

# Protection of Witnesses and Sensitive Information in U.K. Criminal Prosecutions

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	277
II.	DESCRIPTION OF THE UNITED KINGDOM’S DISTINCTIVE CRIMINAL PROCEDURE .....	278
	A. <i>Organizations in the U.K. Criminal Justice System</i> .....	278
	B. <i>Investigation of Crime</i> .....	280
	C. <i>Disclosure of Evidence</i> .....	286
	D. <i>The In Camera Hearing</i> .....	288
III.	DESCRIPTION OF FILM .....	296
IV.	DISCUSSION AND ANALYSIS OF THE LEGAL STORY .....	298
	A. <i>Appointment of Special Counsel</i> .....	298
	B. <i>Disclosure of Material in Closed Session</i> .....	299
V.	CONCLUSION AND RECOMMENDATIONS .....	301

## I. INTRODUCTION

This Article examines the film *Closed Circuit*, as it portrays the legal issues surrounding a British judge’s decision to hold a hearing in camera.<sup>1</sup> As in the United States, holding in camera hearings safeguards the use of witnesses and protects confidential information before it is shared with all

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1. CLOSED CIRCUIT (Focus Features 2013).

parties to a criminal case or the jury.<sup>2</sup> *Closed Circuit* accurately portrays some aspects of the United Kingdom's legal standards that govern these hearings including the judicial deference to the Crown's national security interests, the appointment of cleared special counsel to represent the accused, and the use of pseudonyms to protect witnesses in open court.<sup>3</sup> The film depicts a complicated relationship that arises out of the government's use of an informant.<sup>4</sup> The informant is the son of an accused criminal who sells materials used in a deadly terrorist attack.<sup>5</sup> The next section will present a description of the United Kingdom's distinctive procedure regarding in camera hearings. The sections that follow discuss the film and the accuracy of its portrayal of the U.K. legal system.

## II. DESCRIPTION OF THE UNITED KINGDOM'S DISTINCTIVE CRIMINAL PROCEDURE

### A. Organizations in the U.K. Criminal Justice System

United Kingdom courts and law enforcement agencies resemble the structure of state court systems in the United States.<sup>6</sup> In the United Kingdom, the Crown Prosecution Service (CPS) is the main body charged with prosecuting criminal offenses in court.<sup>7</sup> Parliament, the U.K.'s main legislative body, created the CPS in 1986.<sup>8</sup> Before the creation of the CPS, the police services handled criminal prosecutions through the court systems, and still do so for some crimes today.<sup>9</sup>

Magistrate courts in the United Kingdom handle the preparatory, or preliminary, hearings and any other committal proceedings of all criminal trials after a case is recorded or filed.<sup>10</sup> Magistrate courts also try summary offenses, such as traffic offenses, common assault, and theft.<sup>11</sup> The Crown

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2. *In Camera Law and Legal Definition*, USLEGAL, [https://definitions.uslegal.com/i/in-camera/#:~:text=In%20camera%20is%20a%20Latin,been%20excluded%20from%20the%20courtroom](https://definitions.uslegal.com/i/in-camera/#:~:text=In%20camera%20is%20a%20Latin,been%20excluded%20from%20the%20courtroom.). [<https://perma.cc/YEH2-WXHN>].

3. CLOSED CIRCUIT, *supra* note 1.

4. *Id.*

5. *Id.*

6. Collin McIntyre et al., *Supreme Courts: The US and UK Compared*, L. Soc'Y SCOT. (Feb. 16, 2015), <https://www.lawscot.org.uk/members/journal/issues/vol-60-issue-02/supreme-courts-the-us-and-uk-compared/> [<https://perma.cc/RET6-KXMR>].

7. MARTIN PARTINGTON, *INTRODUCTION TO THE ENGLISH LEGAL SYSTEM* 84 (4th ed. 2000).

8. *Id.* at 94.

9. *Id.*

10. *Id.* at 96.

11. GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* 142 (10th ed. 2009).

Court is the United Kingdom's trial court, and cases are available for appeal in the Court of Appeal.<sup>12</sup>

While Parliament is the United Kingdom's sovereign legislative authority, which the courts must rely on, Parliament also incorporated the European Convention on Human Rights in 1998.<sup>13</sup> The U.K. Court of Appeal sometimes seeks guidance from the decisions of the European Court of Human Rights.<sup>14</sup> When deciding whether to proceed in closed session, contrary law notwithstanding, the film's magistrate judge impliedly weighs countervailing considerations. These considerations include the accused's general right to a fair and public trial under Article VI of the Human Rights Act 1998, the need to safeguard the security of the nation following an attack that killed 120 people, and the protection of the Crown's juvenile witness, which is also required by Article VI.<sup>15</sup>

*Closed Circuit* portrays a terrorism case that proceeds through an investigation and the preparatory hearing stage in the Crown Court.<sup>16</sup> As depicted in the film, the preparatory hearing is adjourned for several days in between testimony from two key witnesses for the CPS.<sup>17</sup>

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12. *Id.* at 146–47.

13. Scottish Parliament Information Center, *The European Convention on Human Rights in the United Kingdom*, 2015, SB 15-59, at 8. For a description of Parliamentary sovereignty in the context of the United Kingdom's unique separation of powers and the Human Rights Act of 1998, see James Hyre, Comment, *The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of 1998*, 73 *FORDHAM L. REV.* 423, 427–46 (2004).

14. See Human Rights Act 1998, c. 42, § 2 (UK) (“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, . . . whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.”); see, e.g., *R v. Loveridge* [2001] EWCA (Crim) 973 (appeal taken from Eng.) (following the approach of the European Court of Human Rights in *Khan v. United Kingdom*, 31 *Eur. Ct. H.R.* 45 (2001), which held that unlawful seizure of videotapes for identification purposes, in violation of the defendant's right to privacy, does not preclude a fair trial or prevent the admittance of the evidence).

15. Human Rights Act 1998, c. 42 (UK).

16. *CLOSED CIRCUIT*, *supra* note 1. In terrorism cases the preparatory hearing is required by Terrorism Act 2006, c. 11, § 16 (Eng.).

17. *Id.*

## B. Investigation of Crime

The Police and Criminal Evidence Act 1984 provides powers to police and sets standards for judicial review.<sup>18</sup> The Act authorizes police to stop and search vehicles, arrest, detain, and question suspects, and enter and search premises.<sup>19</sup> Section 8 gives constables for the police services standalone “powers of entry” to search private premises, but only after obtaining a warrant that shows reasonable grounds that non-privileged items of substantial value to an investigation of a criminal offense will be found there and those items are likely to be admissible evidence at trial.<sup>20</sup> Section 18 allows police to conduct a search of premises following arrest, on similar criteria without a warrant.<sup>21</sup> The police services may seize items that are found on-premises pursuant to a search warrant.<sup>22</sup> They may also seize other incriminating items found there.<sup>23</sup> For ordinary criminal offenses, and in cases where the authority to investigate is conferred by other statutes, police must make a record of items seized upon request.<sup>24</sup>

The legal standards that guide U.K. courts in administering criminal justice are different for terrorism offenses. For instance, the burden of proof required at trial to validate issuance of a warrant to search premises for a suspected terrorist is concerned with the police’s information about the suspect at the time of executing the warrant, rather than what they knew about incriminating evidence or the likelihood of a pending attack.<sup>25</sup> To search premises for “a person who . . . is or has been concerned in the commission, preparation or instigation of acts of terrorism,” the police services are only required to show reasonable grounds to believe that the person is engaged in one of these acts and is likely to be found at the premises.<sup>26</sup> Prohibited conduct ranges from publication of a statement

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18. Police and Criminal Evidence Act 1984, c. 60 (Eng.).

