Case No: CO/4215/2014

Neutral Citation Number: [2016] EWHC 1261 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 May 2016

Before:

LORD JUSTICE SIMON
and
MR JUSTICE OUSELEY

- -

Between :

The Queen (on the application of K, A and B)	**Claimants**
- and -	
(1) Secretary of State for Defence	
(2) Secretary of State for the Foreign and Commonwealth Affairs	**Defendants**

- -
- -

Mr T. Owen QC and Ms S. Knights (instructed by **Deighton Pierce Glynn**) for the **Claimants**
Mr K. Beal QC and Mr Z. Ahmad, (instructed by **the Special Advocates' Support Office**) as **Special Advocates**
Mr J. Glasson QC and Mr B. Watson (instructed by **the Government Legal Department)** for the **Defendants**

Hearing dates: 17, 18 November 2015, and 29 February 2016

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JUDGMENT

OPEN JUDGMENT

Lord Justice Simon :

1. This judgment of the Court, to which we have both contributed, concerns various issues relating to pre-trial disclosure in a claim subject to a closed material procedure ("CMP") direction under s.6 of the Justice and Security Act 2013 ("JSA").

The history of the litigation

2. Three Afghan nationals (K, A and B) each claim that they worked for the Defendants in Afghanistan between 2008 and 2013 as covert human intelligence sources ('CHIS'). In addition, K and B maintain that they carried out additional work for the Defendants which was part covert and part overt, and which included negotiating with a member of the Taliban with a view to persuading him to commit himself to the peace process.

3. On 9 September 2014, a Claim Form was issued on behalf of the three Claimants, now superseded by an Amended Grounds for Judicial Review dated 3 November 2015. At §17 the claims are summarised. First, there was a claim based on a failure to apply or misapplication of relevant disclosed or undisclosed policies for locally engaged staff/CHIS so as to provide them with appropriate protection and compensation following the termination of their employment. Alternatively, if the Claimants fall outside the policies, there is a challenge on the basis that they are unlawful as being applied too rigidly. Secondly, there is a claim for breaches of the European Convention on Human Rights ('ECHR') since 'the Claimants were acting under instruction of the British military and operating within military bases as well as outside.' The claims are advanced under Articles 2, 3 and 8 of the ECHR. Thirdly, there is a claim for breaches of commensurate common law duties of protection. Fourthly, there is a pleaded claim for breaches of what are said to be contracts of employment. Fifthly, there is a claim in negligence. Finally, there is claim for misrepresentation arising out of what the Claimants were told about support and relocation in the event of threats to them and their family.

4. The Amended Grounds set out, in relation to each Claimant, how they came to be engaged as a CHIS and their present circumstances, including a description of the dangers which they say they now face as a result.

5. On 19 September 2014 (Order dated 2 October), following an oral hearing, Burnett J refused an application for urgent interim relief. On 6 October the Defendants served their Summary Grounds of Resistance.

6. The Defendants' Summary Grounds took issue with the claim on two bases. First, it was said that there was no arguable public law claim. Among other points the Defendants relied on Burnett J's observations that the public law claims were 'weak'. Secondly, and more importantly for present purposes, the Defendants argued that the claim for judicial review should be refused because of the difficulties as to what the Defendants could say about the private law claims without departing from what was described as 'the justified policy of 'Neither Confirm Nor Deny' ('NCND')'. At §§4-10, the Summary Grounds stressed the importance of the consistent application of the

NCND policy, and foreshadowed an application to the Court for permission to rely on Closed material, under s.6 of the JSA 2013, should the Claimants be granted permission to bring their JR claim.

7. On 19 December 2014, (Order dated 16 January 2015), following a hearing on 6 November 2014, Cranston J refused permission to apply for judicial review and an application for disclosure.

8. On 5 January 2015 (Order dated 16 January) the parties agreed a consent order by which the Claimants' claims founded on contract, tort and misrepresentation, and their claims for just satisfaction pursuant to the Human Rights Act 1998, 'save as disposed of by the public law proceedings', were to be stayed pending determination of the public law claims. This is an important order for what we have to consider in this judgment.

