The Contemporary Security Vetting Landscape

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1. Introduction

It was reported, in September 2018, that Iram Awan, Private Secretary to the leader of Her Majesty's Opposition, had not been granted a pass to enter the Parliamentary estate despite having applied for one many months previously – though the pass had not been refused, and no explanation for the unusually long delay had been offered.[1] It soon transpired that a second senior figure close to the leader of the opposition was in a similar situation, with both accessing the estate using passes issued to visitors.[2] The incident – and suggestions by one of those affected that it was part of a 'deep-state' conspiracy[3] – resulted in an unusual degree of attention to the question of security vetting: the practice of assessing – either negatively or positively – those whose employment may place them in a position to do to harm to the security of the state, which has taken place in the United Kingdom on a formal basis since the immediately post-war period (and perhaps longer in a less formal fashion).[4] There is much to be concerned with about the idea that Her Majesty's Government (or some proxy for it) might have the ability to prevent Her Majesty's Opposition from playing its constitutional role, either by regulating who can be employed to assist it or even – which in practice may be the same thing – regulating the ability of a person so chosen to enter his or her place of work. Ultimately, however, Awan was granted a Parliamentary pass, and so the issues remained one of mere inconvenience. In early 2019, however, another such incident – this one far more concerning – came to light. Eric King, a noted expert on legal and technical issues around state surveillance, had been denied the security clearance that he needed in order to take up the post as head of investigations at the Investigatory Powers Commissioner's Office, created by the Investigatory Powers Act 2016.[5] The refusal – based, it was claimed, not on King's own conduct or status, but rather on his past associations – was made by the Home Office, the department which is the subject of much of the oversight carried out by IPCO.[6] The overseen had, in effect, exercised a veto over its overseers. What both these examples suggest is that, after an extended period in which the question of national security vetting has been largely absent from politics, the tide may be turning. The time is therefore ripe for a consideration of such law and practice, and its many limitations – one which addresses not only to the 'classic' form of vetting, relating to those who work, directly or indirectly, for the executive branch of the state, but which

considers vetting holistically so as to permit, for example, alongside the consideration of how vetting works also a consideration of who is not vetted, and why not.

In a modern environment in which issues of security are ever more prominent, and more and more of what was once done informally or unofficially – or certainly without the appropriate statutory backing – is now formalised both in law and in practice, it is perhaps surprising that not only has the legal element of the security vetting process not been similarly rationalised, but that there has been little or no pressure on the United Kingdom to do so. This article argues for such rationalisation, not (merely) for the sake of the rule of law-type considerations which arise where there is no clear legal authority or limitation upon the process, but rather because, as it aims to show, fundamental issues about vetting – who is vetted, how they are vetted, why they are vetted – appear never to have been considered in a systematic fashion. To place the matter on a statutory footing would provide an opportunity to carry out such a consideration, and to ensure that those accidents of history which the vetting landscape reflects are smoothed over so far as is practically possible. If the result of such a process is less vetting, then – in light of the ever-present possibility that the vetting process might be abused for more or less directly political ends – then so much the better.

2. The rise and fall of politics in vetting

2.1 A short history of vetting

In the post-war years,[7] Attlee announced that Communists and Fascists would be barred from work which was 'vital to the security of the State', with any individual to whom it was decided this rules should apply being made subject to what became known as the 'purge procedure'.[8] This involved the disclosure of the nature of allegations to the civil servant (to the extent compatible with state security) and then, if the allegation was maintained following written representations, an oral hearing before the 'Three Advisors' – more colloquially, the 'Three Wise Men' – who reported to the relevant Minister. Once the Advisors had reported, the civil servant could make further representations, but the final decision belonged to the Minister, and would usually involve the redeployment of the civil servant in question.[9] A prospective procedure – known as 'positive vetting' – was introduced in 1952,[10] and in 1956 it was made clear that not only might political views (almost invariably Communist sympathies)[11] bar a person from sensitive employment, but that so might what were euphemistically referred to as 'character defects'.[12] Where the latter was

the basis of the suspicion against him, however, the 'purge procedure' did not apply. Not only was there no 'appeal' to the Advisors, but the nature of the suspicion was not usually communicated. Between 1948 and 1954 there were 124 dismissals.[13] In the early 1960s, the government – responding to a number of convictions under the Official Secrets Acts which had taken place in the preceding years – charged an independent Committee with a review of 'security procedures and practices in the public service'.[14] The Committee made a number of recommendations in this area, but did not argue for the wholesale reform of arrangements which it said had 'grown piecemeal' over time.[15]

In the early 1980s, a further review was carried out by the Security Commission at the request of the Prime Minister – at the general level rather than, as was usually the case with the Commission's work, in response to some specific security-related incident.[16] The report was not published, and so its contents are discernible only from the government's response, [17] which describes it as portraying a similar external threat to that which had existed at the time of the previous report, but an evolving internal one. A fall in the membership of the Communist Party of Great Britain was offset against 'the proliferation of new subversive groups of the extreme Left and extreme Right (mainly the former) whose aim is to overthrow democratic parliamentary government in this country by violent or other unconstitutional means' including via terrorism. Also significant was the emergence of technology in government:

> The Commission does not doubt that this trend will continue and indeed accelerate with continuing developments in computer technology and will bring in its train new security problems, which themselves will not stay static, in the safeguarding of classified information made accessible at the terminals of large central computers or stored in mini-computers or on floppy discs or other forms of storage used for word processing machines.[18]

The Commission recommended a review both of the underlying system of classification of material and the retention of the positive vetting system, though with an attempt made to reduce the number of posts to which it applied, suggesting both Under-Secretaries and those working in the private offices of Ministers below Cabinet rank as those in relation to whom PV might not be necessary. It also recommended a softening of the approach to one of the key 'character defects' which had been caught by vetting in the past, saying that from then on in the (home) Civil Service, 'male homosexual inclinations or relationships should not necessarily be treated as an absolute bar

to PV clearance'. Instead, they 'should be dealt with on a case by case basis, paying particular attention to whether the way in which the individual has indulged his homosexual tendencies casts any doubt upon his discretion or reliability.'[19] The Chairman of the Three Advisers was to be a judge. More amendments were recommended in and following the Security Commission's report on possible security breaches related to the circumstances in which Geoffrey Prime, a GCHQ linguist, was convicted both of offences under the Official Secrets Act and a series of indecent assaults on young girls,[20] including the introduction of a more rigorous form of positive vetting, known as 'enhanced positive vetting'. Further changes were introduced in 1985 and were announced – if that is not too strong a term – via the statement, in a written answer by the Prime Minister, that 'the terms of reference of the three advisers and the statement of procedure have been revised.'[21]

A new vetting policy was introduced in 1990.[22] It excluded from employment 'in connection with work the nature of which is vital to the security of the state' any person who:

> (a) is, or has been, involved in, or associated with any of the following activities threatening national security:
>
> 1. (i) espionage,
> 2. (ii) terrorism,
> 3. (iii) sabotage,
> 4. (iv) actions intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means; or
>
> (b) is, or has recently been, a member of any organisation which has advocated such activities; or
>
> (c) is, or has recently been, associated with any such organisation, or any of its members, in such a way as to raise reasonable doubts about his or her reliability; or
>
> (d) is susceptible to pressure from any such organisation or from a foreign intelligence service or a hostile power; or
>
> (e) suffers from defects of character which may expose him or her to blackmail or other influence by any such organisation or by a foreign intelligence service or which may otherwise indicate unreliability.[23]

