House of Lords Report Stage Briefing
Justice and Security Bill (HL Bill 27)
19 November 2012

CLAUSE 12

First Proposed Amendment

Page 8, line 29, leave out Clause 12.

Purpose

The effect of clause 12 is to make a closed material procedure is available before the Special Immigration Appeals Commission (SIAC) for the hearings before SIAC, whereas such a procedure would not be available if the decisions that are the subject of the clause continued to be subject to ordinary judicial review. Those decisions are:

- Certain exclusions of non-EEA national from the United Kingdom wholly or partly on the grounds that their presence would not be conducive to the public good
- Certain decisions to refuse to naturalise or register a person as British citizen

The effect of leaving out clause 12 is thus that the status quo is maintained and that these decisions continue to be dealt with on an ordinary judicial review.

Second and Third Proposed Amendments

Page 8, leave out lines 43 to 45.
Page 9, leave out lines 28 to 30.

Purpose

To restrict the grounds on which the Special Immigration Appeals Commission can hold closed material procedures in the types of case provided for by Clause 12 to national security interests, bringing the immigration-related provisions of the Bill into line with the general provisions concerning closed material procedures in 'relevant civil proceedings'.

Proposed New Clause

After Clause 12, insert new Clause –

Special Immigration Appeals Commission: equal treatment in the use of closed material procedures

(1) The Special Immigration Appeals Commission shall not adopt a closed material procedure in any matter before it save as in accordance with this section.

(2) A closed material procedure shall not be applied so as to allow the Secretary of State to rely upon material that is not disclosed to an appellant or applicant on grounds other than such grounds as may permit such a procedure to be applied by this Act in relevant civil proceedings.

(3) The procedures to be adopted in any closed material procedure shall not provide any lesser protection to an appellant or applicant than would be provided to a party in relevant civil proceedings where such a procedure is adopted.

(4) In relation to subsection (3), it shall be for the Special Immigration Appeals Commission to determine in any matter before it whether any closed material procedure adopted provides any lesser protection, having regard to the risk of prejudice to the interests of the appellant or applicant in pursuing the matter before the Commission.

(5) In this section, "closed material procedure" means a procedure whereby any material, which is to be relied upon by the Secretary of State, is not to be disclosed to an applicant or appellant.

(6) In this section, "relevant civil proceedings" has the same meaning as in section 6.

Purpose

To ensure that safeguards, both procedural and jurisdictional, as to the use of closed material procedures in non-immigration cases are applied equally in immigration cases.

BRIEFING

Stand part and all amendments

Clause 12 extends the use of closed material procedures in immigration cases by extending the remit of the Special Immigration Appeals Commission (SIAC) to two types of cases which come before the ordinary courts as judicial reviews, not as appeals. Clause 12 extends the remit of SIAC to review on judicial review principles of:

- Exclusion cases: where the Secretary of State orders the exclusion from the UK of a non-European Economic Area national wholly or partly on the ground that the person's exclusion is "*conducive to the public good*" and there is no right of appeal against this, and
- Cases where the Secretary of State has refused British citizenship, by naturalisation or registration. There is no right of appeal in such cases.

Currently such cases are dealt with by way of judicial review in the High Court. In the recent case of *(AHK & Ors) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) which concerned refusal of British citizenship, Ouseley J had to deal with cases where the applicants had been given few, and in some cases no, reasons for a refusal on the grounds that they were not of good character. For example, the judgment records "he [AM] has been told nothing other than that naturalisation has been refused on the grounds of character and that it would be contrary to the public interest to give reasons." Ouseley J's dilemma was *"It is not so much that the case is untriable; it can be tried. It is simply that the evidence means that the Claimant cannot win."* He identified the use of a closed material procedure as a potential solution to the impasse the case had reached. However, what he proposed is not what appears in this bill because on his version the public interest immunity procedure is followed first:

> "*The C*[losed] *M*[aterial] *P*[rocedure] *would only occur once the P*[ublic] *I*[nterest] *I*[mmunity] *process had established that there was significant relevant material relied on by the SSHD which was not to be disclosed. The judge would have all that material. The interests of the Claimant would be protected by a S*[pecially] *A*[appointed] *A*[dvocate]. *The imperfections of such a system were preferable to the alternative".*

SIAC is currently and empowered to hold closed material procedures on grounds which extend significantly beyond national security interests and this will also be the case for the new types of procedures which will be able to be dealt with by SIAC as a result of this bill: certain exclusions and refusals to naturalise or registrer a person as a British citizen. All those concerned at the use of closed material procedures generally should be concerned at the far extended reach of such procedures in immigration-related cases. In proceedings before SIAC is that there is no requirement for the Secretary of State to consider first making a claim for public interest immunity.

