Neutral Citation Number: [2015] EWCA Civ 686

Case No: T3/2014/2772

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**Mr Justice Mitting**
**[2014] EWHC 2248 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2015

**Before :**

**LORD JUSTICE RICHARDS**
**LORD JUSTICE LEWISON**
and
**LORD JUSTICE McCOMBE**

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**Between :**

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| **(1) Martin McGartland**<br>**(2) Joanne Asher** | **Claimants/ Appellants** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Defendant/ Respondent** |

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**Phillippa Kaufmann QC** and **Henrietta Hill QC** (instructed by **Bhatt Murphy Solicitors**) for the **Appellants**
**James Eadie QC, Neil Sheldon** and **Louise Jones** (instructed by the **Government Legal Department**) for the **Respondent**
**Angus McCullough QC** and **Ben Watson** (instructed by the **Special Advocates' Support Office**) as **Special Advocates**

Hearing dates : 19-20 May 2015

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# Approved Judgment

## Lord Justice Richards :

1. This is an appeal against a declaration made by Mitting J under section 6 of the Justice and Security Act 2013 ("the 2013 Act") that proceedings brought by Mr Martin McGartland and his long-term partner, Ms Joanne Asher, are "proceedings in which a closed material application may be made to the court". It is one of two cases in which this court has been called upon to consider, at a relatively early stage in the life of the 2013 Act, the correct approach towards an application under section 6. The other is Case No T3/2014/2545, *R (Sarkandi and Others) v Secretary of State for Foreign and Commonwealth Affairs*. Whilst at a general level the cases have points in common, the specific issues in them are very different. The cases have been heard by different constitutions of the court, albeit with myself as a member of both constitutions, and are the subject of separate judgments. In order to enable each judgment to stand alone, there is an element of repetition between them, in preference to substantial cross-referencing.

2. The claimants' pleaded claim in the present case is summarised in paragraph 2 of Mitting J's judgment:

> "[The first claimant] claims to have been an agent of the Royal Ulster Constabulary and/or Special Branch in Northern Ireland between 1987 and 1991. … He claims that after his cover was blown and he escaped kidnapping by the Provisional IRA he lived in Tyne and Wear under an assumed identity until an assassination attempt was made against him in 1999. Thereafter, he claims that he was the recipient of advice and assistance from the UK State to protect him from further risks to his life and safety. By this claim he seeks to prove that the arrangements which resulted did not adequately fulfil promises made to him by State officials of financial and non-financial support. In consequence, he claims he has not received payments to which he is entitled and his health has been impaired. He also claims that his security may have been compromised by errors in the manner in which he was protected. His partner, the second claimant, claims that she has been caused distress and impairment to her mental health by the same events."

3. The Secretary of State filed a limited defence stating that Her Majesty's Government will neither confirm nor deny whether an individual is, or ever has been, an agent of the Security Service and that the application of that policy ("the NCND policy") deprived her of the ability to plead a positive case in response to the claimants' claim. The proceedings were subsequently stayed by agreement pending the coming into force of the 2013 Act.

4. After the 2013 Act had come into force, the claimants applied for an order under CPR rule 3.1(2)(m) requiring the defendant to plead a full defence meeting the requirements of rule 16.5, in place of the limited defence based on the NCND policy; whereas the defendant applied under section 6 of the 2013 Act for a declaration permitting closed material applications in the proceedings. The defendant's section 6 application was supported by both open and closed material.

5. The two applications were heard together by Mitting J. The hearing involved closed as well as open sessions but the judge gave only an open judgment. The claimants had submitted that the defendant's entitlement to rely on the NCND policy should be decided before determining the section 6 application. The judge rejected that submission, made the declaration sought by the defendant under section 6 and dismissed the claimants' application for an order that the defendant be required to plead a full open defence, but without prejudice to the right of the claimants to make a substantially similar application once the steps set out in directions he gave as to the future conduct of the case had been taken.

6. The central question on the appeal is whether the judge was wrong not to decide the NCND issue before deciding whether to make a section 6 declaration. It is submitted on the claimants' behalf that the NCND issue could and should have been resolved on the material before the judge and that if it had been resolved in the claimants' favour it would have led to a requirement for the defendant to plead a full open defence, which in turn would have enabled the court to form a proper assessment as to whether the conditions for a section 6 declaration were truly made out. It is said that a closed material procedure, shutting the claimants out from full participation in the proceedings, is a measure of last resort which was not justified in the circumstances of the case.

7. The claimants' case on the appeal to this court was advanced in an open hearing by Miss Phillippa Kaufmann QC and resisted by Mr James Eadie QC on behalf of the Secretary of State. There was also a closed hearing in which Mr Angus McCullough QC, as special advocate, made submissions in support of the claimant's case, and in response we again heard from Mr Eadie.

8. This open judgment covers all the main issues arising in the appeal, including reference in general terms to arguments advanced in the closed procedure. A separate closed judgment is to be avoided if possible and I do not think that it is needed in this case. The open judgment contains sufficient detail to enable those involved in the closed procedure to understand the court's essential reasoning and conclusions in relation to the arguments advanced.

***The statutory framework***

9. Part 2 of the 2013 Act makes provision for a closed material procedure in civil proceedings. The gateway to such a procedure is section 6:

> "**6. Declaration permitting closed material applications in proceedings**
>
> (1) The court seised of relevant proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.
>
> (2) The court may make such a declaration –
>
> (a) on the application of (i) the Secretary of State … or (ii) any party to the proceedings, or

(b) of its own motion.

(3) The court may make such a declaration if it considers that the following conditions are met.

(4) The first condition is that –

(a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or

(b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following –

(i) the possibility of a claim for public interest immunity in relation to the material ….

(5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.

(6) The two conditions are met if the court considers that they are met in relation to any material that would be required to be disclosed in the course of the proceedings (and an application under subsection (2)(a) need not be based on all the material that might meet the conditions or on material that the applicant would be required to disclose).

(7) The court must not consider an application by the Secretary of State under subsection (2)(a) unless it is satisfied that the Secretary of State has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.

(8) A declaration under this section must identify the party or parties to the proceedings who would be required to disclose the sensitive material ('a relevant person').

