Justice and Security Bill (Part 2)

House of Commons Second Reading Briefing

December 2012

For further information contact

Angela Patrick, Director of Human Rights Policy

email: apatrick@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Evidence which has been insulated from challenge may positively mislead.

Lord Kerr*, Al-Rawi v Ministry of Defence,* [2011] UKSC 34, 93.

The common law principles [of open justice]…are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consideration and proper consideration of the sensitive issues involved.

Lord Dyson*, Al-Rawi v Ministry of Defence,* [2011] UKSC 34, 48.

The question for Parliament is whether Government has persuasively demonstrated, by reference to sufficiently compelling evidence, the necessity for such a serious departure from the fundamental principles of open justice and fairness...the Government has in our view failed to discharge such a burden of justification...

Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill, HL Paper 59, 13 November 2012*

Part 2 of the Justice and Security Bill contains a series of proposals which JUSTICE considers could undermine public confidence in the administration of civil justice and damage the credibility of our judiciary.

JUSTICE considers that the Bill's proposal to introduce closed material procedures (CMP) into all civil proceedings is unfair, unnecessary and unjustified. That one party will present his case unchallenged to the judge in the absence of the other party and his lawyers is inconsistent with centuries of common law tradition in civil justice, where proceedings are open, adversarial and equal. Introducing CMP into the ordinary civil justice "toolkit" of our judiciary could undermine their credibility irreparably and damage public confidence in the civil justice system.

The Supreme Court in *Al-Rawi* refused to expand CMP, concluding that such a fundamental change would require "compelling evidence". JUSTICE considers that Parliamentarians should ask for no less.

In the absence of compelling justification for change, we support the deletion of Part 2 from the Bill. A number of amendments made by the House of Lords insert some basic, essential safeguards into the Government's original proposals. Large parts of the Bill remain untouched. We do not consider that amendment alone can resolve the serious implications of Part 2 for our civil justice system.[1]

[1] We considered many of the proposed amendments in our supplementary brief for House of Lords Report Stage, including the principal JCHR amendments. See http://www.justice.org.uk/resources.php/325/justice-and-security-bill

Introduction

1. JUSTICE is a UK-based human rights and law reform organisation. Its mission is 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.[2] We have a long history of litigating in cases where closed material procedures have been in issue.[3]

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 while his opposition speaks to the judge in private - become an ordinary part of the civil "toolkit" for our judges (Clauses 6 – 10, Part 2). **JUSTICE considers that that the operation of CMP is inherently unfair and that normalising the use of these controversial and previously exceptional hearings risks undermining the credibility of our judges and public confidence in the civil justice system.**

3. Clauses 14 and 15 of the Bill would oust the jurisdiction of our courts to consider ordering the disclosure of information in the public interest where an individual seeks redress in an arguable case in which the UK is shown to be mixed up in wrongdoing, however innocently. This ouster would provide no exception for

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

[3] 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.

individuals seeking redress in cases involving evidence of UK complicity in torture or other serious human rights violations.[4]

4. **This Bill's passage through the House of Lords was controversial. A number of 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 Director of Public Prosecutions) – would have deleted these provisions from the Bill. Labour Peers chose to abstain on this vote, in the light of Government defeats on other amendments. We consider the limited impact of these amendments, below. Even on these most essential of changes however, the Government has failed to clarify whether it will accept the Lords' changes or push for further amendment.**

5. **We support deletion of the central clauses of Part 2 of the Bill. Debate has shown that the Government has not made the case for these controversial reforms, which could lead to irreparable damage to the principles of open, adversarial and equal justice and the long term credibility of the judiciary.**

Background: Secret evidence, open justice and the right of confrontation

6. It is a basic principle of a fair hearing – both in civil and criminal cases - that a person must know the evidence against them. This provides the foundation of the open, equal justice guarantees incorporated in constitutions the world over and reflected in international human rights law. The right to be heard includes the opportunity to challenge the evidence before the court. As our domestic courts have long recognised, it is the "first principle of fairness" that:

> Each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of the material of what is said against him (or her), for what he does not know, he cannot answer.[5]

---

[4] This briefing can be read together with our briefings for Second Reading and Committee which provide fuller information about the background to the Bill. http://www.justice.org.uk/resources.php/325/justice-and-security-bill

[5] *Re D (Minors)* [1996] AC 593 at 603-04 (Lord Mustill).

