Justice and Security Bill (Part 2): Closed Material Procedures

House of Lords
Consideration of Commons Amendments
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1. JUSTICE is an all-party law reform organisation, working to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists. In 2009, we published *Secret Evidence*, in which we called for an end to the use of secret evidence in UK proceedings.[1] We have a long history of litigating in cases where closed material procedures have been in issue.[2]

2. Part 2 of the Bill would ensure closed material procedures (CMP) – where a party to proceedings and his lawyers (together with the public and the press) are excluded – and his interests represented by a publicly appointed security vetted lawyer – a Special Advocate – become an ordinary part of the civil "toolkit" for our judges (Clauses 6 – 12).

3. **JUSTICE considers that that the operation of CMP is inherently unfair and that normalising the use of these controversial and previously exceptional hearings will undermine the credibility of our judges and public confidence in the civil justice system. Allowing one party – usually the Government – to present its case to the Court largely unchallenged and without the benefit of public scrutiny is an anathema to our long-standing common law protection of open, equal and adversarial justice.**

The Lords Amendments: "Last Resort" and "Judicial Discretion"

4. The Bill faced robust scrutiny in the House of Lords. Peers from across the House – including Baroness Kennedy of the Shaws (Chair of JUSTICE and member of the Joint Committee on Human Rights), Lord Pannick, Lord Dubs and Lord Macdonald (the former

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[1] JUSTICE, *Secret Evidence,* 2009. Electronic copies are available online: http://www.justice.org.uk/resources.php/33/secret-evidence

[2] In 2010, JUSTICE jointly intervened with Inquest and Liberty in the Divisional Court in support of the decision of Lady Justice Hallett that she did not have the power to order to hear evidence in secret as part of the inquests arising from the 7/7 bombings (The Divisional Court accepted our submissions). Coroners do not have the inherent jurisdiction to order closed material proceedings. A copy of the judgment and JUSTICE's submissions can be found here: http://www.justice.org.uk/pages/r-secretary-of-state-for-the-home-department-v-assistant-deputy-coroner-for-inner-west-london.html) We made submissions in *A v UK* in Strasbourg and *AF (No 3)* in the domestic courts (Full information on each of these submissions is available online. http://www.justice.org.uk/pages/past-interventions.html). JUSTICE, together with Liberty, most recently intervened in the cases of *Al-Rawi* and *Tariq* in the Supreme Court (*Al-Rawi v Security Service* [2011] UKSC 34; *Tariq v Home Office* [2011] UKSC 35. Copies of JUSTICE's submissions can be found online: http://www.justice.org.uk/pages/al-rawi-.html) (*Tariq* is currently being considered by the European Court of Human Rights. JUSTICE is a third party intervener in the case). The key outcome in these cases – that the Supreme Court did not have the power to introduce closed material procedures in ordinary civil litigation without statutory authority – prompted the introduction of the Justice and Security Bill.

Director of Public Prosecutions) – would have deleted CMP from the Bill. Many Labour Peers chose to abstain. The official opposition, together with many others, supported the Bill only after amendment to insert changes recommended by the Joint Committee on Human Rights (JCHR) and the Lords Constitution Committee. Crucially, these would have required the court to consider whether the degree of harm to the interests of national security if the relevant material were disclosed would outweigh the public interest in the fair and open administration of justice; and whether a fair determination of the proceedings would not be possible by any other means. These changes would ensure CMP remained an exceptional measure, used only in the last resort. Inserting the balancing exercise familiar to PII claims ("the *Wiley* balance") would allow the Court to exercise genuine discretion over whether the departure from the ordinary principles of open, equal and adversarial justice could be justified. The JCHR, supported by evidence from the Special Advocates considered these minimum amendments essential against the background of their conclusion that the Government had not made the case for the expansion of CMP.

5. The Commons has stripped out almost all of these changes. Two basic tests must now be satisfied before the Court may order CMP: (a) that a party will be required to disclose "sensitive material" to another person in the course of proceedings (sensitive material is material which if disclosed would be damaging to national security); and (b) that "it is in the interests of the fair and effective administration of justice in the proceedings" to allow CMP (Commons Amendment 6).