…

(11) In this section –

'closed material application' means an application of the kind mentioned in section 8(1)(a);

'relevant civil proceedings' means any proceedings (other than proceedings in a criminal cause or matter) before (a) the High Court, (b) the Court of Appeal ….

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

10. Section 7 provides for a section 6 declaration to be kept under review and to be revoked where appropriate:

> "**7. Review and revocation of declaration under section 6**
>
> (1) This section applies where a court seised of relevant civil proceedings has made a declaration under section 6.
>
> (2) The court must keep the declaration under review, and may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.
>
> (3) The court must undertake a formal review of the declaration once the pre-trial disclosure exercise in the proceedings has been completed, and must revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.
>
> (4) The court may revoke a declaration under subsection (2) or (3) –
>
> (a) on the application of (i) the Secretary of State … or (ii) any party to the proceedings, or
>
> (b) of its own motion.
>
> (5) In deciding for the purposes of subsection (2) or (3) whether a declaration continues to be in the interests of the fair and effective administration of justice in the proceedings, the court must consider all of the material that has been put before it in the course of the proceedings (and not just the material on which the decision to make the declaration was based)."

11. Applications for the withholding of material in section 6 proceedings are governed by section 8, not by way of direct provision but indirectly, by specifying what must be secured by rules of court:

> "**8. Determination by court of applications in section 6 proceedings**
>
> (1) Rules of court relating to any relevant civil proceedings in relation to which there is a declaration under section 6 ('section 6 proceedings') must secure –
>
> (a) that a relevant person has the opportunity to make an application to the court for permission not to disclose material otherwise than to (i) the court, (ii) any person appointed as a special advocate, and (iii) where the Secretary

> of State is not the relevant person but is a party to the proceedings, the Secretary of State,
>
> (b) that such an application is always considered in the absence of every other party to the proceedings (and every other party's legal representative),
>
> (c) that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security,
>
> (d) that, if permission is given by the court not to disclose material, it must consider requiring the relevant person to provide a summary of the material to every other party to the proceedings (and every other party's legal representative),
>
> (e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be damaging to the interests of national security.
>
> (2) Rules of court relating to section 6 proceedings must secure that provision to the effect mentioned in subsection (3) applies in cases where a relevant person –
>
> (a) does not receive the permission of the court to withhold material, but elects not to disclose it, or
>
> (b) is required to provide another party to the proceedings with a summary of material that is withheld, but elects not to provide the summary.
>
> (3) The court must be authorised –
>
> (a) if it considers that the material or anything that is required to be summarised might adversely affect the relevant person's case or support the case of another party to the proceedings, to direct that the relevant person –
>
> (i) is not to rely on such points in that person's case, or
>
> (ii) is to make such concessions or take such other steps as the court may specify; or
>
> (b) in any other case, to ensure that the relevant person does not rely on the material or (as the case may be) on that which is required to be summarised …."

12. Section 11 contains further provisions concerning the rules of court relating to section 6 proceedings. It provides *inter alia*, by subsection (4), for certain proceedings to be treated as "section 6 proceedings" even though they fall outside the definition of that expression in section 8(1):

> "11(4) The following proceedings are to be treated as section 6 proceedings for the purposes of sections 8 to 10, this section and sections 12 to 14 –
>
> (a) proceedings on, or in relation to, an application for a declaration under section 6 …."

That extended definition is relevant to a question considered later in this judgment, as to whether the closed material filed in support of the Secretary of State's section 6 application could be taken into account for the purposes of the claimants' application that the Secretary of State be required to serve a full open defence.

***The rules of court***

13. CPR Part 82 contains specific procedural rules, including rules about applications under section 6(2) and about closed material applications in section 6 proceedings: see rule 82.1. Rule 82.2 provides in paragraph (1) that where any of the rules in Part 82 applies, the overriding objective must be read and given effect in a way which is compatible with the duty set out in paragraph (2), namely that the court "must ensure that information is not disclosed in a way which would be damaging to the interests of national security".

14. Section 2 (rules 82.4 to 82.18), headed "General provisions", applies, except where otherwise indicated, to the proceedings mentioned in rule 82.1. It includes provision in rule 82.6 for what are described in the heading as "hearings in private":

> "82.6(1) If the court considers it necessary for any party and that party's legal representative to be excluded from any hearing or part of a hearing in order to secure that information is not disclosed where disclosure would be damaging to the interests of national security, it must –
>
> (a) direct accordingly; and
>
> (b) conduct the hearing, or that part of it from which that party and that party's legal representative are excluded, in private but attended by a special advocate to represent the interests of the excluded party.
>
> (2) The court may conduct a hearing or part of a hearing in private for any other good reason."

Sub-paragraph (1) of the rule refers to what would generally be described as a *closed* hearing as distinct from a hearing *in private*, in that a hearing in private is one that the parties and their legal representatives are permitted to attend but from which the *public* is excluded. It may be that sub-paragraph (2) is to be read as referring not to a closed hearing but to a hearing in private properly so called, but on the whole I think it better not to rely on this rule when considering the question of hearings in private later in this judgment.

15. Rules 82.9 and 82.10 relate to the appointment and functions of a special advocate. Rule 82.11 imposes restrictions on communications by the special advocate:

> "82.11(1) The special advocate may communicate with the specially represented party or the specially represented party's legal representative at any time before a relevant person serves sensitive material on the special advocate.
>
> (2) After the relevant person serves sensitive material on the special advocate, the special advocate must not communicate with any person about any matter connected with the proceedings, except in accordance with paragraph (3) or (6)(b) or with a direction of the court pursuant to a request under paragraph (4)."

16. Rule 82.13 relates to applications for permission to withhold sensitive material, as provided by section 8 of the 2013 Act. It reads, in material part:

> "82.13(1) The relevant person –
>
> (a) must apply to the court for permission to withhold sensitive material from a specially represented party or the specially represented party's legal representative in accordance with this rule; and
>
> (b) may not rely on sensitive material at a hearing on notice unless a special advocate has been appointed to represent the interests of the specially represented party.
>
> (2) The relevant person must file with the court and, at such times as the court directs, serve on the special advocate –
>
> (a) the sensitive material; and
>
> (b) a statement of the relevant person's reasons for withholding that material from the specially represented party and the specially represented party's legal representatives."

