Neutral Citation Number: [2018] EWHC 3594 (QB)

Case No: HQ14X01860

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

**Before**:

**Mr Justice Nicol**

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**Between :**

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|---|---|
| **(1) Muna Abdule**<br>**(2) Aburahman Yusuf**<br>**(3) Nusayba Yusuf**<br>**(4) Ruwayba Yusuf** | **Claimant** |
| **- and –** | |
| **(1) The Foreign and Commonwealth Office**<br>**(2) The Home Office**<br>**(3) The Attorney General** | **Defendants** |

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**Karen Steyn QC and James Stansfeld** (instructed by **the Government Legal Department**) for the **Defendants**
**Ben Jaffey QC and Nikolaus Grubeck** (instructed by **Leigh Day**) for the **Claimants**
**Shaheen Rahman QC and Gareth Weetman** (instructed by the **Special Advocates Support Office**) as **Special Advocates**

Hearing dates: 21st November 2018
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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NICOL

## Mr Justice Nicol :

1. This is an application by the Secretary of State for Foreign and Commonwealth Affairs for a declaration under Justice and Security Act 2013 ('JSA 2013') s.6 that a closed material application may be made to the Court in these proceedings.

## The claim

2. The Claim Form was issued in 2014. Particulars of Claim were served on 19th July 2017. It is convenient to take the factual background from those Particulars.

3. The 1st Claimant is or was married to Abdelqadir Mumin ('Mumin'). The 2nd - 4th Claimants are the children of the 1st Claimant and Mumin.

4. In around 2010 Mumin left the UK. The 1st Claimant says that she subsequently learnt that he had settled in Somalia and did not intend to return to the UK. In November 2012 she says that Mumin encouraged her to meet him in Somalia. She says that Mumin told her that any links he had had to the terrorist group al-Shaabab had been cut. She agreed to go and left the UK on about 20th December 2012. She travelled with a return ticket to London for 11th January 2013.

5. She says that she did eventually meet up with Mumin. She says that the relationship between them was unsatisfactory and he initially hindered her attempts at leaving, but she did manage to leave for the airport at Bosaso, Somalia in order to travel back to London. She says that on 11th January 2013 she was stopped at a checkpoint near the airport in Bosaso and detained. She says that she was questioned by interrogators who appeared to know a great deal about her life in the UK. Bosaso is in the semi-autonomous part of Somalia known as Puntland. She says that she was taken to what she understood to be a Puntland Security Forces' base. She says that she was held for several days at the base. She says that she was shackled in a tight and painful manner. For part of the time she was detained at the base, she says she was also hooded in a manner which made it painful for her to breathe. She was threatened with being killed. She says she suffered stomach pains and asked for medical attention, but this was denied. She was frightened and slept little. She says she was given poor quality and insufficient food and, for part of the time, only dirty water.

6. She was questioned by a number of men who spoke English to her. Two of them had American accents, but one, she says, spoke English with the accent of a British native. She refers to him as 'the British interrogator'. She says his information could only have come from the UK government. The Somali interrogators appeared to defer to him as did the head of Puntland's security services who visited her in detention on one occasion.

7. Her driver had been detained at the same time. She says that she saw him being assaulted with a metal pole which added to her fear.

8. When the Puntland minister of security visited her, he accused her of being a member of al-Shabaab which she denied.

9. After about 7 days she says she was taken to a court and required to fingerprint a document, which she assumed was a statement although she could not read it.

10. She says that around 18th January she was transferred to the women's wing of the Central Prison in Bosaso. She says that the conditions there were inhumane and she was tortured there. She says that she was beaten around the legs with a piece of rubber hose pipe which left welts and bruises on her legs. On one occasion she was also made to lie front down in burning hot sand with her hands and feet tied together behind her back. She was forced to remain in this position for 2 hours and, while there, she was whipped with metal cables. Her dress rode up and male guards were called over to add to her humiliation. She says she faced further court hearings in April and June 2013.

11. She was released from detention on 31st October 2013. Her British passport was not returned to her until 14th November 2013. She was eventually permitted to leave Somalia on 5th December 2013 and returned to the UK around 7th December 2013.

12. The causes of action on which the 1st Claimant relies are assault; false imprisonment; and misfeasance in public office. It is the Claimants' primary case that the relevant law is that of England and Wales. Alternatively, they allege that the Defendants are liable under Somali law.

