

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 15, 2012
CORRESPONDENTS' REPORTS

UNITED KINGDOM¹

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Draft Legislation — Intelligence Oversight, Closed Material Proceedings and Disclosure of Sensitive Information

☛ Justice and Security Bill 2012

The Justice and Security Bill had its second reading in the House of Commons on 18 December 2012. The three areas covered by the Bill are (i) oversight of the Security Service (MI5), the Secret Intelligence Service (MI6) and the Government Communications Headquarters (GCHQ) in intelligence matters; (ii) expansion of the regime for closed material proceedings (CMPs) to cover civil law proceedings; and (iii) prevention of court orders for the disclosure of information deemed by the government to be sensitive.

With regard to intelligence oversight, the Bill

aims to enhance the effectiveness and credibility of the oversight of the intelligence community in order to increase public confidence in its work and provide reassurance that its activities are reasonable, proportionate and compliant with legal obligations. The Bill extends the Intelligence and Security Committee's (ISC) remit, granting it additional investigative powers and resources, and changing its status to bring it closer to Parliament. It also extends the remit of the Intelligence Services Commissioner.²

The CMP section of the Bill seeks to expand the protection currently available when sensitive material such as intelligence comes before the courts. CMPs proceed with the assistance of Special Advocates, who are lawyers specially trained for proceedings involving CMPs. During a CMP, only the Special Advocate, government lawyers and the judge are present. The Special

¹ Caroline Harvey, Solicitor, Freshfields Bruckhaus Deringer LLP.

² Overarching Impact Assessment of 12 December 2012, p. 5 <<http://www.parliament.uk/documents/impact-assessments/IA12-034.pdf>>.

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Advocate must therefore defend the litigant without disclosing to the litigant the evidence against him or her.

CMPs are currently used in immigration, terrorism and national security cases. The Bill seeks to extend the scope of CMPs to cover civil proceedings.

CMPs raise questions of compatibility with fundamental fair trial principles due to the defendant potentially being prevented from accessing the evidence against him and have generated a great deal of opinion and debate.

In its version of May 2012, the Bill provided that the government could apply for a CMP, but not the other party or the court on its own motion:

- (1) The Secretary of State may apply to the court seised of relevant civil proceedings for a declaration that the proceedings are proceedings in which a closed material application may be made to the court.
- (2) The court must, on an application under subsection (1), make such a declaration if the court considers that—
 - (a) a party to the proceedings (whether or not the Secretary of State) would be required to disclose material in the course of the proceedings to another person (whether or not another party to the proceedings), and
 - (b) such a disclosure would be damaging to the interests of national security.³

In response to the May 2012 version of the Bill, 57 of the 69 Special Advocates submitted a joint memorandum in June 2012 in which they argued that CMPs were ‘inherently unfair and contrary to the common law tradition’.⁴ They stated:

the Bill does not provide that the decision to trigger a CMP can only be taken ‘where evidence a closed procedure is needed on national security grounds is found to be persuasive by an independent judge’. Instead, clause 6 provides that (i) only the Government can apply for a CMP; (ii) the judge must grant the application if there is any material which would fall to be disclosed and disclosure of which would be damaging to the interests of national security; and (iii) in considering that question the judge is required to ignore the fact that the material in question could be withheld under [public interest immunity] rules or under the Regulation of Investigatory Powers Act 2000 (RIPA). This means that (i) the Government can still decide not to trigger a CMP if it considers that its own interests would be better served by not doing so (for example because it does not want the court to reach its decision on the basis of embarrassing sensitive material); and (ii) if the Government decides to apply to trigger a CMP, the judge will be required to accede to the application if there is any sensitive material relevant to the case, even if the judge considers that the case could be tried using the existing PII rules in a way that would be fair to both sides and that a CMP is therefore not needed. Even if one makes the assumption that there are cases which cannot fairly be tried without a CMP, we consider it wholly unjustified to introduce provisions which allow CMPs in cases which can be fairly tried without a CMP. It is especially objectionable for only one of the parties to litigation (the Government) to be given the choice whether to apply for a CMP.⁵

³ Justice and Security Bill, HL Bill 27, 55/2, May 2012, ss. 6(1)–(2).

⁴ Special Advocates’ Memorandum on the Justice and Security Bill submitted to the Joint Committee on Human Rights (14 June 2012) p. 2 <<http://adam1cor.files.wordpress.com/2012/06/js-bill-sa-response-final-final.pdf>>.