17. Rule 82.14 applies where the relevant person has applied under rule 82.13 for permission to withhold sensitive material. By sub-paragraph (2) it requires the court to fix a hearing unless, *inter alia,* (a) the special advocate gives notice that he or she does not challenge the application, or (b) "the court has previously, in determining the application under section 6(2) of the Act for a declaration, found that the first condition in section 6 of the Act is met in relation to the same or substantially the same material and is satisfied that it would be just to give permission without a hearing". The rule continues:

> "82.14(4) Where the court fixes a hearing under this rule, the relevant person, the Secretary of State and the special advocate must before the hearing file with the court a schedule identifying the issues which cannot be agreed between them, which must also –

> (a) give brief reasons for their contentions in relation to each issue; and
>
> (b) set out any proposals for the court to resolve those issues.
>
> …
>
> (6) Where the court has, in determining an application under section 6(2) of the Act for a declaration, found that the first condition in section 6 of the Act is met in relation to any material, it may give permission to withhold that material without a hearing in relation to that material, whether or not a hearing is required in relation to any other material.
>
> (7) Where the court gives permission to the relevant person to withhold sensitive material, the court –
>
> (a) must consider whether to direct the relevant person to serve a summary of that material on the specially represented party and the specially represented party's legal representative; but
>
> (b) must ensure that any such summary does not contain material the disclosure of which would be damaging to the interests of national security.
>
> …
>
> (10) The court must give permission to the relevant person to withhold sensitive material where it considers that disclosure of that material would be damaging to the interests of national security."

18. Sub-paragraphs (7)(b) and (10) of rule 82.14, reflecting the terms of section 8, contain on their face an absolute protection for material the disclosure of which would be damaging to the interests of national security. Section 14(2)(c) of the 2013 Act provides, however, that nothing in sections 6 to 14 is to be read as requiring a court or tribunal to act in a manner inconsistent with article 6 of the European Convention on Human Rights. It follows that if article 6 requires disclosure of material or of a summary notwithstanding that disclosure would be damaging to the interests of national security (as to which, see for example *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28, [2010] 2 AC 269), the provisions of section 8 and the rules made under it are not to be read as precluding such disclosure.

19. Section 3 of Part 82 (rules 82.19 to 82.26) concerns applications under section 6(2) for a declaration that the proceedings are proceedings in which a closed material application may be made. It provides in rule 82.26(1) that if the court makes a declaration under section 6, it must give directions for the further management of the case or for a directions hearing or for both.

20. Section 4 (rules 82.27 to 82.30) governs the procedures for review and revocation of declarations made under section 6.

### *The material before Mitting J*

21. I have already set out Mitting J's summary of the claimants' case, but it will be helpful to give some further details of their case as pleaded and of the open defence.

22. The amended particulars of claim open with the allegation that the first claimant, Mr McGartland, "was, from 1987 to 1991, an agent of the Security Services, working in Northern Ireland" and that the second claimant, Ms Asher, is his long-term partner. Paragraph 2 states that the proceedings "relate to the conduct of the Security Services, and those charged with acting as the First Claimant's 'handlers'". Paragraph 4 pleads his status in more detail, alleging that in 1987 he "began working as an agent of the Security Services in Northern Ireland, recruited via the Royal Ulster Constabulary and Special Branch with the task of infiltrating the Irish Republican Army". The pleading goes on to detail the subsequent history, including that the first claimant's cover was blown in 1991; that he was relocated to the Tyne and Wear area under an assumed name and at a secret address, with assistance from his handlers; and that he was subject in 1999 to an assassination attempt in which he suffered multiple gunshot wounds and following which he developed post-traumatic stress disorder.

23. Paragraph 7 pleads that the assistance to be provided to him through his handlers has been formalised at various times into agreements, including written agreements in December 2000, March 2002, December 2003 and March 2010. Paragraphs 10 to 16 make various allegations as to the provision of medical care and the subsequent withdrawal or threatened withdrawal of funding for such care. Paragraph 17 pleads a failure to provide medical care for the second claimant's psychiatric difficulties, or to provide her with respite from, or support for, her role as carer for the first claimant. The pleading continues:

> "18. The distress to the Claimants caused by their situation has been compounded by the Defendant continually changing handlers, and using handlers who are not, or who do not appear to be, properly trained.
>
> 19. These handlers have made promises to the Claimants with respect to (i) the provision of a £15,000 a year pension; and (ii) the installation of a secure telephone line. These promises have not been kept.
>
> 20. The handlers have also undertaken to the Claimants that they would be taken 'out' of the conventional state benefits system, and that the Defendant would pay them the full benefits to which they would otherwise be entitled instead. This was because although the Claimants were claiming benefits in their new names, the medical evidence and the like that is required to support such benefits would be in their old names, compromising their security. However the handlers have also reneged on these undertakings. As a result, certain state benefits that the Claimants were receiving have stopped, without any payments in lieu from the Defendant, causing the Claimants additional distress.

> 21. Moreover the handlers have put disclosure of the Claimants' identities at risk by:
>
> (i) Failing, in or around October 2008, to liaise with the Department for Work and Pensions ('the DWP') and the Claimants' local Council, when they decided to investigate certain payments the First Claimant was receiving from the Defendant, and stop the said investigations;
>
> (ii) Thereby causing or permitting the First Claimant to be interviewed by the DWP and the Council, and only latterly inviting them to discontinue the investigation on grounds of 'national security', by which point several individuals would have become aware of the First Claimant's identity and former role;
>
> (iii) Failing to take adequate steps to ensure that those dealing with Claimants' National Insurance contributions and benefits were unaware of his former role;
>
> (iv) Informing the local police of the First Claimant's identity and former role;
>
> (v) Informing those living near the Claimants that theirs was a safe house and that the Claimants were being 'looked after'; and
>
> (vi) Informing builders working on the Claimants' safe house, who were told who the First Claimant was and about books that he had written."

