

Lord Neuberger at the Northern Ireland Judicial Studies Board

Justice and Security

27 February 2014

1. It is a great pleasure to be here in Northern Ireland, one of the three jurisdictions which the UK Supreme Court has the honour and responsibility of serving. It is my first visit as the President of the Court, and it certainly won't be my last. Indeed, I am looking forward to returning in a few months' time to the meeting of the Bars of Ireland and Northern Ireland. It is important that every United Kingdom institution is both in reality and in perception committed to all parts of the realm, and, if it is based in London, that it does not skulk there. That is particularly true for the Supreme Court, which is and should be committed to upholding justice and the rule of law throughout the UK.
2. Unlike the Supreme Courts of other major common law countries, such as the US, Canada and Australia, which have federal courts at lower levels as well, the UK Supreme Court is the only UK-wide Court – with one or two exceptions among the tribunals, all our other courts are English and Welsh, Scottish or Northern Irish. And, unlike all our European neighbours, the UK has no separate constitutional court: the nearest we get is the Supreme Court. So the UK Supreme Court Justices are rather an unusual group in

international terms. In some ways we have to be more detached than the national judges: it would be quite inappropriate for the Supreme Court to get involved in the dispensing of justice or the court systems in the three jurisdictions. That is a matter for the Lord Chief Justice of Northern Ireland, the Lord President in Scotland, and the Lord Chief Justice of England and Wales. On the other hand, partly because of our relative detachment from the running of the courts, and partly because of our constitutional function, we have rather greater potential for getting involved in issues of policy.

3. Nonetheless, whatever his or her standing in the judicial hierarchy, every judge has to be careful not to get involved in political issues or issues which may come before him or her. Separation of functions is a vital feature of any modern civilised system of government: it helps to ensure mutual respect and to minimise misunderstandings. And, as judges, we cannot expect politicians to keep off our patch if we trespass into theirs. However, in this increasingly vocal and accountable world, judges, particularly senior judges, are expected to speak out of court more than was conceivable even twenty years ago. And, indeed, there are several occasions when it is our duty to do so. But that does not mean that we have a free licence to pontificate on whatever topic we fancy; on the contrary, we have to be more careful than ever not to stray outside our territory.

4. I am particularly conscious of this as I stand here, at least partly because of the topic I have chosen to discuss – justice and security. It is a fit topic for a judge; indeed, it is just the sort of topic on which a judge has a duty to speak sometimes. But it is also a topic with clear no-go areas for a judge. In that sense, it has much in common with the European Convention on Human Rights. So, like King Agag of the Amalekites in the First Book of Samuel¹, I must come unto you delicately. But I hope I have a happier fate: you may remember that he was then “hewed in pieces” by the prophet Samuel².
5. During the 1990s, as now, we heard and read a great deal about the duty of Government to provide people throughout the UK with health services, with social security, with housing, and with education, as well as with good transport facilities and services such as care and rubbish collection. There were however two aspects of Government which, at least in Great Britain, we heard and read very little about. The first was the Government’s duty to provide security from attack from abroad or from terrorism at home. Things changed markedly after 9/11 and even more after 7/7, when London, having had a taste from time to time of what you in Northern Ireland had been suffering for decades, came face to face with a new sort of terrorism. We also heard and read very little about the Government’s duty

¹ I Samuel, chapter 15, verse 32

² *Ibid*, verse 33

to ensure the rule of law, other than the perennial demands in some quarters for ever stiffer sentences and vague calls about more police on the beat.

6. It is ironic, because, unlike health, social security, education or transport and other services, defending the realm and maintaining the rule of law are the two most well-established and fundamental duties of any government.

