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Chair

Mr. Norman Doyle

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● (1110)

[*English*]

The Chair (Mr. Norman Doyle (St. John's East, CPC)): You can hear me just fine, Mr. MacDonald?

Mr. Ian MacDonald (Senior Barrister, Immigration and Criminal Law, Garden Court Chambers (United Kingdom), As an Individual): Yes, I can, indeed.

The Chair: Okay. We will bring our meeting to order now. I want to welcome everyone here today as we continue our hearing on detention centres and security certificates.

For Mr. MacDonald's information, we've already sent our report on detention centres to the House of Commons; however, we can still hear evidence and we're very pleased to be hearing from you this morning, Mr. MacDonald.

Just by way of a brief introduction, Mr. MacDonald is a U.K. lawyer specializing in immigration and criminal law. He is a senior barrister with Garden Court Chambers, which is dedicated to civil liberties and social justice.

We want to welcome you here this morning, Mr. MacDonald.

Mr. Ian MacDonald: Thank you very much for that.

The Chair: We do have quite a fine complement of members here this morning, representing the Liberal Party, Bloc party, NDP, and the Conservative Party of Canada.

What we generally do is allow for an opening statement and then we will throw it open to committee members for questions or discussion. So I'll go to you immediately, Mr. MacDonald, and ask you to make your opening statement, if you have one.

Mr. Ian MacDonald: I e-mailed a short statement earlier this morning, but it's only in English and hasn't been translated into French. It sets out the role of the special advocate and my experiences as one.

The role of special advocate came into existence in 1998, really, following a case in the European Court of Human Rights called Jahal, in which enormous criticism was directed against a previously existing advisory panel, which suggested arrangements had to be made that would both accommodate legitimate security concerns and yet accord the individual a substantial measure of protection. That resulted in the creation of what we've called the Special Immigration Appeals Commission, which was set up by an act of Parliament in 1997 and came into operation in 1998.

Although it's called a commission, in fact it's a court presided over by a high court judge, who sits with an immigration judge on one side and someone who usually has a security background on the other side. The proceedings are fairly informal.

The act that sets up that court also makes provision for the appointment of special advocates. I was one of the first special advocates to be appointed by the Attorney General in 1998. At that time I, like the other special advocates, took the appointment because I felt that it was a new system and a very big improvement in terms of fair procedure over the advisory panel that had gone before. At that time, I certainly saw it as a progressive measure.

I felt that all changed after 9/11. The main reason was that after 9/11 the government gave the Special Immigration Appeals Commission, or SIAC, a completely new jurisdiction under the Anti-terrorism, Crime and Security Act of 2001, which made provision for the indefinite detention without trial of suspected international terrorists accused of having links to al Qaeda. This applied only to foreigners who could not otherwise be deported or removed safely from the U.K.; it did not apply to British citizen suspects.

During the course of that particular act, I represented the interests of five of the detainee suspects. Overall, during my time at SIAC I represented roughly 10 different appellants; not all of them, of course, were suspected international terrorists or were being locked up indefinitely. There were, for example, PhD students from Middle Eastern countries whom the government wanted to kick out because it thought they were carrying out studies in order to give their country weapons of mass destruction that would allow them to send missiles to Israel. There was another man who was on it who was accused of helping Pakistan to obtain a nuclear procurement, and so forth.

I'll come to my experience within SIAC. Although the SIAC rules and judgments speak about witnesses and evidence, in fact it's not evidence in the normal sense in which civil and criminal lawyers understand that term. The evidence is almost entirely, in my experience, given by intelligence officers, and their evidence consists not of things that are within their direct knowledge at all, but of assessments. These assessments may be based on a whole variety of sources, from informers and telephone or e-mail intercepts to other assessments by other intelligence services.

One of the things that's very difficult to do, even if you're on the inside, in the kinds of proceedings that are only based on reasonable suspicion, is to test the accuracy of the assessments or the truthfulness of human source materials that are used in reaching these assessments. That's one of the major problems. It's a problem that has certainly been heightened since 9/11 through the widespread use of physical and psychological torture in the quest for better intelligence. One of the troubles with obtaining evidence by torture and slightly less oppressive means, as the Latin historian Tacitus wisely observed 2,000 years ago, is that it tends to bring about false witness. One of the problems is that there is a danger now that you have a whole raft of intelligence that may not be reliable and is certainly questionable.

A second objection is that if you simply allow, as we did, indefinite detention on the basis of reasonable suspicion raised by intelligence assessments, there is no actual role in those cases for the police to play. In the U.K., we have very experienced police who have been dealing with terrorist offences over a long period of time, and they simply don't come into the picture. Therefore, there isn't any real method of turning what is really information into evidence that could be put before a criminal court in the normal way.