24. Paragraphs 22 and 23 plead that at all material times the defendant "has owed, and continues to owe, the First Claimant, as a former informant", duties of care in tort and in contract, and that similar duties are owed to the second claimant as his long-term partner and full-time carer. The particulars of breach of duty, in paragraph 24, effectively repeat the various factual allegations I have mentioned.

25. The Secretary of State's open defence consists largely of a series of non-admissions based on the NCND policy. For example:

> "2. Paragraph is not admitted. The Defendant neither confirms nor denies that the First Claimant is, or ever has been, an agent of the 'Security Services', whether as alleged or at all. …
>
> …
>
> 5. The Claimants' claim is based upon the First Claimant's alleged status as a former 'agent' and/or 'informant', as variously alleged at paragraphs 1, 4 and 22. The duty of care said to be owed by the Defendant to the Claimants, as set out in paragraphs 22 and 23, arises, on the Claimants' case, by reason of this alleged status. The specific allegations advanced by the

> Claimants all concern the acts and omissions of officers of the Security Service.
>
> 6. It has been the policy of successive governments to neither confirm nor deny speculation, allegations and assertions in relation to intelligence matters. In particular, Her Majesty's Government will neither confirm nor deny whether an individual is, or ever has been, an agent of the Security Service or the Secret Intelligence Service.
>
> …
>
> 8. In the particular circumstances of this case, the application of the policy of neither confirming nor denying assertions as to whether an individual is, or ever has been, an agent deprives the Defendant of the ability to plead a positive case in response to the Claimants' claim. The central allegation which underpins the entirety of the Claimants' claim, namely that the First Claimant is a former agent living under the protection of the Security Service, cannot be addressed without confirming or denying his alleged status.
>
> …
>
> 11. For the reasons explained at paragraphs 5-10 above, paragraphs 4 to 21 are not admitted. …"

26. The open material before Mitting J included, in addition to the pleadings, a body of documents relied on by the claimants in support of their argument that there was no basis for the defendant's reliance on NCND in the circumstances of this case. The material also included an open statement of reasons, signed by the Secretary of State, in support of the application for a declaration under section 6. In stating that the first condition in section 6 was met, those reasons put the case in terms of the NCND policy, as applied both to the first claimant's alleged status as an agent of the Security Service (or Security Services) and, albeit briefly, to the operational issues raised by the claimants' complaints about his dealings with his handlers. Thus:

> "16. The primary function of the Security and Intelligence Agencies ('the Agencies') is the protection of national security ….
>
> 17. The more that is publicly known about the operational work of the Agencies, the greater the risk that their operational effectiveness will be impaired ….
>
> 18. The principle of 'Neither Confirm Nor Deny' or 'NCND' has developed in order to protect these objectives. The underlying rationale for NCND is clear; the protection of national security, or specifically, the protection of information which if it were to be disclosed would risk causing damage to national security.

> 19. It will be readily understood that the Agencies cannot be expected to disclose the details of their operations, methods, capabilities and sources (whether human or technical) ….
>
> 20. It has therefore been the consistent policy of the Agencies to provide an NCND response to a question in every case where a straight confirmation or denial would harm national security or would otherwise not be consistent with the proper discharge of the Agencies' statutory functions.
>
> 21. Where an individual makes allegations about operational matters, regardless of the veracity of those allegations, they can be very damaging to national security. Irrespective of the truth of those allegations however the Agencies will neither confirm nor deny the truth of such allegations. There is a world of difference between a statement made by an individual and a disclosure of information which has been officially authorised.
>
> …
>
> 24. The underlying basis in respect of both claims is an allegation that the First Claimant is a resettled agent. The duty of care it is asserted is owed to him arises out of that alleged status. The particular complaints made by the First Claimant concern the alleged dealings he has had with the Security Service. It is not possible to plead a substantive response to the claim without departing from the well-founded NCND policy.
>
> 25. The damage that would be caused to the operational effectiveness of the Security Service and, in particular, its ability to recruit and retain agents, would be very serious should there be a departure from NCND in this case."

27. The judge also had before him a closed statement setting out the Secretary of State's full reasons in support of the section 6 application.

28. The claimants argued that their application that the defendant be required to plead a full open defence, on the basis that she was not entitled to rely on NCND, should be determined first and should be allowed and that there should be no determination of the defendant's section 6 application pending provision of a fully pleaded defence and further submissions. The Secretary of State argued that the court should determine the section 6 application first, having full regard to the claimants' submissions as to the lack of any basis for reliance on the NCND policy in this case, and that the conditions for the making of a section 6 declaration were clearly met.

***Mitting J's judgment***

29. Having set out the background, the judge referred to the Secretary of State's application for a section 6 declaration. He then referred to the claimants' application that he should order the Secretary of State to plead a full defence, and continued:

"4. I decline to do so for both principled and pragmatic reasons. The principled reason is that there is no statutory procedure for me to consider the claimant's application in the light of closed material which I have read which bears upon it. That closed material is capable of affecting the eventual decision on this issue. I acknowledge the force of Miss Kaufmann's submission, but do not consider that I can, in fairness to the defendant, determine it without taking into account closed material. Miss Kaufmann submits that I can treat her application as ancillary to the defendant's Section 6 application. As a matter of principle, I do not agree. Parliament has identified in Section 11(4) what proceedings are to be treated as Section 6 proceedings for the purposes of Sections 8–10. They do not include an application by a claimant to require a defendant to file a detailed open defence, save by relying on material that is fully open. Of greater weight are the pragmatic reasons for declining to adopt this course. Section 6(6) provides that the two conditions which must be satisfied, to which I have referred above, "are met if the Court considers that they are met in relation to any material that would be required to be disclosed". I am satisfied that there is material which would be required to be disclosed which relates to important issues in the proceedings. In paragraphs 18, 20 and 21 of the Particulars of Claim, the claimants identify respects in which they say that their protection was mishandled. To answer that part of the claimant's case, the defendant would, in my judgment, have to rely on details of the means by which protection can be afforded to those at risk and of the training of handlers. It is obvious that those details cannot be put into the public domain or revealed to those who have not been the subject of developed vetting or, exceptionally, accepted to be completely trustworthy without the need for vetting (such as judges). Miss Kaufmann submits that, if necessary, the second claimant, herself and her junior and one or more members of the firm of solicitors who instruct them, would be willing to submit to such vetting. The first claimant, she submits, can be taken to be a trustworthy recipient of such information. There are a number of problems with this suggestion: the process of vetting is highly intrusive and would take months; the second claimant, whose mental health is said to be fragile, might not welcome such intrusions; and if the defendant considered that the first claimant could not be trusted with such information, someone, presumably a judge, would have to determine whether or not he could be. That would be likely to require oral evidence and it would require material which may be sensitive material, in the statutory definition, to be considered. That would require a Section 6 declaration in itself. Such a procedure is cumbersome and may well be unattainable. In any event, it would not satisfy the defendant's proper insistence