7. JUSTICE has long argued against the expansion of closed material procedures (CMP). The Government's repeated assertion that CMP are commonplace, fair or effective is unfounded, and in our view, misleading. Currently CMP are limited to a number of specific circumstances and accompanied by rules and safeguards approved by Parliament. In each of the cases where they have previously been considered, Parliament has had an opportunity to consider individual proposals and the Government has been required to produce evidence of the necessity for CMP in connection with each of those cases. Largely, existing CMP cover exceptional proceedings outside the ordinary civil or criminal justice process which Governments have acknowledged as distinct (e.g. SIAC immigration proceedings, TPIMs or hearings related to security vetting). The Government is asking Parliament to approve the use of CMP in all civil proceedings. The normalisation of this previously exceptional process calls for close scrutiny, consultation and consideration.

8. In *Secret Evidence* (2009), we conducted a major review of the operation of CMP and concluded:

   - **Secret evidence is unreliable:** Evidence which is considered by a court of rational deduction, but unchallenged is inherently unreliable. This unreliability is compounded by the fact that material produced by the intelligence services is not the product of a criminal investigation with the associated safeguards placed on the production of evidence.[6]

   - **It is unfair:** Each of the principles that make up the common law right to a fair hearing – the right to be heard, the right to confront one's accuser and the right to an adversarial hearing and equality of arms – is denied when one party to a claim is denied access to – and the opportunity to challenge - the evidence used against them.[7]

   - **It is undemocratic:** The protection of parliamentary democracy is one of the key foundations of the principle of open justice. Requiring the courts to conduct their work in public ensures through transparency that the public can

[6] *Secret Evidence,* paras 410 – 415

[7] *Secret Evidence,* paras 416 - 422

satisfy themselves that justice is being done. The public's ability to scrutinise judicial decision making is plainly thwarted when proceedings, evidence and judgements are kept secret.[8]

- **Secret evidence is damaging to the integrity of our courts and the rule of law:** Lack of fairness damages the public good of the justice system itself. The integrity of the courts depends on the perception that our judges have adopted a fair and independent process to reach their conclusions.[9]

- **It weakens security:** The use of unchallenged intelligence to affect the outcome of cases can lead to inaccurate conclusions which endanger security. In the case of civil claims involving allegations against Government agencies, this may allow the cover-up of serious wrong-doing and misconduct by officials and agents. This approach breeds complacency and could encourage a drop in professional standards, which in turn could reduce the confidence of the public in the security and intelligence services.[10]

- **The use of secret evidence is unnecessary:** Existing cases have shown that the Government may take an overly cautious approach to claiming secrecy, including for information already in the public domain. There are generally better means of protecting the important public interest in maintaining national security which provide greater respect for the right to open justice and a fair hearing.[11]

9. We consider that each of these criticisms hold firm. Since the publication of *Secret Evidence* a number of developments have underlined our concern that the use of secret evidence is a practice which should not be extended, but rolled back.

[8] *Secret Evidence,* paras 423 - 425

[9] *Secret Evidence,* paras, 426 - 429

[10] *Secret Evidence*, paras 430 - 431

[11] *Secret Evidence,* paras 432 - 437

- In *Al-Rawi v Security Service*, the Supreme Court determined that it did not have the jurisdiction to extend the use of CMP [12] In the lead judgment Lord Dyson stressed:

> The common law principles…are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consideration and proper consideration of the sensitive issues involved.[13] (Emphasis added)

- Responding to the Justice and Security Green Paper, existing Special Advocates (SAs) – security cleared advocates who currently represent people excluded from CMP but who cannot communicate with them - said:

> CMP represent a departure from the foundational principle of natural justice...The way in which CMPs work in practice is familiar to only a very small group of practitioners...The use of Special Advocates may attenuate the procedural unfairness entailed by CMPs to a limited extent, but even with the involvement of SAs, CMPs remain fundamentally unfair.[14]

10. A number of other significant organisations and individuals share concerns about the Government's case for the expansion of CMP, including the Law Society,[15] the Bar Council,[16] the UN Special Rapporteur on Torture,[17] the Equality and Human Rights Commission,[18] the House of Lords Constitution Committee[19] and the Joint Committee on Human Rights.

