

Open Justice and Secret Justice: National Security and Law Reform in the UK

The UK government is currently pursuing changes to the law which will have a significant effect on – among many things – the media’s ability to access and report on information about terrorism and security, and on its ability to play a role in holding government to account. There are any number of points at which the story could be said to begin. A summer afternoon at Westminster is the one I will choose.

The path to legislation

In July 2010, Prime Minister David Cameron told the House of Commons that there were ‘serious problems’ about the ways courts deal with intelligence information. In particular, he said, the security services ‘cannot disclose anything that is secret in order to defend themselves in court with confidence that that information will be protected.’ Additionally, there ‘are also doubts about our ability to protect the secrets of our allies and stop them ending up in the public domain’ as a result of actions taken in the courts. To address these problems, he promised a Green Paper would be published in 2011. (Hansard, HC, 6 July 2010)

The Government argued two cases in particular highlighted the need for change. [*Al Rawi & Others v The Security Service*](#) [2011] UKSC 34 was an action for damages brought by former Guantanamo detainees who claimed British complicity in their unlawful detention and torture. The Supreme Court held that the common law did not allow for closed material proceedings in civil actions. As a result the Government argued that it was forced to settle the claims rather than risk disclosing security sensitive evidence in open court. In [*R \(Binyam Mohamed\) v Secretary of State for Foreign and Commonwealth Affairs*](#) [2008] EWHC 2048 (Admin) one of the same former detainees sought disclosure by the UK government of material that would assist him in defending himself in legal proceedings in the US. This material had been provided to the UK by the US and was therefore, in theory, subject to the ‘control principle’ under which the disclosure of intelligence material rests with the originating country. Although the UK court ordered some disclosure, it did so because the material had already been disclosed in a US court. However the UK Government claimed that the judgment in that case risked damaging and the flow of information foreign intelligence agencies.

The [Justice and Security Green Paper](#) (Cm 8194, Oct 2011) has now made sweeping proposals for changes under which closed material proceedings (CMPs) would be made generally available in civil proceedings. It would see courts closed, with claimants being denied access to relevant material and given limited (if any) explanation of the nature of that material. Security-cleared ‘special advocates’, who would have little (if any) contact with the claimants, would attempt to represent their interests during closed hearings. Any parts of judgments that addressed sensitive material would also be kept secret. As well as the obvious disadvantages to claimants, the public would also learn very little about cases of potentially significant public interest.

The reaction to the Green Paper was significant with the government consultation attracting ninety responses. The government has said it will put draft legislation before parliament in May. What form that will take is presently unclear – some are even questioning whether it will be postponed – but whatever happens, the events of the last three months have likely caused a seismic shift away from the original broad proposals set down in the Green Paper.

In November 2011, the parliamentary Joint Committee on Human Rights (JCHR) opened an inquiry into the human rights implications of the Green Paper. Human rights organisations such as Liberty, Reprieve and others went on the offensive. Most significantly for many, the [Special Advocates made a collective submission](#) to the Green Paper consultation and this group of barristers who have worked unhappily with closed procedures in the Special Immigration Appeals Commission, coming out strongly against the reforms. Their position was stated plainly: ‘Closed material procedures represent a departure from the foundational principle of natural justice that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own. They also undermine the principle that public justice should be dispensed in public.’

The ordinarily Tory-leaning Daily Mail is running a strong ‘No to Secret Courts’ campaign against the proposals. Joshua Rozenberg has argued that the Mail’s effect has been very significant ([‘Closed Courts and Secret Justice’](#), *Standpoint*, April 2012). When the Justice Secretary, Ken Clarke, gave evidence to the JCHR in March he appeared to step away from the breadth of the Green Paper proposals, stating that they were actually much narrower than appeared. The Deputy Prime Minister, Nick Clegg, has said that the Liberal Democrats will not back the proposed changes in their current form. The JCHR delivered its [Report](#) on 4 April 2012. It found that the Government’s claims ‘do not come anywhere close to [providing] the sort of compelling evidence required’ to demonstrate the need for closed material proceedings in civil cases [72].

