

2013 No. 175

COURT OF JUDICATURE, NORTHERN IRELAND

**The Rules of the Court of Judicature (Northern Ireland)
(Amendment) 2013**

Approved by Parliament

Made - - - - 26th June 2013

Laid before Parliament 27th June 2013

Coming into operation in accordance with rule 1

The Lord Chancellor makes the following Rules in exercise of the power conferred by paragraph 3(6)(a) of Schedule 3 to the Justice and Security Act 2013(a) (“the 2013 Act”) to make rules under section 55 and 55A of the Judicature (Northern Ireland) Act 1978(b) and sections 6(9) and (10), 7(6), 8, 10, 11 and 18(4) and (5) of the 2013 Act.

Before making these Rules, the Lord Chancellor has consulted the Lord Chief Justice of Northern Ireland in accordance with paragraph 3(3)(b) of Schedule 3 to the 2013 Act.

Citation, commencement and interpretation

1. These Rules may be cited as the Rules of the Court of Judicature (Northern Ireland) (Amendment) 2013 and shall come into operation on the day after the day on which they are made.

2. In these Rules, a reference to an Order or a rule by number alone means the Order or rule so numbered in the Rules of the Court of Judicature (Northern Ireland) 1980 (c).

Amendments to the Rules of the Court of Judicature (Northern Ireland) 1980

3. In the Arrangement of Orders, after the entry relating to Order 125, insert—

“126. Justice and Security Act 2013 – Closed Material Procedure”.

4. In Order 1, rule 1A (The Overriding Objective), in paragraph (4) for “and Order 116C, rule 2(1)”, substitute “,Order 116C, rule 2(1) and Order 126, rule 2(1)”.

5. In Order 13, after rule 7B, insert—

(a) 2013 c.18

(b) 1978 c.23; to which the most recent relevant amendments were made by paragraphs 29 and 30 of Schedule 5 to the Constitutional Reform Act 2005 (c.4) and by paragraph 15 of Schedule 18 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010 No.976).

(c) S.I.1980/346; to which the most recent relevant amendments were made by S.R. 2011 No.422

“Judgment where application under section 6 of the Justice and Security Act 2013 pending

7C. Judgment shall not be entered against a defendant under this Order if notice has been given under Order 126 of a person’s intention to make an application for a declaration under section 6 of the Justice and Security Act 2013 in relation to the proceedings, and that application has not been disposed of.”.

6. In Order 14, after rule 9, insert—

“Judgment where application under section 6 of the Justice and Security Act 2013 pending

10. No party in an action to which this Order applies may obtain summary judgment if notice has been given under Order 126 of a person’s intention to make an application for a declaration under section 6 of the Justice and Security Act 2013 in relation to the proceedings, and that application has not been disposed of.”.

7. In Order 19, after rule 4, insert—

“Judgment where application under section 6 of the Justice and Security Act 2013 pending

5. Judgment shall not be entered against a Plaintiff under this Order if notice has been given under Order 126 of a person’s intention to make an application for a declaration under section 6 of the Justice and Security Act 2013 in relation to the proceedings, and that application has not been disposed of.”.

8. In Order 78, after rule 1, insert—

“1A. Where in proceedings before a county court the court considers that there is a real possibility that a party would in the course of the proceedings be required to disclose material the disclosure of which would be damaging to the interests of national security, the court must transfer the proceedings to the High Court.”.

9. After Order 125, insert Order 126 (closed material procedure), as set out in the Schedule to these Rules.

Chris Grayling
Lord Chancellor

26th June 2013

“ORDER 126
CLOSED MATERIAL PROCEDURE
PART I
APPLICATION OF THIS ORDER

Scope and interpretation

- 1.—(1) This Order contains rules—
 - (a) about—
 - (i) applications under sections 6(2), 7(4) and 18(1) of the Justice and Security Act 2013;
 - (ii) closed material applications in section 6 proceedings;
 - (iii) section 6 proceedings; and
 - (b) about appeals to the Court of Appeal where there have been proceedings on or in relation to any matter within sub-paragraph (a) in the High Court.
- (2) Subject to paragraph (3), in this Order—
 - (a) “the Act” means the Justice and Security Act 2013;
 - (b) “closed material application” means an application of the kind mentioned in section 8(1)(a) of the Act;
 - (c) “legal representative” is to be construed in accordance with section 14(1) of the Act;
 - (d) “relevant person” is to be construed in accordance with section 14(1) of the Act;
 - (e) “section 6 proceedings” is to be construed in accordance with section 14(1) of the Act;
 - (f) “sensitive material” has the meaning given by section 6(11) of the Act;
 - (g) “special advocate” means a person appointed under section 9(1) of the Act;
 - (h) “specially represented party” means a party whose interests a special advocate represents.
- (3) In relation to proceedings arising by virtue of section 18 of the Act (review of certification)—
 - (a) a reference to the relevant person is to be read as a reference to the Secretary of State; and
 - (b) a reference to the interests of national security includes a reference to the interests of the international relations of the United Kingdom.