The question of vetting in the civil service attracts less attention in recent years. Though there are still occasional prosecutions under the Official Secrets Acts, these now often relate to action taken

for ethical reasons. The phenomenon of foreign powers recruiting ordinary civil servants to carry out espionage has either largely lapsed or simply does not result in any publicity. Certainly, the Security Commission, which was usually the body charged with considering the lessons of the most serious of security breaches,[24] has been moribund for many years.[25] Its last report – relating to the vetting of those employed in the Royal Household – was published in 2004.[26]

2.2 The changing politics of vetting

Security vetting – even if recognised as a 'necessary evil'[27] – attracts suspicion because, as is already evident from the foregoing discussion, the line between those with strong political views and those who are a threat to state security is not always a clear one. There is therefore a concern that the process has been or might be used so as to effectively debar from employment those whose political positions are considered intolerable by those charged with making decisions about vetting.[28] We see this danger, for example, in the definition of 'subversion' at work. The original understanding of the term derived from Lord Denning's report into the Profumo affair. Denning emphasised the need to understand the role of the Security Services, which was strictly confined to the defence of the realm:

> They are not to be used so as to pry into any man's private conduct, or business affairs: or even into his political opinions, except in so far as they are subversive, that is, they would contemplate the overthrow of the Government by unlawful means.[29]

The reference to the lawfulness of the means, however, was officially dropped in 1985 (having been unofficially discarded a decade earlier).[30] Those who were to be kept away from sensitive material and places became, in time, those who – alongside those involved in traditional threats to the security of the state, such as terrorism or espionage – had been involved in or associated with 'actions intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means.'[31] In practice, vetting was almost invariably aimed at those on the left of the political spectrum rather than those on the right.[32] The Radcliffe report focussed upon the threat posed by the CPGB, and Hennessy and Brownfeld report that, in the early years of the process, the authorities 'were overjoyed when they eventually found a fascist in one of the service departments. It made the whole operation look genuinely even-handed'.[33] In the mid-1950s the Security Commission could barely bring itself to pretend that it regarded both extremes as equal threats:

> At one time the Fascist ideology also presented considerable security risks. Although today the chief risk is that presented by Communism, the security arrangements instituted in 1948 were directed, and will continue to be directed, against Communism and Fascism alike. In this paper for convenience and brevity the term "Communism" is used to cover Communism and Fascism alike.[34]

Even when the CBGP began to dwindle, there was an evident unwillingness to discuss the matter without emphasising that the left was the greater threat:

> The fall in CPGB membership, however, has been accompanied by the proliferation of new subversive groups of the extreme Left and extreme Right (mainly the former) whose aim is to overthrow democratic parliamentary government in this country by violent or other unconstitutional means, not shrinking in the case of the most extreme groups from terrorism to achieve their aims.[35]

The wider sense of subversion introduced in the 1980s is still present in the current process, though the word itself is not used. The form those undergoing developed vetting are required to complete asks those completing it if they have ever been involved in actions 'intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means' or been a member or supporter of a group involved in such activities.[36] Even this is accepted as the correct place at which to draw the line between legitimate and illegitimate political activity (and there is of course far more to the vetting system than this one question), it is useful to remember that, as the examples given in the introduction make clear, and as is discussed further below, vetting does not apply only to those who are employed by the state itself in whatever form – directly or indirectly – but also to a range of others, some in the domain of politics rather than administration. For many years, however – roughly, say, from the placing of MI5 on the statute book in 1989 (or at least when the litigation relating to the matter ceased a few years later) until some time after 2010 – the vetting process had little political salience. The practice of vetting employees of the BBC, for example, diminished though the 1980s.[37] Internationally, the fall of the Soviet Union and, domestically, the dominance of New Labour's third way, appear to have dampened down the ideological contestation of the prior decades, or at least displaced it from those fora to which vetting has or might apply.[38] Because vetting was less politically salient, so too was the quality of the vetting process and the presence (or absence) of suitable safeguards, both of which were

relevant in contexts – primarily that of international (as opposed to 'domestic') terrorism – which neither had nor aspired to have footholds in the domestic political institutions.

As the examples with which this article opened suggest, however, this interlude may now have come or be coming to an end. A number of reasons for this shift, which is perhaps best understood as a regression to the mean, might be suggested. The pivot to the left of the Labour Party – a pivot encapsulated by, but hardly limited to, the figure of Jeremy Corbyn – has brought back into the political mainstream the sorts of ideas and individuals that would once upon a time have no doubt been caught up in some of the more enthusiastic purging carried out in the name of national security. Another change, however – exemplified by the travails of Eric King – is more interesting, because less obviously redolent of the past. King, like many others, is prominent in the discourse due to his work with or connections to a number of NGOs which resist what is seen as the expansion of the national security state and, in particular, its surveillance capacities: Liberty, Big Brother Watch, Privacy International etc, along with a number of others, international and transnational. What is distinctive about this group of organisations and the ideals which they pursue is that they cut across the traditional left-right spectrum insofar as it is predicated upon attitudes towards economics. Moreover, the sorts of oversight roles which King was unable to take up because of an adverse vetting decision are a feature of the modern national security constitution: even for many years after the emergence of a modern national security constitution in the mid-1980s all oversight was carried out by senior judges, either acting along (as one of the Commissioners) or on one of the Tribunals set up to determine legal questions. If there is a certain suspicion felt in regard to those belonging to or associated with these privacy-oriented groups, therefore, it would seem to have no direct analogue within the older use (or misuse) of vetting for political reasons, though of course there is good reason to believe that the United Kingdom has previously employed its national security capacities against civil liberties advocates.[39] Whatever the explanation for the renewed salience of security vetting (if that is indeed what is happening) it is clear that the time is ripe to consider the practice in the round.

3. Vetting today

3.1 The legal context

As will be seen below, vetting is not formalised in law: unlike in some other Commonwealth states, there is no statute which governs the process nor its results, and so it would seem that the fact that

a person has undergone, say, developed vetting is a purely administrative one. Nevertheless, the law of course frames the question of access to secret information, and vetting, in a number of ways, to deal with which in full is beyond the scope of this paper. The most important set of rules are those in the Official Secrets Act 1989, which contains a number of offences relating to the disclosure of official information. Section 1(1) of the Act applies to those who are or have been 'a member of the security and intelligence services' or 'a person notified that he is subject to the provisions of this subsection'. It makes it an offence to disclose without lawful authority 'any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.'[40] The result is that, though it is common to notify persons that the Official Secrets Acts apply to them, such notification ('signing the Official Secrets Act') is not a general precondition of the commission of the offences. Notification, the Act provides, 'shall be effected by a notice in writing served on him by a Minister of the Crown' and may be served if 'in the Minister's opinion, the work undertaken by the person in question is or includes work connected with the security and intelligence services and its nature is such that the interests of national security require that he should be subject to the provisions of that subsection.'[41] Notification lasts for five years, but is renewable.[42]

A related offence, which however requires that the disclosure in question must be 'damaging'[43] applies to Crown servants and government contractors, and exists alongside equivalent offences relating to the disclosure of material damaging to defence and international relations.[44] The concept of a 'Crown servant' for the purposes of the Act is broad: it includes Ministers, and members of the devolved administrations (though see the peculiarities of the Northern Ireland position), 'any person employed in the civil service of the Crown, including Her Majesty's Diplomatic Service, Her Majesty's Overseas Civil Service, the civil service of Northern Ireland and the Northern Ireland Court Service', 'any member of the naval, military or air forces of the Crown' and 'any constable and any other person employed or appointed in or for the purposes of any police force'.[45] It also includes those whose are so prescribed by an order made by the Secretary of State.[46] 'Government contractor' is also subject to an expansive definition, being derivative of the definition of 'Crown servant'.[47] The effect, in short, is that the OSA offences will apply to most, perhaps all, of those subject to security vetting and – in the case, for example, of Minsters of the Crown – some who are not.

