Analysis

UK: Government's "secret justice" Bill widely condemned

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The Justice and Security Bill will allow ministers to force civil courts to hear evidence in secret if they believe it to be in the interest of national security. Verdicts will be reached on the basis of evidence that litigants and their lawyers have neither heard nor been given the opportunity to rebut.

Liberal Democrat delegates voted heavily against the government's Justice and Security Bill at their party conference in September 2012. By doing so they became the latest source of criticism of legislation that has been widely condemned across the political spectrum. The Bill plans to extend the use of closed material proceedings (CMP) – which allow the government to present evidence to a court in secret in the interest of national security – to all civil trials. CMP are currently allowed in only a very small number of cases and have been much criticised for undermining the rule of law and the right to a fair trial. The government claims that their extension would allow civil courts to hear evidence that is currently excluded, increasing procedural fairness and causing fewer cases to be struck out on the grounds of national security. Critics argue that the new system is considerably less fair and a clear breach of the government's coalition agreement which made firm commitments to open justice. The Bill would marginalise the role of judges and effectively give the government free reign to decide how sensitive evidence should be handled. This would shroud the workings of the intelligence and security agencies in secrecy and decrease accountability at a time when revelations of their collusion in rendition and torture have highlighted the need for effective scrutiny.

Closed Material Proceedings and Public Interest Immunity

The government currently has two ways of stopping sensitive intelligence data being heard in open court.

Closed material procedures have been used since 1997 in a small number of cases heard before employment tribunals, the investigatory powers tribunal, and special immigration appeals commission (SIAC) hearings. If the government believes that disclosing certain evidence in open court would undermine national security it can apply to the court for CMP and, if successful, present evidence to a judge in secret as part of the trial. A security vetted lawyer known as a 'special advocate' acts on behalf of the defendant/claimant but can disclose no more than a vague summary of the evidence that has been presented against them. The judge will therefore reach a decision based on evidence that the defendant/claimant has not heard nor been afforded the opportunity to rebut.

Public Interest Immunity (PII) certificates are the more common method of shielding the security services from public scrutiny. Under PII rules the government can apply to a judge for a court order to allow for the withholding of evidence that would be harmful to the public interest. In deciding whether to grant the request the court must balance the public interest of excluding the evidence against the interests of open justice and due legal process. Common uses of PII include protecting the identities of police informants and preventing the operational practices and information gathering techniques of the intelligence and security agencies from becoming known. Crucially, any evidence excluded under PII cannot be considered by the court. This means that verdicts are reached on the basis of evidence seen and examined by all litigants (unlike in CMP).

The origins of the Justice and Security Green Paper

The government signalled its intent to extend the use of CMP to all civil trials and coronial inquests in a Green Paper published in October 2011. This was motivated chiefly by the case of former Guantánamo detainee Binyam Mohamed. In February 2010 the Court of Appeal had ruled in his favour and forced the government to disclose a seven paragraph summary of classified CIA intelligence which confirmed that British intelligence services had been complicit in his rendition and torture. Later the same year, the government reluctantly settled out of court in civil cases brought by Mohamed and other former Guantánamo detainees, at a cost of around £15 million, in order to prevent other sensitive intelligence being disclosed in court.

Aghast at having details of their activities revealed, the intelligence and security agencies pushed for legal reform that would afford greater anonymity. They emphasised to the government that without greater protection they might lose the confidence and cooperation of foreign security services, potentially endangering British lives. [1] In fact, the seven paragraph summary of events disclosed in the case of Binyam Mohamed was relatively bland and, crucially, was already in the public domain having been released previously by a US court. A US district court had ruled that Binyam Mohamed's mistreatment amounted to torture and the US government had accepted this verdict. In refusing the government's application for PII, the Court of Appeal made it clear that its reason for so doing was that the information had been publically acknowledged in the US and therefore did not pose a threat to national security. Nonetheless, government ministers have argued on numerous occasions that the Binyam Mohamed case has caused US intelligence agencies to become more cautious in their dealings with their UK counterparts for fear of what British courts might compel the government to disclose. Reprieve argues "it is most likely that the claim is false" and that "no evidence has been supplied to support it." [2]