9. There was then an application for permission to appeal the orders of both Burnett J and Cranston J. On 22 March, Lewison LJ granted permission to appeal both decisions and on 8 May 2015, he allowed the appeal against the refusal of permission to apply for judicial review, and granted permission; the case, except for the appeal against the refusal of interim relief, was remitted to the Administrative Court for the substantive hearing by a Divisional Court in the last week of term or as early as possible in vacation.

10. Ouseley J made directions on 4 June to give effect to that order. On 22 June the Defendants issued their application under s.6 of the JSA 2013, supported by Open and Closed Statements of Reasons. On 30 June, the Defendants served a document entitled 'Detailed Grounds of Resistance', in which it was said that the Defendants had reconsidered their position and had decided to carry out an assessment of each Claimant's circumstances, following which they would decide whether it would be appropriate to take any further action with respect to any of the Claimants. It also said that the Claimants' cases would be considered by reference to all relevant circumstances including, but not limited to, their background, current safety and welfare, the nature of any current and foreseeable threat (including source and cause), the extent of protection through Afghan structures and the limitations of the operating environment in Afghanistan, particularly following the drawdown of military operations there.

11. By an order dated 6 July (signed on 10 September), Mitting J directed that the proceedings were proceedings in which a closed material application could be made under s.6 of the JSA 2013. Following this K and B made witness statements (dated 10 July and served on 14 July) setting out their evidence under 4 headings: their current circumstances (including threats), the security situation in Helmand, a summary of protection sought and an explanation of how the claim came to be made. A's statement was made on 3 October, following a summary dated 10 July and covered similar material, structured differently.

12. On 20 July, Mitting J ordered that the Defendants serve their decisions on the assessments they had decided to carry out, together with any further evidence in open and in closed, by 31 July. It had become apparent that the substantive hearing set for the end of July could not proceed. The assessments of K and A were presented in CLOSED witness statements by the Ministry of Defence (MoD) Intelligence Policy

Unit. The date was subsequently extended so that the assessment of B could be presented in a CLOSED witness statement of 20 August 2015. There was to be a further hearing to consider disclosure of sensitive material to the Claimants. The substantive hearing fixed for 28-30 July was vacated for a date in November, subsequently fixed for 17-20 November.

13. Although there are no closed judgments, on 8 September 2015, Mitting J ordered that the Defendants have permission to withhold sensitive material from the Claimants, that is all the material then served in closed in these proceedings. However, he also ordered that a series of questions be sent to K, A and B, which would give them the opportunity to provide further evidence or comment supporting their claims in relation to aspects which were disputed. Each of K, A and B took that opportunity. Their further material led to three further assessments set out in CLOSED witness statements dated 10 November 2015. Each maintained the earlier assessment, and concluded that it would be inappropriate to take any further steps on the claims.

14. However, it gradually appeared in the immediate run-up to what this Court imagined would be the substantive hearing of the claim, and became clear at the hearing itself, that neither Claimants nor Special Advocates regarded the disclosure issues as complete, the two hearings before Mitting J notwithstanding. Indeed the disclosure issues raised were such as to mean that the substantive hearing could not even begin. This was a very unsatisfactory state of affairs, not least because of Lewison LJ's order for expedition, the efforts made to list necessary hearings in vacation and the Claimants' repeated but not wholly compatible desire for swift decisions.

15. The new disclosure issues raised did not go to whether the closed material could be disclosed without damage to national security; it is obvious that they could not be disclosed without doing significant damage to it. The new issues, on which the lateness of the points limited the success of submissions in identifying and addressing the true issues between the parties, arose from s.14 of the JSA 2013 which provides that the restrictions on disclosure damaging to the interests of national security do not apply to the extent that non-disclosure would lead to a breach of Article 6 ECHR. The threshold issue which needed to be decided by the Court was whether Article 6 of the ECHR applied to the Claimants' claims. It was common ground that the issue should be decided at this stage because it was likely to determine the extent to which the Defendants would have to give disclosure and that the consequences of such an order would, in turn, establish the future direction of the case.