7. Defence and the rule of law have always been government functions.

However, it has only really been since 1945 that national Government took on the responsibility of providing UK citizens with universal education (with the starting gun of the Butler Education Act of 1944), a national health service (launched by Aneurin Bevan in 1948), and a full-blown social welfare system (with the launch of the Ministry of National Insurance in 1948). Of course the roots of these institutions can be linked to some earlier fledglings – social security can be traced back not merely to Lloyd George's National Insurance Act 1911, but to Elizabeth I's 1597 Act for the Relief of the Poor, national education to Forster's 1870 Education Act, and national health to charitable hospitals.

8. As to fundamental, it seems to me clear that if we do not have a state which is both secure from attack – whether externally, through invasion, or internally, through terrorism – and enjoys the rule of law – in the private,

public and criminal fields – the provision of the services which we hear and read so much about become of no value, or at least very depleted value. To make the point in contemporary terms, there is no point in the Government providing flood defences to protect peoples' house if those houses are likely to be bombed by enemies, attacked by terrorists, burned down by arsonists, or occupied by unremovable squatters.

9. So the first point I want to make about Justice and Security should be self-evident on the face of it, namely that they are absolutely fundamental to our well-being, indeed to our very existence as a civilized society. In Great Britain, we have had the luxury of no invasion, no tyranny, no revolution, for well over 300 hundred years, and, because of that I think we are at risk of taking our good fortune for granted. We are running into the danger of forgetting that the price of liberty is eternal vigilance. Here in Northern Ireland, I suspect that you value the defence of the realm and the rule of law rather more consciously: you have recently had a first-hand taste of what could happen if defences crumble or law and order break down. So you appreciate that, like anything that gets taken for granted, you only realise what a precious piece of good fortune it is to live in a safe country where the rule of law is observed, when you have lost that good fortune.

10. So, justice and security, the rule of law and the defence of the realm, together form the bedrock on which our society is built. But, as is so often the case with two fundamental principles, there is frequently a tension between them. An extreme example, beloved of moral philosophers, is that of the ticking bomb and the captured terrorist. The security services catch a terrorist whom they know has placed a nuclear bomb somewhere in London, and it is due to go off in three hours. It is far too late to clear the city of 8 million people, and the only hope of preventing massive carnage is to find and deactivate the bomb. But the terrorist won't talk. Is it permissible to torture him in the hope that he will be persuaded to change his mind? Security says yes; justice says no. It's your decision. What do you do? And you can't get out of it by saying that torture doesn't usually work, because sometimes it does, and it seems to be the only hope.

11. Well, opinions inevitably differ, and I am neither going to solve this conundrum nor ask you to provide a solution. But let me develop the question a bit further and a bit more self-centredly. The security services decide that they should torture the terrorist, but his lawyer discovers what is happening and seeks an urgent injunction from a judge to order the torture to cease at once. Does the judge grant the injunction, as the law would require, as the rule against torture (article 3 of the European Convention on Human Rights) is absolute? Or does she refuse it as a matter of discretion?

Or does she cheat by saying that she is not immediately available or by spinning out the hearing? Well, once again, I ask these questions, and, like jesting Pilate, according to Francis Bacon, when asked what is truth, I shall stay not for an answer, but move on. I am not sure how Pontius Pilate would have sought to explain away his equivocation, but I justify ducking the question today by pointing out that my purpose is not to solve the dilemma, but to highlight how security, the protection of the public from attack, can clash with justice, the requirements of the rule of law.

12. Pursuing the question of torture and terrorism a little further, a well known decision of the House of Lords nine years ago provides a good illustration of the contrast between the pragmatic approach of the world of security and the principled approach of the legal world. In *A and others v The Home Secretary*³, the issue was whether it was open to the court hearing an asylum case to receive evidence tendered by the Home Secretary if it had been obtained by torture – and, in fairness, I should add that the evidence had not been obtained by agents of the Home Secretary, but had been provided to him by another country’s intelligence services, who denied that it had been obtained by torture. However, the question whether evidence obtained by torture could be used in court had to be decided, and the answer a resounding “no”. However, as Lord Rodger said, this does not mean that a

³ [2006] 2 AC 221

Government Minister cannot act, or authorise others to act, on the basis of evidence which he or she knows has been obtained by torture. To suggest that the executive arm of government was constrained in this connection in the same way as the judicial arm, had, he said “the great virtue of coherence; but the coherence is bought at too dear a price. It would mean that the Home Secretary might have to fail in one of the first duties of government, to protect people in this country from potential attack.”⁴ Thus, if the Home Secretary was told that the ticking bomb was in Trafalgar Square, nobody would seriously suggest that she could not order the bomb to be defused on the ground that she only knew about its location as a result of a terrorist being tortured.