13. It is pleaded that the UK government was jointly responsible for these torts either because they were planned, directed or encouraged by UK personnel, or because, in co-operating with the Puntland / Somali authorities the UK government knew or ought to have known of her detention and mistreatment or the real risk that it would occur.

14. The Claimants rely on: the role of the British interrogator; the knowledge of her life in the UK which the interrogators appeared to have; that the British authorities appeared to know what was happening to her before there had been any consular notification or the UK authorities had been alerted to her position by her family; the guards and other prisoners at the base had told her that the base was established and run at least in part by Western governments including the UK; and the Secret Intelligence Service ('SIS') told the Intelligence and Security Committee that they often take the operational lead when a British national is detained in a country such as Kenya on a terrorism related matter.

15. The 2nd - 4th Claimants allege that they have been adversely affected as well in consequence of their mother's ill-treatment.

16. Originally the Claimants sued five defendants: SIS, the Security Service, the Foreign and Commonwealth Office ('FCO') on the basis that it was responsible for SIS; the Home Office ('HO') on the basis that it was responsible for the Security Service (i.e. MI5) and the Attorney-General as the defendant identified pursuant to the Crown Proceedings Act 1947 s.17(3) for the acts and omissions of the UK security and intelligence bodies. On 17th April 2018 Master McCloud directed that the Security Service and SIS be removed as Defendants.

17. The Claimants claim aggravated and exemplary damages.

18. By the same order as mentioned above Master McCloud ordered the Defendant to file an open defence and serve on the Special Advocates a draft closed defence.

19. The Open Defence makes some admissions. Thus it is admitted:

i) The 1st Claimant is now a British Citizen, having been naturalised as such and 2nd- 4th Claimants are the children of her and Mumin who is a Swedish national.

ii) Mumin was excluded from the UK in 2010 because of his support for Al Shabaab, a proscribed organisation.

iii) The 1st Claimant travelled from the UK to Bosaso on or around 20th December 2012. The Defence notes that at the time there was an FCO travel warning advising British Citizens not to travel to Somalia and saying that there was no British diplomatic representative in the country.

iv) The 1st Claimant was arrested at Bosaso airport by the Puntland Security Forces.

v) She was released from detention on 31st October 2013.

20. The Defendants deny that English law is applicable to the claims.

21. Otherwise, the Defendants essentially say that they are unable to plead to the particulars in an open defence.

22. In her order of 19th April 2018 Master McCloud also made directions for the hearing of the present application under s.6 of JSA 2013.

**The statutory criteria for a closed material procedure declaration ('CMP declaration')**

23. The Secretary of State is competent to make an application for a CMP declaration whether or not a party to the proceedings – see s.6(2).

24. By s.6(7):

> 'The court must not consider an application by the Secretary of State under subsection (2)(a) unless it is satisfied that the Secretary of State has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.'

I shall refer to this as the 'PII consideration pre-condition'.

25. If the PII consideration pre-condition is satisfied, two further conditions must be fulfilled as set out in s.6(4)-(6). They are as follows:

> '(4) The first condition is that –
>
> (a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or
>
> (b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following –
>
> (i) the possibility of a claim for public interest immunity in relation to the material,

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

(iii) s.56(1) of the Investigatory Powers Act 2016 (exclusion for intercept materials).

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

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

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

26. Section 6(11) defines 'sensitive material' as 'material the disclosure of which would be damaging to national security.'

27. The obligation to make disclosure referred to in s.6(4)(a) could come about in various ways. I need mention only two.

i) CPR r.16.5 specifies the contents of a defence. As is well known, a defendant must, ordinarily, say which of the allegations in the particulars of claim he admits, which he denies and which he neither admits nor denies but requires the claimant to prove (see r.16.5(1)). Where an allegation is denied, the defendant must, ordinarily, state his reasons for doing so and any positive version of events which he intends to advance – r.16.5(2). I note that in *Belhaj v Straw* [2017] EWHC 1861 (QB) Popplewell J. observed that the term 'material' in s. 6(4) was wider than just documents. As he said at [39],

> 'It would cover disclosure of information pursuant to CPR Part 18. It extends to disclosure in a statement of case if the party's ability fairly and effectively to conduct its case required such disclosure.'

ii) This is a claim in which the Defendants are likely to be required to make standard disclosure. By CPR r.31.6

> 'standard disclosure requires a party to disclose only –
>
> (a) the documents on which he relies; and
>
> (b) the documents which –
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case; and

> (c) the documents which he is required to disclose by a relevant practice direction.'

