IN THE HIGH COURT OF JUSTICE **Claim No. CO/4241/2008**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

on the application of

BINYAN MOHAMED

Claimant

-and-

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

AMENDED STATEMENT OF GROUNDS FOR JUDICIAL REVIEW

A. Introduction

1. The Claimant is a British resident, born in Ethiopia. He is currently detained by the US military authorities in Guantanamo Bay, Cuba.

2. The Claimant ~~is about to be~~has recently been re-charged with offences before a US military commission constituted under the US Military Commissions Act 2006. It is common ground between the Claimant and the Secretary of State that the US military commissions will not comply with basic fair trial standards. In particular, the Claimant will not be entitled to a considerable part of the evidence against him. The prosecution may seek the death penalty against the Claimant; they have sought the death penalty against the other individuals so far re-charged under the 2006 Act.

3. The case against the Claimant before the military commissions will be based on statements given by the Claimant during interrogation. The Claimant's defence is that he was subject to horrific torture following his extraordinary rendition to Morocco and then Afghanistan. The statements that will be relied on by the US Government are the products of that torture, and are therefore inadmissible. Under the US Military Commissions Act 2006, evidence obtained by torture is inadmissible (although as is notorious, the US Government applies a somewhat different definition of torture from that applied by the UK Government and the English courts).

4. The US Government denies that the Claimant was subject to extraordinary rendition, or that he was tortured. Indeed, the US Government continues to deny that *anyone* has been subject to extraordinary rendition or torture.

5. The Claimant therefore needs to lead evidence in his defence that he was subject to extraordinary rendition and torture, along with evidence that tends to suggest that the US Government's continuing blanket denials of extraordinary rendition and torture are false.

6. There are strong grounds for believing that the UK Government and security and intelligence services hold evidence relevant to these matters. UK officials visited the Claimant whilst he was detained in Pakistan, shortly before he was subject to extraordinary rendition to Morocco. These officials then provided information about the Claimant's life in the UK, which was used by US and Moroccan torturers. Save for the question of whether Mr Mohamed was in fact tortured in Morocco (on which the UK Government professes ignorance), all of this is common ground.

7. The Claimant seeks disclosure from the UK government of such evidence to his US lawyers, to support his defence before the military commissions. The request has been refused by the Secretary of State. The issue in this claim for judicial review is whether that refusal was lawful or rational. The Claimant contends that a refusal to disclose

evidence that supports his claims that he was tortured is both irrational and unlawful for the reasons set out below.

8. Such disclosure might normally raise concerns relating to the protection of national security. No such concerns arise here. The Claimant seeks disclosure only to his US lawyers, who are bound by the rules of the military commissions not to disclose classified material to their client. The Claimant is represented before the military commissions by Clive Stafford Smith OBE and Lt Colonel Yvonne R. Bradley of the US Air Force. Mr Stafford Smith has US security clearance to Secret level. Lt Colonel Bradley has Top Secret security clearance. Both of them will strictly abide by the confidentiality rules of the military commissions.

B. Facts

The Intelligence and Security Committee Report on Rendition

9. The Intelligence Services gave evidence to the Intelligence and Security Committee in relation to their knowledge of the Claimant's treatment for the purposes of the enquiry being conducted by the Committee into rendition. The Committee reported in July 2007. Its report includes partially redacted accounts of the evidence given by the Intelligence Services, to which reference is made below.

Council of Europe Report

10. The Council of Europe has also investigated allegations of extraordinary rendition for torture by the US Government. A report was published on 7 July 2007 to which reference is made below.

Ethiopia and UK

11. The Claimant (who is sometimes referred to as "Al-Habashi"(of Ethiopia) in official documents by reason of his Ethiopian origin) was born in 1978. He sought asylum in the UK in 1994 when he was 16 years old. His asylum application was never determined. He remained in the UK for the following 7 years, during which time he was given leave to remain and to work.

Pakistan and Afghanistan

12. The Claimant travelled to Pakistan and Afghanistan in June 2001. He was briefly detained by the Pakistani immigration authorities in April 2002 but then released. He was detained again a week later when trying to leave Pakistan to fly back to the UK.

