

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

ADMINISTRATIVE COURT

B E T W E E N:-

THE QUEEN (on the application of  
BINYAM MOHAMED)

Claimant

- v -

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

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DEFENDANT'S OPEN SUBMISSIONS

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1. This document is served further to the Court's request for submissions, in response to Leigh Day & Co's letter of 5 May 2009, as to whether the closed material provided to the Court on 1 May 2009 should remain closed or be made available, whether on restricted terms or otherwise.
2. Accordingly, the Defendant does not propose to address the other points made in Leigh Day & Co's letter. However, we wish to make it clear that the Defendant strongly objects to Leigh Day & Co's suggestion on the 5<sup>th</sup> page of their letter that the Treasury Solicitor's correspondence in question is "contrary to the duty of candour". This accusation is, yet again, wholly unjustifiable. We do not accept that there is any lack of clarity in the message conveyed by the correspondence from the US Administration. But even if the correspondence was unclear, the provision by the Defendant of that correspondence to the

Court and the Special Advocate (and, insofar as it has been cleared by the US Administration for open release, to the other parties) plainly would not constitute a breach of the Defendant's duty of candour.

3. The Defendant has explained in closed submissions the reasons why the closed material should remain closed. In these open submissions the Defendant addresses the contention that the contents of the closed material should be provided to the lawyers for the Claimant and the Interested Parties, subject to them giving undertakings of confidentiality.
4. The practice of providing documents on a lawyers only basis has been deprecated by the courts and is not appropriate. In *Somerville v Scottish Ministers* [2007] 1 WLR 2734, HL, senior counsel for the petitioners was allowed to inspect the complete versions of documents for which the respondents were claiming public interest immunity. Lord Rodger of Earlsferry (with whose opinion Lord Walker of Gestingthorpe expressly agreed [167]) observed that this procedure was “wrong in principle” [152] and “gave rise to very real practical difficulties” [152].
5. Lord Rodger continued at [153]:

“If the respondents’ claim that, in the public interest, the redacted parts of the documents should not be revealed was valid, then, in normal course, it was valid against counsel for the petitioners who should therefore not have seen the full version. As it was, counsel for the petitioners was left in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with, his clients or instructing solicitors. He even felt inhibited from revealing it to the Lord Ordinary. The result was a certain paralysis in the procedure. In agreement with all of your Lordships, I am satisfied that no such procedure should be followed in future.” [Emphasis added.]
6. Lord Mance observed:

“203. I must start by expressing disagreement with the Inner House’s view that the course adopted under the parties’ protocol and endorsed by the Lord Ordinary is to be encouraged. On the contrary, in my view. It involves disclosure to another party’s (here the petitioners’) counsel of material which the public interest may require should not be disclosed to anyone other than the Scottish Executive. It puts counsel in an invidious and unsustainable position in relation to his or her client. In this respect the observations in *R v Davis* at [1993] 1 WLR, pp 616H-617H per Lord Taylor of Gosforth CJ; *R v Preston* [1994] 2 AC 130, pp 152H-153D, per Lord Mustill; and *R v B*

& G [2004] 1 WLR 2931, para 13, per Rose V-P are relevant, although made in a criminal context. As in this case, such a procedure may also put counsel into a position where he or she is uncertain what it is permissible to disclose or say when making submissions to the court about PII.

204. The procedure has no precedent of which I am aware in the present context, and should not become one. As in the criminal context, issues of PII should so far as possible be discussed in open court in the presence of both parties. In some circumstances, the nature of the documents may make it appropriate for the judge to hear submissions (and if necessary evidence) from the haver in the absence of anyone else, and even for the claim to PII itself only to be made ex parte. If a PII claim cannot be determined on the basis on which it is advanced without further consideration of the content of the relevant documents, it is for the court itself to undertake the task of inspecting the documents to confirm whether or not the documents should be provided to the party applying for them and with what if any redactions. The court may in exceptional circumstances consider it appropriate to invite the appointment of independent counsel to give it assistance (compare *R v H* [2004] 2 AC 134, pp 150 and 155, paras 22 and 36(4) per Lord Bingham of Cornhill).” [Emphasis added.]

7. There are a number of problems associated with the course proposed by the Claimant and the Interested Parties:
  - a. The lawyers for the Claimant and the Interested Parties have a duty to their clients to share relevant information with them, and it would place them in an invidious and unsustainable position to provide them with information which cannot be shared with their clients (this is why the SIAC rules in relation to special advocates make it clear a special advocate owes no professional duty to the person whose interests he represents);
  - b. There would be a real risk of inadvertent disclosure of the protected material when having contact with their clients, advising etc (this is why the SIAC rules forbid special advocates to have contact with the person whose interests he represents, other than with the leave of – and under supervision by – SIAC). This risk is increased by the fact that the material in question is partially in open and so inevitably the subject of discussion; and