Modification to the overriding objective

- 2.—(1) Where any of the rules in this Order applies, the overriding objective in Order 1, and so far as possible any other rule, must be read and given effect in a way which is compatible with the duty set out in paragraph (2).
- (2) The Court must ensure that information is not disclosed in a way which would be damaging to the interests of national security.

(3) Subject to paragraph (2), the Court shall satisfy itself that the material available to it enables it properly to determine the proceedings.

Rules to apply subject to this Order

3.—(1) Subject to paragraph (2), in relation to proceedings to which this Order applies, these Rules apply subject to this Order.

(2) Order 24 (discovery and inspection of documents) applies to proceedings to which this Order applies, subject only to rule 2 and the Court’s permission for material not to be disclosed otherwise than to—

- (a) the Court;
- (b) any person appointed as a special advocate; and
- (c) where the Secretary of State is not the relevant person but is a party to the proceedings, the Secretary of State.

PART II *GENERAL PROVISIONS*

Scope of this Part

4. This Part applies, except where otherwise indicated, to all proceedings mentioned in rule 1(1).

Hearings in private

5.—(1) If the Court considers it necessary for any party and that party’s legal representative to be excluded from any hearing or part of a hearing in order to secure that information is not disclosed where disclosure would be damaging to the interests of national security, it shall—

- (a) direct accordingly; and
- (b) conduct the hearing, or that part of it from which that party and that party’s legal representative are excluded, in private but attended by a special advocate to represent the interests of the excluded party.

(2) The Court may conduct a hearing or part of a hearing in private for any other good reason.

Notification of hearings

6. Unless the Court directs otherwise, it shall serve notice of the date, time and place fixed for any hearing on—

- (a) every party, whether or not entitled to attend that hearing; and
- (b) the special advocate or those instructing the special advocate.

Proceedings which must be determined at a hearing

7. The following proceedings shall, unless the court directs otherwise, be determined at a hearing—

- (a) an application by the Secretary of State under section 6(2) of the Act for a declaration;
- (b) a closed material application;
- (c) a review of the Court’s own motion under section 7 of a declaration made under section 6 of the Act;

- (d) a formal review under section 7(3) of the Act of a declaration made under section 6 of the Act;
- (e) an application under section 7 of the Act for revocation of a declaration made under section 6 of the Act;
- (f) an application under section 18(1) of the Act to have a certificate issued under section 17(3)(e) of the Act set aside;
- (g) an appeal to the Court of Appeal from a decision or order of the High Court made in any of the proceedings mentioned in paragraphs (a) to (f) above.

Appointment of a special advocate

8.—(1) Subject to paragraphs (2) and (3), on—

- (a) the Secretary of State deciding to make an application under section 6(2) of the Act; or
- (b) the Secretary of State receiving written notice under rule 20 (notification of intention to make application for a declaration) that a party other than the Secretary of State intends to make such an application; or
- (c) the Secretary of State receiving written notice under rule 30 (review of certification) of an application under section 18(1) of the Act to have a certificate issued under section 17(3)(e) of the Act set aside,

the Secretary of State must immediately give notice of the proceedings to the Advocate General for Northern Ireland (who, under section 9(1) of the Act, has the power to appoint a special advocate).

(2) Paragraph (1) applies unless a special advocate has already been appointed to represent the interests of the specially represented party in the proceedings and that special advocate is not prevented from communicating with that party by virtue of rule 10 (special advocate: communicating about proceedings).

(3) Paragraph (1) applies whether the proceedings are in the High Court or the Court of Appeal.

(4) Where any proceedings to which this Part applies are pending but no special advocate has been appointed, any party or the Secretary of State may request that the Advocate General for Northern Ireland appoint a special advocate.

Functions of a special advocate

9. The functions of a special advocate are to represent the interests of a specially represented party by—

- (a) making submissions to the court at any hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded;
- (b) adducing evidence and cross-examining witnesses at any such hearing, or part of a hearing;
- (c) making applications to the Court or seeking directions from the Court where necessary; and
- (d) making written submissions to the Court.

