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2013 No. 125920/1

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MICHAEL GALLAGHER FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND MADE ON 12 SEPTEMBER 2013

MAGUIRE J

Introduction

[1] The court has before it an application made by the Secretary of State for Northern Ireland ("the Secretary of State") pursuant to section 6 of the Justice and Security Act 2013 ("JSA"). This application relates to ongoing civil proceedings by way of an application for judicial review. In those proceedings the applicant for judicial review is Michael Gallagher and the respondent is the Secretary of State. These proceedings were begun on 6 December 2013. Leave to apply for judicial review was granted by Treacy J on 21 January 2015. The central issue between the parties in the judicial review relates to the lawfulness of a decision made by the Secretary of State on 26 September 2013. That decision was not to hold a public inquiry into the circumstances of the notorious Omagh bomb explosion which occurred in the town of Omagh, County Tyrone, on 15 August 1998. As is well known, the explosion resulted in extensive loss of life, injury to persons and damage to property. Responsibility for the bomb was claimed by the Real IRA. One of those who died in the explosion was the applicant's son, Aidan.

[2] In the aftermath of the explosion a police investigation began. This investigation has been ongoing for many years. However, the central issue in the judicial review proceedings is not concerned with the effectiveness of that investigation. Rather the central issue relates to the question whether the explosion had been preventable. The applicant's case is that the authorities knew or ought to have known in advance of the explosion and that they failed to take such steps as were reasonable in all the circumstances to respond to and prevent it occurring. A

range of issues relating to the preventability of the explosion have been put forward by the applicant, as will be explained later. In short, the applicant maintains there has been no or no adequate investigation into the issue of the preventability of the deaths so as to satisfy Article 2 of the European Convention on Human Rights.

The Application before the Court

[3] The application before the court is made by the Secretary of State. It seeks a declaration under section 6(2)(a) of the JSA. The declaration sought is that the proceedings are ones in which a closed material application may be made to the court. The reasons for this application are set forth in an open statement of reasons, which is a document of some 8 pages in length, signed by the Secretary of State. Additionally an affidavit has been filed by Lesley O'Rourke, the Head of Security Policy and Casework in the Northern Ireland Office. Moreover, there is before the court a closed statement of reasons from the Secretary of State. For the purpose of the present application the Secretary of State was represented by Mr Eadie QC and Mr Paul McLaughlin BL and the applicant has been represented by Ashley Underwood QC and Mr Foster BL. In addition Mr Scoffield QC has acted as a Special Advocate (appointed by the Advocate General for Northern Ireland) to represent the applicant in that part of the application from which the applicant and his legal representatives have been excluded.

The Statutory Framework

[4] The relevant statutory framework dealing with this sort of application is found in the JSA. Section 6, so far as is relevant, reads:

> "(1) The court seized of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.
>
> (2) The court may make such a declaration –
>
> (a) On the application of –
>
> (i) the Secretary of State (whether or not the Secretary of State is a party to the proceedings), …
>
> (iii) the court may make such a declaration if it considers that the following two conditions are met.
>
> (4) The first condition is that –

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

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

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

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

(iii) section 17(1) of the Regulation of Investigatory Powers Act 2000 (exclusion for intercept material),

(iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section.

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

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

(7) The court must not consider an application by the Secretary of State under sub-section 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").

(9) Rules of court may –

(a) provide for notification to the Secretary of State by a party to relevant civil proceedings, or by the court concerned, of proceedings to which a declaration under this section may be relevant;

(b) provide for a stay or sist of relevant civil proceedings (whether on an application by a party to the proceedings or by the court concerned of its own motion) where a person is considering whether to apply for a declaration under this section;

(c) provide for the Secretary of State, if not a party to proceedings in relation to which there is a declaration under this section or proceedings for or about such a declaration, to be joined as a party to the proceedings.

(10) Rules of court must make provision –

(a) requiring the person, before making an application under sub-section (2)(a), to give notice of the person's intention to make an application to every other person entitled to make such an application in relation to the relevant civil proceedings;

(b) requiring the applicant to inform every other such person of the outcome of the application.

(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 …

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

[5] If a declaration is made under section 6 further provisions within Part II of the JSA are then engaged. Under Section 7 of the Act the court must keep the declaration under review. It may, moreover, at any time revoke the declaration if it considers that it is no longer in the interests of the fair and effective administration of justice for it to remain in place. Applications for the withholding of materials are governed by section 8. This is done by way of specifying what must be secured by rules of court in the following terms:

> "8. Determination by court of application 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 to disclose it, or

(b) is required to provide another party to the proceedings with a summary of the 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 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."

