

CLOSED MATERIAL PROCEDURES UNDER THE JUSTICE AND SECURITY ACT 2013

A Review of the First Report by the Secretary of State

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INTRODUCTION

On 22 July 2014 Justice Secretary Chris Grayling reported on how often closed material procedures (CMPs) have been sought under the [Justice and Security Act 2013](#) (JSA), as he is required to do annually under the Act. As the first and only official consolidated presentation of how the new CMP regime is being used, [this two-page written ministerial statement](#) warrants close attention.¹

The Secretary of State's report provides only numbers. We have tried to match cases to those numbers to test the report's accuracy, to examine whether the reporting requirements and practice are an adequate means for transparency, and to see if it is possible to gain a clearer picture of what has happened in the first year of the JSA.

As we will attempt to show below, the report, when read in light of the cases, should prompt concern about the difficulty of verifying the accuracy of the report, the ways that CMPs are being used, and the adequacy of the reporting requirements.

WHAT ARE THE REPORTING REQUIREMENTS?

[Section 12 of the JSA](#) requires the Secretary of State to make an annual report stating how often in the preceding 12 months applications for section 6 declarations for CMPs have been made, granted and revoked, and how many of the associated final judgments are closed judgments and how many are not closed. A closed judgment is defined in [section 12\(5\)](#) as 'a judgment that is not made available, or fully available, to the public'. Section 12(3) states that the report may also include other information as the Secretary of State deems appropriate.

To say that an application has been made in a way that falls within the reporting requirements, it is helpful to look at the procedural requirements. [Part 82 of the Civil Procedure Rules](#) (and their [Northern Ireland Order 126 counterparts](#)) set down three stages for section 6 applications. First, under CPR 82.21 (NI Rule 20), the Secretary of State must notify all parties that he or she intends to make an application. Secondly, CPR 82.22 (NI Rule 21) states that an application is made by filing with the court material including a statement of reasons supporting the application. Thirdly, when an application is made, the court will give directions for a hearing of the application.

Section 12 requires reporting of applications made and so it would seem that notice under CPR 81.21 (NI Rule 20) does not require reporting. It is the second step – the making of an application – that attracts the reporting requirement. As we understand it, the reporting requirement includes applications made in Northern Ireland which also seem to proceed under the JSA.

¹ Lord Chancellor and Secretary of State for Justice, Chris Grayling, *Written Ministerial Statement*, 22 July 2014, www.parliament.uk/documents/commons-vote-office/July-2014/22%20July%202014/27-JUSTICE-ClosedMaterialProcedure.pdf (All web sites in this report were last accessed on 31 July 2014 unless otherwise stated.)

WHAT WAS REPORTED?

The [report](#) was published on 22 July 2014, covering the period 25 June 2013 (when the JSA came into force) to 24 June 2014. The report took the form of a table accompanied by two footnotes. The table identified each category that was required for reporting and gave the number of applications, judgments, etc, within that category. Excluding categories where there was a zero figure, the report stated the following, and we include the footnotes:

- Number of times the Secretary of State has applied for a section 6 declaration that a CMP application may be made: 5 (*)
- Number of those applications granted (i.e., the number of declarations that a CMP application may be made): 2 (**)
- Number of final judgments made (regarding the application for a declaration) that are closed judgments: 1
- Number of final judgments made (regarding the application for a declaration) that are not closed judgments: 1

(*) Two applications each covered two claimants; one application covered five claimants; and the remaining two applications each covered one claimant.

(**) One declaration covered two claimants; one declaration covered one claimant; and the remaining three declarations are outstanding (within the timeframe of this report).

This tells us that (to 24 June 2014) five applications had been made and, of those, two were granted and decisions had yet to be made in the remaining three. It tells us that there was one open final judgment and one closed final judgment. Presumably, these must relate to the declaration applications that have been granted. Helpfully, and presumably included pursuant to s 12(3), the Secretary of State has provided a limited breakdown showing about the number of claimants affected.

The document attracted some [media attention](#).² Generally, media reports referred to the top line figure that five applications had been made and identified two or three cases where CMPs had been sought, though it was not always clear whether the cases mentioned fell within or outside the reporting period of 25 June 2013 – 24 June 2014. That lack of clarity is understandable as it is very difficult to tell what five cases the report refers to.