13. The Claimant was then detained in Pakistan for 3 months, during which time he was interrogated by US officials on several occasions and by an officer of the Security Service (once) for three hours on 17 May 2002:

> **A member of the Security Service did interview Al-Habashi once, for a period of approximately three hours, whilst he was detained in Karachi in 2002. The interview was conducted by an experienced officer and was in line with the Service's guidance to staff on contact with detainees (Intelligence and Security Committee report on Rendition, p. 33) [145].**

14. The Claimant's account of the interview is that he was told by the Security Service officer that he would be rendered to an Arab country:

> **They gave me a cup of tea with a lot of sugar in it. I initially only took one. 'No you need a lot more. Where you're going, you need a lot of sugar'. I didn't know what he meant by this, but I figured he meant some poor country in Arabia. One of them did tell me I was going to get tortured by the Arabs (Stafford Smith WS at 38) [42].**

15. The Claimant was thus told (in a somewhat euphemistic way) that he was to be rendered to an Arab country, and that the purpose of the transfer would be for him to be tortured. This account ~~appears to be denied by the Secretary of State~~is denied by

'Witness B' the Security Service officer who conducted the interview, although it is what then happened.

16. However, it is admitted by 'Witness B' that he told the Claimant that the US authorities will be deciding what to do with him and this would depend to a very large degree on his degree of co-operation"; that "if he could persuade me he was telling the complete truth I would seek to use my influence to help him"; that "it must be obvious to him that he would get more lenient treatment if he co-operated" and that " if he persuaded me he was co-operating fully then (and only then) I would explore what could be done for him with my US colleagues" [A1/21-22].

17. 'Witness B' made a contemporaneous assessment that the Claimant was "intelligent and patient". He continued: "If he chooses not to co-operative he has the personal qualities and I believe strength of will to maintain his story indefinitely." 'Witness B' concluded that "he will only begin to provide information of genuine value if he comes to believe that it is genuinely in his interests to do so. I don't think he has yet reached this point" [A1/22].

18. It is admitted by 'Witness A' that it had been suggested by the US Authorities around this time that the Claimant might be transferred to Afghanistan. It is claimed by him that "in the circumstances prevalent at the time, the transfer of detainees by the US authorities to detention facilities in Afghanistan was not unusual and was not regarded as unlawful or improper" [Witness A, para. 11].

~~16.~~19. Mr Mohamed reports that on 21 July 2002 he was taken to an airport in Islamabad where he was turned over to US officials. They were dressed in black and wore masks. He was flown to Morocco, having been strip searched and tied to a seat, hooded. His account is supported by the objective evidence (to which he could not have had access as he has been in continuous detention since 2002). Flight records show that at 5.35pm on 21 July 2002, a Gulfstream V executive jet registered to a US CIA front company left Islamabad for Rabat, Morocco. It arrived shortly before 4am on 22 July 2002.

~~17.~~20. The US continues to deny that it is has been involved in extraordinary renditions for torture. Accordingly, any information held by the UK government about the use of this aircraft for such purposes would corroborate the Claimant's case. As to UK knowledge of the transfer, it is admitted that the Security Service knew that the Claimant was to be transferred by the Americans:

> **… they [the Security Service] were aware of the US plan to transfer him… we were told by [the US] that they were going to move him to Afghanistan, and we know that he was moved to Guantanamo. He has claimed that on the route there he was held in Morocco and that while in Morocco, he was tortured… We do not know whether that happened…**
>
> ***** [redacted] (Intelligence and Security Committee report, p. 34) [146].**

~~18.~~21. It appears that the redacted section sets out the evidence available to, and assessment of, the Security Service as to whether the Claimant was indeed rendered to Morocco for torture, as he alleges. Such evidence would be extremely valuable for the defence. Indeed, it appears that the UK Government has concluded that the Claimant was subjected to rendition to Morocco for torture, given their admission to the Intelligence and Security Committee that:

> **… with hindsight, we would regret not seeking proper full assurances at the time… (Intelligence and Security Committee report, p. 34) [146].**

22. In a telegram from the Security Service to the Secret Intelligence Service dated 12 August 2002, it was noted that the Claimant appeared to have disappeared:

> **As of four weeks ago he had not been moved to Bagram and [redaction] appear to have no information on his current whereabouts exclam. If he turns up in Bagram, we would be grateful if you could let us know, as we may wish to interview him again [A1/35] (exclamation mark in original).**

23. A further request for access was made to the US authorities on 22 August 2002 [A1/37]. No reply was received. Nor was the Claimant found at Bagram in Afghanistan by officers of the SIS [A1/39].