> upon keeping such techniques closely guarded within the intelligence community."
>
> 5. I am satisfied that, at least in relation to sensitive material relating to the means by which protection can be afforded and the training of handlers, the first condition identified in Section 6(4)(a) or (b)(i) is satisfied. I am also satisfied under Section 6(5) that it is in the interests of the fair and effective administration of justice to make a declaration under Section 6, because, as paragraphs 18, 20 and 21 of the Particulars of Claim demonstrate, the issues to which this material relates form a significant part of the claimant's case. This part of the case could not effectively and justly be determined without it. I am also satisfied that the Secretary of State has considered whether or not to make a claim for public interest immunity in respect of this material under Section 6(7).
>
> 6. This case raises many and difficult problems, only some of which have been identified above. It is a case in which the statutory obligation to keep the declaration under review imposed by Section 7(2) is not just a formal obligation. Despite the legal effort that has been devoted to the NCND question, the most difficult issue to be resolved will be how to deal with the detail of the claimant's case against his claimed handlers. In the ordinary case, if the detailed account of a claimant is in issue, it will be resolved by direct confrontation between him and witnesses whose account of events contradicts, or differs from, his. If that is not possible, a decision will have to be made as to whether or not such an issue can be justly determined at all; and if so, how. These difficult issues are better decided under the umbrella of Section 6 proceedings and not otherwise; and to be decided when both sides' case has been fully deployed. I have considered whether or not to defer consideration of the Secretary of State's application until after she has produced, in closed initially, her full case, but am satisfied that it is better to embark on the Section 6 process now and to deal with the difficulties which it creates to the fair trial of the issues by the process of review and the use of the techniques afforded by Section 8(3)."

30. The directions he then gave included a requirement on the defendant to file and serve on the special advocates (a) a detailed closed defence, (b) a detailed closed statement of the facts and evidence upon which she proposed to rely, annexing a bundle of the closed documents on which she proposed to rely and indicating which, if any, part of the closed statement and documents should in her opinion be disclosed to the claimants, and (c) a list of the witnesses she intended to call in any closed hearing of the claim. Provision was made for the special advocates to make written submissions under CPR rule 82.14(6) and (7) in respect of that material, for the defendant to make written submissions in response, and for a hearing to determine what, if any, further

disclosure and/or summary of sensitive material should be made to the claimants and their open representatives. The judge's order continued:

> "Once these steps have been taken, it is the intention of the Court to hold a Case Management hearing in which directions will be given to the claimants for the filing and serving of their witness statements and for the disclosure of any documents upon which they rely, so as to inform the Court's decision on the required review of the declaration under Section 6 of the Justice and Security Act 2013 and/or of any directions to be given under Section 8(3) …."

The judge reserved case management of the claim to himself.

***Outline of the submissions on the appeal***

31. In her submissions to this court, Miss Kaufmann traversed the same essential ground as she had covered before the judge. She dealt at some length with the argument that the defendant's entitlement to rely on the NCND policy in order to avoid pleading a full open defence could and should have been decided by the judge before deciding whether to make a section 6 declaration. She took us through the legal principles and some of the factual material relevant to the claimants' case on the NCND issue in order to demonstrate that the case "has legs" to it (she accepted that if we were to conclude that the issue ought to have been decided first, we would be likely to remit the matter to the judge for a decision on it, rather than deciding it ourselves). She submitted that a decision on the NCND issue fell within the scope of "proceedings on, or in relation to, an application for a declaration under section 6", within section 11(4)(a) of the 2013 Act, and that the judge was therefore wrong to rule that he could not take into account, for the purpose of a decision on that issue, the closed material filed by the defendant in support of the section 6 application. She submitted that a decision on the NCND issue was necessary for the purpose of determining whether the condition in section 6(5) was met, namely that it was "in the interests of the fair and effective administration of justice in the proceedings to make a declaration". She emphasised the principle of open justice, the exceptional nature of a section 6 declaration and the need to ensure that the claimants were able to participate to the greatest extent possible in the proceedings on their claim, all of which told in favour of construing section 6 narrowly. She said that if the NCND issue were decided in the claimants' favour and the defendant were required to plead a full open defence, the basis of the section 6 application might fall away, and in any event the court would be in a better position to determine whether a section 6 declaration was necessary or whether any sensitive material could be protected sufficiently by hearings in private and a confidentiality ring involving the claimants and their lawyers. She took issue with the judge's reasoning and with the conclusion he reached.

32. In closed written submissions developed orally in the closed hearing, Mr McCullough advanced closed grounds of appeal in support of the claimants' case. He supported Miss Kaufmann's open submissions and echoed the points she had made about the approach to be taken towards section 6. He reminded the court of the practical difficulties to which the special advocates are subject in a closed procedure, being unable to communicate effectively with the claimants or to take instructions from them. He submitted that on the closed material provided in support of the section 6

application it was not open to the judge to conclude that either of the two conditions for a declaration was satisfied. To the contrary, the closed material strongly indicated that a declaration was unnecessary and that a procedure whereby some or all of any hearing was held in private, with the participation of the claimants, would be realistic and far more consistent with the interests of the fair and effective administration of justice, bearing in mind the extent of the claimants' own claimed knowledge of matters alleged to be sensitive. In any event, the judge ought to have determined the Secretary of State's entitlement to rely on NCND and/or have directed a full closed defence before deciding the section 6 application, in order to see what was required to be disclosed and what the fair and effective administration of justice required; and consideration of the full closed defence subsequently served pursuant to the judge's directions provided powerful support for the argument that the conditions for a section 6 declaration were not met. It was further submitted that the judge was wrong to find on the material before him that the Secretary of State would be required to disclose sensitive material relating to the training of handlers or that any material relating to operational capability could not be dealt with by a private hearing procedure.

