Neutral Citation Number: [2013] EWHC 3402 (QB)

Case No: HQ12X01361/HQ12X00145

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 07/11/2013

Before:
MR JUSTICE IRWIN

Between:

CF	**Claimant**
- and -	
(1) The Security Service **(2) The Secret Intelligence Service** **(3) The Ministry of Defence** **(4) The Foreign and Commonwealth Office** **(5) The Home Office** **(6) The Attorney General**	**Defendants**
and	
Mohammed Ahmed Mohamed	**Claimant**
-and-	
(1)The Foreign & Commonwealth Office **(2) The Home Office** **(3)The Ministry of Defence** **(4)The Attorney General**	**Defendants**

- - - - - - - - - - - - - - - - - - - -

Richard Hermer QC & Tom Hickman (instructed by **ITN Solicitors**) for **CF**
Timothy Otty QC & Dan Squires (instructed by **Birnberg Peirce Solicitors**) for **Mohammed Ahmed Mohamed**
James Eadie QC, Kate Grange, Louise Jones & Rosemary Davidson (instructed by the **Treasury Solicitor**) for the **Defendants**
Hugo Keith QC & Zubair Ahmad (instructed by the Special Advocates Support Office) **PII Advocates**
Hearing dates: 29 – 31 July 2013

- -

OPEN JUDGMENT ON CLOSED MATERIAL PROCEDURE
and PUBLIC INTEREST IMMUNITY

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Irwin:

Factual Background

1. CF and Mohammed Ahmed Mohamed are both British citizens of Somali descent. CF left the United Kingdom in 2009 MA 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.

2. Mohamed alleges, amongst other things, that an application for a control order against him was made prior to the apprehension of both men in Somaliland. It is alleged that this demonstrates the Defendants were aware that Mohamed was about to be arrested in Somaliland and that the request was a precaution. The Secretary of State was given permission to make a control order against Mohamed by Silber J on 13 January 2011 and a control order was made on the same day, allegedly a day before detention in Somaliland.

3. The two civil damages claims are pleaded in similar terms. It is said that the Defendants are liable under the Human Rights Act 1998 and in tort. It is said that the Claimants' arrest, detention and questioning occurred at the behest of the agents or officers of the Defendants, was solicited by them, and or occurred with their assistance, consent "and/or acquiescence". It is also said that officers and agents of the Defendants:

> "by their acts and omissions, procured, induced, encouraged and/or directly caused, or were otherwise complicit in, the detention, assault, and mistreatment and torture"

of the Claimants.

4. On 19 October 2012 Lloyd Jones LJ gave open and closed judgments in the statutory review of these Claimants' control orders and Terrorism Prevention and Investigation Measures ["TPIM"] orders. In these proceedings Mohamed was referred to as "CC", and the open judgment of Lloyd Jones LJ is reported under the neutral citation of *SSHD –v- CC and CF* [2012] EWHC 2837 (Admin). The extensive open judgment reviews the law, reviews the facts which were admitted into open, and the Judge concluded in each case that the Claimants were involved in terrorism related activity. The Judge rejected allegations of abuse of process.

5. He considered the disclosure which had been made on the applications for permission to impose the control orders. In particular, he reviewed the disclosure made to Silber J on 13 January 2011 in relation to Mohamed, and on 13 April 2011 in relation to CF. Lloyd Jones LJ concluded "that the disclosure made to Silber J on 13 January 2011 and 13 April 2011 was deficient". However, for reasons which he set out in

paragraphs 172 to 175 of the judgment, he declined to quash the control orders on the grounds of non-disclosure. Lloyd Jones LJ sustained the orders which had been obtained rejecting public law arguments made in open, and further arguments advanced by the Special Advocates in closed hearing.

6. In relation to each Appellant, Lloyd Jones LJ concluded that it was not possible for him to set out his consideration of each of the Heads of Appeal in the open judgment, and therefore although his conclusions are recited in the open judgment, the detailed considerations which sustain those considerations are confined to the closed judgment.

7. Lloyd Jones LJ refused the applications for permission to appeal his judgment. However, in May 2013 these Claimants were granted permission to appeal by the Court of Appeal. I was informed that the appeal is due to be heard in January 2014.

