Closed material procedures in English family law: development in the shadow of national security and some comparisons with other EU Member States

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Introduction

The last few years have seen a growing complexity in the management of litigation where sensitive public interest disclosure issues arise, particularly (though not exclusively) in relation to national security. Family law has not been immune from these developments. There are times when, for legitimate reason, local authorities, the police or the security service do not wish all parties to the proceedings, or the wider public, to gain access to highly sensitive material in respect of which disclosure may damage the public interest, compromise investigations or put lives at risk. A blanket withholding of disclosure of such information in reliance on the common law principle of public interest immunity may prevent the determination of the case in question. As a result, and as this article will explore, procedures have developed by which the courts can manage the disclosure of such material through the use of closed hearings to the exclusion of certain parties to the proceedings, often with a security-cleared special advocate instructed to represent their interests. The purpose of this article is to consider the role of such procedures in family proceedings in England and Wales, the issues which they arouse in relation to the protection of fundamental rights, and to draw some comparisons with our continental neighbours. At the very heart of the debate is the tension between the disclosure of sensitive material and the principle of open justice.

The early days: *Chahal* and SIAC

The competing issues which arise are illuminated through a reminder of the origins of the closed material procedure and the immigration case of *Chahal v United Kingdom* (1996) 23 EHRR 413. In *Chahal*, the UK sought a deportation order against Mr Chahal for reasons of national security and on the basis of information which the Home Secretary certified as being subject to public interest immunity and therefore confidential. Mr Chahal was entitled to challenge the order to an advisory panel, but was not entitled under the law existing at the time to any legal representation in that challenge, and did not have access to the material upon which the decision to deport had been made. The European Court of Human Rights found this procedure to be, inter alia, in breach of Art 13 (right to an effective remedy) of the European Convention on Human Rights ('the Convention'), on the basis that the appeal process could not effectively review the grounds for his detention. Reference was made by the court to the closed material process adopted in Canada which, the court said, appeared to provide a more effective form of control. In response to this, the Special Immigration Appeals Commission ('SIAC') was introduced in the UK in 1997 with the jurisdiction to hear appeals against immigration decisions in cases in which there is evidence withheld by the government and only disclosed in closed hearings and to the special advocate appointed to represent the interests of the appellant. Under the provisions of the SIAC rules, the special advocate was permitted to make submissions and cross examine witnesses at closed material hearings but, once they had had sight of the closed material, could not take further instructions from the person they were representing. Since the appellant is excluded from the closed material hearings, and because of the

restrictions on the role of the special advocate, the process is said to fall short of entirely mitigating the concerns as to fundamental procedural fairness and the right to a fair trial identified in *Chahal*.

Since the introduction of SIAC, the use of closed material hearings and special advocates has expanded into other fields, and the procedure has been subject to scrutiny by the House of Lords/Supreme Court on a number of occasions. In *Secretary of State for the Home Department v MB* [2007] UKHL 46 (in relation to control orders under the Prevention from Terrorism Act 2005 – orders imposing controls such as curfews on those suspected of terrorism-related activity) Lord Bingham acknowledged the assistance that special advocates can provide in testing evidence but, referring to Lord Woolf's remarks in *R (Roberts) v Parole Board* [2005] UKHL 45, noted the grave disadvantages that may result:

> 'The reason is obvious. In any ordinary case, a client instructs his advocate on the weaknesses and vulnerability of the adverse witnesses, and indicates what evidence is available by way of rebuttal. This is a process which it may be impossible to adopt if the controlled person does not know the allegation made against him and cannot therefore give meaningful instructions, and the special advocate, once he knows what the allegations are, cannot tell the controlled person or seek instructions without permission, which in practice (as I understand) is not given. "Grave disadvantage", is not, I think, an exaggerated description of the controlled person's position where such circumstances obtain.'

Developing this principle further (and also in relation to control order legislation), Lord Phillips in *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 held that the right to a fair trial under Art 6 of the Convention would be satisfied provided that the parties to the proceedings are given sufficient information about the allegations against them to enable them to give effective instructions in relation to those allegations.

