THERE AND BACK AGAIN: THE STRANGE JOURNEY OF SPECIAL ADVOCATES AND COMPARATIVE LAW METHODOLOGY

David Jenkins*

I. INTRODUCTION

In the early years of the so-called “War on Terror”—a term still very much contested in its conceptual propriety, as well as since overshadowed by ongoing military involvement in Iraq and Afghanistan—much academic attention was given to the special detentions and military commissions at Guantanamo Bay, as well as to extraordinary rendition and enhanced interrogations. However, it is important to realize that, in the last ten years, other countries

* Associate Professor of Law, University of Copenhagen (member of the Centre for European Constitutionalization and Security, in collaboration with the Centre for Advanced Security Theory); Attorney at Law (W.Va.; Oh.); J.D. (Washington and Lee University); LL.M., Doctor of Civil Law (McGill University Institute of Comparative Law); This Article is based on my presentation in London at the University of Westminster, School of Law for the conference “After Guantanamo Bay: Perspectives on the War on Terror,” on 21 January 2010. I appreciate the helpful comments from Patrick Glenn (McGill), Kent Roach (Toronto), Michael Plaxton (Saskatchewan), James Chalmers (Edinburgh), and Angus Campbell (Aberdeen).


2. “Enhanced interrogations” refers to the controversial techniques used to gain information from prisoners in conjunction with the War on Terror. See, e.g., Mark Danner, Torture and Truth, N.Y. Rev. of Books, June 10, 2004, at 46 (describing the “methods of physical and psychological coercion” employed to extract information from prisoners at Abu Ghraib); see also Mark Danner, The Logic of Torture, N.Y. Rev. of Books, June 24, 2004, at 70 (providing a history of and the stated justifications for the “extreme interrogation” techniques used at Abu Ghraib).
have also experimented with new, controversial forms of government powers to control, deport, or detain suspected terrorists. Many of these forms limit rights of procedural fairness and permit the use of secret evidence withheld for national security reasons. To draw attention to such developments, of course, is not to justify or excuse either those controversial foreign practices or other American ones. However, looking back in time and abroad to other countries, one can now begin to assess long-term, widespread, and perhaps fundamental changes in how western, liberal democracies manage their mutual commitments to fighting terrorism and upholding the rule of law. One can also study past experiences in order to learn how to pursue these twin commitments much better in the coming years, perhaps in the face of new national security challenges other than terrorism. For these reasons, this article looks at the history of special advocates in the United Kingdom and Canada. Based on the patterns of legal cross-borrowing between these two countries over the last decade, this Article makes three arguments about the past and future use of comparative law in developing and improving transnational legal efforts to fight terrorism: first, judicial use of comparative law must be methodologically sound or it can do more harm than good; second, legislative committees will tend to use comparative law better and with more emphasis on rights than will security-focused executives; third, common security concerns between countries mean that all three government branches (judicial, executive, and legislative) must cooperate in finding “best practices” in national security matters and, to do this, they must use comparative law in a more sophisticated way. Sound comparative methodology is especially important when courts apply a proportionality analysis, lest they make mistakes that will negatively influence subsequent government policy-making.

As discussed in Part II, the development of the British special advocate system was strongly influenced by the 1996 decision of the European Court of Human Rights (ECHR) in Chahal v. United Kingdom, a landmark case forbidding states from deporting people to a risk of torture in another country. Although difficult to foresee at the time, the procedural aspects of this judgment would be the catalyst for significant legal cross-borrowing between the United Kingdom and Canada in their anti-terrorism laws. As part of a proportionality analysis, the Chahal Court referred approvingly to

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the use of special advocates—lawyers who could examine secret evidence withheld from a deportee on national security grounds—in Canadian immigration cases. As Part II shows, the Court recommended this Canadian model to Britain without adequate justification, background context, or cautions as to its future use. The British government (a term which, in the parliamentary context, refers to the executive administration) later relied on Chahal to support a procedurally problematic system of special advocates that Canada itself would later adopt. Despite increasing protections against torture, the ECHR thereby unintentionally provoked a “race-to-the-bottom” by the British and Canadian governments; each looked to the other for innovative ways to rely upon secret evidence and restrict the procedural rights of suspected terrorists in immigration or certain other non-criminal proceedings. The Chahal judgment and its repercussions illustrate how courts must use a thoughtful and cautious methodology when citing comparative law in the national security context, lest they unintentionally green-light governments into adopting a foreign legal mechanism that could adversely skew the delicate balance between security and rights.

As will be shown in Part III, this curious cross-borrowing in British and Canadian law was marked by an executive-led security agenda, where the British and Canadian governments interpreted case law and used foreign legal sources (mainly each other’s) to “rights-proof” their proposals for special advocates. That is, both governments looked for the lowest legally acceptable threshold of due process for deporting or otherwise restricting the liberty of aliens who had not been charged with a criminal offense, but were under suspicion of involvement in international terrorism. In contrast to this security-focused approach, British and Canadian parliamentary committees demonstrated a more rights-conscious perspective in reviewing special advocate systems, exploring foreign alternatives, and considering potentially better practices. The similar patterns of interaction between executive officials and legislative committees in the United Kingdom and Canada suggest that committees have a stronger capacity or willingness than the executive branch to use comparative law as a tool for balancing security and rights.

Finally, this article concludes that the development of special advocates in the United Kingdom and Canada shows that while an unabating threat of international terrorism requires a strong and transnational approach to law-making, there are both practical and principled pitfalls when courts, parliamentary committees, or governments ignore or misuse comparative law. The troublesome history of special advocates thus reinforces the need for a “best practices” approach to making anti-terrorism law that carefully and critically takes into account foreign practices, proceeds from a rights-conscious perspective, and looks for the least rights-restrictive measures to protect national security. As seen from the interdependent development of special advocates in the United Kingdom and Canada, executive officials, legislative committees, and courts will all tend to have different outlooks on national security matters and questions of individual rights. Because international terrorism demands an international response, the ensuing institutional dialogue will almost always include some references to foreign law, in various ways and degrees. As this case study of special advocates shows, careful attention to comparative methodology is now necessary, so that government institutions can communicate clearly with one another, cooperate constructively, and work effectively across borders in crafting transnational anti-terrorism laws that efficiently protect national security without compromising state commitments to the rule of law and fundamental rights.

II. FIRST STOP: STRASBOURG

Although Chahal is a landmark case on Article 3 of the European Convention on Human Rights (European Convention), extending its protections against torture, that decision ironically triggered a downward spiral in procedural fairness in immigration and some other cases concerned with national security. This unfortunate and unanticipated result was the product of the ECHR’s poor use of comparative law, resulting in ill-considered dicta where the Court appeared to advise the United Kingdom to adopt a misunderstood version of a Canadian special advocate system. A closer look at the ECHR’s methodological errors illustrates the

dangers involved in using comparative law in national security cases and in carelessly incorporating foreign legal ideas into a different legal system. Those same mistakes suggest, however, just how judges (as well as executive branch officials and lawmakers, as discussed in Part III) might better use comparative law in crafting transnational anti-terrorism measures, especially as it has already become so commonplace, perhaps even indispensable, in judicial proportionality analysis.

A. Special Advocates at the European Court of Human Rights

The Chahal case arose from the British government’s attempt to deport Karamjit Singh Chahal (along with family members) to India, based on allegations that he was involved with militant Sikh separatist groups. Chahal challenged his deportation order, arguing that he faced a risk of torture and other serious ill-treatment at the hands of law enforcement and security forces, in the event he would be returned to India. The ECHR agreed and held that to deport Chahal to India would therefore violate Article 3 of the Convention. According to the Court, Article 3 not only directly prohibited torture and other forms of abuse, but placed a protective obligation on the Council of Europe States not to deport aliens to third countries where they risked such treatment.

This restriction applied even where the fight against terrorism might otherwise justify removal. Interpreting Article 3 in such a broad and absolute way, the Court rejected British arguments for a balancing test between the risk of torture and public safety concerns. The ECHR also criticized the limited grounds available for the administrative and judicial review of the ministerial deportation decision and the resulting detention. It accordingly found a violation of Convention Article 5(4), guaranteeing the right to have the


7. Id. at 455, ¶ 107 (“In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.”). See also Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 468–69, ¶ 91 (1989) (finding that Article 3 would be violated if the U.K. government were to extradite the applicant to the United States to face a capital murder charge in Virginia).

lawfulness of detention determined by a court. The review panel considering Chahal’s case had denied him legal representation, released only a limited summary of the grounds for his deportation and detention, and was empowered to make only a non-binding recommendation to the Home Secretary, with whom the final decision rested. Therefore, while the Court recognized the British government’s legitimate concerns about protecting information sensitive to national security, the advisory nature of the tribunal and its truncated procedures did not allow Chahal an adequate opportunity under Article 5(4) to know or legally challenge the case against him. The ECHR’s decision therefore required that the United Kingdom revise its immigration procedures in national security cases to allow for adequate review of ministerial decisions.

However, Chahal’s Article 3 and Article 5(4) holdings raised two nagging questions that governments in Europe and elsewhere have struggled with ever since. First, what were states actually to do with those aliens who possibly posed a threat to national security, but could not be deported due to a risk of torture abroad, prohibited by international human rights obligations? Second, how could states

9. European Convention, supra note 5, art. 5(4), 213 U.N.T.S. at 226 (“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.”). See infra text accompanying notes 104–107 (describing immigration procedures used in the Chahal case).


11. Compare Rene Bruin & Kees Wouters, Terrorism and the Non-derogability of Non-refoulement, 15 Int’l J. Refugee L. 5 (2003) (urging states to uphold the absolute obligation of non-refoulement, even in cases of alleged
use and protect security-sensitive evidence in immigration or other legal proceedings in a way that would still assure procedural fairness to the individuals in question? These twin problems, as it has turned out, “are two of the most difficult issues that arise in antiterrorism law and policy.” In the Convention context, the Chahal Court recognized that “the use of confidential material may be unavoidable where national security is at stake.” Nevertheless, this did not release state authorities from their legal accountability before national courts and was not an excuse to undercut Convention rights. Although the ECHR proposed no solution to the first quandary about non-removable aliens, it did address the second problem of security-sensitive evidence in terrorism-related cases. Guided by the interventions of human rights organizations, the Court looked to


Canada for “a more effective form of judicial control,” found in its system of special advocates in immigration proceedings. The Court described the Canadian system, as it understood it:

[A] Federal Court judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.

The Canadian example showed “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.”

This Trans-Atlantic legal excursion was no more than *obiter dicta*, however, as it only demonstrated that other, less rights-restrictive procedures were available, not that the Convention required member states to adopt a special advocate regime (or something like it). The Canadian reference in *Chahal*'s dicta was neither integral to the Court's reasoning nor necessary for deciding the case.

Nevertheless, with these dicta the ECHR proceeded on the twin assumptions that it was both useful and appropriate to refer to foreign law, from outside of the Council of Europe, to determine the extent of the Convention's somewhat flexible Article 5(4) procedural rights in terrorism-related cases. Because the Convention imposes less exacting procedural standards in immigration cases than in criminal ones, as well as allows a higher margin of appreciation in national security matters, the state retains more discretion to fashion special immigration procedures for protecting security-sensitive

15. *Id.* These intervenors were Amnesty International, Liberty, the Centre for Advice on Individual Rights in Europe, and the Joint Council for the Welfare of Immigrants. *Id.* at 472, ¶ 144.

16. *Id.*

17. *Id.* at 469, ¶ 131 [paragraphs 131 and 144 are hereinafter referred to together as the “*Chahal dicta*”].
By referring to Canada, moreover, the Chahal Court not only tested such special procedures against a non-European comparator in determining the contours of the Convention's Article 5(4) rights, but signaled that, as a normative matter, it was appropriate and acceptable to look to other democracies around the world. In this way, the Court used comparative law in an implicit


19. In the United States, in contrast, arguments rage about the legitimacy of referring to foreign and international law when interpreting domestic law, especially constitutional rights. The literature on the debate is vast. Compare Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (finding that laws of other countries may be instructive in interpreting the Eighth Amendment’s prohibition of cruel and unusual punishment), and Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) (noting that courts in other countries have invalidated laws criminalizing homosexual sodomy like the one at issue in this case), with Roper, 543 U.S. at
proportionality analysis of the challenged British procedures, while subtly encouraging the U.K. government to look abroad for “best practices” in crafting effective and Convention-compliant anti-terrorism law. 20 Unfortunately, the ECHR did not match this normative commitment to comparative jurisprudence with methodological rigor—a shortcoming with unexpected and surprisingly far-reaching implications for the subsequent

624–28 (Scalia, J., dissenting) (claiming that the Court should not consider the laws of other countries in interpreting the Constitution), and Lawrence, 539 U.S. at 598 (Scalia, J., dissenting) (claiming that foreign views are meaningless in the Court’s analysis of fundamental rights under the Constitution). See also Justice Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]Kind: The Value of a Comparative Perspective in Constitutional Adjudication, 99 Am. Soc’y Int’l. L. Proc. 351 (2005) (proposing that United States courts should consider foreign and international legal sources more often in cases involving constitutional and human rights); Christopher McCrudden, Judicial Comparativism and Human Rights, in Comparative Law: A Handbook 371 (Esin Orucu & David Nelken eds., 2007) (describing the ongoing debate on the legitimacy of utilizing comparative legal methods in human rights interpretation); Vicki C. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, 119 Harv. L. Rev. 109, 112–15 (2005) (describing three different models for the relationship between national constitutions and law from international sources, as well as the countries where these models exist); cf. Roger P. Alford, In Search of a Theory for Constitutional Comparativism, 52 U.C.L.A. L. Rev. 639, 644 (2005) (urging caution in using international and foreign legal sources to resolve constitutional law cases); Ernest A. Young, Foreign Law and the Denominator Problem, 119 Harv. L. Rev. 148, 161–65 (2005) (arguing that American courts should not consult foreign law or seek international consensus). Nevertheless, the high American skepticism “has no parallel in the United Kingdom or elsewhere in the common law world.” Robert Reed, Foreign Precedents and Judicial Reasoning: The American Debate and British Practice, 124 Law Q. Rev. 253, 259 (2008). See also Esin Orucu, Comparative Law in Practice: The Courts and the Legislature, in Comparative Law: A Handbook, supra, at 411 (describing the increasing use of comparative law in British courts over the last several decades and comparing to practices in other countries, including the United States). Normative rejection of comparative jurisprudence is especially misplaced in regard to its use by the ECHR, which has a unique status as a supranational and regional human rights tribunal. As such, it already works within a pluralistic legal environment, interpreting the European Convention as a “living instrument” to be applied in a “practical and effective” way. See Alastair Mowbray, The Creativity of the European Court of Human Rights, 5 Hum. Rts. L. Rev. 57 (2005).

20. For the meaning of “best practices,” as used in this paper, see supra text accompanying notes 4–5 and infra Part IV. See also David Jenkins, In Support of Canada’s Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law, 66 Sask. L. Rev. 419, 427–30 (2003), for a discussion of an international “best practice” approach to anti-terrorism.
development of special advocate systems in both the United Kingdom and Canada.

B. Problems with Comparative Methodology

In *Chahal*, the Court’s use of comparative law was cursory and methodologically weak. It did not opine on whether a special advocate system, as it had described it, would actually meet the European Convention’s Article 5(4) requirements, if subjected to closer scrutiny. There were three major flaws in the ECHR’s comparative methodology, which would negatively influence the subsequent development of both British and Canadian special advocate systems over the next several years—especially in the security-obsessed climate after September 2001. The first problem was one of selecting comparators; the Court neither canvassed alternatives to the Canadian special advocate system, nor adequately explained why it exclusively referred to it. In this sense, its comparison lacked wide context. Second, the Court demonstrated a limited knowledge of the foreign law used. It only superficially understood the Canadian special advocate system and its deep context in Canadian law. It thereby mischaracterized this national special advocate system in a way that overlooked potentially significant restrictions on its operation, as well as persistent difficulties regarding procedural fairness. Finally, the Court was inattentive to the potential problems of transplanting a foreign legal mechanism, and did not caution the United Kingdom and other states against uncritical reliance upon its dicta in the case. By not appreciating the importance of local context to its comparison, the ECHR gave an unintentional green light to the British adoption and subsequent expansion of a controversial special advocate regime. This troubled instance of legal borrowing had implications beyond

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21. After the United Kingdom had already adopted its own special advocate system, the ECHR belatedly qualified its *Chahal* dicta. In *Al-Nashif v. Bulgaria*, App. No. 50963/99, 36 Eur. H.R. Rep. 37, 678, ¶¶ 95–97 (2002), the Court recognized the British response to *Chahal* and “[w]ithout expressing in the present context an opinion on the conformity of the above system with the Convention,” the Court noted “that, as in the case of Chahal, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.” In *A and Others (ECHR)*, 49 Eur. H.R. Rep. at 717–18, ¶¶ 209–11, the ECHR made clear that it had never before judged the compatibility of any special advocate system with the European Convention, despite referring to such systems on several occasions.
British shores, however, as it eventually impacted Canada, the original lender, for the worse.

1. The Selection Problem and “Wide Context”

First, in looking abroad for alternatives to the British immigration procedures in Chahal, the Court lacked wide context, in that its selection of comparators was too narrow. That is, it did not consider other viable alternatives for protecting security-sensitive information in Canada or elsewhere. Wide context therefore has both jurisdictional and substantive aspects, respectively ignored by the Court in Chahal, in that 1) it referred to one example from Canadian law, to the exclusion of any other national legal systems, and 2) it only considered a special advocate system, disregarding other legal mechanisms that might have been as effective for protecting security-sensitive evidence, but less restrictive to procedural rights. In neither instance did the Court justify the very limited jurisdictional and substantive choices in its dicta, so any methodology behind the reasoning is only subject to speculation. In any case, on its face, the dicta’s narrow context led to a poorly informed comparison and a thin proportionality analysis under Article 5(4). This methodological flaw meant that the judgment offered little guidance to the U.K. government as to just how much it should (or should not) rely on Chahal’s dicta, or where else (and why) it might look for possibly better alternatives in crafting a legislative response.