19. *Id.*

20. *Id.* § 8. This traditional search power is limited by the Protection of Freedoms Act 2012, which allows for a Minister of the Crown, such as the Secretary of State, upon consultation with the agencies exercising such powers and approval by Parliament, to restrict entry onto land by limiting the specific places, times of day, or other manners that premises are searched. *See* Protection of Freedoms Act 2012, c. 9, §§ 39–53 (UK).

21. *See* Police and Criminal Evidence Act 1984, c. 60, § 18 (Eng.).

22. *See id.* § 8.

23. *See id.* § 19.

24. *See, e.g.*, Police and Criminal Evidence Act 1984, c. 60, § 18 (Eng.).

25. *See* Terrorism Act 2000, c. 11 (UK).

26. *See id.* §§ 40(1)(b), 42. Compare the “balance of probabilities” standard of proof the Secretary of State must meet to certify an individual’s past involvement with terrorist activity, for approval of notices to impose specified terrorism prevention and investigation measures. Terrorism Prevention and Investigation Measures Act 2011, c. 23, §§ 2(1), 3 (UK). For an excellent discussion of this form of “more substantive scrutiny,” locating its early advocacy in Parliamentary debate on control orders, see Clive Walker,

encouraging terrorist acts to preparation of a terrorist act under section 5 of the Terrorism Act 2006.<sup>27</sup> Items found on the premises may be seized by police services under their general power to seize evidence related to a criminal offense.<sup>28</sup> If found, this evidence reinforces support for the warrantless arrest of the terrorist suspect under ordinary legislation.<sup>29</sup> Evidence that demonstrates a suspect's engagement in terrorist acts also supports a warrantless arrest, raising reasonable suspicion that the suspect is a terrorist under section 41 of the Terrorism Act 2000.<sup>30</sup> A search of premises is just one way for an investigation to proceed in the United Kingdom.

Understanding the operation and enforcement of the Police and Criminal Evidence Act 1984 is necessary to understanding investigations of both ordinary criminal activity and terrorism activity in the United Kingdom. The standards under the Police and Criminal Evidence Act 1984, along with the nature and purpose of terrorism investigations, result in many arrests and prosecutions under ordinary legislation rather than a counterterrorism regime.<sup>31</sup> For example, in the year ending in September 2013, 257 persons were arrested for terrorism-related offenses under the Terrorism Act 2000, Terrorism Act 2006, subsequent amendments, or related legislation, and 47% of these arrests resulted in charges.<sup>32</sup> Multiple charges are often brought at once, whether under an ordinary regime or counterterrorism regime.<sup>33</sup> When the most serious charge for each arrestee was compiled in

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*Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395, 1416–26 (2007).

27. Terrorism Act 2006, c. 11, §§ 1, 5 (UK).

28. See Police and Criminal Evidence Act 1984, c. 60, § 19 (Eng.).

29. See Terrorism Act 2000, c. 11, § 42 (UK).

30. See *id.* § 41.

31. See Fionnuala Ni Alain & Colm Campbell, *Managing Terrorism*, 9 NAT'L SEC. L. & POL'Y 367, 383–85 (2018) (positing divergent goals to investigations for intelligence purposes and courtroom evidence, analyzing original empirical data on the Diplock courts of Northern Ireland, and finding that in England and Wales terrorist suspects are often arrested more under the Police and Criminal Evidence Act 1984 rather than the Terrorism Act 2000).

32. Home Office, *Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops and Searches*, *Quarterly Update to 30 September 2013*, Great Britain, Gov.UK (Mar. 6, 2014), <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-september-2013/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stops-and-searches-quarterly-update-to-30-s> [https://perma.cc/X9CJ-DNLR] [hereinafter *Quarterly Update to 2013*].

33. *Id.*

2013, for purposes of public assessment and the Independent Reviewer of Terrorism Legislation for Parliament,<sup>34</sup> the Home Office found that 60% of those charges were brought under ordinary criminal legislation.<sup>35</sup> By comparison, for all terrorism-related offenses charged between September 11, 2001 and September 30, 2013, the proportion of *convictions* for non-Terrorism Act offenses is similar but lower over the whole period.<sup>36</sup> Specifically, 45% of convictions following Terrorism Act arrests were for ordinary offenses, and 36% of convictions for terrorism-related offenses were under the Police and Criminal Evidence Act 1984 or other legislation, such as the Firearms Act 1968.<sup>37</sup> Only 55% of arrests under the Terrorism Act that led to a conviction at trial resulted in the most serious charge being brought under the Terrorism Act.<sup>38</sup>

These distributions indicate a recurring trend in initial investigations of terrorism activity in the United Kingdom. Initial investigations often result in the police finding grounds for more serious charges than originally contemplated, or evidence of crimes that are nearer completion, which then results in those charges being recorded under ordinary legislation. This trend may recur concomitantly with continuing, sharp increases in arrests for terrorism offenses. Between 2013 and 2017, the U.K. police and security services made more of these arrests.<sup>39</sup> In 2017, 412 terrorism-related arrests were made, and the United Kingdom was forced to confront several deadly attacks in London and Manchester where extremists killed a total of 36 people.<sup>40</sup> The Crown and Parliament responded to “disrupt terrorist threats in the [United Kingdom] earlier to take account of the scale of the threat and the speed at which plots are now developing.”<sup>41</sup> It still remains to be proven whether, by some widespread bad faith, the general criminal law in the United Kingdom has become a “commonly

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34. See, e.g., Jonathan Hall Q.C., *The Terrorism Acts in 2018: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006*, Gov.UK (Mar. 19, 2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/874082/CCS001\\_CCS0320303768-001\\_Terrorism\\_Acts\\_in\\_2018\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874082/CCS001_CCS0320303768-001_Terrorism_Acts_in_2018_Web_Accessible.pdf) [<https://perma.cc/SVL8-HTFF>].

35. *Quarterly Update to 2013*, *supra* note 32.

36. *Id.*

37. *Id.*

38. *Id.*

39. CONTEST: THE UNITED KINGDOM’S STRATEGY FOR COUNTERING TERRORISM 20 (2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/716907/140618\\_CCS207\\_CCS0218929798-1\\_CONTEST\\_3.0\\_WEB.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf) [<https://perma.cc/SH6F-XX5J>] [hereinafter CONTEST].