Morocco

~~19.~~24. The Claimant was detained in Morocco for 18 months. He gives a detailed account of his torture by Moroccan and US officials, which is set out in the witness statement of Mr Stafford Smith. The torture included shackling, being suspended from walls and ceilings, brutal beatings and being cut all over his body with a scalpel, including his genitals. For example:

> **One of them took my penis in his hand and began to make cuts. He did it once and they stood for a minute, watching my reaction. I was in agony, crying, trying desperately to suppress myself, but I was screaming. They must have done this 20 or 30 times, in maybe two hours. There was blood all over. They cut all over my private parts. One of them said it would be better just to cut it off, as I would only breed terrorists… there were even worse things, too horrible to remember, let alone talk about (Stafford Smith WS at 63) [49].**

~~20.~~25. Unsurprisingly, the Claimant co-operated to avoid further torture:

> **They said, if you say this story as we read it, you will just go to court as a witness and all this torture will stop. I could not take it any more… and I eventually repeated what they read out to me. They told me to say I was with Bin Laden five or six times. Of course that was false. They continued with two or three interrogations a month. They weren't really interrogations – more like trainings, training me what to say (Stafford Smith WS at 64) [49].**

26. This account is supported by the open evidence. By 25 October 2002, the Security Service were referring in communications to the Claimant's "recent co-operation" in the "current debriefing" [A1/40], in contrast to his previous stance. In the same telegram, it is recorded that the US authorities had refused to provide access to the Claimant.

~~21.~~27. During the interrogations, the Claimant was told personal details about his life in the UK, such as details of his education and the names of his friends in London that he had never mentioned and which could only have come from the UK Security Service. He was also shown photographs of people in the UK, which again could only have been

provided by UK intelligence agencies. He was told by an interrogator that the Moroccans had been working with the UK.

~~22.~~28. These allegations are substantially admitted. The Director-General of the Security Service told the Intelligence and Security Committee:

> **[redacted]… when we knew he was in custody, because he had information we believed relevant to the UK from having lived here, [redacted]. [A further two paragraphs are redacted].**

~~23.~~29. The Committee concluded:

> **There is a reasonable probability that intelligence passed to the Americans was used in al-Habashi's subsequent interrogation.**

30. The relevant questions are contained (in heavily redacted form) in the open evidence at [A1/40-52].

~~24.~~31. Accordingly, once the UK Security Service knew that the Americans had rendered the Claimant unlawfully from Pakistan to incommunicado detention in an unknown third country, they (a) decided to co-operate by providing information to assist in his interrogation; and (b) sent lists of questions to be used in his further interrogation. No assurances were sought as to the way in which the material would be used, or the conditions of his detention and interrogation. By providing this information and questions, the UK Security Service provided substantial assistance to the continued criminal interrogation of the Claimant, and encouraged and prolonged his continued interrogation and incommunicado detention. Further information (includinge~~ed~~ the redacted parts of the report) will be powerful corroborative evidence of the Claimant's account.

Afghanistan

~~25.~~32. On 21 or 22 January 2004, the Claimant was again subject to extraordinary rendition. On this occasion he was transferred from Morocco to Afghanistan by US officials in the same executive jet (verified from flight records) that had been used for his earlier rendition. The Council of Europe report on extraordinary rendition concluded that this flight was:

> **…an unlawful detainee transfer, transporting Mr Mohamed from one secret facility to another. Two days later, as part of the same circuit, the same plane had flown back to Europe and was used in the rendition of Khaled El-Masri [Council of Europe Draft Report – Part II: Alleged Secret Detentions and Unlawful Interstate Transfers Explanatory Memorandum by Mr Dick Marty, Repporteur; 7 June 2006 at 2.5 (52), 3.9 (193-214) and 3.9 (209) [204 and 232-235].**