Canadian law, used at the behest of the intervenors in Chahal, was not itself an illogical place for the European Court of Human Rights to look for more proportional means by which the United Kingdom might protect security-sensitive information. As a nation with a close historical and cultural connection to Britain, a legal system derived from English law, and “a Constitution similar in Principle to that of the United Kingdom,” Canada is a natural comparator. The Court’s use of Canadian law, in retrospect, accordingly fits within a selective category for comparators that has been variously labeled as “genealogical,” “historical,” or “familial,” among other things (depending on the emphasized lines of relationships among different systems and the purposes of comparison). Searching for foreign law from such a category serves

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both normative and empirical purposes.\textsuperscript{24} Comparison to a “related” jurisdiction carries normative weight, in that it rests on a belief that similar, albeit different, jurisdictions are commensurable in terms of their particular substantive and procedural law,\textsuperscript{25} larger structures and institutional roles,\textsuperscript{26} and deeper modes of legal thinking or shared values.\textsuperscript{27} Consequently, judges and lawmakers can look to these jurisdictions when deliberating legal problems, while their laws can have special persuasive authority in some cases.\textsuperscript{28} Following upon normative force, comparison between related jurisdictions can then be empirically persuasive based on a belief that a borrowed

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\textsuperscript{25.} See, e.g., Barak-Erez & Waxman, supra note 12, at 9–13 (comparative analysis of methods for handling classified information in terrorist-detention cases over four legal systems sharing the same baseline procedural notice requirement).


\textsuperscript{27.} See generally Zweigert & Kötz, supra note 23, ch. 18 (drawing out the relationships between countries of each system when comparing procedures of the common law and civil law). But compare Lord Irvine of Lairg, Sovereignty in Comparative Perspective: Constitutionalism in Britain and America, 76 N.Y.U. L. Rev. 1, 2–3, 9–11, 21 (2001) (analyzing how the divergent approach to constitutionalism in the United States and the United Kingdom (constitutional supremacy versus parliamentary sovereignty) actually converge at the level of substance because their meaning is determined by the broader legal and political environment within which they subsist and which the United States and United Kingdom share), with P. S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions 1–11, 115–23 (1987) (arguing that despite all of their similarities, the English and American legal systems differ profoundly, the former being highly formal and the latter, highly substantive).

\textsuperscript{28.} Fontana, supra note 23, at 557–62.
solution from a similar legal system, to a similar problem, will have similar results.\textsuperscript{29} It might at least suggest a fairly similar but more "home-grown" response suited to local conditions.\textsuperscript{30} Indeed, British Courts themselves have not only long referred to other common-law jurisdictions on a regular basis (including Canada), finding them especially suited for comparison, but have done so with critical sophistication.\textsuperscript{31} Of course, as jurisdictional differences quantitatively or qualitatively multiply, the normative and empirical force of any comparisons will likely weaken. On both the normative and empirical levels, however, the ECHR appropriately referred to Canadian law, in order to see how it dealt with the problem of security-sensitive evidence in immigration proceedings—a problem shared with its close common-law relation, the United Kingdom.

The Court's selection error, then, was not in looking to Canada, per se, but in its failure to justify its selection on the basis of jurisdictional similarities or any other kind of links. This lack of justification not only lent an air of arbitrariness to its limited comparative foray, but to its exclusion of any other national law that might have given wider context.\textsuperscript{32} The Court, for example, referred to no other common-law country. A survey of the United States, Ireland, Australia, and New Zealand might have shown that none of them (at that time) used a special advocate system quite like that in Canada.\textsuperscript{33} These countries all faced threats from international terrorism, so even a quick study of them would have raised the next question as to whether there were yet other more effective or proportionate examples to the United Kingdom for striking the right balance between a deportee's individual rights and a government's national

\textsuperscript{29} Fontana has described the judicial evaluation of relative normative and empirical value as "refined comparativism." \textit{Id.} See Atiyah & Summers, \textit{supra} note 27; Young, \textit{supra} note 19; Dannemann, \textit{supra} note 23, at 410, 386–89.


\textsuperscript{32} “To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.” Roper v. Simmons, 543 U.S. 551, 627 (Scalia, J., dissenting).

\textsuperscript{33} See, e.g., Barak-Erez & Waxman, \textit{supra} note 12 (extending the common-law comparison to the United Kingdom, Canada, and Israel).
security interests—all still within a common-law context. Moreover, the ECHR could have considered Britain’s legal relationships beyond the common law, which might have recommended different jurisdictional comparators. These additions could have widened the comparative context beyond a single relational plane to a fuller, more complex “matrix.” The most obvious alternative comparators were other Council of Europe States, all subject to the restrictions of Convention Article 5(4), just as the United Kingdom was. Because this selection group was commonly bound by the Convention, there was a clear normative justification for comparing how member states interpreted and implemented shared international treaty obligations—a normative argument that can be extended to comparisons looking at other treaties and general questions of international law. A European solution to the evidence problem in Chahal—especially if it had previously been before the ECHR or reviewed for Convention compatibility by a national tribunal—arguably would have carried some presumption of meeting Article 5(4) requirements. Such a presumption might have recommended a continental example to the United Kingdom, along with or instead of other foreign law, for purposes of what Vicki Jackson has termed “convergence” or “engagement” with the law of other Council of Europe States. Furthermore, a European comparison would have fit with Mark Tushnet’s “expressivist” function of comparisons.

34. See Dannemann, supra note 23, at 411. A related, but somewhat different plane of comparison might be the British Commonwealth, for example. See Gardbaum, supra note 26. In contrast, other relational threads would quite likely be what Fontana, supra note 23, at 550, calls “ahistorical” rather than “genealogical,” as the reasons for comparisons would be based on factors other than a shared history, culture, or development of legal systems.


36. Jackson, supra note 19, at 112.
reinforcing British identity as a part of the Convention’s European regional human rights framework, supplemental or in preference to more culturally contingent, common-law relationships. While the ECHR would have had to exercise greater caution in recommending specific solutions to common-law Britain from continental legal systems, such a wider jurisdictional comparison nonetheless might have either revealed an alternative to special advocates or better supported their use.

As it was, the ECHR failed not only to look beyond Canada, but also to consider legal mechanisms other than its special advocate model. For example, the Court did not examine other Canadian practices for protecting security-sensitive information, such as giving ad hoc security clearances to existing counsel or allowing a Federal Court judge to determine the disclosure of evidence by balancing the public and private interests involved under the Canada Evidence Act (CEA). Of course, as Canada’s special advocate system illustrated, the Canadian Parliament had already decided that these procedures did not sufficiently balance national security concerns with individual rights in all cases—a decision worth the Court’s consideration, if mindful that it had been taken outside of the European Convention’s requirements. However, as discussed in Section 2 below, the ECHR made a more profound error than just ignoring any other Canadian options that might have been worth considering. That is, the ECHR seriously misunderstood how this system of special advocates actually worked, so that the Court could not have properly compared that system’s merits to those of other


38. See infra text accompanying notes 172–175 (regarding a French-inspired, inquisitorial “examining magistrates” system, where judges become experts in anti-terrorism cases and in handling sensitive intelligence evidence).

practices. Had it actually done so, such a critical substantive comparison of alternatives would not have necessarily ruled out special advocates as a policy option. The Convention itself does not require that a state must always find the least restrictive means for balancing rights and public interests, only a proportionate one. 40 State discretion under the Convention notwithstanding, a simple tally of special advocate systems throughout other jurisdictions also would not have been determinative of whether such a system would or would not be permissible under Convention Article 5(4). 41 Similarly, the identification of other methods used elsewhere would say little about their actual Convention compatibility, if borrowed by the United Kingdom. A wider substantive context would nonetheless have better informed the Court’s proportionality analysis: if it did not find a preferable alternative to special advocates through this wide context, it would have at least better justified their use. Thus, substantive comparators would have tended to multiply along with the jurisdictional ones, at the same time that the overall wider context might have also encouraged the British government to consider a variety of other legal mechanisms in response to the Chahal decision. 42 Strangely, the Chahal Court looked to Canada without first exploring existing procedures in U.K. law, where there might have been a domestic mechanism more easily adapted to the purpose and better integrated into the overall framework of British law. 43

40. See A and Others v. United Kingdom, App. No. 3455/05, 49 Eur. H.R. Rep. 29 (2009) (holding that the British system of special advocates was incompatible with the European Convention); Eva Brems, Human Rights: Minimum and Maximum Perspectives, 9 Hum. Rts. L. Rev. 349, 363–364 (2009) (discussing cases where the ECHR did not find a violation, even though less restrictive alternatives were available, and a less restrictive alternative as one element that the ECHR may take into account).

41. See, e.g., Young, supra note 19, at 150–52 (discussing the practice of looking to foreign law sources for consensus and “nose counting,” without regard to the reasons for a practice or decision, rather than for persuasive authority); Jackson, supra note 19, at 126 (discussing how surveying world practices on a particular issue may be less preferable than looking to a few comparable countries or even a singular opinion in comparable country).

42. See infra Part III.A.

43. For example, one possibility might have been adapting the procedures, existing at the time, for determining the government’s public interest immunity claims. This process did not allow the use of secret evidence, but instead let a judge determine, in camera, whether security-sensitive evidence could be withheld or must be disclosed in order for legal proceedings to continue. Of course, an adaptation of this approach would not have permitted the government
The point here, however, is not to consider in detail all the possible comparisons that the ECHR might have made in Chahal. Nor is it to suggest an alternative that should have seemed preferable to special advocates at the time. Rather, the point is merely to draw attention to the many jurisdictional and substantive comparators that were available to the Court—and, as discussed in Part III below, to the British government—for widening the comparative context. With too narrow a perspective, as shown by the Chahal dicta, the selection problem in comparative methodology can lead to seeming or actual arbitrariness in legal comparisons. Such arbitrariness, in turn, can weaken the proportionality analysis and undermine the persuasiveness of the resulting decision.44 Thus, relying on the experience of a single country or a small number of countries arguably raises the specter that arguments developed will to rely on secret evidence in legal proceedings. However, it would have still addressed important security concerns by allowing all questions of disclosure to be resolved in closed hearings, from which a deportee and his regular counsel would be excluded, but where the deportee’s interests would be represented by a special advocate. See R. v. Ward, [1993] 2 All ER 577, 626–28 (C.A.) (holding that the prosecution in a bombing case was obliged to disclose any scientific evidence which might help the defense); R. v. Davis, [1993] 2 All ER 643, 647–48 (C.A.) (where revealing that the prosecution has evidence that it wishes to withhold would reveal the nature of that evidence, the prosecution may make an ex parte motion to the court to withhold the evidence, and what evidence may be disclosed is for the court to decide); R. v. Keane, [1994] 2 All ER 478, 483–84 (C.A.) (holding that where the prosecutor in a counterfeiting case refused to disclose relevant material to the defense on public interest immunity grounds, the prosecution must put the evidence before the court, and the court must balance the level of assistance of the evidence to the defense against the public interest); Criminal Procedure and Investigations Act 1996, c. 25 (U.K.); see also Justice, Secret Evidence 127–33, 213–14 (June 2009), http://www.justice.org.uk/images/pdfs/Secret%20Evidence%20June%202009%20version.pdf (calling for an end to the use of secret evidence in criminal trials in the United Kingdom and recommending replacing special advocates with public interest advocates). Of course, the suitability of public interest immunity or any other existing procedures in British public law would be open to debate. The point here is, the ECHR made no effort to identify possible domestic alternatives for the British government’s consideration, before turning to foreign law. Instead, Parliament would go on to allow the use of special advocates in cases leading to the indefinite detention of non-removable aliens and, in later control order proceedings, depriving aliens and British citizens of their personal liberty—thereby using special advocates in cases going far beyond Chahal’s original immigration context, while corrupting usual standards of procedural fairness by allowing the use of secret evidence and excluding regular legal counsel from hearings on the merits of a case. See infra notes 108–113 and accompanying text.

44. See Young, supra note 19, at 150 (discussing the difference in normative influence between persuasive authority and consensus).
be anecdotal. Likewise, “selecting only those cases that support an argument . . . is one of the basic violations of the rules of empirical inference.” On the other hand, something like the Chahal dicta might also be misconstrued as selective and authoritative, notwithstanding that it is the product of a poor comparative methodology. As explained below in Section 3 of this part, the selection problem can then lead to a mistaken belief that a court has “green-lit” or “rights-proofed” a particular foreign legal solution—a false assumption made by the British government about the Chahal dicta, which negatively impacted subsequent policy choices and legislative responses. The risks of “green-lighting” and “rights-proofing” increase where a court has not paid sufficient attention to local context that can affect the borrowing of foreign law. Before discussing local context any further, however, it is important to understand that the Court’s selection problem in Chahal was also related to one of knowledge; that is, the ECHR did not properly understand, explain, or qualify the deep context of the Canadian special advocate system. This system was not entirely what it seemed in Chahal’s dicta, and the failure of the ECHR to note these particularities had far-reaching consequences.

2. The Knowledge Problem and “Deep Context”

If the ECHR in Chahal did not quite get the Canadian special advocate system right, just how did it actually work and what were the implications of the error? The Court’s description of Canadian law, as it turned out, was weak in both “micro-” and “macro-comparison,” in that it inaccurately portrayed the details of the special advocate system in Canada, while failing to consider potentially important aspects of the larger legal systems of both countries. Thus, the Court’s description of the Canadian system gave only a brief, unsatisfactory overview of what special advocates were and what role they played in testing secret evidence. That overview contained an important error of fact and several errors of omission, as explained below. It also did not take into account some constitutional differences between the United Kingdom and Canada,
which would have filled out the local context, as well.\textsuperscript{49} The selection problem was therefore compounded by a second knowledge problem. That is, the legal comparison behind the \textit{Chahal} dicta not only lacked the wide context that likely would have led to a more critical and convincing proportionality analysis; it also exhibited the Court’s insufficient knowledge about the chosen substantive comparator and missed its deep context in the source legal system. Deep context would have revealed notable limitations on the use of special advocates back in Canada, such as their restrictions to certain immigration cases and the constitutional requirements of the Canadian Charter of Rights and Freedoms,\textsuperscript{50} as discussed below. Therefore, the \textit{Chahal} Court’s comparison was shallow as well as narrow, combining an inadequate knowledge of foreign law with its seemingly arbitrary selection. As will be discussed, the consequences of these two methodological failings would be that the United Kingdom would not only uncritically “borrow” an inaccurate, procedurally problematic version of the Canadian model, but that Canada itself would eventually adopt the \textit{Chahal}-inspired British version as a replacement for its original.

At the time of the \textit{Chahal} judgment, the Immigration Act 1985 was in force in Canada.\textsuperscript{51} Until 2002, the Act provided that an administrative tribunal, called the Security Intelligence Review Committee (SIRC), would review deportation orders against permanent residents in, \textit{inter alia}, national security cases.\textsuperscript{52} SIRC, in

\textsuperscript{49} See infra notes 62–68 and accompanying text.

\textsuperscript{50} Constitution Act, 1982, \textit{being} Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, Part I.

\textsuperscript{51} Immigration Act, R.S.C. 1985, c. I-2 (Can.), repealed by Immigration and Refugee Protection Act (IRPA), 2001 S.C., c. 27 (Can.). See infra notes 193–201 and accompanying text.

\textsuperscript{52} Charkaoui v. Canada (Minister of Citizenship and Immigration), [2007] 1 S.C.R. 350, 394–96, ¶¶ 71–73. SIRC proceedings were also applicable to deportations of non-resident aliens until 1988, when they were discontinued in favor of review before the Federal Court. \textit{Id.} at 394–95, ¶ 75. The main functions of SIRC were and are, however, “to review the activities of CSIS [the Canadian Security and Intelligence Service] and to investigate complaints against CSIS.” Craig Forcese & Lorne Waldman, Seeking Justice in an Unfair Process 5 (2007), available at http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf (citing Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, § 38 (Can.)); see also Security Intelligence Review Committee, Annual Report 1988–89 1–3, 44 (1989) [hereinafter SIRC Annual Report], available at http://www.sirc-csars.gc.ca/pdfs/ar_1988-1989-eng.pdf. For a good summary of the immigration procedures in national security cases prior to 2002, see Forcese & Waldman,
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turn, had statutory authority to implement its own procedures, which came to resemble adversarial, court-room hearings, but allowed for in camera sessions where SIRC-appointed counsel—essentially “special advocates”—would review security-sensitive evidence relied upon by the government and withheld from the individual to be deported.53 Under the SIRC system, Canada’s Minister of Immigration and the Solicitor General (an office abolished in 2005) could agree that a permanent resident was either a threat to national security or otherwise inadmissible on other exceptional grounds, such as involvement in organized crime. The Minister and Solicitor General would issue a report to SIRC, instigating the special national security procedures before it and thereby circumventing the usual avenues of appeal against deportation orders. Consulting with the Canadian Security Intelligence Service (CSIS) and government counsel, SIRC would decide how much case information should be released to the person to be deported. It would then provide that person and his regular legal counsel with a summary of the closed material, withheld on national security grounds, which they could use in challenging the deportation order.54 If SIRC and the government could not agree on what information to disclose, the government had recourse to the procedures in the Canada Evidence Act, as it was at the time:55 the CEA allowed the Federal Court to balance the public and individual interests at stake in deciding what information must be disclosed or withheld, and gave it wide discretion in making appropriate orders.56 In any case, when SIRC had to consider

53. Forcese & Waldman, supra note 52, at 6–7; Ip, supra note 52, at 719; SIRC Annual Report, supra note 52, at 63–64.
55. CEA, supra note 39; However, according to Forcese & Waldman, supra note 52, at 7, the CEA had never actually been used in connection with SIRC proceedings.
56. CEA, supra note 39, § 38.06(2):
If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence [sic] or national
evidence withheld from the deportee in an *ex parte* and *in camera* hearing, the individual and his regular legal counsel would be excluded from the proceedings. Instead, special security-cleared SIRC-counsel would represent the interests of (but not be responsible to) the individual to be deported, arguing for greater disclosure, examining witnesses, and challenging both the factual and legal grounds for the deportation order.  

