the panel could not be considered as a court within the meaning of Article 5 para.4”.²³⁹ This was because the applicant, in his hearing before the panel, could not benefit from legal representation and was given only an outline of the reasons for his deportation. Moreover, not only no power of decision was recognized to the

²³² Ibid. para.50

²³³ See Vitskauskas & Dikov, *supra* note 187, p.46

²³⁴ ECtHR *Chahal v the United Kingdom*, Appl. No. 22414/93, Judgment of 15 November 1996 [hereinafter *Chahal*]

²³⁵ Ibid. para.131

²³⁶ Ibid. para.131

²³⁷ Ibid. para.130

²³⁸ Ibid. para.122

²³⁹ Ibid. para.130

panel but its advice was also not binding to the Home Secretary and was not disclosed.²⁴⁰

On the same grounds, the Court found that also the right to an effective remedy under Article 13 of the Convention had been infringed, “the advisory panel procedure being neither a remedy nor effective”²⁴¹ and considering the deficiencies affecting the judicial review carried out by the British Courts.²⁴²

A breach of both Article 5(4) and Article 13 was thus found by the ECtHR. In reaching this conclusion, the Court noted that “there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice”.²⁴³ In particular, the Court referred to the form of judicial control applied in cases of deportation for national security reasons in Canada.²⁴⁴ The Court mentioned specifically the practice adopted in Canada of holding closed hearings²⁴⁵ in which all the evidence is examined but from which the applicant and his representatives are excluded in order to preserve the confidentiality of the sensitive material. However, during these hearings, a special security-cleared counsel can cross-examine the witnesses and generally help the court in challenging the State’s case.²⁴⁶

The reference made by the ECtHR to this Canadian practice wrongly suggests that special counsels operate before Canadian Federal Courts in immigration cases. The Court probably meant to refer to the presence of security-cleared counsels before the Security Intelligence Review Committee (SIRC).²⁴⁷ The United Kingdom responded to this judgment by adopting the system of special advocates.²⁴⁸

In *A and Others v the United Kingdom*, the Court examined the compliance with the ECHR of the UK system of special advocates which operates in cases where secret evidence is deployed. The present case concerned the preventive detention of suspected terrorists for the purpose of their deportation in accordance with the UK Anti – terrorism legislation. One of the arguments put forward by the applicants was the unfairness of the procedures followed in order to review the need for their detention. This claim was based in particular on the fact that special advocates are not authorized to communicate with their clients after having viewed the closed material.

Although the case involved the application of Article 5(4) ECHR, in the light of the concrete circumstances of the present case and in particular of the lengthy of deprivation of liberty to which the applicants had been subject, the Court held that “Article 5(4) must import substantially the same fair trial

²⁴⁰ Ibid. para.130

²⁴¹ Ibid. para.141

²⁴² Ibid. para.155

²⁴³ Ibid. para.131

²⁴⁴ Ibid. para.131

²⁴⁵ Closed hearing is a hearing which involves the exclusion of one party and of the members of the public and of the press. Closed hearings are both *ex parte* and *in camera*. *Ex parte* hearings are hearings held by a court but from which one party is excluded. *In camera* hearings are hearings held in the presence of both parties but in the absence of the public and the press.

²⁴⁶ Ibid. para.144

²⁴⁷ Jophn Ip, “The Rise and Spread of Special Advocate”, (2008) P.L., p.719. See Chapter IV

²⁴⁸ See Ip, *supra* note 247, p.718

guarantees as Article 6(1) in its criminal aspect”.²⁴⁹ These guarantees normally include the right to have access to all the evidence in possession of the prosecution, “both for and against the accused”²⁵⁰ as an essential requirement for an effective exercise of the rights of the defense.

The Court however recognized that Article 6 does not impose a uniform standard which applies irrespective of the context of the case in question.²⁵¹ also in proceedings which fall under Article 6 of the Convention, “there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigations or the protection of the fundamental rights of another person”.²⁵² At the same time, the Court stressed that when complete disclosure is not possible, counterbalancing measures shall be put in place as a remedy for the lack of full adversarial procedure.²⁵³

As a general principle, it is essential that each applicant is provided with as much information about the allegations and evidence against them as is possible without jeopardizing national security.²⁵⁴ However, where full disclosure is not possible, Article 5(4) prescribes that the “difficulties this [causes] [is] counterbalanced in such a way that each applicant still [has] the possibility effectively to challenge the allegations against him”.²⁵⁵

The Court did not find the UK system itself non compliant with these requirements: “the Court considers that SIAC, which was a fully independent court and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee”.²⁵⁶ Moreover, the special advocates could perform an additional important role in counterbalancing the State’s need for secrecy by “making submissions to the judge regarding the case for additional disclosure”,²⁵⁷ “by testing the evidence and putting arguments on behalf of the detainee during closed hearing”.²⁵⁸ However, the Court added that the special advocates can represent this important safeguard only if the detainee is given “sufficient information about the allegations against him to enable him to give *effective instructions* to the special advocate”.²⁵⁹

This means that where the judicial authority, in the determination of the case, relies to a large extent on open material, it can be safely said that the applicant has been given the opportunity to effectively refute the case against him. Equally, even when most of the underlying evidence is kept secret, if the allegations contained in the open material are detailed enough, it can still be said that it has been possible for the applicant to give sufficient instructions to

²⁴⁹ A at para.217

²⁵⁰ Ibid. para.206

²⁵¹ Ibid. para.203

²⁵² Ibid. para.205

²⁵³ Ibid. para.205

²⁵⁴ Ibid. para.218

²⁵⁵ Ibid. para.218

²⁵⁶ Ibid. para.219

²⁵⁷ Ibid. para.219

²⁵⁸ Ibid. para.220

²⁵⁹ Ibid. para.220. Emphasis added.

his special advocate.²⁶⁰ On the contrary, where the open allegations are of general nature and the determination of the case is based “solely or to a decisive degree on closed material, the procedural requirements of Article 5(4) would not be satisfied”.²⁶¹ In short, non-disclosure is compatible with the requirements for an adversarial proceeding only if the non-disclosed pieces of evidence are not used as decisive or crucial elements to found the conviction.

The court then examined in respect of each applicant if the level of information provided was compliant with the criteria laid out above. In doing so, the Court found that for five of the applicants the allegations were sufficiently detailed to allow the applicants to refute them.²⁶² A violation of the right to procedural fairness under Article 5(4) was instead found in respect of the other four applicants. For them, in fact, the material disclosed was mainly insubstantial while the evidence relied upon against them was largely found in the closed material.²⁶³

Notwithstanding the importance of this judgment, several uncertainties still surround the so called ‘A-type’ disclosure.²⁶⁴ First of all, this principle is easy to state but difficult to apply. Under this principle, in fact, it is for the court to evaluate whether the material disclosed is sufficiently detailed to enable the applicants to give effective instructions to their special advocates on how to refute the allegations against them. However, the line between information which is sufficiently specific and information which is not is not easy to draw. For example, if a hypothetical individual X is deemed to be member of a terrorist group linked to Al-Qaida, the material disclosed will need to indicate a specific association with named individuals on a precise date or it is enough to indicate that the suspect was associated with certain individuals over a certain period? No answer can be given in the abstract. The adequacy of the specificity of the open material will depend on the response that the suspect intends to give to the allegations made. If s/he means to refute them with a blanket denial, no specific information is necessary. On the contrary, if s/he intends to prove the innocence of his/her association with certain individuals and to explain what type of association this was, further details are necessary.²⁶⁵

Secondly, the premise made by the Grand Chamber that in the present case Article 5(4) must “import substantially the same fair trial guarantees as Article 6(1) in its criminal aspect”²⁶⁶ appears inconsistent with its conclusion. In a criminal trial in fact, the defendants must be informed of all the evidence against them as well as of the exculpatory evidence of which the prosecution is in possession. On the contrary, the test that the Grand Chamber laid out in A consists of verifying whether the information given to the suspects – which not necessarily will be all the information at the government’s disposal - places them in an adequate position to give effective instructions to the special advocates. Thus, if the allegations contained in the open material are

²⁶⁰ Ibid. para.220

²⁶¹ Ibid. para.220

²⁶² Ibid. para.222

²⁶³ Ibid. paras.222-224

²⁶⁴ *Home Office v Tariq* [2011] UKSC 35, [2012] 1 A.C. 452, para.88 [hereinafter *Tariq*]

²⁶⁵ John Jackson, “Justice, Security and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?”, (2013) P.L., pp. 724-725

²⁶⁶ Ibid. para.217

sufficiently detailed, the standard laid out by the Court can be met even when all or the majority of the underlying evidence is kept confidential.²⁶⁷ There remains the difficulty deriving from the fact that much emphasis was placed by the Strasbourg Court on the lengthy period of deprivation of liberty faced by the detainee. The question which arises is therefore whether the same standard of disclosure is to be applied in cases where detainees face a shorter period of detention.²⁶⁸ These difficulties probably reflect the Court's refusal to lay down general principles in favor of a contextual approach.

2.3. Immigration cases and the need for "some forms of adversarial proceedings"

Although in the ECtHR's view, immigration cases do not fall under Article 6, the same Court in several occasions stressed that when measures interfering with human rights come into play, "some forms of adversarial proceedings" should always be granted.²⁶⁹ With this regard, great importance should be recognized to the reasoning followed by the Grand Chamber in *Liu v. Russia (No.2)* and in *C.G. and Others*.²⁷⁰ In both cases the Court found a breach of the applicants' right to respect for private and family life (Article 8) and of the right to an effective remedy (Article 13).

First of all, in the Court's view, although the notion of national security is not subject to a comprehensive definition and that a broad margin of appreciation is left to the Executive to assess what is a threat to that security, this "does not mean that its limits may be stretched beyond its natural meaning".²⁷¹ "while the Executive's assessment of what poses a threat to national security will naturally be of significant weight, the courts reviewing the Executive's decisions must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of national security that is unlawful or contrary to common sense and arbitrary".²⁷² It is on this basis that the Court in *C.G. and Others* held that the applicant's alleged involvement in trafficking of narcotic drugs, "can hardly be said, on any reasonable definition of the term [national security] (...), capable of impinging on the national security of Bulgaria".²⁷³

The ECtHR thus stressed that it is for the domestic courts to verify the factual basis for the conclusion that the applicant represents a threat to national security. This shall be achieved by subjecting to judicial scrutiny the sources of information relied upon for the expulsion decisions.²⁷⁴ In the present cases instead, the domestic courts failed to carry out an "independent review of whether the conclusion that the applicant constituted a danger to national

²⁶⁷ See Jackson, *supra* note 265, p.724

²⁶⁸ See Jackson, *supra* note 265, p.727

²⁶⁹ ECtHR *Liu v Russia (No2)*, Appl. No. 29157/09, Judgment of 26 July 2011 [hereinafter *Liu v Russia (No2)*] at para.87

²⁷⁰ ECtHR *C.G. and Others v Bulgaria*, Appl.No.1365/07, Judgment of 24 April 2008 [hereinafter *C.G. and Others*]

²⁷¹ *Liu v. Russia (No2)* at para.88, *C.G. and Others* at para.43

²⁷² *Liu v. Russia (No2)* at para.88

²⁷³ *C.G. and Others* at para.43. Emphasis added.

²⁷⁴ *Liu v. Russia (No2)* at para.89, *C.G. and Others* at para.60

security had a reasonable basis in fact”.²⁷⁵ In their ruling, they merely corroborated the evidence provided by the security services without examining any additional information.²⁷⁶ The courts, instead of examining whether the authorities were able to demonstrate the specific factual grounds relied upon for their decision, confined the scope of their review to a mere formal examination of the expulsion decision.²⁷⁷

Furthermore, the Strasbourg Court examined the deficiencies that the applicants face when the allegations against them are of general nature. With this regard, in *C.G. and Others*, the Court stressed how the lack of “even the outline knowledge of the facts” underlying the national authorities’ decision prevents the applicants from adequately refuting the allegations against them.²⁷⁸ By the same token, in *Liu v. Russia (No.2)*, the Court relied directly on its previous judgment in *A* in holding that the lack of specific allegations made it impossible for the applicants to submit exonerating evidence.²⁷⁹

To sum up, in immigration cases, the combination of Article 13 and Article 8 requires that the individuals concerned are enabled to effectively challenge the orders taken against them and to have “the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality”.²⁸⁰ The Court recognized that when national security is at stake some procedural restrictions might be necessary in order to avoid dangerous leakage of information.²⁸¹ However, the competent appeals authorities, as a minimum, have to be informed of the reasons underlying the expulsion decision, even if that information is not available to the public.²⁸² The judicial authority must be enabled to reject “the Executive’s assertion that there is a threat to national security where it finds it arbitrary and unreasonable”²⁸³ and to examine if a fair balance between the public interests involved and the individual’s procedural rights has been struck. In short, also in immigration cases “there must be some form of adversarial proceedings, if need be through a *special representative* following security clearance”.²⁸⁴

3. General Court and European Court of Justice’s case-law

Also at the European Union level, the use of secret evidence gave rise to important issues. In particular, it raised the question whether the right to effective judicial protection under Article 47 of the EU Charter requires that the applicants be always informed at least of the essence of the grounds and

²⁷⁵ *Liu v Russia (No.2)* at para.89

²⁷⁶ *Liu v Russia (No.2)* at para.89, *C.G. and Others* at para.47

²⁷⁷ *Liu v Russia (No.2)* at para.89, *C.G. and Others* at para.47 and para.60

²⁷⁸ *C.G. and Others* at para.46 and para.60

²⁷⁹ *Liu v Russia (No.2)* at para.90

²⁸⁰ *Liu v Russia (No.2)* at para.99, *C.G. and Others* at para.56

²⁸¹ *C.G. and Others* at para.57

²⁸² *Liu v Russia (No.2)* at para.99, *C.G. and Others* at para.57

²⁸³ *Liu v Russia (No.2)* at para.99, *C.G. and Others* at para.57

²⁸⁴ *Liu v Russia (No.2)* at para.99, *C.G. and Others* at para.57. Emphasis added.

evidence against them.²⁸⁵ In several cases the EU Courts tackled this issue and important findings have been made so far.

3.1. Deportation proceedings: the ZZ case and the obligation to disclose the essence of the reasons for a decision refusing entry

It is of extreme importance to examine the conclusion reached by the European Court of Justice in *ZZ v Secretary of State for the Home Department*.²⁸⁶ In this case, the ECJ held that the necessary compliance with the right to effective judicial protection under Article 47 requires that the essence of the reasons for a decision refusing entry into a Member State must always be disclosed to the person concerned. In doing so, the Court disagreed with the opinion delivered by Advocate General Bot. The Advocate General in fact, in his opinion, maintained that, in some exceptional circumstances, the non-disclosure even of the very essence of the grounds could be justified by severe public security concerns. Beyond that, the Court recognized that it is mostly for the national courts of the Member States to strike an appropriate balance between the compelling necessity to respect the right to effective judicial protection and the national security requirements.²⁸⁷

The European Union law which comes into play in the present case is represented by Directive 2004/38/EC ‘on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’,²⁸⁸ in particular Chapter VI. Article 27 of this Directive enables the Member States to “restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on the grounds of public policy, public security or public health”.²⁸⁹

Important safeguards are then provided by Article 30(2) under which “the persons concerned shall be informed, *precisely* and in *full*”²⁹⁰ of the grounds on which the decision against them was taken unless this would put State security under threat. This guarantee is further strengthened by Article 31 which protects the right to make effective use of appeals procedures: the person against which a decision under Article 27 has been taken has the “right to have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of” such a decision.²⁹¹ These redress procedures shall examine the legality of the decision as well as the facts and the circumstances relied upon in the decision. These procedures shall also make sure that such a decision is proportionate in particular with respect to

²⁸⁵ See de Boer, *supra* note 81, p.1235

²⁸⁶ Case C-300/11 *ZZ v Secretary of State for the Home Department* [2013] ECR I-0000, Judgment of 4 June 2013 [hereinafter *ZZ*]

²⁸⁷ See de Boer, *supra* note 81, p.1235

²⁸⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

²⁸⁹ Article 27(1) Directive 2004/38/EC

²⁹⁰ Article 30(2) Directive 2004/38/EC. Emphasis added.

²⁹¹ Article 31(1) Directive 2004/38/EC

the requirements under Article 28.²⁹² This latter Article outlines the level of protection which has to be accorded in case of expulsion.²⁹³

In the present case, the applicant, ZZ, is a man with dual French and Algerian nationality. He has been married to a British national since 1990 and has eight children with her. He lawfully resided in the UK from 1990 to 2005 and in 2004 he was granted a permanent residence permit by the UK Secretary of State. However, in 2005, after he left the United Kingdom for Algeria, the Secretary of State cancelled his right of residence and when he travelled back to the UK he was excluded from entry on the grounds that his presence would have imperiled public security. This decision was grounded on his alleged involvement in terrorist activities. Such a decision was taken in accordance with Article 27 of Directive 2004/38/EC.²⁹⁴

ZZ then lodged an appeal against the decision refusing entry to the Special Immigration Appeals Commission (SIAC), the independent tribunal which, as will be further discussed below, is competent to deal with appeals against decisions of the Secretary of State to exclude individuals from the UK on public grounds. At the appeal stage, the Secretary of State refused, on the basis of public security reasons, to disclose some key evidence supporting the decision to expel ZZ. Consequently, in compliance with the SIAC Procedure Rules,²⁹⁵ two special advocates were appointed to represent ZZ's interests before SIAC with regards to the confidential material. However, in accordance with Rule 36,²⁹⁶ these specially appointed security – cleared lawyers were allowed to discuss with the party they represented and with his personal advisers only on the open evidence and not on the closed one.

What followed was a hearing in which the SIAC determined to what extent the disclosure of closed evidence relied upon by the Secretary of State would have imperiled the public interest. This hearing took place in the sole presence of the special advocates while ZZ and his personal advisers were excluded. Subsequently, another hearing took place in order to examine ZZ's appeal: this hearing was composed of both an open session, in which ZZ was present, and a closed session, in the sole presence of ZZ's special advocates who made submissions in ZZ's defense. The closed material was discussed only in the closed session.

ZZ's appeal was dismissed by the SIAC which considered the decision refusing entry justified by imperative grounds of national security. The SIAC handed down both a closed judgment and an open judgment. The closed judgment, where all the crucial issues were exhaustively dealt with, was accessible only to ZZ's special advocates and to the Secretary of State. The open judgment, containing only summary grounds, was provided also to ZZ. It was clear from the open judgment that the SIAC was sufficiently satisfied, for reasons contained only in the closed judgment, that in 1995 and 1996, ZZ was involved in activities of the Armed Islamic Group (GIA) network and in other terrorist activities. In particular, in its open judgment, the SIAC held that "for

²⁹² Article 31(3) Directive 2004/38/EC

²⁹³ Article 28 Directive 2004/38/EC

²⁹⁴ ZZ at paras.22-24

²⁹⁵ The SIAC Immigration Appeals Commission (Procedure) Rules (2003)

²⁹⁶ Rule 36 SIAC Rules

reasons which are explained only in the closed judgment, it was satisfied that the personal conduct of ZZ represents a genuine present and sufficiently serious threat which affects a fundamental interest of society, namely its public security and that it outweighs his and their right to enjoy family life in the UK".²⁹⁷

Subsequently, ZZ appealed against the SIAC's judgment to the Court of Appeal (England and Wales) Civil Division. This Court considered that the reasoning and findings of fact contained in the SIAC's judgments were sufficient to support the conclusion reached by the SIAC. However, the court doubted the lawfulness of the SIAC's decision not to disclose to the person concerned the essence of the grounds relied upon in the decision at issue. Therefore, the Court of Appeal decided to refer this issue to the European Court of Justice for a preliminary ruling.²⁹⁸ More precisely, the preliminary ruling was on whether the principle of effective judicial protection enshrined in Article 30(2) of Directive 2004/38 and interpreted in light of article 47 of the EU Charter, requires that "a judicial body considering an appeal from a decision to exclude a European Union citizen from a Member State on grounds of public policy and public security under Chapter VI of Directive 2004/38 ensure that the European Union citizen concerned is informed of the essence of the grounds against him", even if the national authorities contend that such disclosure would be contrary to the interests of State security.²⁹⁹

In his Opinion,³⁰⁰ the Advocate General Bot maintained that exceptional State security reasons could justify the non-disclosure of the grounds for a refusing entry decision. However, Member States must subject the decision of non-disclosure to judicial review and provide for techniques which allow to strike a fair balance between the procedural rights of Union citizens and the interests of State security.³⁰¹ The Advocate General began his analysis maintaining that the "devastating impact"³⁰² of crime terrorism entails that the protection of "intelligence assets and sources"³⁰³ is "an absolute priority".³⁰⁴ However, the necessity to prevent terrorism "cannot result in a kind of suicide of democracy itself".³⁰⁵ This means that it is necessary to find a balance between the demands of the rule of law and the restrictions compelled by the seriousness of the threat to public security posed by terrorism.³⁰⁶

The Advocate General recognized that rights of the defense are fundamental rights stemming from the constitutional traditions common to the Member States and then enshrined in Article 47 of the EU Charter.³⁰⁷ According to the Advocate General, Article 47 of the Charter is applicable in the present case and shall guide the interpretation of the exceptions that Article 30(2) of

²⁹⁷ Ibid. paras.22- 32

²⁹⁸ Ibid. para.33

²⁹⁹ Ibid. para.34.

³⁰⁰ C-300/11 *ZZ v Secretary of State for the Home Department*, Opinion of the Advocate General Bot of 12 September 2012 [hereinafter Bot Opinion]

³⁰¹ See de Boer, *supra* note 81, p.1237

³⁰² Bot Opinion, para.40

³⁰³ Bot Opinion, para.40

³⁰⁴ Bot Opinion, para.40

³⁰⁵ Bot Opinion, para.43

³⁰⁶ Bot Opinion, para.44

³⁰⁷ Bot Opinion, para.61

Directive 2004/38/EC allows to a precise and full disclosure of the grounds on which the expulsion decision was taken. At the same time, in its interpretation of Article 30(2) of the Directive, the Court should bear in mind also that legitimate limitations to the Charter rights are admissible on the basis of Article 52(1) of the EU Charter and that objectives of State security are recognized both in Article 4(2) TEU and in Article 346(1)(a) TFEU.³⁰⁸ Pursuant to Article 4(2) TEU, “the Union (...) shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular national security remains the sole responsibility of each Member State”.³⁰⁹ In connection with this Article, Article 346(1)(a) TFEU provides that the Member States shall not be forced to provide information the disclosure of which is deemed to be incompatible with “the essential interests of [their] security”.³¹⁰

In the light of this, the Advocate General concluded that “Article 30(2) of Directive 2004/38, read in the light of Article 47 of the Charter and Article 346(1)(a) TFEU, should be interpreted as permitting a Member State, in exceptional cases duly justified by the need to guarantee State security and subject to review by the national court, to prevent a Union citizen being informed of the grounds of public security for a decision to expel him, whether in detail or in summary form”.³¹¹ Complete non-disclosure of the grounds, whether in detail or in summary, is thus a possible option in the Advocate General’s view.

However, he made it clear that this conclusion is not sufficient to strike an appropriate balance between the competing interests at stake.³¹² In particular, relying heavily on the ECtHR’s case-law, he stressed that such a fair balance requires that infringements of procedural rights are counterbalanced on the one hand by a rigorous judicial review both of the substance of the measure and of the need for confidentiality;³¹³ on the other hand, by adequate procedural mechanisms capable of providing a satisfactory degree of adversarial proceedings.³¹⁴ In his view, this type of mechanism could be represented by the Special Advocate system established in the United Kingdom.³¹⁵ In fact, “SIAC is a fully independent court”³¹⁶ which has access to all the relevant information and which is authorized to set aside expulsion measures if the State security concerns are not duly proven. Moreover, the special advocates’ power to question the need for secrecy claimed by the national authorities represents an additional procedural safeguard for the individual concerned.³¹⁷

In order to strengthen his conclusion, the Advocate General maintained that the stricter standard applied by the ECtHR in *A* did not apply to the present case. In his view, in fact, expulsion cases, as in *ZZ*, do not fall under the

³⁰⁸ Bot Opinion, paras.66 -67

³⁰⁹ Article 4(2) TEU

³¹⁰ Article 346 TFEU

³¹¹ Bot Opinion, para.81

³¹² Bot Opinion, para.82

³¹³ Bot Opinion, para.88

³¹⁴ Bot Opinion, para.83

³¹⁵ Bot Opinion, paras.88 – 89

³¹⁶ Bot Opinion, para.99

³¹⁷ Bot Opinion, para.99

guarantees of Article 6 of the Convention: he understands “why the European Court of Human Rights has adopted a higher standard for procedural rights where it has been faced with detention situations”.³¹⁸ However, he does not “think that Article 47 of the Charter requires the analogous application of guarantees as rigorous as those under Article 6(1) of the ECHR in its criminal aspect to disputes concerning expulsion measures”.³¹⁹ Similarly, since the preliminary ruling regards the protection of freedom of movement and the right of residence of Union citizens, he claimed that also the reasoning followed by the Court of Justice in *Kadi I*³²⁰ cannot be applied by analogy. In *Kadi I* in fact, the Court set out safeguards regarding specifically the right to an effective judicial protection in relation to measures freezing funds and economic resources.³²¹ It is therefore clear that for the Advocate General the applicable standards vary according to the context in which the measures in question have been adopted.

Moving to the Court’s judgment, the first important point made by the Court is represented by its response to the effort of the Italian Government to have the request for a preliminary ruling declared inadmissible. In particular, the Italian Government maintained that from Article 4(2) TEU and Article 346(1)(a) it is clear that State security falls under the exclusive competence of the Member States.³²² However, the Court held that State security concerns are no grounds for considering European Union law and the due process rights enshrined in it inapplicable.³²³ The request for a preliminary ruling is therefore admissible.³²⁴ In drawing this conclusion the Court referred to its previous judgment in *Commission v Italy*.³²⁵ In that occasion the Court in fact, on the basis of its settled case-law, concluded that “although it is for Member States to take the appropriate measures to ensure their internal and external security, it does not follow that such measures are entirely outside the scope of Community law”.³²⁶

With regard to the substance of the judgment, the Court set aside the restrictive opinion delivered by the Advocate General and adopted a higher standard for the protection of the due process rights of Union citizens. The Court, in fact, concluded that if the exercise of the right to an effective judicial protection is to be effective, the essence of the grounds for a decision refusing entry must always be disclosed to the Union citizen concerned: a complete non– disclosure of those grounds cannot be considered compatible with Article 47 of the Charter.

To this end, the Court maintained that the exceptions to the right of full information that Article 30(2) of the Directive allows on the grounds of State security must be interpreted strictly and in the light of the right to effective

³¹⁸ Bot Opinion, para.111

³¹⁹ Bot Opinion, para.111

³²⁰ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, Judgment of 3 September 2008 [hereinafter *Kadi I*]

³²¹ Bot Opinion, para.112

³²² *Ibid.* para.35

³²³ *Ibid.* para.38

³²⁴ *Ibid.* para.39

³²⁵ Case C-387/05 *Commission v Italy* [2009] ECR I-11831, Judgment of 15 December 2009

³²⁶ *Ibid.* para.45

judicial protection as laid down in Article 47 of the Charter.³²⁷ The Court then recalled that although Article 52(1) of the EU Charter allows limitations on the exercise of the rights enshrined in the Charter, these limitations cannot infringe the essence of the right in question.³²⁸

Therefore, the interpretation of Article 30(2) and 31 of the Directive read in the light of Article 47 implies that, “if the judicial review guaranteed by Article 47 of the Charter is to be effective”,³²⁹ the person whose right to free movement has been restricted must have access to the reasons underlying the decision taken in relation to him.³³⁰ This means that, in compliance with the adversarial principle as a substantive part of the rights of the defense, the parties to a case must be provided with the opportunity to examine and comment on the documents and facts submitted to the court:³³¹ “the fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views”³³².

However, the Court recognized that, in some exceptional cases, the competent national authority may refuse complete disclosure to the person concerned of the grounds underlying the refusing entry decision on the basis of State security reasons. In these cases, the Court held that two conditions must be met by the national courts.³³³

The first condition is that, as provided for in Article 31(1) of the Directive, Member States must put in place an effective judicial review both of the legality of the decision under Article 27 of the Directive and of the validity of the State security reasons invoked by the national authorities to limit disclosure.³³⁴ To this end, on the one hand, Member States must lay down rules which enable the competent court to examine all the grounds and the evidence on which the decision under Article 27 has been based in order to verify its legality.³³⁵ On the other hand, while it is for the national authority to prove that the full disclosure of the grounds and evidence underlying the decision under Article 27 would compromise State security,³³⁶ the court must then independently evaluate whether the disclosure is barred by those reasons.³³⁷ there is no presumption of the existence and of the validity of the State security concerns invoked by the national authorities to refuse disclosure.³³⁸

If the court concludes that the protection of State security does not impose non-disclosure, it will ask the national authority to supply the missing grounds. If

³²⁷ Ibid. para.49

³²⁸ Ibid. para.51

³²⁹ Ibid. para.53

³³⁰ Ibid. para.53

³³¹ Ibid. para.55

³³² Ibid. para.56

³³³ Ibid. para.57

³³⁴ Ibid. para.58

³³⁵ Ibid. para.59

³³⁶ Ibid. para.61

³³⁷ Ibid. para.60

³³⁸ Court of Justice of the European Union, Press release No. 70/13, Luxembourg, 4 June 2013, Judgment in Case C-300/11 *ZZ v Secretary of State for the Home Department*

this disclosure is not authorized by that authority, the court will examine the legality of the decision in question only on the basis of the material disclosed.³³⁹ On the contrary, if the court is sufficiently satisfied that State security reasons stand in the way of a full disclosure of those grounds, in carrying out the judicial review of the legality of the decision under Article 27, the competent court -and this is the second condition- must dispose of techniques and procedures which strike the appropriate balance between, on the one hand, legitimate State security concerns and, on the other hand, the requirements of procedural rights, “whilst limiting any interference with the exercise of that right to that which is strictly necessary”.³⁴⁰ In particular, the need to comply with Article 47 of the EU Charter to the greatest possible extent entails that the person concerned “must be informed, *in any event*, of the *essence* of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based” (the so-called ‘gist’ requirement). This derives from the fact that “the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective”.³⁴¹

However, while a complete non-disclosure of the grounds is not contemplated by the Court, with regard to evidence underlying those grounds a similar weighing up cannot be applied in the same way: “in certain cases, disclosure of that evidence is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities.”³⁴² In this context, the national courts have the task to evaluate whether the restrictions of the rights of the defense caused by non-disclosure of the evidence and of the full and precise grounds underlying the refusing entry decision compromise the evidential value of the confidential evidence.³⁴³

The ECJ then concluded saying that the national courts shall ensure that the Union citizens concerned is provided with the essence of the grounds at the basis of the decision affecting them without compromising the confidentiality of the evidence. Moreover, it is for the national courts to determine, in accordance with the national procedural law, the consequences of any failure to duly inform the person concerned.³⁴⁴ In short, the ECJ have extended to deportation proceedings the safeguards already established in detention cases (A) and in the context of asset freezing (*Kadi I*).³⁴⁵

³³⁹ Ibid. para.63

³⁴⁰ Ibid. para.64

³⁴¹ Ibid. para.65. Emphasis added. The ‘gist’ requirement thus requires the governments to give the individuals concerned enough information about the case against them in order to enable them to efficiently refute the allegations they face, even if that disclosure would be damaging to national security.

³⁴² Ibid. para.66

³⁴³ Ibid. para.67

³⁴⁴ Ibid. para.68

³⁴⁵ Samantha Knights, “Case Comment : *ZZ v Secretary of State for the Home Department (C-300/11)*”, 20 June 2013, available at <http://eutopialaw.com/2013/06/20/CASE-COMMENT-ZZ-V-SECRETARY-OF-STATE-FOR-THE-HOME-DEPARTMENT-C-30011/>

However, while it affirmed that, regardless of the security context, the person subject to proceedings must be informed at least of the essence of the grounds for the decision refusing entry, the European Court of Justice adopted a more circumspect approach with regard to the disclosure of evidence supporting those grounds. Herein lies the problem: the distinction between grounds and evidence can be difficult to apply in practice. The line between grounds and evidence is in fact so thin that it may result impossible to disclose certain grounds without also leaking the underlying evidence. “If one of the grounds, for example, is that Mr. ZZ met with a certain person in a private place then it may suggest that the person is a confidential informant, or that the building is under surveillance, or that Mr. ZZ’s communications are subject to interception”.³⁴⁶ This means that if due process requires disclosure of at least the essence of the grounds for a restrictive decision, disclosure of also the supporting evidence might be inevitable.³⁴⁷

3.2. Sanctions and asset-freezing measures: the *Kadi* saga and *OMPI/PMOI* case

In its judgment in *ZZ*, the ECJ relied heavily on the principles that the Court had already laid down in cases not related to the citizenship context but to counterterrorism sanctions.³⁴⁸ At present, there are two systems of sanctions against terrorism operating at the EU level: the UN-based sanctions, which are EU legal acts implementing UN decisions to sanction certain individuals or entities, and the autonomous EU sanctions. In the latter case, it is the EU itself that identifies who is to be targeted by sanctions.³⁴⁹ Two sets of cases will be examined: the *Kadi* saga, as regards the UN-based sanctions, and *OMPI/PMOI* as regards the EU list. However, from the case-law discussed below it emerges that the ECJ adopted a uniform standard of legality which applies to both systems of targeted sanctions.³⁵⁰

3.2.1. *UN-based sanctions: the Kadi saga*

Provided that UN anti – terrorist sanctions are often based on confidential evidence, in the *Kadi* saga, the ECJ answers this important question: how can effective judicial protection be provided against UN sanctions while at the same time respecting the Security Council’s responsibility in maintaining peace and security at the international level?³⁵¹ The judgments delivered by the ECJ in the *Kadi* saga are important as they established the necessity of judicial reviews

³⁴⁶ Cian Murphy, “European Court of Justice grapples with secret evidence in UK immigration case”, 14 June 2013, available at <http://ukhumanrightsblog.com/2013/06/14/european-court-of-justice-grapples-with-secret-evidence-in-uk-immigration-case-dr-cian-murphy/#more-18765>

³⁴⁷ See Murphy, *supra* note 346

³⁴⁸ See de Boer, *supra* note 81, p. 1243

³⁴⁹ Armin Cuyvers, “ ‘Give me one good reason’ : The unified standard of review for sanctions after *Kadi II*”, (2014) 51 C.M.L. Rev., p.1759

³⁵⁰ See Cuyvers, *supra* note 349, p.1759

³⁵¹ See Cuyvers, *supra* note 349, p.1759

(*Kadi I*), and the intensity and the aim of these reviews (*Kadi II*):³⁵² full review of the listing decision must always be granted but the compliance with the due process requirements demands only the disclosure of at least one well detailed and substantiated ground which justifies the listing. On 5 October 2012, Mr. Kadi was removed from the UN sanctions list. After a few days, he was removed also from the EU list, nine months before the European Court of Justice annulled his listing.³⁵³

The background of the case can be traced back to the new sanctions regime that the Security Council established under Chapter VII of the UN Charter.³⁵⁴ As a response to the rising threat represented by global terrorism, in 1999, the Security Council started imposing freezing measures on all Taliban assets³⁵⁵ in order to hamper their ability of funding terrorist activities. These measures were then gradually broadened in order to target all the entities deemed to be linked to Osama Bin Laden and Al-Qaida.³⁵⁶ The financial assets and resources of the individuals whose names were added in the so-called 'blacklist' were to be frozen by the UN Member States. A new organ of the Security Council, the Sanctions Committee was then established in order to manage these sanctions. What makes this new sanctions regime particularly problematic is that in drawing these blacklists, the Committee "often relies on confidential information provided by the so called originator States".³⁵⁷

The European Union then adopted a EU sanctions list in order to automatically implement the UN measures into its own legal order. This list was drawn under Council Regulation (EC) No 881/2002.³⁵⁸ Due to fact that these restrictive measures are mainly taken on the basis of confidential information, the stage for a fundamental clash between the level of judicial protection of fundamental rights required by the EU constitutional framework and the authority of UN Security Council under Chapter VII was now ready:³⁵⁹ since the so-called originator States generally "do not allow the Sanctions Committee to share this information with third parties",³⁶⁰ it often happens that when it comes

³⁵² Joined cases C-584/10 P, C-593/10 P & C-595/10 P, *Commission and Others v Yassin Abdullah Kadi*, Judgment of 18 July 2013 [hereinafter *Kadi II*]

³⁵³ See Cuyvers, *supra* note 349, p.1760

³⁵⁴ See Cuyvers, *supra* note 349, p.1760

³⁵⁵ UN Security Council Resolution 1267(1999), para 14(b), as later strengthened and broadened to include *inter alia* all persons and entities linked to Al-Qaida by UN Security Council Resolution 1333 (2000), S/RES/1333 (2000)

³⁵⁶ UN Security Council Resolution 1333(2000), as maintained and developed by subsequent resolutions such as 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1988 (2011), 1989 (2011), 2082 (2012), 2083 (2012), 2133 (2014)

³⁵⁷ See Cuyvers, *supra* note 349, p.1760

³⁵⁸ Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan

³⁵⁹ See Cuyvers, *supra* note 349, p.1761

³⁶⁰ See Cuyvers, *supra* note 349, p.1760

to the Union implementing into its own legal order UN measures, it often does so without being in full possession of the supporting information.³⁶¹

The Council Regulation (EC) No 881/2002 in particular imposes restrictive measures directed against persons and entities which are deemed to be associated with Osama bin Laden, the Al-Qaida network and the Taliban. Article 2 of this Regulation provides that “all funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen”.

In 2001, the names of Mr. Yasin Kadi, a resident of Saudi Arabia, and of the Al Barakaat International Foundation (‘Al Barakaat’) were placed in the UN – level blacklist and two days later their names were included in Annex I of Regulation 881/2002. Mr. Kadi and Al Barakaat then brought action before the European judiciary in order to have their listing annulled. They contended in particular that this measure had violated their fundamental rights to be heard and to an effective judicial review since neither the grounds nor the evidence justifying their listing had been disclosed to them.³⁶²

The General Court dismissed the applicants’ action for annulment.³⁶³ In essence, the Court held that since the Council Regulation was designed to implement a resolution adopted at the UN level, its internal lawfulness could not be subject to the judicial review requested by the applicants. This means that the Regulation enjoyed immunity from jurisdiction, with the only exceptions of violations of *jus cogens*.³⁶⁴ Mr. Kadi and Al Barakaat then appealed against this judgment before the European Court of Justice (*Kadi I*).

The ECJ adopted an opposite approach and annulled Regulation No. 881/2002 in so far as it referred to Mr. Kadi and Al Barakaat. The Court based its reasoning on the fact that “fundamental rights form integral part of the general principles of the law whose observance the Court ensures”.³⁶⁵ In the light of this, the Court concluded that international agreements, in the present case the UN Charter, cannot prejudice the judicial review carried out by the European Courts on the legality of all the EC acts. Review, “in principle the full review”, is in fact expression of the constitutional principles enshrined in the EC Treaty as an autonomous legal system. In a Community based on the rule of law, in fact, the respect of fundamental rights is a condition for the lawfulness of all the Community measures. Thus, the asserted immunity from jurisdiction of the Regulation No 881/2002 by virtue of the fact that it gives effect to a UN resolution cannot find any justification under the EC Treaty.³⁶⁶

At the same time the Court recognized the necessity to respect the UN law in the EU legal order: the adoption by the Security Council of resolutions under Chapter VII of the UN Charter reflects in fact the responsibility that this body has in maintaining international peace by taking all the necessary measures. This means that the judicial review that the Community judicature must ensure

³⁶¹ See Curtin, *supra* note 65

³⁶² See Cuyvers, *supra* note 349, p.1761

³⁶³ Case T-315/01 *Kadi v. Council and Commission*, [2005] ECR II-3649, Judgment of 21 September 2005

³⁶⁴ *Ibid.* para.226

³⁶⁵ *Kadi I* at para.283

³⁶⁶ *Ibid.* para.326

applies only to the EU acts and not to the UN acts to which the Community measures intend to give effect.³⁶⁷

Most importantly, in *Kadi I* the crucial problems arising from the use of secret evidence and secret grounds also emerged. Considering the circumstances under which the appellants' names were included in Annex I, the Court found the right to be heard and the right to effective judicial review "patently not respected".³⁶⁸

The Court began its reasoning by highlighting the importance of the right to effective judicial protection as a general principle common to the constitutional traditions of the Member States. This principle is also enshrined in Articles 6 and 13 of the European Convention of Human Right and further affirmed in Article 47 of the Charter of Fundamental Rights of the European Union.³⁶⁹

The Court then held that in order to grant the effectiveness of the judicial review of the legality of the grounds for restrictive measures, the Community authority shall communicate those grounds to the individual or entity concerned.³⁷⁰ The communication of these grounds in fact enables the persons concerned to "defend their rights in the best possible conditions" and places the Community judicature in a position in which it may fully and effectively review the legality of the Community measure.³⁷¹

However, the Court also recognized that, with regard to restrictive measures such as those imposed by the Regulation in question, the Community authorities cannot be required to disclose those grounds before the names of the targeted individuals are listed for the first time. A prior communication, in fact, would have the effect of weakening the effectiveness of freezing measures whose effectiveness relies heavily on the surprise effect.³⁷² In addition, with regard to Community measures which are meant to implement UN resolutions, "overriding considerations to do with safety or the conduct of international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and therefore against their being heard on these matters".³⁷³

However, this does not mean that the restrictive measures adopted on the basis of national security concerns are immune from judicial review. On the contrary, it is for the Community judicature "to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources taken into account in the adoption of the act concerned and on the other hand the need to accord the individual with a sufficient measure of procedural justice".³⁷⁴ This is the passage on which the same Court relied in *ZZ*.

