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**NON-DISCLOSURE OF INFORMATION IN THE
PROSECUTION OF PREVENTIVE DETENTION REGIMES**

LLM RESEARCH PAPER

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Abstract

Preventive detention has been adopted as a measure of counter-terrorism law in many jurisdictions. It has been authorised under the Security Certificate regime in Canada and the Control Order regime in United Kingdoms. Since their adoption, the two regimes have become objects of much debate. The reason is that they both legalised the use of secret evidence and secret hearings in their prosecution. The issue arose whether the non-disclosure of such information in a judicial review to decide the reasonableness of a control order/a security certificate deprives terrorist suspects from a fair hearing.

This paper explores that question by analysing two landmark cases in the United Kingdom and Canada: AF (No 3) and Charkaoui I. The paper's thesis is that the findings of the courts in these two cases are reasonable. However, the alternative to full disclosure as adopted by both the United Kingdom and Canada – the Special Advocate model – is currently too limited. This paper subsequently offers solution for this: the judges should have a more active role in investigating the relevant facts of the cases.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,400 words.

Subjects and Topics

Preventive detention regimes – Control Order – Security Certificate Regime — prosecuting terrorist suspects –Non-disclosure of information

I Introduction

Preventive detention is one of the measures adopted to deal with the threats of terrorism. Nations such as the United Kingdom and Canada have been relying on it as a legal means to prevent a terrorism attack. The two countries have enacted legal regimes for the detention of terrorist suspects – the Control Order regime in United Kingdom and the Security Certificate regime in Canada. Many essential elements of the two preventive detention regimes are strikingly similar, one of which is the type of evidence used in their prosecutions¹. Both the Control Order and Security Certificate Regime legalised secret hearings (trials with only the participation of one party – the State) and secret evidence² in their judicial review process.

Such prosecution has provoked much debate for it impairs the nature of an adversarial system. In an inquisitorial process, the judges have the responsibility to investigating the evidence. In contrast, in an adversarial system like in the United Kingdom and Canada, the responsibility for investigating, selecting and presenting the evidence lies with the two parties involving in the case. Trials in this system are based on the oral evidence presented by the two parties before an impartial judge to determine the truth of the cases. Therefore, it is essential for the suspect to have full access to the evidence and to know all the allegations against him/her. Full access to all the evidence presented in the case is a safeguard of judicial fairness in an adversarial system.

Since the adoption of both the Control Order and the Security Certificate regime, the main legal issue is whether their prosecutions deprive the terrorist suspects³ from judicial fairness⁴. This paper seeks to answer that question. To do so, the paper selects and examines two landmark cases in Canada and the United

1 For the purpose of this paper, the two terms “judicial review process” and “prosecution” will be interchangeable throughout the paper.

2 For the purpose of this paper, “secret evidence” will be interchangeable with “non-disclosure of information” and “closed materials”.

3 For the purpose of this paper, the terms “terrorist suspects”, “affected persons” and “named persons” will be interchangeable throughout the paper.

4 The terms “judicial fairness”, “fair trials” and “fair hearings” will be used interchangeable throughout the paper.

Kingdom regarding non-disclosure of information in the prosecutions under these two preventive detention regimes: *AF (No 3)*⁵ and *Charkaoui I*⁶.

This paper first examines the criticism on the prosecutions of Control Order and Security Certificate regime before the two cases – *AF (No 3)* and *Charkaoui I*. Part II of the paper then examines these criticism in light of the judgments in *AF (No 3)* and *Charkaoui I*.

The paper subsequently argues that these two judgments are reasonable. However, it acknowledges that the Special Advocate model – the alternative to full disclosure in the prosecution of preventive detention regime adopted by both the United Kingdoms and Canada – is too limited. The paper finally expresses the opinion that a more active role of judges can be a solution. Particularly, the judges in a control order/security certificate case should be more active in investigating the relevant facts of the case to achieve a better balance between individual protection and national security.

II The Criticism on the Prosecution of Control Order and Security Certificate regime before the case AF (No 3) and Chakaoui I

In the United Kingdom, the Control Order regime was a preventative measure authorised under Chapter 2 of the Prevention of Terrorism Act 2005 (PTA)⁷. The regime was replaced by the introduction of the Terrorism Prevention and Investigation Measures regime (TPIM) on 15 December 2011⁸. The Control Order regime was enacted to protect the general public from the threats of terrorism by imposing restrictions on those who were suspected of involvement in terrorism activities⁹. The control orders were applicable to both citizens and non-citizens¹⁰. Reasonable suspicions only were sufficient to the issuance of a control order¹¹.

