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Statutory Review of the "Closed Material Procedure" provisions in the Justice and Security Act 2013

"There is a danger that familiarity with the use of such a procedure will sedate those who use it against the abhorrence that the need to resort to such means should provoke. I would have been happier had the bill stated that it could be used only as a last resort. But the die is cast, the bill is passed."

(Nicholas Phillips, *Closed Material*, London Review of Books, 17 April 2014)

Introduction

KRW LAW LLP (KRW) is one of Ireland's leading suppliers of legal representation in Conflict-related Legacy litigation.

In Northern Ireland KRW Law has been involved Conflict-related Legacy litiagtion where the British government or the Chief Constable of the PSNI have made applications for CMP by way of section 6 of the JSA 2013.

Under Section 6 of the Justice and Security Act 2013 the Secretary of State must produce a report on the use of CMPs. These annual reports reveal a continued trend of disproportionate use of CMPs in relation to cases concerning the legacy of the Northern Ireland conflict, despite the region constituting only 2% of the UK population. Such cases generally concern the actions of informants or agents of the state within paramilitary groups. The statistics for the three years 2015 – 2018 confirm 13 applications made in Northern Ireland, with all other applications totalling 24.

We infer that because there has been no annual report on the use of CMP since 2018 that this Statutory Review is a substitute exericse as demanded by section 13 of the JSA 2013. This Review does not remove the requirement of the Secretary of State requried under section 12 JSA 2013:

"*12 Reports on use of closed material procedure (1)The Secretary of State must*

(a) prepare a report on the matters mentioned in subsection (2) for— (i) the period of twelve months beginning with the day on which section 6 comes into force, and (ii)every subsequent twelve month period, and

(b) lay a copy of each such report before Parliament."

National Security and the Rule of Law

As National Security remains undefined in statute KRW maintain that if a National Security 'exemption' is required by the State then it must apply to uphold the Rule of Law and to protect fundamental democractic principles and fundamental rights. Enschrined in the Rule of Law is the commitment to openness, transparency, fairness and accounatability in the administration of justice. We maintain the the CMP offends the Rule of Law by enabling 'secret justice' (a deliberate oxymoron) and therefore erodes the rights to a fair trial.

Concerns of the United Nations

In August 2015 by the UN Human Rights Committee in its concluding observations on the seventh periodic report of the UK on the International Covenant on Civil and Political Rights (ICCPR) and its recommendation that:

"The State party should: (a) Ensure that any restrictions or limitations on fair trial guarantees that are based on national security grounds, including the use of closed material procedures, are fully compliant with its obligations under the Covenant, and particularly that the use of closed material procedures in cases involving serious human rights violations does not create obstacles to the establishing of State responsibility and accountability or compromise the right of victims to a fair trial and an effective remedy."[1]

Also of particular significance are the Preliminary Observations and Recommendations of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his visit to the UK in November 2015 when assessing the various initiatives undertaken to deal with the legacies of the violations and abuses during the period that is widely referred to as 'the Troubles' in Northern Ireland:

"Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use 'national security' as a blanket term. This ends up obscuring practices which retrospectively, it is often recognized (unfortunately, mostly privately), were not especially efficient means of furthering security. In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations."[2]

Concerns of the Judiciary

Lord Woolf in *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966:

"The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where

[1] CCPR/C/GBR/CO/7, 17 August 2015

[2] Preliminary observations and recommendations by the Special Rapporteur on his visit to the United Kingdom of Great Britain and Northern Ireland, London, 18 November 2015

justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve."

Lord Mance in *R (on the application of Haralambous) (Appellant) v Crown Court at St Albans and another (Respondents)* [2018] UKSC 1 (Lord Mance)

"*61. As a matter of principle, open justice should prevail to the maximum extent possible. Any closed material procedure "should only ever be contemplated or permitted by a court if satisfied, after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case": Tariq v Home Office, para 67; and should, of course, be restricted as far as possible. Further, the nature of the issue may require, as a minimum, disclosure of the "gist" of the closed material, to enable the person from whom it is withheld to address the essence of the case against him: A v United Kingdom (2009) 49 EHRR 625, Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269 (a control order case). This will be so, where the issue affects the liberty of the person (A v United Kingdom, and Sher v United Kingdom (2015) 63 EHRR 24, para 149) or has an equivalent effect, as a control order or freezing order can do (AF (No 3); Tariq v Home Office, paras 26-27; and see, in the European Court of Justice, Kadi v Commission of the European Communities (Case T-85/09) [2011] 1 CMLR 24, paras 129-177)"*

The Questions asked by the Statutory Review

How do you see the rationale for extending the use of CMP under the JSA?

It should be clear from the above that we see no rationale for extending the use of CMP under the JSA 2013. CMP has already been extended into the family courts. Any further extension should be resisted in the interests of justice and the government should seriously conceal repeal of this legislation.