- c. The closed material is highly sensitive and disclosure of it to individuals who lack the requisite security clearance creates an unnecessary and unacceptable risk of leaks occurring.
8. Given the recent, unambiguous statements by the House of Lords in the context of a judicial review claim, that sensitive material such as that in issue here should not be shown to the claimant's counsel, the Defendant respectfully submits that the Court should not grant the Claimant's and Interested Parties' request that the closed material should be disclosed to their lawyers.
9. Precisely the same proposal was made to and rejected by the Divisional Court (Moses LJ and Sullivan J) in *R (Corner House Research) v Director of the Serious Fraud Office* (by order dated 17 January 2008). There are even stronger reasons in this case for rejecting the proposal than in *Corner House*. In that case, only the Court saw the closed material, whereas in this case the Special Advocates have seen it and are in a position to make submissions in respect of it.
10. Following the Special Advocate's closed written submissions of last week and specifically certain queries raised in those submissions, HMG communicated with the Obama Administration in relation to the making open of further material in the closed communication to the Court of 1 May 2009.
11. As a consequence, the Obama Administration has agreed to the making open of one further passage raised by the Special Advocate and that passage is identified in an underlined form in the attached version of the Obama Administration's communication. For the avoidance of any doubt, this is the same Obama Administration authored document as disclosed on 6 May 2009 subject to the addition of the underlined words.

PUSHPINDER SAINI QC  
KAREN STEYN  
11 May 2009

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ATTACHMENT

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On two prior occasions the United States Government contacted Her Majesty's Government (HMG) in connection with legal proceedings initiated by former Guantanamo Bay detainee Binyam Ahmed Mohamed. On both occasions, we iterated the high esteem in which we hold the relationship between the United States and the United Kingdom. In maintaining our remarkably open sharing of information, we indicated our strong objection to the public disclosure of certain classified information. We are most appreciative of HMG's efforts in preventing the public disclosure of the highly sensitive information.

It has come to the United States Government's attention that on 22 April 2009 your High Court heard argument on a motion of Mr. Mohamed for reconsideration of the Court's decision to withhold seven paragraphs from its open decision of 21 August 2008. The Court withheld those seven paragraphs at the request of your Foreign Secretary, based on a Public Interest Immunity Certificate that explained the damage to the United Kingdom's intelligence relationship with the United States--and as a consequence the United Kingdom's own national security--if the paragraphs were disclosed. Mr. Mohamed argued during the 22 April hearing that given the change in administration in the United States, HMG should be ordered to ask the Obama administration for its views on the disclosure of the information contained in the seven paragraphs.

Days prior to the 22 April hearing, the Obama administration released four memoranda issued by the Office of Legal Counsel (OLC of the U.S. Department of Justice that describe interrogation techniques that the CIA employed during interrogations of certain high-value detainees. I understand that during the hearing, the High Court placed great import on President Obama's decision to release the OLC memoranda as an indication that the United States Government would not object to disclosure of the seven paragraphs. The Court made clear, nevertheless, that it would entertain further clarification of the United States Government's position, and the potential damage to the U.K.-U.S. intelligence sharing relationship that would be caused by public disclosure of the seven paragraphs.

The seven paragraphs at issue are based upon classified information shared between our countries. Public disclosure of this information, reasonably could be expected to cause serious damage to the United Kingdom's national security. Specifically, disclosure of this information may result in a constriction of the U.S.-U.K. relationship, as well as U.K. relationships with other countries. Among the most critical sources and methods in

the collection of foreign intelligence are the relationships the United Kingdom maintains with foreign countries. Through these relationships, the United Kingdom's intelligence and security services are able to provide national security and foreign policy officials with information that is critical to informed decision making; information that the United Kingdom cannot obtain through other means. Without the assistance of these foreign governments, it is almost certain that the United Kingdom's ability to identify and arrest suspected terrorists and to disrupt terrorist plots would be severely hampered. Quite clearly, the information that the United Kingdom obtains from the United States and other foreign governments is a critical component of the United Kingdom's counterterrorist efforts.

The cooperation and sharing of intelligence between the United Kingdom and United States, as well as with other foreign governments, exists under strict conditions of secrecy. Public disclosure by the United Kingdom of information garnered from such relationships would suggest that the United Kingdom is unwilling or unable to protect information or assistance provided by its allies. As a consequence, if foreign partners learn that information it has provided is publicly disclosed, these foreign partners could take steps to withhold from the United Kingdom sensitive information that could be important to its safety and security. Any decreased cooperation from those foreign partners would adversely impact counterterrorism missions and other endeavors.

Quite distinct from the significant harm to the U.S.-U.K. partnership if the seven paragraphs--or underlying documents--are released, is the impact of President Obama's declassification of the OLC memoranda. The memoranda focused solely on intelligence-gathering methods previously utilized by the CIA. In releasing the memoranda, President Obama made clear his administration's intention that the enhanced interrogation techniques discussed therein would no longer be utilized by the United States Government. Neither in the memoranda, nor in any statements of the administration accompanying their release, was reference made to the identity of any foreign governments that might have assisted the United States. Given the declassification of the highly sensitive information contained in the memoranda, the fact that the President refrained from providing any information about foreign governments is indicative that the United States continues to preserve the secrecy of such information as critical to our national security.

Public disclosure of the information contained in the seven paragraphs withheld from the High Court's open decision, as well as the documents from which the information was drawn, could likely result in serious damage to U.K. and U.S. national security. If it is determined that HMG is unable to protect information we provide to it, even if that inability is caused by your judicial system, we will necessarily have to review with the greatest care the sensitivity of information we can provide in future

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