Use in family proceedings

In what was reported to be the first time, a closed material procedure was used in family proceedings in *Re T (Wardship)* [2010] 1 FLR 1048. The context of this case was an application for contact by the father and paternal grandparents to the child, who had been made a ward of court following his abduction by the father to India. What became a central focus for the court (in consideration of the child's welfare) was an allegation that the father had allegedly taken out a contract for the murder of the mother. However, the police wished to withhold the information in respect of this allegation, including the source of the information, in order to protect the investigation. The court adopted the special advocate procedure, McFarlane J (as he then was) describing the reasons for this being the need for the court 'to establish some form of filter or buffer between the MPS and the parties to the wardship proceedings through which the relevant evidential material could pass or otherwise be assessed by the court in a manner that respected the parties' rights under Art 6(1) of the European Convention and in a manner that was as far as possible commensurate with any countervailing claims of public interest immunity'. McFarlane J spoke in positive terms about the process, which was two-fold. At stage 1, the special advocates were able to test the material, which resulted in a large proportion of it (he estimated 90%) being disclosed to the parties. In relation to the material that remained undisclosed, in stage 2 the special advocates 'conducted a process of cross-examination and submission designed to test the material and enable the court to see any weakness there may be in its evidential value'.

However, in *BCC v FZ and others* [2013] 1 FLR 974, Eleanor King J (as she then was) declined to direct the appointment of a special advocate to assist in the question of whether the claim to public interest immunity in respect of disclosure should be upheld (the *Re T* stage 1), but, having held that there should be no disclosure, did direct the appointment of a special advocate to represent the parents' interests in the future conduct of the case (stage 2). The case

involved care proceedings in which a 16-year-old girl was placed in protective police custody following allegations of sexual and physical abuse by her parents. The police sought blanket non-disclosure on the basis of public interest immunity, which Eleanor King J upheld after having read that material herself, heard oral evidence and heard submissions from all parties – but of course without disclosure of the material to the parents. The judge distinguished *Re T* on the basis that she was satisfied that the police had (unlike in *Re T*) provided complete disclosure to the court at the earliest stage. She concluded that none of the confidential material should be disclosed, even in summary form.

The decision in *BCC* in relation to stage 1 was reflective of the earlier decision of the (then) President Sir Nicholas Wall in *Chief Constable v YK and others* [2011] 1 FLR 1493. Here, the court declined to direct the appointment of a special advocate in a forced marriage case, noting firstly that the court's jurisdiction in relation to forced marriage protection orders was pursuant to a statutory footing and was protective in nature (including that orders could be made ex parte), but secondly that 'there must be something that a special advocate can do which it would not be appropriate for the judge to do' (para [92]). Wall P found that the court itself was fully in a position to resolve the public interest immunity and disclosure issues; in other words there was nothing which the special advocate could do which could not be done by the judge. In *BCC* Eleanor King J similarly held (at para [43]) that there was 'no need for a special advocate to assist on the basic disclosure or PII issue'.

However, it is worth recalling that the use of the special advocate procedure at stage 1 in *Re T* resulted in some 90% of the material which the police had sought to avoid disclosure of being disclosed in one form or another. The effect of the order in *BCC* was to entirely restrict disclosure to the parents. The question therefore remains as to whether the involvement of a special advocate at stage 1 in *BCC* might have resulted in at least some disclosure to the parents at that stage.

Both *BCC* and *YK* reflect to some degree a cautionary or restrictive approach to the use of special advocates. In *YK* Sir Nicholas Wall went as far as to say that the use of special advocates is a matter of last, as opposed to first, resort. However, on 8 October 2015 – almost exactly 5 years after *YK* – Sir Nicholas's successor, Sir James Munby P, issued guidance on radicalisation cases in the family courts (*Radicalisation cases in the Family Courts,* 8 October 2015), which identified, amongst a number of factors which judges hearing such cases should consider, the need to consider PII issues 'and whether there is a *need* for a closed hearing or use of a special advocate' (President's emphasis). Thus, whilst it is specifically emphasised that there must be an identified need for a special advocate, it was not suggested in the guidance that the use of special advocates is a matter of last resort.