A third objection is the more obvious one that is usually put forward, the objection of fairness. As a special advocate, you are allowed to see the appellant and speak to the lawyers representing him or her until the moment that you receive the closed material, the secret material. Then a Chinese wall goes up and you can't speak any longer about the case without the leave of the commission, which will usually only be given to speak of procedural matters. You certainly are not allowed to reveal any of the secret material in order to take instructions on it. Did the appellant make a phone call to A on such and such a day? What was it about? Did he really meet Bin Laden at a training camp in Afghanistan on such and such a date, or was he in fact working at the checkout at a large electrical store in Manchester on that particular date? Has he any proof of that? These are all no-go areas in these cases where you're actually, as a kind of dislocation of representation, between the special advocate and the legal representatives of the appellant.

There are certain situations where it may well be that a special advocate is of value and of some use. One of the first tasks that a special advocate in SIAC has to perform on receipt of the closed evidence is to go through it and then see if it contains material that ought to be disclosed to the appellant, because, for example, it's already in the public domain. That's not very easy to do, because a special advocate has no legal team to back him or her up, nor have they the time to scan through hundreds of websites, some of which may be in foreign languages and so forth. But it is potentially a valuable function, and indeed it's a function that has been replicated in some criminal trials where a special advocate will look at evidence that the prosecution doesn't want to disclose for all kinds of reasons —protection of informers, whatever, but usually for public interest immunity reasons.

The difference, of course, between that and SIAC is that if evidence is not disclosed, then in a criminal trial the prosecution can't use it; in SIAC, they can.

So those are general observations about my experiences.

● (1115)

The House of Lords, in a landmark decision in December 2004, ruled that a law that imposes indefinite imprisonment without trial, that is partial in its operation and only targets one of the groups that may be involved in terrorist planning, is unlawful, and they held that it was a disproportionate and discriminatory response to threats to the nation.

Since that time, the government has introduced control orders under the Prevention of Terrorism Act of 2005, which is basically a form of house arrest—

● (1120)

The Chair: Mr. MacDonald, can I interrupt you there? We only have one hour, and we have a number of committee members who will surely want to get some comments in, and some questions. So could we interrupt you there and go to our committee members?

Mr. Ian MacDonald: Certainly.

The Chair: The first member we have is the critic for the official opposition, Mr. Alghabra, who would like to be able to ask a few questions.

I'll pass it over to Mr. Alghabra now.

Mr. Omar Alghabra (Mississauga—Erindale, Lib.): Thank you, Mr. Chair.

Mr. MacDonald, thank you so much for joining us today. We're going to learn a lot from your insight and experience on this matter.

As you are probably aware, our Supreme Court a month ago decided that the way we have our security certificate procedures right now is unconstitutional. It didn't have an issue with the fundamental intent of the security certificate, but the problem that it saw was with the review procedure and mechanism.

Mr. Ian MacDonald: Yes, I read the case.

Mr. Omar Alghabra: What we have done here in committee is we've actually just tabled a report to the House of Commons with our recommendations. We tried to balance what the Supreme Court thought was necessary and important. Let me share with you some of the recommendations, and I want to hear your input, if you don't mind.

We certainly also are well aware of some of the shortcomings of the special advocate as it exists in Britain. Some of the recommendations that we put forth are to ensure that special advocates have access to the evidence; that special advocates have access to the detainee, where they can share the evidence with them; that special advocates are able to test and challenge the evidence. We also said that our traditional Criminal Code should be the preferred method of prosecution. We also recommended that we should set a period of time after a person has been in detention and we should say that if that period has been reached, if the government is unable to prosecute the individual, then there should be some kind of a release on some conditions. We are not in favour of indefinite detention.

Mr. Ian MacDonald: Yes.

Mr. Omar Alghabra: I just want to ask you, I don't know if you've read the report, but given the summary that I just gave you, how do you feel about these recommendations? Do they address some of your concerns that you've raised?

Mr. Ian MacDonald: Yes, they do. They address some of them. They're not just my concerns; I think they're fundamental concerns. I think they do address clearly that the special advocate has access to the assessments and the documents on which those assessments are based at present.

The main thing is that once the special advocate has that access, at present the special advocate is not allowed to have any kind of communication about the case with either the appellant or the appellant's legal representatives, which means that you cannot properly challenge the evidence in the closed sessions because you haven't got a clue what the appellant's case on it might be. So if you're sharing the evidence with the detainee, then that would certainly be one way. But then there may be certain evidence that is withheld.