13. Looking at the world of security and the world of justice more broadly, an obvious dichotomy between the two worlds is that one works under the cover of darkness whereas the other generally basks in sunlight. There is some irony in that suggestion. The classic illustration of justice could be said to be far from illuminated: she is a figure who is classically shown to be blindfolded, whereas those who are concerned with security, far from wanting to work in the dark, need all the light which CCTV cameras can throw on our activities. A moment's thought, however, shows that this is not in fact inconsistent with the notion that justice works in the open and

⁴ *Ibid*, para 132

security in the shade. Justice is shown blindfolded to demonstrate her impartiality: the blindfold is concerned with her perception of the parties – inside looking out, if you like; open justice is concerned with what the public and the media can see – outside looking in. As for the security services, it is because of the secret activities of criminals, terrorists and enemies that they want all the light they can get – inside looking out; but the last thing the security services need is light shining on their activities – outside looking in.

14. The need for justice to be conducted openly is a fundamental. As long ago as 1829, Bayley J said this:

‘[I]t is one of the essential qualities of a Court of Justice that its proceedings should be in public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, - provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed – have the right to be present for the purpose of hearing what is going on.’⁵

15. That principle has become very topical recently, and not merely in the courts. A succession of cases has emphasised the importance of the public, and perhaps particularly the media, seeing what goes on in court, at least to the extent that it is compatible with the administration of justice. Whether in the family courts, the criminal courts or the civil courts, the public has to be

⁵ *Daubney v Cooper* (1829) 109 E.R. 438; 10 B & C 237 at 240.

able to see justice at work. Unless justice is carried out publicly, there is a real risk that the public will lose confidence in the justice system, and there is a real risk that judicial standards will slip. Sunlight is said to be the best of disinfectants, as Lord Bingham said in one case⁶, quoting the New York Times. The United Kingdom judiciary recognise this, and that is why, in the Supreme Court, we have cameras recording our hearings which are streamed live online, and why we prepare written and televised summaries of every judgment we give, and I am glad to say that the Court of Appeal in London has followed suit. The Brazilian Supreme Court has gone one better. The judges' discussion about every case is also filmed and streamed for the public to see. I think that is probably a step too far.

16. Indeed, there have to be some limits to open justice. Steps have to be taken in cases involving children to ensure that they cannot be identified. In cases involving industrial secrets, one obviously must make sure that the secrets are not revealed publicly. The reasons for secrecy in those two cases are slightly different. Children are entitled to protection, as are any vulnerable people, and that right must be respected by the justice system in the same way as any other institution. The need to protect trade secrets goes further in the sense that, if the law did not keep the information secret, then the person seeking to protect his legal rights to the information could not in

⁶ *Turkington v. Times Newspapers Limited (Northern Ireland)* [2001] 2 AC 277

practice go to court to vindicate his rights. That would be a denial of justice, and an affront to the rule of law. As I said in one case⁷, “Sunlight is the best disinfectant, but it can also burn”. I was rather pleased with myself when I wrote that, which is excellent proof of Dr Johnson’s advice, “Read over your compositions, and wherever you meet with a passage which you think is particularly fine, strike it out”⁸.