Whether or not the government's reasoning is sound, legal reform on the basis of what best suits secretive intelligence services – domestic or foreign – is inherently objectionable. Former Justice Secretary Ken Clarke – who has retained responsibility for the Bill despite being moved in the recent cabinet reshuffle – has therefore been keen to emphasise the positive benefits of extending CMP. In his foreword to the Green Paper he bemoaned the plight of British courts which are "unable to pass judgment on these vital matters: cases either collapse, or are settled without a judge reaching any conclusion on the facts before them." [3] Civil courts, he asserted, would now be better equipped to handle sensitive information because more evidence could be put before a judge. This would lead to fairer trials and fewer cases being struck out or having to be settled out of court. He denied that the government's plans had come about as a result of "immense American pressure" but acknowledged that "sometimes national security requires that you'll have to give a guarantee of complete confidentially to third party countries" and, tellingly, that:

> *I can't force Americans to give our intelligence people full cooperation. If they fear our courts they won't give us the material.* [4]

Criticism of the Justice and Security Bill

Fierce criticism of the Green Paper led to several concessions in the subsequent Justice and Security Bill, published on 29 May 2012. Plans to extend CMP to inquests were scrapped, due in part to a vociferous campaign by NGOs such as Inquest and Justice. The Green Paper stipulated that ministers should be in charge of deciding when the use of CMP was appropriate, but the Bill returns responsibility for authorising requests to a judge. The government said these changes formed part of a "refined and improved" Bill and hoped it would appease critics of the new system. In reality the majority of the Green Paper's objectionable characteristics remain intact within the Bill. Writing in The Guardian, Richard Norton-Taylor derided the changes as a "smokecreen" insofar as the proposals being dropped never had a chance of being agreed in parliament: "an easy ploy, if it was not a deliberate one from the beginning." [5]

Since their inception CMP have been criticised for undermining the rule of law and long-standing principles of open justice. Allowing one litigant to rely on evidence kept secret from another is incongruous with an adversarial legal system and leads to cursory, lopsided decision making. Evidence presented in secret is not really evidence at all. Lord Kerr stated in the Supreme Court's July 2011 judgment in the case of Al Rawi that "there is a constitutional, common law right to be informed of the case made against you in civil litigation" and that:

> *Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.* [6]

The extension of CMP to all civil trials would shroud the workings of the intelligence and security agencies in secrecy and lessen accountability at a time when civil cases brought by former Guantánamo detainees have highlighted the necessity of effective scrutiny. The Director of Liberty, Shami Chakrabarti, notes:

> *The worst practices of the war on terror were exposed through a mixture of investigative journalism and exactly this type of litigation. It is bitterly ironic that the executive's answer to this is legislation that would have prevented such abuses from ever being exposed.* [7]

Similarly, the former Director of Public Prosecutions, Lord Ken Macdonald, warned that the Green Paper's proposals:

> *"threaten to put the Government above the law… after a decade in which we have seen our politicians and officials caught up in the woeful abuses of the War on Terror, the last thing the Government should be seeking is to sweep all of this under the carpet."* [8]

The Bill would allow members of the intelligence and security services to operate in the knowledge that there would be no public scrutiny of their actions, potentially causing a culture of impunity to

develop. In September 2012 the UN special rapporteur on torture, Professor Juan Méndez, added his name to the list of dissenting voices: “if a country is in possession of information about human rights abuses, but isn't in a position to mention them, it hampers the ability to deal effectively with torture.” [9]

The Justice and Security Bill is particularly troubling because it would lead to a clear diminution in the judiciary’s role of deciding if and how evidence should be heard. Judges will be responsible for authorising CMP but the wording of the Bill reduces their input to that of rubber stamping. Clause 6 stipulates that a court “must” approve a minister’s application for CMP if a disclosure “would be damaging to the interests of national security” [10] (emphasis added). Judges will no longer be obligated to weigh the merits of the application against the public interest of open justice nor will they have any discretion to consider whether the trial could be heard fairly under the existing system of PII. Giving evidence to the Joint Committee on Human Rights, the independent reviewer of terrorism legislation, David Anderson QC, said:

