

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

**Claim No. CO/4241/2008**

**BETWEEN**

**THE QUEEN**  
**on the application of**

**BINYAM MOHAMED**

**Claimant**

**and**

**THE SECRETARY OF STATE FOR  
FOREIGN AND COMMONWEALTH AFFAIRS**

**Defendant**

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**CERTIFICATE OF THE SECRETARY OF STATE FOR FOREIGN AND  
COMMONWEALTH AFFAIRS**

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- 1) I am Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs and I make this Certificate on behalf of the Crown.
- 2) I am the Defendant in proceedings brought by Mr Binyam Mohamed for disclosure of documents held by Her Majesty's Government, which his lawyers argue may be exculpatory or otherwise supportive of his case that he was subject to extraordinary rendition, prolonged incommunicado detention and torture. I understand that Mr Mohamed seeks disclosure now (a) because he has no right to disclosure from the US authorities under the US Military Commissions Act at this pre-trial stage, and (b) so as to enable him to persuade the Convening Authority to dismiss the charges against him without the need for a trial before the Military Commission.
- 3) I have read and considered both the Court's open and closed judgments in this case, handed down on 21 August 2008, and am therefore aware that the Court has concluded that, subject to issues of public interest immunity (PII) and similar considerations that would also affect the exercise of its discretion, it is minded to order the provision of "Type A" information (i.e., information specifically relevant to Mr Mohamed as

described in paragraph 135 of the open judgment) in a form to be agreed between the Special Advocates and my representatives or, in the absence of such agreement, in a form to be decided by the Court. I have also taken into consideration the PII Certificate signed by the Home Secretary for the purposes of these proceedings. Having considered the Court's judgments and taken advice, I make this further Certificate for the purpose of assisting the Court to determine questions of public interest immunity and other related issues in the hearing scheduled for Wednesday, 27 August 2008.

- 4) I understand that at that hearing the Court will consider two distinct issues:
  - a) The question of disclosure of the "Type A" documents or the information contained therein, subject to necessary redactions and to the necessary undertakings having been received by this Court, to Mr Mohamed's US lawyers ("Disclosure to the Convening Authority and Mr Mohamed's US lawyers"); and
  - b) The question whether to supplement the open judgment of the Court to enlarge the findings of fact on the basis of some of the information contained in the "Type A" material ("Disclosure of information derived from these documents into the public domain").
- 5) I set out and seek to explain my views in relation to these two issues separately in more detail below. In summary, the starting point in my consideration has been the importance of ensuring disclosure of the information in question in a manner that meets the concerns expressed by the Court. In this regard, I have noted carefully the Court's conclusion that the information in question is not merely necessary but essential for Mr Mohamed's defence. As the Court also concluded, the United Kingdom Government considers that the material in question should be made available and that it has undertaken strenuous action directed to ensuring that it is provided by the United States. I am also required to give careful consideration to the national security and international relations interests of the United Kingdom.
- 6) Important developments have occurred since the handing down of the Court's judgments that address both of these aspects central to my consideration. First, as detailed further below, the United Kingdom Government received formal correspondence from the Government of the United States on 22 August 2008 which sets out certain clear commitments to provide the information concerned to Mr Mohamed's US counsel and to the Convening Authority. Second, there have been material developments relevant to my assessment of the damage to the national security and international relations interests of the United Kingdom that would be occasioned by disclosure of the information in question by order of our Courts. This element is addressed more fully in the sensitive

Schedule attached to this Certificate which is provided to the Court and to the Special Advocates only.

- 7) Having had careful regard to both of these developments, and to wider considerations relating to the administration of justice and to the national security and international interests of the United Kingdom relevant to this matter, I have concluded that the public interest dictates that disclosure of the information in question should take place in a manner consistent with the undertaking of the United States to provide this material and should not take place by order of our Courts or otherwise by the United Kingdom authorities. In so concluding, I underline the conclusion in the Court's judgment that the United Kingdom Government considers that the material in question should be made available to Mr Mohamed's US counsel. Consistent with the undertaking of the United States, and my conclusion as to the proper balance of the public interest, the United Kingdom Government will continue to engage with the relevant US authorities to ensure that such disclosure does indeed take place.

