Neutral Citation Number: [2015] EWCA Civ 687

Case No: T3/2014/2545

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Bean
[2014] EWHC 2359 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE SULLIVAN
and
LORD JUSTICE McFARLANE

- -

Between :

The Queen on the application of
(1) Ahmad Sarkandi
(2) Ghasem Nabipour
(3) Mohammad Fard
(4) Alireza Ghezelayagh
(5) Ahmad Tafazoly — **Appellants**

- and -

Secretary of State for Foreign and Commonwealth Affairs — **Respondent**

- -
- -

Dinah Rose QC and Maya Lester (instructed by **M Taher & Co**) for the **Appellants**
Jonathan Swift QC, Robert Palmer and Caroline Stone (instructed by **Government Legal Department**) for the **Respondent**
Angus McCullough QC and Ben Watson (instructed by the **Special Advocates' Support Office**) appeared as **Special Advocates**

Hearing dates : 9-10 June 2015

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Approved Judgment

Lord Justice Richards :

1. This is an appeal against a declaration under section 6 of the Justice and Security Act 2013 ("the 2013 Act") that the relevant proceedings are proceedings in which a closed material application may be made to the court. The proceedings in question are a claim for judicial review of a decision by the Secretary of State to make a proposal to the EU Council that it add the claimants to a list of persons against whom restrictive measures were to be taken pursuant to EU legislation directed towards the prevention of nuclear proliferation activities by Iran. The declaration under section 6 was made by Bean J on the application of the Secretary of State. The basis of the claimants' appeal, brought with permission granted by the judge below, is that the statutory conditions for the making of such a declaration were not met.

2. This is one of two cases in which this court has been called upon to consider, at a relatively early stage in the life of the 2013 Act, the correct approach towards an application under section 6. The other is Case No. T3/2014/2772, *McGartland and Another v Secretary of State for the Home Department*. Whilst at a general level the cases have points in common, the specific issues in them are very different. The cases have been heard by different constitutions of the court, albeit with myself as a member of both constitutions, and are the subject of separate judgments. In order to enable each judgment to stand alone, there is an element of repetition between them, in preference to substantial cross-referencing.

The EU legislative background

3. Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/14/CFSP ("the 2010 Decision") required Member States to impose restrictive measures, including travel restrictions and asset freezing, on persons and entities listed in Annex I or Annex II to the Decision. Those listed in Annex I included entities owned or controlled by, or acting on behalf of, the Islamic Republic of Iran Shipping Lines ("IRISL"). The nature of the list in Annex II is indicated by Article 20(1)(b), to the effect that those whose assets were to be frozen included:

> "persons and entities not covered by Annex I that are engaged in, directly associated with, or providing support for, Iran's proliferation-sensitive nuclear activities or for the development of nuclear weapon delivery systems, including through the involvement in procurement of the prohibited items, goods, equipment, materials and technology, or persons or entities owned or controlled by them, including through illicit means, or persons and entities that have assisted designated persons or entities in evading or violating the provisions of UNSCR 1737 (2006), UNSCR 1747 (2007), UNSCR 1803 (2008) and UNSCR 1929 (2010) or this Decision as well as other senior members and entities of IRGC and IRISL and entities owned or controlled by them or acting on their behalf, as listed in Annex II."

4. Article 23 provided for the Council, acting by unanimity "on a proposal from Member States or from the High Representative of the Union for Foreign Affairs and Security Policy", to establish the list in Annex II and adopt modifications to it.

5. The 2010 Decision was implemented by Council Regulation (EU) No 961/2010 ("the 2010 Regulation"). Such differences as there are between the detailed wording of the Decision and that of the Regulation are immaterial for present purposes.

6. The claimants were not listed in the annexes to the 2010 Decision or the 2010 Regulation. They were added in 2011, as described below.

7. The Council's decision-making process is summarised in a witness statement of Mr Ajay Sharma, Head of the Iran Department at the Foreign and Commonwealth Office ("the FCO"). He explains that one or more Member States may propose an individual or entity for designation under the EU sanctions regime but that all decisions to designate require unanimity and are collective Council decisions. A proposal is followed by successive rounds of discussion in working groups and at the Council Committee of Permanent Representatives (COREPER). If all Member States agree to a listing, a Council decision and implementing regulation are drafted and are subject to scrutiny by another working group prior to their adoption by a Council of Ministers. One of the points made by Mr Sharma is that there is no mechanism to provide protection for sensitive material and that Member States are often unable to disclose such material during the decision-making process.

8. A Council document dated 22 June 2007, drawn up under the previous EU sanctions regime but still in force at the material time, annexed "practical recommendations" with regard to the listing procedure. The annex stated that proposals for listings should be clear and unequivocal and should aim to include sufficient details (identifiers) so that the listing decision, once it entered into effect, could be effectively implemented by economic operators and national authorities. With regard to natural persons the information should aim to include in particular surname, first name, alias, sex, date and place of birth, nationality and address, identification or passport number. It was primarily the responsibility of those submitting the proposals to provide such identifiers. The recommendations continued:

> "**Reasons for listing and notification of the listing**
>
> 4. Proposals for autonomous listings or additional listings to UN sanctions should include individual and specific reasons for each listing, where the intended sanctions include an asset freeze. It is the responsibility of those submitting the proposal to provide such reasons. Inputs from the Heads of Missions located in the country(ies) concerned <u>will be requested</u> where appropriate.
>
> 5. Those reasons should, in principle, be set out as concisely as possible in a separate column in the Annex to the legal act containing the list of the persons, groups and entities to be listed. As this act will be published in the Official Journal, these reasons should be capable of being made public.

> Notification is effected through publication in the Official Journal.
>
> 6. In exceptional cases, where it is considered that the reasons for the listing are not suitable for publication, because of considerations of privacy and security, the reasons will need to be notified (e.g. by letter) to the person, group or entity concerned. Where this is not possible (because no address is available) a notice should be published in the C-series of the Official Journal on the same day as the publication of the legal act in question informing them that the Council will transmit the reasons for their listing to them on request.
>
> **Additional information**
>
> 7. Additional information in support of new proposals, with the appropriate level of classification, may be submitted to the Presidency for distribution by the Council Secretariat. The information provided should meet the criteria set out in the basic legal act (Common Position).
>
> 8. A copy of the material circulated will be stored in a centralised archive, to be set up for this specific purpose." (Emphasis in the original.)