One of the problems that I think we have had is excessive secrecy. There are all kinds of things that are kept secret that really shouldn't be. That's something that is quite difficult to address in Britain without changing the legislation.

● (1125)

Mr. Omar Alghabra: I don't know if you were aware that we'd written that report. Were you aware that we had a report?

Mr. Ian MacDonald: I was aware that you had, but I've never seen a copy of it.

I certainly totally agree that the criminal courts are the preferred method of dealing with people. The problem, which is a problem that I think any police force has, is turning intelligence information into evidence that's admissible in a court of law.

If you actually look at what's been happening in Britain, the number of people against whom control orders and similar things are being taken is really diminishing—we're talking about fewer than 40 people—whereas the number of criminal prosecutions has increased. There are now, awaiting trial in the United Kingdom, well over 100 defendants in some 35 or 36 different trials. I can't remember the precise figures.

The Chair: Thank you, Mr. MacDonald.

We will now go to a new questioner, Madam Faille, from the Bloc party. Madam Faille.

[*Translation*]

Ms. Meili Faille (Vaudreuil-Soulanges, BQ): I just have a question. Will there be any interpretation this morning?

[*English*]

The Chair: Would you say that again?

[*Translation*]

Ms. Meili Faille: Is Mr. MacDonald getting the interpretation?

[*English*]

Mr. Ian MacDonald: I can't, no.

I can probably understand it in French.

The Chair: According to the technician, you will get the translation.

Okay. Go ahead, Madam Faille.

[*Translation*]

Ms. Meili Faille: I'm sorry, but in Quebec, French is spoken more often than English.

I just have a question about the current process in England. Is a group of individuals currently at work reviewing the legislation?

[*English*]

Mr. Ian MacDonald: Yes, there is. It's been reviewed by a parliamentary committee, which made certain recommendations, but they didn't go very far. And I don't think that any of the reviewing bodies have really dealt with the fundamental fault that seems to exist, and that is that the moment the special advocates get the closed material, there is no kind of communication about the case. So it's impossible for the appellant to know what the case against him is in full. And it's very often impossible for the special advocate to challenge, either on a factual basis or indeed on a legal basis.

There is one case in which I was involved, in which we are taking a legal challenge to the court of appeal and which will be held entirely in secret. It could, in fact, provide very important precedent law, but no one will be allowed to see it or read it.

[*Translation*]

Ms. Meili Faille: Is that the only comment you wish to make about a special advocate's work?

[*English*]

Mr. Ian MacDonald: No. The special committee heard a lot of evidence, including evidence I gave to it, and they produced a report, which really spoke about the fact that once you've seen the confidential material, the special advocate can't take instructions from the appellant or the appellant's counsel. That was a criticism.

Secondly, the special advocates lack the resources of an ordinary legal team, so it would be difficult to conduct a full defence. And that would be, for example, particularly on the question of disclosure —that you can't see whether something is in the public domain.

There is also a serious problem about the use of intercept evidence in criminal trials in Britain, which seems to have the intelligence services, to some extent, at loggerheads with the police, who are in favour of allowing it in.

And a third point the constitutional affairs committee made was that the special advocates have no power to call witnesses. In my experience, that was not a thing I found I would ever have either wanted to do or needed to do, but that's what they said.

● (1130)

[*Translation*]

Ms. Meili Faille: There was another case in Canada, that of Maher Arar. You spoke of too much secret evidence and Justice O'Connor came to the same conclusion. When he tabled his report, he was forced to keep large portions of it under wraps.

[*English*]

Mr. Ian MacDonald: There is obviously going to be some evidence that may be sensitive, for example the identity of informers and so forth, but with a lot of the intercept evidence, I can't see why it has to be withheld. You only have to read the latest novel, or whatever it is, and you can find out what the latest technical advances are in covert surveillance.

The Chair: That completes five and a half minutes here, Madam Faille, so I think I'll go to Mr. Siksay of the New Democratic Party.

Mr. Siksay.

Mr. Bill Siksay (Burnaby—Douglas, NDP): Thank you, Chair.

Thank you for being with us today, Mr. MacDonald. I hope you appreciate that your work and your decisions around your role as a special advocate have had a resonance in many places, including Canada, not just back home for you in Britain. So I thank you for the work you've been doing on that.

I wanted to ask a question. You mentioned the difficulty in using intelligence information that was received, particularly the problem of classified information—how that was classified and the limitations that puts on the process. Do you have any thoughts on how information is classified? Is there any kind of review of the classification process or the decisions made around classification, and how does that affect the kind of process you are involved in?