33. Mr Eadie's response on behalf of the defendant was that there was no proper basis for interfering with this case management decision by a highly experienced judge. Mr Eadie accepted that there is an argument to be had on the NCND issue but submitted that the judge wanted to be fully sighted on all relevant material, closed as well as open, before deciding that issue and that he was entitled to conclude that the conditions for a section 6 declaration were met. The 2013 Act represents a legislative balance, making such inroads into the principle of open justice as are necessary to allow claims to be determined without damaging national security. It would be wrong to try to read its provisions down; they should be given their natural meaning. A section 6 declaration opens the door to consideration of all closed material relied on but does not determine the outcome. The court has a duty under section 7 to keep the declaration itself under review, and consideration of applications made pursuant to section 8 while the declaration is in force leaves open the possibility of the claim itself being tried entirely in open, or partly in private (with or without a confidentiality ring) or partly in closed. It was permissible for the judge to take the view that the claimants' allegations took one obviously into the territory of sensitive material relating to operational capability and that a section 6 declaration was appropriate; but he made no decision as to how the case should ultimately be tried, leaving that until the steps provided for by his directions had been taken.

***Discussion of the issues***

34. A closed material procedure is a serious departure from the fundamental principles of open justice and natural justice, but it is a departure that Parliament has authorised by the 2013 Act in defined circumstances for the protection of national security. The legal context of such legislation is expressed with clarity in the judgment of Lord Neuberger (with whom Baroness Hale, Lord Clarke, Lord Sumption and Lord Carnwath agreed) on the jurisdiction issue in *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 38, [2014] AC 700:

> "2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in

> rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum ….
>
> 3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ('the excluded party') knowing, or being able to test, the contents of that evidence and those arguments ('the closed material'), or even being able to see all the reasons why the court reached its conclusions.
>
> 4. In *Al Rawi v Security Service* [2012] 1 AC 531, Lord Dyson JSC made it clear that, although 'the open justice principle may be abrogated if justice cannot otherwise be achieved' (para 27), the common law would in no circumstances permit a closed material procedure ….
>
> …
>
> 8. In a number of statutes, Parliament has stipulated that, in certain limited and specified circumstances, a closed material procedure may, indeed must, be adopted by the courts. Of course, it is open to any party affected by such legislation to contend that, in one respect or another, its provisions, or the ways in which they are being applied, infringe article 6. However, subject to that, and save maybe in an extreme case, the courts are obliged to apply the law in this area, as in any other area, as laid down in statute by Parliament."

35. The 2013 Act is one of those in which Parliament has stipulated that a closed material procedure may be permitted by the court. It represents Parliament's assessment of how, in relevant civil proceedings, the balance is to be struck between the competing interests of open justice and natural justice on the one hand and the protection of national security on the other, coupled with express provision in section 14(2)(c) to secure compliance with article 6. It is certainly an exceptional procedure, and in the nature of things one would expect it to be used only rarely, but the conditions for its use are defined in detail in the statute. In the circumstances there is, in my judgment, no reason to give the statutory provisions a narrow or restrictive construction, save for any reading down that may be required, in accordance with the terms of the statute

itself, for compliance with article 6. Subject to that point, the provisions should be given their natural meaning and applied accordingly. Appropriate safeguards against inappropriate or excessive use of a closed material procedure are built into the provisions themselves, starting with the conditions for a section 6 declaration and encompassing the provisions for review and revocation of a declaration and those governing applications for permission not to disclose material in proceedings in relation to which a declaration is in place.

36. In order to assess Miss Kaufmann's submission that the judge could and should have decided the Secretary of State's entitlement to rely on NCND before making any decision on the application for a section 6 declaration, it is necessary to explain first the legal basis on which the challenge to the Secretary of State's reliance on the NCND policy is put.

37. The first step in the argument is that the Secretary of State has no automatic right to rely on NCND to avoid pleading a full open defence which complies with the requirements of CPR rule 16.5. Reliance on NCND has to be justified on grounds of public interest and it is ultimately for the court to decide whether the public interest sought to be protected by NCND outweighs the public interest in the administration of justice. As to the public interest sought to be protected by NCND, Miss Kaufmann referred to the rationale given in *In re Scappaticci* [2003] NIQB 56, at paragraph 15, for an NCND policy in relation to the identity of agents:

> "To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger …. If the Government were to deny in all cases that persons named were agents, the denials would meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced …."

38. She accepted that the courts have long recognised the legitimacy of the NCND policy as a means of protecting those interests which it serves to protect, and that where those interests involve national security the courts are very slow to take a different view from the government as to whether national security will be threatened if the policy is not applied. She submitted, however, that reliance on the policy requires justification similar to claims for public interest immunity, and that "[it] is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it" (*Secretary of State for the Home Department v Mohamed and CF* [2014] EWCA Civ 559, [2014] 1 WLR 4240, paragraph 20). She pointed out that the government itself accepts that an NCND policy can admit of exceptions. For example, in *Baker v Secretary of State for the Home Department* [2001] UKHRR 1275, at paragraphs 30-34, it was explained that an NCND policy was applied to

requests for information as to whether the Security Service holds records about a person, but that there were well recognised exceptions dictated by common sense, including "where the person concerned already knows 'conclusively' that there is information held upon him" and "where the Security Service itself decides that the acknowledgment should be made, and even that the information should be published, because that is seen as assisting the proper performance of its statutory functions, or as otherwise being in the public interest" (a situation described as a case of "official confirmation" that the information was held).

39. Miss Kaufmann submitted that an exception to an NCND policy must as a matter of rationality be made where the application of the policy cannot and does not serve any useful purpose, and that such is the case in relation to Mr McGartland, both because there has been official confirmation of his identity as an agent and because he has already disclosed his own identity as such.