What judicial interpretations of the CMP provisions have there been and how have they affected its operation, in particular in relation to Article 6 ECHR (right to a fair trial) and the meaning of "civil proceedings ", and how have the disclosure limits and obligations been affected in cases to which Article 6 applied?

KRW is not aware of any challenge to CMP by way of Article 6 ECHR. We understand that this is because of the operation of section 7 JSA 2013. However, here is no evidence in the public domain regarding the operation or effecrtiveness of section 7. The Review should examine the application of section 7.

What was the impact on the timetable of cases of a CMP application, disclosure processes, and further consideration of continuation of CMP?

Because of the relatively small number of Special Advocates (and particularly Special Advocates with a knowledge and understanding of Conflict-related Legacy litigation) a CMP application impedes the process of litigation substantially. Given that Legacy litigation is historic CMP is a further risk as many

clients engaged in this form of litigation are elderly or vulnerable. Regarding the contiuation of CMP we refer to our comment above on the operation of section 7 JSA 2013.

How often was Article 6 ECHR disclosure invoked and ordered? How were the tests for the application of Article 6 ECHR formulated for those cases? What difference to the disclosure ordered did this make?

We are not able to comment on this in the absence of evidence.

Did defendants decline to reveal evidence which had not been permitted to be withheld and, if so, with what effect on the subsequent conduct or outcome of proceedings?

We are not able to comment on this in the absence of evidence. However, this question goes to the core of the CMP problem-process in that the Plaintiff/Applicant/Claimant is not in a position to know whether the Defendant/Respondent decline to reveal evidence. That is the catch-22 and why there must be a rigorous section 7 JSA 2013 process.

How has CMP under the JSA measured up against its original objectives.

To what extent were the objectives set out by HM Government and the UK Parliament for the use of CMP under the JSA met?

What concerns expressed about how it would operate have been experienced in practice?

We treat these questions as one. KRW Law maintain that an analysis of the Hansard Debates around the passage of the Bill indicates that the *apparent* intention of then government was that CMP would only be applied for in extreme cirucmstances *and* be limited to cases relating to the 'War on Terror' (specifically complex rendition/deportation cases within the scope of NIAC).

From the Northern Ireland perspective CMP has been used in historic Conflict-related Legacy litigation to frustrate the truth-recovery process which is a central plank to the outworkings of the Legacy of the Conflict.

In the absence of state initiated mechanisms to give effect to the State's obligations under the European Convention on Human Rights, many families have sought recourse to civil litigation as a means to access truth recovery and accountability.

Deprived of the opportunity of a criminal trial or an Inquest, the PSNI Chief Constable has sought disproportionate recourse to applications that disclosure obligation be heard in arcane circumstances whereby families lawyers are excluded during a *Closed Material Procedure.*

This is an area of grave concern to lawyers concerned with the protection of human rights, ie the recent growth of secret courts. Almost all criminal and civil matters are held in open court, which means that the press and public are entitled to be present, and where they might be excluded (for example where

it is necessary to protect children) the impugned citizen and their legal representative are present to hear and challenge the evidence presented.

However Part 2 of the Justice and Security Act 2013, which came into effect in July 2013, introduced fundamental changes to British law, in any civil case involving national security by creating an extraordinary alternative to the Public Interest Immunity (PII[3]) procedure.

The 'Closed Material Procedure' (CMP), represents a *'carve out from basic principles of equality of arms and open justice'*[4] by allowing courts to consider any material, the disclosure of which would be "damaging to the interests of national security".

The shifting dynamic behind the legislation was the response to the MI5/MI6 involvement in 'War on Terror' practices such an 'extraordinary rendition' and orders for disclosure in civil cases, arising therefrom, most notably in the case of Binyam Mohamed[5], who was a victim of rendition.

The Justice and Security Green Paper cited the complex and long series of cases[6] concerning Binyam Mohamed[7] as a crucial event in the preservation of sensitive intelligence material. In February 2010, the Court of Appeal (CA) ordered that several paragraphs previously redacted from the Divisional Court judgment in 2008 should be restored and made part of the open hearing. On three separate occasions prior to the CA case the then Foreign Secretary of State, David Miliband signed PII certificates to supress publication of the paragraphs of a Divisional Court reasoning that they contained summarised interrogation techniques used by the CIA against Binyam Mohamed.

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[3] Public-interest immunity (PII) is a principle of English common law under which the English courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. This is an exception to the usual rule that all parties in litigation must disclose any evidence that is relevant to the proceedings. In making a PII order, the court has to balance the public interest in the administration of justice (which demands that relevant material is available to the parties to litigation) and the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging.