[6] The relevant rules in Northern Ireland are located within the Rules of the Court of Judicature (Northern Ireland) Amendment 2013 which brings in a new Order 126.

[7] Provision is made in section 9 of the Act for the appointment by the appropriate law officer of a special advocate to represent the interests of a party in any section 6 proceedings from which the party (and any legal representative of the party) is excluded. In accordance with section 14 (2) (c) of the Act 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.

Judicial Review Application

[8] In order to assess whether the conditions necessary for the making of a declaration under section 6 are satisfied, it is first important to have firm grip of the issues which arise in the judicial review application.

[9] As already noted, the judicial review takes the form of a challenge to a decision made by the Secretary of State declining to order that there should be a public inquiry into the preventability of the Omagh bomb explosion.

[10] The applicant maintains that he has evidence which suggests that the issue of preventability of the explosion is one fit for investigation. As a result of the leave hearing in this case, allegations of preventability have been collated in a single document. The allegations are wide-ranging. They read as follows:

> "**Allegations of preventability**
>
> 1. An anonymous phone call of 4 August 1998, in which it was indicated that an attack would be made on police on 15 August 1998, and the disappearance of the `threat book' at Omagh police station, which should have recorded all such threats as received in the anonymous phone call of 4 August 1998.
>
> 2. Information passed to police between June and August 1998 by the former British security force agent known by the name of Kevin Fulton relating to dissident Republican activity.
>
> 3. Information provided by David Rupert, an agent being jointly operated and managed by the FBI and MI5 at the time of the Omagh bomb, who had established and developed links with dissident Republicans; in particular, through e-mails he provided information on dissident Republican activity including identifying Omagh as a potential target.
>
> 4. Information sent to the RUC by An Garda Siochana on Thursday 13 August 1998, relating to the particulars of the red Vauxhall Cavalier that was used in the Omagh bomb.
>
> 5. A briefing to the Senior Operational Commander South Region on 14 August 1998 indicating that information had been received from An Garda Siochana in connection with a potential borne improvised

explosive device on 15 August, resulting in a military operation being deployed in the South Armagh/South Down area on the morning of 15 August 1998.

6. Surveillance operations relating to events surrounding the Omagh bomb that were reported on in the BBC television programme, Panorama; in particular, telephone and vehicle monitoring carried out by the Government's Communication Headquarters.

7. The tracking and pattern of telephone usage by dissident Republicans and the connections arising between different bomb attacks, including the same mobile telephone being used in the Omagh bomb and the Banbridge bomb on 1 August 1998.

8. Information shared by an Garda Siochana with the RUC relating to intelligence obtained by Detective John White from the agent known by the name of Paddy Dixon, relating to dissident Republican activity; in 2002 Detective White made statements to the PSNI regarding the information that had been obtained.

9. Norman Baxter's evidence to the Northern Ireland Affairs Committee to the effect that investigators into previous attacks in Moira (20 February), Portadown (9 May) and Banbridge (1 August) and Lisburn (30 April) did not have access to intelligence which may have enabled them to disrupt the dissident gang by way of arrest or house searches prior to the Omagh bomb.

10. Information relating to the possibility that there was a surveillance operation taking place on 15 August 1998, which may have involved methods of surveillance employed by the FBI."

[11] From the baseline of the above, the applicant invokes what he describes as the substantive duty under Article 2 ECHR in this area and says that there is "a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual" (Osman v United Kingdom (1998) 29 EHRR 245 at paragraph 115). The duty is take such steps as are reasonable in all the circumstances to respond to a real and immediate risk to life, of which the State is or should be aware: see Re Officer L [2007] UKHL 36 at paragraphs [20] and [21].

[12] The applicant therefore contends that this duty was breached by the United Kingdom authorities in the present case or at least that this contention is arguable. It is further submitted that it is the case that there is an unfulfilled duty on the State to investigate the death in accordance with the standards set by Article 2. Minimum requirements in respect of such an investigation have to be met which include that –

- The authorities must act of their own motion.
- The investigation must be independent.
- The investigation must be effective in the sense that it must be conducted in a manner that does not undermine its ability to reach the relevant facts.
- The investigation must be reasonably prompt.
- There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory; the degree of public scrutiny required may well vary from case to case.
- There must be involvement of the next of kin to the extent necessary to safeguard his or her legitimate interests.

[13] Based on the above, the applicant argues that in fact there has been no or no adequate investigation carried out in this case so as to satisfy the above obligation. Hence it is said that the Secretary of State was bound to order a public inquiry and that the court should compel the Secretary of State to do so. Attention was drawn, in support of the principles which apply in this area, to the case of R (Palmer and another) v HM Coroner for the County of Worcestershire [2011] EWHC 1453 Admin, in particular, at paragraphs [55] and [56].