The Special Immigration Appeals Commission Act 1997 gives power to the Lord Chancellor to make procedure rules for SIAC including rules that may:[1]

> "*(a) make provisions enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,*
> *(b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,*
> *(c) make provision about the functions in proceedings before the Commission of* [a special advocate]*, and*
> *(d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence.*"

The procedures adopted under these rules mean that a person before SIAC may be excluded from written and/or oral evidence which is considered by SIAC and which may be relied upon by SIAC in making its decision on the appeal or application. A special advocate may be appointed "*to represent the interests of the appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.*"[2] However, the Special Advocate "...shall not be responsible to the person whose interests he is appointed to represent." :[3]

At the time when the Special Advocate may communicate with the individual and/or his or her legal representative, neither the Special Advocate, the individual not the legal representative have had sight of the undisclosed evidence. Once the Special Advocate is aware of that evidence, there is no opportunity for communication on the undisclosed evidence, no opportunity for wholly confidential communication and in practice often no communication between the special advocate and the individual and/or his or her legal representative. The court's ability to do justice is fundamentally impaired by this procedure. The individual is denied knowledge of the case being made against him or her, and denied the opportunity to challenge the evidence on which that case is based. Allegations against him or her contained in that evidence or case are unknown to the individual. Hence, inadequacies in that evidence or case cannot be identified, and evidence that would undermine or answer allegations cannot be put forward.

The special advocates[4] who provided evidence to the Constitutional Affairs Committee in February 2005[5] indicated that:[6]

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[1] Section 5(3), Special Immigration Appeals Commission Act 1997
[2] Section 6(1), Special Immigration Appeals Commission Act 1997
[3] Section 6(4), Special Immigration Appeals Commission Act 1997
[4] Nicholas Blake QC (now Sir Nicholas Blake, President of the Immigration and Asylum Chamber of the Upper Tribunal), Andrew Nicol QC (Sir Andrew Nicol, High Court Judge), Neil Garnham QC, Angus McCullough (now QC), Phillipa Whipple (now QC), Tom de la Mare (now QC), Jeremy Johnson (now QC), Daniel Beard (now QC) and Martin Chamberlain
[5] See submission at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323we11.htm
[6] *Ibid*, footnote 19

"*It is one of the Special Advocates' most important functions to ensure that as many as possible of the documents relied upon by the Home Secretary are disclosed to the appellant, whether in whole or in part or in gist form.*"

In other words, the Special Advocate is able to assist the appellant/applicant where the special advocate is able to persuade the Commission that the material should not remain secret. For so long as the material remains secret and the proceedings closed, the ability of the special advocate to assist the applicant/appellant is severely limited. This the special advocates emphasised, stating that:[7]

"*We do not consider that the existence of one case in which the detainee's appeal was allowed demonstrates, as a general proposition, that the use of Special Advocates makes it "possible... to ensure that those detained can achieve justice". Nor should it be thought that, by continuing in our positions as Special Advocates, we are impliedly warranting the fairness of the SIAC appeal process. We continue to discharge our functions as Special Advocates because we believe that there are occasions on which we can advance the interests of the appellants by doing so. Whether we can "ensure that those detained achieve justice" is another matter. The contribution which Special Advocates can make is, in our view, limited by a number of factors – some inherent to the role and others features of the current procedural regime.*"

Nicholas Blake QC, giving evidence to the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, described what happens after judgment is given:

*"If the special advocate thinks there is an error of law in the closed judgment, he gets permission to say, to pass the message out to the other team to say ' I think that you should be appealing, I can't tell you why'. … So there is a sort of open appeal. 'We think there is something wrong but we don't know what it is.' And then the court goes into closed session, so it is antithetical to every [*institute*] of due process and open justice."*

The Lord Chancellor and Secretary of State for Justice has claimed that the extension of the closed material procedure constitutes an extension of justice.[8] He has said of the measures to extend the use of closed material procedures that: "*Of course it's less than perfect, but at the moment the alternative is silence.*" But the use of closed material procedures is not an alternative to silence. On the contrary, it is a means for the State to use silence against a party to proceedings, ensuring that that party is denied the opportunity to hear (or see) the allegations against him or her and on the basis of which he or she stands to be condemned by the court. Justice manifestly is not seen to be done, and cannot be said to be done where the allegations against a party cannot be challenged by him or her.