### **The balancing exercise**

- 8) In reaching my views on the issues noted in paragraph 4 above, I have had regard to two distinct questions that the law requires to be taken into account when considering whether to put a PII certificate before the Court in circumstances in which the material in question otherwise passes the threshold test for disclosure.
  - a) The first question is whether the material identified as relevant and otherwise subject to disclosure attracts PII. The distinction between class and contents claims is no longer regarded as helpful as far as PII claims by the Government are concerned and the approach now adopted by the Government is to focus specifically on the damage that would be done by disclosure. In this regard, the then Attorney General stated in a Written Parliamentary Answer on 11 July 1997 that PII will not be asserted by the Government unless the relevant Minister believes that disclosure of a document or piece of information will cause real harm to the public interest. The Attorney General added that this test is to be applied rigorously.
  - b) If, applying the real harm test, the material attracts PII, the second question is whether the public interest in non-disclosure is outweighed by the public interest in disclosure of the material. It is open to me to consider and balance the relevant competing public interests, and to agree to the disclosure of material that attracts PII, if I am satisfied that the overall public interest favours disclosure. However, if I consider that the material attracts PII and I consider that the overall public interest favours non-disclosure, or if I am uncertain, the proper course is to make a certificate for the assistance of the Court, which is the ultimate decision maker as to whether the

material should be disclosed in the public interest (see *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1995] 1 AC 274, at 288, 295-298 per Lord Woolf, and at 281 per Lord Templeman).

- 9) Furthermore, in reaching the views set out below I have:
- a) personally examined copies of the “Type A” documents in question, which I understand are contained in the closed bundle already before the Court, and have had the benefit of advice from officials and from counsel; and
  - b) at all times been mindful of the Court’s conclusion that, subject to questions of PII and similar considerations that would also affect the exercise of its discretion, it is essential that Type A information should be provided to enable Mr Mohamed to put forward a defence to the very serious charges he faces.

**Disclosure to the Convening Authority and Mr Mohamed’s US lawyers**

10) National security considerations weigh more heavily in the case of our relations with the United States than with any other country. Our level of cooperation is unique. Our reliance on that cooperation to protect the security of British citizens is very great indeed. My officials and those from others in UK government departments and agencies have worked very closely on this case. Their advice has been clear and unanimous and my judgement is the same; disclosure of these documents by order of our Courts or otherwise by United Kingdom authorities would seriously harm the existing intelligence-sharing arrangements between the United Kingdom and the United States and cause considerable damage to the national security of the United Kingdom. I have also assessed that it may damage international relations of the United Kingdom more generally and liaison relationships with third parties.

11) In reaching my assessment, I have taken into account the fact that the US Administration on the basis of clear, consistent and forceful communications, both written and oral from senior officials, including at the highest national security levels, from all of the Departments and Agencies concerned, have indicated that such damage was likely to occur. A recent open indication to this effect was the letter sent to my Legal Adviser, Daniel Bethlehem QC, by John Bellinger, the Legal Adviser to the US Secretary of State, dated 21 August 2008, received in the UK on 22 August 2008, following the handing down of the Court’s open judgment, concerning the disclosure of “Type A” documents as a result of that judgment. In this letter, Mr Bellinger affirms in the clearest terms that the public disclosure of these documents or of the information contained therein “is likely to result in serious damage to U.S. national security and could harm existing intelligence information-sharing arrangements between our two governments”. This point has been

reinforced in the strongest possible terms in discussions between officials in the past days as well as in classified correspondence to which I refer in the sensitive Schedule to this certificate. These representations have been relevant to my consideration of the issues and to my assessment noted above.

- 12) The fact and the nature of these statements made by officials at the highest level in the US Administration is an important factor in weighing the public interest involved in this case. Our intelligence relationship with the United States is vital to the national security of the United Kingdom. As the Intelligence and Security Committee has noted, it saves lives. It is essential that the ability of the United States to communicate in confidence with the United Kingdom is protected; without this confidence they simply will not share information in the open manner that is currently the case. It is important to me that the Court understands the reasoning that would inform such a change in practice. Exchange of information between the US and the UK is comprehensive but very strictly controlled. As set out in the sensitive Schedule, this strict control occurs in and to the benefit of both countries. Disclosure by order of our Courts would introduce a new, and in the mind of our US partners, uncertain dimension into a set of practices that rely upon certainty. The inhibition that this would place on the sharing of information would in my judgement be profound. We would have the same concerns. There is also a real risk of wider and damaging repercussions to the international relations of the United Kingdom more generally and to liaison relationships with third parties. These considerations are elaborated upon in greater detail in the sensitive Schedule.
  
- 13) In putting this PII certificate before the Court I have also taken into account the fact that the US authorities have undertaken to provide the "Type A" information to the Convening Authority and, if charges are referred, to Mr Mohamed's US lawyers through the military commissions system. Mr Bellinger's letter, referred to above, sets out specific commitments relating to the disclosure of 44 key documents that were submitted to the Court in closed evidence and drawn to the attention of the United States authorities for purposes of an exculpatory review in the letters dated 16 June 2008 and 1 August 2008 from the FCO Legal Adviser, Daniel Bethlehem QC, to the Acting General Counsel of the US Department of Defense, Mr Dan Dell'Orto. Pursuant to these commitments, subject to the redaction of the names of American and British government officials and the location of intelligence facilities, the Chief Prosecutor in the Office of Military Commissions undertakes that the documents in question would be disclosed (a) to the Convening Authority at any time upon her request, and (b) to Mr Mohamed's US counsel at the normal discovery phase if the charges against Mr Mohamed were to be referred to a military commission. This disclosure within the US system is expressly stated to be on the understanding that it would avoid and prevent any disclosure in the United Kingdom.

