

IN THE HIGH COURT OF JUSTICE

Claim No. CO/4241/2008

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

B E T W E E N:

THE QUEEN

on the application of

BINYAM MOHAMED

Claimant

-and-

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

SUBMISSIONS ON BEHALF OF THE CLAIMANT

For hearing: 22 April 2009, 1 day

Introduction

1. The open issues for determination by the Court are:
 - a) the Claimant's application for further information;
 - b) the Claimant's application to re-open the Court's fourth judgment; and
 - c) the costs of the action.

Application to re-open fourth judgment

Fourth judgment

2. On 4 February 2009, the Court handed down its fourth judgment dealing with the question of whether passages dealing with the Claimant's treatment and detention in Pakistan should be restored to the first open judgment:

14... The only issue that remains outstanding in these proceedings is whether we should restore to our open judgment seven very short paragraphs amounting to about 25 lines. In these paragraphs we provided a summary of reports by the United

States Government to the SyS and the Secret Intelligence Service (SIS) on the circumstances of BM's incommunicado and unlawful detention in Pakistan and of the treatment accorded to him by or on behalf of the United States Government as referred to in paragraph 87(iv) of our judgment. We did so as the summary was highly material to BM's allegation that he had been subjected to torture and cruel, inhuman or degrading treatment and to the commission of criminal offences to which we referred in paragraph 77 of our first judgment and to which we refer at paragraph 20 below. As explained at paragraph 4 of our first judgment, we redacted those paragraphs at the request of the Foreign Secretary, pending further argument.

3. The Court held that it would not restore the 7 paragraphs to its open judgment, having balanced the public interest in disclosure as against the public interest in the protection of national security from a threat by the US Government to "re-evaluate its intelligence sharing relationship with the United Kingdom with the real risk that it would reduce the intelligence provided" [62]:

62... It was and remains (so far as we are aware) the judgement of the Foreign Secretary that the United States Government might carry that threat out and this would seriously prejudice the national security of the United Kingdom.

4. The Court noted the strong public interest in the publication of the full reasons for its first judgment and the absence of any actual national security risk that would justify the passages being withheld:

68... there was nothing in the redacted paragraphs that would identify any agent or any facility or any secret means of intelligence gathering. Nor could anything in the redacted paragraphs possibly be described as "highly sensitive classified US intelligence." It followed that it was (and remains) our view that the ordinary business of intelligence gathering would not be affected by putting into the public domain the redacted paragraphs as they contain only a short summary of what was reported to the United Kingdom authorities by the officials of the United States Government as to what they say happened to BM during his detention in Pakistan in April and May 2002.

5. Further, the Court held that the position had not changed following the election of President Barack Obama:

78. It was submitted to us by Mr David Rose that the situation had changed significantly following the election of President Obama who was avowedly determined to eschew torture and cruel, inhuman and degrading treatment and to close Guantanamo Bay. We have, however, been informed by counsel for the Foreign Secretary that the position has not changed. Our current understanding is therefore that the position remains the same, even after the making of the Executive Orders by President Obama on 22 January 2009 to which we have referred at paragraph 9 above. The concern of the United States pertains not to disclosure of the treatment of detainees that might be levelled against the administration of President Bush, but to

the disclosure of information obtained through intelligence sharing. However, as we have observed the United States Government will still not make the information public.

6. The Court's conclusions were set out at [107]:

How is this judgement of the Foreign Secretary in relation to the public interest in national security to be balanced against the public interest in open justice as safeguarding the rule of law, free speech and democratic accountability? In our judgement the decisive factors are the other means which have resulted from these proceedings for safeguarding democratic accountability (the reference of the matter to the ISC and the Attorney General) and what has already been placed in the public domain which can engender debate. In the circumstances now prevailing, the balance is served by maintaining the redaction of the paragraphs from our first judgment. In short, whatever views may be held as to the continuing threat made by the Government of the United States to prevent a short summary of the treatment of BM being put into the public domain by this court, it would not, in all the circumstances we have set out and in the light of the action taken, be in the public interest to expose the United Kingdom to what the Foreign Secretary still considers to be the real risk of the loss of intelligence so vital to the safety of our day to day life. If the information in the redacted paragraphs which we consider so important to the rule of law, free speech and democratic accountability is to be put into the public domain, it must now be for the United States Government to consider changing its position or itself putting that information into the public domain.