Applying these conclusions to the present case, the Court found a violation of the applicants' rights of the defense. In particular, since the Council

³⁶⁷ Ibid. paras.281 - 288

³⁶⁸ Ibid. para.334

³⁶⁹ Ibid. para.335

³⁷⁰ Ibid. para.336

³⁷¹ Ibid. para.337

³⁷² Ibid. paras.338-340

³⁷³ Ibid. para.342

³⁷⁴ Ibid. para.344

had never informed the appellants of the evidence adduced against them in justifying their listing, they were unable to put forward their point of view in that respect. Their right to be heard had therefore been violated.³⁷⁵ Moreover, for the same reason, the applicants were unable to defend their rights “in satisfactory condition before the Community judicature”.³⁷⁶ Also their right to an effective legal remedy was consequently infringed.³⁷⁷

Consistently, the Court annulled the Regulation in so far as it concerned the applicants. However, the effects of the listing were maintained for a period of three months.³⁷⁸ This period was necessary, on the one hand, to prevent the applicants from seeking to circumvent the effectiveness of the restrictive measures in case these should prove justified.³⁷⁹ On the other hand, “to allow the EU Council to remedy the infringements found” by listing the applicants in a way that is compatible with the minimum requirements of due process.³⁸⁰

Important steps in favor of procedural justice were thus taken by the European Court of Justice in *Kadi I*. However, the Court did not clarify how these “techniques”³⁸¹ should be shaped in practice, since it was clear that in the present case no balancing exercise had been undertaken. Moreover, a distinction between the grounds for a listing decision on one side and the evidence supporting those grounds on the other had yet to be drawn.³⁸²

After the *Kadi I* judgment, the Commission sent Kadi a letter containing a summary of the reasons behind his listing which had been previously requested and acquired by the Sanctions Committee. Kadi was then given 19 days to submit his comments on the grounds included in this summary. He replied to this letter by asking the Commission “to disclose the evidence supporting the assertions and allegations made in the summary of reasons” and “requested a further opportunity to make representations on that evidence once he had received it”. He also “attempted to refute, providing evidence in support of his refutation, the allegations made in the summary of reasons, in so far as he was able to respond to general allegations”.³⁸³

After having taken in due account Kadi’s comments, the Commission made a new decision keeping Kadi’s listing.³⁸⁴ The Commission justified its decision maintaining that, since the applicant had been given the summary of the reasons and had been invited to comment on them, the requirements laid out in *Kadi I* had been satisfied. Moreover, it held that that judgment did not

³⁷⁵ Ibid. para.348

³⁷⁶ Ibid. para.349

³⁷⁷ Ibid. para.349

³⁷⁸ Ibid. para.376

³⁷⁹ Ibid. para.373

³⁸⁰ Ibid. para.375

³⁸¹ Ibid. para.344

³⁸² See de Boer, *supra* note 81, p.1253

³⁸³ General Court of the European Union, Press release No. 95/10, Luxembourg, 30 September 2010, Judgment in Case T-85/09 *Yassin Abdullah Kadi v Commission*, p.2

³⁸⁴ Commission Regulation (EC) No. 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban

require a further disclosure of evidence as requested by the applicant.³⁸⁵ Mr Kadi returned to the General Court seeking annulment of this new Regulation.

In its second *Kadi* judgment,³⁸⁶ the General Court began with acknowledging the importance of the principle laid down by the ECJ in *Kadi I*: full and rigorous review of the lawfulness of the sanctions is required,³⁸⁷ at least until the UN re-examination procedure offers equivalent protection.³⁸⁸ The Court further specifies that this review “should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in the measure are based”.³⁸⁹ This entails that, in order to exercise an effective judicial review, the EU courts need to have full access to all the information and evidence underpinning the contested measure.

Applying this standard, the General Court held that Kadi’s “rights of defense have been observed only in the most formal and superficial sense”.³⁹⁰ This was because, since the Commission considered itself strictly bound by the conclusions reached at the UN level, it failed to take the applicant’s observation into due account.³⁹¹ Moreover, in the procedure that the Commission undertook in response to Kadi’s requests, “not even the most minimal access to the evidence against him”³⁹² was granted. In this context, “the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him”.³⁹³ No balance had therefore been struck between the applicant’s procedural rights and the need for confidentiality of the information in question.³⁹⁴

In reaching this conclusion, the Court referred to the standards set out in A by the European Court of Human Rights. In doing so, the Court concluded that applying identical criteria in the present case, it is clear that the applicant was not put in a position to effectively challenge any of the allegations he was facing. The only material to which he had access, in fact, was an imprecise and vague summary of reasons.³⁹⁵ To make things worse, even when the allegations against him were sufficiently precise, the Commission made no effort to duly take into account the exculpatory evidence put forward by the applicant.³⁹⁶ The adoption of the contested Regulation has therefore infringed the applicant’s rights of the defense.³⁹⁷

By the same token, given the strong relationship already pointed out by the European Court of Justice in *Kadi I* between the rights of the defense and the right to an effective judicial review, also Kadi’s right to an effective judicial

³⁸⁵ See Press release No.95/10, *supra* note 383, p.2

³⁸⁶ Case T-85/09, *Kadi v. Commission* [2010] ECR II-5177, Judgment of 30 September 2010 [hereinafter *Kadi II (GC)*]

³⁸⁷ *Ibid.* para.126

³⁸⁸ *Ibid.* para.127

³⁸⁹ *Ibid.* para.135

³⁹⁰ *Ibid.* para.171

³⁹¹ *Ibid.* para.172

³⁹² *Ibid.* para.173

³⁹³ *Ibid.* para.174

³⁹⁴ *Ibid.* para.173

³⁹⁵ *Ibid.* para.177

³⁹⁶ *Ibid.* para.178

³⁹⁷ *Ibid.* para.179

review was violated: the lack of access to the grounds and evidence used against the applicant, in fact, prevented him from defending his rights before the EU courts in satisfactory conditions.³⁹⁸

The Regulation was accordingly annulled in so far as it concerns Mr. Kadi. The General Court has hereby adopted a very high standard for the statement of reasons,³⁹⁹ a standard that may be extremely difficult to apply in practice, especially considering the compelling need for confidentiality of the information involved.⁴⁰⁰ The Commission, the Council, and the United Kingdom inevitably appealed against this judgment.⁴⁰¹

First of all, the ECJ (*Kadi II*) reaffirmed that since the UN system for listing, as currently shaped, does not provide effective judicial protection, it is for the EU Courts to ensure the full review of the internal lawfulness of all the Community measures.⁴⁰² Secondly, when laying out the requirements that need to be met in order to preserve procedural justice when confidential information comes into play, the Court relied heavily on the findings in *ZZ*.

However, the Court began with recognizing that the question of whether the fundamental rights of the defense have been infringed need to be addressed in the light of the particular circumstances of each case, “including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question”.⁴⁰³ This means that the requirements laid out in *ZZ* cannot be automatically transposed to the area of sanctions and asset freezing: in this context in fact the UN origin of the restrictive measures has to be taken in due account.⁴⁰⁴

In its decision, the Court made clear that the fundamental procedural rights must be respected both during the administrative process of placing an individual on the list and at the judicial phase that may be triggered by the listed individual in order to challenge the listing before the court.

During the administrative phase, the respect of these rights “requires that the competent Union authority disclose to the individual concerned the evidence against the person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee”.⁴⁰⁵ The individuals concerned must then be enabled to effectively make known their views on the grounds disclosed.⁴⁰⁶ Moreover, when comments are made by the listed individual, it is for the competent European Union authorities to “carefully and impartially” reexamine the validity of the alleged reasons in the light of those comments.⁴⁰⁷ Lastly, even though “a

³⁹⁸ Ibid. para.181

³⁹⁹ See Cuyvers, *supra* note 349, p.1769

⁴⁰⁰ See Cuyvers, *supra* note 349, p.1770

⁴⁰¹ Appeal Brought by the European Commission against the Judgment of the General Court in case T-85/09, 2011 O.J. (C 72) 9; 2011 O.J. (C 72) 9 (EU Council appeal); 2011 O.J. (C 72) 10 (UK appeal).

⁴⁰² *Kadi II* at para.67

⁴⁰³ Ibid. para.102

⁴⁰⁴ Ibid. para.104

⁴⁰⁵ Ibid. para.111

⁴⁰⁶ Ibid. para.112

⁴⁰⁷ Ibid. para.114

detailed response to the comments made by the individual concerned⁴⁰⁸ is not necessarily required, the “individual, specific and concrete reasons” for the listing must always be identified in the statement of reasons.⁴⁰⁹

If a judicial phase then follows, the Court held that the effectiveness of the judicial review entails that the European Courts ensure that the listing decision is taken on a “sufficiently solid factual basis”.⁴¹⁰ The factual allegations supporting the decision must therefore be verified by the Court with the consequence that “judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated”.⁴¹¹ To this end, as set out in ZZ, it is for the relevant EU authorities to provide, when necessary, the information and the evidence underpinning the restrictive measure in order to demonstrate that the reasons relied on are well founded.⁴¹² However, the competent national authority is not required to produce before the Court all the information taken into account for the listing decision in question but it is necessary that the information and evidence produced is sufficient to substantiate the reasons relied upon against the individual concerned.⁴¹³ If the evidence supplied is insufficient to support the reasons for the listing, the EU courts shall disregard that reason as a possible justification for the contested decision.⁴¹⁴

As in ZZ, the Court admitted that “overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned”.⁴¹⁵ In these circumstances, by analogy with ZZ, it is for the EU courts, “before whom the secrecy and confidentiality of that information or evidence in no valid objection”,⁴¹⁶ to carry out the judicial review by applying techniques which accommodate on the one hand the necessary respect for the procedural rights of the person concerned, and on the other, the legitimate security concerns which require the confidentiality of some of the information taken into account in the adoption of the contested decision.⁴¹⁷

To this end, also in the context of sanctions, the EU courts need to examine whether the grounds for non-disclosure are well founded.⁴¹⁸ If not, as already laid out in ZZ, the Court shall give the relevant EU authority “the opportunity to make such disclosure to the person concerned”.⁴¹⁹ If the authority fails to do so, the Court will conduct the examination of the legality of the

⁴⁰⁸ Ibid. para.116

⁴⁰⁹ Ibid. para.116

⁴¹⁰ Ibid. para.119

⁴¹¹ Ibid. para.119

⁴¹² Ibid. paras.120 - 121

⁴¹³ Ibid. para.122

⁴¹⁴ Ibid. para.123

⁴¹⁵ Ibid. para.125

⁴¹⁶ Ibid. para.125

⁴¹⁷ Ibid. para.125

⁴¹⁸ Ibid. para.126

⁴¹⁹ Ibid. para.127

measure contested, by taking into consideration only the material disclosed.⁴²⁰ On the contrary, if the reasons for non-disclosure are well founded, a balance need to be struck between the requirements of an adversarial process, and “the security of the European Union or its Member States or the conduct of their international relations”.⁴²¹ In order to strike such a balance, also the possibility of supplying a summary outlining the contents of the information or of the evidence in question should be taken into account.⁴²² Also in this context, as in ZZ, the Court needs to assess whether the non-disclosure of confidential material and the consequential impossibility for the person concerned to comment on them undermine the probative value of the secret evidence.⁴²³

However, the Court, in laying out the requirements that need to be respected in order to strike such a fair balance, did not conclude as in ZZ that the essence of the reasons for a decision must always be disclosed to the person concerned. Rather, it stated that what should be granted is that “at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision”.⁴²⁴ In the absence of one such ground, the listing cannot be upheld.⁴²⁵

In short, there are three tests that the EU courts shall undertake when carrying out their review in the event of legal challenge. First, at least one of the grounds supporting the listing needs to be sufficiently detailed and specific. Secondly, at least one of the sufficiently detailed and specific ground need to be substantiated. Thirdly, at least one of the sufficiently detailed and substantiated ground need to be sufficient in itself to justify the measure contested.

Applying this standard to the present case, the ECJ held that the General Court’s judgment under appeal was affected by two errors of law. First of all, the General Court had wrongly interpreted the judgment in *Kadi I* by basing its finding that the rights of the defense and the right to effective judicial protection had been infringed on the failure of the Commission to provide Mr. Kadi and the General Court with (all) the information and evidence underpinning the contested decision. The General Court, in fact, itself recognized that not even the Commission had access to those information.⁴²⁶ Also the conclusion drawn by the General Court that the reasons provided by the Sanctions Committee in the summary were too vague and unspecific needed to be set aside if an examination of those reasons is duly carried out. The ECJ, in fact, concluded that the majority of the reasons underlying the contested measure were sufficiently detailed to allow Kadi to effectively defend himself.⁴²⁷

⁴²⁰ Ibid. para.127

⁴²¹ Ibid. para.128

⁴²² Ibid. para.129

⁴²³ Ibid. para.129

⁴²⁴ Ibid. para.130

⁴²⁵ Ibid. para.130

⁴²⁶ Ibid. para.138; in *Kadi II (GC)* at para.95 the General Court recognized that “(...) the Commission confirmed, first, that it did not have any of the evidence in question. A request for the production of evidence must, in its view, be made to the United Nations States which hold it”.

⁴²⁷ Ibid. paras.140 -149

However, notwithstanding these errors, the ECJ endorsed the substance of the General Court's judgment but on the basis of different legal grounds. In particular, the ECJ held that since no information or evidence has been disclosed to substantiate the allegations advanced against Kadi, the mere indication of Mr Kadi's involvement in international terrorism, roundly refuted by the applicant, is "not such as to justify the adoption, at European Union level, of restrictive measures against him".⁴²⁸ In short, since none of the reasons for maintaining the listing, even though adequately detailed, were sufficiently supported by evidence or information, the Regulation maintaining Kadi's listing had to be annulled.⁴²⁹

The findings of the ECJ in *Kadi II* are undoubtedly of extreme importance in the way they highlight the role of the EU courts in maintaining the authority of constitutional values within the EU legal sphere.⁴³⁰ The ECJ reinforced the centrality of the rule of law by holding that all institutional acts must be subject to judicial review in order to test their consistency with the constitutional principles of the EU law.⁴³¹

However, this judgment has also been subject to severe criticism among the scholarly literature. *Kadi II* reflects the attempt of the Court to accommodate the difficulties constantly faced by the competent EU authorities in taking listing decisions without at the same time surrendering the European constitutional principles:⁴³² "the aim is not to make listings *a priori* impossible, but to ensure effective judicial review of listings".⁴³³ This attempt emerges clearly from the fact that, in order to facilitate the sharing of information between third parties and EU authorities, only one reason for the listing needs to be sufficiently detailed and substantiated by information and evidence.⁴³⁴ This means that the EU authorities are not required to produce all the information and evidence taken into account for the decision.

Moreover, even in the event of the EU Courts concluding that national security concerns do not justify the non-disclosure of certain information, the competent authority can still choose to withhold the information in question with the only consequence that the EU Courts will assess the lawfulness of the listing only on the basis of the material disclosed.⁴³⁵ The EU authorities therefore retain the ultimate choice on whether to disclose information to the court. However, the compatibility of this discretion with the standards set by both the ECJ itself and the ECtHR has yet to be discussed.⁴³⁶ First of all, in *ZZ*, which the ECJ frequently relied upon in *Kadi II*, the same Court stated that "it is incumbent upon the Member States to lay down rules enabling the court entrusted with review of the decision's legality to examine both *all* the grounds

⁴²⁸ Ibid. para.153

⁴²⁹ Ibid. paras.150 -165

⁴³⁰ Esme Shirlow, "Taking Stock: Assessing the Implications of the *Kadi* Saga for International Law and the Law of the European Union", (2014) 15(2) *Melbourne J.I.L.*, p.11

⁴³¹ See Shirlow, *supra* note 430, p.13

⁴³² See Cuyvers, *supra* note 349, p.1771

⁴³³ See Cuyvers, *supra* note 349, p.1774

⁴³⁴ See Cuyvers, *supra* note 349, p.1774

⁴³⁵ Ibid. para.127

⁴³⁶ See Cuyvers, *supra* note 349, p.1775

and the related evidence on the basis of which the decision was taken”.⁴³⁷ Similarly, in *Chahal*, the European Court of Human Rights found that the impossibility for the High Court to “have access to the *full* material on which the Secretary of State had based his decision” represented a violation of Article 5(4) ECHR.⁴³⁸

This discretion in withholding information accorded to the competent authorities, in fact, enables the listing authorities to select the material at their disposal making therefore difficult for the Court to carry out a full-merit-based review. These authorities could for example withhold exculpatory evidence or leave out information that could compromise the probative value of the evidence, such as the fact that in acquiring the evidence in question fundamental rights, such as the prohibition of torture under Article 3 ECHR, have been breached.⁴³⁹ Alternatively, they could disclose only partial evidence in order to alter its meaning.⁴⁴⁰

However there might be a political solution for this dilemma: in order to reach an acceptable level of disclosure of information, the EU members of the Security Council (of which France and the United Kingdom are permanent members) will need to block any listing decision proposed to the Sanctions Committee, when the proposing State refuses to provide the information relied upon for the listing proposal in a manner that will enable the EU courts to carry out, fully and effectively, a judicial review over the resulting sanctions.⁴⁴¹

Another problem posed by the judgment in *Kadi II* is that it seems to accept that some evidence might not be subject to the adversarial principle without the safeguards laid out in the ECtHR’s case-law, in particular in the leading ECtHR’s judgment on the use of confidential information: *A and Others v the United Kingdom*. As a means to further facilitates the sharing of confidential information,⁴⁴² *Kadi II* makes it possible for the authority to disclose certain information only to the Court, against which secrecy or confidentiality of the information cannot be legitimately invoked, and not to the individual concerned.⁴⁴³ However, in *A* the ECtHR found that the use that the Courts make of confidential evidence can be accepted only in some very exceptional circumstances and only if “any difficulty caused to the defendant by a limitation on his rights are sufficiently counterbalanced by procedures followed by the judicial authorities”.⁴⁴⁴

In *A* this counterbalancing role was performed by the independent special advocates. These security-cleared counsels, in fact, unlike the individual concerned, have complete access to all the information. Combined with other safeguards such as the full access of the court to all the evidence and provided that the allegations against the defendants are sufficiently detailed to allow an

⁴³⁷ *ZZ* at para 59. Emphasis added.

⁴³⁸ See *Chahal* as summarized by the Grand Chamber of the ECtHR itself in *A* at para. 210. Emphasis added.

⁴³⁹ See Cuyvers, *supra* note 349, p.1775

⁴⁴⁰ See Cuyvers, *supra* note 349, p.1776

⁴⁴¹ Lisa Ginsborg and Martin Scheinin, “You Can’t Always Get What You Want: The *Kadi II* Conundrum and the Security Council 1267 Terrorist Sanctions Regime”, (2011) E.H.R.R., p.18

⁴⁴² See Cuyvers, *supra* note 349, p.1772

⁴⁴³ *Kadi II* at paras.125 -128

⁴⁴⁴ *A* at para.205

effective exercise of the right of the defense, the ECtHR concluded that this type of system could be compatible with Article 5(4) and 6 ECHR “even where all or most of the underlying evidence remained undisclosed”.⁴⁴⁵ However, a similar special advocate system is not available at the EU level.⁴⁴⁶

In the light of this, also the extensive reference to *ZZ* made by the ECJ in *Kadi II* seems unconvincing. *ZZ* in fact concerned the same SIAC procedure which was examined in *A*. This means that the premise that led the ECJ to its conclusion in *ZZ* was the presence of all the far-reaching safeguards incorporated in the UK special advocate system. It is therefore difficult to find in *ZZ* an appropriate guidance for the review of UN-based listing decisions that the EU Courts are supposed to carry out. In this context, in fact, no similar mechanisms have been designed in order to compensate non-disclosure of some information to one party. Yet the special advocate system itself suffers from several shortcomings.⁴⁴⁷

Furthermore, as mentioned above, under the standard elaborated in *Kadi II*, if the Court concludes that the claimed confidentiality of the evidence is not justified, it is up to the authority to either inform the listed individual of the evidence or to withdraw it. In the latter case, the court will evaluate “the lawfulness of the contested measure solely on the basis of the material which has been disclosed”.⁴⁴⁸ In this event however, although the Court is not authorized to rely on the evidence withdrawn in the determination of the case, it will already have known the content of the confidential evidence. The key problem here is that such knowledge may have an undue influence on the judgment of the Court without giving the listed individual the possibility to refute the contents of the confidential evidence in question. Therefore, although the competence of EU judges is well known, there are legitimate doubts about the impartiality of the court.⁴⁴⁹

Notwithstanding these serious concerns raised by the standard endorsed by the European Court of Justice in *Kadi II*, the substance of this ruling has been recently confirmed in another important judgment of the General Court: *Ayadi*.⁴⁵⁰ The background of this case is the same as in the *Kadi* litigation. The individual concerned is Chafiq Ayadi, a Tunisian national residing in Ireland. In 2001 his name was added by the Sanction Committee to the UN Security Council’s Al-Qaida sanctions list and then, in 2002, included in the list which gave effect at the EU level to the UN listing.⁴⁵¹ Ayadi, like Kadi, brought before the General Court an action to annul the EU Regulation in so far as it concerned him but the Court dismissed that action.⁴⁵² However, Ayadi then won on appeal

⁴⁴⁵ *A* at para.120

⁴⁴⁶ See Cuyvers, *supra* note 349, pp.1776 - 1777

⁴⁴⁷ See Cuyvers, *supra* note 349, p.1778

⁴⁴⁸ *Kadi II* at para.127

⁴⁴⁹ See Cuyvers, *supra* note 349, pp.1779-1780

⁴⁵⁰ Case T-527/09 *RENV Ayadi v European Commission*, Judgment of 14 April 2015 [hereinafter *Ayadi*]

⁴⁵¹ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban

⁴⁵² Case T-253/02 *Ayadi v Council*, Judgment of 12 July 2006

to the ECJ which found the appellant's right to defense, in particular his right to be heard, patently not respected.⁴⁵³

Like Kadi, Ayadi then challenged his re-listing by the Commission before the General Court. The Commission in fact in 2009, on the basis of the statement of the reasons for listing provided by the Sanctions Committee, confirmed the inclusion of Mr Ayadi's name in the Annex I of Regulation No 881/2001.⁴⁵⁴ Since Mr Ayadi was de-listed by the Sanctions Committee in 2011, in 2012 the General Court ruled that there was no longer need for giving a ruling on the action for annulment. However, in 2013 this decision was set aside by the European Court of Justice⁴⁵⁵ which remitted the case to the General Court for it to rule on the application. The Court in fact held that, although Ayadi had been de-listed by the Sanctions Committee and consequently by the Union, the applicant continues to have interest in the annulment proceedings because he could still try to obtain some form of reparation and rehabilitation.

In April 2015, Ayadi won before the General Court on the same grounds as Mr Kadi in *Kadi II*. The Court held that although it was not legally bound by the conclusion reached by the ECJ in *Kadi II*, it considers that the same standard "may be applied, by analogy, to Mr Ayadi's case in the absence of any other information or inculpatory evidence concerning Mr Ayadi".⁴⁵⁶ In applying the same standard, the Court concluded that also in the present case the applicant's right of the defense "had been observed only in the most formal and superficial sense".⁴⁵⁷

The applicant's grounds of complaint were the same as those made by Kadi. In particular, also in this case, the Commission failed to comply with its duty to examine whether the reasons advanced for his listing were well founded in the light of the applicant's observations on the Sanctions Committee's statement of reasons. Moreover, the Commission also failed to request the disclosure of information that would have enabled it to duly carry out this examination.⁴⁵⁸ The General Court then concluded that no information can be found from the statement of reasons which sufficiently substantiate that Mr Ayadi was materially linked to Al-Qaida when his name was included in the list.⁴⁵⁹ In fact, it was "apparent that the various reasons given in the statement of reasons, as disclosed by the Sanctions Committee, are not substantiated by any information or evidence, even though they are challenged, point by point,

⁴⁵³ Joined Cases C-399/06 P and C-403/06 P *Ayadi v Council and Commission*, Judgment of 3 December 2009

⁴⁵⁴ Commission Regulation (EC) No 954/2009 of 13 October 2009 amending for the 114th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban

⁴⁵⁵ Case C-183/12 P *Ayadi v Commission*, Judgment of 6 June 2013

⁴⁵⁶ *Ayadi* at para.76

⁴⁵⁷ *Ibid.* para.73

⁴⁵⁸ *Ibid.* para.72

⁴⁵⁹ *Ibid.* para.83

vigorously and in detail, by Mr Ayadi”.⁴⁶⁰ Given these circumstances, the contested Regulation had to be annulled.⁴⁶¹

3.2.2. EU autonomous sanctions: the OMPI/PMOI case

Another example of the challenges that the use of confidential information poses to the European judicature is represented by the asset freezing measures that have been adopted by the Council of the EU against the People’s Mujahedin Organization of Iran (“PMOI”). The legislative framework in *OMPI/PMOI* differs from the one in *Kadi*. In *OMPI/PMOI*, “the contested sanctions list was not adopted at the UN level but by the Community institutions acting in implementation of Security Council’s resolutions drafted in more general terms”.⁴⁶²

In *Kadi*, in fact, the Council and the Commission had merely implemented at the community level resolutions of the UN Security Council and decisions of its Sanctions Committee which identified the targeted persons without leaving to the Community institutions any discretionary power in examining the individual situations. In the system at issue in the present case, instead, although the UN Security Council orders that all UN Members must freeze terrorist financial resources, it leaves to the discretion of the States to specify individually the persons and entities whose funds are to be subject to this sanction. This means that the Community acts which apply these sanctions involve the exercise of the Community’s own power.⁴⁶³

In particular, on 28 September 2001, the Security Council adopted a Resolution⁴⁶⁴ which mandated all the Member States of the UN to combat terrorism in particular by ordering the freezing of the economic resources of persons linked to terrorism. The identification of the persons and entities in question, however, was left to the assessment of the Member States. In order to give effect to this Resolution in the Community, on 27 December 2001, the Council adopted a Common Position and a Regulation (which transposed the Common Position into Community law).⁴⁶⁵ The names of the targeted individuals and entities appeared in the Annex to the Regulation.

The key provision of the Common Position is Article 1(4) which provides that “the list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned” and that such a decision should be taken “on serious and credible evidence or clues, or condemnation for such deeds”. This Article also clarifies that “for the purposes of this paragraph ‘competent authority’ shall mean a judicial authority,

⁴⁶⁰ Ibid. para.82

⁴⁶¹ Ibid. para.87

⁴⁶² Takis Tridimas, “Terrorism and the ECJ: Empowerment and democracy in the EC legal order”, (2009) 34 E.L.Rev., p.117

⁴⁶³ See Tridimas, *supra* note 462, p.118

⁴⁶⁴ UN Security Council Resolution 1373 (2001), S/RES/1373

⁴⁶⁵ Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism and Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism

or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.”⁴⁶⁶ The list in the Annex is regularly updated by the Council in order to ensure that there are still “grounds for keeping [the persons or entities concerned] on the list”.⁴⁶⁷ Since the listing under regime 1373 is decentralized and administrated at a national level, this regime leaves to the Member States and to the EU institutions discretion to balance potential conflicts between human rights and national security concerns.⁴⁶⁸

Therefore, there is a major difference between the two systems of sanctions currently operating at the EU level, at least in theory. On the one hand, under the UN-based regime, the EU often implements the sanctions lists without possessing all the evidence supporting the decision with regard to the listed individuals. On the other hand, in the context of the autonomous EU lists, the EU can ask the national competent authority for the access to any confidential information that led to the EU listing. In this latter context, in fact, the intelligence information is supplied by EU Member States themselves.⁴⁶⁹ However, the current situation is that not only Member States and EU authorities often do not have access to most of the information themselves, but also when they have, they are unwilling to produce confidential evidence to EU Courts.⁴⁷⁰

The PMOI is an Organization founded in 1965 with the aim to replace the regime of the Shah of Iran with a democracy. Since June 2001 it stated expressly to have interrupted all the military activities carried out in the past. In 2002, the Council updated the Community list of persons and entities whose assets must be frozen including, among others, the PMOI. Several decisions were then been taken by the Council in order to give effect to this list. These successive decisions then gave birth to several judgments by the EU Courts. The first judgment was handed down by the Court of First Instance in 2006.⁴⁷¹ The Court annulled one of these decisions⁴⁷² for the lack of sufficient statement of reasons and because, during the procedure followed for its adoption, the applicant was not placed in a position to effectively make his view known. Moreover, this lack of reasons prevented the Court itself to review the legality of the decision. The Court therefore found the obligation to state reasons, the right to a fair hearing and the right to effective judicial protection infringed: “the Court cannot accept (...) that the statement of reasons may consist merely of general, stereotypical formulation (...). The Council is required to state the matters of fact and law which constitute the legal basis of its decision and the considerations which let it to adopt that decision”.⁴⁷³

⁴⁶⁶ Article 1 (4) Common Position

⁴⁶⁷ Article 1(6) Common Position.

⁴⁶⁸ See Ginsborg and Scheinin, *supra* note 441, p.18

⁴⁶⁹ See Curtin, *supra* note 65

⁴⁷⁰ See Cuyvers, *supra* note 349, p.1780

⁴⁷¹ Case T-228/02 *Organisation des Modjahedines du Peuple d'Iran v Council* [2006] E.C.R. II-4665, Judgment of 12 December 2006 [hereinafter *OMPI*]

⁴⁷² Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/848/EC

⁴⁷³ *Ibid.* para.143

Another judgment followed on 23 October 2008.⁴⁷⁴ In this occasion, the Court annulled a later decision⁴⁷⁵ on the grounds that the Council's statement of reasons for that decision made it impossible to understand if and to what extent the Council had taken into due account the judgment of a British judicial authority, the Proscribed Organizations Appeals Commission (POAC). This authority had in fact ordered to remove the PMOI from the British list of terrorist organizations considering unreasonable the Home Secretary's conclusion that the applicant was still an organization linked to terrorism. The Court, in its judgment, highlighted that, in adopting Community fund-freezing measures, it is imperative "that the Council ensure the existence of a decision of a competent national authority, as well as verifying any consequences of this decision at the national level".⁴⁷⁶

On 24 June 2008, the UK Parliament withdrew the PMOI from the national list of proscribed organizations. Nevertheless, with a new decision adopted on 15 July 2008,⁴⁷⁷ the Council decided to maintain the organization on the updated Community funds-freezing list on the basis of the new information acquired. The same day, the Council informed the PMOI of its decision and justified it on the basis of two pieces of information supplied by the French Government: the beginning of a judicial inquiry by the anti-terrorist prosecutor's office of the Tribunal de Grande Instance in Paris and two additional charges brought in March and November 2007 against persons deemed to be part of the PMOI. According to the Council, these acts represented the decision of a competent national judicial authority as required under the applicable basic Community legislation (Common Position 2001/931/CFSP of 27 December and Council Regulation (CE) No 2580/2001 of 27 December 2001).⁴⁷⁸

An action for annulment brought by the PMOI before the Court of First Instance⁴⁷⁹ against this decision inevitably followed. According to the Court, "it is common ground that the Council adopted the contested decision without first informing the applicant of the new information or new material in the file which, in its view, justified maintaining it on the disputed list".⁴⁸⁰ The applicant's right of the defense had therefore been infringed because the organization was not enabled to effectively give its view on the matter before the adoption of the contested decision.⁴⁸¹ In the Court's view, in fact, the Council failed to duly substantiate its claim that the urgency to continue the application on the organization of restrictive measures required the immediate replacement of the

⁴⁷⁴ Case T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] ECR II-0000, Judgment of 23 October 2008 [hereinafter *PMOI*]

⁴⁷⁵ Council Decision 2007/868/EC of 20 December 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/445/EC

⁴⁷⁶ Court of the First Instance, Press release No. 84/08, 4 December 2008, Judgment in case T-284/08 *People's Mojahedin Organization of Iran v Council*

⁴⁷⁷ Council Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC

⁴⁷⁸ See Press Release No.84/08, *supra* note 476

⁴⁷⁹ Case T-284/08 *People's Mojahedin Organization of Iran v Council* [2008] ECR I-3487, Judgment of 4 December 2008

⁴⁸⁰ *Ibid.* para.36

⁴⁸¹ *Ibid.* para.36

withdrawn decision with a new decision based on the new information. The Court claimed that the Council was in the position to adopt a new funds-freezing decision following a procedure respectful of the organization's rights of the defense.⁴⁸²

The Court reached this conclusion on the basis of the principle established in *OMPI*. In fact, with regards to the rights of the defense, the Court found that the principles established in this latter judgment had been disregarded.⁴⁸³ In *OMPI*, the Court stressed how the right of the party to a fair trial must be effectively safeguarded in the Community procedure followed to include or maintain it on the contested list.⁴⁸⁴ This entails, "as a rule" that "the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question".⁴⁸⁵ On the one hand, in the case of an initial decision to freeze funds, the legal conditions on which the person concerned shall be afforded the possibility to express his view is represented by the existence of "specific information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of the Common Position 2001/931 was taken in respect of him by a competent national authority".⁴⁸⁶ On the other hand, in the event of any subsequent decision to freeze funds, the targeted person need to be enabled to make known his view on the material which, according to the Council, justifies maintaining him in the disputed list.⁴⁸⁷ The Court then recognized that for an initial fund-freezing measure to be effective, a surprise effect might be necessary: "such a measure cannot, therefore, be the subject-matter of notification before it is implemented".⁴⁸⁸ However, these considerations do not apply to subsequent decisions to freeze funds taken by the Council in occasion of its regular re-examinations: at this stage, in fact, the assets are already frozen and no surprise effect is necessary to ensure the effectiveness of the sanctions: any "subsequent decision to freeze funds must accordingly be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence".⁴⁸⁹ The same principles were applied by the Court of First Instance in the present case.

Moreover, in the present case, the Court noted that the French authority did not authorize the Council to communicate to the Court certain passages of a document containing a summary of the main points which justified the maintaining of the applicant on the EU list. The French authority, in fact, claimed the necessary confidentiality of those extracts because containing information related to the national defense.⁴⁹⁰ With this regard, the Court concluded that "the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State

⁴⁸² Ibid. paras.38-48

⁴⁸³ Ibid. para.37

⁴⁸⁴ *OMPI* at para.120

⁴⁸⁵ *OMPI* at para.120

⁴⁸⁶ *OMPI* at para.120

⁴⁸⁷ *OMPI* at para.120

⁴⁸⁸ *OMPI* at para.128

⁴⁸⁹ *OMPI* at para.131

⁴⁹⁰ Case T-284/08 *People's Mojahedin Organization of Iran v Council* [2008] ECR I-3487 at para.71

is not willing to authorize its communication to the Community judicature whose task is to review the lawfulness of that decision”.⁴⁹¹ This refusal had in fact the consequence of preventing the Court from reviewing the legality of the contested decision.

Another principle laid out in *OMPI* had therefore been disregarded. In *OMPI*, in fact, the Court also stressed the imperative necessity of an effective judicial review as “the only procedural safeguard that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights”.⁴⁹² It is therefore imperative that the Community Courts carry out, independently and impartially, a strict judicial review on the legality and the merits of the contested measure without it being possible to invoke against them the confidentiality of the information or evidence used by the Council.⁴⁹³ On the basis of the same principle, in the present case the Court concluded that also the PMOI’s fundamental right to an effective judicial review had been infringed.⁴⁹⁴ The contested Council’s decision was annulled.

The *French Republic v OMP*⁴⁹⁵ litigation is the result of the challenge against the General Court’s decision brought by the French Republic before the European Court of Justice. In this occasion, the French Republic sought a ruling that recognized the possibility for a Member State to not release to the court evidence or other material that may prejudice national security. The Court, however, dismissed France’s appeal. The ECJ, in fact, upheld the General Court’s decision to remove the PMOI from the EU sanctions list in the light of the infringement that such decision caused to the PMOI’s right of the defense by failing to inform it of the grounds for its inclusion before the adoption of the decision.

First of all, the Court confirmed the principle according to which the necessity to preserve the surprise effect as a condition for the effectiveness of a restrictive measures applies only to initial decisions to freeze funds but not to subsequent decisions maintaining the person concerned in the list, as the decision in question in the appeal. This means that in the case in question the Council was bound to inform the PMOI of the incriminating evidence against it before the adoption of the decision.⁴⁹⁶

The Court stressed in fact that “the requirement of notification of incriminating evidence and the right to make representations before the adoption of a measure (...) is fundamental and essential to the rights of defense”.⁴⁹⁷ The purpose of this rule is to allow the person affected by the measure to provide his observations before the adoption of the decision in order to enable the competent authority to “effectively take into account all relevant information”.⁴⁹⁸ In particular, the aim of the rule is to give to the person

⁴⁹¹ Ibid. para.73

⁴⁹² *OMPI* at para.155

⁴⁹³ *OMPI* at para.155

⁴⁹⁴ Case T-284/08 *People’s Mojahedin Organization of Iran v Council* [2008] ECR I-3487 at para. 77

⁴⁹⁵ Case C-27/09 P *French Republic v. People’s Mojahedin Organization of Iran* [2011] ECR I-0000, Judgment of 21 December 2011

⁴⁹⁶ Ibid. paras.59 -63

⁴⁹⁷ Ibid. para.64

⁴⁹⁸ Ibid. para.65

concerned the possibility “to correct an error or produce such information relating to his personal circumstances as will tell in favor of the decision’s being adopted or not, or of its having this content or that”.⁴⁹⁹ This right is also expressly recognized in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union: the right to good administration includes also “the right of every person to be heard, before any individual measure which would affect him or her adversely is taken”.⁵⁰⁰

Important insights about how secret evidence should be handled are given by Advocate General Sharpston in her opinion in *French Republic v OMPI*. The Advocate General did not disagree with the General Court’s conclusion that the Council’s refusal to submit the requested confidential information prevented the Court from effectively reviewing the legality of the contested decision.⁵⁰¹ At the same time, however, she understood the French Republic’s position in refusing to allow the Council to disclose the evidence. In her view, in fact, it was not unreasonable that the French Republic had interest in preserving the confidentiality of certain information with the result that the evidence made available to the General Court is not disclosed to the other party.⁵⁰²

However, in accordance with the General Court’s Rules of Procedure at that time in force, the Court could not assure the Council that the information would not, at some point, be notified to the PMOI. The Advocate General claimed in fact that what was absent from those Rules was a provision which allowed the Court to take into consideration, for the purposes of its judgments, confidential evidence that had not been made available to the other party.⁵⁰³ When a document was submitted by a party with the provision that it be kept confidential, Article 67(3) of those Rules gave the General Court only two options. It could accept the request and in this case the information would neither be disclosed to the other parties of the proceedings nor taken into account by the Court in its judgment. Alternatively, it could reject the request, and in this event, the document would be made available to all the parties of the proceedings and taken into account by the Court for the purposes of the judgment.⁵⁰⁴ “No other solution [was] possible”.⁵⁰⁵

According to the Advocate General, however, the absence of a middle way is incompatible with the findings of the Court of Justice in *Kadi I*.⁵⁰⁶ In this case, in fact, the ECJ not only recognized that “overriding considerations” to do with the protection of national security may “militate against the communication of certain matters to the person concerned and therefore against their being heard on those matters”.⁵⁰⁷ It also added that, in this event, it is for the Community judicature to apply techniques which strike the appropriate balance between, on the one hand, the legitimate national security concerns, and on the other, “the need to accord the individual a sufficient measure of procedural

⁴⁹⁹ Ibid. para.65

⁵⁰⁰ Article 41 (2) (a) EU Charter

⁵⁰¹ Sharpston Opinion, para.182

⁵⁰² Sharpston Opinion, para.182

⁵⁰³ Sharpston Opinion, para.177

⁵⁰⁴ Sharpston Opinion, para.177

⁵⁰⁵ Sharpston Opinion, para.177

⁵⁰⁶ Sharpston Opinion, para.180

⁵⁰⁷ *Kadi I* at para.342

justice”.⁵⁰⁸ However, no such technique was provided under the Rules of Procedures at that time in force.⁵⁰⁹

In the light of these shortcomings, Advocate General concluded that “serious consideration should now be given to amending the Rules of Procedure of the General Court so as to make provision for the production of evidence that is truly confidential for consideration by that Court in a way that is compatible with its character without doing unacceptable violence to the rights of the other party or parties to the action”.⁵¹⁰

Further specifications were then made on this point by the Advocate General. She was aware that the possible consequence of withholding information from a party is a “dilution” of their rights of the defense.⁵¹¹ On the other hand, however, “Member States will legitimately wish to insist that effective restrictions on divulging material that may lead (directly, indirectly or accidentally) to the identification of sources or the unmasking of particular surveillance techniques must be maintained”.⁵¹² Therefore, the Advocate General stressed that it is essential that any amendments to the rules concerning the production of evidence before the General Court take into due account these conflicting interests. This entails that the possibility to rely on closed evidence should be granted only if absolutely necessary⁵¹³ and the General Court should always first seek to establish whether the case in question can be solved by relying on the open evidence alone.⁵¹⁴

The Advocate General added also that, in amending these rules, due attention should be drawn on the fact that secret evidence may derive from flawed sources: “it may simply be false” or the Member States and their security services may tend to over-classify information with the consequence of classifying as secret information that is already in the public domain. Moreover, the courts themselves may tend to accept the validity of such information without placing it under due scrutiny.⁵¹⁵ For this reason, any doubt that may arise from the closed evidence should be resolved in favor of the party who has not been able to give their observations on it to the greatest possible extent.⁵¹⁶

Moreover, the Advocate General pointed out that, if on the one hand the adoption of new rules on the use of closed material seemed essential, on the other hand, the temptation to rely, during the amending procedure, on the argument that the fight against terrorism justifies relaxation of the guarantees of fundamental rights needs to be strongly rejected:⁵¹⁷ “respect for human rights is a condition of the lawfulness of acts of the European Union and measures incompatible with respect for human rights are not acceptable”.⁵¹⁸

⁵⁰⁸ *Kadi I* at para.344

⁵⁰⁹ Sharpston Opinion, para.182

⁵¹⁰ Sharpston Opinion, para.186

⁵¹¹ Sharpston Opinion, para.227

⁵¹² Sharpston Opinion, para.228

⁵¹³ Sharpston Opinion, para.230

⁵¹⁴ Sharpston Opinion, para.231

⁵¹⁵ Sharpston Opinion, para.232

⁵¹⁶ Sharpston Opinion, para.232

⁵¹⁷ Sharpston Opinion, paras.238 - 239

⁵¹⁸ Sharpston Opinion, para.240

With this regard, the Advocate General noticed that it is clear from the European Court of Human Rights' case-law that the right to disclosure of evidence, as part of the rights of the defense, is not an absolute right.⁵¹⁹ At the same time, however, it is also evident from the same case-law that some minimum guarantees need always to be provided when it comes to security – sensitive material. In particular, in referring to the *A and Others v. the United Kingdom*, she identified this irreducible minimum requirement in the gist of evidence that at the very least should always be disclosed to the subject of the proceedings.⁵²⁰ This means that at the administrative stage of the EU listing process the Council should provide the party concerned with a non-confidential summary of the evidence, including also the indication of the reasons that the Council intends to take into account for its decision. In the Advocate General's view, the “availability of a non-confidential summary” is thus “an irreducible minimum guarantee in a Union governed by the rule of law. In its absence, it is impossible for the rights of the defense to be safeguarded”.⁵²¹

In short, in the light of the difficulties faced by the EU Courts in handling confidential material, the Advocate General has envisaged a system of rules which allows the use of confidential information when necessary to fight terrorism while at the same time ensuring the respect of the rights of the defense. However, this issue was not explicitly addressed by the Court of Justice in its judgment.