9. The process leading to the Secretary of State's decision to propose the claimants for designation by the Council is described as follows in Mr Sharma's witness statement:

> "32. In July 2011 HMG began to identify potential entities and individuals for designation in preparation for a further round of EU sanctions. There was also a concern that effective sanctions were time critical due to the risk of Iran reaching a point in its nuclear capability where its progress would be irreversible. Four of the five shipping individuals (the exception being Mr Nabipour) were identified as potentially suitable for proposal to the EU Council on 28 July 2011.
>
> 33. Further research and collation of evidence in support of these designations continued through to early September 2011. Mr Nabipour was added to the list of proposed designees on 26 August 2011 following a routine cross-Whitehall meeting to review Iranian shipping developments.
>
> 34. On 8 September 2011, the proposal to list the Claimants was given initial consideration by the FCO. Further cross-Whitehall meetings were held on 6 and 12 October 2011 to discuss draft text of the justification for the designation proposals for each of the individuals on the full list.

> 35. A version of the list amended to reflect the approved unclassified text was sent to the FCO Iran team on 25 October 2011.
>
> 36. On 26 October FCO undertook a final review of the unclassified text and examined the list to ensure they were content that the descriptors provided sufficient information to propose the designation. Once consensus was reached, the list was despatched … along with the descriptions/justifications on 31 October 2011 ….
>
> 37. In the event, four of the five Claimants (all bar Mr Ghezelayagh) were also proposed for listing to the Council by another Member State."

10. A redacted version of the United Kingdom's proposal has been provided to the claimants. It shows the extent of the information provided to the Council in support of the proposal in respect of each of them:

> "44. Mohammad Moghaddami FARD
>
> Identifier: Date of Birth: 19 July 1956, Passport: N10623175 (Iran) issued 27 March 2007; expires 26 March 2012.
>
> Managing Director of Pacific Shipping, and Great Ocean Shipping Services. Set up Crystal Shipping FZE in 2010 as part of efforts to circumvent EU designation of IRISL.
>
> 45. Captain Alireza GHEZELAYAGH
>
> Chief Executive Officer of EU-designated Lead Maritime which acts on behalf of HDSL in Singapore. Additionally CEO of EU-designated Asia Marine Network, which is IRISL's regional office in Singapore.
>
> 46. Ghasem NABIPOUR, aka M T Khabbazi NABIPOUR
>
> CEO of EU-designated Soroush Saramin Asatir Ship Management Company (SSA SMC) that manages IRISL's vessels. NABIPOUR is IRISL's ship management director.
>
> 47. Ahmad SARKANDI
>
> IRISL's financial director as of 2011.
>
> 48. Ahmad TAFAZOLY
>
> Identifier: DOB: 27 Mary 1956, POB: Bojnord, Iran, Passport: R10748186 (Iran) issued 22 January 2007; expires 22 January 2012
>
> Managing Director of EU-designated Santexlines."

11. By Council Decision 2011/783/CFSP of 1 December 2011 ("the 2011 Decision"), the Council decided to amend Annex II to the 2010 Decision by the inclusion of the claimants, among other persons. The reasons given added relatively little to the matters set out in the United Kingdom's proposal. The 2011 Decision was implemented by Council Implementing Regulation (EU) No 1245/2011 ("the 2011 Regulation").

12. By its judgment of 16 September 2013 in Case T-489/10, *Islamic Republic of Iran Shipping Lines v Council of the European Union*, the General Court of the European Union annulled the 2010 Decision and the 2010 Regulation in so far as they concerned IRISL and related companies, essentially on the ground that the Council had not established that IRISL had provided support for nuclear proliferation.

13. By its further judgment of 12 December 2013 in Case T-58/12, *Nabipour and Others v Council of the European Union*, the General Court annulled the 2011 Decision and the 2011 Regulation in so far as they listed the present claimants, among other persons. The court found that the listing was vitiated by an error of assessment: in view of the decision that IRISL's listing should be annulled, the claimants' listing could not be justified by their direct or indirect links with IRISL; and even if the companies other than IRISL referred to in the reasons for the claimants' listing were in fact owned or controlled by IRISL or acted on its behalf or as directed by it, that did not justify the adoption of the restrictive measures since IRISL itself had not been properly identified by the Council as providing support for nuclear proliferation. The court went on, however, to consider whether the listing of the individuals would have been justified if IRISL and its associated companies had been held to have been properly listed. For reasons given at length in the judgment, it held that the listing of Mr Fard and Mr Ghezelayagh would have been justified but that the listing of Mr Sarkandi, Mr Nabipour and Mr Tafazoly would not have been justified.

The pleaded cases in the present judicial review proceedings

14. The judicial review proceedings were commenced in May 2013, seeking declaratory relief and damages pursuant to section 8 of the Human Rights Act 1998. The relevant declaration sought is that "the proposal to list each of the Claimants was unlawful". An application for relief aimed at securing the claimants' delisting has fallen away as a result of the judgments of the General Court. The grounds for judicial review assert:

> "36. In proposing the Claimants for inclusion in the Restrictive Measures, the Secretary of State made manifest and demonstrable errors of fact, acted irrationally and erred in law, for the following reasons.
>
> 37. *First*, there was no lawful or rational basis on which the listing of the Claimants could have been proposed, since none of them falls (or could rationally have been thought to fall) within any of the categories set out in the July 2010 Decision or the October 2010 Regulation which are the essential preconditions for designating individuals ….
>
> …

> 39. The fact that an individual holds a job in a company is not a permissible reason for his inclusion in the Restrictive Measures. It is not one of the criteria for designation ….
>
> …
>
> 42. *Second*, the Secretary of State proposed their designation on the basis of the following material errors of fact:
>
> (a) Captain Alizera Ghezelayagh is included on the basis that he is CEO of Asia Marine Network and Leading Maritime Pte Ltd. But he resigned from Asia Marine Network in April 2010 and Leading Maritime Pte Ltd ceased operations in September 2011 (before his designation).
>
> (b) Ahmad Sarkandi is said to be the 'Financial Director of IRISL since 2011' but he retired in September 2011, before his designation. He was never a financial director, but was until his retirement a finance senior manager.
>
> (c) Mr Nabipour is said to be the shipping manager for IRISL, but he is not and never has been. He has never been employed in any capacity by IRISL.
>
> (d) Mr Fard has been fully retired since April 2012; there is no conceivable continuing basis for his designation. Oasis Freight Agency ceased its operations in 2008 and was liquidated in November 2011 (before his designation).
>
> (e) Mr Tafazoly has never held a position with companies called IRISL China, Rice Shipping or Santexlines.
>
> 43. The Secretary of State was under a duty, prior to deciding to propose the inclusion of a person in the Restrictive Measures, to take reasonable steps and to make proper inquiries in order to acquaint himself with relevant material …."