Evidence before the Court prior to handing down of fourth judgment

7. The Court's fourth judgment was based on the evidence before it. The PII certificates dealt with the threat by the US to reconsider the UK-US intelligence sharing relationship if the redacted paragraphs were restored to the Court's first judgment:

- a) The detail of the position adopted by the US Government was contained in the closed sensitive schedule to the First PII Certificate, which has not been made available to the Claimant's representatives. A gist of the sensitive Schedule is contained in the Second PII Certificate at paragraphs 30-33: "the United States considers it paramount that it is able to retain control of its intelligence information and, where disclosure is required, to handle this within its own adjudicatory system and subject to its own protective measures... for purpose (sic) of assessing the potential scope and likelihood of damage, I have considered a range of public and confidential, including highly classified, correspondence and other statements by senior US officials and other persons..." The correspondence included a letter from the Legal Adviser to the US Department of State ("we want to affirm 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 US national security and could harm existing intelligence-sharing arrangements between our two governments”).

- b) The Court’s conclusion, having reviewed this material, was that it amounted to a threat by the US Government that if the redacted paragraphs were made public, the US Government would re-evaluate its intelligence sharing relationship with the UK, with a real risk that it would reduce the intelligence provided [62].
 - c) It is clear from paragraphs 73 - 77 of the Court’s fourth judgment that the making of this threat, and the assessment of the Defendant, based on evidence, that the threat was real, was crucial to the Court’s conclusion that the paragraphs should not be made public, notwithstanding the powerful public interest in making their contents known.
8. Material was also before the Court as to the stance of the administration of President Obama:
- a) Mr David Rose at paragraph 11 of his written submissions suggested that the national security concerns relied on by the Defendant no longer arose following the election of President Obama.
 - b) This submission was addressed by the Defendant in its written submissions dated 18 December 2008, in which it was stated, at paragraph 15:

Mr Rose suggests that the national security concerns no longer arise following the Presidential election. He is not in a position to give evidence to the court on that issue. But, in any event, the situation has not changed since the election of President-Elect Obama. The concern relates to the disclosure of closed information; it is not a concern that criticism of the treatment of detainees may be levelled at the administration of President Bush. The Secretary of State’s assessment of the likelihood and severity of damage to national security has not changed. All the developments since the Secretary of State’s further certificate of 5 September 2008 have tipped the balance more firmly in favour of safeguarding UK national security (emphasis added).

- c) The assertion of fact in this paragraph (that the situation had not changed since the election of President Obama), was not supported by any witness statement or a further PII Certificate. Leigh Day & Co on behalf of the Claimant pointed out this deficiency in their letter of 18 December 2008. It is regrettable that no response has ever been received to that letter.

- d) At paragraph 78 of the Court's fourth judgment, the Court expressly relied upon the submission made by the Defendant that the position had not changed following the election of President Obama. The "position" referred to by the Court in this paragraph was the position that the US Government was maintaining the threat to re-evaluate its intelligence sharing relationship with the UK in the event that the paragraphs were made public.
- e) This finding was critical to the Court's decision not to make the paragraphs public, and gave rise to the Court's statement at paragraph 107:

If the information in the redacted paragraphs which we consider so important to the rule of law, free speech and democratic accountability is to be put into the public domain, it must now be for the United States Government to consider changing its position or itself putting that information into the public domain.

- 9. The draft judgment was made available to the Defendant and his legal advisers over a week before it was handed down. Detailed proposals for amendments to the judgment were made on behalf of the Defendant. However:
 - a) no amendment was suggested to the paragraphs stating that a grave threat had been made by the US Government; and
 - b) no amendment was suggested to paragraph 78. It was not suggested by the Defendant that the Court had in any way misunderstood the submissions made to it about the position of the Obama administration.

