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THE JUSTICE AND SECURITY BILL

TUESDAY 19 JUNE 2012

David Anderson QC

Evidence heard in Public

Questions 1 - 26

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Oral Evidence

Taken before the Joint Committee on Human Rights

on Tuesday 19 June 2012

Members present:

Dr Hywel Francis (Chair)
Baroness Berridge
Mike Crockart
Lord Faulks
Baroness Kennedy of The Shaws
Baroness Lister of Burtersett
Lord Lester of Herne Hill
Baroness O'Loan
Dominic Raab
Virendra Sharma
Richard Shepherd

Examination of Witness

David Anderson QC, Independent Reviewer of Terrorism Legislation, examined.

Q1 Chair: Order, order. Welcome to the Joint Committee on Human Rights and this oral evidence session on the Justice and Security Bill. At the outset I should announce that the session will end shortly before 3 pm in order that Peers who are on the Committee may be present at the Second Reading of the Bill. For the record, please introduce yourself.

David Anderson QC: I am David Anderson, the independent reviewer of terrorism legislation.

Q2 Chair: Thank you very much. Before we ask you detailed questions about specific aspects of the Bill, perhaps you could outline briefly and in broad terms whether there is anything that you welcome in the Bill and also whether there is anything that particularly concerns you.

David Anderson QC: There are some things that I welcome. The Bill is more modest in its scope than the Green Paper. In particular, it is mostly limited to matters of national security,

which is an improvement on the previous broad category of sensitive information. Inquests have been removed from its scope, as you know. The exclusion of intercept evidence will not apply in closed material procedures. We have each recommended that, and I welcome it. I see from the accompanying documents that the closed judgment database is well advanced.

All that said, there remain two distinct elements of the proposal with which I think you are chiefly concerned. One is the extension of the closed material procedure. The other is the limitation on the Norwich Pharmacal jurisdiction. In a nutshell, my position on each of those elements is the same. They address what I consider to be a genuine problem, but they do so in a way that is disproportionate. There is an element of overkill that I have no doubt will be the subject of debate, both in relation to Clauses 6 and 7 on closed material procedures, and to Clause 13 on Norwich Pharmacal. On Norwich Pharmacal, I propose to test that theory in the United States. I am going there tomorrow, partly to talk to the relevant people about intelligence sharing and about the impact on them of the Binyam Mohamed judgment.

Q3 Mr Raab: Mr Anderson, you said in relation to the extension of CMP that you were satisfied that it was there to deal with a problem. Do you think at a general level that the problem is based on operational experience to date having produced evidence, or on an extrapolation of future trends in a more speculative and hypothetical sense?

David Anderson QC: I hope I am not presuming, but I think that probably we all agree that there is a problem to some extent. I was shown seven cases on 14 March. Three were naturalisation and exclusion judicial reviews. It was made clear to me that that category of case was the larger of the two categories that it was envisaged would be affected by this proposal. I think that we have each suggested that closed material procedures may be justified in such cases. We have each gone further and suggested that they should be brought

within the umbrella of SIAC, which already hears a lot of other immigration cases that could be held in accordance with a closed material procedure. That is the first part of the answer. The second and I suspect more controversial element relates to civil actions that are liable to concern the activities of the security and intelligence services. You asked whether we were looking at existing actions or simply at future actions. All I can say—I worded this very carefully in my supplementary memorandum—is that I was introduced to three of those cases. I did not just see the evidence in those cases but was privy to the advice that counsel gave in them. That persuaded me that in some cases there is already a problem. It would be very nice to believe that the number of cases is very small and that they will soon go away because any indecent enthusiasm we may have had for going along with legal excesses in the first decade of the century is now long in the past. I suspect that that is not the case and that we are already beginning to see the start of a second wave of cases concerning alleged complicity in the targeting of drones. I can only imagine that those cases may raise similar sorts of issues. So I do not suggest that the number of cases is large. I was given only an unscientific sample of three to look at, but that persuaded me that there was a problem.