~~26.~~33. On arrival in Afghanistan, the Claimant was transferred to Cell 17 at the "Dark Prison", a CIA run interrogation centre in or near Kabul. He was held there for 5 months, in conditions of near-complete darkness. At the Dark Prison he was subject to forced stress positions, sleep alteration, starvation, sensory deprivation and the other "enhanced interrogation techniques" then routinely deployed by the United States. He was hung with his hands suspended over his head for days at a time, his head was repeatedly knocked against the wall and he was subjected to "torture by music", including constant deafening sounds of rap and heavy metal music, thunder, aircraft noise, cackling and horror. His account is consistent with the independent account of other prisoners held there, and the techniques authorised for use by the CIA at that time. These techniques constitute torture. See *A v SSHD (No. 2)* [2006] 2 AC 221 at [53] per Lord Bingham of Cornhill.

~~27.~~34. In May 2004, the Claimant was transferred to Bagram Air Force Base in Afghanistan. UK officials visited the base, and were familiar with the conditions of detention there, which are now notorious. By this stage, the Claimant signed confessions without the need for further torture:

> **I don't really remember [what I wrote], because by then I just did what they told me. Of course, by the time I was in Bagram, I was telling them whatever they wanted to hear.**

Guantanamo Bay

~~28.~~35. On 22 September 2004, 4 months later, the Claimant was transferred to Guantanamo Bay. He was subsequently charged with offences in November 2005**.** The military commissions process was struck down by the US Supreme Court in *Hamdan v Rumsfeld* (2006) 548 U.S. 557. The new process was introduced by the Military Commission Act 2006.

~~29.~~36. In Guantanamo Bay, the Claimant's mental state has continued to deteriorate.

~~30.~~37. ~~In the very near future, the~~The Claimant has now been~~is likely to be~~ re-charged with offences. There is a real risk that the prosecution will seek the death penalty against the Claimant; they have sought the death penalty against the other individuals so far re-charged under the 2006 Act. There are further recent developments of which the court should be aware in the confidential annex to the witness statement of Mr Stafford Smith which the Court is invited to read. The Claimant now has a unique opportunity to persuade the Convening Authority of the Military Commission not to proceed with the prosecution. In these proceedings, he seeks disclosure for that purpose, as well as for the purpose of any trial.

Rendition flights

~~31.~~38. The UK Government holds significant evidence which has not been disclosed about the rendition flights carried out by the US. In particular, evidence as to the prisoners transported and the dates and times of flights, and the (often false) identities used by the CIA officials involved will be of importance to the Claimant's defence.

~~32.~~39. There are strong grounds for believing that many of the same personnel were involved in the extraordinary rendition flights which took place from 2002 onwards. These US agents tended to use false names, but the same false names were often used by the same individual. The Claimant's lawyers have managed (through obtaining hotel telephone

records during stop-overs) to identify the real names of at least some of the agents involved. If the individuals involved in the extraordinary rendition of the Claimant can be identified, they can be called to give evidence to confirm his account of his transfer to Morocco and Afghanistan. In particular, the Claimant's lawyers wish to trace the individuals who took photographs of and saw the Claimants mutilated genitals, who can therefore provide strong evidence of his mistreatment whilst in Morocco.

Pre-action correspondence

~~33.~~40. On 28 March 2008, the Claimant's solicitors sent a letter before claim to the Secretary of State requesting the provision of information and evidence set out in an annex [81].

~~34.~~41. On 31 March 2008, the Treasury Solicitor sent an initial response confirming that the Secretary of State would preserve relevant materials [86].

~~35.~~42. In a further letter dated 3 April 2008, the Treasury Solicitor confirmed that the undertaking to preserve relevant materials extended to the Home Office, the Security and Intelligence Agencies and the British authorities responsible for Diego Garcia.

~~36.~~43. On 7 April 2008, the Claimant's solicitors sent a further letter attaching a note from Mr Stafford Smith explaining the urgency of the case, and gave further details of the legal basis of the present claim.

~~37.~~44. On 18 April, the Claimant's solicitors sent a further letter in which it asked three questions to clarify the Secretary of State's position:

> **Please respond to the following questions:**
>
> > **1. Regardless of the legal analysis, is it HMG's position that it will not co-operate with or assist our client in providing evidence that he was subject to torture and extraordinary rendition?**
> >
> > **2. Is it HMG's position that evidence held by the UK Government that US and Moroccan authorities engaged in torture or rendition for torture**

cannot be obtained by the Court's common law *Norwich Pharmacal* jurisdiction?