6. The Government dismisses widespread criticism of its rewrite as "legal hairsplitting" or "semantics".[3] These arguments were roundly rejected by the JCHR in its last report.[4] The current formulation in the Bill will, in practice, reduce the court's discretion to nil, with the judge likely to be presented with CMP or two alternatives: (a) a claim that the Government will be forced to settle or (b) that they will seek to have the case struck out. If the Government has considered PII and will not make an application; CMP will be presented as the only means to protect UK interests.

7. JUSTICE considers it crucial that the key changes supported by the House of Lords on Report are reinserted into the Bill: (a) that CMP are only available when it is not possible for a claim to be resolved by any other means; and (b) the court must be permitted to

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[3] JCHR, Eighth Report of Session 2012-13, *Legislative Scrutiny: Justice and Security Bill (Second Report),* HL 128/HC 1014, para 29-30. Herein "JCHR Second Report", para 37.

[4] JCHR Second Report, para 29-30.

balance the degree of harm to national security against the wider public interest in the fair and open administration of justice.

"The Last Resort"

8. The "fair and effective" test in Commons Amendment 6 is not a suitable alternative to requiring the Court to consider whether PII – or any alternative means, such as the use of confidentiality rings, redaction or anonymity orders – could have been used to protect national security. As the JCHR concluded, this "fair and effective" test is not a test of "strict necessity" and "may lead to CMPs being used in cases where the proceedings could still be heard sufficiently fairly by a claim being made by PII" (and thus, allowing for the consideration of other alternatives, such as confidentiality rings etc). The Special Advocates – the security vetted lawyers at the heart of CMP - consider that it is essential that the Bill spell out the test to be applied by the Court to ensure that the discretion is actively exercised:

> *If it is not spelled out, there is a risk that the court will not address its mind to the question of whether the case could be tried fairly under existing procedures. There is a risk that CMPs will become the default option and that what was justified as an exceptional procedure will come to be accepted as the norm.*[5]

9. The Government argues that this process would require all other alternatives to be exhausted – including through the completion of a full PII exercise – before CMP could be imposed. There is nothing in the language of the Lords amendment designed to require all other options to be used before CMP could be considered. Rather, it is determined to require the court to consider other less draconian means before resorting to a closed procedure.

10. The Minister also argues that, this option will be administratively inconvenient and expensive, as it will require the Minister concerned to consider each piece of evidence before an application for CMP is made, as he does under PII (where the Minister has responsibility for signing a PII certificate). This argument appears misleading for a number of reasons:

[5] JCHR Second Report, paras 73-77.

- Commons Amendment 6 will require the Minister to consider PII in any event. In order to consider PII effectively, it is to be expected that a Minister will review the relevant material involved. Any other alternative suggests that in all cases a Minister will rely solely on the advice of Treasury Solicitors or the Security and Intelligence Agencies.

- Given that the Government has argued that applications for CMP will be rare; and limited to cases involving harm to national security (and with a risk that the vital interests of the United Kingdom will be damaged), it seems unrealistic to suggest that the exercise of Ministerial responsibility could be discharged without the direct involvement of the Secretary of State.

- This would appear to be a straightforward admission that Ministerial oversight in any CMP application will be at arms length. This kind of arms-length Ministerial approval without an opportunity for close judicial scrutiny is akin to the operation of PII in the 80s – before the introduction of the *Wiley* balance - a time when that mechanism was highly discredited for its use of "class-based" immunity.

- It also fails to acknowledge that once CMP has been instigated, a full disclosure exercise will take place, in order to consider whether what evidence can be heard in open court and what must be "closed". Again, it would be expected that a Minister might be involved in determining the degree of risk to national security posed by the disclosure of material being considered for CMP. The implication of the Government's position is that it expects this exercise to be far less rigorous than that conducted within the PII disclosure exercise, giving the Government a significant litigation advantage.

- The Government's position on this issue highlights JUSTICE's concern that CMP should not be allowed to become the default mechanism for the handling of national security cases. Aside from the inherent risks in CMP, it will significantly reduce the degree of both judicial and Ministerial scrutiny of the handling of these cases with a detrimental impact on transparency and accountability and on the credibility of our justice system.