40. The various strands in the argument were brought together in a citation from the judgment of Bean J (as he then was) in *DIL and Others v Commissioner of Police of the Metropolis* [2014] EWHC 2184 (QB). In that case the defendant relied on an NCND policy in relation to the alleged activities of undercover police officers. The issue came before the court in the form of an application corresponding to that of the claimants in the present case, namely that the defendant was not entitled to rely on NCND so as to resist pleading a defence in accordance with CPR rule 16.5. Bean J reached the following conclusions:

> "39. I derive the following guidance from the authorities:
>
> (1) There is a very strong public interest in protecting the anonymity of informers, and similarly of undercover officers (UCOs), and thus of permitting them and their superiors neither to confirm nor deny their status; but it is for the court to balance the public interest in the NCND policy against any other competing public interests which may be applicable ….
>
> …
>
> (3) Even where an individual informant or UCO has self-disclosed, the police (or the Secretary of State) may nevertheless be permitted to rely on NCND in respect of allegations in the case where to admit or deny them might endanger other people, hamper police investigations, assist criminals, or reveal police operational methods ….
>
> …
>
> 45. 'Jim Sutton' has been publicly named as an UCO by the Commissioner in person …. In the two cases involving him, reliance on the NCND policy to avoid admitting that he was an UCO is simply unsustainable.
>
> 46. In the case of 'Bob Robinson' I also consider that NCND can no longer be relied on. He has not only self disclosed

> (using his real name of Bob Lambert), but has been publicly named by the IPCC as a former MPS officer; and he is no longer in the police service.
>
> 47. However, in the case of 'Mark Cassidy' and 'John Barker' I take a different view. Neither of them has self-disclosed nor been officially named as an undercover officer, although each has been named publicly in a variety of media (with a photograph of each man in the *Guardian*). In those circumstances I consider that the Commissioner should not be required to admit or deny whether either of them is an undercover officer or has the real name alleged …."

41. None of the legal principles vouchsafed by those authorities was disputed by Mr Eadie, at least for the purposes of the present appeal. The problem for the claimants lies in the application of the principles to the facts of this case.

42. The claimants' pleaded case is founded on Mr McGartland's claim to have been an agent of the "Security Services". The evidence filed on their behalf includes a body of material, summarised in and exhibited to the witness statements of their solicitor, concerning the publicity surrounding Mr McGartland's former role as a police informant and official references to that role and to the assistance given to him. For example:

i) A statement by the Northumbria Police dated 29 September 1997 stated that the solicitor for "the Crown authorities" (an expression which is accepted to include the Security Service) involved in dealing with the case of Mr McGartland had responded to questions posed by a national television programme to be broadcast that evening, and that:

> "The Crown authorities reject any suggestion that Mr McGartland has been treated unreasonably. Individuals who have given valuable service to the country and who may be at threat as a result deserve – and receive – considerable support at public expense to ensure their safety. The techniques used to resettle and protect such individuals are obviously sensitive and cannot be discussed publicly ….
>
> Despite the difficulties which have arisen, the Crown authorities remain committed to providing the necessary and appropriate support to Mr McGartland …."

ii) A letter dated 8 March 1999 from the Home Secretary to Mr Andrew Hunter MP stated that "following concerns that his identity had been compromised, Mr McGartland was offered a package of security measures by the Crown authorities" but he had disputed the terms of the offer and negotiations had broken down.

iii) A letter from Northumbria Police to Mr McGartland dated 10 January 2000 recorded that since the attempt on Mr McGartland's life in June 1999 he had

been provided with protection by the police as a short-term measure while his negotiations with the Crown authorities for a resettlement package continued.

iv) The recitals to a written agreement dated 27 November 2000 and made between Mr McGartland, the Chief Constable of Northumbria Police, the Northumbria Police Authority, the Royal Ulster Constabulary and the Security Service recorded that Mr McGartland had "provided valuable information to the Security Forces in Northern Ireland", that he had made various allegations concerning wrongful disclosure of his identity and other such matters, that he was presently in the process of being resettled in a further new identity, and that "the RUC, the Chief Constable, the Police Authority, and the Security Service refute the allegations and do not accept liability in respect of any of the allegations made by Mr McGartland" but wished to resolve any outstanding dispute before he assumed his new identity. The terms of the agreement itself are redacted in the copy provided to the court.

43. That material contains ample official confirmation of Mr McGartland's role as a police informer, but in my judgment none of it amounts to official confirmation that he was an agent of the Security Service (or Security Services) as pleaded by him as the underlying basis of his claim; and whilst Miss Kaufmann asserted that nothing turns on whether he was an agent of the Security Service as distinct from a police informer acting as an agent of the State, the court must in my view proceed by reference to the case as pleaded. The material to which I have referred also supports the view that the Security Service was involved in Mr McGartland's resettlement, but again it falls short of official confirmation of the position. Finally, the claimants' pleaded case as to breach of duty takes one into areas of operational methodology that are not and could not be expected to be the subject of any official confirmation.

44. This is of course an unusual case, in that Mr McGartland (and presumably his partner too) may be taken to have personal knowledge of many of the matters pleaded. But what the claimants allege is not necessarily accurate and this is not, as it seems to me, a situation in which "self-disclosure" is an answer to the Secretary of State's reliance on NCND. Nor is it obvious that all relevant matters could be handled without damage to the public interest by means short of a closed material procedure, such as hearings in private coupled with measures to protect the confidentiality of pleadings and other documents disclosed to the claimants. Operational methodology, in particular, is an obviously sensitive area and it is far from self-evident that all relevant information is within the knowledge of the claimants or that disclosure of such information to them and their open representatives could be effected without risk of damage to the interests of national security.

45. This all goes to show that the NCND issue, although open to argument (as Mr Eadie conceded), is less clear-cut than Miss Kaufmann suggested in her submissions. There are, moreover, strong reasons to believe that it could not be decided without consideration of a full closed defence and the related closed material relied on by the Secretary of State in defence of the substantive claim.