28. Because of the expanded definition in JSA 2013 s.6(4)(b)(ii), for present purposes I must take account of the documents (or some of them) on which the Defendants choose to rely or on which they could rely even if they choose not to do so.

**The PII consideration pre-condition**

29. On 18th December 2017 the Rt. Hon. Boris Johnson MP was the Secretary of State for Foreign and Commonwealth Affairs. On that date he made an open statement of reasons in support of the present application. He said that, as required by JSA 2013 s.6(7), he had considered whether a PII application should be made in respect of the material on which he relies as justifying a CMP declaration (what he calls 'the section 6 material'). He first considered whether the section 6 material could be disclosed in open and in his view, it could not. If a PII application was made and approved, the consequence would be that the material would not be evidence in the case and could not be considered. He gave his reasons as to why this would be unsatisfactory and why, therefore, a PII application was not available as an alternative.

30. In *Belhaj* (above) Popplewell J. considered the PII consideration pre-condition at [52]. As he observed,

> 'The precondition in s.6(7) is that the Secretary of State should have *considered* [Popplewell J.'s emphasis] whether to make or advise another to make a PII claim. It does not require a claim to be made. Nor does it require the court to consider whether a PII claim would succeed or be preferable to a closed material procedure for the purposes of this precondition ….In any event, a s.6 application is not the occasion for a judicial review of the Secretary of State. All s.6(7) requires is consideration of the question…'

31. Popplewell J. thought that it was plain that there had been such consideration in the *Belhaj* case. On the basis of Mr Johnson's statement, it seems equally plain to me that the PII consideration pre-condition has also been satisfied in the present case.

**The first condition: Is there some sensitive material which the Secretary of State would be required to disclose within the meaning of s.6(4)?**

32. In *Rahmatullah v Ministry of Defence* [2017] EWHC 547(QB) Leggatt J. was considering a similar application to that before me. In the course of his judgment at [7] he noted the following in relation to the first condition:

> '(i) Although a section 6 declaration opens a gateway to a closed material procedure, it is only the first stage of the process and does not finally decide whether such a procedure will be used at the trial. In particular, section 7 of the Act requires the court to keep any declaration under review, to undertake a formal review once the pre-trial disclosure exercise has been completed, and to revoke the declaration if the court considers that it is no longer in the interests of the fair and effective administration of justice in the proceedings.

> (ii) It is sufficient to justify making a section 6 declaration that the two statutory conditions are met in relation to any relevant material (my [i.e. Leggatt J's] emphasis), and the defendants do not need to put before the court at this stage all the material which might meet the conditions: see section 6(6).'

33. In *Belhaj* Popplewell J. also observed that a s. 6 declaration was only a gateway to further procedures. If a declaration was made there would then be a close and detailed consideration of precisely what material the Defendants would be permitted to withhold from the Claimants and their lawyers. This process is authorized by JSA 2013 s.8. Two questions are considered at that stage. First, whether the Defendants have shown that disclosure would be damaging to national security. If it would then subject to the next question, the court must ensure that such information is not disclosed – see the modification to the overriding objective in CPR r.82.2(2). The qualification and the second question is a consequence of JSA 2013 s.14(2)(c) which, in effect, makes the CMP subject to any contrary requirements as a result of Article 6 of the European Convention on Human Rights ['ECHR'].

34. In *Belhaj* Popplewell J. rejected an argument that the sensitive material had to be limited to central or core allegations or be of high relevance. He concluded that this gloss on the first condition was not justified and I respectfully agree. Popplewell J. did acknowledge a qualification to that general proposition at [38] where he said,

> 'If an issue is so peripheral that it is clear on the s.6 application that disclosure could be dealt with by an alternative method which would serve the interests of the fair and effective disposal of the claim and would not involve a risk of damage to national security, then the second condition would not be fulfilled. But subject to that proviso, the centrality of the issue to which disclosure goes is not a part of the inquiry at the s.6 stage. All that is required by the wording of the Act and its statutory purpose at that stage, in order to fulfil the first condition, is one sensitive passage in one document which would require disclosure as relevant to one issue.'

Again, I respectfully agree.