The Respondent's View

[14] The respondent contests the judicial review on a number of grounds. In broad terms, it is argued that due to the date of the deaths here at issue, which predate the commencement of the Human Rights Act 1998, Article 2 has no application to the case. Alternatively it is argued that the only way Article 2 could enter the case would be through the notion that any obligation to investigate would arise from the Brecknell v United Kingdom test being surmounted. Brecknell is a Strasbourg case, reported at (2008) 46 EHRR 42 at 95, where it has been held that where there has already been an investigation into a death, the need for further investigation might revive in certain circumstances where there was a "plausible or credible allegation, piece of evidence or item of information relevant to the identification and eventual prosecution or punishment of the perpetrator of an unlawful killing" (paragraph 71). No duty arises, however, unless the allegation in question meets the threshold of plausibility or credibility. The respondent in this case submits that the Brecknell test has not been satisfied. This is so, it is argued, on the basis that there has been no fresh material which has become available which is relevant to the identification and prosecution of any of the perpetrators. But also, it is argued, that the allegations of preventability which have been made in this case do not meet the Brecknell threshold of being plausible or credible allegations. But

even if this was wrong, a further argument relied on by the respondent is that any investigative duty which arises in this case has already been satisfied by the numerous reports, inquiries, and reviews which have already been carried out by a wide range of bodies.

[15] These are referred to by the Secretary of State in her open statement of reasons. She said:

> "10. For the purposes of these proceedings, the investigations conducted by the State into the circumstances of the bombing can be divided into seven separate strands which, collectively can be relied upon to establish compliance with any Article 2 duty.
>
> (i) The police investigation initiated immediately after the bombing, which has included internal review and two prosecutions – one unsuccessful (Sean Hoey) and one on-going (Seamus Daly).
>
> (ii) The first investigation by the Police Ombudsman for Northern Ireland ("PONI") [December 2001].
>
> (iii) The external review carried out by Merseyside Police, commissioned by the Policing Board ('NIPB') in the aftermath of the first PONI investigation. [April 2003]
>
> (iv) The report of Sir Peter Gibson into the alleged availability of intercept intelligence in relation to the bombing. [January 2009]
>
> (v) The PONI investigation into the anonymous phone call of 4 August 1998. [September 2009]
>
> (vi) The investigation by the Northern Ireland Affairs Committee ("NIAC"). [February 2010]
>
> (vii) The investigation by PONI into the handling of certain intelligence and its relationship with Government Communications Headquarters in relation to the Omagh bombing on 15 August 1998. [October 2014]

> 11. In addition to the above investigations, there have been a number of other investigations in proceedings arising from the Omagh bombing and which may be relevant to any Article 2 duty. In September/October 2000, Coroner John Lecky carried out inquests in relation to the deaths of those killed in the atrocity. In tandem with the appointment of the Merseyside detectives as internal investigators, the NIPB also announced the other relevant measures. The first was an examination of policy, practices and procedures in relation to murder inquiries in Northern Ireland, carried out by Mr David Blakely (HMI) who provided a comprehensive report in May 2003. The second was a review of Special Branch, conducted by Mr Dan Crompton through Her Majesty's Inspector of Constabularies with a report being published in October 2002. Also of relevance to the Omagh bomb investigation was the McNally report, commissioned by the Minister for Justice in Ireland following the March 2002 PONI report into the activity of An Garda Síochána officers in 1998. In 2005 after the criminal prosecution of Sean Hoey in relation to the Omagh bomb, there was a further NIPB review headed by Sir Dan Crompton and Mr David Blakely. In addition the families of many of those killed and injured in the Omagh bombing have brought civil proceedings against a number of individuals allegedly responsible for perpetrating the Omagh bombing."

[16] It is therefore the Secretary of State's view that "[f]or the purposes of responding to the claim that the State is subject to a duty to investigate further the allegations of preventability, it will be important to consider the extent of the investigations which have already been carried out and the materials which were considered during those investigations" (paragraph 13 of the open statement of reasons).

The Issues

[17] From the above description of the respective positions it would appear that the court hearing this judicial review application will be faced with a number of issues about which it may be expected there will be significant disputes of fact. In particular:

(a) The credibility and plausibility of the allegations of preventability will, it appears, be the subject of challenge by the introduction of evidence by the

Secretary of State. The applicant, in his grounding affidavit, has set out in substantial detail the claims on which he bases his case. However the intention of the Secretary of State seems to be to seek to demolish these as being implausible and lacking in credibility.