Procedural History

8. The claim on behalf of Mohamed was issued on 13 January 2012. The claim on behalf of CF was issued on 3 April 2012. Defences in each case were served on 25 July 2012, in similar form. The Defendants deny they have acted unlawfully as alleged or at all. In each case the defence alleges the Claimant lacks credibility and that no weight can be placed on his evidence. In each case the Defendants decline to plead their case on sensitive matters in the following terms:

> "This defence sets out the defendants case in response to the particulars of claim in so far as the defendants are able to plead their case without causing real harm to the public interest. ……Because of the damage which could be caused to the public interest, the defendants are unable to set out any positive case in response to the claimant's allegations in [the relevant paragraphs in each case] beyond the bare denial at paragraph 7 above and the limited information provided …..below."

In broad terms the Defendants allege in each case that the Claimant is "a member of a terrorist network which is actively supporting extremism in East Africa" and some particulars are given. Any misbehaviour or complicity with misbehaviour by others is denied.

9. By June 2012, the cases were listed together for directions and Lloyd Jones LJ gave directions, including a direction for standard disclosure by list. Directions given on 20 June were subsequently varied by consent to address disclosure issues.

10. By January 2013, the parties were aware, in general terms at least, of the impending legislation subsequently enacted as the Justice and Security Act ["JSA"] 2013. On 17 January 2013, Simon J set case management directions including an order that the

Defendants should serve Public Interest Immunity certificates by 19 April 2013, to be followed by a Case Management Conference in May. By 19 April, it was clear that the JSA would shortly receive Royal Assent, but the Act was not yet available in printed form and was not in force. In their written submissions, the Defendants make clear that:

> "it was not therefore considered appropriate to seek to delay the Case Management of these claims, including the order governing service of a PII Certificate, in those circumstances. Therefore, pursuant to the order of 17 January 2013, the Secretary of State signed a PII Certificate in relation to the material referred to in the Sensitive Schedule to that certificate."

The order of 17 January 2013 was subsequently varied by consent to permit the appointment of Special Counsel to act as "PII Advocates" on appointment by the Attorney General. Mr Hugo Keith QC and Mr Zubair Ahmad were appointed shortly thereafter.

11. On 20 May 2013 the matter first came before me. Following submissions I directed that two issues should be tried in late July 2013, those being:

> "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 effect …….to determine whether the court will make a declaration that a closed material application may be made to the court."

12. The JSA 2013 was commenced on 25 June 2013. The Rules made under Schedule 3 to the Act came into force and were laid before Parliament on 27 June. Applications for a declaration and other orders under the JSA 2013 and for a closed material procedure following such an application have been made subject to Part 82 of the Civil Procedure Rules.

The Justice and Security Act 2013

13. Part 2 of the Act addresses disclosure of sensitive material. The relevant parts of the legislation read as follows:

"**6**. **Declaration permitting closed material applications in proceedings**

(1) The court seised of relevant civil 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 ……

(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 two 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,

(ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,

(iii) section 17 (1) of the Regulation of Investigatory powers Act 2000 (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.

(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 of 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-

…….

"sensitive material" means material the disclosure of which would be damaging to the interests of national security.

7. Review and revocation of declaration under section 6

(1) This section applies where a court seised of relevant civil proceedings has made a declaration under section 6.

(2) The court must keep the declaration under review, and may at any time revoke it if it considers that the declaration is no longer in the interest of the fair and effective administration of justice in the proceedings.

(3) The court must undertake a formal review of the declaration once the pre-trial disclosure exercise in the proceedings has been completed, and must revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.

……

(5) In deciding for the purposes of subsection (2) or (3) whether a declaration continues to be in the interests of the fair and effective administration of justice in the proceedings, the court must consider all of the material that has been put before it in the course of the proceedings (and not just the material on which the decision to make the declaration was based).

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-

……..

(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.

……..

14. Sections 6 to 13: interpretation

……..

(2) Nothing in sections 6 to 13 and this section (or in any provision made by virtue of them)-

(a) restricts the power to make rules of court or the matters to be taken into account when doing so.

