Neutral Citation No. [2016] NIQB 47 | *Ref:* STE9987

Judgment: approved by the Court for handing down | ***Delivered:*** 26/5/2016

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

_____

Between

TERENCE DAMIEN PATRICK McCAFFERTY

Plaintiff:

-and-

SECRETARY OF STATE FOR NORTHERN IRELAND

Defendant:

STEPHENS J

Introduction

[1] This is an application by the Secretary of State for Northern Ireland ("the Secretary of State") for a declaration pursuant to Section 6 of the Justice and Security Act 2013 ("the 2013 Act") and Order 126, Rule 21 of the Rules of the Court of Judicature (Northern Ireland) 1980 that these proceedings are proceedings in which a closed material application may be made to the court. The proceedings in question are a claim by Terence Damien Patrick McCafferty ("the plaintiff") against the Secretary of State in relation to the alleged unlawful revocation on 18 December 2008 by the then Secretary of State of a licence, under which the plaintiff was discharged from prison on 21 November 2008, which revocation resulted in the plaintiff returning to prison on 22 December 2008 and remaining in prison until 1 April 2010.

[2] The application for a declaration by the Secretary of State involved both an open statement of reasons dated 19 June 2014 and a closed statement of reasons. In such circumstances the Advocate General for Northern Ireland, pursuant to Section 9 of the 2013 Act, appointed special advocates "to represent the interests of" the plaintiff in that part of this application "from which the plaintiff and his legal representatives are excluded."

[3] Dr McGleenan QC and Mr Coll QC appeared on behalf of the Secretary of State. Mr O'Donoghue QC and Mr Devine appeared on behalf of the plaintiff in those parts of this application which were open. Mr Simpson QC and Ms Murnaghan QC were the special advocates appointed by the Advocate General for Northern Ireland to represent the interests of the plaintiff in those parts of this application which were closed. I am grateful to all counsel for their assistance. In this open judgment I give reasons for my decision. In the event, it is unnecessary to produce a closed judgment in addition to this open judgment, see *McGartland and another v Secretary of State for the Home Department* [2015] EWCA Civ 686 at paragraph [8] and *XH v Secretary of State for the Home Department* [2015] EWHC 2932 (Admin) at paragraph [3].

The role of special advocates

[4] Section 9 of the 2013 Act provides that a special advocate is a person appointed *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. Sections 8 (1) and 14 define "section 6 proceedings" as any relevant civil proceedings in relation to which there is a declaration under Section 6 and includes any proceedings *treated* as Section 6 proceedings by any enactment. Section 11 (4) (a) provides that, amongst other proceedings, proceedings on, or in relation to, an application for a declaration under Section 6 are to be *treated* as Section 6 proceedings. The application for a declaration is within the definition of Section 6 proceedings. Mr Simpson submitted that as a special advocate only represented the interests of the plaintiff in those parts of the proceedings from which the party (and any legal representative of the party) is excluded that the special advocates did not have any ability to represent the interests of the plaintiff in the open proceedings. In support of that submission he relied, not only on Section 9, but also on Order 129 Rule 9 which is headed "Functions of a special advocate." That Rule provides

> "9. The functions of a special advocate are to represent the interests of a specially represented party by—
>
> (a) making submissions to the court at any hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded;
>
> (b) adducing evidence and cross-examining witnesses at any such hearing, or part of a hearing;

(c) making applications to the Court or seeking directions from the Court where necessary; and

(d) making written submissions to the Court."

It is expressly made clear in Rule 9 (a) and (b) that those functions are limited to any hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded. That is in contrast to Rule 9 (c) and (d) which refer to making applications or written submissions to the Court without any restriction as to whether those applications or submissions can only be at any hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded.

[5] It is not necessary to determine whether the special advocates have any role to play in the open proceedings as the only issue that has arisen in relation to their functions was whether they had the ability to make binding concessions on behalf of the plaintiff during the closed hearing.