16. The Claimants were informed by the Defendants at the close of the 17/18 November hearing, that they took the view that the Claimants were not "telling the truth in relation to material and core parts of their claim, [and] are apparently deliberately putting forward false evidence in order to secure the financial advantage and/or internal relocation sought." They were also told that the Defendants contended that the proceedings do not involve the determination of the Claimants' civil rights such as to engage Article 6. This led the Claimants to seek to make open submissions on the issue, which the Court acceded to. The Court also sought submissions on the effect of the 20 October 2015 ECtHR decision in *Fazia Ali v UK*, App 40378/10, [2015] HLR 46 in which it had reached a different view from the Supreme Court in *Fazia Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 AC 39, in the context of decisions on homelessness under the Housing Act 1996, on what constituted the determination of a civil right. We sought submissions focused on the proceedings as

they stood in order to clarify those which we had already heard. The further hearing took place on 29 February, but did not advance matters as far as hoped.

17. Each Claimant is a Claimant in this single action; each is at present represented by Deighton Pierce Glynn, (DPG), and the same team of Counsel.

18. With that, we turn to the JSA 2013.

The relevant provisions of the JSA 2013

19. Part 2 of the JSA 2013 (with a commencement date of 25 June 2013) deals with disclosure of sensitive material and ss.6-14 deal generally with closed material procedure. Its relevant provisions are as follows.

> "6. Declaration permitting closed material applications in proceedings -
>
> (1) The court seised of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the Court.
>
> (2) The court may make such a declaration –
>
> (a) on the application of -
>
> (i) the Secretary of State (whether or not the Secretary of State is a party to the proceedings), or
>
> (ii) any party to the proceedings, or
>
> (b) of its own motion.
>
> (3) The court may make such a declaration if it considers that the following two conditions are met.
>
> (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 …
>
> (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 proceedings …

(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.

…

7. Review and revocation of declaration under section 6 -

(1) This section applies where a court seized of relevant civil proceedings has made a declaration under section 6.

(2) The court must keep the declaration under review, and may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.

(3) The court must undertake a formal review of the declaration once the pre-trial disclosure exercise in the proceedings has been completed, and must revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings."

20. Section 8 provides for the making of rules of court which "must secure" that a "relevant person" has the opportunity to make an application to the court not to disclose material otherwise than, here, to the court and special advocates. The rules must require the court to refuse permission for material to be disclosed if disclosure would be damaging to the interests of national security. If it grants permission, the court must consider requiring the provision of a summary here to the Claimants, by the relevant person.

S8 (3): "The court must be authorised –

(a) If it considers that the material or anything that is required to be summarised might adversely affect the relevant person's case or support the case of another party to the proceedings, to direct that the relevant person –

(i) is not to rely on such points in that person's case, or

(ii) is to make such concessions or take such other steps as the court may specify, or

(b) in any other case, to ensure that the relevant person does not rely on the material or (as the case may be) on that which is required to be summarised."

21. Section 14 is an interpretation section. Subsection (2) provides that:

> "Nothing in sections 6 to 13 and this section (or in any provision made by virtue of them) –
>
> …
>
> (c) is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights Convention."

22. The rules of court referred to in section 8 are contained in CPR Part 82.

The issue that arises at this stage

23. If no disclosure is required for this court to be acting in a manner consistent with Article 6, the issue of whether disclosure cannot be permitted because of the damage to national security has already been resolved by the decisions of Mitting J, which obviously apply to the material produced on behalf of the Defendants after the 8 September hearing. Further disclosure was not sought on the basis that any of that further material could be disclosed without such damage.

24. Disclosure was sought on some other basis. We can reject at the outset the suggestion that some common law duty of fairness required further disclosure to a level akin to that which Article 6 might require. There is no such duty once proceedings have entered the statutory closed materials procedure. Disclosure is entirely governed by the JSA. If the upshot of the disclosure process is that, on a review under s.7, the s.6 declaration has to be revoked, with whatever consequences that leads to for one side or the other, then that is the answer of the JSA to the question of whether the declaration is no longer in the interests of the fair and effective administration of justice.