(b) affects the common law rules as to the withholding, on grounds of public interest immunity, or any material in any proceedings, or

(c) is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights Convention."

14. The new rule interpolated within the Civil Procedure Rules unsurprisingly follows the pattern of the JSA 2013. It is not necessary to reproduce extensive passages from the rule but some of the provisions are worthy of note:

"**Modification to the overriding objective**

82.2

(1) where any of the rules in this Part applies, the overriding objective in Part 1, and so far as possible any other rule, must be read and given effect in way which is compatible with the duty set out in paragraph (2).

(2) the court must ensure that information is not disclosed in a way which would be damaging to the interests of national security.

(3) subject to paragraph (2), the court must satisfy itself that the material available to it enables it properly to determine proceedings.

……

Evidence in proceedings to which this part applies

82.12

(1) Subject to the other rules in this Part, the evidence of a witness may be given either-

(a) orally before the court; or

(b) in writing, in which case it must be given in such manner and such time as the court directs.

(2) the court may also receive evidence in documentary or any other form.

> (3) the court may receive evidence that would not, but for this rule, be admissible in a court of law.
>
> (4) every party is entitled to adduce evidence and to cross-examine witnesses during any hearing or part of a hearing from which that party and that party's legal representative are not excluded.
>
> (5) a special advocate is entitled to adduce evidence and to cross-examine a witness only during a hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded.
>
> (6) the court may require a witness to give evidence on oath.
>
> …….
>
> **Consideration of closed material application or of objection to special advocate's communication**
>
> **82.14**
>
> …….
>
> (10) the court must give permission to the relevant person to withhold sensitive material where it considers the disclosure of that material would be damaging to the interests of national security."

Declaration under the JSA 2013

15. 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".

16. A PII ruling following the exercise of the "Wiley" balance, (*R –v- Chief Constable of Westmorland Police exp. Wiley* [1995] 1 AC 274) has a stark result. The relevant documents are either in the open, or withheld and thus not brought to bear on the issues. Subject to some rather specific potential orders, anything which is brought into evidence is known to all the parties and to the public. The process of justice is visible. Evidence relied on is heard. Of course, evidence withheld is never heard or examined: it may be so because the PII application was successful, or because the State withheld the evidence anyway, in the face of an unsuccessful PII application, rendering that step proper by abandoning the case, or abandoning the issue to which that evidence relates.

17. As the courts have recognised (see: *Carnduff –v- Rock* [2001] EWCA Civ 680 and in particular Laws LJ at paragraphs 36 and 37) that can mean injustice to the State, which chooses to protect national security – the intelligence capacity of the State, and perhaps the safety of intelligence operatives or agents – at the price of such concessions.

18. It is clear that Parliament set out to alter that situation by enacting the JSA. The Act can have carried no other intention. 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.

19. The risk of injustice to the Claimant can be minimised in a number of ways: principally the testing of the State's case by the Special Advocates, and by the vigilance and care of the court itself, ensuring all points are explored, ensuring a proper caution in the inferences to be drawn, with the limitations of the closed material procedures in mind. These safeguards are imperfect, as has often been said: see for example, *Roberts –v- Parole Board* [2005] 2 AC 738, and the speech of Lord Bingham at paragraph 16; see also the judgment of Lord Dyson in *Al Rawi,* at paragraphs 36 and 37. The Claimants make a number of specific points in this vein: special advocates are not instructed by the Claimants, cannot communicate with them once having seen closed material; special advocates cannot often in practice adduce evidence; their role is limited to making "purely forensic points" and "taking blind shots at a hidden target".

20. Perhaps the most extensive and authoritative statement of the objection in principle to closed material procedures is set out in the judgment of Lord Dyson in *Al Rawi*, to which I have already made reference.

21. One imperfection of closed material procedures that cannot be cured is the offence against the famous maxim of Lord Hewart CJ: in a closed material procedure, justice is not seen to be done, even when it is done. That has implications beyond the particular case. It is obvious that the lack of visibility is likely to diminish respect for the system, whatever the quality of justice actually delivered. This problem is compounded by the fact that relatively few lawyers and judges have experience of working within CMPs. The strongly worded comments proceed from established legal principles and legal "culture".