The central concern in the debates about the proposals is the effect they will have on justice between the parties. However, the JCHR Report inserted another crucial dimension to those debates by picking up on something that the Green Paper completely ignored: the proposals’ effects on the media and democratic accountability.

Implications for the Media: ‘The Missing Issue’

The JCHR rightly described the proposals’ implications for the media as ‘the missing issue in the Green Paper’ [193].

By way of example, the Green Paper makes a statement of its ‘key principles’ and open justice does not appear among them. The Committee points out that the media’s role in ‘holding the government to account and upholding the rule of law is a vital aspect of the principle of open justice, as has been amply demonstrated in the decade since 9/11.’ Its view is that the Green Paper’s failure to address ‘the very considerable impact’ on media reporting ‘is a serious omission’ [217].

The proposals are likely to have a considerable effect on investigative journalism. Evidence that comes out in court is crucial to aiding our knowledge about what goes on in our communities and what the state does on our behalf. As *Guardian* journalist Ian Cobain told the Committee, if CMPs had been used in the *Binyam Mohamed* case then the media would not have found out the true position regarding the Security Service's knowledge of Mr Mohamed's treatment [201]. In courts, rules of evidence and judicial control provide robust checks that prevent parties and witnesses crafting or spinning information for public consumption in the way they can in other circumstances. This applies whether those parties are governments, policing and security authorities, corporations or individuals. As the Committee put it, what emerges in courts enables the media to 'corroborate allegations of wrongdoing' or can 'contradict assurances or denials' [199]. This is all the more important where terrorism and security are at issue because facts can be particularly difficult to ascertain, even where they pose absolutely no risk to national security.

An important question that none of the Green Paper, the JCHR Report or the Supreme Court in *Al Rawi* have answered is whether closed material procedures should be available if all the parties agree to it. They should not. It should not be up to the parties to decide what the public gets to know. Consent arrangements are very troubling because information which is not potentially prejudicial to national security may for reasons of trial management or embarrassment be considered under a closed procedure. That means information of great public interest – even though it is heard in a court as evidence and may pose no risk to national security – may never be revealed to the public or the press.

Under the proposals as they stand, there is not even a mechanism by which the press or the public would be notified of applications to use closed material proceedings.

The danger is that once closed material proceedings become an option – whether by will of the government, consent of the parties, or order of the court – then they will gradually become the norm. There is evidence that this has happened in Australia under the National Security (Criminal and Civil Proceedings) Act 2004. As lawyer I interviewed in my research on its effects explained in 2007, 'The routine order being sought is that all security sensitive information be heard in closed court. That is now the default set of orders.'

If judgments are to be closed, when do they become open? Or do they remain closed forever? One of the most serious open justice problems in the Green Paper is that it provides no mechanism for or indication of when – if ever – closed judgments can be revealed. This is totally unsatisfactory. There must be a review point for all closed judgments and materials heard under closed material proceedings. Ideally the closed judgments should suggest a review point, but closed judgments should also be periodically reviewed, for instance, every five years. There is no reason to suppose that the sensitive material in closed judgments will remain sensitive forever.

The tendency towards closure carries great risks. In its failure to adequately consider open justice, the Green Paper gives rise to concerns about the impact on public trust and confidence in the courts. The JCHR is rightly worried that adopting the Green Paper

proposals ‘may give the appearance that the judiciary has been co-opted by the Government and the security and intelligence agencies’ [213].

The Committee has said that it ‘expects’ that any legislation proposed by the government will be accompanied by ‘a thorough assessment of its impact on media freedom and on continuing public confidence in the administration of justice’ [217]. Moreover, parliament will need to turn its mind to whether it is satisfied by any assessment the government provides. Given the Committee’s seven-page analysis of the media and open justice issues, the ‘expectation’ terminology is a delicate understatement. The Joint Committee on Human Rights has set down something much closer to a demand – and neither government nor parliament should fail to meet it.

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