

# CLOSED MATERIAL PROCEDURES IN CIVIL TRIALS

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This paper considers the adoption of closed material procedures in civil trials in England. It does so in the of the adversarial system, European Convention and common law fair trial, and the procedure that currently exists to deal with situations that the government would like closed material procedures to deal with – public interest immunity.

## **Introduction**

Cases in which closed material procedures (CMPs) are employed proceed on parallel open and closed tracks. The open track proceeds conventionally in all respects. Both parties receive equal disclosure, are entitled to appear at each of the hearings – which are held in open court – and are entitled to know the reasons for courts' various decisions. The closed track, on the other hand, proceeds entirely in the absence of one of the parties. The excluded party receives no disclosure, cannot appear at any of the hearings – which are held in closed court – and is not entitled to know the reasons for the court's decisions. Instead, that party's interests are represented by a special advocate, with whom it is allowed limited contact. The reason for this is that the closed track involves material relating to national security that the government does not want to disclose to the excluded party or to the public at large.

Parliament has so far authorised the use of CMPs in several contexts<sup>1</sup>, but has not yet done so in relation to ordinary civil trials. Nonetheless, the government recently argued that courts have jurisdiction at common law to employ CMPs in civil trials in appropriate cases. Both the Court of Appeal<sup>2</sup>

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<sup>1</sup> For example, CMPs are, or have been, available in certain immigration, detention, anti-terrorism, and employment contexts.

<sup>2</sup> *Al Rawi & Ors v The Security Service & Ors* [2010] EWCA Civ 482

and the Supreme Court<sup>3</sup> disagreed. The government has decided that legislating to allow CMPs to be employed in civil trials is the appropriate course of action. Following its defeat the government introduced the Justice and Security Bill, which – when it is eventually passed – will allow civil trial courts to adopt CMPs in certain circumstances. This essay identifies and briefly discusses some of the issues surrounding the adoption of CMPs in civil trials in England.

### **The adversarial system**

Civil trials in England are strictly adversarial affairs. In an adversarial system trials are contests between the parties in which judges play a limited role.<sup>4</sup> In order for judges properly and fairly to decide cases, they must be presented with evidence and that evidence must be scrutinised, tested, and challenged, so they can assess its worth. As Lord Kerr observed in *Al-Rawi*, “[to] be truly valuable, evidence must be capable of withstanding challenge...Evidence which has been insulated from challenge may positively mislead.”<sup>5</sup> Because of the limited role judges play in an adversarial system, the best way to ensure that the relevant evidence is presented and properly tested at trial is to provide both parties with all potentially relevant material well before trial, so they can identify the relevant evidence and the relative merits of their cases and prepare accordingly.

### **Fair trials and CMPs at common law**

In the light of the above, as well as other considerations stemming from basic human decency and dignity, it is unsurprising that a party’s right to know and effectively test the case against it has been described as the irreducible core of the right to a fair trial<sup>6</sup> and “the best way of producing a fair trial”<sup>7</sup> in an adversarial system. CMPs cut into this ‘irreducible core’ by excluding one of

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<sup>3</sup> *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34

<sup>4</sup> Professor Adrian Zuckerman describes the process of adjudication as “a debate or contest conducted by the parties before an impartial and detached judge, whose responsibility is limited to deciding the case on the issues raised by the parties and according to the evidence presented by them.” Adrian Zuckerman *Zuckerman on Civil Procedure: Principles of Practice* (2<sup>nd</sup> Edition, Sweet & Maxwell 2006, at 402-403)

<sup>5</sup> *Al Rawi*, above note 3, per Lord Kerr at [93]

<sup>6</sup> *Home Office v Tariq* [2011] UKSC 35, per Lord Kerr at [119]

<sup>7</sup> *Secretary of State for the Home Department v AF* [2009] UKHL 28, per Lord Phillips at [64]

the parties from part of the proceedings. Although special advocates represent the interests of excluded parties in the closed proceedings, the special advocate system is riddled with “inevitable [and] inherent frailties”<sup>8</sup> and is a “distinctly second best attempt to secure a just outcome to proceedings.”<sup>9</sup> Accordingly, both the Court of Appeal and the Supreme Court held that CMPs are incompatible with the right to a fair trial at common law. Lord Dyson accused them of “[depriving] litigants of their fundamental common law rights”<sup>10</sup>, while Lord Kerr likened their adoption to the “deliberate forfeiture of a fundamental right which...has been established for more than three centuries.”<sup>11</sup>

### **Fair trials and CMPs under the European Convention**

The law regarding fair trial rights under the European Convention is similar to but slightly less stringent than the common law. This is significant because, if parliament legislates to allow CMPs in civil trials, their compatibility with the right to a fair trial will depend on whether they are compatible with that right under the European Convention, not at common law.