4. New Procedural Rules of the General Court.

4.1. Filling the legislative gap in the “treatment of information or material pertaining to the security of the Union or of its Member States or to the conduct of their international relations”

A crucial issue which emerged from the judgments discussed above is whether there is a need for specific procedural rules regarding the handling of secret evidence in procedures before the EU Courts. This issue was addressed by the adoption of the new Rules of Procedure of the General Court which, under Article 105, permit the use of secret evidence in actions for annulment.⁵²² The changes to the rules were approved on 10 February 2015 by 27 of the 28 EU Member States. The UK in fact abstained voicing concerns over the adequacy of the standards in place to protect the evidence provided.⁵²³ The new procedural Rules then came into force on 1 July 2015.

⁵¹⁹ Sharpston Opinion, para.242

⁵²⁰ Sharpston Opinion, paras.244-245

⁵²¹ Sharpston Opinion, para.216

⁵²² Rules of Procedure of the General Court of 1 July 2015. These new rules replace the existing ones which were introduced in 1991 and were then subject to several amendments.

⁵²³ Maya Lester, “New EU Court Rules to be Adopted without UK Approval”, (2015) available at <http://europeansanctions.com/2015/01/23/new-eu-court-rules-to-be-adopted-without-uk-approval/>; “The UK will abstain from voting on the rules in the Council of the EU, because the rules do not meet UK requirements in two respects: (1) they would not enable confidential information to be withdrawn at any time; (2) they do not provide for judgments to be checked for accidental disclosure of sensitive information before being issued. The UK will lodge a statement making clear that “the absence of these safeguards will limit the types of information

The adoption of the new Rules reflects the General Court's intention to create a special procedural regime for the treatment of highly sensitive information whose confidential nature needs to be preserved without unduly prejudicing the rights of the defense of the other main party. Before this change, in fact, the sharing of all the evidence relied upon by the Court was always required: the Court could take into consideration "only those documents which have been made available to the lawyers and agents of the parties and on which they have been given the opportunity of expressing their views".⁵²⁴ This made impossible, "in the absence of a strict procedural framework designed to ensure confidentiality, for the institutions to produce to the General Court the information justifying the restrictive measures adopted, even though the General Court may have ordered its production as a measure of inquiry".⁵²⁵ Thus, the new Rules, in particular Article 105, aim at filling the legislative gap concerning the "treatment of information or material pertaining to the security of the Union or of its Member States or to the conduct of their international relations".⁵²⁶

The special procedural regime is applicable to all the information or material which needs to be kept confidential on the grounds of national or international security. The range of cases to which this Article is applicable is not determined by reference to categories of documents with certain specific formal characteristics. No reference is, for example, made to the category of classified documents. This entails that also a non-classified document may fall under the regime laid out in Article 105. At the same time, the mere fact that a document is classified does not automatically determine the procedural regime under which it will be treated by the General Court.⁵²⁷

According to the comments on the draft rules, the special regime for the treatment of confidential material relies to a large extent on the case-law of the European Court of Justice, in particular on the decisions delivered in the *Kadi* saga and in *ZZ*.⁵²⁸

Article 105, by enabling the General Court to determine a case on the basis of confidential information which has not been disclosed to the other party, provides the General Court with a legal basis for ruling without complying with the adversarial principle as set out under Article 64. Article 64 provides in fact that "the General Court shall take into consideration only those procedural documents and items which have been made available to the representative of the parties and on which they have been given an opportunity of expressing their views".⁵²⁹

Under Article 105, instead, if a main party "intends to base his claim on certain information or material but submits that its communication would harm

that the UK will be able to submit to the Court and seeking a review of the mechanism in the light of practical experience".

⁵²⁴ Article 67(3) Rules of Procedure of the General Court of 2 May 1991 as last modified on 19 June 2013

⁵²⁵ Council of the European Union, "Draft rules of procedure of the General Court" No. 7795/14, 17 March 2014, p.101

⁵²⁶ Article 105 Rules of procedure of the General Court of 1 July 2015

⁵²⁷ See Council of the European Union, *supra* note 525, p.102

⁵²⁸ See Council of the European Union, *supra* note 525, p.103

⁵²⁹ Article 64 Rules of procedure of the General Court of 1 July 2015

the security of the Union or that of one or more of its Member States or the conduct of their international relations, he shall produce that information or material by a separate document”.⁵³⁰ The information or material thus produced has to be accompanied by an application for confidential treatment in which the overriding reasons which stand in the way of the disclosure to the other party need to be set out.⁵³¹ Similarly, paragraph 2 provides that the regime under the present Article needs to be applied also when the confidential evidence is not produced voluntarily by a party but in response to a measure of inquiry of the General Court.⁵³²

The General Court then needs to examine the relevance of the information for the determination of the case and to establish whether the claimed confidentiality needs to be preserved.⁵³³ If the Court, after this examination, concludes that the material produced is relevant for the decision but is not confidential, “it shall ask the party concerned to authorize the communication of that information or material to the other main party”.⁵³⁴ If the party fails or refuses to make such a communication, the material in question cannot be taken into consideration by the Court in the determination of the case.⁵³⁵ On the contrary, if the General Court concludes that the material is both relevant for the ruling and confidential, the Court “shall then weigh the requirements linked to the right to effective judicial protection, particularly the observance of the adversarial principle” against the requirements flowing from the legitimate concerns regarding security.⁵³⁶

After this deliberation, under paragraph 6, the General Court shall specify the procedures to be adopted in order to accommodate the competing interests at stake. In particular, it shall invite the party concerned to communicate to the other main party “a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof and enabling the other main party, to the greatest extent possible, to make its views known”.⁵³⁷ Under paragraph 8, if the Court considers that the closed material which has not been disclosed to the other party in accordance with paragraph 6 is essential for the determination of the case, “it may, by way of derogation from Article 64 and confining itself to what is strictly necessary, base its judgment on such information or material”.⁵³⁸ However, “when assessing that information or material, the General Court shall take account of the fact that a main party has not been able to make his/her views on it known”.⁵³⁹

In short, paragraph 8 of Article 105, in enabling the General Court to base its judgment on material which has not been communicated to the person concerned, demands that three conditions be met. First of all, the other main party needs to be provided with a non-confidential version or a non-confidential

⁵³⁰ Article 105 (1)

⁵³¹ Article 105 (1)

⁵³² Article 105 (2)

⁵³³ Article 105 (3)

⁵³⁴ Article 105 (4)

⁵³⁵ Article 105 (4)

⁵³⁶ Article 105 (5)

⁵³⁷ Article 105 (6)

⁵³⁸ Article 105 (8)

⁵³⁹ Article 105 (8)

summary of the information or material in question; secondly, the General Court must consider the confidential information or material that, “owing to its confidential nature”,⁵⁴⁰ has not been disclosed to the other party essential for its ruling; thirdly, the General Court shall take into account the fact that a main party was not in a position to make their views known on that material.⁵⁴¹

The Council of Bars and Law Societies of Europe (CCBE), in submitting its comments on Article 105 of the Draft Rules of Procedure of the General Court, pointed out that the draft of the provision in question did not take into account the possibility that the information, considered by the General Court essential and non-confidential, may not be included by the party in the non-confidential version or non-confidential summary. The CCBE therefore suggested to include in the Article a new sentence which states that “where the General Court considers that information or material not included in the non –confidential version or non- confidential summary is relevant in order for it to rule in the case and could have been communicated to the other main party, such information or material shall not be taken into account in the determination of the case”.⁵⁴² In this way, the CCBE proposed the same solution that Article 105 provides for the cases where the General Court concludes that the material produced is relevant and not confidential, but the party concerned fails to supply the information to the other main party.⁵⁴³ However, this invitation was not taken into account.

4.2.The shortcomings of the New Procedural Rules

These new Procedural Rules have been subject to severe criticism when examined in the light of the fundamental rights that come into play: the adversarial principle, the rights of the defense, the right to effective judicial protection and the right to a fair trial as laid down in the EU Charter and in the ECHR and applied by the European Court of Justice and by the European Court of Human Rights. Any move to restrict access to evidence is in fact deemed to weaken due process rights and strengthen Executive power.⁵⁴⁴ The CCBE, among others, strongly invited the General Court to reconsider the content of Article 105. In its view, this provision, by enabling the Court to base its judgments on material that has not been communicated to the person concerned, creates a new regime which can lead to future infringements of the fundamental rights enshrined in the European constitutional framework.⁵⁴⁵

The European Courts in fact have so far held that, in imposing restrictive measures, an irreducible minimum of disclosure needs always to be granted in order to reach a satisfying level of procedural justice (e.g. *ZZ*, *Kadi II* and *A*). However, even though the new regime allegedly relies to a large extent on *ZZ and Kadi II*, the minimum level of disclosure laid out by the ECJ in those

⁵⁴⁰ Article 105 (8)

⁵⁴¹ CCBE Comments on the Draft Rules of Procedure of the General Court, 16 July 2014, p. 11

⁵⁴² See CCBE Comments, *supra* note 541, p.13-14

⁵⁴³ Article 105(4)

⁵⁴⁴ See Sullivan, *supra* note 5

⁵⁴⁵ See CCBE Comments, *supra* note 541, p.12-13

judgments is not met under Article 105.⁵⁴⁶ Serious concerns have in fact been expressed in relation to the requirement that, at the very least, the essence of the grounds for restrictive measures must always be disclosed. These concerns arise from the fact that Paragraph 8 of Article 105 does not entitle the party whose access to the confidential material is restricted to be informed at least of the essence of the allegations against him.⁵⁴⁷ Moreover, also the communication of the non-confidential version or non-confidential summary of the information raises concerns. This summary, in fact, in order to avoid any leak of the closed material, may result in being so vague to make it impossible for the persons concerned to effectively refute the allegations advanced against them.⁵⁴⁸

Furthermore, while in some exceptional cases Article 105 allows non-disclosure, the new Rules do not establish any mechanism, such as the system of special advocates, to counterbalance the effects of this non-disclosure. Rather, it is left to the Court's discretion to balance the competing interests at stake⁵⁴⁹ by making "a reasoned order specifying the procedures to be adopted".⁵⁵⁰ No further guidance "on how sufficient safeguards can be developed on an *ad hoc* basis" is provided by the Rules.⁵⁵¹

Moreover, the new Rules do not provide an equivalent mechanism at the ECJ level. This lack of coordination between the procedural rules of the General Court and the procedural rules of the ECJ may lead to serious complications in the event of an appeal to the ECJ. If for example the General Court was to allow the withdrawal of some evidence, the ECJ could not do the same. This might make it impossible for the ECJ to uphold the General Court's decision. Furthermore, in the case of an appeal, it would be interesting to know whether the General Court may legitimately withhold information from the ECJ in order to avoid inappropriate disclosure on the part of the ECJ.⁵⁵² Another question is to what extent the ECJ would be bound by any General Court's decision to keep certain information confidential. All these complications may be resolved with the adoption by the GC and the ECJ together of a joint mechanism.⁵⁵³

Lastly, another problem posed by these new Rules is that the amending procedure itself is hardly public. In fact, considering the serious impact that changes to the procedural rules can have on legal proceedings, the reconciliation between the democratic need for transparency and the demands for secrecy requires that the process of revision itself is public.⁵⁵⁴ "Secrecy is justifiable only if it is actually justified in a process that itself is not secret".⁵⁵⁵ On

⁵⁴⁶ Maya Lester, "Draft European Court Rules Propose Secret Hearings" (2014) available at: <http://europeansanctions.com/2014/04/06/draft-european-court-rules-for-secret-hearings/>

⁵⁴⁷ See de Boer, *supra* note 81, p.1255

⁵⁴⁸ Maria Giulia Rancan, "Prove 'confidenziali' quando è in gioco la sicurezza dell'Unione", (2015) available at http://www.questionegiustizia.it/articolo/prove-confidenziali-quando-e-in-gioco-la-sicurezza-dell-unione_28-01-2015.php

⁵⁴⁹ See Cuyvers, *supra* note 349, p.1779

⁵⁵⁰ Article 105(6)

⁵⁵¹ See Cuyvers, *supra* note 349, p.1779

⁵⁵² See Cuyvers, *supra* note 349, p.1779

⁵⁵³ See Cuyvers, *supra* note 349, p.1779

⁵⁵⁴ See de Boer, *supra* note 81, p.1256

⁵⁵⁵ Dennis F. Thompson, "Democratic Secrecy", (1999) P.S.Q. 114(2), p.185

the contrary, the revision process that led to the changes examined here largely took place “behind closed doors”.⁵⁵⁶ No public consultation took place because none was provided under the applicable legislative procedure.⁵⁵⁷

⁵⁵⁶ See de Boer, *supra* note 81, p.1256

⁵⁵⁷ See de Boer, *supra* note 81, p.1256

Chapter III: COMPARATIVE ANALYSIS OF THE NATIONAL LEGAL SYSTEMS GOVERNING THE USE - OR MISUSE - OF CLASSIFIED INFORMATION IN COURTS

A comparative analysis of the methods deployed by different Member States in dealing with classified material in judicial proceedings is necessary in order to evaluate whether their regimes are compliant with the European standards outlined above. This analysis shows that, consistently with their respective historical, political and legal background, Member States have responded to the challenges posed by secret material by endorsing different legal regimes and judicial practices. In particular, three main legal systems can be singled out across the European Member States. Two States, the United Kingdom and the Netherlands, have laid out special procedures allowing for the use of secret information as evidence in judicial proceedings. The UK represents an exception in the European legislative landscape due to its adoption of the highly contested 'Closed Material Procedures' (CMPs) as a means to discuss and examine sensitive material without the applicant and his representative being present. In the Netherlands, instead, a system of 'shielded witnesses' has been set out in order to gain information from intelligence officials with the safeguards provided by a special examining magistrate. A different situation can be observed in other States, such as Italy and France, where the only material judicial authorities can have access to is open material or declassified information while no probative value is accorded to secret information. This is unlike other States such as Sweden, Spain and Germany, where an indirect use of intelligence materials by national courts is in practice so that, if a number of conditions is met, a party may be denied access to some information.⁵⁵⁸ The judicial practice adopted in the latter group of States shows a certain degree of acceptance of the use of sensitive information as evidence, despite the absence of a formal legislation.⁵⁵⁹ Special attention will now be drawn to the two opposite regimes for dealing with confidential information in judicial proceedings: the UK system of special advocates (SAs) on the one hand and the so-called State secret privilege under the current Italian legislation on the other.

1. The UK system of special advocates

The United Kingdom is the only country in the European landscape where the use of secret information as evidence in judicial proceedings is provided for in the national legislation.⁵⁶⁰ The British solution to the use of secret evidence is centered on the work carried out by special advocates: security-cleared lawyers who are given access to the confidential information that is instead withheld from the individuals for whom they act. Under this system, the special advocates carry out their work in closed proceedings in which the confidential

⁵⁵⁸ See Policy Department, *supra* note 8, p.7

⁵⁵⁹ See Policy Department, *supra* note 8, p.21

⁵⁶⁰ See Policy Department, *supra* note 8, p.7

material is examined and discussed but in which only the special advocates and the judge can take part.⁵⁶¹

1.1.The system of special advocates as an alternative to Public Interest Immunity

This system was designed as an alternative to the conventional way of dealing with secret evidence: the Public Interest Immunity (PII). The PII procedure is the common law's response to the necessity to reconcile the enduring conflict between the society's interest in a fair system of justice and that of protecting national security, the Country's international relations, the prosecution of crimes and other strong countervailing interests.⁵⁶²

Claims under this procedure are normally made by the Government by submitting a PII certificate with a list of the documents that it wishes to keep confidential and the reasons for such a request explained. It is then for the court to establish whether to uphold the Government's claim for non-disclosure or not.⁵⁶³ In this phase, the court will need to evaluate whether the public interest in preserving the confidentiality of the document outweighs the public interest in securing a fair administration of justice⁵⁶⁴ (the so called *Wiley* balance).⁵⁶⁵ In particular, in evaluating the damage to the administration of justice, the court must take into account the impact of non-disclosure on the court's ability to find the truth and on the ability of the parties interested in disclosure to put forth their case.⁵⁶⁶

The *Wiley* balance test "recognizes that national security is one among a much broader range of public interests" and that "national security should not be permitted automatically to trump all other public interest considerations".⁵⁶⁷ In making this decision, the court is allowed to inspect the documents and to consider if there are other means of protecting the confidentiality of the information while at the same time allowing the disclosure of the documents, for example by withholding names of the sources, producing only extracts or summaries of the contents of the documents or requesting an undertaking of confidentiality from the party to whom the documents are disclosed.⁵⁶⁸

If after having applied the balancing test and having considered alternative options the court accepts the Government's claim for PII, the material becomes inadmissible and it is excluded altogether from the case. In this event, neither

⁵⁶¹ Cian C Murphy, "Counter-Terrorism and the Culture of Legality: The Case of Special Advocates", (2013) 24 K.L.J., p. 22

⁵⁶² Rosalind English, "Secret evidence v open justice: the current state of play", available at: <http://ukhumanrightsblog.com/2011/07/17/secret-evidence-v-open-justice-the-current-state-of-play/>

⁵⁶³ J.R.Williams, "Crossing the Rubicon by Transporting Secret Justice across to Europe: Closed Material Procedure in the UK and EU Courts", (2014) 6 *Gray's Inn Student Law Journal*, p. 7

⁵⁶⁴ See Tomkins, *supra* note 103, p.33

⁵⁶⁵ *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1995] AC 274; see also *R v H* [2004] UKHL 3, [2004] 2 AC 134

⁵⁶⁶ See Williams, *supra* note 563, p.7

⁵⁶⁷ Amnesty International, "Left in the Dark: the Use of Secret Evidence in the United Kingdom", (2012), p.33

⁵⁶⁸ See Amnesty international, *supra* note 567, p.33

can the party claiming immunity rely on that material, nor can the court take that material into account in determining the substance of the case.⁵⁶⁹

There are very close parallels between the PII process as disciplined under the UK law and the regime for handling confidential information at the EU level as previously regulated under Article 67 of the Rules of Procedure of the General Court. In both cases in fact, the court will have to choose between two options. It may either accept the request that a certain document is treated as confidential, in which case the document will not be taken into account for the purposes of the Court's judgment or it may reject the request, in which case the document will be disclosed also to the opposing party and may be taken into consideration for the determination of the case.⁵⁷⁰

1.2. Closed Material Procedures before the Special Immigration Appeals Commission

As mentioned above, the system of the special advocates is the result of the European Court of Human Rights' judgment in *Chahal*.⁵⁷¹ More precisely, the British Parliament's response to this judgment consisted in reshaping the legislation for dealing with immigration cases where national security was involved.⁵⁷² The Special Immigration Appeals Commission Act (1997)⁵⁷³ was then enacted and under this Act the Special Immigration Appeals Commission (SIAC) was set up. The SIAC's task is to hear appeals in immigration and asylum cases where the Home Secretary's decision is driven by national security concerns.⁵⁷⁴ Besides a High Court judge, SIAC also includes an immigration expert and an intelligence expert in order to give the Commission the necessary expertise to engage with the security issues dealt with in the closed material.⁵⁷⁵

Article 5 of the Special Immigration Appeals Commission Act empowers the Lord Chancellor to set out procedural rules for the SIAC. In particular, it provides that he may "make provision enabling proceedings before the Commission to take place without the applicant being given full particulars of the reasons for the decision which is the subject of the appeal".⁵⁷⁶ The possibility to make "provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him"⁵⁷⁷ is also contemplated by the Act. In this event however, a "provision enabling the Commission to give the appellant a summary of any

⁵⁶⁹ Joint Committee on Human Rights, "The Justice and Security Green Paper", Twenty-fourth Report of Session 2010-12, p.32

⁵⁷⁰ See Williams, *supra* note 563, p.22; we can consequently talk about PII/Article 67 procedure.

⁵⁷¹ John Ip, *supra* note 247, p.720

⁵⁷² See Murphy, *supra* note 561, p.25

⁵⁷³ Special Immigration Appeals Commission Act (1997) [hereinafter SIAC Act]

⁵⁷⁴ See Ip, *supra* note 247, p.720

⁵⁷⁵ Constitutional Affairs Committee, "The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates", Seventh Report of Session 2004-05, para.25

⁵⁷⁶ Art. 5 (3)(a) SIAC Act

⁵⁷⁷ Art. 5 (3)(b) SIAC Act

evidence taken” in the absence of the person concerned should be laid out.⁵⁷⁸ In making these rules, the Lord Chancellor shall ensure that the decisions under appeal are effectively reviewed and that no sensitive information is disclosed at odds with the public interest.⁵⁷⁹

The Act provides also for the appointment of special advocates: security-cleared lawyers tasked with representing “the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded”.⁵⁸⁰ However, paragraph 4 of the same Article adds that the person appointed “shall not be responsible to the person whose interests he is appointed to represent”.⁵⁸¹

Special advocates are not governments proxies, in fact they have to give proof of their independence and impartiality. They are selected among advocates with high reputation especially in immigration, criminal law and human rights law. Some of them are also experienced civil litigators.⁵⁸² A background in security and intelligence matters is not a mandatory prerequisite even though some of them might have previously acted in cases where they had to go through the necessary security clearance.⁵⁸³ The roster is meant to be as diverse as possible through the inclusion of barristers with different professional backgrounds and different levels of experience. This aims at ensuring that not all the barristers on the list are lawyers who have worked for the Government in the past.⁵⁸⁴ As a further guarantee of their independence, special advocates usually work in teams of two composed of a senior advocate and a junior advocate: “while one SA is often ‘tainted’, the other is sometimes not”.⁵⁸⁵

As mentioned above, special advocates have to be security-cleared by the security services.⁵⁸⁶ To obtain the necessary security clearance, the lawyers have to undergo a process of examination, involving a background check, aimed at testing whether they can be trusted to have access to classified information.⁵⁸⁷ All special advocates have reported that during the clearance process they have been subject to very intrusive questioning mainly aimed at identifying elements which may make them susceptible to blackmailing, including details on their financial and marital status.⁵⁸⁸

⁵⁷⁸ Art. 5 (3) (d) SIAC Act

⁵⁷⁹ Art. 5 (6) SIAC Act

⁵⁸⁰ Art. 6 (1) SIAC Act

⁵⁸¹ Art. 6 (4) SIAC Act

⁵⁸² See Forcese and Waldman, *supra* note 6, p.26

⁵⁸³ See Forcese and Waldman, *supra* note 6, p.27

⁵⁸⁴ See Forcese and Waldman, *supra* note 6, p.26

⁵⁸⁵ See Forcese and Waldman, *supra* note 6, p.26

⁵⁸⁶ See Forcese and Waldman, *supra* note 6, p.28

⁵⁸⁷ SecurityClearedJobs.com: <https://www.securityclearedjobs.com/staticpages/10287/get-security-cleared/>

⁵⁸⁸ See Forcese and Waldman, *supra* note 6, p. 28. Some concerns arose from the length of time required to complete the cleansing process. Some special advocates in fact queried how the SA roster could be filled with enough ‘fresh’ Special Advocates as the existing ones withdrew or became tainted. See also *Tariq* at para.72: “To be effective security vetting will usually, if not invariably, require to be carried out in secret. Its methods and the sources of information on which it depends cannot be revealed to the person who is being vetted. Those who supply the information must be able to do so in absolute confidence. In some cases, their

Regarding their appointment, while special advocates were once appointed to a specific case by the Attorney General,⁵⁸⁹ the persons concerned are now asked to express their preference among the barristers which are on the special advocate roster, subject to their availability and the absence of conflict of interests which may compromise the impartiality of their work.⁵⁹⁰

The 2003 Special Immigration Appeals Commission (Procedure) Rules⁵⁹¹ provides for more detailed rules regarding the use of closed material and the functions of the special advocates. Rule 4 confirms that, when exercising its functions, some information might be kept secret by the Commission if their disclosure is deemed to be “contrary to the interests of national security, the international relations of the United Kingdom, the detection and the prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest”.⁵⁹² The SIAC however must be satisfied that the material to which it has access is sufficient to determine the case.⁵⁹³

Under Rule 10, if the Secretary of State intends to oppose an appeal, he must provide the Commission with “a statement of the evidence upon which he relies in opposition to the appeal and any exculpatory material of which he is aware”.⁵⁹⁴ At the same time a copy of the same statement shall be served on the appellant.⁵⁹⁵ If, however, the Secretary of State refuses to disclose such a statement to the appellant or to his representative, Rules 37 and 38 will apply.⁵⁹⁶

Rule 37 is of particular importance because it provides a definition of closed material as the “material which the Secretary of State would otherwise be required to disclose to the appellant or his representative (...) but which the Secretary of State objects to disclosing to the appellant or his representative”.⁵⁹⁷ Under the same Rule no closed material can be relied upon in the judgment if a special advocate is not appointed in order to represent the interest of the appellants.⁵⁹⁸ Rule 37 then provides that in the event of the Secretary of State wishing to rely on secret information and a special advocate has been appointed, the Secretary of State must provide the Commission and the special advocate with a copy of the confidential material, containing also the reasons which stand behind the Secretary of State’s decision of non-disclosure and “if and to the extent that it is possible to do so without disclosing information contrary to the public interest” with a non-confidential summary of the material that can be made accessible to the applicant.⁵⁹⁹

personal safety may depend on this. The methods, if revealed to public scrutiny, may become unusable”.

⁵⁸⁹ Art. 6 (2)(a) SIAC Act

⁵⁹⁰ See Forcese and Waldman, *supra* note 6, p.21

⁵⁹¹ The Special Immigration Appeals Commission (Procedure) Rules (2003) [hereinafter SIAC Rules]

⁵⁹² Rule 4(1) SIAC Rules

⁵⁹³ Rule 4(3) SIAC Rules

⁵⁹⁴ Rule 10(1) SIAC Rules

⁵⁹⁵ Rule 10(2) SIAC Rules

⁵⁹⁶ Rule 10(3) SIAC Rules

⁵⁹⁷ Rule 37(1) SIAC Rules

⁵⁹⁸ Rule 37(2) SIAC Rules

⁵⁹⁹ Rule 37(3) SIAC Rules

With regard to the copy of the undisclosed material which has to be served on the special advocates, several concerns have been raised around the nature and the consequent reliability of the information contained in this copy. This reliability in fact seems to vary considerably from case to case. Sometimes, for example, special advocates receive the full transcription of a recorded conversation, sometimes only summaries prepared by the security services. In this latter case, however, special advocates worry that the influence of the Government may result in a mere selective disclosure of information or in summaries of not fully contextualized conversations. Moreover, these summaries may contain 'piled' hearsay, which is "second-hand (or perhaps seventh or eighth hand) accounts of inculpatory conversations".⁶⁰⁰ However, also when special advocates receive the full transcript of the conversation, its credibility has to be tested: "some noted that the questions posed by the security service tend to be designed to advance the service's presuppositions, and not always to explore other alternatives".⁶⁰¹ This entails that special advocates are often called to perform their role on the basis of biased information.⁶⁰²

At this stage and after having carefully examined the confidential material, the special advocates perform one of their core functions, namely contesting the legitimacy of the alleged need for classification by making submissions on whether some confidential material should be disclosed to the appellant.⁶⁰³ Sometimes, special advocates obtain the Government's consent to the release of the information in question; in other circumstances the Government agrees to release a non-confidential summary of the withheld information. In performing this function, special advocates have showed how sometimes, by doing simple Internet searches, one can see that information whose confidentiality has been fiercely claimed by the Government was already in the public domain. Thus, this time-consuming activity of cross-referencing confidential information against information that is already publicly available seems to be essential in order to enhance disclosure to the excluded persons and their legal representatives.⁶⁰⁴

⁶⁰⁰ See Forcese and Waldman, *supra* note 6, p.40

⁶⁰¹ See Forcese and Waldman, *supra* note 6, p.40

⁶⁰² See Forcese and Waldman, *supra* note 6, p.40

⁶⁰³ See Ip, *supra* note 247, p. 721. See also Evidence of Martin Chamberlain to the Joint Committee on Human Rights, "Counter-terrorism policy and Human Rights: 28 days, intercept and post-charge questioning", Nineteenth Report of Session 2006-07, Q46: "There are some cases where the majority of the evidence is in open and there are only a few supporting matters in closed, and there no doubt the appellant will be criticized if they have not explained some feature of the open evidence, and indeed, there are SIAC cases where they have been criticized, but then there are other cases where almost all, or indeed there are cases where all the material evidence is closed, there is nothing in open, and the difficulty is that when the appellant is given a short open statement, he has no idea whether this is 1% of the evidence against him or 99%. He simply has no way of knowing. Q47: "In some cases he does not know even the gist of what is being said in respect of 99% of the case. Part of our role in trying to secure as much disclosure as possible for the appellant involves trying to suggest to the Secretary of State's side, to the Security Service, gists that might be acceptable. We are constantly trying to formulate gists of closed material which we think might enable the Secretary of State to make something open, perhaps in a slightly different form, concealing the source but at least making the thrust of the point open, and sometimes we are successful in small degree and sometimes completely unsuccessful".

⁶⁰⁴ See Forcese and Waldman, *supra* note 6, p.42

Moreover, if necessary, special advocates may pursue the so-called 'Rule 38 procedure' in order to obtain a disclosure order from the tribunal.⁶⁰⁵ Rule 38 in fact provides that if the Secretary of State makes an objection under Rule 37, in order to decide whether to uphold the objection or not, SIAC "must fix a hearing for the Secretary of State and the special advocate to make oral representations"⁶⁰⁶ in the absence of the appellant and his representative.⁶⁰⁷ The Commission must then "uphold the Secretary of State's objection under Rule 37 where it considers that the disclosure of the material would be contrary to the public interest".⁶⁰⁸ In this event, the Commission must evaluate whether a non-confidential summary of the closed material should be served on the appellants and then approve any such summary in order to secure that no information which needs to be kept secret is leaked.⁶⁰⁹

The appeal hearing which follows is held in both closed and open sessions. The open session occurs first. The appellant and his representative can also participate. The special advocate is present as well. Unlike in the open session, only the Home Secretary and the special advocate are allowed to take part in the closed session.⁶¹⁰ In these closed hearings, the focus is on confidential information.⁶¹¹ The role of the special advocates during the closed sessions is described by Rule 35 which states that their function is to pursue the interests of the defendants by "making submissions to the Commission at any hearings from which the appellant and his representatives are excluded", by "adducing evidence and cross-examining witnesses at any such hearings" and by "making written submissions to the Commission".⁶¹²

In practice, the role of special advocates is to challenge the Government's case for example by presenting arguments on the admissibility and credibility of the information supplied by the Government, by identifying inconsistencies in witnesses' testimony and drawing inferences from Government's information. Moreover, in some circumstances, special advocates have been able to shed light on discrepancies in the Government's claims between cases: there are instances of information claimed confidential in one case and treated as open in another case.⁶¹³

However, the special advocates' ability to challenge the Government's case is severely weakened by the restrictions imposed on their possibility to communicate with the appellant once the Home Secretary has served on them the material which it wishes to keep confidential.⁶¹⁴ Full communication is therefore possible only in the initial stages of the process whereas once special advocates have seen the closed material, they "must not communicate with any person about any matter connected with the proceedings".⁶¹⁵ This provision,

⁶⁰⁵ See Forcese and Waldman, *supra* note 6, p.42

⁶⁰⁶ Rule 38(2) SIAC Rules

⁶⁰⁷ Rule 38(5) SIAC Rules

⁶⁰⁸ Rule 38 (7) SIAC Rules

⁶⁰⁹ Rule 38 (8) SIAC Rules

⁶¹⁰ See Ip, *supra* note 247, p.721

⁶¹¹ See Forcese and Waldman, *supra* note 6, p.33

⁶¹² Rule 35 SIAC Rules

⁶¹³ See Forcese and Waldman, *supra* note 6, pp.38-39

⁶¹⁴ Rule 36 (1) SIAC Rules

⁶¹⁵ Rule 36 (2) SIAC Rules

which is deemed to represent “the most dramatic departure from conventional fair trial standards” clearly reflects the Government’s concern with inadvertent disclosure.⁶¹⁶

In the event of the special advocate wishing to consult with the appellant or his lawyer or any other person, he needs to seek the authorization of the Commission⁶¹⁷ which is however required to notify the Secretary of State of the request beforehand.⁶¹⁸ The Secretary of State can then object “to the proposed communication or to the form in which it is proposed to be made”.⁶¹⁹ These restrictions however do not prohibit the applicant to communicate with the special advocate but this communication can only occur through a legal representative and in writing.⁶²⁰ In this event, however, the special advocate can reply to the communication only in compliance with the directions of the Commission, “expect that he may without such directions send a written acknowledgment of receipt to the appellant’s legal representative”.⁶²¹ This means that only the communication from the special advocates to the appellants is restricted whereas no constraints are placed on the communication from the appellants or their legal advisers to the special advocates.⁶²²

With regard to the Commission’s decision, the judgment is often issued in both an open and a closed format⁶²³ when some reasons for the judgment cannot be given without disclosing sensitive information which would threaten national security.⁶²⁴ Rule 47 in fact provides that the Commission must provide the parties with a written determination containing its decision and the reasons for it “if and to the extent that it is possible to do so without disclosing information contrary to the public interest”.⁶²⁵ If such a determination does not contain the full reasons relied upon for the decision, the Commission “must serve on the Secretary of State and the special advocate a separate determination including those reasons”.⁶²⁶

1.3.The use of special advocates: from immigration cases (1997) to its expansion in all areas of civil law (2013)

Having gained foothold in immigration cases that would otherwise be impossible to hear for public interest reasons, the use of CMPs has spread in other areas of law and also the use of special advocates has accordingly increased.⁶²⁷ In each context, as the Government explained in its Green Paper,

⁶¹⁶ See Forcese and Waldman, *supra* note 6, p.36

⁶¹⁷ Article 36 (4) SIAC Rules

⁶¹⁸ Article 36(5)(a) SIAC Rules

⁶¹⁹ Article 36 (5)(b) SIAC Rules

⁶²⁰ Article 36 (6)(a) SIAC Rules

⁶²¹ Article 36(6)(b) SIAC Rules

⁶²² Government Response to the Constitutional Affairs Select Committee’s Report into the Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates, June 2005, p. 8

⁶²³ See Forcese and Waldman, *supra* note 6, p. 33

⁶²⁴ See Williams, *supra* note 563, p.7

⁶²⁵ Article 47(3) SIAC Rules

⁶²⁶ Article 47 (4) SIAC Rules

⁶²⁷ See Ip, *supra* note 247, p.721

“the system operates along the same broad lines based on the original model used in SIAC”.⁶²⁸ The result of this expansion is that while special advocates were originally operating on an *ad hoc* basis, they now operate on a systematic basis.⁶²⁹

In particular, after their introduction with the SIAC Act, the use of special advocates spread in the counter-terrorism field as evidence of the symbiosis between immigration and fighting terrorism.⁶³⁰ Among the pieces of legislation which have extended the use of CMPs we recall: the 2001 Anti-Terrorism, Crime and Security Act⁶³¹ which established a system of preventive detention whereby foreign nationals suspected of terrorism could be permanently interned in Belmarsh prison without trial;⁶³² the 2005 Prevention of Terrorism Act (PTA)⁶³³ which replaced the system under the 2001 Act with control orders, namely restrictive measures targeting those suspected of involvement in terrorism-related activities;⁶³⁴ the Terrorism Prevention and Investigation Measures Act⁶³⁵ which in 2011, after an intense litigation on the control order legislation, replaced the control orders system;⁶³⁶ the 2008 Counter-Terrorism Act⁶³⁷ which permits closed hearing to be held and special advocates to be appointed in the event of the UK Treasury refusing the disclosure of material in the name of the public interest.⁶³⁸ As a result of this legislation, the “SIAC was no longer a relatively obscure tribunal that only dealt with a small number of immigration cases; it was thrust into the legal frontline of the United Kingdom’s post-September 11 counter-terrorism efforts”.⁶³⁹

However, while the spread of special advocates has been certainly extremely broad in civil cases, the rules of evidence in criminal cases have always been much stricter than those governing civil cases and any relaxation of the basic guarantees in the name of public interest concerns has always been firmly opposed. Nevertheless, the use of secret evidence has managed to make some inroads also into criminal law.⁶⁴⁰ In particular, special advocates are used in criminal cases where a PII application is made by the prosecution.⁶⁴¹ The appointment of special advocates in these cases aims at questioning whether a PII claim should be accepted in the first place and at ensuring that the interests of the defendant are adequately protected.⁶⁴² The importance of the appointment of special advocates in these cases derives from the fact that even though, unlike in civil cases, the closed material is not used against the

⁶²⁸ See Green Paper, *supra* note 38, para.2.37

⁶²⁹ See Ip, *supra* note 247, p.724

⁶³⁰ See Murphy, *supra* note 561, p.24

⁶³¹ Anti-Terrorism, Crime and Security Act (2001)

⁶³² See Murphy, *supra* note 561, p.25

⁶³³ Prevention of Terrorism Act (2005)

⁶³⁴ See Murphy, *supra* note 561, p.25

⁶³⁵ Terrorism Prevention and Investigation Measures Act (2011)

⁶³⁶ See Murphy, *supra* note 561, p.25

⁶³⁷ Counter-Terrorism Act (2008)

⁶³⁸ See Policy Department, *supra* note 8, p.22

⁶³⁹ See Ip, *supra* note 247, p.722

⁶⁴⁰ See JUSTICE, *supra* note 69, p.133

⁶⁴¹ See JUSTICE, *supra* note 69, p.135

⁶⁴² See Forcese and Waldman, *supra* note 6, p.23

defendants, disclosure of certain material might be necessary in order for the defendant to receive a fair trial.⁶⁴³

The UK experience is thus a clear example of the propensity of exceptional measures, such as the special advocate system, to expand beyond their original boundaries and “become normalized”.⁶⁴⁴ The use of special advocates became so widespread that as it emerges from a letter sent in November 2011 by the Joint Committee on Human Rights to the Lord Chancellor, the UK Government itself had no accurate figures of how many fields special advocates could be appointed in.⁶⁴⁵ The Joint Committee, in fact, noted that the Government, in its Green Paper, stated that “the Special Advocate system is provided for in legislation in 14 different contexts of civil proceedings as well as performing a slightly different role in criminal trials in exceptional circumstances”.⁶⁴⁶ However, “the previous Government provided this Committee’s predecessor with a list of 21 different contexts in which it said it was aware that special advocates have been or may be used”.⁶⁴⁷

1.3.1. *The rise of questions of legality*

This widespread use of special advocates has given rise to serious questions of legality. If on the one hand the use of closed material proceedings was provided by law in the immigration and counter-terrorism context, special advocates have been appointed by courts also in other proceedings by way of analogical reasoning. Critics of this tendency claim in particular that it should be left to the legislature and not to the judiciary to administrate justice in a way that has such severe implications for the due process.⁶⁴⁸ Moreover, an additional difficulty encountered in instances where the special advocates operate in the absence of a proper authorization is the lack of any procedural rules. In these contexts in fact, while the key features of the special advocate procedure were retained, a detailed procedural framework was absent.⁶⁴⁹

This issue was tackled by the court in *Al Rawi v Security Service*.⁶⁵⁰ In particular, this case raised the question as to whether a court has the power to order a CMP for a trial concerning a civil claim for damages as a substitute for the conventional PII procedure. In the present case, the claim for damages was brought by six former detainees (the claimants) at various locations, among which Guantanamo Bay, against the Security Service and other organs of the State (the appellants). The appellants were deemed to have been complicit in their detention and alleged ill- treatment by foreign authorities.⁶⁵¹ The appellants

⁶⁴³ See JUSTICE, *supra* note 69, p.135

⁶⁴⁴ See Ip, *supra* note 247, p.738

⁶⁴⁵ Joint Committee on Human Rights, The Justice and Security Green Paper Written Evidence, Letter from the Chair, to Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, January 1999, available at: <http://www.parliament.uk/documents/joint-committees/human-rights/Written%20Evidence%20Volume%20v6.pdf>, p.2

⁶⁴⁶ See Green Paper, *supra* note 38, para.2.37

⁶⁴⁷ See Written Evidence, *supra* note 645, p.2

⁶⁴⁸ See Murphy, *supra* note 561, p.29

⁶⁴⁹ See Ip, *supra* note 247, p.737

⁶⁵⁰ *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 A.C. 531

⁶⁵¹ *Ibid.* para.3

admitted in an open defense that the claimants had been detained but they refused any liability for the claimant's alleged mistreatment. Moreover, in their open defense, they also referred to other material in their possession which they wished the court to take into account but which they could not disclose for reasons related to public interest. The open defense was therefore coupled with a closed defense. The appellants insisted on the adoption of a CMP⁶⁵² given the practical difficulties they would encounter in conducting a PII procedure. They noted in fact that given the large number of documents (around 140,000) in respect of which the Public Interest Immunity might be considered,⁶⁵³ "it might take three years to complete the exercise of deciding in respect of which documents PII could properly be claimed".⁶⁵⁴

In addition to this argument of pragmatism, the appellants advanced an argument of principle: even though the right to a fair trial is absolute, "the means of satisfying that right vary according to the circumstances of the case". This entails that "as a general rule, real justice and a fair trial can only be achieved by open hearings, open disclosure, each side confronting the other's witnesses and open judgments". However, "in certain circumstances, a closed procedure may be necessary in order to achieve real justice and fair trial".⁶⁵⁵ The appellants held in fact that a CMP offered a third way between two undesirable outcomes: either the trial having to proceed without the confidential documents or the action being struck out on the grounds that no fair trial is possible without the closed material.⁶⁵⁶ On these grounds, the appellants' primary case was that, since CMPs had already been adopted in some classes of case, there was no reason why the court should not have the power to substitute a conventional PII exercise with a closed material procedure also in other classes of case.⁶⁵⁷

The claimants, however, opposed this possible course contending that a conventional Public Interest Immunity should instead be deployed.⁶⁵⁸ Their case was that, since open procedures are an essential component of the UK system of justice, "a closed material procedure would be such a fundamental change to the way in which ordinary civil litigation (...) is conducted that it should not be introduced by the courts. Any such change can only be made by Parliament".⁶⁵⁹

Even though the parties had already reached a confidential settlement of the case by the time the hearing before the Supreme Court began, the Supreme Court decided to give judgment in order to clarify the important point of principle at issue.⁶⁶⁰ Four of the judges in the majority concluded that the court had no common law power to authorize a CMP as either a substitute for or a supplement to PII without the Parliament's approval.⁶⁶¹

Lord Dyson in particular recognized that some features of the common law trial are fundamental to the UK system of both criminal and civil justice: the

⁶⁵² Ibid. para.4

⁶⁵³ Ibid. para.5

⁶⁵⁴ Ibid. para.5

⁶⁵⁵ Ibid. para.8

⁶⁵⁶ Ibid. para.81

⁶⁵⁷ Ibid. para.8

⁶⁵⁸ Ibid. para.5

⁶⁵⁹ Ibid. para.9

⁶⁶⁰ Ibid. para.7

⁶⁶¹ See Ip, *supra* note 247, p.611

principle of open justice principle and that of natural justice.⁶⁶² The first principle provides that trials should be conducted in public.⁶⁶³ Under the principle of natural justice, a party has the right to know the case against him/her and the evidence supporting it in order to enable him/her to respond to any evidence or submission put forward against him/her by the other party.⁶⁶⁴ Under the same principle, parties should also be enabled to “call their own witnesses and to cross-examine the opposing witnesses”.⁶⁶⁵

Lord Dyson then stated that a closed material procedure represents a departure from both the principles of open justice and natural justice.⁶⁶⁶ On this ground, he held that “the basic rule is that (...) the court cannot exercise its power to regulate its own procedures in such a way as will deny the parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice”.⁶⁶⁷ However, he recognized that in some cases a departure from the ordinary rules of open justice and natural justice might be necessary⁶⁶⁸ but at the same time he considers the issues of principle arising from CMPs to be so fundamental that it is for the Parliament to enact a legislation authorizing the use of CMPs in ordinary civil litigation.⁶⁶⁹

Lord Kerr fully agreed with Lord Dyson.⁶⁷⁰ Similarly, Lord Hope stressed that the task of striking a balance between the right to a fair trial and the demands of national security “is best left for determination through the democratic process conducted by Parliament, following a process of consultation and the gathering of evidence”.⁶⁷¹ Otherwise the courts would be tempted to transform a procedure set out to deal with exceptional cases in a common practice with the result of severely compromising the fundamental components of the right to a fair trial.⁶⁷²

On the other hand, the three dissenting judges concluded that the courts have no power to introduce a closed material procedure as a substitute for PII. However, they recognized that in some exceptional cases the courts might have the power to order a CMP as a supplement for the PII,⁶⁷³ meaning that this power could be exercised only as a last resort after the completion of the PII.⁶⁷⁴

The *fil rouge* hence emerging from the opinions expressed by the judges of the Supreme Court is that the departure from the principles of a fair trial inherent in closed procedures should always be kept to a minimum.⁶⁷⁵

⁶⁶² Ibid. para.10

⁶⁶³ Hanxiao Li, “Closed Material Procedure in Civil Proceedings”, (2013) Laws 546 Research Paper, Victoria University of Wellington, Faculty of Law, p.12

⁶⁶⁴ Ibid. para.12

⁶⁶⁵ Ibid. para.13

⁶⁶⁶ Ibid. para.14

⁶⁶⁷ Ibid. para.22

⁶⁶⁸ Ibid. para.63

⁶⁶⁹ Ibid. para.69

⁶⁷⁰ Ibid. para.88

⁶⁷¹ Ibid. para.74

⁶⁷² Ibid. para.73

⁶⁷³ Ibid. paras.107 and 152

⁶⁷⁴ Tom Hickman, “Turning out the lights? The Justice and Security Act 2013”, June 2013, UK Const. L. Blog, available at <http://ukconstitutionallaw.org>

⁶⁷⁵ See Hickman, *supra* note 674

1.3.2. *The Justice and Security Act: its flawed premises and its flawed provisions*

The Parliament's response to the issue tackled in *Al Rawi* is represented by the 2013 Justice and Security Act (JSA)⁶⁷⁶ whereby the Parliament achieved what the court itself could not do.⁶⁷⁷ After a tumultuous parliamentary drafting procedure, the Act received Royal Assent on 25 April 2013.⁶⁷⁸ This Act goes much further than the previous statutes by codifying in Part 2 the use of CMPs in any civil proceedings before the High Court, the Court of Appeal, the Court of Session or the Supreme Court in which the Executive refuses to disclose sensitive material⁶⁷⁹ which the JSA defines as "material the disclosure of which would be damaging to the interests of national security".⁶⁸⁰

The main rationale standing behind the extension of CMPs in any civil case is not only to prevent threats to national security but also to avoid disclosure of intelligence information provided by foreign allies of the United Kingdom during court proceedings, mainly the United States.⁶⁸¹ It has been argued, in fact, that this proposal by the Government was triggered by the case of Binyam Mohammed⁶⁸² which shed light on the potential threats that disclosure of information may pose to intelligence sharing with the United States.⁶⁸³

Binyam Mohamed was a former detainee at Guantanamo who asked the British Government to disclose confidential material relevant for his trial before a US military tribunal and containing evidence of mistreatment by the US authority. The British Government lost its claim to secrecy and was compelled to release this material. As a result, the US Government threatened to review the extent of intelligence sharing with the UK and "given that such US intelligence [had been] a critical ingredient in every counter-terrorism investigation conducted by the UK agencies since 2001, and that such sharing goes far beyond the counter-terrorism agenda, this was a risk which had to be addressed".⁶⁸⁴ It is clear that although the Government's intention was to legislate, the aim of the JSA was not to restrict the use of the special advocates but to expand their use in all areas of civil law.⁶⁸⁵

Under Section 6 of the JSA, the judge is accorded discretion in deciding whether a CMP should be undertaken. This provision is the result of an amendment made to the original version of the Bill which freed the hands of the courts in deciding whether to accept the Government's application for a CMP.