[6] On 5 May 2016 the special advocates, having examined the closed material, made a request to the court under Order 129 Rule 10 (4) for a direction authorising them to communicate with the specially represented party's legal representatives. I granted that request and allowed the special advocates to make the following communication with the plaintiff's legal representatives:-

> "Having considered all relevant information, in closed and in open, the Special Advocates accept that the legislative test has been met for a section 6 closed material procedure under the 2013 Act.
>
> The Special Advocates contend that there are issues which should be challenged in this case, but accept that this challenge is appropriate in the closed material procedure envisaged in the 2013 Act.
>
> This conclusion has implications for the scope of the hearing listed for 11 and 12 May 2016. In these circumstances the Special Advocates assert that the Plaintiff's OPEN representatives should have the opportunity to consider how they wish to approach that hearing."

Mr O'Donoghue, on behalf of the plaintiff, responded by asserting that the special advocates are not responsible to the plaintiff (Section 9(4)) and they have no authority to make concessions on his behalf. Accordingly, even though that may be their view, having reviewed the closed material, the Court remains bound to

consider the application in full and, in particular, to be satisfied that the two conditions set out in Section 6 of the 2013 Act are met. Dr McGleenan, on behalf of the defendant, agreed that the Court remains bound to consider the application and determine whether the Section 6 conditions are met. I accept the submissions of Mr O'Donoghue and Dr McGleenan. I consider that the special advocates do not have any authority from the plaintiff to make binding concessions on his behalf.

Factual background and the pleadings

[7] On 1 July 2005 at Belfast Crown Court the plaintiff was sentenced to 12 years' imprisonment for possessing an improvised explosive incendiary device with intent to endanger life or cause serious injury to property contrary to Section 3(1)(b) of the Explosive Substances Act 1883. The sentence was due to expire on 22 November 2010 but in accordance with Prison Rules and Section 1(2) of the Northern Ireland (Remission of Sentences) Act 1995 the plaintiff was entitled to be released on licence before that date and was in fact released on licence on 21 November 2008. Accordingly, from that date the plaintiff would have remained on licence, but at liberty, until the expiry of his sentence on 22 November 2010.

[8] The Secretary of State may revoke a licence under Section 1(3) of the Northern Ireland (Remission of Sentences) Act 1995 if it appears to him that a person's liberty "would present a risk to the safety of others or that he is likely to commit further offences …." This was not only a statutory power of revocation but also was expressly set out in the licence that the plaintiff received on his release from prison on 21 November 2008. On 18 December 2008 the Minister of State, on behalf of the then Secretary of State, exercised the power to revoke the licence on both of the stated grounds and the plaintiff was returned to custody on 22 December 2008.

[9] In the letter to the plaintiff dated 18 December 2008 advising him of the reasons for the revocation of his licence the plaintiff was told that the Minister of State:-

> "… *had regard to information made available to him* that you are a leading and active member of the Real Irish Republican Army (RIRA) who held the position of 'Officer Commanding' of RIRA prisoners within HMP Maghaberry prior to your release from prison in November 2008. During your sentence you remained in regular contact with senior RIRA members and involved in directing RIRA business and displayed a clear desire to continue your involvement in RIRA activity after your release, including in becoming involved in plans for attacks that would present a threat to public safety.

> From immediately on your release, you have been in regular contact with leading RIRA figures. It is assessed that you have taken up a leading role in the organisation and have been involved in plans to conduct attacks." (my emphasis)

The defendant asserts that *the information* to which the Minister of State had regard and which was the basis for the decision is sensitive material the disclosure of which would be damaging to the interests of national security. The information was not disclosed to the plaintiff in 2008 and has not been disclosed in these proceedings.

[10] The plaintiff challenged the decision taken on behalf of the Secretary of State to revoke the licence by bringing an application for *habeas corpus*. The Divisional Court dismissed that application ([2009] NIQB 28) and on 16 November 2009 the Court of Appeal dismissed an appeal by the plaintiff from the decision of the Divisional Court. The plaintiff also brought an application for judicial review on four separate grounds, obtaining leave to apply in relation to one ground ([2009] NIQB 59). In addition to pursuing those proceedings the plaintiff made representations to the Secretary of State under Section 1(4) of the Northern Ireland (Remission of Sentences) Act 1995. The hearing of the judicial review was adjourned pending the outcome of those representations. The Secretary of State appointed Sir Anthony Campbell, a retired Lord Justice of Appeal, as a Remission of Sentence Commissioner ("the Commissioner") to consider and to advise the Secretary of State on the plaintiff's representations. The procedure before the Commissioner involved both open and closed statements of evidence. The Attorney General appointed Mr Simpson QC as a special advocate "to safeguard the interests of" the plaintiff in respect of the proceedings before the Commissioner.