40. *Id.*

41. *Id.*

used tool to charge and convict individuals for terrorism.”<sup>42</sup> Instead, as a practical matter, “[T]here may be uncertainty whether the suspect is a terrorist or an ODC [the United Kingdom’s infamously-coined term for “ordinary decent criminal”], and conservative policing might prefer the ordinary law over the exceptional in the context of uncertainty.”<sup>43</sup> As the Home Office indicated in its 2018 report, “[T]he police and [CPS] will continue to investigate and prosecute terrorists, where appropriate, for other criminal offences to effectively disrupt their activity.”<sup>44</sup>

Terrorism-related charges that the CPS ultimately brings under the Police and Criminal Evidence Act 1984 may involve a graver, more imminent threat of violence and harm. In 22% of all charges brought by the CPS under ordinary legislation following arrests under the Terrorism Act 2000 between September 11, 2001 and September 30, 2013, the CPS charged the accused with conspiracy to commit murder, a specific intent crime.<sup>45</sup> In 5% of these cases the CPS charged the accused with soliciting to commit murder.<sup>46</sup> Meanwhile, the most serious charges brought under Terrorism Act legislation included possession of an item for terrorist purposes and preparation to commit terrorist acts, which accounted for 17% and 15% of cases respectively.<sup>47</sup> The gravity of potential harm is great in many of these cases, which results in sentences of multiple years for offenders.<sup>48</sup> However, by statutory design, the ability of the CPS to prosecute offenders in the early stages of the planning process means that

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42. Ellen Parker, *Implementation of the UK Terrorism Act 2006—The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom Versus the United States*, 21 EMORY INT’L L. REV. 711, 720 (2007).

43. Alain & Campbell, *supra* note 31, at 385.

44. CONTEST, *supra* note 39.

45. *Quarterly Update to 2013*, *supra* note 32.

46. *Id.*

47. *Id.*

48. *See id.* When sentencing convicted defendants for terrorist acts, U.K. courts must consider the culpability of the offender, with respect to the defendant’s proximity to carrying out the intended act, and the gravity of the harm prevented. *R v. Kahar* [2016] EWCA (Crim) 568 at [26] (Eng.). Imposing lengthier sentences for these offenses is not only a political choice, for example, see Counter-Terrorism and Border Security Act 2019, c. 3, § 7 (Eng.). Lengthy sentences actually imposed, as opposed to maximum sentences prescribed by Parliament, also reveal the courts’ findings either that underlying criminal activity was near completion at the time of arrest or completed acts would result in a grave impact on victims and public.

some necessarily are less imminent.<sup>49</sup> The trend is for the police services to search or execute an arrest under the Terrorism Act 2000, and in many cases find evidence of serious criminal activity, albeit activity that better fits traditional theories of criminal jurisprudence. The CPS may then bring appropriate charges, and ultimately secure a conviction, for the activity in question.

Following an attack in London, the film portrays a raid of the accused's laboratory in search of physical evidence of materials used in the bombing.<sup>50</sup> The police services find evidence that implicates the accused in the bombing.<sup>51</sup> Law enforcement now has reason to believe the accused was the principal organizer of the bombing and was selling the materials necessary to create it.<sup>52</sup> Presumably, that evidence is also disclosable to the defense because it is material evidence that could assist the defense in exonerating the accused or reducing his sentence.<sup>53</sup> Accordingly, the CPS includes representations of those materials in the case file that is reviewed by Special Counsel Claudia Simmons-Howe.<sup>54</sup> In addition, physical evidence, which includes "real evidence" that plays a role in the events at issue at trial, is important to the criminal trial of a defendant because it is evidence that a jury and judge can see and hear for themselves.<sup>55</sup> Physical evidence "is intended to help the fact-finder better comprehend whether or how an event happened by appealing directly to the fact-finder's senses."<sup>56</sup> Physical evidence is uniquely important in U.K. criminal prosecutions because of its implications for the CPS's decision whether to put on witness testimony if the testimony might risk defense counsel eliciting sensitive information in open court. The release of sensitive information could cause retaliation by international terrorist or criminal groups, resulting in further violence or harm to personnel and the public. However, in the film, physical evidence is never mentioned again. The film focuses on witness testimony concerning the security services' use of an informant and what he knows about the accused's history and role in the attack,

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49. See, e.g., Dianne Webber, *Preparing to Commit Domestic Terrorist Activity: Does the United States Have Adequate Tools to Stop This?*, 34 AM. U. INT'L L. REV. 205, 206 (2018).

50. CLOSED CIRCUIT, *supra* note 1.

51. *Id.*

52. *Id.*

53. See generally ARCHBOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE § 16-113 (2021).

54. CLOSED CIRCUIT, *supra* note 1.

55. Vincent C. Alexander, *Real and Demonstrative Evidence, In General: New York and Federal*, in EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 11:1 (Nov. 2020 ed.).

56. *Id.*



including testimony that is not disclosable to the defense because of its sensitive nature.

National security and the protection of witnesses necessarily implicate the investigation stage in the committing, reporting, and recording of a crime in the United Kingdom.<sup>57</sup> As in the United States, specialized government departments and agencies in the United Kingdom have independent authority to aid the efforts of the police services and the CPS in investigating and prosecuting certain crimes.<sup>58</sup> During investigation efforts, agencies may find evidence that is important to a case, but should not be disclosed. After recording of the case, the CPS may apply to the court for use of in camera proceedings limiting public access for the court to determine whether the evidence should be disclosed.<sup>59</sup> Since 2016, the Crown Court has required that the CPS give detailed reasons why hearings should be held in camera rather than open court.<sup>60</sup>

In the film, the reasons why security services personnel must testify in closed session are presented in closed session during direct examination by the CPS.<sup>61</sup> The United Kingdom's security services investigate the accused's role in the terrorist attack depicted in the film instead of local police.<sup>62</sup> The identity of the CPS's first witness is one piece of information that the CPS protects in closed session, due to the witness's sensitive role in overseeing overseas counter-terror operations.<sup>63</sup> A major issue at the outset of trial is everyone's interest in having access to the proceedings, both the families and the public at large.<sup>64</sup>

When agencies know the relevant evidentiary standards that will pertain later to testimonial evidence at trial, during the investigation agencies can target specific information and collect potential evidence accordingly. The CPS must submit applications to hold evidentiary hearings in closed session, and those applications are generally only granted if a witness can provide evidence that is critical in proving the CPS's case and the witness

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57. PARTINGTON, *supra* note 7, at 83; *see also Guardian News and Media Ltd v. Incedal*, 6 CRIM. L. REV. 433, 434 (2016).

58. *Id.*

59. Criminal Procedure and Investigations Act 1996, c. 25 (UK).

60. *See Times Newspapers Ltd. v. Abdulaziz* [2016] EWCA (Crim) 887 (appeal taken from Eng.).

61. CLOSED CIRCUIT, *supra* note 1.

62. *Id.*

63. *Id.*

64. *Id.*

must not be disclosed to the public.<sup>65</sup> Due to security concerns, the CPS may choose not to put on evidence that risks disclosure of sensitive information if the evidence is merely cumulative. As this Article discusses below, the film plays fast and loose with the legal evidentiary standards for holding in camera hearings, but it also portrays the risk that immaterial information will be disclosed to the defense which may compromise the Crown's security interests abroad.

### C. Disclosure of Evidence

Through a variety of legislation, the United Kingdom limits what can and cannot be disclosed in open court. An early version of the in camera hearing was designed to exclude a person or class of persons from attending proceedings if it would put public safety or defense at risk.<sup>66</sup> The United Kingdom passed the Emergency Powers (Defence) Act 1939 just before World War II.<sup>67</sup> The Act's provision for the in camera hearing was part of a broader attempt at preparing the national defense.<sup>68</sup> Pursuant to the Act, the court could hold closed hearings on its own motion, without an application from the prosecution or defense.<sup>69</sup> The court could also order that information related to the proceedings not be disclosed to the press.<sup>70</sup>

Over time, the United Kingdom's requirements for withholding information from the accused have narrowed. The Police and Criminal Evidence Act 1984, as amended, marks a recent attempt at defining a standard for withholding evidence from the accused following proceedings related to bail in ordinary criminal cases or serious fraud cases.<sup>71</sup> In proceedings in either case, a constable or prosecutor may submit an application to the magistrate judge asking the judge to withhold information from the accused if, among other things, disclosure would result in a person being interfered with—harassed or otherwise—or physically harmed.<sup>72</sup> These sections extend the prosecution's legitimate justification for limiting access to proceedings to protect witnesses' safety in ordinary criminal proceedings.

