Independent report on the operation of closed material procedure under the Justice and Security Act 2013

November 2022

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Abbreviations

ADR	Alternative Dispute Resolution
CMP	Closed Material Procedure(s)
CPR	England and Wales – Civil Procedure Rules
DV	Developed Vetting
ECHR	European Convention on Human Rights
FPR	Family Procedure Rules
GLD	Government Legal Department[1]
HMG	His Majesty's Government
JSA	Justice and Security Act 2013
LPP	Legal Professional Privilege
LSANI	Legal Services Agency Northern Ireland
MoJ	Ministry of Justice
NCND	Neither Confirm Nor Deny
NICTS	Northern Ireland Courts and Tribunals Service
OR	Open Representative
PII	Public Interest Immunity
PSNI	Police Service of Northern Ireland
RCJ	Royal Courts of Justice
Rules CJ NI	Northern Ireland – The Rules of the Court of Judicature
SA	Special Advocate
SASO	Special Advocates' Support Office
SSHD	Secretary of State for the Home Department
SIAC	Special Immigration Appeals Commission
TPIM	Terrorism Prevention and Investigation Measures

[1] Unless otherwise stated, references to GLD in this report should be interpreted as references to GLD on behalf of HMG.

Introduction

1. Section 13 of the JSA[2] requires the Secretary of State to appoint a person to review the operation of sections 6–11 of the Act, as soon as reasonably practicable, after 5 years from 25 June 2013 when the relevant sections of the JSA came into force. The review must therefore cover the period from 25 June 2013 to 24 June 2018.The Secretary of State must lay the reviewer's report before Parliament.

2. On 25 February 2021, the Rt Hon Robert Buckland QC MP, then Lord Chancellor and Secretary of State for Justice, made a Written Ministerial Statement[3] to the UK Parliament setting out the establishment of the review, its terms of reference, and my appointment as the independent reviewer.

3. The terms of reference of the review are set out at Annex 1. The terms make it clear, as does the Act, that this review is concerned with the experience of the operation of sections 6 to 11, and not with the principle of whether the JSA CMP should have been enacted.

4. Annex 2 contains the call for evidence. A general summary of the responses that I received to the call for evidence (between 7 April and 30 June 2021) for this review is set out at Annex 3. I am very grateful to all respondents for their time in preparing their submissions. Further

[2] https://www.legislation.gov.uk/ukpga/2013/18/section/13/enacted

[3] https://questions-statements.parliament.uk/written-statements/detail/2021-02-25/hcws803

questions were asked of SASO, HMG, including Northern Ireland Office and GLD, and ORs in between July and October.

5. Annex 4 (part A) is a schedule of cases, involving sections 6 to 11 of the JSA, which began in the review period. There is a descriptive commentary on most of them in Annex 4 (part B). The case numbers in this Report refer to the cases as numbered in Annex 4. I am grateful to SASO, GLD and the NICTS for the work they all did in compiling the schedule.

6. I have considered cases where the section 6 application was made during the JSA review period but which continued after it ended. I have not considered cases in which the section 6 declaration was applied for after the end of the review period, except where the case adds to the interpretation of the JSA or reveals some problem inherent in the operation of the JSA, which needs to be considered. I have considered the way in which some of the concerns expressed by the SASO and others have or have not been resolved after the end of the review period.

7. This review is not concerned with section 15 of the JSA by which jurisdiction in appeals or judicial reviews about certain exclusion, naturalisation and citizenship decisions were placed within the jurisdiction of SIAC. It is not concerned either with other statutory provisions for a CMP, or with the common law jurisdiction which courts have in providing for closed material procedures in circumstances, exemplified by *R (Haralambous) v St Albans Crown Court* [2018] UKSC 1. The Supreme Court concluded that the High Court had power, notwithstanding the absence of express statutory authority, to consider

closed material as a necessary part of reviewing the lawfulness of a Magistrate's decision in an ex parte procedure to issue a warrant.

8. I consider the position in the Family Division, which also has a common law jurisdiction to use a closed material process, because of concerns that there are no rules of court under the JSA, which may in fact apply to proceedings in that Division.

9. This review is not generally concerned with sections 17 and 18 of the JSA, which deal with the "*Norwich Pharmacal"* jurisdiction, where the disclosure of sensitive material is sought from the UK Government to advance a claim against another party alleged to be involved in wrongdoing against the claimant. The Government can issue a certificate, under section 17(3)(e), that disclosure under the *Norwich Pharmacal* jurisdiction would be contrary to the public interest in protecting national security and the interests of the international relations of the United Kingdom. Such a certificate prevents the disclosure being ordered by the court. However, the certificate is open to review by a court, under section 18. This review is concerned with the operation of sections 6–11 in relation to the review of a certificate issued under section 17(3) (e). However, I am told by the GLD, who would know, that there have been no reviews of certificates under section 18. I have therefore said no more about that aspect of my remit in this report.

10. The formulation of one question in the call for evidence led to concern on the part of some respondents that further extensions beyond the CMP in the JSA were contemplated. That was not what lay behind the question. The extension referred to was the extension of CMP from

those which existed before the JSA, notably in SIAC, to the civil courts under the JSA, following the decision of the Supreme Court in Al-*Rawi v The Security Service and Others* [2011] UKSC 34.

11. My Report begins with a description of the aims which Government set for Part 2 of the Act. The second substantive chapter describes the operation of Part 2, referring to the Rules of Court and judicial decisions on its interpretation. It is important to establish what the Act requires and how the Courts have held it should be applied. Third, I have considered the concerns expressed in Parliament during the passage of the Bill, to see the extent to which they have been borne out in practice. Fourth, I have addressed the concerns which respondents to the call for evidence have expressed about the operation of the Act, but not those which are in substance a disagreement with the principle of CMPs. Finally, I set out my conclusions in section 5. Recommendations are made in various parts of section 4, and are brought together in section 6.

Sir Duncan Ouseley

Section 1: The aims of Part 2 of the Justice and Security Act 2013

1. The Explanatory Memorandum to the Act sets out a succinct summary of the aims of this part of the JSA in these terms:[4]

> "15. The Green Paper noted an increase in the number and diversity of judicial proceedings which relate to national security-related actions. In many of these cases, the facts cannot be fully established without reference to sensitive material. However, this material cannot be used in open court proceedings without risking damage to national security. Difficulties arise both in cases in which individuals are alleging Government wrongdoing, and in cases in which executive actions or decisions taken by Government are challenged. There have been occasional cases resolved by the use of a closed material procedure with the consent of both parties. However, the Supreme Court ruled in Al Rawi and others v Security Service and others [2011] UKSC 34 that a court is not entitled to adopt a closed material procedure in an ordinary civil claim for damages. The court in Al Rawi held that it was for Parliament to decide whether or not to make closed material procedures available in such proceedings.
>
> 16. The Green Paper considered that in cases involving sensitive material the court may be prevented from reaching a fully informed judgment because it cannot hear all the evidence in the case. Under the current system, the only method available to the courts to protect

[4] https://www.legislation.gov.uk/ukpga/2013/18/pdfs/ukpgaen_20130018_en.pdf

material such as intelligence from disclosure in open court is through public interest immunity. A successful public interest immunity application results in the complete exclusion of that material from the proceedings. Any judgment reached at the end of the case is not informed by that material, no matter how central or relevant it is to the proceedings.

17. The difficulty identified by the Green Paper was that the Government could be left with the choice of causing damage to national security by disclosing the material or summaries of it; or attempting to defend a case with often large amounts of relevant material excluded. If the material cannot safely be disclosed, the Government may be forced to concede or settle cases regardless of their merits and pay compensation, or ask the court to strike out the case. Most significantly, claimants and the public may be left without clear findings where serious allegations are made because the court has not been able to consider all the evidence."

2. The following description of the aims of Part 2 is drawn from the Green Paper of 19 October 2011,[5] "Justice and Security", and from the Government's statements and responses in Parliament, including in Committee, during the passage of the Bill.[6]

3. At root, the question was how to deal with the need for Government to rely on material which could not be disclosed without harm to the interests of national security. The legislative principle was that a means should be found for Government to be able to rely on that material, as

5 https://www.gov.uk/government/consultations/justice-and-security-green-paper

6 https://bills.parliament.uk/bills/1016

could other parties, but with restrictions on its disclosure, and safeguards on its use, when not disclosed to a party and legal representative. The CMP was adopted for that purpose. It would at least permit judicial evaluation of that material, with the assistance of the Special Advocate, and would lead to a reasoned conclusion, even if the reasoning available to the non-State parties and public did not deal with the material which had not been disclosed publicly.

4. Justice required that serious allegations made against security and intelligence agencies should be resolved by a court and not disposed of by a settlement forced on the Government, because it could only defend itself by revealing, to the public and to hostile litigants, material which would be damaging to the interests of national security. In effect, a claim, well-founded in whole or part or wholly untrue could not be defended, if the defence required the disclosure of material damaging to national security. The Government was and would be forced to compromise claims which it might have been able to defend in whole or part, by paying large sums of money to potentially unmeritorious claimants; and doing so even at the risk of the money being used for purposes hostile to the well-being of the UK, because such claims could only be defended by harming national security. It did not want cases to settle simply because relevant evidence was not before the court.

5. The Government characterised the legislative choice as a choice between “justice through a closed material procedure or no justice at all.” The Act aimed to close “a damaging gap in the rule of law”, as the Rt Hon. Mr Kenneth Clarke QC, Minister without Portfolio, leading for the Government on the Bill, put it in Committee; 4 March 2013 Hansard col 698. It was seen as a choice between such justice as could be

obtained through a closed material procedure and such justice as could be obtained through a PII process and other procedural mechanisms short of a closed material procedure. Inevitably neither could be perfect for the sort of cases which the legislation was introduced to deal with. As was said in the debates, this was a "world of second-best solutions."

6. A related but distinct aim was to avoid the unjustified loss of public confidence in the performance and conduct of the intelligence agencies and others, damage to their reputation among particular groups or communities, and morale among their staff, which was risked when payments of damages were made without a judgment that the claim was made out. There would always be the risk, however unjustified the defendant said that the claim was, that the claim would be seen as justified from the very fact of such payments. The settlements could be exploited in hostile propaganda. A CMP would advance the accountability in the courts of the intelligence services, leading to material being considered by a court which it had hitherto been unable to consider.

7. It was also a legislative aim that the process of Ministers issuing PII certificates, whilst remaining available, should not be the primary measure whereby national security was protected in ordinary civil proceedings, because the examination and consideration of documents could be an immensely time-consuming process for Ministers. There was no point in the time-consuming PII exercise being undertaken by Ministers, if there were then to follow a CMP in which the national security material was then as closely analysed as the disclosure procedure required, and as undertaken under other CMP regimes. If national security PII material, central to the claim or defence, were

never to enter the disclosure process in a CMP, it was not easy to see the point of a CMP.

8. The PII system also provided no sufficient answer to the problem, because Ministerial certification, and the upholding of that certificate by a court for which the Minister would be bound to contend, would exclude from the case the very material upon which the Government would seek or need to rely. Ministers have been held to have a duty to make a PII claim for national security material. It was not for them simply to waive that duty in the interests of fairness in litigation, or for their litigation advantage. The operation of PII would mean that there was no adjudication on the full facts. The real problem with PII certificates was that the upshot of a successful claim for PII was that the material played no part in the case, for either side. So, a defendant would not be able to rely on material the disclosure of which would be harmful to national security. That was the very disadvantage which the Act aimed to redress.

9. The Government also recognised that the absence of relevant material, for example if excluded under PII, could work an injustice against a claimant. It could lead to material helpful to him not being available at all. With PII, disgraceful behaviour could be made immune from disclosure to anyone representing the claimant's interests.

10. It was often stated, including by proponents of PII as the alternative to a CMP, that national security PII material had never been disclosed under the *Wiley* balance struck between the public interests in open and fair hearings, and in the protection of national security. That would mean,

as the Government contended, that the material would simply be excluded from the case.[7]

11. The aim, therefore, was that the necessary protection of national security should not prevent defendant bodies, whether Ministers, the intelligence agencies or the police, from deploying the relevant evidence so as to defend themselves against allegations, and instead should enable a judge to reach a conclusion on all the relevant material. If the claim could not be tried at all, that would be unfair to the claimant and contrary to the public interest, not just in the administration of justice but in obtaining a judicial examination and ruling on allegations of real gravity concerning the actions of governmental bodies. If the claim were to be tried, it could not be fairly tried if the defendant were disabled, through the application of the exclusionary process of PII, from putting forward its defence. The PII process had not released national security material in the past; and other devices or procedures could not sensibly enable the necessary national security material to be deployed without harm. The legislative aim was not to exclude evidence which might otherwise have been disclosed to the claimants and ruled on by the judge, but to permit the inclusion of evidence which the defendant could not otherwise use and which the judge would not otherwise see. The defendants would be forced to settle. Damages, sometimes substantial, could be payable to those who did not merit it and who could use it to further terrorist activities. The Government and the intelligence services would be likely to suffer reputational damage.

[7] *R v Chief Constable of West Midlands Police, ex parte Wiley* [1994] UKHL 8, [1995] 1 AC 274 held that the court could order disclosure of confidential documents unless the public interest in their confidentiality outweighed the public interest in securing justice. Hence the *Wiley* balance

In such circumstances, fairness required the adoption of a course which produced an outcome which was less unfair than those which the conventional procedure produced.

Section 2: The Provisions of Part 2 of the Justice and Security Act 2013 covered by this Review

1. The CMP under the JSA is not a new form of action. Neither the JSA nor the CMP create a cause of action or an entitlement to bring proceedings which could not previously have been brought, nor do they act as a bar to any proceedings which could previously have been brought. The CMP is a procedure which may be ordered in "relevant civil proceedings". "Relevant civil proceedings" are any proceedings which are "before" the High Court, Court of Appeal, Court of Session, or Supreme Court, and are not "proceedings in a criminal cause or matter". They cover, therefore, proceedings begun in the usual ways, seeking the remedies available in private law civil proceedings, commonly damages, or judicial review remedies in respect of the decisions, actions or omissions of public bodies. The list of courts, which may hear "relevant civil proceedings", shows that proceedings may be relevant civil proceedings at first instance and at all stages of appeal. Indeed, they could first become such proceedings at an appeal stage. Proceedings before a lower court, such as a County Court, in which a party sought to invoke the CMP would have to be transferred to the High Court first.

"Civil proceedings" and "Criminal cause or matter"

2. There have been judicial decisions on the boundaries between "civil proceedings" and "criminal cause or matter". In *R (Al-Fawwaz) v*

Secretary of State for the Home Department 2015, (case 5 in annex 4), the High Court granted a section 6 declaration on the uncontested application by the Home Secretary, in a case in which judicial review was sought of her refusal, on the grounds of national security, to accede to Letters Rogatory issued by a New York Judge, in connection with material held by MI5, and said to be relevant to the claimants' trial in New York on charges of conspiracy arising out of the bombing of US Embassies in East Arica. Wyn Williams J held that a mere connection with criminal proceedings in another jurisdiction did not make the claim one in "a criminal cause or matter." In the context of the Act, the question was what core function was being performed by the court in the proceedings in question.

3. In *R (Belhaj) v Director of Public Prosecutions* 2018, (case 20 in annex 4), the question was whether a "criminal cause or matter" was confined to cases which could result in conviction or acquittal or whether it extended to cases in which a refusal to prosecute by the Director of Public Prosecutions' was challenged. The Divisional Court found that the challenge to the decision not to prosecute an individual for his alleged complicity in the unlawful rendition and torture of Mr Belhaj in Libya, was not brought in a "criminal cause or matter", and so a CMP could be sought in respect of the judicial review proceedings. The Supreme Court, overturning the Divisional Court decision, said that the phrase "criminal cause or matter" had to be given its ordinary and natural meaning, and not one constrained by the context of the JSA. The challenge was in a "criminal cause or matter". This case was further discussed in *Re McGuinness (Attorney General for Northern Ireland intervening)* [2020] UKSC 6, which resolved which court had

jurisdiction to hear an appeal in relation to a judicial review challenge to the release on licence of the murderer Michael Stone; this was not an appeal in a "criminal cause or matter", so appeal lay to the Court of Appeal. The decision was seen not to be in conflict with *Belhaj*, which, it concluded, should not be given too wide an application either.

4. As I return to later, there is some uncertainty over whether Family Division cases come within the scope of the JSA's "relevant civil proceedings".

Starting the CMP process

5. The CMP is brought into "relevant civil proceedings" by an application under section 6(1) for a declaration that the proceedings "are proceedings in which a closed material application may be made to the court." The application for a declaration is often called a gateway procedure. An SA may be appointed for this application. The CMP declaration permits an application to be made for permission to withhold material the disclosure of which would be harmful to the interests of national security.

6. The declaration is not a decision on what material should be disclosed to the other parties to the case, or on what other mechanisms should be employed, if any, in respect of parts of the sensitive material. It enables the need for that to be considered later, when there would be full knowledge of what the issues really are and of the full evidence. The declaration is not a decision that part of the merits hearing, or trial, will be held under closed conditions. After the declaration is made, the claimant, OR and public are excluded only from those parts of the

proceedings in which the closed material is discussed, that is essentially, the material which the Secretary of State will have been permitted to withhold or seeks permission to withhold.

7. It was a matter of controversy during the passage of the Bill as to who should be able to make the application. Section 6 permits it to be made by the Secretary of State, whether or not the Secretary of State is a party to the proceedings, or by any party to the proceedings or by the court of its own motion. The relevant Secretary of State might not yet be a party to the proceedings or know that the defence of a party could involve the possible disclosure of "sensitive material" as defined. This could happen where the police were defendants. Rules of Court provide for the Secretary of State to be notified and joined as a party to the proceedings if there is an application by another person.

8. No declaration has been made by the Court of its own motion, except perhaps in Case 42, involving wardship proceedings.

9. The Act applies to all parts of the UK. According to the Government's annual reports to Parliament on the use of CMP under the JSA,[8] there have been 54 applications for a declaration in the UK in the five-year review period: some of these involved multiple claimants. 35 were made in England and Wales; 19 in Northern Ireland. None were made in Scotland. More detail is to be found in Annex 4. The Annex 4 case total differs at 55 because I have included three cases which started after the end of the review period, and, in other cases, especially Northern Ireland, multiple claimants were involved but covered under the same

[8] https://www.gov.uk/government/collections/use-of-closed-material-procedure-reports. At the time of writing, the reviewer had access to the reports from 2013/14 to 2019/20.

applications or judgments. I have re-arranged the way they are counted.

10. There is no definition of the “Secretary of State”, who can make the application under section 6(2). It is not one particular Secretary of State but is the one relevant for the purposes of the application. By section 6(8), the declaration must identify the party who would be required to disclose the sensitive material.

The statutory pre-condition

11. Before the court can make the declaration, it has to be satisfied that a pre-condition and two subsequent conditions are met. Section 6(7) was the subject of much controversy in the passage of the Bill: should PII powers be exhausted before a CMP is considered? Section 6(7) provides simply that, before the court considers an application for a declaration, it has to be satisfied that the Secretary of State has first considered making a claim for PII in respect of the material upon which the application was based, or has considered advising another person to make such a claim. This does not mean that the Secretary of State has to have considered all the material which, because of its relevance to the substantive proceedings, could be subject to a PII claim in the absence of a CMP. The Secretary of State only has to consider that which is relied on for the purpose of the application for the section 6 declaration, because once the declaration is made, disclosure follows a different route for national security material.

The statutory conditions for making a declaration

12. Section 6(4) contains the first condition to be satisfied before a declaration is made. It can be satisfied in two ways. The first way it can be satisfied is by showing that a party "would be required to disclose sensitive material in the course of the proceedings to another person (whether or not that person was a party to the proceedings)". This deals with the position where, pursuant to the rules and practices of disclosure applicable to the type of civil proceedings, and in the absence of special rules being applied to it, disclosure would be required of "sensitive material". The seeming breadth of "sensitive material" is restricted by definition in section 6(11) to "material the disclosure of which would be damaging to the interests of national security." "Sensitive material", by that definition, is narrower than the material in respect of which a PII certificate can be given and upheld by the court. Those wider interests are damage to international relations, damage to the country's economic wellbeing, and the prevention and detection of crime.

13. The sensitive material relied on does not have to be central to the defendant's case. It is sufficient if the material would have to be disclosed to the claimant under the normal disclosure rules in civil litigation. I summarise those rules as: is the material relevant to the case? If it is prima facie relevant and would have to be disclosed to the parties but for the CMP, that condition for the CMP is made out.

14. The second way in which the first condition can be met is by showing that sensitive material, relevant to the case, would have to be disclosed by a party, but for the possibility of a PII claim being made in respect of

the material, or where there was no requirement to disclose it if the party chose not to rely on it, or because of the statutory exclusion for intercept material, or because of any other statutory bar to disclosure, which would not apply if a declaration under section 6 were made. This condition therefore prevents other exclusionary rules, which would otherwise bar disclosure, operating so as to exclude a section 6 declaration on the grounds that the material, which the defendant wished to rely on, could or would not be disclosed anyway.

15. Accordingly, if, for example, material was such that a PII claim could be made in respect of it, that possibility would not prevent the making of a section 6 declaration. This was not aimed at excluding the potential use of PII. It was aimed at preventing that possibility of disclosure being said to make a section 6 declaration unnecessary, on the grounds that the material might not be disclosed anyway because a PII claim could be made for it, and upheld. That would have undermined the purpose of the Act. The same approach applies to intercept material, by requiring the statutory exclusion on its evidential use to be disregarded, when considering what a party might be required to disclose.

16. Whichever way the first condition is met, the second condition, about which the court also has to be satisfied, is that it would be in the interest of the "fair and effective administration of justice in the proceedings" to make the section 6 declaration. The courts have rejected arguments that the condition cannot be satisfied because of the unfairness said to be inherent in the operation of a CMP; something more than that is required. The second condition would otherwise undermine the very purpose of the Act, which is interpreted as creating its own balance between the various public interests at stake. It has also been

interpreted, in one case, as enabling the court to consider whether a PII process, on the facts and circumstances of a particular case, could be a fairer process, without undermining the purpose of the Act.

17. Section 6(6) contains an important limit on what has to be shown for the conditions to be met. An application for a declaration does not have to be based on all of the material which could meet the two conditions, or on all of the material which the party applying for the declaration would have to disclose. It is sufficient if the material upon which the applicant relies in its application satisfies the court that the two conditions are met.

18. Alternative mechanisms to a CMP may be considered at the declaration stage since they may obviate the need for a declaration at all. Courts have varied in the detail in which in open, at the declaration stage, they have considered alternatives; some have discussed alternatives in principle, such as the problems with a ring of confidentiality, or PII. The difficulties are often obvious even in principle. It is not necessary for them all to be spelt out on every occasion when they are considered. Of course, one difficulty with applying some alternative mechanisms to the sensitive material, at this stage, is that the court may well not have considered all of it or have done so with a full appreciation of the issues. Those points can be, and will usually much better be, considered when disclosure issues are being resolved, after the making of the declaration.

"National security"

19. There is no definition of the phrase "would be damaging to the interests of national security" or of its parts: "national security" and what amounts to damage to its interests. The point has been made that the question is whether the disclosure would harm the interests of national security, and not whether it would risk harm to the interests of national security. But it is not clear that much in practice turns on that.

The statutory discretion

20. Under section 6(1), even if the two conditions for making a declaration are satisfied, the court retains a discretion not to make it. The Bill, as originally drafted, required the court to make the declaration if the conditions were satisfied. It was amended to give the court a discretion. The discretion not to make a CMP declaration has been considered, but has not been exercised. The courts have held that it is not easy to see the circumstances in which it would refuse to make a declaration if the precondition and the two statutory conditions were both satisfied, especially as it is not necessary for it at that stage to have seen all the material upon which the applicant might wish to rely, and to seek permission to withhold from the other party. The arguments in the cases for the discretion to be exercised against making a declaration have in essence been that the CMP is an unfair and objectionable procedure. This is an argument in principle against a CMP, as the courts have pointed out. Parliament did not create a general discretion for the courts to decide whether a CMP process could be used as a matter of principle; nor did it specify what factors should motivate the exercise of the discretion. It would have been obvious that the discretion could not

be exercised so as to undermine the purpose of the Act. It was simply thought better not to oblige the court to make the declaration, just in case something, unforeseen, warranted its refusal although the conditions were satisfied.

After the declaration: the general position

21. Once a declaration has been made, the procedure which follows is largely provided for in rules of court in the three UK jurisdictions, the general content of which is determined by sections 8 and 11. Section 8 governs the rules of court in relation to disclosure in "section 6 proceedings". These rules of procedure are principally related to the disclosure or non-disclosure of relevant material which, absent a PII claim, would be disclosed as evidence, to the court and to the other parties, if there were no CMP procedure or other statutory bar. "Section 6 proceedings" also include proceedings for the declaration itself; section 11(4). Section 10 provides that, subject to the provisions of sections 8, 9 and 11, the normal court rules of disclosure which would otherwise apply, continue to apply to the proceedings.

22. Section 11 contains other general requirements about the content of the court rules. Section 11 (1) is one of the most important. The rule maker must have regard "to the need to secure that disclosures of information are not made where they would be damaging to the interests of national security." This is not, and has not been interpreted as, an obligation to consider whether or not to do that; it is an obligation to secure that outcome in the rules. Section 11(2) permits rules of court to make provision about mode of proof, evidence, the need for hearings, open and closed judgments, proceedings from which a party and his legal

representatives are excluded, and SAs. They also permit the court to give a summary of evidence taken in the absence of a party to the excluded party. But this would not permit the disclosure of any evidence from the closed sessions which would harm the interests of national security. This provision does not appear in any of the rules of court. However, it is hard to see, if evidence were given in a closed session, the disclosure of which would not be harmful to the interests of national security, and which was of relevance such that the excluded party or his legal representatives should know of it, that the SA would not apply for permission to communicate it to them or that the SA would not receive permission from the court to do so.

23. The rules of procedure, however, must and do secure the opportunity for "a relevant person" to apply to the court "for permission not to disclose material" otherwise than to the court, the appointed SA and the Secretary of State where he or she is a party, but is not the "relevant person"; section 8(1)(a). "A relevant person" is a person who would be obliged to disclose sensitive material; sections 6(8) and 11(5). The language therefore requires permission from the court not to disclose the sensitive material to the party who would be excluded or to his legal representatives.

24. In England and Wales, Part 82 of the Civil Procedure Rules[9] applies to applications for a declaration and its revocation under sections 6(2) and 7(4), to the applications for permission not to disclose material, to section 6 proceedings more generally, and to appeals.

[9] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-82-closed-material-procedure

25. The procedure in Northern Ireland is governed by Rules of the Court of Judicature Order 126;[10] Order 126 is almost identical to CPR 82 but preferring the use of "shall" to "must". The Order does not require separate reference here, nor do its different provisions, Order 78, for the transfer of closed material proceedings from the County Court to the High Court.

26. The procedure in Scotland is governed by the Court of Session Rules, Chapter 104.[11] This is differently structured from the CPR and the Rules of CJ NI, but covers the same ground and again requires no separate reference. Indeed, there have been no such proceedings as yet in Scotland.

27. For the sake of convenience, in this Report I shall refer to the CPR.

28. CPR82.2(2), as required by section 11(1) states that "the court must ensure that information is not disclosed in a way which would be damaging to the interests of national security." The overriding objective in Part 1 and, so far as possible, other rules are to be given effect in a way which is compatible with that obligation. CPR82.2(3) requires that, subject to the obligation in CPR82.2(2), "the court must ensure that the material available to it enables it properly to determine proceedings."

29. CPR82.6 provides for hearings to be in private, by requiring the court to exclude any party and their legal representatives from any hearing or part of a hearing where it considers that to be necessary to prevent the disclosure of material where its disclosure would be damaging to

[10] Page 665 of https://www.justice-ni.gov.uk/sites/default/files/publications/justice/the-rules-of-the-court-of-judicature-northern-ireland-1980-february-2021.pdf

[11] https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules

national security. The hearing is then to be conducted in private, but in the presence of any SA appointed to represent the interests of any excluded party. A hearing can also be conducted in private for any other good reason, as would be possible with any ordinary trial. However, unless otherwise directed, every party must be notified that the hearing is to take place, where and when, even if personally excluded from it; CPR82.7.

30. Not every part of the CMP has to be determined at a hearing, but certain aspects do require a hearing such as: applications for a declaration and for its revocation, a formal review of the declaration and a review of the court's own motion.

31. There are provisions in the CPR dealing with the detail of making of a section 6(2) application, the directions hearing for such an application, directions after the making of the declaration, and the review of a declaration.

The appointment and role of the SA

32. Section 9 deals with the appointment of the SA. The Attorney General or Advocate General for the relevant part of the UK "may appoint a person to represent the interests of a party in any section 6 proceedings from which the party (and any legal representative of the party) is excluded". "Section 6 proceedings" are those in which a declaration has been made under section 6. They also include the proceedings referred to in section 11(4), which are the proceedings on the application for or about an application for a declaration, or for or about its revocation, and a closed material application.

33. There is no obligation to appoint such an advocate; it was recognised that a party might not wish to have one. That wish not to have a SA has not arisen under the JSA, nor have there been any proceedings in which the appropriate law officer has used his discretion to refuse to appoint one. The language of "representing the interests of the party" was chosen to reflect the absence of the normal professional relationship between advocate and client, as section 9(4) shows.

34. CPR 82.9, 10 and 11 deal, as required, with the appointment of the SA, its timing, and with the SA's functions. The appointment covers not just the SA's role in disclosure hearings but in the trial or merits hearings themselves, or any other hearings from which the party *and* his open legal representatives are excluded. So SAs would not have a direct role in relation to any hearing in which the ORs were present but under a duty of confidence, and from which the claimant was excluded. This would be the case with any ring of confidence.

35. The various rules of court, reflecting the obligations not to disclose material which could be damaging to the interests of national security, permit the SA to communicate freely with the person whose interests they represent up to the point at which any material, which the relevant person seeks permission not to disclose, is served on them. The timing of this is often a matter of negotiation but may be directed by the court. Thereafter, the shutters come down, and they cannot communicate with the persons whose interest they represent or with their legal representatives or any other person, unless the SA has obtained the direction of the court, authorising the proposed communication with the person whose interests they represent or his legal representatives. A "closed material application" is an application for permission not to

disclose material otherwise than to the court, or to the SA. This means that the SAs have to have all their contact with the OR and the OR's client before the closed material is served for the purpose of the section 6 declaration. They can of course play a part in the court's decision as to whether a declaration should be made. Where two SAs are appointed, QC and junior, as is not uncommon, the closed material may be served on one but not on the other, so that one may continue to have discussions with the OR and client, while the other deals with the closed material which has already been served. The SAs cannot communicate about the closed material, at that stage.

36. There are a few exceptions: they can communicate with the court, the relevant person, the Secretary of State and his representatives, the Attorney General, and administrative assistants. The persons whose interests they represent can send what statements or information they wish to the SA, who do not need the court's direction in order to acknowledge receipt of documents sent to them.

37. Unless an exception applies, the SA requests the direction of the court, under CPR82.11, which notifies the Secretary of State, and the relevant person, of the request, and of the content and form of communication proposed. The relevant person and the Secretary of State may object to the content, in whole or part, or to its form. The court then resolves the issue, applying the requirement in CPR82.2 that information damaging to the interests of national security should not be disclosed. Any objection to a communication proposed from the SA to the specially represented person or his legal representatives, has to be dealt with at a hearing, subject to the same exceptions which apply to the need for a

hearing to determine an application for permission to withhold sensitive material; CPR82.14.

38. It is not uncommon for SAs to seek permission to communicate advice, to those whose interests they represent, on the merits of an appeal based on grounds which arise in the closed part of the proceedings or which together with open grounds, become arguable. But they cannot, in offering such advice, disclose any part of the grounds which would involve disclosing material which would be damaging to the interest of national security. Permission is not routinely granted.

39. CPR82.10 permits the SA, in addition to making submissions, to adduce evidence, which may be written or oral, and to cross-examine witnesses at any hearing from which the party whose interests they represent, and his legal representatives, are excluded.

After the declaration: the procedure for permitting material to be withheld

40. Section 8 of the Act requires the relevant procedure rules to provide the opportunity for an application to the court for permission not to disclose material other than to the court, the appointed SA, and the Secretary of State, (when the latter is a party but not the holder of the material at issue). CPR82.13 meets that requirement. The relevant person cannot rely on sensitive material at a hearing unless a SA has been appointed; CPR82.13(1)(b). The relevant person must file the sensitive material in question with the court and serve it on the SA at the time directed by the court, along with its reasons for seeking permission to withhold in that way.

41. The procedure for permitting material not to be disclosed is at the heart of the CMP. CPR 82.14 sets out the procedure for identifying and resolving issues about what material is “sensitive”, or can be disclosed or gisted, or other proposals for resolving the issues. The court must give permission for the sensitive material not to be disclosed if “it considers that the disclosure of the material would be damaging to the interests of national security.” This is given effect in CPR82.14(10). If permission is given not to disclose material, the court must consider requiring the relevant person to provide a summary of that material to every other party and their legal representatives, but the court is obliged to prevent the summary containing any material the disclosure of which would be damaging to the interests of national security, CPR 82.14(2). CPR 82.14 is not in terms itself a balancing exercise, but the provisions of section 14(2) (c) apply so that neither section 8 nor the rules of court can be read “as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the European Convention on Human Rights.” Article 6 deals with fair trial rights.