17. Where security, confidentiality or privacy is entitled to protection, the duty of any judge must be to ensure that (i) effective secrecy must be given, and (ii) if it is necessary to keep information given in or about legal proceedings secret, the secrecy should be kept to a minimum. The concern over so-called super-injunctions in 2009, when I was Master of the Rolls, provides a good example. If a person has to go to court to prevent a newspaper publishing information about him on the ground that it is private, it would be a denial of justice if there were no restriction on reporting the proceedings. If newspaper 1 could report all the details of the evidence in a claim brought by a footballer (it so often seems to be a footballer) seeking to stop newspaper 2 reporting a story about him playing away, if I can put it that way (including the name of the footballer and the person with whom he had been playing), it would make a mockery of the proceedings. Indeed, it would

⁷ *Sugar v The British Broadcasting Commission* [2010] WLR 2278, aff’d [2012] 1 WLR 439

⁸ *James Boswell, The Life of Samuel Johnson* (1791) Vol II.

undermine the rule of law, because it would effectively prevent a person from enforcing his right to privacy, and it is an essential ingredient of the rule of law that citizens not merely have rights, but that they can enforce those rights through an accessible, independent and effective judicial system.

18. In one footballer case in the Court of Appeal⁹, we had to decide whether to let the media report on the proceedings by naming the footballer without saying what he had done, or to say what he had done without naming the footballer. We referred to what Lord Rodger famously said¹⁰ in an earlier case, “What’s in a name? ‘A lot’ the press would answer”. However, we ultimately decided that it was fairer to let the media publish what the footballer had allegedly done rather than who he was. I suppose that people might have had a pretty good idea of what he was supposed to have done if we had permitted the press to name the footballer and say that he had obtained an injunction restraining a newspaper from telling a story of an unspecified nature which impinged on his private life.

19. Of course, the need for sunlight as the best disinfectant applies, at least in principle, to any aspect of public life, not just the law. This was appreciated by the last Government, when they promoted the Bill which became the

⁹ *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645

¹⁰ *Re Guardian News and Media Ltd* [2010] 2 AC 697, para 63

Freedom of Information Act 2000. It helps to ensure that shafts of sunlight permeate all areas of Government and public life, except where it is thought appropriate for darkness to remain. The move to openness is even apparent in the security services, where the heads of what used to be called, and are still nostalgically known to many of us as, MI5 and MI6, are now known by name. This would have been unthinkable in the days of the cold war.

Recently, we even saw the heads of the various security services being televised giving evidence to a parliamentary committee. We may not have been much the wiser about what they did or thought, but the very fact that it happened shows how far we have moved in terms of openness in the past three decades.

20. Unsurprisingly, politics and technology move together. Just as surveillance is facilitated by technological advances, so is the ability to gather and disseminate information – and, as Mr Assange and Mr Snowden have demonstrated, that includes information which is, or was intended to be, secret. In this respect, justice and security are not so much at odds, but are in the same boat. And appropriately for organisations in the same boat, they are also rather at sea. The security services quite rightly want to keep their secrets, but they also have to retain those secrets, and, more importantly in this context, they have to disseminate them among security personnel. Part of the reason for the failure to detect the 9/11 bombers was, I think, seen to

be attributable to failures to pass on information between security services, and that helps to explain why there is so much sharing of information within those services. In those circumstances, especially in the rapidly developing world of IT, with sophisticated hackers, inquisitive media and whistleblowers with all sorts of motives, it is very hard to ensure that the secrets remain secret and do not get into the wrong hands.

21. This problem also confronts Justice: when a judge makes an order preventing information of a private, confidential or defamatory nature being published, it rather undermines the rule of law if the information is nonetheless published on the blogosphere or twittersphere. To those with an anarchistic streak there is a quasi-romantic aspect to this unruliness, but there is deep and understandable concern in many quarters that some of the on-line material represents a real threat both to security and to justice. Having said that, we have to make sure that any reaction to this problem is proportionate. As Benjamin Franklin said, “Whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech.”¹¹

22. The interest of Justice and Security clash both at the substantive level and at the procedural level. At the substantive level are issues such as what we

¹¹ The New-England Courant, Number 49, 2-9 July 1722, page 1

should do with people believed to be dangerous to society but against whom there is insufficient evidence to prosecute and imprison, and how relaxed or concerned we should be about the possibility of the security and police forces monitoring our every movement and our every communication. The procedural area concerns issues such as secret court hearings, and the right of suspected terrorists to information as to the basis upon which they are being held.