"The *Wiley* Balance": Judicial control and the public interest

11. Nor is the "fair and effective" test a substitute for the requirement of the Court to consider the degree of risk posed to national security by disclosure against the competing public interest in the fair and open administration of justice. The Minister made clear in evidence to the JCHR that the Government did not consider that openness was a relevant consideration for the Court once an application for CMP had been made. This begs the question: on what basis is the Court expected to exercise any discretion to refuse CMP.? The JCHR determined that the Government's argument invites the conclusion that:

> *there can only be one answer to the question once an application is made for CMP: that the only choice in such cases is between a CMP and the case not being heard at all. In fact, this part of the Bill is defining the test which determines whether or not there should be a CMP. In making that decision, it is obvious to us that the desirability of openness is an important consideration which should weigh in the judicial balance. The Government's approach, by not taking open justice into account would make it more likely that CMPs would take place in practice.*[6]

12. The Government has suggested that its test will enhance judicial discretion, rather than limit it. This appears to imply that the judges will be free to apply their inherent jurisdiction to protect the principles of open, adversarial and equal justice, as they did in *Al-Rawi.* However, this neglects the ordinary principles of statutory interpretation. This Act will present the courts with a clean slate. The starting point in its application will be the statutory language and Parliament's intention. If it is clear that Parliament has rejected a test based on the protection of open and adversarial justice; and any notion of "last resort", it will send a message to the courts that these considerations are not permitted. As the Supreme Court has made clear in its recent and clearly reluctant acceptance of its power to consider closed judgments under existing statutory provision for CMP: where Parliament has spoken, the judges must act:

> *It must be emphasised that this is a decision which is reached with great reluctance by all members of the court; indeed it is a majority decision. No judge can face with equanimity the prospect of a hearing, or any part of a hearing, which is not only in private, but involves one of the parties not being present or represented at the hearing*

[6] JCHR Second Report, para 61.

and not even knowing what is said either at the hearing or in a judgment in so far as it discusses what was said or produced by way of evidence at the closed hearing. Nonetheless, as Parliament has decided that, in certain circumstances, such a procedure is necessary and permissible.[7]

Summary

13. We remain concerned that, despite any limiting amendment, closed hearings are likely to become the default in national security cases, once CMP becomes an accepted part of the civil justice tool-kit. This will, in practice, rule out the many existing practical measures which may be taken to strike a more effective balance between open justice and security. Existing practice on redaction, confidentiality rings, undertakings and anonymity will fall by the wayside if the proposals in the Bill become law. This will reduce the likelihood that significant claims against the Government are exposed to public scrutiny, with a corresponding reduction in the ability of a judicial hearing to enhance transparency and accountability. These concerns are compounded by the fact that these cases may involve allegations of serious wrongdoing by the Government, including allegations of torture, inhuman and degrading treatment. The position taken by the Special Advocates on these amendments must carry significant weight. The Special Advocates work at the heart of the existing CMP process and would benefit from its expansion. They have resisted this Bill at every stage. On the eve of this debate, they have spoken out to urge Peers to stand their ground and make CMP truly a measure of last resort.[8]

14. **We urge Peers to insist that the core amendments recommended by the JCHR and passed with cross-party support of the House of Lords are inserted into this Bill. The alternatives proposed by Government unduly restrict the discretion of the court and will lead to the default use of CMP in cases where national security concerns are raised. Commons Amendment 6 should be rejected unless amended to ensure CMP remain a measure of last resort.**

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[7] Supreme Court Release, Statement by Lord Neuberger, President of the Court, *Bank Mellat*, 21 March 2013. http://www.supremecourt.gov.uk/news/bank-mellat-v-hm-treasury.html Although the judges in this case set out their own criteria for establishing when they could use CMP, including that it is limited to cases where CMP is "necessary", these criteria were set against a statutory background which provides no guidance at all on the use of CMP by the Supreme Court. Should this Act pass, the court will have no such discretion. The judges will be bound by the "fair and effective" test and must be guided by Parliament's intention in determining whether and when they might refuse to exercise their discretion to use CMP.

[8] http://ukhumanrightsblog.com/2013/03/22/exclusive-special-advocates-open-letter-and-briefing-note-on-secret-trials/