Q4 Baroness O'Loan: Do you see any reason why some special advocates should not be invited by the Government to view the material that you examined in those three cases to see if they agree with you that the cases can be fairly determined only by a CMP?

David Anderson QC: They certainly could be. That would be a matter for the Government if they wished to permit that. The thing to remember about special advocates is that, first, they are extremely trustworthy members of the Bar—they have all been security cleared—but also that they are advocates, just as counsel for the Home Secretary, whom I talked to, were advocates. They are retained by the solicitors for the people who are subject to control orders, TPIMs, damages actions or whatever, in order to promote their case. So if one had a situation in which the special advocate was there and counsel for the Home Office

was there, too, it would be an adversarial proceeding. One would not set up the special advocate to be the judge. It would be for a special advocate to bring out those aspects of what the Home Secretary said that did not seem to be right. Certainly one could imagine such an adversarial way of doing things. If one is going down that route, the most reliable way of doing it is with a real case in front of a real judge.

We saw that in the AHK case in front of Mr Justice Ouseley, which I think I mentioned when I came to see you in March. That was a naturalisation and exclusion case on judicial review. The judge was asked to give his opinion on whether these cases could be fairly tried without a closed material procedure. His opinion, when he had heard detailed argument and thought about the matter for some weeks, was that, “a CMP is the only realistic alternative to the Claimants simply losing; the cases in other language become untriable”. The judge is neutral, impartial and in possession of all the facts. That was his conclusion in that case.

I accept that we do not have a similar conclusion that I am aware of in a civil action such as a damages claim, although my understanding is that in one of the drone cases Mr Justice Mitting indicated that there should be a two-day hearing in order to decide whether the case could be fairly tried without a closed material procedure. Last I heard that had not been set down—I do not know when it is likely to be argued. I would have thought that when it is, the judgment—like that of Mr Justice Ouseley in the naturalisation and exclusion field—is likely to be the best evidence of whether there is a problem. It will be better than my evidence and better, perhaps, than the evidence of special advocates who, like me, have already taken a position on some of these issues.

Q5 Baroness Berridge: Are you aware of any cases in which the Government have made a *Carnduff v Rock* application to strike out the claims because the national security material is so central to the claim that they cannot defend themselves without damaging disclosure of material?

David Anderson QC: No, I am not. I think I can understand why that is, certainly in relation to the naturalisation and exclusion judicial reviews. As you will know from the AHK judgment, the line the Government took on those cases was to argue that they were not covered by Al Rawi and that a closed material procedure was permissible even without a specific statute. That was the way they argued it. They have therefore not seen the need to apply for strike-out. I am not aware of a damages case in which the Government have applied for strike-out, either, although I refer you to what Mr Justice Mitting decided to do in the drones case, which was effectively on his own initiative to have a hearing on the issue of whether the case could be fairly tried. Why that is, I do not know. I would have thought that the Government might be as resistant as anybody to seeking to dispose of a case in circumstances where the court was not allowed to look at any of the evidence or come to any conclusion, which would be how it would work if there was a strike-out. Certainly in terms of perception—I have read material about secret justice and how terrible it is to sweep material into secret courts where the public cannot come in—of course closed material procedures are far from ideal, but at least the material gets an airing in a way that it does not when a strike-out application is made and succeeds.

Q6 Mr Sharma: Does Part 2 of the Bill contain the sorts of conditions that you had in mind to ensure that a CMP is resorted to only in cases of strict necessity?