35. Mr Jaffey QC, counsel for the Claimants, is right to emphasise that material is only sensitive if its disclosure would be harmful to national security. It follows that material which would be harmful to international relations is not, as such, within the definition. However, as Mr Jaffey accepted, in principle, the disclosure of material which was damaging to international relations could thereby harm national security.

36. Mr Jaffey is also entitled to observe that the definition of 'sensitive material' is confined to material whose disclosure 'would be' damaging to national security. He argues that it is not sufficient that national security would be *at risk* by disclosure. He is right as to the language of the statute, although, necessarily the Court is having to make an assessment as to the future. Since the subject matter of that assessment is the consequence for national security of taking a particular course, the Court is also obliged to pay close attention to the views of those who have both expertise in that matter and constitutional responsibility for it, namely the intelligence services and the ministers under whom they work - see *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153

37. In the Closed session, I was shown a document which I was told was Open and had been obtained by the Claimants' solicitors as a result of a Freedom of Information request. It is an email dated 18th July 2013. The sender and addressee have been redacted, although it may be that it comes from the Head of Prisoner and Human Rights Policy of the Consular Directorate, Foreign and Commonwealth Office. The text of the email reads:

> 'Consular were made aware of Ms Abdules' detention on the 30th January (see below). This is worrying as we only made representations 5 months later on 20th June, after Reprieve lobbying. The email below does not mention potential death penalty and it may be that we were unaware of the potential serious charges. But knowing that the President's son possibly conducted one of the interviews should have sounded some alarms in getting involved in the case and making representations about fair trials. [redaction] is not able to find anything about this case. [redaction] do you have anything?'

The 'email below' appears to be a reference to an email of 30th January 2013. Again the sender and addressee have been redacted although it may have been sent from the Deputy Head CT Operations Department UK Somalia Unit Foreign and Commonwealth Office. The Subject line is 'FW: Puntland'. The text appears to have been redacted except for the words:

> 'Suggestions here of BNs in detention in PL – are you aware?'

38. In Closed Ms Rahman submitted that it was apparent that the FCO had been concerned that it had not made representations at an earlier stage particularly given that they knew that the President's son possibly conducted one of the interviews 'which should have sounded some alarm bells'.

39. I have taken this exchange into account, though quite what inferences can be drawn from the exchange may need to be the subject of further argument.

**The second condition: Is it in the interests of the fair and effective administration of justice in the proceedings to make a declaration?**

40. In *R (Sarkandi) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687 the Court of Appeal acknowledged at [57] that a CMP was

> '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 and for the protection of national security.'

41. It added at [58],

> 'It is certainly an exceptional procedure, and in the nature of things one would expect it to be used only rarely, but the conditions for its use are defined in detail in the statute. In the circumstances there is, in my judgment, no reason to give the statutory provisions a narrow or restrictive construction, save for any reading down that may be required, in accordance with the terms of the statute itself, for compliance with article 6. Subject to that point, the provisions should be given their natural meaning and applied accordingly.'

42. At [61] the Court did agree that it would only be in the interests of the fair and effective administration of justice to make a declaration if that was necessary and

> 'it will not be necessary to make a declaration if there are satisfactory alternatives.'

43. Having said that, the Court rejected the argument that the Judge below had erred by not giving greater consideration to the use of PII as an alternative to a CMP declaration. The court said at [63],

> 'a PII claim would be bound to lead to the withholding, and thus the exclusion from consideration, of important detail in the material taken into account by the Secretary of State in reaching his decision, and that the judge was right to say that such detail was essential to an evaluation of the substantive [? case]. To exclude the detail from consideration would not only be unfair to the Secretary of State but might preclude a trial at all, on the principles in *Carnduff v Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786.'

44. One of the other alternative methods of dealing with sensitive material which has been canvassed in earlier cases is gisting. However as Popplewell J. recognised in *Belhaj* at [24] the Court has to be careful not to be drawn into a detailed exercise which would be conducted, for instance, on an application under JSA 2013 s.8 or in the course of a PII application. He added,

> 'At the s.6 stage, the court has to take a view on the basis of the sensitive material and in the light of its nature and content together with its importance as compared with open material, whether the likely result of a PII exercise or [the s.8 process] would put sufficient material in open proceedings to meet the justice of the case.'