---

[12] [2011] UKSC 34, para 69

[13] *Al-Rawi,* para 48.

[14] Response to Consultation from Special Advocates, 16 December 2011, para 2.

[15] http://www.lawsociety.org.uk/representation/parliamentary-briefings/justice-and-security-bill---law-society-briefing/

[16] http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2012/july/bar-council-chair-condemns-secret-court-plans/

[17] http://www.guardian.co.uk/law/2012/sep/11/un-official-secret-courts-torture

[18] http://www.equalityhumanrights.com/news/2012/october/commission-advises-parliamentarians-on-violations-in-justice-and-security-bill/

[19] http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/18/1802.htm

11. The Joint Committee on Human Rights conducted close scrutiny of the Bill's proposals. They concluded that the Government has failed to make the case for reform.[20] **We share their view.**

12. The JCHR proposed a number of amendments to deal with a few of the worst excesses of the Government's proposals; to reintegrate some judicial discretion into the CMP process; to limit the scope for further expansion and to provide for subsequent parliamentary oversight. Peers from both the JCHR and the Lords Constitution Committee proposed these amendments at Report in the House of Lords, only some of which were successful. We deal these amendments below.

13. However, we consider that these amendments do not address the underlying lack of justification provided by the Government nor the fundamental objections to the expansion of CMP into the ordinary civil justice system, including the potential impact upon open, adversarial and equal justice and the credibility of our judicial system. Introducing a degree of judicial discretion may allow for some consideration of the countervailing public interest in open justice, or for the consideration of alternative means of securing protection for national security, but it will not address the burden posed by the Justices: the need for <u>compelling</u> evidence that the introduction of CMP is strictly necessary despite its impact on the right to a fair, adversarial and open hearing (notably, in *Al-Rawi,* the Court was asked to consider CMP as part of its inherent jurisdiction. The Court would have retained such discretion as would be written into the Bill by amendment).

    Any opportunity to reduce the shelf-life of potentially damaging legislative proposals through a combination of sunset clause and subsequent parliamentary review must be welcome. However, this form of after-the-event political compromise addresses neither the need to justify the need to act; nor will it protect against any harm which might ensue while the Act is in force. The impact of the mechanism on the use of CMP in connection with the control orders regime (with renewals year on year despite significant criticism of the fairness of the proceedings from commentators and the Joint Committee on Human Rights and litigation challenging the fairness of the process proceeding throughout) serves to highlight the limitations of subsequent parliamentary review. That the

---

[20] Fourth Report of Session, *Legislative Scrutiny: Justice and Security Bill,* HL Paper 59, HC 372, para 46

Government remains resistant to even this limited form of subsequent parliamentary oversight is a significant cause for concern.

A: Clauses 6 to 12 - Expanding closed material procedures

14. Clause 6 provides that, on application, a court may make a declaration that CMP is available, on further application, in any set of proceedings. A declaration will be made when disclosure that would otherwise be required would be "damaging to the interests of national security" and the "degree of harm to the interests of national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice" and "a fair determination of the proceedings is not available by any other means".

15. In its original incarnation, Clause 6 would have enabled the Secretary of State alone to apply to the relevant court for the proceedings to be declared eligible for CMP. The Court would have been bound to make the declaration if presented with any disclosure which would be "damaging to the interests of national security" (Clause 6(2)). In taking this decision, the Court was directed to ignore whether the trial could be heard fairly without CMP. It could not take into account the availability of PII or the fact that the material may not be relied upon (Clause 6(3)). Although the Secretary of State was bound to consider whether to make an application for PII (Clause 6(5)), was not required to exhaust PII before CMP would be available. PII and CMP were presented in the Government's proposals as alternative options entirely at the election of the Secretary of State alone.