4 February statements

- 10. The Court handed down its fourth judgment on 4 February 2009. Immediately following the publication of the judgment, statements were made by the Defendant and other representatives of HM Government which call into question the factual findings on the basis of which the fourth judgment was made. The Defendant and his spokesmen have stated that:
 - a) no threat was made by the US Government;
 - b) no approach had been made by the UK Government to the new US administration of President Obama; and

- c) no representations had been made to the Court about the attitude of the new administration.

11. The key statements are as follows:

- a) Statement of Foreign Office spokesman to Mr David Rose on 4 February:

We haven't made any representations to the court regarding the new administration's approach to this case. We have not approached the new administration about these paragraphs. We haven't made any representations about their attitude and we haven't been asked by the court to do so, despite the new executive orders and the attitude that may now prevail in Washington.

- b) Interview with the Defendant on Channel 4 News on 4 February:

Miliband: ... There has been no threat from the United States to quote unquote, break off intelligence co-operation. What there is, is a simple fact, which is that intelligence co-operation depends on confidentiality... In this case, the United States made clear, in documents that have been published, that there would inevitably be serious and lasting harm if that fundamental principle was breached.

Snow: Are you saying that the judges are wrong, and that in fact there is not a threat to our intelligence sharing relationship with the United States?

Miliband: What the judges quote is the serious and lasting harm, quote unquote, that would result from a breach of that fundamental principle of confidentiality. It's for us to decide, in Britain, when and how to disclose our secrets; it's for others, in other countries, to decide when and how to display their secrets...

Snow: Have you checked that this threat - and it is a threat, because the judges call it a threat - still stands under the Obama administration?

Miliband: Well, it's been a founding principle for 60 years of the Anglo-American -

Snow: Does it still stand under the Obama administration?

Miliband: There's no evidence that it doesn't stand...

- c) Official Report of daily briefing by Prime Minister's Official Spokesman, 4 February:

Put that the judge had made a point about the US administration threatening to withhold intelligence, the PMS said that we were still examining the totality of what the judges had said, but the point was that the court found in our favour today in this case. Put that the Foreign Office Counsel had checked with the Obama administration that this was the case, the PMS said

we had not engaged with the US administration on the detail of this case.... Put that he seemed to be accusing the Foreign Office Counsel of perjury, the PMS replied that he was not accusing anyone of anything and he would not enter a discussion about the very specific details of an individual court case.

Directions hearing

12. The Court held a directions hearing on 11 February 2009. At that hearing Mr Pushpinder Saini QC made submissions setting out the Defendant's position:

11. My Lord will be aware there are two points that are raised by Ms Rose's application. The first is that the court has found there was a threat and the Secretary of State has said there was not a threat. In relation to that, our position is very simple...

13... the court, and we respect the court's view, has characterised the materials and evidence looked at both in open and closed as amounting to a threat. The Foreign Secretary respectfully disagrees with that characterisation and it is a matter for the court how it characterises evidence... The second point is a matter of more substance...

16... in our 18th December submissions we stated that the change in administration did not affect the basis upon which the US government had objected to the disclosure, namely that the importance of ensuring no breach of confidentiality as regards in terms of communication, I think the court effectively cited that in its judgment. Nothing happened between that statement on 18th December 2008 and the delivery of the court's draft judgment on 4th February, which caused the Foreign Office to change that assessment. Had there been any development, the Foreign Office would have of course brought it to the court's attention.

17... Now, neither following disclosure, nor indeed in detailed discussions which I am going to refer to, has there been any suggestion to the Foreign Secretary that the court's summary of the US opposition to disclosure is inaccurate. So, neither when the draft judgment was shared with those agencies, which are within the Obama administration, my Lord subsequently - and there is an important subsequent development here, which is that in this very last week, Mr Bethlehem, who, your Lordships are aware, is the Foreign Office legal adviser has visited Washington and... there has been no suggestion by these US officials within the Obama administration that the court's summary of the US position on disclosure is inaccurate.

13. Mr Saini QC did not address the central question of whether the Obama administration would reconsider the US-UK intelligence sharing relationship if the 7 paragraphs were restored to the court's open judgment. His submissions merely stated that the US government still objected to disclosure. Nor did he explain whether any enquiry had in fact been made as to the stance of the Obama administration about reconsideration of the intelligence sharing relationship.

