

JUSTICE AND SECURITY ACT 2013

EXPLANATORY NOTES

BACKGROUND

Background on closed material procedures

15. The Green Paper noted an increase in the number and diversity of judicial proceedings which relate to national security-related actions. In many of these cases, the facts cannot be fully established without reference to sensitive material. However, this material cannot be used in open court proceedings without risking damage to national security. Difficulties arise both in cases in which individuals are alleging Government wrongdoing, and in cases in which executive actions or decisions taken by Government are challenged. There have been occasional cases resolved by the use of a closed material procedure with the consent of both parties. However, the Supreme Court ruled in *Al Rawi and others v Security Service and others* [2011] UKSC 34 that a court is not entitled to adopt a closed material procedure in an ordinary civil claim for damages. The court in *Al Rawi* held that it was for Parliament to decide whether or not to make closed material procedures available in such proceedings.
16. The Green Paper considered that in cases involving sensitive material the court may be prevented from reaching a fully informed judgment because it cannot hear all the evidence in the case. Under the current system, the only method available to the courts to protect material such as intelligence from disclosure in open court is through public interest immunity. A successful public interest immunity application results in the complete exclusion of that material from the proceedings. Any judgment reached at the end of the case is not informed by that material, no matter how central or relevant it is to the proceedings.
17. The difficulty identified by the Green Paper was that the Government could be left with the choice of causing damage to national security by disclosing the material or summaries of it; or attempting to defend a case with often large amounts of relevant material excluded. If the material cannot safely be disclosed, the Government may be forced to concede or settle cases regardless of their merits and pay compensation, or ask the court to strike out the case. Most significantly, claimants and the public may be left without clear findings where serious allegations are made because the court has not been able to consider all the evidence.