Justice and Security Act 2013:
Civil Procedure (Amendment No 5) Rules 2013

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JUSTICE considers that the operation of closed material procedures (CMP) is inherently damaging to our system of justice. Their introduction by Part 2 of the Justice and Security Act 2013 ("the JSA") into civil proceedings is unfair, unnecessary and unjustified. That one party will present his case unchallenged to the judge in the absence of the other party and his lawyers is inconsistent with the common law tradition of civil justice where proceedings are open, adversarial and equal.

In *Bank Mellat (No 1)* – the first case where the Justices were reluctantly persuaded to sit in secret – the Supreme Court urged caution. Their judgment expressed some regret that the government may be too quick to overstate the need for secrecy. In the words of Lord Hope – one of four who would have resisted the use of these "obnoxious" procedures – secret justice of this kind is "really not justice at all" (para 98).

JUSTICE has prepared this briefing to inform members of the Houses of Parliament in considering changes to the Civil Procedure Rules which are crucial to allow for the introduction of CMP. We focus on what the Rules will <u>not</u> do. They will not make CMP any more palatable. In fact, by modeling these Rules largely on those designed for existing secret procedures, including those used in the Special Immigration Appeals Commission (SIAC), it is likely that these measures will compound the inadequacy of the Special Advocate system and the inherent unfairness of these extraordinary procedures for the party excluded from their case.

Speculation over which cases the Government will ask to be heard under CMP is rife. The Explanatory Memorandum explains that there are currently 20 live cases which Ministers are considering for CMP. These Rules of Court, hastily thrown together by officials and with little consultation, would set aside the overriding objective of our courts to do justice in favour of absolute secrecy in any case where national security is raised by Ministers. They would do nothing to improve the capacity of the Special Advocate to represent the interests of the excluded party. They take no steps at all to address the impact on other procedural measures within the wider Civil Procedure Rules which may be adversely affected by the introduction of CMP (such as the rules on settlement in Part 36).

The Rules appear to confirm that the true function of Part 2 of the Act will be, in practice, to deter litigation against the Government in national security cases or to create a significant litigation advantage for Ministers in cases that proceed.

Introduction

1. JUSTICE is a UK-based law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the UK section of the International Commission of Jurists. In 2009, we published *Secret Evidence*, in which we called for an end to the use of secret evidence in UK proceedings.[1] We have a long history of litigating in cases where closed material procedures have been in issue.[2]

2. JUSTICE has prepared this briefing to inform members of the Houses of Parliament in consideration of changes to the Civil Procedure Rules which are crucial to allow for the introduction of CMP and other changes made by Part 2 of the JSA. We regret that the Rules appear to have been prepared in a rush, and are based as closely as possible on existing measures for the operation of CMP within the Special Immigration Appeals Commission. In short, we emphasise what these Rules will not do. No attempt appears to have been made by the Ministry of Justice to recognise that the introduction of CMP into ordinary civil litigation is a step-change which may require special consideration. This lack of rigour confirms JUSTICE's concern that the primary purpose of CMP will, in practice, be to secure default non-disclosure and secrecy in cases where Ministers seek such protection, lending a significant litigation advantage to Government.

Closed Material Procedures

3. JUSTICE considers that the operation of closed material procedures (CMP) is inherently unfair and damaging to our system of justice. Their introduction by Part 2 of the Justice and Security Act 2013 ("the JSA") into civil proceedings is unfair, unnecessary and unjustified. Making CMP part of the ordinary civil justice "toolkit" of our judiciary will, in our view, undermine the credibility of our judges and damage public confidence in the civil justice system. Although encouraged to sit in CMP in the case of *Bank Mellat (No 1),* the Supreme Court expressed concern that nothing that the Justices had seen in closed session would have affected their judgment.[3] Recently, the public inquiry into the circumstances of the death of Azelle Rodney has concluded and reported with

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[1] JUSTICE, *Secret Evidence,* 2009. Electronic copies are available online: http://www.justice.org.uk/resources.php/33/secret-evidence

[2] Further information about JUSTICE's history in relation to CMP can be found in our submissions on the Justice and Security Bill: http://www.justice.org.uk/resources.php/325/justice-and-security-bill

[3] *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38, para 51, 69 – 74 (Lord Neuberger).