Special advocate: communicating about proceedings

10.—(1) The special advocate may communicate with the specially represented party or the specially represented party's legal representative at any time before a relevant person serves sensitive material on the special advocate.

(2) After the relevant person serves sensitive material on the special advocate, the special advocate must not communicate with any person about any matter connected with the proceedings, except in accordance with paragraph (3) or (6)(b) or with a direction of the Court pursuant to a request under paragraph (4).

(3) The special advocate may, without directions from the Court, communicate about the proceedings with—

- (a) the Court;
- (b) the relevant person (where this is not the Secretary of State);
- (c) the Secretary of State or any person acting for the Secretary of State;
- (d) the Advocate General for Northern Ireland or any person acting for the Advocate General for Northern Ireland; or
- (e) any other person, except the specially represented party or the specially represented party's legal representative, with whom it is necessary for administrative purposes for the special advocate to communicate about matters not connected with the substance of the proceedings.

(4) The special advocate may request directions from the court authorising the special advocate to communicate with the specially represented party or the specially represented party's legal representative or with any other person.

(5) Where the special advocate makes a request for directions under paragraph (4)—

- (a) the Court shall notify the relevant person and (where the relevant person is not the Secretary of State) the Secretary of State of the request, and of the content of the proposed communication and the form in which it is proposed to be made; and
- (b) the relevant person or the Secretary of State or each of them (where each wishes to object) shall, within a period specified by the Court, file with the Court and serve on the special advocate notice of any objection which the relevant person or the Secretary of State has to the proposed communication or to the form in which it is proposed to be made.

(6) Paragraph (2) does not prohibit the specially represented party from communicating with the special advocate after the relevant person has served material on the special advocate, but—

- (a) the specially represented party may only communicate with the special advocate through the specially represented party's legal representative in writing; and
- (b) the special advocate must not reply to the communication other than in accordance with directions of the Court, except that the special advocate may without such directions send a written acknowledgment of receipt to the specially represented party's legal representative

Evidence in proceedings to which this Order applies

11.—(1) Subject to the other rules in this Order, the evidence of a witness may be given either—

- (a) orally before the Court; or
- (b) in writing, in which case it shall be given in such manner and at such time as the Court directs.

(2) The Court may also receive evidence in documentary or any other form.

(3) The Court may receive evidence that would not, but for this rule, be admissible in a court of law.

(4) Every party is entitled to adduce evidence and to cross-examine witnesses during any hearing or part of a hearing from which that party and that party's legal representatives are not excluded.

(5) A special advocate is entitled to adduce evidence and to cross-examine a witness only during a hearing or part of a hearing from which the specially represented party and the specially represented party's legal representatives are excluded.

(6) The Court may require a witness to give evidence on oath.

Sensitive material

12.—(1) The relevant person—

(a) shall apply to the Court for permission to withhold sensitive material from a specially represented party or the specially represented party's legal representative in accordance with this rule; and

(b) may not rely on sensitive material at a hearing on notice unless a special advocate has been appointed to represent the interests of the specially represented party.

(2) The relevant person shall file with the Court and, at such time as the Court directs, serve on the special advocate—

(a) the sensitive material; and

(b) a statement of the relevant person's reasons for withholding that material from the specially represented party and the specially represented party's legal representatives.

(3) The relevant person may at any time amend or supplement material filed under this rule, but only with—

(a) the agreement of the special advocate; or

(b) the permission of the Court.

Consideration of closed material application or of objection to special advocate's communication

13.—(1) This rule applies where the relevant person or, as the case may be, the Secretary of State has—

(a) applied under rule 12 (sensitive material) for permission to withhold sensitive material; or

(b) objected under rule 10(5)(b) (special advocate: communicating about proceedings) to a proposed communication by the special advocate.

(2) The Court shall fix a hearing for the relevant party, the Secretary of State and the special advocate to make oral representations, unless—

(a) the special advocate gives notice that he or she does not challenge the application or objection;

(b) the Court has previously, in determining the application for a declaration under section 6 of the Act, found that the first condition in section 6 of the Act is met in relation to the same or substantially the same material and is satisfied that it would be just to give permission without a hearing;

(c) the Court has previously considered—

(i) an application under rule 12(1) for permission to withhold the same or substantially the same material ; or

(ii) an objection under rule 10(5)(b) to the same or substantially the same proposed communication; and

is satisfied that it would be just to give permission or uphold the objection without a hearing; or

(d) the relevant person, the Secretary of State and the special advocate consent to the Court deciding the application or objection without a hearing.