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65. *Witness Protection and Anonymity*, CROWN PROT. SERV., <https://www.cps.gov.uk/legal-guidance/witness-protection-and-anonymity> [<https://perma.cc/HUL5-2V6W>].

66. Emergency Powers (Defence) Act 1939, 2 & 3 Geo. 6. c. 62, § 6 (Eng.).

67. See Guy Seidman, *Unexceptional for Once: Austerity and Food Rationing in Israel, 1939–1959*, 18 S. CAL. INTERDISC. L.J. 95, 117 (2008).

68. See *id.*

69. Emergency Powers (Defence) Act 1939, 2 & 3 Geo. 6. c. 62, § 7 (Eng.).

70. *Id.* § 6.

71. Police and Criminal Evidence Act 1984, c. 60, §§ 47ZD-H (Eng.).

72. *Id.*

The language of this statute suggests a growing concern for protecting witnesses who can provide crucial evidence to the CPS.

In the film, the CPS argues that its informant's safety concerns are paramount citing the informant's information, young age, and relationship with the accused.<sup>73</sup> Independently, to protect his own safety, the informant promises to withhold information from the security services if the CPS calls him to testify in open court.<sup>74</sup>

To accompany the Criminal Procedure and Investigations Act 1996, the United Kingdom enacted a Code of Practice which provides the police services with a procedure for preparing investigation material.<sup>75</sup> The Code requires police to appoint a disclosure officer to administer the investigation which includes compiling a list of any sensitive material that will not be disclosed.<sup>76</sup> Sensitive material includes "material relating to national security" and "material relating to the identity or activities of informants, or undercover police officers, or witnesses, or other persons supplying information to the police who may be in danger if their identities are revealed."<sup>77</sup>

The film suggests that the CPS withholds more information from the defense than is really allowed by law in the United Kingdom. However, based on the proposed testimony from security services personnel and their informant, the CPS meets nearly all criteria for protection of information under the Code of Practice.

In general, under the findings of the Criminal Cases Review Commission, there is no duty to disclose all the information gathered during an investigation to an applicant.<sup>78</sup> On the other hand, the accused generally has a right to have hearings held in open court, during which confidential information may be disclosed to the public.<sup>79</sup> Since Parliament required U.K. courts to abide by the European Convention on Human Rights in 1998, the United Kingdom subscribed to the assurance of European countries' guarantee of public scrutiny of court proceedings.<sup>80</sup> This guarantee helps to protect "against the administration of justice in secret . . . and maintain

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73. CLOSED CIRCUIT, *supra* note 1.

74. *Id.*

75. PARTINGTON, *supra* note 7, at 99–100.

76. *Id.* at 100.

77. ARCHBOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE § 12-28 (2020).

78. GARY SLAPPER & DAVID KELLY, SOURCEBOOK ON ENGLISH LEGAL SYSTEM 181 (1st ed. 1996).

79. ARCHBOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE § 4-3 (2020).

80. *Id.* § 16-95.

public confidence in the administration of justice.”<sup>81</sup> A reporter raises this concern upon interviewing the Attorney General in the film’s opening scenes.<sup>82</sup>

#### D. *The In Camera Hearing*

Today, U.K. judges may order evidence to be put on in closed proceedings in limited circumstances.<sup>83</sup> The Criminal Procedure and Investigations Act 1996 indicates the circumstances under which a prosecutor for the CPS must disclose material found during an investigation to the accused.<sup>84</sup> Whereas a prosecutor has an initial duty to disclose exculpatory material, the Act mandates that other material not be disclosed if the prosecutor applies to the Crown Court and the judge concludes it is not in the public interest to disclose the material to the public.<sup>85</sup> Under the United Kingdom’s former rules of criminal procedure, Crown Court Rules 1982/1109, Rule 24A gave the prosecutor or a defendant at minimum seven days before trial to file an application for “all or part of a trial [to] be held in camera for reasons of national security or for the protection of the identity of a witness or any other person . . . .”<sup>86</sup> An order under Rule 24A was reversible if the applicant did not give the requisite notice to the court.<sup>87</sup>

The Criminal Procedure Rules Part 16 now supersede Crown Court Rules 1982 with respect to criminal cases.<sup>88</sup> At the outset, Part 16 broadly distinguishes press reporting restrictions from those limiting access to the proceedings.<sup>89</sup> Section 1’s introduction, “When this Part applies,” acts as a guidepost to signal the Crown Court’s need to distinguish what may be required of trial courts in either case.<sup>90</sup> This section provides, “This Part applies where the court can—(a) impose a restriction on—(i) reporting what takes place at a public hearing, or (ii) public access to what otherwise would be a public hearing.”<sup>91</sup> The applicant now has at minimum five days

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81. *Id.*

82. CLOSED CIRCUIT, *supra* note 1.

83. *See* ARCHBOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE § 16–95 (2020).

84. Criminal Procedure and Investigations Act 1996, c. 25 (UK).

85. *Id.*

86. Hearings in Camera, The Crown Court (Amendment) (No. 2) Rules 1989, SI 1989/1103 art. 2.

87. *See* Veronica Cowan, *Crown Court Rules 1982, Rule 24(A) as Amended—Objection to Hearings In Camera— Whether Judge Should Exercise Any Inherent Jurisdiction in order to Circumvent Failure to Comply with the Rule*, CRIM. L. REV. 302 (1991).

88. Hearings in Camera, The Crown Court (Amendment) (No. 2) Rules 1989, SI 1989/1103, art. 2.

89. CRIM. P R 16.1.

90. *See id.*

91. *Id.*

before trial to make the application, rather than seven.<sup>92</sup> Moreover, the Criminal Procedure Rules in Part 16 outline alternative statutory authority to be relied on:

The court can restrict access to the courtroom under—

- (a) section 8(4) of the Official Secrets Act 1920(h), during proceedings for an offence under the Official Secrets Act 1911 and 1920;
- (b) section 37 of the Children and Young Persons Act 1933(i), where the court receives evidence from a person under 18; [or]
- (c) section 75 of the Serious Organised Crime and Police Act 2005(j), where the court reviews a sentence passed on a defendant who assisted an investigation.

The court has an inherent power, in exceptional circumstances—

- (a) to allow information, for example a name or address, to be withheld from the public at a public hearing;
- (b) to restrict public access to what otherwise would be a public hearing, for example to control disorder; [or]
- (c) to hear a trial in private, for example for reasons of national security.<sup>93</sup>

It is unclear whether case law that construed Rule 24A will continue to apply as mandatory authority in criminal cases, but it should apply persuasively due to the common subject matter and the history surrounding closed proceedings. As the United Kingdom responded to terrorism events in the 2000s and 2010s by enacting and amending its statutory law, the Crown Court may have needed to fashion available courtroom procedures to the more clearly defined and delineated policy interests that are present when information needs to be protected in different types of criminal cases. Thus, a separate body of criminal procedure rules was made applicable to these cases. Enumerating the authority above makes expectations of the parties and court clear on the types of cases that may demand limited access to proceedings. *Closed Circuit* opens with the Attorney General's announcement to the press that the CPS met its burden applying to the

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92. *Id.* at 16.6.