42. The application for permission not to disclose the material must always be made in the absence of every party to the proceedings and the ORs, other than the SA and the Secretary of State, where he or she is a party but not the relevant person.

43. By CPR 82.14, the application for permission to withhold sensitive material, must be dealt with at a hearing where the SA, relevant person and Secretary of State can be heard, unless (a) the SA gives notice that he does not challenge the application not to disclose material, or (b) the court in determining the section 6(2) application or an earlier application for permission to withhold material has in effect already found that the

material in issue is or would be sensitive material and is satisfied that it would be just now to give permission for it to be withheld without a hearing, or (c) if the Secretary of State, relevant person and SA all agree that the issue can be determined on paper without a hearing.

44. In practice, the disclosure process, which involves one of the most important functions of the SA, starts with the disclosure of all relevant material to the SA, court and the Secretary of State, if not a party. All the parts for which no claim is made that its disclosure would be damaging to the interests of national security are disclosed to the other parties and their legal representatives. Of course, there is scope for debate about whether the disclosure process to the SA has been full and thorough; disclosure to the SA may come in more than one tranche. Where there is a contest between the SA and the defendant about its further disclosure to the ORs and claimant, those parts are identified by the SA in a Schedule, to which the relevant party responds. Much is agreed, and the court is left to rule on the remaining issues. There is often a negotiation about what can or cannot be said or rephrased, about how it might be safely gisted, or is not to be relied on and on what can be said to convey the point to be addressed by the claimant without damaging national security.

45. Gisting is routinely considered as part of the disclosure process to see if the point can be gisted without causing harm to national security. Questions can also be approved for sending to a claimant which point him to issues which need addressing but which do so in a way which does not harm national security. Other mechanisms, such as anonymity and redaction, are also considered at that stage. The closed judgments often take the form of a point by point decision, often given at the

hearing, on the various issues which the schedule of disclosure requests by the SAs, and the defendants' responses leave for resolution.

46. The refusal of permission to a relevant person to withhold sensitive material or a summary of it, does not amount to an order that it or the summary be disclosed. The relevant person is not required to serve the material or the summary; CPR 82.14(9)(a). The relevant person still retains the right to refuse to disclose material which it had not been permitted to refuse to disclose it or any summary.

47. Where the relevant person refuses to disclose material which it has not been permitted to withhold, section 8(3) (b) however requires the court to be authorised to ensure that the relevant person does not rely on that material or summary.

48. However, the further problem which that could give rise to was that the material thus withheld could have been favourable to the excluded party, either by advancing part of his case or by undermining that of the State defendant. By section 8(3)(a), therefore, the court has to be authorised to direct that the relevant person is not to rely on "such points" or has to make concessions as the court may specify or to take other steps as the court may specify.

49. CPR82.14 deals with this. Where the court refuses permission to withhold material, and the relevant person has declined to disclose it, even in summary, and it is considered by the court to be material which might adversely affect the case for the relevant person or support the case of any other party to the proceedings, the court has power to direct that the relevant person "is not to rely on such points in the

relevant person's case" or is to make such concessions or take such other steps as the court may direct; CPR 82.14(9)(b)(i). In any other case, where the court refuses permission to withhold material but the relevant person declines to disclose it or the summary, the court may direct that the relevant person must not rely on the material which it has refused to disclose or the summary if it has refused to disclose the summary; CPR 82.14(9)(b)(ii).

50. No instance, however, has been given of material in fact being withheld after permission to withhold it has been refused. The Government's response to the call for evidence states that it has not happened.

51. Indeed, if the relevant person does not intend to rely on sensitive material, and that material does not adversely affect the relevant person's case or advance the case of another party, the court may still direct that the relevant party cannot rely on that material without being required to serve a summary of it on the specially represented person and the ORs; CPR 82.14(8).

After the declaration: the degree of disclosure required

52. One of the principal issues in disclosure is the degree of disclosure required. The requirements of section 8(1)(c) and 11(1), and of the rules of court are overridden by the provisions in section 14(2)(c) which prevents a court acting in a manner inconsistent with the fair trial rights of Article 6 ECHR. This limitation on the operation of the CMP has been recognised from the first draft of the Bill. In its way, though perhaps not wholly recognised in debate, this is part of the balance between the two competing interests, of fair trial and the protection of national security.

53. One standard, often referred to as the *AF (No. 3)* standard, derives from the decision in *AF (No. 3) v Secretary of State for the Home Department* [2009] UKHL 28], [2010] 2 AC 269, a Control Order case. In general terms, this standard requires sufficient information to be given to enable the individual to give effective instructions to his representatives in relation to the allegations against him. It was applied in those cases where the State was imposing significant restrictions on the fundamental freedoms of an individual, such as through Control Orders, TPIM, and Asset Freezing Orders. Gisting and other mechanisms are obviously considered in such cases. This standard, where it applies, may mean that harmful national security material has to be disclosed, or more precisely here, permission to withhold it has to be refused. The relevant party then has to disclose it or any summary required, or forego reliance on it. It may then have to concede the case.

54. The application of Article 6 does not mean that *AF (No. 3)* necessarily applies. However, under the JSA, where it is the claimants who bring proceedings, the requirements of *AF (No. 3)* have commonly been held not to apply. Other standards have been held to be consistent with the application of Article 6, depending on the facts and circumstances of the case. There is no uniform unvarying standard to be applied irrespective of context, facts and circumstances. The decision in *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452, an employee vetting case, illustrates that point.

55. This of course assumes that the civil proceedings in question come within Article 6 as claims involving the determination of “civil rights”. Not all civil proceedings involve a determination of civil rights and the scope of that phrase has been the subject of disagreement between the

Strasbourg Court and the Supreme Court. It is seen in a JSA case in *K, A and B v Secretaries of State for Defence and Foreign and Commonwealth Affairs* 2017 (case 28–30 in Annex 4).

After the declaration: the relevance of other mechanisms in the disclosure process

56. The Act does not make use of the CMP a last resort, because the Government did not regard other mechanisms as useful means of achieving the fundamental aim of the JSA. During disclosure proceedings, the question of summaries, gisting, redacting, anonymity, confidentiality rings, and the use of PII can be considered. They are not excluded from the range of measures which the court can consider, if thought possibly useful in any particular case.

57. Anonymity does not usually enable much to be disclosed, but would obviously be an issue raised by the SA. Giving evidence behind a screen is not unusual in SIAC, Control Order or TPIM cases, but it is not a vehicle again for much by way of disclosure. Redaction can be useful but, like anonymity, is rarely at the heart of the matter.

58. PII and confidentiality rings have not been used in a JSA case in respect of national security material. The problems with them are well known, not always appreciated by their proponents, but were rehearsed at length during the passage of the Bill, and have been considered in judgments under the JSA.

59. Neither the Act nor rules of court prevent the court considering at any stage, whether on the application for a declaration, or during the disclosure process or on the review of the declaration after completion

of the process, whether a PII claim should be sought in respect of some material, and taking the response, to an invitation to the Secretary of State to make a PII claim, into account in deciding how to exercise its various powers. The fundamental problem, however, in applying PII rules to national security material, is that they run counter to the fundamental aim of the JSA. It is very unlikely that a court would refuse to uphold the Secretary of State's certificate. The material would be excluded from the trial. That is the very problem which Part 2 of the JSA was designed to prevent.

60. The confidentiality ring has often been touted as an answer, but it has not been used in CMP cases. Instead, it has been considered and rejected by the judges for compelling reasons. In one case, *XYZ*, the judge decided to leave its possible use for later decision on particular material, but that was a very rare case. It suffers from the drawback in principle that in camera hearings are not open justice, one objection in principle to the CMP. Both would lead to restricted public judgments.

61. A confidentiality ring does not enable the claimant to give effective instructions to his lawyers on the case against him, the other main objection to the CMP in principle. It creates a division between them, quite apart from other problems, notably protection of materials, the risk of inadvertent disclosure, by silence or from active pressure to reveal material, and the DV of ORs, leading to potentially invidious or professionally embarrassing outcomes for those who do and do not receive DV clearance. This could lead to problems in subsequent cases for ORs who had received national security material in an earlier case, as SAs have found, and as I shall come to.

After the declaration: review and revocation

62. Section 7 is important to the operation of the procedure. A formal review of the declaration under section 6 is required by section 7(3) once the pre-trial disclosure exercise in the proceedings has been completed. The declaration must also be kept under review by the court, which can at any time revoke it under section 7(2), "if it considers that the declaration is no longer in the interests of the fair and effective administration of justice." The revocation may be of the court's own motion or on the application of the Secretary of State, whether a party or not, or of any party to the proceedings. Rules of court are to provide for how that formal review is to be conducted.

63. The review process has not in fact led to revocations. That may be because its possible operation, for better or worse for one or other or both sides, will have affected how the prior disclosure process was approached by both sides.

Judgments

64. CPR 82.16 and 17 deal with open and closed judgments. The court gives judgment in the usual way, save to the extent that it cannot disclose its reasoning where to do so would disclose information damaging to the interests of national security. Any such reasoning is to be set out in a separate judgment only made available to the relevant person, the Secretary of State and the SA. The court is required to serve notice, on the Secretary of State and the relevant person, of its intention to serve what is to be the open judgment on the specially represented party. They have 5 days in which to ask the court to

reconsider the terms of the judgment if they consider that the judgment contains material which, if disclosed, would be damaging to the interests of national security. The intended judgment and any such request to the court have to be served on the SA. The request is then for the judge to resolve. There is no equivalent rule enabling the SA to contend that the closed judgment contains material which should be placed in the open judgment. There is nothing, however, to stop such representations from the SA, which the court would be bound to consider, and does.

65. The remaining provisions of the JSA concern the annual reviews and this review of the operation of sections 6–11 of the Act, begun considerably later than it should have been.

Section 3: The experience of concerns about the future operation of Part 2 of the Act expressed during the passage of the Bill

Scope

A. One of the most often expressed concerns was whether the CMP was really justified by the number of cases which could fall within its scope. How many cases really justified this major departure from open and natural justice, what sort of issues did they involve? Was this more than a hypothetical problem?

1. The Government, in its response to the report of the Joint Committee on Human Rights in January 2013, estimated that there were then 20 live civil damages cases, some relating to several individuals, in which national security information was centrally relevant. Three such cases had been settled in the preceding year, and seven new ones had been started. It did not suggest that the numbers then live were all that could emerge over the years.

2. There is, in Annex 4, a full statement of the number of cases in which a CMP has been applied for and a declaration granted. It is not absolutely complete, but is complete enough to give a clear answer to this concern. According to the Government's annual reports to Parliament on the use of CMP under the JSA, there have been 54 applications for a section 6 declaration in the period under review, averaging just over

10 a year in the last four years of the period. The numbers have fallen back, halving in the last couple of years after the review period. I do not regard this as out of line with what Parliament could reasonably have anticipated from what it was told. I have taken the figures for applications for declarations, rather than for declarations themselves as they have mostly been granted, and there is a time lag between the applications and the decision (I should mention that there have been decisions or orders made on paper or by consent which have proved less readily recorded in Annual Reports and in the Annex 4 case schedule than full judgments).

3. Of the 52 cases listed in Annex 4 which began during the review period and in which a section 6 application was made: 17 were damages cases brought in England and Wales, 16 of which were based on allegations related to UK actions abroad (Libya 8, Somalia 3, Iraq including prisoner treatment or transfer to Afghanistan 5), 1 claim related to the treatment of an alleged Northern Ireland informant. 19 of the 52 were judicial review claims brought in England and Wales: 11 concerned the lawfulness of the cancellation of passports or the refusal to issue travel documents for terrorist or extremist national security reasons, with one citizenship claim linked to SIAC proceedings; 2 concerned asset freezing orders, related to damages actions which were also subject to section 6 declarations; 3 (in reality the one case) related to the treatment of alleged covert human intelligence sources in Afghanistan; 1 concerned the licencing of arms sales to Saudi Arabia (recorded with its post review period related challenge); 1 challenged the decision not to prosecute anyone for their alleged role in the rendition of Mr Belhaj; 1 concerned a SIAC disclosure decision; 1

challenged the refusal of a request from the US under Letters Rogatory, where intelligence material was involved; 1 arose out of the Libyan "Embassy" shooting of PC Yvonne Fletcher. There was 1 wardship case in family proceedings.

4. The rest, 13, involved claims brought in Northern Ireland. Of these, 9 were damages claims in 2 of which I have found little to explain the subject matter; 3 related to the actions of alleged informants participating in crime; 1 to the alleged failure of the Police Service of Northern Ireland to prevent a Provisional IRA robbery; 1 to an alleged agent and his handlers' alleged involvement in murder; 1 to the lawfulness of the recall of a Real IRA prisoner; 1 to unlawful detention. 3 were judicial review claims: 1 related to the Government's refusal to hold an inquest into the Omagh bombing; 2 concerned the refusal of criminal injuries compensation. 1 related to a wrongful arrest claim (where the declaration was refused).

5. Although the particular range of cases in which a section 6 declaration has been made was not foreseen, including the cases in 2020, the Act has not provided in any real sense an opening of the door for cases to which it was anticipated by Parliament that the Act would not be applied. It is difficult, in view of the terms of the Act, to see how that would happen; if the cases meet the terms of the Act, the arguments for its application are those which Parliament has accepted through its enactment of the JSA. If they fall outside its terms, the Act will not apply. The jurisprudence under the Act shows great care and caution in its application, rather than enthusiasm for its widespread application.

6. It is a constant point made by the judges who granted declarations, and where a judgment is available, that national security material was central to those cases. I have found no case in which a CMP declaration was granted where the court considered that the national security evidence was trivial or peripheral to the case. Rather the courts, aware that by no means all relevant national security material has been placed before them, have been careful to ensure that that material does indeed justify the declaration, and justifies it at the stage sought, including by seeking a closed draft defence to help identify the real issues. Where final judgments have been available, the central importance of the closed material is clear from open judgments.

B. Could the CMP be extended in practice to a wider range of cases in which the departure would not be justified?

7. Damages claims involving the UK Government's alleged response to violent Islamist extremism, principally through the alleged activities of the UK Government abroad, were plainly an important aspect of the arguments which underlay the Act, but, as I read the debates, more by way of what was seen as a clear illustration of the problem rather than a definition of its limits. There is nothing in the statements in the debate by Government Ministers to suggest that those cases set the intended limit of the CMP under the JSA, and very little from others to suggest that that is how it was seen either. No rationale was suggested for limiting the scope of the CMP in that way, nor was any language used in the Act which could be thought to have had that effect.

8. The scope of the CMP under the Act was clearly not limited either to private law damages claims but covered judicial review claims, with or without an associated damages claim.

9. There are two areas, however, where respondents have raised issues about the scope of the operation of the Act in practice, which it is convenient to deal with here.

Northern Ireland

10. The first is the number of cases arising in Northern Ireland, chiefly arising out of events during the Troubles or more recent terrorist actions.

11. Although Northern Ireland, and the litigation arising out of the Troubles and enduring terrorism, did not loom large in the debates, there was no doubt that the CMP would be available in Northern Ireland. Northern Ireland MPs' principal concern about the Act, was that it should not apply to inquests; and it does not. Northern Ireland also featured in the debates over whether the procedure should cover prisoner recall and whether a judge should hear a trial where he or she had had earlier sight of closed material which had later been excluded from the trial. The Committee on the Administration of Justice, a human rights NGO based in Belfast, made a submission to Parliament on the Second Reading of the Bill, which accurately described the range and sensitivity of Northern Ireland "legacy" cases which were to come within the scope of the Act: judicial reviews and investigations into conflict-related deaths, the range of civil actions for damages arising out of deaths and ill-treatment, and recall of ex-paramilitary prisoners. There would be

cases where informants were alleged to be participants. Closed evidence would be problematic for building confidence in the legal and judicial system to a degree unlikely in Great Britain.

12. A respondent considered, in its response to the call for evidence for this review, that the scope of the operation of the Act had been extended beyond its intended scope of national security cases to “civil and family” cases. It was being disproportionately applied in Northern Ireland, in connection with Troubles legacy litigation; 36 percent of the 41 applications for section 6 declarations between 2013 and 2017 related to Northern Ireland (this gives a fair picture although the figures may not wholly tally with the Annual Reports about which I repeat my earlier comment; Annex 4 is intended to be more precise). The extensive delays in litigation caused by CMP in historical litigation, where plaintiffs were generally older citizens, meant that they might not live to see the outcome: more effective case management and time limits were required.

13. Another respondent made the point that legacy cases generally concerned the alleged actions of informants or State agents within paramilitary groups. The underlying concern was that the process would not allow a fair trial and full redress for unlawful acts. They thought that the CMP had been used to frustrate the “truth-recovery process”.

14. It may well be that the number of Northern Ireland cases was not anticipated, but those in which a section 6 declaration has been made fall comfortably within the language and purpose of the Act. There is no reason to suppose that, had the number been anticipated, they would have been excluded from the scope of the Act or that special legislative

provision would have been made for them. I see nothing in the various judgments to suggest that these cases gave rise to some peculiar unfairness, although they have a particular sensitivity, given the sectarian divisions, and the distrust of the police, Ministry of Defence or intelligence services which underlay them. The Act has worked as intended, so far as I can tell, in those cases, and it is not easy to see how those cases would have had been dealt with fairly and effectively, without the CMP.

15. There is one area where any failure to appreciate the number of Northern Ireland cases may have had an impact, which should be addressed. That concerns the support required for the operation of the SA system, the slowness of the DV system, and the working circumstances of the SAs in Northern Ireland, about which the SASO responses make a number of points which are of concern which require addressing. This has slowed down the progress of cases. I will come to this aspect later. I have not seen any evidence that the number of judges available to hear such cases has affected the delays. I accept the concern that many Plaintiffs will be elderly, seeking to have their cases resolved as soon as possible, to bring some degree of closure. There may be scope for the Rules CJ NI to be amended to aid case management, including the imposition and enforcement of stricter time limits.

Family cases

16. The second area concerns family cases. In *Al-Rawi*, the Supreme Court accepted that there was already a practice, albeit not often used in the Family Division, whereby CMP were held with a common law but not

statutory underpinning. The Family Division was held to have a common law jurisdiction to use that procedure. Many respondents raised this problem. The SAs say that CMP cases are not infrequently adopted in family proceedings, under common law powers. There has only been one case, in or after the review period, in which the JSA may have been applied albeit in the absence of rules of court. The judgment on that is wholly confidential, like so many Family Division cases. Little is known about it or the procedure adopted or the parties.

17. There has been some debate in family cases as to whether the JSA applied to the Family Division. If the JSA applies to it, rules of procedure should have been promulgated years ago. The CPR do not apply to the Family Division. There are no Family Division rules covering CMPs under the JSA. Amendments were drafted to the Family Procedure Rules in 2017, but they have not been finalised, and no steps to bring them into force have been taken by the MoJ. It is not clear why that was so, or whether they were drafted under the JSA or under common law powers or both.

18. If the JSA does not apply to the Family Division on the grounds that its proceedings are not “relevant civil proceedings” under the JSA, there may be legal debate as to whether the JSA, of itself, had superseded the common law procedure developed in the Family Division, and policy debate as to whether Part 2 of the JSA should be amended so as to apply it to the Family Division.

19. The circumstances in which the interests of national security could become involved in family cases include the repatriation of minors from countries where there is material supporting safeguarding concerns, or

wardship of children being groomed for or inadequately protected from violent extremist attitudes, or where one parent is acting as an informant about the other's extremist activities, and the probable involvement of police and social services. They suggest that special rules would be required for the Family Division, whether or not the Act applied to it. The CPR could not simply be adopted by the Family Division. I have not seen this referred to as a problem in Northern Ireland.

20. It is worth referring to the reported cases in the Family Division which touch upon this topic. *Re A (Sexual Abuse: disclosure*) [2012] UKSC 60 [34] discusses the possibilities of a common law CMP jurisdiction in the Family Division, and its limitations. *Re XY and Z (Disclosure to the Security Service)* [2016] EWHC 2400 (Fam), MacDonald J, concerned the disclosure of a mother's witness statement and a confidential judgment by a local authority to the Security Service, to see what (if any) further information MI5 possessed on the parents' Islamist extremism. Conditions prevented MI5 using this or passing it on for its own purposes, but the Court recognised that it might seek the Court's permission to do so. How was such an application to be determined? In [89–92], the Court pointed out that there were no rules of court applicable to the Family Court. There was therefore uncertainty about the legal basis for and procedures to be adopted in any Family Court CMP. It was considered however that suitable arrangements could probably be made, bearing in mind the President of the Family Division's guidance of 2015 on "Radicalisation in Family Cases." *Re R (Closed Material Procedure: Special Advocates Funding*) [2017] EWHC 1793 (Fam) concerned the responsibility for the SA's costs. The police

sought to rely on some closed material, which all agreed should be dealt with in closed hearings, relating to a conspiracy to murder the husband; an SA was appointed to represent the interests of the mother; the question was who should pay her costs. The CMP appears from paragraph 2 of the judgment not to be under the JSA, but under the Family Division's own common law jurisdiction. The President of the Family Division had produced in 2015 Guidance on the "Role of the Attorney General in appointing Advocates to the court or Special Advocates in Family Cases".

21. The cases to which "Radicalisation in Family Cases" applies have to be dealt with by High Court Judges. It reminds them of the sensitivity of some of the material which may be involved, and that its disclosure could damage the public interest and even put lives at risk. No more disclosure should be sought from the police or other agencies than is necessary for the dispute to be resolved. PII and CMP and the use of a SA would have to be considered. Co-operation between the safeguarding agencies was to be expected. The family and criminal justice systems should co-operate to achieve the proper administration of justice in both systems. This is not guidance under the JSA.

22. The Government's response to the call for evidence invited me to consider what procedural rules should be put in place for Family Division CMP. It advocated that procedural rules should be devised, rather than the procedure being left to ad hoc decisions on a particular case.

23. If, as to which I can express no view, the JSA applies to Family Division cases as "relevant civil proceedings", amendments to the Family

Procedure Rules are long overdue, and must be promulgated rapidly to eliminate a long-standing breach of statutory duty. If the JSA does not apply to Family Division cases, continued uncertainty over the appropriate procedures to apply to the closed material cases which it has a common law jurisdiction to entertain, and the appropriate parties to them, seems undesirable. However, I have had no especial problem drawn to my attention, and I have no real feel for how many cases could be affected or in what way. There is something to be said, in view of the common law jurisdiction of the Family Division, for the continued evolution of its own practices and procedures, before its experience enables the codification of good practice into procedural rules and directions. I do not consider that I should make any recommendation on this point. That is for the MoJ and the President of the Family Division to consider.

C. The procedure should only be used to protect the interests of national security, and not the wider range of sensitive issues, namely the protection of international relations, national economic well-being or the prevention or detection of crime, which PII could cover.

24. The CMP has only been used where a judge concluded that national security was at issue, and where the judge considered that the protection of national security required the adoption of a CMP. There have been very few cases in which an application for a declaration has failed, which suggests that defendants are not attempting to misuse the procedure. Those few that have been refused were not refused because of attempted misuse, but rather because the CMPs were not necessary or not yet shown to be necessary (e.g. *ZMS* case 34). There was a failed attempt based on a misunderstanding of whose knowledge

of what mattered, when assessing the lawfulness of an arrest, but the judge refused the declaration (e.g. *Logan,* case 45). The SA would be able to advise that an appeal be pursued if a section 6 declaration were thought, arguably, to have been granted with no or inadequate national security justification.

25. There have been cases where national security interests existed alongside other interests which could not come within the scope of national security, but which were within the broader scope of PII, i.e. the protection of international relations, or economic well-being or the prevention or detection of crime. These of course are not always exclusive and water-tight compartments; each may involve national security: terrorism involves serious criminal acts; national security involves dealing with other countries in a variety of ways, including intelligence sharing. However, if the conclusion is that the disclosure of the material would be harmful to the interests of national security, it is covered by the Act.

26. PII can be claimed in the normal way in respect of those other interests subject to PII to the extent they fall outside the scope of national security. PII would still apply to them and could lead to that material being excluded, subject to the *Wiley* balance, with or without a CMP. One effect of section 14(2)(b) preserving the common PII rules, is that PII would apply to such material. It would not simply pass into the CMP with no more ado. PII applications were made in respect of non-national security PII material in *CF* and *Mohamed* (cases 1 and 2), and *ZMS* and *HTF* (case 34). PII applications were also made in *Khaled* (cases 14 and 15), *Maftah (*case 17), *YR* (case 32), and *AA* (case 33A).

D. The language of "national security" should not be used to cover up what was merely embarrassing, reprehensible, or was unlawful conduct in domestic or international law.

27. I have seen no evidence of claims of "national security" being used to cover up what was unlawful conduct or the reprehensible or merely embarrassing, but where no national security interest was involved.

28. One response to the call for evidence said that the CMP had been used to cover up evidence of UK Government involvement in serious human rights abuses, and risked shielding State wrongdoing from scrutiny, citing *CF and Mohamed* (cases 1 and 2), and the *Belhaj* litigation (cases 19–20) and more directly the *Kamoka* group of cases (cases 10–18), in which several Libyans sued MI5 for their alleged role in attempting to deport them where it was said the Government knew that there was a real risk that they would be tortured. The first two were struck out for non-compliance with directions by the claimants. The rest were settled, *Belhaj* including an apology. The contention that a CMP was used as a cover up assumes that the material at question was not national security material. Yet declarations were made by the courts. It assumes alternatively that that material would have been disclosed publicly under a PII process, which is exceptionally unlikely for national security material. Government could still protect it under PII by conceding the claim as brought. I reject this response evidence.

29. Of course, where national security and unlawful, reprehensible or embarrassing conduct may have been intermingled, declarations under section 6 can be sought and granted. Allegations of that sort are common in CMP cases. First, the question of whether UK Government

bodies were involved in or aware of any third-party misconduct may well be at the heart of the national security issues in the case. Second, those issues could not be tried, or tried fairly, with the PII process because that would have excluded the national security evidence upon which either party may have wished to rely. The degree or nature of misconduct may also be critical to liability and damages. The open judgments on section 6 declarations often refer to the vital importance of the CMP to a judicial resolution of those issues. The allegations could not otherwise be defended, as PII would operate to exclude the defence evidence. *CF* is but one example.

E. The scope of "national security" or its interests is not spelled out.

30. There is no definition, deliberately, of those words. "National security" was said, by the Government, to be a clear enough expression, which judges could interpret flexibly and appropriately.

31. None of the cases have involved a decision as to the meaning of "national security", or a debate as to whether the material used to justify the declaration was "national security" material at all. None of the judges has expressed a view that the decision on granting a declaration or on disclosure was hampered by the absence of a statutory definition. There are indications as to what Government considered the term covered in what Mr Brokenshire, Parliamentary Under-Secretary for the Home Department, said in Committee on 5 February 2013, Hansard col 184, and in the Security Service Act 1989 and the Intelligence Services Act 1994. One question was whether "national security" could cover claims against the Ministry of Defence in relation to collateral damage

from bomb or drone. That will be for the judges to decide if and when it arises.

32. There was also concern that the CMP would be used where the damage to the interests of national security would be marginal or trivial. That concern has not been borne out. The declarations which have been granted, with the benefit of a judgment, have referred to the nature and degree of the national security related evidence on which the defendant wishes to rely. This has gone far beyond the marginal or trivial. I infer that, in cases where there is no judgment, most of the applications were not contested, which itself would point strongly to the national security evidence not being marginal or trivial, but serious and significant to the case.

F. The CMP was not excluded from use in cases of habeas corpus, but it was expected that such cases would be rare.

33. There has been no application for a CMP during the review period, and so far, as I am aware, none outside it, in the context of an application for habeas corpus.

G(i) Each piece of evidence which would be used only in the closed proceedings would need to be examined individually to see if it its disclosure would harm national security, and what other mechanisms could be adopted to enable it or a gist to be made available to the excluded parties and their legal representatives.

34. This is in fact what happens in the application of the Act and the procedural rules, although of course, the decision that disclosure of a particular piece of evidence would be harmful to national security would

inform the decision in relation to other evidence raising the same issue about the risk its disclosure would cause.

G(ii) Evidence which was second and third hand would routinely be admitted, to which no weight could or should be attached, and which would not meet the usual court rules on admissibility. Would there be a different approach to the burden and standard of proof?

35. The admissibility of evidence is a matter for existing legislation and the CPR, subject to the changes made by the Act, for example in relation to intercept evidence. Judges are well placed to decide admissibility issues and what weight to give to what evidence. It requires no further legislative action or change to the rules of procedure. Opinion evidence in closed would be subject to the same constraints as in open. Inferences can be drawn by witnesses, explained and justified. Much may depend on the issue: in judicial review proceedings, the question is likely to be whether the decision-makers had reasonable grounds for the decision, which involves having a reasonable basis for any inferences which they drew, or which they accepted from others. This is a common place of judicial review proceedings. Where the issue involves questions of fact which it is for the judge to decide, the question of what inferences should or should not be drawn from the evidence is a matter for the judge, who may or may not be assisted by the inferences which the defendant has drawn or seeks to draw from that material. SAs are able to make submissions as to what inferences can or cannot be drawn or should or should not be drawn. They can point to the limitations on the claimant in providing an alternative explanation, to the extent that the claimant is unaware of the issue to

which the primary evidence relates and from which the inference is to be drawn.

36. I have seen nothing in the open or closed judgments which suggests that a different approach to the burden or standard of proof is adopted, in either part of the claim, from that which would apply if the case were wholly dealt with in the normal open procedure. There is nothing in the Act or procedural rules which would permit such a difference.

G(iii) Would evidence obtained by torture be admitted?

37. The Government is not entitled to adduce evidence which has probably been obtained by torture; *A (No. 2) v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221. Before the Government or a court could reach that conclusion, *A(No.2)* requires an investigation of uncertain scope and practicability into the source of the evidence to show that it probably was not obtained by torture. This would have to be carried out by or on behalf of the Government. For pragmatic reasons, as it puts it, the Government does not adopt that approach. Instead, the Government, as it did in in SIAC after *A (No. 2),* has developed an alternative practice, which the SAs describe as Government's almost invariable practice. It does not seek to rely on it where there are reasonable grounds for believing that it *may* have been so obtained. The GLD response said that when there are reasonable grounds for suspecting that evidence may have been obtained by torture, the Government "will" investigate. I am aware of no case in which, after such investigation as is realistically practicable, it has then pressed onto a court decision on whether it was probably not obtained by torture. It has instead adopted its pragmatic approach.

38. In SIAC, though I have not seen the issue arise under the JSA, the Practice Note requires the Government to disclose exculpatory material even if its origin meant that it could not itself rely on it. I recommend later that a Practice Direction should be made for CMPs under Part 2 of the Act. This could be made part of it.

39. The Government is not prevented by *A(No.2)* from reliance on such evidence in coming to conclusions which may later be challenged in court, notably in judicial review proceedings. It is however, prevented from reliance on it in defending its decision in judicial review.

G(iv) How would the reliability of evidence be tested?

40. The open judgments do not show that there has been cross-examination in open of defendant witnesses by open advocates, nor has any claimant given oral evidence in such cases: no damages claim has been fought to trial. There are, in any event, obvious problems when the answers to OR cross-examination cannot be given in open, and cross-examination is undertaken with no knowledge of the further evidence which the witness may give in closed hearings. There are obvious limits as to how far an issue can be pursued in open when it may only elicit a general, but unhelpful answer, which the open advocate simply cannot follow up. Cross-examination may not advance the claimant's case at all and a tactical decision not to pursue it may be made. The SA may or may not be in a better position to undertake cross-examination where instructions cannot be taken, or at best not readily taken, from the excluded party, as cross-examination proceeds. SAs do undertake cross-examination in closed sessions; there are often

issues in closed about which a claimant could not give useful evidence or instructions anyway.

41. The open judgments on the merits do not reveal that any claimants gave oral evidence in judicial review claims either. Evidence in such claims is usually given in writing, and claimants did provide written witness statements. There are obvious inhibitions to them giving oral evidence anyway. They may be exposed to cross-examination when they do not know what evidence there is in closed which may contradict their answers, evidence they might be able to explain but which they do not have the chance to. This may provide a plausible reason for not giving evidence, which cannot itself be tested. The direct confrontation of conflicting testimony cannot therefore be carried out through cross-examination, or the assessment of credibility through such indicia as demeanour.

42. However, demeanour is not the only or even a particularly useful measure of credibility: the limitations on the usefulness of such an approach are well known, especially where there are differences in those behavioural response patterns supposed to indicate credibility and reliability, and the more so where answers are mediated through an interpreter. Credibility, reliability and accuracy of recall are often more usefully judged by contradictions, belated explanations, illogicalities such as internal evidential contradictions, objective improbabilities, and measurement against external evidence such as documents, or by the likelihood of any particular witness being better informed, accurate or reliable, or having reasons to be untruthful.

G(v) Have claimants called witnesses in closed proceedings cases?

43. Expert witnesses have been called by the SA in one case (*K, A, B).* I know of no case in which a non-expert witness has given evidence for a claimant within the closed part of a case.

H. There was no absolute obligation on the Law Officers to appoint a SA

44. The absence of such an absolute obligation was intended to deal with a claimant who did not wish to have a SA. It has happened in other circumstances, but I have not come across it in any JSA cases. Although the SAs highlight the problems of appointing and supporting SAs in Northern Ireland, I have not come across any case in which the relevant Law Officer has declined to appoint a SA where the claimant wanted one. This is not the same as the claimant's preference for a named SA being met, nor the same as delay in appointing a SA for want of advocates who have undergone DV. Neither of those are problems likely to be solved by an absolute obligation. Those are issues on which I comment later.