(3) If the special advocate does not challenge the application or the objection, he or she must give notice of that fact to the Court, the relevant person and the Secretary of State no later than the end of—

- (a) 14 days after the date on which the relevant person or the Secretary of State serves on the special advocate the notice under rule 10(5)(b) or the material under rule 12(2), or
- (b) such other period as the Court may direct.

(4) Where the Court fixes a hearing under this rule, the relevant person, the Secretary of State and the special advocate shall before the hearing file with the Court a schedule identifying the issues which cannot be agreed between them, which shall also—

- (a) give brief reasons for their contentions in relation to each issue; and
- (b) set out any proposals for the Court to resolve those issues.

(5) A hearing under this rule shall take place in the absence of the specially represented party and the specially represented party's legal representative.

(6) Where the Court has, in determining an application for a declaration under section 6 of the Act, found that the first condition in section 6 of the Act is met in relation to any material, it may give permission to withhold that material without a hearing in relation to that material, whether or not a hearing is required in relation to any other material.

(7) Where the Court gives permission to the relevant person to withhold sensitive material, the Court —

- (a) shall consider whether to direct the relevant person to serve a summary of that material on the specially represented party and the specially represented party's legal representative; but
- (b) shall ensure that any such summary does not contain material the disclosure of which would be damaging to the interests of national security.

(8) If the Court is satisfied that—

- (a) the relevant person does not intend to rely on sensitive material, and
- (b) that material does not adversely affect the relevant person's case or support the case of another party to the proceedings,

the Court may direct that the relevant person must not rely in the proceedings on that material, without the Court first requiring the relevant person to serve a summary of that material on the specially represented party and the specially represented party's legal representative.

(9) Where the Court has not given permission to the relevant person to withhold sensitive material from, or has directed the relevant person to serve a summary of that material on, the specially represented party and the specially represented party's legal representative—

- (a) the relevant person shall not be required to serve that material or summary; but
- (b) if the relevant person does not do so, at a hearing on notice the Court may—
 - (i) 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, direct that the relevant person is not to rely on such points in the relevant person's case, or that the relevant person makes such concessions or takes such other steps as the Court may direct; and
 - (ii) in any other case, direct that the relevant person shall not rely in the proceedings on that material or (as the case may be) on what is required to be summarised.

(10) The Court shall give permission to the relevant person to withhold sensitive material where it considers that disclosure of that material would be damaging to the interests of national security.

Failure to comply with directions

14.—(1) Where a party or the special advocate fails to comply with a direction of the Court, the Court may serve on that person a notice which states—

- (a) the respect in which that person has failed to comply with the direction;
- (b) a time limit for complying with the direction; and
- (c) that the Court may proceed to determine the proceedings before it on the material before it if that person fails to comply with the direction within that time limit.

(2) Where a party or the special advocate fails to comply with the direction after such a notice, the Court may proceed in accordance with paragraph (1) (c).

Judgments

15.—(1) Where the Court gives judgment in any proceedings to which this Part applies, it may withhold any, or any part, of its reasons if and to the extent that it is not possible to give those reasons without disclosing information the disclosure of which would be damaging to the interests of national security.

(2) Where the judgment of the Court does not include the full reasons for its decision, the Court shall serve on the relevant person, the Secretary of State (where not the relevant person) and the special advocate a separate written judgment giving those reasons.

Application by the Secretary of State or relevant person for reconsideration of decision

16.—(1) If the Court proposes, in any proceedings to which this Order applies, to serve on a specially represented party—

- (a) notice of any order or direction made or given in the absence of the Secretary of State or, if the relevant person is not the Secretary of State, the absence of the relevant person; or
- (b) any written judgment;

then before the Court serves any such notice or judgment on the specially represented party, it shall first serve notice on the Secretary of State and, if the relevant person is not the Secretary of State, on the relevant person, of its intention to do so.

(2) The Secretary of State or relevant person may, within 5 days of being served with notice under paragraph (1), apply to the Court to reconsider the terms of the order or direction or to review the terms of the proposed judgment if the Secretary of State or relevant person considers that—

- (a) the Secretary of State or relevant person's compliance with the order or direction; or
- (b) the notification to the specially represented party of any matter contained in the judgment, order or direction,

would cause information to be disclosed where such disclosure would be damaging to the interests of national security.