3.2 Forms of vetting

Vetting policy in the United Kingdom is set by the Cabinet Office.[48] Vetting is now carried out (mostly) by a single body,[49] United Kingdom Security Vetting, which replaced the separate bodies which had themselves been set up in order to bring consistency to a process that had until relatively recently been carried out at the level of independent departments.[50] Around 170,000 cases were considered in the 2017-18.[51] All those who have access to 'government' assets must meet the 'Baseline Personnel Security Standard', involving the provision of proof of identity, confirmation of employment history, nationality and immigration status, and disclosure of unspent criminal convictions.[52] This has no special application to the national security context – where it is considered necessary and proportionate, additional national security vetting will be carried out,[53] the nature of such vetting being linked to the system of classification of assets and material as SECRET or TOP SECRET.[54] There are three forms of such national security vetting.[55]

The first, 'counter-terrorism check' ('CTC'), is carried out on those whose employment involves 'proximity to public figures assessed to be at particular risk from terrorist attack', given them access to 'information or material assessed to be of value to terrorists' or involves 'unescorted access to certain military, civil, industrial or commercial establishments assessed to be at particular risk from terrorist attack.'[56] Those undergoing a CTC will be required to complete the Security Questionnaire – an intimidating form requiring disclosure of a vast range of personal information, including those relating to the applicant's relationship history, her family, her employment history, medical information, and financial history, as well as what is described as 'security information', which the form notes will be 'checked against national security records'.[57] Checks will be made of departmental records, spent and unspent criminal records, and MI5 files and, as with all forms of national security vetting, 'may extend to third parties included on the security questionnaire.'[58] The second, progressively more onerous, form of national security vetting is a 'Security Check' ('SC'), carried out on those involved in posts which require them to have 'long-term, frequent and uncontrolled access to SECRET assets and/or occasional, supervised access to TOP SECRET assets'.[59] In addition to what is involved in CTC, an SC will involve the checking of 'credit and financial history with a credit reference agency'; where there are 'unresolved financial concerns', a person undergoing an SC 'may also be required to complete a separate Financial Questionnaire so that a full review of personal finances can be carried out.'[60] The third, and most intrusive, form of national security vetting is 'Developed Vetting' ('DV'), which is carried out on those who are employed in posts which require them 'to have frequent and uncontrolled access to TOP SECRET assets or require any access to TOP SECRET codeword material.'[61] As well as completing a

Security Questionnaire, those undergoing DV must complete a 'DV supplement' and a Financial Questionnaire. Additional checks include a 'full review of personal finances' (including 'an assessment of an individual's assets, liabilities, income and expenditure both on an individual basis and taking into account the joint position with a spouse or partner') and a 'detailed interview conducted by a trained Investigating Officer'.[62] A person's referees will also be interviewed within the DV process,[63] which UKSV estimates takes '32 times more effort to complete than one CTC or SC case'.[64] In all cases, the clearance attaches to the person, and can be transferred from one post to another. Clearances must, however, be renewed periodically, whether or not the holder has changed post.[65]

The key feature of the vetting regime is that it is based not upon the status of the individual being vetted – the identity of the employer, whether state or non-state, or the characterisation of the post in which he or she is employed – but rather functional matters such as access to locations or material. One effect of this approach is that a large number of individuals who are not directly employed by any emanation of the state are subject to vetting. Mostly these will be, for example, contractors working in a defence context, but the example of Iram Awan shows that a functional approach may capture those who work in political roles. Secondly, and conversely, a functional approach sits uneasily with the modern democratic constitution. Many of those who sit at the heart of the state – judges, politicians etc – enjoy the sort of access to places and information which would normally see them subject to the highest level of vetting and yet, as the next section discusses, are not in fact vetted.

3.3 Who is vetted?

In its application to civil servants and the contractors performing tasks on behalf of or alongside the civil service, the logic of the application of vetting processes seems uncontroversial, assuming – as perhaps we should not – that political considerations can be strictly separated from those relating to security. But the executive is not of course apolitical in its entirety, and there is no logical reason why vetting could not stray beyond the executive into political or even judicial branches of state. How far that is the case is difficult to say, for there seems to never have been any sustained consideration of the matter. Members of Parliament are not, it is clear, security vetted. Rodney Brazier points out that they 'do not, in the ordinary run of parliamentary business, have access to information which could be useful to an unfriendly state, so that if they were blackmailed the state would not be exposed to harm.'[66] This point predates, however, the creation of the Intelligence

and Security Committee of Parliament, members of which do have such access. It is notable, therefore, that members of the ISC are not subject to vetting,[67] notwithstanding that – if security were the only consideration – there would seem to be a basis for doing so. That they are not, that is, indicates that security is not the only relevant consideration. There exists also an important democratic principle, whereby the security and intelligence agencies ('SIAs') should not have a role in determining the suitability of those to whom they – like the rest of the state – are accountable, and that principle is strong enough to overcome the threat which is created when member of the ISC are granted access to sensitive material. Nevertheless, it remains possible – perhaps likely – that, as with Ministers of the Crown (discussed below), some sort of informal or unofficial vetting takes place, and there remains the possibility that the SIAs (most probably MI5) have some – indirect and attenuated – role in determining who it is, or is not, that is charged with carrying out oversight of them. If so, then the lack of formal vetting is positively misleading.