25. It is only if the disclosure to the extent ordered would require this court to act inconsistently with Article 6 that further disclosure has to be considered. The principles on which it would then act can be summarised as follows. In *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28, [2010] 2 AC, Lord Phillips referred to the principle at [59] (in the context of control orders) applying the approach of the Grand Chamber of the ECtHR in *A v. United Kingdom* (2009) 49 EHHR 625, and concluded that (in that case, the controlee) had to be 'given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations'.

> "Provided this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirement of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."

See also Lord Hope at [84], and [87]:

> "where detail matters, as it often will, detail must be met with detail ..."

26. The inherent tension, between the requirement of fairness in the trial process, that a party should know the case against him, and the interest of national security in not disclosing particularly sensitive information, was discussed later in the speech of Lord Phillips at [63], and it was partly as a result of his invitation to Parliament to consider how that tension should be resolved consistently with the ECHR (see [64]) that the JSA 2013 was enacted by Parliament.

27. One further matter of generality may be noted at this stage: namely, that if it is a case to which Article 6 applies, the extent of the requirement to give disclosure will depend on context and all the circumstances of the case, see, for example, *Bank Mellat v. HM Treasury* [2015] EWCA Civ 1052, Richards LJ at [14]. Thus, in *Tariq v. Home Office* [2012] 1 AC 452, the House of Lords had to consider the extent to which there was an obligation to disclose sensitive material in an employment claim. At [81] Lord Hope contrasted cases where it was sought to confine fundamental rights and impose severe restrictions on personal freedom or where the individual was faced with criminal proceedings, with cases involving civil claims for damages. The analysis is an illustration of how the context will frame the necessary Article 6 protections, see also *Kiani v Home Secretary* [2015] ICR 1179, Lord Dyson MR at [23].

28. The question of whether further disclosure was required to avoid this court acting inconsistently with Article 6 depended on the claim presently before us, with the effect of the agreed stay in place. Paragraph 17 of the amended Claim form raised six grounds: a policy ground, breach of the ECHR Articles 2-8, common law failures in a duty of protection, in negligence, breach of contract and misrepresentation. It is only the first two which are not stayed, and which call here for consideration of Article 6. The first was said to be within the scope of Article 6 since it involved the determination of the civil rights of the Claimants under any relevant policy. The second involved Article 6 as a direct claim that the Defendants owed obligations to the Claimants pursuant to Articles 2-8 ECHR, as they were within the territorial scope of the ECHR. We appreciate that that is a summary of the main points as we see them, and not the fullness of their variations.

The policy based arguments

29. In his grounds, Mr Owen QC for the Claimants relied on an open 'Intimidation Policy' which relates to Locally Employed Staff. This policy recognised the contribution of local Afghanis who had assisted in achieving the aims and objectives of HM Government in Afghanistan, and who might be at risk when HM Armed Forces left the country. This policy envisages the provision of funds allowing for the relocation of the individual 'and, if appropriate, their family'. But the policy would only apply to a CHIS if employed for the purposes of that policy. That is not the issue before us, but is one of contract, stayed by consent. Alternatively, suspecting that there may be a policy which applied to CHIS, paragraph 79 of the grounds relies on it. Paragraph 80 of the amended grounds contends that the Defendants were obliged under the policy, such as they assumed it might be, to carry out an individual

assessment of the risks facing each Claimant, and to send it to the individual Claimants; it asserted that they were entitled, as a result of the risks they faced, to be relocated to a safe area in Afghanistan, and to financial support in accord with those policies.

30. We have considered carefully the arguments developed by Mr Owen, and rather more so by Mr Beal in closed. We are satisfied, on the basis of the factual claims, as put forward by the Claimants, and on the consideration of the closed material, that the part of the claim which is not stayed by consent does not arguably involve the determination of any Claimant's civil rights, and so Article 6 is not engaged on that basis so as to require further disclosure.

31. The first question is whether a claim related to any policy is a claim which involves the determination of a civil right, within Article 6 ECHR, with the disclosure requirements which accompany such a claim.

32. The unanimous decision in *Osman v. United Kingdom* [1998] 29 EHRR 245 at [115 and following] shows that Article 6 applies to disputes 'over rights and obligations which can be said, at least on arguable grounds, to be recognised under domestic law.'