15. The Secretary of State's grounds of defence state in paragraph 33 that the reasons given for listing the claimants are to be read alongside the reasons that had been given for the designation of IRISL and associated entities. Each of the claimants was considered to have been acting (whether directly or through one of IRISL's associated entities) on behalf of IRISL and in that regard they were all considered to be senior members of IRISL: each worked at the highest levels within IRISL or its associated entities. The pleading continues:

> "34. The Secretary of State is (and was at the time of the decision to propose the Claimants) in possession of evidence on which he was entitled rationally to conclude as follows:
>
> (1) IRISL was engaged in, directly associated with, or provided support for Iran's proliferation-sensitive nuclear activities or for the development of nuclear weapon

> delivery systems, including through the procurement of the prohibited items, goods, equipment, materials and/or technology.
>
> (2) Each of the listed entities named above as being associated with IRISL was acting on IRISL's behalf, and each of their activities included activities directed towards evading or violating the 2010 Council Decision, the 2010 Council Regulation and/or the UNSCRs.
>
> (3) Each of the Claimants held the positions in IRISL itself and/or within the associated listed entities, as stated in the Council's reasons.
>
> (4) By virtue of their position in the highest echelons of IRISL's wider corporate structure (including those associated companies), they were acting on behalf of IRISL and/or at IRISL's direction.
>
> (5) The Claimants were accordingly 'senior members of IRSIL' within the meaning of Article 20(1)(b) of the 2010 Council Decision.
>
> 35. The Secretary of State's proposal to the EU Council was accordingly based on the fact that each of the Claimants were senior members of IRISL, in the sense described above."

16. In response to the first ground of challenge, that there was no lawful or rational basis on which the listing of the claimants could have been proposed, the grounds of defence contend at paragraph 39 that "the Secretary of State was entitled on the evidence to conclude that each of the Claimants could be proposed for listing", and go on at paragraph 40 to develop that contention with further detail.

17. In response to the second ground of challenge, that the Secretary of State made material errors of fact arising from an alleged failure to take reasonable steps to make enquires and acquaint himself with relevant material, the grounds of defence submit *inter alia*, at paragraph 42, that "the inquiries undertaken before the Claimants were proposed amply supported the accuracy of the facts relied upon by the Secretary of State", and issue is taken with the relevant factual assertions in the grounds of claim. Paragraph 43 states that the Secretary of State "accordingly denies that he failed to make reasonable enquiries before proposing the Claimants for listing".

18. The grounds of defence state that the Secretary of State is unable to disclose, without causing serious harm to national security, the evidence referred to in the relevant paragraphs of the defence, that he has given notice of his intention to apply for a declaration under section 6 of the 2013 Act, and that without such a declaration he is unable to give further particulars of his case. Before considering the application for such a declaration, I need to set out the relevant provisions of the 2013 Act.

The provisions of the 2013 Act relating to a closed material procedure

19. Part 2 of the 2013 Act makes provision for a closed material procedure in civil proceedings. The gateway to such a procedure is section 6:

> "**6. Declaration permitting closed material applications in proceedings**
>
> (1) The court seised of relevant proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.
>
> (2) The court may make such a declaration –
>
> (a) on the application of (i) the Secretary of State … or (ii) any party to the proceedings, or
>
> (b) of its own motion.
>
> (3) The court may make such a declaration if it considers that the following conditions are met.
>
> (4) The first condition is that –
>
> (a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or
>
> (b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following –
>
> (i) the possibility of a claim for public interest immunity in relation to the material ….
>
> (5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.
>
> (6) The two conditions are met if the court considers that they are met in relation to any material that would be required to be disclosed in the course of the proceedings (and an application under subsection (2)(a) need not be based on all the material that might meet the conditions or on material that the applicant would be required to disclose).
>
> (7) The court must not consider an application by the Secretary of State under subsection (2)(a) unless it is satisfied that the Secretary of State has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.

> (8) A declaration under this section must identify the party or parties to the proceedings who would be required to disclose the sensitive material ('a relevant person').
>
> …
>
> (11) In this section –
>
> > 'closed material application' means an application of the kind mentioned in section 8(1)(a);
> >
> > 'relevant civil proceedings' means any proceedings (other than proceedings in a criminal cause or matter) before (a) the High Court, (b) the Court of Appeal ….
> >
> > 'sensitive material' means material the disclosure of which would be damaging to the interests of national security."

20. Section 7 provides for a section 6 declaration to be kept under review by the court and to be revoked where appropriate. It is an important section but for the purposes of the present appeal I can omit the detail.

21. Applications for the withholding of material in section 6 proceedings are governed by section 8, not by way of direct provision but indirectly, by specifying what must be secured by rules of court:

> "**8. Determination by court of applications in section 6 proceedings**
>
> (1) Rules of court relating to any relevant civil proceedings in relation to which there is a declaration under section 6 ('section 6 proceedings') must secure –
>
> > (a) that a relevant person has the opportunity to make an application to the court for permission not to disclose material otherwise than to (i) the court, (ii) any person appointed as a special advocate, and (iii) where the Secretary of State is not the relevant person but is a party to the proceedings, the Secretary of State,
> >
> > (b) that such an application is always considered in the absence of every other party to the proceedings (and every other party's legal representative),
> >
> > (c) that 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
> >
> > (d) that, if permission is given by the court not to disclose material, it must consider requiring the relevant person to

> provide a summary of the material to every other party to the proceedings (and every other party's legal representative),
>
> (e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be damaging to the interests of national security.
>
> (2) Rules of court relating to section 6 proceedings must secure that provision to the effect mentioned in subsection (3) applies in cases where a relevant person –
>
> (a) does not receive the permission of the court to withhold material, but elects not to disclose it, or
>
> (b) is required to provide another party to the proceedings with a summary of material that is withheld, but elects not to provide the summary.
>
> (3) The court must be authorised –
>
> (a) if it considers that the material or anything that is required to be summarised might adversely affect the relevant person's case or support the case of another party to the proceedings, to direct that the relevant person –
>
> (i) is not to rely on such points in that person's case, or
>
> (ii) is to make such concessions or take such other steps as the court may specify; or
>
> (b) in any other case, to ensure that the relevant person does not rely on the material or (as the case may be) on that which is required to be summarised."

