SECRET EVIDENCE AND CLOSED HEARINGS

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INTRODUCTION

1. Since the establishment of the Special Immigration Appeals Commission in 1997 the use of secret evidence and closed hearings has expanded significantly, despite the vigorous opposition of civil liberties groups, lawyers and politicians[1]. The inherent unfairness of such procedures need hardly be stated – they represent a departure from the principle of natural justice that all parties should be entitled to see and challenge the evidence relied upon against them and that justice should be dispensed in public.

2. The use of Special Advocates to represent a party's interests in their absence at a closed hearing cannot eradicate that inherent unfairness, even in contexts where Article 6 of the ECHR requires open disclosure of a "*gist*" of matters that are kept closed on national security grounds. Once the closed material has been seen by the Special Advocate, there are severe constraints upon any communication with the litigant. The system was described by Lord Kerr in *Al Rawi v Security Service* thus:

> *"It is, self evidently and admittedly, a distinctly second best attempt to secure a just outcome to proceedings. It should always be a measure of last resort; one to which recourse is had only when no possible alternative is available. It should never be*

[1] In particular to the extension of closed material procedures to civil proceedings introduced by the Justice and Security Act 2013

regarded as an acceptable substitute for the compromise of a fundamental right such as is at stake in this case."[2]

3. Notwithstanding these objections, closed material proceedings ("CMP'S") are currently permitted in the following contexts.

CONTEXTS IN WHICH CLOSED HEARINGS ARE PERMITTED

Special Immigration Appeals Commission ("SIAC")

4. SIAC determines appeals from decisions to exclude or remove individuals from the UK on national security grounds, and decisions to refuse or remove British Citizenship, pursuant to the provisions of the Special Immigration Appeals Commission Act 1997 and Nationality Immigration and Asylum Act 2002.

5. Rule 4 of the SIAC Procedure Rules 2003 sets out the Commission's general duty to "*secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest"*.

6. The Special Advocate's functions are defined in Rule 35 as representing the interests of the individual by making oral and written submissions, adducing evidence and cross-examining witnesses in the closed hearings. Rule 36 provides that once closed material has been served upon the Special Advocate they are no longer allowed to communicate

[2] [2012] 1 AC 531, at 94

with the individual or their representative on substantive matters except with the permission of the Commission, to which the Secretary of State may object. In practice, it is likely to be impossible to find a way for the Special Advocate to take instructions upon the specifics of the closed evidence upon which the Secretary of State relies without disclosure to the individual. The individual is only able, through his open legal team, to send one way communications to the Special Advocate as the case progresses regarding any further gist of the evidence that is made open or other developments.

7. The definition of "closed material" in Rule 37 was amended in 2013, to bring it in line with the Justice and Security Act 2013 ("JSA"). In place of the original provision which defined the material as material "*on which the Secretary of State wishes to rely….but which the Secretary of State objects to disclosing to the appellant or his representative"* the provision was widened to cover any material which *"the Secretary of State would otherwise be required to disclose"* under the rules, but which the Secretary of State objects to disclosing. The Secretary of State must give a summary of the material if possible, without compromising the public interest. A hearing will take place under Rule 38 at which a Special Advocate can challenge the Secretary of State's objection to disclosure. Prior to the hearing the Special Advocate will meet with the Secretary of State's team and attempts will be made to narrow the issues.

8. A Practice Note was introduced in October 2016, setting out procedural requirements in relation to matters such as the requirement for the Secretary of State to conduct exculpatory reviews and the timing and nature of the same. Rule 38 hearings and the

need for the directions to allow sufficient time for negotiation between the Secretary of State and Special Advocate to narrow the issues are also addressed.[3]

Control Orders and Terrorism Prevention and Investigation Measures ("TPIMs")

9. Control orders were introduced by the Prevention of Terrorism Act 2005 and enabled the Home Secretary to impose severe constraints upon the liberty of the subject on the basis of a reasonable suspicion of involvement in terrorism-related activity. In the early days these could include 18 hour curfews and relocation. The 18 hour curfew in addition to other restrictive measures was held to be a breach of Article 5 in *SSHD v JJ &ors*[4][5].

10. TPIMs replaced Control Orders and were introduced by the TPIM Act 2011. They can be imposed for a maximum period of 2 years after which the TPIM cannot be renewed in the absence of new terrorist related activity ("TRA"). The test for imposition of a TPIM was also changed, such that the Secretary of State was required to demonstrate a reasonable belief rather than a reasonable suspicion of TRA. Relocation was abandoned at first, but that power was reintroduced under the Counter-Terrorism and Security Act 2015, which also introduced the requirement that the Secretary of State must be satisfied on the balance of probabilities that the subject has been involved in TRA.