22. For a number of years now, at least since the inception of the Special Immigration Appeals Commission Act 1997, Parliament has chosen to run such a risk, where the State's case is mounted to protect public safety or national security from those who, it is said, should be removed from the country, or be stripped of their British nationality so they can no longer come here. There the stakes are certainly high. Since then, additional statutory provisions have imported closed material procedures. Most

notable are to be found in the Prevention of Terrorism Act 2005, dealing with control orders and in the Counter-Terrorism Act 2008, relating to financial restriction proceedings.

23. In enacting the JSA, Parliament has taken the further step of instituting closed material procedures so as to prevent the risk of unjust damages claims against the State. Of course, such claims for money may often carry implications and consequences beyond the award of money: revealing misbehaviour by State actors; providing a spur to inhibit repetition of wrongdoing; bringing validation to the successful Claimant and discipline to any impugned official; possibly carrying embarrassment and political consequences in its wake. However, the new statutory regime is available without any demonstration that the case in hand would, if it succeeded, bring consequences beyond monetary compensation.

24. No submission has been made in this case that the provisions of the JSA are incompatible with the ECHR, and that the court should so declare.

25. The Claimants do say that the PII process is necessarily fairer than the process which would follow a declaration under S6 of the Act, and hence they say a PII process should always be concluded before a declaration is made under the Act. They say that the statute at several points stipulates that the court has a discretion in the matter and that the court must be satisfied of the justice of a declaration (see "it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration" S6 (6) JSA). If a PII process is fairer, they say such a process is required in every case before a declaration. How can the court be satisfied of the justice of the matter without considering all the documents?

26. Force is added to their argument by the fact that this case, and others where the question will arise, turns on allegations of very serious breaches of the law by State actors: participation in unlawful detention, complicity with assault, removal of the Claimants to England. How can it be right for such allegations to be met by evidence which is never communicated to the Claimants? How can it be right for a judge to rule on the case in reliance on evidence heard in private, and for reasons which can never be fully expressed in public?

27. As I have already indicated, there is powerful judicial support for the Claimants' criticisms of the limitations of closed material procedures, drawn from authority of the greatest weight. It would be idle to repeat the parade of learning on which the Claimants rely. It includes dicta of Lord Mustill in *D (Minors)* (*Adoption Reports: Confidentiality*) [1996] AC 593 at p 603-604, Lord Phillips in *AF (No3) –v- SSHD* [2010] 2 AC 269 at paragraph 63, many of the judgments of the Supreme Court in *Al Rawi* and many of the judgments in *Bank Mellat* [2013] UKSC 38. It should be noted, however, that all of those critical views were made in consideration of the common law: none was directed to the provisions of this Act.

28. The thrust of the submissions advanced by the Claimants here is that CMPs are inherently unfair. Their written submissions put it in the form of a rhetorical question: "How can a CMP ever be in the interests of the 'fair' administration of justice?"

29. The Defendants submit that the assertion that CMPs are not effective at achieving justice is a generalisation, and an over-simplification. They point to the remarks of Laws LJ in *Carnduff* and to the judgment in the Supreme Court in *Tariq –v- Home Office* [2012] 1 AC 452, especially the judgments of Lord Mance at paragraphs 39-41, Lord Hope at paragraphs 18-83 and the support for the approach of Lord Mance in the judgment of Lord Brown at paragraph 84. They say *Tariq* is direct authority for the proposition that closed material procedures can be fair and Article 6 compliant.

30. The Defendants also respond that the Claimants' submissions run expressly counter to the provisions of the Act. The wording of S6(7) is quite clear. Parliament has declined to make it a pre-condition of a declaration that PII proceedings should be conducted in every case: the pre-condition is that the Secretary of State should have considered making such an application (but by necessary implication, has decided against proceeding in that way). Further, Parliament has expressly provided that an application need not be based on all of the material that might meet the conditions: S6(6).