⁵ *Ibid.*, pp. 4–5.

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A revised version of the Bill was published in November 2012. It contained the following main amendments:

1. In the revised version of the Bill, it is not only the Secretary of State who may apply for a declaration that a CMP application may be made, but 'either party or the court on its own motion'.
2. The May 2012 Bill provides that a court **must** declare that a CMP application may be made if (i) a party would be required to make a disclosure, and (ii) the disclosure would be damaging to the interests of national security. The November 2012 Bill provides that a court **may** declare that a CMP application may be made if (i) a party would be required to make a disclosure, and (ii) the disclosure would be damaging to the interests of national security, **and in addition** if (iii) 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 (iv) a fair determination of the proceedings is not possible by any other means.
3. A new section in the November 2012 Bill requires the Secretary of State to give notice to all of the parties to the proceedings of an intention to make an application, and also to inform them of the outcome.
4. The November 2012 Bill adds the Supreme Court to the list of relevant civil proceedings — the May 2012 Bill only included the High Court and the Court of Appeal.

The Bill continues to be hotly debated and its progress continues.

Cases — Transfer of Detainees

- *Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v Yunus Rahmatullah (Respondent) and Secretary of State for Foreign and Commonwealth Affairs and another (Respondents) v Yunus Rahmatullah (Appellant)* [2012] UKSC 48
<http://www.supremecourt.gov.uk/decidedcases/docs/UKSC_2012_0033_Judgment.pdf>

Mr Rahmatullah is a Pakistani citizen and was detained in February 2004 in Iraq by British forces who transferred him to the custody of United States forces. British forces were aware that the US forces were going to transfer him to a third country but were not provided with any information in this regard. By June 2004, Mr Rahmatullah was in a detention facility in Bagram Air Field, Afghanistan. On 15 June 2010, the recommendation of the US army detainee review board that Mr Rahmatullah be released was approved; however he remains in detention.

The transfer of detainees was subject to the Memorandum of Understanding (MOU) of 23 March 2003 between the US and the UK, a document without binding force. The MOU included provisions which stated: (i) the UK could request the return by the US without delay of prisoners of war, civilian internees and civilian detainees transferred by the UK; and (ii) any removal of transferred prisoners of war to another country required agreement between the UK and the US.

The Court of Appeal issued a writ of habeas corpus requiring the UK to seek the return of Mr Rahmatullah from the US. The US refused the request of the UK on the basis that the government of Pakistan had requested the repatriation of Mr Rahmatullah. This response to the writ of habeas corpus was found by the Court of Appeal to be adequate.

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The issues before the Supreme Court were: (i) the appeal by the Secretary of State against the issue of the writ of habeas corpus; and (ii) the appeal on behalf of Mr Rahmatullah that the response of the US demonstrated that the UK could not secure his release. Both appeals were dismissed.

Although the Supreme Court did not rule on the legality of the detention of Mr Rahmatullah, it found clear prima facie evidence that he was detained unlawfully under the *Geneva Conventions*. The issue of the writ was not deemed to constitute an intrusion into foreign policy.

In relation to the response of the US to the UK request for the return of Mr Rahmatullah, the Supreme Court found that the US authorities had received the necessary documents to consider the issue and made their decision from an informed perspective. On the cross-appeal, the letter sent by the US authorities, while not explicitly referring to the 2003 MOU, did not suggest that it had not been considered. The US authorities had a copy of the Court of Appeal's decision and were aware of the basis upon which it was made.

Cases — Lawfulness of United States Drone Attacks in Pakistan

• *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3728 (Admin)

This case involved a challenge by way of judicial review to the passing of intelligence by GCHQ employees to the US for use in drone strikes in Pakistan. It was alleged that the GCHQ employees may be secondary parties to murder under English law for facilitating the commission of a war crime or crimes against humanity on the basis of directing armed attacks by the US in Pakistan.

The court identified the aim of the proceedings as 'to persuade a court to do what it can to stop further strikes by drones operated by the United States'⁶ and dismissed the challenge for lack of foothold to pronounce on the conduct of the US in Pakistan.

The court noted that GCHQ conduct is subject to oversight and that the arguments presented were merely a shroud for the true purpose of the proceedings — to condemn the activities of the US in Pakistan — for which permission could not be obtained overtly.