45. In *Belhaj* the open advocate for the Claimants had argued that the arguments for a CMP should be tested with particular rigour given that the action involved claims of the utmost seriousness including kidnap and torture by senior members of the executive and the security services. Popplewell J. responded at [28] by saying,

> 'The force of these submissions is diminished by two factors. First, they cut both ways. If the Defendants cannot address the issues without resort to material which would damage the interests of national security, and which would be excluded under any PII application, there is a risk that no trial would take place following an application under the *Carnduff* jurisdiction (*Carnduff v Rock* [2001] 1 WLR 1786). It is this very possibility which it was the purpose of the closed material procedure introduced by the Act to avert. The more serious the case, the greater the imperative to avoid this result…. Secondly Mr Hermer [the Claimants' open advocate] and Mr Johnson QC [the Claimants' Special Advocate] were concerned to develop arguments that national security concerns could properly be met by one or more alternative procedures, namely PII applications, gisting, disclosure into confidentiality rings which might exclude the Claimants themselves, or sitting in private. However all these involve departures from natural or open justice to some extent…'

46. One of the other alternatives canvassed in *Belhaj* and the present case was creating a confidentiality ring, that is disclosure on terms that the documents or information could not be onwardly disclosed beyond a carefully prescribed circle. In theory, the circle

could include the Claimant themselves (realistically, in view of the ages of the 2nd – 4th Claimants just the 1st Claimant herself). Mr Jaffey argued that was a practical option here since, as far as the 1st Claimant was aware, it was not alleged that she herself was a terrorist threat or had taken part in any terrorism related activity. She had renewed her passport in 2016.

47. Another type of confidentiality ring will sometimes exclude the lay client but embrace the lawyers. The problems and dangers of such a course were adverted to by the House of Lords in *Somerville v Scottish Ministers* [2007] 1 WLR 2734 at [152]-[153] and [203]-[204] and by Ouseley J. in *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin) at [21]-[28].

48. Whether or not this type of confidentiality ring may in principle still be used, Mr Jaffey made clear that he would not want to be put in a position where material was disclosed to him alone, on which he would have wished to take instructions from the 1st Claimant, but which he was precluded from doing by the terms of the confidentiality ring. It was only if the sensitive material was of a nature on which she could not be expected to give instructions that he asked me to consider this alternative to a CMP.

## Discretion

49. JSA 2013 s.6(1) says that if the conditions in the section are fulfilled, the court *may* make a declaration. Even in those circumstances, therefore, there is a discretion to be exercised. That was recognised in *XH v Secretary of State for the Home Department* [2015] EWHC 2932 (Admin) at [22], but, as the Court also said,

> 'given that the second condition requires the court to conclude that it is in the interests of the fair and effective administration of justice in the proceedings to make the declaration, [the circumstances where discretion would be exercised against making a CMP declaration where the statutory conditions are fulfilled] are likely to be few and far between.'

## Application to the present case

50. CPR Part 82 governs the procedure in relation to applications under JSA 2013 s.6(2) – see r.82.1(1)(a). It allows for the court to receive closed evidence in relation to the application – see r.82.23(4) (as authorised by JSA 2013 s.11(4)(a)). Accordingly, in addition to the open material, I received closed evidence from the Secretary of State. This comprised a closed statement of reasons in support of the application for a CMP declaration from Mr Johnson, a sample of material which the Secretary of State would wish to remain closed, and a schedule which advanced reasons why their disclosure would be harmful to national security.

51. Mr Jaffey, of course, was not able to see the closed material. Necessarily, therefore, he was in a position, graphically described by Lord Hewart CJ in *Coles v Odhams Press Ltd* [1936] 1 KB 416 at 426 and adopted by Lord Bingham in *R (Roberts) v Parole Board* [2005] 2 AC 738 at [18] as

> 'taking blind shots at a hidden target'.

52. He argued that it was plain to the 1st Claimant that the security services would have had an interest in her. That was most likely because of her husband and his terrorist connections. It was also apparent from the matters already mentioned above as to why the 1st Claimant alleged that the UK government was complicit in her ill-treatment. Furthermore, 7 days after her detention, the Metropolitan Police Service contacted Slough Social Services to say that she had been detained in Somalia on suspicion of involvement in terrorist offences. Subsequently, there was an occasion when the 1st Claimant was stopped by SO15 and questioned under Terrorism Act 2000 Schedule 7 for 2 hours. When she asked why, she says she was told,

> 'Let's stop playing games, we know your history.'