93. CRIM. P R 16.1.

Crown Court and that some of the preparatory proceedings will be held in camera.<sup>94</sup>

The trial court has the power to regulate its own proceedings.<sup>95</sup> Likewise, the court has wide discretion in granting applications under Rule 24A.<sup>96</sup> The protection of a witness's safety is often necessary because witness intimidation takes the form of actual or implied threats of physical violence or discouragement by the community from testifying.<sup>97</sup> Whereas, protecting the privacy or avoiding embarrassment to an applicant is insufficient to justify withholding proceedings from open court under the Contempt of Criminal Court Act 1981.<sup>98</sup> Applications that are based on the witness's fear of having an emotional reaction to testifying in open court also provide an insufficient justification.<sup>99</sup>

Similarly, public interest immunity may prevent or limit disclosure of third-party medical documents to hearings in camera in order to protect the privacy and safety of an accuser in a criminal trial for sexual assault.<sup>100</sup> Evidence put on by an accuser may also be heard by the accused, counsel, and solicitors while excluding all other persons.<sup>101</sup> In these cases, where the accused puts on evidence of the accused's own character, the court may also hear this evidence in camera to protect the safety of the accused.<sup>102</sup>

Similar to closed hearings for reviewing evidence at trial, preparatory hearings, where the prosecution discloses the principal facts and legal issues in advance of trial, are generally prohibited from being written about and published by the press under the Contempt of Court Act 1981.<sup>103</sup> The court's order restricting publication at trial may issue before the court hears any challenge by the media.<sup>104</sup> The same standards apply to summary

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94. CLOSED CIRCUIT, *supra* note 1.

95. GERALD H. GORDON ET AL., *Regulation of Court*, in RENTON & BROWN'S CRIMINAL PROCEDURE 18-03 (6th ed. 2018).

96. See Judith Killick, *Appeals: Applications for Leave to Appeal Against Order for Trial to Take Place in Camera*, CRIM. L. REV. 912, 913 (1994).

97. Gilbert Marcus, *Secret Witnesses*, PUB. L. 207, 211 (1990).

98. *Publication of Matters Exempted from Disclosure in Court*, in 2 WHITE BOOK 3C-75 (2020).

99. Lynne Knapman, *Jurisdiction to Hold Proceedings in Camera*, CRIM. L. REV. 120, 121 (1988).

100. Jennifer Temkin, *Digging in the Dirt: Disclosure of Records in Sexual Assault Cases*, 61 CAMBRIDGE L.J. 126, 131, 142 (2002).

101. GORDON ET AL., *supra* note 95.

102. *Publication of Matters Exempted from Disclosure in Court*, in 2 WHITE BOOK 3C-75 (2017).

103. Criminal Procedure and Investigations Act 1996, c. 25, § 37 (UK).

104. *Publication of Matters Exempted from Disclosure in Court*, in 2 WHITE BOOK 3C-75 (2017).

proceedings held in magistrate courts.<sup>105</sup> For less serious charges where the magistrate court, rather than the Crown Court, proceeds for trial, the accused may apply for disclosure and the prosecutor may move to exclude evidence by the same standards.<sup>106</sup> Here, the film proceeds by the converse assumption that all preparatory hearings are open to the public, and imposes trial standards for holding hearings in camera on the preparatory hearing on terrorist Farroukh Erdogan.<sup>107</sup> The Crown Court judge hears material in closed session first, suggesting his fear that some inadvertent disclosure might be made in open session, for which he would need to issue a prior restraint on the press.<sup>108</sup>

For instance, in real practice in *Guardian News and Media Ltd. v. Incedal*, Incedal and a co-defendant were arrested and charged with terrorism offenses in 2013.<sup>109</sup> The Court of Appeal upheld the Crown Court's order that most of the trial be held in camera.<sup>110</sup>

During those proceedings, only a limited number of accredited journalists had been allowed to attend, and the trial court restricted the press from publishing about the closed proceedings.<sup>111</sup> It held the administration of justice would be seriously frustrated if the press as a whole had access to the closed proceedings.<sup>112</sup> The Court of Appeal has also held that trial courts may order that the details of closed hearings that are accidentally revealed subsequently in open court be restrained from publication by the press, if, by the same standards, it is necessary to prevent frustration of the administration of justice.<sup>113</sup>

Although the court may need to reserve detailed discussion of the reasons why a party needs to proceed in camera for the closed session, the use of hypotheticals or discussion of types of cases where closed proceedings

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105. Lynne Knapman, *Proceedings in Camera - Application to Hear*, CRIM. L. Rev. 382, 382 (June 1988).

106. See, e.g., *R v. Tower Bridge Magistrates Court Exp.* Osborne [1988] QB 152 J.P.N. 286 (Eng.).

107. CLOSED CIRCUIT, *supra* note 1.

108. *Id.*

109. *In re Guardian News and Media Ltd v. Incedal* [2016] EWCA (Crim) 11 [6], 1 AC 33 [6] (Eng.).

110. *Id.*

111. *Id.*

112. *Id.*

113. See, e.g., *Times Newspapers Ltd. v. Abdulaziz* [2016] EWCA (Crim) 887 (appeal taken from Eng.); *Times Newspapers Ltd. v. R* [2007] EWCA (Crim) 1925 (appeal taken from Eng.).

are needed later in open court may preserve the closed session's function.<sup>114</sup> The court's use of an in camera hearing is not an absolute guarantee of the anonymity of the witness or other evidence to be protected, as against the press and general public, going forward at trial. Documents presented to the court in camera that are necessary to refer to later at trial may be subject to disclosure.<sup>115</sup> In that case, the court will weigh any legitimate press purpose for making the trial more intelligible to the public against the safety of persons mentioned in those documents.<sup>116</sup> In other cases, Parliament requires the Crown Court to make reference to witnesses by pseudonym or requires witnesses to testify behind screens to protect their identities, but only if the evidence those witnesses provide is necessary to the CPS's case.<sup>117</sup> The court will weigh the witness's interest in concealing his or her identity for safety concerns against the accused's right to confront an accuser and right to be present at trial.<sup>118</sup> The film portrays the special importance of this procedure for protecting security services personnel and informants in national security cases.<sup>119</sup>

Where the prosecution withholds evidence because it contains sensitive material, the prosecution must put it before a judge to rule on disclosure to ensure the accused's right to a fair trial.<sup>120</sup> Only the Director of Public Prosecutions (DPP), who is the head of the CPS, or the Attorney General may make the application to withhold sensitive material evidence for the prosecution.<sup>121</sup> Currently, a deputy prosecutor for the CPS, presumably with authority from the DPP, may make the application.<sup>122</sup> The court gives great weight to the national security interests raised by the prosecution.<sup>123</sup> The DPP acts independently of the executive branch when applying to the court.<sup>124</sup> Still, even in national security cases, holding the hearing in closed session must be strictly necessary for the trial court to use its discretion to grant the application.<sup>125</sup> The act of swearing in the jury, reading the charges to the jury, providing a part of the judge's opening remarks and prosecution's opening statement, rendering a verdict, and, if applicable, sentencing, must

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114. *Id.*

115. ARCHBOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE, § B 383-86 (2020).

116. *Id.*

117. *See* Coroners and Justice Act 2009, c. 25 § 86 (UK).