I. Could material be redacted even to SA?

45. This has undoubtedly happened in other CMP cases, such as in SIAC, where redactions have been made on the grounds of relevance, for example where a document also covers unrelated points, or highly sensitive identifying detail. The justification for the redaction was explained; and the judge saw what was redacted so as to be satisfied that it truly was not relevant. It is for the judge dealing with disclosure to be satisfied that the redaction is justified on grounds of irrelevance. This has also arisen in one JSA case at least in which the court argued, in

the closed judgment, that to save time in this point being contested, redactions merely on the grounds of irrelevance should not be done. The SAs would be able simply to ignore it as irrelevant. The issue of disclosure to the ORs would not arise.

J. The process would inhibit settlements which resolved the vast majority of civil claims after the usual disclosure process, when an informed assessment of the prospects could take place; but the parties would not be in that position under the CMP.

46. All but one CMP damages claims in fact have settled, probably rather more than anticipated. There have been settlements, including by withdrawal of the claim, in other cases. Those outcomes give rise to other issues, but the CMP has not prevented a significant role for settlement in cases to which it has applied. There is an issue over the role of the SAs in any mediation process, to which I shall come.

K. There should be a separate disclosure judge so that the trial judge would not be affected by knowing what material a court had refused a defendant permission to withhold, but which it had declined to disclose.

47. This could be an issue where the trial judge has seen material in a PII hearing which the claimant does not then see. It would only arise in the CMP where the judge has refused permission for the defendant to withhold material, but the defendant, as it is entitled to do, declines to disclose it. This has not happened in practice as no such material has been withheld, and other processes, including requiring concessions would be applied, were it to happen. The SAs do not raise it as an issue. However, it is plain that judges and advocates, as *Logan* (case 45) shows, are alive to this potential problem and can be expected not

to hear a trial if they have seen evidence on an issue which makes it appear unfair in their view for them to hear the trial. No rule is required for that, merely an awareness of the possible problem, and, having considered what the SA and defendant have to say, reaching a view about whether there should be a different trial judge for that case. No separate “disclosure judge” is required as a matter of routine.

L. It should be open to a judge to consider the potential role of PII, for there might be cases which a judge could be satisfied could be fairly tried without the need for a CMP, by excluding material under PII.

48. The fact that it is relatively easy for a Minister to satisfy the condition in section 6(7) does not mean that PII is not considered by the judge when making a section 6 declaration or in disclosure decisions. No specific requirement for judicial consideration of a PII process is or has proved necessary for that purpose. The cases commonly do consider whether PII could be an answer. Judges, however, have concluded that the extent of the relevant national security material meant that to follow a PII process would undermine the purpose of the procedure enacted by Parliament. The comments of the judges do rather reinforce the notion that the CMP is used where PII could not but exclude from consideration the essential features and much of the contextual detail upon which the defendant needs to rely in the defence. The Act itself was seen in Parliament and in the courts as striking the balance between the protection of the interests of national security and what fairness required in an individual case; (e.g. *McGartland* case 4).

49. One respondent was critical of the judicial approach to this provision, suggesting that the judiciary should be more demanding in terms of the

detail and reasoning required of the Secretary of State for the purposes of section 6(7). I have seen nothing to criticise in the judicial approach to interpreting or applying the language Parliament used in the Act. Parliament could have required more of the Secretary of State, but it did not. Much of this criticism appears to stem from the view that the PII process ought to have been adopted instead of the CMP. This is a matter of principle, rejected by Parliament, and not one to be brought in by judges in a way which would undermine the purpose the Act.

M. The Court should have power not to order a CMP, even if the conditions in section 6 are satisfied.

50. This led to the statutory discretion being given to the courts to refuse to grant a declaration, even if the conditions in section 6 were satisfied. There has been no case, however, in which the discretion not to make the declaration has been exercised. The discretion does not come into play unless the statutory conditions have been satisfied. As the courts have pointed out, e.g. *XH* (case7), it could only be in exceptional circumstances that the discretion would be exercised against the making of a declaration once the two conditions have been satisfied. While the desirability of a discretionary power, to cover unforeseen circumstances, is understandable, it was not enacted to cover any particular set of circumstances, or any which have arisen.

N. Would the media be sufficiently aware of the decisions on applications for declarations and on subsequent stages?

51. There are no special measures to inform the media of section 6 applications or of decisions on applications for declarations, or of any open hearings or judgments on other stages or indeed on the

substantive merits. These are treated like any other proceedings; the media scan the daily cause lists; the parties may inform them; the judicial press office may be asked. The open parties can tell them, if they so wish, of orders which have been made. I see no sign that this has created any problems for the media. There will always be parts of a case within the CMP which are dealt with in open. The handing down of open judgments is listed in the usual way, with copies available. There should normally be an open judgment, where there is a closed judgment, except where the closed judgment concerns only the details of disclosure. The fact of such a judgment or series of extempore judgments being delivered should be recorded in an order, sent to the ORs, and available publicly as with any court order. It would not, of course, state what the content of the order was, but merely that decisions on disclosure had been made. I see no case for the media to be specifically informed about these proceedings or orders or judgments in them, in a different manner from that for other open proceedings. If a non-party wishes to see a Court order, it can apply in the usual way, under CPR Part 5.

52. The open judgment should set out anything in the closed judgment the disclosure of which would not be harmful to the interests of national security. The Security or Intelligence Service vets the draft open judgment before it is handed down to ensure that it contains nothing harmful to national security. The closed judgment, subject to the usual arrangements for correcting drafts for errors, goes to the closed parties at the same time. The SAs can point to any parts of the closed judgment which they contend can be included in the open judgment before it is released. The judge, having considered the views of the

defendant on the national security implications, can take a view on those points.

Summary

53. My general appraisal of these concerns raised during the passage of the Bill is that they have not been borne out in practice. The number of Northern Ireland cases may not have been anticipated, but it was plain that cases related to the legacy of the Troubles, and arising after the Stormont House Agreement, would fall within the scope of Part 2 of the JSA. Family cases were not discussed, they have barely been touched by the JSA although there is uncertainty about the scope of the undoubted common law jurisdiction, and its interaction, if any, with the Act. There were always bound to be cases the nature of which could not readily be foreseen. Many of the England and Wales cases have related to Islamist extremism and the alleged UK response to it, here and abroad. The overall number of cases is not so large as to cause any justifiable anxiety about misuse of the procedure. That has not been a theme in judicial decisions. SAs have not complained that section 6 declarations were sought baselessly or as cover-up for wrongdoing.

54. What was not anticipated was the number of cases which settled; paradoxically, Parliament's concern was that the normal process of settlement would be inhibited. The fact of a settlement does not show that the CMP was unjustified. It shows that the contention that an unfair settlement was forced on an unwilling defendant would not be justified in those instances, save perhaps where *AF (No. 3)* disclosure may or would have required the disclosure of national security material.

55. The absence of a definition of “national security” has not proved problematic in practice.

56. I see no reason to doubt the ability of judges to deal with admissibility, weight and credibility issues, notwithstanding that the usual process of oral evidence and cross-examination will not have been followed. Their judgments show that they are fully aware of the limitations on the claimant and of the departure from the normal fair trial procedures.

57. SAs have been appointed in each case.

58. The absence of a PII process has not precluded judicial consideration of its potential or of other mechanisms. But this chiefly arises at the disclosure stage and cannot sensibly be done at the declaration stage, before all the evidence is provided to the SA and the detailed disclosure process has been undertaken. Parliamentary debate focused on the declaration stage, but that is not where these mechanisms are usually capable of sensible consideration.

59. I do not see justified criticism in some respondents’ comments that the pre-condition, and more importantly, the two statutory conditions, are found to be readily satisfied. Rather than suggesting an over lax statute and judicial approach, it suggests that the independent judiciary receives cases which properly merit a declaration. Of greater concern would be defendants persistently advancing cases which judges rejected as outwith the Act, or not based on national security material.

Section 4: Concerns about the operation of the Act raised in the responses to the call for evidence

A. Timing of this Review

1. A number of respondents made the perfectly correct point that this review should have begun earlier. It should have begun "as soon as reasonably practicable" after 24 June 2018. It did not begin earlier than 25 February 2021, nearly three years later. That is not as soon as reasonably practicable. The response from the Ministry of Justice states that the delay was caused by the fact that it is not the sponsoring department for the Security and Intelligence Agencies, and does not itself generate the data. It has been in discussion until November 2020 with relevant bodies over who should be the reviewer and how it should be resourced. I see no value in my taking this delay point further.

B. The conduct of this review

2. The SAs complained in their response to the call for evidence that the Government sought to restrict contact between one of the respondents to the call for evidence and SASO for the purposes of this review, on the basis that there was a risk of accidental disclosure of national security material. The SAs made the point that, on many occasions, they had spoken to various bodies publicly, with the Government's knowledge, without any suggestion that they should not do so.

3. I am not in a position to, nor does my task require me to, adjudicate on a dispute of this sort. However, I have not seen or been told of evidence of accidental disclosure from SAs of national security material. Their comment about having spoken publicly about their function and cases is correct. I have not been made aware of any instance in which that was thought to have involved any disclosure harmful to national security.

4. The SAs also complained about a lack of cooperation from Government in their production of almost all the content of the schedule of cases in Annex 4 (Part A). This is a document essential to the review of the Act and I am grateful to the SAs for the role they played in producing it. GLD and the NICTS did respond to my requests for further assistance and provided a great deal of further information and helpful detail, for which I am also grateful.

C. Should five yearly reviews be repeated?

5. This five-year review is intended to see how the Act, over time, has been operated, what problems in practice have been encountered, and how it has or has not achieved the objectives set for it. I see no particular purpose in such a further review unless some marked change is later observed. But that is a matter for Parliament in the light of the continued Annual Reports which it will receive.

D. The Annual Reports

6. These should continue because Parliament and the public should be informed about what cases are dealt with in this procedure, so very different from the normal. But that is already provided in the Act.

7. There has been justified criticism of the time which elapses between the end of the reporting year and the production of the report for that year. Delays have lengthened from 4–6 months during the review period to 17 and 10 months for the two later years up to 24 June 2020. The latter periods are not “as soon as reasonably practicable” after 24 June in the relevant year. A 6 months’ delay might be at the far limits of that phrase.

8. However, the delay is in part related to the content. The statutory duty is placed on an unspecified Secretary of State, but the Secretary of State for Justice appears to have picked up the baton. But the MoJ does not hold the relevant information. It commissions a report from the GLD, which takes a month or longer to produce a draft for circulation to the relevant government bodies, for completing and confirming the information. The first report, containing the statutorily required information, but no more, was produced within 2 months. There was understandable criticism of the limited usefulness of the information and, in response, the MoJ sought to provide more. The Reports were greatly improved, but their production took rather longer. That should, however, still have taken no more than 3–4 months, if the system for recording the relevant information were in place.

9. A respondent to the call for evidence was also critical of the limited information in the Annual Reports required by the Act: they should contain greater details, subject to national security implications, of the

circumstances in which declarations were sought or granted. Otherwise, the CMP under the Act was less transparent than it ought to be. Another respondent to the call for evidence made much the same point.

10. The primary problem with the content of the reports is that it is impossible to track the operation of the Act in relation to individual cases or by their subject matter. It is difficult to relate what happens in each year to what happened in other years. This is partly because the statutory requirement is not fashioned with that in mind. The structure ignores the fact that relevant stages occur in more than one year. The statistics do not contain all orders, especially if made by consent or on paper. I was surprised at the effect of those limitations on the conduct of this review.

11. **RECOMMENDATION: The Annual Reports should be improved by adopting the general format of Annex 4 (Part A) to this review, without being unduly prescriptive about it. Data should be recorded on a simple spreadsheet as it comes in. The Annual Report should not require an examination of each case file. There should be a single point of contact, which should be within the GLD, which acts for many of the defendant parties. The GLD then ought to have systems in place, outside their case files, for recording the broad subject matter of the case, the parties (anonymised if so ordered) to any case, dates of section 6 applications and declarations, disclosure and review or revocation decisions, whether judgments were given, both interlocutory and final, closed and open, and the outcomes including the fact of settlement. The data should identify orders made by consent or without opposition, but need not record applications or**

permissions to communicate with ORs by the SA. The data should state in respect of each open judgment whether there was or was not a closed judgment. Neutral citations should be provided for open judgments. As cases continue from year to year, the reports would follow a rolling format, with concluded cases dropping off, and new data for existing cases being added. This is all of course subject to any court orders made in any particular case. GLD's counterparts in Northern Ireland and Scotland should do likewise and forward the information to GLD, so that they can all readily be brought together by the MoJ.

E. The appointment of SAs: the "taint check" and requests for specific SAs

12. The Government has adopted a practice of checking whether the involvement of the appointed SA in previous closed cases has given that SA knowledge of closed material, such that there is a risk of inadvertent disclosure to the ORs or their client, when they meet to discuss the new case, as envisaged by CPR 82.11(1) and NI Order 126 .10(1) before the closed material in the particular case is delivered to the SA. This is called a "taint check". It is not provided for in the Act or Rules of Court. It means that the ORs may face the dilemma of not speaking to the appointed SA or having a different one appointed from the one chosen. The process can also take weeks even in a routine case. The SAs say that the results of the checks seem inconsistent, even capricious; no reasons are given; they can ask for the decision to be reversed, but were not aware that any had been reversed.

13. The Government on the other hand seeks to discourage ORs from asking for a specific SA. There is an obvious reason for ORs seeking an SA who has had recent experience in the specific area to which their claim relates. I do not see why ORs should be discouraged from asking for a particular SA, and I make no discouraging noises, let alone some form of recommendation. But a request for a specific SA, especially, but not only, if it is based on a prior familiarity with personnel or geographical area in question, rather emphasises the point of a "taint check". The ORs will know of the risk of delay and refusal if they make such a request, which of itself may justify a "taint check".

14. I believe that this practice had already been adopted for cases in SIAC, for example; it has been continued with the 2013 Act. I can see that some such check is necessary where the national security material from the earlier case may be part of the later case. There is a proper basis for a genuine concern, which the practice seeks to address, and which cannot just be disposed of on the grounds that the SAs are all DV cleared. I also consider however that, in the absence of any suggestions, let alone evidence, to the contrary, SAs should be trusted to be vigilant and knowledgeable about risks of inadvertent disclosure through questions, responses, silences or gestures. But that may not be enough. I do not consider however that the point can simply be left there. I make the following recommendation, again without being unduly prescriptive as to its form.

15. **RECOMMENDATION: This practice should be spelt out in guidance approved by the Attorney General, and Advocates General, and preferably agreed with SASO, on the basis that a "taint check" is a reasonable tool for the protection of national security at this**

interface between ORs, their clients and closed material. The guidance should convey the circumstances in which the check will be undertaken, its intended timescale, the need for a brief but informative reasoned response, with a quick review. The Law Officers should be in charge, proactively, of this process, as SAs are their appointments. Such a check need not be automatic for every appointment, but a request for a specific SA appears to be one reasonable trigger for a "taint check".

16. **A record of which SA represented the interests of whom and in which case should enable the body controlling the intelligence material to offer a swift alert to the potential for a problem, and an appointment to be made of an SA for whom no such potential problem existed.**

F. Procedural changes: application for the section 6 declaration

F(i) The service of a draft closed defence

17. The Government, in its response to the call for evidence, raised the point that some courts had required the service of a draft closed defence before the making of a declaration under section 6. There is no provision for this in the Act or rules of procedure. The courts required a draft closed defence where they considered that a draft or draft summary closed defence would assist in the judgment on the application under section 6 for a declaration, as to whether the statutory conditions for a declaration were met. The question has arisen where there was room for debate as to what issues were being contested in

view of the publicly available material, and how central to the contested issues the closed material would be. Such orders were made in *Kamoka*, *Belhaj* and *Abdule*, for example, (cases 10–11, 19 and 37). The Government was concerned that this undermined the principle behind the Act; and it risked national security because there was uncertainty over the status of any such defence filed before the CMP declaration. It was also disproportionate if the Government decided not to contest the case, were the section 6 declaration refused. The issues which the court needed to consider for the purpose of making a section 6 declaration could be adequately spelled out in the Statement of Reasons which accompanied the application for a declaration.

18. The SAs, by contrast, wanted a new rule requiring a draft closed defence to be served in each case.

19. A draft closed defence can obviously serve a useful purpose, in identifying issues against which the section 6 application can be judged. It cannot be regarded as necessarily disproportionate. It is equally obviously not always necessary. Judges have considered that they needed one for the purpose of the declaration, Statement of Reasons notwithstanding. I see every reason to enable them to make that judgment where the case merits it, on their analysis at the declaration stage. It should be considered on a specific application by the ORs, acting on the advice of the SAs that it would be useful. I appreciate that unless it is ordered automatically, or the section 6 application is unopposed, the application for an order that a closed defence be served, could entail an adjournment in the hearing of the section 6 application, while any order for a closed draft defence was complied with. It could also be possible for this to be dealt with by the judge on

paper, beforehand. Either way it seems likely only to be a short point. A possible time saving through having an automatic requirement, is counterbalanced by time wasted in preparing them unnecessarily.

20. **RECOMMENDATION: The rules of court should make provision enabling a court to require a draft closed defence or draft summary to be served, or a particular issue to be pleaded to in draft, before it considered or ruled on a section 6 application. The rule should also provide that the draft could not be the subject of any disclosure request into open or comparison with later non-draft versions.**

F(ii) The material relied on in the section 6 application

21. The SAs contended that the defendant/applicant for the declaration should be required, under the rules of procedure, to put forward not just its selection of the closed material it would adduce at trial, but an avowedly representative selection of the whole range of that material, and an indication of the nature of what it was not producing at that stage.

22. I see no need for or advantage in a “representative selection”. In all cases where a declaration has been granted, the material relied warranted the declaration. It is difficult to see what could be gained for those purposes from considering additional material. I do not see how the “representative” nature or otherwise of the material could be judged at the section 6 declaration stage. If the sensitive material is but a small part of the material, the rest will be disclosed into open. The disclosure process will determine what cannot remain closed and yet still be relied on. A review can determine if a CMP remains necessary.

23. The court may be better informed if it is told of the nature of what is not put forward at the declaration stage, if at present it is not so informed. However, I am not persuaded that it is necessary. The court can always ask for further information, and can expect its provision; but I have seen nothing to suggest that a court deciding on the application felt itself unsure about the decision for want of further information, or later felt it had been given a misleading picture at the stage of granting a declaration.

F(iii) Multiple applications for section 6 declarations

24. I agree with the Government that the rules of procedure should be clear that any section 6 declaration made in the High Court should continue so as to cover any appeal or further appeal. The appellate court should be able to review or revoke it for the purposes of hearing an appeal. I am not clear that this has actually been an issue for an appeal from any first instance decision. If it is not clear, I am not sure by what wording, the issue is in doubt. It could be that the problem, if it exists, arises from the language of sections 6 and 7 rather than the rules. The declaration provisions of Part 2 of the Act have not yet been before the Supreme Court, which has its own rules. I am not persuaded that some recommendation is now called for, but if the problem were to emerge and require amendment to either Act or rules, there seems a sensible case for the change.

25. The Government also contended that there should only be one section 6 declaration in any one set of proceedings to avoid what happened in *Kamoka (case 10–11)* where the first section 6 declaration was limited to the strike out application. When that strike out application failed, a

second section 6 application had to be made for the substantive proceedings.

26. I can see that a single application would be desirable in general. I cannot see, however, that there should be a hard and fast rule about it. One of the purposes of an application to strike out a claim is to reduce the cost and time burden of contesting the proceedings. This has to be left to the case management judgment of the judge in any particular case.

G. Procedural changes and functions of the SA

27. The Government suggested that greater clarity would be beneficial over the role of the SAs. I am not sure that it wanted that to the extent of an exhaustive list of their functions. Areas of doubt included their role in ADR and mediation, drafting of pleadings, drafting open legal analysis for communication via the so-called LPP route to the open party, and the instruction of open experts. I take these in turn. Overall, they merit specific changes in the Rules. But I see no value in an expressly exhaustive list, unless I knew, which I do not, that there is nothing else which could arise which should be added.

G(i) Closed Pleadings and Open Submissions

28. The SAs contended that the rules of court should be amended so that they can put forward grounds of challenge or claim which arose out of the closed material but which the ORs are unaware of. They also seek to be able to draft and communicate legal submissions to the open parties.

29. I agree in relation to closed pleadings and grounds of challenge. It has occurred in at least one case. I go a little further in my recommendation. I cannot however see the value of a rule change for the submission of open legal submissions to the ORs. There is no need for the SAs to duplicate the submissions of ORs, however much better their drafting or advocacy. If they consider that the ORs have missed an open point, they can seek to communicate that, by any available route. Obviously, no such communication can take place in respect of points of law which arise as a result of sight of closed material. There is however a point about the use of the so-called LPP route which merits some rule change which I turn to shortly.

30. **RECOMMENDATION: The rules of court ought to be amended as suggested by the SAs. The court ought also to be able to require them to put forward closed pleadings and grounds of challenge. This would be of value in focusing the arguments which the SA put forward as well, on fact as well providing a framework for their legal submissions. These closed pleadings and grounds can supplement the open ones, taking new or points expressed as alternatives to those in open, in the light of the closed material. They should not however be permitted to conflict with the open pleadings, or grounds.**

G(ii) Evidence

31. The SAs point to the ability to call evidence, which is most likely to be expert evidence, but say that the power is largely illusory, and has only been exercised in *K, A and B*. They suggest no rule change but highlight the practical difference between a power under the rules and

the substance of its exercise. I record the point. They also suggest that they should be able to instruct open experts; but I see no reason why this open evidential route should not be notified to the ORs, following the normal communication routes, for them to pursue it.

G(iii) The SAs' role in mediation

32. ADR, notably mediation, is encouraged in damages claims in civil litigation. It is used in cases in which a section 6 declaration has been made. The role of settlements in CMP cases is probably greater than anticipated. I have little information about how the process works in relation to closed material. SAs, who have asked to attend the mediation, have found that the defendants routinely object to their being present. The process is then only informed by the defendants' view of the strength or merits of their case including the closed material, which of course is not itself revealed to the ORs or to the mediator. The SAs are concerned that the position advanced by the defendants in the mediation represents a one-sided and disputable picture of the defence case, and would wish to be able to communicate that to the OR, even if only by communication to the defendants' advocates at the mediation, so that they can reconsider how the matter is put. The justification for the Government objection can only be that the SAs' presence risks conveying something of the nature of the closed material to the ORs. Any other communication to the OR could be required to be in writing, even just in hand-writing and made subject to prior clearance. The remaining risk would be that there would be some non-verbal communication by facial expression, body language or gestures. It has never been suggested, however, that such non-verbal communications

take place at open hearings where the SAs and ORs are present. I have never seen anything to suggest it.

33. The Government opposes any participation by SAs in mediation or settlement negotiations first on the grounds that where there is a full admission of liability by the Government (or damages are to be assessed on a full liability basis but without any such admissions), only issues as to quantum of damages are left and there is no need for the involvement of the SAs. I agree with that part of the response, and I do not understand the SAs to seek to participate in those issues either. The Government's second point is that the ORs are better placed to represent their client's position in the negotiations and to take instructions. That is correct but only up to a point. That point is where the strength of the case in closed has to be assessed. I do not know if any reference is made to the strength or weakness of that position in the course of mediation or negotiations, but if it is, that is clearly unfair, if it cannot be contradicted, or a different appraisal put forward, where merited. If no reference is made to it, the Government side will be able to reach and present a fully informed view; not so the ORs. I consider that there is the potential for unfairness there which ought to be addressed if at all possible. This is all rather one-sided to the obvious disadvantage of ORs, and the absence of the SAs from mediation or other ADR procedures or the settlement process has to be justified by other arguments. I note that the ORs have made no such suggestion.

34. That leads on to the third Government point, which it says prevents agreement to the attendance of SAs at mediations or their expressions of view, however generalised, about the strength of the closed case, or the overall strength of the case. This is the risk of inadvertent

disclosure, and the problem of preventing communication from SAs to ORs which has not been vetted for harmful national security disclosure. This is not a fanciful risk, and has to be allowed for. However, I see the SAs as recognising the concern if not the reality of the risk, and as seeking ways of providing useful information to ORs, whilst allaying those fears. The SAs suggest that any communication could be made via the Government team, in the form of asking it to correct any errors in the view expressed about the effect of the closed evidence on the strength of the case, or to acknowledge that a more favourable view was taken by the SAs. I do not see why that should not happen. The Government has not said that it forswears any reference in any mediation process to the strength of its case, allowing for the closed material, when the ORs can form a view of its strength on the open material. It is difficult to see that the mediation process could usefully proceed without some such appraisal being communicated by the Government side, directly, or indirectly by the nature of the discussions. Again, the ORs have made no such comment, however.

35. **RECOMMENDATION: Attendance at ADR procedures, if desired by the ORs, should be added to the SAs' functions set out in the rules of court. I consider that SAs should be able to attend to make representations in private to the defendants about how they are putting matters at ADR procedures.**

G(iv) The SAs' role in settlement advice

36. The SAs say that they have generally had no involvement in settlements. That may relate to the problem over ADR attendance. There is no limit on what the ORs can send to them. The SAs also say

that communication requests to the ORs are not infrequently refused on the grounds that they reveal something of the merits of the case in closed, in particular if the comment is optimistic about the merits of the claimant's case, but less so if the comment is pessimistic. The ORs have not raised it as a problem in deciding whether to settle or at what level, and have not done so although further requests have been sent to them relating to mediation and settlement. I have set out the Government objections above.

37. Nonetheless, I can see no objection, if the ORs seek advice from the SA about settlement, to the SAs giving a general and unreasoned view as to the strength of the case or the odds of success on liability, or the acceptability of an offer. I find it difficult to see that the general comment would reveal more about the closed evidence than does the stance taken by the defendants in any settlement offer. I see no route however for such advice not to pass through a clearance process, which may be a significant inhibition. Any generalised comment may be able to go through the "LPP" route, after clearance. This may be an area where the recommended Practice Direction could assist. A standard form of safe letter might be drafted for example. I make no more specific recommendation on this point. It might have to be tested by a request being decided by a court, in closed, by a judge who would not later try the case.

H Other procedural changes

H(i) Joinder of Parties

38. The SAs suggested that there should be a means of adding a party in closed if the correct defendant has not been sued, and could only be sued by the ORs if material harmful to national security were disclosed. This problem has been encountered in practice; I do not have details but take their concern as justified. An amendment to the rules of court is required.

39. **RECOMMENDATION: The rules of court should be amended so as to permit the addition of a party named solely in closed proceedings, supported by closed pleadings.**

H(ii) Communication between SAs and ORs without Court permission

40. I agree with the Government that CPR Part 82 should be amended, as should the rules in Northern Ireland and Scotland, formally to acknowledge the informal practice which has grown up of requests for permission to communicate with the OR being agreed informally between the SAs and the defendants, without troubling the court every time.

41. **RECOMMENDATION: Rules of court should be amended to provide for a request for permission to communicate not being sent to the court, if agreed with the defendant.**

H(iii) The "LPP" confidential channel of communication

42. The LPP route, so-called, is a channel of communication developed by SASO and the GLD whereby a Government team, outside the

Government's litigation team, clears material which has no national security sensitivity, for transmission from SAs to the ORs. It is not provided for by the rules of court. It avoids the need for the court to be involved in the process. It is not yet established in Northern Ireland, and could help reduce delays there.

43. **RECOMMENDATION: This "LPP" confidential channel of communication should now be recognised in the rules of court, both in Great Britain and in Northern Ireland.**

H(iv) Evidence in Northern Ireland

44. In Northern Ireland, there is no general requirement in the Rules CJ NI for witness statements to be served in advance of a hearing. There is therefore no scope for resolving in advance what could or should be disclosed to the OR and their client. There are practical difficulties in dealing with disclosure after the evidence has been given. There can therefore be practical difficulties and unfairness where witness evidence is given in a closed hearing which could have been disclosed in open. Although, to my mind, this is to a large degree inevitable in relation to oral answers in closed cross examination, there is substance in the point the SAs make. A rule change in Northern Ireland, for CMP, should be made.

45. Moreover, cross examination in closed proceedings requires proper notice of the evidence to be led; the service of witness statements could save preparation time and assist focus on what is relevant.

46. **RECOMMENDATION: The Rules CJ NI should be changed so that written witness statements for closed evidence are served on the**

SAs, and indeed by the SAs for any closed witnesses whom they call, well before the closed hearing at which they are to be adduced. I say "well before" so as to provide the opportunity for further disclosure to be explored and, if more is disclosed, for instructions to be taken on it.

H(v) Changes to the Rules CJ NI to reduce delays

47. In section 3, at paragraph 15, I referred to the possible scope for the Rules CJ NI to be amended to assist effective case management including the imposition and enforcement of tighter time limits in view of circumstances particular to Northern Ireland where delays in legacy litigation undermined its purpose and value for elderly litigants. I am not able to recommend specific changes.

48. **RECOMMENDATION: Amendment to the Rules CJ NI should be considered to see if they can reduce delays in legacy litigation in particular.**

H(vi) The interpretation of CPR Part 82.23 (2) and (4) adopted by Bean J, in *Sarkandi* [2014] EWHC 2359 (Admin), (case 3)

49. The CPR seemingly required the section 6 application to be heard in the absence of the ORs and the claimant, even when the issues were entirely open. It was interpreted so that the hearings should only take place in their absence where that was necessary. This change is not controversial. It makes clear what is currently practice in relation to open proceedings within the CMP cases. This does not appear to be a problem in the Rules CJ NI.

50. **RECOMMENDATION: This interpretation should be reflected in the CPR expressly.**

H(vii) Joinder of section 6 applications and section 8 disclosure hearings

51. The Government suggested the rules of court be amended so as to permit, but not require, the application for a declaration under section 6 to be conducted at the same time as the disclosure issues. I am not clear what gain there would be unless all the closed material were before the judge hearing the section 6 application. That does not appear to be the practice at present, and is not required by the Act. I can see that this would add to the time before a decision on the application were made. Disclosure for the purposes of determining the section 6 decision itself seems rather unlikely, but I can see that the issue could arise, for example if the CMP application depended on one point or one piece of evidence, where the disclosure decision would determine the outcome of the section 6 application. Were that to arise, and I am not aware that it has, I do not read the rules as preventing the judge making an appropriate order. Otherwise, I see no real point in the suggested rule change.

H(viii) A Practice Direction for CPR Part 82 and the Rules CJ NI, setting out practical guidance on the operation of CMPs.

52. The Government suggested that there should be a Practice Direction setting out practical guidance on the operation of CMPs. There is scope for this; a Practice Direction is a common feature of the CPR. There is a Practice Note in SIAC. In SIAC, for example, the Practice Note requires both SAs and the SSHD to inform the ORs of the nature and purpose of

any closed steps in the proceedings, so far as consistent with the statutory rules. It seems to me that a Practice Direction could be a useful place for guidance on the interaction between the courts, SAs, and other parties, and on how the various parties should seek to conduct themselves.

53. The SAs have expressed concerns that they are not included in open discussions conducted by email about the case, or in case management discussions, involving court staff; and that the defendants routinely did not recognise the need to keep the ORs as fully informed as possible. The need to keep ORs abreast of CMP stages should also be recognised. This is an area where a Practice Direction could assist.

54. The Practice Direction could also set out what sort of requests, if any, for permission to communicate with the ORs need not go to the defendants for prior approval, and when hard copies of requests could be dispensed with. This can create acute problems when the communication is urgent or time-sensitive; the SAs' input has often been received after the deadline for response. The SAs point to the delay in dealing with routine requests and a turn around time which, in relation to procedural requests, did not meet the 24 hour target which Mr Brokenshire said the Government would use its best endeavours to meet, in a letter dated 31 October 2012.

55. It is said by the SAs that GLD's approach to disclosure was not to disclose all that could be put in open but, as a default position, to seek to withhold the whole document and leave it to the SA to make proposals for disclosure. This added delay, and also meant that the SA, who could only communicate freely with the ORs and their client before

receipt of the closed material, might well have less than should be the case on which to take instructions from them. This also added to the time which the disclosure process took.

56. The Government, on the other hand, was concerned that communications requests were being used increasingly by SAs to try to open up closed material. Checking these requests was time and resource consuming. A way should be found to place a limit on the purpose and content of such requests. There may also be a concern about the extent to which delays are occasioned by requests for further searches and disclosure of material to the SAs, which may or may not then lead to further hearings about disclosure into open.

57. I do not consider that I can reach any conclusion about where fault, if any, lies on those points. However, the need to maximise the open disclosure process at the earliest opportunity could be emphasised in a Practice Direction with more concrete tests or requirements. Rules of court cannot deal with over-ambitious communication requests, but a Practice Direction could set out clearer principles or approaches for different sorts of request, from the purely informative, to procedural issues, or urgent requests, and ones which genuinely created national security issues. As to requests for further disclosure to the SAs, the court ultimately decides whether or not such further disclosure should be given, although the avoidance by defendants of an over-narrow approach to what is relevant for disclosure to SAs has been commended in one closed judgment.

58. I do not consider that the Court of Session Rules need be troubled by such an addition, as the Court has heard no cases under Part 2, and

can take what note it considers appropriate of the other Practice Directions, should a case arise.