widespread criticism of the Metropolitan Police Service and individual officers. That case was for many years used as justification in arguments by Government for CMP to be available within inquests in order to allow for the hearing of intercept material.[4] Sir Christopher Holland, in his report, makes clear that there was no need in the determination of his findings for the inquiry to sit in closed session, despite having the power to do so within an Inquiries Act 2005 procedure.[5] JUSTICE considers that these cases again illustrate that the enthusiasm of Government for CMP can be misplaced, with authorities too quick to resort to secrecy when the interests of justice can be served through other less intrusive means. In our view, they illustrate the folly of adopting CMP as an ordinary tool of the civil justice system. At the least, they show the need for the discretion of the court, such as remains within section 6 JSA, to be interpreted as widely as possible (we return to this issue below).

The Rules

4. On 26 June 2013, the Government tabled the Civil Procedure (Amendment No 5) Rules 2013[6] ("the Rules") in both Houses of Parliament. The Rules came into force the following day and will lapse unless approved by both Houses within 40 days. Made pursuant to Schedule 3(3) of the Act the Rules will amend the Civil Procedure Rules to provide guidance on the operation of closed hearings in ordinary civil cases (sections 6 and 7, JSA). They also cover applications under section 18 of the Act to set aside the certification of a specific case by Ministers as one where *Norwich Pharmacal* jurisdiction will not be available.[7] Despite the controversial nature of these reforms, the Rules were published in draft for only around 10 working days, placed in the libraries of both Houses, without fanfare on 11 June 2013.

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[4] See for example, Government arguments made in support of proposals which would have introduced CMP in inquests during the passage of the Counter-terrorism Act 2008 and the Coroners and Justice Act 2009.

[5] http://azellerodneyinquiry.independent.gov.uk/docs/The_Azelle_Rodney_Inquiry_Executive_Summary_(web).pdf (at para 15). Here the Chair of the Inquiry makes clear that although hard work was required, it was perfectly possible to have a fair and full inquiry without a closed session. Unfortunately, within the statutory framework provided by Sections 6 and 7 and these Rules, we regret that there will be no incentive on the Government, or adequate discretion afforded to the court, to justify such rigour. We are concerned that closed sessions will become default rather than exceptional, as a virtue of administrative convenience rather than necessity.

[6] S.I. 1571/2013. The Rules and their accompanying Explanatory Memorandum (EM) can be found here: http://www.legislation.gov.uk/uksi/2013/1571/introduction/made

[7] Certifications made subject to Section 17(3)(e).

5. **JUSTICE regrets that the Rules were not published in draft to allow for more detailed consideration of how CMP might operate within our civil courts. Members of both Houses may wish to ask Ministers to confirm whether or not the Rules were provided in draft to the relevant House Committees who had subjected the Act to detailed scrutiny (the Joint Committee on Human Rights ("JCHR") and the House of Lords Constitution Committee). Although the Act provides for the Secretary of State to consult the Lord Chief Justice, in light of the time and resources expended by both of the relevant Parliamentary Committees in the scrutiny of the Act, JUSTICE considers that it would be disappointing if these Committees were not consulted or provided with adequate opportunity to express a view on the draft Rules. We regret that Members of both Houses have been given very little opportunity to consider their content before being called to vote on their approval.**

6. In the remainder of this brief, we raise two general concerns about the nature of the Rules and one specific concern about their drafting. The most significant of these concerns relates to Rule 82(2)2 which sets aside the overriding objective for the courts to act justly, in favour of non-disclosure. Where we do not comment on a specific part of the Rules or their likely operation, this should not be read as approval.

The Role of the Special Advocate

7. As these Rules are broadly modelled on the existing provision for closed material hearings,[8] nothing in them grapples with the deficiencies already identified by Special Advocates operating under those Rules. The Special Advocates – the security vetted lawyers at the heart of the CMP regime – were extremely concerned about the expansion of CMP. They took every opportunity during the passage of the Act to highlight the inherent unfairness of CMP and the limited value they could add. They specifically highlighted specific restrictions under the existing Rules which operated to make their work even more difficult and less likely to serve the interests of the excluded party. Some of these concerns had already been recognised in the Government's own Green Paper which preceded the JSA.[9] A list was provided by way of shorthand by the Special Advocates in their response:

[8] See, for example, CPR 76, 79 and 80.

[9] Justice and Security Green Paper, October 2011, paras 16 (Summary), 2.24 – 2.38.