5 *AF v Secretary of State for the Home Department* [2009] HRLR 26, [2009] UKHL 28 [hereinafter *AF(No 3)*].

6 *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] 1 SCR 350 [hereinafter *Charkaoui I*].

7 Prevention of Terrorism Act 2005 (UK), c 2.

8 Terrorism Prevention and Investigation Measures (UK).

9 above n 7.

10 Ibid.

11 Ibid.

In Canada, the Security Certificate regime was equivalent to the Control Order regime. The regime was authorised under section 77 of the Immigration and Refugee Protection Act 2001 (IRPA)¹². The Security Certificate is jointly issued by the two Ministers (Minister of Immigration and Minister of Public Safety and Emergency Preparedness) and only applies to non-citizens¹³. The purpose of detention under the Security Certificate Regime is to determine if the person is inadmissible to enter or remain in Canada on the grounds of national security¹⁴. The certificate will become a removal order when it is determined to be reasonable¹⁵.

Except for some minor differences, the Control Order regime in the United Kingdom and Security Certificate Regime in Canada worked in a very similar manner. One such similarity is their prosecutions which authorise the use of secret evidence and secret hearings¹⁶. Secret hearings deprived the named persons from participating in their trials; secret evidence excluded the named persons from full access to the evidence against them. Further, in Canada, before the case *Charkaoui I*, the trials to decide the reasonableness of a security certificate were carried out with only the participation of a “designated judge” and one party – the Government¹⁷.

Debates on the Control Order and Security Certificate regime evoked as the prosecutions under these regimes permit the Government to use secret evidence, and therefore the terrorist suspects were excluded from that trial. Secret evidence is a departure from the prosecutors’ duty to disclosure of evidence¹⁸. This duty is an essential requirement of an adversarial system such as United Kingdom and Canada¹⁹. Academic debates focus on whether permitting the use of secret evidence would limit procedural fairness²⁰.

12 Immigration and Refugee Protection Act SC 2001 c 27, s 77.

13 Ibid.

14 Ibid.

15 Immigration and Refugee Protection Act SC 2001 c 27, s 80.

16 The use of secret evidence and secret hearings is authorised under section 77 of IRPA and Chapter 2 of PTA.

17 *Charkaoui v Canada*, above n 6, at [4]-[10].

18 Stephen P Jones “The Prosecutor’s Constitutional Duty to Disclose Exculpatory Evidence” (1995) 25 University of Memphis Law Review 735 at 737.

19 Ibid.

20 David Jenkins “There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology” (2010) 42 Columbia Human Rights Law Review 279 at 280.

III *The Criticism Assessed in Light of AF (No 3) and Chakaoui I*

The right to a fair trial is fundamental to the rule of law and to democracy itself²¹. This right applies to both criminal and civil cases, and it is absolute and cannot be limited²². The two crucial components of a fair hearing are: the right of an individual to know the case against him/her, and the right of an individual to effectively challenge the evidence against him/her²³.

The Control Order and Security Certificate regime authorised using secret evidence and secret hearings (the hearings that exclude the terrorist suspects) in their prosecutions. Can such prosecution ever be fair? In the light of *AF (No 3)* and *Chakaoui I*, such prosecution can be fair if the terrorist suspects are provided certain requirements of individual protection.

AF v Secretary of State for the Home Department (No 3) was a UK's landmark case under the Control Order regime. Likewise, *Chakaoui I* was a landmark case under the Security Certificate regime in Canada. In both *AF (No 3)* and *Chakaoui I*, the main question discussed by the courts was whether terrorist suspects were deprived from the right to a fair hearing by a prosecution that authorised secret evidence and secret hearings.

A *AF v Secretary of State for the Home Department (No 3)*

I *The facts*

The case *AF (No 3)* was a joint appeal by three appellants: AF, AN and AE²⁴.

A control order was first made against AF on 24 May 2006, against AN on 4 July 2007 and against AE on 15 May 2006²⁵. Each control order was made pursuant to section 2 of PTA, and was issued on the ground of reasonable suspicion that the appellant was, or had been, involved in terrorism-related activities²⁶. These control orders involved significant restrictions on liberty of the appellants²⁷.

21 National Council for Civil Liberties "Article 6 Right to a fair hearing" Liberty – protecting civil liberties and promoting human rights < www.liberty-human-rights.org.uk >.