59. **RECOMMENDATION: There should be a Practice Direction under CPR Part 82 and Rules CJ NI Order 126 which, among other matters, could usefully address the issues described above.**

J. Costs and legal aid

J. (i) Costs

60. There are no special rules dealing with costs in CMP cases. Ward and Jones ("National Security, Law, Procedure and Practice", OUP 2021, Chapter 7, Section J) refers to certain cost decisions, while pointing out that there is little jurisprudence, and what there is, is largely unreported. As normal cost rules apply to CMP cases, the successful litigant is awarded their costs, in the normal way. In *XH,* (case 7), the successful defendant, SSHD, was awarded costs. The Court of Appeal refused permission to appeal the cost decision; it noted that the claimant had persisted in his claim after receiving further disclosure as to the reasons for the cancellation of his passport, which he unsuccessfully claimed was disproportionate and unfair. In *Sarkandi*, (case 3) the unsuccessful appellant/claimants were ordered to pay the Foreign and Commonwealth Office's costs of the appeal; there had been both open and closed judgments. In *Kamoka*, (cases 10–11), no order for costs was made in the Government's favour, although it was successful in its strike out application. Weight was given to the significance of the closed material in reaching that decision, even though the judge thought that

any reasonable claimant would have been very cautious about making certain allegations in view of the facts available in the open material.

61. The authors of that chapter point to costs decisions where CMPs have taken place under other statutory provisions notably in relation to Control Orders, TPIMs or asset freezing. There the Courts have recognised that a different approach to costs should be adopted. I consider that the courts already have sufficient discretionary powers to deal with costs issues where a claim has failed because of closed evidence, judging the significance of that in the light of the nature of the allegations in the claim, the open evidence, and the stages at which a court has given a judgment on the arguability of the claim or its merits.

62. The SAs raise the question of what cost orders would be made if a claimant failed to beat a Part 36 offer in a CMP, where closed evidence played a significant role. No judgment deals with this as no private law damages claim has yet failed at trial. The SAs are also concerned that the costs position is unclear where the SA initiates a step, for example an appeal, which is based on closed evidence. Do the ORs face a cost liability? Do the SAs face a costs risk? These risks, they say, are a potential inhibition to the fair conduct of CMP cases.

63. I know of no case in which either issue has led to any judgment. On the failure to beat a Part 36 offer, the ORs have provided no evidence of any problem and they are best placed to know if any such risks played a part in their settlement negotiations, or an adverse costs judgment. The England and Wales ORs have put in no response on any point, although invited to submit responses in the call for evidence. I am

unable to see a more than theoretical problem and make no recommendations.

64. On the latter point, the SAs point to no case in which they faced a costs risk themselves, or where they have been inhibited from taking a step or advising that it be taken, because of a costs risk to the claimant or to themselves. The ORs have provided no evidence of such a risk either. It is not easy to see, outside a wasted costs order, how the ORs or SAs could themselves be liable in costs.

65. I see no reason why, where steps are taken in reliance upon advice given by an SA, of which an appeal is the most obvious example, the unsuccessful appellant should not face the costs risks, just as he would if he brought an unsuccessful appeal on the advice of his ORs.

J.(ii) Legal aid

66. The SAs "understand" there to be real practical problems with legal aid where the defendant relies on closed material, because of the uncertainty which unknown material creates for the assessment of the merits of a case. A respondent to the call for evidence made the same point. The major problem, however, appears to be substantial delays in obtaining legal aid. I do not know how frequent or significant the delays are. It appears that legal aid is eventually granted to those who qualify. The ORs were in the best position to comment, if there were a problem of significance. They have put in no evidence.

67. Another respondent to the call for evidence commented that if a limited legal aid certificate is granted by the LSANI up to and including discovery, then there is still a requirement to seek specific authority to

participate in a CMP process, but that should not be necessary. The CMP process, if invoked should automatically be allowed under the issued legal aid certificate and legal aid regulations, without adding another layer of administration for the applicant/plaintiff representative, to seek funding cover. If invoked, it should be viewed as a step in the discovery process, without a requirement for a specific request for authority to the legal aid agency. Another respondent to the call for evidence expressed the same view, and urged that the position be reversed. I do not know if that is the same in Great Britain.

68. It seems to me that a requirement under the regulations for a further authority is an unnecessary step, either to participate in the declaration procedure or in the subsequent stages. There is no obvious need to participate in the closed disclosure process itself as that will be dealt with by SAs alone. I do not consider that I can make any specific recommendation on that point. I do not know why that extra step, which adds to delay, exists. I urge the legal aid authorities to consider it, and remove it unless it serves a necessary purpose, which at present escapes me.

69. **RECOMMENDATION: LSANI, and the legal aid authorities in Great Britain if the same applies, should consider removing the requirement for a specific authorisation to participate in a CMP process, where legal aid has already been authorised. Its retention should be publicly justified.**

J(iii) Cost management

70. The Government suggested that CMPs should be excluded from the cost management provisions in CPR 3.12–3.18. Closed costs should

not be revealed in open, as that itself could risk national security even by suggesting the extent of the closed material; open and closed work, and therefore their costs, were difficult to disentangle. I agree that the CPR, in damages claims, should be amended accordingly. Cost management is very much the exception in judicial review cases anyway.

71. **RECOMMENDATION: CMP cases under the JSA should be excluded from the cost management provisions in the rules of court.**

J(iv) Cost protection

72. This was raised by one respondent, but I see no case for special rules for it. If it meets the normal rules, cost protection will apply. If not, I see no reason why some special rule should make cost protection apply.

L. Resources for SAs

73. The SAs' response to the call for evidence recites, from the Green Paper and elsewhere, Ministerial promises that sufficient independent junior legal and SASO support would be provided for the effective and thorough performance of the SAs' duties, for further training, and for a searchable database containing summaries of closed judgments. This database would enable SAs and HMG counsel to identify potentially relevant closed judgments. This was also an aspect of putting the parties and advocates on a more equal footing. This was said by Mr Brokenshire to be close to finalisation in October 2012. By October 2015, lack of support, lack of replacement of those who left SASO, and lack of other resources was said by the SAs to be acute, going well

beyond routine inconvenience and difficulty, and affecting their professional standards.

74. These issues were raised in 2015 with GLD, and in 2016, with the Independent Reviewer of Terrorism Legislation, David Anderson QC. There was a period from May 2016 until November 2017 of significantly improved support. Thereafter, there were again serious concerns about the level of staffing and the replacement of staff at SASO. A major problem was lack of SASO lawyers and the pipeline of DV cleared lawyers, at the same time as there was a major increase in SASO workload; (it is to be remembered that SAs are required for far more than JSA work, including but not limited to SIAC which itself has had a considerable increase with the nationality refusals on national security grounds). A major problem appears to be that many potential recruits are reluctant to undergo DV clearance.

75. The issue was then raised with Max Hill QC, the next Independent Reviewer of Terrorism Legislation. SASO stated in the various email exchanges with GLD that “the steps promised by Jonathan Jones, as Treasury Solicitor, have not been delivered, with the result that SAs are left without any adequate support from SASO. It is obvious that the integrity of closed proceedings is undermined if SAs are not effectively supported by SASO.” Notwithstanding the comments of Mr Hill in his final review at [10.7–10.10], as set out in the SASO evidence to me at pages 24–25, and with which I agree, the SASO evidence is of a continuing lack of the requisite support. This was further addressed by Jonathan Hall QC, Mr Hill’s successor as Independent Reviewer of Terrorism Legislation, who referred to the problem of the move of the SASO premises to an address further away from court and chambers,

which added to the logistical problems. This remained the position during the review period.

76. However, after June 2018, there was a marked improvement in the support SASO was able to deliver in England and Wales. The system was usually able to function as required, even with illnesses and holidays. But the impression they convey is of a system with limited resilience. The training programme stopped almost entirely during the review period, and was not increased at all, as promised to them; new SAs had to learn on the job. After June 2018, there was a budget for in-house training essential of new SAs, and a renewal of the one-day course, held on three occasions. This, they said, maintained the level of training in place before the JSA but added nothing to it, contrary to the promises made during the Bill's passage through Parliament.

77. The position in Northern Ireland merits special comment. The perhaps unexpected number of CMP cases in Northern Ireland has led to a range and degree of problems for SAs, and their resourcing, equally unanticipated. Powerful points have been made on their behalf which require addressing, for the same reasons of fairness in the operation of the CMP as apply to England and Wales.

78. The SASO evidence relating to 2019 is relevant to the functioning of the Act, and it requires mention here. The Northern Ireland work location previously used was unlikely to continue to be available. SASO required its own dedicated, closed material, room in Belfast, urgently. SAs could not travel to remote State locations to review material, and having had to make appointments to do so.

79. Northern Ireland SAs also were concerned about staffing and sought a full time SASO member in Belfast. There may not have been enough work in Northern Ireland for a full time SASO staff member, but there were costs and inefficiencies in drawing on the stretched resources of SASO in London, and in the travel of staff to Belfast.

80. Other points of concern in Northern Ireland were the near absence of training for SAs, the absence of access to a database of closed judgments, the lack of supporting infrastructure in IT facilities for handling closed material, the absence of an established system for the transfer of hard and soft copies of closed material from London to Belfast, delays in transmitting closed material between SASO in Belfast and London, the requirement to work at a State facility remote from Belfast, and the restrictions on its availability to SAs, coupled with a general dependence on State bodies for all aspects of closed litigation, including the delivery of closed materials to court. A respondent to the call for evidence also commented adversely on the level of support available for SAs.

81. The Northern Ireland Office, PSNI and Ministry of Defence provide the SAs with facilities for viewing sensitive material, depending on the "facilitating" organisation. They occasionally use facilities provided by the NICTS. The system does not operate as in Great Britain, with chambers and the SASO in London. Closed material from the SAs is served on the court in hard copy only and on the Crown Solicitor's Office.

82. The NICTS did not consider that Northern Ireland, on its own, was likely to warrant a database of closed judgments in view of its numbers. That

may be so, but this is UK-wide legislation. The England and Wales closed judgment database, whatever form it may take, should be available for use by SAs in Northern Ireland cases, wherever they may be based, and if they happen, in Scottish cases. The Northern Ireland closed judgments should be part of that database. I deal specifically with this database later.

83. Support for SAs is a major issue to emerge from the review. The predicate for the CMP is that its operation will be as fair as possible, consistent with its purpose. SAs are key to the fair operation of the CMP. They need to be sufficient in number, supported by premises, training, equipment and staff, and access to a library of closed judgments, on equal terms as I shall come to, with Government counsel. The long history of complaints and eventual remedial action, delayed and temporary, shows there to be real substance in their complaint. It is to be remembered that a complaint about their facilities is a complaint, at root, about the equality of facilities with those representing the defendants, and the unfairness of real disparities.

84. The resources in Northern Ireland need addressing most urgently. There are a not inconsiderable number of CMP cases for that relatively small jurisdiction. They are likely to be sensitive and complex. The needs were probably not anticipated and have been addressed with insufficient vigour.

85. **RECOMMENDATION: The Attorney General, for England and Wales, and the Advocate General in Northern Ireland, with GLD and Northern Ireland Office, and SASO should resolve urgently what is required, and the Ministry of Justice should take**

responsibility for seeing that what is necessary is provided, with budgetary provision accordingly. The chief topics are set out above. Future Annual Reports should have an annex explaining which support issues have been resolved in England and Wales and in Northern Ireland, and which issues continue. As there have been no cases under Part 2 in Scotland, the urgent resources issue does not arise there.

86. The SAs also expressed concern about the shortage, exacerbated by the level of turnover, of security-cleared staff at the RCJ, including recording equipment and operators. SIAC is better staffed and equipped. I do not doubt this at all. This problem is worse in Northern Ireland. The RCJ and Court of Judicature staff undertaking this task are vital. The CMP is an intensive user of resources. That is unavoidable.

87. **RECOMMENDATION: The availability of DV cleared staff in the court system for Part 2 cases should also be addressed in the Annual Reports.**

M(i) A database of closed judgments

88. Although such a database is part of the resource issue, it merits further consideration because of its importance and the range of issues to which it gives rise. An important part of the resources of the SAs and GLD advocates are closed judgments, especially those dealing with common issues which will often relate to disclosure. They go beyond JSA judgments to include closed judgments under other legislation and in SIAC, for example.

89. The SAs said that no closed judgment database had been made available to them throughout the whole of the 5-year review period, despite promises made during the passage of the Bill and persistent questioning as to its whereabouts and delivery. Government advocates have been able to cite closed judgments; SAs have not, unless they happened to know of them. They therefore lacked equality of arms, and access to the law. This promised database was not, they said, the closed judgment database established in the RCJ. Another respondent to the call for evidence said that there should be proper and equal access to a database or library of closed judgments.

90. The Government did give assurances on a number of occasions during the passage of the Bill that there was a searchable database of the summaries of closed judgments, which would be regularly updated, and available to SAs and HMG advocates. A good enough selection can be found in the Green Paper (Annex F) in HMG's January 2012 response to the Joint Committee on Human Rights' report, in what the Home Office Minister, Mr James Brokenshire, told the House of Commons on 4 March 2012 and in a Factsheet published by HMG in 2014. The terms of these are essentially the same. I quote from the Factsheet:

> "4. The Government believes it is important to ensure that those who are entitled to access closed judgments are able to do so efficiently and effectively. For this reason, the Government has created a searchable database containing summaries of closed judgments which will allow special advocates and HMG counsel to identify potentially relevant closed judgments. It is not a database containing the full version of closed judgments handed down by the courts.

> 5. [This] gives effect to a proposal in the Review of Counter Terrorism Powers, reiterated in the Justice and Security Green Paper. [SASO] was consulted on the creation of the database and has been given the opportunity to comment on the format and individual case summaries.
>
> 6. The database is a … spreadsheet. It has been designed … to allow a search by nature of the case, e.g. SIAC, TPIM, level of case, and key words."

91. It was designed for the quick identification of potentially relevant judgments, and that helped protect SAs against the risk of unnecessary "tainting". If an SA or HMG counsel needed to read the full judgment, they could request a copy from SASO or GLD. The Home Office held and managed the database, which was updated three times a year. The summaries would identify legal principles. Summaries of particularly sensitive cases would not be added routinely, to reduce the risk of the summary being linked to that particular case. The Factsheet concluded by saying "It is the intention for summaries of all future closed judgments to be entered into the database".

92. It is clear that that assurance has not been maintained after the passage of the Bill. The issue was raised by SASO repeatedly in 2015. The GLD responded that "it is unfortunate that [the database] has not yet been put in place but liaison will continue with a view to having it put in place as soon as practicable" (SASO quote this in a response to me).

93. GLD said that it had no separate closed judgment library. Unless it used the RCJ closed judgment Library, it could only access closed judgments through a file search or "corporate memory." The Home Office had had

a database of judgments, but it had not been operational since 2012/13. The GLD did not directly answer whether there had been assurances given in the passage of the Bill, which had not been met. The GLD reply to me and further reply of 22 December 2021 explained what had happened.

94. A database had been created in 2012, and the first iteration was sent to SASO in November 2012. It was primarily made up of control order judgments. Delay in updating the system and preparing summaries then followed, while various concerns were resolved. A protocol was agreed by mid-2013. But thereafter, HMG does not know what happened.

95. In late 2015, the Lord Chief Justice asked the then Mr Justice Irwin to set up a working group to look at producing a coordinated library of closed judgments covering SIAC, Employment Appeal Tribunal, High Court and Investigatory Powers Tribunal cases. This initiative was the result of a terrorist criminal trial, *R v Incedal* [2016] EWCA Crim 11. The closed database was to yield open summaries of principles and issues.

96. The working group included GLD, SASO and other HMG representatives. Its intention was that there would be a library at the RCJ, which would be a resource accessible to all with appropriate clearance, including Judiciary, HMG advocates and SAs.

97. HMG saw this as superseding the closed searchable database, which would now be an unnecessary duplication. It had seen a digest of the cases in the RCJ closed library as becoming available for use at GLD and SASO offices. That has not happened, though HMG accepts that

such a digest should be available, with suitable security, in those offices.

98. I have examined the library of closed judgments at the RCJ. It contains closed judgments given under the JSA, by SIAC, Control Orders and TPIMs, asset freezing cases and some employment appeals. Judgments are held in hard form. Electronic versions are only available on judicial closed laptops. There is no searchable database. These are not summaries. The room where this closed material library is kept is secure. It is not in an area to which the public or advocates are admitted without control; it is in the judicial secure area. No SA, GLD lawyer or judge has used it. There are no protocols governing who can use it, though proof of DV clearance would be required. There is no special room for advocates. Access is not controlled by the Government; access is controlled by specific personnel at the RCJ. The Practice Direction of 14 January 2019 of the Lord Chief Justice and the Senior President of Tribunals is a public document.

99. It has not been shown to me however that the absence of the database has had any real effect on equality of arms, if it is right that HMG advocates have had no more access to a searchable database than have the SAs.

100. Both SASO and GLD receive copies of all closed judgments, including those delivered in closed material proceedings outside the JSA, notably SIAC, TPIM, and Employment Appeal Tribunals. Indeed, SASO provided the bulk of the material for the RCJ closed judgment Library. Besides, in practice, very few JSA closed judgments contained any points of even possible general application. They are very much related

to the specific factual issues and specific documents. Few disclosure judgments exist, and I found very few where some general points might be found about particular types of closed evidence or sources. Judges are alert to the need to put principles applied to closed material into open where they can.

101. The GLD advocates, through file search, personal or corporate memory, may have been able occasionally to cite cases of which a SA might have been unaware. Both sides could have been in that position.

102. There would however have been undesirable inefficiency both in case preparation, by SAs and GLD, and in the use or lack of use of previous decisions where they could have been relevant in closed cases, most probably in disclosure. There may have been difficulties over “tainting” which would not apply to the HMG advocates, and which a closed summaries database could alleviate.

103. The case for the database of closed judgments available alike to GLD advocates and SAs has not gone away. Indeed, the increasing number of closed judgments, and jurisdictions in which they play a part, with common issues likely to arise across them, reinforces the case. The needs of Northern Ireland SAs and the number of Northern Ireland cases rather underlines the importance of a UK wide database. The density of the material makes the identification of points of principle or of wider application than the facts of a particular case important. A searchable database is needed.

104. The RCJ closed library cannot satisfy that: it is in a location which is not readily accessible; it is not a database or searchable or summarised. The needs of the JSA should be met without being encumbered with

the problems which the RCJ closed library has to overcome. Its advantages and purposes could have sufficed to meet the JSA needs, but it would have had to be quite different in order to do so sensibly. The RCJ library may be better seen essentially as a judicial resource, as SASO and GLD receive their own copies of all closed judgments, to be managed judicially by the judge who has charge of it. But that is not a matter for me.

105. **RECOMMENDATION: HMG should now, and with speed, devise and maintain the summaries database, in consultation with SASO, the system for identifying and summarising the points of potential wider application, and the means of making it available securely on electronic device available to SAs and HMG advocates alike in their secure locations. It should follow the lines set out in the Factsheet cited above in the absence of good reasons to alter it.**

106. This recommendation is particularly important to Northern Ireland, where the need is considerable, and the resources spread too thinly. The database would be of particular value there. The searchable database available to Northern Ireland SAs should include those from England and Wales and vice versa. It should be a single database available to SAs in all parts of the United Kingdom. The JSA is a UK nationwide Act. There may or may not be special sensitivities over access to the full closed judgments in Northern Ireland. That, however, is no reason for the principles, points of practice or good illustrations of answers to issues of application beyond the particular case, not to feature in the summaries.

107. In any event, SAs in Northern Ireland ought to have access to the full UK judgments in the same way that SASO in London has access to closed judgments in England and Wales, and perhaps in some cases to Northern Ireland closed judgments.

108. **RECOMMENDATION: The database of summaries should cover Northern Ireland cases as well and be available to SAs and HMG advocates there on an equal footing. The England and Wales closed judgments should be available to SAs in Northern Ireland as they are to SASO in London. If a JSA case is heard in Scotland, the same should be made available to them.**

M(ii) Future publication or destruction of closed judgments

109. One respondent to the call for evidence said that the closed judgments should be made public once the harm which disclosure in public would cause to national security has disappeared, whether through the passage of time or otherwise. There should be a review process, probably managed by a judge, at intervals of about ten years. Another respondent to the call for evidence also said that the judgments should be made public when the national security interest could no longer be harmed by disclosure.

110. I do not favour the later publication of closed judgments, even where disclosure of the closed material would no longer harm national security, unless the risk that parties would try to re-open the case in the light of what they then saw, were eliminated. I regard that as a doubtful prospect. I am also not persuaded that the effort involved in determining, at a future stage, what could then be released, is justified in what seems to me to be a marginal gain to the litigant or public.

111. One respondent to the call for evidence questioned the provision in paragraph 3 of the Practice Direction for consideration of the destruction of closed judgments, if they were not to be retained. He urged that they should not be destroyed. This review, he said, should find out if any have been destroyed. Another respondent to the call for evidence also opposed their destruction.

112. GLD in its further response also expressed opposition to the destruction of closed judgments and urged that they should be retained in perpetuity.

113. The Senior Information Officer at the RCJ was not aware of any being destroyed. Disclosure decisions often proceed as a series of decisions, given orally and not transcribed, over what is and what is not permitted to be withheld. It is difficult to be certain whether there were any gaps: the substantive judgments and procedural judgments of significance appeared to be there. Gaps are far likelier to arise because of the absence of transcript, or single “judgment” or failure in lodging a transcript in the Library.

114. Paragraph 3 of the Practice Direction has to be read with paragraph 2. Paragraph 2 requires a copy of each closed judgment to be lodged with the RCJ Senior Information Officer “for consideration for inclusion in [this] library of closed judgments”. It is those which are rejected for inclusion which have to be “disposed of securely”. The emphasis is on the security of their disposal, if not retained for inclusion. It is not about the destruction of judgments once retained for inclusion. If all closed judgments are lodged for consideration for inclusion, those not included have to be disposed of securely. The real point at issue is not the latter,

but whether any should not be included, and that inclusion should instead be automatic.

N. Judges

115. The Government expressed the view that a system of ticketing specialist national security judges should be introduced, with appropriate experience or training. A respondent to the call for evidence expressed a similar view, in order to reduce the time and complexity of the procedure. Only such ticketed judges should be able to deal with the case management of CMP cases. There are two issues here: should there be a cadre of specialist judges, and at what judicial level should case management be carried out?

116. There are advantages to any ticketing process, formal and informal. There are also drawbacks to any such system, and more especially so if it is to be applied to the relatively small judicial body in Northern Ireland, which could be especially sensitive to such a process. My view is that the deployment of judges is far better left to the Lord Chief Justices of England and Wales and of Northern Ireland, and to the Lord President in Scotland, who can balance all the competing factors.

117. I do accept the Government's suggestion, echoed by one respondent to the call for evidence, that each case should have a single judge in charge of its management. There are advantages if that judge manages it all the way through, including the trial, subject only to the possibility that the case management judge will have seen material withheld after the disclosure process. The parties, especially the SAs will know of that, as will the judge. The advantages of familiarity with the law, the

evolution of the case and evidence can be considerable. I understand that deployments will mean that the same judge throughout may not always be possible, but it should be a deployment aim. And certainly, it is desirable to avoid a single case passing through many judicial hands.

118. I do not consider that case management decisions should be made by Masters. That dilutes the High Court judiciary's expertise in an area where cases are not all that common. The cases are inherently sensitive. Many case management issues are quite complex, the problems are not always apparent, and they may raise issues of principle. They require careful and secure document handling and judgment writing. A potential layer of appeal and delay should be avoided in an area where the closed material procedures already create more delay than present in conventional litigation. The advantages of the eventual trial judge acquiring early knowledge of the issues and problems in a particular case should not readily be forgone.

119. **RECOMMENDATION: I do not consider that the use of the same judge throughout where possible requires a rule change, but I recommend it as a deployment strategy. If adopted, there seems no need for a rule change in respect of Masters. But if a rule change is required for case management in CMP cases to be done only by High Court Judges, then I recommend it, at least where the case management issue touches or concerns closed material.**

O. Other points from the responses to the call for evidence

120. One respondent to the call for evidence did not know whether the Government had any policy for its decisions as to when to apply for a section 6 declaration, or in deciding what material should not be disclosed. The respondent urged that the Government should have and publish a policy on these issues. I see no need for such policies; it applies for a declaration when it considers litigation merits it, and discloses what it considers can be disclosed without harm to national security or, so far, where courts have refused permission for it to be withheld.

121. Another respondent to the call for evidence suggested that judges should place in the public domain evidence, which is disclosed to the SAs, which is evidence of "gross violations of human rights or serious violations of international humanitarian law". They should do this where there would otherwise be no accountability or effective remedy for victims. There could be a balancing requirement between the public interests at stake including the harm to national security. That degree of public disclosure of national security material is not a matter for this review but is for Parliament.

122. A respondent to the call for evidence criticised judges as too ready to accept the defendants' contentions as to why material should be withheld. I understand that it may disagree with the decision of judges, where principles are set out in open judgments. It may disagree with appellate courts' judgment on those principles. That is not useful evidence that the system does not work, or work as intended by

Parliament. Otherwise, this view can only express the impression of SAs about the closed process, in cases where their closed advocacy has been unsuccessful. That is not useful either. I have seen no evidence that defendants resist disclosure into open of material which they would have not resisted disclosing under PII within conventional litigation procedures. Nor is a "class" basis adopted: the disclosure process examines each piece of evidence. There is of course recognition that national security is generally involved in certain types of evidence, and the conclusion on one piece of evidence may apply to several other pieces of evidence. But that cannot be a sensible criticism of the operation of the JSA, if that is what the respondent to the call for evidence meant.

123. A respondent to the call for evidence criticised what it saw, on the basis of "the picture that emerges from the open case law and the experiences of practitioners" as "reduced scrutiny by the courts who appear to us" to take the approach that the process is intrinsically fair rather than reviewing each case, and to take an unduly narrow approach to Article 6 disclosure, which it says is "arguably a significantly lower level of scrutiny than that conducted under PII." In my view, this second hand, impressionistic and tentative view is rather ill-founded. The declaration stage leads to a CMP in which the detailed scrutiny of disclosure takes place. This process is at least as careful as any given by the courts in a PII process. The difference is in the outcome, which for PII national security material, so far as is known, has led to its exclusion from the case. Of course, views may legitimately differ as to what Article 6 requires. But judges apply well-established decisions at Court of Appeal and Supreme Court level, and their

decisions are appealable if they are thought arguably to have misapplied them to new situations.

124. These points give rise to no recommendations.

Section 5: Overall Conclusions

1. In general terms, I agree with the appraisal by the Government that it has been able to defend claims for damages and for judicial review which would not have been possible without CMPs. Indeed in my view, it is clear from almost all of the cases where a CMP was declared, that this process enabled the cases to proceed; and without it, they would either not have proceeded at all or would have proceeded to a settlement because the defending parties would have been disabled by PII from presenting material essential or important to their case. It is difficult to know, if there had been no CMP, precisely which well-founded claims would have failed because the relevant evidence could not be adduced to advance them, and which ill-founded claims would have succeeded because the relevant evidence could not be adduced to defeat them. It is clear, however, that there are some in each category. The main objective of the provisions of the Act with which I am concerned has been met, and indeed met for both sides.

2. Judges have commented in some cases to the effect that the claim either could not have proceeded or the defendants could not have defended it without the CMP: *CF and Mohamed* (cases 1 and 2), *Belhaj* (case 19). It is also my view that *K, A, and B* (cases 28–30) in which the claimants lost, either could not have been tried at all, or could not have been defended at all, without the CMP. The challenge to the disclosure decisions of SIAC would have been impossible without a CMP; *SIAC and AHK,* case 21. I also note *CAAT* (case 31) in which the claimant won in the Court of Appeal. It is clear that that success depended on

the availability of closed material, in the CMP, to show that the presumption of regularity, which would otherwise have applied to defeat the claim, had been refuted. Martin Chamberlain QC (now Mr Justice Chamberlain) who appeared for the claimant expressed the view that it seems likely that, applying the presumption of regularity, the claim would have failed without the CMP. This is because the closed material would have been inadmissible; the PII claim in respect of it would "almost certainly" have succeeded; see "Civil Procedure Rules at 20", Chapter 7 "National Security, Closed Material Procedures and Fair Trials".

3. In judicial review cases, the Government has sometimes won and sometimes lost cases which it would have been hard or impossible to have tried without recourse to a CMP. The transfer to SIAC of judicial reviews of exclusion and nationality decisions on the grounds of national security has enabled those claims to be considered, where they would have been in very great danger of being found untriable or incapable of being won by claimants, applying my decision in *AHK v Secretary of State for the Home Department* [2012] EWHC (Admin) 1117.

4. The number of settlements has been higher than was anticipated. The array of Libyan cases was probably not foreseen. The listed cases do not include any civil damages claims which the Government has defended to a trial, although the need to defend these properly was one of the prime reasons behind the introduction of the process.

5. The SAs contend that the aim of the CMP was to enable Government to fight cases rather than to settle them; therefore, the high level of

settlement in damages claims shows that the purpose of the JSA has not been met. That is a significant over-simplification. I do not know, and indeed no one can know, what would have happened to those cases in the absence of a CMP. The basis of the settlements is unknown; they are confidential. Some involved an express non-admission of liability. The effect of the JSA on the level of settlement or on the issues which led to settlement, is unknown. Nor is it possible to know the degree to which the settlement was merits-based, or litigation risk versus costs, level of damages and time. The JSA however substitutes something closer in that respect to normal litigation for the random outcomes of strike out, or inevitable failure or success because the defendants were disabled from evidencing their defence. But the JSA, for certain, would enable the defendant and SAs to know what closed evidence would be before the judge at trial, and what evidence it would have to disclose or make concessions about. It is highly likely that the settlement was reached on a sounder basis with the CMP than would have been the case if there had been no such procedure, and the defendant had been unable to defend the case, or the claimant unable to proceed with it, save for whatever PII might have forced into evidence. The cases are brought, defended or conceded on a more informed and considered basis.

6. The fact of settlement does not mean that the defence was likely to have failed. The Government however cannot now contend that it was *forced* to settle unmeritorious claims to avoid the disclosure of national security material, unless, as could have happened, permission was refused to withhold material disclosure of which was harmful to the interests of national security, and the Government refused to disclose it.

From the outset, the Bill contained provisions which meant that, if such disclosure were required under Article 6 ECHR, it would have to be given or appropriate concession made, or the case would have to be conceded. The ECHR could require the interests of justice in a particular case to trump those of national security.

7. I consider therefore that the objects of Part 2 are being met, and that the Act is operating within the general scope of Parliament's intentions. The concerns expressed during the passage of the Bill about its practical operation have generally not been borne out.

8. One important point, however, to emerge from this review, which is the subject of a recommendation, arises out of the much greater than anticipated number of settlements. There also appears to be something of a pattern to the stage at which settlements take place in damages claims: after the disclosure process has been concluded, but before any actual disclosure into open, which may have been required, takes place. Much closer attention needs to be given to the role of the SAs in the settlement process, which should include attendance at mediation meetings. Consideration also should be given to how the formalised "LPP" communication system could enable general advice to be given by SAs, when requested to do so by ORs, about the effect of the closed material on the prospects of success or the acceptability of the settlement proposed, if necessary with some form of court procedure for the resolution of any "disclosure" issue.

9. The timing of settlements, when the SAs and defendants know the probable or precise state of the closed evidence, and what the

defendants may have to disclose, adds considerable force to the view that fairness requires greater scope for SA participation.

10. A respondent to the call for evidence was of the view that most of the policy rationale for the CMP had not been made out, and that "evidence is now heard in secret when previously it would have been disclosed in open." I disagree. I see no possible basis for that latter assertion. What would previously have been excluded under PII is now likely to heard in closed; disclosure under PII, despite harm to national security, was exceptionally rare if it ever occurred at all, and what was not disclosed was then excluded wholly from the case.

11. CMP, a respondent to the call for evidence says, has become more commonplace than envisaged, and the balance between open and fair justice and national security has not been maintained as promised. I disagree.

12. A respondent to the call for evidence feared that the CMP had become "the option for the court where it is administratively most convenient regardless of whether less draconian means might be used to safeguard national security". That is simply wrong. Judges have considered it, and have concluded that PII is not a real alternative because its exclusionary effect would in general terms be inconsistent with the underlying purpose of the Act. I have not found any example of a case in which PII was rejected by judges as less convenient, or because CMP was "most convenient". The tentative nature of SAs' comments, as reported by a respondent to the call for evidence, that some cases, unspecified, could have been tried fairly, and presumably

more fairly, by the use of PII to exclude evidence is less than convincing. It is not borne out by the judicial approach to PII.

13. Alternative mechanisms, such as anonymity and rings of confidentiality, have been considered in various cases, and, for obvious reasons, have been found to be inadequate alternatives to a CMP, although some, notably anonymity, redactions and gisting are deployed in the disclosure process.

14. I also accept the broad comments from the Government and SAs that the CMP process significantly extends the litigation timetable from that which would apply if there were no CMP, and no PII process instead. The section 6 process and the disclosure process are time-consuming. As the Government points out, the disclosure process may cover several departments or bodies. The SA can make requests for further closed searches and disclosure. The disclosure process is protracted and may be spread out over several months. The section 7 review stage adds to the timetable, though no revocation has ever occurred. The more cumbersome and overlapping aspects of the open and closed hearings, the need to consider disclosure with any new material, the process of moving from open to closed hearings, the larger number of advocates whose availability has to be considered, the difficulty of replacing the SA if not available, the production of two judgments, and the clearance process, all make the process more complicated, time and resource-consuming and cumbersome. Few court staff have the necessary clearance.