Mr. Ian MacDonald: There are certain parts of that question that raise things that I'm not allowed to discuss publicly, but I don't think there is any—I'm sure there is an ongoing review. Basically, what I've said is that before SIAC, what one had were assessments made by intelligence officers who were giving evidence. Now, they all gave evidence in open court—that was when the appellant and the appellant's representatives were present—and it usually consisted of about five lines. When we went into closed session, they might be giving evidence that lasted all day. But basically, my cross-examinations and other special advocates' cross-examinations were trying to test the accuracy of assessments. We were never looking at original evidence. We never heard original witnesses. It was all based on assessments. So in a sense, it's opinion evidence all the time. And that's as far as one could go with that procedure.

Mr. Bill Siksay: As a practical issue, Mr. MacDonald, is there any training that lawyers would get in the difference between assessing evidence and assessing information—testing evidence versus testing assessments or intelligence information?

Mr. Ian MacDonald: No. There's no training for people who are appointed as special advocates. You learn on the job. Most of us were all very experienced lawyers, either in the immigration field or in trial work, which I've always done. But there was no kind of training whatsoever.

The only observation I would make is that the intelligence services having to justify assessments that they made before trained lawyers was probably a very big cultural shock. There must be discussions going on, which I know nothing about, about how they can do that.

We've heard a lot of stuff about intelligence assessments being politically manipulated. Well, the opposite kind of effect took place within SIAC. The basis upon which these assessments were arrived at and whether the fact that A who had been seen at the wedding of B who had been seen at some other social function with C who was a second cousin of bin Laden proved there was a terrorist connection were the kinds of things one had to look at.

● (1135)

Mr. Bill Siksay: After the court decision that called the legislation into question there was new legislation brought in, I believe. There was an attempt to extend indefinite detention to British nationals, as well as foreign nationals. Did that succeed? What is the status of that now in Britain?

Mr. Ian MacDonald: No. There was no attempt to have indefinite detention. After the case the government refused to release the detainees, even though they must have known that holding them was contrary to the European convention on human rights, which is incorporated as part of our law.

The Chair: Thank you, Mr. MacDonald.

I'm sorry to interrupt you. Did you want to finish your answer? I have to go to another committee member right now, so—

Mr. Ian MacDonald: No, no. That's fine.

The Chair: Okay. Thank you.

Mr. Ed Komarnicki is with the Conservative Party, and he is parliamentary secretary to the Minister of Citizenship and Immigration.

Mr. Komarnicki.

Mr. Ed Komarnicki (Souris—Moose Mountain, CPC): Thank you, Mr. MacDonald.

Certainly you've been informative of what the process has been. I'll have a series of questions that maybe you could attempt to answer. I'll put them together as I speak.

First, you indicated with respect to SIAC that there was a change after 9/11 that made it difficult for you, as special counsel. I'm wondering if the change of legislation caused that and whether you were able to perform your duties better before that.

One of the other issues in dealing with it in a criminal court is that turning intelligence information into court evidence would be problematic. I think one of the witnesses testified that no democratic country has found a way to effectively prosecute people where part of the evidence is secret and cannot be disclosed to the individual. It's a dilemma that all western countries face. You may have hit on part of what the problem is in the fact that you don't actually get to see original evidence; it's more opinion-based evidence.

Part of our recommendation was that the special advocate would have the ability to test the confidential or secret evidence and give an opportunity for the detainee to meet the case against them—all subject of course to balancing that with national security.

One of your comments was that you had no legal team or time to scan through websites or to dig up original evidence. If you had the resource base, could you not test some of the information to verify its authenticity or accurateness, to actually turn it into original evidence?

● (1140)

Mr. Ian MacDonald: Right, we're dealing with your last question first.

In none of the cases that I was involved in did SIAC have before it anything more than about probably 10% of the evidence that was available to the security services. That came out because we sought discovery from time to time from them within the closed sessions.

Mr. Ed Komarnicki: But could—

Mr. Ian MacDonald: Let me give you an example, and I've got to be a little bit careful about what I say.

Intercept evidence is obviously going to be based upon accurate translations of what was actually said. Before SIAC a summary would be used, without the actual words. Sometimes the words were there, but not always.

Mr. Ed Komarnicki: But couldn't one incorporate provisions that would allow you to get closer to the bottom of the allegations, or the essence?

Mr. Ian MacDonald: Well, obviously if you're prepared to pour resources into it, you can do that. It's also a problem with unused material in criminal trial cases. It's often a question of time and resources.

Mr. Ed Komarnicki: It's the objective to balance infringing the rights of the detainee as little as possible against ensuring the safety and security of the nation, because it's better to ensure, I suppose, the safety and security of the nation rather than be sorry. So in that balance, can you see yourself operating as a special advocate if you had the ability to probe and test the information or evidence?