David Anderson QC: How shall I be diplomatic about this? No, it does not. I said that I thought that a CMP could be tolerable in these sorts of cases—but only if certain conditions were satisfied. One was that a CMP should be a last resort to avoid cases being untriable, as Lord Kerr put it in the Al Rawi case. The second was that the decision to trigger a CMP must be for the court and not for the Government. I was thinking there of what Lord Hope said last year in the Supreme Court in the Tariq case: namely, that it was important that the decision should be taken by someone who was both impartial and independent of the

Executive. Thirdly, I said that intercept evidence should be admissible in those closed material proceedings, as it is in all other closed material proceedings. On that I find comfort in Schedule 2 to the Bill. The fourth thing I said was that continuing efforts should be made to improve the closed material procedure, not least by setting up a committee under the chairmanship of a High Court judge to look at some of the ideas that special advocates come up with. I would not have expected that in the Bill, but I am not aware of any movement at this stage in that direction.

Q7 Lord Lester of Herne Hill: One of the ideas you put forward earlier was that one should try to have public interest immunity first as the normal procedure, with judicial balancing as explained by Lord Woolf in *Wiley*, and that the judge should then go on, having decided whether that is an appropriate procedure, to consider CMP. The Bill seems in Clause 6(5) to give that task entirely to the Minister, who has to think about that balancing. Is it your evidence, in accordance with what you said before, that the judge rather than the Minister should do the initial PII balancing exercise before resorting to the CMP procedure?

David Anderson QC: Yes. I and many others said that the judge should have the last word. In fairness to the Government, under the procedure devised in the Bill the judge does have the last word. The only difficulty is that that word is dictated to the judge by the Secretary of State. First, the judge can make a decision only if the Secretary of State makes an application and has no other jurisdiction to consider it. Secondly, when the judge does come to consider it, it is not for him to weigh up the relative merits of PII or CMP, or to decide what the fairest way would be to decide the case. 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. The word “must” features in Clause 6. The judge “must” order a closed material procedure. 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.

Q8 Mr Sharma: You have partly answered my question, but do you agree with the concerns expressed by special advocates about the extent to which the judge's hands are tied by Clause 6, which requires the judge to accede to the Secretary of State's application if the court considers that the proceedings will involve the disclosure of material that will be damaging to national security?

David Anderson QC: Yes, I think I agree with every word—and not only because they are generous enough to quote me in quite a few of their footnotes. The consequence in the way things will be done, if the clause becomes law, is that some cases will be tried by a closed material procedure that could have been fairly tried under PII. It may also be that some cases may be struck out that could more fairly have been tried by a closed material procedure. These would be cases where the Government, for whatever reason, chose not to apply for a closed material procedure. Of course, the judges have plenty of practice with terrorism legislation in smoothing the rough edges and making it operate as fairly as they can. But I would say that Clauses 6 and 7 are a pretty unpromising start for that exercise.

Q9 Baroness Lister of Burtersett: The special advocates in their note to us were very concerned about there being no definition of “national security”. I wonder whether you have a view on that.

David Anderson QC: I am not immediately aware of any statute in which “national security” is defined. It may be one of those phrases for which one has to trust the good sense of judges to come up with a meaning. But I cannot pretend it is something that I have looked into in detail. If there is a well worn, well used definition that works in other contexts, I agree that it would make sense to apply it here.

Q10 Baroness Kennedy of The Shaws: I wanted to ask about the old human rights principle, equality of arms. Do you think that the Bill treats the parties to civil litigation on an equal basis, or is there a privileging of the Government?

David Anderson QC: No, it does not treat them on an equivalent basis. I almost wonder if there was an element of left hand and right hand here. I looked just before I came in at the Government's response to this Committee's report of last April. In that response the Government correctly cited the judgment of Lord Clarke in *Al Rawi*, which stated: "A closed procedure might also be necessary in a case in which it is the non-state party which wishes to rely upon the material which would otherwise be subject to PII in order to defend itself in some way against the state". Similarly, Mr Justice Ouseley in the recent *AHK* case said: "I do not see that this procedure should only be available to the advantage of one party". So that seemed uncontroversial within the judiciary, and perhaps even within government. Yet under Clause 6 it is only the Secretary of State who may invite the court to embark on a closed material procedure. I am a little baffled by this. It is very much part of the Government's justification for the Green Paper and the Bill that a closed material procedure can achieve fairness for individuals whose claims would otherwise have been struck out. I do not understand where the incentive is for the Government to request a closed material procedure if they reckon that in the absence of such a procedure they might win a strike-out. As one sees from the judgment in *AHK*, it is not a fanciful possibility. Mr Justice Ouseley said in that case that if there is no closed material procedure, some of these cases will be struck out.