Unlike at common law, a party’s right under the European Convention to know the case against it is not absolute. Rather, according to the Supreme Court’s interpretation of the relevant European Court of Human Rights decisions, the right may be derogated from, to varying extents, depending on what is necessary and proportionate in the circumstances.<sup>12</sup> For example, in the context of hearings that relate to or may result in the deprivation of liberty, CMPs are permitted provided they are strictly necessary and do not come at the expense of the excluded party’s ability effectively to challenge the case against it.<sup>13</sup> This requires that the excluded party be given sufficient information about the case against it to enable it to give effective instructions

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<sup>8</sup> *Al Rawi*, above note 3, per Lord Kerr at [94]

<sup>9</sup> *Ibid*

<sup>10</sup> *Al Rawi*, above note 3, per Lord Dyson at [38]

<sup>11</sup> *Ibid*, per Lord Kerr at [92]

<sup>12</sup> See *Tariq*, above note 6, per Lord Kerr at [111]-[119] and Lord Dyson [139]-[147]

<sup>13</sup> See for example: *A & Ors v United Kingdom* [2009] ECHR 301; *AF*, above note 7; and the discussion of such cases in *Tariq*, above note 6.

to its special advocate.<sup>14</sup> That information may come from the open material or a summary of the closed material or a combination of both – but if it cannot be provided a CMP will not be available.<sup>15</sup> By contrast, in the context of a claim for damages in the Employment Tribunal, where the government’s case turned on material gathered through surveillance and security vetting, the Supreme Court held that the hearing could proceed by way of a CMP and that the excluded party was not entitled to a summary of the case against it if, and to the extent that, providing such a summary would jeopardise the surveillance or security vetting regime.<sup>16</sup>

### **Public Interest Immunity**

The fact that CMPs may not necessarily breach the right to a fair trial under the European Convention does not mean they should be available for civil trials in England, especially given the jurisdiction’s principled common law tradition. Furthermore, the common law has over the years developed a procedure to deal with the situations that the government would now like to see dealt with by way of CMPs – public interest immunity (PII).

PII requires judges to weigh the public interest in national security against the public interest in the administration of justice when determining whether the government should disclose or withhold material relating to national security.<sup>17</sup> The public interest in the administration of justice no doubt includes the parties’ right to a fair trial.<sup>18</sup> PII usually results in one of two scenarios. First, the court could hold that the public interest in the administration of justice outweighs the public interest in national security and thus order the government to disclose the material. The government would then have to decide whether to abide by the court’s order or concede the issue – and possibly the case as a whole. Alternatively, the court could decide that the

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<sup>14</sup> *A & Ors*, above note 13, at [220]; *AF*, above note 7, per Lord Phillips at [59]

<sup>15</sup> *Tariq*, above note 6, per Lord Brown at [88] and Lord Dyson at [143]

<sup>16</sup> *Tariq*, above note 6, per Lord Dyson at [161]

<sup>17</sup> *Conway v Rimmer* [1968] AC 910 (HL); *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274 (HL)

<sup>18</sup> Adrian Zuckerman, “Common Law Repelling Super Injunctions, Limiting Anonymity and Banning Trial by Stealth” (2011) 30 *Civil Justice Quarterly* 223 at 234; Adrian Zuckerman, “Closed Material Procedure – Denial of Natural Justice” (2011) 30 *Civil Justice Quarterly* 345 at 350

national security concerns outweigh the public interest in the administration of justice and order the trial to proceed without the sensitive material.

One of PII's major benefits, apparent in both of these scenarios, is that it guarantees equality of arms, in the sense that, if a trial proceeds, both parties will have received equal disclosure and will be entitled to full participation at all stages of the trial.<sup>19</sup> That is one of the reasons why virtually all of the Supreme Court judges in *Al Rawi* who considered the issue held that, if CMPs were employed at common law, they could only be employed after PII, and not as an alternative to it.<sup>20</sup> Ultimately, of course, the majority could not stomach even that.

### **Is PII adequate and sufficient?**

It has been suggested that both of the scenarios that PII usually result in are objectionable and would benefit from the availability of CMPs. In relation to the first, it has been suggested that by ordering the government to disclose the material (or effectively concede the issue or even the case), the court puts the government in an impossible situation, especially if it has a strong defence. This is not so. If the court rules that the government's interests are not compelling enough to receive special treatment, then the government is in no different position than any other litigant who has a strong defence but does not want to employ it for fear of the harm or embarrassment it may bring to himself and/or others.