22. The relevant rules are contained in CPR Part 82. Ms Rose preferred to concentrate on the requirements laid down by section 8 itself rather than on the way in which effect has been given to those requirements in the detailed rules. I should, however, note that the main rules governing an application to withhold sensitive material as referred to in section 8 are CPR rules 82.13 and 82.14, and that two sub-paragraphs of rule 82.14 call for particular comment. Sub-paragraph (7) provides that where the court gives permission to the relevant person to withhold sensitive material, the court (a) must consider whether to direct the relevant person to serve a summary of that material on the specially represented party and the specially represented party's legal representative, but (b) "must ensure that any such summary does not contain material the disclosure of which would be damaging to the interests of national security". Sub-paragraph (10) provides that the court "must give permission to the relevant person to withhold sensitive material where it considers that disclosure of that material would be damaging to the interests of national security". Both those provisions reflect the terms of section 8 and contain on their face an absolute protection for material the disclosure of which would be damaging to the interests of national security. Section 14(2)(c) of the 2013 Act provides, however, that nothing in sections 6 to 14 is to be

read as requiring a court or tribunal to act in a manner inconsistent with article 6 of the European Convention on Human Rights. It follows, and it was common ground before us, that if article 6 requires disclosure of material or of a summary notwithstanding that disclosure would be damaging to the interests of national security (as to which, see for example *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28, [2010] 2 AC 269), the provisions of section 8 and the rules made under it are not to be read as precluding such disclosure.

23. I should also mention rule 82.26(1) which provides that if the court makes a declaration under section 6, it must give directions for the further management of the case or for a directions hearing or for both. This appears to have been overlooked in the present case, where no such directions were given following the making of the declaration under section 6. The point is not, however, material to the appeal.

The application under section 6 of the 2013 Act.

24. The Secretary of State's application for a declaration under section 6 was supported by an open statement of reasons signed by the Foreign Secretary himself and by the open witness statement of Mr Sharma to which I have already made reference. It was also supported by a closed statement of reasons to which closed material was annexed. The open statement of reasons stated that the closed material was sensitive and was relevant to the issues in the case: "the Defendant wishes to substantiate why it was rationally entitled to conclude that the Claimants are persons falling within the criteria of Article 19(1)(b) and 20(1)(b) of [the 2010 Decision] by reference to such material" (paragraph 15). Mr Sharma's witness statement also made clear that the material was relied on as evidence confirming the accuracy of each of the reasons given for the claimants' listing (paragraph 45).

25. The procedure adopted for handling this material at first instance is described at paragraphs 8-10 of the judgment of Bean J. A corresponding procedure was adopted for the hearing of the appeal before us. The case for the claimants was developed in an open hearing in which we heard submissions from Ms Dinah Rose QC on behalf of the claimants and from Mr Jonathan Swift QC on behalf of the Secretary of State. This was followed by a short closed hearing in which we heard submissions from Mr McCullough QC, special advocate, in support of the appeal, again resisted by Mr Swift.

26. This open judgment covers all the main issues arising in the appeal, including reference in general terms to arguments advanced in the closed procedure. A separate closed judgment is to be avoided if possible and I do not think that it is needed in this case. The open judgment contains sufficient to enable those involved in the closed procedure to understand the court's essential reasoning and conclusions in relation to the arguments advanced.

27. In a footnote to his judgment, at paragraph 42, the judge referred to the late service of material by the Secretary of State and to the difficulties this had caused to the special advocates in particular. During the course of the closed hearing on the appeal, this court added its own expressions of concern about the state of the closed material and in particular about the lack of a clear explanation, in a closed witness statement or the closed statement of reasons, of the documents provided and how they were tied in with the Secretary of State's decision-making process. Such an explanation, pulling

things together, was given in an annex to Mr Swift's closed skeleton argument but that is an unsatisfactory substitute for an explanation accompanying the section 6 application and the closed material when filed. The deficiencies were not such as to affect the outcome of the appeal but I mention the point because of the importance of ensuring that closed material procedures are conducted with care and clarity.

The judgment below

28. The judge began his discussion of the issues by accepting a submission by Mr Swift that the General Court's decision annulling the claimants' listing did not determine either the substantive claim or the section 6 application. He said that the decision under scrutiny in the present judicial review was that taken by, or in the name of, the Secretary of State that a proposal would be made to the Council to designate the claimants. Its lawfulness and rationality were issues for the Administrative Court applying English law, not for the court in Luxembourg. Quite apart from the jurisdictional point, it did not follow logically that because the Council's decision was wrong on the basis of the material before it, the Secretary of State's decision was wrong on the basis of the different, more extensive material before him.

29. The judge then referred to Ms Rose's submission, which is at the heart of the appeal, that the Secretary of State cannot rationally seek to support his decision to propose the claimants for listing on the basis of material which he did not share with the Council. He distinguished *AN v Secretary of State for the Home Department* [2010] EWCA Civ 869, on which Ms Rose relied and to which I will return.

30. The judge referred to the requirement in section 6(7) not to consider an application unless satisfied that the Secretary of State has considered whether to make a claim for public interest immunity ("PII") in relation to the material on which the application is based. He referred to the Secretary of State's open statement of reasons which confirmed that consideration had been given to whether to make a claim for PII, and he expressed agreement with the Secretary of State's stated approach that "section 6(7) requires me to consider in essence whether, having regard to the section 6 material, PII rather than an application for a CMP [closed material procedure] is the more appropriate course in the case. That exercise requires consideration of whether the particular claim could fairly be tried without the section 6 material".

31. The judge rejected a submission by Mr McCullough that, on the basis of the evidence so far adduced, there had been a failure to conduct a proper analysis or assessment of the sensitive material, or take reasonable steps to make further enquiries, before the decision to propose the claimants for designation had been made. The judge observed:

> "Those are points which he can no doubt develop at the substantive hearing for judicial review, where they will have to be evaluated in the light of all the evidence then before the court. But they do not arise at this interlocutory stage. Section 6 does not require me as a prerequisite to making a CMP declaration to conclude, for example, that the Secretary of State is more likely than not to succeed in defeating the substantive claim. I consider that I need to be satisfied that the Secretary of

> State has an arguable defence and that the sensitive material appears *prima facie* to be relevant and to support that defence."