15. This increase in litigation time and costs is particularly significant in Northern Ireland, where, resources apart, there is as the Government

put it, a “complicated factual backdrop to many of the NI legacy cases.” This does not appear to have been anticipated, or catered for as it is now clear it should have been.

16. Much of the delay is an inevitable accompaniment to the CMP processes. But there are steps which are the subject of recommendations which may help. These inherent problems do not support any view that a CMP process is lightly applied for, or as a means of covering up marginal material.

17. The SAs think that Government really has no incentive for such cases to be resolved speedily and invokes vague resource constraints to justify far more protracted timetables than would be tolerated in other cases. The Government thinks that delays are cause by excessive request for disclosure to them, and for communication to the ORs. I cannot adjudicate on this common sort of dispute, but the recommendation for a Practice Direction may assist in focussing Government’s attention on the need for active consideration of doing all that it can to disclose what may be disclosed, and SAs on the need not to make time-consuming disclosure or communication requests which have no real value or prospects.

18. Of greater importance, and this is the primary area of recommendations, is the resourcing and facilities for SAs and especially SAs engaged in Northern Ireland cases, where the situation is particularly urgent. The CMP process inevitably demands more resources than normal litigation. PII resource demands have been saved under the CMP. The main requirements are for training and support staff (though recruiting staff when so many potential candidates

appear not to wish to be DV cleared may not be simply a resource issue). The requirements for Northern Ireland are more extensive, and include the locations where closed material can be seen, the support staff in Belfast, the means of communication of closed material between SAs, defendants and the courts, and other aspects of the handling of closed material by SAs.

19. The CMP system, to be as fair as it can be, needs more and better organised SA resources to that end. It is a more expensive process for the State than conventional litigation, though the PII system would be costly in terms of Ministerial time, and SAs in all probability for the court hearings on whether certificates should be upheld or not. That extra cost has to be provided for willingly, quickly and responsively. It should not be a recurrent or long-standing problem, requiring the involvement of successive Reviewers of Terrorism Legislation. This significant multi-faceted defect in the operation of the Act can and should be addressed with alacrity and vigour, with the position in Northern Ireland to the fore.

20. I have also made a number of more minor recommendations, mostly to improve the workings of the procedures and rules of court. I see no need for changes to the Act in order to give proper effect to the intentions of Parliament.

Section 6: Recommendations

Annual Reports[12]

1. **The Annual Reports should be improved by adopting the general format of Annex 4 (Part A) to this review, without being unduly prescriptive about it. Data should be recorded on a simple spreadsheet as it comes in. The Annual Report should not require an examination of each case file. There should be a single point of contact, which should be within the GLD, which acts for many of the defendant parties. The GLD then ought to have systems in place, outside their case files, for recording the broad subject matter of the case, the parties (anonymised if so ordered) to any case, dates of section 6 applications and declarations, disclosure and review or revocation decisions, whether judgments were given, both interlocutory and final, closed and open, and the outcomes including the fact of settlement. The data should identify orders made by consent or without opposition, but need not record applications or permissions to communicate with ORs by the SA. The data should state in respect of each open judgment whether there was or was not a closed judgment. Neutral citations should be provided for open judgments. As cases continue from year to year, the reports would follow a rolling format, with concluded cases dropping off, and new data for existing cases being added. This is all of course subject to any court orders made in any particular case. GLD's counterparts in Northern Ireland and**

[12] See section 4, paragraphs 6–11

Scotland should do likewise and forward the information to GLD, so that they can all readily be brought together by the MoJ.

The appointment of SAs: the "taint check" and requests for specific SAs[13]

2. **This practice should be spelt out in guidance approved by the Attorney General, and Advocates General, and preferably agreed with SASO, on the basis that a "taint check" is a reasonable tool for the protection of national security at this interface between ORs, their clients and closed material. The guidance should convey the circumstances in which the check will be undertaken, its intended timescale, the need for a brief but informative reasoned response, with a quick review. The Law Officers should be in charge, proactively, of this process, as SAs are their appointments. Such a check need not be automatic for every appointment, but a request for a specific SA appears to be one reasonable trigger for a "taint check".**

3. **A record of which SA represented the interests of whom and in which case should enable the body controlling the intelligence material to offer a swift alert to the potential for a problem, and an appointment to be made of an SA for whom no such potential problem existed.**

[13] See section 4, paragraphs 12–16

The service of a draft closed defence[14]

4. **The rules of court should make provision enabling a court to require a draft closed defence or draft summary to be served, or a particular issue to be pleaded to in draft, before it considered or ruled on a section 6 application. The rule should also provide that the draft could not be the subject of any disclosure request into open or comparison with later non-draft versions.**

Closed pleadings and open submissions[15]

5. **The rules of court ought to be amended as suggested by the SAs. The court ought also to be able to require them to put forward closed pleadings and grounds of challenge. This would be of value in focusing the arguments which the SA put forward as well, on fact as well providing a framework for their legal submissions. These closed pleadings and grounds can supplement the open ones, taking new or points expressed as alternatives to those in open, in the light of the closed material. They should not however be permitted to conflict with the open pleadings or grounds.**

The SAs' role in mediation[16]

6. **Attendance at ADR procedures, if desired by the ORs, should be added to SAs' functions set out in the rules of court. I consider that SAs should be able to attend to make representations in**

[14] See section 4, paragraphs 17–20

[15] See section 4, paragraphs 28–30

[16] See section 4, paragraphs 32–35

private to the defendants about how they are putting matters at ADR procedures.

Joinder of Parties[17]

7. **The rules of court should be amended so as to permit the addition of a party named solely in closed proceedings, supported by closed pleadings.**

Communication between SAs and ORs without Court permission[18]

8. **Rules of court should be amended to provide for a request for permission to communicate not being sent to the court, if agreed with the defendant.**

The "LPP" confidential channel of communication[19]

9. **This "LPP" confidential channel of communication should now be recognised in the rules of court, both in Great Britain and in Northern Ireland.**

Evidence in Northern Ireland[20]

10. **The Rules CJ NI should be changed so that written witness statements for closed evidence are served on the SAs, and indeed**

[17] See section 4, paragraphs 38–39

[18] See section 4, paragraphs 40–41

[19] See section 4, paragraphs 42–43

[20] See section 4, paragraphs 44–46

by the SAs for any closed witnesses whom they call, well before the closed hearing at which they are to be adduced. I say "well before" so as to provide the opportunity for further disclosure to be explored and, if more is disclosed, for instructions to be taken on it.

Changes to the Rules CJ NI to reduce delays[21]

11. **Amendment to the Rules CJ NI should be considered to see if they can reduce delays in legacy litigation in particular.**

The interpretation of CPR Part 82.23 (2) and (4) adopted by Bean J, in Sarkandi [2014] EWHC 2359 (Admin), (case 3)[22]

12. **This interpretation should be reflected in the CPR expressly.**

A Practice Direction for CPR Part 82 and the Rules CJ NI, setting out practical guidance on the operation of CMPs[23]

13. **There should be a Practice Direction under CPR Part 82 and Rules CJ NI Order 126 which, among other matters, could usefully address the issues described above (see section 4, paragraphs 52–58).**

[21] See section 4, paragraphs 47–48

[22] See section 4, paragraphs 49–50

[23] See section 4, paragraphs 52–59

Legal aid[24]

14. **LSANI, and the legal aid authorities in Great Britain if the same applies, should consider removing the requirement for a specific authorisation to participate in a CMP process, where legal aid has already been authorised. Its retention should be publicly justified.**

Cost Management[25]

15. **CMP cases under the JSA should be excluded from the cost management provisions in the rules of court.**

Resources for SAs[26]

16. **The Attorney General, for England and Wales, and the Advocate General in Northern Ireland, with GLD and Northern Ireland Office, and SASO should resolve urgently what is required, and the Ministry of Justice should take responsibility for seeing that what is necessary is provided, with budgetary provision accordingly. The chief topics are set out above. Future Annual Reports should have an annex explaining which support issues have been resolved in England and Wales and in Northern Ireland, and which issues continue. As there have been no cases under Part 2 in Scotland, the urgent resources issue does not arise there.**

[24] See section 4, paragraphs 66–69

[25] See section 4, paragraphs 70–71

[26] See section 4, paragraphs 73–87

17. **The availability of DV cleared staff in the court system for Part 2 cases should also be addressed in the Annual Reports.**

A database of closed judgments[27]

18. **HMG should now, and with speed, devise and maintain the summaries database, in consultation with SASO, the system for identifying and summarising the points of potential wider application, and the means of making it available securely on electronic device available to SAs and HMG advocates alike in their secure locations. It should follow the lines set out in the Factsheet cited above in the absence of good reasons to alter it.**

19. **The database of summaries should cover Northern Ireland cases as well and be available to SAs and HMG advocates there on an equal footing. The England and Wales closed judgments should be available to SAs in Northern Ireland as they are to SASO in London. If a JSA case is heard in Scotland, the same should be made available to them.**

Judges[28]

20. **I do not consider that the use of the same judge throughout where possible requires a rule change, but I recommend it as a deployment strategy. If adopted, there seems no need for a rule change in respect of Masters. But if a rule change is required for case management in CMP cases to be done only by High Court**

[27] See section 4, paragraphs 88–108

[28] See section 4, paragraphs 115–119

Judges, then I recommend it, at least where the case management issue touches or concerns closed material.

Annex 1 – Terms of reference of the review of the "closed material procedure" provisions in the Justice and Security Act 2013

1. In accordance with s.13(1) and (2) of the Justice and Security Act 2013 ("the Act"), to review the operation of the following sections of the Act covering the period from 25 June 2013 to 24 June 2018:
   - Section 6 (declaration permitting closed material applications in proceedings)
   - Section 7 (review and revocation of declaration under section 6)
   - Section 8 (determination by court of applications in section 6 proceedings)
   - Section 9 (appointment of special advocate)
   - Section 10 (saving for normal disclosure rules)
   - Section 11 (general provision about section 6 proceedings)

2. In relation to the above, to review the operation of section 17(3)(e) (disclosure proceedings) of the Act, and of those procedure rules relevant to sections 6–11 of the Act.

3. To report to the Secretary of State for Justice.

In accordance with s.13(5) and (6) of the Act, the Secretary of State must lay a copy of the reviewer's report before Parliament. Before doing so, the Secretary of State may, after consulting the reviewer, exclude from the copy any part of the report that would, in the opinion of the Secretary of State, be

damaging to the interests of national security if it were included in the copy laid before Parliament.

Annex 2 – Call for evidence produced by the JSA CMP review secretariat on behalf of the reviewer

About this call for evidence

To:	All interested parties
Duration:	**From Wednesday 7 April 2021 to Wednesday 30 June 2021**
Enquiries:	JSA CMP review secretariat Email: JSA-CMP-statutoryreview@justice.gov.uk
How to respond:	Please familiarise yourself with the sections “How to respond” and “Treatment of responses” further below. Please email your response by **Wednesday 30 June 2021** to JSA-CMP-statutoryreview@justice.gov.uk
	Given the current COVID-19 situation, access to office buildings is limited. If you would like a paper copy, or if you would prefer to mail a hard copy of your submission, please get in contact with the JSA CMP review secretariat using the email address above.

Glossary

CMP	Closed Material Procedure
CPR	Civil Procedure Rules
ECHR	Council of Europe European Convention on Human Rights
JSA	Justice and Security Act 2013

Background

1. Sections 6 to 11 of the JSA make provision about the disclosure of sensitive material in civil proceedings. In particular, section 6 of the JSA empowers senior courts across the UK (the Supreme Court, the Court of Appeal and the High Court (including in Northern Ireland), and the Court of Session (in Scotland)) to make a declaration that the case is one in which a closed material application may be made in relation to material, the disclosure of which would be damaging to national security. An application for such a declaration may be made by a Secretary of State, any party to the proceedings or a court of its own motion. Under section 9 of the JSA, a "special advocate" can then be appointed to represent the interests of the party prevented from seeing the sensitive material ('the excluded party'). Generally, once the special advocate has seen the sensitive material, they are unable to consult further with the excluded party.

2. Section 13 of the JSA[29] contains a requirement to review the use of CMP under the Act, as soon as reasonably practicable, after 5 years from when the relevant section of the JSA came into force. The review must therefore cover the period from 25 June 2013 to 24 June 2018. In summary, a Secretary of State is required to appoint a reviewer and must lay the reviewer's report before Parliament.

3. On 25 February 2021, the Lord Chancellor and Secretary of State for Justice made a Written Ministerial Statement to the UK Parliament to inform about the establishment of the review, its terms of reference, and the name of the reviewer, Sir Duncan Ouseley. More information of the review process is available on GOV.UK[30].

4. The terms of reference of the review are:

   "1. In accordance with s.13(1) and (2) of the Justice and Security Act 2013 ("the Act"), to review the operation of the following sections of the Act covering the period from 25 June 2013 to 24 June 2018:
   - *Section 6 (declaration permitting closed material applications in proceedings)*
   - *Section 7 (review and revocation of declaration under section 6)*
   - *Section 8 (determination by court of applications in section 6 proceedings)*
   - *Section 9 (appointment of special advocate)*
   - *Section 10 (saving for normal disclosure rules)*
   - *Section 11 (general provision about section 6 proceedings)*

   2. In relation to the above, to review the operation of section 17(3)(e) (disclosure proceedings) of the Act, and of those procedure rules relevant to sections 6-11 of the Act.

[29] https://www.legislation.gov.uk/ukpga/2013/18/section/13/enacted

[30] https://www.gov.uk/guidance/review-of-closed-material-procedure-in-the-justice-and-security-act-2013

3. To report to the Secretary of State for Justice.

In accordance with s.13(5) and (6) of the Act, the Secretary of State must lay a copy of the reviewer's report before Parliament. Before doing so, the Secretary of State may, after consulting the reviewer, exclude from the copy any part of the report that would, in the opinion of the Secretary of State, be damaging to the interests of national security if it were included in the copy laid before Parliament."

Questionnaire

5. This is a review of the operation of the CMP. It is not a review of the overall principle of making a CMP part of the civil procedure in senior Courts across the UK. That has been decided by the UK Parliament in 2013, and it will be for the UK Parliament to decide whether this procedure should remain, including by taking into account this review of its operation. Please bear this in mind when providing your responses to the questions set out below.

Theme 1 – Aims of CMP under the JSA.

6. How do you see the rationale for extending the use of CMP under the JSA?

7. What judicial interpretations of the CMP provisions have there been and how have they affected its operation, in particular in relation to Article 6 ECHR (right to a fair trial) and the meaning of “civil proceedings”, and how have the disclosure limits and obligations been affected in cases to which Article 6 applied?

Theme 2 – How has CMP under the JSA operated in practice.

8. What was the impact on the timetable of cases of a CMP application, disclosure processes, and further consideration of continuation of CMP?

9. How often was Article 6 ECHR disclosure invoked and ordered? How were the tests for the application of Article 6 ECHR formulated for those cases? What difference to the disclosure ordered did this make?

10. Did defendants decline to reveal evidence which had not been permitted to be withheld and, if so, with what effect on the subsequent conduct or outcome of proceedings?

Theme 3 - How has CMP under the JSA measured up against its original objectives.

11. To what extent were the objectives set out by HM Government and the UK Parliament for the use of CMP under the JSA met? What concerns expressed about how it would operate have been experienced in practice?

12. Is it possible to see how the litigation would have proceeded (or not) in the absence of a CMP?

Theme 4 – Whether changes to the procedure or the language of the Act are recommended to improve the process.

13. This theme includes, in particular, the overall time taken by the procedure, the cost involved including legal aid, and the operation of the Special Advocates.

14. Can the procedural steps be simplified? Are there procedural safeguards which are unnecessary or others which are needed, especially in relation to Article 6 ECHR?

15. Are there any changes to CPR Part 82[31] which should be made?

16. Are there any other points which respondents wish to make, not covered by the above questions, bearing on the operation of the CMP?

[31] PART 82 - CLOSED MATERIAL PROCEDURE (justice.gov.uk)

How to respond

Contact details for, and format of, the responses

17. Please email your response to the questions at pp. 7-8 **by Wednesday 30 June 2021** to JSA-CMP-statutoryreview@justice.gov.uk

18. Given the current COVID-19 situation, access to office buildings is limited. If you would like a paper copy, or if you would prefer to mail a hard copy of your submission, please get in contact with the JSA CMP review secretariat using the email address above.

19. In preparing your response, please consider the following guidance:

    - We would welcome succinct responses. Please try to keep your response to a maximum of 10 pages or 6,000 words.
    - Respondents should only submit a single response.
    - Where relevant, representative groups are asked to give a summary of the people and organisations that they represent when they respond.
    - All respondents are asked to familiarise themselves with the section further below on “Treatment of responses”.

Complaints or comments

20. If you have any complaints or comments about the consultation process you should contact the JSA CMP review secretariat by emailing JSA-CMP-statutoryreview@justice.gov.uk

Extra copies

21. Alternative format versions of this publication can be requested from the JSA CMP review secretariat by emailing JSA-CMP-statutoryreview@justice.gov.uk

Next steps

22. The responses to this call for evidence will be considered by the reviewer in coming to his conclusions in the report.

23. In accordance with sections 13(5) and (6) of the JSA, the Lord Chancellor and Secretary of State for Justice must lay a copy of the reviewer's report before Parliament. Before doing so, he may, after consulting the reviewer, exclude from the copy any part of the report that would be damaging to the interests of national security if it were included in the copy laid before Parliament.

24. We are aiming to conclude this process within 2021.

Treatment of responses

General approach

25. A general summary of the responses to this call for evidence will be included as an annex to the reviewer's report.

26. Individual responses are subject to the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the UK General Data Protection Regulation (GDPR), the Data Protection Act 2018 (DPA), and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry of Justice.

27. In terms of personal information, the Ministry of Justice is the data controller and will process any such data in accordance with the UK GDPR and DPA.

28. The obligation of anonymity (for example where a party or witness was anonymised) by Court Order must be respected in all responses.

National security

29. Where responses deal with what happened in the closed part of the CMP in a particular case, they are to be in a separate response from any response that relies on open sources. These responses will not be published at all, and they must be provided under the same security classification and procedure as applied to documents produced in the CMP. **Please contact the JSA CMP review secretariat (by emailing** JSA-CMP-statutoryreview@justice.gov.uk**) before you submit this type of response. Do not send this type of response without prior arrangement with the JSA CMP review secretariat.**

Annex 3 – General summary of the responses to the call for evidence

1. A call for evidence on behalf of the reviewer took place from 7 April to 30 June 2021 (see separate Annex). The questions (reproduced further below, in bold) in the call for evidence paper were grouped under four main themes:
   - Theme 1: aims of CMP (closed material procedure) under the JSA (Justice and Security Act 2013);
   - Theme 2: how has CMP under the JSA operated in practice;
   - Theme 3: how has CMP under the JSA measured up against its original objectives;
   - Theme 4: whether changes to the procedure or the language of the Act are recommended to improve the process.

2. A total of 18 responses were received and, for convenience, they have been grouped into four broad categories:
   - Government;
   - Special Advocates;
   - Non-governmental organisations and individual respondents (this group includes charities, legal professionals and academics); and
   - Members of the judiciary.

3. Most of the respondents in the “members of the judiciary” group felt that it was not appropriate to comment on the operation of CMP so far; one respondent referred to a comment already publicly reported in an open judgment, that rule 82.23(3) of the CPR (Civil Procedure Rules) would

benefit from a clarification that the hearing of the application for a CMP should, only so far as necessary, take place in the absence of the claimants, their lawyers and the public, and that this would only be necessary when the closed material was being referred to.

4. Paragraph 25 of the call for evidence paper stated that "A general summary of the responses to this call for evidence will be included as an annex to the reviewer's report". Therefore, what follows is a general summary of what the respondents in the other three groups (Government, Special Advocates, and non-governmental organisations and individual respondents) said in answer to the questions in the call for evidence paper.

Theme 1 – Aims of CMP under the JSA

How do you see the rationale for extending the use of CMP under the JSA? What judicial interpretations of the CMP provisions have there been and how have they affected its operation, in particular in relation to Article 6 ECHR (right to a fair trial) and the meaning of "civil proceedings ", and how have the disclosure limits and obligations been affected in cases to which Article 6 applied?

Government

5. The Government argued that the purpose of the CMP was to allow the courts to take account of relevant closed material when civil claims were brought against the Government. This would enable the courts to consider all the relevant evidence before giving judgment. The aims of CMPs under the JSA, as set out in the Justice and Security Green Paper dated October 2011, were to: better equip the courts to give

judgment in cases involving sensitive information; protect UK national security by preventing damaging disclosure of genuinely national security sensitive material; and, to modernise judicial scrutiny to improve public confidence that executive power was held fully to account.

6. In relation to Article 6 ECHR (European Convention on Human Rights), as far as the Government was aware, an *AF (No.3)*-type disclosure has only been ordered in cases involving some form of executive action (including non JSA-CMP cases such as TPIMs – Terrorism Prevention and Investigation Measures – and asset freezing orders). The Government agreed with this approach. The courts have tended to approach the question of what level of disclosure is required in cases to which Article 6 ECHR, but not *AF (No.3)*, applies by carrying out a balancing exercise, on a case-by-case basis, between claimants' rights to a fair trial and the public interest in keeping national security-sensitive material in closed. It referred to case law.

7. As to the meaning of "civil proceedings", in relation to case with a criminal facet, the Government noted one judicial review claim which constituted "civil proceedings" for the purposes of the JSA though involving criminal proceedings abroad, but also the Supreme Court's ruling that judicial review of a decision not to prosecute, taken by the Director of Public Prosecutions, fell within the scope of "criminal cause or matter" and therefore those proceedings did not fall within the scope of "civil proceedings".

Special Advocates

8. The Special Advocates explained that the rationale, advanced by the Government in the Green Paper, was to enable the Government to defend itself against civil claims that it would otherwise be required to settle or which would be declared non-justiciable. The premise was that CMP was fair and effective. The Special Advocates stressed that that premise was the subject of challenge by the Special Advocates, and many others who responded to the consultation in the Green Paper. The Special Advocates also stressed that the CMP can never be 'fair', as applied to legal proceedings, because it constituted serious incursions into principles of open justice and natural justice. Any rationale for CMP, the Special Advocates argued, must be that they are less unfair than the alternatives, where there is sensitive material of central relevance to the issues in a case. The Special Advocates also explained that, at a level of principle, judicial interpretations should be addressed by reference to open case law.

Non-governmental organisations and individual respondents

9. One respondent expressed serious concerns about the rationale for using CMP under the JSA, and stressed the need for compliance with the UK's obligations under international human rights law, especially in relation to the right to fair trial. The respondent also considered that CMP had been disproportionately used in Northern Ireland; suggesting that the current use should be reconsidered, including reviewing the application of s.7 JSA ("review and revocation of declaration under section 6"). The respondent also argued against any extension of CMP.

10. Another respondent also expressed similar reservations about the use of CMP, and the importance of UK's compliance with its international human rights obligations. The respondent also expressed concerns on the extension of CMP to Northern Ireland.

11. One respondent expressed similar serious concerns about the use of CMP (and stressed the need for compliance with the UK's international human rights obligations), and argued: that CMP had repeatedly been used to cover up evidence of UK involvement in serious human rights abuses, and shielding State wrongdoing from scrutiny (the respondent quoted various civil claims against HMG on rendition comparing the situation before and after the JSA, including cases such as Binyam Mohammed, and Abdel Hakim Belhaj and his wife); that CMP had spread dangerously across the justice system, going far beyond the policy rationale offered to Parliament (it mentioned the increase in the use of CMP under the JSA over the years, including potentially in family proceedings, and disproportionately in Northern Ireland); and that the statutory safeguards on the use of CMPs contained in the JSA were ineffective, with safeguards shown to have had little impact since 2013. The respondent was also against any extension of the use of CMP.

12. One respondent stated that the use of CMP was inherently unfair and fundamentally inconsistent with the common law tradition of civil justice where proceedings are open, adversarial and equal. Their use across the justice system, the respondent argued, threatens both the right to a fair hearing and the accountability of the Government. The respondent strongly opposed any extension of the current regime.

13. One respondent recommended that, in reviewing the operation of sections 6 to 11, the review should take an approach that recognises that the provisions under review affected fundamental principles of the rule of law, including natural justice, open justice and equality of arms. The respondent quoted the concerns raised in this respect at the time of the Green Paper and the Bill, and contended that they remained relevant today, including the secrecy inherent in CMP and the lack of clarity of how many cases the Government had to settle before and after the JSA. The respondent also raised the risk of CMP becoming part of the accepted wisdom of how national security sensitive evidence should be handled by courts.

14. One respondent expressed concerns about the rationale for CMP at the time of the Bill and now (especially in relation to open justice and equality of arms), and about overuse in Northern Ireland. The respondent recommended that CMP should be ended immediately, and the relevant legislation repealed; that, in the meantime, a proper section 7 JSA investigation needed to take place to see why CMP was being used so much in Northern Ireland; there should be no expansion of the use of CMP in general, and in relation to ongoing Legacy Inquest processes in Northern Ireland in particular. The respondent also noted that, to date, there have been no revocations of CMP as a result of the court's review process under the JSA.

15. One respondent expressed concerns about the compatibility of CMP with the right to a fair trial in Article 6 ECHR, and the limitations that CMP imposed on the adversarial nature of trials (for example, the limitations on Special Advocates to challenge evidence by being unable to communicate with the client), making cases difficult to litigate and

violating the principle of equality of arms. The respondent also indicated that PII and the *Wiley* test could be used instead of CMP to balance the administration of justice and the public interest. The respondent also noted that the extension of the use of CMP under the JSA was not confined, post 2013, to a limited number of claims, contrary to what was indicated by the Government at the time of the Green Paper and the Bill. The respondent also expressed concerns about the lack of information on how s.7 JSA (the review mechanism for CMP declarations) is operating, and more generally about the insufficient information provided in the statutory annual reports on the use of CMP under the JSA. The respondent was concerned about any further extension of CMP.

Theme 2 – How has CMP under the JSA operated in practice

What was the impact on the timetable of cases of a CMP application, disclosure processes, and further consideration of continuation of CMP? How often was Article 6 ECHR disclosure invoked and ordered? How were the tests for the application of Article 6 ECHR formulated for those cases? What difference to the disclosure ordered did this make? Did defendants decline to reveal evidence which had not been permitted to be withheld and, if so, with what effect on the subsequent conduct or outcome of proceedings?

Government

16. The Government argued that it was inevitable that CMP will significantly extend the litigation timetable in some cases, particularly when closed

material was central to the case and there was a large volume to disclose. Significant resources were required at the time of application under the JSA, with delays attributable to the intensive disclosure exercises that the Government is required to undertake, often across multiple departments and, in some cases, beyond those who are party to proceedings. This was also commonly the point in a CMP process where closed disclosure requests are made by the Special Advocates.

17. The Government stated that one specific issue encountered in some cases, concerned the sequencing of the determination of a section 6 application and the service of a closed defence. Courts have, on occasion, taken the view that a closed defence must be served prior to the determination of the application. The Government argued that this approach undermined the principle behind the JSA and the necessity for a section 6 declaration to be made before a CMP took effect and the court is able to hold closed material (for example, there is a lack of clarity over the status of any closed defence filed prior to a section 6 hearing in the event that the court declined to make a section 6 declaration). The Government also argued that it was generally disproportionate to require that a closed defence be filed prior to a section 6 hearing given that the Government might decide not to contest a claim if a section 6 application failed.

18. The Government also indicated that it had experienced delays in the way CMP operates in Northern Ireland, which significantly increased the length and costs of proceedings there.

19. In relation to Article 6 ECHR disclosure, the Government pointed out that an order for disclosure on an Article 6 basis could lead to the

Government being required to provide disclosure which met the test set out in a pre-JSA control order case by the House of Lords *(AF(No.3))*. If the court were not satisfied with the level of disclosure, the Government could decide to concede an issue rather than disclose material which would damage national security or there could be a question as to whether the case continued to be triable under *Carnduff*. The Government also quoted case law to the effect that, where Article 6 is engaged, the court would strike an appropriate balance between the requirements of national security and the right of an individual to effective judicial protection, taking account of all the facts of the case. The Government also suggested that the *AF(No.3)* standard of disclosure is case specific, thus in circumstances where both Article 6 ECHR and *AF(No.3)* disclosure applied, it was a matter for the court, looking at the case, as to whether the disclosure made into open met the *AF(No.3)* standard and the proceedings themselves were Article 6 compliant. The Government also noted that the application of *AF(No.3)* disclosure, was not an issue specific to JSA CMP (for example, the courts applied it to detention cases, asset freezing orders, Terrorism Prevention and Investigation Measures).

20. The Government also stated that it has never withheld material, or a summary of material, under section 8(2) of the JSA, where it has been refused permission to withhold it.

Special Advocates

21. The Special Advocates made extensive comments.

- In general, CMP substantially protracted the length of time that cases took to resolve, to accommodate each of the stages; and that the

Government rarely had an incentive for cases involving CMP to be resolved speedily. The Special Advocates argued that resource considerations (which may impose logistical constraints, and were rarely transparently presented) were routinely invoked by defendants as justifying timetables that were far more protracted than would be tolerated in other contexts.

- Even where the parties consented to the making of a s.6 declaration, the Government might insist on issuing an application, resulting in avoidable delay. The Special Advocates also argued that the requirement for consideration of PII (Public Interest Immunity) under s.6(7) was not, in practice, treated as adding anything to the two principal conditions in s.6. Courts tend to accept at face value a brief statement by the relevant Secretary of State that PII has been considered as being sufficient. As applied in practice, the conditions for the making of a section 6 declaration were undemanding. The result, the Special Advocates argued, may be that, in at least some instances, cases which previously could have been fairly tried using PII and ancillary mechanisms (including gisting and confidentiality rings) were made subject to a s.6 declaration. In so far as the statutory machinery provides protection, this was through the operation of the section 8 disclosure process within the CMP rather than at the section 6 stage.
- The length of time that the disclosure process took was case-specific, but in all cases it protracted the timetable. In the most document-heavy cases, the Special Advocates argued, the Government might demand a timetable spread out over many months, sometimes more than a year, and insist that it was not realistically possible for disclosure to be completed more quickly.

The Special Advocates explained that resource limitations and competing priorities (usually invoking national security imperatives) were cited in support. Courts, perhaps inevitably, were reluctant to deny the Government's demands, which tended to be acceded to in the directions ordered. So, the Special Advocates argued, the section 8 process tends to be far more protracted and onerous than it would be if the Government recognised a duty of openness at the outset of the process.

- In most cases, the section 7 review was not a time-consuming stage, but requires to be catered for in directions, thus adding to the overall timetable. The Special Advocates could not identify any case in which the review led to a revocation of a CMP declaration.
- Substantive hearings were substantially protracted by involving closed, as well as open, elements. More broadly, the Special Advocates identified a range of problems and concerns arising in the operation of CMP under the JSA in practice. These problems related, for example, to: the duty of openness; the issuing of s.6 applications without due consideration for PII and whether some historical sensitive material was still sensitive after the passage of time; the availability of closed court facilities; objections to Special Advocates attending mediation between the parties; concerns around the application of non-statutory CMP to family proceedings, achieved by invoking the court's inherent jurisdiction to regulate its procedure (and the suggestion to bring in rules in this respect to ensure more certainty and transparency).
- The Special Advocates explained that the requirements of Article 6 ECHR will applied in most, although not all cases, under the JSA. That is not to say, the Special Advocates argued, that the level of

disclosure required by Article 6 is held to be the standard in *AF (No.3)*. These questions may be answered only on the basis of what is known in open in each case under the JSA. The Special Advocates also explained that the requirements of *AF (No.3)* will generally make a considerable difference to the degree of disclosure required. Even if held to be required by Article 6, the Government may decline to give the disclosure identified, preferring to abandon the relevant part of the case.

Non-governmental organisations and individual respondents

22. One respondent suggested that a CMP application impeded the litigation process in legacy cases in Northern Ireland substantially, including because of the small number of Special Advocates with experience in such cases. The respondent also stressed that it is hard for claimants even to know whether defendants declined to reveal evidence, hence the suggestion for a review of how s.7 JSA is being applied in practice.

23. One respondent shared similar concerns, especially when CMP is used in cases involving serious human rights violations, and stressed the need to ensure that CMP has not created obstacles to accountability or compromised the right of victims to a fair trial and effective remedy in favour of secrecy and security.

24. One respondent suggested that there was some ambiguity as to when it would be “fair and just” to order a CMP. The same respondent also suggested that courts should always be the final decision makers in assessing whether it is fair and just to order a CMP. Guidance on what circumstances a CMP may be refused may therefore be useful. The

same respondent suggested that it was questionable whether the 'spectrum of intensity' approach to disclosure (that is, where CMP cases were subject to variable requirements of disclosure depending on how the court classified them) to disclosure under Article 6 ECHR was proper, as it operated inconsistently and in some cases, he thought, unfairly; the respondent suggests that courts should be careful not to water down the vital Article 6 protections, and should feel comfortable with ordering disclosure where it was necessary to do so.

25. One respondent noted that there are very few Special Advocates with expertise in conflict-related litigation in Northern Ireland. Given the number of such cases in Northern Ireland, and the use of CMP, the respondent expressed concerns about further undue delay on litigants who might already be elderly or vulnerable in other ways. The respondent also observed that there was no way of knowing whether defendants in CMP cases declined to reveal evidence because of the secretive nature of the CMP application process.