Mr. Ian MacDonald: Well, yes, that actually brings me back to the first question you asked me. I think the fundamental change after 9/11 was bringing in indefinite detention. The whole focus of SIAC, in fact all the SIAC cases practically, not all of them but the vast majority, were detention cases.

In that sense, we're quite different from the particular thing that you're dealing with, security certificates, because the premise upon which detention was based was that it would not be possible to remove this person to the country of origin because he would face the risk of torture or something else.

The Chair: Okay, thank you, Mr. Komarnicki.

I will now go to another Liberal member of the committee, Mr. Andrew Telegdi. Mr. Telegdi.

Hon. Andrew Telegdi (Kitchener—Waterloo, Lib.): Thank you very much.

Actually, where the parliamentary secretary ended off in balancing the rights of the individual with the security of the nation, I think in some ways that's very dangerous and a false premise. The reason I say that is if you use the test of reasonable suspicion, there was a reasonable suspicion that there were weapons of mass destruction in Iraq, and you can see where that led to.

The other issue is that it ends up being counterproductive; it breeds a mentality of them and us. In terms of the creeping nature of the erosion of civil liberties, it's clearly demonstrated in the Canadian context, where originally we had security certificates for people with no status in the country, then in 2002 we put in security certificates for people with status in the country, and in 2003 an attempt was made to have the security certificates extend to citizens.

My question to you as a jurist—The whole integrity of the judicial system, if we're going to maintain it, is the ability to test that evidence, because if you rely on untested evidence, we have all sorts of outcomes that are very dangerous to society itself and the system itself.

And the indefinite detention—we just saw the other day what happens when you obtain information by threats or torture, where somebody who is a detainee under a security certificate was released on very stringent conditions. The witnesses against him all recanted, essentially. Yet this person is sitting here with the security certificate over them. I think it really does create a dilemma of producing that them-and-us mentality, when if you're going to be fighting terror, it's everybody's and all groups' responsibility in a society to do that. That's my real fear, and I'm not sure what your experience is over in England with that.

● (1145)

Mr. Ian MacDonald: I think that balance between public safety and fundamental liberties and human rights is really at the heart of all this. Perhaps I can quote Lord Hoffman, who is one of the judges in the Belmarsh detainees case. In his judgment, he said:

> I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.

That was part of his judgment.

It seems to me that the starting point one must have in a democratic society is one must have good intelligence. In fact, if you lock up everyone who's on your intelligence radar or place them under control orders, house arrests, that wouldn't have prevented either the atrocity that took place in Madrid, or indeed the London bombings that took place on 7/7 in the London tube. They happened because intelligence either was not there or had not been properly applied.

So you find that locking people up may enable the politicians—and I know I'm talking to politicians—to look as if they are protecting us, but the reality is that for the next set of bombers, if they are not on their radar, then at best it's going to be a cosmetic measure to appease public fear and probably not much else.

Secondly, when people are on your radar, assessments and information of the intelligence services, it seems to me, need to be turned into evidence so that the suspected perpetrators can be arrested, tried, and convicted before the courts in open and fair trials. And that in fact is being done in the U.K. on a very big scale now. So far, it's causing a whole lot of other problems in terms of a pileup of cases in certain courts in London and overworked police officers, but that is, it seems to me, the way to go. The starting point for it all is having good intelligence.

The Chair: Thank you, Mr. MacDonald.

We now go to Mr. Raymond Gravel of the Bloc party. Mr. Gravel.

[*Translation*]

Mr. Raymond Gravel (Repentigny, BQ): Thank you, Mr. MacDonald. I read your biographical notes which were translated into French. You have a fairly impressive resume.

I have a question for you about security certificates in Great Britain. How much weight do these certificates carry when it comes to detaining a person in Great Britain?

[*English*]

Mr. Ian MacDonald: We don't actually have anything quite like security certificates in Britain. But if the Secretary of State decides that someone ought to be deported because they are a threat to security, then the Secretary of State has the power of arrest and detention pending deportation. That, in fact, is what at the moment SIAC is mainly dealing with under its current caseload.

What is happening, of course—I think our opposition may be different from the Canadian one, but we will not deport people either, if there is a risk of their being tortured, because of the United Nations Convention Against Torture, which has been incorporated into U.K. domestic law, or because it would be a breach of article 3 of the European Convention on Human Rights, which forbids absolutely torture and inhumane and degrading treatment. We will not return people in those circumstances, and that applies all over Europe.