118. Gilbert Marcus, *Secret Witnesses*, 2 PUB. L. 207, 211 (1990).

119. CLOSED CIRCUIT, *supra* note 1.

120. *Rowe v. United Kingdom*, 74 Eur. Ct. H.R. 302 (2000).

121. *See Guardian News and Media Ltd v. Incedal*, 6 CRIM. L. REV. 433, 434 (2016).

122. *Witness Protection and Anonymity*, *supra* note 65.

123. *See id.*

124. *Id.*

125. *Id.* at 435.



be done in open court.<sup>126</sup> Thus, for instance, because it contravenes with the Interception of Communications Act 1985 to disclose the manner in which the police services receive intercepted communications, disclosure may only occur in closed session, whereas the underlying evidence may be heard in open court.<sup>127</sup> Similarly, in the film, an explanation of how the informant accessed the accused's computer is heard in camera.<sup>128</sup>

In 2016, the Court of Appeal held that independent counsel may be assigned in place of defense counsel to attend the hearing in cases involving national security.<sup>129</sup> Notwithstanding, current legislation on witness anonymity through the Coroners and Justice Act 2009 is silent on whether special counsel should be assigned.<sup>130</sup> Furthermore, the Court of Appeal in *R. v. H and C* suggested that a trial court should consider the prosecution's application to direct witnesses in closed session and the material that the prosecution seeks to withhold from the defense in detail to determine whether special counsel is required.<sup>131</sup> Recently, the U.K. Attorney General drafted guidelines for prosecutors' applications for witness anonymity.<sup>132</sup> Material included in the prosecution's application may be sufficient for a trial court to find that closed proceedings will not prevent a fair trial without appointment of special counsel.<sup>133</sup> The court, however, may invite the Attorney General to appoint special counsel to represent the defense in closed court.<sup>134</sup> If special counsel is appointed, counsel is to represent the interests of the accused.<sup>135</sup> However, the Attorney General has the benefit of clearing the

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126. *In re Guardian News and Media Ltd v. Incedal* [2016] EWCA (Crim) 11 [24], 1 AC 33 [24] (Eng.).

127. See Veronica Cowan, *Interception of Communications Act 1985 - Admissibility of Intercepted Material - Whether Preventing or Detecting Crime Included Prosecuting Crime*, CRIM. L. REV. 803, 804 (1992).

128. CLOSED CIRCUIT, *supra* note 1.

129. *In re Guardian News and Media Ltd v. Incedal* [2016] EWCA (Crim) 11 [66], 1 AC 33 [66] (Eng.).

130. Coroners and Justice Act 2009, c. 25 (UK).

131. *R v. H* [2004] UKHL 3, [2004] 2 AC 134, [8]-[9] (appeal taken from Eng.).

132. Attorney General's Office, *Applications for Witness Anonymity Orders: The Prosecutor's Role*, GOV.UK (Nov. 30, 2012), <https://www.gov.uk/guidance/applications-for-witness-anonymity-orders-the-prosecutors-role#d-appointment-and-role-of-special-counsel-in-applications-for-witness-anonymity> [<https://perma.cc/48AA-LXGB>].

133. *Id.*

134. *Id.*

135. *Id.*

appointment beforehand.<sup>136</sup> As a recent development in the procedure for in camera proceedings, as explained below, the use of special counsel is a central concern of the film. While appointment of special counsel is meant to protect the rights of the accused, the film suggests the difficulty of counsel's being an independent advocate.

In matters of national security, decisions by the Court of Appeal are reviewable by the European Court of Human Rights.<sup>137</sup> The decision to grant an in camera hearing is only reversible by the European Court if there were no potential justifications for holding the hearing in the United Kingdom.<sup>138</sup> The European Convention recognized that proceedings against a terrorist in open court may only be justified where the police officers or soldiers, who normally undertake risks of reprisal by testifying, provide sufficient evidence through testimony, the prosecution puts on physical evidence, or the accused makes an admissible confession.<sup>139</sup> The U.K. Court of Appeal held that its sovereign interest in protecting material that constitutes a risk to national security, as against the accused's evoking it in open court when it is irrelevant to the immediate case, may outweigh the Convention's requirements under the Official Secrets Act 1989.<sup>140</sup> The U.K. Supreme Court acknowledged the existence of situations where withholding in camera material from the European Court of Human Rights may be justified.<sup>141</sup>

In *R. v. Shayler (David Michael)*, a former member of the Crown's Security Services provided several documents to the press that were classified as either "secret" or "top secret."<sup>142</sup> The defendant, Shayler, was convicted under the Official Secrets Act 1989 for providing confidential information obtained through intercepted communications to the press.<sup>143</sup>

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136. THE GOVERNANCE OF BRITAIN: A CONSULTATION ON THE ROLE OF THE ATTORNEY GENERAL (2007), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243193/7192.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243193/7192.pdf) [<https://perma.cc/7HWJ-LTCY>].

137. See *European Court of Human Rights*, INT'L JUST. RES. CTR., <https://ijrcenter.org/european-court-of-human-rights/> [<https://perma.cc/A7J4-5BAJ>].

138. See, e.g., Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 HUM. RTS. L. REV. 495, 505 (2018) (citing deferential arbitrariness standard of review used by the court in *K2 v. United Kingdom*, App. No. 42387/13, ¶ 49 (Feb. 7, 2017)).

139. Gilbert Marcus, *Secret Witnesses*, 2 PUB. L. 207, 210 (1990).

140. See, e.g., *R v. Central Criminal Court* [2015] UKSC 76, [2016] AC 771 (appeal taken from Eng.); *R v. David Michael Shayler* [2003] EWCA (Crim) 2218 (appeal taken from Eng.).

141. *R (Yam) v. Central Criminal Court* [2015] UKSC 76, [39], [2016] AC 771, [810] (appeal taken from Eng.).

142. *R v. David Michael Shayler*, [2003] EWCA Crim 2218 [2]-[4], [2003] A.C.D. 79 [H3]-[H4].

143. *Id.* at [H5].

At trial, the prosecution filed an application to conduct direct examination of a certain witness in camera, which the trial court granted.<sup>144</sup>

Later in open court, the accused was ordered to give the court advance notice if he planned to question the prosecution's other witnesses, which might further disclose confidential information on a service member's identity.<sup>145</sup> The accused applied to the court to cross-examine the earlier prosecution witness for credibility.<sup>146</sup> In upholding the trial court's decision to refuse the accused's application, the U.K. Court of Appeal noted that the use of an in camera hearing during the trial had not "ceased to be a true adversarial process" in contravention of the European Convention on Human Rights.<sup>147</sup> The Court of Appeal considered that the accused had not assured he would only ask questions of material fact.<sup>148</sup> Furthermore, the prosecution would likely pull the witness to avoid the disclosure of information which would be harmful to national security.<sup>149</sup> Finally, the court noted that the witness's testimony provided essential evidence to the case.<sup>150</sup> In the film, however, there is a real risk that Special Counsel Simmons-Howe will ask about and evoke immaterial information that the security services does not want disclosed, even in closed session.<sup>151</sup>

In cases involving national security, where the accused seeks to proceed without his or her name being disclosed, the Court of Appeal has held that there must be a real and immediate threat to the accused's safety.<sup>152</sup> This real and immediate threat must deter the CPS from prosecuting cases in the future.<sup>153</sup> Only by deterring the CPS's future cases would the administration of justice be frustrated by refusing the accused's application in a particular case.<sup>154</sup>

Whether or not a case implicates national security, the public interest in preserving the anonymity of informants has long been recognized.<sup>155</sup>

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144. *Id.* at [H6].