Ministers are not vetted, though – unlike in the case of Members of Parliament generally – there has been serious discussion of the possibility in the past.[68] The Security Commission addressed this question as part of a report it produced in the early 1980s, noting that not only may a Minister be a risk, but that it had been in the previous decade 'driven to that conclusion in the case of a junior Minister on the grounds of character defects'.[69] The Minister in question was Lord Lambton: in its earlier report, the Commission had concluded that his behaviour of was such that, had it continued, it would 'compelled' it to recommend that he 'be denied further access to classified information.'[70] It nevertheless concluded, both then and a decade later, that vetting of Ministers should not take place:

> The Commission recognises, however, that the way in which ministerial posts are filled upon a change of government makes it impracticable to subject Ministers to PV clearance before appointment and probably politically unacceptable to invite them to co-operate in PV clearance procedures in respect of themselves after appointment…[71]

It is striking, in retrospect, that the question of practicability is privileged over that of democratic principle within this account.[72] Since then, Rodney Brazier is one of the few to have considered the point. Starting from the premise that Ministers might 'receive the most secret and sensitive information about defence and international relations' or 'be made aware of information relating to the economic well-being of the state' Brazier notes that they as much as civil servants 'would

be in a position to help the enemies of the state, and could thereby threaten national interests and even national security':

> Logically, and quite properly, steps should be taken to screen people before they were appointed to such important positions. Such steps are taken in relation to civil servants: Ministers are, however, exempt from them.[73]

This, though, is not quite the full story. In the same report in which the Security Commission recommended against the vetting of Ministers it acknowledged that 'effective arrangements exist for drawing to the attention of the Prime Minister of the day any relevant security information which may have reached the Security Service about those whom he is likely to wish to appoint to Ministerial office' and that 'the Government Chief Whip of the day can be expected to be very well informed about any member of either House of Parliament who is a potential candidate for Ministerial office'.[74] That is, formal vetting was felt unnecessary because a sort of unofficial system of vetting was in place. Such unofficial processes, whether or not they rise to the level of what we might call informal vetting, may well counter or even entirely exclude the possibility that a person who for one reason or another poses a threat to security finds him or herself in Ministerial office. They have, however, a number of obvious downsides. Chief amongst them for Brazier was that informal vetting was likely to have an arbitrary dimension: 'the individual concerned… would then be exposed to an intrusive examination of his life which most other Ministers are spared, and about which he might well remain ignorant.'[75] Brazier therefore put forward – if hesitantly – a case for abandoning the implied distinction between civil servants and ministers in the vetting process:[76]

> No Minister, it is true, has ever been identified publicly as a traitor, but then potential treason is not the only risk. Over the years several Ministers have had to resign when their unacceptable private behaviour or character defects or potential as blackmail victims have been exposed, or have been threatened to be exposed - and those are the very criteria which bar civil servants from secret work. Had those factors been known before those Ministers had been appointed, they would not, presumably, have been given office.[77]

More significant, however, is that unofficial vetting of this sort is perhaps even more democratically objectionable than is a formalised vetting of Ministers: the SIAs enjoy an ability to influence the composition of Her Majesty's Government, but without that fact being acknowledged, and without the process enjoying democratic legitimacy. Also relevant here is that

all members of the Cabinet are members of the Privy Council – of which, strictly speaking, the Cabinet is but a committee. All will, therefore, have taken the Privy Council oath, by which a Counsellor is bound to 'keep secret all Matters committed and revealed unto you'.[78]

Judges are not vetted. They are, however, deemed to be vetted. This is necessary, as judges are called upon to determine issues which require them to view material whose disclosure might be contrary to the public interest generally or do harm to national security specifically. This might arise, for example, in the adjudication of claims of public interest immunity ('PII'), or the trying of some issue within a closed procedure.[79] Coroners, however, are neither vetted nor deemed to be so. This has had certain implications in the context of deaths the investigation of which have for one or another reason national security ramifications.[80] The usual response has been for the Coroner step aside and allow the inquest to be carried out instead by a High Court judge appointed as a Deputy Coroner for that purpose. On one occasion, however, relating to the death of Alexander Perepilichnyy – a Russian businessman who died in what some considered to be suspicious circumstances – the Coroner in question refused to do so. The Home Secretary therefore declined to disclose the him documentation in respect of which public interest immunity was being claimed, instead making a separate PII application to the High Court. The High Court allowed this second application, permitting the Home Secretary to refuse to disclose the documentation to the Coroner in order for him to judge the first PII application. The Court observed that this meant that 'the Coroner's position becomes untenable':

> He cannot have sight of relevant, sensitive material which is the subject of the PII ruling. To my mind that puts him in a position in which he cannot conduct a full and fair inquest. It is for the Chief Coroner to arrange for a replacement who is able to view the sensitive material and continue the inquest.[81]

Even when judges are given specific roles which involve greater than normal access to secret material, they do not appear to be vetted. Writing of the Security Commission, Lustgarten and Leigh noted that members were not positively vetted upon appointment but that 'the public servants will all have successfully undergone the highest level of vetting whilst in office'. This was not true of judges:

> The judicial members uniquely are taken on trust, an extraordinary testament to the perception of judges and their role in the British system of government. Why particular

> judges receive the Prime Ministerial letter of invitation remains a mystery, but it may be not irrelevant to the process that the first chairman, Winn J., had served in naval intelligence and that both he and Lord Bridge (member of the Commission 1977-85 and chairman 1982-85) had before their elevation been Treasury Counsel.[82]

It is likely, though impossible to verify, that similar considerations might apply to senior judges who have acted as, for example, Commissioners within the national security apparatus – Security Service or Intelligence Services Commissioner, perhaps, the Interception of Communications Commissioner or, now, the Investigatory Powers Commissioner[83] – or who are appointed to the various specialist tribunals with a national security remit.

4. Redress for vetting decisions

One key reason for reconsidering the modern security vetting landscape is the inadequacy of the mechanisms which exist for challenging adverse vetting decisions. Any reform of the system would be required to improve on the system as it currently exists, which this section explains and critiques. The possibility of informal or unofficial vetting was discussed in the previous section. One reason to object to such practices is that anyone subject to such vetting by definition has no access even to the inadequate apparatus discussed in this section.

4.1 The Security Vetting Appeals Panel

In 1997, while issues about the adequacy of remedies in deportation cases were being dealt with by the creation of a secret tribunal (SIAC) a similar change was made with the introduction of the Security Vetting Appeals Panel ('SVAP'),[84] which replaced the 'Three Advisers' in challenges to refusal or withdrawal of security clearance. Unlike its predecessor institution, SVAP is available not only to civil servants but also to contractors who are the subject of adverse vetting decisions. SVAP has, however, never been given a statutory footing of the sort which SIAC (like other tribunals which operate in this area) enjoys, and though it is chaired by a retired judge (with retired or serving judges acting as deputy chairs)[85] it is not a judicial body, does not employ a judicial procedure, and does not produce binding decisions:

> [SVAP] follows an informal procedure, with hearings confidential to the parties concerned. It makes an 'open' report of its findings with recommendations to the head of the

> department or organisation involved and copies the report to the appellant. Where the case involves sensitive information, the Panel endeavours to provide the appellant with a gist of the information, but the need to protect such information means that in such cases a separate 'closed' report will be made to the head of the department or organisation. The Panel can recommend that the vetting decision stand, or that the security clearance should be given or restored. It can also comment on the process followed, and can recommend that it be re-run. SVAP recommendations are not binding on departments and organisations, though in practice they are almost invariably followed.[86]

In this respect, SVAP represents only a relatively slight departure from the practice of the Three Advisers,[87] and is certainly quite insufficient on its own to do procedural justice to those whose interests are adversely affected by decisions regarding vetting.