Q11 Lord Lester of Herne Hill: I wonder whether the Government might say that, if an individual wanted to apply for CMP and told the Government, they would have no alternative but to make the application on that person's behalf, even though it was against

the their interests in the litigation. Otherwise, they would clearly be judicially reviewed. I agreed with what you said, but that might be an answer that they would give.

David Anderson QC: It might be, and it might be very useful to have that answer in a form where it could be deployed in court. That goes back to what I was saying: judges have to be trusted. They have a very good record in this area of taking unclear or unpromising legislation and crafting out of it a procedure that seems to work fairly in practice. That is not to say that that could not be done, perhaps in exactly the way that Lord Lester suggested. But if that is what one is aiming at, it is a strange place to begin.

Q12 Baroness Kennedy of The Shaws: Tom Hickman expressed concerns that Part 2 of the Bill does nothing to advance the fairness rationale, which of course was the justification in the Green Paper for the extension of these proceedings. I wonder whether you agree with him.

David Anderson QC: I am not sure whether I agree with every word: I would have to read his paper again. But I have read his blog, and very good it was, too. No—subject to ingenious interpretation of the sort suggested by Lord Lester, this plainly does not guarantee equality of arms or the equal treatment of the two parties to litigation.

Q13 Baroness Kennedy of The Shaws: On the equality of arms issue, there is a problem. I have done these cases. There is the difficulty that the special advocate is presented with a problem, for example of intercept material. I have done cases where the intercept material on the face of it seems incriminating. Then when you know facts about the material that are presented to you by your client, you discover that a very different interpretation can be placed on it that would not be available to a special advocate who did not have the opportunity of discussion with the defendant. I will give a good example. I represented somebody who was acquitted but who had been considered to be present during very incriminating conversations. It was only because of his contention that he was

not in the room that we had the tapes listened to. You could hear the door opening and closing, which showed that he had left the room. That is the sort of thing that would not be possible to test—so from practical experience one's concerns about fairness are very alive.

David Anderson QC: I would agree. I never sought to describe special advocate procedures as perfectly fair. I think that few people who have participated in them would do so. For my last report on control orders—a sort of epitaph for control orders that was published in March—I had found another example by chance in the law reports. It was of somebody who had not been present first time around, not because it was a closed material procedure but because he was not a party to the case. Evidence was given that this person was seen holding a gun in a photograph. The judge said that the photograph was from 2004. It was said to be compelling evidence of this person's involvement in terrorism. Subsequently the person was put on criminal trial. He had the opportunity to look at the photograph and explain that it had been taken in 2002, on a family holiday. The jury was directed that this had nothing whatever to do with terrorism and was indeed a holiday photograph taken two years earlier. That is another example of what you say, which is that without the ability to comment on every detail of all the evidence, you cannot guarantee a completely fair trial. That is what Lord Kerr said in *Al Rawi*. I would say that there is no perfectly fair solution to this conundrum. As long as you are going to have a case in which national security evidence is central, there is no way of deploying it all in open court. You have an unpalatable choice. Either you have to do without parts of the case—to the extent that you can do that under PII—or you have to have everything in the case, including intercept evidence that would not normally be admissible in court, but withhold some of it from the person whose interests are directly affected. It is not a nice choice, but ultimately you have to try to make it work one way or the other.