Daniel Bethlehem QC letter

14. At the directions hearing, the Court ordered the Defendant to “file and serve any further evidence he wishes to rely upon and a response to the Claimant’s application for the fourth judgment to be re-opened”. The Defendant sought to comply with this direction by a letter from Daniel Bethlehem QC dated 24 March 2009.

15. On the question of a threat, Mr Bethlehem QC declined to give any open response to the allegations made:

The Defendant’s response to these contentions will be addressed in its written and oral submissions in due course. This letter does not anticipate that response. In particular, it does not address any issue that may be relevant to the first limb of the Claimant’s application, which goes to arguments and evidence that were addressed in closed proceedings in the case.

16. On the position of the Obama administration, Mr Bethlehem QC admits that the Foreign Office did not know the position of the incoming US administration as at 18 December 2008, when the Defendant’s written submissions were filed:

The FCO had no dealings – and indeed could not properly have had any dealings – on these matters with any staff or officials of President-elect Obama in the period between 4 November 2008 and 20 January 2009.

17. In these circumstances, it is difficult to understand how the Defendant was properly able to state in his 18 December written submission without qualification or caveat that “the situation has not changed since the election of President-Elect Obama”.

18. Mr Bethlehem QC then reported on the discussions he had with individuals in the new US administration following receipt of the embargoed fourth judgment:

In subsequent discussion with the Acting Legal Adviser of the State Department, who was one of the recipients of the embargoed Judgment, I indicated that the Defendant had made no representations to the Court about the attitude of the new US Administration on any aspect of the case...

19. This passage is also inconsistent with the 18 December written submission. The Defendant had in fact made representations to the Court about the position of the new US administration and the Court relied on those representations in reaching its judgment.

20. Mr Bethlehem continued by referring to the statement of the US National Security Council on 4 February 2009 that “the United States thanks the UK government for its continued commitment to protect sensitive national security information and preserve the long-standing intelligence sharing relationship that enables both countries to protect their citizens”. This carefully worded statement does not state what the new US administration’s response would be if the Divisional Court restored the redacted passages to its first judgment. The obvious ambiguity was challenged by journalists in a State Department press briefing the following day. The relevant exchange is quoted in Mr Bethlehem’s letter:

Q: ... would it do serious harm to intelligence information sharing relationships between the US and the UK if the documents that describe his treatment as a detainee were to be made public in the UK?

A: Well, look, one of the things that I want to make clear is that we really thank the United Kingdom for, you know, its continued commitment to, you know, protecting sensitive national security information and to preserve our longstanding intelligence-sharing relationship. You know, it’s the best I can tell you on that.

21. The question was put again: “it’s not clear to us whether or not the US Government under an Obama administration really does want these things to be kept secret”:

Well, I’ve just outlined to you what our position is with regard to intelligence sharing... But beyond that, I just don’t have anything more I can give you on it.

22. Mr Bethlehem QC’s letter concludes with a statement of the current position:

14. Since these discussions in Washington, there have been further exchanges between UK and US officials on the question of the disclosure of the information in issue in [the] Court’s Judgment of 4 February 2009. The Foreign Secretary also discussed this with US Secretary of State Clinton on 2 March 2009. Secretary Clinton made it clear that the position of the US Administration on the disclosure of US intelligence material had not changed.

15. It is my understanding on the basis of these exchanges that the position of the new US Administration on the question of the public disclosure of US intelligence information, including that in issue in the *Binyam Mohamed* proceedings before our Court, remains as previously represented to the United Kingdom and expressed in documentation disclosed by the United Kingdom to the Court in both the open and closed proceedings in this case.

Legal framework

23. The Court's jurisdiction to re-open a judgment that has been handed down but not perfected in an order was confirmed post-CPR by *Robinson v Fernsby* [2003] EWCA Civ 1820:

96. Once a judgment has been handed down or given, there are obvious reasons why the court should hesitate long and hard before making a material alteration to it. These reasons have been rehearsed in the cases to which I have referred and I need not elaborate them further. The cases also acknowledge that there may very occasionally be circumstances in which a judge not only can, but should make a material alteration in the interests of justice. There may for instance be a palpable error in the judgment and an alteration would save the parties the expense of an appeal. On the other hand, reopening contentious matters or permitting one or more of the parties to add to their case or make a new case should rarely be allowed. Any attempt to do this is likely to receive summary rejection in most cases. It will only very rarely be appropriate for parties to attempt to do so. This necessarily means that the court would only be persuaded to do so in exceptional circumstances, but that expression by itself is no more than a relatively uninformative label. It is not profitable to debate what it means in isolation from the facts of a particular case.