16. Once the Court has made a declaration that CMP is available, Clause 7 provides that Rules of Court will allow a relevant person to make applications for particular material (including individual documents, witness evidence or classes of material, for example) to be "closed" (i.e. heard without the presence of the other side or their legal representatives, but with the attendance of a special advocate). These applications will always take place in the absence of the other side and his representatives (Clause 7(1)(c)). The Bill provides that the Court can never order disclosure when it considers that any material would be damaging to national security (Clause 7(1)(c)). The Court is permitted to provide a summary – but not required to provide one – only where a summary would not be damaging to the interests of national security (Clause 7(1)(e)).

17. Where the Court refuses to order that material be dealt with as closed or the Court directs that a summary must be provided, the Secretary of State is not compelled by the Bill to disclose that material (Clause 7(2)). Instead, the party holding the material can opt not to disclose, but the Court is empowered to direct them either not to rely on the material or to "make such concessions or take such other steps as the Court may specify" (Clause 7(3)).

18. During its passage through the House of Lords, multiple changes to Clause 7 were proposed, including to:

- require a judge to hear material in closed session only when the damage to national security would outweigh the public interest in fair and open interests of justice (Amendment 47);
- require a summary of the closed material to be provided (Amendment 48);
- ensure that summary was sufficient to allow the individual excluded to give effective instructions (Amendment 49)
- make clear that the summary should take steps to protect national security in so far as it would be possible to do so (Amendment 50).

19. In our view, these proposed amendments highlight the risk of injustice posed by the proposals in Clause 7. In effect, this clause would require secrecy without close judicial scrutiny to become the default in any circumstances when national security is said to be in play. The Bill places no duty on the court to provide a claimant excluded under CMP with a summary of the material which is "closed." The court is required to "consider" making a summary available, but is under no direct requirement to do so. Rather, Clause 7(1)(e) starts from the premise that the court is prevented from making any disclosure or providing any summary which damages national security. This is perhaps surprising given that both domestic courts and the European Court of Human Rights have struck down decisions made under existing CMP as incompatible with the right to a fair hearing guaranteed by Article 6 ECHR where the person has not been given enough information for them to understand the case against them. The starting point in this case-law is that a person must be given as much disclosure – whether through the provision of documents, evidence or a summary – as is needed to secure a fair trial.

20. Clause 11(5) stresses the duty of the court under the Human Rights Act 1998, providing that nothing in the Bill is to be read as requiring the court to act incompatibly with Article 6 ECHR. The Government explains that where Article 6 applies, the court should provide such summaries as are necessary. This reassurance is welcome. However, the restrictive approach on the face of the Bill makes non-disclosure the starting point for the court. In our view, this is incompatible with existing case-law (and the common law principles of open justice) which suggests that the goal should be to secure a fair hearing in so far as is possible. The Equality and Human Rights Commission have published their legal advice, which suggests that, despite Clause 11(5) there is a risk that these proposals will operate in a way which will violate the ECHR. We agree. However, on this issue, the ECHR should not provide the only touchstone for Parliamentarians. The right to open, adversarial justice in civil proceedings is protected by centuries of common law, as recognised by the Supreme Court in *Al-Rawi.* Parliamentarians should be slow to restrict these protections and should only do so in evidence of compelling need.

21. In the House of Lords, the Government rigorously resisted any amendment to Clause 7, despite recommendations of both the JCHR and the Lords Constitution Committee that amendment was needed to restore judicial discretion and the notion that harm to the public interest in national security could be balanced more effectively against the risk of damage to the public interest in open, adversarial justice. This Clause remains largely unchanged.

22. JUSTICE considers that the proposals in Clauses 6 – 12 to extend CMP to ordinary civil proceedings remain ultimately unfair, unnecessary and unjustified. In their evidence to the Joint Committee on Human Rights (JCHR) the Special Advocates strongly voiced their concern that there was no evidence to justify the proposal to expand closed material procedures to ordinary civil proceedings.[21] The Joint Committee came to the same conclusion. We share their view and consider that **Clauses 6 – 12 should be deleted from the Bill**.