Because SVAP is not a judicial body, and does not produce decisions on points of law or which are otherwise binding, relatively little is in the public domain about its work.[88] It is not subject to the Freedom of Information Act and the occasional question in Parliament elicits only the response that it is not possible to comment on individual cases.[89] A triennial review conducted by the Cabinet Office recommended that it be preserved, and shed some light on the body's work, emphasising the distinction between the SVAP and the employment tribunals whose work in this area is discussed further below:

> While cases may be brought to an Employment Tribunal where refusal or withdrawal of clearance leads to dismissal or is challenged on grounds of discrimination, this will not apply to all the cases where appeals lie to SVAP, and their roles are fundamentally different. An Employment Tribunal's ability to examine sensitive national security information was more limited than SVAP's until the enactment of the Justice and Security Act 2013. And Departments in any event value the relatively informal process followed by SVAP and the specific expertise it has developed in considering vetting decisions.[90]

In many cases, therefore, an individual whose security clearance is withdrawn or refused will be able to challenge that decision before the SVAP and then, because it results in a loss of employment, before a Tribunal. Because, however, it is only available to those who are already in state employment (whether as civil servant or contractor), it provides no remedy to those who are prevented from taking up such a post by the refusal of security clearance.[91]

The Security Vetting Appeals Panel has been considered, only once, by the Court of Human Rights. Gulamhussein was an administrative assistance in the Home Office whose security clearance was suspended because of, he was told, '[a]ssociation with individuals suspected of involvement and support for terrorism overseas, in particular the insurgency in Iraq.'[92] Both the internal process and the SVAP rejected his appeal, the latter recommending that the refusal of clearance be withheld and holding – if that is the correct term – that because its 'rulings' are not binding, that it was not determining Gulamhussein's civil rights and that, therefore, Article 6 of the ECHR was not engaged. When Gulamhussein applied to the Court of Human Rights (his application having been joined with that of Mr Tariq, discussed further below) it held that it was unnecessary to decide whether the refusal of security clearance involved the determination of his civil rights, though the Court hinted at its view in noting that 'the link between the decision to revoke Mr Gulamhussein's security clearance and his loss of duties and employment was more than tenuous or remote'.[93] As regards the SVAP, it held that Mr Gulamhussein was in a lose-lose situation: if SVAP was determining his civil rights, and so Article 6 was engaged, then it was simultaneously fulfilling the requirements of Article 6 by assessing the merits of the decision to refuse him clearance. The Court nevertheless held that Article 6 did not apply to the Panel:

> Given that the SVAP is staffed by senior members of the judiciary and has access to the same evidence under similar procedural rules to the domestic courts, the Court acknowledges that its recommendations must be highly persuasive. However, this does not amount to their being "directly decisive"… SVAP's recommendation does not have any particular consequence; it makes its recommendation to the relevant Head of Department who then takes the final decision concerning security clearance… Therefore the SVAP was not able to take a decision that would be "directly decisive for the right in question" and so Article 6 did not apply to the proceedings before it.[94]

This places the SVAP in a privileged position: able to present itself as a judicial body and so to influence very strongly (probably definitively) the fate of those subject to adverse vetting decisions – and only, it must be remembered, a subset of those – without having to adhere to the requirements which would normally apply to judicial bodies. The strength of this point is of course impossible to identify precisely without knowing – which we do not – what proportion of SVAP's recommendations are accepted by the Heads of Department to which they are made.

4.2 Legal challenges to vetting

SVAP provides a (sort of) remedy – though partial and inadequate – to those who are the subject of negative vetting decisions, but not (we are told) a legal one, and so possibility of legal challenge can be considered separately. Amongst the burgeoning body of national security case law in recent decades – prompted by, to name only the most obvious factors, the changing security context post 9/11 and the incorporation of the ECHR into domestic law by the Human Rights Act 1998 – there has been relatively little, and relatively limited, consideration of vetting. There are multiple potential routes to a legal challenge on vetting, some of them direct and others indirect.

First, there exists, logically, the possibility of a judicial review on common law grounds of a decision to withdraw or refuse security clearance, whether the clearance is to allow the individual in question to work directly for a public authority or is being given by such an authority to permit the individual to work for a private party. One question about such judicial review will be whether or not it requires the applicant to avail herself of the possibility of 'appealing' to the SVAP prior to bringing such a claim before the relevant court. Normally one is required to make use of any right of appeal before making an application for judicial review, but if the UK takes the position that Article 6 does not apply to its work, then it would seem to follow logically that SVAP does not fall within the category of remedies to which recourse must be made. Nevertheless, a challenge to the decision of the original decision-maker to withdraw or refuse clearance, while no doubt possible, is highly unlikely to succeed to the extent to which it is based upon considerations of national security, to which the courts will apply only a very light touch review. Barring outright irrationality, such a claim will no doubt fail. What if a person has brought a judicial review not against the decision-maker but against the SVAP that has, later in the process, recommended that the decision be upheld? There does not appear to be any examples of applications for judicial review being made in respect of the recommendations of the SVAP. Though one was pending in the *Gulambusseini* case, it was withdrawn after the Supreme Court's decision in *Tariq* – presumably because the terms of that judgment rendered an Article 6 challenge highly unlikely to succeed – notwithstanding that nothing in *Tariq* speaks directly to the amenability of the SVAP to judicial review. The better view must be that it is so amenable, but a successful challenge to its recommendations will not necessarily impact upon the decision which follows from those recommendations. And so the hurdle is not amenability but rather the grounds on which any challenge might be brought.

Where a person has gone before the SVAP and the original decision has remained intact, the quality of the procedure employed there will potentially be a ground of a challenge to the overall decision. It is thus significant that its procedures do not respect absolutely the principle of *audi alteram partem*. In the 1980s, the decision of GCHQ to withdraw the security clearance of an employee who has disclosed to them his homosexuality was held to be amenable to judicial review and the process employed held to meet the criteria of natural justice. Here, however, a certain amount of factual material had been disclosed to the applicant and his solicitor – disclosure could take place without problem specifically because it was he who had informed GCHQ in the first place. Had GCHQ taken the view that the material could not have been disclosed on national security grounds – as it likely would have if its sources were anything but the applicant himself – the judge made clear that this 'that would be an end of the matter'.[95] The more modern approach is such that the mere invocation of national security would no longer have quite that effect, but it would presumably factor in – along with, crucially, the possibility of an appeal to SVAP – to any consideration both of the reasonableness and the procedural requirements of such a decision.

The second route by which challenge might happen is human rights-based claim to the vetting. Both the ultimate decision-maker and the SVAP will be public authorities for the purpose of the Human Rights Act 1998, though – as discussed above – the specific rights engaged by the decisions (of the former) and recommendations (of the latter) may vary. A number of such challenges have been brought in the era of the modern national security constitution – an early example is *Esbester*, brought by an individual who had been refused employment at the Central Office of Information. Though no reasons had been given, he suspected that the decision related to his involvement with the Campaign for Nuclear Disarmament and membership of the CPGB. Having made an application to the Security Services Tribunal – a precursor to the Investigatory Powers Tribunal – he was informed, as all applicants to that body in fact ultimately were, that no determination had been made in his favour. Amongst his complaints was that he had been denied the effect remedy that Article 13 of the Convention required him to have. Because, however, his logically prior complaint of a violation of Article 8 was held to be manifestly ill-founded (on the basis that the Security Service Act 1989 provided adequate legal basis for the interference with his rights) the adequacy of the remedy not directly addressed.[96] In addition, there exists a possibility of bringing a claim in the Investigatory Powers Tribunal alleging that the involvement of the SIAs in the vetting process has resulted in a breach under the ECHR. The Tribunal is recognised as providing an effective remedy under the EHCR,[97] and it has recently been held that a person who wishes to bring a claim over which it has jurisdiction before the Court of Human Rights must first

exhaust his or her domestic remedies, including by making recourse to the IPT.[98] Nevertheless, the IPT operates on a 'neither confirm nor deny' basis and any such challenge is vanishingly unlikely to succeed.