(3) Where the Secretary of State or relevant person makes an application under paragraph (2), the Secretary of State or relevant person must at the same time serve on the special advocate—

- (a) a copy of the application; and
- (b) a copy of the notice served on the Secretary of State or relevant person pursuant to paragraph (1).

(4) Rule 13 (consideration of closed material application or of objection to special advocate's communication), except for paragraphs (6) to (8) of that rule, applies with any

necessary modifications to the consideration of an application under paragraph (2) of this rule.

(5) The Court shall not serve notice or a written judgment on the specially represented party as mentioned in paragraph (1) before the time for the Secretary of State or relevant person to make an application under paragraph (2) has expired.

Supply of Court documents

17. Unless the Court otherwise directs, Order 66, rule 3 (Copies of documents for other party), and Order 66, rule 5 (Right to inspect, etc., certain documents filed in Court Offices) do not apply to any proceedings to which this Order applies.

PART III APPLICATIONS UNDER SECTION 6(2) OF THE ACT

Scope of this Part

18. This Part contains rules about applications under section 6(2) of the Act (application for a declaration that the proceedings are proceedings in which a closed material application may be made).

Possible application for declaration under section 6 of the Act by Secretary of State: notification to Secretary of State if not a party

19.—(1) This rule applies where the Secretary of State is not a party to relevant civil proceedings but—

- (a) it appears to—
 - (i) a party to those proceedings; or
 - (ii) the Courtthat the party may be required to disclose material the disclosure of which would be damaging to the interests of national security, and
- (b) either—
 - (i) the party does not intend to make an application for a declaration under section 6 of the Act; or
 - (ii) the Court does not consider it appropriate to make such a declaration of its own motion.

(2) Where this rule applies by virtue of paragraph (1)(a)(i) and (b)(i)—

- (a) the party shall—
 - (i) notify the Secretary of State and the Court in writing; and
 - (ii) not disclose the material in question unless and to the extent that the Court directs; and
- (b) the Court shall on receiving notification give such directions as appear necessary pending the Secretary of State's response.

(3) Where this rule applies by virtue of paragraph (1)(a)(ii) and (b)(ii), the Court shall—

- (a) direct the party in question not to disclose the material in question unless and to the extent the Court directs otherwise;
- (b) notify the Secretary of State in writing; and
- (c) give such directions as appear necessary pending the Secretary of State's response.

(4) Within 14 days of being notified in accordance with paragraph (2) or (3), the Secretary of State must respond in writing to the Court—

- (a) confirming that the Secretary of State intends to apply for a declaration under section 6 of the Act;
- (b) confirming that the Secretary of State does not intend to apply for such a declaration; or
- (c) requesting further time to consider whether to apply for such a declaration.

(5) The Court—

- (a) may stay the proceedings either on application by a party or of its own motion where the Secretary of State has been notified under paragraph (2) or (3); and
- (b) shall stay the proceedings where the Secretary of State responds in accordance with paragraph (4)(a) or (c).

(6) Any stay may be subject to conditions, including a condition that the application shall be made, or confirmation given that no application shall be made, within a time specified by the Court.

Notification of intention to make application for a declaration

20.—(1) Any person who intends to make an application under section 6(2) of the Act—

- (a) shall, at least 14 days before making the application, serve written notice of that intention on the Court and on every other party to the relevant civil proceedings and (if the Secretary of State is not a party) on the Secretary of State;
- (b) may at any time apply to the Court for the relevant civil proceedings to which the declaration would relate to be stayed pending—
 - (i) the application; or
 - (ii) the person’s consideration of whether to make an application.

(2) The Court may stay the relevant civil proceedings to which the declaration would relate on an application under paragraph (1)(b) or of its own motion.

(3) Any stay may be subject to conditions, including a condition that the application shall be made, or confirmation given that no application will be made, within a time specified by the Court.

Application for a declaration

21.—(1) An application under section 6(2) of the Act shall be made by the applicant filing with the Court—

- (a) a statement of reasons to support the application and any additional written submissions;
- (b) material in relation to which the Court is asked to find that the first condition in section 6 of the Act is met;
- (c) the details of any special advocate already appointed under rule 8 (appointment of a special advocate).

(2) Where the applicant is the Secretary of State, the statement of reasons required by paragraph (1)(a) must include the Secretary of State’s reasons for not making, or not advising another person to make, a claim for public interest immunity in relation to the material on which the application would be based.

