LORDS' DEBATE ON 11 JULY 4.30PM
ON CLAUSES 6 AND 7 OF THE JUSTICE AND SECURITY BILL

NOTE

---

1. The Lords sitting in a committee of the whole house debated amendments to the Justice and Security Bill clauses 6 and 7.

2. The amendments proposed were probing amendments. All the amendments that were debated were withdrawn upon the Minister's assurances that further reviews would be conducted over the summer.

3. The speeches on different issues were not necessarily grouped around the proposed amendments so I have grouped them in order of relevance below.

Amendments 39 and 40

4. There were two main amendments proposed. The first from L. Faulks, L. Lester, L. Pannick and L. Macdonald were amendments 39 and 40.

5. The amendments go together. Amendment 39 inserts a clause before clause 6 which codifies PII.

6. Amendment 40 replaces clause 6 entirely. Amendment 40 allows CMPs but only in relation to any residuary evidence that has been successfully excluded by a PII application and that it is essential for the court to consider.

7. Amendment 40 further provides that any party may apply for a CMP in relation to that residuary category of evidence. The court may grant the application if it considers that:

    a. A CMP is the only way in which the issues in the case can be determined, and

b. The public interest in having the issues in the case determined outweighs the unfairness of either the claim or the defence being struck out.

8. Liberty supports these amendments.

9. The amendments were debated by L. Carlisle, L. Lester, L. Faulks, L. Pannick, L. Woolf, L. Falconer, B. Berridge and B. Manningham-Buller. The distinction was drawn between PII and a CMP which was an important difference, namely that although with both the evidence is considered by a Judge without the other party present, if the PII application is successful that evidence is excluded so that the trial judge does not take it into account. In a CMP trial on the other hand the judge takes into account the secret evidence when reaching a decision on the substantive issues in the case. This is evidence on which his judgment is based and which has not been tested.

10. L. Lester said it was David Anderson QC's idea to put PII first before CMP. The USA he said were much more concerned with the Norwich Pharmacol issue than CMP. The reason for this is that with NP if the judge orders disclosure the evidence must be disclosed, whereas with a CMP the party can always settle the case or withdraw if they do not wish to disclose the evidence.

11. There was much discussion about whether the proposal to put PII first before a CMP was permitted was too inflexible. There discussion as to whether or not it was a good idea to codify PII and whether that would remove its ability to develop as it had done so far under the common law.

12. L. Pannick said the reason for putting PII first was that a CMP should be a last resort. PII maintains secrecy as effectively as a CMP. PII does not enable a judge to rely on material that is only seen by one party. In answer to L Falconer's point on rigidity he said that no one could point to any case of PII where a judge had disclosed anything the security services would not have wanted to be disclosed. There had been no appeals by security services from any disclosure decisions. Even if a public authority loses a PII application they can settle the case and not disclose. He was prepared to accept that there ought to be CMPs as this result was not satisfactory for the public authority in having to settle these cases. Amendment 39 was an attempt to codify the common law position. PII does not require disclosure.

13. L. Wallace (Minister) said clause 6(2) was just intended to mean that material that would have to be disclosed under the usual rules.

14. L. Carlisle said that it was fundamental to the overriding objective of fairness in litigation that any party should be able to rely on a CMP. He repeatedly said that the special advocates were more effective than they thought they were. He based this on his review of control order cases. He said that CMPs should be rarely used and that the decision that determines how the case progresses should be that of the judge.

15. L. Woolf said that there was a need to keep the flexibility of PII and it should not be codified. He thought it was dangerous to put PII and CMPs into separate water tight containers and that the judge should have both options available to him. He thought the amendments would also lead to a straight jacket and for that reason he preferred L.Thomas' amendments. He said the bill was not clear in its current form.

16. B. Berridge said that the amendments meant that CMPs would only be available for the residue of undisclosed information. She said the SAs had now been invited to go in and look at the three cases that David Anderson QC had inspected so that there would be more than one view on the need for CMPs.