Q14 Baroness Berridge: We are trying delicately to find a balance and what is least unjust. We might have cases that are untriable, which is not ideal, or we may have situations that end up behind closed doors. I want to take us out of each individual case and think about how this will be communicated to the public in the blogosphere or Twittersphere. People will appear with judgments in saturated material cases that say very little, as far as I can see. In other situations we may not have a trial at all. In that context, we have to communicate this and retain public confidence. Can you help me with that balance? How do we retain public confidence when we communicate these cases?

David Anderson QC: I agree that public confidence is terribly important. I certainly do not claim any expertise in that direction that the Committee does not have. I am certainly no expert on how you sell legislation or ideas to people. In the context of the debate, one reads a lot about secrets being swept under the carpet. To my mind that submission has more resonance when one thinks about a case that is simply not examined at all because it is deemed untriable than one in which a judge will look at absolutely everything and, first, show as much as possible to the person affected, which is absolutely vital, and finally, come to a judgment—as much as possible of which, including any adverse conclusions that the judge might draw in relation to the security and intelligence services or anybody else, will be open.

Q15 Baroness Berridge: So you would balance the potential of a judgment in the situation that Baroness Kennedy outlined against no judgment at all—which is what a strike-out would be?

David Anderson QC: As you know, the way I have always approached the Bill—perhaps it is because I am a barrister, but I am certainly not the only one who takes this view—is that you have to trust the judges. We have terribly good judges. They are very good at balancing factors and deciding on the fairest way to decide a case. The way I have approached the Bill is that it is not to be resisted as a matter of principle. The closed material procedure is a

weapon that could usefully be added to a judge's armoury, but it should be for the judge to decide on the fairest way to dispose of a case. Strike-out seems not at all fair. Public interest immunity is in a sense the ideal because at least everyone can come to court, and the person concerned knows everything about the evidence that is deployed against them. But you could argue that that is not wholly fair, either, because the case that is argued ends up being slightly different from the case as it exists because there is a whole part of it that everyone has to pretend is not there because it cannot be disclosed. So it is a difficult exercise. I am certainly not going to sit here and declare in advance that one of the three solutions is always going to be more just than the others, because I do not think that it is. I think the sensible thing is to let the judges make the decision, because they are very good at knowing what is fair and what is not.

Q16 Lord Lester of Herne Hill: Having taken the case of Binyam Mohamed to bits, in terms of public confidence what strikes me as bizarre is that after the American federal judge, in a very long judgment, had revealed in public the ill-treatment amounting to torture of Binyam Mohamed, it was still the position taken in our court that even a short version of evidence that had already been made public in the United States through a US court should not be made public. The second odd thing was that the evidence in that case was that the intelligence services on both sides of the Atlantic recognise that if a judge wishes to order disclosure in the interests of justice, it is well recognised by the intelligence service. When you visit the land of the free tomorrow and meet our allies, perhaps you could put that to them as part of your conversations. I cannot believe that the United States, which is a proud democracy, will take a different position from that taken in the case itself.

David Anderson QC: I certainly propose to make that point. Another point that I propose to make is that to the best of my knowledge no United Kingdom court has ever let anything remotely secret out into the open in violation of the control principle. In relation to the

issue that you raise, it was indeed extraordinary. One had paragraphs that were already in the public domain but about which it was none the less said on the highest authority from the United States that if released in the United Kingdom they would or could damage the intelligence relationship. There were witness statements. A minute was disclosed in which the Secretary of State, Hillary Clinton, said that it would damage that relationship. The CIA had expressed itself in similar terms. The Divisional Court said that it could not see any rational basis for that. I am not sure how that went down in the United States. Right or wrong, it seems that two or three years later, the problems persist. The Lord Chief Justice perhaps put his finger on it when he discussed it in the Court of Appeal. He stated in paragraph 53 that, “the issue is the control principle rather than the confidentiality of any information within the redacted paragraphs themselves”. He said that by the end the case was not about protecting secret material—because it was not secret—but about ensuring that the control principle was upheld. What concerned the Americans more than the specific paragraphs in that case was the idea that an English court could say that something the Secretary of State had declared about the intelligence relationship was without rational basis, and proceed on the basis that they were going to disclose it anyway. In other words, it was the principle rather than the facts of the case that alarmed them.