22 Ibid.

23 *Charkaoui v Canada*, above n 6, at [53]-[64].

24 *AF (No 3)*, above n 5, per Lord Phillips.

25 Ibid.

26 Ibid.

27 Ibid.

The judges, who decided the reasonableness of their control orders, relied upon secret evidence to make their decisions, and the nature of this evidence was not disclosed to the appellants²⁸. The appellants therefore contended that their rights to a fair hearing as guaranteed by Article 6 of the European Convention on Human Rights (ECHR) was violated²⁹.

2 *The House of Lords' findings on the prosecution of the Control Order regime*

The issue brought to the House of Lords was whether the Control Order's prosecution applied to the three appellants in this case satisfied the right to fair hearings under Article 6 of the European Convention on Human Rights (ECHR)³⁰. Article 6 – the right to fair hearings – reads as follows:

1. In the determination of his civil rights and obligations 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

3. Everyone charged with a criminal offence has the following minimum rights:
... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Answering the question at issue, the House of Lords has consistently ruled that in accordance to Article 6, the respondents in control order cases should be entitled to the right to disclosure of sufficient information about the allegations against them. Consequently, the person named under a control order can give effective instructions to their special advocates. If this requirement was satisfied, even though the details (or the sources) of the evidence forming the allegations

28 Ibid.

29 Ibid.

30 European Convention on Human Rights 213 UNTS 221, art 6 [hereinafter ECHR].

in the trials were not made available to the affected persons, these trials would be fair³¹:

... the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied 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 ...

...The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order.

B Charkaoui I

1 The facts

The case *Charkaoui I* was an appeal at the Supreme Court regarding the constitutionality of the Security Certificate Regime³². The case involved Mr. Charkaoui, a Moroccan refugee, who has been a permanent resident in Canada³³. A security certificate for Mr. Charkaoui was signed; he was arrested and detained in 2003³⁴. The evidence against Mr. Charkaoui included secret material³⁵. According to IRPA, a summary of the case against Mr. Charkaoui was sent to him³⁶. Nonetheless, this summary did not disclose to him the close material because of national security concerns³⁷. Mr. Charkaoui found this summary did not reasonably inform him of the circumstances giving rise to his security certificate. Consequently, he found his right to a fair trial, which was protected under section 7 of the Charter of Rights and Freedoms, was infringed³⁸.

31 *AF (No 3)*, above n 5, at [59]-[65].

32 *Charkaoui I*, above n 6, per McLachlin CJC.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

2 *The Supreme Court's findings on the prosecution of the Security Certificate regime*

The right to a fair hearing was acknowledged by the Supreme Court in their analysis as a basic right protected by the principles of fundamental justice³⁹:

The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process... This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of habeas corpus. It remains as fundamental to our modern conception of liberty as it was in the days of King John...

This basic principle has a number of facets. It comprises the right to a hearing. It requires that the hearing be before an independent and impartial magistrate. It demands a decision by the magistrate on the facts and the law. And it entails the right to know the case put against one, and the right to answer that case.

Section 7 of the Charter of Rights and Freedoms concerned with whether the limit on life, liberty or security of a person has been imposed in a way that respects the principles of fundamental justice. The section reads as follows⁴⁰:

Life, liberty and security of person

7. 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.

The Court acknowledged that “security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s 7 stage of the analysis”⁴¹. For section 7 to be satisfied, each of the following requirements must be substantively satisfied⁴². The first requirement was the right to a hearing (the hearing must be before an independent and impartial magistrate, a decision by the magistrate must base on the facts and the law)⁴³. The second requirement was

39 *Charkaoui I*, above n 6, at [28]-[29].

40 Canadian Charter of Rights and Freedoms, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

41 *Charkaoui I*, above n 6, at [23]

42 *Charkaoui I*, above n 6, at [29].

43 *Ibid.*

the right to know the case put against one, and the last requirement was the right to answer that case⁴⁴.

The Supreme Court reasoned that the first requirement – the right to a hearing was met:⁴⁵

The *IRPA* process includes a hearing. The process consists of two phases, one executive and one judicial. There is no hearing at the executive phase that results in issuance of the certificate. However, this is followed by a review before a judge, where the named person is afforded a hearing. Thus, the first requirement that of a hearing is met.

The Court then turned on to the other requirements and concluded that only the first requirement was satisfied⁴⁶:

I conclude that the *IRPA* scheme meets the first requirement of independence and impartiality, but fails to satisfy the second and third requirements, which are interrelated here...