46. That brings me to the way the judge dealt with the matter. His first reason for rejecting the contention that the claimants' application for a full open defence should be decided first was that there was no statutory power to take into account, for the purposes of that application, the closed material filed in support of the Secretary of

State's section 6 application. On that issue I disagree with him. In my judgment, in the particular circumstances that arose here, the claimants' application could properly be regarded as falling within the scope of "proceedings on, or in relation to, an application for a declaration under section 6" (see section 11(4)(a) of the 2013 Act), so as to be treated as "section 6 proceedings" in which closed material could properly be considered. The claimants' application was intimately related to the question when the section 6 application should be decided and even to whether a declaration should be made. We are told that it was conceded on behalf of the Secretary of State that the judge could take the closed material into account in relation to the claimants' application. Whilst on the appeal Mr Eadie supported the judge's approach on the issue, as he was entitled to do, I think that the original concession was correct. It is therefore unnecessary to consider a submission by Mr McCullough that the court could have received closed material in any event at common law for the purpose of determining whether the Secretary of State should be required to plead a full open defence.

47. That issue is, however, of limited significance since the judge attached greater weight to his separate "pragmatic reasons" for declining to decide the claimants' application first; and if those reasons are well founded, they provide a sufficient basis for the conclusion reached by the judge. He was satisfied that, to answer the claimants' pleaded case as to the alleged mishandling of their protection, the Secretary of State would have to rely on details of the means by which protection can be afforded to those at risk and of the training of handlers, and that the conditions for a section 6 declaration were met in relation to such material. In my judgment, he was entitled to take that view:

i) As I have already said, the claimants' case takes one into an obviously sensitive area of operational methodology and it is far from self-evident that all relevant information is within the knowledge of the claimants or that disclosure of such information to them and their open representatives could be effected without risk of damage to the interests of national security. How far matters can be dealt with by way of techniques such as the provision of summaries and/or hearings in private can only sensibly be resolved after consideration of a full closed defence and all the related closed material.

ii) The judge was in my view entitled to reject, for the reasons he gave, the suggestion that the second claimant and members of the claimants' legal team might undergo developed vetting so as to enable them to have personal access to sensitive material.

iii) As the judge observed, a section 6 declaration can be made if the two conditions are met in relation to *any* material that would be required to be disclosed in the course of the proceedings (section 6(6)). Mr McCullough argued that the material before the court in support of the section 6 application did not include anything relating to the training of handlers. He did not dispute, however, that the material included material relating to operational methodology ("the means by which protection is afforded", as the judge put it); and if the statutory conditions were met in relation to that material, it was a sufficient basis for a declaration.

iv) The judge was entitled to find that the first condition was met in relation to that material, on the basis of section 6(4)(a) or 6(4)(b)(i): I consider the latter to be the more appropriate, in that this was sensitive material which, in order to meet the pleaded case, the Secretary of State would be required to disclose were it not for the possibility of a PII claim in relation to it.

v) He was also entitled to find that the second condition was met in relation to that material, on the basis that, as he put it, the relevant *part* of the claimants' case "could not effectively and justly be determined" without a section 6 declaration: a declaration would enable proper consideration to be given, within the context of a closed material application pursuant to section 8, to how such material was to be dealt with. I do not accept that a decision whether the second condition was met could or should only have been taken after reaching a decision on the NCND issue. Nor do I accept that the judge ought to have found, on the material before him, that the fair and effective administration of justice would be better achieved by other means rather than by allowing the possibility of closed material applications.

vi) The judge gave express consideration to whether to defer a decision on the section 6 application until after the Secretary of State had produced a full defence, initially in closed, but concluded, in my view reasonably, that it was better to embark on the section 6 process and to deal with the difficulties it created by the powers and duties under sections 7 and 8.

vii) He also gave proper consideration to the requirement in section 6(7) that the court must be satisfied that the Secretary of State, before making the section 6 application, considered whether to make a claim for PII in relation to the material on which the application is based.

viii) Thus, he gave due consideration to the relevant considerations and satisfied himself that the statutory conditions were met before exercising the discretion given by section 6(3) to make a declaration.

48. It seems to me that Mr Eadie was right that the judge wanted to be fully sighted, with full consideration of all the material for which protection was sought, before deciding how much could and should be put into open or dealt with in private and how best to achieve a fair trial of the substantive claim. The NCND issue was left for resolution as part of that process. I do not read the judge's judgment as reaching a final decision on anything beyond opening the gateway to closed material applications by making the section 6 declaration. The fact that he had found the first condition to be met in relation to certain material does give rise to the *possibility* of permission being given to withhold that material without more (see CPR rule 82.14(2)(b) and (6)), but the reality is that the court can be expected to scrutinise with care the asserted justification for withholding material pursuant to any closed material application that is challenged by the special advocates. In relation to all the material sought to be withheld, consideration can be given to the question whether disclosure could be made to the claimants and their open representatives without damage to the interests of national security. If, for example, the court concludes that otherwise sensitive material could be disclosed to the claimants and their open representatives on terms as to confidentiality and/or hearings in private without damage to the interests of national security, then the court can be expected to refuse permission for the material

to be withheld to that extent, whilst still giving permission for it not to be disclosed on any wider basis. Further, if permission is given for material to be withheld from the claimants and their open representatives, the court must go on to consider whether to direct service of a summary. Throughout the process, the court must ensure compliance with the claimants' rights under article 6. Moreover, if the court considers at any time that the section 6 declaration is no longer in the interests of the fair and effective administration of justice in the proceedings, it must revoke the declaration pursuant to section 7; and the judge evidently had the section 7 duties of review well in mind when reaching his decision.

49. I have made some references in general terms to the closed material and the closed submissions but I should add, for the avoidance of doubt, that I am not persuaded by Mr McCullough's submissions that there is anything in the detail of the closed material to show that the judge's decision was wrong.

50. In short, though it has taken me a long time to get there, I accept Mr Eadie's submission that this was a case management decision properly open to the judge and that there is no proper basis for this court to interfere with it.

***Conclusion***

51. For those reasons I would dismiss the appeal.

**Lord Justice Lewison :**

52. I agree.

**Lord Justice McCombe :**

53. I also agree.