⁶⁷⁶ Justice and Security Act 2013 (UK) [hereinafter JSA]

⁶⁷⁷ See Williams, *supra* note 563, p.6

⁶⁷⁸ See Hickman, *supra* note 674

⁶⁷⁹ See Jackson, *supra* note 265, p.720

⁶⁸⁰ Section 6(11) JSA

⁶⁸¹ See Policy Department, *supra* note 8, p. 22

⁶⁸² R(Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65

⁶⁸³ Alexander Horne, "Special Advocates and Closed Material Procedures", 25 June 2012, Home Affairs Section, p.7

⁶⁸⁴ Nigel Inkster, "Balancing Secrecy with Openness and Accountability", 21 November 2011, International Institute for Strategic Studies

⁶⁸⁵ See Murphy, *supra* note 561, p.29

Under the original draft, in fact, no power to refuse such a request was accorded to the court and, besides the Government, neither the court nor the other parties in the case could apply for a CMP. This provision was then removed and this change has been welcomed by many as a crucial improvement of the original draft of the Act.⁶⁸⁶

Paragraph 1 of Section 6 provides in fact that “the court seized of relevant civil proceedings *may*⁶⁸⁷ make a declaration that the proceedings are proceedings in which a closed material application may be made to the court”.⁶⁸⁸ In order to make such a declaration the court needs to be satisfied that two conditions are met: i) “a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person”⁶⁸⁹ and ii) “it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration”.⁶⁹⁰ It is clear that the latter condition will be the first important issue under discussion between the Government and the claimants.⁶⁹¹

Such a declaration may be made by the court on the application of the Secretary of State or of any other party to the proceedings or of its own motion.⁶⁹² However, paragraph 7 specifies that if such an application is made by the Secretary of State, the court must not take it into account unless it is satisfied that the Secretary of State has previously “considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based”.⁶⁹³ Paragraph 8 then provides that the declaration under Section 6(1) must identify a relevant person which is defined as the party “who would be required to disclose the sensitive material”.⁶⁹⁴

In the event of a declaration under section 6 being made, the rules of court must ensure that the relevant person has the opportunity to apply for the permission of the court not to disclose material “otherwise than to (i) the court, (ii) any person appointed as a special advocate, and (iii) where the Secretary of State is not the relevant person but is a party to the proceedings, the Secretary of State”.⁶⁹⁵ When this type of application is made, these rules must ensure that “the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security”⁶⁹⁶ and that, if this permission is given, the court “must consider requiring the relevant person to provide a summary of the material to every other party to the proceedings”.⁶⁹⁷ The rules of court must also secure

⁶⁸⁶ Lord Brown, Final debate on the Justice and Security Act (2013), available at <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130326-0002.htm#13032671000268>

⁶⁸⁷ And not “must”. Emphasis added.

⁶⁸⁸ Section 6(1) JSA

⁶⁸⁹ Section 6(4) JSA

⁶⁹⁰ Section 6(5) JSA

⁶⁹¹ See Hickman, *supra* note 674

⁶⁹² Section 6(2) JSA

⁶⁹³ Section 6(7) JSA

⁶⁹⁴ Section 6(8) JSA

⁶⁹⁵ Section 8(1)(a) JSA

⁶⁹⁶ Section 8(1)(c) JSA

⁶⁹⁷ Section 8(1)(d) JSA

that the court is required to ensure that the summary does not include material the confidentiality of which should be preserved in the interest of national security.⁶⁹⁸

The JSA further provides that in any proceedings from which the party or his/her legal representative are excluded, “the appropriate law officer may appoint” a special advocate in charge of representing the interests of the excluded party.⁶⁹⁹ In relation to proceedings in England and Wales, the appropriate law officer is the Attorney General.⁷⁰⁰

Also some counterbalancing mechanisms have been put in place under the JSA. Section 7 provides that in the event of a declaration under Section 6 having been made “the court must keep the declaration under review, and may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings”.⁷⁰¹ This entails that “the fair and effective administration of justice”⁷⁰² is the condition not only for triggering but also for terminating closed proceedings.

Moreover, an effective oversight mechanism has been introduced in order to grant a high degree of transparency on the use of the CMP system.⁷⁰³ Section 12 requires the Secretary of State to prepare a report every twelve months on the use of CMPs during the reporting period. This report shall include the number of applications made and by which party, the number of revocations, the number of the declarations made by the court under Section 6, the number of final judgments issued in the proceedings under Section 6 which are closed judgments and the number of open judgments.⁷⁰⁴

However, the conclusions that can be drawn from the first report published after that the JSA came into force and which covers the period from 25 June 2013 to 24 June 2014 are disappointing. The full substance of what happened the first year, in fact, is still in the dark since the report did not provide sufficient information for the public to be adequately informed about the use and the reasons for the use of CMPs. The reports need to be more accurate and comprehensive in order to enhance transparency on the kind of situations in which CMPs have been sought.⁷⁰⁵ “what can be made public should be made public” as a matter of democratic accountability.⁷⁰⁶

Furthermore, under Section 13, the Secretary of State must appoint a person to review every five years the operation of the provisions under the JSA concerning the use of CMPs.⁷⁰⁷ Sections 12 and 13 thus play a significant role in discouraging an over-use of the CMP system.⁷⁰⁸

⁶⁹⁸ Section 8(1)(e) JSA

⁶⁹⁹ Section 9(1) JSA

⁷⁰⁰ Section 9(3) JSA

⁷⁰¹ Section 7(2) JSA

⁷⁰² Section 7(2) and Section 6(5) JSA

⁷⁰³ See Hickman, *supra* note 674

⁷⁰⁴ Section 12 JSA

⁷⁰⁵ Lawrence McNamara and Daniella Lock, “Closed Material Procedures under the Justice and Security Act 2013. A Review of the First Report by the Secretary of State”, August 2014, Bingham Centre for the Rule of Law, p. 7-8

⁷⁰⁶ See McNamara and Lock, *supra* note 705, p.7

⁷⁰⁷ Section 13 JSA

⁷⁰⁸ See Hickman, *supra* note 674

In its Green Paper, the Government premised its proposal to extend the use of CMPs to any civil proceedings on the insufficiencies of the PII system and it listed the possible benefits that could derive from this proposal. First of all, the Government held that CMPs, unlike the PII system, make all the relevant material reviewable by the court regardless of its security classification and in its view, “a judgment based on the full facts is more likely to secure justice than a judgment based only on a proportion of relevant material”.⁷⁰⁹ The Government therefore deems that, in terms of outcome, the administration of justice is better served by including as much relevant information as possible rather than by hiding potentially pivotal evidence from the court’s sight altogether; it believes that CMPs represent the only way to maximize the amount of relevant material at the court’s disposal while at the same time protecting sensitive information from potentially harmful disclosure.⁷¹⁰

Secondly, when a CMP is adopted, it is less likely that the Government is left to face the all-or-nothing choice of either disclosing sensitive material which might harm national security or having to drop a case or to settle it or to strike it out altogether when it wishes to forward a defense but it feels it cannot do so without endangering national security.⁷¹¹ Thus, in the Government’s view, when sensitive material comes into play, it is better for the court to be enabled to adjudicate on the substance of the case rather than having to leave the case not tried at all.⁷¹² Moreover, the Government held that in the contexts in which CMPs were already in place, they have shown to deliver procedural fairness and work effectively.⁷¹³

However, there are several substantive differences between the CMPs and PII procedures which affect the procedural fairness that in the Government’s view can be reached only when CMPs are adopted.⁷¹⁴ First of all, the assumption that in every instance the judge is bound to reach a fairer outcome if he is given access to all the relevant material is fundamentally misguided. Compared to CMPs in fact, the PII is inherently fairer because it rests on the principle of the respect of the equality of arms.⁷¹⁵ Under the PII system in fact “if documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court”.⁷¹⁶ On the contrary, CMPs allow the Government and the Court to rely on material which at the same time is withheld from the claimant.⁷¹⁷ Consequently, the effect of the use of a closed material procedure is that the Government can forward its case on the basis of material that the opposing party has no chance to challenge.

The fallacy of the result-oriented approach adopted by the Government in its Green Paper is very well described by Lord Kerr in *Al Rawi*. He noted in fact that the opportunity to “see everything” does not necessarily enable the judge to

⁷⁰⁹ See Green Paper, *supra* note 38, para.2.3

⁷¹⁰ See Green Paper, *supra* note 38, para.2.2

⁷¹¹ See Green Paper, *supra* note 38, para.2.3

⁷¹² See Green Paper, *supra* note 38, para.2.4

⁷¹³ See Green Paper, *supra* note 38, para.2.3

⁷¹⁴ See Williams, *supra* note 563, p.8

⁷¹⁵ See Williams, *supra* note 563, p.9

⁷¹⁶ *Al Rawi* at para.41

⁷¹⁷ *Al Rawi* at para.41

determine the case on the basis of a more accurate reconstruction of the truth: “to be truly valuable, evidence must be capable of withstanding challenge (...) Evidence which has been insulated from challenge may positively mislead (...) However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented”.⁷¹⁸ It is therefore evident that procedures where the judge determines the case on the basis of only one side’s interpretation of the evidence presented clearly deny the centrality of the right to know and to challenge the case.⁷¹⁹

A second major difference between CMPs and PII procedures is that in closed procedures, the Government minister can decide to withhold some relevant material without undertaking the *Wiley* balancing exercise which, on the contrary, in the PII process it is up for the court to carry out.⁷²⁰ In *Al Rawi*, Lord Kerr held that in claiming a PII the Government faces an “healthy dilemma”: the Government “will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII”.⁷²¹ On the contrary, under the closed material procedure, neither the Government nor the court are supposed to weigh the public interest in disclosure against the public interest in confidentiality.⁷²² “all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make”.⁷²³ As a consequence of the absence of the *Wiley* balance, information may be kept confidential even though its disclosure would have only a relatively slight impact on the countervailing public interests.⁷²⁴

Furthermore, the Government’s fear that a successful PII claim would make a case untriable⁷²⁵ should be set aside. There is only one precedent⁷²⁶ where as a result of a PII application the court struck out the claim because it deemed impossible to adjudicate upon the case without disclosing information

⁷¹⁸ *Al Rawi* at para.93

⁷¹⁹ *Al Rawi* at para.93. The entire citation: “The appellants’ second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive -for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable”.

⁷²⁰ See Williams, *supra* note 563, p.10

⁷²¹ *Al Rawi* at para.96

⁷²² See Tomkins, *supra* note 103, p.33

⁷²³ *Al Rawi* at para.96

⁷²⁴ See Hickman, *supra* note 674

⁷²⁵ See Green Paper, *supra* note 38, para.2.3

⁷²⁶ *Carnduff Rock* [2001] EWCA Civ 680; [2001]1 W.L.R.1786

which should be kept confidential.⁷²⁷ Since cases like this one are a rarity, they “do not pose a problem on a scale which provides any justification (...) for making a fundamental change to the way in which litigation is conducted” in the UK jurisdiction.⁷²⁸

In the light of this, severe criticism has preceded and followed the adoption of the JSA. Its implications, in fact, were defined as an extensive intrusion into the fundamental principles of open justice and equality of arms as protected both under the common law and under Article 6 ECHR.⁷²⁹

Furthermore, a close analysis of the JSA shows that only a fettered level of judicial discretion is left to the court.⁷³⁰ Under this new legislation in fact, the court is accorded discretion in making a declaration under Section 6(1) but once such a declaration has been made, Section 8(1)(c) provides that, if the Government applies to withhold material from the opposing party by means of a CMP, the Rules of Court must make sure that the court is required to give permission to withhold the confidential material “if it considers that the disclosure of the material would be damaging to the interests of national security”.⁷³¹ Based on the wording of the provision, the court seems to be accorded discretion in determining whether disclosure of material would represent a threat for national security. However, given the vague nature of the concept of ‘national security’, the Government could easily use national security as a shield to avoid vetting.⁷³² The new legislation seems to imply that once the declaration under Section 6 is made, no further balance of interests is left to the court.⁷³³ “once the CMP trigger has been pulled, the court loses its power to order disclosure of sensitive material, where this is required in the interests of natural justice or openness”.⁷³⁴

The Joint Committee on Human Rights also noticed that the range of information that the Government can use to invoke a CMP is too broad. In order to circumvent this problem, the Committee proposed to confine the “material (...) the disclosure of which would be damaging to the interests of national security” under S.6(11) of the Act to two narrow categories: “information that would reveal the identity of intelligence officers or their sources and information that was provided by another country in a promise of confidentiality”.⁷³⁵ In the Committee’s view, in fact, sensitive material within the meaning of the JSA should not be the material the disclosure of which might harm public interest but the material the disclosure of which represents a real risk of harm to national security. However, by failing to introduce in the JSA any clause restricting the definition of sensitive material, the Parliament lost an opportunity to limit the use

⁷²⁷ See Williams, *supra* note 563, p.12

⁷²⁸ *Al Rawi* at para.50

⁷²⁹ Oxford Human Rights Hub, “Justice and Security Act 2013: Impact on Open Justice and Trial Rights”, available at <http://ohrh.law.ox.ac.uk/justice-and-security-act-2013-impact-on-open-justice-and-trial-rights/>

⁷³⁰ See Williams, *supra* note 563, pp.10-11

⁷³¹ Section 8(1)(c) JSA

⁷³² See Li, *supra* note 663, p.16

⁷³³ See Hickman, *supra* note 674

⁷³⁴ See Hickman, *supra* note 674

⁷³⁵ John Sullivan, “Closed Material Procedures and the Right to a Fair Trial”, (2014) 29(1) *Md.J.Int'lL.*, p.285

of CMPs to the strictly necessary standard as laid out by the ECtHR.⁷³⁶ Opponents of this Act suggested in fact that the new legislation was designed merely in order to allow the Government to claim the need for closed procedures in order to avoid the spread of embarrassing secrets.⁷³⁷

1.4. Closed Material Procedures and the need for a minimum level of disclosure

Besides the difficulty witnessed by the UK experience to confine the use of closed material procedure to exceptional cases, there are several other substantive aspects of this procedure which clash with the common law principles of fair trial. When the SIAC was first set up, these concerns did not arise because immigration and asylum claims do not fall under Article 6 ECHR since they do not determine civil rights within the meaning of this Article. However, these issues became compelling when the SIAC's model of closed hearing became the basis for a subsequent expansion of closed hearings in other areas of law.⁷³⁸ In particular, the principles of due notice and of open justice and the duty to give reasons are compromised by CMPs because they deny the excluded party the opportunity to participate and contribute to the outcome of the procedure.

First of all, the principle of due notice is severely curtailed by CMPs. Closed material procedures, in fact, are a clear exception to the general principle stemming from the core of the right to a fair trial namely that the persons concerned must know the case against them in order to exercise their right to see, to comment on and to challenge the evidence produced against them by submitting contrary evidence:⁷³⁹ "if the right to be heard is to be a real right which is worthy of anything, it must carry with it a right in the accused man to know the case which is made against him (...) and then he must be given a fair opportunity to correct or contradict" it.⁷⁴⁰

Secondly, the duty of open justice is also subject to strict restrictions under closed material procedures⁷⁴¹ despite the well established principle that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".⁷⁴² Publicity is important because it represents an essential deterrent against arbitrariness by enabling the public to understand and scrutinize the administration of justice:⁷⁴³ closed material procedures "will inevitably weaken democratic control, because they will have a tendency to keep from the public and from the great mass of parliamentarians, material which the public, which Parliament may need in order to come to informed conclusions about aspects of the security and intelligence agencies performance".⁷⁴⁴ Besides these accountability concerns, lack of publicity prevents the court from determining the substance of the case on the

⁷³⁶ See Sullivan, *supra* note 735, pp. 285-286

⁷³⁷ See Horne, *supra* note 683, p.8

⁷³⁸ See "Article 6: The Right to a fair trial", *supra* note 185, p.230

⁷³⁹ See Williams, *supra* note 563, pp.14-15

⁷⁴⁰ *Kanda v Government of Malaya* [1962] AC 322 PC, 337

⁷⁴¹ See Williams, *supra* note 563, p.15

⁷⁴² *R v Sussex Justices Ex p McCarty* [1924] 1 KB at paras.256 and 259

⁷⁴³ See Williams, *supra* note 563, pp.15 -16

⁷⁴⁴ See Williams, *supra* note 563, p.16

basis of additional information which may arise only if the public is aware of the Government's claims. Sometimes in fact, third parties may be in possession of relevant information but they will be able to submit them only if they are aware of the evidence.⁷⁴⁵

Thirdly, the duty to give reasons is also seriously weakened.⁷⁴⁶ In closed material procedures, in fact, the court may hand down closed judgments which prevent the individuals concerned from having full access to the reasons for the decision against them. Even though the special advocates are under a continuing duty to make sure that as much material as possible is provided to the excluded party, the court may still exclude from the open judgment those reasons which cannot be given without disclosing information which may potentially harm the public interests at stake. The open judgment will therefore tell the applicants whether the court accepts or not the allegations made against them but it might be unable to inform them of the full reasoning followed by the court in drawing such a conclusion.⁷⁴⁷ "The party will know the outcome only".⁷⁴⁸

The result is that the excluded party will not know why and on what basis s/he has lost his/her case and his/her legal team will not have enough information to evaluate whether an appeal is worthwhile.⁷⁴⁹ Serious mental effects can also derive from this unfair treatment: the excluded party will inevitably be filled with "feelings of resentment, confusion, anger, rejection and helplessness".⁷⁵⁰ Moreover, the veil of secrecy placed over closed judgments makes it impossible to develop academic discourses on those judgments. This is problematic considering the essential role that academy plays in upholding the rule of law by subjecting case-law to a constant critical appraisal.⁷⁵¹ "secrecy makes such appraisal impossible and impoverishes the culture of legality as a result".⁷⁵²

In the light of these concerns, the necessity to identify a minimum standard of procedural fairness soon emerged.⁷⁵³ In the context of control orders, an essential role was played by the European Court of Human Rights which in *A* concluded that when a detainee is facing a lengthy deprivation of liberty, as an essential counterbalance for the lack of full disclosure, s/he must be provided with sufficient information about the charges against him/her to give effective instructions to the special advocate. Just two weeks after the ECtHR's judgment, in *Secretary of State for the Home Department v AF (No 3)*,⁷⁵⁴ the UK

⁷⁴⁵ See Harten, *supra* note 34, p.14

⁷⁴⁶ See Williams, *supra* note 563, p.16

⁷⁴⁷ See Jackson, *supra* note 265, p.726

⁷⁴⁸ See Williams, *supra* note 563, p.16

⁷⁴⁹ See Williams, *supra* note 563, pp.16-17

⁷⁵⁰ See Williams, *supra* note 563, p.17

⁷⁵¹ Cian Murphy, "Secret Evidence in EU Security Law: Special Advocates before the Court of Justice", (2012) Centre of European Law, King's College London, available at <https://www.kcl.ac.uk/law/research/centres/european/research/CELWPEL022012FINAL.pdf>, p. 10

⁷⁵² See Murphy, *supra* note 751, p.10

⁷⁵³ See Jackson, *supra* note 265, p.720

⁷⁵⁴ *Secretary of State for the Home Department v AF (No3)* [2009] UKHL 28; [2010] 2 A.C. 269 [hereinafter *AF*]

Supreme Court endorsed the principle of the “core irreducible minimum”⁷⁵⁵ of information, as laid out in *A*, in the control orders under PTA 2005.⁷⁵⁶

This decision represents a continuation of the line of reasoning started by the House of Lords in *MB v Secretary of State for the Home Department*.⁷⁵⁷ This latter case represents in fact the first meaningful challenge to the use of secret evidence in the context of control orders.⁷⁵⁸ In 2005, the Secretary of State imposed a control order on MB who was suspected of being an Islamist extremist. However, the ratio of *MB* is difficult to identify due to the divergent judicial opinions expressed by the Law Lords.⁷⁵⁹

At one end, Lord Bingham affirmed that “the concept of fairness imports a core, irreducible minimum of procedural protection”⁷⁶⁰ and that special advocates can never represent a panacea for the great disadvantages suffered by a person who is not aware of the case against him/her and consequently unable to give effective instructions to them.⁷⁶¹ On this grounds, in the present case, Lord Bingham found the “very essence of the right to a fair hearing (...) impaired” since “MB was confronted with a bare, unsubstantiated assertion which he could do no more than deny”.⁷⁶² At the other end, Lord Hoffman appeared satisfied with the appointment of a special advocate as a sufficient safeguard against the unfairness stemming from the withdrawal of some information from the controlees.⁷⁶³ Baroness Hale, Lord Carswell and Lord Brown adopted an intermediate approach by stating that even though the use of special advocate safeguards the suspect against procedural injustice in almost every cases, there might be exceptional cases where it would be impossible to ensure a fair trial.⁷⁶⁴

The majority then concluded that the provisions of the PTA “should be read and given effect except where to do so would be incompatible with the right of the controlled person to a fair trial”.⁷⁶⁵ However, this conclusion accords the trial judge discretion in deciding whether the requirements of a fair trial are satisfied in the different concrete circumstances of control order hearings.⁷⁶⁶

Unlike in *MB*, in *AF* the position taken by the court is clear: it held that it had no choice but to apply to persons facing control orders the degree of disclosure laid out in *A* as they too face a considerable period of imprisonment.⁷⁶⁷ The majority of their Lordships in fact concluded that the requirements of a fair trial cannot be met if a party is denied also the gist of the

⁷⁵⁵ *AF* at para.81

⁷⁵⁶ See Jackson, *supra* note 265, p.722

⁷⁵⁷ *MB v Secretary of State for the Home Department* [2007] UKHL 46; [2008] 1 A.C. 440

⁷⁵⁸ See JUSTICE, *supra* note 69, p.79

⁷⁵⁹ Aileen Kavanagh, “Special Advocates, Control Orders and the Right to a Fair Trial”, (2010)

⁷³ (5) M.L.R., p. 839

⁷⁶⁰ *Ibid.* para.43

⁷⁶¹ *Ibid.* para.35

⁷⁶² *Ibid.* para.41

⁷⁶³ *Ibid.* para.54

⁷⁶⁴ See Kavanagh, *supra* note 759, p.840

⁷⁶⁵ *Ibid.* para.72

⁷⁶⁶ See Kavanagh, *supra* note 759, p.840

⁷⁶⁷ See Jackson, *supra* note 265, p.728

case against him,⁷⁶⁸ “at least where he is at risk of consequences as severe as those normally imposed under a control order”.⁷⁶⁹

This conclusion was driven especially by the evidence submitted to their Lordships by the special advocates, evidence that showed their limited role in challenging the Home Secretary’s case in closed proceedings. Lord Philips explained that the application of the A principle entails that “there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations”. However, if “the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirement of a fair trial will not be satisfied, however cogent the case based on the closed materials may be”.⁷⁷⁰

Accordingly, he held that the best way to ensure procedural fairness is to provide the parties to a trial with the fullest information of the allegation put forward against them and of the evidence relied upon. However, when other aspects of the public interest run into conflict with this principle, it is up to the Parliament and to the Government, in accordance with the law, to lay down possible solutions.⁷⁷¹ That law includes also the Convention as applied by the Human Rights Act.⁷⁷² This Act requires the courts to act in accordance with Convention rights and to take in due account the jurisprudence of the Strasbourg Court, jurisprudence which now includes also the principle laid out in A.⁷⁷³

Lord Hope, noted that “the principle that the accused has a right to know what is being alleged against him has a long pedigree” and that “the rule of law in a democratic society” does not tolerate allegations on grounds that cannot be disclosed.⁷⁷⁴ This means that, as a “core principle”, in every case the judge must ensure that the controlled person is provided with sufficient information to enable him/her to give effective instructions to his/her special advocate.⁷⁷⁵ The concrete application of this principle will then vary from case to case and it will be for the judge to strike the appropriate balance between what has to be disclosed to comply with this principle and what needs to be kept confidential.⁷⁷⁶

⁷⁶⁸ See Kavanagh, *supra* note 759, p.846

⁷⁶⁹ AF at para.65

⁷⁷⁰ Ibid. para.59

⁷⁷¹ Ibid. para.64

⁷⁷² Human Rights Act (1998)

⁷⁷³ Ibid. para.64; see also para.91: “The government has a responsibility for the protection of the lives and well-being of those who live in this country and a duty to promote the enactment of such legislation as it considers necessary for that purpose. (...) The duty of the courts, however, is rather different. It is not, directly at least, a duty to protect the lives of citizens. It is a duty to apply the law. Where the relevant law is, as here, statutory, the court’s duty is to construe the statute and faithfully to apply it so construed. In the process of construction the courts can and should take into account the purposes for which the statute was enacted and, by doing so, endeavor to reach a construction that promotes those purposes. The courts should also take into account treaty obligations by which the United Kingdom is bound under international law and assume, unless the language of the statute compels the contrary conclusion, that the legislature intended the statute to be consistent with those treaty obligations”.

⁷⁷⁴ Ibid. para.83

⁷⁷⁵ Ibid. para.85

⁷⁷⁶ Ibid. para.86

In striking such a balance the judge will need to take into account that “it is a sufficient statement of allegations against him, not the underlying material or sources from which it comes, that the controlled person is entitled to ask for”.⁷⁷⁷ He reminded, in fact, how the ECtHR has been careful in drawing a distinction between the disclosure of allegations and the disclosure of the evidence underlying the allegations.⁷⁷⁸ Overall, according to Lord Hope, the Grand Chamber in *A* “set a relatively high standard. It suggests that where detail matters, as it often will, detail must be met with detail”.⁷⁷⁹

Baroness Hale noted that the evidence submitted by the special advocates reveals that the scope for challenging the Secretary of State’s objection to disclosure is very limited because “these objections are (...) often in the nature of class claim relating to the sort of information it is, rather than specific to the particular case”.⁷⁸⁰

Also their Lordships who did not welcome the ECtHR’s decision in *A* with equal enthusiasm held that the authority of the statement of the Grand Chamber “is such that our courts have no option but to accept and apply it”.⁷⁸¹ Lord Hoffman for example criticized the decision of the ECtHR in *A* saying that this decision would destroy the system of control orders as an essential part of the UK defense against terrorism. However, he also held that the United Kingdom is bound by the Convention to accept the decisions of the ECtHR and that rejecting its interpretation of the Convention would place the United Kingdom in breach of the international obligations which it undertook when it acceded to the Convention:⁷⁸² “I can see no advantage in your Lordships doing so”.⁷⁸³

Overall, the conclusion reached by the House of Lords in *AF* brings the UK in line with the European standards⁷⁸⁴ thanks to the fact that it enhanced the level of procedural fairness in control order proceedings and consequentially strengthened the special advocates’ ability to argue for disclosure.⁷⁸⁵ The expected result was an increased degree of disclosure. With this regard, however, it seems that the Government put in place new strategies to avoid the procedural demands of *AF*. The Government in fact reacted by either revoking control orders when it was not ready to disclose a sufficient level of intelligence information or by disclosing as little as possible in the hope of meeting the requirements in *AF*.⁷⁸⁶ In the latter case in particular, while the decision in *A* suggests that a great degree of detail should be provided, the Government’s approach is to disclose the so-called ‘headline allegations’ such as that the

⁷⁷⁷ Ibid. para.86

⁷⁷⁸ Ibid. para.86

⁷⁷⁹ Ibid. para.87

⁷⁸⁰ Ibid. para.105

⁷⁸¹ Ibid. para.108

⁷⁸² Ibid. para.70

⁷⁸³ Ibid. para.70

⁷⁸⁴ See Murphy, *supra* note 561, p.26

⁷⁸⁵ See Kavanagh, *supra* note 759, p.851

⁷⁸⁶ See Kavanagh, *supra* note 759, p.852

individual concerned is alleged to be involved in some terrorist training without specifying when and where this training took place.⁷⁸⁷

Further practical difficulties derive from the so-called iterative approach to disclosure that lower courts have been adopting in some cases. Under this approach, controlees are only given limited disclosure on the assumption that that information may be enough to enable the persons concerned to give sufficient instructions to their representatives. If it then turns out that it is not, the person concerned will be given more details. However, special advocates expressed their concerns about the practical difficulties of constantly revising disclosure issues and they pointed out the unfairness which may be caused to the controlled persons when they are required to respond to a part of the allegations against them before being given more of what they have the right to know.⁷⁸⁸ In some other cases, the Government replaced control orders with less invasive restrictive measures, in respect of which Article 6 ECHR allegedly does not apply⁷⁸⁹ since less severe restrictions do not affect civil rights within the meaning of Article 6 ECHR.⁷⁹⁰

In conclusion, neither the spirit nor the letter of the judgment has been respected by the Government who rather took a minimalist approach in the implementation of the decision.

Beyond these concerns, also the content itself of the judgment in *AF* is substantially problematic. The principle laid out in this case in fact raises the same problem arising from *A*:⁷⁹¹ “it easy to state, but its application in practice is likely to be much more difficult”.⁷⁹² In particular, the level of detail that needs to be met in order to enable the person concerned to give instructions is not easy to establish.⁷⁹³ As one of the special advocate noted: “what *AF* decided was that somebody has the right to know the essence of the case against them. What that means in practice is quite difficult to determine in an individual case”.⁷⁹⁴

Notwithstanding these uncertainties, the principle laid out in *AF* was found applicable also to financial restrictions. With this regard, important principles have been set out in the context of the Bank Mellat’s ongoing application against Financial Restriction Orders imposed on the bank pursuant to the 2008 Counter- Terrorism Act. This Act empowers the British Government to impose financial restrictions on people and entities deemed to be involved in terrorism and nuclear proliferation in order to shut down their operations. In 2009, the HM’s Treasury made an order preventing all persons operating in the financial market from entering or participating in any business relationship with Bank

⁷⁸⁷ Joint Committee on Human Rights, “Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010”, Ninth Report of Session 2009-10, para.50

⁷⁸⁸ See Ninth Report, *supra* note 787, para.51

⁷⁸⁹ See Kavanagh, *supra* note 759, p.852

⁷⁹⁰ See Ninth Report, *supra* note 787, para.50

⁷⁹¹ See Kavanagh, *supra* note 759, p.856

⁷⁹² *AF* at para.85

⁷⁹³ See Kavanagh, *supra* note 759, p.856

⁷⁹⁴ Evidence of Ms. Mountfield to the Joint Committee on Human Rights, Ninth report, *supra* note 787, Q35

Mellat.⁷⁹⁵ This Iranian bank, in fact, had allegedly provided funds “to a UN listed organization connected to Iran’s proliferation-sensitive activities and” to be “involved in transactions related to financing Iran’s nuclear and ballistic missile program”.⁷⁹⁶

In 2010, the bank challenged this financial restriction before the High Court. In this occasion Mitting J held that the *A* principle as interpreted by the House of Lords in *AF* applied in the present case.⁷⁹⁷ The Treasury challenged this conclusion on the grounds that the principle laid out in those proceedings is not an immutable rule which applies to all civil proceedings in which Article 6 ECHR comes into play. On the contrary, since the balance to be struck between the interests at stake varies according to the context, also the procedural requirements stemming from Article 6 will need to be adapted to the factual backgrounds. The Court of Appeal,⁷⁹⁸ however, upheld the conclusion reached by Mitting J in requiring “the Treasury’s disclosure to be sufficient to enable the bank to give sufficient instructions not merely to deny, but actually to refute (in so far as that was possible), the essential allegations relied on by the Treasury to justify the making and continuance of the direction”.⁷⁹⁹ The court recognized that the precise extent of the disclosure which needs to be granted is inevitably fact-specific.⁸⁰⁰ What constitutes sufficient information under Article 6(1) ECHR will in fact inevitably depend on several elements such as “the particular issues between the parties, the contents of the statements of case, the nature and import of the particular evidence in question, and the state of knowledge of the party seeking the information”.⁸⁰¹ A balancing exercise is therefore inevitable but there is an irreducible minimum under Article 6(1) which has to be accorded to any party involved in litigation to which Article 6(1) is applicable.⁸⁰² The court consequently applied the gist requirement in a CMP where no restrictions on personal liberty were involved.⁸⁰³

The contested financial restriction order was then found unlawful by the Supreme Court⁸⁰⁴ on both procedural and substantive grounds.⁸⁰⁵ In the same case, the Supreme Court gave a preliminary ruling⁸⁰⁶ in which it held that it had jurisdiction to hold a closed hearing even though the statutory scheme did not

⁷⁹⁵ Maya Lester, “UK Supreme Court quashes Order against Bank Mellat” (2013) <http://europeansanctions.com/2013/06/20/uk-supreme-court-quashes-order-against-bank-mellat/>

⁷⁹⁶ Maya Lester, “First ever Closed Hearing in the UK Supreme Court – Bank Mellat’s Case” (2013) <http://europeansanctions.com/2013/03/21/first-ever-closed-hearing-in-the-uk-supreme-court-bank-mellats-case/>

⁷⁹⁷ *Bank Mellat v HM treasury* [2010] EWHC 350 (QB)

⁷⁹⁸ *Bank Mellat v HM Treasury* [2010] EWCA Civ 483

⁷⁹⁹ *Ibid.* para.6

⁸⁰⁰ *Ibid.* para.6

⁸⁰¹ *Ibid.* para.21

⁸⁰² *Ibid.* para.18

⁸⁰³ See Murphy, *supra* note 561, p.28

⁸⁰⁴ *Bank Mellat v HM treasury* [2013] UKSC 39

⁸⁰⁵ See Lester, *supra* note 795 available at: <http://europeansanctions.com/2013/06/20/uk-supreme-court-quashes-order-against-bank-mellat/>

⁸⁰⁶ *Bank Mellat v HM treasury* [2013] UKSC 38

explicitly permit closed hearings in the Supreme Court. This was the first time the Supreme Court had held a closed hearing in its history.⁸⁰⁷

Moreover, *AF* does not provide clear indications as to whether the A-type disclosure applies to other civil proceedings where a CMP is ordered.⁸⁰⁸ This is the issue addressed in *Tariq v Home Office*. In this judgment, the appellant, Mr Tariq, complained that the Home Office's decision to withdraw his security clearance as an immigration officer amounted to an unlawful discrimination. He claimed in particular this decision had been taken in circumstances where grounds of race and/or religion were directly or indirectly involved. On the other hand, the Home Office's case was that the contested decision was triggered by national security concerns⁸⁰⁹ because his close association with individuals suspected of being involved in terrorist-related activities was deemed to have placed him in a vulnerable position. There was in fact the risk that those individuals had tried to force him to abuse his position as an immigration officer.⁸¹⁰ However, no further information specifying these general allegations was made available to the applicant. The Supreme Court of Justice unanimously upheld the order of the Employment Tribunal to determine the case through a CMP in the interests of national security so long as sufficient measures of procedural justice were put in place. In this case, unlike *Al Rawi*, the CMP had a specific statutory authorization.⁸¹¹

The question addressed by the court was whether the A-type disclosure could apply to the present case. The majority took the view that the need to provide the person concerned or his legal representative with sufficient information as laid down by the ECtHR in *A* was not an absolute requirement. This principle in fact, if applied strictly, may have the consequence of forcing the party in charge of protecting national security to capitulate or concede the claim.⁸¹²

Lord Mance in particular reached this conclusion on the basis of the Strasbourg Court's decision in *Kennedy*⁸¹³ in which the Court held that the gist requirement does not apply in cases concerning secret surveillance.⁸¹⁴ In *Kennedy* the Court examined the legitimacy of the rules of procedure of the Investigative Powers Tribunal (IPT) in respect, among others, of Article 6 ECHR. The IPT is the body empowered of hearing complaints about alleged interceptions of communications. Concerning this issue, the Court concluded that "in order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, (...) the restrictions on the applicant's rights in the context of

⁸⁰⁷ See Lester, *supra* note 796, available at: <http://europeansanctions.com/2013/03/21/first-ever-closed-hearing-in-the-uk-supreme-court-bank-mellats-case/>

⁸⁰⁸ See Jackson, *supra* note 61, p. 728

⁸⁰⁹ *Tariq* at para.2

⁸¹⁰ *Tariq* at para.5

⁸¹¹ See Jackson, *supra* note 265, p.728

⁸¹² See Jackson, *supra* note 265, p.728

⁸¹³ ECtHR *Kennedy v United Kingdom*, Appl.No.26839/05, Judgment of 18 May 2010 [hereinafter *Kennedy*]

⁸¹⁴ *Tariq* at para.68

the proceedings before the IPT were both necessary and proportionate and did not impair the very essence of the applicant's Article 6 rights".⁸¹⁵

Moreover, a number of Lordships in *Tariq* placed extreme importance on the factual differences between the case in question and the context in *AF*. Among these, Lord Hope observed that in *AF* the actions of the Executive were severely restricting the fundamental rights of the individual concerned and that when fundamental rights are at stake, the rule of law requires that sufficient material is made at the individual's disposal. On the contrary, in the present case, the individual is not affected by harsh restrictions on his personal liberty: "this is a civil claim and the question is whether Mr Tariq is entitled to damages".⁸¹⁶ Similarly, a contextualist balancing approach was adopted by Lord Dyson when he pointed out that the claim in question is "a claim for damages for alleged discrimination" and even though he recognizes the importance of the right not to be victim of discrimination, "on any view, discrimination is a less grave invasion of a person's rights than the deprivation of the right to liberty".⁸¹⁷

In his dissenting opinion, Lord Kerr stressed that as a general rule the parties to a litigation need to be informed in detail of the allegations against them in order to enable them to counter those allegations.⁸¹⁸ This does not mean that exceptions to this general rule do not exist but these exceptions must be justified by "a strong countervailing public interest".⁸¹⁹ Moreover, similar restrictions have to be counterbalanced "by appropriate procedures allowed by the judicial authorities" and most importantly, "the restrictions must not be such as effectively to extinguish the very essence of the right".⁸²⁰ And the very essence of the right to a fair trial under Article 6 includes the requirement that the persons concerned are given sufficient information about the case made against them in order to be able to give meaningful instructions to refute that case.⁸²¹ This entails that in order to preserve a truly adversarial context, even though some variables may change according to the concrete circumstances, some indispensable features have always to be present regardless of the claim that is made.⁸²²

Lord Kerr then noted how the conclusion reached by the majority resulted in creating a separate and privileged class of cases to which the *A*-type disclosure applies. However, the eligibility criteria for the inclusion in this class are unclear: "Certainly, the class is not confined to those whose liberty is at stake".⁸²³ In the light of the ECJ's judgments in the *Kadi* saga in fact, *A*-type disclosure also applies to freezing order cases. But if this disclosure "is required in challenges to freezing orders, does it extend to property rights more generally? If it does, why should property rights be distinguished from loss of

⁸¹⁵ *Kennedy* at para.190

⁸¹⁶ *Tariq* at para.81

⁸¹⁷ *Ibid.* para.160

⁸¹⁸ *Ibid.* para.105

⁸¹⁹ *Ibid.* para.114

⁸²⁰ *Ibid.* para.114

⁸²¹ *Ibid.* para.118

⁸²² *Ibid.* para.134

⁸²³ *Ibid.* para.133

employment cases? After all, loss of livelihood may be just as devastating as having one's assets frozen".⁸²⁴

Lord Kerr's view seems to have inspired the High Court's decision in a subsequent case concerning Bank Mellat's challenge against new financial restrictions imposed on it under the 2011 and 2012 Orders.⁸²⁵ The major distinction between the 2009 Order and the 2011 and 2012 Orders is that while the first order applied to Bank Mellat alone, the others were targeted at all the Iranian Banks. In this case, in addressing the question as to what level of disclosure the Government was required to grant to the bank, the Government argued that on the basis of the conclusion reached in *Tariq*, unlike in detention cases, when it comes to financial restrictions no minimum level of disclosure is required. In this cases in fact, the necessary fairness was already being provided by the closed hearing procedure.⁸²⁶ However, the UK High Court rejected this argument holding that "while the Bank's liberty is not affected in the same way as that of an individual, the utterly damaging effect on its ability to function is material (...). In these circumstances, (...) Article 6(1) does require disclosure that meets the requirement of AF (3)".⁸²⁷ This conclusion was then upheld by the Court of Appeal in 2015:⁸²⁸ "restrictions on the freedom to do business or to engage on financial transactions can be as serious for a bank as restrictions on personal liberty for individual".⁸²⁹

Furthermore, in the light of the principle laid out in *AF*, concerns have emerged also from the provision under the Justice and Security Act which, as mentioned above, provides that if the court denies permission to disclose material, it must also consider whether the relevant person should be required to provide a summary of the information withheld to every other party to the proceedings.⁸³⁰ However, this provision seems to go sharply against the essence of the gist requirement, as outlined in *A* and in *AF*, respectively by the European Court of Human Rights and the House of Lords in *AF*.⁸³¹ As Lord Hope stated in *AF* in fact, "where detail matters, as it often will detail must be met with detail"⁸³² and this standard does not seem to be met by the mere provision of a summary.