33. The most recent and helpful authority on what constitutes the determination of a civil right, useful in this context, is the decision in *Fazia Ali*, above. The Supreme Court was concerned with whether the decision of a local housing authority under s193(5) of the Housing Act 1996, that it had discharged its duty to the applicant, was a determination of his civil rights for the purposes of Article 6 ECHR. A duty was owed under the Act, to the unintentionally homeless with a priority need who were eligible for assistance, to secure that accommodation was available. In defined circumstances that duty would cease, including by an applicant's refusal of suitable accommodation. Decisions on what duties were owed were subject to review by the local authority and then challenge in the County Court on a point of law. Lord Hope analysed extensively the ECtHR jurisprudence on the application of Article 6 in the realm of welfare duties. He concluded [49] that where the award of services or benefits in kind was not an individual right of which an applicant could consider himself the holder, but was dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria were satisfied and how the need for it ought to be met, Article 6 was not engaged.

34. The Strasbourg Court however concluded that the process did involve the determination of a civil right, albeit agreeing that the process complied with Article 6. The Court set out its general principles: there had to be a dispute over a "right" which can be said, arguably at least, to be recognised under domestic law. The dispute may relate to the existence of a right in the first place as well as to its scope and the manner of its exercise. Finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences being insufficient to bring Article 6 into play; [53]. The starting point must be the provisions of domestic law and their interpretation by the domestic courts; to differ from superior national courts would need strong reasons. It was necessary to look to the realities of the situation and not stop at appearance and language; [54].

35. The Strasbourg Court noted that the Supreme Court had accepted that the Council had owed to the applicant a duty to secure accommodation, which she could enforce and

which was a matter of acute concern to her; she had a "general right to be housed", "general" , we take it, in the sense that no specific dwelling could be identified. The Court was satisfied that she had a legally enforceable right to be provided with accommodation, albeit that the right could cease before that aim was achieved. The Court then concluded that this right was an Article 6 civil right. Disputes over entitlement to social security or welfare benefits now generally fell within Article 6.

36. In *Fazia Ali*, the right was both conditional, subject to the exercise of an evaluative judgment, and incapable of precise definition, rather than being say a right to a fixed amount of money or benefit. The Court uses the words "exercise of discretion" for what we take to mean an evaluative exercise, since the exercise of discretion is for these purposes the antithesis of a right. This did not necessarily militate against recognition as a "civil right" of an "entitlement" so derived. What the ECtHR called the "discretion" was subject to clearly defined limits: once initial qualifying conditions were met, there was a duty to secure accommodation by one of three means.

37. It is also clear that the fact that a claim is brought by judicial review has nothing to do with the decision as to whether it involves the determination of a civil right. The fact that the claim is against a public body is not determinative either, and indeed not of itself of any real weight. Nor, applying *Fazia Ali*, is the fact that a decision may involve considerable judgment and evaluation, necessarily determinative, though it is relevant to that issue.

The ECHR ground

38. Paragraph 86 of the amended grounds contended that the Claimants were engaged by the Defendants so that they were under the authority and control of the Defendants in relation to their tasks in a way which brought them within the territorial jurisdiction of the UK for the purposes of Article 1 ECHR. The duties then owed to them under Articles 2, 3 and 8 were ongoing. The Defendants maintained their position of "NCND" in relation to the Claimants' asserted engagements as CHIS.

39. We considered whether the Claimants' case supported any extra-territorial effect of the ECHR based on the exception which arises where HM Government or HM Armed Forces are engaged in support of government of a foreign state in the territory of that state. In the recent case of *Serdar Mohammed and others v. Secretary of State for Defence and another* [2015] EWCA Civ 843, the Court Appeal (Lord Thomas of Cwmgiedd, Lloyd-Jones and Beatson LJJ) considered the history and current state of the law on this issue and, in particular, the effect of the decision of the Grand Chamber of the ECtHR in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 and of the Supreme Court in *R (Smith) v. Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29 [2011] 1 AC 1. The activities of a State's agents abroad may fall within the territorial jurisdiction of the State even where it has no effective control of the area in question, and that whenever and wherever a State which is a contracting party to the ECHR purports to exercise legal authority or uses physical force abroad, it must do so in a way which does not violate ECHR rights. It is not legal control but the exercise of physical power over the person in question which is decisive, see *Serdar Mohammed* at [93(iv)], [95] and [99]. We also considered the observations of the ECtHR in *Soering v. United Kingdom* (1989) 11 EHRR at [86] and [88] as an illustration of the principle that the UK, as a contracting party to the ECHR, was obliged by the terms of