145. *Id.* at [H7].

146. *Id.*

147. *Id.* at [H9].

148. *See id.* at ¶¶ 15–20.

149. *See id.*

150. *See id.*

151. CLOSED CIRCUIT, *supra* note 1.

152. Nick Taylor, *Trial: Court Material—Trial in Camera—Anonymity of Defendants*, 2 CRIM. L. REV. 114, 114–16 (2009).

153. *Id.*

154. *Id.* at 115–16.

155. *See, e.g.,* D. v. NSPCC [1978] AC 171 (HL) 186 (applying principles of witness anonymity to those providing information to local governments and charities);

Whether an informant is used at all in a particular case should not be disclosed in open court because of the implications of the CPS's inability to make the same statement in other cases would have.<sup>156</sup> This is why the CPS's first witness in camera in the film is reluctant to disclose their use of an informant, and arguably why she is not required to.

Witness anonymity extends to private organizations and local governmental authorities who cooperate with police. For instance, in *D. v. NSPCC*, a person complained to the National Society for the Protection of Children, a private charity, regarding a mother's maltreatment of a fourteen-month-old girl.<sup>157</sup> Even though the information turned out to be unreliable, the NSPCC would not release the name of the complainant, and the Court of Appeal reversed the trial court's order to disclose the name to the mother.<sup>158</sup> In this case, the Court of Appeal protected the state's interest in preventing children from being abused by preserving the complainant's confidentiality.<sup>159</sup> On the other hand, defendants' applications for disclosure of details on informants may be necessary where the informant is not only unreliable, but also actively participates in the events at trial and the defendant is set up.<sup>160</sup> The same concern to protect witness safety cuts across the two kinds of cases and is crucial to the CPS's justification for holding closed sessions in the film.

### III. DESCRIPTION OF FILM

*Closed Circuit* was produced by Focus Features and Working Title Films, released in 2013, and distributed throughout the United States and Europe.<sup>161</sup> By most measures, the film was a flop as it grossed under \$6 million in the United States despite its \$15 million budget.<sup>162</sup> Shortly after the film's release, *Closed Circuit* received poor reviews as seen by Rotten Tomatoes' "Tomatometer," IMDb's average user rating of the film, and reviews by *The Guardian*.<sup>163</sup> Despite the film's anticlimactic ending, the film builds in suspense, and reveals complicated relationships between the players

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Marks v. Beyfus [1890] QBD 25 (AC) 494 25 QBD 498 (AC) (finding that disclosure of informant identities is usually not warranted in public prosecutions).

156. See *R v. Rossouw* [2006] EWCA (Crim) 2980 [¶ 12] (appeal taken from Eng.).

157. *NSPCC*, AC 171 (HL) at 202–03.

158. *Id.* at 171–72.

159. *Id.*

160. *R v. Turner* [1995] Crim. App. 94–95 (Eng.).

161. *Closed Circuit*, IMDB, [imdb.co/title/tt2218003/](http://imdb.co/title/tt2218003/) [perma.cc/5XUS-YYWL].

162. *Id.*

163. *Id.*; *Closed Circuit*, ROTTEN TOMATOES, [https://www.rottentomatoes.com/m/closed\\_circuit\\_2013](https://www.rottentomatoes.com/m/closed_circuit_2013) [perma.cc/AN72-ACE2]; Mark Kermode, *Closed Circuit – Review*, *GUARDIAN* (Oct. 26, 2013), <https://www.theguardian.com/film/2013/oct/27/closed-circuit-review> [perma.cc/5UDU-AHPP].

involved as well as competing policy interests that are present in these cases.

*Closed Circuit* is a film that largely focuses on a case against a terrorist suspect that proceeds after a bombing in London.<sup>164</sup> The Attorney General appoints Special Counsel Claudia Simmons-Howe to represent the accused, in place of defense counsel Martin Rose, during a series of closed sessions in preliminary hearing.<sup>165</sup> Through interviews with the accused, the accused's son, wife, and others, counsel learns that the Crown assigned the accused to infiltrate a terrorist cell in Germany.<sup>166</sup> However, counsel also learns that something went wrong, and the accused supplied the materials for the bombing in London.<sup>167</sup> The closed proceedings sought by the CPS include testimony from a witness employee of the security services who headed the operation.<sup>168</sup> Simmons-Howe applies for the accused's son to take the stand as an informant.<sup>169</sup>

The film opens as the attack occurs, police raid and arrest the accused at a dwelling he used, and a media reporter interviews the Attorney General.<sup>170</sup> The Attorney General announces that closed proceedings will be held without defense counsel present, but that special counsel appointed by the accused's former public defender will attend.<sup>171</sup>

In its first closed session, the Crown Court dismisses everyone but the prosecutor, special counsel, security service, and a court reporter.<sup>172</sup> The prosecution calls a witness from the security services and the court orders the witness to be referred to as Witness X.<sup>173</sup> The witness discloses that Emir is the security services' informant on Erdogan.<sup>174</sup> The witness testifies that the security services found out the boy had been hacking Erdogan's computer when they arrested Erdogan.<sup>175</sup> Emir has information about the terrorist cell, as well as the identities of security services personnel in other

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164. CLOSED CIRCUIT, *supra* note 1.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

countries.<sup>176</sup> Witness X does not want the boy called in open court because he will likely withhold evidence if he must testify.<sup>177</sup> Special Counsel Simmons-Howe wants to call the boy in closed session, which the CPS also objects to.<sup>178</sup>

Before another closed session begins and Simmons-Howe calls the boy to testify, someone enters the accused's prison cell and hangs him.<sup>179</sup> With word that the accused has died, the trial court dismisses the case.<sup>180</sup>

#### IV. DISCUSSION AND ANALYSIS OF THE LEGAL STORY

Defense Counsel Rose and Special Counsel Simmons-Howe are depicted as the heroes of this film. Whereas, in real practice in the United Kingdom, their interests would be confined to representing the accused in the immediate proceedings, in *Closed Circuit*, Rose and Simmons-Howe stand for the court's countervailing considerations for public access to court proceedings, as well as individual citizens' rights to privacy and freedom to act independently of the state. Nevertheless, in the process of portraying their ordeal with the Erdogan case, the film highlights important policy for conducting closed hearings.

##### *A. Appointment of Special Counsel*

The film follows the recent development in national security cases regarding appointment of special counsel. However, in the film, Special Counsel Simmons-Howe is appointed by a former public defender rather than the Attorney General as required by the U.K. Court of Appeal.<sup>181</sup> The writers for the film may have chosen someone else to appoint special counsel to make the process seem fair to the accused, or to suggest that Defense Counsel Rose was unable to appoint her due to their romantic history. In practice, the Attorney General's ability to clear candidates for special counsel ensures that information revealed in closed session is not disclosed to the accused or the press.