3. Is it HMG's position that the UK is under no obligation under international law to assist foreign courts and tribunals in ensuring that torture evidence is not admitted?

~~38.~~45. The Treasury Solicitor responded on 24 April 2008:

> **You further allege that HM Government provided information and assistance to the US or Moroccan authorities, which was subsequently used in the torture of your client. However, you do not provide any evidence to support either (a) your assertion that any such alleged information or assistance "was subsequently used in the torture of [your] client" and/or (b) HM Government had "become mixed up in the wrongdoing so as to *facilitate* the wrong", ie. the alleged rendition and/or torture of your client…**

~~39.~~46. It is difficult to see how this argument can properly be advanced in light of the evidence given by the Security Service to the Intelligence and Security Committee and the Committee's findings.

~~40.~~47. The letter then turned to deal with the three questions:

> **1) In your correspondence to date, you have sought to obtain information by asserting that there is a legal duty on HM Government to provide you with disclosure. If, however, you are now abandoning that assertion, but wish to make a request on some sort of discretionary/exceptional basis, you should make full representations and present evidence in that regard so that my client may give due consideration to any such request.**
>
> **2) Yes, it is HM Government's position that, in the circumstances of this case, "evidence held by the UK Government [your formulation] that US and Moroccan authorities engaged in torture or rendition [your allegation] cannot be obtained by the court's common law *Norwich Pharmacal* jurisdiction".**
>
> **3) Yes, it is HM Government's position that, in the absence of relevant mutual assistance agreements and a specific request by a foreign court or tribunal for assistance under such an agreement, "the UK is under no obligation under international law to assist foreign courts and tribunals in ensuring that torture evidence is not admitted".**

48. On 20 June 2008, the Secretary of State wrote to the Claimant's solicitors refusing to exercise his discretion to release any of the materials requested.

C. Grounds

~~41.~~49. The decision of the Secretary of State to refuse to provide the information and evidence requested in the annex to the pre-action letter was both irrational and unlawful and should be quashed.

~~42.~~50. The refusal to provide the information requested was:

a) a breach of domestic common law duties to provide information relating to wrongdoing committed by third parties; and

b) contrary to customary international law (which forms part of the common law).

Torture

~~43.~~51. The prohibition on the use of the fruits of torture in legal proceedings is a fundamental part of the common law. This principle is also a peremptory norm of general international law. As the US Court of Appeals put it in *Filartiga v Pena-Irala* (1980) 630 F 2d 876 "the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind" (cited with approval in *A (No. 2)* per Lord Bingham at [33]).

~~44.~~52. As such, torture is a crime of universal jurisdiction. Under section 134 of the Criminal Justice Act 1988, torture of anyone, anywhere in the world, is a crime under English law. Further, evidence obtained by torture is inadmissible in any legal proceedings in England.

~~45.~~53. The same position applies under US law and international law:

a) Section 948r of the United States Code (as introduced by the Military Commissions Act 2006) provides:

> **A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.**

b) Article 15 of the UN Convention Against Torture is in similar, but wider, terms.

Rationality

~~46.~~54. In *A (No. 2)*, Lord Hoffmann emphasised the importance and constitutional significance of the prohibition on the use of the products of torture in judicial proceedings:

> **82… The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of suspects to countries where they would be tortured…**
>
> **83… the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system. Not only that: the abolition of torture, which was used by the state in Elizabethan and Jacobean times to obtain evidence admitted in trials before the court of the Star Chamber, was achieved as part of the great constitutional struggle and civil war which made the government subject to the law. Its rejection has a constitutional resonance for the English people which cannot be overestimated.**
>
> **84. During the last century the idea of torture as a state instrument of special horror came to be accepted all over the world… Among the many unlawful practices of state officials, torture and genocide are regarded with particular**

revulsion: crimes against international law which every state is obliged to punish wherever they may have been committed.