1.5. Restrictions on special advocates' ability to preserve the adversary nature of Closed Material Procedures

Whether or not CMPs comply with the European standards, the European and domestic jurisprudence is centered around the effective ability of special advocates to reduce the negative impact of CMPs on due process rights.⁸³³ Thus, the crucial question that needs to be answered is whether the functions

⁸²⁴ Ibid. para.133

⁸²⁵ *Bank Mellat v HM Treasury* [2014] EWHC 3631 (Admin)

⁸²⁶ Ibid. para.4

⁸²⁷ Ibid. para.27

⁸²⁸ *Bank Mellat v HM Treasury* [2015] EWCA Civ 1052.

⁸²⁹ Ibid. para.22

⁸³⁰ Section 8(1)(d) JSA

⁸³¹ See Oxford Human Rights Hub, *supra* note 729

⁸³² *AF* at para.87

⁸³³ See Williams, *supra* note 563, p.17

carried out by the special advocates represent an adequate safeguard against the restrictions that the use of secret evidence poses to the applicants' rights of the defense.⁸³⁴ What makes the ability of special advocates to challenge the closed case even more important is that, despite the mistaken assumption that what is usually withheld from the person concerned are only the precise details of the open allegations, almost all cases involve allegations contained entirely in closed sources which therefore cannot be disclosed to the person concerned at all, not even in a gisted form.⁸³⁵

However, the special advocates' ability to enhance the rule of law has been subject to severe criticisms and the adoption of the JSA, by extending their use, has intensified this controversy. There are in fact several limitations under which special advocates operate and all of them seriously curtail their ability to challenge the Government's case.⁸³⁶ Several special advocates resigned in protest showing their reluctance to cooperate with a system which they perceive as inherently unfair.⁸³⁷

These limitations place the special advocates in an "unorthodox ethical position".⁸³⁸ Lord Bingham, in *R v H and C*,⁸³⁹ in fact, said that "a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession".⁸⁴⁰ In particular, it has been said that they "occupy an interstitial space somewhere between an amicus curiae

⁸³⁴ See Ip, *supra* note 247, p.731

⁸³⁵ See JUSTICE, *supra* note 69, p.200. See also Dinah Rose QC, Uncorrected Transcript of oral evidence taken before the Joint Committee on Human Rights, 24 January 2012: "I have had experience of closed procedures in acting for the Home Office, acting as a special advocate and acting for an appellant. One of the things that has always struck me from contrasting these roles is how different an open case may look from a closed case. The case that an appellant thinks they are meeting may not be simply different in extent but wholly different in kind from the case they are actually meeting. You just cannot tell; it is a classic iceberg situation, where two-thirds is underwater".

⁸³⁶ See JUSTICE, *supra* note 69, p.193.

⁸³⁷ A mass resignation threatening the survival of the system was averted in 2004 - 2005. Rick Scannel in resigning from the panel of the 19 special advocates in 2004-5 declared: "I thought I couldn't in good conscience act in a system which continued to test the lawfulness of the detention of these men in a context in which the House of Lords had declared the very provisions upon which the detentions were based to be incompatible with the detainees' human rights" (See Clare Dyers, 'Government Prepares to Unveil Changes to Anti-Terror Laws' *The Guardian*, 17 January 2005, available at: <http://www.theguardian.com/politics/2005/jan/17/terrorism.ukcrime>); His resignation followed that of MacDonald who held that: "When SIAC was first introduced (...) I initially took the view that was a big improvement on what had happened before because it introduces an element of fairness which had previously been lacking. My objection was when you tacked on the jurisdiction under the Anti-Terrorism Act to SIAC which was purely an immigration court, and at first I stayed on because I thought that I might be able to make a difference, but eventually one had to balance that against really being some kind of *fig-leaf* of respectability and legitimacy to a process which I found odious". Emphasis added (Evidence of Ian MacDonald to Constitutional Affairs Committee, Seventh report, *supra* note 575, Q1)

⁸³⁸ See Ip, *supra* note 247, p.735

⁸³⁹ *R v H and C* [2004] UKHL 3

⁸⁴⁰ Andrew Boon and Susan Nash, "Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems", (2006) 9(1) *Legal Ethics*, p.110

and an ordinary legal representative".⁸⁴¹ Therefore, these essential differences with the traditional role of lawyers not only raise doubts concerning the effectiveness of the system but also prompt important questions related to professional ethics.⁸⁴² Their ethical position is in fact still not well defined by means of a specific professional code⁸⁴³ and this is problematic considering the severe interferences with the rights of the defense suffered by those who are subject to the state action.⁸⁴⁴

With regard to the first and maybe most serious limitation, as mentioned above, once the special advocates have seen the closed evidence, they are prohibited from having any direct communication about any matter connected with the proceedings with the defendant and his lawyer⁸⁴⁵ other than merely acknowledging the receipt of any information sent to them by the applicant.⁸⁴⁶ Under Article 36 of the 2003 SIAC Procedure Rules in fact, the special advocate is allowed to discuss the confidential material only with the Commission, the Secretary of State, the relevant law officer and any other person, different from the appellant and his representative, "with whom it is necessary for administrative purposes for him to communicate about matters not connected with substance of the proceedings".⁸⁴⁷ This is problematic because even though no restrictions are placed on communication at the early stages of the procedure, the essence of the case often emerges only after the beginning of the closed proceedings and it is at this very stage that the bar on communication applies.⁸⁴⁸

This inability to communicate with the client prevents the special advocate from taking instructions about how to refute the Executive's allegations from the person who is probably the best source of relevant information.⁸⁴⁹ As a result, in the absence of instructions, the counsels "can only speculate as to what might be said in reply"⁸⁵⁰ and the court will not benefit from the fruits of a proper counter-investigation by the individual concerned.⁸⁵¹ Due to the lack of communication in fact, special advocates can identify inconsistencies in the Home Secretary's evidence and any aspect of the allegations made by the Home Secretary which are unsupported by evidence but they "have no means of knowing whether the defendant has an answer to any particular closed allegation".⁸⁵² In many cases, in fact, the person concerned is the only who is one able to submit exculpatory evidence or alibis proving, for example, that s/he

⁸⁴¹ See Ip, *supra* note 247, p.735

⁸⁴² See Murphy, *supra* note 561, p.30

⁸⁴³ See Ip, *supra* note 247, p.735

⁸⁴⁴ See Murphy, *supra* note 561, p.31

⁸⁴⁵ Article 36(2) SIAC Rules

⁸⁴⁶ Article 36(6)(b) SIAC Rules

⁸⁴⁷ Article 36(3) SIAC Rules

⁸⁴⁸ See Ip, *supra* note 247, p. 732; See also Murphy, *supra* note 561, p. 30: "At precisely the point at which the accused's participation is most important, both to ensure the legitimacy of the process and to guarantee the effectiveness of counter-terrorism, he is excluded. At that point, no matter how skilled or conscientious the special advocate is, he has become part of a system to which the accused is subject rather than in which the accused participates".

⁸⁴⁹ See Ip, *supra* note 247, p.733

⁸⁵⁰ See JUSTICE, *supra* note 69, p.194

⁸⁵¹ See Harten, *supra* note 34, p.10

⁸⁵² See JUSTICE, *supra* note 69, p.196

was not the person talking in a conversation, or, if s/he was, that the conversation had been wrongly transcribed, translated or interpreted or that the conversation had to be placed in a different context.⁸⁵³ This limitation has been described as “extremely frustrating and counter-intuitive to the basic way that lawyers are used to doing their job”.⁸⁵⁴

Moreover, even though the appellant can unilaterally communicate in writing with the special advocate, this possibility lacks of practical utility given that the person is unaware of the contents of the undisclosed material and given that the special advocate is only allowed to acknowledge receipt.⁸⁵⁵

Also the possibility accorded to the special advocates to seek the authorization of the court to consult with the appellant is significantly impaired under the current legislation. Any proposed communication, in fact, has to be notified to the Secretary of State who may object to it if it deems that this communication could inadvertently reveals secret information to the defendant.⁸⁵⁶ In an hypothetical example, the special advocate may seek the court’s permission to ask the defendant if s/he was in a specific location on the night in question and if s/he met anyone on that occasion. In this case, “the Secretary of State could object that, by specifying the date and the location, this would thereby alert the defendant to the fact that the security service knew of the alleged meeting, thereby enabling the defendant to guess at the source of the evidence (whether interception, surveillance or informant, etc.)”.⁸⁵⁷ This also means that apparently non-leading questions may be objected by the Secretary of State.⁸⁵⁸

This tendency of the Secretary of State not to approve communications which may have anything to do with substantive closed material has led special advocates to attempt to obtain permission to communicate with the defendant only for procedural points rather than for substantive issues.⁸⁵⁹ Moreover, another reason why special advocates have rarely sought this type of authorization is that asking for the Secretary of State’s permission is considered not tactically desirable. This may in fact reveal their strategy to the Secretary of State and may thus unfairly favor the Government side.⁸⁶⁰

Restrictions on communication also compromise the full realization of the clients’ autonomy. Full communication in fact enables the clients to present their version of the facts, clarify inconsistencies and interrogate the advisor: “the

⁸⁵³ See Williams, *supra* note 563, p.20

⁸⁵⁴ See Nineteenth report, *supra* note 603, para.201

⁸⁵⁵ See Ip, *supra* note 247, pp.732 - 733

⁸⁵⁶ Article 36(5) SIAC Rules; See Green Paper, *supra* note 38, para. 2.31: “Any such communication would have to be cleared through the Secretary of State on advice from the relevant experts, most commonly officials in the Agencies familiar with the case in question and with an understanding of the potential for public interest damage to be caused”.

⁸⁵⁷ See JUSTICE, *supra* note 69, pp.194-195

⁸⁵⁸ See JUSTICE, *supra* note 69, p.195

⁸⁵⁹ See JUSTICE, *supra* note 69, p.199

⁸⁶⁰ See Murphy, *supra* note 561, p.31 Evidence of Mr Andrew Nicol to the Joint Committee on Human Rights, Nineteenth report , *supra* note 603, Q44: “It is a feature of this process that if you want to raise anything with the appellant, you have first to raise it with your litigation opponent, the Secretary of State’s team. Sometimes we would feel inhibited about even drawing attention of our opponents to the fact that there are certain areas on which we would like to have assistance”.

essence of advocacy is for the advocate to say for clients what they would say for themselves in full knowledge of the law”.⁸⁶¹ The principle of free and confidential communication between the client and his representative obviously does not apply in the relationship with special advocates.

Serious concerns arise also from the restrictions imposed on special advocates regarding access to evidence and to expert advice on technical and intelligence matters involved in the closed evidence.⁸⁶² These restrictions limit the special advocates’ ability to rebut the national security evidence provided by the other party.⁸⁶³ The difference with the ordinary regime is clear-cut: in any ordinary litigation, the lawyers representing a party are given the opportunity to “consult experts relevant to the case at hand to enable them to interpret technical evidence, to advise them of relevant issues that are not apparent to a non-expert, and to help them to rebut the expert evidence given by the other party”.⁸⁶⁴

Under the original legislation which first introduced the special advocate system in 1997, no entitlement to consult with experts, including interpreters or to call witnesses in reply was granted. Special advocates were denied any kind of professional support in dealing with closed material. They were formally instructed by lawyers employed by the Treasury Solicitor’s Department but who were not security-cleared and this implied that these instructing lawyers were not able to perform certain functions, such as checking whether the material whose disclosure the Home Secretary objected to disclose was publicly available, with the consequential increase in the burden imposed on special advocates.⁸⁶⁵ In describing the system in which they were supposed to work, one special advocate said that “when you receive your first set of instructions in this, you do feel as if you are walking into something of a vacuum. Your solicitor can know nothing about the detail of the case and there is no express provision for you even to consult other special advocates”.⁸⁶⁶

In response to these deficiencies, in 2005 the Government established the Special Advocate’s Support Office (SASO) within the Treasury Solicitors Department in order to support the special advocates both on a administrative and a professional level.⁸⁶⁷ This Office now provides for both procedural solicitors and substantive solicitors. Procedural solicitors give initial instructions and engage in correspondence with the parties in respect of any open matters.⁸⁶⁸ The substantive solicitors on the contrary are instructing solicitors with the necessary security clearance which will enable them to engage with the substance of the closed material.⁸⁶⁹ Moreover, these security vetted solicitors keep a database of closed material in order to provide advice and assistance to

⁸⁶¹ See Boon and Nash, *supra* note 840, p.116

⁸⁶² See Boon and Nash, *supra* note 840, p.118

⁸⁶³ See Murphy, *supra* note 561, p.32

⁸⁶⁴ See JUSTICE, *supra* note 69, p.201

⁸⁶⁵ See JUSTICE, *supra* note 69, pp.201-202

⁸⁶⁶ See Seventh Report, *supra* note 575, para.107

⁸⁶⁷ See Government Response to the Constitutional Affairs Select Committee’s Report, *supra* note 622, p.11

⁸⁶⁸ See Boon and Nash, *supra* note 840, p.118

⁸⁶⁹ See Government Response to the Constitutional Affairs Select Committee’s Report, *supra* note 622, p.11

the special advocates on the basis of disclosure arguments used in other closed hearings. However, in order to avoid the leak of sensitive information, after being served with closed material, the substantive solicitor is allowed to make contact only with the special advocate while no contact is possible with the procedural solicitor on matters concerning closed material.⁸⁷⁰ In the light of this, although these measures represent an improvement compared to the previous practice, “the legal team, in a conventional sense at least, is illusory”.⁸⁷¹

Amendments to procedural rules have been made also in order to enable the special advocates to call witnesses and to obtain expert assistance. However, these amendments fall short of practical effects because in order to enable experts to advise on closed material and witnesses to give evidence they would need to be granted the necessary security clearance.⁸⁷² As noted by Lord Bingham in the *Roberts*⁸⁷³ case, “even if a special advocate is free to call witnesses, it is hard to see how he can know who to call or what to ask if he cannot take instructions from the defendant or divulge any of the sensitive material to the witness”.⁸⁷⁴

Moreover, special advocates cannot benefit from the support of intelligence service personnel in handling closed cases as instead was recommended by the Constitutional Affairs Select Committee in its seventh report (2005).⁸⁷⁵ Since in fact only few outside the Government are able to develop sophisticated and well-informed expertise in the field of security intelligence, the government has found it impossible to identify persons who could appropriately assist the special advocates in handling closed material considering that “those serving members of the Security and Intelligence Agencies (...) owe duties of confidence and loyalty to the Agencies by whom they are employed”.⁸⁷⁶ Requiring members of the Security Service to provide special advocates with arguments which will undermine the assessment made by one of their colleagues and “-in effect to act against the interests of national security- would place that employee in an invidious position”. The same reasoning can be extended to retired members of the Agencies, with the further problem that they are likely to have lost access to the most up-to-date information which is available only to the insider.⁸⁷⁷

In the light of this, the proposal made by the Government in its Justice and Security Green Paper to offer additional training to special advocates in order to

⁸⁷⁰ See Boon and Nash, *supra* note 840, p.118

⁸⁷¹ See Boon and Nash, *supra* note 840, p.118

⁸⁷² See JUSTICE, *supra* note 69, p.205

⁸⁷³ *Roberts v Parole Board* [2005] UKHL 45

⁸⁷⁴ *Ibid.* para. 18; See also Lord Steyn at para.88: “Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a *phantom hearing* only”. Emphasis added.

⁸⁷⁵ See Seventh Report, *supra* note 575, para.97: “The Government could also usefully consider whether intelligence service personnel could be provided in support of Special Advocates in the handling of closed material, (...)”.

⁸⁷⁶ See Government Response to the Constitutional Affairs Select Committee’s Report, *supra* note 622, p.10

⁸⁷⁷ See Government Response to the Constitutional Affairs Select Committee’s Report, *supra* note 622, p.10

increase their capability to analyze and assess intelligence information⁸⁷⁸ does not seem to address the still deep imbalance which affects the access to expert evidence in closed material proceedings. Furthermore, in this already problematic context, further uncertainties derive from the lack of clear rules on the probative value of closed materials:⁸⁷⁹ in the absence of any formal rules of evidence, second or third hand hearsay or even more remote evidence is admitted, “frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings”.⁸⁸⁰

This ongoing lack of access to independent expert evidence has had the result of depriving special advocates of any means to gainsay the Government’s assessment about what can or cannot be disclosed in order to avoid harm to the public interest. As a result, the Court is almost bound to uphold the Government’s view on matters of national security in the absence of any evidence or expert opinion which proves the contrary.⁸⁸¹ This difficulty to carry out an independent review of the Government’s claim in closed material procedures in fact creates a sort of dependence of the courts on Executive officials to supply and assess the relevance and the reliability of confidential information which secret evidence is drawn from and to justify the case for secrecy.⁸⁸²

The court therefore not only needs the Government to be fair in selecting confidential information in the State’s possession and in supplying all the information which may benefit the affected individual⁸⁸³ but it also relies on the Government’s assessment of the implications of the disclosure of confidential information:⁸⁸⁴ evaluating intelligence information, predicting how its release may harm compelling public interests, finding a compromise between secrecy and disclosure are complex tasks which “engage wide-ranging issues such as the novelty of investigative techniques, the effectiveness of data-mining software, the conditions of a witness’s imprisonment in a foreign country, the motivation of a foreign agency to share information, the immutability of governmental caveats and so on”.⁸⁸⁵ No such task can be undertaken by the court without the necessary judicial expertise in the security intelligence field.⁸⁸⁶ This issue has thus led the courts to unduly favor the interests of secrecy and security over disclosure⁸⁸⁷ and consequently, compared to cases where the Executive is subject to a greater duty of disclosure and where the court can benefit from the results of independent means of investigation, in CMPs there are greater opportunities for error and abuse.⁸⁸⁸

⁸⁷⁸ See Green Paper, *supra* note 38, para.2.24

⁸⁷⁹ See Murphy, *supra* note 561, p.32

⁸⁸⁰ Justice and Security Green Paper, Response to Consultation from Special Advocates, 16 December 2011, p.7

⁸⁸¹ See Ninth Report, *supra* note 787, para.59 and para.62

⁸⁸² See Ninth Report, *supra* note 787, para.62

⁸⁸³ See Harten, *supra* note 34, p.15

⁸⁸⁴ See Harten, *supra* note 34, p.21

⁸⁸⁵ See Harten, *supra* note 34, p.21

⁸⁸⁶ See Harten, *supra* note 34, p.21

⁸⁸⁷ See Harten, *supra* note 34, p.3

⁸⁸⁸ See Harten, *supra* note 34, p.15

With this in mind, courts must be guarded against basing their relationship with the Government merely on trust and must be ready to fully test the claimed need for confidentiality as an expression of the basic principle according to which the interests of the Executive “do not exhaust the public interest”.⁸⁸⁹ Well documented instances in which the Executive’s secrecy power has been misused show that Ministers are not always reliable in their assessment of evidence as a threat to national security.⁸⁹⁰ There have been cases⁸⁹¹ where material or part of the material that the Executive intended to keep confidential had already been disclosed in earlier proceedings⁸⁹² or cases where Government ministers manipulated the need of secrecy only to avoid personal embarrassment.⁸⁹³ In both circumstances, the court’s reliance on the Executive on matters of secrecy ended up being betrayed.⁸⁹⁴

The lack of accountability is a further limitation affecting the special advocate system.⁸⁹⁵ This limitation derives from the fact that, under Article 6 of the SIAC Act, the special advocate “shall not be responsible to the person whose interests he is appointed to represent”.⁸⁹⁶ This provision clearly clashes with the advocates’ duty in ordinary contexts to promote and protect “fearlessly and by all proper and lawful means the lay client’s best interests”.⁸⁹⁷ Special advocates in fact owe the person they represent no duty of care in relation to the work they perform.⁸⁹⁸ This lack of professional accountability has implications on the effectiveness of the system and also raises further questions regarding professional ethics.⁸⁹⁹ However, even though they are not professionally accountable to the defendant, special advocates tend to be highly qualified professionals: no suggestions that any of the appointed special advocates have acted unprofessionally can be found.⁹⁰⁰ Nonetheless, further work should be carried out in order to address the ethical issues deriving from the absence of formal accountability since “there would still be formidable practical difficulties in holding a disciplinary hearing about a special advocate’s conduct of a case in closed session”.⁹⁰¹

Moreover, the lack of accountability may lead special advocates to determine the defendant’s case in a way which clashes with his/her wishes.⁹⁰² This concern was tackled in the *Abu Qatada* case.⁹⁰³ Before the hearing of this case, the defendant clearly declared his wish not to participate in the

⁸⁸⁹ See Williams, *supra* note 563, p.16

⁸⁹⁰ See Williams, *supra* note 563, p.16

⁸⁹¹ See for example R (on the application of Al-Sweady) v Secretary of State for Defense [2009] EQHC 1687 (Admin)

⁸⁹² See Williams, *supra* note 563, p.16

⁸⁹³ See Harten, *supra* note 34, p.16

⁸⁹⁴ See Harten, *supra* note 34, p.16

⁸⁹⁵ See JUSTICE, *supra* note 69, p.206

⁸⁹⁶ Article 6(4) SIAC Act

⁸⁹⁷ Article 303 (a) Bar Code available at <https://www.barstandardsboard.org.uk/regulatory-requirements/the-old-code-of-conduct/>

⁸⁹⁸ See Boon and Nash, *supra* note 840, p.114

⁸⁹⁹ See Murphy, *supra* note 751, p.9

⁹⁰⁰ See Murphy, *supra* note 751, p.9

⁹⁰¹ See JUSTICE, *supra* note 69, p.207

⁹⁰² See JUSTICE, *supra* note 69, p.207

⁹⁰³ *Abu Qatada v Secretary of State for the Home Department* (SC/15/2002, 8 March 2004)

proceedings which he deemed inherently unfair and unable to get at the truth.⁹⁰⁴ His lawyers did not take part in the open hearing either. At the beginning of the closed hearing, the two special advocates appointed to represent the defendant informed the SIAC that the appellant's interest could be better served by non-participation.⁹⁰⁵ The SIAC considered that the withdrawal of the special advocates from the case was not damaging for the appellant's position since the evidence against him was so strong that even the intervention of the special advocates would have not persuaded the Commission otherwise.⁹⁰⁶ Nonetheless, the court strongly disagreed with the special advocates' decision: "we do not doubt that the Special Advocates believed they had good reasons for adopting the stance that they did (...) But we are bound to record our clear view that they were wrong and that there could be no good reason for not continuing to take part in an appeal which was still being pursued".⁹⁰⁷ However, despite the conclusion drawn by the court that the appellant's interests can never be better served by the absence of the special advocates, it is difficult to see how a special advocate could represent the appellants' interests if they refuse to discuss any aspects of the case with them from the beginning of the proceedings.⁹⁰⁸

Besides these restrictions, other incidental shortcomings affect the special advocate system. First of all, as part of the extensive measures taken to avoid leakage, special advocates cannot carry out their role in subsequent proceedings if the closed material they have seen in one case might lead to leaks of information in a subsequent one.⁹⁰⁹ This provision derives from the assumption that once a special advocate had seen the material in relation to which the Government claims the need for confidentiality, s/he is considered potentially tainted.⁹¹⁰ In practice, special advocates are considered tainted on a country-specific basis⁹¹¹ and "if there are factual connections between named persons in different cases or in relation to a particular secret document used in multiple proceedings".⁹¹² This provision heavily curtails the special advocates' ability to build up a solid experience and an effective legal strategy on how to challenge the Government's claims.⁹¹³

In addition, it has been argued that the availability of the special advocate system may lead to an increase in secrecy claims made by the State. The Government in fact may be less inclined to disclose evidence as it knows that special advocates will safeguard the overall fairness of the trial. This is probably a side-effect of the European jurisprudence. By calling for the use of secret

⁹⁰⁴ It happens in fact that the persons concerned decline to engage with the special advocates even in the open appeal process thus leaving the special advocates completely in the dark about how the appellants would wish to defend themselves.

⁹⁰⁵ See Boon and Nash, *supra* note 840, p.116

⁹⁰⁶ *Abu Qatada* at para.9

⁹⁰⁷ See JUSTICE, *supra* note 69, p.207

⁹⁰⁸ See Boon and Nash, *supra* note 840, p.117

⁹⁰⁹ See Murphy, *supra* note 561, p.31

⁹¹⁰ See Forcese and Waldman, *supra* note 6, p.28

⁹¹¹ See Forcese and Waldman, *supra* note 6, p.28. For example, SAs who have been provided with classified material referring to Algeria are considered tainted in relation to future cases involving the same country.

⁹¹² See Forcese and Waldman, *supra* note 6, p.28

⁹¹³ See Williams, *supra* note 563, p.21

evidence to be counterbalanced by the other safeguards, the European Courts in fact have focused their attention on the lawfulness of the procedure as a whole rather than on every single aspect of it.⁹¹⁴

Furthermore, the difficulties faced by the special advocates in arguing for the disclosure of the claimed confidential material are also exacerbated by the endemic problem of late delivery of those documents on the part of the Government.⁹¹⁵ In this respect, even though special advocates did not suggest that this late disclosure is the result of a deliberate strategy by the Government, their evidence certainly suggests that there is a severe lack of discipline in respecting the timetable for disclosure laid down by the courts.⁹¹⁶ This widespread delay in disclosure has the result of compromising the special advocates' ability to challenge the Government's secrecy claims since it leaves them with insufficient time to scrutinize the closed material in order to challenge the Government's case.⁹¹⁷

Moreover, it has also been noted that the possibility that defendants are accorded to choose their special advocates from a roster is far from a real choice. The need for security-vetting and the risk of information leaks in fact result in limiting the number of special advocates to a small pool of under twenty.⁹¹⁸

As a final remark, also the fact that special advocates spend most of the time in closed proceedings seeking greater disclosure of the material in possession of the Government raises concerns. This is surely a valuable task but it implies that the efforts put in place by special advocates are diverted from challenging the material in the substance.⁹¹⁹

For all the reasons outlined above, it is deeply regrettable that the Government did not equip the Justice and Security Act 2013 with a clause which confines the use of CMPs to the exceptional circumstances where a fair determination of the case cannot be reached by means of a PII procedure.⁹²⁰ After a lengthy debate, in fact, the so called 'last resort' requirement was removed on the basis of the Government's argument that this requirement would unnecessarily fetter the judge's discretion as to when to use CMP.⁹²¹ However, unless a PII exercise has been conducted first, it will be impossible to tell whether a closed material procedure represents the only way to ensure that the case is judicially determined. Thus, considering the difficulties posed by closed procedures, when the use of sensitive material is crucial for the determination of the case, the PII should be kept as the initial step and CMPs as a last resort.⁹²² This concern was clearly expressed by Lord Brown during the final debate about the Justice and Security Act in the House of Lords: the 'last resort' requirement "reminded the judge that there may be other possible, less objectionable ways of meeting the needs of those, generally the Crown but

⁹¹⁴ See Murphy, *supra* note 561, p.35

⁹¹⁵ See Williams, *supra* note 563, p.21

⁹¹⁶ See Ninth Report, *supra* note 787, para.63

⁹¹⁷ See Ninth Report, *supra* note 787, para.65

⁹¹⁸ See Boon and Nash, *supra* note 840, p.112

⁹¹⁹ See Murphy, *supra* note 751, p.11

⁹²⁰ See Williams, *supra* note 563, p.13

⁹²¹ See Hickman, *supra* note 674

⁹²² See Williams, *supra* note 563, p. 13

sometimes the claimant, who seek to rely on evidence, (...) which in the vital interests of national security cannot be adduced in open court”.⁹²³

2. The Italian State secret privilege

2.1. The State secret privilege from its origins to Law 124/2007

The Italian Constitution⁹²⁴ proclaims the idea of transparency and accountability of the State powers as expression of the sovereignty of the people. Moreover, freedom of information, the right to access to court and the independence of the judiciary are fundamental principles enshrined in the Italian constitutional framework.⁹²⁵ Nevertheless, a constitutional foundation for the existence of the so-called State secret privilege can be identified.⁹²⁶

In its decision n.82/1976,⁹²⁷ the first leading case regarding State secrets, the Constitutional Court held that the presence of the State secret aims to safeguard the “supreme interest of the State in its international personality, that is, the interest of the State in its territorial integrity, independence and – in an extreme sense – in its survival. This is an interest that is present and preeminent in all constitutional systems, irrespective of the political regime, and that in our Constitution is enshrined in the emphatic formula of Article 52⁹²⁸ which states that “the defense of the fatherland is the sacred duty of every citizen”.⁹²⁹ In this way, the State secret, which in the words of the Court rests in Article 52 Const., seems to prevail over other constitutional principles, such as the obligation to prosecute under Article 112 and the right to defense under Article 24 of the Italian Constitution.⁹³⁰

This reasoning was further developed in the ruling in 1977⁹³¹ when the Constitutional Court identified the basis for the State secret privilege not only in Article 52 but also in Article 126⁹³² of the Constitution and in particular in Article 5, which proclaims that “the Republic, one and indivisible, recognizes and promotes local autonomy”,⁹³³ and Article 1 under which “Italy is a democratic Republic based on labor” and that “the sovereignty belongs to the people, who exercise it in the forms and limits of the Constitution”.⁹³⁴ In the Court’s view, “it is in relation with all these norms that it is possible to speak of an internal and external security of the State, of a need to protect it against violent actions that

⁹²³ See Lord Brown, *supra* note 686

⁹²⁴ Constitution of the Italian Republic (1948)

⁹²⁵ See Giupponi and Fabbrini, *supra* note 74, p.446

⁹²⁶ Andrea Marrone, “Il nomos del Segreto di Stato” in *Nuovi profili del segreto di Stato e dell’Attività di Intelligence* (Torino: Giappichelli, 2010), pp.18-23

⁹²⁷ Constitutional Court, Judgment n. 82/1976, 14 April 1976

⁹²⁸ *Ibid.* para.5

⁹²⁹ Article 52(1) Italian Constitution (1948)

⁹³⁰ Carmelo Danisi, “*State Secrets, Impunity and Human Rights Violations: Prosecution Restricted in The Abu Omar Case*”, (2011) 7(3) E.H.R.R., Special Issue 2011 on Protecting Human Rights while Countering Terrorism, p.192

⁹³¹ Constitutional Court, Judgment n. 86/1977, 24 May 1977

⁹³² Under Article 126 of the Italian Constitution national security reasons may justify the dissolution of regional councils and the dismissal of the President of the regions.

⁹³³ Article 5 Italian Constitution

⁹³⁴ Article 1 Italian Constitution

contrast the democratic spirit which inspires the constitutional structure and the supreme interests valid for all societies organized in a State (...). The institutional interests [protected by the State secret privilege] shall relate to the State conceived as a community and never overlap with the interests of the Government or of the political parties supporting its activities".⁹³⁵ The State secret privilege is thus a tool that cannot be lawfully employed to promote the interests of political majorities⁹³⁶ but only to protect the supreme interests of the State against subversive actions ensuring its integrity as a democratic community of individuals.⁹³⁷

The Italian legal framework relating to the work of intelligence agencies and the State secret privilege has recently experienced an important revision with the adoption of the Law 124/2007, entitled 'Intelligence System for the Security of the Republic and new Provisions governing Secrecy'. The new legislation features the absolute centrality of the Prime Minister⁹³⁸ who as the head of the intelligence organizations has the exclusive "high direction and general responsibility" over the activities of the intelligence agencies "in the interest and defense of the Republic and its democratic institutions".⁹³⁹

The new legislation has introduced a clearer distinction between State secret *stricto sensu* and confidential information, requiring the absolute secrecy of the former and allowing some limited forms of disclosure of the latter.⁹⁴⁰ The State secret status can only be asserted by the Prime Minister.⁹⁴¹ The effect of this classification is that the information "shall be made known solely to the persons and authorities called to carry out essential functions in their regard, to the extent and within the limits that are indispensable for performing their respective tasks and achieving respectively established goals".⁹⁴²

Article 39 outlines several critical matters, the respect of which can justify the invocation of the State secret regarding given information. In particular, the State secret privilege can be invoked to protect "acts, documents, information, activities and other things whose knowledge and circulation can damage the integrity of the Republic, including in relation to international agreements, the defense of its underlying institutions established by the Constitution, the State's independence *vis à vis* other States and its relations with them, as well as its military preparation and defense".⁹⁴³

However, under the same Article the State secret privilege cannot be invoked with regard to information, documents or other matters concerning acts of terrorism or acts subverting the constitutional order, acts constituting the criminal offences of devastation and ransacking (Article 285 of the Italian Penal Code),⁹⁴⁴ mafia-style criminal organizations (Article 416-bis of the Italian Penal Code), political-mafia collusion (Article 416-ter of the Italian Penal Code) and

⁹³⁵ Constitutional Court, Judgment n. 86/1977 at para.5

⁹³⁶ See Giupponi and Fabbrini, *supra* note 74, p.447

⁹³⁷ See Policy Department, *supra* note 8, p.118

⁹³⁸ See Giupponi and Fabbrini, *supra* note 74, p.443

⁹³⁹ Article (1)(1)(a) Law 124/2007

⁹⁴⁰ See Giupponi and Fabbrini, *supra* note 74, p.458

⁹⁴¹ Article 39(4) Law 124/2007

⁹⁴² Article 39(1) Law 124/2007

⁹⁴³ Article 39(1) Law 124/2007

⁹⁴⁴ Italian Penal Code (1930)

mass murder (Article 422 of the Italian Penal Code).⁹⁴⁵ Through this provision, Law 124/2007 ensures that the State secret privilege is not invoked to jeopardize the same constitutional interests that the State secret aims to protect.⁹⁴⁶

A Prime Ministerial decree of 2008⁹⁴⁷ further specified the information that may fall under the possible area of application of the State secret privilege. The examples listed include: information regarding the protection of the economic interests of the State and of the popular sovereignty, information containing the whereabouts of military bases and information relating to plans for subversion. Moreover, the Prime Minister may also decide to classify as a State secret, information on the organization, the activities and the competencies of the intelligence agencies including their connections with foreign intelligence services. However, despite the attempt by the legislator to identify in a more analytical way the information which can be protected under the State secret privilege, it seems that the range of information which may be classified as secret remains broad.⁹⁴⁸

With regard to the duration, Law 124/2007 further provides that the classification as a State secret ordinarily lasts for 15 years⁹⁴⁹ but the Prime Minister can prolong this for a further 15 years.⁹⁵⁰ After a maximum duration of 30 years, “all those who have an interest can request the Prime Minister to grant access to the information, the documents, the acts, the activities, the objects and the places which are covered by the State secret”.⁹⁵¹ At any time however, the Chief Executive can declassify any information when its secrecy stops being necessary.⁹⁵² However, when the information in question concerns other States or international organizations, a special agreement with foreign or international authorities is required for the removal of the State secret privilege.⁹⁵³

With regard to confidential information, Law 124/2007 identifies four categories of information for which there are different disclosure policies: top-secret, secret, top-privy and privy.⁹⁵⁴ Unlike secret information *stricto sensu*, confidential information can be disclosed to “those who need to access it (...) for their institutional functions”.⁹⁵⁵ Moreover, information is classified as confidential not by the President of the Council but directly by the authority “which has drafted the document or the acts or which has obtained the information (...) or is responsible” for it.⁹⁵⁶

Information classified as a State secret and confidential information also differ in the duration of the classification. In particular, information can remain

⁹⁴⁵ Article 39(11) Law 124/2007

⁹⁴⁶ See Giupponi and Fabbrini, *supra* note 74, p.461

⁹⁴⁷ Decree of the President of the Council, 8 April 2008

⁹⁴⁸ Alessandro Pace, “L’apposizione del segreto di Stato nei principi costituzionali e nella legge n.124 del 2007”, (2008) *Giur. Cost.*, p.4042

⁹⁴⁹ Article 39(7) Law 124/2007

⁹⁵⁰ Article 39(8) Law 124/2007

⁹⁵¹ Article 39(7) Law 124/2007

⁹⁵² Article 39(9) Law 124/2007

⁹⁵³ Article 39(10) Law 124/2007

⁹⁵⁴ Article 42(3) Law 124/2007

⁹⁵⁵ Article 42(1) Law 124/2007

⁹⁵⁶ Article 42(2) Law 124/2007

classified as confidential for a maximum of ten years while after five years the law provides an automatic downgrading to a lower level of secrecy,⁹⁵⁷ unless the authority which classified the information, or the Prime Minister if the duration is prolonged for more than 15 years, provides otherwise.⁹⁵⁸

In addition, “should a judicial authority order the production of classified documents in relation to which State secret status is not invoked, the documents shall be delivered to the judicial authority requesting them”⁹⁵⁹ meaning that the confidentiality of information not protected under the State secret privilege cannot be invoked against the judicial authority.

The different legal regime adopted by the Law 124/2007 for secret information and confidential information thus seeks to reflect the different qualitative relevance of the information in question. On the one hand, State secrets *stricto sensu* involve the protection of the supreme and essential interests of the State, while, on the other, confidential information concerns those fundamental interests of the Republic that intelligence agencies deem appropriate to protect by restricting access only to those institutionally involved.⁹⁶⁰

With regard to criminal trials, there is no legislation or judicial practice under the Italian legal system allowing for the use of secret documents.⁹⁶¹ As a general principle stemming directly from Articles 24 and 111 of the Italian Constitution, which protect the rights of the defense and the right to a fair trial respectively,⁹⁶² “no evidence can ground a judgment in a criminal court, unless it was disclosed to the defendant, for his/her perusal, in the course of the trial”.⁹⁶³ This means that even in the aftermath of 9/11, as expression of the fundamental constitutional principle of the rights of the defense and the right to a fair trial, the Italian legal system offers strong guarantees of the basic right to be fully informed of the evidence supporting a criminal charge. Within this framework, any restriction of personal liberty in the name of national security would be unconstitutional.⁹⁶⁴

Indeed, under Article 202 of the Italian Code of Criminal Procedure (c.p.p.),⁹⁶⁵ as reformed by Article 40 of the Law 124/2007, when a public servant is requested to testify on matters which s/he deems to be a State secret, s/he must refrain from providing the information requested in order to avoid revealing the information protected.⁹⁶⁶ Severe punishments are also provided under the Italian Criminal Code for those who reveal classified information.⁹⁶⁷

When the State secret privilege is invoked, the presiding judge must suspend the hearing and refer the matter to the Prime Minister who has 30 days

⁹⁵⁷ Article 42(5) Law 124/2007

⁹⁵⁸ Article 42(6) Law 124/2007

⁹⁵⁹ Article 42(8) Law 124/2007

⁹⁶⁰ See Fabbrini e Giupponi, *supra* note 74, p.460

⁹⁶¹ See Policy Department, *supra* note 8, p.29

⁹⁶² See policy Department, *supra* note 8, p.29

⁹⁶³ See Policy Department, *supra* note 8, p.113

⁹⁶⁴ See Policy Department, *supra* note 8, p.119

⁹⁶⁵ Italian Code of Criminal Procedure (1989)

⁹⁶⁶ Article 202 (1) c.p.p.