(b) Substantial evidence it would appear will also be adduced by the Secretary of State for the purpose of demonstrating that there has already been extensive investigation carried out by or on behalf of the State. It would appear that substantial evidence will be placed before the court to demonstrate that there has in fact already been full investigation into the aspects of preventability which the applicant relies on to substantiate his case for a public inquiry.

[18] While the above appears to the court to encapsulate the state of the issues before it, the court has asked itself what its role ought to be in the context of assessing these issues for the purpose of this section 6 application. A question arises as whether the court is obliged to view the lines which have been drawn at face value or whether it is necessary for the court to reach a conclusion about the arguability or indeed the strength of the Secretary of State's position as it has been explained. Is it for the court to ask itself whether it is necessary for the Secretary of State, in order to be able to defend the judicial review, to go into detail in respect of the issues identified and lay before the court the broad width of the materials which it would appear he or she has in mind putting before the court, for example, detailed evidence repudiating the plausibility and credibility of the applicant's preventability case and similarly detailed evidence in respect of the various investigations which have already been carried out?

[19] On these issues, it appears to the court that it is unlikely that it would be any part of the intention of the legislature when establishing the grounds rules for a section 6 declaration that the court would itself be seeking to reach a conclusion on the issue of whether the Secretary of State's proposed defence would be likely to be successful. Such an approach would appear to involve the court pre-judging the outcome and the merits of the proposed defence. Such would hardly be appropriate in the context of section 6. But if the court, on the other hand, was to adopt the view that the Secretary of State is entitled to draw the lines of defence for the purpose of section 6 just where he or she pleases without any judicial control, this could open the door to a situation where the Secretary of State may obtain a section 6 declaration simply because he or she is willing to introduce sensitive material, even though it might not strictly be needed for the purpose of her defence.

[20] It therefore appears to the court that it needs to strike a balance and that this should involve it considering whether the Secretary of State's defence is arguable and whether the introduction of sensitive material as part of it is a legitimate and necessary, rather than just being convenient.

[21] The test proposed above appears to the court to be broadly consistent with the approach of the High Court and Court of Appeal in the case of Sarkandi and Others [2015] EWCA Civ 687: see paragraph [31] in the judgment of Richards LJ.

[22] The court's posture on this issue, which will later feed into its consideration of the statutory conditions, is that it accepts that the Secretary of State legitimately needs to place before the court a detailed account of the investigations which have to date been carried out in order both to neutralise the credibility and plausibility of the allegations raised by the judicial review applicant but also to rebut the suggestion that the State's duty under Article 2, if it applies to this case, has gone unfulfilled. The court is unable to conclude that either line of defence is not open to the Secretary of State and/or is not arguable.

Candour

[23] As these proceedings take the form of a judicial review application there can be little doubt that in the conduct of the proceedings the respondent will owe to the court a duty of candour. As a matter of modern judicial review jurisprudence the court would expect to be fully sighted on relevant materials which may have an impact on the court's consideration of the issues in this case. As Laws LJ put the matter in R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 "there is…a very high duty on public authority respondents, not least central government, to assist with full and accurate explanations of all facts relevant to the issue the court must decide"(see paragraph [50]). It will, therefore, be necessary to be alert to this as it will be likely to have an effect on the quantum of material which the respondent would be required to disclose.

Section 6 (7) of the JSA

[24] The above sub-section has already been set out *supra.* It is of jurisdictional importance in that it instructs the court not to consider an application of this type unless it is satisfied that the Secretary of State has, before making it, considered whether to make a claim for public interest immunity in relation to the material on which the application is based.

[25] In this case the applicant submits that there is clear and indisputable evidence that the required consideration to a claim for public interest immunity has taken place. For this purpose reliance has been placed on the Secretary of State's open statement of reasons. Under the heading "Consideration of PII Claim" the Secretary of State stated as follows:

> "14. Before making this application I have considered whether to make a claim for public interest immunity…or advise another person to make such a claim in respect of the material on which the application is based…

> 15. Having considered whether to do so, I am satisfied that the material which would otherwise be required to be disclosed in these proceedings includes sensitive material as defined at section 6 (11) of the 2013 Act.
>
> 16. I have concluded that the sensitive material in this case (a sample of which is appended to the closed statement of reasons in this application) cannot be disclosed in the course of open proceedings because of the damage such disclosure would cause to the interests of national security. A successful claim for public interest immunity of that material would mean that it could not be relied upon and would not be available to the Court at the hearing of the substantive judicial review application. The Applicant's allegations of preventability and how these issues have featured in the various investigations are both serious and important. It would therefore be highly unsatisfactory if the Court, when determining whether a duty of investigation arises out of those allegations, was unable to have access to all of the material relevant to them.
>
> 17. I have therefore concluded that the claims advanced cannot be properly or fairly determined solely on the basis of the open non-sensitive material. In the light of the above, I have decided not to make a PII claim now, nor would I advise another person to make such a claim at this time. A potential consequence of a successful PII claim might be a Carnduff application raising at least the prospect that the Applicant's claims would not be tried at all. I have therefore concluded that the most appropriate course of action is to make this application".