[11] On 29 March 2010 the Commissioner issued his advice to the Secretary of State. The Commissioner advised that Article 5(4) of the European Convention on Human Rights ("ECHR") entitled the plaintiff to a fair trial procedure before the Commissioner and that "what constitutes a fair trial depends to some extent on what is at stake." He considered that in the proceedings before him "the procedure can only be fair if the (plaintiff) has sufficient information to allow him to give effective instructions in relation to the (closed evidence) so as to allow him to challenge it." In the event the Commissioner found that he had "no alternative but to advise that (the plaintiff) be released" not because he had "found grounds on which to question the decision made by the Minister of State" but because he found that it was "not possible to provide the (plaintiff) with a fair trial." The plaintiff was then released from prison on 1 April 2010 and commenced these civil proceedings on 4 January 2012.

[12] In his statement of claim served on 15 June 2012 the plaintiff relies on a number of separate causes of action. The plaintiff alleges that his detention between 22 December 2008 and 1 April 2010 was "unlawful for the plaintiff who was not in breach of his licence and there was no evidence to suggest that he was so." The

plaintiff further alleges that this period of detention "was consequent upon the plaintiff's recall to prison without any sustainable evidence to justify the decision to recall the plaintiff to prison." Accordingly, the plaintiff alleges that the defendant was guilty of misfeasance in public office, trespass to the plaintiff's person, wrongful arrest, unlawful detention and false imprisonment. As one of his particulars the plaintiff alleges that the defendant contested "the lawfulness of the plaintiff's detention up to and until and including 1 April 2010 in circumstances that were wholly unjustified." The plaintiff also alleges that in the course of arrest he was manhandled, subject to unlawful search, had a firearm pointed at him, was put in fear and placed in handcuffs. Furthermore, the plaintiff alleges that the defendant was "in breach of the plaintiff's rights under the European Court of Human Rights" (sic)

a) by detaining the plaintiff in breach of Article 5 ECHR,

b) by failing to provide the plaintiff with a fair hearing in relation to his detention it (sic) was in breach of Article 6 ECHR and

c) by detaining the plaintiff and by failing to provide him with a fair hearing by which he could assert his entitlement to release it was a breach of the plaintiff's rights pursuant to Article 8 ECHR.

No particulars are given in relation to the plaintiff's claims under the ECHR and for those claims to proceed the plaintiff will need to apply for leave to amend the Statement of Claim. Mr O'Donoghue during the open hearing indicated that it will be the plaintiff's contention that there was no lawful process in place expeditiously to challenge the revocation of his licence and that the procedure that was used was not one which provided a fair trial.

[13] The defendant's defence pleads that the licence was revoked, it appearing to the then Minister of State that the plaintiff's liberty would present a risk to the safety of others and that he was likely to commit further offences. It is also alleged that the plaintiff was informed that the decision related to information that the plaintiff was a leading and active member of the RIRA. The defendant denies that the detention was unlawful, denies that the plaintiff was not in breach of his licence conditions and contends that the plaintiff's licence was lawfully revoked. Also the defendant denies any breach of ECHR but, for instance, in relation to Article 8 does not plead any positive case under Article 8 (2) which permits interference by a public authority with the exercise of the right if it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. No particulars are given in the defence of the facts and matters upon which the defendant relies to establish that the plaintiff's licence was lawfully revoked except insofar as it is alleged that the plaintiff was a leading and active member of the RIRA, but that allegation is not particularised.

[14] In a reply to a notice for particulars the defendant served again on the plaintiff the defendant's open statements of evidence that were made available to the plaintiff during the proceedings before the Commissioner. Those open statements of evidence contain some further particulars, for instance, that the plaintiff was visited in prison by a range of RIRA figures, naming 8 such individuals. Also that after his release he was in contact with a range of RIRA figures from across Northern Ireland including some of the 8 named individuals who visited him in prison.