> *The judge’s hands are effectively tied. If there is disclosable material that impacts on national security - as there obviously will be in any case in which an application is made - the judge is required to agree… It seems that the Government have given formal effect to the requirement that the judge should have the last word, but in substance the Secretary of State continues to pull the strings.* [11]

The Bill does not define what comes under the umbrella of “national security” meaning that the basis for applications could be very broad. Moreover, the government will be obliged to consider but not exhaust the possibility of using the current PII system before applying for CMP. Liberty concludes:

> *In our view, it is most likely that CMP will become the default in cases involving national security claims. This will rule out the many existing practical measures which may be taken to strike a more effective balance between open justice and security.* [12]

The new system is also inherently one-sided because only the government will be able to apply for CMP. Non-state litigants will not be afforded this right nor will a judge have any power to instigate CMP themselves or make their own recommendations as to how evidence could best be heard. The upshot of this is that the government will enjoy total control over how sensitive evidence is handled in civil cases. They will be able to choose between hearing evidence in closed court before a judge under CMP, asking the judge to exclude evidence under PII, or applying for neither and calling for the case to be struck out on national security grounds. The House of Lords Constitution Committee expressed concern that:

> *The Government acts as the sole gatekeeper to the use of CMP in civil cases… It is ‘constitutionally inappropriate’ for the government to have a dual role in civil proceedings of acting as a party to the litigation and being the gatekeeper deciding on how that litigation is conducted.* [13]

The new system promotes a distinctly arbitrary form of justice. Damningly, special advocates appointed by the government to work within the existing system of closed proceedings - who the government might have hoped would support the Bill - have stated in no uncertain terms that its provisions are unnecessary and unfounded. In a memorandum submitted to the Joint Committee on Human Rights they argue that “the case has not been made for the introduction of closed material

procedures in other types of civil litigation" and that "the Government would have to show the most compelling reasons to justify their introduction; that no such reasons have been advanced; and that, in our view, none exists." [14]

The wider context

Upon forming a coalition government in May 2010, the Lib Dems and Conservatives emphasised the depth of ground between the two parties on civil liberties issues. They vowed to be "strong in defence of freedom" and chastised Labour for having "abused and eroded fundamental human freedoms and historic civil liberties." Their coalition agreement pledged specifically to "protect historic freedoms through the defence of trial by jury." [15] Just under two and a half years later the government has introduced a Bill that will do away with centuries' old principles of open justice.

This is merely the latest in an increasingly long list of substantive civil liberties commitments the coalition has failed to deliver on. Promises to restore rights to non-violent protest and further regulate CCTV and the DNA database have fallen by the wayside. Having pledged to "end the storage of internet and email records without good reason" the government's Communications Data Bill will instead introduce a system of total digital surveillance.

The coalition's legislative agenda has become increasingly draconian. The Justice and Security Bill in particular displays a casual disregard for the rule of law characteristic of the previous Labour government. Ken Clarke's recent branding of critics of the Bill as the "more reactionary parts of the human rights lobby" is reminiscent of the stubborn refusals of Labour ministers to engage with civil liberties campaigners or admit they had a case to answer. [16] Things could soon get worse given the newly appointed Justice Secretary, Chris Grayling, once resolved to "tear up" the Human Rights Act. [17] Increasingly the coalition government is mirroring its predecessor.

The Justice and Security Bill also highlights the deference paid to the intelligence services by politicians fearful of being seen to be weak on issues of national security. The coalition was widely expected to replace Labour's notoriously illiberal system of control orders - another form of secret justice - but under heavy pressure from MI5 retained the scheme under a new title: Terrorism Prevention and Investigation Measures. In the weeks following its formation the coalition also signalled its intention to find a way to allow intercept evidence to be heard in criminal courts - Britain is the only common law country to outlaw its use entirely - but in the face of opposition from the intelligence services this came to nothing. [18] The Justice and Security Bill is simply the latest example of the intelligence and security agencies getting their way.

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