23. Both areas have become the subject of intense focus since the end of the last century as a result of the growth of international terrorism. For you in Northern Ireland, just as the troubles seemed to be seriously on the wane, a new form of terrorism was appearing. For the rest of the United Kingdom, it was more of a new baptism of fire – almost literally. And, for all of us, it has involved a steep learning curve in terms in many aspects. One of those aspects is the tension between security and justice, a tension which has required the judiciary to step up to the plate, and has tested our constitutional settlement.

24. The pressure on the security services, indeed the pressure on the whole of government, to take steps to combat the risk of further terrorist attacks is enormous – send them back; if you can't do that lock them up; if you can't do that, subject them to 24/7 surveillance; and if you can't do that, try them

secretly. This sort of attitude is perfectly understandable: it reflects the government's primary duty to defend its citizens. But that does not make it right, and it leads to a concomitant pressure on the rule of law. Lord Justice Sedley famously reminded us that freedom of expression should "extend to the irritating, the eccentric, the contentious, the heretical, the unwelcome and the provocative" because "freedom to speak only inoffensively is not worth having"¹². By the same token, proclaiming the importance of the rule of law to be little more than sanctimonious cant if we cast it aside as soon as we come face to face with terrorism.

25. Yet fine words and pious hopes are easy. To maintain principles in challenging times is difficult. As Lord Kerr said in his Lord Macdermott lecture last year, Justice Brennan of the US Supreme Court has pointed out how after "each perceived security crisis" the US "has remorsefully realised that the abrogation of civil liberties was unnecessary", but it has been "unable to prevent itself from repeating the error when the next crisis came along"¹³. In many ways, it is particularly difficult for the executive and the legislature, which are understandably concerned to protect the public, to forget about the importance of the rule of law when society is, or is perceived to be, under attack. The temptation for the executive to promote

¹² *Redmond-Bate v Director of Public Prosecutions* [1999] Crim LR 998

¹³ The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis (1988) *Israeli Yearbook on Human Rights* 11

legislation and rules which protect society, and, some might say, to protect their backs, irrespective of the consequential detrimental effect on civil rights and freedoms, is considerable and understandable. So, too, is the temptation to pass such legislation very great so far as the legislature is concerned, and for very similar reasons. It is at this point that the judiciary both comes into its own and comes under pressure. We have to hold the line, and uphold the rule of law, because if we don't who will?

26. We are constantly reminded that Parliament has democratic legitimacy, which the judiciary lacks, and that is a perfectly valid point. Indeed, it is fundamental to the 20th and 21st century notions of parliamentary sovereignty. However, democratic accountability has its downside: the very fact that MPs need to be re-elected means that decisions which are unpopular but right are sometimes difficult for parliament to take. The judges, without the MPs' concern about re-election, indeed without many of the intolerable pressures under which 21st century politicians suffer, are occasionally better placed to consider matters dispassionately and in terms of principle and to make the unpalatable but correct decisions. That is not a bid for judicial power; far from it. The judges have the duty to uphold the law, which often involves quashing a decision of the executive, and occasionally involves undermining a decision of parliament. But undermining a statute passed by parliament is a course which is invoked only sparingly and as a last resort. Indeed, absent very unusual

circumstances (which I doubt very much would ever occur), it can only be done directly when EU law would otherwise be infringed or indirectly when human rights are infringed. So I emphasise the adverb “occasionally”. But, as Lord Brown said in the hunting case¹⁴, “The democratic process is a necessary but not a sufficient condition for the protection and vindication of human rights. Sometimes the majority misuses its powers. Not least this may occur when what are perceived as moral issues are involved.” So, too, I would add, when issues such as terrorism are involved. But the courts have to be very, very careful before stepping into issues which involve judgments on direct questions of national security.