[21] Special Advocates, Memorandum to the JCHR, June 2012, paras 1 – 3. http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2012-13/justice-and-security-bill/

The case for reform?

23. There are no national security reasons for change. There is no evidence that the operation of public interest immunity has led to disclosures which have endangered national security. The JCHR stressed, "the current system of PII does not jeopardise national security".[22] That PII will continue to operate in the context of inquests where the Government does not have an option to withdraw or concede underlines that the existing law poses no risk to national security.

24. The Government has failed to provide any other justification for reform. We consider the Government's arguments below:

- **"CMP is in the interests of justice":** The Government argues that, in the interests of fairness, the extension of CMP is needed in order to maximise the information before the Court and to increase the likelihood that justice will be done.[23] This argument was made before the Supreme Court and dismissed, most eloquently by Lord Kerr:

> For what…could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of that argument, however lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.[24]

The admission of unchallenged evidence under CMP undermines the right to open, adversarial justice. It is more likely to lead to an unjust result and undermines the credibility of the court and the administration of justice.

---

[22] Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper,* HL Paper 286/HC 1777, para 8.

[23] *Green Paper,* for example, para 2.2 – 2.3.

[24] *Al-Rawi,* para 93

The Government argues that "no evidence currently heard in open court will be heard in secret in future".[25] This ignores that CMP changes the nature of the judicial exercise entirely, introducing a significant litigation advantage for one side in the case (usually the Government) and potentially undermining the credibility of the judges in the case. The original draft would have required the Court to ignore PII in opening the gateway to CMP (Clause 6). Although Lords amendments introduce greater judicial discretion in considering the public interest in disclosure, we remain concerned that this exercise could become a basic exercise in hurdle-jumping to secure the imposition of CMP. In our view, if the courts were to adopt this approach, this could rule out the many existing practical measures which may be taken to strike a more effective balance between open justice and security. In our view, existing practice on redaction, confidentiality rings, undertakings and anonymity, developed over decades in the development of PII, will fall by the wayside if the proposals in the Bill become law and it is possible that information that might previously have been heard utilising those techniques will be confined to CMP.

- **"CMP is fairer to both the claimant and the defendant":** The Government argues that the use of CMP will allow the court to consider evidence which may be beneficial to the claimant's case.[26] We find it difficult to follow how this is likely to be tested in practice. The material considered in CMP will be produced by the Government or by the party opposing the excluded individual. The ability of the Special Advocate to determine how this material (or additional material which might be requested if the claimant were fully informed) might benefit the claimant's case is limited by the inability to take instructions from the claimant after the content of the material is disclosed.

  The Government refers to the cost associated with settling the claims made by the Guantanamo detainees. The Green Paper asserted that the Government was compelled to settle these claims and the Government continues to argue that it would be fairer if the Government were able to rely on material currently declared inadmissible during PII albeit within a CMP.[27]

[25] Government Response to consultation on Justice and Security Green Paper, Executive Summary.

[26] *Green Paper,* Executive Summary, xi

[27] *Ibid,* para 1.18

The JCHR rejected this argument wholesale.[28] We note that settlement in the Guantanamo cases preceded the final decision of the Supreme Court that CMP was not an option. The application of PII was never tested by the Government in practice.

Cases are settled by Government for a variety of reasons, including different types of litigation risk. Without access to the case or the advice received within Government, it is difficult to assess the motivation for settlement. The litigation brought in the *Al-Saadi* case, settled last week (alleging UK involvement in rendition of Libyan dissidents and their families to the Gaddafi regime), was thought to have been one of the first cases where the Government would be expected to seek CMP. Yet, the case has been settled at a relatively early stage, while Parliament continues to debate this issue.