[26] It is the court's view that the above statements are sufficient to meet the statutory requirement found in section 6(7) as they fulfil it.

[27] The above conclusion also appears to be consistent with authority in this area. In CF v Security Service and Others [2014] 2 AER 378 Irwin J, commenting on section 6 (7), said:

> "The precondition for a declaration set out in section 6(7) of the 2013 Act is agreed to have been fulfilled since the Secretary of State has not merely considered whether to make a claim for PII in relation to the material on which

> this application is based but has done so before making the application" (see paragraph [37]).

[28] In particular it also appears from Irwin J's judgment that the language of the sub-section does not impose any obligation for the Secretary of State to have completed the public immunity process before making an application of the sort before the court.

[29] Later judgments appear to follow a similar approach on this point: see McGartland v Secretary of State for the Home Department [2015] EWCA Civ 686 at paragraph [47] (vii) and XH v Secretary of State for the Home Department [2015 EWHC 2932 Admin at paragraph [12].

[30] A decision which may go further than the authorities cited above is that of McCafferty v Secretary of State for Northern Ireland [2016] NIQB 47. When considering section 6(7) Stephens J at paragraph [26] commented that it was "not formulaic" and required the Secretary of State to consider "in essence whether having regard to sensitive material, PII rather than an application for a declaration is the more appropriate course in the relevant civil proceedings". This required "consideration of whether the particular claim could fairly be tried without the sensitive material".

[31] In so far as what Stephens J has said adds to the meaning to be given to section 6(7) (as against being of importance to the issue of the fulfilment of the second condition – a matter he appears to leave open at paragraph [27]) - it is the court's view that when the passage in the open statement of reasons quoted above is read as a whole it can be seen that the Secretary of State has considered the question of the appropriate course as between the assertion of PII and an application for a declaration but has decided that the latter is the appropriate course in this case at this time.

[32] The court will therefore hold that the statutory requirement in section 6 (7) has been satisfied in this case.

The First Condition

[33] The first condition which must be satisfied is that found in section 6 (4) of the Act. For present purposes this condition may be satisfied either where the court is satisfied that:

> "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)" (s.6 (4) (a)) or where the court is satisfied that:

> "a party to the proceedings would be required to make such a disclosure were it not for…(i) the possibility of a claim for public interest immunity in relation to the material" (s.6 (4) (b) (i)).

[34] In respect of the first condition the Secretary of State has said in the open statement of reasons that she had been advised by counsel that "sensitive material would have to be disclosed were it not for one or more of the reasons found in section 6 (4) (b)".

[35] The court, in considering the question of whether the first condition is satisfied has concentrated on whether the Secretary of State, absent the possibility of a claim for public interest immunity, would be required to disclose sensitive material.

[36] This has meant that the court has had to reflect on the discussion above at paragraphs [14]-[20] about the ambit of the disclosure which would have to be made by the Secretary of State given the nature of the issues in the litigation and the lines of defence thereto as well as the requirement of disclosure which arises by reason of the nature of judicial review proceedings. The court has also had to have regard to the materials which have been presented to it by the Secretary of State as samples of material which would, in the Secretary of State's submission, have to be disclosed.

[37] In considering that material the court has had to have regard to both open material which has been tendered to it and closed material which has been tendered to it. In the case of the latter the Special Advocate as well as the court has seen that material and it was the subject of discussion at the closed hearing held in respect of this application.

[38] In the course of his submissions the Special Advocate accepted that among the closed materials he had seen were relevant materials which fall within the statutory definition of sensitive materials (though he did not concede that all of the material was of this character) and the court has reached the same conclusion. The question then becomes whether such materials would for the reasons given have to be disclosed were it not for the possibility of a public interest immunity claim. On this question, the court has concluded that because of the nature of the Secretary of State's defences to this proceedings and the need for the Secretary of State to perform the duty of candour which arises from the nature of the proceedings, disclosure of sensitive material will be a feature of significance in this case. In the court's view, without prejudice to the generality of the above, this is particularly the case in respect of the Secretary of State's contention that any Article 2 duty to investigate has already being performed by reason of the extensive range of investigative steps upon which the Secretary of State relies. But it is also clear that the requirements of candour would very likely have the effect in this case of requiring the Secretary of State to disclose sensitive materials which form elements in the relevant factual matrix.