Directions for hearing of an application

22.—(1) When a party to the relevant civil proceedings or (if the Secretary of State is not a party) the Secretary of State has submitted an application for a declaration under section 6 of the Act, the Court must serve notice of the application on—

- (a) all other parties and (if the Secretary of State is neither a party nor the applicant) the Secretary of State;

- (b) the legal representatives of all other parties and (where relevant) the Secretary of State; and
- (c) the special advocate,

and must give directions for a directions hearing unless it considers that the application can be determined on the papers, in which case it shall give directions as it considers appropriate.

(2) Any directions hearing shall take place in the absence of the specially represented party and the specially represented party's legal representative.

(3) At the directions hearing the Court shall give directions—

- (a) for the hearing of the application; and
- (b) specifying a date and time by the parties and special advocate must file and serve any written evidence or written submissions.

(3) The hearing of the application shall take place in the absence of the specially represented party and the specially represented party's legal representative.

Notification by applicant following hearing of application

23.—(1) When the Court has determined an application made under section 6(2) of the Act, the applicant shall within 7 days of that determination serve written notice of the outcome of the application on every other party to the relevant civil proceedings and (if the Secretary of State is not a party) on the Secretary of State.

(2) The notice shall be limited to stating whether the application was granted or refused.

Secretary of State to be joined where declaration made

24. If the Court makes a declaration under section 6 of the Act and the Secretary of State is not already a party to the proceedings in relation to which the declaration is made, the Court must order the Secretary of State to be joined as a party to those proceedings, unless the Secretary of State does not wish to be joined and notifies the Court in writing accordingly.

Directions following declaration

25.—(1) If the Court makes a declaration under section 6 of the Act, it shall give directions for a directions hearing,

(2) The Court shall, either when giving directions under paragraph (1) or at the directions hearing, give directions—

- (a) for a hearing of a closed material application; and
- (b) specifying a date and time by which the parties and special advocate shall file and serve any written evidence or written submissions.

(3) Rules 12 and 13 shall apply where any sensitive material is filed by a relevant person.

PART IV

REVIEW AND REVOCATION OF DECLARATIONS MADE UNDER SECTION 6 OF THE ACT

Scope of this Part

26. This Part contains rules about—

- (a) revocation—
 - (i) of the Court's own motion; or
 - (ii) on application,

- of a declaration made under section 6 of the Act; and
- (b) the Court's formal review of such a declaration.

Possible revocation of declaration: Court's own motion

27.—(1) This rule applies if the Court at any time considers that a declaration made under section 6 of the Act may no longer be in the interests of the fair and effective administration of justice in the proceedings.

(2) The Court shall in writing—

- (a) notify the parties (and the Secretary of State if not a party) and the special advocate that it is considering whether to revoke the declaration; and
- (b) invite them to make submissions.

(3) Each party (and the Secretary of State if not a party) and the special advocate shall within 28 days of the date of notification under paragraph (2) file a response either—

- (a) containing written submissions either supporting or opposing revocation of the declaration and giving reasons; or
- (b) confirming that the party (or Secretary of State, or special advocate, as appropriate) does not wish to make any submissions.

(4) The Court shall, on receipt of the responses under paragraph (3), either—

- (a) give directions—
 - (i) for a hearing to determine whether the declaration should be revoked; and
 - (ii) specifying a date and time by which the parties (and Secretary of State if not a party) and special advocate must file and serve any written evidence or written submissions; or
- (b) determine the issue without a hearing.

(5) A hearing under this rule shall take place in the absence of the specially represented party and the specially represented party's legal representative.

Application for revocation of declaration

28.—(1) An application under section 7(4)(a) of the Act for revocation of a declaration made under section 6 of the Act shall be made by the applicant filing with the Court—

- (a) a statement of reasons to support the application; and
- (b) any written submissions.

(2) When such an application has been made, the Court shall serve notice of the application on—

- (a) all other parties and (if the Secretary of State is neither a party nor the applicant) the Secretary of State;
- (b) the legal representatives of those parties and (where relevant) the Secretary of State; and
- (c) the special advocate,

and shall give directions for a hearing unless it considers that the application can be determined on the papers, in which case it shall give directions as it considers appropriate.

(3) Each party (and the Secretary of State if neither a party nor the applicant) and the special advocate shall within 28 days of the date of notification under paragraph (2) file a response either—

- (a) containing written submissions either supporting or opposing revocation of the declaration and giving reasons; or
- (b) confirming that the party (or Secretary of State, or special advocate, as appropriate) does not wish to make any submissions.