[4] Turning out the lights? The Justice and Security Act 2013 – Tom Hickman. .
http://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/

[5] [2011] QB 218

[6] The case originated in the US in the case of Farhi Saeed Bin Mohammed v Barack Obama (Civil Action No. 05-1347 GK) 2009, where Binyam Mohamed sought disclosure of information necessary to assist his defence before a US Military Commission and in particular to show that the prosecution case consisted of evidence obtained through torture.

[7] R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.1) [2008] EWHC 2048 (Admin) [2009] 1 WLR 2579 and (No.2) [2009] EWHC 152 and 2549 (Admin) [2009] 1 WLR 2653 (Divisional Court) and [2010] EWCA Civ 65 and 158 [2011] QB 218 (Court of Appeal).

The radical significance of CMP's from a rule of law perspective cannot be over-estimated, however infrequently Parliament's intention is, that it be used. Indeed during the final debate in the House of Lords, Lord Brown, himself a retired Law Lord, and former Intelligence Services Commissioner, warned that the legislation involved such a:

"radical departure from the cardinal principle of open justice in civil proceedings, so sensitive an aspect of the court's processes, that everything that can possibly help minimise the number of occasions when the power is used, should be recognised."[8]

The intention of Parliament on review of Hansard was that this repressive anti-terror legislation, was the new world order response to the 'War on Terror'.

However the facts of the matter in practice are somewhat different to the explicit Parliamentary intentions, and as is often the case, repressive measures are often invoked immediately in this jurisdiction to preserve the interests of the State in concealing their involvement in murder and other crimes. It is a fact that in the 5 years since the inception of this legislation, only 41 such applications have been made anywhere in Britain, yet 15 relate to matters in the north, and NONE of them relate to the War on Terror.

CLOSED MATERIAL PROCEDURE - FACTS

The facility for an application for Closed Material Procedure came into law in July 2013.

On 22nd July 2014 Justice Secretary Chris Grayling submitted the first annual report to Parliament on how often closed material procedures (CMPs) had been sought under the Justice and Security Act 2013 (JSA), as he is required to do annually under the Act.

Critical analysis by the Laurence McNamara and Daniella Lock, for the Bingham Centre for the Rule of Law in the report *"Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State"* published in August 2014, noted that the report was lacking in details and was merely a statement of numerical facts.

Subsequent reports have provided more details and from review, a startling pattern emerges with specific relevance to the preponderance of applications made in the Belfast High Court. Perhaps most concerning, is the decision to stop publishing annual reports.

[8] House of Lords - 26th March 2013, Col 1032.

TOTAL APPLICATIONS MADE		RELEVANT TO NORTHERN IRELAND
2013-2014[9]	5 applications made	2[10]
2014-2015[11]	11 applications made	4[12]
2015-2016[13]	12 applications made	5[14]
2016-2017[15]	13 applications made	4[16]

15 out of the 41 applications have been made in relation to the British Government's intelligence interests in relation to their role in the conflict in Ireland, 36%.

11 February 2013 Letter to the Chair of JCHR , from Rt Hon Kenneth Clarke QC MP, Minister without Portfolio, Cabinet Office:

"I only want CMPs to be used for that small category of cases that hinge on sensitive national security information where it is in the interests of the fair and effective administration of justice, and where that continues to be the case throughout the proceedings." (Legislative Scrutiny: Justice and Security Bill (second report) - Joint Committee on Human Rights (parliament.uk) (last accessed 18 May 2021)

Is it possible to see how the litigation would have proceeded (or not) in the absence of a CMP?

By way of Public Interest Immunity procedure.

Whether changes to the procedure or the language of the Act are recommended to improve the process.

Part 2 of the JSA 2013 should be repealed.

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[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342224/moj-report-closed-material-procedure.pdf

[10] 1. Terence McCafferty (NI SoS). 2. Martin McGartland (Home Secretary)

[11] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468375/closed-material-procedure-report-2015.PDF

[12] 3. Margaret Keeley (MOD). 4. Margaret Keeley (PSNI Chief Con)
5. Michael Gallagher (NI SoS) 6. Simone Higgins (PSNI Chief Con).

[13] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/568767/report-on-use-of-closed-_material-procedure-25-june-2015-to-24_june-2016_.pdf

[14] 7. Eilis Morely (MOD) 8. Anthony Lee (PSNI Chief Con)
9. Roddy Logan (PSNI Chief Con) 10.Higgins (linked to 6/8 PSNI Chief Con)
11. Gerard Hodgins (MOD)

[15] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664979/use-of-closed-material-procedure-2016-17-report.pdf

[16] 12. Gabriel Magee (PSNI Chief Con) 13. Ryan Hegarty (Plaintiff)
14. Elizabeth Monaghan (Plaintiff) 15. Mary Heenan (Plainiff)