

The Justice and Security Bill:

Human rights, politics and policy in action

Angela Patrick
Director of Human Rights,
JUSTICE
March 2013



The “Secret Courts” Bill



Why Secret Courts?



Why “Secret Courts”?

- Clause 6, Justice and Security Bill:

“The court seised of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a **closed material application** may be made to the court.”



Closed Material Procedures

- What does “closed” mean?
- Origins and History: *Chahal* and beyond
- The role of the Special Advocate



Closed Material Procedures

A party to a claim may be:

- (a) denied the right to attend the trial of his own case;
- (b) denied knowledge of another party's statement of case;
- (c) denied knowledge of, and the opportunity to challenge evidence on which another party will rely;
- (d) denied the opportunity to make submissions on another party's case;
- (e) denied the knowledge of material or evidence that may support his case or harm the case of another party;
- (f) denied the right to receive a statement of the court's reasons for its decision in his case; and
- (g) denied an effective right to appeal the decision of the court (since the judgement may not be fully disclosed).



The Special Advocate

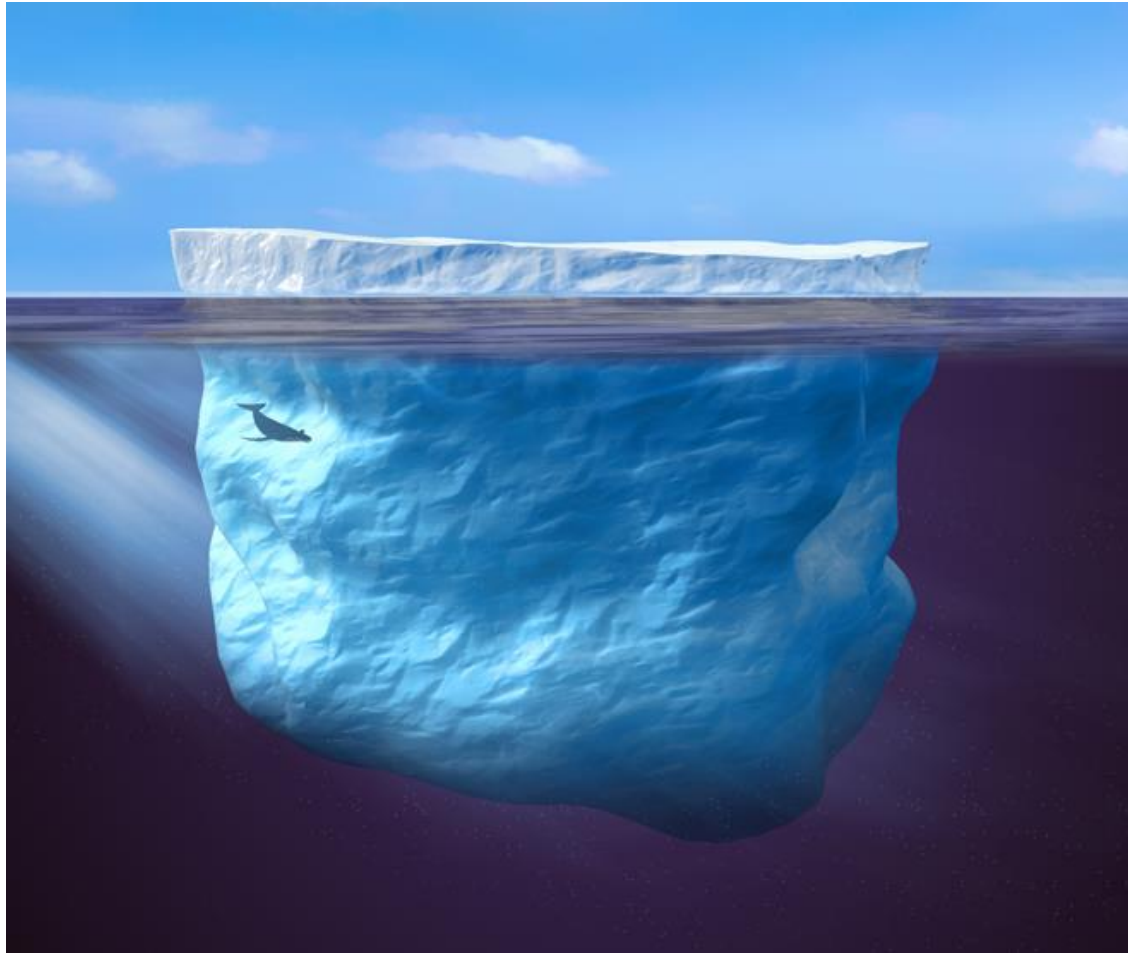
Clause 9, Justice and Security Bill

The appropriate law officer may appoint a person to represent the interests of a party in any section 6 proceedings from which the party (and any legal representative of the party) is excluded.

A person appointed as a special advocate is not responsible to the party to the proceedings whose interests the person is appointed to represent.



The Special Advocate



History in the Courts

- *Chahal v UK*
- *A & Ors v UK*
- *AF & Ors v Secretary of State (No3)*
- *Kadi No 2*
- *Al-Rawi v Security Service*
- *Tariq v Home Office*



Common Law: Open and Natural Justice

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.

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



Common Law: Open and Natural Justice

“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”

Lord Dyson, *Al-Rawi*, para 48



Common Law: Open and Natural Justice

To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.

Lord Kerr, *Al-Rawi* at 93.



Secret evidence: the Problems

- **Secret evidence is unfair**
- **Secret evidence is unreliable**
- **It is undemocratic**
- **Secret evidence is damaging to the integrity of our courts and the rule of law**
- **It weakens security**
- **The use of secret evidence is unnecessary**



The case for “secret courts”

- National Security?
- Government is otherwise forced to settle claims it could otherwise defend.
- If a case can't be heard, it could be struck out.
- Settlements may be funding terrorism.
- Nothing in CMP will restrict the amount of information put before the Courts under the current rules.



The response?

- Nothing in the current system has harmed national security;
- The Government has no evidence to support its claim that settlements have been forced;
- No strike outs sought by Government (so far);
- If settlements funding terrorism: why not prosecute and recover the money?
- CMP will restrict the flexibility afforded by PII and limit information disclosed.



Justice and Security Bill: The Government's Final Case

- Government now accepts that anyone can apply
- Applications will be “rare” (@ 15 cases per year)
- The judge will have “absolute” discretion.



In the judge's hands?

The Bill

- Clause 6 discretion: “fair and effective administration of justice in these proceedings”
- Clause 8: Open or closed?
- Clause 8: Summaries?
- Clause 8: Sanctions
- Clause 12 and Article 6

Rejected amendments

- **Last Resort**
- **Wiley Balance**
- **Compulsory summaries**



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What next?

- Political Ping-pong;
- Likely litigation and challenges at home at abroad;
- Limits on transparency and accountability may be difficult to assess in practice;
- Value of reporting;
- Continuing work of Special Advocates



Further reading

- The Justice and Security Bill:
<http://services.parliament.uk/bills/2012-13/justiceandsecurity.html>
- JUSTICE's Briefing on the Bill:
<http://www.justice.org.uk/resources.php/325/justice-and-security-bill>
- UK Human Rights Blog Coverage:
<http://ukhumanrightsblog.com/2013/03/03/everything-you-need-to-know-about-the-secret-trials-coming-to-a-courtroom-near-you-angela-patrick/>

Contacts

apatrick@justice.org.uk

www.justice.org.uk

@JUSTICEhq