As to the second scenario – where the court orders the trial to proceed without the material – it has been suggested that this is objectionable because it prevents the court from considering relevant material. However, employing a CMP for the excluded material would, for the simple reasons outlined above, automatically reduce the fairness of the trial (fatally at common law, but not necessarily under the European Convention.) Furthermore, there is no guarantee that the court would benefit from having that additional material before it. Lord Kerr's warning about the potential for evidence that is insulated

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<sup>19</sup> *Al Rawi*, above note 3, per Lord Dyson at [41]

<sup>20</sup> *Ibid*, per Lord Brown at [80], Lord Kerr at [92] and Lord Mance at [102]-[103]

from meaningful challenge to mislead, quoted above, applies “however astute and assiduous the judge”<sup>21</sup>.

### **Hard choice cases**

Some judges argue that PII can lead to a third scenario, where the court decides that a trial cannot proceed without the sensitive material but that the national security interest in that material is too great for it to be disclosed.<sup>22</sup> Professor Adrian Zuckerman has called these “hard choice cases”<sup>23</sup>. Several judges have suggested that CMPs are appropriate in hard choice cases because without them such cases can’t be tried at all.<sup>24</sup>

However, it is arguable that such cases do not actually arise. For example, if the court considers that a fair trial cannot be held without the sensitive material, it is arguable that it must order the disclosure of that material because without it the court must either proceed to a trial that it knows to be unfair or strike the case out for lack of evidence – a determination belied by the unavailable material.<sup>25</sup> It will then be for the government to decide whether to continue with the litigation or concede the issues to which the material relates. Support for this position can be gleaned from various sources. First, in *Science Research Council v Nasse*<sup>26</sup>, Lord Salmond held that “[if] the court is satisfied that it is necessary to order certain documents to be disclosed in order fairly to dispose of the proceedings, then...the law requires that such an order should be made.”<sup>27</sup> Similarly, in *R v H*<sup>28</sup> the House of Lords held that any derogation from full disclosure, made in order to protect an important public interest, “must always be the minimum derogation necessary to protect the public interest in question and must never imperil the

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<sup>21</sup> *Ibid*, per Lord Kerr at [93]

<sup>22</sup> *Ibid*, per Lord Dyson at [15], Lord Brown at [86], Lord Mance at [108] and Lord Clarke at [157]; and *Tariq*, above note 6, per Lord Kerr at [110]

<sup>23</sup> Zuckerman, “Closed Material Procedures”, above note 18, at 351-353

<sup>24</sup> *Al Rawi*, above note 3, per Lord Mance at [112] and [120], and, to a lesser extent Lord Clarke at [159]-[162] and [178]-[179]; and *Tariq*, above note 6, per Lord Mance at [40]

<sup>25</sup> Zuckerman, “Common Law Repelling Super Injunctions”, above note 18, at 234

<sup>26</sup> [1980] AC 1028 (HL)

<sup>27</sup> *Ibid*, at 1071

<sup>28</sup> [2004] UKHL 3

overall fairness of the trial.”<sup>29</sup> Second, in some criminal cases the government is forced to choose between disclosing sensitive material essential to the defence case and abandoning a well-founded prosecution.<sup>30</sup> Why should the government not be forced into a similar position in civil cases? Finally, it might be argued that the court’s primary concern should be ensuring the fair administration of justice, and that it should leave the protection of national security to the executive.<sup>31</sup>

There are various potential responses to these arguments. First, *Science Research Council* was not a hard case, so it offers guidance rather than a definitive solution.<sup>32</sup> Second, *R v H* was a criminal case, and in criminal cases defendants are presumed innocent until proven guilty, and if found guilty may face imprisonment. Accordingly, as Lord Mance explained in *Tariq*, “it is better that the state should forego prosecution than that there should be any risk of an innocent person being found guilty through inability to respond to the full case against them.”<sup>33</sup> Finally, this approach assumes that the court has no choice but to determine the case on its merits, either by proceeding to trial or striking it out for lack of evidence. The Court of Appeal and various judges in the Supreme Court, however, have held that the court may simply declare such cases to be non-justiciable.<sup>34</sup>

Alternatively, it might be suggested that this scenario – the ‘untriable’ case – would never arise because the claimant and defendant could still give evidence themselves, albeit evidence that would not be as detailed as they would like it to be.<sup>35</sup> That is not necessarily so. For example, the claimant’s case may be so weak without the excluded material that it is at risk of being struck out. The reason it would not have been struck out already is because of the potential significance of the case and the possibility that the PII exercise

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<sup>29</sup> *Ibid*, at [18]

<sup>30</sup> Zuckerman, “Closed Material Procedures”, above note 18, at 357

<sup>31</sup> Zuckerman, “Common Law Repelling Super Injunctions”, above note 18, at 234

<sup>32</sup> Zuckerman, “Closed Material Procedures”, above note 18, at 351

<sup>33</sup> *Tariq*, above note 6 at [40]