Article 1 to secure that everyone with its jurisdiction enjoyed the rights, freedoms and protections under the ECHR.

40. As the judgment of the Court of Appeal in *Serdar Mohammed* makes clear at [91], it is only in exceptional circumstances that extra-territorial acts give rise to jurisdiction under Article 1:

> "In *Al-Skeini v. United Kingdom* (2011) 53 EHRR 18 the Grand Chamber, while reiterating (at [131]) that jurisdiction under Article 1 was primarily territorial and that extraterritorial acts gave rise to jurisdiction only in exceptional circumstances, endorsed the extensions of territorial scope indicated in the earlier cases. In particular, it confirmed (at [138]) that the ECHR applied where:
>
> > "as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory".

41. But *Al-Skeini*, and Serdar Mohammed in the light of *Smith v MoD* [2013] UKSC 41, [2014] 52 (but with evident serious concern), went further: effective control of the area in question was not a necessary condition for the application of the ECHR. The crucial question was whether the State "through its agents exercises control and authority over an individual, and thus jurisdiction…."; *Serdar Mohammed* [91], quoting [136-7] of *Al-Skeini*. At [93], this latter formulation was treated as an alternative to territorial control, largely removing that as a basis for jurisdiction.

42. At [95] of *Serdar Mohammed* the Court approved an observation by Leggatt J in *Al-Sadoon v Secretary of State for Defence* [2015] EWHC 715 (Admin):

> "… it follows from *Al-Skeini* that whenever and wherever a State which is a contracting party to the ECHR purports to exercise legal authority or uses physical force abroad, it must do so in a way that does not violate ECHR rights."

43. For reasons we are able to give only in the closed judgment, the facts asserted by the Claimants, if correct, do not persuade us at all that they were within the scope of the ECHR whether described as its territorial limits or control or authority so as to come within its jurisdiction.

44. Mr Owen submitted that the whole claim should be seen as one large protection claim and that Article 6 should be considered accordingly. Undoubtedly, that is the purpose of each aspect of the claim. But the argument appeared to be that this aspect of the claim would determine the other aspects of the claim, presently stayed, and so those other aspects of the claim should be taken into account for the purpose of dealing with Article 6 disclosure in relation to the claims which were not stayed. We do not accept that approach, as it ignores the effect of the stay. Moreover, the contract and misrepresentation claim can proceed; the question of a CMP and Article 6 will have to be considered. The tort claim might be made more difficult by the absence of disclosure here, but it does raise different issues, and again the question of a CMP will require consideration in that context. The question of just satisfaction for any breach

of human rights does not arise on the conclusions we have reached, and would make no difference anyway, since if there was an arguable claim that the ECHR applied, that would suffice without the claim for just satisfaction being added. This is not an example of a claim or outcome skewed by the process which the parties agreed should be adopted. Had there been no stay, the different ways in which the claims did or did not engage Article 6 would obviously affect how they should proceed.

45. There was also a related submission from Mr Beal that the litigation as a whole, and the tort claim in particular, engaged Article 1 Protocol 1 ECHR, as damages claims amounting to a property right of which the Claimants were being deprived by non-disclosure, and that engaged Article 6. The upshot of that submission, based on the rather different circumstances of *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301 would appear to be that Article 6 is engaged in any case in which it was not otherwise engaged. The submission goes rather too far. Our decision on disclosure moreover does not deal with disclosure in the stayed claims. The point is irrelevant. It is not a legitimate purpose of these proceedings to provide disclosure for the other, stayed, claims.