27. In his Macdermott speech, Lord Kerr dealt with what he called “the long tug of war between the courts and the executive as to the rights of suspected terrorists to disclosure of material on which decisions adverse to them have been taken”. He might, I should add, have referred to the legislature as well as to the executive. He reminded us of the noble role which the House of Lords played in ensuring that we did not fall into the trap identified by Justice Brennan. Parliament had fumbled the ball by passing section 23 of the Anti-Terrorism Crime and Security Act 2001 enabling people to be sentenced to what Lord Hope referred to as “indefinite imprisonment in consequence of denunciation on grounds that are not disclosed and made

¹⁴ *R (otao Countryside Alliance and others) v Attorney General* [2008] 1 AC 719,

by a person whose identity cannot be disclosed”¹⁵, which, as he also said “is the stuff of nightmares”. Ironically, that parliament was virtually the same parliament which less than four years earlier had given the courts the very weapon with which these nightmares could be dissipated, the oft maligned Human Rights Act 1998, and which less than two years earlier had enacted the liberating Freedom of Information Act 2000. The effect of 9/11 and the Iraq war on the mindset of the legislature and the executive is thus graphically illustrated by these three statutes.

28. One of the sharpest clashes between Security and Justice arises where justice cannot properly be done in a particular piece of litigation without the production of evidence which needs to be kept secret for security reasons. In some cases, this can be got round by part, or even all, the proceedings being held in private. As I have mentioned, the privacy should be limited to, and go no further than, the extent necessary to ensure privacy. But a private hearing will not do when a jury is involved or where the evidence is so sensitive that it cannot properly be seen by the other party or other parties to the litigation. In such cases, there are three possibilities – all of them unsatisfactory. The first is for the case to go ahead without the secret material being disclosed. The second is for the case to be untriable, so that the claimant or the defendant loses the opportunity to advance his case or

¹⁵ *A and others v Secretary of State for the Home Department* [2005] 2 AC 68

defend her position. And the third is for the case to proceed on some unusual basis.

29. As for the first, the case going on without the material being used or seen, I suppose that, in some cases, it might just about be possible to do justice of a kind without the evidence being produced, but it is patently unsatisfactory. Once it is accepted that the material is relevant but could not be used, the losing party will have a justifiable sense of injustice. That will be particularly true where (as will normally be the case) the losing party had not seen the material and the winning party was the Government, which in some shape or form, had seen the material. This first solution has not been adopted by our courts, save where the parties have agreed. This is simply because it would make something of a mockery of the legal system if we permitted half-baked, admittedly unfair, trials to take place.

30. The second solution, that the action stops or doesn't take place, is also plainly unsatisfactory. In some cases, it means that the Government has to pay damages to people who may not deserve it. In the *Al-Rawi* case, for instance, a number of claimants sued the UK security services for being unlawfully detained¹⁶. Some of them had been in Guantanamo Bay and

¹⁶ *Al Rawi v The Security Service* [2012] 1 AC 531

claimed that the security services had not done anything to get them out, and had even helped the US authorities to keep them in. The Security Services claimed that they could only defend themselves by relying on evidence which they could not disclose to the claimants. As our trial process requires any evidence shown to the judge to be shown to the other side, and the security services could not do that, it had to throw in the towel and pay damages. In another type of case, it is the claimant who suffers: that is where he cannot bring a claim without relying on documents which the Government has and would normally be required to produce, but refuses to do so because the material is secret – ie on grounds of so-called public interest immunity (“PII”)¹⁷.