31. The very principle at stake in *Al Rawi* was the question whether the court could introduce a closed material procedure, where that was found necessary. The answer was no. It is unsurprising to find that the Supreme Court emphasised that such an abrogation of common law procedure could only be enacted by Parliament: see for example the judgment of Lord Dyson at paragraphs 31, 35, 47 and 48.

32. Exactly the same point was made by Lord Neuberger in his leading judgment in *Bank Mellat* at paragraph 8, where he said:

> "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."

33. In a later passage in the same judgment, in paragraph 52, Lord Neuberger emphasises that it is for the legislature to prescribe in general:

> "how the tension between the need for natural justice and the need to maintain confidentiality is to be resolved in the national interest."

and how:

> "it is the European Convention through Article 6, as signed up to by the executive and interpreted by the courts, which operates as a principled control mechanism. On that the legislature can prescribe in this connection."

34. As I have already noted, there is in this case no application for a declaration that the provisions of the JSA 2013 represent a breach of Article 6 and are incompatible with the Convention. I must therefore operate in a straightforward fashion within the parameters of the legislation, when seeking to resolve the tension between the need for natural justice and the need for confidentiality.

35. In my judgment, the wording and the scheme of the Act run directly counter to the principal submissions of the Claimants. It would indeed be hard to read the provisions consistently with those arguments.

36. 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.

37. 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.

38. I have considered whether the material in relation to which the declaration is sought is "sensitive material", within the definition given in S6(1) of the JSA, and I am fully satisfied that it is so. I have summarised the nature of the material in the closed judgment. For present purposes and subject to the constraints of CPR Part 82, on which I have ruled following argument in closed application, I can summarise some of the relevant material as follows.

39. The material contains assessments by the Defendants, prepared by different members of staff over a period of time, of the terrorist threat in East Africa in 2010-11, and material which reveals the degree of the Defendants knowledge of that threat and indicates how that knowledge was gained. The material also reveals the extent of the Defendant's knowledge of the Claimants. The sensitive schedule lodged by the

Foreign Secretary outlines the potential damage to national security flowing from revelation of this material. Without prejudice to any argument of detail, or as to the limits of what may properly be admitted in evidence within or without the confines of a CMP, I accept that much of the material is "sensitive", and could not be revealed without real damage to national security. The material is relevant to the issues in the case. Some of the sensitive material might be thought to be amongst the most relevant.

40. For those reasons, which are amplified in the closed judgment by fuller references to the material relied on, I conclude that the "first condition" in S6(4) is made out.

41. The "second condition" under S6(5) is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration. I have already addressed many of the arguments advanced by the Claimants in their submissions on this point. They amount to an attack upon the scheme and purpose of the Act, and whether directed to this "condition" or to a revocation of a direction under S7(2) or 7(3) of the Act, it seems to me I am not entitled to reject the clear intention of the legislature. The question therefore becomes whether there are considerations special to this case, taking the matter as a whole, bearing in mind all the circumstances, which mean that it would not be in the interests of "the fair and effective administration of justice" to make a declaration here.

42. I begin with the history of the case. Does it diminish the fairness in the case that the Defendants began by issuing an application for PII? No doubt that may have raised anticipation on the part of the Claimants that the matter would be disposed of by that route. However it does not seem to me that any kind of "estoppel" or legitimate expectation arises. The Claimants have not relied on that initial indication of approach in any way to their detriment. Indeed, for some months before the commencement of the Act, they were in full anticipation of the intention of the Defendants to seek a declaration.

43. The information contained in the documents is the most centrally relevant material to the claims. In the simplest sense, a court which remained in ignorance of it would operate in the dark: would lack the answers to essential questions. Of course, if there is a declaration the Claimants will lack the answers to some of the essential questions. I return to this below. However, I am convinced that the information is such that no court could fairly try the case without this material (or most of it). This is a case which would in other circumstances be likely to be untriable, in the *Carnduff* sense. In the absence of disclosure, one side would win and the other lose by default.

44. At the same time, in relation to some of the centrally relevant material, it is in the highest degree likely that a PII application would be successful.

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.