(1) The prohibition on any direct communication with open representatives, other than through the Court and relevant Government body, after the SA has received the closed material;

(2) The inability effectively to challenge non-disclosure;

(3) The lack of any practical ability to call evidence;

(4) The lack of any formal rules of evidence, so allowing second or third hand hearsay to be admitted, or even more remote evidence; frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings;

(5) A systemic problem with prejudicially late disclosure by the Government;

(6) Where AF (No.3) applies, the Government's approach of refusing to make such disclosure as is recognised would require to be given until being put to its election, and the practice of iterative disclosure;

(7) The increasing practice of serving redacted closed documents on the Special Advocates, and resisting requests by the SAs for production of documents to them (i.e. as closed documents) on the basis of the Government's unilateral view of relevance;

(8) The lack of a searchable database of closed judgments.[10]

8. Nothing in these Rules will improve the situation of the Special Advocate or the operation of CMP. That the Ministry of Justice have not taken steps to address their existing concerns, but have transplanted Rules which are already deficient, suggests that the existing limitations of the SIAC process will be moved wholesale into our ordinary civil courts. No attempt has been made to make the CMP process fairer, and, in fact, by virtue of its expansion into ordinary civil litigation, the operation of CMP is likely, in practice, to create greater injustice for the party excluded.

CMP and Civil Litigation

9. The Rules make no provision for any wider consideration of the impact which the introduction of CMP may have on ordinary civil claims. This concern was raised by JUSTICE and many others during the passage of the JSA.[11] There are a significant number of aspects of an ordinary case which will be affected by a decision to institute

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[10] http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf (at para 17)

[11] See for example, JUSTICE's briefing for House of Lords Second Reading, para 19, page 21. http://www.justice.org.uk/resources.php/325/justice-and-security-bill

CMP. These impacts will have a detrimental effect on the ability of solicitors and counsel to effectively advise their clients within the existing Civil Procedure Rules and will significantly diminish individual claimants' ability to have their case heard fairly in any individual set of proceedings. Only a few examples should serve to illustrate. In order to secure ongoing funding for a claim, the Legal Aid Agency will require a merits assessment. If a CMP is likely, it will be extremely difficult for a solicitor to effectively advise on prospects of success. Similarly, if the Government (or a third party) were to make an offer of settlement under Part 36 after the institution of CMP, it will be extremely difficult for the solicitor operating outside the closed session to advise on the merits of the offer. Equally, if CMP is imposed – although a Special Advocate may be able to assist in ascertaining prospects of success – advising on a Part 36 offer or on the merits of an appeal, this is not permitted under existing Rules as, once in closed procedure, they are restricted from communicating with the excluded party or their legal team. Nothing in the Rules grapples with these difficult questions. No provision is made for any variation to the traditional role of the Special Advocate nor is any specific mechanism provided whereby the judge may be able to intervene to authorise assistance by a Special Advocate or by any other means.

The Overriding Objective: Justice or Non-Disclosure (Rule 82(2)2)

10. The overriding objective of all civil procedure is that the court will deal with every case "justly and at proportionate cost" (CPR 1). Rule 82(2) provides for this objective – and any other part of the CPR to be set aside or read compatibly with the duty set out in Rule 82(2)2 that:

> *The court must ensure that information is not disclosed in a way which would be damaging to the interests of national security.*

11. This Rule reflects existing provision in the CPR to set aside the overriding objective in connection with CMP applications under existing statutory mechanisms.[12]

12. However, this Rule will apply to all applications made under Part 2 of the Act, including under section 6 JSA. Section 6 JSA was agreed only after careful argument in both Houses. It provides for two specific hurdles to be crossed before the Court may consider

[12] In Parts 76. 79 and 80, the overriding objective and the rest of the CPR is subject to a duty of non-disclosure "contrary to the public interest". Although the test in Rule 82(2)2 is designed more narrowly to provide for default non-disclosure in cases where disclosure would be damaging to the interests of national security, this is a modification which is necessary to reflect the scope of Section 6 JSA.

making the declaration which will allow for CMP in any specific set of proceedings. The first concerns the requirement to disclose sensitive material. Sensitive material is defined as any material the disclosure of which would be "damaging to the interests of national security". It is this condition which is reflected in the duty at Rule 82(2)2. However, the second condition is set out in section 6(5) JSA:

> *that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.*

13. There is nothing in the Rules which makes particular provision to reflect how the Court should consider and apply this condition in any application made under section 6. Thus, the Rules appear to suggest that in the consideration of any application under section 6, the default position for the Court must be default non-disclosure rather than any consideration of the underlying and general objective to do justice in the case. If this is the intention of Government, we consider that this is inconsistent with the requirements of section 6(5) and the intention of Parliament in passing the Act. The Explanatory Memorandum explains the Government's view that the approach of the court to any application under section 6 is that it must be the same as that made under section 7 (which contains no second condition, despite attempts during the Act's passage to insert one):

> *In order for the procedure not to be self-defeating, the disclosure required for this critical stage has to be treated as if it were itself an application for permission to disclose only in closes session. [...]*
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> *In debates Ministers set out what they thought the judge would have to consider where open disclosure of relevant material would be damaging to the interests of national security. In examining what is in the interests of the fair and effective administration of justice in the proceedings, the court will focus on the relevance of the sensitive material to the issues in the case in order to assess how necessary it is to take it into account to resolve the issues in the case, and whether there are alternative measures that would enable the case to be heard without a CMP. The court will also need to take into account other factors, which may include whether both parties would consent to a CMP, the importance of the sensitive material to the*

issues in the case and the existence of material – such as intercept material – that could only be dealt with in closed proceedings.[13]

14. Unfortunately, JUSTICE considers that this explanation appears contradictory and inconsistent with the text of section 6(5) JSA. Creating equivalence between the two tests applied under section 6 and 7 for the purposes of setting these Rules does not avoid the creation of a "self-defeating" process, but instead appears designed to circumvent the intention of Parliament in refusing to allow the Government to create equivalence in the statutory tests set out in the Act.

15. We welcome the acceptance by the Government that the test in section 6(5) will require the Court to perform a wide-ranging consideration of the necessity for a CMP, including the consideration of alternative means to protect sensitive material. However, we do not consider that this test is one which can be applied consistently with the intention of Parliament while subject to the clear duty proposed in Rule 82(2)2 which would appear to make the overriding objective of the Court non-disclosure. The considerations for the Court set out by the Government in the Explanatory Memorandum – and by Ministers during the passage of the Act – are all issues best determined according to the ordinary discretion of the Court, including the original overriding objective for proceedings to be proportionate and just. Making the discretion of the Court in section 6(5) subject to the duty in Rule 82(2)2 appears to circumscribe that discretion unduly and in a manner inconsistent with the intention of Parliament. Section 11 of the Act requires that any person making these Rules must "have regard to the need to secure that disclosures of information are not made where they would be damaging to the interests of national security". Unfortunately, the drafters appear to have taken this duty as their starting point and their own overriding objective. It cannot be allowed to render, through the exercise of delegated powers, the clear statutory language in section 6(5) nugatory in its effects.

16. In our view, section 6(5) must remain crucial in the Court's determination of how and when CMP will be used in civil proceedings. This approach would be consistent with the guidance of Lord Neuberger in *Bank Mellat (No 1)*:

[A]ny judge, indeed anybody concerned about the dispensation of justice, must regard the prospect of a closed procedure, whenever it is mooted and however understandable the reasons proposed, with distaste and concern. However, such

[13] EM, paras 7.7-7.8

distaste and concern do not dictate the outcome in a case where a statute provides for such a procedure; rather, they serve to emphasise the care with which the courts must consider the ambit and affect of the statute in question.[14]

17. We consider any other approach to the Rules – including the suggestion by the Government's Explanatory Memorandum – would be subject to challenge as *ultra vires*. At the very least, in any case where article 6 of the European Convention on Human Rights ("ECHR" or "the Convention") is in play, any direction on the Court in Rule 82(2)2 to take non-disclosure as a starting point, must be set aside in order to act compatibly with the rights of the excluded party under the Convention, consistent with the duties of the Court under sections 3 and 6 Human Rights Act 1998.

18. While JUSTICE finds the operation of CMP entirely objectionable, we consider that Parliament's determination that the Court's underlying duty to act proportionately and justly in any individual case must be set aside is a step that must be taken reverently and in full reflection on the underlying purpose of our justice system. **In JUSTICE's view, this inconsistency alone should provide justification for Parliament to require the Rules to be redrafted in order to accurately reflect the intention of the underlying statutory provision in section 6.**

[14] *Bank Mellat (No 1)*, para 51.