Neutral Citation Number: [2024] EWHC 942 (KB)

Case No: KB-2022-004388

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2024

Before :

MR JUSTICE CHAMBERLAIN

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Between :

ANDREW HALE-BYRNE	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR BUSINESS AND TRADE	**Defendants**
(2) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	

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Paul Diamond (instructed by **Moore Barlow**) for the **Claimant**
Adam Heppinstall KC and James Purnell (instructed by **Government Legal Department**) for the **Defendants**
Stephen Cragg KC and David Lemer as **Special Advocates to the Court** (instructed by the **Special Advocates' Support Office**)

Hearing date: 24 January 2024

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Approved Judgment

This judgment was handed down remotely at 10:00am on Wednesday 24th April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 These are my reasons for deciding, after a hearing on 24 January 2024, to make a declaration pursuant to s. 6(1) of the Justice and Security Act 2013 that these are proceedings in which a closed material application may be made ("a s. 6 declaration").

2 Since the decision, the defendants have made a closed material application and also applied for summary judgment pursuant to CPR Part 24. The claimant has applied to join Lord Darroch of Kew as third defendant. I have given directions for the determination of these applications.

Background

3 Andrew Hale-Byrne was a civil servant. He worked for the Ministry of Defence from 2001 to 2009 and then for the Department for International Trade from 2017 to 2021. On 13 October 2020, when he was recovering from cancer surgery, an armed team from the Metropolitan Police forcibly entered and searched his home and arrested him on suspicion of making a damaging disclosure of information in his possession by virtue of his position as a Crown servant (contrary to s. 3 of the Official Secrets Act 1989) and misconduct in public office (a common law offence). He was questioned in relation to these offences, but never charged.

4 These proceedings do not concern the way in which the arrest was effected, about which Mr Hale-Byrne has separate complaints. Nor do they concern the means by which the police and/or other agencies obtained the information which led to it. There is a complaint and claim before the Investigatory Powers Tribunal about these matters. I informed the parties that I am one of the members of the Tribunal dealing with that complaint and claim. No objection was taken to my dealing also with the present application.

5 The present claim, issued on 11 November 2022, is brought against the Secretaries of State responsible for the then Departments of International Trade (where Mr Hale-Byrne worked) and Foreign, Commonwealth and Development Office. In his Particulars of Claim, Mr Hale-Byrne says that named officials from these departments acted in bad faith by falsely identifying him to police as the source of diplomatic telegrams which had been leaked to Steven Edginton, a freelance journalist working for *The Sun*. The telegrams were from Sir Kim Darroch (now Lord Darroch), who was HM Ambassador to the United States of America. The publication of these telegrams precipitated his resignation. Mr Hale-Byrne says that the officials falsely identified Mr Hale-Byrne to the police, and then informed the press of his arrest, in order to create a distraction from adverse reporting about the conduct of Sir Kim, whom Mr Hale-Byrne accuses of misconduct endangering national security.

6 This course of conduct on the part of officials is said to give rise to claims against the defendant Secretaries of State for misfeasance in public office, breach of Mr Hale-Byrne's rights under Articles 3, 8 and 18 ECHR and unlawful processing of personal data contrary to Article 5 of the General Data Protection Regulation ("GDPR").

The law

7 The court may make a s. 6 declaration if it considers that two conditions are met. The first (s. 6(4)) 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,
>
> (ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,
>
> (iii) s.56(1) of the Investigatory Powers Act 2016 (exclusion for intercept material),
>
> (iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section."

8 It is sufficient if the first condition is met in relation to one issue in the case and by reference to some sensitive material relevant to that issue: *Belhaj v Straw* [2017] EWHC 1861 (QB), [22] and [37] and the case law cited there. The court should respect the Secretary of State's assessment that disclosure of sensitive material will cause damage to national security, save to the extent that it is vitiated by public law error: *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765, [70].

9 The second condition (s. 6(5)) is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.

10 Section 6(7) provides that the court may not make a s. 6 declaration on the application of the Secretary of State unless satisfied that, before making the application, he has considered whether to make, or advise another person to make, a claim for public interest immunity (PII).

11 As to this, it should be borne in mind that, in a case where the central issue turns on evidence in respect of which a PII application would be likely to be successful, the claim may fall to be struck out applying the principles in *Carnduff v Rock* [2001] 1 WLR 1786. This could result in a grave injustice to the claimant. It follows that the seriousness of the underlying allegations may, in an appropriate case, be a reason in favour of a CMP, rather than a reason against one: see *Belhaj*, [28].

12 Sensitive material is defined in s. 6(11) as material the disclosure of which would be damaging to the interests of national security.