[15] From a consideration of the plaintiff's statement of claim, the defendant's defence and the reply to the notice for particulars it appears that in essence the plaintiff alleges that there were no good grounds to revoke his licence and that the justification offered by the defendant is entirely unsubstantiated. The defendant, on the other hand, contends, on the basis of the information which has not been disclosed, that the decision to revoke the licence was lawful and appropriate it appearing to the Minister of State on the basis of that information that the plaintiff was a leading and active member of the RIRA. The defendant wishes to rely on the material which has not been disclosed to justify the decision and submits that it is only possible to have a fair and effective trial of the plaintiff's claim if a declaration is made and there is a closed material procedure.

Legal principles

[16] Under Section 6(1) of the 2013 Act the court seised 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. These civil proceedings, being proceedings (other than proceedings in a criminal cause or matter) in the High Court are "relevant" proceedings: see Sections 6(11) and 14(1) of the 2013 Act. This court is seised of these proceedings.

[17] The application for a declaration may be made by the Secretary of State or any party to the proceedings or of the court's own motion: Section 6(2). In these proceedings the application is made by the Secretary of State, who is also a party to the proceedings. The fact that the application for a declaration is made by a party to the proceedings is a factor to be considered in relation to the second statutory condition.

[18] The court is given discretion to make a declaration if it considers that two statutory conditions are met. It follows that both conditions have to be established on the balance of probabilities but even if they are the court retains discretion to refuse to make a declaration. There may be circumstances in which it would not be appropriate to make the declaration after a finding that the statutory conditions are satisfied. However, given that the second condition requires the court to find that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration, the circumstances in which discretion would not be exercised

if both conditions have been established are "likely to be few and far between": see *XH v SoS for Home Department* [2015] EWHC 2932 Admin, at paragraph [22].

[19] The first condition is set out in Section 6(4) and in order to satisfy the condition there is a requirement of a finding, on the balance of probabilities, either 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, (*as far as this case is concerned, that*)
>
> (b) 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, …" (my emphasis)

In relation to this condition under both Section 6(4)(a) and (b) it has to be established 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).

[20] *Material* is not defined in the 2013 Act but in civil proceedings such as this it includes information contained in pleadings or in documents.

[21] *Sensitive material* means material which would be damaging to the interests of national security: Section 6(11).

[22] A *requirement to disclose* in the course of the proceedings to another person (whether or not another party to the proceedings) arises as a result of, for instance, the requirements contained in Order 18 in relation to pleadings, the requirements contained in Order 24 in relation to discovery of documents, the provisions of Section 31 of the Administration of Justice Act 1970 which could lead to a requirement to provide pre action discovery or the requirements arising under a *Khana* subpoena. In so far as discovery of documents is concerned the test to be applied in this jurisdiction is still that contained in *Compagnie Financiere du Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55, per Brett LJ at pp. 62, 63 so that the requirement to disclose documents extends to any document which, it is reasonable to suppose, contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences.

[23] If there was a public interest immunity certificate then there would be no *requirement to disclose*. Accordingly, the purpose of Section 6(b)(i) is that the requirement to disclose can still be established in circumstances where there is "the *possibility* of a claim for public interest immunity in relation to the material" (emphasis added). As was decided by the Court of Appeal in England and Wales in *R (on the application of Sarkandi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687 at paragraph [50], that part of 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."

[24] The second statutory condition contained in Section 6(5) is that it is "in the interests of the fair and effective administration of justice in the proceedings to make a declaration." 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. In the 2013 Act Parliament has stipulated that a closed material procedure may be permitted by the court and sets out the 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 ECHR. The court is required to apply the statutory procedure which is not under challenge and it is against that statutory background that the court is required to weigh the fairness and effectiveness of a closed material procedure to the plaintiff and to the defendant. It should also take into account the public interests in play in relation to open justice and upholding the principles of natural justice. In carrying out that balancing it is not in the interests of the fair and effective administration of justice if it is not necessary to make a declaration and it would not be necessary to do so if there are satisfactory alternatives: see *Sarkandi* at paragraphs [34] and [61]. An alternative is a PII application and a consideration of that alternative should take into account that it is a party to the proceedings who has decided not to apply for a PII certificate. However, the court should also take into account whether a PII claim would be bound to lead to the withholding, and thus to the exclusion from consideration, of important detail in the material taken into account by the Minister of State in reaching his decision to revoke the plaintiff's licence. In some cases to exclude the material from consideration would not only be unfair but might preclude a trial at all, on the principles in *Carnduff v Rock* [2001] EWCA Civ 680,[2001] 1 WLR 1786. Another factor to be taken into account in considering the balance is that the plaintiff has a team of lawyers who can communicate freely with him together with special advocates to represent his interests in closed hearings. There should also be consideration of the difficulties faced by the special advocates in responding to the sensitive material in circumstances in which they cannot take instructions from the plaintiff but that consideration is on a provisional basis as the extent to which, in the course of the Section 6 proceedings, the court gives permission for material to be withheld and requires the provision of a summary of the material withheld, the