... since the named person is not given a full picture of the case to meet, the judge cannot rely on the parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture... without knowledge of the information put against him or her, the named person may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence. The named person is, to be sure, permitted to make legal representations. But without disclosure and full participation throughout the process, he or she may not be in a position to put forward a full legal argument...

... In the *IRPA*, an attempt has been made to meet the requirements of fundamental justice essentially through one mechanism — the designated judge charged with reviewing the certificate of inadmissibility and the detention. To Parliament's credit, a sincere attempt has been made to give the designated judge the powers necessary to discharge the role in an independent manner, based on the facts and the law. Yet, the secrecy required by the scheme denies the named person the opportunity to know the case put against him or her, and hence to challenge the government's case.

The Supreme Court then concluded that the right to a fair trial, which was protected under section 7 of the Charter of Rights and Freedoms, was infringed.

44 Ibid.

45 *Charkaoui I*, above n 6, at [30].

46 *Charkaoui I*, above n 6, at [31].

They reasoned that the defendants were not fully aware of the case when they only received a summary containing very general information.

III An Evaluation of the Rulings in AF (No 3) and Chakaoui I

The principle of open justice is considered as fundamental and absolute in a modern democratic society⁴⁷:

Every party has a right to know the full case against him, and the right to test and challenge that case fully.

As discussed earlier, the prosecution of either the Control Order or the Security Certificate regime was criticised as a one-sided procedure that deprived the affected persons from the right to a fair hearing. This proclamation was confirmed by the judgments of the British House of Lords and the Canadian Supreme Court in the two cases – *AF (No 3)* and *Chakaoui I*. This part of the paper argues that these judgements are reasonable.

A The judgments in Chakaoui I and AF (No 3) endorsed the criminal justice approach

1 How criminal law principles applied in AF v Secretary of State

The House of Lords held that the ruling by the Grand Chamber of the European Court of Human Rights in the case *A v United Kingdom*⁴⁸ answered to the question at issue in *AF (No 3)*. The House of Lords found that the prosecution under the Anti-Terrorism, Crime and Security Act⁴⁹, which was discussed in *A v United Kingdom*, was similar to the prosecution of Control Order regime in the sense that they both legalised closed materials. The issue in *A v United Kingdom* was whether the hearings of the terrorist suspects, who were detained under the Anti-Terrorism, Crime and Security Act conformed with the standard of fairness set out in Article 5 of ECHR⁵⁰:

Article 5 – Right to liberty and security

⁴⁷ *Bank Mellat v HM Treasury* [2013] 3 WLR 179 at [3].

⁴⁸ *A v United Kingdom* (2009) EHRR 29.

⁴⁹ Anti-Terrorism, Crime and Security Act 2001 (UK).

⁵⁰ European Convention on Human Rights 213 UNTS 221, art 5.

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The Grand Chamber held that the procedural requirements of Article 5 were infringed when the affected persons were only disclosed general allegations and the decision to legalise the detention was based exclusively on closed material.

Lord Phillips, who delivered the leading judgment in *AF v Secretary of State*, applied the Grand Chamber's finding into his analysis. He reasoned that the control order might potentially impose upon an affected person's liberty, severe restrictions. Consequently, he held that sufficient information about the allegations against the affected persons must be disclosed to them, so they can provide effective instructions to their special advocates⁵¹.

2 *How criminal law principles applied in Charkaoui I*

The Supreme Court's reasoning in *Charkaoui I* reflects criminal justice approach. In the lower court decisions, which led to the appeal in *Charkaoui I*, the principles of criminal law relating to disclosure were not applied⁵². The lower courts reasoned that the nature of the prosecution under the Security Certificate regime was of administrative law⁵³. Therefore, it is not reasonable to apply the principles of criminal law relating to disclosure in the case of Mr. Charkaoui⁵⁴.

⁵¹ *AF (No 3)*, above n 5, at [59].

⁵² *Charkaoui II* [2008] 2 SCR 326 at [15].

⁵³ *Ibid.*

⁵⁴ *Ibid.*

However, the Supreme Court overturned these findings in *Charkaoui I*. At first glance, the Court referred to Professor Hamish Stewart's opinion that the of fundamental justice developed form criminal law context should be applied whenever one of the three basic human rights of a person – the life, liberty and security was at stake⁵⁵:

Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged.

The Supreme Court continued their analysis, considering many criminal statutes⁵⁶ and prior criminal cases⁵⁷. Finally, the Court ruled that the use of close materials in the Security Certificate regime, without satisfactory substitutes for knowing and challenging the case against an individual, infringed the human rights protected under section 7 of the Charter.

