

A NOTE CONCERNING THE HISTORY OF PART 7 OF THE CRIMINAL JUSTICE
ACT 2003 CONCERNING AN ORDER THAT A CRIMINAL TRIAL ON
INDICTMENT BE CONDUCTED OR CONTINUED WITHOUT A JURY

1. HISTORY.

1.1 The proceedings concerning the substantial consideration of Pt 7 by Parliament took place on the following occasions :

- 14 January 2003 – House of Commons Home Affairs Committee.
- 19 May 2003 – House of Commons debate.
- 16 June 2003 – House of Lords debate.
- 15 July 2003 – House of Lords in Committee.
- 18 November 2003 – House of Commons debate.
- 19 November 2003 – House of Lords debate.
- 20 November 2003 – House of Commons debate.
- 20 November 2003 – House of Lords debate.

1.2 From the outset of these proceedings in relation to jury tampering concern was expressed by Members of both Houses in respect of two matters :

- in general, the erosion of the right of trial by jury.
- In particular, the means by which the Prosecution was to prove that a jury tampering had taken place and / or might take place together with the associated matters required by Pt 7. In this regard the question of PII and a hearing by the Judge *ex parte* the defendant and his advisers was raised upon numerous occasions.

1.3 On 15 July 2003 in the House of Lords Lord Hunt stated :

"I oppose the Question that Clause 41 [the proposed right of a defendant to apply for trial by Judge alone] stand part of the Bill and indeed the whole of

Part 7, which seek to restrict trial by jury. I asked for all the clause stand part debates relating to Part 7 to be grouped today because, from these Benches, our objective is to strike Part 7 from the Bill. We therefore consider that if we are successful in deleting Clause 41, all the other clause stand part debate will be consequential and all other clauses will fall. It is on that basis that I speak today”. [Hansard :Column 769].

1.4 In the House of Lords Part 7 was deleted from the Bill.

1.5 On 18 November 2003 in the House of Commons the Home Secretary [Rt Hon David Blunkett MP] stated :

“I seek to reinstate part 7, with minor alterations that I shall mention later. On Second Reading I said that we would respond to sensible debate and suggestions and that we would be prepared to listen to reasoned argument. It was therefore a surprise to discover that we faced neither sensible debate nor reasoned argument on part 7 of the Bill. The House of Lords chose simply to delete it, not to attempt to reflect on it, revise it or respond to my request. I wish, therefore, to make one or two matters clear at the beginning of this debate. First, the time for posturing is over. Our amendments respond to the debates in Committee and in the House of Lords. They respond to the sensible observations that were made despite the Lords’ pyrrhic victory in deleting part 7 completely. The amendments therefore respond to the will of the Back Benchers in this House and to the reflections of the more sensible people in the upper House. I should make it clear, therefore, there will be no further amendments to part 7. When the Bill goes back to the Lords, their lordships should consider whether they would like to see this Bill fall on the issues considered in part 7. I say that because it is time to make it clear that we are talking about some of the most organised and desperate criminals that this country has to deal with. We are not talking about people who have committed a minor crime or who have been accused of shoplifting. We are talking about organised criminality on a grand scale.” [Hansard : Column 649].

2. THE OBSERVATIONS OF THE HOME OFFICE MINISTERS.

2.1 Against the background of the Parliamentary history of Pt 7 as set out in Paragraph 1 :

- In House of Commons on 18 November 2003 the Home Secretary gave an assurance that trial conducted without a jury under Pt 7 in circumstances of jury tampering would be used only as a last resort. [Hansard : Column 655].

- In the House of Lords on 19 November 2003 Baroness Scotland QC [the a Home Office Minister, now HM Attorney General] made the following observations :

“Clauses 43 and 45 provide an effective and a proportionate solution to the increasing problems of jury tampering...” [Hansard : Column 1953].

“Clauses 43 and 45 provide a strong and effective deterrent to those who would seek to wreck trials and subvert due process by tampering with the jury. They send out a clear message that attempts to pervert the course of justice in that way will not be tolerated. Far from undermining the jury, the proposals will protect its integrity. I emphasise that the clauses are intended as a last resort. Jury protection measures will be appropriate and effective in most cases where there is a risk of tampering. I also remind the House that the test for jury exclusion in these circumstances is a high one, and deliberately so : we anticipate that only a handful cases a year will meet it.” [Hansard : Column 1962 – 3].