What the British government are now trying to do is circumscribe their international obligations by entering into diplomatic agreements, or what are called memorandums of understanding. The first of those memorandums of understanding, one relating to Algeria and a second to Libya, have been before SIAC and will be working their way up through our court system, but we don't expect them to get as far as the House of Lords for a very long time.

So in a sense it's a different approach, but a lot of us have a lot of concerns about memorandums of understanding, because they seem to attempt to bypass very clear international obligations.

And they aren't simply being used in relation to terrorist offences. I've recently done a case where a memorandum of understanding was apparently reached between the Chinese government and the British government about the removal of a police chief who had been giving passports out to people who belong to Falun Gong, the Christian group in China.

There are important legal issues that are raised; there are important issues about the enforcement of international human rights law. There are also difficult factual issues involved with those developments.

● (1150)

The Chair: Thank you, Mr. Gravel.

We have three more people who wish to ask questions, Mr. MacDonald. We have Nina Grewal of the Conservative Party, and we'll have two more after that.

Ms. Grewal.

Mrs. Nina Grewal (Fleetwood—Port Kells, CPC): Thank you, Mr. Chair.

Thank you, Mr. MacDonald, for agreeing to speak to our committee and share your insights into the detention of terrorism suspects.

After 9/11 and the passage of the Anti-Terrorism Crime and Security Act 2001, how many terrorist suspects have been detained in the United Kingdom?

Mr. Ian MacDonald: Do you want me to answer that first?

Mrs. Nina Grewal: And as a special advocate with the special immigration appeal court, how many appellants did you defend? And could you please speak to the drawbacks of the special advocate procedure?

Mr. Ian MacDonald: As far as the numbers are concerned, there are actually very few people. About 24 people were detained. And of course they had an option if they wanted to go to another country, or found a country they could go to.

One of the detainees, it was discovered, had dual French nationality. He was released from detention and went to France, where he runs a little shop and has been completely undisturbed by the French government, which obviously did not take the same view about what to do with him as the British government did. Another one went to Morocco, and apparently nothing happened to him when he went there.

So if you look at it in terms of numbers, there were very few people. Nearly all of the people were of North African or Jordanian origin, and none of them was in any way suspected of being engaged in actual terrorist acts; they were being detained more because they were suspected of being associated and having links with terrorist groups operating overseas. So they are quite a different breed, if you like, from the British-born terrorists responsible for the atrocities that took place on the London Tube on 7/7.

You then asked about the drawbacks of being a special advocate. The real drawback of being a special advocate in these cases was first of all that the threshold upon which detention could occur was exactly the same threshold on which a police officer could arrest a suspect in the street. In the police officer's case, it's the start of a whole process of obtaining evidence and charging someone or releasing them, and so forth, and eventually going to trial. In the case of those people, it was such a low threshold it was difficult to win any appeals.

There was one case called “M”, which was referred to in the Charkaoui judgment, that was won. All the rest were lost.

The second problem was that when you saw things in the evidence, there was absolutely no way you could go to check what the client had to say about them and ask, did you make a phone call to such-and-such a person, and what's your relationship with such-and-such a person? You could ask none of those questions. You could not take instructions.

Then the other thing is that if you asked certain questions of the intelligence officers who were giving evidence about the assessments, they would have no direct knowledge of various things, simply because they didn't know anything further than the sources they'd used in the assessments they had made. And there was also a very poor link-up with the police.

● (1155)

The Chair: Okay. Thank you.

We will now go to Mr. Karygiannis of the Liberal Party. Mr. Karygiannis.

Hon. Jim Karygiannis (Scarborough—Agincourt, Lib.): Mr. MacDonald, I thank you for taking the time to speak to our committee.

I'd like to ask a few short questions, if I may.

Mr. Ian MacDonald: Yes.

Hon. Jim Karygiannis: Are there currently any detainees you're working with, or who you know, who are in custody?

Mr. Ian MacDonald: Well, yes, but I've recently been working as defence counsel in criminal trials, and I am currently doing so.

I was involved in one of the big control order cases, and when the court of appeal quashed the control order on my client, who was under some form of house arrest, he disappeared before the police could serve a new and less restrictive control order on him—and no one knows where he is. So everyone else is going to the House of Lords on that case, except me.

Hon. Jim Karygiannis: Thank you, sir.

The Chair: Thank you.

The only questioner I have left is Mr. Wilson, from the Liberal Party.

Mr. Blair Wilson (West Vancouver—Sunshine Coast—Sea to Sky Country, Lib.): Thank you, Mr. Chair.

Thank you, Mr. MacDonald, for being here and sharing your thoughts with us.