<sup>34</sup> *Carnduff v Rock* [2001] EWCA Civ 680; *Tariq*, above note 6, per Lord Kerr at [110]; and the references in above note 21

<sup>35</sup> Zuckerman, “Closed Material Procedures”, above note 18, at 354-355

will result in supporting material being disclosed.<sup>36</sup> But if after the PII exercise the court orders the government to withhold such material, the claimant will not be able to proceed. Alternatively, the claimant's case and the government's defence might be so intertwined with the excluded material that without that material they are reduced to making bald assertions and denials - hardly a trial in any meaningful sense of the word and not one a court would be willing to entertain. As Laws LJ observed in *Carnduff v Rock*, "a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all."<sup>37</sup>

### **Are CMPs appropriate in hard choice cases?**

Once it is accepted that hard choice cases can arise, the issue of how courts should handle them needs to be addressed. Supreme Court judges appear to be divided between those who consider CMPs should be available so that a trial can be held, and those who consider that courts should simply declare such cases to be non-justiciable.<sup>38</sup>

Judges in favour of adopting CMPs to deal with hard choice cases generally argue that a CMP-based trial is better than no trial and that claimants should at least be given the choice to proceed with CMPs before courts can declare their cases non-justiciable. Both arguments are hard to swallow. As to the former, if a CMP is employed to try a case that cannot otherwise be tried, then the very essence of the case - that without which it simply cannot proceed - will unfold in the absence of one of the parties. Compare that to employing a CMP in the second PII scenario discussed above - where the court orders the trial to proceed in the absence of the sensitive material. If a CMP is adopted in these circumstances, at least the open hearings - in which the party excluded from the closed hearings is able to participate - will have a significant bearing on the overall trial, because it would be possible to hold a fair trial on the basis of the material available in those open hearings alone. But if CMPs are inappropriate in these cases, it is very difficult to see

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<sup>36</sup> These are recognised exceptions to the power of a court to strike out a statement of case.

<sup>37</sup> *Carnduff*, above note 32, at [36]

<sup>38</sup> See the references in above notes 22 and 32



how they are appropriate, or less inappropriate, in hard cases. If anything, they are even more inappropriate. As Lord Kerr observed in *Tariq*, declaring hard cases non-justiciable is "a plainly more palatable course than to permit a proceeding in which one party knows nothing of the case made against him and which, by definition, cannot be subject to properly informed challenge. At least in the [former] situation both parties are excluded from the judgment seat. In the state of affairs that will result from [employing a CMP], one party has exclusive access to that seat and the system of justice cannot fail to be tainted in consequence."<sup>39</sup>

As to whether claimants should be given a choice to proceed with CMPs in hard choice cases, the simple answer is that they should not, because, as Lord Brown explained in *Al-Rawi*, "the damage done...to the integrity of the judicial process and the reputation of English justice [would simply be too great]...The rule of law and the administration of justice concern more, much more, than just the interests of the parties to litigation. The public too has a vital interest in the conduct of proceedings. Open justice is a constitutional principle of the highest importance. It cannot be sacrificed merely on the say so of the parties."<sup>40</sup>

### **Declaring hard choice cases non-justiciable**

The alternative to employing CMPs in hard choice cases is to declare such cases to be non-justiciable or 'untriable'. This approach need not be as unpalatable as Lord Mance found it in *Tariq*<sup>41</sup>, for the reasons given by Lord Kerr in the same case (quoted above).<sup>42</sup> Furthermore, it need not be limited to the court simply declaring the case to be non-justiciable. For example, Professor Zuckerman has suggested that, once the court has made such a declaration, the claimant could be awarded compensation for being denied its right to a trial, provided it shows that it had a reasonable prospect of

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<sup>39</sup> *Tariq*, above note 6, at [110]

<sup>40</sup> *Al Rawi*, above note 3, at [83]-[84]

<sup>41</sup> *Tariq*, above note 6, at [40]

<sup>42</sup> *Ibid*, at [110]

success.<sup>43</sup> Such an approach would recognise the denial of the claimant's right, protect national security, and avoid a finding of liability against the government while saving costs and recognising, to a limited extent, the validity of the claimant's case.<sup>44</sup> Even more importantly, it would not jeopardise the integrity of the civil justice system.

## **Conclusion**

The above is a survey of some of the issues surrounding the adoption of CMPs in civil trials in England. It suggests that although CMPs might not render civil trials unfair under the European Convention, they are neither necessary in practice nor desirable in principle.

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<sup>43</sup> Adrian Zuckerman, "Court protection from abuse of process – The means are there but not the will" (2012) 31 *Civil Justice Quarterly* 377 at 390-392

<sup>44</sup> *Ibid*