Britain to use secret evidence in court

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15 July 2013

The Justice and Security Act 2013 (JSA) came into force this month. The key provision contained within the legislation creates a new judicial procedure which will permit the use of secret evidence in any civil trial in the UK.

The move represents a severe attack on the right to a fair trial and will supplement the vast array of repressive powers already at the disposal of the state. Under conditions of deepening social inequality and with social tensions rising, Britain's ruling elite are trampling on fundamental democratic rights like their counterparts in the United States and across Europe.

The new provision is known as "closed material procedure" (CMP). According to its terms, if the government decides to seek CMP in the course of a trial, a judge will have the power to decide to present evidence to the court in secret, without the defendant being granted access to the information. Only a "special advocate", who is appointed by the government and given security clearance, would be party to the evidence.

Defendants will have no opportunity to challenge evidence presented against them if CMP is enforced, which is a breach of the legal principle of "equality of arms" which holds that evidence presented in a court of law must be openly available to both sides in the legal proceedings. This must include the right of a party to challenge and respond to such evidence by presenting material and calling witnesses of their own. This principle has been under attack in the US, particularly in the case of the military trial currently under way against whistle-blower Bradley Manning.

Nor will defendants have the right to challenge the enforcement of a CMP. Section 8 of the act states that a court must ensure that an application for a CMP "is always considered in the absence of every other party to the proceedings (and every other party's legal representative)."

In Britain, CMP is already used in cases heard by the Special Immigration Appeals Commission (SIAC), as well as the Intelligence Protection Tribunal (IPT), which is ostensibly designed to act as a mechanism to oversee the activities of the security forces. The IPT, which is due to hear a complaint brought by human rights groups against the government's massive spying operations exposed by Edward Snowden, has only found in favour of the complainant on 10 occasions in over 1,000 hearings. Its deliberations remain secret and there is no right of appeal after a judgement has been made.

A parliamentary report by the Joint Committee for Human Rights published in 2007 provided the following damning indictment of CMP in the areas where it was then used:

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

The government has now implemented a system that broadens this practice to include any civil trial involving issues of "national security". After a judge determines that the case is one in which CMP should apply, the court will have no power to block a government request to withhold any piece of evidence from the defendant. As the act states, when an application is made to prevent the other party accessing

a piece of information, the court "is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security."

Ruling circles are aware of the huge implications this change will have for legal proceedings. Speaking in the House of Lords debate on the regulations, Lord Brown, a former Intelligence Services Commissioner, warned that the "legislation involves so radical a departure from the cardinal principle of open justice in civil proceedings, so sensitive an aspect of the court's processes, that everything that can possibly help minimise the number of occasions when the power is used should be recognised."

Such concerns do not reflect any genuine opposition to the antidemocratic measure, but rather the fear that the open adoption of such police state methods will provoke opposition among broad layers of people, above all in the working class.

There are powerful reasons driving the ruling elite in Britain to adopt authoritarian measures such as the JSA. Under conditions of deepening social inequality at home and mounting military conflict abroad, they are no longer even able to permit a limited examination of their worst crimes in the courts.

The implementation of the JSA itself was seen as a response to the case of Binyam Mohammed, a British citizen who was detained at the US prison camp at Guantanamo Bay for years without trial. Mohammed brought an action against the government for being complicit in his torture in 2011. During the proceedings, evidence came to light that directly implicated British agents in his torture in collaboration with US security officials. The revelations exposed the ruthless methods employed by the British security services against those accused of terrorism in the face of repeated government denials that it had engaged in such practices.

Details also came to light of the government's participation in rendition, which involved the arrest of individuals and their transportation to a third country or to CIA "black sites" throughout the world, where detainees suffered torture and ill treatment.

Much of the information upon which these revelations were based had initially been kept secret by the government, under the previous procedure for the non-disclosure of classified information in a court known as Public Interest Immunity (PII). The terms of PII permitted a judge to decide whether it was correct that the information remain undisclosed by balancing the desire for secrecy on the part of the government with the public interest of open justice. In the case of Mohammed, the judge ruled that for reasons of public interest, it was necessary that the evidence implicating the British agents be released even though it had initially been withheld.

Under the new regime, courts no longer have these powers and the government will effectively be in a position to ensure that material considered secret will remain so. In any case in which it is deemed that national security will be adversely affected, the courts will be able to legitimise the withholding of that information by the government from the public.

Another significant difference is that under the PII system, the secret evidence could not be considered by the court and was excluded from the trial. Now, the court is able to take such information into account when reaching its judgement. Presented by the government as an attempt to increase "judicial oversight", it represents in reality a vast expansion of state power in legal proceedings and a corresponding erosion of the rights of the entire population.