17. L. Falconer said that the proposed CMPs were significantly different from the existing CMPs which were all related to protecting the public from terrorist activity whereas in civil proceedings it was about resolving a dispute between parties. He said the government had not made out its case for CMPs. He said if the need for change was made out then the government's solution was flawed. He said amendments 39 and 40 did not quite solve the problem and that the judge should have the option to choose between PII and CMP. He said Al Rawi said CMPs were not available at common law absent agreement of the parties so there would need to be statutory change to introduce them.

18. L. Wallace said that all apart from L. Falconer accepted that there were a small number of cases where CMP was needed. He said amendment 39 was a significant change to the common law and was not needed. The government had ruled out statutory PII in the green paper. Reform was needed for CMPs as Al Rawi said. He did not accept the proposed amendments in the way they set out that PII and CMP should interact.

19. There was debate about whether clause 6(5) that requires the SOS to consider PII was sufficient to make him really consider it. L. Falconer said it was just a tick box requirement. L. Wallace said that this was a statutory duty and the SOS would be legally obliged to conduct a proper consideration or

they would be judicially reviewed. L. Lester intervened to say that it was not desirable that the bill should encourage satellite litigation in this way. L. Wallace did not answer this point and said that it had always been for ministers to assert PII. He said it was not necessary to exhaust PII before CMP could be used.

20. L. Pannick said that David Anderson and said that CMP was a useful weapon but it should be for the judge to decide when it was used. L. Wallace replied by pointing out that it was L.Pannick's Constitution Committee that had said it was not necessary to exhaust PII.

21. L. Wallace said that CMP was a similar process to PII. In a CMP the first stage was to have the CMP granted, but the second stage required that each document was examined and redacted if possible and only if this were not possible would CMP be used for each bit of material on which a decision had been made. He said it was inconceivable that a judge would allow CMP if a SOS was cynically choosing it over PII for litigation advantage. All the evidence good and bad would be before the court so the judge would know if one procedure was being preferred over another for tactical reasons.

22. L. Thomas replied that the SOS is not a judge and would choose the option of most benefit to him. He said the bill was a straight jacket where the minister dictated the procedure.

23. L. Wallace replied that CMP under the bill was a two stage process where each piece of evidence would be looked at by the judge. He said he was willing to engage to make the bill address the objective of ensuring that the procedure was fair and that material was available where possible. There was time to do this before report stage.

24. L. Lester asked if L. Wallace was saying that at stage 1 the judge had discretion to order PII or CMP and if not why not.

25. L. Wallace said that it was a two stage test. Once through the stage 1 gateway where a CMP was ordered, that did not mean that all the evidence would go in to the CMP.

26. L. Falconer said he would help drafting an amendment. He said if L. Wallace was saying that the judge makes the decision then the bill needs redrafting because at present it says it must be granted if SOS applies.

27. L. Faulkes (who had proposed the amendments) said that he would withdraw them on the basis that the probing debate had led to clarification from the minister and an acceptance that there was room for improvement. He acknowledged that the SAs did not accept CMPs should be introduced in any form. He said although the statutory form of PII looked formulaic it arose out of the system of common law that had checks and balances in it and was a well established principle. He said it was an important question that PII should be considered and that should entail a JR. Amendment 39 was withdrawn and amendment 40 was not moved.

Amendments 41 and 50

28. These amendments were proposed by L. Thomas. The amendments change clause 6 to allow any party to apply for a CMP.

29. Debate was had as to the circumstances in which a claimant might want to apply for a CMP. An example was given of where a habeas corpus case in the USA needed evidence to show his accuser (Binyam Mohammed) accused him under torture. Naturalisation refusal cases were also cited.

30. L. Thomas said that PII can exclude evidence useful to a claimant and that they may prefer CMP to PII.

Amendment 62

31. Proposed by L. Pannick and L. Lester – amends clause 6 to require sufficient information to be given to enable the excluded party to give effective instructions to his legal representative and special advocate.

32. There was debate and much concern raised about the restriction on evidence being given to special advocates. There was consensus that there was need for improvement in the way SAs take instructions.

Notes made by Carla Revere (Research Assistant to Emily Thornberry MP, Shadow Attorney General).

The UKHRB is grateful to both Ms Revere and the Shadow AG for forwarding these notes and giving permission for us to publish them on the blog. The full debate is available from Hansard at:
http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120711-0001.htm#12071152000230