Q17 Baroness O’Loan: Mr Anderson, in your comment on the Green Paper you said that it was preferable that the option of a CMP, for all its inadequacies, should exist. Given the fact that you have identified correctly the judicial integrity that has prevented any lapses of national security; given that you have also identified the fact that there is an impetus for government to choose not to put material into a closed material procedure where it would assist the claimant; and given that in some of these cases we may even be talking about the possibility of a death sentence, do you think that there is any way in which one could introduce some kind of Wiley balancing procedure into a closed material procedure?

David Anderson QC: Well, that is an interesting and difficult question. One area in which a sort of Wiley balance comes into a closed material procedure is when you look at whether you can give a gist of what has been said to the individual in question. That is not exactly a public interest immunity exercise because you do not have to confront anything as extreme as showing a person the secret evidence against them that is being relied on. But you have to decide whether the interests of fairness require that they should at least know enough about the evidence to go and have a word with their special advocate, as Baroness Kennedy suggested, which might give an answer to the evidence that has been adduced against them. That is an issue that the Bill ducks. I must say I was one of those who encouraged the Government to duck the issue in legislation, partly because I did not relish what I thought they would probably say if they did start to legislate on the question of gisting. I am conscious as well that it is being litigated at the moment. The Court of Appeal and, I think, the Employment Appeal Tribunal in Tariq, said that there is an obligation to give people the gist in employment proceedings and presumably also in civil proceedings. Eight out of nine judges in the Supreme Court went the other way, and the case is now in Strasbourg. Goodness knows what they will say. It would not be unprecedented for them to follow the Court of Appeal rather than the Supreme Court. I suspect that that is something that the judges will have to work out—how far the Wiley balance is introduced through the device of gisting. It may be that Tariq is the case through which they can do it.

Q18 Baroness Lister of Burtersett: This follows on from what you were talking about, and you may have answered it. In the past you emphasised the importance of gisting. As a matter of basic fairness, do you agree with those who argue that there should be a general obligation in a civil litigation CMP to disclose sufficient information to the excluded party to enable them to give effective instruction to their special advocate?

David Anderson QC: Since it is under litigation—not that probably anyone would pay attention to my views anyway—I will not express a direct answer to that. All I can say is that I can see the great attractions from a policy point of view of requiring gisting in all types of case. I know, through talking to open advocates, for example in SIAC, something of how it must feel when your client is confronted with a case about which they know almost nothing. That is the case in some of these SIAC cases.

The other thing that emboldens me is the whole saga of control orders, which I have looked at carefully in the exercise of my functions. As you know, the issue of whether a gist was required in a control order case went to the Supreme Court. It applied a judgment from Strasbourg in the case of *A v United Kingdom*. It was not a control order case but a *Belmarsh* case, but it said that the principles were the same and that in a control order case you had to give people enough information to allow them properly to instruct their special advocate. I should add that the Supreme Court—the House of Lords as it was in those days—did so with some reluctance, predicting in some quarters the demise of the control order regime. They said it might not be possible to keep it going. Well, in a sense their bluff was called because what happened after that was that two or three control orders had to be abandoned because the Government simply did not feel that they could give even a gist without jeopardising national security. It may be that other control orders were not made that could have been made. However, the control order system has survived.

If you can give the gist to these extremely dangerous people who are right at the top end of risk when it comes to terrorism, it is tempting at least from a policy perspective to say, “Well, why should we not give the gist to people who might be beginning a civil claim, or people who might have been sacked or refused promotion for security vetting reasons?” Of course, it is not up to the courts to decide policy. They are deciding whether Article 6 applies and looking at its requirements, and we will have to see what they say in Strasbourg.