B The reasonableness of partially importing the standards of evidence in criminal law into anti-terrorism law

Even though anti-terrorism law falls into a different category, it closely resembles criminal law as “terrorism is a form of crime in all essential respects”⁵⁸. In fact, it is a common practice to use criminal law as a means to prevent and punish terrorism activities. Many jurisdictions had enacted statutes that reflect the application of criminal law principles in anti-terrorism context. An illustration is Part II of Canada Criminal Code⁵⁹.

More importantly, as mentioned by the Canadian Supreme Court in *Charkaoui I*, the application of the principles of fundamental justice, which were developed in criminal cases, should not be restricted only in the criminal law context⁶⁰.

⁵⁵ *Charkaoui I*, above n 6, at [18].

⁵⁶ Criminal Code 1985 RSC, c C-46, s83, s 487, s 503.

⁵⁷ *Application Under s 83 28 of the Criminal Code, Re* [2004] 2 SCR 248, [2005] 2 WWR 605.

⁵⁸ Gary LaFree, James Hendrickson “Build a Criminal Justice Policy for Terrorism Criminology & Public Policy” (October 2007) < www.onlinelibrary.wiley.com >.

⁵⁹ Criminal Code 1985 RSC c C-46.

⁶⁰ above n 55.

These principles should apply in any context where any of the three basic human rights – life, liberty and security – was at stake⁶¹.

However, the standards of evidence that is germane to criminal law cannot be totally imported into the context of Control Order and Security Certificate regime. The reason is the preventive detention regime is of administrative law nature. Further, there is and national security involved. In a criminal law context, the accused is entitled to full disclosure of all the evidence and participate in the trials against him/her. Nevertheless, the prosecution under the Control Order and Security Certificate regime is not of a criminal context. Accordingly, the requirements of evidence do not need be totally resemble the evidence requirements of evidence in criminal cases. In addition, for national security concerns, a portion or even all the evidence against the affected persons must not be disclosed. Thus, the standards of disclosure in a control order or security certificate case ought to be lower than the standards of disclosure in a criminal case. When analysing the cases – *AF (No 3)* and *Charkaoui I* – both the British House of Lords and the Canadian Supreme Court were aware of this factor. The British House of Lords only ordered disclosure of relevant information about the allegations against the terrorist suspects⁶². Similarly, the Canadian Supreme Court did not order full disclosure of evidence, but considered for alternatives in their analysis⁶³.

IV The Alternatives to Full Disclosure

A recognisably increasing number of legal guidelines concerning the protection of human rights in the counter-terrorism context have been issued. These guidelines imposed a duty on the States to take responsibility to protect individuals from the violations of human rights by counter-terrorism actions. For example,

61 Ibid.

62 above n 31.

63 *Charkaoui I*, above n 6, at [70]-[84].

Article I of the Council of Europe's Guidelines on Human Rights and the Fight against Terrorism states in its Preamble:⁶⁴

- [c] Recalling that a terrorist act can never be excused or justified by citing motives such as human rights and that the abuse of rights is never protected;
- [d] Recalling that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;
- [f] Reaffirming the imperative duty of States to protect their populations against possible terrorist acts;

These words clearly illustrate the notion that even in the counter-terrorism context, respect and protection of an individual's human rights should be taken into account. To balance national security and an individual's human rights in the prosecution of terrorist suspects, States have adopted several alternatives to give the terrorist suspects an effective court challenge. In order to give the persons named under a control order or a security certificate an effective court challenge, both the United Kingdom and Canada have adopted the Special Advocate model as an alternative for full disclosure. This part of the paper will examine the Special Advocate model in these countries to argue that this model has not yet reached a correct point of balance. Subsequently this paper will offer a solution to improve the ability of named persons to have an effective court challenge.

A An examination of the Special Advocates Model in UK and Canada

1 Background information

In Canada, the decision in *Charkaoui I* led to the adoption of the Special Advocate regime in section 85 of IRPA, amend 2007⁶⁵.

In the United Kingdom, the Special Advocate was adopted since 1997. It was authorised in the Special Immigration Appeals Commission Act⁶⁶ as a response

⁶⁴ Council of Europe *Human rights and the fight against terrorism* (Council of Europe Publishing, Strasbourg, 2005) at 7.

⁶⁵ Immigration and Refugee Protection Act SC 2001c 27 amendment 2007, s 85.