- (4) The Court shall, after receipt of the responses under paragraph (3), either—
- (a) give directions—
 - (i) for a hearing to determine whether the declaration should be revoked; and
 - (ii) specifying a date and time by which the parties (and Secretary of State if not a party) and special advocate must file and serve any written evidence or written submissions; or
 - (b) determine the issue without a hearing.
- (5) A hearing under this rule shall take place in the absence of the specially represented party and the specially represented party’s legal representative.

Review of declaration: formal review

29.—(1) Once the pre-trial disclosure exercise in proceedings where there has been a declaration under section 6 of the Act has been completed, the Court shall review whether the declaration continues to be in the interests of the fair and effective administration of justice in the proceedings.

(2) If the Court considers that the declaration may no longer be in the interests of the fair and effective administration of justice in the proceedings, it shall proceed in accordance with paragraphs (2) to (5) of rule 27.

(3) If the Court considers that the declaration continues to be in the interests of the fair and effective administration of justice in the proceedings, it may so declare without a hearing.

(4) For the purposes of section 7(3) of the Act and this rule, the pre-trial disclosure exercise in the proceedings is to be considered to have been completed when—

- (a) where Order 24, rule 2 or 3 applies to the proceedings, discovery under those rules has been completed in accordance with this Order;
- (b) where Order 24, rule 2 or 3 does not apply to the proceedings, the equivalent applicable discovery to that required by those rules has been completed in accordance with this Order.

PART V

REVIEW, UNDER SECTION 18 OF THE ACT, OF A CERTIFICATE UNDER SECTION 17(3)(E) OF THE ACT

Review of certification

30.—(1) An application under section 18(1) of the Act to have a certificate issued under section 17(3)(e) of the Act set aside shall be made by the applicant filing with the Court—

- (a) a statement of reasons to support the application; and
- (b) any written submissions.

(2) The Court with which the documents in paragraph (1)(a) and (b) must be filed is—

- (a) the High Court, if the Court seized of the proceedings in relation to which the certificate was issued is the High Court or county court; or
- (b) the Court of Appeal, if the Court seized of the proceedings in relation to which the certificate was issued is the Court of Appeal.

(3) When such an application has been made, the Court must serve notice of the application on the Secretary of State and the Secretary of State’s legal representative, and on the special advocate when a special advocate has been appointed pursuant to rule 8.

(4) The Secretary of State shall, within 28 days of the date of notification under paragraph (3), file, and serve upon the special advocate, a response either—

- (a) containing written submissions opposing the setting aside of the certificate and giving reasons; or

- (b) confirming that the Secretary of State does not oppose the setting aside of the certificate.
- (5) The special advocate shall within 28 days of being served under paragraph (4) file, and serve on the Secretary of State, a response either—
 - (a) containing written submissions supporting the setting aside of the certificate and giving reasons; or
 - (b) confirming that the special advocate does not wish to make any submissions.
- (6) The Court shall, after receipt of the responses under paragraphs (4) and (5), either—
 - (a) give directions—
 - (i) for a hearing to determine whether the certificate should be revoked; and
 - (ii) specifying a date and time by which the parties (and Secretary of State if not a party) and special advocate shall file and serve any written evidence or written submissions; or
 - (b) determine the issue without a hearing.
- (7) A hearing under this rule shall take place in the absence of the specially represented party and the specially represented party’s legal representative.

PART VI

APPEALS TO THE COURT OF APPEAL

Modification of Order 59 (Appeals to the Court of Appeal)

- 31.**—(1) Order 59 applies to an appeal to the Court of Appeal—
 - (a) against an order of the High Court on or in relation to an application under section 6(2), 7(4) or 18(1) of the Act, or section 6 proceedings;
 - (b) where the order under appeal was not made on or in relation to a matter within sub-paragraph (a) but the appeal proceedings involve such a matter or are section 6 proceedings.
- (2) Paragraph (1) is subject to—
 - (a) rule 2;
 - (b) Part 2 of this Order; and
 - (c) paragraph (3) of this rule.
- (3) The appellant shall serve a copy of the appellant’s notice on any special advocate.”

