

JUSTICE AND SECURITY ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Disclosure of sensitive material

Section 6: Declaration permitting closed material applications in proceedings

67. **Section 6** enables certain courts hearing civil (but not criminal) proceedings, namely the High Court, the Court of Appeal, the Court of Session or the Supreme Court, to make a declaration that the case is one in which a closed material application may be made in relation to specific pieces of material.
68. The declaration is an ‘in principle’ decision made by the court about whether or not a closed material procedure (a “CMP”) should be available in the case. It will normally be based on an application made by a party to the proceedings or the Secretary of State. However, a court may also make a declaration of its own motion. An application for a declaration will be supported by some (but not necessarily all) of the relevant sensitive material, and the Act provides (at section 11(4)) that these initial proceedings for a declaration (whether following an application or on the court’s own motion) may themselves be held by way of a CMP, with special advocates appointed to represent the interests of any party excluded from the closed part of the hearings.
69. The court will first need to be satisfied that the Secretary of State has considered making or advising another person to make an application for public interest immunity for the material on which the application for a declaration is based. During the application process for a declaration, the person applying will need to persuade the court that there is relevant material the disclosure of which would damage national security and to put forward arguments as to why a CMP would be in the interests of the fair and effective administration of justice - for example, the degree of relevance of sensitive material to the issues in the case. The court will consider the material provided in support of the application, and whether it meets the condition that it is relevant and its disclosure would damage national security. The sensitive material forming part of the application for a declaration is protected, because, as explained above, these preliminary proceedings may themselves be held in a CMP.
70. **Subsection (2)(a)** allows for an application for a declaration to be made by the Secretary of State (whether or not a party to the proceedings) or by any party to the proceedings. The application need not relate to material which the applicant themselves would be required to disclose, and may relate to material required to be disclosed by another party to the proceedings (although this situation is less likely to arise in practice).
71. **Subsection (3)** provides that if the court considers the two conditions specified in **subsections (4)** and **(5)** are met, it may make a declaration that an application can be made in that case for material to be heard in a CMP.
72. **Subsection (4)** sets out the first condition: that a party to the proceedings would be required to disclose sensitive material in the course of the proceedings (or would be so required but for certain litigation rules, such as the continuing availability of PII).

The court must ignore the exclusion of intercept material set out in RIPA, meaning that intercept evidence could be used to support an application for a declaration. It must also ignore any other enactment which would prevent the party from disclosing the material where that enactment would not prevent disclosure if the proceedings were closed.

73. *Subsection (5)* states that the second condition is that a declaration would be in the interests of the fair and effective administration of justice in the proceedings. The judge would consider this in the circumstances where open disclosure of relevant material would be damaging to the interests of national security. James Brokenshire (Home Office Minister for Crime and Security) indicated in Commons Committee that, “in examining that question [of whether a CMP would be fair and effective], the court will want to focus on what is necessary for resolving the issues in the case before it. In particular, it should focus on the relevance of the sensitive material to the issues in the case”.
74. *Subsection (6)* sets out that the two conditions are met if the court considers them met in relation to any material that would be required to be disclosed and makes clear that an application for a CMP declaration need not be based on all the material.
75. *Subsection (7)* sets out that the court, before considering an application from the Secretary of State for a CMP declaration, must be satisfied that the Secretary of State has first considered whether to make, or advise another person to make, a claim for public interest immunity for the material on which the application is based. The court cannot order the Secretary of State to apply for PII, as it is the responsibility of a party in possession of sensitive material to do so. The court’s consideration of the Secretary of State’s consideration of PII is limited to the material on which the application for a CMP declaration is based and does not require the Secretary of State to undertake a full PII exercise.
76. *Subsection (8)* states that a declaration must identify the party or parties who would be required to disclose sensitive material. Such persons are referred to as “a relevant person” for certain purposes such as an application for a closed material procedure under section 8(1)(a).
77. *Subsection (9)* allows rules of court to be made to:
 - (a) provide that any party, or the court itself, must notify the Secretary of State that a CMP may be needed, thereby affording him or her the opportunity to make an application for a declaration or be joined to any proceedings for an application for a declaration (see paragraph (c) below);
 - (b) allow the proceedings to be stayed while a person considers whether to make an application for a CMP;
 - (c) enable the Secretary of State to be joined as a party to proceedings for or about a declaration (for example, if the Secretary of State is not already a party to the proceedings for an application for a declaration). Rules made under this paragraph will also enable the Secretary of State to be joined to proceedings in relation to which there is a declaration in place (if he is not already a party to such proceedings). In essence, this would enable the Secretary of State (who has responsibility for national security), to be joined to the main action in appropriate cases, where the disclosure of material in the case would be damaging to national security.
78. *Subsection (10)* sets out that such rules of court must require a person to give notice to every other person entitled to make an application in relation to the case of his or her intention to make an application for a declaration. The rules must also require the applicant to inform every other such person of the result of the application.
79. *Subsection (11)* defines “closed material application” as an application of the kind mentioned in section 8(1)(a). It also defines “relevant civil proceedings” to establish

*These notes refer to the Justice and Security Act 2013
(c.18) which received Royal Assent on 25 April 2013*

the range of civil proceedings in which a declaration under section 6(1) may be made. “Relevant civil proceedings” are defined as proceedings in the High Court, the Court of Appeal, the Court of Session or the Supreme Court which are not criminal proceedings. This subsection also defines “sensitive material” as “material the disclosure of which would be damaging to the interests of national security”.