If SIRC reported to the Governor-in-Council that there were reasonable grounds to conclude that the individual concerned was inadmissible on national security or certain other exceptional grounds, the Governor-in-Council could then finally direct the Minister to certify and carry out the deportation.

In *Chahal*, the Court’s micro-comparison of the Canadian special advocate system was inaccurate in three important respects. First, the Court mistakenly believed that this system was used before the Federal Court of Canada, which was incorrect.  

It was used before SIRC, which was not a court but an administrative tribunal reporting back to the Governor-in-Council. The Federal Court could only become collaterally involved, under the CEA, to determine what evidence must be disclosed in the ongoing SIRC proceedings. The ECHR also made two notable errors of omission. It did not mention that SIRC and the special advocate had access to the complete security file on the individual in question, allowing them to challenge the secret evidence more effectively. More importantly, the special advocates could communicate with the individual both before and after receiving the closed file. This meant that a) although the special advocate was technically independent counsel to SIRC, so that there was no attorney-client relationship, and b) he or she

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security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

See also Code & Roach, *supra* note 39, at 105–06.


60. Forcese & Waldman, *supra* note 52, at 9; see also *Secret Evidence, supra* note 43, at 181.
was forbidden from revealing any of the secret evidence, the special advocate could nevertheless discuss the case with and take instructions from the individual to be deported.\footnote{Forcese & Waldman, supra note 52, at 9.} As explained more fully in Part III below, the ECHR’s failure to mention these three points meant that the United Kingdom would adopt and expand upon this mistaken version of Canada’s special advocate system, importing it with fewer procedural protections.

The ECHR therefore not only overlooked three important limitations built into the Canadian special advocate system itself, but failed to make any macro-comparison whatsoever between the two national legal systems. Had it delved just a little deeper into Canada’s special advocate system, it might have discovered that the review procedures pursuant to a Canadian security certificate resembled the British ones it had found incompatible with the European Convention. Immigration decisions of SIRC and the Governor-in-Counsel, based on national security claims, were subject to judicial review in the Federal Court,\footnote{Id. at 6.} as was the British Minister’s final decision in Chahal’s case, based upon the recommendation of the review panel. In \textit{Chahal}, the Court found that process to be flawed, due to the structural shortcomings of the British review panel, as well as to the limited grounds for judicial review of the ministerial decision to deport.\footnote{Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 430, 435–36, 449–50, ¶¶ 43, 65–67, 127–32 (1996).} Even without undertaking a more detailed comparison between SIRC and the British review panel, or between Canadian and British judicial review doctrines, these systemic similarities might have raised concerns by the Court that the Canadian special advocate model was part and parcel of administrative proceedings similar to the ones it had just found to violate Article 5(4) of the Convention. This more systemic view might have colored the debate as to whether special advocates, in actuality, would be a desirable procedural addition to British immigration procedures.

Macro-comparison of Canada’s security certificate procedures and their place in the administrative law framework would have also led to questions of constitutional law. As already discussed, the \textit{Chahal} dicta lacked sufficiently wide context, due to the Court’s exclusive focus on Canada. The selection of this comparator—though not necessarily its singularity—could be retrospectively justified on
the basis of the close legal, historical, and cultural links between the United Kingdom and Canada. Nevertheless, there are important constitutional differences between the two countries, which the Chahal Court ought to have taken into account. Ultimately, all aspects of the Canadian security certificate procedures were required to comply with the requirements of Canada’s written Constitution, such as Section 7 of the Charter of Rights, which guarantees that all deprivations of life, liberty, and security of the person must be in accordance with fundamental justice. Moreover, when exercising judicial review, Canadian courts can strike down primary legislation that violates the Charter. Although such a judicial invalidation remains subject to parliamentary override under the Section 33 “notwithstanding clause,” the federal Parliament has never invoked it. In a legal system without a written constitution and still premised on parliamentary sovereignty, British courts simply did not have a similar power to check the legislature. At the macro-level of constitutional law and the separation of powers, then, there were systemic checks to the use (or abuse) of special advocates and secret evidence in Canada, which simply did not exist in the United Kingdom. For example, a statute permitting reliance upon secret evidence in a criminal trial would undoubtedly violate section 7 of the Charter, as would a later security certificate procedure that was “inquisitorial” by depriving a deportee of any representation whatsoever in ex parte, in camera hearings. A better understanding of these points alone might have given useful background to the Canadian special advocate system, encouraged the Chahal Court to be more cautious in its dicta, and better informed the British government’s later policy decisions.

There were, of course, institutional obstacles to the Chahal Court’s acquisition of foreign legal knowledge and exploration of its deep context; such obstacles are “institutional” in the sense that

64. See supra notes 22–31 and accompanying text.
65. Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), §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.”).
66. Id. § 33(1) (“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”).
67. Forcese & Waldman, supra note 52, at 18.
judges generally face many difficult, practical problems when comparing foreign law. Judges must deal with these factors as best they can and adapt their comparative methodology accordingly. The four institutional obstacles, which no doubt affected Chahal’s comparative methodology, were those of 1) efficiency, 2) functionality, 3) legal culture, and 4) reductionism. The first two are closely related to the judicial organization and role. Efficiency factors are mostly out of the hands of judges and are related to questions of judicial administration. These restrictions are essentially ones of finite resources. Concerns of cost, lack of staff, access to foreign legal materials and language limitations, docket overload, and time pressures can strongly influence how much effort a judge can put into comparative research. The second knowledge impediment, functionality, is related to the nature of adjudication and the purpose of the particular comparison. That is, the judicial comparison is not an academic exercise, but one assisting a pragmatic purpose, such as a proportionality analysis, interpretive uniformity, legal convergence, or international judicial dialogue. As any comparison will accordingly be rhetorical in nature, it must be clear, succinct, instructive, and tailored to its particular ends.

The other two institutional obstacles are more serious and lead to skepticism about the desirability, rational integrity, or usefulness of legal comparisons, whether made by judges, policymakers, or even academics. When a judge does look to foreign law, legal culture impacts the extent and quality of that comparison. Many judges not only lack the language skills to read original foreign primary and secondary legal documents, but also sufficient familiarity with the foreign legal system to research and understand those materials properly. Inadequate “internal understanding” of foreign law becomes even more difficult as one proceeds from a micro- to macro-comparison, and increasingly must take into account extra-

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legal or interdisciplinary considerations like foreign politics, economics, culture, and history.\textsuperscript{72} Factors such as these complicate understanding of the deep context of the source legal system, as well as the local context of the receiving jurisdiction, as discussed below. Finally, the knowledge problem will perhaps always be plagued by the challenge of reductionism. Just as a judge must at some point stop and justify the selection of comparators, so too must that judge decide how deeply he or she must dig into the overall foreign context. Reductionism reveals a paradox not only within deep context, but more fundamentally within the comparative enterprise as a whole: the deeper one goes in trying to understand foreign law, the more one realizes that a “perfect” or “true” understanding is likely impossible\textsuperscript{73}—especially within the probably inescapable limitations posed by the other institutional obstacles. Nevertheless, the \textit{Chahal} dicta were not methodologically flawed solely on account of these four factors. Rather, it was because the Court failed to take the knowledge problem properly into account, consciously and cautiously work around the obstacles above, and justify its methodological choices. It is little wonder, then, that the ECHR did not anticipate the British reception of the \textit{Chahal} dicta and the ensuing consequences.

3. The Borrowing Problem and “Local Context”

To be fair, the \textit{Chahal} Court could not have foreseen the events of September 11, 2001, the so-called “War on Terror,” and the especially strong anti-terrorism measures that would follow in the United Kingdom.\textsuperscript{74} As discussed in more detail in Part III, the British government and Parliament responded quickly to \textit{Chahal} by introducing special advocates into immigration proceedings.\textsuperscript{75} In the post-9/11 period, the government secured further legislation first

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\textsuperscript{72} See generally Anmus, supra note 24 (describing different modes of comparative law analysis and attendant problems of legitimacy and practicability); see also Dannemann, supra note 23, at 413–14 (discussing the importance of legal context in understanding the particular rules in a legal system).

\textsuperscript{73} Dannemann, supra note 23, at 390–91; see Pierre Legrand, \textit{European Legal Systems are not Converging}, 45 \textit{Int’l. \\& Comp. L.Q.} 52 (1996); Markesinis \\& Fedtke, \textit{supra} note 31, at 117–22.


\textsuperscript{75} \textit{Special Immigration Appeals Commission Act, 1997}, c. 68 (Eng.) [hereinafter SIACA].
allowing for indefinite detention and, after encountering legal difficulties with that approach, for a system of control orders.\textsuperscript{76} Notwithstanding that 9/11 and these drastic anti-terrorism laws were several years into the future, the Court compounded its selection and knowledge problems with another one concerned with legal borrowing. As explained below, with the \textit{Chahal} dicta, the Court not only gave an apparent “green light” to the United Kingdom to adopt the Canadian special advocate regime (as it had described it),\textsuperscript{77} but did so without considering how the local context might affect the operation and development of that foreign transplant. It gave no general cautions or reservations to its dicta that might have stood as a bulwark against procedural deficiencies, such as those it would later find in \textit{A and Others v. The United Kingdom}.\textsuperscript{78} Accordingly, in \textit{Chahal}, the ECHR failed to anticipate that at some point and in some way the British government might, in a sense, “abuse” its suggestion of special advocates in wholly foreseeable ways, such as through uncritical reliance, a security- rather than rights-driven interpretation, and expansion outside of a limited immigration context.

There were both passive and exhortatory aspects to the Court’s “failure to warn” in \textit{Chahal}. Its dicta were too brief, too lacking in explication, yet too sweeping in potential application to warn the United Kingdom or other Council of Europe States against uncritical and potentially problematic reliance upon them, even in the pre-9/11 security environment. Some expression of healthy skepticism in its use of comparative law would have been appropriate, especially given its lack of wide and deep context. To the contrary, the Court neither recognized the limitations to its comparative analysis, nor made clear the purpose of that comparison. The \textit{Chahal} dicta were certainly the result of an implicit proportionality analysis, and so the comparison in \textit{Chahal} appeared as something more than just judicial window dressing, “inspiration,” or “bricolage,” whereby the ECHR was casting about generally for

\textsuperscript{76} ATCSA, \textit{supra} note 74; PTA, \textit{supra} note 74; \textit{see also} A and Others v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.), ¶¶ 7–14 (appeal taken from Eng.) (U.K.).


\textsuperscript{78} A and Others v. United Kingdom, App. No. 3455/05, 49 Eur. H.R. Rep. 29 (2009); \textit{see infra} notes 181–185 and accompanying text.
ideas or comparative ornaments to its judgment. The Court nevertheless gave no clear indication as to the importance of the Canadian reference to its own reasoning or to the British government’s expected response. Thus, it was uncertain as to whether the Court was using the Canadian example to work out hard-edged procedural rules under Article 5(4), to illustrate common problems or universal principles of procedural fairness, or merely to give one of possibly many examples of a less rights-restrictive alternative. The Chahal dicta could have fulfilled any of these purposes in the search for a better solution to the existing British immigration procedures. Moreover, the Court gave no hint as to what weight the British government should give to the special advocate reference, if any at all. That is, was the ECHR mandating or recommending a special advocate system as the only, best, or judicially preferred solution to Chahal’s problem of secret evidence? Did it already consider such a system to comply with the Convention? Or was the Court merely throwing out a solitary example to show the United Kingdom that there were many other alternatives, leaving it up to the British government to find one on its own?

In addition to this lack of judicial guidance, and as later developments in the United Kingdom would bear out, the Court’s poorly-worded dicta could be misinterpreted as exhorting the British government to implement and maintain a controversial, procedurally defective system of special advocates. As mentioned above, the Court’s reference to only one combination of jurisdictional and substantive comparators, along with its recommendatory tone, was subject to misinterpretation as a positive endorsement of the Canadian special advocate model—inaccurately portrayed, at that. The Chahal dicta therefore not only failed to warn, but easily lent themselves to misunderstanding as a conclusive, baseline interpretation of Article 5(4) requirements in future cases. Thus, the Court could be seen, rightly or wrongly, as prospectively ruling on a hypothetical procedural mechanism, either to prescribe special

80. See Bryde, supra note 69, at 214–16; Fontana, supra note 23, at 554–55.
81. See Choudhry, supra note 23, at 833–35; Bryde, supra note 69, at 216–17; Yap, supra note 79, at 1018.
advocates to the United Kingdom or suggest some alternative that indicated a Convention floor, below which the United Kingdom might not go. Judicial “rights minimalism” of this sort can “green-light” a government unquestionably or timidly to adopt a specific measure, such as special advocates, or in any case to aspire only to minimum human rights standards. This governmental strategy of “Convention-proofing,” accordingly forestalls more critical, careful considerations of other, rights-maximizing policies. Such a phenomenon has been noted by Canadian scholars in regard to “Charter-proofing,” a phrase coined by Kent Roach, under the Canadian Charter of Rights and Freedoms. This “entails a process of designing legislation that erodes protections for rights in such a way as to meet the lowest possible threshold,” and is therefore just “a matter of shrewdly predicting what the courts will be prepared to do.” By focusing on minimum constitutional requirements, Charter-proofing can easily overlook the wisdom or effectiveness of a proposed policy, the risks of its poor enforcement or abuse, or its overall compatibility with other legal principles and rule of law values. A government should certainly always be concerned with ensuring that policies and legislation are compliant with applicable constitutional

83. See Roach, Implications, supra note 13, at 294, 304–05; Kent Roach, The Role and Capacities of Courts and Legislatures in Reviewing Canada’s Anti-Terrorism Law, 24 Windsor Rev. Legal & Soc. Issues 5, 14 (2008) [hereinafter Roach, Role and Capacities] (the dangers of judicial “green-lighting,” by either actually or apparently making a prospective ruling on the rights-compatibility of a legal measure, also reflect the institutional limitations of the judicial branch because “[c]ourts are the captive of the issues that are argued before them. They cannot always see the big picture.”).


86. Roach, Dangers, supra note 84, at 131; Kent Roach, September 11: Consequences for Canada 99 (2003) [hereinafter Roach, September 11] (seen from the approach of Charter-proofing, then, “consistency with the Charter is nothing more than a prediction that the courts will not strike the legislation down.”).

or international human rights requirements. However, Convention- and Charter-proofing—which together might be generally described as “rights-proofing”—are more cynical processes, whereby a government does not aspire to find the practice that least impairs rights; instead, it seeks to find the policy most likely to survive judicial challenge, usually with the aim of pushing state power to the limit at the expense of a fuller realization of rights, beyond the minimum baseline or floor. 88

Rights-proofing, then, is arguably a unique use of comparative law by state policy-makers, and both contrasts and is coupled with another, directly opposing purpose: a rights-conscious use of comparative law to find less restrictive “best practices,” as discussed in this paper’s conclusion. Even so, both of these purposes might also be seen as manifestations of other typologies for the borrowing of foreign law. 89 For efficiency purposes, the British adoption of a special advocates system (discussed in Part III) certainly seemed to “save[] time and costly experimentation.” 90 Moreover, it arguably was the most efficient way, within the confines of the European Convention, to maximize the state’s security concerns and enlarge governmental powers. Any potential disjunction or conflict with other domestic legal practices, deeply-rooted institutions, or cultural factors—and concerns about the subsequent development and effects, as well as success or failure of a particular

88. Roach, Dangers, supra note 84, at 134–35. However, legislatures are not necessarily immune from rights-proofing, especially when they are responding to political pressures, focus too narrowly on addressing a particular judicial decision, or the government is in a strong position to push its legislative agenda. See Roach, Role and Capacities, supra note 83, at 34–35, 40–41 (discussing the pressures that lead to “Charter-proofing” of the Canada Evidence Act).

89. Jonathan M. Miller, A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process, 51 Am. J. Comp. L. 839 (2003) (providing a view of legal transplants with respect to sociological typology); see also Michele Graziadei, Comparative Law and the Study of Transplants and Receptions, in Oxford Handbook, supra note 23, at 440, 456–61 (noting that prestige and economic incentives can influence legal transplants); Jan M. Smits, Comparative Law and its Influence on National Legal Systems, in Oxford Handbook, supra note 23, at 513, 530–31 (discussing alternative motives behind adopting foreign law, including saving time and money or being compelled economically to do so as well as discussing the incentives of courts to adopt foreign law).

legal transplant—will not necessarily detract from a government’s initial and maybe urgent desire to implement an apparently efficient solution to a pressing problem. The purposes for borrowing, moreover, need not be exclusive and can overlap. So, a government can mask its efficiency attempts at rights-proofing and security maximization by claiming that a “superior” power or tribunal (say, the ECHR or European Union institutions) has imposed a particular foreign legal mechanism on the receiving country. Such a claim can be a politically calculated move by a government to deflect responsibility away from it and cloak the foreign law with an external authority. Claims to authority can also be premised on disingenuous or doubtful moral arguments for prestige, however. In the case of the British adoption of special advocates, the government could claim (as seen in Part III) not only that the Chahal Court had endorsed such a system, but that it was based on a model originating in Canada—a country that many people in the United Kingdom would associate with liberal values such as tolerance, cultural pluralism, and respect for human rights. The British government’s proposal for special advocates, made in response to Chahal, might then have had a superficial appearance of moral legitimacy, as well as the perceived advantage of having already been vetted and tried by a country with a good reputation for protecting human rights.

Of course, when considering or guessing at a government’s purposes in borrowing foreign law, “[d]etermining the dominant typology involves some subjectivity, especially since the individuals

91. As the legal controversies over the British special advocate system indicate, in the long-run borrowing might not be as efficient as a government might at first believe. How the transplanted law develops and how effective it is in serving its intended purpose, therefore, are separate questions from why government policy-makers choose to borrow it. Miller, supra note 89, at 845–46, 867; Graziaidi, supra note 89, at 455, 464; Alan Watson, Legal Transplants: An Approach to Comparative Law 17, 20, 27, 30 (2d ed. 1993). But see Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 Mod. L. Rev. 11, 12 (1998) (rejecting the dichotomy of “repulsion or interaction,” and the notion of “legal transplant,” in favor of “legal irritant”).

