



JUDICIARY OF
ENGLAND AND WALES

CF

-v-

Security Services and others

and

Mohammed Ahmed Mohamed

-v-

Foreign and Commonwealth and others

High Court (Queen's Bench Division)

7 November 2013

SUMMARY TO ASSIST THE MEDIA

The High Court (Mr Justice Irwin) has today made the first court ruling on the use of the Justice and Security Act 2013 in a civil claim for damages.

In a ruling on preliminary issues, the Court made a declaration that the Government can make a closed material application to the court in this case. The Court also ruled on PII.

Factual background

“CF and Mohammed Ahmed Mohamed are both British citizens of Somali descent. CF left the United Kingdom in 2009, Mohammed Ahmed Mohamed having left in 2007. They were both detained by the Somaliland Authorities on 14 January 2011. They were then detained until removal to the UK on 14 March 2011. Each claims that they were unlawfully detained, tortured and mistreated during the period of detention in Somaliland.” (para 1)

Procedural history

This is set out in paragraphs 8 – 12.

The two preliminary issues to be determined by the judge were:

“A. To determine the public interest immunity application, in so far as it relates to material the disclosure of which is not claimed by the Defendants to be damaging to the interests of national security.

B. Provided that by 4.00pm on Friday 12 July 2013, the Justice and Security Act 2013.....is in force, and provided that Rules of Court made under Schedule 3 to the Act are in force, having been laid before Parliament and not having ceased to have

effectto determine whether the court will make a declaration that a closed material application may be made to the court.” (para 11)

The Justice and Security Act 2013

The relevant legislation to be considered by the Court is set out in paragraphs 13 – 14.

Declaration under JSA 2013

This application is considered in paragraphs 15 – 55.

Mr Justice Irwin said: “The process of considering an application to withhold information from disclosure on the grounds of public interest [“a PII application”], and the procedures laid down under the JSA are very different, and in their essence may be thought of as conflicting. In his leading judgment in *A1 Rawi –v- Security Service* [2012] 1 AC 531 at paragraphs 41 Lord Dyson described a closed procedure as “the very antithesis of PII”.” (para 15)

Mr Justice Irwin went on to say:

“The Act permits the State to establish a regime, if the relevant criteria are established in the case in hand, allowing evidence to be adduced in private, under strict conditions which do not threaten national security. This can avoid the need for a concession which threatens or carries injustice for the State. It imports a corresponding risk of injustice to the Claimant acting against the State, whose case will now be met by evidence he never hears and cannot answer.” (para 18)

In reaching his decision, Mr Justice Irwin said:

“In my view the Defendants are therefore correct that the court may make a declaration, and adopt a closed material procedure, before disclosure has been given and without a PII claim having been made or determined. The question of whether it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration, must turn on the specific circumstances of the case in hand, and cannot properly turn on objections which would arise in every case, and which would therefore, if successful, subvert the intention of Parliament.

“The pre-condition for a declaration set out in S6(7) of the JSA is agreed to have been fulfilled, since the Secretary of State has not merely considered whether to make a claim for public interest immunity in relation to the material on which this application is based, but has in fact done so before making this application. The material advanced here was withheld in the control order proceedings pursuant to the Prevention of Terrorism Act 2005. A PII application was made in these proceedings in relation to this material, although that application is now in effect superseded by the application for a CMP.” (paras 36- 37)

In respect of the application for a declaration for closed material procedures, the judge went on to conclude:

“For the reasons I have given, in the closed judgment as well as this open judgment, I make the declaration pursuant to S6(1) of the JSA 2013 that a closed material application may be made to the court.” (para 55)

Public Interest Immunity

PII is discussed in paragraphs 56 – 64.

Mr Justice Irwin said:

“The co-existence of the JSA 2013 and PII is uneasy. In my view the description of the processes cited above as being “antithetical” is just. Moreover, in restricting the ambit of the JSA to material affecting national security, excluding material where PII may be sought on other grounds, Parliament has created problematic anomalies. If, as in this case, material is sought to be excluded on the ground of potential damage to the international relations of the UK, then to the extent that such an application is successful, that material cannot be introduced into a CMP which has been permitted pursuant to the Act. So if a declaration is followed by permission for a CMP, material which would have been excluded under a PII application on the (usually) more serious and pressing ground of potential damage to national security will be seen and assessed by the court; material excluded on the ground of potential damage to international relations cannot be considered either in the open proceedings or within the CMP.

“Another anomaly is the restricted potential response by the State to an unsuccessful application for PII, based on the international relations ground. Usually, if the State is unsuccessful, the relevant Secretary of State has the choice to abandon the case or the issue in question, and by that means avoid disclosure. Where there has been a declaration, meaning that sensitive material can be considered, it is hard to see that as a practical choice, unless the issues to which the PII-excluded material relates, are quite discrete from the case which will be addressed within the CMP.” (paras 56 – 57)

-ends-

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.