[39] As far as legal authority is concerned, there is some helpful guidance available in respect of the first condition. In Sarkandi and Others Richards LJ at paragraph [50] referring to the first condition said:

> "The first condition does not require the court to consider what the outcome of a PII claim might be. What it looks to is whether a party would be required to disclose sensitive material were it not for the possibility of a PII claim. The fact that a PII claim might lead to the production of a non-sensitive summary as the price of withholding the primary sensitive material is neither here nor there for the purpose of deciding whether the first condition is met".

[40] At paragraph [43] in Sarkandi Richards LJ, considering the position of the Secretary of State in that case, which was also a judicial review, remarked that:

> "The Secretary of state's position is that material taken into account, or at least some of that material, is to be found in the closed material filed in support of the s.6 application. I am satisfied that the court can properly proceed on this basis… The Secretary of State is entitled to rely on that material in defending the rationality of his decision … and he would as a matter of principle be required to disclose to the claimants (subject to the possibility of a PII claim) any material so relied on. The requirement of disclosure would also arise from the Secretary of State's duty to provide the court with a full explanation of why he made the decision under challenge".

It is the court's view that, while the facts and issues in that case were different from those of the case now before the court, the mode of analysis is similar and can broadly be applied to the case before it.

[41] In the circumstances of the present case, the court is satisfied that the first condition has been shown to be satisfied on the material before the court.

The Second Condition

[42] The second condition is found at section 6(5) of the JSA. For a declaration to be made under section 6 the court must be satisfied that it is in the interests of the fair and effective administration of justice in the proceedings to make the declaration. Self-evidently the terms of this condition introduce wider considerations which have been reflected in the case-law to date.

[43] In Sarkandi Richards LJ had this to say at paragraph [57]:

> "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 Sumption and Lord Carnwath agreed) on the jurisdiction issue in Bank Mellat v Her Majesty's Treasury (No 2)…
>
> > '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 it can even give a judgment which is only available to the parties. Such a course can 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 the 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'.

[58] 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 only 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".

[44] Similar sentiments are found in this jurisdiction in McCafferty: see: paragraph [30]. Stephens J, in particular, placed emphasis on the need to weigh the fairness and effectiveness of a closed material procedure to the plaintiff and to the defendant. He endorsed paragraph [61] of Sarkandi where Richards LJ stated that "it cannot be in the interests of the fair and effective administration of justice in the proceedings to make a section 6 declaration and thereby open the gateway to a closed material procedure unless it is necessary to do so and it will not be necessary to make a declaration if there are satisfactory alternatives".

[45] Also consonant with these authorities is the judgment of Burnett LJ in XH v Secretary of State for the Home Department: for citation see paragraph [29] *supra*.

[46] In the present case it is therefore necessary for the court, bearing in mind the sentiments which ought to inform its judgment as discussed above, to consider possible other ways of proceeding apart from the making of a section 6 declaration. The options in a case of this kind will, however, be limited. It may be that the judicial review proceedings could be defended without any reference to sensitive material or with sensitive material being taken out of the equation by the use of public interest immunity, perhaps with the mitigation which could be introduced by a process of gisting. Or it may be that if sensitive material is excluded this will would produce such unfairness to the Secretary of State that, under the Carnduff principle, no viable trial could take place at all. On the other hand, if a section 6 declaration is made this would not lead to the exclusion of sensitive material which would be capable of being put before the court and at the same time be seen by the applicant's special advocate, albeit that the special advocate will be unable to obtain the applicant's instructions in respect of it.

[47] In this area it is worthwhile to rehearse briefly the position of the parties before the court. The Secretary of State's case, as explained by Mr Eady, is that as leave has been granted on the basis of open material only, the court must at a full hearing revisit all the issues in the light of both open and closed material. The only way to effectively do this is *via* the section 6 declaration route. A Carnduff resolution of this case would serve no-one's interest and would fail altogether to ventilate the important issues of public interest which have arisen. In his submission, the sensitive material in this case cannot be viewed as peripheral but instead is central to a consideration of whether in fact, as contended for by the applicant, the state arguably failed to take reasonable steps to deal with a real and immediate threat to life – a standard which is not easily met. The court cannot be left to determine this having sight only of open material and it is therefore necessary

for the court to permit the use of mechanism of a section 6 declaration to enable the court to be fully informed, an option Parliament has facilitated by the introduction of the JSA. The use of PII, counsel argued, would mean that the Secretary of State would be unable to defend him or herself properly and this would be likely to lead to a situation where, in the absence of key information, the wrong result would be achieved when the correct result could have been achieved by the use of the JSA. It could not, moreover, be in the interests of the applicant to succeed in the proceedings because the court was only partially sighted as to the available evidence.