92. Miller, supra note 89, at 847 (discussing externally-dictated transplants as a result of a nation’s desire to please a foreign nation through acquiescing to their demands or to take advantage of opportunities provided by adopting the foreign legal model).

93. Watson, supra note 91, at 99 (arguing that legal transplants gain legitimacy if taken from a respected system).

94. Miller, supra note 89, at 854–55 (discussing that one explanation for a legal transplant’s success is the prestige of the foreign model it was taken from).
who are the focus of each typology may vary.\textsuperscript{95} This subjectivity is compounded, as a foreign legal mechanism can develop in its new environment in unpredictable ways and for any variety of reasons that might or might not accord with the original purposes for its adoption.\textsuperscript{96} Finally, the ambiguities and uncertainties surrounding transplants are further complicated by theoretical debates about whether and to what degree laws and legal systems reflect social factors, or are autonomous entities that can be instituted for purposes of solving problems or effecting specific legal change in the host jurisdiction.\textsuperscript{97} Naturally, it is unrealistic to demand that a judge accurately predict exactly how state institutions will respond to his or her citations of foreign law or how a legal transplant will develop after its reception. However, judges (as well as policymakers) should probably always expect that some kinds of natural alterations or “errors” will occur when transplanting foreign laws, that such laws will require inevitable “adjustments” as they migrate between and penetrate legal systems, and that all of these effects might only become apparent over time.\textsuperscript{98} The judge must therefore be mindful of these difficult questions and take them into account as part of a practical comparative methodology. Although they might outwardly appear too academic, complex, and unanswerable, these questions point towards very real problems with analyzing and borrowing foreign law. Otto Kahn-Freund, for example, simultaneously warned about and encouraged the critical use of comparative law. Intended

\textsuperscript{95} Miller, \textit{supra} note 87, at 872.

\textsuperscript{96} See Watson, \textit{supra} note 91, at 27, 111–13 (discussing how many factors, including changes in society, lead to transplanted law taking on different interpretations and that new interpretations do not necessarily mean rejection of that law); Otto Kahn-Freund, \textit{On Uses and Misuses of Comparative Law}, 37 Mod. L. Rev. 1, 12–13, 17, 20 (1974) (arguing that some factors that determine the success of legal transplants are political considerations, the allocation of power within the government structure, and labor relations).

\textsuperscript{97} John W. Cairns, \textit{Development of Comparative Law in Great Britain, in Oxford Handbook}, \textit{supra} note 23, at 131, 171 (discussing both Kahn-Freund's theory of legal transplants involving economic and societal factors and Watson's approach focusing on historical relationships between legal systems); Graziadei, \textit{supra} note 89, at 465–74 (discussing the two views of legal transplants); Werner Menaki, \textit{Comparative Law in a Global Context: The Legal Systems of Asia and Africa} 50–51 (2d ed. 2006) (discussing the debate between “culturalists” and “transferists”); see Watson, \textit{supra} note 91, at 6–9, 35, 95–97, 99; Kahn-Freund, \textit{supra} note 96.

\textsuperscript{98} Thanks to Kent Roach for suggesting to me the ideas of inevitable error and adjustment upon the migration of foreign law.
for legislators, his advice is just as applicable to judges and executive officials:

[A]ny attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this [U.K.] or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law.99

The contextual awareness of which Kahn-Freund speaks does not foreclose the idea of borrowing. It does, however, deny that foreign law can be examined, borrowed, or transplanted effortlessly and without regard at all to other legal and extra-legal factors.100 It just as much rejects extreme views that social, cultural, or linguistic differences preclude transplants altogether.101 Although judges, as well as legislators or executive officials, cannot ignore these questions, they do not need to answer or even understand them all (a perhaps impossible task even for dedicated, academic comparatists). Rather, when using comparative law, judges must at least be aware of and openly recognize the serious problems of local context, just as they have to consider wide and deep context; as explained in Part III, failure to do so can have unanticipated and serious consequences, whenever governments rely on judicial comparisons in adopting foreign legal mechanisms. In summary, then, an adequate appreciation of local context means that judges must take into account and acknowledge that state actors can have many purposes for using (or abusing) judicial references to foreign law, that legal transplants can develop in different, perhaps unexpected ways in a


100. Kahn-Freund's view is therefore reconcilable with that of Alan Watson. See Watson, supra note 91, at 111–14; Edward M. Wise, The Transplant of Legal Patterns, 38 Am. J. Comp. L. 1, 3, 5–6, 21–22 (1990) (discussing Watson's view of law as autonomous from social factors); see generally William Ewald, Comparative Jurisprudence (II): The Logic of Legal Transplants, 43 Am. J. Comp. L. 489 (1995) (discussing the importance of Watson's theory of legal change and development through legal transplants); Teubner, supra note 91, at 17–18 (building on Kahn-Freund's view to provide the “missing link in Watson’s account of autonomous transplants . . . .”).

host jurisdiction and for a variety of reasons, and that the combination of these two variables can be volatile in the national security context, where the relationship between security and rights is especially tense.

III. SPECIAL ADVOCATES IN LONDON AND OTTAWA

The British response to the *Chahal* decision proved that concerns about rights-proofing are well-founded. Relying heavily on the ECHR’s dicta, the government secured legislation introducing a system of special advocates in deportation proceedings on national security grounds. Parliament later expanded the use of special advocates and the reliance on secret evidence into indefinite detention and control order cases, while the government went on to ignore the subsequent and repeated concerns of parliamentary committees. Of course, while *Chahal* is not directly responsible for either Parliament’s controversial legislation or the government’s overriding focus on security, that decision nonetheless set the preconditions for both. It did so by green-lighting a procedurally problematic version of Canadian special advocates, without giving due regard to the potential problems that might result from their introduction into a foreign legal environment. *Chahal* was the buttress with which the U.K. government (and, later, the Canadian one) could fortify its security agenda against parliamentary criticisms and justify extraordinary departures from due process.

A. The British Special Advocate System: Borrowing from Canada

The British special advocate system legislatively developed in two stages until 2007, when in two rulings the House of Lords modified its operation in attempting to bring it into line with Convention requirements.\(^\text{102}\) Going further than these judgments, in 2009 the ECHR found important aspects of this system to be incompatible with the Convention, likely heralding a possible third stage of legislative development sometime in the near future.\(^\text{103}\) In any case, stage one began in 1997 with the government’s response to the *Chahal* judgment, where the ECHR found the British

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\(^{102}\) Sec’y of State for the Home Dep’t v. JJ and Others, [2007] UKHL 45 (appeal taken from Eng.); Sec’y of State for the Home Dep’t v. MB, [2007] UKHL 46 (appeal taken from Eng.).

immigration procedures in question to violate Convention Article 5(4), as already explained in Part II.\textsuperscript{104} Under that system, as it then was, the Home Secretary would simply order deportation of an alien on the grounds that it was "conducive to the public good" for reasons of national security.\textsuperscript{105} There was no appeal, strictly speaking, against such an order.\textsuperscript{106} However, a non-statutory, government advisory panel (nick-named the "Three Wise Men") would review the Home Secretary's decision and all the secret evidence, before issuing a non-binding recommendation to him or her as to whether the order should stand. The individual to be deported could appear before the panel, ostensibly to challenge the Minister's deportation order. However, he was entitled only to a very basic outline of the grounds for removal, could not see any closed, security-sensitive evidence that was the basis for the decision, and had no right to legal representation. Furthermore, he could neither know nor legally appeal the panel's undisclosed advice to the Home Secretary, who was free to accept or disregard the recommendation at his or her discretion. The ministerial decision was subject to judicial review upon a very deferential standard.\textsuperscript{107} After the ECHR decided in \textit{Chahal} that these procedures violated Article 5(4), of course, the British government was obligated to reform them.

As for a possible replacement, the government looked to the Court's dicta in \textit{Chahal} and laid before Parliament the bill that would become the Special Immigration Appeals Commission Act, 1997 (SIACA),\textsuperscript{108} creating a British system of special advocates, described below. The Parliamentary Under-Secretary of State for the Home Department, Mike O'Brien, made clear in the House of Commons that the special advocate system in the SIACA "builds on an approach adopted by the Canadians, which was commended by the European Court in its findings in Chahal."\textsuperscript{109} Based on Mr.

\begin{footnotesize}
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\item[104.] \textit{Ip}, supra note 52, at 718, 720.
\item[106.] \textit{Id.} § 15(3).
\item[108.] SIACA, supra note 75.
\item[109.] Statement of Mike O'Brien, 299 Hansard (1997) 1056 (U.K.). The Parliamentary Under-Secretary of State for the Home Office in the House of Lords, Lord Williams of Mostyn, had previously made this claim before the upper House. Statement of Lord Williams, 295 Hansard (1997) 736 (U.K.); \textit{see also} \textit{Secret Evidence}, supra note 43, at 181-82 (criticizing the government's failure to
\end{itemize}
\end{footnotesize}
O’Brien’s remarks to the House, the government saw that dicta as something more than a simple illustration within the ECHR’s proportionality analysis or an invitation to consider other possible comparisons. Rather, it took the position that the Court had affirmatively “commended” this “different relationship” between the special advocate and the individual to be deported. Although characterizing the flavor of the special advocate system as “probably more Canadian” than British, the Court’s perceived commendation was the reason the government felt that it “should go down that route.”

The government not only uncritically followed the ECHR’s mistaken description of how the Canadian SIRC system worked, but took its dicta as a positive suggestion and an authoritative pronouncement on the Convention compatibility of that foreign model. Thus, according to the Under-Secretary in the Commons, the government believed that “the special advocate relationship, which protects national security and the defendant, meets our European Convention obligations, and we do not expect that it would be challenged.”

The government used the Court’s Canadian comparison to Convention-proof its proposed special advocate system from a security-slanted perspective, an approach which would color research the Canadian procedure. The Joint Committee on Human Rights also later recognized the Canadian inspiration for SIAC procedures, per the *Chahal* dicta. Joint Committee on Human Rights, Anti-Terrorism, Crime and Security Bill: Further Report, 2001–02, H.L. 51, H.C. 420, ¶ 10 n.22.


111. Id.

112. Not all parliamentarians were so sanguine about the suitability and Convention compatibility of the Canadian example, without further critical examination and debate. See Statement of Lord Thomas, 296 Hansard (1997) 747 (U.K.) (expressing doubts about the procedural fairness of the proposed system); Statement of Lord Lester, *id.* at 742 (calling attention to important differences between the actual Canadian system and that proposed by the government, based on the *Chahal* dicta); *see also* Constitutional Affairs Committee, The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates, 2004–05, H.C. 323-1 [hereinafter CAC Seventh Report 2004–05] (finding defects in the Special Advocates system and recommending improvements). “After the *Chahal* judgment, neither the Home Office, the Foreign Office nor the Attorney General’s office made any inquiries to the Canadian government concerning the Canadian use of special counsel. Nor did they carry out any research of their own into the Canadian Legislation, procedure or practice. Nor does Hansard show any attempt by the government to correct the record on this matter. Instead, government ministers and officials were apparently content to accept compliments for work they had not done.” *Secret Evidence*, *supra* note 43, at 182.

its subsequent expansion and defense of that system over the next several years.

Accordingly, the SIACA created SIAC, having the status of a superior court of record, to hear appeals from deportation orders made on national security and some other exceptional grounds.\(^\text{114}\) Appeal from SIAC on points of law could then be had to the English Court of Appeal in England and Wales, or the equivalents in Scotland and Northern Ireland.\(^\text{115}\) The SIACA also provided for the appointment of a special advocate, who—while counsel for SIAC, and so not responsible to the individual to be deported—could challenge the government’s secret evidence in \textit{in camera}, \textit{ex parte} proceedings.\(^\text{116}\) In response to the attacks of September 11, 2001, however, Parliament expanded the role of these special advocates beyond the original, limited immigration context of removal proceedings—a process of expansion that in time, with the second developmental stage discussed below, would completely separate the special advocates system from immigration altogether by using it against British citizens.\(^\text{117}\) Section 23 of the ATCSA, which received Royal Assent in December 2001, allowed for the indefinite detention of aliens who could not be deported due to a risk of torture abroad. As such a drastic interference with the liberty of the person would undoubtedly have violated Article 5, the British government derogated from its Convention obligations pursuant to Article 15,\(^\text{118}\)

\(^{114}\) SIACA, \textit{supra} note 75, §§ 1–2, 4.

\(^{115}\) \textit{Id.} § 7.


\(^{117}\) \textit{Ip, supra} note 52, at 721, 724–25 (“Having gained a foothold in the legal system, the special advocate procedure subsequently spread. Parliament authorised several other bodies to use special advocates, including the Proscribed Organisations Appeal Commission (POAC), the Pathogens Access Appeal Commission (PAAC), and a number of other specialist tribunals,” (footnotes omitted) as well as their use in public interest immunity proceedings in criminal prosecutions); SASO Manual, \textit{supra} note 116, ¶¶ 68–74. On the spread of special advocates and the use of secret evidence generally in different sorts of civil proceedings, see \textit{Secret Evidence, supra} note 43, at 102–4, 10–33.

\(^{118}\) European Convention, \textit{supra} note 5, art. 15(1), 213 U.N.T.S. at 232 (“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under
on the basis that the threat of international terrorism, in the wake of the September 11 attacks, constituted a public emergency. Thus, whereas the SIACA responded to Chahal’s problem of how to safeguard security-sensitive evidence in immigration proceedings, the ATCSA addressed what the House of Commons Home Affairs Committee labeled the “intractable problem” resulting from Chahal’s main Article 3 holding.\(^\text{119}\) That is, the ATCSA allowed for detention of those aliens believed to be a threat to national security, for reasons of suspected involvement with terrorism, but who were unable to be deported due to a risk of torture upon removal to a receiving third-country. Taken together, then, the SIACA and ATCSA significantly heightened the individual liberty interests at stake and undermined procedural fairness in closed SIAC proceedings, using special advocates when the government sought to rely on secret evidence. An alien suspected of terrorism could now face indefinite imprisonment, without criminal charge or public trial, on a lesser burden of proof than reasonable doubt, without full benefit of legal counsel, and in some cases without even knowing the “gist” of the case against him.\(^\text{120}\)

Stage two of the development of the special advocate system, like the first one, began with an adverse judicial decision against the government in 2004. In A and Others v. Secretary of State for the Home Department,\(^\text{121}\) the House of Lords quashed the government’s Article 15 derogation and, pursuant to Section 4 of the Human Rights

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international law."). However, Article 15(2) qualifies the state power of derogation (“No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”); see Human Rights Act, 1998 (Designated Derogation) Order 2001 (SI 2001/3644) (U.K.) available at http://www.unhcr.org/refworld/pdfid/46e5564f2.pdf.


\(^\text{120}\) CAC Seventh Report 2004–05, supra note 112, vol. 1, ¶ 64 (“Proceedings before SIAC under the 2001 Act could be seen as a move towards a de facto criminal trial.”); see also Martin Chamberlain, Special Advocates and Procedural Fairness in Closed Proceedings, 28 Civil Justice Q. 314 (2009) (explaining that plaintiffs in closed proceedings may not have the right to see and challenge all the information put before the judge).

\(^\text{121}\) A and Others v. Sec’y of State for the Home Dep’t, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.), ¶ 73 (appeal taken from Eng.).
Act,122 declared Section 23 of the ATCSA to be incompatible with Convention Articles 5 and 14. Because this section targeted only foreigners and not British citizens posing the same risk, it unjustifiably discriminated on the basis of national origin. It therefore violated Article 14 and was not a measure “strictly required by the exigencies of the situation,” as mandated by Article 15.123 Accordingly, the indefinite detention provision could not then survive scrutiny under article 5, as it was a disproportionate restriction of personal liberty. A and Others (H.L.) thus rejected this solution to the Chahal problem of non-removable aliens. No longer able to detain non-deportable aliens indefinitely, the government was once again faced with the problem of what to do with those individuals it could not deport, but did not wish to release due to national security concerns. Although A and Others (H.L.) did not address special advocates, it was nevertheless to be the catalyst for their expansion beyond the immigration context.124

After long and heated debates in both Houses of Parliament, the government secured passage of the PTA, repealing Section 23 of the ATCSA and replacing indefinite detention with a new and innovative system of control orders.125 Under the PTA, the Home Secretary could order various restrictions on the personal liberty of both non-deportable aliens and British citizens suspected of involvement with terrorism.126 Control orders were subject to judicial

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123. See European Convention, supra note 118 (providing the text of Article 15); see also European Convention, supra note 5, art. 15(1)–(2), 213 U.N.T.S. at 232.


126. PTA, supra note 74, §§ 1(1), 2(1)(a)–(b); for reviews of PTA procedures, see Clive Walker, Keeping Control of Terrorists without Losing Control of Constitutionalism, 59 Stan. L. Rev. 1395, 1411–14 (2007) (explaining the contents and issuance of control orders); Ip, supra note 52, at 723–24 (describing the provisions and results of the PTA (including control orders)); McGoldrick, supra
review in the High Court of England and Wales, or the equivalent in Scotland and Northern Ireland, while the standard of review depended on whether the particular order's severity did or did not require an Article 15 derogation. Where the government intended to rely on secret evidence in control order proceedings, a special advocate would protect the individual's interests in the in camera hearing, much the same as before SIAC. As the government explained, procedure under the PTA was “modeled on that adopted for the Special Immigration Appeals Commission (SIAC), following a Canadian precedent, and was approved by the European Court of Human Rights in the case of Chahal v. UK . . . .”

In this way, the PTA expanded Britain’s special advocate system in terms of its forum, purposes, and subject. Special advocates could now be used in the regular courts for preventively restricting the liberty of aliens and citizens alike upon ministerial order. Where citizens were concerned, then, control order proceedings would have no connection at all to immigration control. Executive power to restrain the freedom of British nationals was even stronger in conjunction with the preventive detention of suspected terrorists under the Terrorism Act, 2000. The period for detention without charge, originally seven days, would be lengthened over time to a controversial twenty-eight days. Even so, preventive detention was

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note 125, at 511–14 (describing control orders under the PTA); Ewing & Tham, supra note 124, at 671–73 (describing control orders under the PTA).