32. A further submission by Mr McCullough, as to the absence of evidence before the court to show that the IRISL companies were engaged in or supporting Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems, was also rejected, on two grounds: first, that section 6(6) expressly allowed an applicant under section 6 to keep some material back for the substantive hearing; and second, that the Secretary of State had been entitled to rely at the material time on the 2010 Decision imposing restrictive measures on the IRISL companies, so that it was unnecessary for him to have before him evidence of those companies' involvement in such activities.

33. The judge held that the first condition, in section 6(4), for a declaration under section 6(1) was satisfied. The special advocates accepted that the material in question was sensitive within the section 6(11) definition; and the judge, citing the observation of Laws LJ in *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 that "there is … a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide", regarded it as disclosable on general principles, subject to any PII application.

34. As to the second condition, in section 6(5), the judge referred to the observation of Lord Dyson in *Al-Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531, at paragraph 14, that "a closed material procedure involves a departure from both the open justice and the natural justice principles", and said:

> "36. … It cannot, therefore be in the interests of the fair and efficient administration of justice to make a declaration allowing a CMP [closed material procedure] unless it is necessary to do so, and it will not be necessary to do so if there are satisfactory alternatives."

He rejected the submission of the special advocates that an application for PII combined with the provision of a gist of the sensitive material would be a practicable alternative:

> "37. … The present claim challenges the rationality of the Secretary of State's decision. The detail of the material available to the decision-maker is essential to an evaluation of the substantive case. An application for PII would exclude it from consideration.
>
> 38. As to gisting: the overall gist of the sensitive material is set out at paragraph 34(ii) to (iv) of the Detailed Grounds of Defence. I do not consider that any useful further particulars of the evidence could be provided as open material without the risk of damaging national security. As to a confidentiality ring, a possibility which was only faintly hinted at, I regard it as wholly impracticable in a case of this kind: as Lord Mance said in *Somerville v Scottish Ministers* [2007] 1 WLR 2734 at [203],

> it would put counsel for the claimants in 'an invidious and unsustainable position'."

He then cited observations of Irwin J in *CF v Security Service; Mohamed v Foreign and Commonwealth Office* [2013] EWHC 3402 (QB) at paragraphs 45 and 52, to which I will return. He expressed agreement with Irwin J's observations and concluded that there was no practicable alternative to a closed material procedure if the present case was to be fairly tried, and that the second condition was satisfied.

35. Having found that the two statutory conditions were met, the judge concluded, in the exercise of the discretion conferred by section 6(3), that he should make a declaration that the claim for judicial review was one in which a closed material application might be made to the court.

The first condition: requirement to disclose sensitive material

The case for the claimants

36. Ms Rose submitted that the judge was wrong to find that the two statutory conditions were met.

37. As to the first condition, that the Secretary of State would be required to disclose sensitive material in the course of the proceedings or would be required to do so were it not for the possibility of a PII claim (section 6(4)), she submitted that in reaching the conclusion that the condition was met the judge failed to apply the proper test for disclosure in judicial review and erred in concluding that the sensitive material "appears *prima facie* to be relevant", still less that it was necessary to the fair determination of the proceedings.

38. In relation to the test for disclosure, she relied on the statement by Lord Bingham in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650, at paragraph 3, that "[t]he test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly".

39. She submitted that the Secretary of State would not be required to disclose any sensitive material, for the simple reason that it was irrelevant to the issues in the case. The rationality of the decision to propose the claimants for designation by the Council would have to be judged on the basis of the material that the Secretary of State put forward to the Council in support of the proposal, all of which was now in open. The Secretary of State could not rationally make a proposal to the Council on the basis of material that he did not share and was not prepared to share with the Council. This was true as a matter of general principle and was fortified by the Council's procedural document described at paragraph 8 above and by the legislative scheme. A Member State proposing a person for listing had to provide reasons in a form that could be made public or communicated to the person listed, with the possibility of submitting additional information to the Council. The Council, for its part, was not entitled to justify its decision by reference to matters not appearing in the statement of reasons for the decision itself or in the documents and evidence communicated at their request to the persons listed (see, in particular, paragraph 53 of the General Court's judgment in *Islamic Republic of Iran Shipping Lines v Council of the European Union*, cited above); and "the legality of the contested measures may be assessed only on the basis

of the elements of fact and of law on which they were adopted and not on the basis of information which was brought to the Council's knowledge after the adoption of those measures" (paragraph 39 of the General Court's judgment in *Nabipour and Others v Council of the European Union*, cited above).

40. In the closed hearing, Mr McCullough made submissions supportive of the case advanced by Ms Rose in open. He submitted that the court should take a strict approach to the conditions in section 6 and should only make a declaration allowing a closed material procedure as a last resort; and that applying that approach, a declaration was at the least premature. He raised general concerns, to which I have already made some reference, about the state of the closed material. As to the first condition, he accepted that the closed material was sensitive in the form in which it had been produced but he said that assessment of the requirement to disclose the material called for consideration of the issues in the substantive judicial review claim. On the irrationality issue he supported Ms Rose. On the issue of error of fact, he submitted that a requirement of disclosure had not been established, given the form and content of the material produced and the scope for gisting such material as might be relevant.

Discussion of the first condition

41. I cannot accept the case advanced by Ms Rose, as supported by Mr McCullough, in relation to the first condition. I would reject it largely for reasons put forward by Mr Swift but which I would express as follows.

42. First, the target of the judicial review proceedings is the Secretary of State's *decision to propose* the claimants for listing by the Council, not what happened thereafter (including the Council's decision to list them). In considering the rationality challenge, that "there was no lawful or rational basis on which the listing of the Claimants could have been proposed", what matters is whether the material taken into account by the Secretary of State in reaching the decision to make the proposal provided a rational basis for that decision. The question is *not* whether the Secretary of State gave the Council sufficient reasons and/or sufficient supporting information for the purposes of a listing decision by the Council. It was for the Council to decide, in the light of the input from the United Kingdom and other Member States, whether it had a legally sufficient basis for listing the claimants. A suggestion by Ms Rose that the Council acted as a rubber stamp for proposals put forward by Member States has no support in the evidence and is contradicted by Mr Sharma's description of the decision-making process, summarised at paragraph 7 above.