I have to agree with some of the comments you made earlier. The potential real threat to Canadian liberty and freedom may indeed come more from the unconstitutional laws initiated by the state, rather than the acts perpetrated by the terrorists. I thought it was an interesting comment.

When I heard what you were talking about, two key issues seemed to spring up. One dealt with the fact that the evidence before the special prosecutor cannot be shared with the accused and adequately tested. The second was the problem of obtaining access to the original evidence used to formulate the assessment.

I have two questions for you. First, do you believe your United Kingdom system of a special advocate and special immigration appeal commission adequately balances the fundamental human rights and freedoms of the individual with the security concerns of the state?

Mr. Ian MacDonald: No. I think where special advocates have in fact been quite useful is not in the area I've been talking about. It's where they've been used in criminal trials and in some terrorist criminal trials to look at the undisclosed evidence and to argue with the judge in private session that it should be disclosed. Of course, if it isn't disclosed, then it won't be used.

I can tell you from my own experience in criminal trials, it would appear that when it was indicated to the police that they should arrest or put under surveillance certain individuals, one of the senior police officers described to me that when they met the intelligence services, they got these assessments. He said he didn't want assessments, because they're nothing but guesswork, and he wanted some evidence.

They have actually been extremely successful in doing what I've indicated is the essential task that has to be performed, which is to be able to turn information received through intelligence into admissible evidence in a court of law.

● (1200)

Mr. Blair Wilson: Yes, one of the recommendations we've put forward is that the special advocate be allowed to test, challenge, and meet the evidence presented. They will obviously have time to discuss it with the accused, come back, and test the evidence. There seems to be a fundamental difference between what we're recommending and what your system has in place right now. Is that correct?

Mr. Ian MacDonald: I'm not certain that it's actually true. I think the government realized that for detention or complete house arrest, those methods aren't really getting them or us anywhere in terms of being better protected. House arrest means they're not allowed to use the telephone, they're not allowed to have visitors, and their children can't have other children in to play. The only real way to proceed is to use the police to actually collect evidence.

Mr. Blair Wilson: Mr. MacDonald, why wasn't the original evidence made available to you? Why did you only receive assessments? Could you not dig deeper? Why wouldn't they make the original evidence available to you?

Mr. Ian MacDonald: Well, they don't have the original stuff. If you get an assessment from another intelligence service, you don't have the original.

If there's an informer who is speaking to Algerian intelligence, you're not going to have access to that informer to know whether or not the information is reliable. In fact, you may not even know whether or not anything emanating from Algerian intelligence is reliable. That's the problem.

We are operating on an international scale here. This isn't a domestic crime that we're talking about. There is really a fundamental problem in getting inside those assessments.

What seems to in fact be happening now in Britain is that when the police take over from the intelligence services, they find actual admissible evidence, and they travel far and wide to do so. You'll have evidence from someone who saw a defendant in a training camp in the Philippines, Afghanistan, or wherever. They do that.

Mr. Blair Wilson: That's where your conclusion came from that we should be using the criminal courts to test these types of cases instead of using the special advocate system.

Mr. Ian MacDonald: Yes, but I think there is room for a special advocate, particularly on issues of discovery.

The Chair: Thank you. I'm going to interrupt here, because even though we've reached 12 o'clock, I have some short questions from about four members on the committee.

Mr. Komarnicki first, then Mr. Telegdi.

Mr. Ed Komarnicki: Mr. MacDonald, you indicated that one of the issues in the special advocate system, for instance, was the question of whether the detainee made a call or not. You wouldn't necessarily have to talk to the detainee about that. You could check independent telephone records. You could speak to the potential recipient of the call. There are other ways to gather evidence than going back to the detainee.

If the rules were sufficiently in place to allow you to do that, could you not still achieve the balance we talked about with respect to the protection of the state and to minimum interference with the detainee's rights?

Mr. Ian MacDonald: I think it would be very difficult, because I've seen the amount of time and the number of people who are used to collect, for example, telephone evidence in terrorist trials. There is an enormous amount of legwork that's involved, particularly if you're looking at sources of e-mails or mobile phones—an enormous amount of work.

As a single person, you certainly have no chance of doing it. The kind of team that you would need to do it.... In criminal trials it's evidence that is gathered by very experienced police officers and it's shared with the defence.

● (1205)

The Chair: Okay, thank you, Mr. MacDonald.

Mr. Telegdi and Madam Faille, and then Mr. Siksay. We'll shut it down then.

Hon. Andrew Telegdi: Mr. MacDonald, history has shown us that the most efficient perpetrator of terror is the state. Setting up a "them and us" kind of scenario really reminds me of the O.J. Simpson effect, where, as you know, we had a jury that would not convict O.J. Simpson. The response of the black population in the state was essentially that O.J. Simpson was innocent, and the response of the rest of the population was that he was guilty. And that's what I mean by "them and us".