EXPLANATORY NOTE

(This note is not part of these Rules)

These Rules amend the Rules of the Court of Judicature (Northern Ireland) 1980 (“the principal Rules”) for the purpose of implementing Part 2 of the Justice and Security Act 2013 (2013 c.18) (“the 2013 Act”) by—

- amending Order 1, rule 1A (application by the Court of the overriding objective), so that it is subject to rule 2 of Order 126 (modification to the overriding objective);
- amending Orders 13, 14 and 19 to ensure that judgment in default is not entered where the reason for a statement of claim or a defence not having been served is that the process of considering whether a declaration under section 6 of the 2013 Act should be applied for or made is still under way;
- amending Order 78 to provide for transfer to the High Court of proceedings in the county court in which sensitive material is in issue; and
- inserting a new Order 126 containing rules about proceedings in which sensitive material is in issue and it is necessary to ensure that such material is not disclosed where such disclosure would be damaging to the interests of national security (including the modification of the application of other Orders in the principal Rules for the purposes of those proceedings).

The 2013 Act makes provision, in Part II, to allow the use in civil proceedings of “closed material procedure” for the admission and hearing of, and argument in relation to, national security-sensitive material. In such a procedure, the sensitive material is withheld from the other party and is disclosed only to the Court and to a special advocate appointed to represent that other party’s interests. Part II of the Act provides for a process in which, if it appears that a party to proceedings may be required in the course of the proceedings to disclose sensitive material, the Court may make a declaration that the proceedings are proceedings in which a “closed material application” may be made to the Court. A closed material application is an application for permission to disclose sensitive material only to the Court and special advocate. The initial declaration acts as a gateway to enable closed material procedure to be used where necessary thereafter in the proceedings, but with those parts of the proceedings where sensitive material is not in issue being undertaken in “open” procedure in the normal way.

Part I of Order 126 contains rules about the scope, interpretation and application of the Order. Rule 2 modifies the overriding objective for the purposes of Order 126 by placing a duty on the Court to ensure that information is not disclosed where such disclosure would be damaging to the interests of national security and by requiring that the overriding objective be read and given effect in a way which is compatible with that duty. This, and the rest of Order 126, is, however, subject to section 14(2) of the 2013 Act, which provides that nothing in the relevant sections of the 2013 Act or in rules made by virtue of them is to be read as requiring the Court to act in a manner inconsistent with Article 6 of the European Convention on Human Rights.

Part II of Order 126 contains general provisions applying to all proceedings to which Order 126 applies. These include provision for—

- hearings, including the circumstances in which the Court is to conduct “closed” hearings (rules 5 to 7);
- notifying the Advocate General of proceedings, the appointment and functions of a special advocate and the special advocate’s communications with others (rules 8 to 10);
- modification of rules of evidence (rule 11);
- the procedure for closed material applications and objections to proposed communications by the special advocate with the specially represented party (rules 12 to 14);
- the Court to withhold (so that they are given only to the Secretary of State (or, if the person who has to disclose sensitive material is not the Secretary of State, that other

“relevant person”) and special advocate, but not to the specially represented party) any, or any part, of its reasons when giving judgment, if it is not possible to give reasons without disclosing information in a way which would be damaging to the interests of national security (rule 15);

- applications by the Secretary of State for the Court to reconsider the terms of any order or decision given in the Secretary of State’s absence, or the terms of any judgment, to prevent the disclosure of information in a way which would be damaging to the interests of national security (rule 16).

Part III of Order 126 contains rules about the making and consideration of an application for a declaration that the proceedings are proceedings in which a “closed material application” may be made to the Court, including provision to ensure that the Secretary of State, where not a party to the proceedings, is always notified of the possibility that such an application may be made because sensitive material is in issue, and that the Secretary of State is joined as a party (where not already a party) when a declaration is made.

Part IV of Order 126 contains rules about the review and revocation of declarations that proceedings are proceedings in which a closed material application may be made to the Court. Such review and revocation may be of the Court’s own motion, or on application, and a formal review must take place once the pre-trial disclosure exercise in the proceedings (defined in rule 29) has concluded.

Part V of Order 126 contains a rule about the making and consideration of an application (under section 18 of the 2013 Act) to have set aside a certificate under section 17(3)(e) of the Act (that is, a certificate by the Secretary of State in relation to proceedings seeking disclosure of information in proceedings under the Court’s *Norwich Pharmacal* jurisdiction or any similar jurisdiction, that certain information is sensitive information which should not be ordered to be disclose).

Part VI of Order 126 contains a rule modifying the application of Order 59 of the principal rules in relation to appeals to the Court of Appeal against an order on or in relation to an application under section 6, 7 or 18 of the Act, or in “section 6 proceedings” (proceedings where there has been a declaration that the proceedings are proceedings in which a closed material application may be made to the Court, or proceedings treated as such proceedings by any enactment), or where the appeal proceedings involve such a matter or are themselves section 6 proceedings.

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2013 No. 175

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