Further developments: *Al Rawi*, *Re A* and the Justice and Security Act 2013

Alongside the progression of cases in the family law context from *Re T* to *BCC*, a civil action for damages was simultaneously progressing from the Queen's Bench Division through the Court of Appeal to the Supreme Court between 2009 and 2011: *Al Rawi v Security Service* [2011] UKSC 34. The action was brought by six claimants who had been detainees at Guantanamo Bay. They sought damages for unlawful detention, rendition and mistreatment. At first instance Silber J allowed the government's proposed course of action that a closed material procedure could be adopted within the civil claim. The Court of Appeal disagreed, Lord Neuberger (as Master of the Rolls) explaining that

> 'Under the common law, a trial is conducted on the basis that each party and his lawyer sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair' (para [14])

and

> 'the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it' (para [30]).

The conclusion of the Court of Appeal was therefore clear: absent an Act of Parliament, it would never be appropriate for a civil trial to be conducted under a closed material procedure. However, whilst on appeal to the Supreme Court, the government's challenge was dismissed by a majority, the views of the justices were divergent. Whilst some strong views were expressed as to the danger of a closed material procedure taking place in a civil trial absent legislative action, and the risk of evidence which is insulated from challenge being misleading, some pragmatism was also apparent: Lord Clarke, for instance, noted the problem that if the government was forced to rely upon issuing a PII certificate, that would preclude it from relying on that evidence at all, effectively preventing it from mounting a defence.

Shortly after the decision of the Supreme Court in *Al Rawi*, the Supreme Court decided the case of *Re A (A child)* [2012] UKSC 60. Baroness Hale (giving the judgment of the court) rejected the possibility of a closed material procedure in a case where the local authority claimed public interest immunity in relation to confidential disclosure of sexual abuse allegations made by a vulnerable young woman against the father of a girl then aged 10. One of the reasons Baroness Hale gave for rejecting a closed material procedure was the fact that *Al Rawi* had determined that there was no power to adopt such a procedure in ordinary civil proceedings. But she noted, however, that there may be greater latitude in children's cases where welfare is paramount, albeit that 'the arguments against making such an inroad into the normal principles of a fair trial remain very powerful'. She continued:

> 'The second difficulty lies in the deficiencies of any closed material procedure in a case such as this. We have arrived at a much better understanding of those difficulties in the course of the control order cases, culminating in *AF (No 3)*. The essential requirement of any fair procedure is that the person who stands to lose his rights has an opportunity effectively to challenge the essence of the case against him. There may be cases in which this can be done by offering him a "gist" of the allegations and appointing a special advocate to scrutinise the whole of the material deployed against him. In a case such as this, however, it is not possible effectively to challenge the allegations without knowing where, when qnd how the abuse is alleged to have taken place.'

Thus, whilst the court rejected a closed material procedure in that case, and decided that disclosure must take place (the rights of privacy being considered an insufficient justification for the grave compromise of the fair trial and family life rights of the parties), the possibility of closed material procedures in family proceedings was not ruled out, notwithstanding the Supreme Court's decision in *Al Rawi*.

However, since *Re A*, and in specifically in response to the *Al Rawi* litigation, Parliament took the step of legislating for closed material procedures in civil litigation through the Justice and Security Act 2013. This has been the subject of considerable and hotly-contested debate. As Adam Tomkins has remarked, the 2013 Act permits that which was ruled impermissible by the court in *Al Rawi* (see A Tomkins, *Justice and Security in the United Kingdom*, 2013). However, he also states that by virtue of modifications to the Bill through its passage through the second legislative chamber the resulting Act is not so much of a threat to the rule of law as critics to the legislation have claimed. One amendment which the Lords did seek to enact, but which the House of Commons rejected, was provision that closed material procedures are adopted only as a matter of last result, mirroring Sir Nicholas Wall's view in *YK*. However, despite the rejection of the Lords' proposed amendment, there remains a degree of protection/safeguard as to the

circumstances in which a closed material procedure may be adopted: by s 6(5) of the Act, the procedure can only be adopted where two conditions are met, namely (a) that disclosure of sensitive material would be required; and (b) it is in 'the interests of the fair and effective administration of justice in the proceedings'.