- **"CMP will allow claims to proceed which might otherwise be struck out":** In *Al-Rawi*, the Supreme Court accepted that where sensitive material was not protected by PII, it would theoretically be open to the Court to stay or strike-out the claim because it would not be in the public interest for it to proceed (relying on the precedent of *Carnduff v Rock*.[29]) The Government argues that CMP would be preferable to a claim being struck out and the claimant denied any possible redress. The case of *Carnduff v Rock* was exceptional and we are unaware of any other case where the risk of strike out has arisen. We consider it dubious authority on which to proceed.[30] In recent evidence to the JCHR, David Anderson QC referred to a number of cases where domestic courts have been asked to consider CMP and indicated that strike out could be possible without a closed procedure.[31]

---

[28] Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper,* HL Paper 286/HC 1777, para 72 – 80.

[29] *Al-Rawi,* paras 50, 81- 82, 86, 103, 108, 158, 175 – 181. See also Lord Justice Mance in *Tariq* at 40, Lord Kerr at 110 (where he considers strike-out may be a more palatable outcome than the introduction of CMP in some cases). *Carnduff v Rock* [2001] EWCA Civ 680 was not a national security case. In fact, it was a contractual claim brought by a police informant. The case has itself been subject to criticism and may be wrongly decided.

[30] See JUSTICE submission in *Al-Rawi,* paras 103 on.

[31] HC 370-i. Uncorrected Transcript of Evidence, *The Justice and Security Bill,* 19 June 2012, QQ 4-5.

In our view, the likelihood of a stay or a strike out remains exceptional and unlikely.[32] With this in mind, we note the Government's refusal to assist the Joint Committee on Human Rights in its efforts to better explore the extent of the challenge that the Government has identified, by asking for further information on the volume and type of cases thought by Government to be so "saturated" with material damaging to national security to make them untriable.[33]

However, taking on board this theoretical and admittedly limited risk, it is arguable that under the existing system, the price of preserving the public interest in the credibility of the courts and the proper administration of justice is that in some circumstances one or other party may exceptionally be disadvantaged in the greater public interest. Thus, in some cases where PII is denied, the Government may choose to drop a prosecution rather than rely on sensitive material or may put forward a defence which is not supported by evidence which it keeps secret in the public interest. In some cases the claimant may have to accept the unlikely risk that his claim may be struck out.[34] Although this step may appear to have serious implications for access to justice; it remains a wholly theoretical prospect. It is for Parliament to determine whether this theoretical risk, in admittedly a limited number of cases justifies the interference with the principles of open, adversarial justice and the impact on the credibility of the judiciary which the expansion of CMP will have.

---

[32] We note that the Government has not sought to argue that claims should be struck out in this context, including in the *Al-Rawi* cases. We accept that this would be an extremely unattractive argument for a Government to make in any consequence, and in particular, in a context where the Claimant seeks redress for alleged serious violations of international human rights standards. However, that this option has only arisen in the context of arguments on CMP, without the issue having been tested in litigation, together with the role of the Court under PII and using alternative mechanisms to protect the various public interests in play (in preserving national security, in securing access to justice and protecting open and equal justice), compounds our view that strike out in practice, taken against the background of the Court's existing role would be unlikely. If there were a risk, nothing in the Bill would redress this concern. The risk would be to the Claimant and his or her interest in a fair hearing. Under Clause 6, the Claimant can do nothing to prevent strike out should that option be on the table (and possibly proposed by the Secretary of State). Rather, CMP remains in the gift of the Secretary of State alone (See Supplementary Briefing on Amendments).

[33] Fourth Report of Session, *Legislative Scrutiny: Justice and Security Bill,* HL Paper 59, HC 372, paras 43 – 46.

[34] We expand on this argument in our submissions to the Supreme Court in *Al-Rawi,* see paras 1-2.