Theme 3 – How has CMP under the JSA measured up against its original objectives

To what extent were the objectives set out by HM Government and the UK Parliament for the use of CMP under the JSA met? What concerns expressed about how it would operate have been experienced in practice? Is it possible to see how the litigation would have proceeded (or not) in the absence of a CMP?

Government

26. The Government said that it had been able to defend numerous private law claims and judicial reviews, being able to put evidence forward in its defence, which would not otherwise have been possible without the ability to put in place CMP under the JSA. This, the Government argued, has therefore also ensured that claimants were able to pursue claims, without them being likely to be struck out by the *Carnduff* jurisdiction. The Government also stressed that the existence of a CMP did not undermine obligations on the parties, including the Government, to consider and explore alternative dispute resolution throughout the various stages of proceedings.

Special Advocates

27. The Special Advocates argued that, in the large-scale civil claims for damages, the Government had not used the CMP to fight the case to trial, but the claims had been settled (almost invariably on confidential terms – and usually only after the case had been substantially prolonged by the procedures that the CMP entails). The Special Advocates therefore stated that the stated objective, that the JSA would enable the Government to fight cases that it would otherwise have to settle did not appear to have been borne out in relation to private law damages claims, which had been advanced as justification for CMP in civil proceedings. The Special Advocates then made various additional observations:
    - That, across the board of judicial review applications to which the JSA has been applied, there may be a clearer attainment of the objectives (but the respondent also indicated that, in the Green

Paper, judicial review cases were not identified or advanced as the main basis for the provisions for CMP in the JSA).

- The Special Advocates explained that the Government has won (and sometimes lost) cases, at least some of which may be recognised as being hard or impossible to have tried fairly without recourse to a CMP.
- The Special Advocates referred to the Special Advocates' response to the Green Paper which listed a series of practical concerns about the proposal for CMP to be extended to ordinary civil proceedings under the following heads: (a) funding and access to justice; (b) evidential admissibility; (c) costs protection mechanisms (in particular Part 36); (d) advice on prospects; (e) corruption of the common law (through development of a body of secret case law); (f) funding of Special Advocates and closed proceedings. To a greater or lesser extent, the Special Advocates argued that each of these anticipated problems had been encountered in practice. The Special Advocates stressed that point (e) is more acute than had been feared, through the lack of a closed judgment database, accessible to them on equal terms to the defendant's advocates.
- The Special Advocates also indicated that there were cases in which a s.6 application had been refused, and others which had proceeded without recourse to the CMP even though a s.6 declaration had been made.

Non-governmental organisations and individual respondents

28. One respondent raised concerns about the apparently disproportionate use of CMP in Northern Ireland, and drew attention to the debates on the Justice and Security Bill in 2012–13 when the UK Government

indicated that CMP (under what later became the JSA) was meant to be used in a very small number of cases. The respondent suggested that PII could be used instead of CMP.

29. One respondent raised concerns in relation to the use of CMP in Northern Ireland, and indicated that CMP should only be used as an absolute last resort when the PII process has been exhausted.

30. One respondent suggested that HMG had not provided evidence to show whether CMP is meeting its stated policy aim of stopping cases being abandoned for fear of disclosing sensitive material, and that HMG had not provided information as to the number of cases that would have been settled prior to 2013 proceeding to trial with a CMP, and the number of cases which have since been able to be tried using CMP. The same respondent also stressed that the expansion of the use of CMP has also led to a proliferation of secret jurisprudence, an expanding body of secret law known only to those admitted to closed proceedings. At present, the respondent argued, there was no system of law reporting to ensure that issues of law decided by judges in closed proceedings were made public. As a result, the law itself, developed case by case in CMPs, was kept secret from both the public and Parliament, despite it potentially affecting some of the public's most fundamental rights or even relating to the UK's involvement in torture. This threatens the foundations of open justice in the UK, enabling the Government to shape the law in closed proceedings without any public scrutiny. It also denies Parliament its prerogative of amending and changing the law, as MPs would never know of the way this secret law was being developed by judges behind closed doors. The respondent suggested that PII could be used instead of CMP.

31. One respondent stated that most of the policy rationale for the introduction of CMP through the JSA had not been made out and evidence was now heard in secret when previously it would have been disclosed in open. The respondent recognised that the availability of CMP could be justified to the extent that it allows cases to be brought that would otherwise not be, due to a lack of evidence or would be struck out as un-triable. However, the respondent argued, this limited advantage should not be taken out of proportion to reality, especially given the impact of CMP on the fair administration of justice. Further, the respondent was concerned that the Government's approach towards CMP undermined the assurances that CMP would not become commonplace, and that a fine balance between open and fair justice and national security would be met. The respondent was also concerned that the courts appeared to be too ready to accept Government claims for withholding information. The respondent, echoing the SAs, also suggested that the Government should not approach the question of whether to apply for material to be in closed in the mode of an adversarial litigant, seeking to begin wide and end up with a more reasonable narrow result; it should seek only to withhold that which was strictly necessary, trying to limit the impact on natural justice, the disadvantages to claimants' cases and the public interest in open justice that resulted from CMP. The respondent suggested that PII could be used instead of CMP.

32. One respondent stated that CMP cases had extended beyond returning Guantanamo detainees, and that CMP applications by the Government tended to be successful. Both of these considerations pointed to a higher future usage of CMP, with concerns for transparency and

accountability. He also argued that special attention should be given to the use of CMP in Northern Ireland (especially if this extended to the many historical investigations), which faced operational challenges such as the small number of Special Advocates there. He also expressed concerns that the information available on CMP under the JSA (specifically the statutory annual reports to Parliament on the use of CMP) was limited and not presented in a helpful way; amongst the issues experienced, he flagged delays in the publication of the annual reports, the lack of detailed information in the reports and the lack of inclusion of interim decisions. He argued that the review should examine the past delays and require more specific information to be covered in future reports, including recommending a separate and publicly available list of matters where a CMP has been sought. He also raised concerns about the delay in establishing the review, which he suggested the review should examine, and recommended that a 5-year review of the CMP provisions should become a permanent feature of the JSA.

33. One respondent considered that CMP under the JSA had been disproportionately used in Northern Ireland in ongoing conflict-related legacy litigation and reiterated its concerns about the secretive nature of the procedure. It also indicated that the extensive use of CMP did not match reassurances given during the passage of the JSA in Parliament. It also referred to PII as an alternative to using CMP, though it expressed concerns that in Northern Ireland, PII was used to remove information from the trial evidence.

Theme 4 – Whether changes to the procedure or the language of the Act are recommended to improve the process

This theme includes, in particular, the overall time taken by the procedure, the cost involved including legal aid, and the operation of the Special Advocates. Can the procedural steps be simplified? Are there procedural safeguards which are unnecessary or others which are needed, especially in relation to Article 6 ECHR? Are there any changes to CPR Part 82 which should be made? Are there any other points which respondents wish to make, not covered by the above questions, bearing on the operation of the CMP?

Government

34. The Government made various recommendations on the future operation of CMP.

35. First, it suggested that the JSA should be amended to clarify whether sensitive material that could potentially damage international relations could be subject to PII, should the court order that it cannot be withheld under the JSA.

36. Second, the Government suggested that CPR Part 82 should be clarified: better to define the role of the Special Advocates; to discourage the practice of open representatives requesting specific Special Advocates; to confirm in the Rules the existing informal practice for the content of communications requests to be agreed between the Special Advocates and the Government parties, without the need to burden the court every time the Special Advocates wished to

communicate with the open representatives; to establish reasonable limits on the purpose and content of communications requests (which the Government observed having been used to open up closed material, and which tend to be onerous both in resources and risks to national security).

37. The Government also suggested that there was sufficient flexibility within the JSA and CPR Part 82 to enable the process to be shortened in appropriate cases, for example, by joining a section 6 and section 8 hearing together; but the Government stressed the need to retain each formal procedural step to ensure the overall fairness.

38. The Government recommended exploring further changes to CPR Part 82: to exclude CMP proceedings from the cost management provisions in the CPR; to introduce a system whereby only judges with experience/training of national security issues would hear national security cases and be involved in case managing CMP cases; to set out (as a separate Practice Direction) practical guidance on the operation of CMP; to use the same CMP declaration throughout the proceedings (from first instance to appeals), without the need to seek a section 6 declaration more than once in a set of proceedings.

39. Finally, the Government invited the reviewer to consider what might be included in Rules of Court for family courts in order expressly to provide for the use of CMP under the JSA (as opposed to relying just on the court's inherent jurisdiction); this respondent explained that scenarios in which a CMP under the JSA might be used in family courts include cases where minors are being repatriated from high-risk jurisdictions

overseas when there might be material evidencing safeguarding concerns in terms of where those children might be placed.

Special Advocates

40. The Special Advocates made substantial comments on this theme.

- The main procedural safeguard that they regarded as unnecessary, and an impediment to the efficient conduct of CMP, was that the bar on communication between Special Advocates and open representatives extended to purely procedural issues. The Special Advocates queried the legal basis and practical justification for the 'tainting check' process (that is, the review, by the Government, of the previous CMP cases in which a specific Special Advocate was involved in, and whether there was a risk of inadvertent disclosure in communications between the Special Advocate and the Open Representatives).
- The Special Advocates identified various potential changes to CPR Part 82 and to Order 126 of the Rules of the Court of Judicature in Northern Ireland (for example when Special Advocates call evidence, and in relation to witness evidence in Northern Ireland).
- The Special Advocates reiterated substantial concerns in relation to the operation of CMP, including those arising from failures in their monitoring and review. The Special Advocates argued that Parliament's requirements for monitoring of and reviewing the use of CMP under the JSA had been frustrated by the Government (because of the inordinate and unlawful delay, in the Special Advocates' view, in commissioning the review, and the unexplained and increasing delays in publishing the statutory annual reports on the use of CMP). In addition, the Special Advocates complained that

the Government had recently sought to prohibit discussion between the Special Advocates and bodies interested in contributing to this review.

- The way in which CMP has been operated by Government parties, the Special Advocates argued, had the effect of increasing the unfairness, beyond the level of unfairness that is inherent in the regime of CMP sanctioned by Parliament. In particular, the Special Advocates stressed the Government's failure to honour the commitments made at the time of the JSA to provide adequate support and resources for the Special Advocate system that is integral to the operation of CMP. This included training for Special Advocates, and the promised provision of a closed judgment database.
- In addition, the Special Advocates highlighted a particular and acute failure to provide the necessary facilities and support for CMP in Northern Ireland, to enable Special Advocates to operate effectively in that jurisdiction. By contrast with the position in London for Special Advocates operating in England and Wales, in Northern Ireland the Special Advocates stressed that: there were no dedicated facilities for Special Advocates to work on closed material; there was no comparable SASO (Special Advocates Support Office) in Belfast; there was no mechanism or route for the clearance of confidential communications from Special Advocates to open representatives. These shortcomings, the Special Advocates argued, have contributed to substantial delays in progressing any cases involving CMP in Northern Ireland, over and above the delays inherent in the operation of CMP. The Special Advocates also explained that, in specific cases, State bodies did not recognise, or act in accordance

with, duties: to keep open representatives as fully informed as is possible, subject only to the statutory constraints of the proceedings; to maximise the open disclosure provided at the earliest possible stage; to devote sufficient resources to progressing closed cases that would enable them to be resolved within a reasonable timescale.

Non-governmental organisations and individual respondents

41. One respondent suggested the whole use of CMP in civil proceedings in senior courts should be rejected, and the relevant sections of the JSA repealed accordingly.

42. One respondent suggested that the statutory annual reporting process on the use of CMP under the JSA should be enhanced by including more information on the reported cases, for example the reports could identify the types of circumstances in which CMP is sought and granted, the judgments that determined proceedings, or provide reasons why this information cannot be included in the report. The same respondent also recommended that steps are taken to ensure a comprehensive library for closed judgments is available and accessible to legal teams and judges in Northern Ireland.

43. One respondent suggested introducing, purely as an interim measure (pending abolition of CMP altogether, which it urged), a ‘red flag’ system to ensure wrongdoing came to light, amending section 8 of the JSA to give courts the power to order the disclosure of evidence of rights abuses where it was in the public interest to do so. The same respondent also stressed that the current safeguards under the JSA had proved ineffective (there has not been a single revocation of a CMP declaration) and that where a person’s fundamental rights were at stake

(especially the prohibition of torture) within a CMP, fairness requires that they be given an "irreducible minimum" of disclosure to enable that person to respond effectively to the case.

44. One respondent recommended: improved reporting by the Government in its annual reports on CMP under the JSA (for example, the respondent highlighted that the annual reports should include judgments on disclosure, citations and dates of the various entries, noting whenever a CMP case was settled or withdrawn, whether a CMP application was contested, and whether a CMP declaration was refused); that the Government should take a constructive approach to CMP, seeking to ensure that it had the minimum impact on open justice, the claimant's case and the right to a fair hearing; the Government should provide information on its internal processes when deciding whether to seek to withhold material in closed proceedings, and the number of cases which the Government concluded were not appropriate for CMP; a single case management judge for cases where an application for CMP has been made and granted; consideration of the merits of developing a pool of specialist judges allocated to cases involving CMP; a Practice Direction which clarified the management of cases, and continued availability of closed judgments (the latter should be made available to judges and Special Advocates acting in CMP cases); the introduction of a protective costs regime for claimants in proceedings where there is CMP.

45. One respondent made various recommendations for the future monitoring and operation of CMP.

- In relation to the maintenance and availability of a closed judgment library, he recommended: that no closed judgment should be

destroyed (and that the review should examine whether any judgments have been destroyed); that there should be a clear, comprehensive and principled system in place for the management of closed judgments (and that information about that system should as far as possible be accessible to the public without restriction); that a list of closed judgments handed down pursuant to the JSA should be publicly available. The respondent then made practical suggestions on how the above recommendations could be reflected in existing Practice Direction and guidance for the courts.

- The respondent also recommended that a system should be created that enables closed judgments to be reviewed periodically so that they can (either fully or in part) be made open if publication would not pose a risk to national security; the review system should ensure, the respondent argued, that the courts are the decision-makers about what was published and what was kept closed (he also suggested that further specifics of a review system should be the subject of consultation with a wide range of stakeholders).
- Finally, he dealt with the use of CMP in family proceedings, considering: that it would be desirable to have certainty on the status of the JSA in relation to family proceedings (the respondent argued that only the absence of family procedure rules on CMP seems to prevent this); that the JSA should become the basis for CMP in family proceedings in the High Court where a CMP is used for national security reasons (to provide a clearer statutory basis and ensuring reporting by the Secretary of State); and that there should be an amendment to the CPR to accommodate this (the respondent suggested that the relevant CPR provisions could be transplanted

into the family procedure rules, leaving room for family courts to exercise discretion).

46. One respondent recommended the repeal of the CMP provisions in the JSA. The respondent also expressed very strong opposition to any extension of CMP to inquests, especially in Northern Ireland in relation to legacy inquests.

47. One respondent argued that Special Advocates should be allowed to communicate with clients, even if they could not reveal specific details of the evidence, in order to improve the excluded party's ability to present its case. It also observed the delays in the CMP process in Northern Ireland and recommended the use of time limits and case management guidance. More generally, it expressed concerns about the disproportionate use of CMP in Northern Ireland.

48. One respondent referred to the latest edition of a legal textbook on national security which includes information on CMP.

Follow up to the call for evidence

49. After reviewing the submissions received as part of the call for evidence, the reviewer asked more specific follow up questions to the Government, the Special Advocates, Northern Ireland authorities, and to the Open Representatives in CMP cases. The questions covered a range of areas including: the list of CMP cases and their outcomes; the database of CMP cases; the destruction of closed judgments; costs; legal aid; and mediation in CMP cases.

Annex 4 – Part A – List of CMP cases

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
1	CF	Damages – UK involvement in detention and return to the	12/07/2013, SSFCA[35]	07/11/2013, hearing	s.6: 29-31 July 2013 Further disclosure hearing to determine Article 6/AF(No.3)	s.6/PII[36]: [2013] EWHC 3402 (QB) A6/AF(No.3): [2014] EWHC 3171 (QB)	s.6/PII: Yes A6/AF(No.3): Yes	CLOSED: 31/01/2014 OPEN: 17/06/2014	Claim struck out on 01/12/2014 due to Claimant's failure to comply with directions

[32] The schedule follows the date of the section 6 application except, for convenience, where cases were linked in some way. Case 42 is a family case, and cases 43 onwards are Northern Ireland cases.

[33] Closed Material Procedure.

[34] Given the nature of CMP cases, there are often multiple tranches of OPEN and CLOSED disclosure and evidence, with some documents being partly or fully opened up right up to the final determination of the case. This schedule includes key disclosure dates, but not all of the multiple dates when disclosure was given. It gives the date of the first CLOSED disclosure to the Special Advocates (usually the s.8 application, however in some cases all of the material has been disclosed at s.6 stage), and the date of any final disclosure into OPEN, following the s.8 process or otherwise. Where there has not been any further OPEN disclosure, for example if the case has settled or been withdrawn prior to the completion of the s.8 process, or where the Defendant has been permitted to withhold the sensitive information in full, this does not necessarily mean that no OPEN disclosure has been provided at all, as there will ordinarily have been some wholly OPEN disclosure in the normal course of proceedings.

[35] Secretary of State for Foreign and Commonwealth Affairs.

[36] Public Interest Immunity.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
		UK of the Claimants			arguments: 24-25 June 2014				
2	Mohamed Ahmed Mohamed (formerly anonymised as CC)	Damages – UK involvement in detention and return to the UK of the Claimants	12/07/2013, SSFCA	07/11/2013, hearing	s.6: 29-31 July 2013 Further disclosure hearing to determine Article 6/AF(No.3) arguments: 24-25 June 2014	s.6/PII: [2013] EWHC 3402 (QB) A6/AF(No.3): [2014] EWHC 3171 (QB)	s.6/PII: Yes A6/AF(No.3): Yes	CLOSED: 31/01/2014 OPEN: 17/06/2014	Claim struck out due to Claimant absconding from bail and failing to prosecute the claim
3	Sarkandi	Judicial Review – UK proposal to add C to EU sanctions measures	05/12/2013, SSFCA	11/07/2014, hearing	s.6 OPEN: 07/03/2014 s.6 CLOSED: 28/04/2014 s.6 appeal: 9-10 June 2015	s.6: [2014] EWHC 2359 (Admin) s.6 appeal: [2015] EWCA Civ 687	No	CLOSED: 05/12/2013 There does not appear to have been any further OPEN disclosure as the claim was discontinued prior to the s.8 process.	Withdrawn by notice of discontinuance served 24/06/2014
4	Martin McGartland & Joanne Asher	Damages – failure to provide psychiatric care and/or access to benefits	14/02/2014, SSHD	08/07/2014, at a hearing	s.6: 19-20 June 2014 s.6 appeal: 19-20 May 2015	s.6: [2014] EWHC 2248; s.6 appeal: [2015] EWCA Civ 686	s.6: No s.6 appeal: No	n/a – CMP not pursued	Ongoing
5	Al-Fawwaz	Judicial Review - refusal to provide intelligence material to US court	21/10/2014, SSHD[37]	20/11/2014, hearing	s.6: 20/11/2014 s.8: 03/12/2014 Final hearing: 17-19 Dec 2014	s.6: [2015] EWHC 468 (Admin) s.8: [2015] EWHC 469 (Admin) Final hearing: [2015]	s.6: No s.8: No Final hearing: Yes	CLOSED: 13/11/2014 No further OPEN disclosure: Defendant permitted to withhold sensitive material in full.	Claim dismissed

[37] Secretary of State for the Home Department.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
						EWHC 166 (Admin)			
6	AZ	Judicial Review – refusal to issue travel document	21/04/2015, SSHD	30/04/2015, at a hearing	s.6: 30/04/2015 s.8: none Preliminary issues[38] 12-13 Nov 2015 Appeal on prelim issues: 29/11/2016	s.6: ex tempore judgment Prelim issues: [2015] EWHC 3695 (Admin) Appeal: [2017] EWCA Civ 35	s.6: no Prelim issues: no Appeal: no	CLOSED: 01/06/2015 OPEN: 10/11/2015	Substantive claim withdrawn by consent order sealed 22/05/2018
7	XH[39]	Judicial Review – challenge to passport cancellation	13/05/2015, SSHD	08/10/2015, at a hearing	s.6: 08/10/2015 s.8: none - disclosure issues resolved by agreement between SSHD/SAs[40] s.7: C and SA's application for revocation heard at the appeal. The Court of Appeal considered the application and ordered that the parties agree	s.6: [2015] EWHC 2932 (Admin) Final hearing: [2016] EWHC 1898 (Admin) Appeal: [2017] EWCA Civ 41	s.6: No Final hearing: No Appeal: No	CLOSED: 21/12/2015 Further OPEN disclosure and agreed gist served 03/05/2016	Challenge dismissed by the Divisional Court and appeal dismissed by the COA[41]

[38] Hearing of preliminary procedural grounds

[39] This was the lead case in a number of challenges to the refusal/cancellation of a passport using the Royal Prerogative. These cases are grouped together for the purpose of the table.

[40] Special Advocates.

[41] Court of Appeal.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
					directions. It does not appear that this was ever pursued. Final hearing: 7-8 July 2015 (heard with AI) Appeal: 13-14 Dec 2016 (with AI)				
8	AI	Judicial Review – challenge to cancellation of passport	22/03/2016, SSHD	22/03/2016, on paper	Substantive hearing[42]: 7-8 July. Appeal: 13-14 Dec 2016 (with XH)	Substantive: [2016] EWHC 1898 (Admin) Appeal: [2017] EWCA Civ 41	Substantive: No Appeal: No	CLOSED: 15/06/2016 OPEN: nothing was Opened up prior to CLOSED proceedings being discontinued	OPEN grounds dismissed; CLOSED grounds withdrawn by consent order dated 04/07/2018
9	Miah	Judicial Review – challenge to the SSHD's refusal to issue the Claimant with a British passport	13/05/2015, SSHD	n/a – case withdrawn prior to determination of application	n/a	n/a	n/a	CLOSED: 13/05/2015	Joined with XH but following withdrawal of legal aid, case withdrawn by consent order sealed 23/07/2015[43]

[42] In this case, the OPEN, procedural grounds were heard with XH, before the s.8 process was complete. The Claimants appealed in both cases and the CLOSED grounds in AI were stayed pending the outcome of the appeal. The CLOSED grounds were subsequently withdrawn.

[43] Prior to withdrawal, this case was joined with XH, which continued to a final hearing.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
10[44]	Kamoka & Others (C1-5, strike out application)	Damages – UK action against Libyan citizens, multiple claimants	06/05/2015, SSHD	01/07/2015, at a hearing	s.6: 30/06-01/07/2015 s.7/disclosure principles: 15/10/2015 s.8: 16-17 Nov 2015 strike out:15-18 Dec 2015 strike out appeal: 18-25 July 2017	s.6: [2015] EWHC 60 (QB) s.7/disclosure principles: [2015] EWHC 3307 (QB) s.8: no judgment strike out: [2016] EWHC 769 (QB) strike out appeal: [2017] EWCA Civ 1665	s.6: Yes s.7/disclosure principles: No s.8: no judgment strike out: Yes strike out appeal: Yes	CLOSED: 25/09/2015 OPEN: 02/12/2015	Claim struck out by the High Court but Cs' appeal allowed and the claim was reinstated.
11	Kamoka & Others (C1-5, substantive)	Damages – UK action against Libyan citizens,	27/04/2018, SSHD	14/12/2018, at a hearing	s.6: 14/12/2018 Disclosure issues CMC: 16/07/2019	s.6: [2019] EWHC 290 (QB)[45]	s.6: Yes CMC: No	CLOSED: 25/01/2019 No further OPEN disclosure[46]	Settled on 25/07/2019 With no admission of liability.

[44] The procedural history of Kamoka is complex with multiple applications pursuant to the Justice and Security Act 2013. The main civil proceedings were brought by 12 claimants, referred to here as C1-C12. By the time the case settled there were 19 claimants (C1-C19) whose claims had either been consolidated or were stayed behind the initial proceedings. Additionally, three of the claimants brought concurrent judicial review proceedings (C11, C12 and C19). For ease of reference we have set out each s.6 application, and any subsequent CMP stages, on a separate line of the table.

[45] This judgment is primarily of the Claimants' application for summary judgment for C1-C5, however the s.6 applications for C1-C10 are briefly considered.

[46] While there was no further OPEN disclosure in the substantive proceedings prior to settlement, the Claimants had previously been provided with disclosure with respect to the strike out proceedings above, in which the s.8 process had been completed.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
		multiple claimants				CMC: [2019] EWHC 2383 (QB)			
12	Abushima & Others (C6-9)	Damages – UK action against Libyan citizens, multiple claimants	25/05/2018, SSFCA	14/12/2018, at a hearing	s.6: 14/12/2018	s.6: [2019] EWHC 290 (QB)	s.6: Yes	CLOSED: 25/01/2019 No further OPEN disclosure	Settled on 25/07/2019 With no admission of liability.
13	Saleh Mohamed (C10)	Damages – UK action against Libyan citizens, multiple claimants	25/05/2018, SSFCA	14/12/2018, at a hearing	s.6: 14/12/2018	s.6: [2019] EWHC 290 (QB)	s.6: Yes	CLOSED: 25/01/2019 No further OPEN disclosure	Settled on 25/07/2019 With no admission of liability.
14	Khaled (C11)	Damages – UK action against Libyan citizens, multiple claimants	13/07/2015, SSFCA	11/12/2015, by consent	s.8 & PII: 5-6 July 2016 s.8 renewed PTA[47]: 22/06/2017	s.8 & PII: [2016] EWHC 1727 (QB) s.8 renewed PTA: [2017] EWCA Civ 1349	s.8 & PII: Yes s.8 renewed PTA: No	CLOSED: 26/02/2016 OPEN: 21/07/2016	Settled on 25/07/2019 With no admission of liability.
15	Khaled (C11, JR[48])	Judicial Review – challenge to financial restrictions	27/01/2017, SSFCA	23/02/2017, on paper	Disclosure principles: 07/06/2017	Disclosure principles: [2017] EWHC	Disclosure principles: No	CLOSED: 24/02/2017 No further OPEN Disclosure[50]	Settled on 25/07/2019 With no admission of liability.

[47] Permission to appeal.

[48] Judicial review.

[50] The s.8 process was not completed following between lifting the stay and settlement, however the disclosure exercise had nearly been completed in the civil claim, which covered broadly the same material.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
						1422 (Admin)[49]			
16	Maftah (C19)	Damages – UK action against Libyan citizens, multiple claimants	17/02/2017, SSFCA	23/02/2017, on paper	n/a	n/a	n/a	n/a[51]	Withdrawn by consent order dated 10/08/2017
17	Maftah (C19, JR)	Judicial Review – challenge to financial restrictions	17/02/2017, SSFCA	23/02/2017, on paper	Disclosure principles: 07/06/2017	Disclosure principles: [2017] EWHC 1422 (Admin)	Disclosure principles: No	CLOSED: 14/09/2017 No further OPEN disclosure	Settled on 25/07/2019 With no admission of liability.
18	Abdulrahim (C12)[52]	Damages – UK action against Libyan citizens, multiple claimants	13/07/2015, SSFCA	n/a[53]	n/a	n/a	n/a	n/a	Settled on 25/07/2019 With no admission of liability.
19	Belhaj PLC	Damages – UK involvement in	08/06/2017, SSFCA	21/07/2017, at a hearing	s.6: 10-11 July 2017	s.6: [2017] EWHC 1861 (QB)	s.6: No	CLOSED: 10/11/2017 Case settled prior to further OPEN disclosure	Claim settled by consent orders sealed 22/05/2018

[49] The Claimants applied for PTA of this decision and proceedings were stayed pending the appeal. The Claimant's subsequently withdrew the appeal.

[51] Claim withdrawn prior to s.8 process.

[52] Abdulrahim also brought a JR claim which was proceeding with Khaled (C11) and Maftah (C19), however Abdulrahim's JR claim was stayed prior to the s.6 application being made, therefore this has not been included on the table.

[53] The civil claim was stayed prior to the determination of the s.6 application, and no further steps were taken in these proceedings before settlement.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
		extraordinary rendition							
20	Belhaj (DPP)	Judicial Review – challenge to decision not to prosecute anyone (re alleged role in extraordinary rendition)	08/08/2017, SSFCA	No s.6 declaration made	Preliminary issue[54]: 2-3 Nov 2017 Appeal on prelim issue: 22/03/2018	Prelim issue: [2017] EWHC 3056 (Admin) Appeal: [2018] UKSC 33	Prelim issue: No Appeal: No	n/a – CLOSED disclosure not provided as s.6 declaration not granted	Claim withdrawn by consent order sealed 18/05/2018
21	SIAC (AHK)	Judicial Review – SSHD challenge to preliminary decisions of SIAC[55]	15/01/2015, SSHD	20/01/2015, hearing	s.6: 20/01/2015 s.8: none Final hearing: 10/02/2015	s.6: ex tempore judgment Final hearing: [2015] EWHC 681 (Admin) Additional judgment dealing with declaration and costs: [2015] EWHC 1236 (Admin)	Final hearing: Yes	CLOSED: 26/01/2015 There does not appear to have been any further OPEN disclosure.	Declaration made as to the required level of disclosure in SIAC exclusion and naturalisation cases
22	MR	Judicial Review – challenge to	15/02/2016, SSHD	24/03/2016, by consent	s.8: 16-17 June 2016 (OPEN and CLOSED) & 27	s.8: [2016] EWHC 1622 (Admin)	s.8: ex tempore judgment for both	CLOSED: 04/04/2016 OPEN: 24/11/2016	Claim dismissed

[54] Hearing of the preliminary issue of whether the proceedings constituted a "criminal cause or matter" such that they would fall outside the Court's jurisdiction to make a s.6 declaration. At first instance it was held that the Court did have jurisdiction to receive an application, however this was overturned on appeal to the Supreme Court.

[55] Special Immigration Appeals Commission.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
		cancellation of passport			July 2016 (CLOSED only) Final hearing: 1-2 December 2016	Final: [2017] EWHC 469 (Admin)	CLOSED hearings Final: Yes		
23	TH	Judicial Review – refusal to renew passport	15/02/1016, SSHD	27/06/2016, by consent	n/a – s.6 and s.8 by consent and withdrawn prior to final hearing	n/a	n/a	CLOSED: 21/09/2016 OPEN: 23/06/2017	Case withdrawn by notice of discontinuance dated 30/11/2017
24	AS	Judicial Review – challenge to cancellation of passport	13/05/2016, SSHD	17/10/2017, by consent	s.8: 23/02/2018 Final hearing: 15-16 May 2018	s.8: no OPEN judgment Final hearing: [2018] EWHC 1792 (Admin)	s.8: ex tempore CLOSED judgment Final: Yes	CLOSED: 08/12/2017 OPEN: 23/03/2018	Claim dismissed
25	KCM	Judicial Review – challenge to withdrawal of passports	17/06/2016, SSHD	08/11/2016, by consent	n/a – s.6 by consent and proceedings withdrawn prior to s.8 and final hearings	n/a	n/a	CLOSED: 10/02/2017 Proceedings withdrawn prior to any further OPEN disclosure	Withdrawn by consent order sealed 30/10/2018 Passport issued.
26	B [separate cases managed and heard together]	Judicial Review – challenge to cancellation of passport	17/01/2018, SSHD	25/01/2018, by consent	s.8: 11 & 13 April 2018 Final: 17-18, 21 & 24 May 2018	s.8: none Final: [2018] EWHC 2651 (Admin)	s.8: ex tempore CLOSED judgment Final: Yes	CLOSED: 26/02/2018 OPEN: 20/04/2018	Claim dismissed
27	ND	Judicial Review – challenge to cancellation of passport	08/02/2018, SSHD	19/02/2018, on paper	s.8: 11 & 13 April 2018 Final: 17-18, 21 & 24 May 2018	s.8: none Final: [2018] EWHC 2651 (Admin)	s.8: ex tempore CLOSED judgment Final: Yes	CLOSED: 26/02/2018 OPEN: 20/04/2018	Claim dismissed

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
28-29-30	K, A & B [three separate claims, managed and heard together]	Judicial Review – alleged breach of duties to Afghan civilians claiming to be covert human intelligence sources	22/06/2015, SSD[56]	06/07/2015, at a hearing	s.6: 06/07/2015 various s.8/disclosure hearings as follows: 1. 08/09/2015 2. 17-18 Nov 2015 & 29/02/2016 3. 22-23 Sept 2016 (appeal from hearing 2) 4. 26/01/2017 5. 31/10/2017 s.7 review (by consent)[57]: 05/09/2018 Final: 4-5 Oct 2018[58]	s.6: ex tempore judgment s.8/disclosure hearings: 1. None 2. [2016] EWHC 1261 (Admin) 3. [2016] EWCA Civ 1149 4. [2017] EWHC 830 Admin) 5. None Final: [2019] EWHC 1757 (Admin)	s.6: no s.8/disclosure hearings: 1. ex tempore CLOSED judgment 2. Yes 3. Yes 4. No 5. Yes Final: Yes	CLOSED: 01/09/2015 OPEN: 21/08/2018	Claim dismissed
31	Campaign Against Arms Trade (CAAT) v Secretary of State for International Trade (Amnesty International	Judicial Review - UK licensing of arms sales to Saudi Arabia		Between June and Sept 2016		[2017] EWHC 1726 (Admin); [2019] EWCA Civ 1020			Claimant won on appeal on one ground.