In July 2017, Cobb J was tasked with considering the funding arrangements for special advocates in the (family) case of *Re R (Closed Material Procedure: Special Advocates: Funding)* [2017] EWHC 1793 (Fam). The court in that case referred to the circumstances in which the family court would consider it appropriate to hold closed material hearings as being 'reasonably exceptional'. Whilst the principal issue at that hearing was funding, it was argued by counsel for the police that the direction for appointment of a special advocate for the father could and should be discharged because there was no longer any need for a closed material process. Cobb J declined that request, and, importantly, said that at the next closed material hearing he would need to 'determine afresh whether any of the sensitive material can in fact be disclosed into the [open] proceedings'. Whilst suggestive of a cautious attitude to the possible discharge of the appointment, the approach of Cobb J nonetheless demonstrates a proactive case management of sensitive material through the use of a special advocate at stage 1.

Some comparisons with other EU Member States

In its 2014 report *National Security and secret evidence in legislation and before the court: exploring the challenges*, the European Parliament concluded that the UK constitutes 'an "exception" in the broader EU landscape due to the existence of the much-contested "Closed Material Procedures" (CMPs)'. The comparative study looked at the regimes for the use of intelligence evidence in France, Germany, Spain, Italy, the Netherlands and Sweden as well as the UK. The study found that only the UK and the Netherlands had incorporated the use of 'secret' evidence into legal proceedings by statute, and the UK's system of closed material procedures was the most developed and extensive of all the Member States considered. The results of the study also demonstrated a wide variance in practice and procedure, both within and between those countries that had introduced legislation to provide for the use of sensitive material. The closest comparison to the UK was the Netherlands, which in 2006 introduced legislation to provide for 'shielded witnesses' in court, through which members of the intelligence services may be heard before a special examining magistrate. In most cases the procedure is in camera and ex parte, but relates only to criminal proceedings. In other types of proceedings, intelligence evidence may be admitted for the judge to see, but there is limited scope for assessing the legitimacy of the evidence. In Germany, unlike in both the UK and the Netherlands, the study noted that the courts cannot, by virtue of the Federal Constitution, determine cases based on secret evidence. However, second-hand or hearsay evidence may still be admissible. There is also a process whereby if intelligence services refuse to give access to information, a party can challenge this refusal, and the legality of the refusal will be assessed by a higher administrative court. However, only the judges determining the decision not to disclose documents will have access to the documents. Both France and Italy appear to apply a more rigid approach to use of the confidential intelligence evidence, at least in respect of criminal law: in France a confidential document or information may not be communicated to judges, and cannot be used as evidence; similarly in Italy all evidence that is deployed must be disclosed to the defendant.

Drawing the threads together

There is, in conclusion, little doubt that over the last 20 years the English courts have become more acquainted (if not more comfortable) with the use of closed material procedures, and more latterly in the context of family proceedings. A more developed and systematic framework has developed as compared to other EU Member States studied in 2014. Nonetheless there remains a strong and unavoidable sense that such proceedings are imperfect, and they continue

to be heavily critiqued by many observers. They require very careful consideration before they are invoked, even if the test is not now one of 'last resort'.

That they are an established (albeit exceptional) part of family proceedings is however clear. In *Re R*, Cobb J began his judgment by saying as follows:

> 'It is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion (see Lord Mustill in *D v NSPCC* [1995] 2 FLR 687). The closed material procedure operates to ensure, to the fullest extent achievable, that this cardinal principle is observed even when the material in question, including that which attracts Public Interest Immunity, is highly sensitive.'

Since the complexity and extent of documentary (including surveillance) evidence and data seems set to continue to increase, the use of carefully-managed closed material procedures seems likely to grow. In addition to the open justice and Art 6 concerns inherent in such procedures, there are also practical and financial consequences to litigation through the use of a closed material procedure: an overall increase in complexity, further hearings and more legal representatives through the appointment of special advocates – all of which serve to increase the cost and length of proceedings. It is vital therefore that the court takes an active case management role in any case where issues of disclosure of sensitive material arise.