46. Mr Hermer also argued forcefully in favour of alternative mechanisms to PII, and by extension against an order permitting a CMP. He argued in favour of a number of mechanisms, and I understand the submission to be that a range of such measures taken together might be appropriate, even if no one device might be successful on its own. He advanced restricted access to documents, *in camera* proceedings and/or a confidentiality ring. He relied on the remarks of Lord Woolf MR in *Wiley* at pages 307G/308C, where the Lord Woolf suggested that there "is usually a spectrum of action which can be taken …which will mean that any prejudice due to non-disclosure of the documents is reduced to a minimum."

47. Mr Hermer also relied on the remarks of Moses LJ in *R (Serdar Mohammed) –v- SSHD* [2012] EWHC 3454, where the judge described a confidentiality ring as affording:

> "a means whereby the public interest in immunity and in the administration of justice may be protected to an extent without the one having to yield completely to the other."

Mr Hermer cited authority for the use of confidentiality rings in competition cases (*Genzyme –v- OFT* [2003] CAT 7, *Claymore Dairies Ltd –v- Director General of Fair Trading* [2003] CAT 12; *Capesio AG –v- Office of Fair Trading* [2006] CAT 9, *BSkyB –v- Competition Commission* [2008] Cat 9; and *Warehouse Group –v- Office of Communications* [2009] CAT 37); in intellectual property cases (*Warner –v- Lambert Co –v- Glaxo Laboratories* [1975] RPC 354; *Dyson Ltd –v- Hoover Ltd* [2002] EWHC 500) and in procurement cases (see *Roche Diagnostics Limited –v- The Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933).

48. In addition to these cases drawn from more commercial fields, Mr Hermer recites a number of control orders/TPIM and SIAC cases in which sensitive material has been disclosed to counsel, including him and junior counsel instructed in this case. He cites in particular *SSHD –v- AM* [2009] EWHC 425 (Admin) and *R (Evans) –v- Secretary of State for Defence* [2010] EWHC 1445 (Admin).

49. Mr Eadie responds with a firmly negative view of the practicality, perhaps one should say safety, of such mechanisms, particularly where the courts are concerned not with commercial confidentiality, however valuable, but with national security and the

safety of individuals at risk. He relies on the sceptical remarks of Ouseley J, rightly described as a judge with very great experience in such matters, as to the problems which can arise from confidentiality rings, in *AHK –v- SSHD* [2013] EWHC 1426 (Admin).

50. I will consider these arguments again in a slightly different light, when addressing the PII claim in this case, which is maintained in respect of material where currently HMG relies on prospective damage to international relations, rather than national security. However the point at issue now is whether such mechanisms and devices, taken together, would be a satisfactory method of trying this case, avoiding the need for a closed material procedure; whether, taken together, they enable me to conclude that the "fair and effective administration of justice in the proceedings" would be better served by such an approach, rather than by granting a declaration. I have considered the evidence of Ms Nembhard in this context: she is a solicitor with experience of a number of cases where, to a greater or lesser degree, such devices have been engaged.

51. I am not persuaded by the Claimants' argument. The material concerned is plainly sensitive for national security reasons and, as such, the Claimants could not conceivably be admitted into the confidentiality ring, given their history. The effect would be that the Claimants' lawyers would be privy to a great raft of information about which they could not speak to their clients. The relationship between them and their clients would be hobbled. The risk of inadvertent disclosure would in my judgment be high, such disclosure might arise from entirely innocent, and indeed necessary, pregnant silence by a lawyer. There would be no special advocates. There would be no lawyers for the Claimants who could communicate freely with them. I reach this view without the slightest disrespect to the Claimants' legal team, their integrity, professional probity or capacity. It simply seems to me they would be in an impossible position.

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.

53. One specific aspect of this case diminishes the disadvantages of a closed material procedure. This is not a case which turns centrally on matters alleged by the State against the Claimants, but which are not revealed to them. On the contrary, here it is the Claimants who make the allegations. They have already given detailed accounts

and it is they who have set the agenda for the case. This by no means abolishes all difficulties, but it is a more manageable situation. Fair and effective justice may more easily be achieved, than in many cases which are subjected to CMPs. That should not reduce the vigilance by the court or the energy of the parties to ensure that the outcome is fair to both sides.