53. Mr Jaffey submitted that I should treat any reliance on the principle of 'Neither Confirm Nor Deny' ('NCND') with circumspection. He reminded me of the comments of Maurice Kay L.J. in *Secretary of State for the Home Department v Mohammed* [2014] 1 WLR 4240 at [20] that NCND is not a legal principle and, when the government runs up the NCND flag, the courts are not automatically obliged to salute it. NCND, even as applied by the government is not an inveterate and absolute policy. While Lord Justice Pitchford was conducting the Undercover Policing Inquiry he gave a lengthy written ruling on the principles which he would apply in relation to the public disclosure of information. He addressed NCND at [144] – [152]. He said at [145],

> 'It might be thought that there is a paradox inherent in the justification for the "Neither Confirm Nor Deny" policy on the one hand and its use on the other. It is frequently advanced and justified on the ground that *any* [emphasis in the original] exception will undermine its effectiveness (e.g. in *Scapaticci*) while it is frequently the subject of exceptions. In fact there is no paradox because it does not in all circumstances depend on blanket application for its effectiveness. I respectfully concur with the view of Lord Justice Burnett [in *Al-Fawwaz v Secretary of State for the Home Department* [2015] EWHC 166 (Admin) at [78]-[79]] that the application of the policy is considered in its particular circumstances and within the legal context of the case. It is applied if it serves a public interest that outweighs the countervailing public interest in disclosure.'

54. I agree with Ms Steyn QC, counsel of the Defendants, that any reliance on NCND there may have been is not undermined by disclosures previously made.

55. Mr Jaffey also drew attention to the public apology which was given by the Prime Minister to Mr Belhaj and Ms Boudchar on 10th May 2018 and which led to the settlement of their litigation. The apology included the following:

> 'The UK Government's actions contributed to your detention, rendition and suffering. The UK Government shared information about you with its international partners. We should have done more to reduce the risk that you would be mistreated. We accept this was a failing on our part. Later during your detention in Libya, we sought information about and from you. We wrongly missed opportunities to alleviate your plight: this should not have happened.'

56. Mr Jaffey invites comparison with what Popplewell J. had said when making the CMP declaration at [59],

> 'I have little hesitation in concluding that disclosure of the s.6 material would cause significant damage to the interests of national security, substantially for the reasons set out in considerable detail in the Sensitive Schedule. It would be contrary to the policy behind NCND in a way which would damage national security. It would reveal operational details of the security services in relation to intelligence of importance to national security. Such disclosure is itself damaging to national security irrespective of whether the particular intelligence itself remains sensitive, in the same way as disclosure of intelligence communications received from foreign services can itself damage liaison relationships so as to damage national security, irrespective of the current sensitivity of the intelligence itself…'

57. As to this last point, Ms Steyn QC commented that the *Belhaj* litigation did not get to the point where the government was required to apply for any material to remain closed pursuant to JSA 2013 s.8.

58. At an earlier stage Mr Belhaj and Ms Boudchar had also urged the CPS to prosecute Mr Jack Straw (the Foreign Secretary at the time of their rendition) and Sir Mark Allen (described in the Supreme Court as someone who was said to have been a senior officer of SIS). The DPP concluded that there was insufficient evidence. Mr Belhaj and Ms Boudchar sought judicial review of the DPP's decision regarding Sir Mark Allen. The Secretary of State applied for a CMP declaration. A declaration was made which the Court of Appeal upheld. Mr Belhaj and Ms Boudchar appealed to the Supreme Court. After they received the Prime Minister's apology, Mr Belhaj and Ms Boudchar made clear that they did not wish to pursue the judicial review. Nonetheless, on 4th July 2018 the Supreme Court gave judgment and held that such a procedure was not available because JSA 2013 s.6(11) provided that it could not be used in criminal proceedings and the judicial review was an example of criminal proceedings.

59. Since there was no longer likely to be a criminal prosecution of Sir Mark Allen, the Intelligence and Security Committee of Parliament ('ISC') felt able on 28th June 2018 to issue its reports, 'Detainee Mistreatment and Rendition 2001-2010' (HC 113); and 'Detainee Mistreatment and Rendition: Current Issues' (HC 114).