~~47.~~55. The decision of the Secretary of State to refuse to provide evidence to the Claimant's lawyers about his torture, and the practice of extraordinary rendition for torture by the US Government, is irrational applying ordinary public law principles. No reasonable Secretary of State, giving proper consideration to the importance as a matter of legal public policy of preventing the use of evidence obtained by torture could properly refuse to provide full and complete assistance to the Claimant in the preparation of his defence before the military commissions. The issues could scarcely be more important. The liberty (and potentially, the life) of the Claimant is at stake, as is the fundamental principle that evidence obtained as a result of torture should not be used in judicial proceedings anywhere. The public interest in the disclosure of the materials sought by Mr Mohamed is overwhelming.~~ Notably, no substantive reasons have been advanced for refusing the request made.~~

56. The reasons given in the letter of 20 June 2008 for refusing disclosure are irrational:

~~48.~~a) First, ~~N~~national security concerns cannot be used to justify this irrational decision. Both of the Claimant's lawyers have high level security clearance. None of the information revealed will become public. Instead, it will be used for the purpose of making out a defence expressly recognised by the US Military Commissions Act 2006. Nor is there any possibility that the information disclosed could be misused. Consistent with their duties under the rules of the military commissions, the Claimant's lawyers will not disclose any classified information to the Claimant or any other third party. The members of the military commissions are all security cleared to the highest level, and classified evidence is heard *in camera* and in the absence of the Claimant.

b) Secondly, the suggestion that disclosure to Mr Stafford Smith and Lt Col Bradley would "seriously prejudice the viability of the UK's liaison relationships with highly valued partners" is unsustainable [SM1/71]. It is not proposed to release

the information publicly, or pass it outside of the control of the UK and US governments. It will not prejudice co-operation because it will be passed only to US personnel who have an appropriate security clearance and whom have satisfied the US authorities that they are trustworthy to receive and handle such material and to use it properly, and in accordance with US law.

c) Thirdly, it is said that the request is speculative because it is not known what evidence the US authorities will rely upon. This is incorrect for the reasons set out at paragraph 115 of Mr Stafford Smith's witness statement [62].

d) Fourthly, it is suggested that disclosure in the course of the US trial process is sufficient. This is also an incorrect and insufficient response. At present, the Claimant is trying to avoid a trial process by making representations to the Convening Authority. The material requested is required for that purpose also. In any event, it is highly doubtful whether the material sought will be provided as part of the process of disclosure. A torturing state does not readily disclosure material that would show that such torture has taken place.

e) Finally, it is contended by the Secretary of State that a search for material would be onerous. However, in the circumstances, an administrative burden cannot properly outweigh the overwhelming public interest in ensuring that torture evidence is not admitted.

~~49.~~57. The grounds on which the Secretary of State has refused to co-operate are also irrational. It was suggested in the letter of 24 April that the Claimant had failed to produce any evidence that the UK Security and Intelligence Services had provided information and assistance which was used in the torture of the Claimant. As the Secretary of State well knows, it has been admitted by the Security Service before the Intelligence and Security Committee that this took place.

~~50.~~58. It is well established that decisions relating to the role of the Secretary of State in similar areas are susceptible to challenge on rationality grounds. See *R (Abbasi) v Secretary of*

State [2002] EWCA Civ 1598 at [106(iii)], *R (Al Rawi) v Secretary of State* [2007] 2 WLR 1262 at [105] and *Kaunda v President of the Republic of South Africa* (2004) 10 BCLR 1009 at [69].

Common law

~~51.~~59. It is well-established that a person (or government body) that becomes mixed up in the wrongdoing of another comes under a duty to assist the victim of that wrongdoing by giving such information as he has about the wrongdoing. The classic statement of the principle is to be found in Lord Reid's speech in *Norwich Pharmacal v Commissioners for Customs and Excise* [1974] AC 133 at [175A-B]:

> **[The authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did.**

~~52.~~60. In *Norwich Pharmacal*, HM Customs and Excise were ordered to disclose details of the importers of a drug, who were importing in breach of Norwich Pharmacal's intellectual property rights. They had only become 'mixed up' in the wrongdoing to the extent that pursuant to statute, they held records of the identity of the importer.