43. The process leading to the Secretary of State's decision to make the proposal is described in Mr Sharma's witness statement, including the passage quoted at paragraph 9 above. From the witness statement and the case as pleaded in the grounds of defence it appears that substantially more material was taken into account in reaching the decision to propose the claimants than was set out in the brief details communicated to the Council in the proposal itself. The Secretary of State's position is that the material taken into account, or at least some of that material, is to be found in the closed material filed in support of the section 6 application. I am satisfied that the court can properly proceed on that basis, notwithstanding Mr McCullough's points concerning the deficiencies in the closed material. Mr McCullough accepted that in its present form the material is sensitive. The Secretary of State is entitled to rely on

that material in defending the rationality of his decision to propose the claimants; and he would as a matter of principle be required to disclose to the claimants (subject to the possibility of a PII claim) any material so relied on. The requirement of disclosure would also arise from the Secretary of State's duty to provide the court with a full explanation of why he made the decision under challenge. That duty was described in the passage from *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* cited by Bean J (see paragraph 33 above). It was considered and applied by the Divisional Court in *Secretary of State for the Home Department v Special Immigration Appeals Commission* [2015] EWHC 681 (Admin). The duties of disclosure applicable in the circumstances here under consideration are therefore different from, and more extensive than, the duty of disclosure described in *Tweed v Parades Commission for Northern Ireland* upon which Ms Rose relied.

44. In support of her argument that it was not open to the Secretary of State to support the rationality of his decision to make the proposal by reference to material that he did not and was not prepared to share with the Council, Ms Rose relied on *AN v Secretary of State for the Home Department* and argued that Bean J was wrong to distinguish the decision of the Court of Appeal in that case. *AN* concerned non-derogating control orders made under the Prevention of Terrorism Act 2005. Such an order could be made only by the Secretary of State, on the grounds in section 2(1) of the Act. The Secretary of State had to obtain the permission of the court to make the order, either in advance of, or in case of urgency immediately after, making the order. The function of the court was to consider whether the decision of the Secretary of State that there were grounds to make the order was obviously flawed. In the cases under consideration in *AN*, the Secretary of State had made the orders on the basis of undisclosed material. Following the decision of the House of Lords in *Secretary of State for the Home Department v AF (No.3)* (cited above), he elected to revoke the orders then in force rather than to make the further disclosure required by *AF (No.3)*. The issue in *AN* was whether the orders should be quashed *ab initio*. Mitting J held that the orders should be revoked rather than quashed, stating that, subject to one qualification, "when the Secretary of State decides to apply for permission to make the order and makes it, he is not inhibited from relying on closed material which, in due course, he may elect to withdraw rather than to disclose or gist". The Court of Appeal allowed the appeal and quashed the orders.

45. The central passage in the judgment of the Court of Appeal upon which Ms Rose relies is paragraph 27, *per* Maurice Kay LJ:

> "In order to advance a submission that a control order was valid when made but only succumbed to legal difficulty at a later date, the Secretary of State would have to establish that, in relation to the point for which he is asserting legality, he can satisfy the court as to the reasonable grounds for his suspicion of terrorism-related activity and the need for public protection. However, he could only do that by relying on the material that he is unwilling to disclose or gist. In other words, he would need to resort <u>now</u> to closed material in a manner not countenanced by *AF (No.3)*. Whilst I accept Mitting J's suggestion that, in court, the Secretary of State does not have to rely on all the material that led him to his view about terrorism-

> related activity and public protection, he does have to rely (with consequential disclosure obligations) on sufficient of it to satisfy the court that his decision to make a control order was and is not flawed. In these cases, he has chosen not to do so. I shall assume that he has reasonable grounds for exercising that choice. However, its consequence is that he has disabled himself from satisfying this appellate court that, throughout, he has been able to satisfy section 2(1). In essence, we are being invited to assume that, but without access to the relevant material. We are being asked to find that he acted reasonably when, in truth, that is something that we cannot test against the material relied upon by the Secretary of State." (Emphasis in the original.)

46. Bean J distinguished the decision in *AN* on the following basis:

> "29. I do not accept that this reasoning is applicable to the present case. Under the system of non-derogating control orders the Home Secretary himself made the order. The court could not assess the lawfulness of the order, and the controlee could not challenge it in court, without knowing at least the gist of the evidence on which it had been based. This is in contrast with the present case, where the designation of the claimants was a decision of the EU Council, not of the Foreign Secretary. In English law a prosecutor, and in some circumstances (for example when applying for an injunction without notice) a claimant in civil proceedings, is under a duty to disclose to both the court and the defendant material which weakens his case. But he is not under the same duty to disclose material (such as a tip-off to police) which does not weaken his case and which influenced him to begin the proceedings."

47. I agree with Bean J that the reasoning in *AN* is inapplicable to the present case. I do not accept that what was said in *AN* about the court's inability to test the lawfulness of the Secretary of State's order in the absence of further disclosure can be transposed to the very different context of the relationship between the Secretary of State, as maker of the proposal, and the Council, as the EU institution responsible for the decision to list. Moreover, the concern of the Court of Appeal in *AN* was that in the absence of disclosure of the material relied on or a gist of that material, sufficient to satisfy the requirements laid down in *AF (No.3)*, the court was unable to test whether the Secretary of State had reasonable grounds for his suspicion of terrorism-related activity and the need for public protection and could not therefore be satisfied that the decision to make a control order was not flawed. The issue in the present case, by contrast, is whether to allow a closed material procedure that has the potential of enabling the court to consider the entirety of the material on which the decision to make the proposal was based and to test by reference to all such material whether the Secretary of State had a reasonable basis for the decision. Whether that is achievable in practice will depend upon the extent to which, in the course of the closed material procedure itself, the court gives permission for material to be withheld and requires the provision of a summary of the material withheld, the extent to which the Secretary

of State is willing to provide any such summary, and the resulting extent to which the Secretary of State is permitted to rely on the closed material in defence of the substantive claim. Given that the outcome of the closed material procedure cannot be determined in advance, the situation is plainly very different from that facing the court in *AN*; and the uncertainty of outcome of the procedure is not a valid reason for refusing to open the gateway to the procedure in the first place.