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[3] https://www.judiciary.gov.uk/wp-content/uploads/2014/12/practice-note-for-proceedings-before-siac-from-5-oct-2016.pdf

[4] [2008] 1 AC 385

[5] A 16 hour curfew was the tipping factor in a suite of measures that amounted to a breach of Article 5 in *SSHD v AP* [2011] 2 AC 1

11. The case of *AF No 3*[6] established that in order to comply with Article 6, the subject of the order must be given sufficient information about the allegations in order to be able to give effective instructions which would not be possible where the open material consisted purely of general assertions. That is the case even if such disclosure may involve a risk to national security. Accordingly, the court may identify matters relied upon in closed that must be gisted in order for the subject to have a fair trial. The Secretary of State is then put to his or her election as to whether to provide the gist or to withdraw reliance upon those matters. Provisions for closed hearings and disclosure procedures are similar to those in SIAC and are to be found in CPR 80, with the rules relating to Control Orders included at CPR 76.

Asset Freezing Orders

12. Financial Restrictions Proceedings were introduced under the Counter-Terrorism Act 2008 and further measures were introduced in the Terrorist Asset Freezing Act 2010. The provisions concern the freezing of assets of those suspected of financing terrorists pursuant to UN Sanctions, EU sanctions, and domestic legislation. The procedural rules are similar to those for SIAC and TPIMS and are set out in CPR Rule 79.

13. In *Bank Mellat v HM Treasury*[7] the Supreme Court held that, while there was no express provision for closed material provisions to be applicable in the Supreme Court, and that these should be regarded with *"distaste and concern"* it could nonetheless adopt the procedures prescribed under the Act when hearing an appeal from the Court of Appeal. Reliance was placed upon on ss 40(2) and 40(5) of the Constitutional Reform Act 2005,

[6] [2010] 2AC 269
[7] [2014] AC 700

which made provision for the Court to do justice in *any* appeal from the Court of Appeal. The majority reasoned that, given the lower courts had determined the case on the basis of evidence heard in a closed hearing, the Supreme Court could not justly decide the matter by either ignoring the existence of the evidence so heard, or by attempting to hear the evidence in an open hearing. Lords Kerr, Hope and Reed strongly dissented from this position however, and argued for the strict application of the principle in *Al Rawi*[8], that only Parliament could introduce procedures digressing from the norms of open justice. They considered that pragmatism was not a sufficient reason to deviate from this approach and the wording of the CTA did not allow for the Supreme Court to create its own closed hearings procedure.

14. The *Bank Mellat*[9] litigation also established that *AF (no3)* disclosure requirements apply to financial restrictions appeals given the severe effect upon the Bank's ability to operate. EU law was in play and so the essence of the grounds upon which a decision was made had to be disclosed pursuant to pursuant to *ZZ (France) v SSHD*.[10][11]

Employment Tribunals

15. National security proceedings are provided for at paragraph 94 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. This empowers the tribunal to hold hearings in private, in the absence of a party or to take steps to anonymise the identity of a witness in the interests of national security.

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[8] *ibid*
[9] [2014] 2 WLR 791
[10] [2016] 1 WLR 1187
[11] As to the difference, if any in the approach required by AF (no 3) and *ZZ* see *Kiani v SSHD* [2016] QB 595 and *MR v SSHD* [2016] 3 CMLR 42 and below.

16. The case of *Tariq v Home Office*[12] concerned an immigration officer whose security clearance was withdrawn after the arrest of his brother and cousin during an investigation into a suspected terrorist plot. His brother was released without charge, but his cousin was convicted of various offences. In the employment tribunal proceedings the Claimant claimed discrimination on grounds of race and/or religion. A closed material procedure was ordered as the Secretary of State's case was that the decisions were not discriminatory but taken in the interests of national security. The Supreme Court held that the demands of national security justified a closed material procedure. Security vetting was a highly sensitive area where the need to preserve the integrity of sources of information and the methods of obtaining it was paramount.

17. Moreover, applying *Kennedy v United Kingdom*[13] there was no absolute requirement of a minimum standard of disclosure in this case. The general nature of the Secretary of State's case had been communicated and the requirement for further gisting would be kept under review with the assistance of the Special Advocate.

Closed Material Proceedings under the Justice and Security Act 2013 ("JSA")

18. The controversial extension of closed material procedures to all civil proceedings was introduced by the JSA 2013. Declarations under section 6 have been made in a number of recent cases, some examples of which are set out below. The procedural rules are set out in CPR 82.