127. PTA, supra note 74, §§ 1(2)(b), 1(4), 3–4; See Walker, supra note 126, at 1409–10, 1415–20 (providing a detailed analysis of the differences between “derogating” and “non-derogating” control orders); Ewing and Tham, supra note 124, at 673–74; McGoldrick, supra note 125, at 514–15.

128. PTA, supra, note 74, § 3(5); See Ewing & Tham, supra note 124. See generally Civil Procedure (Amendment No. 2) Rules, 2005, S.I. 2005/656 (U.K.) [hereinafter PTA Rules] for procedures regarding the use of special advocates under the PTA; Walker, supra note 126, at 1405, 1409, 1441 (noting that paragraph 7 allows for the appointment of qualified lawyers known as “special advocates” who must represent the interest of the relevant party but who is not obliged to follow instructions from said party); Ip, supra note 52, at 724 (“[A]s a result of the PTA, special advocates now appear in the ordinary courts on a systematic basis.”).

129. Department of Constitutional Affairs, Explanatory Memorandum to the Civil Procedure (Amendment No. 2) Rules 2005, ¶ 7.2 [hereinafter Explanatory Memorandum], in PTA Rules, supra note 128.

130. Walker, supra note 126, at 1408–09; Ip, supra note 52, at 724.

131. TA 2000, supra note 74, § 41 & sch. 8, § 36(3); Criminal Justice Act 2003, c. 44, § 306(4); TA 2006, supra note 74, § 23(7). On two occasions, the government also sought to extend the period of detention without charge to ninety and forty-eight days. Both times, parliamentary opposition forced the
at least statutorily limited. Previous to the PTA, such drastic, open-ended restrictions on the citizen’s liberty because of alleged terrorist activity could only have occurred upon criminal charge and pursuant to criminal procedure. Furthermore, the London Underground and bus bombings of July 7, 2005 only increased government fears of home-grown terrorism and strengthened its arguments for extraordinary preventive measures against suspected terrorists of any nationality. This was due to the fact that the “7/7” perpetrators were British citizens with domestic connections to radical Islamic groups. Thus, by the end of this second developmental stage, the original immigration context surrounding Chahal, its dicta, and the Canadian special advocate model had exploded. As explained in


132. Walker, supra note 126, at 1400. See Ewing & Tham, supra note 124, at 674–78, for an account of the personal impact of control orders on individuals subject to them.

133. Walker, supra note 126, at 1397–1400. Control orders not only respond to terrorist threats posed by British nationals, but also represent a more general trend towards preventive, non-criminal measures to control all sorts of conduct, such as “anti-social behaviour orders.” See Clive Walker, The Threat of Terrorism and the Fate of Control Orders, [2010] Pub. L. 4, 7, 10–11.

134. See Dora Kostakopoulou, How to do Things with Security Post 9/11, 28 Oxford J. Legal Stud. 317, 331–32 (2008); Chamberlain, supra note 120, at 314, 325–26; Jennifer Tooze, Deportation with Assurances: The Approach of the UK Courts, [2010] Pub. L. 362, 373, 385–86; Ip, supra note 52, at 724, 736, 739, 740–41. As Ip, at 740, also points out, “(o)nce it is accepted that special advocates may be employed in a certain situation because of a compelling state interest such as national security, the next inquiry is, almost inevitably, whether there are other interests that are equally or almost as compelling to validate their use elsewhere. The result is a gradual analogical expansion.” For example, in R. v. H, [2004] UKHL 3, ¶ 22, the House of Lords recognized that a court-appointed special advocate might be necessary to represent a criminal defendant in public interest immunity proceedings, while in Roberts v. Parole Board, [2005] UKHL 45, ¶¶ 18, 20, 125–127, it allowed their use in parole board hearings where the government wishes to introduce secret evidence. On the other hand, in R. v. Davis, [2008] UKHL 36, ¶ 35, the House of Lords refused to go so far as to permit a court to allow the introduction of secret evidence, in the form of anonymous witnesses, in a murder trial. In response to this decision, Parliament passed the Criminal Evidence (Witness Anonymity) Act, 2008, c. 15, to allow anonymous witnesses in criminal trials. Indeed, by early 2010, even the government found that “it was difficult to provide a comprehensive list of all the contexts in which closed material (as it prefers to call secret evidence) and special advocates are used . . . .” Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In, Sixteenth
Part III.B below, the British government would rely on *Chahal* to Convention-proof this expansion.

As for its operation, the British system of special advocates before SIAC and the High Court under the PTA generally worked along the lines suggested by the *Chahal* dicta, at least until modification by the House of Lords decisions in 2007, discussed below.\(^{135}\) There were accordingly some important differences between the British and Canadian models, resulting from the ECHR’s inaccurate description of the original SIRC procedures, as already discussed in Part II.\(^{136}\) First, and as just explained, special advocates came to be used in the regular court system, against citizens, for purposes beyond immigration control.\(^{137}\) This was a remarkable evolution far beyond their original role before SIRC back in Canada.\(^{138}\) Second, although the *Chahal* Court did not mention it, Canadian special advocates enjoyed full access to the government’s case materials and could readily adduce evidence.\(^{139}\) The British special advocate, on the other hand, might not have access to the complete security file on the individual and faced restrictions on adducing evidence, disadvantaging him or her in discovering material potentially favorable to the individual concerned. The British restriction on access and evidence gathering, along with a lack of other resources and administrative support, impaired the ability of special advocates in the United Kingdom to know all the

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135. See [*infra* notes 179–180 and accompanying text. See also Special Immigration Appeals Commission (Procedure) Rules, 2003, SI 2003/1034, r. 35–36 (Eng.) [hereinafter SIAC Rules] (defining the role of the Special Advocate, in representing appellants before SIAC and rules governing communications between the Special Advocate and the appellant); SASO Manual, [*supra* note 116, ¶ 22 (explaining that the Special Advocate is defined in the SIAC Rules and that a similar model applies to the PTA); Nicholas Blake, *The Role of the Special Advocate*, 42 Middle Templar (Hon. Soc’y Middle Temple, London) Summer 2007, at 5–7 (describing the functions of the special advocate in SIAC and control order proceedings); Ip, [*supra* note 52, at 720–21 (explaining how SIAC corresponds to the *Chahal* dicta in establishing the position of special advocates, the procedure for using closed material without disclosure to the appellant, and the special advocate’s limited ability to consult with the appellant); Tooze, [*supra* note 134, at 369–70 (describing the appointment, role, and powers of the special advocate)].

136. See [*supra* Part II.B.

137. See [*supra* text accompanying notes 117–134.

138. See [*supra* Part II.B.2.

facts, test the government's case, and push for more disclosure.\textsuperscript{140} Finally, while the British special advocate could initially consult with the individual, once he or she received the closed file, all further communication was prohibited without permission from either SIAC or the High Court,\textsuperscript{141} apparently rarely (if ever) given.\textsuperscript{142} In Canada, such communication was not prohibited, another important point the Chahal Court had overlooked in its dicta.\textsuperscript{143} The communication ban in the United Kingdom thus further impeded the special advocate's ability to build a “case,” despite the absence of an attorney-client relationship, and limited the individual’s right to effective legal counsel. An additional complication of this ban was that experienced special advocates might become increasingly “tainted” by exposure to classified information that they could not reveal. “Tainted” special advocates could not easily work with one another, make use of relevant (and sometimes contradictory) evidence from other cases in which they had been involved, or perhaps even speak freely with individuals in new cases prior to receipt of the closed material.\textsuperscript{144}

\textsuperscript{140} Chamberlain, supra note 120, at 318–20. See also SASO Manual, supra note 116, ¶ 108 (noting the special advocate’s minimal opportunities to understand the appellant’s case and that special advocates have never, as of the publication of the Manual, called their own witnesses during closed hearings); Forcense & Waldman, supra note 52, at 39–42; Tooze, supra note 134, at 370–71, 374 (outlining concerns about the special advocate’s restricted communications with the appellant, the special advocate’s limited ability to counter a government claim that a material must be closed for the public interest, and the special advocate’s lack of expertise, evidence, and resources). In response to the problem of resources and support, at least, the government established the Special Advocate Support Office in 2006. SASO Manual, supra note 116, ¶¶ 87, 90; Forcense & Waldman, supra note 52, at 30–31.

\textsuperscript{141} SIAC Rules, supra note 135, r. 36; PTA Rules, supra note 128, r. 76.25. See SASO Manual, supra note 116, ¶¶ 101–02; Chamberlain, supra note 120, at 315, 321–23; Forcense & Waldman, supra note 52, at 35–37, 39; Ip, supra note 52 at 721, 732–33; Tooze, supra note 134, at 371.

\textsuperscript{142} Forcense & Waldman, supra note 52, at 37.

\textsuperscript{143} Compare SIAC Rules, supra note 135, r. 36 (prohibiting communications from the special advocate to the appellant about the proceedings, with certain exceptions), and PTA Rules, supra note 128, r. 76.25 (almost identical to the SIAC rules, but refers to the court instead of the Commission) with Forcense & Waldman, supra note 52, at 9 (“SIRC lawyers or legal agents may . . . question the named person even after the former are fully apprised of the secret information against the latter. In so doing, they take special care not to disclose (even involuntarily) secret information.”), and Ip, supra note 52 at 719–20, 735 (explaining that SIRC counsel were allowed to question the appellant after seeing undisclosed material, without actually disclosing the content of the information).

\textsuperscript{144} SASO Manual, supra note 116, ¶¶ 111–12; Forcense & Waldman, supra note 52, at 28.
There were two other differences, as well, regarding the individual’s access to evidence in the United Kingdom and Canada. Although it seems never to have been used, the CEA provided a means by which a Federal judge could resolve disputes between SIRC and the government over the disclosure of evidence by weighing the competing interests in disclosure versus non-disclosure. \(^{145}\) Under the British system, disclosure of evidence is prohibited by SIAC or the High Court whenever and to whatever extent it is “contrary to the public interest.” \(^{146}\) Moreover, the Canadian Charter requires that SIRC provide the person to be deported with a summary of the undisclosed evidence, having sufficient content to make clear the allegations. \(^{147}\) In contrast, and as seen below in Part III.B, there would be some confusion in the British courts over what minimum content, if any, the Convention required in such summaries—a position complicated by government objections to disclosure. \(^{148}\) This question would not be settled until the ECHR intervened in A and Others. So although the new British system (at least at its inception in SIAC immigration proceedings) was arguably an improvement over the deficient proceedings rejected in Chahal, and special advocates might have had some limited successes in securing greater disclosure of material or challenging the government’s case, it still could not allay continuing, serious concerns about the overall fairness of SIAC and especially control order procedures. \(^{149}\)

\(^{145}\) See supra note 39 and accompanying text.

\(^{146}\) SIACA, supra note 75, § 5(6)(b). See SIAC Rules, supra note 135, r. 4, 37(3)(c); PTA, supra note 74, § 4(3); PTA Rules, supra note 128, r. 76.1(4), 76.2, 76.29(8); Ewing & Tham, supra note 124, at 674; Tooze, supra note 134, at 370. Furthermore, SIAC can only order disclosure if it finds there is no public interest at all in confidentiality, giving due deference to the ministerial determination of national security needs. Sec’y of State for the Home Dep’t v. Rehman, [2001] UKHL 47, [2003] 1 AC 153, ¶ 53.

\(^{147}\) See supra note 53 and accompanying text.

\(^{148}\) Chamberlain, supra note 120, at 320; Tooze, supra note 134, at 369–70. See also Paul Craig, Perspectives on Process: Common Law, Statutory and Political, [2010] Pub. L. 275, 283–86 (describing the debate in A and Others v. Sec’y of State for the Home Dep’t as to whether the European Convention’s procedural requirements can be met without disclosure to the deported person).

\(^{149}\) See, e.g., CAC Seventh Report 2004–05, supra note 112, vol. 1, at ¶¶ 32–43 (reviewing criticism of SIAC’s operation from a variety of sources, including the U.N., Amnesty International, MPs, and even the special advocates); Chamberlain, supra note 120, at 317–18, 323–24; Forcese & Waldman, supra note 52, at 43–45 (discussing the need for, and continuing criticisms of, the special advocate system); Ip, supra note 52, at 731–32 (questioning whether special advocates can adequately ameliorate the unfairness of proceedings where certain
B. Political and Judicial Dialogue in Britain—or Lack of It

Despite ongoing controversies, however, the British government continued to rely on the Chahal dicta in arguing that its special advocate system, as it operated and spread, was Convention compatible. It did so even when the system (particularly in regard to control orders) had begun to unravel from legal challenges under the Convention. The government thus demonstrated a security-driven agenda and blinkered preoccupation with Convention-proofing—an approach conflicting with the more rights-focused concerns of both the courts and parliamentary committees. So while the British government doggedly defended its special advocates system from its inception in 1997 into as late as March 2010, despite the legal setbacks discussed below, there was also considerable and escalating conflict between it and the parliamentary committees responsible for reviewing the system’s operation. Over the years, the House of Commons Constitutional Affairs Committee (CAC) (replaced by the Justice Committee in November 2007), the Home Affairs Committee (HAC), and most especially the Joint Committee on Human Rights (JCHR) repeatedly expressed worries over procedural shortcomings in the special advocates system. As it stated in its Twelfth Report of 2005–06, the JCHR did not accept that the Chahal decision had settled the matter, so that “[t]he question of compatibility of the system of closed hearings and special advocates with the Convention’s guarantees of a fair hearing . . . therefore remains an open one . . . .” 150 From 2004 to 2010, the committees’ points of concern consistently related mainly to the restrictions on communication between special advocates and the individuals in question, the government’s inadequate disclosure of evidence, the advocates’ inability to adduce evidence, and the availability of people are denied full disclosure of the case against them). But see Tooze, supra note 134, at 374–76 (supporting the use of special advocates in some immigration cases). For a candid and interesting “insider’s view” of the role of and problems with special advocates, see Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning, Nineteenth Report of Session 2006–07, H.L. 157, H.C. 394, at ev. 10–21 (U.K.) [hereinafter JCHR Nineteenth Report 2006–07] (testimony of Nicholas Blake, Martin Chamberlain, Judith Farbey, and Andy Nicol).

administrative support for them. In its Nineteenth Report of 2006–07, for example, the JCHR criticized the “enormous disadvantage” facing the individual, when denied “even the gist of the case against him.” It particularly condemned the limitations on communication between the special advocate and the person concerned, which the committee considered “essential, if Special Advocates are to be able to perform their function . . . .” In a damning conclusion, the JCHR acerbically remarked on the whole system that, “[a]fter listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as ‘Kafkaesque’ or like the Star Chamber.”

In its various reports over the years, the JCHR accordingly suggested reforms that would have brought the British special advocate system more into line with the original SIRC model in


152. JCHR Nineteenth Report 2006–07, supra note 149, ¶ 199.

153. Id. ¶ 205.

154. Id. ¶ 210.
Canada, although it did not explicitly recognize this. For example, the JCHR recommended that the government empower SIAC and the courts to balance the competing state and individual interests in deciding on the disclosure of security-sensitive evidence.\footnote{Id. ¶ 199.} It recommended a statutory obligation that the government must always provide persons with the gist of the allegations against them, as well as to amend the PTA to allow special advocates to call witnesses.\footnote{See JCHR Ninth Report 2009–10, supra note 151, ¶¶ 48, 53–54, 62–65; JCHR Fifth Report 2008–09, supra note 151, ¶ 27; JCHR Thirtieth Report 2007–08, supra note 151, ¶ 131; JCHR Twentieth Report 2007–08, supra note 151, ¶¶ 90, 101–03, 110; JCHR Ninth Report 2007–08, supra note 151, ¶ 73.} It also called for the “relaxation of the current prohibition on any communication between the special advocate and the persons concerned or their legal representative after the special advocate has seen the closed evidence.”\footnote{Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Eighteenth Report), 2003–04, H.L. Paper 158, H.C. 713, at 28 (U.K.).} Only then could the special advocate represent the individual’s interest adequately and gain information necessary to counter the government’s case.

On several occasions, in considering other, less rights-restrictive alternatives to the use of special advocates, the CAC and especially the JCHR looked to foreign jurisdictions. In its Eighteenth Report of 2003–04, the JCHR even commended the government’s comparative research into how other countries legally dealt with terrorism.\footnote{Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008, 2007–08, H.L. Paper 57, H.C. 356, at 37 (U.K.); Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill, 2007–08, H.L. Paper 108, H.C. 554, at 38 (U.K.); Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill, 2007–08, H.L. Paper 172, H.C. 1077, at 40 (U.K.). One special advocate later pointed out to the JCHR that Canada permitted communication between special advocates and the individuals concerned. Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, 2009–10, H.L. Paper 64, H.C. 395, at 27 (U.K.).} Before A and Others (H.L.) and the PTA, the government indicated in a Discussion Paper from early 2004 that it was “willing to consider any realistic alternative proposals and approaches which take account of the government’s human rights obligations, for example, the right to a fair trial, and to learn from

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155. Id. ¶ 199.
the experience of other countries.” Recognizing that other countries faced threats from terrorism, the government looked at various legal mechanisms in France, Germany, Canada, and the United States for dealing with non-removable aliens and protecting security-sensitive evidence. Nevertheless, the Discussion Paper only briefly described these mechanisms with little analysis of their suitability to the British context. The government also failed even to mention the Canadian inspiration to its special advocate system, let alone consider how the SIAC model compared to that of SIRC. So while the Discussion Paper demonstrated some wide context in terms of both jurisdictional and substantive comparators, its comparative analysis lacked depth, was unfocused, and unclear in purpose. In contrast, and about the same time, the JCHR itself looked at many foreign examples for dealing with terrorism in its Eighteenth Report of 2003–04, but with a little more detail and more of a thematic focus. Unfortunately, the JCHR also overlooked the Canadian connection to SIAC proceedings, its comparisons were more descriptive than critical, and they purposefully excluded immigration measures. This latter omission was unfortunate and somewhat puzzling, given that at the time Britain’s special advocate system was still limited to the immigration context under the SIACA and ATCSA. Nevertheless, the Discussion Paper and the JCHR’s Eighteenth Report of 2003–04 indicated the latent capacities of both government and parliamentary committees to engage together in serious comparative research when scrutinizing anti-terrorism laws, as well as to respond to decisions of the ECHR or other courts without lapsing into shallow Convention-proofing.