Submissions for the claimant

13 Paul Diamond for the claimant submitted in his skeleton argument that a closed material procedure (CMP) represents a derogation from common law standards of fairness and should only be permitted where there is no viable alternative. In this case, it was said that the application for a s. 6 declaration was being used for the improper purpose of protecting a former ambassador from embarrassment. This, Mr Diamond submitted, was "the United Kingdom's *Dreyfus* case".

14 At para. 19 of his skeleton argument, Mr Diamond submitted as follows:

> "The 'evidence' to be presented to the learned judge in any Closed part of this hearing is likely to have been obtained by bugging, the accessing of electronic equipment and the monitoring of the Claimant. This 'evidence' was most likely obtained by unlawful means and by a misuse of the security services; and for wholly political purposes. The Claimant has now raised a claim against the security services at the Investigatory Powers Tribunal."

15 Mr Diamond also submitted in writing that this was not a national security case and there was no good reason why it should not be heard in OPEN. However, by the end of the hearing, his submissions had softened somewhat. The key point was that the court should bear in mind the need to test the propriety of the defendants' reasons for informing the police that Mr Hale-Byrne was responsible for leaking the telegrams; and, having considered the CLOSED material supporting the application, the court should adopt whatever procedure would be best suited to achieving that objective.

Submissions for the defendant

16 Adam Heppinstall KC for the defendants submitted that condition one is satisfied here because the defendants would be required to disclose sensitive material. The CLOSED bundle for the s. 6 application contained a selection of representative examples of the types of sensitive material which would fall to be disclosed.

17 Condition two is satisfied because the material will be relevant to the issue – in particular, the reasons for the claimant's arrest; and it would not be possible to determine these claims on the basis of OPEN material alone.

Submissions of the Special Advocates

18 The Special Advocates, Stephen Cragg KC and David Lemer, filed a short CLOSED skeleton argument, which with the agreement of the Secretaries of State was disclosed into OPEN. It indicated that the Special Advocates did not oppose the s. 6 application in CLOSED.

Decision

19 I can express my reasons for concluding that a s. 6 declaration is appropriate in this case briefly and entirely in OPEN:

(a) The essence of Mr Hale-Byrne's case is that his arrest was procured in bad faith by named officials as a way of distracting from adverse reporting about Sir Kim

Darroch. It follows that the reasons why Mr Hale-Byrne was arrested and the information which led to that arrest, insofar as they are known to the defendants, will be central to the determination of liability.

(b) I am satisfied on the basis of the CLOSED statement of reasons and sensitive schedule that there is evidence which bears on that question and which is "sensitive material" for the purposes of s. 6(11) of the JSA. I have borne in mind in this regard that the interest which must be affected by the disclosure of the material is "national security", and not any of the other interests protected by other CMP regimes, such as "the international relations of the United Kingdom". In some cases, it may be difficult to say whether the damage which disclosure would cause is damage to the UK's national security. This is not such a case. Disclosure of the sensitive material I have seen would unquestionably cause damage to the UK's national security.

(c) It is not possible at this stage to say whether the claim could be tried at all without a CMP. As the authorities make clear, it is also not necessary to reach a decision about that. It is sufficient to say that, if a s. 6 declaration were not made, the likely consequences would be as follows:

(i) the defendants Secretaries of State would claim PII over some or all of the material centrally relevant to the question of liability;

(ii) the PII claim would be upheld and the material would therefore be inadmissible;

(iii) the defendant would deny the central premise of the claim (that they procured Mr Hale-Byrne's arrest in bad faith in order to divert attention from adverse reporting on Sir Kim Darroch), but as a result of PII would be unable to plead any positive case as to why the arrest had taken place;

(iv) the court would be unable to go behind the defendants' bare denial and would be unable to interrogate the inadmissible sensitive material; and

(v) either the claim would fail because the defendants would be unable to prove an essential element of their case (see e.g. *R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin)) or the claim would be struck out under *Carnduff v Rock*.

(d) If, on the other hand, a s. 6 declaration is made, the court will be able to investigate why Mr Hale-Byrne was arrested and reach a view about whether his claim has substance. That investigation will take place partly in OPEN and partly in CLOSED. In the CLOSED part of the proceedings, the Special Advocates will seek to ensure that anything which can properly be disclosed into OPEN is so disclosed and, in respect of the material which cannot be disclosed into OPEN, will make such submissions as can be made on Mr Hale-Byrne's behalf.

(e) It follows that it is in the interests of the fair and effective administration of justice in the proceedings to make a s. 6 declaration. The second condition is therefore satisfied. Insofar as any residual exercise arises, I exercise that discretion to grant the s. 6 declaration.