~~53.~~61. The most recent restatement of the principles by the House of Lords is its decision in *Ashworth Hospital Authority v MGN* [2002] 1 WLR 2033. The House of Lords held that there is no requirement that the person against whom the proceedings have been brought should be an actual wrongdoer who has committed some civil or criminal wrongful act. Where a person, albeit innocently, and without incurring any liability, becomes involved in a civil or criminal wrong committed of another, that person thereby comes under a duty to assist the person injured by those acts by giving him any information which he is able to give by way of discovery. While therefore the exercise of

the jurisdiction does require that there should be a *prima facie* case of wrongdoing, the wrongdoing which is required is not that of the person against whom the proceedings are brought (per Lord Woolf at [26]) who may well be entirely innocent.

~~54.~~62. Further, in *Mitsui v Nexen Petroleum* [2005] 3 All ER 511 Lightman J emphasised that the *Norwich Pharmacal* remedy was flexible and capable of adaptation to new circumstances, and that an order could be made not just where the identity of a person is needed, but also "where the claimant requires a missing piece of the jigsaw". The applicability of the *Norwich Pharmacal* jurisdiction to the investigation of criminal (as opposed to merely civil) wrongdoing was confirmed in *Hughes v Carratu* [2007] EWHC 1791 (QB).

~~55.~~63. The present case falls four square within the *Norwich Pharmacal* principles:

a) *Wrongdoing*: There is strong evidence that the Claimant has been the victim of grave criminal wrongdoing, namely torture, a crime of universal jurisdiction.

b) *Mixed-up*: The Secretary of State and the Security and Intelligence Services have become mixed up (unwittingly or otherwise) in the wrongdoing committed by the US and Moroccan authorities:

i) Security Service 'Witness B' made veiled threats to the Claimant to the effect that he would be more harshly treated by the Americans if he did not co-operate fully. He also offered to assist the Claimant and make representations to the US authorities but only if the Claimant co-operated. In the event, no steps were taken at the relevant time to make any representations to the US authorities as to the appropriate and lawful treatment of the Claimant. Nor were any attempts made to obtain undertakings as to the Claimant's treatment.

ii) The UK Government did not protest or object to the US proposal that the Claimant be rendered from Pakistan to Afghanistan for further

incommunicado detention and interrogation, without the protection of any legal advice or judicial process, without charge, and potentially for an unlimited period.

iii) Security Service 'Witness A' states that the proposed rendition of the Claimant from Pakistan to Afghanistan and his incommunicado detention for an undefined period by the US authorities "was not regarded as unlawful or improper" [Witness A, para. 11]. No explanation is provided for this belief. In any event, a misapprehension as to the law cannot exonerate HM Government from being mixed-up in the unlawful treatment of the Claimant.

iv) The UK Government did not protest or object once it became clear that the Claimant had been subject to rendition to a third country for incommunicado detention and further interrogation. Nor was any objection raised when access to the Claimant was refused.

v) On the contrary, ~~I~~it is common ground that the UK Government provided information which ~~was used in~~formed the basis of much of the interrogation of the Claimant and provided questions for use in his further interrogation, in circumstances in which it was known that he had been rendered to an unknown third country without any legal or judicial protection and was being held incommunicado and subjected to an extended interrogation. ~~It is likely that t~~The UK Government then willingly received the product of those interrogations. The likely and foreseeable effect of providing this material was to prolong the Claimant's incommunicado detention and interrogation by torture in Morocco.

vi) Further, the Security and Intelligence Services have admitted that with hindsight, they should have sought undertakings and assurances as to

how the material they provided would be used. These factors alone are sufficient to show that the Defendant was mixed up in wrongdoing by others. The UK Government was not a mere onlooker or bystander.

vii) Further, the Claimant ~~contends that he~~ was told that he would be rendered for torture to an Arab country by an official of the Security Service. ~~Although this is denied, the Claimant has at least established a reasonable *prima facie* case and disclosure should be ordered to enable this to be tested.~~

~~ii)~~

~~iii)~~viii) In addition, the Secretary of State has subsequently made a decision to conceal the full facts from the Claimant and the public when the matter was investigated by the Intelligence and Security Committee. Many of the relevant facts have been redacted from the public report, presumably so as not to embarrass the United States, thus facilitating the continued concealment of the underlying wrongdoing.