31. That leaves one with the third option, namely devising a special system for trying a case with secret evidence. This has happened over the past thirteen years or so, in various classes of case, including those involving some asylum seekers and immigrants whom the government wished either to expel, or, if they could not be expelled, to curtail their liberty, in either case for reasons which could not be vouchsafed for security reasons. In such cases, and certain others, legislation was enacted by parliament initially in 1997¹⁸ to permit a so-called closed material procedure. This involves (i) the sensitive

¹⁷ *Duncan v Cammell Laird & Co Ltd* [1942] AC 624

¹⁸ Eg SIAC Act 1997, Prevention of Terrorism Act 2005 and Counter-Terrorism Act 2008

material being put before the judge, (ii) the sensitive material not being seen by the other parties (especially the asylum seeker); (iii) the material not being seen by the lawyers to the other parties either (as they would not be entitled to have secrets from their clients), but (iv) the material being shown to so-called “special advocates”, responsible barristers appointed by the court who were security-cleared to see the evidence, and (v) while not technically acting for the asylum-seeker, the special advocates making submissions on his behalf in connection with the material, and (vi) while they would clearly be labouring under a huge disadvantage, the asylum-seeker’s lawyers also being permitted to make submissions. Their task was somewhat eased by a decision of the Strasbourg court that the gist of the contents of the secret material had to be communicated to them¹⁹.

32. In *Al Rawi* (the case where people formerly held in Guantanamo Bay sued the security services), it was argued on behalf of the Government that the judges could order a closed material procedure off their own bat, even in the absence of legislation permitting it, where it would otherwise impossible to have a trial without it. Both the Court of Appeal and the Supreme Court rejected that argument. They thought that the judges should not, as it were, permit the purity of the common law to be sullied by such a procedure, in a

¹⁹ *A v United Kingdom* [2009] ECHR 301, considered in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269

case, such as a damages claim against the government, where it was not expressly authorised by statute. To put it in less hi-faluting terms, it seemed that, if such a departure from natural justice was to be permitted, it should only be as a result of a statute sanctioning it after a democratic debate in parliament, rather than as a result of a judicial decision. This view was supported by the doubts which had been cast on the special advocates system, by a full report published by the Joint (ie House of Lords and House of Commons) Committee on Human Rights in 2010.²⁰

33. In that regard, the common law is more protective of the trial process than the European Convention which allows the special advocates procedure.²¹ Lord Kerr has had the decency to draw my attention to an article by Adam Tomkins²², which suggests that my judgment in the Court of Appeal was firm and unambiguous on the point, whereas the decision of the Supreme Court upholding the decision was “confused and convoluted”, “as clear as mud”, and betrayed “some late switching of sides”. I think that that was a bit harsh, but it gives rise to an interesting debate, which I can do no more than mention this evening, namely whether the Supreme Court should be seeking to produce multiple judgments or single judgments in its decisions.

²⁰ *9th Report of 2009-2010*, HL 64, HC 395

²¹ *Chahal v United Kingdom* (1996) 23 EHRR 413

²² Justice and Security in the United Kingdom, Social Science Research Network May 31, 2013

(I think that the answer is that it depends on the issue, but it also depends on how easy it is to extract a clear ratio for the decision). However, let me return to the article and return the compliment: Professor Tomkins refers to Lord Kerr's remarks (which accorded with my view) as "powerful". Those remarks ended with the observation that "[e]vidence which has been insulated from challenge can positively mislead"²³.