Nicholas Blake QC, giving evidence to the Eminent Jurists Panel on Terrorism, Counter-terrorism and human rights said

"…these measures…are intrusions against due process and…there is a real risk of the system going to spread to other areas and undermine fair trial rights, where paradoxically its object originally was to add fairness to an area of the law where fairness was missing…Special advocates are being used all over the place… I think the very fact of the system, and perhaps even the expense and the complexity of the system, is some deterrent upon its over-use. The fact that it is quite expensive for the government to use this system may be, I would imagine, one reason why in essence only 20 persons were subject to it, unless it becomes a mass system. I think it would be impossible to have a mass system, unless the system was made very much more summary, in which case it is not system at all.[9]

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[7] *Ibid*, paragraph 7

[8] 'Secret justice bill not perfect, says Ken Clarke', *The Guardian*, 29 May 2012

[9] Evidence to the Eminent Jurist's Panel on Terrorism, Counter-terrorism and human rights, available at http://ejp.icj.org/IMG/Blake_transcript.pdf

ILPA contends that all controls and limitations favoured by parliament should apply equally to cases that come before SIAC and Ministers should be asked to give undertakings to amend the SIAC procedure rules to reflect the conclusions reached in the consideration of this Bill. Those appearing before SIAC should not be subject to a lower standard of protection than those in other courts.

A report of an ILPA/Redress seminar in 2006,[10] attended by lawyers with experience of SIAC and of the special advocate procedure, recorded

> *"It might have been benign at the outset to use a specially cleared advocate…to be able to have access to closed material – it has been acknowledged by Strasbourg that there are legitimate security concerns. However, what is in place now is not what was envisaged then. At least then, in article 3* [of the European Convention on Human Rights] *cases concerning a national security issue against the individual, if argument was about risk on return then that would be able to be played out in open court with an advocate quite properly representing their client. Since then much has changed. The reality now is that the Government's changes are taking the real argument into a closed arena. There is no basis for or justification whatsoever for arguing about risk on return on the basis of diplomatic assurances made in closed session."*

We recall the comments of the Joint Committee on Human Rights:

> *"After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening…has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them. "*[11]

Second and third proposed amendment

In SIAC cases, the closed material procedure may be adopted on far wider grounds than those which, under Clause 6, would apply in the civil hearings before the higher courts.

Before SIAC, the adoption of a closed material procedure is required (not allowed, but *required*) not only "*in the interests of national security*" but also, "*in the interests of the relationship between the United Kingdom and another country.*" In addition the Secretary of State can certify that the information on which the decision was based should not be made public because this is "*otherwise in the public interest."* These additional reasons for using a closed material procedure are not reasons that can justify the interference with a fair trial that a closed material procedure represents. In SIAC, the procedure rules (rule 4) include a general duty to ensure "*that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.*" Thus the comments of the Lord Chancellor and Secretary of State for Justice that "*...the only issue where you will go into closed proceedings will be national security*"[12] do not hold good in immigration cases.

[10] A report of the seminar can be read at http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf
[11] Joint Committee on Human Rights, HL Paper 157, HC 394, 30 July 2007. See also Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights* (Sixteenth report): Annual Renewal of Control Orders Legislation 2010, HL Paper 64/HC 395, 26 February 2010.
[12] See *The Guardian*, *op cit*

The dangers of the broader reasons for using closed material procedures were highlighted by the then Nicholas Blake QC, himself a special advocate at that time, giving evidence to the Joint Committee on Human Rights: [13]

> *"Certainly, there are closed issues on safety on return and some concerns as to whether the public interest test—because this is not national security; this is about foreign relations and things which governments prefer not to have revealed. ..whether those are really closed issues and whether there are no means by which the appellant's team can understand the context in which these assurances are being negotiated and debated and issues of concern without being excluded from that discussion. I think that is a relevant concern and a live issue in certain cases… If you have a ton of reasons why there should be disclosure and you have a feather against, the feather beats the ton because the statute says nothing which transgresses the line is permitted and that is the point."*