c) *Necessity*: It cannot be doubted that a *Norwich Pharmacal* order is essential to protect the Claimant's legitimate interests. The stakes (liberty or life) could not be higher. Normally such an order is sought to protect mere commercial interests. The US authorities are denying that the Claimant has been tortured, and the procedures adopted by the military commissions do not meet international fair trial standards. The US authorities have refused to investigate the complaints that the Claimants were tortured [SM1/55]. An order is necessary and would be of real practical assistance to the Claimant. In particular, an order is needed to obtain evidence to persuade the US Convening Authority that the case against the Claimant is based on or tainted by torture evidence and should therefore not be proceeded with.

International law

~~56.~~64. The same result is achieved by the application of the principles of customary international law. This is unsurprising, given that customary international law is part of the common law. See *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 and Fatima, *Using International Law in Domestic Courts* (2005) para. 13.1-8.

~~57.~~65. Torture is contrary to customary international law. The duty of states where torture has taken place was considered by Lord Bingham in *A (No. 2)* at [34]:

> **As appears from the passage just cited, the *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture. In *Kuwait Airways*…, the House refused recognition to conduct which represented a serious breach of international law. This was, as I respectfully think, a proper response to the requirements of international law… Article 41 of the International Law Commissions' draft articles on the Responsibility of States for internationally wrongful acts (November 2001) requires states to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law. An advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*… explained the consequences of the breach found in that case:**
>
>> **"159. Given the character and importance of the rights and obligations involved, the court is of the view that all states are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all states, while respecting the United National charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the states parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."**

~~58.~~66. Under customary international law, it is not sufficient merely to condemn torture, or the use of it in judicial proceedings. A state must not render aid or assistance in maintaining a situation in which torture could be used in criminal proceedings by another state. Further, it is for all states to ensure that any attempted use of torture evidence is brought to an end. These obligations must include providing evidence to the defence which would tend to indicate that torture had taken place, to ensure that the products of such torture are not used in evidence.

~~59.~~67. Article 7(1) of the UN Convention Against Torture provides that:

> **States Parties shall afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings [494].**

The same must equally apply to criminal proceedings in which the defence seeks the exclusion of evidence obtained by torture.

~~60.~~68. Further, Article 15 of the Convention provides:

> **Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made [495].**

~~61.~~69. In order to ensure the real and effective protection of Article 15, it is submitted that States obligations under that Article include an obligation to disclose material which tends to show that statements made as a result of torture if that material would otherwise be used in legal proceedings. Otherwise, the protection granted by Article 15 would be a dead letter.

~~62.~~70. The Secretary of State seeks to rely on *Al-Rawi* [2007] 2 WLR 1219 at [102] as authority for the proposition that he is under no duty to provide information to the Claimant. The

Court of Appeal[1] held that "as a matter of international law: (1) the status of *jus cogens erga omnes* empowers but does not oblige a state to intervene with another sovereign state to insist on respect for the prohibition of torture…". Accordingly, the Secretary of State was not ordered to make representations seeking the release of Mr Al-Rawi from Guantanamo Bay.

~~63.~~71. However, the present case is very different. The Secretary of State is not being asked to make inter-state representations on the plane of international law. He is being asked to provide information and evidence held in the United Kingdom to ensure that evidence obtained by torture can be argued to be inadmissible. Such circumstances fall squarely within the duty on states to take positive steps as identified by Lord Bingham in *A (No. 2)* and by the ICJ in the *Palestinian Wall* case.

D. Conclusion

~~64.~~72. The Court is invited to grant permission and, in due course, to quash the decision to refuse to provide the information, and order the provision of the information set out in the annex to the letter of 28 March 2008.

PHILIPPE SANDS QC **DINAH ROSE QC** **BEN JAFFEY**

Matrix

Blackstone Chambers

2 May 2008

[1] A petition for leave to appeal to the House of Lords was granted in *Al-Rawi*, but he was released before the appeal, which therefore became academic.

DINAH ROSE QC **BEN JAFFEY**

15 July 2008

Claim No. CO/4241/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

on the application of

BINYAN MOHAMED

Claimant

-and-

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

AMENDED

STATEMENT OF GROUNDS

FOR JUDICIAL REVIEW

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