- 14) In deciding whether to put a PII certificate before the Court in relation to this question, I have balanced the interests of national security and damage to international relations against the interest of disclosure at this stage of the US proceedings to Mr Mohamed's US lawyers in consequence of an order of our Court. In light of the factors summarised above, as supplemented by the sensitive Schedule, I am satisfied that the balance of the public interest does not favour disclosure of the documents in question by order of our Courts or otherwise by the United Kingdom authorities.
- 15) As noted above, in reaching this conclusion it has been sharply in my mind that the Court has concluded that it is essential to Mr Mohamed's defence to any charges that may be brought against him that he has access to the material in issue in these proceedings for the purposes of his submissions. I recognise and accept the utmost importance of this assessment and may well have been inclined to reach a different conclusion on the balance of the public interest were the US authorities not to have made the commitments to make the documents in question available that are set out in Mr Bellinger's letter of 21 August 2008. In the circumstances, however, I am persuaded that the interests of justice will be served, in a manner consistent with the United Kingdom's national security and international relations interests, by disclosure within the US system pursuant to the governmental undertaking now provided by the United States.
- 16) As indicated above, in reaching this conclusion, I have had regard *inter alia* to the following considerations: that, in these proceedings, Mr Mohamed's primary concern has been that the material in question should be disclosed to the Convening Authority before she makes a decision on whether to refer charges; that this objective will very largely be achieved by the US undertaking; that in any event, the Convening Authority (a) is aware of the existence of the relevant documents (and has been provided with the open redacted versions previously before this court), and (b) has already been provided with a copy of Mr Bellinger's letter together with further representations from Mr Mohamed's US lawyers; that a further objective of the application was to secure the provision of the material in question to Mr Mohamed's US counsel for use in any military commission proceedings, should charges be referred; that this object would be achieved by disclosure in accordance with the US undertaking; that the basis of the remedy sought and provided through our courts is an exceptional remedy. Furthermore, I have had regard to the very real risk of harm to the national security and international relations of the United Kingdom, which for the reasons set out above, and as elaborated upon in detail in the attached sensitive Schedule, I consider could follow from disclosure by order of our Courts or otherwise by the United Kingdom authorities.

## **Disclosure of information derived from these documents into the public domain**

- 17) The strongly expressed concerns of the US Government weigh even more heavily in relation to questions of disclosure of information derived from the documents in question into the public domain, as this would involve the disclosure of highly classified intelligence information into the public domain without any safeguards as to its further use.
- 18) As a result, while I am fully sensitive to the need that there be, as far as possible, open administration of justice, I am of the clear view that there are compelling reasons going to the national security of the United Kingdom and the prevention of harm to the international relations of the United Kingdom that dictate that the information in question should not be disclosed into the public domain.
- 19) In deciding whether to put a PII certificate before the Court in relation to this issue, I have balanced the interests of national security and damage to international relations against the interest of disclosure into the public domain. I am satisfied that the balance of public interest is against disclosure of the information contained in the "Type A" documents into the public domain. In reaching this conclusion, I have had regard to *inter alia* the following considerations: that, in these proceedings, Mr Mohamed has not sought the unrestricted disclosure of the information in question; that the object of the application was to secure the provision of the relevant material to Mr Mohamed's US counsel for use before the Convening Authority and otherwise in any military commission proceedings; that this object would very largely be achieved by the US undertaking; that the basis of the remedy sought and provided through our courts is an exceptional remedy which does not otherwise dictate wider disclosure in the public interest; that no direct benefit to Mr Mohamed would be served by wider disclosure; that no harm would be done to Mr Mohamed or to his case before the Convening Authority and/or in any military commission proceedings by non-disclosure into the public domain. Furthermore, I have had regard to the very real risk of harm to the national security and international relations of the United Kingdom which, for the reasons set out above and elaborated upon in the sensitive Schedule, I consider could follow from public disclosure of this information by order of our Courts or otherwise by the United Kingdom authorities.

## **Conclusion**

- 20) In putting this PII certificate before the Court, I accept that the Court has final responsibility for determining questions of disclosure and in particular for deciding whether the interests of justice outweigh the public interest that I have asserted. I also accept that the Court is in a better position than I am to assess the relevance and importance of the information and the requirements of the interests of justice. If the

Court requires further assistance from me in order to reach its own determination, I am ready to provide it.

*[signed in the original]*

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**The Right Honourable David Miliband MP**

Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs

Dated the 26<sup>th</sup> day of August 2008