⁶⁶ Special Immigration Appeals Commission Act 1997 (UK).

to the decision in *Chahal v United Kingdom*⁶⁷. The special advocates were described as “litigation friend”, and they are introduced to ensure that the rights of the appellants are protected⁶⁸.

In the United Kingdom and Canada, special advocates are nominated to present the terrorist suspects in a control order or security certificate case; in a control order or security certificate case, the closed materials may make up a large portion of the government’s allegations. In general, special advocates are legal counsels who are security-clear and granted access to secret evidence to act on behalf of the named persons in a secret hearing⁶⁹. Also, they had to be independent from the named persons⁷⁰. This Special Advocate model is a legal mean to give the affected persons the ability to indirectly participate in the secret hearings and test the secret evidence against him/her. The model was introduced with the expectation to balance national security and the ability of a terrorist suspect to amount to an effective court challenge.

2 *Special Advocate - a limited model*

In brief, the Special Advocate model helps increase judicial fairness for the persons named under a control order or security certificate. However, this model is currently too limited.

In a broad sense, the Special Advocate model can improve the ability of the named persons to have an effective court challenge. The special advocates accomplish two vital functions: first it tests the cogency of the closed materials presented by the Government⁷¹, and secondly it examines the nature of the public interest at stake when the materials are disclosed⁷². The case *Charkoui 2009*⁷³ is an illustration of the success of the special advocates in performing these duties. After the decision in *Charkoui I*, the Parliament passed new statute, introducing the

67 *Chahal v United Kingdom* (1996) 23 EHRR 413.

68 House of Commons Constitutional Affairs Committee *The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates, Seventh Report of Session 2004-05* (March 2005).

69 Immigration and Refugee Protection Act 2001 SC c27 s83, s85, s78, s81, s82 ; Prevention of Terrorism Act 2005 c 2.

70 Immigration and Refugee Protection Act 2001 SC c27 s 85; Prevention of Terrorism Act 2005 c 2.

71 Daphne Barak Erez, Matthew C Waxman “Secret Evidence and the Due Process of Terrorist Detentions” (2009) 48 Columbia Journal of Transnational Law 3 at 25.

72 Ibid.

73 *Charkaoui, Re* [2010] 4 FCR 448, 2009 FC 1030, 2009 CF 1030.

special advocates into the Security Certificate regime⁷⁴. *Charkoui 2009* was the case in which the reasonableness of Mr. Charkaoui's security certificate was reviewed again at the Federal Court under a prosecution that was in accordance with the new statute; the judicial review was carried out with the participation of special advocates. In this case, the evidence which Ministers asserted could not be disclosed was sent to the judge and Mr. Charkaoui's special advocates. The advocates challenged the assumptions of the government regarding what material must be kept secret. After reviewing the arguments presented by both the and Mr. Charkaoui's special advocates, the court ordered disclosure of this evidence on basis that it would not be injurious to national security. The Minister therefore chose to withdraw that evidence as permitted under Immigration and Refugee Protection Act instead of disclosing it⁷⁵.

Nevertheless, since the introduction, there have been criticisms on this model. One of the main criticisms is the restriction on communication between special advocates and terrorist suspects after the secret evidence has been disclosed to the special advocates. Both Canada and the United Kingdom require the special advocates to gain approvals from the courts to communicate with the named persons after they access to the secret evidence⁷⁶. Furthermore, special advocates can represent a named person to participate in a secret hearing, but they are unable to share the close materials and get comments regarding the materials from that named person. This means that the special advocates and the named person cannot effectively work together and has been the subject of criticism in both the United Kingdom and Canada⁷⁷.

Another criticism on the special advocate regime is the ability of special advocates in testing the reasonableness of the secret evidence. The special advocates are not given the right to call witnesses or allowed to consult expert opinion regarding the close materials in order to keep national secrecy. These restraints potentially weaken the special advocate's ability to test the secret evidence presented by the Government.

⁷⁴ above n 65.

⁷⁵ Immigration and Refugee Protection Act 2001 SC c27 s 83.

⁷⁶ above n 71.

⁷⁷ Ibid.

B Increase individual protection in a control order/security certificate case

The lack of full disclosure of evidence in the context of the control order and security certificate regime leads to the impairment of two basic human rights: the right of an individual to participate in their trials and the right to challenge the evidence held against them. The Special Advocate model was a solution adopted in both the United Kingdom and Canada, aiming to give more protection for the effected persons and ensure the precision of the final decision. However, as discussed earlier, this model is limited. The question is how can we better protect individual rights without full disclosure? This paper argues that the collaboration of the special advocate model in conjunction with a more substantive role taken by judges can be a possible answer to this question. To be more precise, this paper suggests that judges should play more of an active role in investigating a case of suspected terrorism.