60. The ISC Reports noted that they had not come across any evidence indicating that UK agency officer or defence intelligence personnel had directly carried out mistreatment, but verbal threats had been made in 9 cases and in two cases UK personnel had been directly involved in mistreatment by others. The ISC also referred to whistleblowing by former SIS officers, of a practice of deliberately not recording certain information. Reference was also made to cases of two British Citizens who had been arrested in Somaliland on suspicion of terrorism related activities. When made subject to control orders and Terrorism Prevention and Investigation Measures, they argued abuse of process. MI5 told the ISC that the Court had found no abuse of process, but lessons had been learned. Mr Jaffey argued that for this reason and because of the other material referred to in the witness statement of his solicitor, Ms Srinivasan, the activity of the UK intelligence services in Somalia were not secret.

61. Mr Jaffey also noted that the ISC reported that use was often made of the immunity conferred by Intelligence Services Act 1994 s.7.

62. Mr Jaffey stressed, as, of course, I accept, that the two conditions in s.6 were cumulative so that, even if sensitive information would be disclosable, a CMP declaration could only be made if it would be in the interests of the fair and effective administration of justice to make such a declaration. In that context, he said that I should scrutinise whether some alternative procedure would be sufficient. He suggested that PII might be a possibility. PII had the advantage that the court had to consider not only the public policy in favour of withholding the material, but also whether non-disclosure was compatible with fairness to the claimants. The precise nature of disclosure could also be calibrated by making use of gists.

63. In this case, he argued, the nature of the 1st Claimant's claims made it particularly important that the adjudication of her claims should be open and transparent.

64. In Open Ms Steyn argued that both conditions were fulfilled. So far as the first condition was concerned, the detailed submissions could only be made in closed, but she drew my attention to *Secretary of State for the Home Department v Rehman* (above) where at [50] Lord Hoffman commented on the particular responsibility of the executive for national security.

65. So far as the second condition was concerned, she adopted what Popplewell J. had said in *Belhaj*: the significance of the Claimant's claims cut both ways. Because they were so serious, it was the more important that the Defendant should be able to defend himself fully and properly. Because they were so serious it would be the more unattractive for the Defendant's inability to defend himself to lead to the claim being stayed or struck out pursuant to the *Carnduff* principle. That was precisely the kind of outcome which the JSA 2013 had been intended to avoid.

66. Ms Steyn argued that PII was not a satisfactory alternative. If PII was successfully invoked, it had the consequence that the material in question was neither disclosed nor deployed. That option did not assist the party who did wish to adduce and rely on the information in question.

67. Nor were confidentiality rings a satisfactory alternative for the reasons given in *Somerville v Scottish Ministers* and by Ouseley J.

## Conclusion

68. I have considered in Closed session the particular materials which Ms Steyn has submitted the Defendant would be required to disclose (in the sense used in s.6(4)). I have taken into account the arguments advanced in Open by Mr Jaffey and, in Closed, by Ms Rahman QC, the Claimants' Special Advocate. I have decided that the Defendant would be required to disclose sensitive material. I cannot say more at this stage.

69. I have also concluded that it would be in the fair and effective administration of justice to make a CMP declaration. I have considered whether there are alternatives which would be satisfactory and appropriate. I have decided that there are none. These two conditions are not in hermetically sealed compartments. Thus, as Ms Steyn accepted in the course of her Closed submissions, the Defendant could not properly engineer a situation where it was obliged to disclose sensitive material simply in order to demonstrate the need for a CMP declaration – see for instance the decision of Maguire J. in the Northern Ireland High Court in *Michael Gallagher's Application for Judicial*

*Review* [2016] NIQB 95 T [19]-[20]. Thus, had I concluded that the sensitive material in question was peripheral to the issues in dispute, I would not have found the second condition to be satisfied, but that is not this case.

70. None of the various alternatives which have been mooted are adequate or appropriate. Of course, a CMP is a serious departure from the principles of natural justice and open justice, but it is a departure which Parliament has endorsed if the prescribed conditions are fulfilled, as I have found they are.

71. The court is not obliged to make a CMP declaration even if the statutory conditions are fulfilled, but as has been said, having reached the conclusion that it is in the fair and effective administration of justice to make a declaration, the circumstances in which the Court would nonetheless not do so, will be rare. This is not one of those rare cases.

72. Accordingly, I will make a declaration that these proceedings are proceedings in which a closed material application may be made to the Court.

73. The next stage will be to decide how the s.8 application shall proceed and I will invite the parties to consider what directions would be appropriate.