B: Clauses 14 and 15 - Ousting *Norwich Pharmacal* and other similar jurisdictions

25. The *Norwich Pharmacal* jurisdiction is designed to support access to justice and to ensure individuals with a right to a remedy are not excluded from justice by an inability to access documents and other evidence relevant to their case, but held by a party other than the defendant. Claimants asking the court to exercise this exceptional jurisdiction have several significant hurdles to overcome before the court will order disclosure:

    - **An arguable case:** The claimant must show that they have an arguable case in the main litigation.
    - **Involvement of the defendant:** The defendant must be involved or 'mixed-up' in the underlying claim, however innocently.
    - **No other means of obtaining the information:** The *Norwich Pharmacal* jurisdiction is a remedy of last resort. The claimant must show that he has no other way of obtaining the information.
    - **No more than necessary:** The court will only order such limited disclosure as shown to be necessary.
    - **A discretionary remedy:** The court must ultimately be satisfied, having taken into account each of these factors, that the information should be disclosed in the public interest.[35]

26. Clause 14 of the Bill will oust the jurisdiction of the courts to hear *Norwich Pharmacal* applications in any case which concerns "sensitive information", including in any case where the Secretary of State certifies that the disclosure of the material in question would "be contrary to the public interest". This "sensitive information" provision will effectively stop this power being used in any case relating to or involving the intelligence services. Clause 14(3) defines such information so broadly that it will exclude information which is held by, obtained from, or relating to an intelligence service, or even third party information derived from such a source. The ouster of jurisdiction in connection of this information is absolute and not subject to review.

---

[35] Rule 31.18 Civil Procedure Rules; *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133; *Mitsui v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch).

27. Certification by a Minister may be issued in connection with information where disclosure would be considered contrary to "national security" or "the interests of the international relations of the UK". This definition is potentially very broad, particularly in light of the very limited justification for reform, set out below. The decision of the Secretary of State to certify such information would be subject to review only on only limited judicial review grounds. The Court will only be permitted to examine whether the Minister "ought" to have concluded that disclosure would be contrary to the public interest (Clause 15(2)). Any judicial review challenge would be automatically subject to CMP. Any challenge of the Secretary of State's assessment of the need for non-disclosure would be extremely difficult under ordinary judicial review since neither the relevant material nor the reasons for certification would not be available to the party seeking disclosure. Under CMP, the potential for the Secretary of State's decision to be seriously questioned would, in our view, be miniscule.

Is it necessary to limit Norwich Pharmacal disclosure?

28. The Government accepts that there is no risk of the United States or any of our other international partners withholding intelligence with any "threat to life implications". The justification for change is to assuage concerns expressed in "clear signals" from overseas that the flow of information may reduce if no steps are taken to narrow the law in this area (in other words to reinforce the "control principle" which assumes that we will "control" or in so far as possible keep confidential material provided to us by third states):
    - Prior to the concern expressed in relation to the *Binyam Mohammed* case, we are unaware of any serious or significant objection having been raised to this last-resort jurisdiction;
    - The Green Paper suggested that disclosure under *Norwich Pharmacal* does not take into account important national security considerations. This neglects: (a) the significant hurdles which a claimant must cross before disclosure will be ordered and (b) the application of public interest immunity to material that would otherwise be disclosed under a *Norwich Pharmacal* order.
    - This process is used as a matter of last resort and designed to create a judicial discretion, in limited cases, to allow a court to order disclosure where it is in the public interest to protect an individual's right to a remedy

and to support access to justice where a defendant has become involved in wrongdoing. This discretion is bound by other public interest considerations, including national security. Disclosure is ruled out in cases where public interest immunity is successfully established.

29. The *Binyam Mohammed* case itself illustrates the substantial safeguards in the *Norwich Pharmacal* process:
    - The FCO accepted that Mr Mohammed had an arguable case that he had been subject to cruel, inhuman and degrading treatment.[36] By the time of the final judgment by the Court of Appeal, a US Court had accepted the truth of his allegations.[37]
    - The Divisional Court had little difficulty in concluding that by seeking to interview the claimant and supplying questions for his interviews, the UK had gone far beyond bystander or witness to the then alleged wrongdoing of the US.[38] The UK was "mixed-up" in his treatment.
    - He sought only disclosure to his security vetted counsel, already cleared to receive sensitive information in the US.
    - At the time of his application, *Binyam Mohammed* was facing charges which included capital offences. He was in custody at Guantanamo bay. The consequences he faced were grave and the public interest in ensuring that information relevant to his defence was in the public domain significant.