1 The problem of the limited role of adversarial judges and the unequal positions of parties in a control order/security certificate case

Under the Control Order and Security Certificate regimes using secret evidence in the prosecution of a terrorist suspect places the parties in two unequal positions. The Government is the only party who has access to the secret evidence. This inequality causes difficulties for terrorist suspects to have an effective court challenge. One of the main disadvantages for the suspect is that they are excluded from participating in the trials against them. The second disadvantage is that they are unable to test the secret evidence held against them.

Unlike the inquisitorial system, under an adversarial system (such as the United Kingdom and Canada), judges do not have the responsibility to collect evidence⁷⁸. The responsibility of preparing evidence for the trials rests with the parties⁷⁹. The adversarial system of Canada and the United Kingdom places the decision maker i.e. the judge in a neutral position⁸⁰. The judges in an adversarial system do not collect any evidence by themselves, but merely rely on the evidence submitted by

78 Luke M Froeb, Bruce H Kobayashi “Evidence production in adversarial vs. inquisitorial regimes” (2001)

70 Economics Letters 267 at 267.

79 Ibid.

80 Ibid.

the parties⁸¹. Consequently, legal representation from two parties involving in the case is a crucial element of this adversarial system⁸².

However, the prosecution under Control Order and Security Certificate regime departs from this requirement of an adversarial system. The current regimes permit the Government to present secret evidence in the trial against a terrorist suspect, and therefore, exclude the terrorist suspect from the right of disclosure to such evidence and the right to participate in his/her own trials. As only one party (the Government) has access to the secret evidence, the cross-examination between parties in an adversarial system is therefore unfairly impaired. This potentially affects the accuracy of the judges in making their final decision. Furthermore, the burden of proof in a trial of suspected terrorism is rather low. The proof is not upon concrete evidence but only to the standard of a reasonable suspicion on national security grounds. The current application of secret evidence under the adversarial system may therefore increase the risk of mistakenly sentencing innocent people. The problem of using close materials in an adversarial system has been noted by the Canadian Supreme court in the *Charkaoui I* that:

an adversarial system, which is the norm in Canada, relies on the parties — who are entitled to disclosure of the case to meet, and to full participation in open proceedings — to produce the relevant evidence...As Hugessen J. has noted, the adversarial system provides “the real warranty that the outcome of what we do is going to be fair and just” (p.384); without it, the judge may feel “a little bit like a fig leaf”...

2 *A more active role of judges as a solution*

Adversarial judges have limited role to play in investigating the relevant facts of the case. This issue is acknowledged as one of the obstacles in a terrorist trial, which uses secret evidence. The Supreme Court in *Charkaoui I* stated that⁸³:

... an adversarial system, which is the norm in Canada, relies on the parties – who are entitled to disclosure of the case to meet, and to full participation in open proceedings – to produce the relevant evidence. The designated judge under the *IRPA* does not possess the full and independent powers to gather evidence that exist in the inquisitorial process. At the same time, the named

81 Ibid.

82 Ibid.

83 *Charkaoui I*, above n 6, at [50]-[51].

person is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the designated judge, despite his or her best efforts to get all the relevant evidence, may be obliged – perhaps unknowingly – to make the required decision based on only part of the relevant evidence.

... Judges of the Federal Court have worked assiduously to overcome the difficulties inherent in the role the IRPA has assigned to them. To their credit, they have adopted a pseudo-inquisitorial role and sought to seriously test the protected documentation and information. But the role remains pseudo-inquisitorial. The judge is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy. At the same time, since the named person is not given a full picture of the case to meet, the judge cannot rely on the parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture.

One of the basic distinct differences between an adversarial system and inquisitorial system is the role of the judge in the investigation of the proceedings⁸⁴. Unlike their adversarial-system counterparts, the judges in an inquisitorial system are more active in obtaining evidence⁸⁵. An inquisitorial judge possesses the power to independently investigate all relevant facts of the case; they are not passive recipients of information presented in the hearings like the adversarial judges. Since the inquisitorial-system judges are active to secure justice by their own investigation, legal representation from the side of the defendant is not necessarily regarded as indispensable. This is one key advantage of the inquisitorial system over the adversarial system if using secret evidence is permissible in trials.