⁹⁶⁷ Articles 261-262 Italian Penal Code

to confirm that the information is secret.⁹⁶⁸ Should the Prime Minister confirm the existence of the State secret privilege, the information will be declared inadmissible as evidence and will not be taken into account by the judge in the determination of the case.⁹⁶⁹ Alternatively, should the Prime Minister deny the existence of the privilege or remain silent for 30 days, the information will be revealed during the trial and will be subject to the ordinary evidentiary rules.⁹⁷⁰

In the event of confirmation, if the judge considers the information excluded from the proceedings to be essential for the determination of the case, the judge must dismiss the case as the State secret cannot be disregarded. On the other hand, if the judge deems that the case can be adjudicated without referring to the protected information, the trial will proceed.⁹⁷¹

As a means of balancing the needs of national security with the rule of law requirements,⁹⁷² the Prime Minister's decision to confirm the State secret privilege can then be challenged by the judge or by the Public Prosecutor before the Constitutional Court, so raising a conflict of powers against the Prime Minister.⁹⁷³ The Constitutional Court will be called to decide whether the Executive has legitimately used its power to classify information as secret. If, as result of this conflict, the existence of the State secret privilege is denied, the Prime Minister is not allowed to raise any further objection to the use of the information in question. If the privilege is confirmed, the judicial authority will be prevented from using the information directly or indirectly.⁹⁷⁴

In any case, the existence of the State secret privilege can never be invoked against the Constitutional Court which is required to adopt all necessary guarantees to avoid disclosure of the information.⁹⁷⁵ Full access to the documents classified as secret is thus granted to the constitutional judges in order to place them in the best position to verify whether the State secret claim has been lawfully invoked.⁹⁷⁶ The recent reform has therefore attempted to charge the Constitutional Court with the role of "the final arbiter of the inevitable tensions raising between the judiciary (which pursues its institutional task of prosecuting crimes) and the Executive (which has a constitutional duty to ensure national security)".⁹⁷⁷

Besides the judicial oversight of the Executive's use -or misuse- of the State secret privilege assigned to the Constitutional Court, Law 124/2007 also provides for a parliamentary oversight mechanism assigned to the newly established Joint Parliamentary Committee on the Security of the Republic (COPASIR).⁹⁷⁸ The Joint Committee comprises five members of the House of

⁹⁶⁸ Article 202 (2) c.p.p.

⁹⁶⁹ Article 202 (5) c.p.p.

⁹⁷⁰ Article 202 (4) c.p.p.

⁹⁷¹ Article 202 (3)c.p.p.

⁹⁷² Federico Fabbrini, "Understanding the *Abu Omar* case: The Secret Privilege on a Comparative perspective", (2010) World Congress of the International Association of Constitutional Law – Workshop No.6: "The Rule of Law in the Age of Terrorism", p.6

⁹⁷³ Article 202(7) c.p.p.

⁹⁷⁴ Article 202(7) c.p.p.

⁹⁷⁵ Article 202 (8)c.p.p.

⁹⁷⁶ See Policy Department, *supra* note 8, p.117

⁹⁷⁷ See Giupponi and Fabbrini, *supra* note 74, p.462

⁹⁷⁸ Article 30 Law 124/2007

Deputies (Camera dei Deputati) and five members of the Senate (Senato della Repubblica).⁹⁷⁹ It is tasked with exerting a general and systematic control of the intelligence and security services in order to verify that they act “in observance both of the Constitution and of the law and in the defense and exclusive interests of the Republic and its institutions”.⁹⁸⁰ This means that while the Constitutional Court is tasked with solving the conflicts of allocation of power which may arise between the Executive and the judicial authority, COPASIR is charged with verifying whether the actual use of the State secret privilege corresponds to the goals pursued by the relevant legislation.⁹⁸¹

In exercising its overseeing role, the Joint Committee organizes meetings, it can request documents directly from the intelligence agencies,⁹⁸² it is the recipient of various compulsory communications from the Government⁹⁸³ and it is charged with reporting annually to the Parliament on “its activities and formulate proposals or observations regarding issues within its competence”.⁹⁸⁴

However, under the new legal framework, there are also some gaps which diminish the capacity of the Joint Committee to work as an effective countercheck of the Executive’s deliberations on State secrecy matters. Under Article 31 of Law 124/2007 in fact, if the sharing of information with the COPASIR may threaten “the security of the Republic, the relationship with foreign States, the course of ongoing operations or the security of sources of information and agents of the secret services”,⁹⁸⁵ the Prime Minister can use the State secret privilege to oppose the disclosure of the documents requested by the Joint Committee. However, under the same Article, the State secret privilege cannot be used to oppose disclosure to the COPASIR if a two-thirds majority of the Joint Committee decides to investigate the activities of the intelligence services in order to verify their compliance with their institutional mandate provided by the law.⁹⁸⁶

When COPASIR disagrees with the Prime Minister’s decision, the only weapon at its disposal is to refer the matter to both Chambers of the Parliament “for their assessment of the situation”,⁹⁸⁷ following the traditional logic of Parliamentary oversight on the Executive’s determinations.⁹⁸⁸ Moreover, every time the Prime Minister’s office, in compliance with Article 202 of the Italian Code of Criminal Procedure, confirms that a given document is classified as a State secret, the Joint Committee must be promptly informed.⁹⁸⁹ The President of the Joint Committee is then entitled to request the Prime Minister provide, at a secret hearing, all the necessary information to evaluate the merit of the

⁹⁷⁹ Article 30(1) Law 124/2007

⁹⁸⁰ Article 30(2) Law 124/2007

⁹⁸¹ Vittorio Fanchiotti, “Stato di diritto e Ragioni di Stato: il caso Abu Omar e la Consulta”, (2009) 3 *Questione Giustizia*, p.20

⁹⁸² Article 31 Law 124/2007

⁹⁸³ Article 33 Law 124/2007

⁹⁸⁴ Article 35(1) Law 124/2007

⁹⁸⁵ Article 31(8) Law 124/2007

⁹⁸⁶ Article 31(9) Law 124/2007 as modified by Article 6 Law 133/2012: ‘Changes to Law 124/2007 concerning the Intelligence system for the security of the Republic and the new provisions governing secrecy’

⁹⁸⁷ Article 31(10) Law 124/2007

⁹⁸⁸ See Fabbrini, *supra* note 972, p.20

⁹⁸⁹ Article 40(5) Law 124/2007

decision.⁹⁹⁰ In this event, if the COPASIR concludes that the confirmation of the classification is illegitimate, the Joint Committee is requested to inform the House of Deputies and the Senate in order to enable them to take the appropriate measures.⁹⁹¹

However, notwithstanding these pervasive powers assigned to COPASIR, the Prime Minister's decision to classify an information as a State secret cannot be overturned by either the Joint Committee or the Parliament. Indeed, "while it certainly maintains its power to force the Government to resign, it is unlikely that the Parliament will resort to such power as a consequence of a violation of Law 124/2007 or other provisions related to State secrets and national security as a whole".⁹⁹²

2.2. The State secret privilege in criminal proceedings: the *Abu Omar* case and the self-restraint of the Constitutional Court

It is a core principle that the requirements of a fair trial shall be more onerous in the criminal context given the severity of the potential consequences on the liberty of the individual concerned. However, the rules regarding State secrecy explained above raise concerns with respect to the obligation to prosecute when a State secret is used as a way to limit the extent of the judicial oversight of the practices of the Executive and of the intelligence agencies.⁹⁹³ Indeed, these constraints provide the Executive with significant and sometimes unfettered power regarding the claim of the need for secrecy.⁹⁹⁴ These issues are well exemplified by the *Abu Omar* case in which the Constitutional Court adopted a "weak syndicate model" with respect to the Prime Minister's decision regarding the need for classification of the information involved.⁹⁹⁵

The *Abu Omar* case illustrates the post 9/11 US practice of extraordinary rendition. This practice consists in the abduction of suspected terrorists and their forcible transfer to third countries in which constitutional and international human rights standards do not apply and where they are detained and subject to ill-treatment for interrogation purposes.⁹⁹⁶

In 2001 Hassan Mustafa Osama Nasr, known as Abu Omar, obtained the status of political refugee in Italy because he faced the threat of political prosecution in his home country.⁹⁹⁷ He was the imam at the Milan mosque until 2003 when, as a result of a joint operation between the CIA and the Italian Military Intelligence and Security Service (SISMI), he was kidnapped and transferred to Egypt where he was secretly detained for several months. There, he claimed to have suffered torture and other inhuman and degrading treatment on the grounds of his alleged connections to radical Islamist groups.⁹⁹⁸ In recording his testimony, Mr. Abu Omar recounted that the cell in which he was

⁹⁹⁰ Article 40(5) Law 124/2007 as modified by Article 10 Law 133/2012

⁹⁹¹ Article 40(5) Law 124/2007

⁹⁹² See Policy Department, *supra* note 8, p.117

⁹⁹³ See Policy Department, *supra* note 8, p.28

⁹⁹⁴ See Policy Department, *supra* note 8, p.20

⁹⁹⁵ See Policy Department, *supra* note 8, p.112

⁹⁹⁶ See Fabbrini, *supra* note 972, p.3

⁹⁹⁷ See Danisi, *supra* note 930, p.188

⁹⁹⁸ See Fabbrini, *supra* note 972, p.3

detained measured 2 meters by 1 and half meters, that cockroaches, rats and insects walked all over his body night and day, that electrodes were applied to his body and that he suffered from sleep deprivation and was subject to sexual abuse and beatings.⁹⁹⁹

The Office of the Public Prosecutor of Milan began criminal investigations regarding the abduction of Mr. Abu Omar in order to ascertain responsibility¹⁰⁰⁰ among the twenty-six Americans and seven members of the Italian military intelligence service involved.¹⁰⁰¹ Under Article 112 of the Italian Constitution in fact, “the public prosecutor has the duty to initiate criminal proceedings” whenever he has knowledge of the commission of a crime.¹⁰⁰² The Italian authorities always denied any complicity with the US agents’ extraordinary rendition program.¹⁰⁰³

During the investigation, the Office of the public prosecutor was able to collect a considerable amount of material concerning the abduction of Mr. Abu Omar. At this stage, no attempt was made by the Executive to obstruct the inquiry by invoking the State secret privilege with respect to the documents acquired. However, the Government sent a confidential letter to the prosecutors warning them about the existence of national security concerns relating to the relationship between the SISMI and the CIA. These investigations then led to the formal indictment of those allegedly responsible of the abduction.¹⁰⁰⁴ Under the Italian Code of Criminal procedure, in fact, if after having conducted the criminal investigations, there is sufficient evidence to believe that the persons under investigation have committed the offense in question, the public prosecutor is required to indict those believed to be responsible, thus requesting a criminal trial be initiated.¹⁰⁰⁵ Under the Italian Code of Criminal procedure, the decision whether to open criminal trial is then made by the preliminary hearing judge (gup) at a public hearing.¹⁰⁰⁶

On 14 February 2007, pending the preliminary hearing, the Prime Minister at the time brought an ‘allocation of powers’ action before the Italian Constitutional Court. With this action, the Government complained that the investigations conducted by the prosecutor breached the State secret regarding the relationship between Italian military intelligence and its foreign counterparts. It therefore requested the Court to declare all the evidence collected by the prosecutor during the investigation invalid.¹⁰⁰⁷

On 16 February, the criminal trial against the CIA and SISMI agents were opened by the preliminary hearing judge in Milan .¹⁰⁰⁸ On 14 March 2007, a new

⁹⁹⁹ Abu Omar, “This is how they kidnapped me from Italy”, (2007) *Chicago Tribune*, available at <http://www.chicagotribune.com/news/nationworld/chi-cialetter-story-story.html>

¹⁰⁰⁰ See Fabbrini, *supra* note 972, p.3

¹⁰⁰¹ Chris Jenks and Eric Talbot Jensen, “All Human Rights are Equal, but some are more Equal than Others: the Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights”, (2010) 1 *Harvard N.S.J.*, p.173

¹⁰⁰² Article 112, Italian Constitution

¹⁰⁰³ See Danisi, *supra* note 930, p.190

¹⁰⁰⁴ See Fabbrini, *supra* note 972, p.4

¹⁰⁰⁵ Art. 405 c.p.p.

¹⁰⁰⁶ Art.424 juncto Art. 429 c.p.p.

¹⁰⁰⁷ Reg. C. 2/2007

¹⁰⁰⁸ See Fabbrini, *supra* note 972, p.4

'allocation of powers' action was brought by the Prime Minister against the preliminary hearing judge, claiming that the decision to open a criminal trial was based on evidence collected in violation of the State secret privilege and, as such, invalid.¹⁰⁰⁹ In response, the Office of the public prosecutor of Milan also commenced legal proceedings against the Government before the Constitutional Court complaining that the claimed existence of a privilege prevented the judiciary from exerting its constitutional prerogatives in providing justice. Moreover, it also complained that the position of the Government was inconsistent as it did not formally invoke the State secret privilege during the investigations but only at a later stage.¹⁰¹⁰

During this period, the criminal trial in Milan continued and the then Head and Deputy Head of the SISMI, Nicolò Pollari and Marco Mancini, as well as three other Italian members of the SISMI, advanced the impossibility to present relevant evidence in their defense without referring to documents protected by the State secret privilege. The assertion of such a privilege was then confirmed by the then Prime Minister.¹⁰¹¹

As a result, on 30 May 2008 the Chief Executive began new legal proceedings before the Constitutional Court claiming that the continuation of the trial before a decision on the State secret privilege had been issued violated the Executive's prerogatives in national security matters provided by the Constitution.¹⁰¹² On 13 December 2008, the Tribunal of Milan responded to the Government's action by suspending the trial and complaining to the Constitutional Court that the assertion of the State secret privilege made it impossible for the court to decide on the merit of the case.¹⁰¹³

Eventually, on 11 March 2009 the Constitutional Court delivered its decision on the five conflicts of allocation of powers raised in the context of the same criminal trial upholding the legitimacy of the asserted need for classification.¹⁰¹⁴ The focus of the decision was whether the Executive could place the State secret privilege on documents related to the relationship between the SISMI and the CIA and thus hamper the judiciary's capability to investigate and prosecute the individuals allegedly responsible for Mr. Abu Omar's abduction.¹⁰¹⁵

The Court founded its reasoning on the conclusions it had drawn in its previous decisions in 1976 and 1977. In particular, it recalled that State security is a fundamental and insuppressible public aspect which prevails over any other.¹⁰¹⁶ The Court thus reaffirmed that State secret privilege, as a fundamental tool for the protection of the integrity of the Republic and its institutions "represents a preeminent interest in any legal system, whatever its political regime" and that the Executive has "broad discretion" in determining what should be kept secret.¹⁰¹⁷ The Court then added that the judiciary can

¹⁰⁰⁹ Reg. C. 3/2007

¹⁰¹⁰ Reg. C. 6/2007

¹⁰¹¹ See Fabbrini, *supra* note 972, pp.5-6

¹⁰¹² Reg. C. 14/2008

¹⁰¹³ Reg. C. 20/2008

¹⁰¹⁴ Constitutional Court, Judgment 106/2009, 11 March 2009

¹⁰¹⁵ See Fabbrini, *supra* note 972, p.6

¹⁰¹⁶ Constitutional Court, Judgment n.106/2009 at para.3

¹⁰¹⁷ *Ibid.* para.3

neither scrutinize the *an* nor the *quomodo* of the decision of the Executive to protect an information under the State secret, because “the choice of the necessary and appropriate means to ensure national security is a political one, belonging, as such, to the Executive branch and not to the ordinary judiciary”.¹⁰¹⁸ In the words of the Court, any judicial review of the decision to invoke the State secret privilege is so excluded¹⁰¹⁹ because “the judgment on what means are considered as most appropriate or simply useful to ensure the security of the State rests with the Prime Minister, under the control of the Parliament.”¹⁰²⁰ Consequentially, it is for the Parliament “to scrutinize the way in which the power of asserting the State secret privilege is exercised, since the Parliament, (...) is the institution which, as the locus of popular sovereignty, can best oversee the most important and most pressing decisions of the Executive”.¹⁰²¹ In this constitutional framework, the only task left for the Court is to verify “the existence or non-existence of the conditions” that legitimize the invocation and confirmation of the State secret privilege but not to “judge on the merit of the reasons” that led to its invocation.¹⁰²²

The Constitutional Court thus bowed to the autonomous evaluation made by the Executive under the control of the Parliament and restricted its review to an external oversight of the compliance with the procedural rules governing the classification of documents as State secrets.¹⁰²³ In ruling in this way, the Court mainly upheld the Prime Minister’s position and found that the demands by the Office of the public prosecutor and subsequently by the gup and the Tribunal of Milan infringed the prerogatives of the Executive branch.¹⁰²⁴ Once the State secret privilege has been invoked to oppose disclosure of documents concerning the relationship between the Italian intelligence agencies and the CIA, the public prosecutor should not have used these documents to formulate the formal indictment, the preliminary hearing judge should not have based the decision to open a criminal trial on this evidence¹⁰²⁵ and the judge should not have admitted the examination of witnesses on this matter.¹⁰²⁶ However, the Tribunal of Milan could not be blamed for having continued the trial.¹⁰²⁷

The Constitutional Court also rejected the conflicts of allocation brought by the public prosecutors¹⁰²⁸ and by the Tribunal of Milan¹⁰²⁹ in which they complained that the invocation of the State secret privilege violated the judiciary’s constitutional prerogatives to investigate crimes and guarantee justice. On this count, the Court clarified that the State secret “never concerned the crime of abduction *ex se* - which can therefore be investigated by the judicial authority in the ordinary way– but rather, on the one hand, the

¹⁰¹⁸ Ibid. para.3

¹⁰¹⁹ Ibid. para.4

¹⁰²⁰ Ibid. para.12.4

¹⁰²¹ Ibid. para.12.4

¹⁰²² Ibid. para.12.4

¹⁰²³ See Fabbrini, *supra* note 972, p. 8

¹⁰²⁴ Ibid. para.8

¹⁰²⁵ Ibid. para.8.7

¹⁰²⁶ Ibid. para.11

¹⁰²⁷ Ibid. para.11

¹⁰²⁸ Ibid. para.6.1

¹⁰²⁹ Ibid. para.12

relationship between the Italian intelligence services and the foreign agencies and, on the other, the organizational structure and operative functions of the Italian intelligence services”.¹⁰³⁰

The decision therefore led to a clear contradiction: the abduction was to be prosecuted, however, since the relationship between allied intelligence services was involved, all evidence supporting the conviction of the culprits was bound to be struck out from the proceedings.¹⁰³¹ In this way, the State secret privilege seems to outweigh the obligation to prosecute”.¹⁰³²

After the Constitutional Court ruling, the criminal trial restarted in Milan. However, on the basis of this ruling, no evidence concerning the relationship between the SISMI and the CIA could be used by the prosecutors or the judge. In its judgment, the Criminal Court of Milan¹⁰³³ convicted 23 CIA agents of the crime of abduction and two SISMI agents for aiding and abetting. The other Italian defendants were acquitted since the impossibility to gain access to certain documents concealed under the State secret privilege made it impossible to judge their involvement.¹⁰³⁴ “the existence of a State privilege *de facto* represented an insurmountable hurdle that significantly shaped the outcome of the trial”.¹⁰³⁵

The decision of the Tribunal was then appealed by both parties before the Criminal Division of the Court of Appeal of Milan. In 2010 the Court of Appeal¹⁰³⁶ also followed the judgment delivered by the Constitutional Court and confirmed the conviction of the CIA agents and of the two SISMI agents while accepting the argument of the State secret privilege put forward by the other Italian officers.¹⁰³⁷

In 2012 the Supreme Court of Cassation¹⁰³⁸ annulled the Court of Appeal’s judgment by setting aside the strict interpretation of the State secret privilege adopted by the Constitutional Court. The Supreme Court based his reasoning on the assumption that “only documents and information related to *legitimate* intelligence actions can be classified as State secrets”.¹⁰³⁹ In the present case, however, the defendants and the Prime Minister’s office have always denied any official Italian involvement in the abduction of Abu Omar. The Supreme Court thus argued that the Italian officers involved in the case acted without an official mandate and as a consequence, the State secret privilege could not be properly invoked with respect to information and documents regarding their *illegitimate* involvement in the case.¹⁰⁴⁰ The Supreme Court of Cassation then ordered a new appeal to be heard.

¹⁰³⁰ Ibid. para.3

¹⁰³¹ See Danisi, *supra* note 930, p.195

¹⁰³² See Danisi, *supra* note 930, p.192

¹⁰³³ Trib. Milano, sez.IV Pen., Judgment 535/2009, 4 November 2009

¹⁰³⁴ See Policy department, *supra* note 8, p 114-115

¹⁰³⁵ See Fabbrini, *supra* note 972, p.8

¹⁰³⁶ Corte App., sez. III pen., Judgment 3688/2010, 15 December 2010

¹⁰³⁷ See Policy Department, *supra* note 8, p.116

¹⁰³⁸ Cass., sez. V pen., Judgment 46340/2012, 19 September 2012

¹⁰³⁹ See Policy Department, *supra* note 8, p.116. Emphasis added.

¹⁰⁴⁰ See Policy Department, *supra* note 8, p.116. Emphasis added.

In 2013, the Court of Appeal of Milan¹⁰⁴¹ ruled accordingly in sentencing the Italian officers that had been previously acquitted.¹⁰⁴² As a result, the Italian Government raised a new ‘allocation of power’ action before the Constitutional Court claiming that, in its innovative judgment, the Supreme Court of Cassation had interfered unduly in the Government’s constitutional authority with respect to State secrets.¹⁰⁴³ In 2014, the Constitutional Court judges¹⁰⁴⁴ reaffirmed their previous interpretation that the State secret privilege had been legitimately invoked. The Italian defendants were finally acquitted by the Court of Cassation.¹⁰⁴⁵

The unsuccessful litigation in the *Abu Omar* case shows how, if left unchecked and un-reviewed,¹⁰⁴⁶ the Executive’s claim to secrecy can make it impossible for a victim to obtain the conviction of those responsible and for the public to know whether serious allegations of misconduct are well-founded.¹⁰⁴⁷ Indeed, in this case, the Constitutional Court was unwilling to review the need for confidentiality asserted by the Executive, even in a case concerning extraordinary rendition and all the consequential serious infringements of the most basic rights, i.e. being kidnapped and secretly transferred to detention sites and being subjected to inhuman and degrading treatments for interrogation purposes.¹⁰⁴⁸ In deeming itself unable to disregard the State secret privilege with respect to the relationship with foreign secret services, the Court ruled out any chance of bringing to justice officers of the Italian secret service allegedly responsible for severe human rights violations.¹⁰⁴⁹ Effectively, this “is simply tantamount to admitting that they can benefit from absolute immunity that is not explicitly included in any law” of the Italian Republic.¹⁰⁵⁰

Moreover, in abdicating its supervisory role regarding the merit of invoking the State secret privilege, the Constitutional Court refused to exercise a role granted to it by the law itself.¹⁰⁵¹ Indeed, Law 124/2007, which regulates the State secret privilege, provides that “in no circumstances may State secret status be invoked against the Constitutional Court”.¹⁰⁵² It is so reasonable to think that this provision reflects the intention of the Parliament to charge the Constitutional Court with a supervisory role of Government actions in state secrecy matters.¹⁰⁵³

¹⁰⁴¹ Corte App., sez. IV pen., Judgment 985/2013, 12 February 2013

¹⁰⁴² See Policy Department, *supra* note 8, p.116

¹⁰⁴³ See Policy Department, *supra* note 8, p.116

¹⁰⁴⁴ Constitutional Court, Judgment 24/2014, 13 February 2014

¹⁰⁴⁵ Cass., sez. I pen., judgment 20447/2014, 16 May 2014

¹⁰⁴⁶ See Fabbrini, *supra* note 972, p.30

¹⁰⁴⁷ See Policy Department, *supra* note 8, p.43

¹⁰⁴⁸ See Fabbrini, *supra* note 972, p.22

¹⁰⁴⁹ See Policy Department, *supra* note 8, p.116

¹⁰⁵⁰ See Danisi, *supra* note 930, p.197

¹⁰⁵¹ Tommaso F. Giupponi, “Servizi di informazione e segreto di Stato nella legge n.124/127”, (2009) *Forum Quaderni Costituzionali*, available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0161_giupponi.pdf, p.47

¹⁰⁵² Article 40(8) Law 124/2007

¹⁰⁵³ See Fabbrini, *supra* note 972, p.15

Thus, while full disclosure of evidence within criminal trials has to be preserved as a cornerstone of the rule of law and democracy,¹⁰⁵⁴ by limiting its review only to the formal and procedural aspects without testing whether the Prime Minister's decision was reasonable and proportionate the Court's approach was too weak.¹⁰⁵⁵ In so doing, the Court transformed its self-restraint into an excessively deferent acceptance of the Executive's decisions on state secrecy matters and failed to verify the compliance of such decisions with the law, in particular with Article 39 of the Law 124/2007, as a means of indirectly discouraging possible abuse by the Government. Indeed, the judicial review of decisions addressing national security concerns is not designed to restrict the substantial discretionary power that the law accords to the Executive in these matters but rather to avoid totally arbitrary decisions regarding state secrecy by the Prime Minister's office.¹⁰⁵⁶

The Prime Minister's Office is a political authority and therefore easily influenced by the State's alliances. The political use of the State secret privilege clearly emerges regarding the point in time when it was invoked in *Abu Omar*. In particular, the Italian Government raised the issue of state secrecy not at the beginning of the proceedings regarding Abu Omar's abduction, but only at a later stage when unfavorable evidence about the Government's conduct started to emerge. Nevertheless, the judicial authority was bound to respect the asserted confidentiality in order to avoid releasing information deemed to be secret, thus confirming the preeminence of state secret concerns over the obligation of criminal prosecution.¹⁰⁵⁷

As a result, "by limiting its own power to effectively review the claim of state secrecy, the Constitutional Court opened a disturbing loophole in the 'checks and balances' safeguards of the Italian Republic, leading to a lack of democratic accountability and negative effects on the rule of law".¹⁰⁵⁸

It appears that, within the broad definition of the area of application of the State secret privilege provided by the Italian legal system, the decision regarding what shall be classified as secret in the best interests of the State rests entirely and ultimately with the Prime Minister's office¹⁰⁵⁹ leaving to the judicial review a merely formal role.¹⁰⁶⁰ The Italian courts, and in particular the Constitutional Court, seem to have no role in deciding what information is kept secret and why,¹⁰⁶¹ creating a situation "with significant impacts on criminal prosecution and ultimately, on the separation of powers".¹⁰⁶² Indeed, since the Constitutional Court made it clear that the evaluation of the need for employing state secrecy falls outside its jurisdiction, the Court has no power to avoid the risk that national security unduly prevails over the protection of individual rights and, as shown by the *Abu Omar* case, such protection could be granted by the

¹⁰⁵⁴ See Policy Department, *supra* note 8, p.119

¹⁰⁵⁵ See Policy Department, *supra* note 8, p.117

¹⁰⁵⁶ See Policy Department, *supra* note 8, pp.115-116

¹⁰⁵⁷ See Danisi, *supra* note 930, p.193

¹⁰⁵⁸ See Policy Department, *supra* note 8, p.115

¹⁰⁵⁹ Arianna Vadeschi, "Il Segreto di Stato resta senza giudice", (2014) 1 *Giur. Cost.*, pp.394-395

¹⁰⁶⁰ See Policy Department, *supra* note 8, p.118

¹⁰⁶¹ See Policy Department, *supra* note 8, p.43

¹⁰⁶² See Policy Department, *supra* note 8, p.118

Court only by delivering a sound judgment.¹⁰⁶³ The present case is therefore an example of the failure, or maybe the refusal, of the Italian authorities “to balance seemingly opposite constitutional principles, such as the defense of the country, as per Article 52 of the Constitution [and other intertwined provisions], and the protection of human rights”, whose inviolability is both enshrined in the Italian Constitution¹⁰⁶⁴ and provided under the international obligations that Italy accepted in ratifying numerous human rights treaties.¹⁰⁶⁵

Mr. Abu Omar, together with his wife Nabila Ghali, also filed a complaint of unlawful abduction to the European Court of Human Rights.¹⁰⁶⁶ The applicants asked the Strasbourg Court to verify whether the ill-treatment endured by Abu Omar during his transfer and detention amounted to a violation of the prohibition of torture under Article 3 of the Convention and whether the impunity of those responsible as a result of the invocation of the State secret privilege represented an unlawful intrusion of the Executive in the right to a fair trial and to an effective remedy under Article 6 and 13 of the Convention. In addition, the applicants claimed a violation of the right to respect of private and family life under Article 8 of the Convention given that Abu Omar’s abduction led to forcible separation from his wife for more than five years.¹⁰⁶⁷ The case is still pending but should the Strasbourg Court deliver a judgment significantly different from the prudent approach adopted by the Italian judiciary, the Italian Constitutional Court may reconsider whether to strengthen its overseeing of the reasons given by the Executive in support of the need for secrecy.¹⁰⁶⁸

Overall, even though state secret claims are subject to both judicial review by the Constitutional Court and to a political oversight by COPASIR, both kinds of oversight have proven to be weak in overseeing the Prime Minister’s broad discretion regarding what constitutes national security and what is to be classified as secret.¹⁰⁶⁹ This ineffectiveness derives from a voluntary self-restraint on the part of the Court in the first case and from a substantial lack of power to overrule the Executive’s decision in the second case.¹⁰⁷⁰

To conclude, despite the fact that the Italian legal framework has recently undergone an overhaul, there are still loopholes that intelligence agencies may exploit to avoid accountability.¹⁰⁷¹ In this regard, the *Abu Omar* case demonstrates that these shortcomings could be filled if the Constitutional Court were not to limit its control to a procedural overview but were to verify also whether, in invoking the State secret privilege, the Executive branch has struck

¹⁰⁶³ See Danisi, *supra* note 930, p.194

¹⁰⁶⁴ See Danisi, *supra* note 930, p.192

¹⁰⁶⁵ Francesco Messineo, “ ‘Extraordinary Renditions’ and State Obligations to Criminalize and Prosecute Torture in the Light of the *Abu Omar* case in Italy”, (2009) 7 J.I.C.J., p.1042; among the treaties, the European Convention on Human Rights (ECHR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

¹⁰⁶⁶ ECtHR *Nasr and Ghali v Italy*, Appl. No.no.44883/09

¹⁰⁶⁷ European Court of Human Rights, Press Release 211, 23 June 2015, Chamber hearing in the case of Ghali v Italy (Appl.No. 44883/09)

¹⁰⁶⁸ Giuseppe Arconzo and Irene Pellizzone, “Il Segreto di Stato nella Giurisprudenza della Corte Costituzionale e della Corte Europea dei Diritti dell’Uomo”, (2012) 1 *Rivista A.I.C.*, p.26

¹⁰⁶⁹ See Policy Department, *supra* note .8, p.38

¹⁰⁷⁰ See Policy Department, *supra* note .8, p.117

¹⁰⁷¹ See Giupponi and Fabbrini, *supra* note 74, p.466

a fair balance between national security, that State secret protects, and the enforcement of criminal justice, that State secret may hamper.¹⁰⁷²

2.3.The State secret privilege in administrative proceedings: expulsion cases

2.3.1. *The right to access to administrative documents under Law 241/1990*

Also in administrative proceedings, the right to access to documents, as an essential component of the rights of the defense, has been put under pressure by the apparently ever more compelling needs for confidentiality. The right to access to administrative documents has been already recognized in sectorial legislation in particular as of the 1980's.¹⁰⁷³ However, it was formalized for the first time as a general rule only under Chapter V (Articles 22 ff.) of Law 241/1990.¹⁰⁷⁴ 'New rules concerning the administrative procedure and the right to access to administrative documents'. Article 22 defines the right to access as "the right of interested parties to view and to take copies of administrative documents".¹⁰⁷⁵ Law 241/90 has been subject to two further amendments. Law 15/2005¹⁰⁷⁶ almost entirely reshaped Chapter V regarding access to administrative documents while legislative decree 36/2006¹⁰⁷⁷ made some changes to the original legislation in order to implement in the Italian legal system Directive 2003/98/EC¹⁰⁷⁸ on the re-use of public sector information.

Law 241/90 represents the first comprehensive attempt made by the legislator to implement in the public administration sector the principles set out in Article 97 of the Italian Constitution,¹⁰⁷⁹ which prescribes that "public administration offices shall be organized according to provisions of law, so as to ensure the efficiency and impartiality of the administration".¹⁰⁸⁰ Consequently, the administrative action was formalized in a unified text and opened up, at least in principle, the possibility for the general public to have closer contact with the public administration, on a level of parity with the public administration. The right to access was thus introduced in the Italian legal framework as an essential tool to ensure the transparency and impartiality of the public administration, as enshrined in Article 97 of the Italian Constitution.¹⁰⁸¹

¹⁰⁷² Federico Gustavo Pizzetti, "Il più recente orientamento della corte costituzionale nel caso Abu Omar: novità sul segreto di stato?", (2014) 6 *Processo penale e Giustizia*, p. 129

¹⁰⁷³ Diana Urania Galetta, 'Transparency and Access to Public Sector Information in Italy: A Proper Revolution?', (2014) 6(2) *I.J.P.L.*, p.216

¹⁰⁷⁴ Law 241/1990, 'New rules concerning the Administrative Procedure and the Right of Access to Administrative Documents'

¹⁰⁷⁵ Article 22(1)(a) Law 241/1990

¹⁰⁷⁶ Law 15/2005 'Changes and integrations to Law 7 August 1990 n. 241, concerning general rules on the administrative action'

¹⁰⁷⁷ Legislative Decree 36/2006 'Transposition of Directive 2003/98/CE on the re-use of public sector information'

¹⁰⁷⁸ Directive 2003/98/EC of the European Parliament and of the Council on the re-use of public sector information, 17 November 2003

¹⁰⁷⁹ See Galetta, *supra* note 1073, p. 214

¹⁰⁸⁰ Article 97(2) Italian Constitution

¹⁰⁸¹ Davide Denti, 'Administrative Law in Sweden and Italy: a Comparison', (2008) available at https://www.academia.edu/896258/Administrative_Law_in_Sweden_and_in_Italy_a_comparison, p.2

Besides Article 97, other sound constitutional grounds for a general right to access to the public administration documents have also been identified by the Italian legal doctrine. The principles of democracy, the protection of personal rights, equality under Article 1, 2 and 3 of the Italian Constitution, the freedom of information under Article 21 and all those freedoms which characterize a democratic citizen-authority relationship were all invoked to legitimize the existence of a general right to access to administrative documents. Likewise, Articles 24¹⁰⁸² and 113¹⁰⁸³ of the Constitution were also often invoked to support a generalized access to administrative documents by virtue of the strong links between the right to access to administrative documents and the effective judicial protection of the legal rights and interests set forth therein.¹⁰⁸⁴ Consequently, the adoption of the Law has been welcomed as a landmark change from administrative activity governed by norms based on secrecy to norms founded on the principle of transparency.¹⁰⁸⁵

Under the original version of Article 22 of the Law, “in order to ensure transparency in the administrative activities and to facilitate impartiality thereof, anyone who may be interested therein for the protection of legally relevant situations is granted the right to access to administrative documents pursuant to the formalities established under this law”.¹⁰⁸⁶ However, in the following years, a restrictive interpretation equating the interest in having access to the administrative documents to the so-called interest in bringing a legal action gradually gained consensus in the Courts’ rulings.¹⁰⁸⁷ As a result, in order to gain access to administrative documents, the applicant was required to demonstrate a direct, concrete and actual interest therein. In formalizing this restrictive interpretation, Law 15/2005 radically changed Article 22 of Law 241/1990 which now provides that the right to access to administrative documents¹⁰⁸⁸ can be legitimately exercised by “private parties, including those having interests that are public or diffuse, who have a direct, concrete and currently existing interest corresponding to a legally protected situation that is linked to the document to which access is requested”.¹⁰⁸⁹

¹⁰⁸² Article 24 Italian Constitution: “1.All persons are entitled to take judicial action to protect their individual rights and legitimate interests. 2.The right to defense is inviolable at every stage and instance of legal proceedings”.

¹⁰⁸³ Article 113(1) Italian Constitution : “The judicial safeguarding of rights and legitimate interests before the organs of ordinary or administrative justice is always permitted against acts of the public administration. 2.Such judicial protection may not be excluded or limited to particular kinds of appeal or for particular categories of acts”.

¹⁰⁸⁴ See Galetta, *supra* note 1073, pp.216-217

¹⁰⁸⁵ See Galetta, *supra* note 1073, p. 217

¹⁰⁸⁶ Article 22 Law 241/1990 prior to the amendments made by Law 15/2005

¹⁰⁸⁷ Among others, Italian Council of State, sez. IV, Judgment 1024,10 June 1996; sez.VI, Judgment 966, 7 December 1993; sez.VI, Judgment 1243, 19 July 1994; sez. IV, Judgment 1036, 26 November 1993

¹⁰⁸⁸ Article 22(1)(d) as amended by Law 15/2005 defines administrative documents as “every graphic, photographic or filmed, or electromagnetic or any other kind of representation of the contents of acts, including internal documents or those not relating to a specific procedure, that are held by a public administrative body and concerning activities of public interest, regardless of whether the substantive law governing them is public or private”.

¹⁰⁸⁹ Article 22(1)(b) Law 241/1990

Article 25 of Law 241/1990 subsequently specifies how the right to access shall be exercised, namely “by viewing and taking copies of the relevant administrative documents, in the ways and subject to the limitations established under this law”. Moreover, “the examination of the documents shall be free of charge”. However, if copies of the documents are requested, “without prejudice to the provisions currently in force on stamp duties, as well as document search and identification fees, the issuance of a copy shall be subject only to payment of the copying costs incurred”.¹⁰⁹⁰ The same Article also requires that the request for access shall contain a statement of reasons¹⁰⁹¹ in order to demonstrate the qualified interest that is now necessary for the right to access to be granted.¹⁰⁹² Moreover, the request “must be addressed to the public authority that created the document or holds it permanently”.¹⁰⁹³

Article 25 further outlines the legal paths which can be followed in order to obtain judicial protection of the right to access in the event that the public administration fails to grant disclosure of the requested documents. Pursuant to paragraph 4, when facing a decision to explicitly or implicitly¹⁰⁹⁴ deny access to the requested documents or to defer disclosure, two options can be pursued. The first is to appeal to the Regional Administrative Tribunal (Tribunale Amministrativo Regionale – TAR). The Regional Administrative Tribunal rule in chambers within thirty days of the expiry of the time-limit for lodging an appeal. Provided that the conditions required are fulfilled, the administrative judge “shall order the production of the requested documents”.¹⁰⁹⁵ The decision issued by the TAR can then be appealed within thirty days of the date of notification to the Council of State which will decide the case within the same time-frame and according to the same criteria.¹⁰⁹⁶

The second alternative provided by Article 25(4) is to appeal to the Ombudsman or to the Commission for Access referred to under Article 27 Law 214/1990.¹⁰⁹⁷ With this appeal the applicant will ask for a reversal of the decision taken by the administration holding the requested documents. The Ombudsman and the Commission for Access will then have thirty days from the receipt of the application to deliver their decision. Should the denial or the postponement of the requested access be deemed unlawful by the Ombudsman or the Commission for Access, “they shall inform the applicant and notify the authority responsible for granting access thereof”. If the latter authority should “fail to issue an act confirming the reasons for its decision within thirty days of receipt of the notification by the Ombudsman or the Commission, access shall be granted”.¹⁰⁹⁸ After having appealed to the Ombudsman or to the

¹⁰⁹⁰ Article 25(1) Law 241/1990

¹⁰⁹¹ Article 25(2) Law 241/1990

¹⁰⁹² See Galetta, *supra* note 1073, p.221

¹⁰⁹³ Article 25(2) Law 241/1990

¹⁰⁹⁴ Under Article 25(4) Law 241/1990 “upon expiry of a thirty days from the date of the request without any successful result, such request shall be deemed rejected”. This is the so-called ‘silence-denial’.

¹⁰⁹⁵ Article 116(4) Code of Administrative procedure (legislative decree n.104/2010)

¹⁰⁹⁶ Article 116(5) Code of Administrative procedure

¹⁰⁹⁷ Article 25(4) Law 241/1990

¹⁰⁹⁸ Article 25(4) Law 241/1990

Commission for Access, the applicant is still entitled to challenge the same decision before the Administrative Tribunal.¹⁰⁹⁹

However, while transparency is certainly a founding value in modern democracies, its consistency with other competing interests has to be preserved.¹¹⁰⁰ To this end, paragraph 3 of Article 25 specifies that “access may be denied, postponed, or restricted in the cases and to the extent established under Article 24” but “the reasons for such denial, postponement or restriction must be stated”.¹¹⁰¹

Article 24 of Law 241/1990 set forth a number of cases in which the right to access can be subject to restrictions. Under paragraph 1 in particular, the right to access is excluded, *inter alia*, when the document requested is protected under the State secret privilege pursuant to Law 801/1977¹¹⁰² and its successive amendments and in other cases of secrecy or prohibition of disclosure envisaged by the law, by the Government via regulation ex paragraph 6 of the same Article or by the public administrations ex paragraph 2.¹¹⁰³ Paragraph 6 provides that, by means of regulation, the Government may lay out other cases in which access to administrative documents shall not be admissible in order to protect the interests listed therein (national security and defense, international relations, monetary and currency policy, protection of public order, prevention and prosecution of crimes with particular reference to investigative techniques, the identity of the sources of information etc.).¹¹⁰⁴

Further provisions aim to limit the range of cases in which access may be denied. Paragraph 4 provides that access to administrative documents can be refused only when the power of deferment cannot be efficiently exercised.¹¹⁰⁵ By the same token, paragraph 5 specifies that “the documents containing information connected to the interests referred to in paragraph 1 shall be deemed secret solely within the limited scope of such connection” and “to such an end, public administrations may also set a timeframe for each category of documents during which the right of access shall not be granted”.¹¹⁰⁶ Moreover, paragraph 7 adds that access must be granted “to those administrative documents the knowledge of which is necessary to protect or defend” the applicant’s legal interests.¹¹⁰⁷ therefore, in the wording of the law, the right of defense overrides the limitations imposed on the right to access.