extent to which the Secretary of State is willing to provide any such summary, and the resulting extent to which the Secretary of State is permitted to rely on the closed material in defence of the substantive claim, all remain to be decided and the uncertainty of outcome of the procedure is not a valid reason for refusing to open the gateway to the procedure in the first place.

[25] Section 6(6) provides that 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 of the material that might meet the conditions or on material that the applicant would be required to disclose)" (emphasis added). The defendant does not have to make available in the closed proceedings at the stage of an application for a declaration all the material which it considers to be sensitive material. All that the applicant is required to do is to demonstrate that *any* sensitive material is disclosable in the civil proceedings, leaving to a later stage whether there is additional sensitive material and whether that additional sensitive material is disclosable. At that later stage under Section 8 or Article 6 ECHR the court may or may not give permission not to disclose any of the sensitive material.

[26] If the applicant for a declaration is the Secretary of State then Section 6(7) provides that the "court must not consider an application by the Secretary of State … 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." In *XH v Secretary of State for the Home Department* [2015] EWHC 2932 (Admin) Burnett LJ described this as "the statutory pre-condition" because the court must be satisfied before the Section 6 application can be entertained that the Secretary of State has considered an application for public interest immunity ("PII"). It is only if such consideration has been given that the court can be invited by the Secretary of State to make a declaration under Section 6. I consider that this is not formulaic but rather Section 6(7) requires the Secretary of State to consider in essence whether, having regard to the sensitive material, PII rather than an application for a declaration is the more appropriate course in the relevant civil proceedings. That exercise requires consideration of whether the particular claim could fairly be tried without the sensitive material.

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

consider that the statutory pre-condition or, alternatively, the second statutory condition in Section 6(5) requires the court to give consideration to the fairness of the defendant's decision not to make an application for PII.

[28] A declaration under Section 6 must identify the party or parties to the proceedings who would be required to disclose the sensitive material ("a relevant person").

[29] The two conditions in Section 6 are a gateway into an ongoing procedure which is to be kept constantly under review. For instance, it is not a decision that the sensitive material should not be disclosed in accordance with the ordinary rules of pleadings and discovery but rather it opens the door to a closed procedure in which procedure the court considers whether it gives permission not to disclose the sensitive material. The ongoing procedure is prescribed in Sections 7 and 8 and at all times is subject to Article 6 ECHR. If the court makes a declaration under Section 6 then, under Section 7, it 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. It has an obligation to undertake a formal review of the declaration once the pre-trial disclosure exercise in the proceedings has been completed, and it must revoke the declaration if it considers that it is no longer in the interests of the fair and effective administration of justice in the proceedings. In deciding 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). Under Section 8 the court must address detailed questions as to what should be disclosed or gisted from the closed material.

[30] If the court makes a declaration then, not only must the court keep the declaration under review, having the power to revoke it, but also rules of court must secure that, in this case, the Secretary of State, being the party to the proceedings who would be required to disclose the sensitive material, has the opportunity to make an application to the court for permission not to disclose material otherwise than to, in this case, the court and any person appointed as a special advocate. On the hearing of that application 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. However, if permission is given not to disclose material, the court 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). In exercising those powers the court must ensure to the greatest possible extent that there is compliance with the adversarial principle in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision. The permission not to disclose material is limited to that which is strictly necessary, so that the person concerned is informed, in any event, of the

essence of the grounds in a manner which takes due account of the necessary confidentially of the evidence.

