

# Investigating State Secrecy: The Justice and Security Act 2013

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# Open Justice

Publicity in the administration of justice ... is one of the surest guarantees of our liberties

Lord Shaw, *Scott v Scott*(1913)

# Natural Justice

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

Lord Denning, *Kanda v Government of Malaya* (1962)

# What is PII?

- The right to a fair trial includes not only the right to know the evidence against you but also the right to disclosure of relevant unused material in your opponent's possession.
- In both civil and criminal cases, a party can apply *ex parte* for an exemption on the grounds that the disclosure of the material would harm the public interest. This is known as *public interest immunity*.
- The test is whether the public interest in non-disclosure is outweighed by the public interest in the proper administration of justice.

# What is PII?

- If the application for PII is granted, the party can refuse to disclose relevant material to the other side. However, they cannot prevent the disclosure of the *evidence* they rely on.
- If the application for PII is refused, the party must either disclose the material to the other side or, alternatively, settle the case out of court.

# What are CMPs?

- CMPs are a means of protecting sensitive information from being disclosed contrary to the public interest.
- CMPs allow a Court to consider evidence submitted by one party which has not been disclosed to the other party and its legal representatives.
- CMPs need not involve the appointment of a special advocate.

# What are special advocates?

- Special advocates are one way of reducing the inherent unfairness of CMPs.
- In the context of CMPs, a special advocate is appointed to represent the interests of the excluded party.
- In the UK, a special advocate is prohibited from direct communication with the excluded party once he or she has viewed the closed material.

# Limitations of special advocates

- In the absence of sufficient disclosure of the closed material, the excluded party cannot give effective instructions to the special advocate.
- Any proposed communication with the excluded party must be supervised by the court and is subject to objection by the other party.
- Special advocates do not have benefit of expert assistance because of difficulty obtaining clearance.

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# PII versus CMP

In many ways, a closed procedure is the very antithesis of a PII procedure. They are fundamentally different from each other. The PII procedure respects the common law principles to which I have referred. If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. The effect of a closed material procedure is that closed documents are only available to the party which possesses them, the other side's special advocate and the court.

Lord Dyson, *Al Rawi v Security Service* (2011)

# The Growth of CMPs since 1997

- SIAC 1997
- NI National Security Certificate Review Tribunal 1998
- POAC 2000
- Investigatory Powers Tribunal 2000
- Employment Tribunals 2000
- Pathogens Access Appeals Commission 2001
- NI Sentences Review Commissioners 2001
- Planning Tribunals 2004
- Control order hearings 2005
- Parole board hearings 2005
- Industrial Tribunals 2005
- Employment discrimination claims in County Courts 2006
- First Tier Tribunal and Upper Tribunal 2007
- Asset-freezing proceedings 2008

# JSA Timeline

- Mid-2009 - Guantanamo detainees sue govt
- Feb 2010 - Court of Appeal judgment in *Binyam Mohamed* case
- November 2010 – Govt settles Guantanamo detainees claim
- July 2011 – Supreme Court rules against use of secret evidence in civil claims (the *Al Rawi* case)
- October 2011 – Green Paper on Justice and Security
- May 2012 – Bill introduced in Parliament
- April 2013 – Justice and Security Bill passed

## DECLARATION UNDER SECTION 6

- Do proceedings involve information whose *possible* disclosure could 'damage the interests of national security'?
- Is it in the 'interests of justice' for a declaration to be made?

If the Secretary of State is involved:

- Has the Secretary of State *considered* whether to apply for public interest immunity?

## APPLICATION TO USE CLOSED MATERIAL UNDER SECTION 8

- Would disclosure of the information 'damage the interests of national security'?

# Bank Mellat v HM Treasury

[2013] UKSC 378 at paras 68-74 per Lord Neuberger, including:

- 1) “Any party who has been excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and arguments it received” (para 69);
- 2) Possible even to address closed material in open court (para 71);
- 3) Parties “should try and agree a way of avoiding, or minimising the extent of, a closed hearing” (para 72);
- 4) Courts should be “robust” about requests (para 74).

# Cases under the JSA

- *R (Ignaoua) v SSHD* [2013] EWCA Civ 1498 – Claimant sought a judicial review of the Secretary of State’s decision to exclude him from the UK on grounds of national security. Secretary of State granted a certificate under the JSA to try and halt the judicial review and transfer it to SIAC. Court of Appeal held that the certificate was outside the Secretary of State’s powers.
- *CF v Security Service and others* [2013] EWHC 3402 – civil claim for damages re alleged UK complicity in the Claimants’ detention and torture in Somaliland. No declaration of incompatibility with Article 6 ECHR sought. Irwin J noted that “the co-existence of the JSA 2013 and PII is uneasy” but granted a declaration under s6(1) JSA that CMPs applicable to proceedings, notwithstanding the Claimants’ submissions that the PII procedure should be exhausted first.

# Cases to Watch

- *R(Miranda) v SSHD and another* (Admin Court, pending) – key ruling re scope of ‘terrorism’ under 2000 Act and, by extension, scope of ‘national security’.
- *Gulamhussein and Tariq v UK*, no 46538/11 (pending) – complaint against the Supreme Court judgment in *Tariq v Home Office* in 2011, re question of whether the right to a fair trial under Article 6 ECHR requires an irreducible minimum level of disclosure in all types of cases.
- Possible introduction of CMPs in the CJEU in Luxembourg
- Claims of Liberty, Privacy International, ACLU, Belhaj and others before the Investigatory Powers Tribunal



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