On the thrust of your question, I could not agree more that the more information one can give the individual, the better it is from the point of view of the fairness of a closed material procedure.

Q19 Lord Faulks: Clause 13 provides for an absolute prohibition on the disclosure of material, on the Norwich Pharmacal jurisdiction. I think that probably you have already answered this question. Do you think that that is proportionate as a response to the undoubted problem that has been identified by the Government?

David Anderson QC: I agree that there is a problem, and it is very simply stated. If you share your most important secrets with an ally who uses them in ways that you are not happy with, it is likely that you will be more cautious about sharing information with them in future. You might say that that speaks in favour of an unconditional exclusion. Against that, as Lord Lester pointed out, my understanding from case law is that it has never been possible to give an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that it is necessary and in the interests of justice to do so. That was stated, in terms, by the Court of Appeal in paragraph 46. I know that there was evidence also before the Divisional Court from people who knew the scene in America and who were able to say, well, even British secrets are not guaranteed to be protected in America, where there is the possibility of an application under the federal Freedom of Information Act, from which foreign-sourced intelligence is not excluded.

So what I suggested when I first made submissions to the Committee was that a complete exclusion of all intelligence services material was disproportionate, and that in order to reassure our friends, principally in the United States, it might be possible to introduce a system of ministerial certificates whereby the Minister would certify that specific information could not be disclosed for reasons of national security or perhaps international relations, and that only on judicial review grounds could that certificate be set aside. I know that this

Committee—perhaps, if I may say so, also motivated by the wish to reassure, because that word appears in your report—made an alternative suggestion very much along the same lines. It was that the Norwich Pharmacal law, as explained by the Court of Appeal in *Binyam Mohamed*, should be codified in a way that would satisfy everybody. It seems not to have satisfied everybody. I will ask people about this when I go to America. It is only when I have those answers that I will form my own view on what would be acceptable. Surely at least in one respect what is proposed is disproportionate, because it applies to all information within the possession of the intelligence agencies. Presumably that includes the bill from Tesco for their sandwiches, to which no security importance whatever attaches. It is very difficult to see how that could be proportionate, even if it does turn out to be necessary to have some sort of blanket exclusion, as suggested in the Bill.

Q20 Baroness Kennedy of The Shaws: I once did a case in which that kind of material was objected to on the basis that it would be possible to work out from the use of lavatory rolls how many people were in a particular operation.

David Anderson QC: It is because they are so ingenious that they look after us so well.

Q21 Lord Faulks: If an order is made that results in an obligation to disclose information, the Government do not have any choice, whereas they do have a choice under CMPs or the PII. They can say: we will settle the case. Do you think that that is a relevant factor in the approach to this legislation?

David Anderson QC: Yes, I entirely agree. In relation to closed material procedures, I hope that our intelligence partners and friends are reassured that whatever we decide about our internal procedures for dealing with these cases will not have the effect of forcing courts to disclose secrets that are protected under the control principle or anything of that kind. If I may say so, this Committee rightly identified that under the closed material procedure the issue is fairness. The reason that I am very cautious about Norwich Pharmacal is that there is

an issue. It is possible and conceivable that if a decision went the wrong way, secret information might be disclosed into a forum that it should not be disclosed into. That is why I have been quite cautious in what I have said about that.

Q22 Lord Lester of Herne Hill: It seems that Clause 13 goes further than the previous Government's position on the issue that we are talking about. If we are trying to make it a non-absolute affair, two possibilities occur. One would be at least to make sure that it did not cover all information but only information received in confidence from foreign intelligence services. Secondly, there must be an ability to balance the interests of national security against any competing public interest. Those are the suggested ways of doing it. What is your comment on them?