[31] Section 8 provides that if the court gives permission for material not to be disclosed, then the court 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), but 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. That Section, together with the Rules, on their faces contain an absolute protection for material the disclosure of which would be damaging to the interests of national security. However Section 14 (2) (c) provides that nothing "in sections 6 to 13 and this section (or in any provision made by virtue of them)—(c) is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights Convention." In *McGartland and another v Secretary of State for the Home Department* [2015] EWCA Civ 686 it was stated that 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, [2009] 3 All ER 643), the provisions of Section 8 and the rules made under it are not to be read as precluding such disclosure."

Open submissions on behalf of the plaintiff

[32] In his concise and focussed written and oral submissions Mr O'Donoghue made a number of points which I will now address.

[33] Mr O'Donoghue's first submission was that in the proceedings before the Commissioner there was a finding that it was not possible to provide the plaintiff with a fair trial. Accordingly, that as the issues in the civil proceedings were identical or almost identical to the issues before the Commissioner, it should be apparent that there was no possibility of a fair trial if a declaration was made, because the applicant could never be given sufficient information to enable the special advocate effectively to challenge the case that is made against him. In response Dr McGleenan contended that the proceedings before the Commissioner involved the liberty of the individual and that what constitutes a fair trial depends to some extent on what is at stake. For that reason a finding of unfairness in the proceedings before the Commissioner could not be read across into these proceedings. Mr O'Donoghue's position in reply was that in the proceedings before the Commissioner the liberty of the plaintiff was at stake but that these civil proceedings also related to the liberty of the individual and whether he was justifiably detained.

[34] I consider that the finding of unfairness in the proceedings before the Commissioner, which was a finding at the *conclusion* of open and closed hearings, though not determinative, should be taken into account under the second condition,

subject to the qualification that the course of the proceedings before the Commissioner and the course of the Section 6 proceedings may differ. The finding of unfairness by the Commissioner was after both open and closed hearings. It was not made at an initial stage. Similarly, a Section 6 declaration opens the gateway to a closed material procedure at a pre-disclosure and pre-closed defence stage. After the gate is opened the whole course of the Section 6 proceedings may differ from the proceedings before the Commissioner, including whether there is permission not to disclose and as to gisting. Also, at this stage, I do not have all the defendant's documents which would ordinarily be disclosable, let alone necessarily all the sensitive material that should be made available on discovery absent permission not to disclose. In the closed proceedings I have already raised categories of potentially sensitive documents that, on a preliminary basis, I consider are relevant and which have not been produced by the defendant. It may be that the information in these civil proceedings which is capable of being disclosed is different from the information which was capable of being disclosed in the proceedings before the Commissioner. Furthermore, if it becomes apparent that it is not possible to have a fair trial, then the declaration will be revoked. I consider that the scheme of the 2013 Act requires that a view is formed as to fairness and effective administration of justice on the information presently available and thereafter the court is allowed to be sighted and informed so that it can continue to assess fairness and effective administration of justice.

[35] Also, not having had detailed submissions, I do not consider that it is possible at present to state that the issues before the Commissioner and in these civil proceedings are the same. For instance, the state of mind of the Minister of State is relevant in these civil proceedings to the claim for misfeasance in public office. Furthermore, the initial decision under Section 1(3) of the Northern Ireland (Remission of Sentences) Act 1995 was whether it *appeared* to the Minister of State that a person's liberty "would present a risk to the safety of others or that he is likely to commit further offences …." The advice of the Commissioner was based on the inability to have a fair trial of the issue as to whether it not only appeared to the Minister, but whether one or other of the grounds had been established. These are issues about which I will require to hear submissions.

[36] I do not accept Mr O'Donoghue's submission that, taking into account the finding of the Commissioner, any Section 6 proceedings are bound to be unfair, although that finding should be taken into account in the balance under the second statutory condition.

[37] The second submission was that the Secretary of State in her open statement of reasons had not expressly asserted that the sensitive material was relevant to the issues in the proceedings and therefore disclosable. It was contended that, absent such an assertion, the court should either require a further open statement from the Secretary of State or dismiss the application for a declaration. I consider that to require an express assertion on the facts of this case is unnecessary. It was clear from the letter dated 18 December 2008 that the Minister of State in arriving at his decision

"had regard to information made available to him." That information, which is the sensitive material upon which the Secretary of State relies in her application for a declaration, is clearly relevant to the decision to revoke the plaintiff's licence and is clearly relevant to these proceedings.