The JCHR showed this potential very clearly in its Twenty-fourth Report of 2005–06, dedicated to a comparative study of ways to deal with non-deportable individuals and security-sensitive evidence. In this report, committee members looked closely at

160. Id. at 12–15.
161. Id. at 14–15.
163. Id. at 25.
different measures in Canada, France, and Spain, going so far as to visit these countries and interview officials there. The JCHR examined Canadian investigative hearings into suspected terrorist offences and judicial power to order disclosure under the CEA, as well as the French and Spanish investigative magistrates systems. It also considered how officials in those jurisdictions conceived of “balancing” individual rights and security. The committee analyzed these mechanisms within their broader common and civil law systems, before deciding that a civilian-style investigative magistrate system “would not sit easily with common law traditions.” The JCHR additionally considered substantive criminal offences in these countries, as well as different approaches to accommodating governmental concerns about using intelligence sources in legal actions against suspected terrorists (such as through the alternative reliance upon targeted intercept evidence, which was not generally permitted in the United Kingdom).

In this report, moreover, the JCHR showed significant attention to comparative methodology. It carefully chose its comparators, established both wide and deep context, and had clear purposes in mind. First, the JCHR referred to Chahal for the origins of the British special advocates system, arguing that it was of the “utmost importance that the origins of special advocates in our law are properly understood, in order to prevent their use in other areas where they may be incompatible with human rights requirements.” Furthermore, the committee looked abroad for “a number of different ways in which to overcome what are currently perceived to be obstacles to prosecuting for terrorist offences.” The JCHR was therefore using comparative law not only to find less rights-restrictive alternatives to the British system of special advocates, but also to forestall its spread into other areas of the law after the PTA, as well as to bring anti-terrorism

165. Id. ¶ 13.
166. Id. ¶¶ 73, 53–76.
167. Id. ¶¶ 91–106 (explaining how the JCHR further looked at how these countries coordinated operations between the police, intelligence services, and prosecutors, and how judges in France and Spain exercised control over terrorism cases.).
168. Id. ¶ 42.
169. Id. ¶ 49.
proceedings as closely as possible back into line with criminal law norms. 170

Contrary to earlier indications in its Discussion Paper of 2004, after Parliament's passage of the PTA the government showed little interest in engaging directly with the results of the JCHR's comparative study. 171 The notable exception was a 2007 Home Office internal report on the French examination magistrates system, in which it found that the many differences between the criminal justice systems in France and the United Kingdom weighed against introduction of examining magistrates, in whole or in part. 172 Although the government periodically made some minor procedural amendments to improve the capability of special advocates to call witnesses and exert pressure for more disclosure, committee responses to these changes were ambivalent; the committees vacillated between offering congratulations for any improvements and expressing doubts about whether they went far enough in improving the fairness of SIAC and control order proceedings. 173 Just

170. See generally JCHR Ninth Report 2009–10, supra note 151, ¶¶ 74–76 (showing how a few years later, the JCHR briefly considered the new Canadian special advocate system adopted in 2008, as well as the Canadian Senate's review of anti-terrorism legislation); JCHR Sixteenth Report 2009–10, supra note 134, ¶ 121 (discussing different forms of counter-terrorism legislation review); CAC Seventh Report 2004–05, supra note 112, vol. 1, ¶ 101 (citing a Letter from Lord Falconer to the Constitutional Affairs Committee, id., vol. 2, ev. 82) (discussing how in its Seventh Report of 2004–05, the CAC had briefly raised the possibility of a special criminal court to try suspected terrorists, sitting without a jury, based on such a tribunal in Ireland. The Lord Chancellor of the day, Lord Falconer, looked into but rejected this possibility, as it utilized criminal rules of evidence that would require more disclosure and a higher standard of proof than under the PTA).

171. See generally Sec'y of State for the Home Dep't, Government Reply to the Twenty-fourth Report from the Joint Committee on Human Rights: Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention, 2006, Cm. 6920 ¶ 7 [hereinafter Government Reply to the JCHR Twenty-fourth Report 2006] (agreing that the use of special advocates in criminal proceedings would violate Articles 5(4) and 6 of the European Convention).

172. Home Office, Terrorist Investigations and the French Examining Magistrate System, July 2007 (on file with author); see also Government Reply to the JCHR Twenty-fourth Report 2006, supra note 171, ¶ 10 (“We are firmly of the view that the investigating magistrates model should not be borrowed wholesale and imported into our own institutional arrangements.”).

after passage of the PTA, the government had also established SASO to give operational support to special advocates, but this, too, elicited conflicting responses from the CAC. On the whole, however, the government regularly dismissed the main criticisms of the committees and, except for its study and rejection of examining magistrates, did not follow up with serious comparative studies of alternatives to the existing special advocate regime. Instead, the government at first preferred to rely both explicitly and implicitly on the *Chahal* dicta and, later, on controversial decisions of the British courts. As the government argued in 2007, the English High Court


and Court of Appeal judgments as of that date were “consistent with the European Court of Human Rights’ express recognition\textsuperscript{176} that the use of confidential material by the courts is acceptable where there are adequate safeguards (including judicial scrutiny of the procedure adopted and special advocates).”\textsuperscript{177} Even as late as March 2010, after losing \textit{A and Others} (ECHR) and \textit{AF}, both discussed below, the government still refused to compromise on the issue of permitting further communication between the individual concerned and the special advocate, after he or she had received the closed material.\textsuperscript{178}

The government thus combined almost out-of-hand rejections of committee recommendations with an uncritical reliance on the \textit{Chahal} dicta and unsettled domestic case law in an attempt to Convention-proof its special advocates system. Whether complacent or politically calculated, this attitude showed little regard for the concerns repeatedly expressed by parliamentary committees, much less the better practices which might have been found through serious comparative study of foreign law.

The government’s intransigent attitude was ultimately to its own cost, however. From 2007 to 2009, it would go on to lose several important legal challenges before the House of Lords and the European Court of Human Rights. Although the government could claim that the courts in none of these cases found a special advocate system to be per se incompatible with the European Convention, the courts gradually dismantled the core of the control order and special advocate regimes under the PTA—that being the ability to rely

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\textsuperscript{176} See, e.g., \textit{Chahal} v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 469, ¶ 131 (1996) (recognizing that judicial review of proceedings involving sensitive information may sufficiently accommodate national security concerns and still accord the individual adequate procedural protections); \textit{Tinnelly} & Sons Ltd v. United Kingdom, App. No. 20390/92, 27 Eur. H.R. Rep. 249, 288, ¶ 72 (1998) (acknowledging that some limitation on the right of access to courts may be justified on national security grounds); \textit{Al Nashif} v. Bulgaria, App. No. 50963/99, 36 Eur. H.R. Rep. 655, 678, ¶¶ 96–97 (2003) (noting \textit{Tinnelly} and pointing out that since that case the UK has introduced “special counsel” to deal with cases involving national security, as an example to point out that “there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice.”).

\textsuperscript{177} Government Reply to the JCHR Nineteenth Report 2007, \textit{supra} note 175, ¶ 45, 46.

\textsuperscript{178} Government Reply to JCHR Ninth Report 2010, \textit{supra} note 173, at 11.
extensively on secret evidence, and prevent communication between the special advocate and the individual in question. In 2007, the House of Lords decided the two cases of *Secretary of State for the Home Department v. JJ and Others* and *Secretary of State for the Home Department v. MB*, in which it found that control orders and the use of special advocates engaged rights under Convention Articles 5 and 6, and that onerous restrictions and the refusal to disclose the gist of allegations in some circumstances could violate the Convention. *JJ* and *MB* together therefore increased the judicial scrutiny that must be given to special advocate procedures and made clear that the government could not simply deprive a person of personal liberty based wholly on secret evidence, without sufficient regard for procedural fairness.

In 2009 and in a European sequel to *A and Others* (H.L.), the ECHR finally reviewed the United Kingdom’s special advocate procedures under the since-repealed Section 23 of the ATCSA. It found in *A and Others* (ECHR) that the earlier House of Lords’ judgment did not go far enough to satisfy the Convention. The Court examined the use of special advocates and the reliance upon secret evidence before SIAC where indefinite detention was at stake.

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180. However, in *MB*, [2006] EWCA at ¶¶ 50–54, Lord Hoffman dissented in the four to one decision, choosing to defend the existing special advocate procedures without any modifications. Recognizing the problem of secret evidence that was created by the *Chahal* judgment, Lord Hoffman agreed with the Government’s security-prioritizing approach to interpreting the dicta in that case and accepted the ECHR’s Canadian example as meeting minimum European Convention standards. At paragraph 54, he wrote,

The Canadian model is precisely what has been adopted in the United Kingdom, first for cases of detention for the purposes of deportation on national security grounds (as in *Chahal*) and then for the judicial supervision of control orders. From the point of view of the individual seeking to challenge the order, it is of course imperfect. But the Strasbourg court has recognized [sic] that the right to be informed of the case against one, though important, may have to be qualified in the interests of others and the public interest. The weight to be given to these competing interests will depend upon the facts of the case, but there can in time of peace be no public interest which is more weighty than protecting the state against terrorism and, on the other hand, the Convention rights of the individual which may be affected by the orders are all themselves qualified by the requirements of national security.
holding that a deprivation of liberty, “based solely or to a decisive degree on closed material” so general as to prevent a person charged from instructing a special advocate, that evidence would violate Article 5(4) of the Convention. 181 Parliamentary committees had been saying this all along, while it was an important characteristic of Canada’s SIRC system that the Chahal Court had left out of its influential dicta. Indeed, the Court briefly turned back to its decision in Chahal. It recognized once again that a system of special advocates might be one way to protect security-sensitive information in terrorism-related cases. 182 However, it elaborated upon its well-worn dicta by citing both the Supreme Court of Canada in Charkaoui v. Canada, discussed below, and the Supreme Court of the United States in Hamdi v. Rumsfeld, 183 for the proposition that an individual could not receive a fair hearing under Convention Article 5(4) if not given an opportunity to know and challenge the case against him. The ECHR therefore rejected the limitations of the special advocate system that the United Kingdom had implemented in response to Chahal. Although it still held out the possibility that a special advocate system might satisfy Article 5(4), this time it referenced foreign law in order to derive (or at least illustrate) the procedural requirements of such a system under the Convention. The Court also clarified the original Canadian model, with the help of a third-party intervention by the British human rights group Justice, pointing out that the special advocates before SIRC could continue to communicate with the individual to be deported even after receiving the closed file. 184 The Court thereby corrected some of the methodological mistakes it had made in Chahal, this time using foreign law more cautiously and with more attention to the procedural rights now clearly at stake. In one of the many ironies surrounding special advocates in the United Kingdom and Canada, the Court now referred back to and clarified its Chahal dicta in order to declare incompatible the British special advocate system that very dicta had instigated. The legal controversies over the British special

182. Id. at 713–14, 717–18, ¶¶ 197, 209–11.
183. Id. at 691–92, ¶¶ 111–12; Charkaoui v. Canada (Minister of Citizenship and Immigration), [2007] 1 S.C.R. 350 (holding that a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to it); see infra notes 202–223 and accompanying text (discussing Charkaoui); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that parties whose rights are to be affected are entitled to be heard and notified of allegations).
advocate system and the decision in *A and Others* (ECHR), then, might have been avoided from the start, if only the *Chahal* Court had been just as careful in its use of comparative law.

As the JCHR pointed out afterwards, the “decision of the Grand Chamber of the European Court of Human Rights in [*A and Others*] leaves no room for doubt that basic fairness requires that at the very least the controlled person be provided with the gist of the closed material which supports the allegations made against them.” 185 Accordingly, shortly after the ECHR’s decision, the Appellate Committee of the House of Lords had to take it into account in *Secretary of State for the Home Department v. AF*,186 a control order case challenging, under Convention Article 6(1), the withholding of evidence from an individual subject to a control order. The Lords held, in the words of Lord Phillips,

[The ECHR] establishes that 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. Where, however, 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 requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.187

In applying *A and Others* (ECHR), the House of Lords read in to the PTA the Article 6 requirement that an individual subject to control orders must always be given sufficient information to know the case against him in order to instruct his legal representative.188

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185. JCHR Fifth Report 2008–09, *supra* note 151, ¶ 27; see also JCHR Sixteenth Report 2009–10, *supra* note 134, ¶ 54 (concluding that, in light of the decision, the United Kingdom “violated the right to have the lawfulness of detention decided by a proper court . . . .”).


188. Compare the House of Lords’ decision in *AF*, id., with *Sec’y of State for the Home Dep’t v. MB*, [2007] UKHL 46, ¶¶ 70–72 (finding that evidence can be
Although *A and Others* (ECHR) concerned the indefinite detention of aliens and *AF* dealt with control orders, these decisions had implications for the use of special advocates in other contexts as well. This became apparent soon afterwards, for example, in *R. (on the application of Cart) v. Upper Tribunal*,\(^{189}\) in which the English High Court applied *A and Others* (ECHR) and *AF* to SIAC decisions to revoke or deny bail for aliens detained as suspected terrorists, pending a final determination of their immigration status. Nevertheless, even after *AF* required greater disclosure of information to individuals concerned, the government stood by the overall Convention compatibility of its special advocate system. For the government, “[t]he key point remains that control orders legislation is fully compliant with the ECHR. This is borne out by the fact that the Law Lords have never made a declaration of incompatibility in relation to the 2005 Act.”\(^{190}\) Not surprisingly, the JCHR rebuked the government for obstructing the decisions of the ECHR and the House of Lords. The committee accused the government of taking a “passive and minimalist approach to compliance,” and criticized “the approach of some lower court judges of requiring only a little further disclosure at a time.”\(^{191}\) The government naturally denied these charges, while complaining that the decision in *AF* put it in an “invidious position” in choosing whether to disclose more material in some cases or to refuse to do so and risk failing to make its case.\(^{192}\)

With the government’s original control orders and special advocate regimes now lying in tatters, it once more had to address the two problems raised by *Chahal*: where should the United
Kingdom go from here in dealing with non-deportable individuals and protecting security-sensitive information? Would it stubbornly resist the changes repeatedly urged by parliamentary committees over the years and try to get around the decisions of A and Others (ECHR) and AF? Or would it reform the special advocate system along the lines suggested, thereby bringing it closer to the original SIRC model in Canada? Perhaps it could try another alternative, such as introducing intercept evidence or strengthening the judicial power to compel disclosure, this time drawing more carefully on foreign legal solutions. With special advocates becoming an increasingly familiar facet of the British legal process outside of the immigration setting, and a new Tory-Liberal Democrat coalition coming into government in May 2010, predictions beyond that time were difficult. After the decisions in A and Others (ECHR) and AF, however, a third-stage in the development of British special advocates loomed on the horizon and it seemed clear in what direction they were headed, one way or another—back to Canada, where they had originated. The greatest irony of all, however, was that Canada had since abandoned its own special advocate system in favor of the procedurally defective British one.

C. Back to Canada: The Grass is Always Greener . . .

In late 2001, the Canadian Parliament significantly overhauled national immigration law with the Immigration and Refugee Protection Act (IRPA), repealing the Immigration Act. Although receiving Royal Assent on 1 November 2001, the IRPA was the product of a very long and thorough legislative review process, begun in 1997, and it received its first reading in the House of Commons in February 2001; as such, the IRPA was not in fact a comprehensive rewriting of the Immigration Act and “the most important legislation in the immigration field in more than twenty-five years.” Canadian Bar Association, Citizenship and Immigration Law Section, Submission on Bill C-31: Immigration and Refugee Protection Act 1 (2000) [hereinafter CBA Submission on Bill C-31].

193. Immigration and Refugee Protection Act, S.C. 2001, c. 27; Immigration Act, 1976, R.S.C. 1976–77, c. 52. As the Canadian Bar Association commented on a preceding bill to what would eventually become the Immigrant and Refugee Protection Act, the government’s proposed reforms would be a “comprehensive rewriting of the Immigration Act” and “the most important legislation in the immigration field in more than twenty-five years.” Canadian Bar Association, Citizenship and Immigration Law Section, Submission on Bill C-31: Immigration and Refugee Protection Act 1 (2000) [hereinafter CBA Submission on Bill C-31].
response to the September 2001 terrorist attacks in the United States. Nevertheless, the IRPA toughened up Canada’s immigration rules, reduced the procedural protections available to aliens denied entry or ordered to be deported, and, in particular, “drastically altered the right of permanent residents to appeal deportation orders.”

The IRPA abolished SIRC’s immigration role, so that permanent residents subject to security certificates could no longer challenge their deportation decisions before that tribunal. Instead, their appeals could only be heard in the Federal Court, just like non-resident aliens. In *ex parte, in camera* hearings, from which the individual to be deported and his counsel were excluded, the Federal Court judge would hear alone and consider the security-sensitive evidence which the government had withheld from the individual in question. He or she would then decide whether the certificate was reasonable. Unlike the SIRC process, no special advocate was available to represent the individual’s interests in the closed hearing, argue for more disclosure of evidence, and challenge the confidential information. This, in turn, put the judge in a quasi-investigative or inquisitorial role, forcing him or her to assess the sufficiency of the government’s evidence without the benefit of counter-arguments from opposing counsel in adversarial proceedings. Moreover, although the person facing deportation would still receive a summary of the evidence, the judge could not order disclosure of any information that would be “injurious to national security or to the safety of any person.”