A third possible route of legal challenge – partially overlapping with the second – and to which most of the modern case law relates, is to bring an employment law claim relating to the outcome of a vetting process – a route which is available as regards both public and private sector employers. Here, the challenge can be made either to the relevant employment decision itself or, more frequently, the process by which any challenge to it must take place, which has for many years been more restrictive than is the normal employment tribunal process. So, for example, section 7 of the Employment Tribunals Act 1996 permits the Secretary of State to make regulations regarding proceedings before employment tribunals.[99] It further provides that such regulations 'may make provision enabling a Minister of the Crown, if he considers it expedient in the interests of national security' to do one of a number of things, including to sit in private, exclude the applicant from the proceedings, and keep secret the reasons for its decision.[100] In practice, these proceedings will be what are described in other contexts as 'closed material proceedings' and the person so appointed will be is what is known in those contexts as a 'special advocate'.[101] A provision inserted into the Act by the Employment Relations Act 2004 provides for the extension of these processes into other types of employment proceedings. [102]

Though elsewhere in the legal order, the various international regimes have been a reasonably effective weapon against the secrecy engendered by provisions of this nature, the application of those regimes to the vetting context has been disappointing. It reflects a persistent, and at times rather alarming, belief that the loss of employment is – in relative, but sometimes also in absolute terms – a relatively minor interference with the rights of the individual, such that any challenge to a decision which results in that loss need not attract the sort of procedural protection which applies to more serious such interferences. So, for example, in *Tariq*, a challenge was brought on Article 6 grounds to the use of a closed material procedure in employment proceedings brought on the grounds of racial and religious discrimination grounds. The applicant, formerly an immigration officer, had seen his security clearance withdrawn after his brother and his cousin were arrested on suspicion of involvement in planning a terrorist attack and the latter was convicted of related offences. The Supreme Court was required to consider, in effect, whether the standard it had set in *AF (No 3)* – a case relating to control orders, where the intrusiveness of the restrictions associated with the control order was such as to render it a deprivation of liberty –

applied also here. That standard – the '*AF (No 3)* disclosure requirement' or, more often, the 'gisting' requirement – requires that the person who seeks to challenge the imposition of measures restricting his liberty be given 'sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations'.[103] In *Tariq*, however, the Supreme Court held that this requirement did not extend to cases like the those brought by the applicants, which were too distant from the context (criminal proceedings) in which the Strasbourg Court had first articulated it. Lord Dyson, for example, suggested that while he did not 'wish to underestimate the importance of the right not to be subjected to discrimination', it was the case that 'on any view', discrimination was 'a less grave invasion of a person's rights than the deprivation of the right to liberty.'[104]

When Mr Tariq applied to the Strasbourg Court (where his case was joined with that of Mr Gulamhussein, discussed above), it – in finding that both his application and a similar one were inadmissible because manifestly ill-founded – summarised the relevant principles which apply in this context. First, 'the right to disclosure of relevant evidence is not an absolute right'.[105] Article 6, the right to a fair trial, will be satisfied (in the civil context) where 'the domestic courts had the necessary independence and impartiality; had unlimited access to all the classified documents which justified the decision; were empowered to assess the merits of the decision revoking security clearance and to quash, where applicable such a decision if it is arbitrary.'[106] In its previous case law, it recalled, it had also examined whether 'the domestic courts duly exercised the powers of scrutiny available to them, and whether their application of a restricted procedure for reasons of security appeared arbitrary or manifestly unreasonable.'[107] Applying these to the fact of Mr Tariq's case, the Court held that the process by which he had been able to challenge is dismissal was in accordance with Article 6 of the Convention, effectively endorsing the two-tier approach which the Supreme Court had taken.[108]

5. Conclusion

Accepting without hesitation that the question of security clearance is of the utmost importance in securing the state and its interests against those who might seek to harm it and them, the picture which emerges from a consideration of the vetting landscape as it exists in the United Kingdom is a somewhat unedifying one. There exists too much uncertainty as to who is vetted, and what can be said with certainty reflects if not an incoherence then certainly a series of questionable and historically contingent assumptions which should be made manifest and, if necessary, revisited.

The system by which adverse vetting decisions can be revisited is inadequate, not only because the Security Vetting Appeals Panel is a non-curial body which effectively makes decisions of greater import than many of those made by courts, but also because it is unavailable to those who are the subject of such decisions while not already in the employ of the state. Such persons can be denied natural justice, forced to fall back on an expensive judicial review procedure within which they might well be denied – compatibly with both EU law and the ECHR – knowledge of even the very minimum of the case against them.

As with many issues under the heading of security, it is perhaps the case that the question of vetting attracted (significantly) less attention in a period where the ideological extremes of domestic politics were felt to have become blunted, and the primary threat to security was from external actors, advancing an ideology to which there was little sympathy on both left and right. If that was true once, it would seem no longer to be, as the two examples with which this article opened in their own way demonstrate. Not only is the polarisation of politics apparently increasing, with that polarisation eventually – but inevitably – finding its way into the state's institutions, but with the increased surveillance powers of the state comes a renewed opposition to those powers and their use. This second trend, which would appear to be reflected in the refusal of security clearance to Eric King on the basis of his involvement with a range of (broadly) anti-surveillance organisations, cuts across the ideological spectrum which the use of vetting powers (if not their substance) has always reflected. This return of politics into the vetting arena is, though unwelcome, entirely predictable. Though the basic logic of the vetting project – the need to ensure that those minded to harm national security are not, as far as can be helped, in a position to do so – is sound and largely uncontentious, the reality is that no bright line has ever been or could ever be drawn between those factors which speak directly to security and those, on the other hand, which are political in nature. Political activity – especially when it takes place outside of the formal structures of political parties – very often leads to association with individuals whose politics may be more extreme or whose methods may be less palatable. As the political returns to the constitution, therefore, in the form of greater ideological diversity than was present, say, between the early 1990s and the early 2010s, vetting risks once again becoming a legal tool which effectively but surreptitiously frames the field of legitimate political activity. If so, the case for its reform will only grow stronger than it already is.