[48] Mr Underwood, in contrast, laid emphasis on what he viewed as the modest hurdle the applicant needed to surmount. In his submission the information in the public domain, already in the applicant's possession, means that it is arguable that there has been a breach of the State's obligation under Article 2 on the basis that the State had not discharged its responsibility to investigate. There has been insufficient attention given to the issue of preventability of the explosion and such investigations as there had been were not of a type which the relevant authorities could rely on and lacked focus on the overall picture and circumstances.

[49] In simple terms, counsel submitted that it was unnecessary for a declaration to be made in this case. There were viable alternatives which the Secretary of State had available. The onus was on the Secretary of State to establish that he or she would be *required* to disclose material which would be damaging to the interests of national security and the application could only succeed if it was in the interests of fair and effective administration of justice. Nothing in the open material provided by the Secretary of State established that either of the conditions in section 6 had made out and indeed some of the open material supported the applicant's contentions. There was no need to have regard at all to intelligence in order for the court to carry its functions at a full hearing of the application.

[50] Furthermore, in deciding the section 6 application the court had to take into account the overall public interest in resolving the issue; the fact that the applicant's case was about the vindication of his rights in law and was not a money claim; the need to avoid secret justice and promote public scrutiny; and the ability of the Secretary of State to make use of public interest immunity in a way which would ensure that the substance of the issues is disclosed.

[51] In reaching its conclusions on all issues, but particularly in respect of the second condition, the court acknowledges that it has had the advantage of considering the Secretary of State's closed statement of reasons as well as a substantial volume of sample closed materials. It also has had the advantage of considering a closed skeleton argument filed on behalf of the Secretary of State and one prepared by the Special Advocate together with submissions in a short closed session from both Mr Eadie and Mr Scoffield.

[52] The court is satisfied that the sample of closed material which it has seen contains substantial reference to sensitive material the disclosure of which would be damaging to the interests of national security. This material would, in the court's view, have to be disclosed by the Secretary of State in order both to make the defences it seeks to assert and to meet the requirements of candour which rest upon him or her for the purpose of the judicial review. The court is also satisfied that for those purposes it is necessary for the detailed expositions found in the sample material which has been provided to be available to the court at a full hearing.

[53] While the court has considered other options for dealing with the sample material, other than *via* a section 6 declaration, it is of the view that these likely would not in this case provide satisfactory alternatives to the making of the section 6 declaration sought. In particular, the court believes that if the Secretary of State was to make a public interest immunity application is respect of those parts of the materials which require protection from disclosure such an application would be likely to be successful given the sensitivity of the material. If this is right, the effect therefore would be that the material would be put beyond use in the proceedings to the disadvantage of the interests of justice.

[54] Nor does the option of creating summaries or gisting in the event of a successful public interest immunity claim appear to the court to be attractive in the light of the importance of the detail contained in many of the documents which form part of the sample material before the court in closed session. The detail of the documentation is integral to its importance in the litigation and, in the court's estimation, much would be lost if the actual materials are not made available for the court's evaluation.

[55] Another suggestion made on behalf of the applicant as an alternative to the declaration sought was the use of a confidentiality ring so that sensitive material could circulate within those in the ring. This idea has some support in authority (see, in particular, in the judgment of Moses LJ in R (Mohammed) v Secretary of State for Defence [2012] EWHC 3454 Admin) but it has yet to be favoured in a JSA case. The jurisprudence was reviewed by Irwin J in CF where there is reference to the use of this device to protect information in a variety of contexts, including where commercial secrets were involved. However, ultimately, the judge was not persuaded of its suitability in the case before him. At paragraph [51] he said:

> "The material concerned is plainly sensitive for national security reasons and, as such, the claimants could not conceivably be admitted into the confidentiality ring, given their history. The effect would be that the claimants' lawyers would be privy to a great raft of information about which they could not speak to their clients. The relationship between them and their clients would be hobbled. The risk of inadvertent disclosure would in my judgment be high, and such disclosure

> might arise from entirely innocent, and indeed necessary, pregnant silence by a lawyer. There would be no special advocates. There would be no lawyers for the claimants who could communicate freely with them. I reach this view without the slightest disrespect to the claimants' legal team, their integrity, professional probity or capacity. It simply seems to me they would be in an impossible position. Certainly, the risks attendant on a confidentiality ring are high, in my view, and would be so here."