Iraq war cases

[12] [2012] 1 AC 452
[13] (26839/05) (2011) 52 E.H.R.R. 4

19. **In Rahmatullah & ors v MOD & ors** [14] **the court made declarations that a CMP would be appropriate in two out of three cases brought by Claimants alleging ill-treatment by British forces during the Iraq war.** In the case of two of the Claimants, an investigation of the reasons for their detention and the grounds for any belief that they posed a threat to security would be required. That would include consideration of the Defendant's closed evidence on their alleged involvement with a terrorist group, which the Claimants denied. Open disclosure of that material would be damaging to national security but the claims could not be properly determined in the absence of the material, hence a CMP was appropriate.

20. In relation to the third Claimant, the MOD had not yet pleaded its case on a key issue, namely their knowledge of any ill-treatment at the hands of US forces. Therefore, it was impossible to take an informed view on the necessity of a declaration at this time and the application was refused.

Royal Prerogative Passport cases

21. In R(XH) & ors v SSHD[15] the Claimants were British nationals who challenged the decisions to remove their passports under prerogative powers on grounds of suspected terrorist activity. The Court of Appeal rejected the argument that the use of the prerogative to withdraw a passport unlawfully circumvented the procedural safeguards contained in the TPIM Act, under which travel could be restricted as part of a suite of

[14] [2017] EWHC 547 (QB)

[15] [2017] EWCA Civ 41

measures and where the TPIM would come to an end after 2 years. Judicial review was an adequate remedy for the withdrawal of the passport. A margin of appreciation was accorded to Member States in assessing national security needs and the decision was a proportionate restriction on freedom of movement in accordance with both domestic and EU law.

Omagh bombing

22. In *An application by Michael Gallagher for Judicial Review*[16] a section 6 declaration was made in a challenge where it is alleged that reasonable steps were not taken to prevent the Omagh bombing in 1998 and that there was a failure to order a public inquiry. It was accepted that sensitive evidence upon which the Defendant wished to rely relating to the investigations could not be the subject of a claim for public interest immunity in this case as it would be unavailable to the court and could result in it being impossible to try the claim. Accordingly, it was in the interests of the fair and effective administration of justice in the proceedings to make the declaration. A confidentiality ring would not be a satisfactory way to deal with the material given, for example, the risk of inadvertent disclosure.

UN Sanctions Committee designation

23. In *Khaled & ors v FCO & ors* **it was argued that there was a common law right to a core minimum standard of disclosure under a JSA CMP. That was rejected as inconsistent with the overall scheme of the Act.** If the Claimants were entitled to a

[16] [2016] NIQB 95

core minimum disclosure, they would be entitled to the disclosure of material whose revelation would harm national security, an outcome violating what the Act clearly said about the supremacy of national security interests.

Afghan covert intelligence sources

24. *In* **K, A & B v SSD & FCO**[17] **the court determined the extent of disclosure required in respect of claims made against the UK government by Afghan nationals who alleged they were used as former covert human intelligence sources and now required, relocation, protection and compensation.** The Court of Appeal had previously held that Article 6 applied, having regard to *Ali v United Kingdom*[18] in which the ECtHR held that that a civil right existed where a homeless person had a right to accommodation once qualifying conditions were met (disagreeing with the Supreme Court's decision in *Ali v Birmingham CC*[19].)

25. The Divisional Court noted that its duty under s.14 JSA was not a duty to order disclosure, but to prevent disclosure harmful to national security. There were no provisions for ordering the disclosure of such material. The court should first ensure that there remained no material which could be disclosed without harming national security. The court would then identify what additional material would also need to be disclosed for the purposes of Article 6 and permission would be refused to withhold that material. The Secretary of State retained the right to refuse to disclose but could not rely upon the material.

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[17] [2017] EWHC 830 (Admin)

[18] *(*40378/10) (2016) 63 E.H.R.R. 20

[19] [2010] UKSC10

26. There was a spectrum of cases on article 6 and the national security balance. *AF No 3* disclosure was not necessarily required in every case. At the lower end of the spectrum were cases such as *Tariq* and *Kiani* and the higher end were the control order or asset-freezing cases. In this case, public law obligations in relation to the risk of harm to life and limb placed it at the higher end of the spectrum but not at the level of control orders or asset freezing as no executive action had been taken to restrict the Claimant's liberty, finances or movement rights. Nor were the asserted risks the result of the defendants' actions. Accordingly, *AF (no 3)* disclosure did not apply. However, it was held that *Tariq* and *Kiani* did not require that there be no disclosure which might harm national security. A balance might have to be struck weighing contextual points such as whether the Claimant's instructions would be required on a particular issue, which would not be necessary in relation to policy issues of policy but may in other cases.

Other Contexts

27. In addition to those referred to in this paper closed hearings occur at the Security Vetting Appeals Panel, the Proscribed Organisations Appeal Commission, the Investigatory Powers Tribunal and have been permitted in family and criminal proceedings.

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