54. Given the importance of the issues involved, and the fact that the legislation has never previously been judicially considered, I have hitherto set out my reasoning without reference to a point made by the PII Advocates in the open extracts from their skeleton argument. The PII Advocates have rightly been scrupulous to avoid saying anything which might be thought to derogate from open points of principle. It is worth recording, however, the following passage from their skeleton argument:

> "In this balancing exercise, the PII advocates must concede that the ability of the CMP to allow for judicial consideration of the most relevant material is a determinative factor."

55. 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.

Public Interest Immunity

56. 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.

57. 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.

58. I raised with counsel in the course of argument whether, in the event that material favouring the Claimants was excluded on the ground of PII, it would be proper, in order to ensure fair and effective justice, to require that material to be admitted in evidence within a CMP. Mr Eadie rejected this as running counter to the clear terms of the Act, and I accept the force of that argument. However, it seems to me that if such a situation were to arise in respect of specific material, then any judge would have to consider carefully how to ensure fair and effective justice. Part of Mr Eadie's response was to suggest that counsel for HMG would have a clear duty to be fair, and not to take a point which conflicted with material of which counsel was aware, but which could not be deployed. I accept that approach may provide the answer or part of it. It seems to me that the Court would have to keep the point under active consideration, assisted by special counsel. I would not rule out the possibility that, following a successful PII application alongside a CMP, a court might require admissions from the Crown within the closed evidence, to ensure fairness. I should make it clear that this is not a pressing issue in this case at this stage: rather it is an illustration of the difficulties which may be anticipated in any case where these antithetical approaches to evidence must co-exist.

59. As I have set out in detail in the closed judgment, I have ruled in respect of a number of specific applications for PII on the ground of potential damage to the international relations of the UK. I was able to do so following extensive and helpful discussions between counsel for the defendants and PII advocates. I did so with the certificate of the Foreign Secretary, and in particular the Sensitive Schedule in mind. I bear in mind the close personal interest and knowledge demonstrated by the Foreign Secretary in Somaliland and the other countries in the region, and outside it. In general, I did not consider that the approach of the Foreign Secretary was overstated or exaggerated. The concessions made by PII advocates in discussion and negotiation were entirely proper.

60. I approached my task following the steps identified in *Wiley*: first establishing that the material was relevant, secondly that it was liable to cause significant or serious damage to international relations, and then considering whether on balance the interest in public justice outweighs that potential damage. I conducted the exercise, considering this body of material, without reference to the declaration and the prospect of a CMP, as if the material within the PII application were the only sensitive material in question. At the conclusion, I reviewed my provisional conclusions to see if the potential CMP, and the duty to ensure that the proceedings will be fair and effective, should alter the PII rulings. I took the view that did not arise, save potentially in the way I have indicated above: if during the case excluded material might favour the Claimants, then that must be addressed.

61. The consequence is that, subject to a decision by the Defendants to avoid the effect of any ruling by concessions, a significant body of material will be available in open evidence, either fully or by gist or summary. It is not possible to recite here what will be included. In the closed judgment I have identified what will be excluded. Those rulings will of course be kept under review.

62. It is worth highlighting that the reasons for excluding material on the ground of likely damage to international relations do not touch on the core of the case between the Claimants and Defendants. The decisions turn on broader considerations, most notably the pressing requirement to preserve confidence and the capacity for frank communication between the various parties involved.

63. I have considered once more in the light of the PII rulings whether any other approach, in particular a confidentiality ring, might properly be invoked to avoid the PII exclusions. For the reasons I have already indicated, I do not believe any such approach could be effective here, all the more so since such an approach would mean that some counsel would be within a CMP, some counsel would not be privy to the CMP but would be privy to such material as would be within the confidentiality ring, and no counsel would be in the same position as the Claimants. That seems to me unworkable, impractical and a recipe for confusion, as well as importing a risk of inadvertent disclosure, sooner or later. For a reason which I can only explain in the closed judgment, the very fact of a confidentiality ring might cause damage to international relations.

64. Subject to the finalised draft of the gist(s), which must now be completed in the light of my rulings, and to the extent indicated in my closed judgment, the application for PII succeeds.