Given Canada's makeup, we represent the world essentially in our demographics, in the population make-up, so we're all in the same boat, and we desperately need people in the Muslim community. That's where the problem is coming up and we need their help and cooperation. If we create a "them and us" mentality, we're going to have a hard time achieving that.

Have you folks talked about that in England?

Mr. Ian MacDonald: Yes, I've certainly come across it. I haven't mentioned it in my paper, but in fact particularly after 7/7 there was an enormous increase in racially aggravated crimes throughout the city areas where black and Asian populations lived.

Of course the attackers couldn't distinguish a Sikh from a Muslim, so they just attacked them anyway. Over one month there was an increase of something like 1,000 attacks, and in many of the cases the attackers referred to the victim either as a Bin Laden or a Saddam Hussein. The figures have been published by the criminal prosecution service...quite a dramatic increase.

The Chair: Thank you, Mr. MacDonald.

Madam Faille of the Bloc party.

[*Translation*]

Ms. Meili Faille: If, acting as a special advocate, you find that there is insufficient evidence to maintain the security certificate, what steps do you take to clear the person' s name or to have him released from custody?

[*English*]

Mr. Ian MacDonald: First of all, I would imagine that one of the questions that arises is whether the person should be held in detention or on bail, and in fact a number of the Belmarsh detainees, because their mental health had deteriorated to such a very large extent, were eventually let out on bail. So that's one opportunity, but in a sense you're looking at a different process. If people are suspected of being involved in terrorist activities, then my view is that evidence ought to be sought against them, and they ought to be processed through the normal criminal courts.

There are wider questions about deporting suspected terrorists, because in a sense if you're removing them to another country where they're going to be free, then all you're doing is exporting the possibility of them carrying on their terrorist activities in some other place.

[*Translation*]

Ms. Meili Faille: I asked you the opposite question, Mr. MacDonald. If, upon examining the evidence adduced, you find that it is inadmissible or inconclusive in terms of maintaining the security certificate, how do you go about getting the security certificate quashed?

● (1210)

[*English*]

The Chair: Brief response, Mr. MacDonald.

Mr. Ian MacDonald: No, because the role of the special advocate is the role of an advocate, not a judge. So you always have to be able to convince the judge. In all the cases I was involved with, not only did I cross-examine security officers as witnesses, but I also made a closing speech to the court. The final arbiter was the court. Of course, in these situations it's not only special advocates who are at a disadvantage as well as the appellant, but the judge is at a disadvantage as well.

The Chair: Thank you, Mr. MacDonald. Thank you, Madam Faille.

Mr. Siksay.

Mr. Bill Siksay: Mr. MacDonald, when you wrote your letter of resignation, you used some very strong language throughout, but you also characterized the personal dilemma you faced very succinctly. You talked about how "My role has been altered to provide a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial. For me, this is untenable."

Could you elaborate a bit more on that as a way of concluding, and if anything has changed in the system in the U.K. now that might change your perception of that system?

Mr. Ian MacDonald: Yes. It was a balancing exercise, because initially I stayed in there, after the new legislation was introduced in 2001, because like other special advocates and like most lawyers, I thought I might be able to make a difference by staying in. But eventually I felt I had to balance what little difference I might make by being in there against the fact that I was legitimizing a form of indefinite detention, on reasonable suspicion merely, for an indefinite period. I felt in conscience that I couldn't stay on there, and I felt particularly, in light of the House of Lords judgment, that the view I took was a very tenable one.

Unfortunately, only one other special advocate resigned at the time I did. The others decided to stay on. And I have never publicly criticized them and I won't do so now. It was a very personal decision. It seemed to me that the wrong balance was being struck with the whole way in which these particular people were being treated, because at best, at the very highest, they would be grade-C terrorists, and one has to look at whether there really was a serious threat to the life of the nation in Great Britain at the time.

Of course that is a personal opinion, not me speaking as a lawyer.

The Chair: Thank you, Mr. MacDonald.

On behalf of the committee, we want to thank you for giving testimony today. Unfortunately, we're out of time, and we have other committee business that we have to get to, but, as you can tell, the committee was very interested in what you had to say.

Mr. Ian MacDonald: I'm very pleased to have had the opportunity to talk to you and share some of these thoughts with you. I hope they will be of assistance to you in all your deliberations.

Thank you.

The Chair: Thank you, sir. Goodbye.

I guess we'll have to suspend for a moment to go in camera.

[*Proceedings continue in camera*]

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