While the present case is different on the facts from CF, and the position of the judicial review applicant in this case, who has no allegations against him, contrasts with that of the plaintiff in CF, nonetheless the difficulty of operating a confidentiality ring is not to be underestimated.

[56] In another case – albeit not one under the new JSA arrangements – Ouseley J, a judge with considerable experience in relation to the handling of sensitive materials, also was not attracted to the use of such a ring and indeed was sceptical about its use. In AHK v Secretary of State for the Home Department; AM v Secretary of State for the Home Department [2013] EWHC 1426 Admin at paragraph [23] *et seq* he referred to a series of risks which he had discussed in a SIAC case in 2006. These included the risk of inadvertent disclosure; the difficulties which would arise if, contrary to the arrangements, disclosure took place; and the problem of how the Commission or a court could decide who was safe to be included in the ring.

[57] In view of these difficulties the court is not of the view that the use of a confidentiality ring is likely to be a satisfactory method of dealing with sensitive information in this case. While superficially there might be an attraction in the use of a confidentiality ring or its use alongside other measures, most obviously *in camera* hearings, these do not, in the court's estimation, offer a sufficient level of protection for the information as to enable the court to place its confidence in them as a suitable alternative way of dealing with such materials. It is not an appropriate way to proceed in this context for the court to take risks with information whose disclosure (whether inadvertent or not) can bring with it serious damage to the interests of national security.

[58] Finally the suggestion was made on behalf of the applicant for judicial review that the court could itself operate the requirements of candour in a flexible way which could reduce the need to disclose sensitive materials. The court can see that such an approach might possibly be a viable one in some circumstances but it does not think that it would be likely to be of any substantial advantage in this case given that it has already recognised the importance of disclosure of sensitive information in the context of the Secretary of State being able to marshal his or her defence to the litigation. Given this, even if the court allowed for some mitigation in the rigor of

the Quark Fishing approach to candour, this would not, in the court's view, make serious inroads into, never mind, obviate the problem of how to deal with sensitive material in this case.

[59] In respect of its overall conclusion in respect of the test found in section 6 (5), applying the sort of approach exemplified in such cases as Sarkandi and XY, the court considers that the second condition is met.

Discretion

[60] It is not in dispute between the parties to this litigation that even if the court is satisfied about the existence of the pre-condition found in section 6(7) and even if it is also satisfied about the application meeting the two conditions which have just been discussed, nonetheless, the actual making of a declaration as sought is discretionary: see the terms of section 6(3).

[61] Mr Underwood urges the court not to make the declaration sought even if satisfied about the matters above. He does so principally on the basis that the scheme of the 2013 Act, he says, was aimed at intractable problems the United Kingdom Government was facing in the context claims for damages. The Act, he argues, was not intended for use in a case such as the present. In support of his argument counsel relied on a number of extracts from the parliamentary debates on the Bill before it became an Act which the court has considered.

[62] The question of the ambit of the court's discretion has been the subject of consideration in some of the authorities. In particular, it was referred to by Burnett LJ in XY where he faced a not dissimilar submission made by Mr Underwood. However, at paragraph [22] Burnett LJ said in words this court would endorse:

> "The language of s.6, 'may', undoubtedly imports a discretion to refuse to make the declaration even if the statutory pre-condition and the two conditions are satisfied. The court is not obliged to make the declaration. Parliament has chosen not to require there to be a closed material procedure in these circumstances. That is likely to have been because of its sensitivity in avoiding dictating how proceedings should be conducted in an environment where the range of circumstances in which the question of a s.6 declaration might arise are very wide indeed. There may be circumstances in which it would not be appropriate to make the declaration after a finding that the statutory conditions are satisfied. That said, given that the second condition requires the court to conclude that it is in the interests of the fair and effective administration of justice in the proceedings to make the declaration, they are likely to be few and far between.

> There is nothing about the circumstances of this case which has led me to conclude that as a matter of discretion the declaration should not be made".

[63] Having regard to the above and bearing in mind the range of situations in which the making of a declaration under section 6 may arise, the court is unable to say that it is persuaded to decline to make a declaration on the facts of this case, either on the basis of the specific submission advanced by Mr Underwood in respect of the limited purpose of the legislation (which the court regards as too narrow) or more generally.

Conclusion

[64] The court will make the section 6 declaration sought by the Secretary of State in this application.

[65] The court will convene a further hearing to deal with the directions required by Order 126 Rule 25(1).