“The Government’s amendments to clause 43 put beyond doubt the fact that there must be evidence of a real and present danger of jury tampering before the first condition of a trial to be conducted in the absence of a jury is met.” [Hansard : Column 1964].

“I hope the amendments make it abundantly plain, if it was not before, that there is no question of the police and / or Prosecution simply whispering in the Judge’s ear in order to secure a juryless trial. Firm and substantial evidence of risk will be needed for an application for juryless trial to succeed. Our amendments make that clear and, in doing so, answer the concerns expressed by Her Majesty’s loyal Opposition and those voiced in the other place by others who have spoken”. [Hansard : Column 1964].

“If I can paraphrase what was said in the other place, I can assure Mr Grieve that they already require the Court to make examinations in minute detail, before ordering that a trial be conducted or continued without a jury. I invite the House to remember that Clause 43 draws on existing case law on jury protection applications which requires the Judge to order full protection for the jury only where there is a real and present danger of jury tampering.” [Hansard : Column 1965].

“Several questions were asked about the way in which prosecuting applications under Clause 43 would be made in circumstances involving sensitive information. The Government are confident that existing public interest immunity procedures are fair and effective and do not in any way endanger the rights of defendants. We are also confident that they will work equally well when used in the course of an application under Clause 43.” [Hansard : Column 1966].

3. PII AND *EX PARTE* HEARINGS.

3.1 During the proceedings identified in Paragraph 1 numerous Members of both Houses who are lawyers with experience of conducting the sort of cases contemplated in PT 7 participated. Repeatedly the questions were raised about how PII was going to be dealt with and how, as it was put, there would be avoidance of the prosecution “*whispering in the Judge’s ear*” during an *ex parte* hearing in an endeavour to obtain an order for the case to be conducted without a jury.

3.2 The Home Office Ministers’ responses to these questions is reflected in the following observations :

- On 18 November 2003 in the House of Commons the Home Secretary answered a question from by stating :

“I am familiar with my hon. and learned Friend’s point about public interest immunity [which was directed to an ex parte hearing]. She will be familiar with the case of Edwards and Lewis, where the judgement was unclear. We think there is need for clarity and, unusually, we have referred the matter to the Grand Chamber and we shall be prepared to look at and take the necessary steps to ensure that safeguards are set up. The point is serious, but there is not yet sufficient clarity for us to be able to deal with it this afternoon.” [Hansard : Column 656]

- On 19 November 2003 in the House of Lords Baroness Scotland QC stated :

“The Government are confident that existing public interest immunity procedures are fair and effective and do not in any way endanger the rights of defendants. We are also confident that they will work equally well when used in the course of an application under Clause 43”. [Hansard : Column 1966]

4. COMMENTARY.

4.1 It should not be overlooked that, as far as the law of England and Wales is concerned, the uncertainties concerning *Edwards & Lewis v UK* have been resolved by the House of Lords in *R v AF & Others [2009] UKHL 28* by making it clear that in order to ensure that a criminal trial is fair and in accordance with Art. 6 ECHR some details of the facts underlying an allegation – substantive and / or procedural - concerning a defendant must be given to the defendant. The judgement in *R v AT & Others* was given after the judgement in *R v T & Others* had been handed down by the Court of Appeal and whilst the Court of Appeal

was considering the question of certifying a point of law of general public importance which, in the event, the Court of Appeal declined to do.

4.2 In *R v T & Others* during the proceedings concerning the discharge of the jury and the application that the retrial be tried without a jury and during the proceedings concerning the successful appeal by the prosecution against the order that the retrial be conducted with a jury no details of the facts underlying the alleged risk of jury tampering was given to the defendants and their advisers and these details and their consequences were considered by the courts during *ex parte* PII hearings in the absence of the defendants and their advisers. In consequence, in its judgement in *R v T & Others* the Court of Appeal was not able to state in any detail the facts underlying its order that the retrial be conducted without a jury as a result of which the Court of Appeal was unable to give guidance as to the sort of factual circumstances which would warrant making an order pursuant to Pt 7 CJA 2003 that a criminal trial upon indictment be continued or conducted without a jury. In these circumstances it is advisable that those concerned with the making of such an order are aware of what seems to have been the intention of Parliament regarding the circumstances in which such an order should be made.

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Tooks Chambers.

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