There was therefore to be no balancing of the public and individual interests at stake, as was implicit in previous SIRC proceedings and explicit under the CEA. The IRPA not only fell below the standards of the previous SIRC system, but in doing away with special advocates altogether, ironically offered fewer procedural protections than the problematic British system of special advocates introduced after *Chahal*. Under the IRPA regime, aliens could now be removed from Canada without adequately knowing the grounds

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196. Forcese & Waldman, supra note 52, at 10.
197. Immigration and Refugee Protection Act ¶¶ 78(e), (g).
198. Forcese & Waldman, supra note 52, at 12, 60; Code & Roach, supra note 39, at 95–97.
199. Immigration and Refugee Protection Act ¶¶ 78(b), (h).
for their deportation or having had sufficient opportunity to challenge the government’s case.

In *Charkaoui v. Canada (Citizenship and Immigration)*, decided in February 2007, the Supreme Court of Canada unanimously found that the IRPA procedures violated Section 7 of the Charter and could not be “saved” under Section 1, which allows reasonable limitations of Charter rights when demonstrably justifiable in a free and democratic society.\(^{202}\) Although the precise contours of fundamental justice can vary with the context taken as a whole, such as when national security and prolonged detention are at issue, it at least requires “substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case.”\(^{203}\) As Chief Justice McLachlin explained, writing for the Court, this basic Section 7 principle required a right to a hearing before an independent and impartial magistrate, demanded that the magistrate decide the case on the facts and the law, as well as entailed a right to know the case to be met and the right to answer that case.\(^{204}\) *Ex parte, in camera* hearings where only the government

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\(^{204}\) Charkaoui, [2007] 1 S.C.R. at 375, ¶ 29. The Court also found that a mandatory 120 day period before foreign nationals could receive a hearing on their deportation order, in contrast to a 48 hour requirement for permanent residents, was arbitrary and violated §§ 9 and 10(c) of the Constitution Act, 1982. Charkaoui, [2007] 1 S.C.R. at 400–03, ¶¶ 88–94. Section 9 provides that
was heard, judicial reliance on secret evidence withheld from the individual subject to the security certificate, and the stunted inquisitorial role of the judge violated this principle, despite the best efforts of federal judges to test the government’s case. As the Chief Justice explained,

The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?  

Without adequate procedural substitutes to compensate for the non-disclosure of security-sensitive evidence, the IRPA process was fundamentally flawed. It not only denied the person in question a basic right to procedural fairness, but also, by assigning the federal judge an awkward, civilian-style “pseudo-inquisitorial” role, undermined the common-law’s adversarial system. This forced the judge to decide the case without always knowing “the whole factual picture.” In this regard, the decision in Charkaoui arguably validated the concerns expressed by British parliamentarians and government in deciding against introducing a French-inspired, examining magistrate system. What the IRPA certainly did, in any case, was to violate the principles of fundamental justice by preventing a decision on the facts and the law, and denying the individual the right to know and respond to the case against him.

As the Supreme Court noted, however, Charter rights are not absolute and Parliament can limit them under Section 1 of the Charter if the restrictions are reasonable, and demonstrably justifiable in a free and democratic society, as determined by a proportionality analysis. The Court repeatedly recognized that

“[e]veryone has the right not to be arbitrarily detained or imprisoned,” while section 10(c) guarantees that everyone has the right on arrest or detention “to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.”

206. Id. at 383, ¶ 51.
207. See supra text accompanying notes 164–172.
208. See Constitution Act, 1982, Part I, § 1. As Chief Justice McLachlin succinctly explained, “[a] finding of proportionality requires: (a) means rationally connected to the objective; (b) minimal impairment of rights; and
security-sensitive information needs protection, that terrorism presents special challenges to the state, and that “the protection of Canada’s national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective.”

Even though “Parliament is not required to use the perfect, or least restrictive, alternative to achieve its objective,” not just any means will pass Section 1 scrutiny.

Furthermore, a violation of Section 7 rights, as in *Charkaoui*, is particularly difficult to justify due to their fundamental nature.

The Court accordingly found that the IRPA procedures could not be saved by Section 1, as it remained theoretically possible for Parliament to devise less restrictive measures for the protection of security-sensitive evidence. By canvassing alternatives in both domestic and foreign law, it therefore simultaneously condemned the IRPA process as disproportionate, while opening a door for Parliament’s response.

Looking to Canadian practices first, the Supreme Court noted that such national security concerns were not new and that “[i]n a number of legal contexts, Canadian government institutions have found ways to protect sensitive information while treating individuals fairly.”

Not surprisingly, the Court referred to the earlier SIRC system of special advocates. It viewed it favorably but cautiously, warning that “[c]ertain elements of SIRC process may be inappropriate to the context of terrorism.”

Besides SIRC, the Court drew attention to the power of a judge, under the CEA, to weigh the individual and public interests in disclosure, again recognizing that CEA procedures might not be entirely suited to the same problems addressed by the IRPA. Citing the trial of the alleged bombers of a

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211. Id. at 390–91, ¶ 66 (“Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of § 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.” (citing Re. B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 518)).
213. Id. at 395, ¶ 76.
1985 Air India flight, the Court also remarked how regular defense counsel had enjoyed access to security-sensitive information, subject to undertakings of confidentiality. 214 Finally, it explained how the official inquiry into the affair of Maher Arar, a Canadian citizen whom the Americans had given over to Syrian custody, had made use of special amicus curiae to assist with confidentiality claims governed by the CEA. 215 Turning its glance outward, the Supreme Court of Canada then considered SIAC and the British special advocate system, noting that it had been “created in response to Chahal v. United Kingdom,” and apparently modeled on Canada’s old SIRC procedures. 216 The Court believed the British system to resemble the SIRC model in its general outline, and thought that a special advocate system of some sort would definitely be an improvement over the IRPA. 217 Importantly, however, it acknowledged the flaws in the British system and mentioned the House of Commons Constitutional Affairs Committee, which had criticized the ban on communication after the special advocate had received the closed file, lack of resources in support of the special advocates’ functions, and absence of a power for special advocates to call witnesses. 218

The use of comparative law by the Supreme Court of Canada in Charkaoui interestingly contrasts with that of the ECHR in Chahal. First, the Canadian Supreme Court preferred other, less restrictive domestic practices, something the ECHR did not do by failing to inquire into existing British practices that might have improved upon the immigration procedures at issue in Chahal. The ECHR instead turned immediately to Canadian law, which it then mischaracterized in its dicta. Second, although the Supreme Court of Canada only looked abroad to the British special advocate system—thereby lacking wide and deep context in much the same way as had the Chahal Court—its use of that one, isolated example differed in two important ways concerning local context and the problems of adapting or borrowing foreign legal mechanisms. The first difference was that the Supreme Court drew attention not only to possible limitations in adapting other domestic practices, but to the criticisms of and problems with the British model. Moreover, the Supreme Court had clear purposes in drawing on other legal mechanisms,

216. Id. ¶ 80.
217. Id. at 397–400, ¶¶ 81–82, 84, 86.
218. Id. at 398–99, ¶ 83; McLachlin C.J. was most likely referring to the CAC Seventh Report 2004–05, supra note 112.
whether domestic or foreign in origin. In the Court’s quest for “alternatives” to the IRPA, for example, it found that the CEA “illustrate[d] Parliament’s concern under other legislation for striking a sensitive balance between the need for protection of confidential information and the rights of the individual,” while the “procedures adopted in the Air India trial suggest that a search should be made for a less intrusive solution than the one found in the IRPA.”

Furthermore, the Court emphasized that “bearing in mind the deference that is owed to Parliament in its legislative choices, the alternatives discussed demonstrate that the IRPA does not minimally impair the named person’s rights.”

Chief Justice McLachlin then summed up the Court’s approach and drove the point home: “Mechanisms developed in Canada and abroad illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the IRPA. Precisely what more should be done is a matter for Parliament to decide. But it is clear that more must be done to meet the requirements of a free and democratic society.” The Charkaoui Court therefore took care neither to prescribe any one policy option, nor to Charter-proof any of its suggestions in advance. Qualified and non-committal, the Court’s references to both domestic and foreign alternatives to the IRPA regime were part of a proportionality analysis under the Charter, itself contributing to a rights-oriented dialogue with both the government and Parliament. The Supreme Court used British, like Canadian, law not only to illustrate that the flawed IRPA process was disproportionate, but to help Parliament

220. Id. at 399, ¶ 85.
221. Id. at 400, ¶ 87.
find the best rights-conscious response to the mutual interests of national security and procedural fairness.\textsuperscript{223}

Parliament eventually responded to \textit{Charkaoui} by adopting a British-style special advocate system, despite the Court’s recognition of its problems and invitation to consider other options. Under the IRPA Amendments, introduced into Parliament in October 2007 as Bill C-3,\textsuperscript{224} the Minister of Citizenship and Immigration, along with the Minister of Public Safety and Emergency Preparedness, could jointly issue a security certificate against both permanent resident and non-resident aliens, on the grounds that they were inadmissible to Canada as a national security threat or for other exceptional reasons.\textsuperscript{225} As under the IRPA, the Federal Court would then review the deportation order for reasonableness, but now subject to appeal to the Federal Court of Appeal under some circumstances.\textsuperscript{226} The individual subject to the certificate, along with counsel, would receive summaries of the evidence supporting the deportation order and could make representations in an open hearing.\textsuperscript{227} The government and judge could still initiate closed proceedings, thereby excluding the individual and his counsel, so that the judge could consider evidence withheld as injurious to national security.\textsuperscript{228} However, in contrast to the IRPA process, a special advocate would now represent the person’s interests in the closed session.\textsuperscript{229} There, the special advocate could make oral and written submissions for more disclosure of information, cross-examine witnesses, and challenge the law and facts supporting the government’s case.\textsuperscript{230} Nevertheless, the special advocate would not be in a lawyer-client relationship with the person and could not communicate with him after receiving the closed case file, except with leave of the court.\textsuperscript{231} By prohibiting such communication without prior judicial authorization, the IRPA Amendments replicated one of the biggest procedural flaws of the

\begin{footnotesize}
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  \item[223.] In order to give Parliament time to amend the IRPA, the Supreme Court suspended its declaration of unconstitutionality for one year. \textit{Charkaoui}, [2007] 1 S.C.R. at 419, ¶ 140.
  \item[224.] An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, 2008, c. 3 [hereinafter IRPA Amendments].
  \item[225.] \textit{Id.} § 77(1).
  \item[226.] \textit{Id.} §§ 77(3), 78–79.
  \item[227.] \textit{Id.} §§ 77(2), 83(1)(e)–(g).
  \item[228.] \textit{Id.} §§ 83(1)(c)–(d).
  \item[229.] \textit{Id.} § 83(1)(b).
  \item[230.] \textit{Id.} §§ 85.1(1)–(2), 85.2.
  \item[231.] \textit{Id.} §§ 85.1(3)–(4), 85.4(1)–(2).
\end{itemize}
\end{footnotesize}
British special advocate system and left out one of the safeguards of
the old SIRC process. Moreover, the IRPA Amendments still allowed
the judge to rely on evidence that had not been included at all in the
summary for national security reasons, so long as it was “reliable and
appropriate.”\footnote{232} It thereby ignored one of the specific worries of the
\textit{Charkaoui} Court.\footnote{233} This meant that in some circumstances an
individual still might not know all of the case against him.

The IRPA Amendments were not surprising, however, given
the government’s security agenda and the somewhat ambivalent tone
of the parliamentary committees reviewing the security certificate
regime. Different committees had uniformly advocated adoption of a
special advocate system, as an improvement over the IRPA process,
but did not speak with a common voice about its most controversial
procedural points. For example, shortly after \textit{Charkaoui}, the House
of Commons Standing Committee on Citizenship and Immigration
(SCCI) reported on security certificates and its accompanying
detention regime. It recommended a special advocate system that
would “afford detainees an opportunity to meet the case against them
by being informed of that case and being allowed to question or

\footnote{232. \textit{Id.} §§ 83(1)(h)--(i).}

\footnote{233. \textit{See} Penny Becklumb, Library of Parliament, Legislative Summary—Bill
\textit{C}-3: An Act to Amend the Immigration and Refugee Protection Act (Certificate
and Special Advocate) and to Make a Consequential Amendment to Another Act,
LS-567E, at 22–25 (2008); \textit{see also} Craig Forcese & Lorne Waldman,
Canada doesn’t need a Star Chamber, Nat’l Post, Oct. 25, 2007,
(discussing the flaws in Bill C-3’s special advocate system);
\textit{Charkaoui} v. Canada (Minister of Citizenship and Immigration), [2007] 1 S.C.R.
350, 384–89, ¶¶ 53–63 (noting that named persons may be shown little or none of
the material relied on by the judge to decide a case, thus limiting their ability to
challenge the case against him/her). For examples of how some federal judges
have allowed communication between special advocates and the individuals
concerned, as well as managed disclosure of security-sensitive evidence, see Re.
Mahjoub, [2010] F.C. 325 (Can.) (ordering the disclosure of information or
evidence not yet disclosed which the Court recognized); Re. Almrei, [2009] F.C. 3
(Can.) (noting that while the presence of special advocates may result in
enhanced fairness in the hearings, they are not fair to the extent that the
evidence used against the named person is inaccessible); Re. Harkat, [2009] F.C.
1266 (Can.) (holding that a judge must exclude evidence that poses a threat to
national security and determine which information may be provided to the named
person without harming national security); Re. Jaballah, [2009] F.C. 969 (Can.)
(holding that special advocates can communicate with counsel of named person
on condition that there be no disclosure, direct or indirect, of confidential
information or evidence that is injurious to national security).}
counter it, but without elaborating any further on the procedural details or addressing the Supreme Court’s concerns about the British model. Rather, the SCCI interpreted *Charkaoui* in a way that seemed generally to Charter-proof a special advocate system: “Since the Court said that a less intrusive approach would be to allow for a special advocate in the security certificate process, it is implicit that if Parliament were to amend the Act to provide for a special advocate, the security certificate process would be Charter compliant.” The SCCI did not consider at all the former SIRC system. The House of Commons Subcommittee on the Review of the Anti-terrorism Act (SCRATA) similarly supported a special advocate system in response to *Charkaoui*, as well as extending its use to other security-related and in camera, ex parte proceedings. Briefly discussing some of the Canadian alternatives put forward by the Supreme Court (such as SIRC and amicus curiae) the SCRATA concluded,

> [T]he imbalance between the state and the individual or entity can be redressed by developing a scheme whereby security-cleared counsel can challenge evidence in closed hearings, and adduce evidence of their own, and advocate on behalf of transparency and accountability in situations where the limited disclosure of information make it difficult, if not impossible, for affected persons to fully defend their interests.

The SCRATA at least addressed one of the criticisms of the British model, by arguing that special advocates should be able to adduce evidence of their own. The subcommittee, however, did not mention to what extent special advocates should be allowed to communicate with the person to be deported after receiving the closed file, nor did it specifically engage with the Supreme Court’s

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235. Id. at 8.


237. Id. at 80. The SCRATA also recommended that special advocates should not be in a lawyer-client relationship with the individual concerned, although they should receive adequate administrative support. Id. at 78–80.
criticisms of the British model. Together, the SCCI and SCRATA recommended a special advocate system to correct the constitutional defects of the IRPA, as identified by the Supreme Court in Charkaoui. In doing so, though, they did not engage in any significant comparative analysis of the British model, nor did they go into much detail about the precise form a new Canadian special advocates system should take.

In contrast, the Special Senate Committee on the Anti-terrorism Act (CATA) was repeatedly more critical about the idea of special advocates, not only after Charkaoui, but even before the Supreme Court handed down the decision. In early February of 2007, just before the Charkaoui judgment, the CATA had criticized the IRPA and suggested a special advocate system of some kind in a lengthy and detailed report on Canadian anti-terrorism law, ominously titled “Fundamental Justice in Extraordinary Times.” Still, in that report, the CATA had carefully noted the flaws in the British model and drew attention to the criticisms of it in the CAC Seventh Report of 2004–05. Should Canada adopt such a system, the committee argued, it must allow for continuing communication between the special advocate and the individual concerned. The CATA repeated these concerns after the Supreme Court’s decision in Charkaoui, thereby picking up on an important point overlooked by the SCCI and SCRATA. It also urged the government and Parliament to go beyond the Court’s ruling to examine Canada’s anti-terrorism legislation as a whole, and reminded the government that the Court had “only set out minimum constitutional protections,” which should not discourage a more rights-conscious approach to reform of the IRPA. In its later report on Bill C-3 specifically, the CATA therefore criticized the proposed IRPA Amendments on account of the restricted communication between the special advocate and the individual in question, as well as the special advocate’s inability to compel discovery of classified government information.


Nevertheless, complaining that time limitations hampered its work, it proposed no amendments to the bill. In these reports, but without explicitly saying so, the CATA had consistently advocated a special advocate system akin to Canada’s earlier SIRC model. The committee’s strong position likely exerted less pressure on the government than it might have done, however, due to its blunted opposition to Bill C-3, a similar lack of committee resistance to Bill C-3 in the House of Commons, and the more open-ended endorsements of special advocates by the SCCI and the SCRATA. Furthermore, with the exception of the comprehensive report on “Fundamental Justice” by the CATA, all of these committee reports were fairly short and did not look too closely at the faults in the British special advocates system. They accordingly did not show the same potential for using comparative law to challenge the proportionality of government anti-terrorism measures, as had the various parliamentary committees in the United Kingdom.