One of *Closed Circuit*'s central concerns, on the other hand, is that government control over the appointment may undermine special counsel's independence in representing the accused. Although U.K. case law has not

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*; Attorney General's Office, *Applications for Witness Anonymity Orders: The Prosecutor's Role*, Gov.UK (Nov. 30, 2012), <https://www.gov.uk/guidance/applications-for-witness-anonymity-orders-the-prosecutors-role#d-appointment-and-role-of-special-counsel-in-applications-for-witness-anonymity> [<https://perma.cc/48AA-LXGB>].

borne out the issue, the Attorney General guidelines suggest the contrary: that the Crown Court will not invite special counsel unless there is a real risk that witness testimony may be subject to an adverse credibility assessment on cross-examination.<sup>182</sup> Thus, the recent use of special counsel in closed proceedings suggests it may act as an ameliorative measure for the accused to confront witnesses.

### *B. Disclosure of Material in Closed Session*

*Closed Circuit* opens in part with the Attorney General's interview, during which he announces that preliminary hearings in the Erdogan case will be held in closed session.<sup>183</sup> Thus, the film begins by presuming the CPS has applied and shown the Crown Court there is a significant national security interest in conducting preliminary hearing proceedings in camera.

Notwithstanding, in ordinary criminal proceedings in the United Kingdom, at the preliminary hearing stage, the public does not have a legal right of access to the full details of the CPS's case.<sup>184</sup> The film presumes there is a valid public interest in following preliminary proceedings after a deadly terrorist attack by the accused. The Attorney General assures the public the proceedings are necessary to bring the accused to justice.<sup>185</sup> Asked by the reporter whether there should be concern that holding hearings in closed session amounts to a secret trial, withal the suggestion of abuse it evokes, the Attorney General assures the public the trial will be fair.<sup>186</sup> Showing the delicacy with which the court must handle them, the film realistically portrays how the CPS providing detailed reasons why closed proceedings are necessary first in open court itself may reveal sensitive information. First determining the order of proceedings, the trial judge responds to the prosecution's suggestion that the order be left to the "wisdom and discretion of the bench."<sup>187</sup> The prosecutor is suggesting that the disorder that follows and the adverse impact on the public interest in the trial, is much greater if a judge must issue a prior restraint on the press when the defense elicits sensitive information in open session. Instead, the judge orders that the court enter into closed proceedings first. As U.K. case law requires in the

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182. *Id.*

183. CLOSED CIRCUIT, *supra* note 1.

184. *See* Criminal Procedure 2015, § 8.2 (Eng.).

185. CLOSED CIRCUIT, *supra* note 1.

186. *Id.*

187. *Id.*

interest of the administration of justice, the full details of the information the security services have on Erdogan are not revealed until the CPS calls their first witness in closed session.<sup>188</sup> There, Witness X reveals that Emir has both material information and sensitive, non-material information.<sup>189</sup>

Whereas, in real practice, the defense would only be prohibited from knowing the identities of the witnesses that the CPS plans to call in closed session, but not general information the CPS includes in its application on the risks of proceeding in open court,<sup>190</sup> in the film, Simmons-Howe has limited access to the case file.<sup>191</sup> Simmons-Howe and Rose must quickly interview Farroukh's associates to piece together the risks the CPS seeks to prevent.<sup>192</sup> On the other hand, in the Code of Practice Parliament enacted guidelines for the police services to use during investigations to determine what information to disclose to the defense; the Code of Practice requires disclosure of any material that is not sensitive in nature.<sup>193</sup> Although Erdogan's former involvement in a German terrorist cell might broadly "relat[e] to national security," as the Code of Practice defines "sensitive material,"<sup>194</sup> a court might well find that unsanctioned involvement would be more material to the case than its disclosure might risk revealing his operations as an undercover operative—apart from the underlying criminal activity. The film suggests that the case file that was turned over by the state lacks even basic information on the accused. However, based on U.K. law, it is likely that all but this information relating to official investigations, and that on Emir, would have been properly disclosed.

The first closed session concerns real evidence in the case as well as the state's efforts to prevent Simmons-Howe and Rose from investigating.<sup>195</sup> The film's climax occurs when Simmons-Howe tells Witness X she has been both professionally and personally made aware of the national security concerns in the case.<sup>196</sup> However, if *Closed Circuit* followed the United

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188. CLOSED CIRCUIT, *supra* note 1; *See, e.g.*, Times Newspapers Ltd. v. Abdulaziz [2016] EWCA (Crim) 887 (appeal taken from Eng.); Times Newspapers Ltd. v. R [2007] EWCA (Crim) 1925 (appeal taken from Eng.).

189. CLOSED CIRCUIT, *supra* note 1.

190. *See* Coroners and Justice Act 2009, c. 2, § 86 (UK).

191. CLOSED CIRCUIT, *supra* note 1.

192. *Id.*

193. *See* Criminal Procedure and Investigations Act 1996, c. 25, § 23 (UK); Criminal Procedure and Investigations Act 1996 Code of Practice, § 10.3 (Eng.), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447967/code-of-practice-approved.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf).

194. *See* Criminal Procedure and Investigations Act 1996, c. 25, § 23 (UK); Criminal Procedure and Investigations Act 1996 Code of Practice, § 2.1 (Eng.), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447967/code-of-practice-approved.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf).

195. CLOSED CIRCUIT, *supra* note 1.

196. *Id.*



Kingdom's legal standards, the CPS would have proceeded with Witness X's testimony alone in closed session, without Emir's testimony. Based on her personal knowledge of Erdogan's involvement in the bombing and the physical evidence the police services collected in a raid, it would be unnecessary for Emir to testify to make the CPS's case. By suggestion from the Court of Appeal, if the CPS did not need Emir's testimony, neither would Witness X be required to answer whether they were using an informant at all. Even so, on application from special counsel, the Crown Court would have likely denied the accused's application to cross-examine Emir because it might be used to elicit damaging, immaterial information.

On the other hand, the CPS's interest in keeping their first witness's identity anonymous and her testimony about Erdogan's involvement with a terrorist cell in Germany would likely be sufficient for the Crown Court to allow the CPS to examine her in camera. Early in the film, Rose goes to a dinner where he meets the witness, who introduces herself as a civil servant working for the transportation department.<sup>197</sup> When the witness later takes the stand in closed session, the audience realizes her cover.<sup>198</sup> The film suggests that revealing the witness's identity as a chief in the security services in open court would put her safety at risk. Protecting the witness's safety and her crucial testimony as to the accused would justify her examination in camera.

#### V. CONCLUSION AND RECOMMENDATIONS

The use of in camera hearings in the United Kingdom protects the safety of witnesses and the public-at-large. Procedural safeguards to the rights of the accused ensure that the accused also receives a fair trial. However, the CPS's interest in convictions may prevent them from being fully forthcoming regarding any biases a witness might have when applying to the court. Thus, the Crown Court's requirement that the prosecution describe any reasons their witnesses may not be credible may present a conflict of interest. Because the court's invitation of special counsel is contingent on such a showing, the accused's right to confront witnesses may likewise be affected if these risks are downplayed. However, the recent use of special counsel at all to represent the accused in camera preserves this right if special counsel is independent and bound by confidentiality.

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197. *Id.*

198. *Id.*

Further, recent legislation in the United Kingdom has begun to distinguish the requirements for protection of witnesses in ordinary criminal cases from cases where national security is at stake. Protecting the safety of witnesses is paramount to the prosecution of criminal offenses in the criminal justice system. However, cases which implicate national security may have a wider variety of information that would be harmful to disclose in open court. Thus, courts should implement procedure which is precisely tailored to the case at hand. The legal standards guiding courts on holding in camera hearings should align with the interests present in each case.