David Anderson QC: Well, if they could be achieved, I suggest that they should be. I think that this may have been debated. I suspect that there may be difficulties in distinguishing between intelligence derived from foreign sources and domestically derived intelligence, simply because in some respects intelligence gathering is so closely co-ordinated with that of other countries that it can be very difficult to disentangle the two. If you start looking at an intelligence product and asking whether it was derived in whole or in part from foreign-sourced intelligence, you will find that the answer is very often yes. It may even be that on the intelligence side of the debate there could be nervousness about having separate regimes for foreign-sourced intelligence and domestically sourced intelligence simply because by one's choice of regime one might signal to people who should not necessarily know whether we had the capability ourselves or whether we have had to rely on other people.

Q23 Lord Lester of Herne Hill: On the effect of Clause 13, Binyam Mohamed faced a capital charge. The then Foreign Secretary stated in his first public interest immunity certificate that if he were being tried by the military commission, he might well have come to a different conclusion, namely that the exculpatory intelligence material should be disclosed

in order for him to have a fair trial. My reading of Clause 13 is that even in that situation—a capital charge in the United States—it would be impossible for a judge to order disclosure. That is why it seems to be regressive compared with the previous Government. Do you agree?

David Anderson QC: I think that that is undoubtedly right—and not just in relation to the judgment in Binyam Mohamed. The American authorities were involved at a very high level right through the period when the case was being decided. They were always being called on to say this, that or the other, and it sensitised them to the issue. I would have hoped that the judgment of the Court of Appeal, and in particular the judgment of the Lord Chief Justice in early 2010, which set out very clearly just how seriously we take the control principle, just how rarely it would be set aside and just how inconceivable it is that any of our judges would ever disclose anything of real operational secrecy, would have been sufficient to provide the reassurance that the Committee was seeking. If that is not the case, I want to know why not, and what would be acceptable, falling short of the blanket ban that we currently have in Clause 13.

Q24 Baroness Berridge: My question relates back to closed material procedures. I know that inquests are no longer part of this, but there were a number of inquests that involved very sensitive information. I refer not just to 7/7 but to a weapons inspector, Terry Jupp, who tragically killed himself while developing weapons. Why is the Government's position that CMPs are needed in civil proceedings if it has been accepted that PII can do the job in those circumstances in inquests?

David Anderson QC: I suspect that we may be getting into politics here, which all of you are more expert at than I am.

Q25 Baroness Berridge: In terms of things to fear, is there anything in those situations that would distinguish them? I have spoken to people who were involved in those inquests.

Very sensitive information was dealt with, and Lady Justice Hallett apparently did a brilliant job in 7/7 of achieving something that people did not think was achievable. In terms of principle, can you distinguish the two situations and say why we need CMPs in civil proceedings but not in inquests?

David Anderson QC: Well, I cannot give you an answer to that. It may be that in an inquest one is not examining with quite the same rigour whether a given legal standard has been met—whether it is the standard required to constrain someone under a TPIM or to say that somebody has committed a tort and somebody else has suffered loss as a result—and so there may be a little more leeway for managing without material that in a civil or TPIM-type case it might be necessary to deploy. I am quite sure that when the Green Paper was proposed, it was felt that it would be desirable to have closed material procedures in inquests. The fact that that ambition has been disclaimed is perhaps something that some would welcome. However, it is a little difficult to turn it round and say that that proves that we do not need it for anything else, either. Like you, I have hearsay to go on. I spoke to people involved in the 7/7 inquest. My impression was that barristers and judges are resourceful people. There is a lot of good will on both sides; one was not dealing with people who had great agendas or great campaigns to promote. Expedients were found and everybody just about muddled through to produce, as you say, an excellent job. It was thought that this would not necessarily always be the case, but for the time being there is a willingness to go ahead on the current basis.

Q26 Chair: Thank you very much for your evidence this afternoon; you have been most helpful. Everyone has been very disciplined and we have kept to time. If there are any additional questions we wish to ask you, may we send them in the form of a letter?

David Anderson QC: Of course.

Chair: Thank you very much.