48. It follows from all this that Ms Rose's attempt to circumvent a closed material procedure by confining the rationality issue to the information that the Secretary of State put forward to the Council in support of the listing proposal must be rejected. It does not provide a valid basis for challenging the judge's finding that the first condition was met. The rationality argument can be advanced in due course at the hearing of the substantive claim, where it can be considered in the context of all the material upon which the decision was based, to the extent that the outcome of the closed material procedure allows the Secretary of State to rely on such material; but it cannot avail the claimants at this point in the proceedings.

49. There is a further and separate reason why the judge was entitled to find that the first condition was met. The rationality argument is just one of the grounds of claim in the judicial review proceedings. A second ground alleges that the Secretary of State's proposal was based on errors of fact in relation to each of the claimants. It is linked with the allegation, either as part of the same ground or as a distinct ground of claim, that the Secretary of State failed to take reasonable steps and to make proper inquiries in order to acquaint himself with relevant material before deciding to propose the claimants (an allegation based on the duty expressed in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B). Those allegations of factual error and inadequate inquiry are denied by the Secretary of State, who again relies on the closed material in support of that part of his defence. He is plainly entitled to rely on it for that purpose, and would equally plainly be required to disclose it (subject to the possibility of a PII claim) in the course of the proceedings.

50. I have referred to the requirement to disclose material "subject to the possibility of a PII claim" because that is how, in summary, the first condition is expressed. Mr McCullough's submission that there may be scope for gisting in the context of a PII claim goes primarily to the second condition; but in so far as he relied on it in relation to the first condition, I think that such reliance was misplaced. The first condition does not require the court to consider what the outcome of a PII claim might be. What it looks to is whether a party would be required to disclose sensitive material were it not for the *possibility* of a PII claim. The fact that a PII claim might lead to the production of a non-sensitive summary as the price of withholding the primary sensitive material is neither here nor there for the purpose of deciding whether the first condition is met.

51. Accordingly, I am satisfied that the judge was right to find that the first condition was met on the facts of the present case.

The second condition: the interests of the fair and effective administration of justice

The case for the claimants

52. As to the second condition, that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration (section 6(5)), Ms Rose submitted that a section 6 declaration, as the gateway to a closed material procedure, should be a measure of last resort. A closed material procedure is inherently and irremediably unfair. Factual allegations may be made which cannot be challenged or tested. The role of the special advocates, who cannot effectively communicate with the claimants or obtain instructions, does not remedy the unfairness. The procedure is pernicious to justice, and all the more so if a closed judgment is given. It creates an inequality of arms, handing the advantage to the Secretary of State in the litigation and giving him privileged access to the court. It risks corrupting the legal process. Those considerations mean that full weight must be given to the second condition.

53. Ms Rose referred to the strong criticisms of a closed material procedure that were made by Lord Dyson in *Al-Rawi v Security Service* (cited above), in particular at paragraphs 27-37 and 92-93, and by Lord Neuberger and Lord Hope in *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 38, [2014] AC 700, at paragraphs 2-7, 67-74 and 89-100 of the judgments on the jurisdiction issue. She submitted that in *CF v Security Service; Mohammed v Foreign and Commonwealth Office* (cited above), which appears to have been the first case in which an application under section 6 of the 2013 Act was decided, Irwin J was too sanguine in making the declaration sought. In any event the case had a specific feature which, as Irwin J put it at paragraph 53 of his judgment, diminished the disadvantages of a closed material procedure, namely that it was not a case which turned centrally on matters alleged by the State against the claimants but not revealed to them; on the contrary, it was the claimants who made the relevant allegations and who had already given detailed accounts and had set the agenda for the case.

54. Ms Rose then applied those general points in making a detailed critique of the judge's reasoning at paragraphs 36-40 of his judgment. She submitted that he set too low a threshold for the second condition and that he failed to consider or weigh the unfairness of a closed material procedure to the claimants, and the consequential adverse effects of such a procedure on the fair and effective administration of justice. An inherently unfair closed material procedure should be adopted only if everything else is even more unfair. The judge's conclusion was based only on his assessment that the detail of the material available was essential to an evaluation of the substantive case and that an application for PII would exclude it from consideration. That, however, was insufficient to warrant a finding that the second condition was met. The material in question, if relevant at all, is of limited relevance, minimising the extent of any unfairness to the Secretary of State if a declaration were refused. The material consists of undisclosed allegations made against the claimants and prejudicial to them, which they would be well placed to rebut if the material were disclosed to them but to which they and the special advocates are unable to respond in the absence of disclosure. If, contrary to the claimants' submissions, the material is of significant relevance to the claim, its deployment in closed proceedings would deprive the claimants of a fair hearing and prevent the fair and effective administration of justice. Deciding the case on the basis of such material would undermine the

confidence of the claimants and of the public in the effectiveness of the judicial system.

55. Again, the case advanced by Ms Rose in open was supported by Mr McCullough in the closed hearing. I have referred already to his submission that the court should take a strict approach to the conditions in section 6 and should only make a declaration as a last resort; and that applying that approach, the declaration in this case was at least premature. That point was particularly relevant to his submissions on the second condition, where he argued that the court could not be satisfied without further inquiry that a declaration was in the interests of the fair and effective administration of justice. He submitted that it was not apparent on the basis of the closed material that gisting in the context of PII was not practicable, such that a fair hearing could be achieved without a closed material procedure. Further details of the content of the material could be provided to enable the claimants to address the evidence without having to resort to a closed material procedure. The judge should have tried the PII process first, falling back on a section 6 declaration only if it then proved necessary, and dismissing or adjourning the section 6 application in the meantime.

Discussion of the second condition

56. I do not accept that the judge was wrong to find that the second condition was met. In my judgment, he adopted the correct general approach and reached a conclusion to which he was entitled to come in the circumstances of this case.

57. A closed material procedure is a serious departure from the fundamental principles of open justice and natural justice, but it is a departure that Parliament has authorised by the 2013 Act in defined circumstances for the protection of national security. The legal context of such legislation is expressed with clarity in the judgment of Lord Neuberger (with whom Baroness Hale, Lord Clarke, Lord Sumption and Lord Carnwath agreed) on the jurisdiction issue in *Bank Mellat v Her Majesty's Treasury (No 2)* (cited above):

> "2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum ….
>
> 3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private

> hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ('the excluded party') knowing, or being able to test, the contents of that evidence and those arguments ('the closed material'), or even being able to see all the reasons why the court reached its conclusions.
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> 4. In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson JSC made it clear that, although 'the open justice principle may be abrogated if justice cannot otherwise be achieved' (para 27), the common law would in no circumstances permit a closed material procedure ….
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> …
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> 8. In a number of statutes, Parliament has stipulated that, in certain limited and specified circumstances, a closed material procedure may, indeed must, be adopted by the courts. Of course, it is open to any party affected by such legislation to contend that, in one respect or another, its provisions, or the ways in which they are being applied, infringe article 6. However, subject to that, and save maybe in an extreme case, the courts are obliged to apply the law in this area, as in any other area, as laid down in statute by Parliament."