Clause 7(1)(c) of the Bill adopts this same approach: the feather beats the ton. ILPA concurs with the Constitution Committee[14]:

> *"In our view, there is no justification for requiring that material must be closed in such a case even where the risk to national security of its disclosure could be shown to be outweighed by the risk to the fair administration of justice that would be caused by its being withheld.*
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> *24. The further issue arises of how to ensure that the court takes all available steps to mitigate the unfairness inherent in permitting material to be treated as closed.* ***In our view, the court should be required, for example, to consider whether the material could be disclosed to parties' legal representatives in confidence and whether the material could be disclosed in redacted form.****"*

Proposed new clause

Subsection (2) of the proposed New Clause would restrict the use of closed material procedures to the grounds permitted in 'relevant civil proceedings' (see Clause 6 of the Bill), being national security grounds. Subsection (3) would require procedures to ensure parity of safeguards to applicants and appellants before the Special Immigration Appeals Commissions as for parties in relevant civil proceedings, and subsection (4) would permit the Commission to determine how that parity was to be ensured.

ILPA concurs with the Constitution Committee's analysis and conclusion[15]:

> *"The scheme of the Bill…is that it will fall exclusively to the Secretary of State to decide whether or not it is "appropriate" to claim PII and to decide between the PII route and applying to the court to adopt the CMP route. There are no criteria against which "appropriateness" is to be assessed. It is not the public interest in the fair administration of justice that is served by such a scheme, but the Secretary of State's necessarily partisan interest as a party to litigation. We do not consider this to be constitutionally appropriate."*

The Constitutional Affairs Committee said in its 2007 report *Special Immigration Appeals Commission (SIAC) and the use of Special Advocates:*[16]

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[13] Oral evidence before the Joint Committee on Human Rights, 11 March 2006, published as part of the Committee's 19th report of session 2006 to 2007, http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/7031204.htm See also his evidence to the Eminent Jurist's Panel on Terrorism, Counter-terrorism and human rights, available at http://ejp.icj.org/IMG/Blake_transcript.pdf

[14] Constitution Committee, Third Report, 13 June 2012, Justice and Security Bill, http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/18/1803.htm

[15] Constitution Committee, Third Report, 13 June 2012, Justice and Security Bill, http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/18/1803.htm

[16] Seventh Report of Session 2004–05 HC 323-I, 3 April 2005

'207. One of the Special Advocates told us that "the best way of describing sometimes what goes on in these closed sessions is not evidence proving a proposition, as you would do in a civil or criminal trial, by your best evidence or all the available evidence, but selected highlights of a plausible hypothesis…He thought that if the Secretary of State is permitted to rely on material which would not generally be admissible in evidence (e.g. because it is second or third or fourth hand), the system could afford to be a little more robust in requiring SIAC or the court to be satisfied to a standard of "more probable than not". In other words, there should be a more robust test which requires a case to be put rather than "a plausible hypothesis."

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Annexe Cases before the Special Immigration Appeals Commission (SIAC):

The jurisdiction of SIAC is established by the Special Immigration Appeals Commission Act 1997. Currently that Act gives SIAC jurisdiction in three circumstances:[17]

- where a person would have a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against an immigration decision (or a decision to deprive the person of British citizenship), but for the certification by the Secretary of State that the decision was taken wholly or partly on grounds of "*the interests of national security*" or "*the interests of the relationship between the United Kingdom and another country*";
- where a person would have a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against an immigration decision (or a decision to deprive a person of British citizenship), but for the certification by the Secretary of State that the decision was taken wholly or partly in relation on information which in the opinion of the Secretary of State should not be made public "*in the interests of national security*", "*in the interests of the relationship between the United Kingdom and another country*" or "*otherwise in the public interest*";
- where a person is detained under immigration powers and applies for bail, if the Secretary of State certifies that the person's detention "*is necessary in the interests of national security*" or if the person's detention follows a decision to refuse leave to enter or to make a deportation order "*in the interests of national security*".

[17] Sections 2 to 3, Special Immigration Appeals Commission Act 1997