However, as also illustrated by the United Kingdom’s experience, executive officials can aggressively assert a security agenda and rights-proof proposed legislation in order to fortify the government from criticisms in parliamentary committees or debates—even if critics can identify less rights-intrusive alternatives using comparative law. Much like the British government had done with the Chahal dicta, the Canadian government supported the IRPA Amendments by relying on the Charkaoui Court’s acknowledgement of the security problem and its reference to the British special

243. The Commons committee responsible for Bill C-3 had previously proposed only relatively minor amendments. See generally Standing Committee on Public Safety and National Security, First Report on Bill C-3, 2007–08, H.C. 39-2 (Can.); Roach, Role and Capacities, supra note 83, at 17–18, 28, 39–40, 47, 51, has suggested that committees in Canada’s unelected Senate, like the United Kingdom’s House of Lords, have shown themselves more sensitive to rights concerns (particularly the rights of vulnerable minority groups), than those in the elected, more majoritarian-minded House of Commons. In any case, while their work is undoubtedly necessary and helpful, committees of either house in Canada (and the United Kingdom) arguably labor under a larger institutional disadvantage to the executive, as “Parliament has traditionally not been an effective forum to discuss complex and sensitive security issues.” Id. at 25. See also id. at 29, 31–32 (discussing Parliament’s lack of access to secret information and weaknesses in committee action).
244. See Roach, Role and Capacities, supra note 83, at 29–31, 46 (discussing the committees’ lack of analyzing comparative law and comparing Canada’s approach to certain security issues with that of Britain).
advocates model. As Dave McKenzie, the Parliamentary Secretary to the Minister of Public Safety, put it in the House of Commons during debate on Bill C-3 in October 2007,

In February the Supreme Court of Canada confirmed the use of security certificates generally. However, it found aspects of the security certificate process that required legislative improvement. In addition, various parliamentary committees have recommended changes to the Immigration and Refugee Protection Act.

The government has moved swiftly and is taking action. Bill C-3 is an essential public safety tool that enables us to continue to prevent inadmissible persons from remaining in Canada while ensuring that there is better protection of the rights of individuals subject to security certificates.

Bill C-3 would set into law the Supreme Court of Canada’s ruling on security certificates, and takes into consideration the recommendations of both Houses of Parliament.\footnote{246} The government spokesman in the Senate, David Tkachuk, repeated these sentiments in Parliament’s upper chamber, stating that “Bill C-3 meets and exceeds the requirements of the Supreme Court of Canada’s ruling on security certificates.”\footnote{247} Thus, the government looked to Charkaoui, not as inspiration for a comparative approach to finding the best practice, discussed in the conclusion, but to Charter-proof the IRPA Amendments and the adoption of a British-style special advocate system.\footnote{248}

Some in Parliament criticized the government’s approach. As one MP charged, despite the alternatives presented in Charkaoui, the government had “imported, essentially holus-bolus, the concept of

\footnote{245} Legis. Summary Bill C-3, supra note 233, at 14.
\footnote{246} 142 Parl. Deb. H.C. (Num. 9) (2007) 1310 (Can.) (Statement of Dave MacKenzie); see also 142 Parl. Deb. H.C. (Num. 19) 1210 (Can.) (Statement of Dave MacKenzie) (characterizing Bill C-3 as a response to and in line with the Supreme Court of Canada’s decision and one that shapes special advocates according to Canada’s particular needs).
\footnote{248} See Roach, Implications, supra note 13, at 286, 294, 305–06 (discussing the comparative approach of the Court that included noting weaknesses of the British advocate system and suggesting the Court be more careful not to appear to endorse a particular legislative option, which the legislature here used despite its weaknesses).
special advocate from the United Kingdom...” 249 Another drew attention to the hazards of racing to the bottom: “I have a feeling that with the bill before us, the government is looking to do the minimum of what the court is asking. In so doing, it has taken a huge risk. I am absolutely sure that sooner or later the issue will once again end up before the Supreme Court.” 250 The government’s reliance on Charkaoui and such parliamentary criticisms revealed the government’s continuing emphasis on national security through confidentiality, rather than security of the person through due process. 251 This is not to say that the Canadian government completely ignored committee recommendations on all aspects of the security certificate regime, or that its professed commitments to institutional dialogue and striking the right balance between state and individual interests were entirely rhetorical. It recognized that there were controversies about a special advocate system, and incorporated into the final version of Bill C-3 some of the committee and MP concerns. 252 Nevertheless, the IRPA Amendments continued

249. 142 Parl. Deb. H.C. (Num. 9) (2007) 1215 (Can.) (Statement of Ujjal Dosanjh); see also id. at 1205 (Statement of Dawn Black) (raising serious concern over importing the special advocate system despite its major flaws as seen in the United Kingdom); id. at 1310 (Statement of Penny Priddy) (same); id. at 1245 (Statement of Serge Menard) (discussing the serious weaknesses of the special advocate system and opining the government should have more carefully studied Canada’s experience and comparative examples); 144 Parl. Deb. S. (Num. 31) (2008) 1600 (Can.) (Statement of George Baker) (expressing concern that the advocate system is taken part and parcel from the British system despite the existence of better alternatives).


251. Charkaoui v. Canada (Minister of Citizenship and Immigration), [2007] 1 S.C.R. 350, 384, ¶ 55. As the Supreme Court remarked on the IRPA process: “Confidentiality is a constant preoccupation of the [security] certificate scheme.” Id. The Parliamentary Secretary to the Minister of Citizenship and Immigration suggested that the balance between security and rights, in circumstances addressed by the security certificate regime, would also tip heavily in favor of the former under the IRPA Amendments: “At some point, national security and the safety of the person must trump individual rights, but in such a manner that least interferes with this. That is the idea behind the bill [C-3].” Statement of Ed Komarnicki, 142 Hansard, H.C. (2007) 1335 (Can.); Roach, Implications, supra note 13, at 305–06, 328, 342.

252. Changes incorporated into the final IRPA Amendments included a guarantee of privileged communications between the special advocate and the individual concerned, § 85.1(4); a statutory requirement for “adequate administrative support and resources” for special advocates, § 85(3); a standard that all evidence be “reliable,” § 83(1)(i); a prohibition on torture evidence, § 83(1.1); and the allowance of an appeal from the Federal Court’s decision on the reasonableness of the security certificate, § 79. See also Statement of Dave
to restrict communications between the special advocate and the individual concerned, permit the government and judge to withhold evidence from the summary, and allow the special advocate only limited powers to adduce evidence. So, notwithstanding some positive responses to parliamentary concerns, the government was determined to push through a procedurally weaker version of special advocates, based on the misplaced assumption or politically-calculated argument that such a system had already been endorsed by the Supreme Court.

The post-Charkaoui period has perhaps not given Canadian parliamentary committees as much time as their British counterparts to comment on the use of special advocates, while the government’s timetable for passage of the IRPA Amendments also allowed little opportunity for in-depth debate, as the CATA and some parliamentarians complained. These excuses aside, the Canadian committees have, on the whole, not shown themselves as critical of the British-inspired model as they might have been or as independent in undertaking comparative research into alternatives for protecting security-sensitive evidence. The search for less restrictive measures is nonetheless especially important given that Section 7 of the Charter (like Article 3 of the ECHR) prohibits deportation to torture, albeit with a possible exception in extraordinary circumstances of national security. This means that, as in the United Kingdom, non-deportable aliens are vulnerable to long-term, potentially indefinite detention if no safe receiving country can be found. However, even stronger procedural protections would

MacKenzie, Hansard, H.C. (2007), 1320–25 (Can.) (describing the legislative changes in Bill C-3); Statement of David Tkachuk, 144 Hansard, Sen. (2008), 1540 (Can.) (explaining the changes implemented by Bill C-3); Legislative Summary - Bill C-3, supra note 233 (providing context, description, and commentary on Bill C-3); First Report on Bill C-3, supra note 243 (proposing changes to Bill C-3); Roach, Implications, supra note 13, at 326–27 (discussing recognition of limited appeals in Bill C-3); Roach, Role and Capacities, supra note 83, at 48–50, 52 (describing special advocates as proposed in Bill C-3). On the other hand, as Roach points out, at times executive officials might actually moderate problematic or intemperate committee proposals, as “[e]xperts within the executive can play a role in restraining the more populist activities of elected members of the government.” Id. at 16–17.


254. See Suresh, supra note 209.

255. See generally Jonathan Shapiro, An Ounce of Cure for a Pound of Preventive Detention: Security Certificates and the Charter, 33 Queen's L.J. 519 (2008) (criticizing the Court's decision in Charkaoui and the Canadian
be necessary in the (hopefully unlikely) event that the Canadian government would one day push to deport someone despite a risk of torture upon return.

Unfortunately, some in government and Parliament have interpreted *Charkaoui* as generally endorsing special advocates or Charter-proofing them, without adequately considering specific procedural aspects (such as the ban on communication) or that a particular detention can sometimes, for all practical purposes, become divorced from realistic prospects for removal in the foreseeable future. Furthermore, those taking such a security-focused approach have done so despite the Canadian Supreme Court’s care in laying out several alternatives in *Charkaoui*’s proportionality analysis, noting their respective drawbacks, and encouraging both the government and Parliament to think carefully about and look around for potentially better domestic or foreign solutions. Most problematic of all, however, is that the British model which Canada adopted in response to *Charkaoui*—and which was based on *Chahal*’s faulty understanding of Canada’s earlier SIRC system—has since been found defective by both the ECHR and the House of Lords. It is therefore likely that yet another stage in the development of Canadian special advocates is on the horizon.

IV. CONCLUSION: COMPARATIVE METHODOLOGY AND BEST PRACTICES

In *Chahal*, the ECHR interpreted Convention Article 3 to prevent Council of Europe States from deporting individuals to a risk of torture abroad. The Court also found that the British immigration procedures in question violated Article 5(4), because they did not allow a deportee to know and answer the case against him. While *Chahal* is a landmark decision of Convention law, it nevertheless presented states with practical difficulties in dealing with non-removable aliens suspected of terrorism and in using security-sensitive evidence in legal proceedings. Moreover, the ECHR complicated matters by suggesting that a Canadian-style special

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advocate system might be one way to deal with the evidence problem. In its proportionality analysis, however, the *Chahal* Court not only failed to canvass other alternatives beyond Canadian special advocates, but also overlooked important procedural safeguards to their use before SIRC and in Canada’s legal system, as a whole. Compounding these errors of wide and deep context, the Court neither made clear its purpose in comparing, nor accounted for how local context might possibly affect a future British reception of special advocates. The *Chahal* dicta thus displayed critical methodological flaws that would have serious and unanticipated consequences not only in the United Kingdom, but also back in Canada. With the ECHR’s “green light,” the U.K. government and Parliament would go on to adopt special advocates based on their faulty description in *Chahal*, leaving out the procedural protections of the original Canadian model. Later, at the insistence of the government, Parliament would expand their use beyond immigration matters into a controversial control order regime, as well as into other areas of the law. Canada would, in turn, abandon its own SIRC system of special advocates and adopt the British model. In doing so, Canada incorporated the same *Chahal*-inspired defects as the United Kingdom. Although parliamentary committees and courts in both countries would criticize these special advocate systems, both the British and Canadian governments would reject these concerns by interpreting *Chahal*, national court cases, and each other’s national examples in such a way as to “rights-proof” their respective special advocate proposals. While parliamentary committees and courts displayed a rights-conscious approach (for the most part), in that they used comparative law to search for less rights-restrictive measures for protecting national security, the British and Canadian governments clung to security-maximizing agendas—agendas they supported with the *Chahal* dicta.

The strange journey of special advocates between Strasbourg, London, and Ottawa highlights the practical importance of a good comparative methodology and the potential consequences of a bad one. At the same time, it strongly attests to comparative law’s appeal to government institutions when crafting legal responses to international security threats. The international nature of much terrorism requires a similarly international response. Pressures for international cooperation in turn lead to transnational law-making efforts, by which state officials will study and sometimes emulate foreign law in their search for the “best practice” in fighting terrorism (and perhaps for protecting national security in general). As this
author has previously suggested, such a transnational trend was discernible very soon after September 2001, as the United Kingdom, Canada, and the United States adopted anti-terrorism legislation that reflected (to varying degrees) similar legal concepts for the definition, investigation, and prevention of terrorism offenses. The history of special advocates shows that three reasons for such transnational efforts remain as valid now as ten years ago, albeit with a renewed and stronger emphasis on the importance of a rights-centered jurisprudence.

First, the United Kingdom, Canada, and other countries still face common threats from international terrorism and must overcome common problems in countering them. They also remain under a common obligation to implement international law that targets, for example, terrorist financing or hostage-taking. It is only natural, then, that executive officials, legislators, and courts would look abroad to see how other nations cope with the same challenges, and borrow legal concepts and mechanisms intended to deal with them. Indeed, the international nature of terrorism prompted the Chahal Court itself to look outside of the Council of Europe for an alternative way to deal with security-sensitive evidence. Accordingly, “[c]omparison of anti-terrorism legislation in Canada, the United Kingdom, and the United States suggests that their laws contribute to a harmonized, cooperative, and effective response that promotes international law.” Of course, as previously suggested, actual and long-term effectiveness or efficiency of a legal transplant must be considered separately from apparent and short-term efficiency at the time of a foreign law’s adoption. Likewise, as explained below, the benchmarks of effectiveness or efficiency vary depending upon whether one takes a security- or rights-oriented perspective. Nonetheless, the incentives for cooperation and harmonization, to one degree or another, remain strong when executive officials and legislators craft new anti-terrorism laws.

The second reason supporting transnational efforts is that the United Kingdom and Canada can and will first look to other common-law jurisdictions for new ideas. Not only is it easier for

257. See generally Jenkins, supra note 20 (discussing various nations’ anti-terrorism legislation). However, this study did not include Australia, New Zealand, Ireland, or other common-law jurisdictions, and focused on criminal, not immigration, law.
258. Id. at 255 (citation omitted).
lawmakers and lawyers to do so, given the accessibility of resources, but these countries share historical, cultural, and legal ties that make them natural comparators. As already explained in this article, not only did the Chahal Court look to Canada (although, unfortunately, to the exclusion of elsewhere), but government officials and parliamentarians in both the United Kingdom and Canada have regularly referred to and adapted many of each other's legal approaches. This is not to say, though, that important differences do not exist between even common-law jurisdictions, which require due consideration. The British government’s rejection of a civilian-style investigative magistrate system, moreover, only further illustrates the added complexities of borrowing legal ideas, as differences in legal culture or traditions multiply and deepen. Nevertheless, common problems and common legal insights not only explain but justify why executive officials, legislatures and their committees, and courts, all in their own ways, engage in transnational efforts against terrorism. To really find the “best practice,” however, a good comparative methodology is indispensable.

The third reason for supporting transnational efforts has special significance in light of this history of special advocates. As seen in the proportionality analysis of Chahal, Charkaoui, or the comparative studies of parliamentary committees, one reason for using comparative law is to discover alternatives for protecting national security that are less restrictive of individual rights. This rights-conscious approach to the use of comparative law contrasts with a security-maximizing agenda, like those of the British and Canadian governments. As the cross-borrowing of special advocate systems between the United Kingdom and Canada demonstrates, a strong current towards international cooperation and harmonization can just as easily accompany security-driven, not rights-driven, efficiency concerns. Thus, as evidenced by the committee criticisms and courtroom defeats in both countries, the British and Canadian governments used comparative law in a “race-to-the-bottom” to rights-proof their controversial special advocates systems, find the due process baselines below which they could not go, and push the limits of state power. They did so as part of a larger discourse of emergency, intended to prioritize public safety over human rights.


261. See supra notes 164–172 and accompanying text.
concerns. This security-focused perspective contrasts with a best practices approach, properly understood, whereby all government actors consider foreign law from a rights-conscious perspective and look for measures that effectively protect national security interests, but while minimizing restrictions on rights. Pursuant to this conception of best practices, the state’s commitment to national security cannot be divorced from its commitment to the rule of law, of which procedural fairness and other substantive rights are a part. Best practices, therefore, do not recognize radical trade-offs between security and rights, where a government can maximize the former while greatly minimizing the latter. Rather, “[t]he balance of security and rights is not a ‘zero-sum game,’ . . . but is instead a more complex process of seeking solutions and a suitable state of being that defends the dignity of the individual within a democracy’s overarching value system.”

The history of special advocates demonstrates that rights-proofing, hasty security solutions, and “copy-cat” legislation undermine the critical inquiry at the core of a best practices approach. Such a critically bankrupt use of foreign law evidences the absence of a coherent comparative methodology. Whereas executive officials might show a lack of integrity in their use of comparative law, manipulating it only to search for and support security-maximizing measures, the well-intended but methodologically weak use of comparative law can also do more harm than good. So, while the Chahal Court might have had good faith in looking for the best solution to the problem of security-sensitive evidence (which it had created), its methodologically deficient dicta nevertheless sparked the British and Canadian race to the bottom. Moreover, although parliamentary committees and courts in the United Kingdom and Canada might have been more willing and able to use comparative law in their search for genuine best practices, they were effectively “back-footed” by the Chahal dicta and the support it could lend to the security agendas of the British and Canadian governments.

A best practices approach, then, necessarily relies upon a coherent methodological approach to the use of comparative law. Such an approach includes attention to wide, deep, and local contexts, each with its own constituent factors. Methodological rigor and rights-consciousness are not only prerequisites for critical judicial comparisons, however; they equally apply to comparisons.

262. See Jenkins, supra note 260, at 192; Walker, supra note 126, at 13–16.  
made by executive officials and legislators. Of course, different state institutions might naturally have their own perspectives on rights and security matters, have different capabilities in their study of foreign law, and communicate across borders in different ways. Nevertheless, institutional disagreements about the best balance between national security and rights is not inconsistent with a best practices approach, where differences in view rest upon sound methodology and still seek to protect vigorously, rather than dilute, procedural or other rights. Likewise, in learning from one another, states might indeed borrow foreign legal mechanisms; borrowing, however, is not synonymous with imitation, nor does it exclude improvements in rights protections. The key to best practices is therefore a transnational, institutional dialogue, in which a critical, sophisticated, yet practical use of comparative law is necessary. While a commitment to best practices by all state institutions is not a guarantee against mistakes or unwise policy choices, it can at least better guard against serious, far-reaching errors that will assuredly result from stunted institutional dialogue and executive security-maximization. This is the comparative lesson of the Chahal dicta, and the travels and travails of British and Canadian special advocates.


265. See McCrudden, supra note 19, at 393–94.

266. See Roach, Implications, supra note 13, at 285, 304, 348, 352–53; Roach, Role and Capacities, supra note 83, at 52.