2.3.2. State secrets as grounds for expulsion decisions

Worrying tensions between the right to access and the alleged need for confidentiality for security and public order reasons arise especially in expulsion cases when expulsion orders are issued on the basis of classified information to

¹⁰⁹⁹ Aldo Travi, *Lezioni di Giustizia Amministrativa*, (Torino: Giappichelli Editore, 2014), p. 346

¹¹⁰⁰ See Galetta, *supra* note 1073, p.212

¹¹⁰¹ Article 25(3) Law 241/1990

¹¹⁰² Law 801/1977 regulated the Italian security regime until the implementation of Law 124/2007 and its successive amendments under Law 133/2012

¹¹⁰³ Article 24(1)(a) Law 241/1990

¹¹⁰⁴ Article 24(6) Law 241/1990

¹¹⁰⁵ Article 24(4) Law 241/1990

¹¹⁰⁶ Article 24(5) Law 127/1990

¹¹⁰⁷ Article 24(7) Law 127/1990

which the issuing authority denies access thus severely hindering the possibilities to challenge the order on the part of the person concerned. Expulsion cases are regulated both under the 'Unified Text on measures concerning immigration and norms on the status of foreign citizens'¹¹⁰⁸ (UTI) contained in legislative decree 286/1998 and its subsequent changes¹¹⁰⁹ and under legislative decree 30/2007¹¹¹⁰ which transposed Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States into the Italian legal framework. In particular, while it is a well established principle that the right to access also applies to foreign citizens, the Unified Text on migration relied heavily on the possibilities to restrict the right to access allowed for under Law 241/1990.¹¹¹¹

With regard to expulsions of non-EU citizens, two types of administrative expulsions are envisaged in the Italian legislative framework: return decisions issued by the Ministry of the Interior under Article 13(1) UTI and under Article 3 of the Law 144/2005¹¹¹² (ministerial expulsions) and return decisions issued by the Prefect¹¹¹³ under Article 13(2) on the other.¹¹¹⁴ Under Article 13(1) UTI, the

¹¹⁰⁸ Pursuant to Article 1(1), legislative decree 286/1998 applies to citizens of non EU States and to stateless people.

¹¹⁰⁹ Legislative decree 286/1998: 'Unified Text on measures concerning immigration and norms on the status of foreign citizens'. The original version of legislative decree 286/1998 has then been subject to several changes. The most important amendments were introduced by Law 189/2002 ('Amendments to the legislation on immigration and asylum', known as the 'Bossi-Fini Law'). The measures introduced by Law 189/2002 were then tightened first by the so-called 'security decree' (Law Decree 92/2008) and after by Law 94/2009, known also as 'security package'. The 'security package' attached a new degree of illegality to irregular stay by introducing for the first time the so-called 'crime of illegal immigration'. Further amendments were then made by Law Decree 89/2011 ('Urgent provisions completing the transposition of Directive 2004/38/E on free movement of EU citizens and transposing Directive 2008/115/EC for returning illegally staying third-country nationals') which responded to several decisions delivered by both the European Court of Justice and the Italian Constitutional Court by softening some of the most contested repressive measures.

¹¹¹⁰ Legislative decree 30/2007: 'Transposition of Directive 2004/38/CE on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States' as amended and consolidated by legislative decree 32/2008: 'Amendments and integrations to the Legislative decree n.30/2007, transposing Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States'. The legislative decree n.30/2007 has subsequently been further amended by decree law n.89/2011: 'Urgent provisions completing the transposition of Directive 2004/38/E on free movements of EU citizens and transposing Directive 2008/115/EC for returning illegally staying third-country nationals'. The decree law filled some gaps between the EU Directive and its transposition in the Italian system mainly in order to avoid infringement procedures launched by the European Commission.

¹¹¹¹ Paola Balbo, "Il diritto alla difesa, il ricorso e le modalità di comunicazione dei provvedimenti che riguardano i cittadini extracomunitari", (2003) available at http://www.diritto.it/materiali/processuale_penale/balbo.html

¹¹¹² Legislative decree 144/2005: 'Urgent provisions to combat international terrorism' then converted in Law n.155/2005

¹¹¹³ The Prefect is the head of the Italian Prefettura. The Prefettura is the local branch of the central government. Their offices deal with a broad range of issues including order and public security issues and immigration.

¹¹¹⁴ Shalini Iyengar et al., 'A Legal Guide to Immigration Detention in Italy. An English Overview of the Italian, European and international legal framework that governs immigration detention in Italy', (2013) International University College of Turin, Human Rights and Migration Law Clinic, p. 9

return decisions issued by the Ministry of the Interior are based on public order and national security concerns.¹¹¹⁵ In addition, legislative decree 144/2005 empowers the Minister of the Interior to issue expulsion orders also for reasons of prevention of terrorism.¹¹¹⁶

On the other hand, expulsion orders are issued by the Prefect under the circumstances listed in Article 13(2) UTI when: “the foreigner entered the country avoiding border controls and was not rejected”; the foreigner stayed in the country “without applying for a residence permit within the prescribed time-limit” or remained in the country after “the residence permit had been revoked or annulled or if the expiry date had been exceeded by more than sixty days and no application for renewal had been made”; the foreigner entered on the basis of a short-stay visa but failed to declare his/her presence within the set time-limit of eight days or failed to leave the country within three months; the presence of the foreigner in the country poses a threat to public policy or national security due to his/her criminal activities.¹¹¹⁷

Any expulsion order has to be issued by means of an immediately enforceable decree, even if under appeal. The decree must also include a statement of the reasons for expulsion.¹¹¹⁸ Moreover, any decision or measure concerning the entry, the stay or the removal of a foreigner expulsion order has to be communicated to the foreigner concerned along with an indication of the available appeal procedures and, if necessary, a translation in the known language.¹¹¹⁹

Expulsion orders may then be contested before a judicial authority. The current legislation provides, on one hand, that return decisions issued by the Prefect can be challenged before the competent Justice of Peace (*giudice di pace*)¹¹²⁰ within thirty days of notification of the measure or within sixty days if the person concerned is resident abroad. Foreigners are granted free legal aid and, if necessary, can benefit from the assistance of an interpreter.¹¹²¹ On the other hand, appeals against ministerial expulsion orders issued under Article 13(1) UTI can be challenged before the Regional Administrative Tribunal of Lazio and the proceedings is regulated by the Italian Code of Administrative Procedure.¹¹²² Ministerial expulsion orders issued under Article 3 law decree 144/1005 can instead be appealed before the TAR with territorial jurisdiction (which not necessarily will be the TAR of Lazio).¹¹²³

However, only limited powers can be exercised by the judicial authorities entrusted with the review of the measure. With regard to the Prefect’s expulsion orders, the general principle emerging from Italian case-law is that the judge shall limit his/her scrutiny to the formal and procedural aspects of the Prefect’s decision. Indeed, since the Prefect’s determinations do not depend on a

¹¹¹⁵ Article 13(1) UTI

¹¹¹⁶ Article 3 Law 155/2005

¹¹¹⁷ Article 13(2) UTI

¹¹¹⁸ Article 13(3) UTI

¹¹¹⁹ Article 13(7) UTI

¹¹²⁰ The ‘*giudice di pace*’ is an honorary judge appointed by the Minister of Justice and in charge of resolving minor claims under civil, administrative or criminal law.

¹¹²¹ Article 18 legislative decree 150/2011

¹¹²² Article 13(8) UTI

¹¹²³ Article 3(4) Law decree 144/2005

discretionary assessment of the individual situation but simply on the verification that the requirements set forth by the law have been satisfied,¹¹²⁴ the judicial authority is required only to ascertain that the prescribed conditions for an expulsion order are fulfilled.¹¹²⁵

However, also with regard to ministerial expulsions, the limited case-law available makes clear that the scrutiny exercised by the judicial authorities shall be restricted to a mere external oversight of the lawfulness of the contested decision from a formal and procedural point of view.¹¹²⁶ In fact, the judicial authority is not entitled to extend its scrutiny to the merit of the decision which is deemed to be at the exclusive discretion of the governmental authority: the greater the discretion accorded to the administration, the less the scope for scrutiny left to the judicial authority.¹¹²⁷

As mentioned above, the issuing authority shall also include in the expulsion decision a statement of the reasons underpinning the measure¹¹²⁸ as expression of the general principle enshrined in Article 3 Law 241/1990: “every administrative measure (...) must include a statement of reasons” with the only exception of normative measures and those of general application.¹¹²⁹

However, the Italian Courts have clarified that for expulsion orders adopted by the Prefect, the motivation can be limited to the mere indication of the circumstances given by the law as legitimate grounds for an expulsion order without the need for more detailed justifications. Indeed, given the fettered nature of the measure, the Prefect has no discretion once the requirements on which an expulsion order depends have been shown to be fulfilled. Therefore, in the presence of the circumstances listed under Article 13(2) UTI, the Prefect is obliged to adopt the expulsion measure. As a result, even general and summary grounds may satisfy the administration’s duty to state adequate reasons, as long as the information provided is sufficient to enable the person concerned to exercise efficiently and consciously his/her right of redress before a judicial authority.¹¹³⁰

Conversely, stricter requirements are imposed on the Ministry of the Interior. Enjoying, on the one hand, broad discretion when deciding expulsion orders, the Ministry is required, on the other, to account for its conclusion in an accurate and detailed presentation of the grounds at the basis of its decision.¹¹³¹ The duty to state reasons for ministerial expulsion orders aims to counterbalance the almost unfettered discretion that current legislation allows to the Ministry when taking such intrusive measures in the name of such vague concepts, as public order and national security.¹¹³²

¹¹²⁴ Lorenzo D’Ascia, *Diritto degli Stranieri e immigrazione. Percorsi Giurisprudenziali*, (Milano: Giuffrè Editore, 2009), p.380

¹¹²⁵ Among others, Cass., sez I., Judgment 6370, 1 April 2004; Cass., Ordinance 462, 13 January 2010

¹¹²⁶ Council of State, sez.IV, Judgment 88, 12 January 2006

¹¹²⁷ Salvatore Centonze, *L’espulsione dello straniero*, (Padova: CEDAM, 2006), p.286

¹¹²⁸ Article 13(3) UTI

¹¹²⁹ Article 3 Law 241/1990

¹¹³⁰ Cass. sez.I, Judgment 5518, 14 March 2006

¹¹³¹ Nicola Canestrini, “Sull’espulsione c.d.ministeriale ex art.13 D.Lgs.286/98”, (2004) available at www.altalex.com; see also TAR Piemonte, sez. II, judgment 168, 26 January 2002

¹¹³² Bruno Nascimbene, *Diritto degli Stranieri*, (Padova: CEDAM, 2004), p.521

Nonetheless, grave threats to the rights of the defense of the person affected are now posed by ministerial expulsion orders. Expulsion orders for reasons of public order and national security, as well as those on grounds of prevention of terrorism, are often taken on the basis of sensitive information whose disclosure would be liable to compromise seriously national security.¹¹³³ Relying on Article 24(1)(a) of the Law 241/1990 in fact, the Minister of the Interior often denies or restricts access to the documents underlying the return decision by claiming the need for confidentiality. This tendency has opened the door to disturbing misuses of the State secret privilege.

The expulsion order quashed in December 2004 by the Regional Administrative Tribunal of Lazio¹¹³⁴ neatly exemplifies these possibilities of abuse. In the expulsion order in question, the Minister of the Interior merely referred to certain unspecified actions which, in the wake of the increasingly pressing threat posed by terrorist organizations, were deemed to endanger public order and national security. Further elements regarding the actual threat posed by the individual concerned were not given by the authority. Moreover, simple internet searches revealed that more detailed, even though inconsistent, information regarding the reasons for the expulsion was publicly available on the Minister of the Interior website (<http://mininterno.it>). The subsequent request for disclosure of the relevant documents advanced by the individual concerned was left unanswered by the Executive who invoked the State secret privilege. The individual then lodged an appeal against this refusal with the Tribunal which ordered the production of the requested documents. However, the material produced by the Executive in compliance with the judicial order turned out to be merely newspaper articles (clearly not covered by the State secret privilege) reporting some opinions publicly expressed by the appellant. The expulsion order was annulled by the Regional Administrative Tribunal of Lazio which concluded that the ‘dangerous’ actions contested by the Minister of the Interior were simply the expression of the appellant’s constitutional right to freedom of expression. The Tribunal found a violation of paragraphs 1,3 and 7 of Article 13 of the legislative decree 286/98 and of Articles 3 and 7¹¹³⁵ of the Law 241/1990.

The Italian Council of State¹¹³⁶ delivered its interpretation regarding the possibility of disclosure of classified documents held by the Minister of the Interior. The Council of State recalled that, under the current legislative framework, when classified information *not having a State secret status*¹¹³⁷ is involved, the public administration cannot lawfully invoke a blanket denial of right to access. Article 24 paragraph 7 Law 241/1990, which provides that despite the confidentiality of the information requested “the applicants must nevertheless be guaranteed access to those administrative documents the

¹¹³³ Nicola Canestrini and Giovanni Guarini, “Segreto di Stato, accesso agli atti, espulsione ministeriale”, (2015) available at www.canestrinilex.com; see also D’Ascia, *supra* note 1124, p.322

¹¹³⁴ TAR Lazio, Sez. I ter, Judgment 15336, 10 December 2004

¹¹³⁵ Article 7 Law 241/241: ‘Provided there exist no impediments deriving from the need to conduct a procedure particularly swiftly, the commencement of a procedure shall be communicated (...) to the parties who will be directly affected by the final measure and to those who are required by law to intervene’.

¹¹³⁶ Council of State, sez.I, parere n.2226, 1 July 2014

¹¹³⁷ Emphasis added

knowledge of which is necessary to protect or assert their legal interests”,¹¹³⁸ has been complemented by Article 42(8) Law 124/2007. Under this latter Article, “should a judicial authority order the production of classified documents in relation to which State secret status is not invoked, the documents shall be delivered to the judicial authority requesting them”.¹¹³⁹

Therefore, it is clear that when the administration holding the requested document denies the access to it, the requesting party can always appeal to a judicial authority, from which classified information not having a State secret status cannot be withheld. If the judicial authority then concludes that the interest of the individual concerned in defending his/her legal interests outweighs the interests of the public administration in safeguarding the confidentiality of sensitive information, disclosure shall be ordered. Security classifications under Article 42 of the Law 124/2007 can however justify the adoption of precautionary measures in order to avoid undue disclosure of information. Indeed, paragraph 8 of Article 42 adds that the judicial authority which requests disclosure of the documents shall make sure that they “are kept in a manner that protects their confidentiality whilst guaranteeing the right of the parties to the proceedings to view them without taking a copy”.¹¹⁴⁰ The disclosure could for example be limited only to the information directly relevant to the determination of the case while withholding other information. This conclusion is consistent with the generally established principle that the judicial authority shall pursue the interests of justice while taking into account all the competing interests at stake. Any compression on those interests, whether private or not, should be only where strictly necessary, in compliance with the principle of proportionality.¹¹⁴¹

However, when in an appeal against a ministerial expulsion order, the determination of the case depends on the acquisition of information allegedly covered by the *State secret privilege*,¹¹⁴² no such balancing exercise can be carried out by the judge against which, unlike other security classifications, the State secret privilege can be invoked. Article 3(5) Law 144/2005, no longer in force, provided that in this event the proceedings were to be suspended in order to give the competent administration the opportunity to disclose *sua sponte* the missing information. Upon expiry of a period of two years from the beginning of the suspension, the Administrative Tribunal was then required to set another time-limit for the disclosure of the information. Only after the expiry of this second time-limit, could the judicial authority proceed to examine the legality of the contested order on the basis solely of the grounds already disclosed.¹¹⁴³ Given the restrictions on the rights of the defense that this provision was imposing on the person affected,¹¹⁴⁴ the legislator accorded only a temporary

¹¹³⁸ Article 24(7) Law 241/1990

¹¹³⁹ Article 42(8) Law 124/2007

¹¹⁴⁰ Article 42(8) Law 124/2007

¹¹⁴¹ See Canestrini, *supra* note 1131; see also Council of State, sez.VI, Judgment 579, 7.May 1988; sez. IV, Judgment 241, 4 March 1992

¹¹⁴² Emphasis added

¹¹⁴³ Article 3(5) Law 144/2005

¹¹⁴⁴ Due to the suspension of the proceedings the persons concerned was prevented from exercising their right to an effective judicial remedy for a significant period of time.

duration to this provision:¹¹⁴⁵ the two-year suspension of the proceedings was to be applied only until 31 December 2007.¹¹⁴⁶

Thus, in the absence of any other procedural rule replacing the expired provision, the ordinary rules apply. In this respect, the Regional Administrative Tribunal of Lombardy (Brescia)¹¹⁴⁷ clarified that the State secret privilege does not alter the ordinary distribution of the burden of proof among the parties to the case. This means that when a party claims that his/her case cannot be furthered without referring to information with a State secret status, the party will face two alternatives. S/he will either disclose the relevant evidence thus breaching the State secret privilege or will decide to withhold the documents thus risking dismissal of his/her claim.¹¹⁴⁸ Given these two options, the administration is likely to withhold the information in question as a matter a case strategy. On the one hand, if confidentiality is still needed for national security reasons, the Ministry will certainly prefer to have its case dismissed rather than facing the risk of endangering the interests it is tasked with protecting (especially considering that in event of dismissal there is no provision preventing the Ministry from issuing another expulsion order on the same grounds). On the other hand, the administration will probably decide to withhold the relevant documents even if the information contained therein turns out to be insufficient to justify the expulsion decision, so avoiding any embarrassment before the court or in broader public opinion.¹¹⁴⁹

Expulsion decisions against citizens of the Union and their family members are instead regulated under legislative decree n.30/2007. This legislative decree transposed Directive 2004/38/EC, which is deemed to represent “a landmark policy development” in the consolidation of free movement rights in the Italian legal system.¹¹⁵⁰ However, examination of the way in which the Directive has been implemented in Italy reveals serious divergences between the European normative framework and the national transposition. Key deficiencies liable to weaken severely the European framework of protection are also found in the provisions concerning expulsion orders.

Under the Directive, the only grounds which may legitimize an expulsion decision targeting citizens of the Union or their family members are “public policy, public security or public health”.¹¹⁵¹ Moreover, the Directive prescribes that these restrictive decisions “shall comply with the principle of proportionality” and shall be taken exclusively on the basis of the personal conduct of the person concerned. “The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”.¹¹⁵² Important procedural safeguards are granted in order to prevent arbitrary expulsions: “the person concerned shall be

¹¹⁴⁵ See Centonze, *supra* note 1127, p.307

¹¹⁴⁶ Article 3(6) Law 144/2005

¹¹⁴⁷ TAR Lombardia Brescia, sez.I, Judgment 1140, 6 November 2007

¹¹⁴⁸ *Ibid.* para.3

¹¹⁴⁹ See Centonze, *supra* note 1127, p.308

¹¹⁵⁰ Policy Department, “The Right of Citizens to move and reside freely within the territory of the European Union”, (2009), p.vi

¹¹⁵¹ Article 27(1) Directive 2004/38/EC

¹¹⁵² Article 27(2) Directive 2004/38/EC

notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them”.¹¹⁵³ Moreover, “the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security”.¹¹⁵⁴ The notification shall also inform the persons concerned of the authority before which they can lodge an appeal, the time-frame within which the appeal is admissible and the time left to the person to leave the country.¹¹⁵⁵ “Judicial, and where appropriate, administrative redress procedures” shall also be made available in the host Member State for the person concerned.¹¹⁵⁶ “The redress procedures shall allow for an examination of the legality of the decision, as well as the facts and circumstances on which the proposed measure is based”.¹¹⁵⁷

In Italy, expulsion decisions are admitted on a wider range of grounds compared to the Directive, namely on grounds of “State security,¹¹⁵⁸ imperative reasons of public security¹¹⁵⁹ and other grounds of public policy or public security”.¹¹⁶⁰ However, only a limited conceptual framework of what these categories really mean is provided by the legislation. Consequentially, broad discretion is left to the Italian authorities which could use Article 20 as a legal basis for adopting measures in breach of the Directive.¹¹⁶¹ Although public health as a possible ground for expulsion is not mentioned under Article 20(1) of the legislative decree, paragraph 8 almost literally transpose paragraph 1 of the Directive in narrowing down the diseases which may justify measures restricting freedom of movement.¹¹⁶² In compliance with the Directive, expulsion decisions shall comply with the principle of proportionality and shall be taken exclusively with respect to the personal conduct of the person which must represent a genuine, present and sufficiently serious threat to public order or public safety.¹¹⁶³

¹¹⁵³ Article 30(1) Directive 2004/38/EC

¹¹⁵⁴ Article 30(2) Directive 2004/38/EC

¹¹⁵⁵ Article 30(3) Directive 2004/38/EC

¹¹⁵⁶ Article 31(1) Directive 2004/38/EC

¹¹⁵⁷ Article 31(3) Directive 2004/38/EC

¹¹⁵⁸ Article 20(2) Legislative decree n.30/2007: “Grounds of State security exist when the person to be removed falls within one of the categories referred to in Article 18 of the Law No 152 of 22 May 1975 (internal anti-terrorist legislation) and its successive amendments, or where there are reasonable grounds for considering that that person continued presence in the territory of the State may in any way encourage terrorist activities or organizations, including at international level”.

¹¹⁵⁹ Article 20(3) Legislative decree n.30/2007: “Imperative reasons of public security exist when the person to be removed has behaved in a manner that constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or public safety”.

¹¹⁶⁰ Article 20(1) Legislative decree n.30/2007

¹¹⁶¹ Policy Department, *supra* note 1150, p.131

¹¹⁶² Article 29(1) Directive 2004/38/EC: “The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member States”.

¹¹⁶³ Article 20(4) Legislative decree n.30/2007

Paragraph 9 specifies the subjects empowered to take expulsion measures: the Ministry of the Interior adopts expulsion measures on grounds of imperative public security in respect of the persons referred to in para 7¹¹⁶⁴ as well as expulsion orders for reasons of state security. In the other cases, the expulsion measure is taken by the Prefect of the place where the person concerned is resident.¹¹⁶⁵ Article 22 then refers to the judicial authorities before which the person concerned can challenge the expulsion decision: the Regional Administrative Tribunal has the jurisdiction for the appeals against expulsion decisions taken on grounds of State security and public policy while the ordinary judicial authority (in the monocratic composition) is entrusted with the review of the expulsion measures based on public security and imperative reasons of public security.¹¹⁶⁶

Most importantly, paragraph 10 of legislative decree 30/2007 transposes Article 30 of the Directive. Expulsion decisions must contain a statement of the reasons for the decision unless this would be contrary to the interests of state security. The expulsion order shall be notified to the person concerned along with, if necessary, a translation in the known language. The notification shall also inform the person concerned of the available redress procedures and of the time-limit allowed for the person to leave the country.¹¹⁶⁷ However, this transposition is incorrect and incomplete as the national provision fails to specify that the person concerned shall be informed “precisely and in full” of the grounds supporting the decision as provided by the Directive.¹¹⁶⁸ Therefore, the transposing norm seems to authorize a complete omission of the statement of reasons for state security reasons while the European provision seems to imply that when a precise and full disclosure of the grounds is not possible, there is still room for a more concise statement of reasons.¹¹⁶⁹

No specific provisions have been laid out to regulate the case in which state security reasons stand in the way of full disclosure of the grounds supporting the contested expulsion decision. The ordinary rules governing appeals before judicial authorities will therefore apply¹¹⁷⁰ and the restrictions imposed by the State secret privilege on the judicial oversight outlined above will probably reemerge. The examination of the “legality” of the expulsion decision as well as of the “facts and circumstances” on which it is based to which Article 31(3) of the Directive attaches the judicial (or administrative) redress procedure may therefore become impossible.¹¹⁷¹ This inevitably raises doubts about the compliance of the Italian transposing norms with the standards

¹¹⁶⁴ Expulsion of people residing for 10 years and minors.

¹¹⁶⁵ Article 20(9) Legislative decree n.30/2007

¹¹⁶⁶ Article 22(1)(2) Legislative decree n.30/2007

¹¹⁶⁷ Article 20(10) Legislative decree 30/2007

¹¹⁶⁸ Milieu Ltd. and Europa Institute, “Conformity Study for Italy. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States”, (2008), p. 47

¹¹⁶⁹ Marcello Di Filippo, “La Libera Circolazione dei Cittadini Comunitari e l’Ordinamento Italiano: (Poche) Luci e (Molte) Ombre nell’Attuazione della Direttiva 2004/38/CE”, (2008) 2 *Riv.dir.internaz.*, p.446

¹¹⁷⁰ Flavio Guella, “La disclosure nell’effettività della tutela giurisdizionale e le ragioni ‘riservate’ di sicurezza nazionale nell’allontanamento dei cittadini stranieri”, (2013) 4 D.P.C.E., p.1296

¹¹⁷¹ See Di Filippo, *supra* note 1169, p.447

of protection envisaged at EU level¹¹⁷² and also more serious concerns about the adverse implications that these restrictive readings may have on fundamental rights which constitute the very foundation on which the European Community is based.¹¹⁷³

Overall, when the State secret privilege is invoked, the Italian legal system does not seem to guarantee the standards of protection of the rights of the defense that both the European Court of Justice and the European Court of Human Rights have established in their respective case-law. On the one hand, while under these standards the court entrusted with the review of the restrictive measure shall be able to examine all grounds supporting the decision, under the Italian legal system the State secret can be invoked against any judicial authority, except for the Italian Constitutional Court. However, as outlined above, the Constitutional Court has also restricted its oversight role merely to the formal and procedural aspects of the decision thus leaving great or maybe unfettered discretion to the Chief Executive on state secret matters. On the other hand, while compliance with the adversarial principle requires that the persons concerned must be informed at least of the essence of the grounds against them, the Italian authorities often present a blanket denial to the request for access when secret information is involved. In the absence of alternative mechanisms of protection, such as the UK special advocate system,¹¹⁷⁴ it is hard to imagine how the right of redress can be effectively exercised if not even a non-confidential summary is granted to the persons concerned (and to their lawyers).

¹¹⁷² Alessandra Lang e Bruno Nascimbene, "L'attuazione in Italia della direttiva 2004/38/CE sulla libera circolazione dei cittadini dell'Unione Europea", (2007) 2 *Dir.imm. e citt.*, p.62

¹¹⁷³ Sergio Carrera and Anais Faure Atger, "Implementation of Directive 2004/38 in the Context of EU Enlargement. A proliferation of different forms of citizenship?", (2009) CEPS Special Report, p.21

¹¹⁷⁴ See Guella, *supra* note 1170, p.1301

Chapter IV: THE WAY FORWARD: HOW THE NEED FOR SECRECY SHOULD BE MANAGED BY EU COURTS

The courts of the European Union have always been seen as guardians of fundamental rights against abuses by the Executive.¹¹⁷⁵ In the context of global terrorism, the EU Courts are even more essential in safeguarding the principles of the rule of law, transparency and accountability in the face of an ever-increasing threat of erosion. In a world where the threat posed by terrorism is more real than ever, there is, therefore, a growing need for the implementation of new mechanisms designed to strengthen the central role that the EU courts play in consolidating and promoting the very fundamental human rights principles on which Europe has been built.¹¹⁷⁶ EU courts also often face the pressing need to preserve the confidentiality of highly sensitive information, while at the same time avoiding undue limitations on procedural fairness. In addition, the problems posed by non-disclosure are likely to be amplified when transferred to the EU supranational legal order.¹¹⁷⁷

As we have seen, the European Court of Justice does not affirm that the right to disclosure of the grounds for security-based measures shall be defended in absolute terms. Therefore, national authorities can lawfully oppose full and complete disclosure of the grounds for restrictive measures if necessary for reasons of state security. Nonetheless, the European Court of Justice clearly affirmed that any infringements of the founding values of a democratic society in the name of the fight against terrorism would not be acceptable. In the words of the Court, as a means to strike a fair balance between the procedural rights of the person concerned and the interests of state security, any non-disclosure shall be counterbalanced by two conditions.

First, the alleged need for secrecy must be proved by the claiming authority and then be subject to meaningful judicial scrutiny by the Court which will so need to have access to all the evidence and grounds underpinning the contested decision. Secondly, where the Court has concluded that full and precise disclosure would be liable to severely compromise national security, “the Court with jurisdiction (...) must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate state security considerations regarding the nature and sources of information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle”.¹¹⁷⁸ To that end, as a means to limit any departure from the adversarial principle to the strictly necessary, at the very least, the essence of the grounds underpinning the restrictive decision has to be disclosed to the person concerned in order to enable him/her to mount an effective defense.¹¹⁷⁹ However, beyond the gist requirement no further guidance is given by the Court on what sort of

¹¹⁷⁵See Sullivan, *supra* note 5

¹¹⁷⁶See Policy Department, *supra* note 8, p.9

¹¹⁷⁷See Williams, *supra* note 563, p.24

¹¹⁷⁸ZZ at para.57

¹¹⁷⁹ZZ at para.65

accommodating techniques should be adopted in order to reconcile the demands of procedural rights with the need to safeguard public security.¹¹⁸⁰

At this stage, the necessity to lay out procedural rules for the handling of confidential information seems beyond doubt. The current reality is that sovereign Member States and EU institutions are unwilling to share with the EU courts security-sensitive information originating from their intelligence services.¹¹⁸¹ Indeed, Article 346(1)(a) TFEU prescribes that “No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security”.¹¹⁸² Prima facie, that provision can be interpreted to enable the Member States to refuse to produce such material even upon request of the EU courts.¹¹⁸³ The establishment of a system which enables the European courts to handle confidential information while ensuring its non-disclosure to the individuals concerned may therefore be able to overcome the Member States’ distrust when it comes to presenting confidential evidence before the EU courts.¹¹⁸⁴

Likewise, as mentioned above, with regard to sanctions taken at UN level, the EU authorities themselves often do not receive the primary intelligence information supporting the listing before the UN Security Council. Most of this information generally comes from the so-called originator countries who often refuse to communicate confidential material to third parties.¹¹⁸⁵ Therefore, a diplomatic process aimed at concluding information-sharing agreements should be initiated, whereby the so-called originator countries agree to share confidential information with the EU institutions. However, since intelligence information that has been provided to EU institutions may then be presented to the EU court, such a process will work only if the EU courts have at their disposal procedural measures protecting confidential evidence.¹¹⁸⁶

It is clear however, that the application of *only*¹¹⁸⁷ the PII/Article 67 procedure as prescribed before the recent amendments to the rules of procedure of the General Court is insufficient to deal with the hard choice cases arising from the use of confidential information in courts. When faced by similar dilemmas, there is a significant need for procedural rules leaving room for judicial balancing between the competing interests at stake, rather than for procedures which impose on the Executive branch an all-or-nothing choice. Under the PII-like system, when confidential information comes into play, the Executive will either have to disclose confidential material liable to endanger (inter)national security, or settle or withdraw from a case which it would rather put forward but feels that it cannot without prejudicing public security.¹¹⁸⁸ Forcing an authority or institution either to disclose information that may threaten security or to drop their case against potentially guilty parties does not

¹¹⁸⁰ See de Boer, *supra* note 81, p.1250

¹¹⁸¹ See Cuyvers, *supra* note 349, p.1780

¹¹⁸² Art.346(1)(a) TFEU

¹¹⁸³ Nicholas J. Forwood, “Closed Evidence in Restrictive Measures Cases: A Comparative Perspective” in *Of Courts and Constitutions*, (Oxford; Portland: Hart Publishing, 2014), p. 107

¹¹⁸⁴ See Cuyvers, *supra* note 349, p.1780

¹¹⁸⁵ See Cuyvers, *supra* note 349, p.1760

¹¹⁸⁶ See Forwood, *supra* note 1183, p.108

¹¹⁸⁷ Emphasis added.

¹¹⁸⁸ See Williams, *supra* note 563, p.25

seem to be the most sensible and morally justifiable way forward.¹¹⁸⁹ At the same time, while the new procedural rules of the General Court may sufficiently reassure some authorities to supply more intelligence evidence to the European court, they do not seem to provide much in the form of procedures able to reconcile the competing interests at stake.¹¹⁹⁰ As outlined above they do not provide a similar mechanism before the European Court of Justice, nor do they grant an adequate measure of procedural fairness.

The UK special advocate system, albeit with some substantial adjustments, seems to be the only way to handle secret evidence effectively, while at the same time ensuring to the greatest possible extent “some forms of adversarial proceedings”.¹¹⁹¹ This conclusion also seems to be accepted at European level. While the European Court of Justice did not explicitly refer to a specific mechanism able to accommodate the competing interests at stake, the European Court of Human Rights held that the “special advocates could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing” first by questioning the need for secrecy itself and then by testing the evidence put forth by the other main party and by making submission on behalf of the person concerned regarding the case for additional disclosure.¹¹⁹²

At the same time however, a wholesale incorporation of the UK special advocate system into the EU law does not seem to be a suitable solution in the light of the various flaws which currently affect the inherent fairness of that system as it currently operates. Transferring in full the UK closed material procedure (CMP) to the General Court and the European Court of Justice would simply mean exporting the same deficiencies to a higher level.¹¹⁹³ Moreover, the European Courts have some specific features which may amplify these problems. For instance, unlike SIAC, the GC and the ECJ do not include experts in intelligence and security matters.¹¹⁹⁴ Therefore the EU Courts may lack the necessary expertise to carry out a meaningful scrutiny of claims made by the intelligence services.¹¹⁹⁵ In addition, in the light of the peculiarities which distinguish the legal professions across the Union, it may be difficult to conceive a special advocate performing at EU level a similar role to that performed by the UK special advocates.¹¹⁹⁶ While in the UK there are many advocates who have gained significant experience in dealing with secret evidence, the same cannot be said with regard to advocates operating in other Member States, where a similar UK-style special advocacy has not been implemented.¹¹⁹⁷ Moreover, given the multiple approaches to security threats found in the EU States, Europe does not have “a singularity in security” but “multiple securities”:¹¹⁹⁸ “the

¹¹⁸⁹ See Williams, *supra* note 563, p.25

¹¹⁹⁰ See de Boer, *supra* note 81, p.1255

¹¹⁹¹ *Liu v Russia (No 2)* at para.99, *C.G. and Others* at para.57

¹¹⁹² *A* at paras.219-220

¹¹⁹³ See Williams, *supra* note 563, p.26

¹¹⁹⁴ We recall that SIAC is composed also of an intelligence expert and an immigration expert.

¹¹⁹⁵ See Williams, *supra* note 563, p.26

¹¹⁹⁶ See Murphy, *supra* note 751, p.13

¹¹⁹⁷ See Murphy, *supra* note 751, p.13

¹¹⁹⁸ J. Peter Burgess, “There is No European Security, Only European Securities”, (2009) 44(3) *Coop.Confl.*, p.309

ambition of a Europe-wide approach to security has grown into a complex constellation involving national cultures, institutional norms, political agendas, local perceptions and global needs”.¹¹⁹⁹ In such a varied context, it is so hard simply to transpose one system onto all the others.¹²⁰⁰

Nonetheless, the appointment of a special representative following security clearance seems to be the most adequate mechanism to reconcile in the most satisfactory way the tensions between procedural fairness, on the one hand, and the need for confidentiality of security-sensitive information on the other. It should, however, be stressed that fully open justice has to be preserved as the normal expectation when lodging an appeal before any judicial authority. The exclusion of the accused from the hearings in which serious allegations against him/her are discussed is, in fact, inherently unfair. “In an ideal world” CMPs would not exist. However, “in the real, harsh world”, their use might be inevitable when facing hard choice cases.¹²⁰¹ A UK-style special advocate system should thus be taken as a baseline in setting up a new procedural mechanism for the management of secret evidence at both the General Court and the ECJ.¹²⁰² Indeed, much of the debate on the UK system has centered more on the way in which that system operates rather than on its core structure.¹²⁰³ However, some substantial changes seem to be essential in order to rectify (or maybe only mitigate) the many shortcomings which affect the current UK system .¹²⁰⁴

If the EU decides to implement CMPs at the GC and ECJ level, the following scheme should be taken into account. First of all, it must be reiterated that any use of secret information is a waiver of the right to full disclosure and should be treated as such.¹²⁰⁵ Therefore, the departure from the requirements for a full, fair hearing constituted by closed material procedures should be limited to extraordinary cases. The same reasoning expressed by Special Advocates in their response to the Government’s Green paper (2011) shall apply by analogy also to the EU context: “it is one thing to argue that, for reasons of national security, the unfairness and lack of transparency inherent in CMPs should be tolerated in specific areas (...). It is quite another to suggest that Government Ministers should be endowed with a discretionary power to extend that unfairness and lack of transparency to any civil proceedings, including proceedings to which they are themselves party”.¹²⁰⁶ This means, on the one hand, that recourse to secret intelligence should be made only when there are no other reasonable means to acquire the same information using non-secret methods,¹²⁰⁷ while, on the other, CMPs should not be applicable to all areas. The use of closed material procedures should rather be confined to those clearly defined situations where traditionally there has been a need for the

¹¹⁹⁹ See Burgess, *supra* note 1198, p.310

¹²⁰⁰ See Williams, *supra* note 563, p.27

¹²⁰¹ See Williams, *supra* note 563, p.27

¹²⁰² See Williams, *supra* note 563, p.24

¹²⁰³ Sharpston opinion, fn 89

¹²⁰⁴ See Williams, *supra* note 563, p.24

¹²⁰⁵ See Forcese and Waldman, *supra* note 6, p.53

¹²⁰⁶ See Response to Consultation from Special Advocates, *supra* note 880, p.2

¹²⁰⁷ See Policy Department, *supra* note 8, p.71

EU institutions and EU States to rely on security-sensitive material,¹²⁰⁸ such as sanctions and asset-freezing or cases of deportation. Notwithstanding the difficulties, as seen in the UK,¹²⁰⁹ which may be encountered in circumscribing its use to a narrow set of cases, the exceptional nature of closed material procedures should be preserved so as to ensure that they are deployed only when national or international security faces real threats and not as a means to “suppress embarrassing or controversial practice”.¹²¹⁰

Secondly, even in the limited areas where CMPs are applicable, they should be used only as a last resort after having verified that other less rights-impairing alternatives are not reasonably available.¹²¹¹ As clearly expressed by Lord Kerr in *Al Rawi*, the inherent frailties which affect the special advocate system make it “a distinctly second best attempt to secure a just outcome to proceedings. It should always be a measure of last resort; one to which recourse is had only when no possible alternative is available. It should never be regarded as an acceptable substitute for the compromise of a fundamental right such as is at stake in this case”.¹²¹² Therefore, the first step should be the application of the PII/Article 67 process. Only after having conducted a PII exercise will it be possible to determine whether a closed material procedure is the only way to ensure that the case is judicially determined.¹²¹³

The UK-style PII process allows secret evidence to be handled without interference in due process rights, which, in contrast, CMPs cause. In particular, while the closed material procedure rests on the exclusion of the persons concerned from the access to secreted documents which are available to the other party and the court, the PII process ensures both parties “full participation in all aspects of the litigation”.¹²¹⁴ Moreover, under the PII procedure it will be left to the Court to determine whether the public interest in preserving the confidentiality of the relevant information is weighty enough to justify interferences in the ordinary way to administrate justice (the UK’s *Wiley* balance).¹²¹⁵ This is consistent with the requirement set out by both the European Court of Justice and the European Court of Human Rights requiring the trial judge to scrutinize the alleged need for secrecy.¹²¹⁶ However, if the

¹²⁰⁸ See Williams, *supra* note 563, p.28

¹²⁰⁹ See Twenty – fourth Report, *supra* note 569, para.113. The Joint Committee on Human Rights shares the concerns expressed by some witnesses “that the availability of a closed material procedure would in practice distort the way in which the court conducts the PII process, so that even if a statute circumscribed the availability of closed material procedures as narrowly as possible, they would in practice inevitably be resorted to much more frequently”.