30. The material sought by *Binyam Mohammed* under *Norwich Pharmacal* was never ordered by our courts. Before a decision was taken, it was disclosed in the US proceedings. *Binyam Mohammed* illustrates plainly that these claims will involve cases where the UK is at least "mixed-up" in allegations of serious human rights obligations or unlawful behaviour. In practice, it may be difficult to dispel the impression – however unjustified - that the ouster and the use of certification to prevent disclosure would be associated with cover-up, concealment and collusion designed to hide embarrassment, misconduct and illegality, particularly in cases involving atrocities of the most serious kind. Without any compelling evidence of

---

[36] *Binyam Mohammed (CA),* paras 66-67

[37] Ibid, paras 120 - 126

[38] Ibid, paras 68-71

harm, we urge Parliamentarians to exercise caution in considering the case for reform.

31. We share the view of the JCHR, expressed in their report on the Green Paper and their Report on the Bill that ouster of the kind proposed in the Bll is entirely disproportionate to any justification provided by the Government:

> [The absolute application of the control principle would mean] that our legal framework admits of the possibility of individuals facing the death penalty being unable to obtain disclosure of material which is central to their defence, without any judicial balancing of the gravity of the harm likely to be done to the individual on the one hand and the degree of risk to national security on the other. We do not think our legal framework should countenance that possibility.[39]
>
> We are troubled by the suggestion that the Executive is happy to acknowledge a role for the courts in the adjudication of PII claims on national security grounds so long as it always upholds the Government's claims to immunity from disclosure. In our view, the statement of the Secretary of State on a PII certificate is not merely a matter of form. Rather...it reflects a fundamental constitutional settlement ... [and] the explicit recognition...that the possibility of the court rejecting the executive's claim is acknowleged and accepted...The rule of law requires this.[40]

32. The proposals in the Bill neglect the safeguards built into the *Norwich Pharmacal* jurisdiction and its underlying purpose. The jurisdiction of the court is ultimately designed to protect the public interest in access to justice. The ouster proposed in the Bill – which in effect would make the control principle absolute – is inappropriate given that disclosure might be sought in cases where an individual faces a threat to his life, in violation of international standards, and where there might be evidence that the UK is mixed-up in the circumstances of his plight.

---

[39] Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper,* HL Paper 286/HC 1777, para 162

[40] Fourth Report of Session 2012-13, *Legislative Scrutiny: Justice and Security Bill,* HL Paper 59/HC 372, para 93

33. The evidence provided by the Government to the JCHR goes to the heart of the problem in the Bill. It makes clear that the concern which the Government seeks to address is not solely the issue of *Norwich Pharmacal* jurisdiction, but a perceived failing in the application of PII in these cases by Government and our allies overseas, notably, in the US. We share the conclusion of the Joint Committee on Human Rights that this would be wholly inappropriate and inconsistent with the rule of law.

34. The effect of the ouster clauses in this Part of the Bill, combined with the expansion of CMP in clauses 6 – 11 would be to grant the Secretary of State complete and unfettered control over a broad class of material relevant to the work of the security and intelligence services. We share the concerns of the Joint Committee on Human Rights that this would ultimately mean wiping away decades of carefully developed case-law designed to enhance the credibility of our ability to balance national security and with wider public interest. In our view, this approach could ultimately undermine the credibility of the process; the reputation of the relevant agencies and any Government officials seeking to operate the measures outlined in the Bill. As the JCHR concluded:

> Clause 13 of the Bill...amounts to a reversion to class-based claims for PII, in which Ministers exercise a veto over disclosure on the ground that the information falls into a particular class, regardless of its contents. We are acutely aware of historic cases, such as the Matrix Churchill case, in which executive overreaching of the power to make class-based claims for PII led to the welcome abandonment of such an approach.[41]

35. This approach would reduce the discretion offered to our courts and increase the control offered to the Executive over sensitive material far beyond any mechanism offered in other countries, including in the US.[42]

We support the deletion of these clauses from the Bill.

---

[41] Fourth Report of Session 2012-13, *Legislative Scrutiny: Justice and Security Bill,* HL Paper 59/HC 372, para 93

[42] Ibid, para 95.