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[1] Waugh, *Jeremy Corbyn's Close Aide*.
[2] Pickard, *Corbyn aides*, and Stewart, *Commons launches investigation*.
[3] Murray, *Is the "deep state" trying to undermine Corbyn?*
[4] On security vetting, Linn, *Application Refused* and Leigh and Lustgarten, *Employment, Justice and Détente*. Hollingsworth and Norton-Taylor, *Blacklist* addresses the wider context of vetting, including accounts of – for example – vetting in the construction industry and car industry.
[5] Townsend, *Home Office under fire*. King now uses the surname Kind instead. Here I use the name by which he was referred to in the relevant media reports.
[6] Townsend, *Home Office under fire*. On IPCO, see Scott, *Hybrid institutions*.
[7] See the accounts of the development of vetting in Andrew, *Defence of the Realm* and Williams, *Not in the Public Interest*. See also Fredman and Morris, *The State as Employer*.
[8] See the discussions in Andrew, *Defence of the Realm* and Mahoney, *Civil Liberties*.
[9] The unfairness of this procedure was seen as the key failing of the new vetting process: Mahoney, *Civil Liberties*, 87 notes that '[t]he primary objections to negative vetting, as it was called, both within and outside of Parliament, were due more to the perception of a lack of fairness in the procedure, than to the theoretical principle of barring certain people from secret work.' Williams pointed out that a 'remarkable feature' of the procedure was that 'in cases where the civil servant denied the allegations against him to the bitter end' it involved 'four separate occasions when the Minister had to make a binding ruling' Williams, *Not in the Public Interest*, 174.
[10] See Hennessy and Brownfeld, *Security Purge*, suggesting that the introduction of positive vetting was motivated in part by the hope that 'it would induce the United States to be more co-operative in sharing

atomic information'. The key figure here was Klaus Fuchs, a German refugee who had been granted British citizenship in 1942 and later worked on the Manhattan Project, but was revealed in 1950 to have been spying for Russia.

[11] See Hennessy and Brownfeld, *Security Purge*, 968.

[12] Conference on Privy Councillors, *Statement*. As this document explains, the Conference's full report 'includes a close examination of the security procedures in the public services, and it would not be in the public interest to publish the full text of the Report or to make known all its recommendations.' See also Jackson, *Individual Rights*, 375 noting that the circumstances of Burgess and McLean 'served to focus public attention on the importance of considering persons with character defects as potential security risks'. An inquiry into John Vassall – the Civil Servant who spied for Russia – noted that he had survived positive vetting unscathed, possibly as a result of certain errors of judgment made during it: Radcliffe, *Vassall Case*.

[13] "[A] total which probably included resignations and transfers to other jobs': Andrew, *Defence of the Realm,* 838.

[14] Radcliffe, *Public Service*.

[15] Including that it 'would be reasonable to establish the right of any Department in respect of establishments or staff employed on secret work to deny access to or to refuse to negotiate (either by correspondence or face to face) with a named trade union official whom it had reason to believe to be a Communist under the definition used in the purge procedure' ([37]).

[16] Though a central element of the background to the report was the claim by journalist Chapman Pincher that Sir Roger Hollis, formerly Director-General of MI5, had been a Soviet spy.

[17] HMG, *Recommendations of the Security Commission*.

[18] HMG, *Recommendations of the Security Commission*, [5].

[19] HMG, *Recommendations of the Security Commission*. [17].

[20] Security Commission, *May 1983*.

[21] HC Deb 03 April 1985, vol 76 col 617WA.

[22] See the discussion in Leigh and Lustgarten, *Employment, Justice and Détente*, 615-8.

[23] HC Deb 24 July 1990, vol 177 col 160WA.

[24] As well as those discussed in the present work, see eg Security Commission, *May 1985* and Security Commission, *July 1995*.

[25] See Leigh and Lustgarten, *Security Commission*. When the Intelligence and Security Committee was being reformed, it was argued that the functions once exercised by the Commission should be handed over to it, so that '[f]uture historians would no longer have to worry about whatever happened to the Security Commission and we would have given that body what one might call a decent burial.' HL Deb 9 July 2012, vol 738, col 1008 (Lord Lloyd of Berwick).

[26] Security Commission*, May 200*4. The report was prompted by the employment as a footman at Buckingham Palace of a reporter for the Mirror newspaper. The reporter had been subject to a counter-terrorism check.

[27] Leigh and Lustgarten, *Employment, Justice and Détente* 641.

[28] Recent research has also demonstrated a racial dimension to vetting practices: Lomas, *'Crocodiles in the Corridors'*.

[29] Lord Denning, *Lord Denning's Report*, [230].

[30] Norton-Taylor, *In Defence of the Realm?,* 36-7.

[31] Security Service Act 1989, s 1(2).

[32] An aspect which was present from the very beginning: see Andrew, *Defence of the Realm,* 383.

[33] Hennessy and Brownfeld, *Security Purge*, 968.

[34] Conference of Privy Councillors*, Statement*, [5].

[35] HMG, *Recommendations of the Security Commission*, [4].

[36] HMGt *Developed Vetting*, Q 26.

[37] Reynolds, *The vetting files*. One case related to the practice was brought before the European Court of Human Rights, which declared it inadmissible: *Hilton v United Kingdom* Application no 12015/86 (6 July 1988) (admissibility).

[38] On the former point, see Andrew, *Defence of the Realm*, 751-2, noting that the decline of subversion had seen vetting practices, and MI5's role in them, significantly reduced at the early 1980s. When the changes were put into place the number of checks in which MI5 was involved fell from 360,000 in 1990 to 'about 250,000 in 1991'.

[39] Some of the litigation which prompted the creation of a statutory basis for MI5 was brought by two individuals who claimed that MI5 held files on them as a result of their work with the National Council of

Civil Liberties (now better known as Liberty): *Hewitt and Harman v United Kingdom* [1989] ECHR 29. Both applicants went on to be Labour MPs.
[40] Official Secrets Act 1989, s 1(1).
[41] OSA 1989, s 1(6).
[42] OSA 1989, s 1(7).
[43] Meaning that 'it causes damage to the work of, or of any part of, the security and intelligence services' of 'it is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause such damage or which falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely to have that effect.' OSA 1989, s 1(4).
[44] OSA 1989, ss 2 and 3.
[45] OSA 1989, s 12(1).
[46] OSA 1989, s 12(1)(g), and see the Official Secrets Act 1989 (Prescription) Order 1990 (SI 1990/200).
[47] OSA 1989, s 12(2).
[48] National Audit Office, *National Security Vetting*, 4.
[49] Though note that '[s]ome other organisations, such as police forces, conduct their own vetting': NAO [1.1]fn.
[50] See the overview in National Audit Office, *National Security Vetting*.
[51] National Audit Office, *National Security Vetting*, 4.
[52] Cabinet Office, *Personnel Security Controls*.
[53] There is reason to believe that not all vetting is (or, at least, was) equal. In its 2004-05 report, the Intelligence and Security Committee said that that 'there are six organisations that carry out vetting investigations in the UK: the Security Service, the SIS, GCHQ, the Defence Vetting Agency, the FCO and the Office of Civil Nuclear Security. We had been told that the three intelligence and security Agencies conducted more thorough vetting of their staff and consequently would not accept the vetting clearance of the other organisations without making additional enquiries. We were therefore concerned that a two-tier developed vetting system was being created or effectively existed.' Intelligence and Security Committee, *Annual Report 2004–2005*, [47].
[54] Cabinet Office, *Personnel Security Controls*, 20-2.
[55] Though see National Audit Office, *National Security Vetting*, 4 which refers to the 'three most common categories of national security vetting' implying others exist.
[56] Cabinet Office, *Personnel Security Controls*, 20-1.
[57] HMG, *Security Check/Counter-Terrorist Check*.
[58] Cabinet Office, *Personnel Security Controls*, 21.
[59] Cabinet Office, *Personnel Security Controls*, 22.
[60] Cabinet Office, *Personnel Security Controls*, 22.
[61] Cabinet Office, *Personnel Security Controls*, 22. Given recent delays to the DV process, which is already much longer than the others, the National Audit Office noted that some departments had 'started vetting individuals for DV roles at SC level first, so that the individual can work in a limited capacity consistent with their SC clearance, while their DV clearance is pending': National Audit Office, *National Security Vetting*, 5.
[62] Cabinet Office, *Personnel Security Controls*, 22.
[63] Cabinet Office, *Personnel Security Controls*, 22.
[64] National Audit Office, *National Security Vetting*, [3.16].
[65] National Audit Office, *National Security Vetting*, [3.19] notes that a backlog in DV cases was addressed by postponing some DV renewals which would otherwise have been due and permitting interviews, normally undertaken in person, to be carried out over the phone instead. There is also the possibility of so-called 'aftercare' checks, which might be scheduled, 'for example as a planned review of an individual's circumstances', or unscheduled, in response to 'an unforeseen event or change in circumstances': [3.22].
[66] Brazier, *Qualifying as a Minister*, 139-40.
[67] 'As Members of Parliament, [its Members] are not subject to the security vetting procedures that officials undergo in order to have access to such material.' Intelligence and Security Committee of Parliament, *Frequently Asked Questions*. A persistent myth is that all members of the ISC of must be Privy Counsellors. This is not in fact true: Bochel, Defty and Kirkpatrick, *Watching the Watchers*, 77-8.
[68] See Andrew, *Defence of the Realm*, 394 noting that the question arose in respect to knowledge of 'atomic secrets' during the Churchill government of the early 1950s, and that Attlee had dealt with the issue by not sharing such secrets with the full cabinet but rather a special committee thereof.