¹²¹⁰ See Williams, *supra* note 563, p.28

¹²¹¹ See Williams, *supra* note 563, p.28

¹²¹² *Al Rawi* at para.94

¹²¹³ See Williams, *supra* note 563, p.28

¹²¹⁴ *Al Rawi* at para.41

¹²¹⁵ See Williams, *supra* note 563, p.28

¹²¹⁶ Among others, *Dowsett* at para 50: “the Court reiterates the importance that material relevant to the defense be placed before the trial judge for his ruling on questions of disclosure at the time when it can serve most effectively to protect the rights of the defense”. *ZZ* at para 60: “As for the requirements to be met by judicial review of the existence and validity of the reasons invoked by the competent national authority with regard to State security of the Member States concerned, it is necessary for a court to be entrusted with verifying whether those reasons stand in the way of precise and full disclosure of the grounds on which the decision is based and of the related evidence”.

application of the PII exercise would make the case untriable, but it is absolutely necessary to continue the trial in the interests of justice, then a UK-style closed material procedure should be made available.¹²¹⁷ Nevertheless, only if substantial changes and adaptations to the EU context are put in place, may special advocates be able to play an essential role in pressing for greater disclosure and in testing the veracity of the undisclosed information.¹²¹⁸

First of all, restrictions on communication between the named person and his/her special advocate is certainly the feature of the UK model which has attracted most controversy. In the absence of any instruction from the person concerned, special advocates are obviously ill-equipped to undermine the credibility of the Government's case in the way that they might do in regular proceedings.¹²¹⁹ Consequently, if the special advocate system is to be applied in Luxembourg, the persons concerned must be granted a greater opportunity to communicate with their special advocates throughout the trial, while the special advocates shall be able to question the named person after being fully apprised of the closed material.¹²²⁰

Indeed, the constraints on questioning the named person imposed on special advocates seems to rest more on the suspicions harbored by security services towards special advocates than on substantial grounds. This emerges from the fact that under the UK system, the same concerns with involuntary disclosure which bar communication between the special advocate and the named person do not extend to government lawyers and to members of the security service who can continue to question the named person before and during the proceedings, as if they were less likely to ask the sorts of questions which may inadvertently convey sensitive information.¹²²¹ However, "there is simply no reason to presume that special advocates are more prone to involuntary disclosure than government lawyers or security service interviewers".¹²²²

In the light of this, in its seventh report on the use of special advocates in the UK in 2005, the Constitutional Affairs Committee recommended that "the Government reconsider its position on the question of contact between appellant and special advocate following the disclosure of closed material". In particular, "it should not be impossible to construct appropriate safeguards to ensure national security in such circumstances and this would go a long way to improve the fairness of the special advocate system".¹²²³ The reason for this is twofold: first, if communication is permitted, the special advocate will be better positioned to know whether the allegations can be challenged on the basis of evidence not available to the person concerned, and, second, the special advocate will be able to follow a legal strategy consistent with the one pursued by the appellant's legal team.¹²²⁴ In July 2007, in its nineteenth report on the UK

¹²¹⁷ See Williams, *supra* note 563, p.28

¹²¹⁸ See Williams, *supra* note 563, p.28

¹²¹⁹ See Forcese and Waldman, *supra* note 6, p.39

¹²²⁰ See Williams, *supra* note 563, p.28

¹²²¹ See Forcese and Waldman, *supra* note 6, p.64

¹²²² See Forcese and Waldman, *supra* note 6, p.64

¹²²³ See Seventh Report, *supra* note 575, para.86

¹²²⁴ See Seventh Report, *supra* note 575, pp.45 – 46. In its response to this recommendation from the Committee, the Government claimed that the permission accorded to the special

system, the Joint Committee on Human Rights also concluded that “it is essential, if special advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the special advocate and the controlled person”.¹²²⁵ The Joint Committee also stressed the “preparedness of the special advocates to take responsibility for using their professional judgment to decide what they could or could not safely ask the controlled person after seeing the closed material”.¹²²⁶

The Canadian SIRC¹²²⁷ counsel model did not suffer from this as well as from many other shortcomings and could, therefore, be used as a baseline for meaningful changes. Under the Canadian immigration regime in force until 2002, security-cleared lawyers were made available in proceedings before the Security and Intelligence Review Committee (SIRC). SIRC is tasked with monitoring the activities of the Canadian Security Intelligence Service (CSIS).¹²²⁸ Up to 2002, SIRC played an important role in immigration proceedings in which the Government’s decision to remove a permanent resident was driven by, *inter alia*, national security–related concerns.¹²²⁹

When the Minister of Employment and Immigration and the Solicitor General deemed the presence of a non-citizen not conducive to the public good, they could issue a report to the SIRC. The SIRC then investigated the matter and sent a report with a recommendation to the Governor in Council who could then request the Minister to issue a security certificate if s/he was convinced that the presence of the named person was inadmissible.¹²³⁰ The non-citizen and his/her counsel were normally allowed to take part in the hearings before the SIRC. However, if the removal decision was adopted on sensitive national security-related grounds, the named person's participation at the hearing was not permitted. The resulting procedural vacuum was filled by security–cleared counsels.¹²³¹

advocates to communicate with the person concerned was “not just a theoretical possibility”. It argued in fact that in a number of cases, special advocates obtained permission to communicate on “legal points and factual matters”. In addition, it pointed out how “some of the difficulties which the Special Advocates experience in being able to argue the appellant’s case have emerged because the appellants have declined to discuss the case with their Special Advocate when they were able to, and because they have refused to engage with the open appeal process with the result that the Special Advocate is completely in the dark about the nature of the appellant’s defense”. See Government Response to the Constitutional Affairs Select Committee’s Report, *supra* note 622, p.8

¹²²⁵ See Nineteenth report, *supra* note 603, para.205

¹²²⁶ See Nineteenth report, *supra* note 603, para.205; See also para.204: “We asked the Minister why, if he was prepared to trust the Special Advocates to have access to the closed material, he was not prepared to trust their professional judgment and their expertise to decide what questions they can ask the controlled person, after having seen the closed material, without revealing anything which may be damaging to national security. He replied that it was a question of trust, rather it was about placing undue burdens on the Special Advocate”.

¹²²⁷ However, the SIRC was not a court, but an administrative Tribunal

¹²²⁸ See *Ip*, *supra* note 247, p.719

¹²²⁹ See Forcese and Waldman, *supra* note 6, p.6. When the procedure involved foreign nationals who were not permanent residents, the hearing took place before a Federal Court.

¹²³⁰ Immigration Act, R.S.C. 1985, c.I-2, s.39 and 40, now repealed by IRPA

¹²³¹ Murray Rankin, “The security Intelligence Review Committee”, (1990) 3 *Ca.J.Admin.L.&Practice*, pp.183 – 184

Unlike the UK regime, however, after the SIRC counsels had been fully apprised of the closed material, they could still have contact with the named person throughout the entire proceedings in order to obtain, in particular, the list of questions that the named person wished to have asked at the closed hearing or the additional witnesses s/he wished to be cross-examined before the SIRC.¹²³² Obviously, in order to avoid possible involuntary disclosures, special care had to be taken in formulating the questions. Nonetheless, the Canadian special advocates reported that even questions framed in an oblique manner in order to avoid inappropriate leaks of information were essential to unearth potentially exculpatory information.¹²³³ For example, if the confidential material also included an allegation that the defendant took part in a terrorist training camp in March 2002, the special advocate cannot directly ask the defendant if in March 2002 s/he was in a terrorist training camp, but s/he could ask where s/he was in 2000, 2001 and 2002. Certainly, it will not always be possible to ask questions in an indirect manner. If, for example, the reliability of a specific informant is in doubt, there would be no way for the counsel to ask his/her client for information about that informant without revealing his/her identity.¹²³⁴ Overall however, this system proves how continued contact with the named person is still possible while avoiding the risk of inadvertent disclosure.

The pre-2002 system has then been radically altered by the Immigration and Refugee Protection Act (IRPA).¹²³⁵ The IRPA security certificate process also permits the expulsion of aliens on several grounds, including national security.¹²³⁶ However, it abolished the SIRC's role in immigration proceedings. Permanent residents subject to security certificates were thus deprived of the possibility to challenge their deportation order before the tribunal. Instead, their appeals could only be heard in Federal courts, as was the case for foreign nationals who were not permanent residents. Under the IRPA security certificate process, the Court judge would determine the case in *ex parte* and *in camera* hearings in which s/he could consider the security-sensitive material produced by the Government but withheld from the individual to be deported and his/her counsel. Unlike the SIRC process, no special advocate could be appointed to represent the excluded party in the closed hearing.¹²³⁷

However, in 2007 the Supreme Court of Canada¹²³⁸ unanimously held that the IRPA's security certificate scheme "unjustifiably violates s.7 of the Charter by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person's interests".¹²³⁹ Around the same

¹²³² See Forcese and Waldman, *supra* note 6, p.viii

¹²³³ See Forcese and Waldman, *supra* note 6, p.9

¹²³⁴ David Cole and Stephen I. Vladeck, "Comparative advantages: secret evidence and 'cleared' counsel' in the United States, the United Kingdom and Canada" in *Secrecy, National Security and the Vindication of Constitutional Law*, (Cheltenham; Northampton: Edward Elgar Publishing: 2013), p.185

¹²³⁵ Immigration and Refugee protection Act, S.C. 2001

¹²³⁶ See Ip, *supra* note 247, p.726

¹²³⁷ David Jenkins, "There and Back Again: the Strange Journey of Special Advocates and Comparative Law Methodology", (2011) 42 *Colum. Hum. Rts. L. Rev.*, p.336

¹²³⁸ *Charkaoui v. Canada*, 2007 SCC 9 [2007] 1 SCR 350, [hereinafter *Charkaoui*]

¹²³⁹ *Ibid.* para.3

time as the *Charkaoui* decision, two parliamentary committees suggested the employment of special advocates in the IRPA security certificate process. In particular, by calling in 2007 for the adoption of a special advocate model in Canada,¹²⁴⁰ the special Senate Committee held that the continued communication between the named person and the special advocate should not be abandoned. The Committee found that appropriate safeguards can be established by the Government to ensure that “the credibility and the integrity” of national security–related evidence is not compromised while permitting communication “in the interest of procedural fairness”. “In addition to be sworn to secrecy and being subject to offences under the Security of Information Act, a special advocate should follow clear guidelines when meeting with the affected party or his or her counsel. For example, he or she might communicate with the client in the company of another person, likewise sworn to secrecy, so that there can be close monitoring of what is discussed and inadvertent errors of disclosure prevented”.¹²⁴¹

In response to *Charkaoui*, the Canadian Parliament adopted an amended special advocate system¹²⁴² which resembled the UK closed material procedures both in terms of function (namely, making oral and written submissions available for more disclosure, cross-examining witnesses, challenging the Government’s case from both a legal and substantial point of view) and, ironically, in terms of restrictions on communication between the named person and the special advocate once the latter has reviewed the closed files.¹²⁴³ In fact, no communication is allowed after the closed material have been served on the special advocates, except with leave of the court.¹²⁴⁴ However, a crucial difference still persists between the UK model of special advocacy and the Canadian one: in Canada, while the judge’s authorization is the precondition for communication, there is no statutory provision requiring the Government to be notified of the proposed communication and so allow objections to be made.¹²⁴⁵

The regime adopted in the United States under the Classified Information Procedures Act (CIPA)¹²⁴⁶ is another example of how continuous

¹²⁴⁰ Canada, Special Senate Committee on the Anti-terrorism Act, Fundamental Justice in Extraordinary Times, February 2007, available at: <http://www.parl.gc.ca/Content/SEN/Committee/391/anti/rep/rep02feb07-e.htm>

¹²⁴¹ See Special Senate Committee on the Anti-terrorism Act, Fundamental Justice in Extraordinary Times, *supra* note 1240

¹²⁴² An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, SC 2008, c.3.

¹²⁴³ See Jenkins, *supra* note 1237, p.342

¹²⁴⁴ See Jenkins, *supra* note 1237, p.342

¹²⁴⁵ See Ninth report, *supra* note 787, para.75; See also Evidence of Mr McCullough to Joint Committee on Human Rights Q50: “In that context , where material of probably equal sensitivity may be involved, it has not been thought necessary to have the same absolute prohibition on communication between special advocates and the open representatives. (...) after the Canadians examined the British system and the British experience, (...) they have adopted a system which permits discussion between open representatives and special advocates on open matters, and have deployed a regime whereby the ex parte procedure may be used if there is a desire to communicate from the special advocates to the open advocates on anything that may impinge on closed material”.

¹²⁴⁶ Classified Information procedures Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025, 2025-31 (1980) (codified at 18 U.S.C. app. 3)

communication throughout the process can be allowed between cleared counsel and affected persons without jeopardizing material regarded by the Government as confidential.¹²⁴⁷ Enacted in 1980, the CIPA is the result of an attempt to set the balancing point between procedural fairness and secrecy during criminal trials. It was passed by Congress in order to counter so-called 'graymail'. 'Graymail' is the label which has been applied to a tactic used by a defendant who in the course of a criminal prosecution threatens to disclose sensitive information, thus placing the Government before the 'disclose or dismiss' dilemma to either release the sensitive material or drop the prosecution.¹²⁴⁸ After three decades, the CIPA is still the standard for disciplining the introduction of classified information in criminal proceedings.¹²⁴⁹

The CIPA "establishes procedures to protect classified information from public disclosure, including disclosure to a defendant and his/her counsel if they do not possess the requisite security clearance".¹²⁵⁰ More precisely, it provides criminal procedures which enable the trial judge to rule on the relevance or admissibility of confidential information in the necessary secure setting (*in camera* and *ex parte* hearings). Where the judge finds the classified information both admissible¹²⁵¹ and relevant,¹²⁵² the Government can propose to substitute the classified information with a non-confidential version of the material. It is then for the court to determine whether the proposed form of substitution can be permitted.¹²⁵³ A basic fairness test applies to any form of substitution proposal,

¹²⁴⁷ Evidence of Mr de la Mare to the Joint Committee on Human Rights, Ninth report, *supra* note 787, Q50: "Can I just add that in the United States, where I suppose the security concerns are every bit as great as in the United Kingdom, the system they have used, even in Guantanamo Bay, has been one in which open lawyers see all of the material and yet remain free to communicate with their clients". In its Green Paper (2011), however, the Government held that even though "a wide range of international partners face the same fundamental challenge of protecting sensitive information while ensuring that the courts have the tools available to deliver high standards of justice (...) the UK faces a unique and unprecedented set of circumstances. We face a high threat from terrorism (...). This threat demands a comprehensive and sophisticated response. The cornerstone of this response will always be police-led work to prosecute terrorists".

¹²⁴⁸ Richard P. Salgado, "Government Secrets, Fair trial, and the Classified Information procedures Act", (1988) 98 Y.L.J., p.427

¹²⁴⁹ Arjun Chandran, "The Classified Information Procedures Act in the Age of Terrorism: Remodelling CIPA in an Offense-Specific Manner", (2015) 64 *Duke. L.J.*, p.1412

¹²⁵⁰ *United States v. Abu Ali*, 528 F.3d 210, 245-46 (4th Cir. 2008)

¹²⁵¹ See *United States v Wilson*, 750 F2d, 9: the evidence shall not be "prejudicial, confusing or misleading".

¹²⁵² See *Roviaro v United States*, 353 U.S. 53 (1957): the information has to be helpful or essential to the defense.

¹²⁵³ The substitution of the classified material with an unclassified version may occur both during discovery and at trials. During the discovery process, the court may authorize the Government to "delete specified items of classified information from documents to be made available to the defendant through discovery (...), to substitute a summary of the information for such classified document, or to substitute a statement admitting relevant facts that the classified information would tend to prove" (18 U.S.C. app. 3 § 4). Any determination taken by court regarding what information and in what form should be handed over to the defense can be taken in *ex parte* hearings from which the defense is excluded. At trials, if the defendant wishes to disclose confidential information in his/her case, s/he is required to notify the court and the other party in writing. The written notice shall contain also a brief description of the classified information (18 U.S.C. app. 3 § 5). In response, the Government may then request the court to review the evidence in *in camera* hearings (in which case, the hearing will be closed to the public, but the

and the court will permit the substitution only if it grants “the defendant substantially the same ability to make his/her defense as would disclosure of the specific classified information”.¹²⁵⁴ In this way, the CIPA devised a way to provide the defendant with the basic information needed to mount an effective defense, while, at the same time, filtering out the confidential details.¹²⁵⁵

However, while CIPA grants an important standard of protection, it has also raised several practical problems. Under this mechanism, it is for the judge to determine what information should be disclosed. However, when the judge is faced by a large amount of potentially classified material, determining what is helpful or essential for the defense may be impossible or, at least, extremely laborious.¹²⁵⁶ In order to facilitate the production of classified discovery material, the courts applying the CIPA in terrorism cases have required that classified information is disclosed only to defense counsels who have obtained the necessary security clearance.¹²⁵⁷ Security-cleared counsels are tasked with making substantive arguments on the evidence produced, presenting motions and cross-examining witnesses on the behalf of the defendant. After they have been apprised of the closed material, the cleared counsels are prohibited, under threat of prosecution, from revealing the information to the defendant. Overall, even though the US procedure does not prescribe the appointment of special advocates, it seems to operate in a broadly similar, but not identical, way to UK special advocate system: the court appoints a pre-cleared counsel to review classified material on behalf of the defendant, but cannot divulge the confidential information to the defendant and his counsel.¹²⁵⁸

There is, however, a major distinction between the two models: the protective orders to which the CIPA-cleared counsels are subject do not prevent them from conferring with the defendant and from taking instructions from him/her. Unlike in the UK, there are no barriers which isolate, both legally

defense has the right to be heard). At this stage, the court shall determine whether the evidence is both relevant and admissible (18 U.S.C. app. 3 § 6 (a): the so-called ‘Section 6(a) hearing’). If the information is found to be both admissible and relevant, the Government “may move that, in lieu of the disclosure of such specific classified information, the court order (A) the substitution of a statement admitting relevant facts that the specific classified informant would tend to prove; or (B) the substitution for such classified information of a summary of the specific classified information”(18 U.S.C. app. 3 § 6 (c)).

¹²⁵⁴ 18 U.S.C. app. 3 § 6 (c); Even if the CIPA explicitly sets this standard only in its provisions disciplining substitutions at trial, courts have considered this standard applicable also to substitutions approved for discovery.

¹²⁵⁵ Serrin Turner and Stephen J. Schulhofer, “The Secrecy problem in Terrorism Trials”, (2005) Liberty & National Security Project, Brennan Center For Justice at NYU School of Law, available at: <https://www.brennancenter.org/sites/default/files/legacy/publications/20050000.TheSecrecyProblemInTerrorismTrials.pdf>, p.20

¹²⁵⁶ See Turner and Schulhofer, *supra* note 1255, p.26

¹²⁵⁷ The CIPA does not explicitly prescribe the so-called ‘counsel’s eyes-only’ solution. Nonetheless, it is widely accepted that courts have the power to structure the discovery phase. See among others, *United States v Moussaoui*, No 01 - cr - 00455, 2002 WL 1987964, at page 1 (ED Va 29 August 2002); *United States v Bin Laden*, No 98 -cr-01023, 2001 WL 66393 (*Bin Laden II*), at page 2 (SDNY 25 January 2001); *United States v Bin Laden*, 58 F Supp 2d 113, 116 – 17 (SDNY 1999)

¹²⁵⁸ See Forwood, *supra* note 1183, p.103

and practically, the closed counsel from the person they represent.¹²⁵⁹ The UK special advocates' response to the Government's Green Paper (2011) is significant on this count: they find "it striking that in the US, where the threat from terrorism is at least as great as that in the UK, and relevant material must be at least as sensitive, lawyers acting for terrorist suspects are afforded a substantially greater measure of trust and confidence than is given to SAs in existing CMPs".¹²⁶⁰

This is not to say that the systems operating in the US and in Canada are unhindered. However, these procedures prove that with appropriate guidance it should be possible to loosen the current bars on any communication between the special advocate and the person concerned whilst, at the same time ensuring confidentiality.¹²⁶¹ It has been argued that a more relaxed regime governing contact with the person affected will surely "place an enormous responsibility on the shoulders of Special Advocates not to disclose inadvertently matters".¹²⁶² However, it is also true that the skills acquired in years of work as barristers have adequately equipped the special advocates to take instructions and seek information while avoiding involuntary disclosure.¹²⁶³ Possible means to secure confidential information while relaxing bans on communications have already been proposed by special advocates themselves: "safeguards would include the presence of someone from the Special Advocates Support Unit taking a full record, possibly even tape-recording these meetings, and it probably would include certain topics which might be more capable of being subject of discussion than others, and there would be certain dangers which would make communication impossible. In other areas it might be possible. (...) it therefore depends upon experience, judgment and cooperation".¹²⁶⁴

Also at EU level, special advocates should be allowed to seek the court's permission to communicate with the affected person not only on matters of pure strategy and procedural administration, but also on the substance of the closed file, without notice given to the authority or institution concerned, unless the court judge deems it potentially liable to disclose sensitive material.¹²⁶⁵ When no concerns about any sensitive disclosure arise, the Court shall, therefore, be empowered to authorize the communication without referring the substance of the proposed communication to the opposing party. However, when the proposed communication raises a serious question of sensitive disclosure, it should be open for the special advocate to decide whether to pursue the application on notice to the institution or to abandon it.¹²⁶⁶ The need for judicial authorization therefore delegates to the court the decision regarding the scope

¹²⁵⁹ See Forwood, *supra* note 1183, p.108

¹²⁶⁰ See Response to Consultation from Special Advocates, *supra* note 880, p.12

¹²⁶¹ See Nineteenth report, *supra* note 603, para.205

¹²⁶² See Nineteenth report, *supra* note 603, para.203

¹²⁶³ See Forcese and Waldman, *supra* note 6, p.37

¹²⁶⁴ Evidence of Mr Blake to the Joint Committee on Human Rights, Nineteenth report, *supra* note 603; Q44

¹²⁶⁵ See Williams, *supra* note 563, p.29

¹²⁶⁶ See Response to Consultation from Special Advocates, *supra* note 880, p.15

of the special advocates' actions.¹²⁶⁷ Any responsibility for avoiding inadvertent disclosure will obviously be placed on the shoulders of the special advocates who will, therefore, be subject to secrecy obligations.¹²⁶⁸

However, a relaxation of the restrictions on communication would be meaningful only if the defendant is given enough information to enable him/her to give instructions to the special advocate about how the allegations brought against him/her might be rebutted.¹²⁶⁹ It is a well-rooted principle both in ECJ and ECtHR case-law that as much information as possible “about the allegations and evidence against each applicant” has to be disclosed “without compromising national security or the safety of others”.¹²⁷⁰ However, regarding the minimum grounds that must be disclosed to the applicant, both Courts seem to have adopted a case-by-case approach. As outlined above, depending on the response that the defendant intends to give to the allegations made, reference to precise meetings in stated locations at stated dates¹²⁷¹ as well as details about the time and the context of the conduct imputed to the person concerned and the role s/he played in that context¹²⁷² may all be taken into account when evaluating whether the grounds are adequately detailed.¹²⁷³ As a general rule however, it should be recalled that where “the open material consisted purely of general assertions” and the Court’s decision “was based solely or to a decisive degree on closed material”, the requirements of procedural fairness would not be satisfied.¹²⁷⁴

A possible device to relax these constraints on disclosure to the affected person could be the creation of a secrecy level. Not all secrecy claims are the same and they should be treated differently according to what they are meant to protect. On the one hand, secrets protecting security intelligence sources or investigative techniques are correctly withheld from the named persons and their counsels in the light of the severe impact that their release may cause to national and international security.¹²⁷⁵ On the other, it is less convincing if secrets such as those referring to diplomatic and international relations are treated in the same manner.¹²⁷⁶ However important, such cases do not deal with fundamental national security concerns and should be protected by means other than non-disclosure to the named person, such as “a publication ban and/or a non-disclosure undertaking from those made privy to the material”.¹²⁷⁷ In this regard, another important principle established by the Joint Committee on Human Rights in its nineteenth report on the UK system of special advocates could be transferred to EU level. The Joint Committee held that there should be

¹²⁶⁷ Kent Roach, “Secret Evidence and its Alternatives”, (2012) *SSRN Electronic Journal*, available at: https://www.researchgate.net/publication/228162319_Secret_Evidence_and_its_Alternatives, p.7

¹²⁶⁸ See Forcese and Waldman, *supra* note 6, p.vii

¹²⁶⁹ A at para.220

¹²⁷⁰ A at para.218

¹²⁷¹ A at para.220

¹²⁷² *Kadi II* at paras.141-150

¹²⁷³ See de Boer, *supra* note 81, p. 1250

¹²⁷⁴ A at para.220

¹²⁷⁵ See Forcese and Waldman, *supra* note 6, p.48

¹²⁷⁶ See Forcese and Waldman, *supra* note 6, p.48

¹²⁷⁷ See Forcese and Waldman, *supra* note 6, p.48

“a clear statutory obligation on the Secretary of State always to provide a statement of the gist of the closed material” as the only means to enable the person concerned to appreciate the real nature of the allegations against him/her and to give effective instructions on how to rebut them.¹²⁷⁸

A more comprehensive disclosure should also be granted to the special advocates themselves as a way to foster their ability to test the veracity of the closed information¹²⁷⁹ by means of cross-examination and independent investigation.¹²⁸⁰ “A blindfolded special advocate can do little or nothing to advance the interests of the named person”.¹²⁸¹ Moreover, in complying with this disclosure obligation, the authority or institution concerned shall act in utmost good faith by providing information both favorable and unfavorable to their own case. Full disclosure should also be performed on an ongoing basis as new information comes at their disposal.¹²⁸² Such an obligation should be provided by the law and sanctions should be available in cases of lack of disclosure as well as in cases of late disclosure.¹²⁸³ Once again, the successful track record in Canada on this account is instructive. Under the Canadian SIRC procedure, the SIRC counsel can benefit from access to the entire file held by the Canadian Security Intelligence Service. This will inevitably alleviate the serious concerns that the security services, either intentionally or involuntarily, may fail to disclose all the relevant, and sometimes even exculpatory, information to the only person tasked with representing the named person’s interests.¹²⁸⁴ Indeed, even when acting in good faith, their different professional background may give the members of the security service a vision of what is relevant to the defendant’s case which does not correspond with that of a legal advocate. In this way, full access to security services information would avoid any risk of selective disclosure.¹²⁸⁵

Moreover, the provisions prohibiting special advocates from acting in subsequent proceedings should be relaxed, even if they have already seen related sensitive evidence: “there is no reason why security-cleared special advocates should not be trusted any less in subsequent cases when they have managed to keep confidential material to themselves in a situation where there is more pressure on them to divulge”.¹²⁸⁶ A relaxation of this rule will, in fact, enable special advocates to build up solid knowledge and expertise in the best means to protect the interests of the excluded parties.¹²⁸⁷ Moreover, the creation of a coherent ethical norm for the special advocate role may be a way to solve the ethical issues raised by their unorthodox position towards the defendant compared to the traditional lawyer–client relationship.¹²⁸⁸ Only a specific professional code can address the ethical issues raised by special

¹²⁷⁸ See Nineteenth report, *supra* note 603, para.199

¹²⁷⁹ See Forcese and Waldman, *supra* note 6, p.ii

¹²⁸⁰ See Forcese and Waldman, *supra* note 6, p.vi

¹²⁸¹ See Forcese and Waldman, *supra* note 6, p.62

¹²⁸² See Forcese and Waldman, *supra* note 6, p.vi

¹²⁸³ See Forcese and Waldman, *supra* note 6, p.47

¹²⁸⁴ See Forcese and Waldman, *supra* note 6, p.viii

¹²⁸⁵ See Forcese and Waldman, *supra* note 6, p.62

¹²⁸⁶ See Williams, *supra* note 563, p.29

¹²⁸⁷ See Williams, *supra* note 563, p.29

¹²⁸⁸ See Boon and Nash, *supra* note 840, p.123

advocacy.¹²⁸⁹ Also concerns arising from differences in legal professions standards across the European may be overcome with adequate training and education.¹²⁹⁰

It is probably also worth reaffirming that special advocates shall be of advanced standing in their profession and appointed to a roster of special advocates by a body not associated to the authority or institution concerned. The roster should be public and the pool from which special advocates are chosen should be widened in order to grant the person concerned a real choice. Moreover, in order to allow special advocates to perform their functions to the highest standards, they shall be well-resourced and supported by an administrative structure.¹²⁹¹

The impasse concerning the lack of expert assistance in handling closed material, which severely hampers special advocates' ability to perform their role effectively, can also be overcome. The British Government's alleged inability to identify members of the intelligence service who could assist the special advocates in managing national security-related cases¹²⁹² seems to be flawed. It is true that members of the Security and Intelligence Agencies owe duties of loyalty to the Agencies for whom they work and that they are bound to a statutory duty to act to protect national security. However, it is also true that, as any other public official, they cannot act contrary to the rule of law.¹²⁹³ Once again, applying at EU level a principle affirmed within the UK framework, it can be argued that "there should be no inconsistency between working for the security service and working to protect fundamental rights (...), including the right to a fair trial".¹²⁹⁴ Logistical support to special advocates from members of intelligence services will certainly boost their capability to challenge closed material more rigorously, thus lifting another grave constraint on what they can in practical terms do for the affected person whose interests they represent.¹²⁹⁵

As a further guarantee and in order to counterbalance the fact that secret evidence may originate from flawed sources or be the result of the authorities' tendency to over-classify information, any doubt or ambiguity arising from the adduced evidence during closed material procedures should be resolved in favor of the party who did not have chance to express his/her view on it to the fullest possible extent.¹²⁹⁶ The basic burden of proof and standard of review which currently applies to civil and administrative proceedings should also be raised once it becomes clear that proceedings imply possible heavy constraints on life, liberty or the safety of the person:¹²⁹⁷ "it is one thing to deprive a person of full information where fingerprinting is at stake, and quite another to deny him or her information where consequences are removal from the country or

¹²⁸⁹ See Boon and Nash, *supra* note 840, p.124

¹²⁹⁰ See Williams, *supra* note 563, p.29

¹²⁹¹ See Forcese and Waldman, *supra* note 6, p.65

¹²⁹² See Government Response to the Constitutional Affairs Select Committee's Report, *supra* note 622, p.10

¹²⁹³ See JUSTICE, *supra* note 69, p.234

¹²⁹⁴ See JUSTICE, *supra* note 69, p.234

¹²⁹⁵ See JUSTICE, *supra* note 69, p.234

¹²⁹⁶ Sharpston Opinion, para.232

¹²⁹⁷ See Forcese and Waldman, *supra* note 6, p.iii

indefinite detention”.¹²⁹⁸ Deportation and prolonged detention without trial may in fact be possible consequences of ‘nominally’ non-criminal procedures.¹²⁹⁹ This means that when serious consequences may result from the proceedings, the threat to international or national security posed by the individual concerned should be proven “to at least a balance of probabilities standard”, rather than by merely referring to reasonable suspicions.¹³⁰⁰ The burden of proof should so be proportionate to the gravity of the prospective consequences on the person concerned.¹³⁰¹ A similar escalation in the standard of proof may also compel the institutions to make more information available, at least to the special advocates and to the courts, in order to provide further grounds in support of their case.¹³⁰²

The provision made available under Article 257 TFEU may also be deployed. EU courts certainly lack any experience in scrutinizing security intelligence information. Nonetheless, under the aforementioned provision, “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialized courts attached to the General Court to hear and determine at first instance certain classes of action or proceedings brought in specific areas”.¹³⁰³ Specialized courts may therefore be set up to determine cases in closed material procedures. This will probably circumvent some of the problems when European judges do not have the necessary knowledge of and expertise in security service practices. Such a solution, in fact, would allow some specific judges to gain greater understanding of security matters, enabling them to carry out a more effective scrutiny of the intelligence evidence presented before them.¹³⁰⁴

Overall, extensive debate and broad consultations will also need to take place at EU level before any procedural reform can be implemented.¹³⁰⁵ It is essential that the public is consulted in a reform process such as that outlined above, which could alter the core architecture of the EU justice system. In fact, the assumption that similar procedural changes affect only those who are targeted by sanctions or by expulsion decisions is misplaced. Anyone who might want to oppose Executive abuse in cases where sensitive security-related information is involved is affected.¹³⁰⁶

¹²⁹⁸ *Charkaoui* at para.60

¹²⁹⁹ See Forcese and Waldman, *supra* note 6, p.vi

¹³⁰⁰ See Forcese and Waldman, *supra* note 6, p.ix

¹³⁰¹ See Forcese and Waldman, *supra* note 6, p.66

¹³⁰² See Forcese and Waldman, *supra* note 6, p.47

¹³⁰³ Article 257 TFEU

¹³⁰⁴ See Williams, *supra* note 563, p.29

¹³⁰⁵ See Williams, *supra* note 563, p.27

¹³⁰⁶ See Sullivan, *supra* note 5

CONCLUSION

*“He who decides something without hearing the other side is not just, even if he makes a just decision”.*¹³⁰⁷

In the wake of an increasingly transnational terrorism phenomenon, the balancing of security, secrecy and fundamental procedural rights represents an increasing challenge for both the Executive and the judicial authorities. In a context where the counterterrorism policy pursued both at a national, supranational and international level is mainly based on the work of intelligence services, the use of secret evidence in courts may be unavoidable in order to respond to legitimate security concerns which emerge with the disclosure of information in open courts. However, while it is a well-rooted principle in the European constitutional framework that in non-criminal trials, overriding concerns relating to the security of the European Union or of its Member States or the conduct of their international relations, may justify restrictions on full disclosure, the increasing reliance on intelligence information as the basis for restrictive measures has inevitably raised serious constitutional concerns when secrecy claims are invoked to obstruct investigations and judicial accountability on Government action.¹³⁰⁸

In a context where fundamental constitutional rights are subject to a systematic threat of illegitimate compressions in the name of security, the EU courts have opted for a relatively strong standard of protection for the rights of the defense and of judicial redress, enshrined in the EU Charter and in the European Convention of Human Rights.¹³⁰⁹ On the basis of emergent EU security jurisprudence, a fully developed procedural system can be devised at the supranational judicial level in order to remedy the issues of fairness, reliability and accountability raised by non – disclosure. In the words of the European Court of Justice, there are two conditions which should accompany any limitation on full and precise disclosure on the grounds for restrictive measures.

Firstly, the alleged need for secrecy must be proved by the claiming authority and then be subjected to a meaningful and independent judicial scrutiny by the Court which will thus require access to all the evidence and grounds underpinning the contested decision.¹³¹⁰ While the preclusion of communicating some grounds is not as such a violation of the European Convention on Human Rights and of the Charter of Fundamental Rights of the European Union, non--disclosure does not imply that confidential information is immune from judicial review. Therefore effective judicial scrutiny is essential in preventing possible abuses of secrecy perpetrated by the Executive branch: “in delimiting the legitimate parameters of national security claims and making sure they are not used as a cover-up for unlawful practices”, independent judicial oversight is “an absolute requirement to restrain the discretionary powers given

¹³⁰⁷ Seneca, *Medea* (I A.D.)

¹³⁰⁸ See Policy Department, *supra* note 8, p.58

¹³⁰⁹ See Policy Department, *supra* note 8, p.58

¹³¹⁰ ZZ at paras.58 – 62

to the Executive and to the alliance of intelligence services at the European/transnational level".¹³¹¹ Given the increasingly transnational nature of terrorism,¹³¹² the supranational courts are well-positioned to promote and consolidate an effective implementation of fundamental supranational principles.¹³¹³ Supranational courts should thus refrain from taking the same deferential approach too often adopted by domestic courts in relation to state secret claims and uphold the rule of law principles with increasing vigilance. The trust-based relationship between the judiciary on the one hand and the Executives and the intelligence communities on the other is in fact clearly incompatible with the necessary independence of the judiciary as one of the strongest safeguards of the liberties of a democratic society:¹³¹⁴ "the ability to effectively vindicate one's rights through the justice system is a vital element in a modern democracy. It ensures that justice, in its broadest sense, can be done, and it provides an essential check on executive action".¹³¹⁵

If then the court is sufficiently satisfied that State security reasons stand in the way of a full and precise disclosure of those grounds, the competent court, and this is the second condition, must dispose of techniques and procedures which strike the appropriate balance between, the Executive's legitimate interest in preserving the confidentiality of the nature and sources of information relied on for the contested decision, and the requirements of procedural rights.¹³¹⁶ To that end, "in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defense", in any event, the person concerned must be provided at least with the essence of the reasons underpinning the restrictive decision.¹³¹⁷ Beyond the gist requirement however, no further guidance is given by the Court on what sort of accommodating techniques should be adopted in order to reconcile the demands of procedural rights with the need to safeguard public security.¹³¹⁸

Therefore a new procedural system should be urgently devised, both at the levels of the General Court and the European Court of Justice, in order to protect the person concerned from unlawful non-disclosure and at the same time reassure EU and national authorities to produce intelligence material to the European Courts. In a context where the application of only the PII/Article 67 procedure leaves the court ill-equipped to deal with the hard choice cases raised by the use of secret evidence and where the new procedural rules of the General Court do not provide a sufficient measure of procedural fairness, a UK-

¹³¹¹ See Policy Department, *supra* note 8, pp.70-71

¹³¹² See Garlicki, *supra* note 34, p.323: "The general process of globalization led not only to globalization of terrorist activity (we are thus far away from the 'old good times' when terrorism remained mostly confined to particular countries), but also to the need for a global response. Consequentially, the 'war on terror' became, to a considerable extent, detached from the national constitutional context".

¹³¹³ See Policy Department, *supra* note 8, p. 9

¹³¹⁴ See Green Paper, *supra* note 38, p.1

¹³¹⁵ See Green Paper, *supra* note 38, p.1

¹³¹⁶ ZZ at para.64

¹³¹⁷ Ibid. para.65

¹³¹⁸ See de Boer, *supra* note 81, p.1250

style closed material procedure seems to be the best way forward to protect the confidentiality of the information at stake, whilst allowing special advocates to act on behalf of the defendant.¹³¹⁹

As a general principle however, a hearing without full knowledge will never entirely meet the principles of fundamental justice, especially when the proceedings may lead to heavy interferences with life and liberty. Departure from conventional full fair hearing requirements in closed proceedings should be limited to those circumscribed areas where traditionally there has been a genuine need for resorting to intelligence material¹³²⁰ and only after having made sure that the sensitive information at stake cannot be acquired by means of non-secret methods.¹³²¹ Moreover, even in those limited areas where closed material procedures are applicable, said procedures should be used strictly as a measure of last resort, after having accurately ascertained that less rights-impairing alternatives, such as the PII/Article 67 process, cannot be deployed without making the case untriable against the interests of justice.¹³²²

However, in the light of the several shortcomings of the current UK system, the introduction of the special advocate system in Luxembourg would require fundamental changes as well as substantial adaptations of the procedure to the EU framework. Lifting constraints on communication between the person concerned and the special advocate after the latter has been served with the closed files¹³²³ and providing the defendant with enough information to enable him/her to give instructions to the special advocates about how the allegations adduced against him/her might be rebutted,¹³²⁴ represent the two major changes capable of increasing the overall fairness of the UK-style closed material procedure. Indeed on the one hand foreign experiences prove how, with appropriate guidance, it should be possible to loosen the current bars on communication between the special advocate and the person concerned whilst securing material regarded as confidential by the Executive.¹³²⁵ On the other hand, the insistence of both the European Court of Justice and the European Court of Human Rights on the necessity to provide the person concerned with at least the essence of the grounds against him/her, shows how this knowledge represents a crucial “aspect of the minimum adversary nature of the proceedings”¹³²⁶ which should always go hand-in-hand with complete and independent judicial oversight.

Although it is impossible to dispel all doubts of unfairness through the implementation of a UK-style special advocate mechanism, the adoption of this

¹³¹⁹ See Williams, *supra* note 563, p.24

¹³²⁰ See Williams, *supra* note 563, p.28

¹³²¹ See Policy Department, *supra* note 8, p.71

¹³²² See Williams, *supra* note 563, p.28

¹³²³ See Williams, *supra* note 563, p.28

¹³²⁴ A at para.220: “The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate”.

¹³²⁵ See Nineteenth report, *supra* note 603, para.205

¹³²⁶ See de Boer, *supra* note 81, p.1261

system may go some way in preserving the tradition of open and natural justice on which any democracy is built, by protecting the excluded parties from significant injustice.¹³²⁷ This however should not obscure the fact that this system is a mere attempt at accommodating national security requirements within a framework of procedural fairness and as such, should be confined to those exceptional cases where there are genuine and compelling national security concerns.¹³²⁸

Overall, what emerges from European jurisprudence is that while States have a positive obligation to protect the life and liberty of the people under their jurisdiction, there are some fundamental “human rights standards which must be secured to everyone”. “Everyone means everyone”. “States are not allowed to combat terrorism at all costs” but they should do all what can reasonably be expected from them to protect the lives of their citizens without however resorting to methods capable of undermining the same values they strive to protect.¹³²⁹ “one does not defend a society and its principle by undermining or dismantling them”.¹³³⁰ In this context, the supranational courts have proven their awareness of the “immense difficulties faced by States in modern times in protecting their communities from terrorist violence”,¹³³¹ recognizing that restrictions on a fully adversarial procedure can be admitted. On the other hand, they have also countered attempts of several States to lower their standards of

¹³²⁷ See Evidence of Mr Nicol to the Joint Committee on Human Rights, Nineteenth report *supra* note 603, Q 38: “I would add something on the role of Special Advocates. I see it as mitigating the unfairness which is inherent in a system where the appellant, one party to the proceedings, does not know all the material that they are supposed to be meeting or answering. That is inherent. It is irreducible in the sense that, as long as the appellant does not know it, there is always going to be the fertile possibility that explanations or responses that could be given are not, because that material has not been disclosed to the only person who could provide them. The system of Special Advocates can never overcome that irreducible element of unfairness but, having accepted that, I think that the functions that we try to perform can at least mitigate it and *is better than not having a system where there is a partisan representative*. We are not like friends of the court, *amici curiae*; we are partisan. We partisan on the part of the person whose voice is otherwise not going to be heard in the proceedings and in relation to material which is otherwise going to be put before the Commission with nobody saying anything contrary to the Government’s view”. *Emphasis added.*; See also *MH and others v Secretary of State for the Home Department* [2008] EWHC 2525 (Admin) at para.36: Despite all the limitations on the ability of [special advocates] to achieve substantive justice, the experience of those (...) who have seen the [special advocate] system in action demonstrates that that it provides a benefit certainly favor in the field of submissions about disclosure. What is disclosed after [a special advocate’s] intervention is almost always considerably more than the executive proposed to give before it. In nearly ten years experience as a special advocate, I cannot recall an occasion when absolutely nothing was added to the [defendant’s] state of knowledge after the disclosure process was complete. I am aware that that experience is not unique”.

¹³²⁸ See Ip, *supra* note 247, p.741

¹³²⁹ ECtHR *Saadi v Italy*, Appl. N. 37201/06, Judgment of 28 February 2008, concurring opinion of Judge Myjer, joined by Judge Zagrebelsky: “Indeed, the Convention (and protocols thereto) contain legal human rights standards which must be secured to everyone within the jurisdiction of the High Contracting parties (Article 1). Everyone means everyone: not just terrorists and the like. The States also have a positive obligation to protect the life of their citizens. They should also have a positive obligation to protect the life of their citizens. They should so all that could be reasonably expected from them to avoid a real and immediate risk to life

¹³³⁰ Mike Dodd, “Secret trials are wrong”, (2014) 25(3) B.J.R., p.9

¹³³¹ *Chahal* at para.79

human rights protection¹³³² by laying out an irreducible minimum which shall always be provided to individuals concerned, however threatening their conduct might be.

When the use of secret evidence seems inevitable, a combination of complete and independent judicial review, gist requirement and assistance of special advocates may represent an effective procedural path to ensure that anyone who is affected by restrictive measures adopted in the name of national or international security, is granted sufficient protection against arbitrariness.

¹³³² Barbara Concolino, “Divieto di tortura e sicurezza nazionale: il no della Corte europea dei diritti dell’uomo al bilanciamento nei casi di espulsione di presunti terroristi”, (2008) 3 *Dir.pubbl.comp.eur.*, p.1109

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