[56] Secretary of State for Defence.

[57] By consent it was agreed the s.6 declaration should remain.

[58] With further written evidence and submissions provided by the parties 15/03/2019-24/05/2019.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
	and others intervening)								
	CAAT 2	Judicial Review - challenge to export licensing decision (made after the first CAAT JR appeal)	22/01/2021	20/04/2021					
32	YR[59]	Damages – UK involvement in Iraqi detention	26/08/2016, SSFCA	22/03/2017, at a hearing[60]	s.6: 7-8 Mar 2017 disclosure hearing[61]: 15/10/2019	s.6: [2017] EWHC 547 (QB) disclosure: [2019] EWHC 3849 (QB)	s.6: No disclosure: Yes	CLOSED: 17/05/2019 No further OPEN disclosure prior to settlement	Settled
	AA	Damages – UK involvement in Iraqi detention	26/08/2016, SSFCA	22/03/2017, at a hearing	s.6: 7-8 Mar 2017 disclosure hearing: 15/10/2019	s.6: [2017] EWHC 547 (QB) disclosure: [2019] EWHC 3849 (QB)	s.6: No disclosure: Yes	CLOSED: 17/05/2019 No further OPEN disclosure prior to settlement	Settled
33	Ullah	Judicial Review – challenge to NCA[62]	12/02/2021, SSHD	23/07/2021, by consent	n/a	n/a	n/a	CLOSED: 25/06/2021 No further OPEN disclosure yet as s.8 process ongoing	Ongoing

[59] YR and AA were case managed together, but not formally joined.

[60] The s.6 applications in YR, ZZ, HTF, ZMS and XYZ were all heard together.

[61] The issue of applicable law was also heard at the same time and given a separate judgment: [2019] EWHC 3172 (QB).

[62] National Crime Agency.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
		decision not to sanction damages payment agreed in AA							
34	ZMS and HTF[63]	Damages – alleged unlawful detention and mistreatment at the hands of US forces following transfer by UK forces	17/10/2016, SSD	22/03/2017, at a hearing	s.6: 7-8 Mar 2017 s.8 & PII: 19-20 June 2018	s.6: [2017] EWHC 547 (QB) s.8 & PII: [2018] EWHC 1623 (QB)	s.6: No s.8 & PII: No	CLOSED: 25/09/2017 (documentary evidence); 23/02/2018 (witness evidence) OPEN: 27/07/2018 (doc evidence); 13/08/2018 (witness evidence)	Settled
35	XYZ[64]	Damages – alleged unlawful detention and mistreatment at the hands of US forces following transfer by UK forces	17/10/2016, SSD	22/03/2017 – s.6 declaration refused	s.6: 7-8 Mar 2017	s.6: [2017] EWHC 547 (QB)	s.6: No	CLOSED: 25/09/2017 Case stayed prior to any OPEN disclosure	Settled

[63] Lead cases for Schedule 3 Claimants in the Iraqi Civilian Litigation.

[64] XYZ was initially case managed with ZMS and HTF, however this case was stayed pending assessment of XYZ's capacity to litigate the claim, and subsequently settled.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
36	W2 and IA	Judicial Review – deprivation of citizenship (with SIAC appeal)	09/03/2017, SSHD	10/03/2017, on paper	Renewal hearing[65]: 23-24 Mar 2017 Appeal: 26-27 Oct 2017	Renewal: [2017] EWHC 928 (Admin) Appeal: [2017] EWCA Civ 2146	Renewal: Yes Appeal: Yes	CLOSED: 09/03/2017 No further OPEN disclosure as permission refused.	Interim relief and permission to apply for JR refused. Appeal dismissed.
37	Abdule, Yusuf and others[66]	Damages – alleged UK involvement in detention and torture	01/05/2018, SSFCA	21/12/2018, at a hearing	s.6: 21/11/2018	s.6: [2018] EWHC 3594 (QB)	s.6: Yes	CLOSED: 05/04/2019 No further OPEN disclosure as withdrawn prior to s.8 process	Withdrawn by consent order dated 25/06/2019
38	Motasim	Damages – relating to HMG[67] conduct in prosecution that was discontinued	15/01/2019, SSHD	03/08/2021, by consent	n/a	n/a	n/a	None yet – s.8 process ongoing	Strike out application refused - Master Davison [2017] EWHC 2071 (QB) Appeal against refusal of strike out dismissed [2018] EWHC 562 QB
39	Police Federation, John Murray	Judicial Review – challenge to the decision not to release sensitive material to the CPS[68] for the	23/11/2017, Claimants	09/03/2018 – s.6 declaration refused on paper	n/a	n/a	n/a	n/a	Permission to apply for JR refused on the papers and not renewed to an oral hearing

[65] The Claimants' applications for interim relief and permission to apply for JR were refused and the Claimants renewed to an oral hearing.

[66] This case had been stayed behind Belhaj PLC.

[67] His Majesty's Government.

[68] Crown Prosecution Service.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
		purpose of a potential prosecution							
40	KA[69]	Damages – alleged UK involvement in detention and torture	06/03/2018, SSFCA	17/05/2018, at a hearing	s.6: 17/05/2018	s.6: [2018] EWHC 2723 (QB) (unreported)	s.6: No	CLOSED: 06/03/2018 No further OPEN disclosure as withdrawn prior to s.8 process	Withdrawn after defendant made strike out application by consent order dated 12/07/2018
41[70]	Eric Kind	Judicial Review – challenge to National Crime Agency refusal of DV[71] clearance	20/01/2020, SSHD	03/03/2020, by consent	s.8: 06/10/2020 Final: 16-17 Feb 2021	s.8: none Final: [2021] EWHC 710 (Admin)	s.8: ex tempore CLOSED judgment Final: Yes	CLOSED: 08/06/2020 OPEN: 26/10/2020	JR allowed on ground 3 only. Quashing order made.
42	Re H	Wardship proceedings		14/11/2016					Settled No judgment, open or closed.
43	McCafferty v Secretary of State for Northern Ireland	Damages - NI unlawful detention, misfeasance, breach Arts 5 & 8 ECHR and breach of statutory duty	19/06/2014	26/05/2016		[2016] NIQB 47	No		Ongoing. Numerous reviews; most recent adjourned in February 2020 for discussion between Defendant's counsel and SA

[69] Also referred to as Abdusalam. This case had been stayed behind Belhaj PLC.

[70] Outside the review period but illustrative of the range of cases to which CMP applies and difficulty of dealing with the claim without it.

[71] Developed Vetting.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
44	Re Gallagher's Application for Judicial Review	Judicial Review - NI challenge to failure to hold public inquiry into whether Omagh bomb could have been prevented.		01/12/2016		[2016] NIQB 43 [2021] NIQB 85	No Yes		Final reasoned judgment 8 Oct 2021. Government had arguably breached Article 2 ECHR; ordered to hold Article 2 ECHR compliant inquiry with both open and closed evidence.
45	Logan v Chief Constable of the Police Service of Northern Ireland	Damages - NI wrongful arrest	28/04/2016			[2017] NIQB 70			s.6 declaration not made
46	Higgins and Lee v Chief Constable of the Police Service of Northern Ireland	Damages - NI; wrongful arrest, and other torts arising from alleged planting of incendiary device at behest of RUC[72].	09/03/2016	28/06/2016		[2016] NIQB 81	No		Ongoing
47	Margaret Keeley and 31 other Plaintiffs v Chief Constable of	Damages - NI; various torts arising out of alleged wrongful arrest	Begun in 2008; Ministry of Defence	It appears from the 2021 judgment that at some point		[2021] NIQB 81			Defendants' stay application, pending conclusion of criminal proceedings and investigations, Operation

[72] Royal Ulster Constabulary

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
	Police Service of Northern Ireland, Scappaticci and Ministry of Defence.	and unlawful detention in 1994. The 32 Plaintiffs mostly brought separate actions.	joined in 2011	a s6 declaration was made.					Kenova, heard in April 2017; no judgment. Application reheard June 2021 and refused 23 September 2021. Directions to be given in October for future conduct of action.
48	Morley v Ministry of Defence, Peter Keeley and Chief constable of Police Service of Northern Ireland.	Damages - NI PSNI[73] alleged to have caused or permitted murder of P's son.		23/01/2017		[2017 NIQB 8; (s6 declaration) [2020] NIQB 77 disclosure of third party's (Ombudsman) material.			Settled
49	Monaghan E	Damages - NI	08/03/2017 Application by P's solicitors						
50	Heenan	Damages - NI	Yes; application by P's solicitors.	None.					Ongoing
51	Gabriel Magee	Damages - NI wrongful arrest, false imprisonment and assault.	08/05/2017 application by P's solicitors.	None					Ongoing

[73] Police Service of Northern Ireland.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
52	Colin Keys	Damages - NI former RUC officer alleges negligence against RUC in 1983 for its unlawful failure to prevent PIRA[74] attack and robbery.	28/09/2017	30/11/2018; variety of factors led to delay including relationship to review of legacy cases, though there were some closed hearings before the declaration.					Liability settled Oct 2020, so CMP has not been used.
53 and 54	James Martin and Veronica Ryan (separate actions).	Judicial Review - NI refusal to grant compensation under Criminal Justice Act 1988.	19/01/2018	Application adjourned and not resolved as issues to be litigated were agreed and did not require CMP					s.6 declaration not pursued - no CMP begun.
55	Anton Craig	Damages - NI relating to alleged unlawful arrest and detention in 2006, and PIRA membership. Acquitted in	22/05/2018	No decision as SAs do not wish to receive closed material until they have viewed other prosecution					Ongoing

[74] Provisional Irish Republican Army.

Case number[32]	Case (anonymised where applicable)	Case type and nature of the allegations	s.6 CMP[33] application	s.6 CMP declaration granted	Details of CMP hearings	OPEN Reference	CLOSED judgment (Yes/No)	Key disclosure dates (first CLOSED and final OPEN disclosure following s.8 hearing or otherwise)[34]	Outcome
		2010 of causing explosion with intent. Alleges participating informant on behalf of PSNI and Ministry of Defence.		files, which is subject of specific discovery application.					

Annex 4 – Part B – Summary of the reported JSA cases

Not all the cases in the schedule merit summary here; some had been sufficiently mentioned elsewhere; there was little more than the bare procedural bones for others.

1 and 2. ***CF v Security Service and others; Mohamed (formerly CC) v Foreign and Commonwealth Office and others*** **[2013] EWHC 3402 (QB); [2014] EWHC 3171 QB**

1. These were actions for damages brought by two British citizens who alleged that their arrest, detention and questioning in Somalia by the Somali authorities had been requested or helped by agents of the defendants, who had directly or indirectly caused them to be detained, assaulted and tortured. After three months, they had been unlawfully removed to the UK. The defendants denied the allegations in the pleadings but contended that they could add no detail without causing real harm to the public interest: they said that the claimants were members of an active terrorist network, supporting violent extremism in East Africa. A declaration under section 6 was sought. The sensitive material contained assessments of the terrorist threat in East Africa, the degree of the defendants' knowledge of it and their sources, and showed the extent of knowledge of the claimants.

2. Irwin J rejected the claimants' argument that PII proceedings were always a necessary precursor to an application for a closed material declaration; that would be contrary to the scheme of the Act. The

sensitive material was centrally relevant to the case. Without it the court would lack answers to essential questions; no court could fairly try the case without it, and without it, it was to the highest degree likely that one side would win and the other lose by default. It was also likely to the highest degree that a PII application would be successful in relation to some of the material. This material could neither be gisted or summarised without the gist being either excessively bland or harmful to the interests of national security. Such gists could neither avoid the need for the CMP[75] nor enable an effective trial to be mounted.

3. Irwin J also rejected the claimants' submissions that other mechanisms could be deployed to obviate the need for a CMP. They did not warrant the conclusion that the fair and effective administration of justice would be better served by using them instead of the CMP. As the claimants could not be admitted to the confidentiality rings, their lawyers could not speak to them about the evidence; and the risk of inadvertent disclosure was high, even as a result of "pregnant silence". There would be no SA[76] for them in respect of material in the confidentiality ring. With the CMP, the claimants would have their legal representatives who could communicate freely with them and SA who would see all of the closed material, and who would have the claimants' evidence on which the claim they brought was based.

4. The court also conducted a PII process on material sensitive because of the serious damage its disclosure could cause to international relations then before it, as if there were no section 6 application. This material could not form the basis of a declaration that the cases were

[75] Closed Material Procedure

[76] Special Advocate

section 6 proceedings, as it was not sensitive because of the damage to national security which its disclosure would cause. A significant amount of material would be available in open, fully or by gist or summary. The material which would be excluded by PII in relation to international relations was not central to the case, and the PII application succeeded. There was a closed judgment. There was no appeal.

5. Later, in *CF*'s case at [2014] EWHC 3171 QB, Irwin J decided that fairness did not require the disclosure of material which would be damaging to national security. The claimant had already set his case out in full, and although he could well be able to provide further detail in response to the defendants' evidence, that could be handled on an ad hoc basis by question and answer as occasion might require. Although cross-examination of the defendants' witnesses would be curtailed in open, it would not be curtailed in closed. He would bear in mind the limitations which non-disclosure might place on the drawing of adverse inferences where a point had not been answered by the claimant. Both proceedings were eventually struck out because of the claimants' non-compliance with directions.

3. *R (Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWHC 2359 (Admin); [2015] EWCA Civ 687

6. The five claimants sought judicial review of the Secretary of State's decision to propose to the EU Council that they should be added to the 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. An order was also sought that delisting should be proposed and damages paid. The Secretary of State applied for a declaration under section 6 which was granted by Bean J and upheld on appeal.

7. Bean J made one point on the wording of CPR82. 23(4), which is found in all three sets of rules of court: seemingly it requires the whole of the application for a declaration to be heard in the absence of the specially represented parties and their legal representatives. He held that, as not all of the application needed to be heard in their absence, the rule should be read as applying only “so far as necessary”, that is necessary to prevent disclosure of material which could be harmful to the interests of national security.

8. The application for the declaration was opposed on the grounds that the challenge to the rationality of the Secretary of State’s proposal to the EU Council could be determined on the basis of material which involved no harm to national security. The SA opposed the application, arguing that consideration of the material under a PII process would be sufficient to enable the court to proceed in the normal manner; the Secretary of State had given no real consideration to the use of PII. Bean J was satisfied that PII had been considered. He found that making a section 6 declaration did not require the court to assess the prospects of the defendant succeeding, beyond being satisfied that, on all the material, it had an arguable case. The two conditions were satisfied.

9. On appeal, the Court noted the common problem of the late service of the Secretary of State’s closed material, and the difficulties which this

posed for the SA in particular. The Court emphasised that the CMP had the potential to enable it to see the whole of the material upon which the decision to propose the names of the five for inclusion on the EU list was based, and all other relevant material. It was not necessary for the court to anticipate the outcome of the declaration proceedings. Nor was it necessary in considering the first condition to consider more than the possibility of a PII claim; it was not required to anticipate the outcome of any such claim. Scope for gisting on a PII claim was more relevant to the second condition.

10. The claimants submitted that the second condition should not be found to be satisfied in view of the unfairness of a CMP, and its grave breach of the principles of open and natural justice. Richards LJ reiterated, as in *McGartland*, that Part 2 of the Act was the way in which the competing public interests had been balanced and required no narrow or restrictive meaning, save to the extent that that was required by the Human Rights Act. Bean J had been entitled to conclude that a PII claim would exclude from consideration the detail of the material available to the decision-maker, detail essential to the evaluation of the substantive case. PII did not require detailed consideration for that purpose under the section. The Court of Appeal was satisfied that the circumstances of the case entitled Bean J to conclude that both conditions were met.

4. *McGartland and another v Attorney General* [2014] EWHC 2248 (QB); [2015] EWCA Civ 686

11. The first claimant claimed to have been an agent of the RUC[77] or Special Branch in Northern Ireland and sought damages or compensation for the alleged failure of UK state officials to provide him and his partner with sufficient support and advice to ensure that their lives and wellbeing were protected, after he claimed that his cover had been blown, putting his life at risk.

12. The defendant applied for a declaration under section 6; the claimants applied for an order that the defendant be required first to plead openly and in detail to the allegations, arguing that it was untenable for the defendant to maintain the stance that it would neither confirm or deny that the first claimant had been an agent.

13. Mitting J rejected the claimants' application and granted the defendant's application for a declaration. The closed material relevant to the declaration bore upon the claimants' application, which could not be determined without considering the closed material. The Act did not permit their application to be considered as an ancillary part of the section 6 application. The defendant could not be required to file a defence which was entirely open. The defendant would have to rely on closed material to defend its position; this would relate to how agent handlers were trained, and the details of what protection was afforded to those at risk. Those details could not be put into the public domain or revealed to those who had not been the subject of DV, or who did not need it by virtue of their position. He rejected the claimants' suggestion

[77] Royal Ulster Constabulary

that the second claimant and the legal team should be subject to such vetting. The national security material was a significant part of the case, and the claim could not be fairly and effectively determined without it. There were difficult problems about how conflicts of evidence could be resolved, and it was better now for the case to proceed under section 6, until both sides' cases had been fully deployed, at which point the closed material declaration would have to be reviewed, but on a fully informed basis.

14. This decision was upheld on appeal as a case management decision properly open to the judge. Richards LJ stated that, as Part 2 represented Parliament's balance between the competing interests of open and natural justice on the one hand and national security on the other, with an express provision to secure compliance with Article 6 ECHR,[78] there was no reason, exceptional provision though it was, to give it a narrow or restrictive reading unless required by the Human Rights Act. Although there was much open material to support the first claimant's contention that he had been an agent, there had been no official acknowledgment that he had been an agent of the Security Service as he claimed, or that it had been involved in his resettlement. Any step beyond "Neither Confirm Nor Deny" (NCND) could not be decided without consideration of a full closed defence and the related substantive defence material. It was also far from self-evident that all relevant information could be within the knowledge of the claimants.

15. There were some specific points of note. CPR[79] 82.6(1), and its equivalents in the other two sets of rules of court, refer to hearings from

[78] European Convention on Human Rights

[79] Civil Procedure Rules

which it is necessary to exclude a party and its legal representatives but which the SA attends as a hearing in private, as does CPR82.6(2). This could lead to the view that 82.6(2) refers to a different sort of hearing in private, which is one where the parties are all present but from which the public and press are excluded. Richards LJ thought it better to read CPR82.6(2) as not covering that latter sort of hearing (I see no need for an amendment to the CPR as the position is in reality clear at least following this judgment).

16. There was no closed judgment at either stage. Eventually, the CMP was not pursued.

5. *R(Al-Fawwaz) v Secretary of State for the Home Department* [2015] EWHC 166 and 469 (Admin)

17. These cases are related closely to the decision referred to in section 2 on the scope of "criminal cause or matter." The decision challenged was the refusal of the Home Secretary to comply with Letters Rogatory issued by the New York judge conducting the claimant's trial for conspiracy in connection with the Islamist terrorist bombing of two US Embassies in East Africa. The material was thought by the claimant to assist his case. The section 6 declaration was granted, without contest. The challenge was dismissed. There was a closed judgment. It is difficult to see how parts of this claim could have been heard without a CMP, or how PII would have helped. Disclosure to a ring of confidentiality is discussed in the later judgment at [9-15] by Wyn Williams J and rejected for reasons given.

6. *AZ v Secretary of State for the Home Department* [2015] EWHC 3695 (Admin); [2017] EWCA Civ 35

18. This case concerned a Syrian national who had been recognised as a refugee and had leave to remain in the UK. The Secretary of State refused his application for a refugee travel document on national security grounds: he was alleged to be an Islamist extremist who wanted to go to Syria to fight. A declaration was made under section 6; it is not clear whether that was made without objection. The decision to refuse the travel document was challenged on the grounds that insufficient notice had been given to the claimant before the decision was taken of the Secretary of State's area of concern, and so he had been unable to answer them before the decision, and insufficient reasons had been given for the decision itself to enable the claimant to challenge that refusal.

19. The case is of note for the analysis of the varying nature of the duty of disclosure in national security related cases. There were circumstances in which the rights of the claimant to know the essence of the case against him would prevail over the interests of national security, such as in Control Orders, Asset Freezing Orders, EU citizens being prevented from exercising rights of free movement. Refusal of a refugee travel document was not in the same league as those. This decision, for the reasons given by Nicol J, was upheld by the Court of Appeal.

7 and 8. *XH v Secretary of State for the Home Department*; [2015] EWHC 2932 (Admin) (s6 XH); and with *AI v Secretary of State for the Home Department* [2016] EWHC 1898 (Admin) (substantive hearing); [2017] EWCA Civ 41

20. A section 6 declaration was granted in judicial review proceedings brought in respect of the use of the Royal Prerogative to cancel the claimant's British passport on the grounds that he had been involved in terrorist activity. This decision was said to breach Article 8 ECHR and various free movement rights under EU law; damages were also sought. The Court considered the jurisprudence of the Luxembourg Court on what EU law required in what the Luxembourg Court called "state security" cases. The claimant accepted that, subject to minimum disclosure requirements, a section 6 declaration was warranted. But first, the claimant contended that it was necessary for the court to decide whether EU rights were in play since that could affect the nature of the disclosure requirement in due course. It was accepted on behalf of the defendant that the disclosure process would have to be undertaken on the assumption that the claimant had an EU law claim. The Court found that resolving whether the claimant had an EU law claim before making a section 6 declaration however would be to put the cart before the horse. Detailed questions of what should be disclosed or gisted from the closed material should follow as the next stage after the making of the declaration.

21. The Divisional Court applied the approach of Richards LJ in the Court of Appeal in *Sarkandi*. It rejected the SA's submission that the defendant, in order to advance the application for a declaration, had to show that it was obvious that PII and gisting would not meet the justice

of the case; that would be to require the PII exercise and the section 6 application to proceed together. The court would generally be in a position to take a view on whether PII and gisting would be likely to put sufficient material into the open part of the proceedings to meet the justice of the case. It was, however, overwhelmingly likely that, were a PII application to be made rather than using the CMP, the material would be protected from disclosure; it would be for the court to conduct the balancing exercise envisaged by *R v Chief Constable of West Midlands, ex parte Wiley* [1994] UKHL 8, [1995] 1 AC 274:

> "The material which the claimant would like to see, and that the court needs to have to resolve the legal issues, would be precisely that which would almost certainly be protected from disclosure." Although some material might be put into open without harm and some might be gisted "it is clear that a PII claim would result in the exclusion of important detail of the material relied upon by the Home Secretary in making her decision. That detail was necessary to the fair and effective administration of justice in these proceedings."

22. The court recognised that it had a discretion to refuse to make the declaration, even if the two statutory conditions were satisfied, but thought such cases were likely to be far and few between. Parliament was likely to have been sensitive not to dictate how the court should conduct proceedings in this sort of case.

23. This case was heard substantively in 2016, and the challenge was dismissed, along with another case raising similar issues; *AI*. A section 6 declaration had been made in *AI* though it is not clear whether that was opposed or not, or whether there was a judgment or not on it.

There is an extensive open judgment on the many legal issues particular to that category of case. There was in fact a closed hearing dealing with the closed evidence, but there was no closed judgment. This, as the Court of Appeal made clear at [20], was because the SA had accepted that there was no properly arguable case that there was insufficient evidence in the closed material for the Secretary of State to suspect on objective grounds that XH was involved in Islamist extremism.

24. The Court of Appeal dismissed the appeal. It found that the essence of the case against the claimant had been disclosed as required by the relevant EU Directive and Luxembourg jurisprudence. It dismissed the various grounds, including that the Royal Prerogative had been superseded by the statutory TPIM[80] provisions, and that EU rights of free movement were breached. It also considered the standards of disclosure required where an EU right of the nature at issue here was involved.

10-13 *Kamoka and others v The Security Service and others* [2015] EWHC 60 (QB); [2015] EWHC 3307(QB); [2016] EWHC 769 (QB); [2017] EWCA Civ 1665; [2019] EWHC 290 (QB); [2019] EWHC 2383 (QB)

25. After the discovery of various documents in the offices of Colonel Gadhafi's security services allegedly relating to Libyan Islamists and others, proceedings were brought by Mr Kamoka and 11 others alleging that they had been unlawfully detained in the UK, or had had their liberty unlawfully restricted here, or had been nominated unlawfully by the UK to the UN for the freezing of their assets as terrorists. The claim

[80] Terrorism Prevention and Investigation Measures

concerned the way in which, during the period of rapprochement between the UK and Libya Governments after the terrorist attacks of 9/11, their co-operation on counterterrorism, including against the Libyan Islamic Fighting Group, involved, it was said, UK governmental participation indirectly, and to the knowledge of the Libyan Government, in a global programme of rendition and torture led by the CIA. Reliance was placed on what had happened to other individuals. They claimed that these documents showed that these UK Government actions constituted the tort of false imprisonment or misfeasance in office because relevant documents had been withheld in earlier SIAC[81] proceedings, in an abuse of power, which made their detention pending deportation or restrictions under Control Orders or asset freezing under Asset Freezing Orders unlawful. Some of the Claimants had been successful appellants before SIAC, against the Secretary of State's endeavour to deport them to Libya with assurances as to their treatment there. Some were then subject to Control Orders, which were subject to review in the Courts. The Defendants sought to strike out the claims or to have them dismissed on the grounds that they were precluded by statute or were an abuse of the process of the court, relitigating by the sidewind of private law damages claims, issues which could only be taken further by way of appeal in SIAC or review proceedings.

26. Irwin J rejected the arguments that the claims were barred by statute. He refused to hold that they were an abuse of process, partly because he did not see how a claimant could be expected to know what was in the closed material in those earlier proceedings so as to judge what

[81] Special Immigration Appeals Commission

was now new; the potential alternative remedies were highly uncertain, technical and procedurally complex. He had not at this stage considered any closed material. That meant that he could not compare the material which was actually before SIAC or the judge reviewing the Control Orders to see to what extent the material discovered in Libya was actually new material, and material which the defendants could have disclosed to the SA. He gave the defendants the opportunity to renew their strike out application before him, this time with the benefit of the closed material. A section 6 declaration was made by Irwin J on I July 2015 with an open and closed judgment. The declaration is of note because it appears that it related only to this first contentious stage of the proceedings, the application by the defendants to strike out the claim. If the strike out application failed, it was anticipated that an application for a CMP declaration would be made in the substantive proceedings.

27. That CMP declaration was then reviewed pursuant to an order by Irwin J under section 7(2) and (3), whichever might turn out to be applicable, [2015] EWHC 3307(QB). The review preceded the completion of the disclosure process in the strike out application. The claimants argued that the attempt to strike out the claim was bound to fail, and so there was no reason for the present CMP declaration to continue. Irwin J rejected the application that the declaration should be revoked at that stage: it should await the completion of the disclosure process, and for other procedural reasons.

28. The bulk of the judgment concerned the principles to be applied to the disclosure process, which at that stage concerned only the strike out application. Many of the same factors applied as they would to the

disclosure process in the substantive claim. One different factor would be that it was the defendants' application to strike out the claim rather than the claimant's action against the defendants. Irwin J pointed out that the test of "fair and effective justice" under the Act could not import the full common law principles of fairness, for they would conflict with the Act: there had to be a "reconciliation of fairness principles under common law with the provisions of the statute. Fairness must mean "as fair as possible consistent with the provisions of the Act…" He described this as a familiar problem confronting the common law and emphasised the flexibility and adaptability of the common law, and that it was not a series of hard and fast rules. The common law did not import "a requirement to disclose an irreducible minimum of information, even if that were to be an incursion on the protections in the Act." It did mean that disclosure should reveal as much as possible to the claimants, consistently with the provisions of the Act protecting national security material, and that, if it could not be revealed in full, it should be summarised as fully as possible, again consistently with the Act.

29. It was agreed that the principles laid down by the Supreme Court in *AF(No.3) v Secretary of State for the Home Department* [2010] 2 AC 269 relating to Article 6 ECHR, applied where the liberty of the individual was in question. Outside those areas, Irwin J's analysis of the authorities under other statutory provisions, showed that Article 6 did not require the full panoply of the normal provisions underpinning fairness or equality of arms. The constituent elements of a fair process were not absolute or fixed; there was no uniform, unvarying standard to be applied irrespective of the context, facts and circumstances; *Tariq v The Home Office* [2012] 1 AC 452. Where the liberty of the subject was

at stake, the detainee was to be provided with sufficient information about the allegations against him to enable him to give effective instructions to the SA, even if the interests of national security would be harmed in so doing.

30. The present case did not concern anyone currently detained or at risk of detention but did concern the right to liberty and the protection against arbitrary detention, which made achieving justice a high priority. They sought to test whether there had been an abuse of power by those in authority. But it was not so vital as gaining release, as with a writ of habeas corpus. Irwin J put the present cases lower in the spectrum than cases where long-standing residents or those married to UK citizens were excluded from the UK. He bore in mind the extent of material already available, and the nature of the strike out proceedings. Different decisions on what needed to be disclosed could apply if the strike out were unsuccessful and the position of the claimants on various issues was clarified. The events protected by national security happened to others and were deployed because the claimants said that what happened to them bore upon the issue of whether the claimants could ever properly have been returned to Libya. This also made it unlikely that the claimants would have any instructions to give for strike out purposes, were that material disclosed. The strike out issues were essentially legal ones. The common law and the application of Article 6 pointed in the same direction.

31. The defendants' strike out application was then renewed after disclosure of closed material to the SAs. Irwin J's judgment on the renewed strike application is at [2016] EWHC 769 (QB). In the open judgment, he said that he was satisfied that there was "wide disclosure

of the top-secret documents bearing on the Claimants' concerns as well as important closed oral evidence. A review of the disclosure made to SIAC leads to my clear conclusion that there was no suppressio veri." He did not consider that the fact that there had been closed evidence before SIAC precluded a successful strike out on the basis that the new claim was a relitigation of the former findings or claim. New claims could be a collateral challenge and therefore an abuse of process. Here, he struck out the claims relating to the SIAC and Control Order reviews, subject to certain possible distinctions which he permitted the claimants to try to make good. There was a lengthy closed judgment. No material distinction was drawn between those appellants before SIAC whose appeals had been successful, and those whose appeals did not proceed because in the light of SIAC's decision that the Islamist extremists would not be safe on return, the deportation proceedings against the others were abandoned.

32. This strike out decision was considered by the Court of Appeal in [2017] EWCA Civ 1665. It concluded that the proceedings were not an abuse of process. While it was not prepared to hold that a case in which there had been a CMP could not be the basis for a striking out based on abuse of process in subsequent litigation, it could not be an abuse of process for a party to earlier proceedings to take, in later proceedings, points or claims of which he had been unaware and had good reason for not being aware of. The Court then considered whether the position of the SA, and his knowledge, made any difference, as it would do if the SA were a "privy" or had a "privity of interest" in the proceedings with the claimant, as the ordinary solicitor or advocate would be. The role of the SA, limited by statute, in which the SA did not represent the

claimant, nor have a lawyer/client relationship with him, meant that he was not a privy to the case; the claimant therefore could not be fixed with knowledge of what the SA knew or ought to have known. Those whose appeals were not in fact heard, were also not privies. Taking a broad, "multi-factorial" view of abuse of process, the court concluded that the proceedings were not an abuse of process; it was not for the court in open to discuss why various points might not have been taken by the SA in the SIAC proceedings but commented that there was no basis for any criticism of them in the earlier proceedings in the light of the Court's review of the material. A declaration under section 6 was made in the substantive proceedings in February 2017.

14-17. *Khaled and Maftah v Secretary of State for Foreign and Commonwealth Affairs* [2017] EWHC 1422 (Admin); [2016] EWHC 1727 QB

33. There were two sets of proceedings, in each of which a section 6 declaration had been made. A section 6 declaration had been made in judicial review proceedings in which the claimants challenged the decision of the Secretary of State to nominate them for listing by the UN Sanctions Committee as persons involved in terrorism, and his further decision not to seek their de-listing. Jay J, in the 2017 open judgment, dealt with the contention that, although these were not claims to which Article 6 ECHR applied as they did not determine civil rights, the standard of disclosure required at common law was the same as that set out in *AF (No. 3)*, namely that required to enable the claimants to give effective instructions to their SA. He held that there was no such right as, to the extent that the common law did require such a level of disclosure, it would not be consistent with the language of the Act.

34. The Claimants had also brought a civil claim for damages arising out of the same decision. The judgment of Irwin J at [2016] EWHC 1727 QB refers to the section 6 declaration being made by consent in the QB (Queen's Bench) proceedings. The essence of the claim was that the defendants knew that the material on which they were relying had been obtained illegally, through torture, and was unreliable. Although Article 6 applied, the requirement of disclosure in *AF (No.3)* did not apply. The damages action was not of the same gravity as deprivation of liberty or severe restrictions on liberty or asset freezing.

35. At some stage, the actions brought by Mr Maftah and Mr Khaled were linked to the others. In [2019] EWHC 290 (QB), Jay J rejected the claimants' open application for the defence to be struck out. It was agreed that in that event, that there was no sound reason for opposing the making of a section 6 declaration. He contemplated that a further strike out application could be pursued once the closed material had been deployed to the SA. He concluded that he would not be in a position to judge the safeguards in place in respect of the ill- treatment alleged by Messrs Belhaj and Al Saadi without seeing all the material, nor could he find that critically important material had been ignored unless he knew all that had been considered.