Cases — Government Response to Al-Jedda Decision in the European Court of Human Rights

• Ministry of Justice, 'Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments' (September 2012) p. 27

<<http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf>>

This case has been discussed previously.⁷ The government has now issued the following Response:

In terms of general measures concerning similar violations, the Government notes there are a significant number of legal claims pending domestically from former detainees who were

⁶ *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3728 (Admin), para 13

⁷ Caroline Harvey, 'United Kingdom', 14 *YIHL* (2011) p. 5, available from <www.asser.nl/YIHL/correspondentsreports>..

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interned in Iraq on security grounds during the period of occupation. The Government has entered into settlement negotiations with the claimants' British legal representatives and a significant number of cases have already been settled.

The Government takes the view that the judgment relates to the factual circumstances of the UK's past operations in Iraq and it has no implications for its current operations elsewhere including detention operations in Afghanistan where the legal basis for UK operations is materially different from that which pertained in Iraq.

Cases — Government Response to Al-Skeini Decision in the European Court of Human Rights

☛ Ministry of Justice, 'Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments' (September 2012) p. 29

<<http://www.justice.gov.uk/downloads/publications/policy/moj/responding-human-rights-judgments.pdf>>

This case has been discussed previously.⁸ The government has now issued the following Response:

In March 2010 the Ministry of Defence announced the establishment of the Iraq Historic Allegations Team (IHAT). The IHAT was originally established to investigate many alleged violations of Article 3, arising from mistreatment of individuals by British forces in Iraq during the period March 2003 – July 2009. However, on 26 March 2012, the Minister for the Armed Forces stated that the judgment in this case obliged the authorities to undertake additional investigations concerning Article 2 and a new team was to be created within IHAT for this. The action plan indicates that the new team will investigate the five Al Skeini cases as well as other claims of alleged Article 2 and 3 violations in approximately 170 cases in total.

The IHAT is led by a civilian, who reports to the Provost Marshal (Navy), the head of the Royal Navy Police (RNP), following recent structural changes. It contains a number of investigations and case review teams staffed by a mix of RNP and civilian staff (§14 of the judgment *R (Ali Zaki Mousa) v Secretary of State for Defence & Anr* [2011] EWCA Civ 1334). In the event of the work of the IHAT leading to prosecution or disciplinary proceedings, decisions on whether to prosecute will be taken by the Director of Services Prosecutions under the Armed Forces Act 2006.

The Government takes the view that the Al Skeini judgment relates to the particular circumstances of the past operations in Iraq and it has no implications for its current operations elsewhere, including in Afghanistan, where the legal basis for UK operations is materially different from that which pertained in Iraq.

Legislation — Prisoners of War

☛ *Armed Forces Act 2006*

On 8 March 2012 the new section 371A of the *Armed Forces Act 2006* entered into force by way of Article 3(a) of SI 2012/669.

⁸ *Ibid.*, p. 4.

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As discussed earlier,⁹ section 371A gives Her Majesty the power to issue a Royal Warrant applying the relevant provisions of the *Armed Forces Act 2006* (or provisions equivalent thereto) to prisoners of war.

This is necessary in order to amend the current duality of regimes for prisoners of war and armed forces and thereby bring the outdated 1958 Regulations into line with Articles 82 and 102 of *Geneva Convention Relative to the Treatment of Prisoners of War*.¹⁰

No Royal Warrant has yet been issued.

Government Inquiry — Alleged abuse of Iraqi Detainees by British Armed Forces

☛ Al-Sweady Inquiry

As discussed earlier, this Inquiry is examining allegations of human rights abuses by British soldiers in 2004 of Iraqi nationals (including unlawful killing and mistreatment) near Al-Majar after a firefight known as the Battle of Danny Boy. A date for commencement of oral hearings has been announced as 4 March 2013.

Government Inquiry — Involvement of United Kingdom in Iraq

☛ Iraq War Inquiry

This Inquiry, chaired by Sir John Chilcot, is examining the role of the United Kingdom in Iraq between 2001 and 2009. The Committee is currently considering its report, which will be published in 2013 or later.

Parliamentary Debates — Applicability of the Fourth Geneva Convention to the West Bank, East Jerusalem and the Gaza Strip

☛ *Parliamentary Debates*, House of Lords, Column WA174 (Written Answer), 4 July 2012

Lord Hylton asked:

what procedures are open to [the UK government] and other ratifying states to establish whether the Fourth Geneva Convention applies to the West Bank, East Jerusalem and the Gaza Strip; what uses they have made of such procedures, if any; and whether they intend to invoke articles 49, 71 and 147 in respect of actions by Israel.