[69] HMG, *Recommendations of the Security Commission*, [22]. The report in question is Security Commission, *July 1973*, relating to the behaviour of Earl Jellicoe and Lord Lambton. In relation to the latter's drug use, the Commission had said that 'there would be a significant danger of his divulging, without any conscious intention of doing so, items of classified information which might be of value to a foreign intelligence service in piecing together from a number of different sources a complete picture from which conclusions dangerous to national security could be drawn' ([33]).
[70] Security Commission, *July 1973*, [31].
[71] HMG, *Recommendations of the Security Commission*, [22]. It nevertheless reaffirmed an earlier recommendation that when Ministers are appointed to a department they should be 'given specific instructions upon security problems and procedures.'
[72] See also Security Commission, *July 1973*, [42]: '…the practical difficulties involved in trying to apply the [positive vetting] process to Ministers are insuperable'.
[73] Brazier, *Qualifying as a Minister*, 137. See also Brazier, *It is a constitutional issue.*
[74] Security Commission, *July 1973*, [42].
[75] Brazier, *Qualifying as a Minister*, 139.
[76] Security Commission, *July 1973*, [42]: 'We have noted that it has never been thought appropriate to subject Ministers to the positive vetting process, which is applied to officials so that a positive judgment may be taken that they are suitable to be entrusted with exceptionally secret information.'
[77] Brazier, *Qualifying as a Minister*, 137, 139.
[78] HC Deb 28 July 1998, vol 317 col 182WA.
[79] For a discussion of the distinction between these processes, see Tomkins, *Justice and Security*.
[80] Eg under the law of investigatory powers, which distinguishes High Court, Crown Court and Circuit judges from others (including, by implication, Coroners). As a matter of policy, the state applies the same policy to security and intelligence material: 'One justification is to avoid the position in which different approaches are applied depending on whether the material is sensitive as RIPA intercept material or whether it is sensitive for some other reason. It is said that the distinction may not be easy to draw in practice when the RIPA provisions apply to information which has intercept material as its source. Another justification for the policy is practical: at the High Court, for example, there are established mechanisms in place for the handling of this type of material such as secure storage, DV cleared administrative staff and secure courtrooms.' *Secretary of State for the Home Department v Her Majesty's Chief Coroner for Surrey* [2016] EWHC 3001 (Admin), [45].
[81] [2016] EWHC 3001 (Admin), [77].
[82] Lustgarten and Leigh, *Security Commission*, 220.
[83] Scott, *Hybrid institutions*.
[84] See the judgment of the Court of Human Rights in *Tinnelly & Sons and McElduff v United Kingdom* (1999) 27 EHRR 249, and White, *Security vetting*. 'The panel will be available to all those, other than recruits, in the public and private sectors and in the Armed Forces who are subject to security vetting at these levels, have exhausted existing appeals mechanisms within their own organisations and remain dissatisfied with the result.' HL Deb 19 June 1997, vol 580 col 123WA
[85] Alongside a number of lay members. In every appeal a panel of 3 – either the chair or a deputy chair and 2 lay members – is assembled.
[86] Cabinet Office, *Security Vetting Appeals Panel.*
[87] See the description of its procedure in Leigh and Lustgarten, *Employment, Justice and Détente*, 622-3.
[88] Which is not insubstantial, and appears to be increasing over time: 'SVAP has heard 82 cases between 1998 and 2012: 14 between 1998 and 2002; 19 between 2003 and 2007; and 49 between 2008 and 2012.' Cabinet Office, *Security Vetting Appeals Panel*, [17]. 'Of the appeals to the Panel over this period, the appeal was upheld in 22% of the cases and not upheld in 63% of the cases. In 15% of the cases, the organisation was advised to re-examine the case or to undertake the vetting process again, or decided to do so itself' ([18]).
[89] HC Deb 22 July 2004, vol 242 col 514W.
[90] Cabinet Office, *Security Vetting Appeals Panel*, [4].
[91] 'The Security Vetting Appeals Panel is an independent avenue of appeal for Civil Service staff and contractors whose security clearance has been refused or withdrawn.' Security Vetting Appeals Panel, *About us*.
[92] *Gulamhussein v United Kingdom* 46538/11 (26 April 2018) (admissibility), [5].
[93] *Gulamhussein*, [78].

[94] *Gulambussein*, [81]. (references omitted).
[95] *R v Director of Government Communications Headquarters ex parte Hodges* [1988] Lexis Citation 2586.
[96] *Esbester v United Kingdom* 18601/91 [1993] ECHR 64. See also *G, H and I v United Kindgdom* (1993) 15 EHRR CD41.
[97] *Big Brother Watch v United Kingdom* [2018] ECHR 722.
[98] *Big Brother Watch v United Kingdom* [2018] ECHR 722.
[99] See also the Equality Act 2010, s 117.
[100] Employment Tribunals Act 1996, s 10(5).
[101] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237, reg 94 and Schedule 2.
[102] ETA 1996, s 10(6).
[103] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28
[104] [2009] UKHL 28, [59].
[105] *Tariq v United Kingdom* 46538/11 (26 April 2018) (admissibility), [71].
[106] 46538/11 (26 April 2018) (admissibility), [71].
[107] 46538/11 (26 April 2018) (admissibility), [71]. See, in particular, *Regner v Czech Republic* 35289/11 (19 September 2017).
[108] 46538/11 (26 April 2018) (admissibility), [88]-[98]. Such an approach is evident also in the equivalent jurisprudence under the European Union's Charter of Fundamental Rights: see, on one hand, *ZZ (France) v Secretary of State for the Home Department* (C-300/11) EU:C:2013:363; [2013] QB 1136 and *ZZ (France) v Secretary of State for the Home Department* [2014] EWCA Civ 7 and, on the other, *Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776.