[38] The third submission was that the Secretary of State in her open statement, when referring to consideration of a PII application, did not say that she had carried out the balancing exercise as defined in *R v Chief Constable of West Midlands Police Ex parte Wiley* [1995] 1 AC 274, at 289H, which is "to balance the public interest in avoiding harm being done to the nation or the public service as against the public interests that the administration of justice should not be frustrated by the withholding of the production of the documents." I do not consider that there is a requirement to import PII principles or the *Wiley* balance into the process to obtain a declaration. The equivalent condition contained in the 2013 Act is set out in Section 6(5) and it is that condition that should be applied.

Consideration of the statutory conditions

(a) The statutory pre-condition

[39] The open statement of the Secretary of State includes the assertion that she has considered whether to make a claim for PII. She also states that the plaintiff's allegations are of particularly serious misconduct by the Government. That as such it would be highly unsatisfactory if the Court in determining those allegations were to be deprived of access to all the relevant material relating to those allegations. That she has concluded that the claims advanced cannot be properly or fairly determined on the basis of the open, non-sensitive material. That she has concluded that she would not make a PII claim and instead makes this application for a declaration. I have taken into account that the application is made by a party to the proceedings. I accept that the Secretary of State has considered an application for PII before inviting the court to make a declaration. I accept that an application for a declaration is the more appropriate course in these proceedings. I do not consider that the claim or the defence to the claim could fairly be tried without the sensitive material.

(b) The first statutory condition

[40] The reasons and the evidential foundation for the decision to revoke the plaintiff's licence are directly in issue in these proceedings. I have considered the material which informed that decision. I consider that it is sensitive. I have no doubt that its disclosure would be required in the course of the proceedings were it not for the possibility of a PII claim. In my judgment the first condition is met.

(c) The second statutory condition

[41] The central thrust of the plaintiff's claim is that there was no evidential basis for the revocation of his licence. It is only if the closed material is tested in the course of Section 6 proceedings that the court will be able to conclude whether the grounds of revocation were or were not justified and/or whether it did or did not appear to the Minister of State that there were grounds to revoke. I consider that the detail contained in the sensitive material is essential to an evaluation of the substantive issues in these civil proceedings. I have weighed in the balance the public interests in play and also the difficulties faced by the special advocates. I have also considered the decision of the Commissioner as to the fairness of the proceedings before him. On the basis of the present information I consider that there is no practicable alternative to Section 6 proceedings if these civil proceedings are to be fairly tried. I consider that the second condition is met.

(d) Discretion

[42] I have considered the exercise of discretion and, given that I have concluded that it is "in the interests of the fair and effective administration of justice in the proceedings to make a declaration", I exercise discretion in favour of making a declaration.

Conclusion

[43] I make a declaration pursuant to Section 6 of the Justice and Security Act 2013 ("the 2013 Act") and Order 126, Rule 21 of the Rules of the Court of Judicature (Northern Ireland) 1980 that these proceedings are proceedings in which a closed material application may be made to the court and that the party to the proceedings who would be required to disclose the sensitive material is the defendant.

[44] I will hear counsel in relation to the costs of the application.

[45] I will also hear counsel in relation to directions, including matters, such as:

(a) An application to amend the open statement of claim.

(b) An application to amend the open defence.

(c) Service of open lists of documents by both the plaintiff and the defendant.

(d) Service of a closed defence by the defendant on the special advocates.

(e) Service of a closed list of documents by the defendant on the Special Advocates.

(f) Requiring the defendant to serve on the special advocates a bundle of all the sensitive material which would be disclosable and indicating which, if any, of the documents should, in her opinion, be disclosed to the plaintiff.

(g) Fixing a date for an application by the defendant to determine whether permission should be granted not to disclose certain materials and, if so, to determine whether a summary of the sensitive material should be made to the plaintiff and his open representatives.

(h) All other directions following a declaration which are to be made under Order 126, Rule 25 of the Rules of the Court of Judicature (Northern Ireland) 1980.

The parties are to produce a draft of the proposed directions.