36. Jay J delivered an open judgment on various case management issues in an open judgment [2019] EWHC 2383 (QB). There was in place a temporary ring of confidentiality, sought unusually by the claimants, in respect of their confidential medical reports, and which would have controlled those on the defendants' side who were able to see them. It was feared that they would be used operationally by MI5 or MI6. The

judge was not prepared to continue it, as the need for it was not made out.

37. The cases were all later settled.

19. *R (Belhaj) v Straw and others* [2017] EWHC 1861 (QB)

38. The defendants applied for a section 6 declaration in these proceedings in which the claimant, a Libyan national, alleged that he was unlawfully abducted by state agents from Malaysia via Thailand to Libya, where they were tortured and sentenced to death, and that the defendants were complicit in those acts, through the provision of the intelligence which led to their rendition, knowing that he risked torture if returned to Libya, and supplying questions to be put to the claimant in Libya; they were also present at his interrogation there. Allegedly relevant documents came to light after the fall of Gadhafi. Popplewell J made the declaration; there is no closed judgment.

39. The judge pointed out that PII covered a broader range of public interests than national security, which the Act did not cover; so, a PII application could run in parallel with the section 6 procedure, covering those other interests. But the two processes had fundamentally different outcomes in terms of the evidence available to the judge. The Act recognised that the exclusionary PII procedures might prevent any fair trial taking place at all and sought to remedy that deficiency through the CMP. Paragraphs 21-32 contain a useful summary of the purpose and operation of the Act.

40. Popplewell J rejected the submission that the application for the declaration had to be decided by reference to issues of central

importance or core allegations, or that the sensitive material had to be highly relevant. Nor was it for the court at that stage to form some view about the defendants' case, from the general denial or their simply putting important allegations in issue, before it had been answered. It was not part of the section 6 exercise to evaluate the strength of the defendants' case. If section 6 declarations could be made for part only of the claim, as to which the judge was doubtful, it would be better resolved through case management decisions after completion of the disclosure process. While a closed defence could be ordered before the declaration was made, where there was no such order, the next step in the proceedings would be the order for the closed defence. The absence of a closed defence, whilst it meant that the issues were not well defined, was not a bar to the making of the declaration. Nor did the absence of a closed defence make the defendant's consideration of a possible PII claim irrational.

41. Both conditions were satisfied. On the second condition, the judge noted as relevant that the proceedings were brought not just against the Government but also against two named individuals who wished to have a real and fair opportunity to defend themselves. Popplewell J also pointed out in relation to the second statutory condition that:

> "(52) The precondition in s.6(7) is that the Secretary of State should have considered whether to make or advise another to make a PII Claim. It does not require a claim to be made. Nor does it require the Court to consider whether a PII claim would succeed or be preferable to a closed material procedure for the purposes of this precondition. That is clear from the wording of s. 6(7) and CPR 82.22(2) and is the approach consistently applied in the authorities: see F v Security

> Service per Irwin J at paragraph 37; McGartland at paragraph 47(vii) and (viii); XH at paragraph 12. The Secretary of State's Open Closed Statement of Reasons confirms that he has considered whether to make or advise another person to make a PII application and explains why he has concluded that such a course is less preferable than a closed material procedure. Mr Hermer's submission that I should treat the decision as irrational because there had been no sufficient identification of the issues is to be rejected. Not only was there a sufficient identification of the issues on the statements of case, for the reasons I have addressed above, but it does not follow from the fact that the Court and the Claimants have only the identification of the issues in the open Defences that that was the limit of the information available to the Secretary of State or which informed the advice to him. In any event, a s. 6 application is not the occasion for a judicial review of the decision of the Secretary of State. All s. 6(7) requires is a consideration of the question, and it is clear that that has taken place. The PII precondition is fulfilled in this case."

42. This approach was said by a respondent to the call for evidence to contrast with what Stephens J said in *McCafferty* that the court had a duty to consider the fairness of the defendant's decision not to make an application for PII.

43. Popplewell J also said:

> "60(5). Whilst this is a matter for more detailed consideration at the s.8 stage, it appears to me to be very unlikely that the material could be put into open or made available to the Claimants or their legal

representatives in a way which would better promote a fair and effective trial than a closed material procedure. As I have observed, much of the material can only properly be understood and weighed in the context of a substantial part of the material as a whole, such that gisting is unlikely to provide a realistic solution in most instances. Sittings in private and/or the use of confidentiality rings are unlikely to provide a satisfactory solution, both because of the risk of disclosure, even inadvertent, and because of the hobbling effect on the conduct of the Claimants' case if, as is almost inevitable, they were themselves to be excluded from the confidentiality ring. The problems with confidentiality rings where national security is engaged are well known, and have been articulated in a number of cases, including by Irwin J in F v Security Service at paragraph 51, whose remarks apply with equal force to the present case."

21. *R (Secretary of State for the Home Department) v Special Immigration Appeals Commission and AHK* [2015] EWHC 681 (Admin)

44. This was a challenge by way of judicial review to the approach taken by SIAC to the extent of the material which SIAC ordered to be made available to the SA, that is disclosed to them in the sense of that word in normal litigation, and which would then be considered for disclosure onwards to the claimant and his ordinary or OR.[82] The cases in which this issue arose were statutory reviews by SIAC of decisions to refuse naturalisation, and in one case to exclude a claimant from the UK. Limited reasons had been given; their theme was that each claimant was an extremist with connections to groups hostile to the UK. Ouseley

[82] Open Representative

J had made a CMP declaration, which was, to the best of his recollection, unopposed, for the obvious reason that only SAs could make informed submission in opposition to the Government; there was an extempore judgment on it. The SSHD[83] argued that SIAC should have ordered that no more be disclosed than the material considered by the decision-maker. The Court rejected that submission, but also rejected the approach by SIAC, if it had intended that everything which the summary writer or official might have been able to access, whether actually accessed or not, should be disclosed. The right approach was between the two, spelt out more fully in the open judgment. There was also a closed judgment. A later judgment dealt with the form of order and costs; [2015] EWHC 1236 (Admin). There was no order for costs.

22. *R (MR) v Secretary of State for the Home Department* [2016] EWHC 1622 (Admin); [2017] EWHC 469 (Admin)

45. This is another case in which a British national's passport was cancelled under the Royal Prerogative, on the grounds that he was involved in terrorism-related activity, with very few details given. The grounds of the judicial review challenge were similar to those in *XH*: public law grounds based on irrationality, lack of evidence, ignoring of material considerations, and the absence of justification for a serious interference with EU rights of free movement. A declaration had been made by consent under section 6. The first judgment deals with the extent of the disclosure obligations in the context of EU rights of freedom of movement. The open final judgment of the Divisional Court sets out the disclosed gist of the closed material.

[83] Secretary of State for Home Department

26 and 27. *B and ND v Secretary of State for the Home Department* [2018] EWHC 2651 (Admin)

46. This was a challenge by way of judicial review by two British nationals who claimed that their passports had been wrongfully cancelled. They were said to be supporters of Islamist violent extremism intending to participate in an aid convoy to Syria to further those ends. A section 6 declaration was made in January 2018. The challenge was refused; the hearing was within the review period; the judgment came outside it. Nicol J explained that the closed evidence and submissions reinforced the conclusions in the open judgment.

28-30. *R (K, A, and B) v Secretaries of State for Defence and for Foreign and Commonwealth Affairs* [2016] EWHC 1261 (Admin); [2016] EWCA Civ 1149; [2017] EWHC 830 (Admin); [2019] EWHC Admin 1757

47. A declaration under section 6 was made in 2015. The claimants, who were Afghan nationals, claimed to have worked for the UK Government as covert human intelligence sources, an allegation which was neither admitted or denied in each case. They claimed that their work as CHIS[84] had put their lives and wellbeing at risk, and sought financial assistance with the costs of relocation within Afghanistan. Further disclosure was sought of the material which the defendants had been permitted to withhold. The claimants contended that the claim arguably involved the determination of their civil rights, which would affect the extent of disclosure to which they were entitled. Their claims alleged that a disclosed or undisclosed policy had been misapplied, and the decisions breached their rights under Articles 2,3 and 8 ECHR. The

[84] Covert Human Intelligence Source

Divisional Court held that the claims did not arguably involve the determination of their civil rights. The Court of Appeal allowed the appeal, on the basis that the interpretation or application of a policy, if it existed, could involve the determination of civil rights. It thought it highly unlikely, in the light of the 2013 Act, that there was a free-standing right of disclosure. The Court of Appeal, also held, obiter, that the claimants were not within the jurisdiction for the purpose of the ECHR.

48. The case was remitted for the Divisional Court to consider what further disclosure if any was required in the light of the requirements of Article 6. The Court however rejected the submission that the full requirements of *AF (No.3)* applied; *K, A, B v Secretary of State for Defence* [2017] EWHC 830 (Admin). The relationship between disclosure, human rights and national security was discussed:

> "11. How therefore should the JSA and CPR be interpreted in accordance with the s14 duty? The Court should ensure first that there remains no material which can be disclosed without harm to national security. It must then identify what material needs to be disclosed for the purpose of Article 6. It then refuses permission to withhold that material, reading the clear obligations to the contrary as subject to the requirement that they do not apply if disclosure is necessary for the purposes of Article 6. That does not alter the right of the Secretary of State to refuse to disclose it. The court does not order disclosure; a refusal of disclosure is not a breach of a court order; the Secretary of State is entitled to decide not to disclose that material, but he cannot then rely on it, whether the case is continued in CMP or not. The decision on what material the Secretary of State should not be permitted to withhold is made without regard to where

that would leave the litigation, in the CMP or with the prospect of revocation, an issue on which the parties differed to a degree. After the Secretary of State has reached a decision on disclosure, the court may need to consider whether the CMP should be revoked under s7. This would be done with knowledge of the extent to which Article 6 required disclosure which the court had not received. A decision on revocation may involve comparing the limitations of a trial within the CMP, with the limitations on a trial were the case taken out of the CMP. Article 6 could thus simply transfer the case back to the limitations of the open track."

49. The court analysed the earlier authorities as showing that there was a spectrum rather than a hierarchy of disclosure requirements which were compatible with the application of Article 6; Article 6 did not always require the application of *AF (No.3)*.

"23. Although there has been no specific invocation of Articles 2 and 3 ECHR before this court and the right is one asserted at public law which involves a degree of evaluation susceptible to judicial review, the claims are based on asserted public law obligations in relation to the risk of harm to life and limb. This is at the higher end of the spectrum or scale when it comes to procedural fairness. It is, in my judgment, at a higher level than the employment context in Tariq and Kiani but it is not at the level of a Control Order, or asset freezing or other restriction such that AF (No.3) disclosure is required. Executive action has not been taken against the Claimants to restrict their liberty or finances or movement rights. Nor are the asserted risks from others the result of action taken by the Defendants against the Claimants. They are ongoing protection

claims in circumstances where the risks are said to arise from what others might have done or might do….

27. Fourth, the nature of the claim is important, towards the higher end of the spectrum, as I have explained. Fifth, so too is the particular manner in which national security arises, as referred to in Tariq, and ZZ in the Court of Appeal. Strasbourg has held that a Claimant cannot receive the full rights of disclosure of the gist if to accord such rights "would jeopardise the efficacy of the vetting regime itself", see Kiani [23], citing Tariq [159]. In my judgment, where Claimants make a claim that arises out of their asserted voluntary engagement with national security work, there must be a necessary acceptance on their part that the procedure to be adopted, for a fair consideration of any claims about how they have been or ought to have been treated, will not jeopardise the very system with which they claim to have become voluntarily and knowingly involved. The claim to such a relationship cannot be made without acceptance of the correlative restriction on breaching national security inherent in the very existence of such a relationship. The NCND policy is one of the building bricks in the protection of those who are or who are said to be CHIS, as the Claimants must have understood and on which they in effect acknowledge they depend; and it derives its cohesive strength from its consistent application. On what the Claimants assert, they cannot be in a better position in terms of disclosure than those who undertook employment in security-vetted work, who must have known that there were limits on what could be disclosed in the event of a dispute."

50. The reasons included that the claimants could add nothing on the existence or interpretation of any relevant policy, which the SA could readily deal with. They had also been able fully to put forward their own version of events in Afghanistan and what their situation was. The court was engaged in a process of review of the defendants' decisions and not a process of itself determining where truth lay in any particular case. A significant further factor was the basis of the claim itself. There was no closed judgment on those principles.

51. Further disclosure was given. These claims were tried in 2018, and the judicial review claims were dismissed in 2019**.** There was a closed judgment.

31. *R (Campaign Against Arms Trade) v Secretary of State for International Trade (Amnesty International and others intervening)* [2017] EWHC 1726 (Admin) and [2019] EWCA Civ 1020

52. This claim for judicial review contended that the Secretary of State was obliged to suspend extant export licences for arms to Saudi Arabia, and to cease granting new ones, in order to comply with government policy to deny such licences where there is "a clear risk that the arms might be used in the commission of a serious violation of International Humanitarian Law." A declaration under section 6 had already been made. The claim was dismissed; there is a closed judgment. It is not possible to see how this case could have proceeded without the closed material, or that PII could have advanced the claimant's case one whit:

> "212. The advantage of the closed material procedure is that we have had full access to all the facts and materials relied on by the Secretary of State…the closed material, in our view, [Burnett and

Haddon-Cave LJJ,] provides valuable additional support for the conclusion that the judgements made by the Secretary of State were rational."

53. There was a successful appeal by the claimant against that decision. It came outside the review period, but I refer to it as it was an appeal from a decision within the review period, useful to understanding the operation in practice of the CMP. The appeal was successful on the grounds that the Secretary of State ought to have considered the relevance of past violations of international humanitarian law to the risk of future breaches. This was a judgment reached on the basis of open and closed material.

32-35. *Rahmatullah (YR)v Ministry of Defence and another, Ali (AA) v Ministry of Defence and another; XYZ, ZMS and HTF v Ministry of Defence* [2017] EWHC 547 QB; [2018] EWHC 1623(QB); [2019] EWHC 3849 QB

54. The defendants applied for section 6 declaration in these various related proceedings. Two claimants, YR and AA, who had been detained by British forces in Iraq, were transferred to US custody, and transported to Afghanistan where they were detained for ten years. They alleged that their detention, treatment and transfer by British forces was unlawful, and that the British forces were also liable for their detention and ill treatment by US forces in Afghanistan. Their claims were based on torts and on the Human Rights Act. Two others were arrested by British forces, claimed to have been assaulted by British forces during the day when they were detained, and that they were then unlawfully handed over to US forces who detained them for a year,

subjecting them to serious ill-treatment. XYZ was detained by US forces but was placed temporarily in the hands of British forces before being returned to US forces' custody. He claimed to have been severely ill-treated by both, and that the British knew he would be severely ill-treated by US forces, when they handed him over to them. Declarations were made in all cases save that of XYZ. There was no closed judgment.

55. In reaching his decisions on the applications, Leggatt J reiterated that the making of a declaration was only the gateway to a CMP; it was the first stage in the process and did not dictate how the trial would proceed; the procedure had to be kept under review. The defendants did not need to put before the court, when seeking a declaration, all the sensitive material upon which they might later rely. In considering whether a declaration was in the interests of the fair and effective administration of justice, the court should focus on whether the material relied on at the stage of the application for the declaration was necessary for resolving the issues in the case.

56. Leggatt J was satisfied in YR's case that much of the material was undoubtedly sensitive; its disclosure could reveal the extent of the UK's information about suspected terrorists and how that information was obtained. Time had not removed the damage its disclosure would do to national security. The claim could not properly be tried without the evidence as to why YR was in Iraq and arrested, and unless the SA had the opportunity to test the reliability of the material and the inferences which the defendant sought to draw from it. In AA's case, the same points applied, but additionally, AA said that his arrest was based on false intelligence and mistaken identity. Leggatt J thought that this

made it all the more important for the court to consider the material which bore directly on that point.

57. ZMS had made very detailed statements about his treatment on arrest; HTF's case presented similar features. In order to assess the credibility of the allegations, it would be necessary to investigate in detail the planning and preparation of the operation, the intelligence on which it was based, the training of the soldiers, the methods used in carrying it out and any monitoring of those involved. At least some of those issues would require the consideration of sensitive material. He was satisfied that there was "no practical or workable alternative to a closed material procedure." Nor would a ring of confidentiality be feasible since the claimant's lawyer would be given the material on terms which prevented its communication to the claimant, to the truthfulness of whose evidence and instructions the material directly related.

58. The declaration was however refused in the case of XYZ because the application could not be properly judged before the defendant pleaded to a particular issue; the sensitive material relied on did not yet justify the declaration. Even if disclosure of the two documents which the judge had seen became necessary, he did not rule out a confidentiality ring in respect of them. In many cases such a ring would be impracticable, but this case was not necessarily one of them: the claimant's lawyers would not obviously be embarrassed by their inability to communicate about them with him, nor could he see that restricted disclosure, as opposed to the publicity from the use of the material in open court, would be damaging to national security.

59. In June 2018, Males J delivered judgment on the standard of disclosure to be applied in the cases of *HTF* and *ZMS*, [2018] EWHC 1623(QB). There was also a PII claim for one category of documents, on which the SA made submissions. There was no closed judgment. If the material which the defendant sought to withhold, or a summary of it, had to be disclosed to comply with Article 6 obligations, permission to withhold it had to be refused, regardless of the national security consequences; and the defendant then had the choice of providing disclosure or the summary, or of making appropriate concessions. It was for the court to decide whether disclosure would be damaging to national security, giving appropriate weight to the view of the executive. The requirements of Article 6 involved a spectrum of disclosure which was case and context specific, as held by the Divisional Court in *K, A, B v Secretary of State for Defence* [2017] EWHC 830 (Admin). At one end of the Article 6 spectrum were cases involving substantial restrictions on liberty, such as with Control Orders, where the standard in *SSHD v AF (No.3)* [2009] UKHL 28 applied, in which sufficient information had to be given to enable the individual to give effective instructions in relation to the allegations against him. But that did not apply to all Article 6 cases, which involved the determination of civil rights in a variety of circumstances. There was no "uniform unvarying standard to be applied irrespective of context, facts and circumstance." There could be cases where that standard might be met without any information being given about the material withheld, depending on the nature of the proceedings and the circumstances. What was unacceptable in a case where personal liberty is at stake, might satisfy Article 6 where something less was at stake. K, A and B claimed that they were covert human intelligence sources for the UK in Afghanistan, entitled to

protection, relocation and compensation as a result. *AF (No. 3)* disclosure had not been required. The claimants here sought disclosure of whether the units involved in their capture were UK special forces, and further details of the reasons why ZMS was detained as the target of a specific operation.

60. Males J then discussed the application of the "Neither confirm or deny" (NCND) policy in respect of the involvement of special forces, where the claimant sought to know whether they had been involved in his detention. Having discussed the relevant authorities, he concluded that the policy needed to be applied consistently, and that weight had to be given to the consistent policy of successive governments, which accorded with common sense in the light of the multi-faceted threats faced by the UK. He concluded that disclosure of whether or not special forces were involved would harm national security, and that nothing short of a CMP would be appropriate. He was not concerned with the striking of a balance between the interests of national security and the fair and effective administration of justice at that stage. He then turned to what Article 6 required. The way in which the issue was considered is relevant. There was no current risk to either claimant; they had been released from detention 9 years ago and were seeking financial compensation. But the allegations did involve matters of legitimate public concern. Their ability to give effective instructions was not affected by not knowing the identity of the units involved in their capture; it was not material to any significant extent. The claimants had a strong suspicion about the identity of the units, which they could use in their preparation for trial. Their identity was not necessary to maintain public confidence in the rule of law. Were their identity to become

material, the SA would be able to test the evidence, knowing what the claimants were saying about it.

61. ZMS had been told that he was alleged to be linked to Iranian groups engaged in the movement of weapons, and had been shown photographs of those to whom he was said to be linked. He wanted further details of the intelligence on which that was based. That would be harmful to national security, and the SA only sought disclosure of a summary. There would be some effect on ZMS' ability to give instructions but there would be no material impact on his ability to give effective instructions. He could give instructions to the SA about some of those whom he strongly suspected were in the groups in question; and the SA who had all the details would be able to protect his interests. In any event, what mattered for the lawfulness of his detention was whether there was a reasonable basis for the view that he needed to be detained for reasons of national security. In so far as his case was that those who were believed to belong to such groups, were more likely to be ill- treated, what mattered was the belief of those who detained him and not the accuracy of that belief. The maintenance of public confidence did not require further disclosure.

62. The PII claim was upheld in respect of documents from the Red Cross, which would cause substantial damage to the public interest if released. The *Wiley* balance was against their disclosure; they were of no particular significance to the case. PII was used as the documents did not involve issues of national security.

63. The judgment of Turner J at [2019] EWHC 3849 QB in *Rahmatullah and Ali*, appears directed to the extent of disclosure to the SA and not to the onward disclosure to the OR.

64. This group of cases was settled. In *R(Ullah) v National Crime Agency*, further proceedings were begun outside the review period to challenge the decision of the National Crime Agency (NCA) not to sanction the payment of the damages agreed in the settlement in at least one of the cases. An application for a section 6 declaration was made in February 2021 but has not yet been decided.

36. *R (W2 and AI) v Secretary of state for the Home Department* [2017] EWHC 928 (Admin); [2017] EWCA Civ 2146

65. W2 was deprived of his British citizenship while he was out of the UK. He challenged that decision by judicial review. A section 6 declaration was made, there appears to be no judgment. Permission to apply for judicial review was refused because the grounds of challenge were unarguable or raised issues which could and therefore should be dealt with by SIAC; judicial review would not be available if there were an appropriate alternative remedy. The appeal was dismissed on the grounds that the challenge did in substance fall within SIAC's jurisdiction, and that the appeal would be an effective remedy for an appellant out of country. Closed and open evidence and submissions relevant to that were considered at first instance and on appeal. There was a closed judgment at first instance but not on the appeal.

37. *Abdule and three Others v Foreign and Commonwealth Office* [2018] EWHC 692 (QB), Master McCloud; [2018] EWHC 3594 (QB) Nicol J

66. This case was begun during the review period and the first, but not the second judgment, was delivered during it. This claim for damages for assault, false imprisonment, and misfeasance in public office, was brought by a UK national mother and her three children who went to Somalia to join her husband and their father, who, she said, had ceased his connection with the al-Shabaab terrorist group. She claimed that she was detained by Puntland Somali forces, assaulted, and interrogated. She claimed that the UK participated in her interrogation, knowing of the conditions under which she was detained and of the treatment meted out to her. The defendant applied for a section 6 declaration. Before the application was heard, the claimants applied for an order for the service of an open defence and for the service of a draft closed defence on the SA before the hearing of that application, so that it could inform the judgment about the need for and the fairness of granting the declaration. Master McCloud ordered that both be served. She concluded that the parties and court should be put in the best position to judge the statutory tests for the making of a declaration and that fairness and efficiency, at least in this case, required as early as possible a view of the defence case, so that what was at issue could be seen more precisely. She also concluded, after a learned analysis, that the Master did have jurisdiction to conduct the section 6 application hearing, but that as a matter of discretion, largely because of the nature of the proceedings and the Masters' lack of secure facilities for handling closed material, the case should be released to a High Court Judge.

The Master's jurisdiction should be exercised up to the point of making the necessary preparatory orders for that hearing.

67. The second judgment was the decision on the section 6 application which Nicol J granted, applying the principles set out in earlier decision ss such as *Belhaj*, *Rahmatullah* and *Sarkandi*. I note that in relation to a ring of confidentiality, open counsel did not favour one, as he did not wish to be put in the position of having information which he could not discuss with his client. The sensitive material was not peripheral to the case. The judge was alive to the possibility, canvassed in *Maguire*, that a defendant might try to rely on peripheral closed material so as to engineer a CMP which would not otherwise have been justified.

38. *Momen Motasim v Crown Prosecution Service, Commissioner of the Metropolitan Police, the Security Service and the Secret intelligence Service* [2017] EWHC 2071 QB; [2018] EWHC 562 (QB)

68. In these proceedings, commenced in 2017, the claimant seeks damages for an alleged breach of Article 5 ECHR, in respect of his detention after charge and up to his acquittal on serious terrorist-related charges. The Crown Prosecution Service sought PII for material which it was thought undermined the prosecution case. Its disclosure was ordered by the trial judge. The prosecution was abandoned instead. The defendants' strike out application was refused by Master Davison in [2017] EWHC 2071 QB. The appeal was dismissed; [2018] EWHC 562(QB). The case proceeded; a declaration under section 6 in 2019 was made without opposition. I note it only because of the circumstances in which the claim was brought and in which the section 6 application was granted.

41. *R (Kind) v Secretary of State for the Home Department* [2021] EWHC 710 (Admin)

69. I note this case because of the unusual circumstance in which it was brought. The challenge was to the adverse decision of the defendant on the DV process for an otherwise successful applicant for the position of Head of Investigations of the Investigatory Powers Commissioner's Office. I do not know when the section 6 declaration was made but it is unlikely to have been within the review period. There is a full open judgment covering most of the salient points, and a closed judgment supporting the open reasoning.

43. *McCafferty v Secretary of State for Northern Ireland* [2016] NIQB 47

70. A member of the Real IRA, released on licence from his 12-year sentence for explosives offences, was recalled to prison for breaching the licence conditions. The Commissioner ordered his release because Mr McCafferty was not given enough information about why he had been recalled to enable him to challenge those reasons. Mr McCafferty sued the Secretary of State for damages for misfeasance in public office, trespass to the person, wrongful arrest, unlawful detention and false imprisonment. The defendant wished to rely on the closed material which had been used to justify the decision to recall Mr McCafferty, but which had not been disclosed to him at the recall hearing. She applied for a declaration under section 6. Mr McCafferty opposed it on the grounds that it would prevent him having a fair trial; nor had she carried out the balancing exercise between protecting national security and the administration of justice, inherent in *Wiley*.

71. Stephens J found that the two statutory conditions were satisfied. He described them as the gateway to an ongoing procedure which was to be kept constantly under review. *Sarkandi* and *XH* were applied. There was no basis for exercising the discretion not to make a declaration, and cases where it should be exercised would be few and far between. The question of whether the CMP would be fair and effective required the court to form a view on the information available to it, and then to keep that judgment under review. The proceedings were not bound to be unfair. Neither the claim nor defence here could be fairly tried without the CMP. The detail in the sensitive material was essential to an evaluation of the substantive issue in the civil proceedings. It was only if the closed material were tested that the court could decide whether the grounds for recall were justified. PII would not achieve that. There was no requirement to import a PII process or *Wiley* balance into the Act. Stephens J said:

> "[27] In considering this aspect of the statutory scheme I consider it relevant to bear in mind the different effects of a PII certificate and a CMP. If a PII certificate is upheld, then the evidence in question is wholly excluded from the proceedings. No party may rely on it and neither may the court. That is not the position in relation to closed material under which procedure the defendant may continue to use and to rely on closed material even though the plaintiff and his legal representatives are unable to see that material. It could be suggested that to allow the defendant to choose between the route of PII and a CMP is unfair because it enables the defendant to determine whether the evidence will either be totally excluded under PII or used under the CMP. I consider that the statutory pre-condition or, alternatively,

the second statutory condition in Section 6(5) requires the court to give consideration to the fairness of the defendant's decision not to make an application for PII."

72. The question, he said, however was whether the CMP would be fair and effective, which it would not be if the PII were a fairer way of proceeding when the interests of both parties are considered. There was no closed judgment.

44. *Re Gallagher's Application for Judicial Review* [2016] NIQB 43; [2021] NIQB 85

73. This was a claim for judicial review of the Secretary of State's refusal to hold a public inquiry into the Omagh bombings of 1998. The claimant was the parent of one of the victims. He alleged that the Government knew or ought to have known that the bombing was planned and failed to take reasonable steps to prevent it. The Secretary of State applied for a declaration under section 6 which was granted. Maguire J applied, broadly, the approach in *Sarkandi*, and on discretion, the analysis in *XH*. The judge took the view that it was inappropriate to reach a view at that stage on the arguability of the defence or the strength of its case. But it was appropriate to consider whether the closed material was a legitimate and necessary part of the defence, and not just a matter of convenience to it. The judge was satisfied that it was not being introduced merely as a matter of convenience; there was a legitimate need to place a detailed account of the investigation before the court. The defence was not unarguable, and to make it good, material would have to be placed before the court, the public disclosure of which would be damaging to the interests of national security. PII would simply serve

to exclude that material. The judge agreed with what had been said in other cases about the practicable problems with a confidentiality ring. The judge also rejected a submission that Parliament had intended the closed material process to be available only in cases where the State faced an intractable problem in damages claims which prevented it mounting its defence, and that therefore the declaration should be refused as a matter of discretion.

74. The final open judgment concluded that the Government had arguably breached its protection duties under Article 2 ECHR and had to hold an Article 2 compliant inquiry into the measures which could have been taken to thwart the bombing, including closed material. There was also a closed judgment.

45. *Logan v Chief Constable of the Police Service of Northern Ireland* [2017] NIQB 70

75. The plaintiff was arrested under the Terrorism Act and was released just over a day later. He brought proceedings in the County Court for damages for unlawful arrest. The case was transferred to the High Court so that a section 6 application could be made. When the application was made, it was found to be unnecessary, as the issue which would determine the lawfulness of the arrest was what was in the mind of the arresting officer and not any analysis of sensitive material of which he would have been unaware. Stephens J gave the plaintiff the opportunity to seek his recusal as he had seen closed material in the course of the section 6 application, although he could not remember it, save that he had seen an affidavit which was not part of the trial material, and upon which neither party was relying. No application for

his recusal was made. It illustrates a potential problem, and one which was dealt with in the normal way by the judge.

46. *Higgins and Lee v Chief Constable of the Police Service of Northern Ireland* [2016] NIQB 81

76. These were damages proceedings in respect of various torts, in which the Plaintiffs alleged that a participating informant, with the knowledge of the Royal Ulster Constabulary (RUC), had planted incendiary devices on them so that they would be found in the search which followed. The defendant applied for a declaration under section 6. The declaration was made. Stephens J rejected the contention that the public debate about whether the named individual was an informant meant that his true position was no longer an issue of national security nor that the NCND policy was inapplicable. The fact that the alleged misconduct was some years ago and that security methods and practices could have changed was a matter for the judge to consider in judging the sensitivity of the closed material.

47. *Margaret Keeley v Chief Constable of Northern Ireland, Scappaticci, and Ministry of Defence* [2021] NIQB 81

77. This claim is one of a group of 32, mostly separate, claims brought by Plaintiffs who claim damages arising out of torts allegedly committed by the defendants as a result of the activities of Mr Scappaticci, a member of the Provisional IRA who was said to work for the UK Government as a double agent, “Stakeknife”. The claims relate to events between 1987 and 1994. Proceedings, begun in her case in 2008, and the others were delayed while the investigation, Operation Kenova, into the activities of Mr Scappaticci was concluded and while consequential criminal

prosecutions took place. The claim has not proceeded beyond the hearing of and refusal of an application for a stay, while investigation and any prosecutions were concluded. That is what the judgment relates to. It appears that a section 6 declaration has been made in some but not all cases; it has certainly been applied for in some because SAs have been appointed.

48. *Morley v Ministry of Defence, Peter Keeley and Chief Constable of the Police Service of Northern Ireland* [2017] NIQB 8 and [2020] NIQB 77

78. The Claimant sued the Ministry of Defence as the alleged handler of Mr Keeley who was said to have been an MoD[85] agent; it was alleged he murdered her son, on the instructions of or with the knowledge of the MoD, or that the MoD had failed to take proper steps to protect her son, and that the RUC had then failed to carry out a proper investigation into the murder. The MoD applied for a section 6 declaration which was granted. Stephens J analysed the statutory provisions, applying *McGartland*. The SA, who had seen at least some of the sensitive material, could see no realistic basis for opposing the declaration. The open advocates made a number of submissions as to how certain aspects of the closed material should be approached, on which Horner J commented. He found that the details in the sensitive material which he had seen were essential to an evaluation of the substantive issues, and that there was "no practical alternative" to the declaration if the issues were to be fairly tried.

79. The later decision concerns an application for disclosure of third-party material, from the Police Ombudsman of Northern Ireland. It deals with

[85] Ministry of Defence

the principles and practice behind such disclosure within the CMP, and the ability of Police Ombudsman for Northern Ireland (PONI) itself to seek a section 6 declaration so that it could deal with the issues of disclosure, including disclosure to the open advocates. Horner J, as with the Court of Appeal on the abuse of process strike out in *Kamoka*, pointed out the restrictions on the disclosure of third-party material to SAs, who were not privies to the claimant. I include this later procedural decision as it is relevant to proceedings begun in the review period, and what it says is relevant to the general operation of the Act.

80. The claim was settled.

Post review date claims

81. The SA' Schedule of cases included cases in which a section 6 declaration had been applied for up to May 2021. I have not dealt with those, save as stated in the Introduction to this Review. I note that, after the review date, there was a reduction in the proportion of Northern Ireland cases (3/19), one case involved a challenge to an interim decision of SIAC, as did a case dealt with in the review period, six related to immigration, including passport, decisions, and one arose out of immigration detention. Three others involved challenges to, or damages claims in respect of the alleged killing of civilians by soldiers in Afghanistan, and to the unlawful treatment of detainees, including UK involvement in rendition and torture abroad. The availability of judicial review as a route to challenge decisions of the Investigatory Powers Tribunal may lead to section 6 applications, and a challenge to the lawfulness of part of the Investigatory Powers Act 2016 has led to an application for a section 6 declaration.

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