IDENTIFYING THE CASES AND RECONCILING THEM WITH THE REPORTED DATA

A. The applications for a declaration

Five applications for a section 6 declaration seem to be readily identifiable. Four of these have judgments that state clearly that an application was made. Court documents have been lodged in the fifth. We outline them here but, as we will explain in the following sections, the other

² Dominic Casciani, 'How many times did the court doors close?' BBC News Online, 22 July 2014, www.bbc.co.uk/news/uk-28426830

information in the report does not clearly match up to these and we cannot be sure that these are the five applications referred to in the Secretary of State's report.

1. [CF & Mohamed v Secretary of State for the Home Department](#) [2013] EWHC 3402 (QB)

This is a case with two claimants. Two British citizens of Somali descent alleged that they were unlawfully detained, tortured and mistreated during a period of 2-months detention in Somaliland, and that this occurred either at the behest of the UK government or with its assistance or consent. The court stated plainly that a section 6 declaration had been applied for (paragraph 12) and was granted (paragraph 55). The decision was handed down on 7 November 2013 and so the application is clearly within the reporting period.

2. [McGartland and another v Attorney General](#) [2014] EWHC 2248 (QB).

This is a case with two claimants. McGartland and his partner Joanne Asher have brought a claim against the UK government, alleging that McGartland was an undercover agent in Northern Ireland and that the UK had failed to protect him adequately or as agreed. Again, there are plain statements from the court: the Home Secretary applied for a section 6 declaration (paragraph 3). The application was considered in a two-day hearing beginning 19 June 2014 and so the application had clearly been made within the reporting period. The decision was outstanding at 24 June 2014. It was granted by Mitting J on 8 July 2014 (paragraph 5).

3. [R \(in the application of Sarkandi and others\) v Secretary of State for Foreign and Commonwealth Affairs](#) [2014] EWHC 2359 (Admin)

This is a case with five claimants. The claimants sought judicial review of the Secretary of State's proposal to add their names to a list of individuals who were subject to sanctions such as asset-freezing. Once more, the position is stated plainly that the Secretary of State had applied for a section 6 declaration (paragraph 7). With hearings on 7 March and 28 April 2014, the application was clearly made within the reporting period. The decision was outstanding at 24 June 2014. It was granted by Bean J on 11 July 2014 (paragraph 41).

4. [Youssef v Secretary of State for Foreign and Commonwealth Affairs](#) [2013] EWCA Civ 1302

This is a case with one claimant. The case was an appeal against the Administrative Court's dismissal of the appellant's claim for judicial review of the Secretary of State's decision to allow him to be added to a list of persons subject to economic sanctions under the UN Security Council Resolution 1617.

It is beyond doubt that an application for a section 6 declaration was made in this case. The Court of Appeal stated at paragraph 44 that 'on 18 July [2013] an application was issued under s 6(1) of the Act for a declaration "that the proceedings are proceedings in which a closed material application may be made to the court."' However, the application for a declaration was not considered. The court held that such an application would only

touch one of grounds of appeal and, that ground having been rejected, the application for a section 6 declaration did not fall for consideration (paragraphs 44-47).

Certainly, this application should be included in the Secretary of State's report. It is irrelevant that the decision refers to section 6(1); that necessarily engages section 6(2) and the court in *Sarkandi* (paragraph 41) made similar use of section 6(1). It is perhaps noteworthy that it was the appellants that instigated the move towards a CMP and that the judgment does not say whether it was the Secretary of State or the appellants that issued the application. Regardless, an application was made within the reporting period and that should be recorded in the report.

5. *Terence McCafferty v Secretary of State for Northern Ireland* (2012 No 360)

This is a case with one claimant. In July 2005 Mr McCafferty was convicted and jailed for a bombing in Belfast. He was released from prison on licence in November 2008, and then arrested and returned to prison the next month. In these proceedings he is arguing that revocation of the licence and re-imprisonment was unlawful, with no evidence on which those actions could be based. The proceedings will of course involve examining the reasons why he was re-arrested. On 20 June 2014 the Secretary of State for Northern Ireland, Theresa Villiers applied for a declaration that these were proceedings in which a CMP application may be made, filing an open statement of reasons in accordance with the relevant procedural rules. The solicitors for one of the parties have advised us that the hearing on this application will take place on or after 28 September. As such, the decision was outstanding at 24 June 2014.

But are these the five applications to which the Secretary of State is referring? It is difficult to know because, matching them against further information in the report about the declarations that were made, the cases above cannot be reconciled with the numbers in the report.