Applying this advantage of the inquisitorial system to the context of Control Order and Security Certificate regime, the terrorist suspects will be benefited with more judicial fairness's safeguards. Under the Control Order and Security Certificate regimes, terrorist suspects cannot effectively perform their role in the cross-examining process as the evidence is not disclosed to them. If the judge who reviews the reasonableness of a control order or a security certificate possesses the power to independently investigate all relevant facts of the case like a true inquisitorial judge, he/she can be the one who cross-examines that secret evidence.

⁸⁴ above n 78.

⁸⁵ NZ Law Commission “Adversarial System and Inquisitorial System: A Brief Overview of Key Features” Law Commission <www.lawcom.govt.nz>.

For instance, if the judge in a control order or a security certificate case finds the secret evidence contradicts with the evidence that he/she found in his/her own investigation, that judge can ask for more explanations in support of the secret evidence from the Government.

Additionally, if the judge in a control order or a security certificate case is entitled to independently investigate the case, that judge will not need to investigate all the facts and evidence that either proves the innocence or guilt of the terrorist suspects. That judge only needs to investigate and collect the evidence that proves the innocence of the terrorist suspects. The first reason is that the evidence proving the guilt of the terrorist suspects is already collected by the Government. Secondly, the Government will be the one who is better at investigating and collecting such evidence. Take *Charkaoui I* for example, the evidence against Mr. Charkaoui, which presented by the Government, included secret evidence. That secret evidence was acquired from Canadian Security Intelligence Service, the special agent in charge of investigating terrorism activities⁸⁶.

V Conclusion

Courts across many democratic jurisdictions are wrestling with balancing national security and individual protection in a trial of terrorist suspects. It has been acknowledged by many democracies that individual protection must be respected in the fight against terrorism⁸⁷. The Canadian Supreme Court has noted this acknowledgment in the very beginning of the *Chakaoui I*⁸⁸:

Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

⁸⁶ *Charkaoui I*, above n 6, at [71].

⁸⁷ Kent Roach “Must we trade Rights for Security? The Choice between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain” (2006) 27 *Cardozo Law Review* 2151 at 2152.

⁸⁸ *Chakaoui I*, above n 6, at [1].

Likewise, the British House of Lords acknowledged in *AF (No 3)* that⁸⁹:

The country must be entitled to defend itself against those who would destroy its freedoms. The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens. It is the duty of the court to do all that it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual.

Secret evidence used in the prosecution of preventive detention regimes in the United Kingdom and Canada is a controversial subject as it represents a departure from the fundamental requirement of an adversarial system. In an adversarial system such as that of the United Kingdom and Canada, the foundational principle of natural justice is that the defendants are entitled to disclosure of all the evidence before the court. Further, the defendants are entitled to challenge that evidence. Using secret evidence in a control order or security certificate trial poses a potential risk that human rights, primarily the right to a fair trial, are breached. The reason is that the terrorist suspects have limited opportunities to challenge the secret evidence upon which their control orders and security certificates are issued.

Both the British House of Lords and the Canadian Supreme Court are of the opinion that using secret evidence in the trials under Control Order and Security Certificate regime has a potential to deprive the terrorist suspects of a fair trial. This is the underlying reason for the judgments in *AF (No 3)* and *Chakaoui I*. The British House of Lords in *AF (No 3)* held that the respondents in control order cases should be entitled to the right of disclosure of relevant information about the allegations against them to enable an effective court challenge. Similarly, the Canadian Supreme Court held in *Chakaoui I* that the summary given to Mr. Charkaoui – a summary of very general information on the secret evidence – did not enable him a fair trial.

The two judgments did not put an end to the use of secret evidence in the prosecution of Control Order and Security Certificate regime. However, these judgments brought a huge change in the prosecution under the two preventive detention regimes. They represented the attempt of the authorities to strike a better

89 *AF (No 3)*, above n 5, at [76].

balance, between national security and individual protection, in a trial of terrorist suspects.

Both Canada and the United Kingdom have been relying on the Special Advocate model to provide the terrorist suspects a more effective court challenge and to limit the risk of incorrect sentencing innocent people. Nevertheless, this model have been criticised by academics as it has many limitations. Firstly, special advocates have limited ability to communicate with the terrorist suspects. Further, they have a limited role to play in testing the secret evidence. This paper has suggested a more active role of judges, particularly a more active role in investigation, as a solution to enable more individual protection for the terrorist suspects in a control order and security certificate case.

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