34. As a result of the *Al Rawi* decision, the government published a Green Paper which contained a proposal to enact legislation permitting a closed material procedure to be adopted in a wider class of case than heretofore, indeed to civil actions generally. The Green Paper resulted in a number of objections, including in particular a strongly expressed paper from over 50 special advocates suggesting that closed material procedures were unfair, and relying on what Lord Kerr said in *Al Rawi*, as well as a detailed analysis challenging the need for the proposed legislation. The Bill thereafter promoted by the Government largely ignored such objections. During its passage through the House of Lords, many people may feel that it was substantially improved especially in two important respects, which survived when the Bill returned to the House of Commons. Those two changes were (i) it is not just the government, but "any party" who can ask for a closed

²³ *Al Rawi* [2012] 1 AC 531, para 93

material procedure²⁴, (ii) it would be a judge, not the government, which ultimately decided whether to adopt that procedure²⁵, although the test the judge has to apply is slightly more circumscribed. A judge can only permit a closed material procedure if (i) a party would be required to produce evidence which is sensitive for reasons of national security and (ii) it is “in the interests of the fair and effective administration of justice” that there is a closed material procedure. The last few pages of Professor Tomkins’s article contain a spirited view of the way in which the Bill made its way through parliament and he does not hold back in expressing his opinions about the tactics of many of the organisations involved. As a serving judge, I cannot do more than say that it makes interesting reading.

35. Eight weeks after the Justice and Security Act hit the statute book, there was another development in the courts so far as closed material procedures were concerned. In *Bank Mellat v Her Majesty's Treasury (No. 1)*²⁶, the Supreme Court, by a majority of six to three decided that, where a closed material procedure was mandated by statute in the High Court, and, on appeal, to the Court of Appeal, then, even though the statute concerned did not provide expressly for the Supreme Court to have a closed material procedure, it could do so.

²⁴ Justice and Security Act 2013, section 6(2)

²⁵ *Ibid*, section 6(1)

²⁶ [2013] UKSC 38

36. The division was interesting because the six in the majority were all English whereas the three in the minority were Celts. So in that case Lord Kerr and I were on opposite sides. Some may see the decision as a dark one for open justice, not least because we then decided, by a bare majority of five to four (Lord Dyson joined the Celts), that we would have a closed material procedure. However, I believe that the message we sent out was very much in favour of open justice. After twenty minutes of listening to argument and looking at evidence, we were all quite satisfied that the closed material procedure, which had been pressed on us as necessary by the government, was completely unnecessary (as Lord Kerr, it must be admitted, had thought). Accordingly, we were able to make some pretty strong statements to discourage advocates from seeking closed material procedures, and to discourage judges from agreeing to adopt such procedures. I would add another note of discouragement, this time extra-judicially. Under section 7(2) of the 2013 Act, a court that has ordered a closed material procedure, must keep the decision “under review” and can revoke it, if it “is no longer in the interests of the fair and effective administration of justice”. So, even where such a procedure has been ordered, judges should be constantly ready to discharge the order.

37. I hope that, in the course of this talk, I have managed to convey the fundamental importance of Justice and Security to the health and well-being of our society, and to the challenges which result from time to time owing to the inevitable tensions between these two vital matters. How we deal with those challenges, both in terms of procedure and on terms of outcome, will determine the sort of society in which our children and grandchildren grow up. We cannot afford to sacrifice either our security or the rule of law, and when, as is inevitable, there has to be some give and take, we must make sure that the compromise is worked out in an appropriate and proper manner, and that we hold fast to our fundamental principles. As I have already indicated, it is all too easy to mouth these high-minded statements and all too easy to stick to them in times of tranquillity: it is when we feel that we are under attack that our commitment to the rule of law is really tested.

38. While I have referred to the executive and the legislature fumbling the ball on occasion, it is understandable if they sometimes lean too far in favour of security at the expense of justice, and no great damage is done if the judiciary then do their bit and uphold the rule of law, and, I might add, the legislature and executive accept and follow the court's decision. That is a healthy and civilised government at work. While nobody will agree with every decision which the executive and legislature have made in order to

maintain security, and while nobody will agree with every decision which the courts have made to uphold the rule of law, I believe that all three arms of government have done their honest best, and that, so far at least, it has been a pretty good best. But, as I have also said, the price of liberty is eternal vigilance, and rather than congratulating ourselves on what we hope and believe that we have achieved so far, it is to the future to which we should be looking.

39. Thank you very much indeed.

David Neuberger

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