B. The applications for a declaration that were granted

The Secretary of State reports that two applications for a declaration were granted, one of which covered two claimants and the other covered one claimant

It appears that three of the five applications must be those in *Sarkandi* (five claimants), *CF & Mohamed* (two claimants) and *McGartland* (two claimants). A declaration was granted in *CF & Mohamed*, which would be the declaration which affected two claimants.

What of the other two applications? We are looking for:

- An application with one claimant, which was outstanding at 24 June. This should be *McCafferty*. It looks like it cannot be *Youssef*, as that appeared to have been finalised.
- An application with one claimant, where a declaration was made by 24 June. It appears it cannot be either *Youssef* (as there was no declaration made) or *McCafferty* (as the matter was almost certainly outstanding). On the other hand, if it is *Youssef* then, based on what we can locate, it seems inappropriate to record the application for a declaration as having

succeeded. Should it be that the *McCafferty* declaration application was granted then a judgment should presumably be available, at least some of which should be open.

Are there other cases which may be the application with one claimant where a declaration was made? We can only identify one possible case and, though it attracted [media attention in mid-June](#), we do not believe this is the case that matches that place in the report.³

6. *Keeley v Chief Constable of the Police Service of Northern Ireland (PSNI) and others* (2008 No 133645)

Margaret Keeley, the ex-wife of an MI5 informer in Northern Ireland, has brought a claim for false imprisonment, [alleging that her arrest and detention were unlawful and intended to protect her then husband](#).⁴ On 28 May 2014, the PSNI lodged a Rule 20 notice of intention to apply for a section 6 declaration.

The solicitors for one of the parties have told us the Court directed that a hearing on this application will take place on 28 September 2014. As we understand it there has not yet been an application under NI Rule 21 and thus this case would not fall within the reporting period. (Of course, if the application has been made then the Secretary of State's report should show six applications.) Having said that, even if a Rule 21 application has not been made, it is a case the Secretary of State could have deemed to be appropriate further information to include under s 12(3).

On any view, however, it seems it cannot be the application that affects one claimant and in which a declaration was made because the hearing has not yet occurred.

In our research and analysis we have been unable to match to the reported data the cases that we have located and we have been unable to locate a further case with a single claimant the Secretary of State made a successful application. As such, although the first five cases we have considered look like they warrant a place in the Secretary of State's report as application that have been made, we are not confident that those are in fact the cases with the five applications reported by the Secretary of State.

When trying to match the judgments against the cases, we again struggle to reconcile the figures.

C. The open and closed final judgments

The Secretary of State's report states that two final judgments were issued which decided section 6 declarations: one closed and one not closed. Again, it is not clear which cases the Secretary of State is referring to. Among the cases we have identified there are only two contenders.

³ Owen Bowcott & Henry McDonald, 'Northern Ireland informer cases to be held partially in secret' 15 June 2014 www.theguardian.com/uk-news/2014/jun/15/northern-ireland-informer-secret-court-ira-stakeknife.

⁴ 'Stakeknife: Secrecy bid in Freddie Scappaticci court case to be resisted' BBC News Online, 16 June 2014, www.bbc.co.uk/news/uk-northern-ireland-27868074.

First, in *CF & Mohamed* there was an open final judgment on 7 November 2013 and (as the court indicates at paragraph 55) an accompanying closed final judgment. The case alone could account for the both figures in the report but there is a complicating factor. The Act defines a closed judgment as '[one that is not made available, or fully available to the public.](#)' Arguably, the decision could thus be counted in the report solely as a closed final judgment.

Secondly, there was an open judgment in *Youssef* which, although not a final judgment in the sense that the application for a declaration was granted or refused, is still a final judgment in so far as it appears to be the end of the matter as regards the section 6 application. While it seems uncontroversial that *Youssef* should be recorded as a case where a section 6 application was made, it is more difficult to categorise it as a reportable 'final judgment', which [section 12\(5\)](#) defines as a 'judgment to determine the proceedings.' because the *Youssef* decision is not one where the application was granted and nor is it outstanding, it does not fit into the reporting framework, it may be that reporting framework needs some adjustment. Nonetheless, it seems equally uncontroversial to state that the outcome in *Youssef* should fall within the kind of further information that under section 12(3) the Secretary of State should deem appropriate to provide.

Thirdly, not having been able to establish what the single-claimant case was where an application for a declaration was granted, it is difficult to know how that case fits into the judgment profiles, though presumably there must be a judgment that determined the proceedings.