58. The 2013 Act is one of those in which Parliament has stipulated that a closed material procedure may be permitted by the court. It represents Parliament's assessment of how, in relevant civil proceedings, the balance is to be struck between the competing interests of open justice and natural justice on the one hand and the protection of national security on the other, coupled with express provision in section 14(2)(c) to secure compliance with article 6. It is certainly an exceptional procedure, and in the nature of things one would expect it to be used only rarely, but the conditions for its use are defined in detail in the statute. In the circumstances there is, in my judgment, no reason to give the statutory provisions a narrow or restrictive construction, save for any reading down that may be required, in accordance with the terms of the statute itself, for compliance with article 6. Subject to that point, the provisions should be given their natural meaning and applied accordingly. Appropriate safeguards against inappropriate or excessive use of a closed material procedure are built into the provisions themselves, starting with the conditions for a section 6 declaration and encompassing the provisions for review and revocation of a declaration and those governing applications for permission not to disclose material in proceedings in relation to which a declaration is in place.

59. In the context of the present case I would place particular emphasis on the provisions of section 8 of the 2013 Act and the rules made under it to the effect that if the court gives permission for material to be withheld, it must consider requiring the Secretary of State to provide a summary of the material to the claimants and their open legal representatives, and that if the Secretary of State elects not to provide such a summary the court may give directions that he is not to rely on the relevant points in his case or

is to make concessions. As I have said, those provisions must be read and applied in a manner consistent with article 6 and, therefore, the disclosure requirements laid down in *AF (No.3)*.

60. The application of the second condition must be considered against that general background.

61. In my view the judge was right that it cannot be in the interests of the fair and effective administration of justice in the proceedings to make a section 6 declaration and thereby open the gateway to a closed material procedure unless it is necessary to do so, and that it will not be necessary to make a declaration if there are satisfactory alternatives. Ms Rose's contention that, since a closed material procedure is itself unsatisfactory, the judge ought to have said that a declaration will not be necessary if there are "less unsatisfactory" alternatives is in my view a semantic quibble.

62. The judge gave due consideration to whether an application for PII would represent a satisfactory alternative. What he said in paragraph 38 of his judgment (quoted above) about the impracticability of useful further gisting without the risk of damaging national security was in my view addressed to the question of gisting in the context of a PII application. It was *not* addressed to the question whether the provision of a summary of withheld material might be required in the context of a closed material procedure pursuant to section 8 if a declaration were made, and it did not foreclose argument about a summary in that context. Mr Swift conceded this in terms during the closed hearing, submitting that the issue of a summary in the context of a closed material application pursuant to section 8 was not even before the judge, let alone was it determined by him.

63. The judge took the view that the result of a PII application would be to exclude from consideration the detail of the material available to the decision-maker, detail which was essential to an evaluation of the substantive case. There might be greater scope for gisting in the PII context than the judge accepted, but I do not think that it was necessary or appropriate for him to consider the application of PII principles any more extensively than he did. It seems to me that a PII claim would be bound to lead to the withholding, and thus to the exclusion from consideration, of important detail in the material taken into account by the Secretary of State in reaching his decision, and that the judge was right to say that such detail was essential to an evaluation of the substantive. To exclude the detail from consideration would not only be unfair to the Secretary of State but might preclude a trial at all, on the principles in *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786. In the circumstances, even allowing for the disadvantages of a closed material procedure, the judge was entitled to conclude that a PII claim was not a satisfactory alternative to a section 6 declaration.

64. The paragraphs from the judgment of Irwin J in *CF v Security Service; Mohammed v Foreign and Commonwealth Office* which the judge cited and with which he expressed agreement were these:

> "45. I have also considered carefully the various submissions for alternative mechanisms intended to deal with the problem of sensitive material. What of gisting and summary? Much of the material here could not be summarised or gisted without

> either being summarised so generally as to be excessively bland, or causing the damage to national security which is feared. That conclusion proceeds from the nature of the material. I do not consider that gists or summaries provide the means to dispense with a closed material procedure and yet mount an effective trial. It is a rather different question as to whether, if a closed material procedure takes place, summaries and gists may play a role in permitting the Claimants and their representatives to give evidence focussed on the issues, and ensure their accounts cover the points which need to be addressed. That will need careful and detailed consideration.
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> …
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> 52. Difficult though closed material procedures can be, they do carry the benefit that the Claimants have both a team of lawyers who can communicate freely with them, and special advocates who cannot communicate directly with them, but who will be aware of all the evidence, and can test it thoroughly, with the Claimants' instructions and evidence in mind. The court will be alive to the need to open as much evidence as possible, and to ensure that the Claimants address in evidence all that needs to be covered. Experience of conducting closed material procedures does suggest that given care about the practicalities, given an emphasis on ensuring the issues are properly addressed, combined with caution and clear thinking as to the inferences that can fairly be drawn, a just result can be achieved. The problem that cannot be overcome is that justice cannot be seen to have been done. Certainly, the risks attendant on a confidentiality ring are high, in my view, and would be so here."

65. Perhaps those observations do not acknowledge as fully as they might the difficulties faced by special advocates in testing evidence that emerges in the closed material procedure, in circumstances where they cannot seek the instructions of the claimants on that evidence, but the general thrust of the observations does not strike me as unduly sanguine. I do not think that Bean J fell into error in expressing agreement with them and adopting a similar approach in the present case. It is true that Irwin J's case had a specific feature that in his view diminished the disadvantages of a closed material procedure, and that Bean J did not refer to that aspect of Irwin J's judgment, but that was not a crucial point. Bean J rightly concentrated on the particular features of the case before him. I am satisfied that he was entitled to conclude in the circumstances that the second condition was met.

Conclusion

66. For those reasons I would dismiss the appeal.

Lord Justice Sullivan :

67. I agree.

Lord Justice McFarlane :

68. I also agree.