The Minister of State, Foreign and Commonwealth Office (Lord Howell of Guildford) replied:

The UK has determined that Israel has obligations as an occupying power with respect to the West Bank, East Jerusalem and the Gaza Strip under applicable international law, including the Fourth Geneva Convention.

In its advisory opinion of 9 July 2004 on the legal consequences arising from the construction of the separation barrier erected by Israel, the International Court of Justice affirmed the applicability of the Fourth Geneva Convention in the Occupied Palestinian Territories (OPTs).

⁹ Caroline Harvey, 'United Kingdom', 14 *YIHL* (2011) p. 1, available from <www.asser.nl/YIHL/correspondentsreports>.

¹⁰ Opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

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The UK has a regular dialogue with the Government of Israel with regard to the implementation of Israel's obligations under international law with respect to the OPTs, including those arising under the Fourth Geneva Convention.

Parliamentary Debates — Obligation to Review New Weapons and Means and Methods of Warfare

☛ *Parliamentary Debates*, House of Commons, Column 48WH, 11 December 2012

The Minister for Defence Equipment, Support and Technology commented that the obligation to review new weapons and means and methods of warfare as contained in Article 36 of Additional Protocol I to the Geneva Conventions applies to unmanned capabilities as well as to manned weapon systems.

Parliamentary Debates — Legality of Israeli Settlements in Palestinian Territories

☛ *Parliamentary Debates*, House of Commons, Column 268-269, 11 December 2012

Mark Hendrick, Member of Parliament for Preston, stated:

It is clear that there is no credible plan on the table to achieve a two-state solution or peace, and I believe that the UK has a responsibility to work with our European partners to create a credible plan and to use all the instruments at our disposal to bring pressure to bear on Israel. The settlements are illegal under international law, specifically article 49 of the fourth Geneva convention and United Nations Security Council resolutions 242 and 338. The United Nations, the International Court of Justice and the overwhelming majority of states share this view.

Early Day Motion — Munitions

☛ House of Commons, 'Depleted Uranium Munitions' (Early Day Motion 629 tabled on 24 October 2012)

<<http://www.parliament.uk/edm/2012-13/629>>

The following motion on Depleted Uranium Munitions (primary sponsor: Katy Clark; sponsors: Peter Bottomley, Michael Connarty, Julian Huppert, John McDonnell and Alan Meale) received 58 signatures:

That this House notes that the British Army maintains depleted uranium (DU) munitions within its arsenal and that 1.9 tonnes of DU rounds were fired by UK forces during Operation Telic in Iraq; recognises continuing media reports of increased rates of certain cancers and congenital malformations in Iraq; acknowledges that the UN Environment Programme has repeatedly called for a precautionary approach to DU use after field investigations in the Balkans and Iraq; recalls that the British Royal Society and World Health Organisation both recommend precautionary measures to reduce post-conflict DU risks; recalls the Government's policy on radioactive discharges which considers that the unnecessary introduction of radioactivity into the environment is undesirable; further notes that precautionary guidelines are in place for British troops to reduce their likelihood of DU exposure and that DU is not used in live firing training on British soil; and calls on the

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Government to support the resolution to be put before the UN General Assembly this autumn calling on states to take a precautionary approach to the use of DU.

Early Day Motion — Drones

• House of Commons, 'Drones' (Early Day Motion 661 tabled on 31 October 2012)

<<http://www.parliament.uk/edm/2012-13/661>>

The following motion on drones (primary sponsor: Tom Watson; sponsors: David Anderson, George Galloway, John Hemming, Caroline Lucas and Sandra Osborne) received 23 signatures:

That this House welcomes the new All Party Parliamentary Group on Drones, also known as unmanned aerial vehicles; notes that the use of drones by the UK, in Afghanistan and elsewhere, is an issue of concern; draws attention to allegations that the UK is sharing information with other states for the purposes of targeted killings using drones; further notes the human rights questions which arise from the direct and indirect use of drones by the UK; further notes the need for increased transparency and accountability on this use; and calls on the Government to work with the All Party Parliamentary Group on this issue.'

CAROLINE HARVEY