CONCLUSIONS

The first point to be drawn from the report is that the section 12 reporting requirements do not ensure that enough information will be provided so that the public can be adequately informed about the occasions when CMPs are sought and why declarations are made or not made.

While it might be argued that a Secretary of State should not have an obligation to provide every piece of information, it seems reasonable to expect that he or she should, at a minimum, deem it appropriate to provide sufficient information to enable a lawyer, researcher or journalist to ascertain from publicly available information the types of situations in which CMPs were sought and to make a judgment about whether the report is accurate and comprehensive. Simply put, subject to any secrecy requirements imposed by the courts or unless the fact of identifying the cases would imperil national security, Parliament should require that the Secretary of State's report identify the cases, the dates on which applications were made, and the judgments that determined proceedings. Where there are reasons why this information cannot be included in the report, the Secretary of State should be required to state those reasons in the report. Moreover, the section 12(3) power to include further information should be used to enhance transparency: what can be made public should be made public.

This is vitally important as a matter of democratic accountability, especially because the cases where CMPs have been or almost certainly will be sought often engage the behaviour of governments and the adequacy of oversight mechanisms. As we understand it, in [Belhaj v The Rt Hon Jack Straw MP and others](#) [2013] EWHC 4111 (QB) there has not yet been a section 6 application for a declaration, but it is surely a case where this is likely.

Secondly, as the analysis of the cases against the data shows, we do not know the full substance of what happened in the first year. It may be, of course, that there are cases in the public domain which we have not located, or it may be that there are cases with some further secrecy attached which cannot be identified. There seem to be several possible combinations, as we have pointed out, but we cannot tell whether or not the report is accurate. Someone else may be able to make the numbers add up – we very much hope someone will – but we have been unable to. Whatever the true position, the report does not provide enough information for an observer to get an adequate picture of what has happened this year. That is worrying.

It would be helpful if the Secretary of State was to identify the cases to which the report refers.

Thirdly, the Ministry of Justice has stated that [the powers have been invoked 'sparingly'](#)⁵ but that is not an appropriate way to characterise their use. Sparingly is a relative concept. It suggests sparingly in relation to the number of occasions when section 6 declarations could have been sought. But, of course, no evidence is provided in that regard. We do not know whether they have been sought at every turn or only sometimes. All we know is that a declaration has been sought on five occasions in the first year. While it is a small number of cases, the early indications are that CMPs will be deployed in a very, very wide range of circumstances.

This is apparent from the kinds of cases where the government has thought a section 6 declaration should be sought. They include claims brought by non-British citizens abroad and by British citizens living in the UK. The claims range from those which relate to the deprivation of liberty to those which concern the imposition of economic sanctions. Some cases are focussed on the past – not least Britain's relationship with the IRA – and others relate to much more contemporary issues such as allegations of recent misconduct by the security services. It seems nothing is off the table and, importantly, we are a long way from the archetypal case that was the impetus for the legislation, which was an action against the government by returning Guantanamo detainees. In the scope of cases, if not in the number, the use of the powers is anything but 'sparing'.

Fourthly, because only a limited amount of information falls under the reporting requirements, the report does not reflect the full extent of moves towards using closed procedures more generally. A broader analysis would look at other effects of the JSA, including the section 15 provisions which effectively move some judicial review matters out of the High Court and into SIAC. For example, in *Ignaoua* [2014] EWHC 1382 (Admin) it was observed that a section 6 declaration would be certain if the matter remained in the High Court. There has also been one attempt – partially successful – to hold an entire criminal trial out of the public eye.⁶

In all, it is to be hoped that some further information will be provided to supplement this year's report and we would welcome any details that readers may be able to add. More importantly, perhaps, it is to be hoped that, if the JSA remains as it is, all future reports are more comprehensive and provide sufficient information to enable the public to obtain a meaningful picture of how CMPs are being used.

⁵ Tamara Cohen, 'Ministers demand five trials in secret: New powers to be used to block access to court cases', Daily Mail, 23 July 2014, www.dailymail.co.uk/news/article-2702166/Ministers-demand-five-trials-secret-New-powers-used-block-access-court-cases.html

⁶ *Guardian News and Media Ltd v AB and CD* [2014] EWCA Crim 12 June 2014 (Decision only; judgment pending) <http://www.judiciary.gov.uk/wp-content/uploads/2014/06/guardian-v-ab-cd.pdf>

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