24. Proper reasons for re-opening a judgment include where new information or evidence comes to light. Neuberger J identified the principles in *Charlesworth v Relay Roads* [2000] 1 WLR 230:

In these circumstances, I conclude that the following principles apply where a party is seeking to call fresh evidence on a new point after judgment has been given but before the order has been drawn up:

1. The court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh evidence and/or to hear fresh argument;
2. The court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice;
3. The general rules relating to amendment apply so that:
 - (a) While it is no doubt desirable in general that litigants should be permitted to take any reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs;
 - (b) As with any other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants;

4. Quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in *Ladd -v- Marshall*;

5. Almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it.

6. The court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare.

25. Where contentious factual issues are raised by an application re-open a judgment, the Court may give directions for the service of evidence and the provision of disclosure on the issues raised by the application to re-open judgment. See, for example, *Albon v Naza Motor Trading SDN BHD (No. 5)* [2007] EWHC 2613 (Ch), Lightman J.

Application for further information

26. Leigh Day & Co wrote to the Treasury Solicitor on 26 March 2009 requesting further information and clarification of Mr Bethlehem QC's letter of 24 March. The letter requested an explanation of:

- a) The factual basis of the submission made on 18 December 2008 about the position of the Obama administration in light of the admissions in Mr Bethlehem QC's letter.
- b) Whether it is currently the assessment of the Defendant that the Obama administration would re-evaluate its intelligence sharing relationship with the UK if the redacted paragraphs from the first judgment were made public by the Court.

27. The requests were made because Mr Bethlehem's letter is not consistent with the 18 December submissions and the concluding paragraphs of his letter are ambiguous. The fact that "the position of the US Administration on the disclosure of US intelligence material has not changed" does not address the issue for the Court, which is whether there has been any change in the US position that it would re-evaluate its intelligence sharing relationship with the UK if the redacted paragraphs in the Court's judgment were made public by an independent Court, which had decided that their disclosure was

very important in the public interest. This ambiguity in the reference to the “position” of the US authorities was specifically noted by counsel for the Claimant at the hearing on 11 February 2009, in response to the statement of Mr Saini QC on that occasion.

28. The Treasury Solicitor responded on 1 April 2009 refusing to provide the information or clarification sought:

It is for our client to decide what form of response is made to your client’s application to re-open the fourth judgment, and for the purposes of the court’s order that response is as set out in Mr Bethlehem QC’s letter of 24 March 2009. For the avoidance of doubt we confirm that:

(i) so far as concerns the question of the existence of a threat, the Defendant’s position is quite simply as stated by counsel on 11 February 2009 (see page 8 of the open transcript);

(ii) so far as concerns the question of misleading the court in relation to the position of President Obama, Mr Bethlehem’s letter confirms and amplifies the factual background as explained to the court by counsel on 11 February 2009; and

(iii) we do not consider that any further response is required.

29. The Treasury Solicitor’s response does not deal with the requests made. The Claimant therefore issued an application for further information returnable at the hearing on 22 April 2009. The Defendant has been asked to attend the hearing with the relevant information, so that it can be provided immediately if the Court so orders.

30. The Court should not have to deal with the re-opening application on the basis of partial and incomplete information. The CPR provides that the proper means to present evidence to the Court in any case (whether an application to re-open a judgment, a *Norwich Pharmacal* application or a claim for judicial review) is by a witness statement or statement of case verified by a statement of truth. The Defendant has elected not to adopt either course, preferring to use a letter from Mr Bethlehem QC and submissions by counsel.

31. The Court has previously insisted the parties ensure that their case is set out properly in written evidence. It is submitted that this discipline is of particular importance in the re-opening application. The great sensitivity of the issues, and the secrecy with which much of the evidence is shrouded means that accuracy, precision and clarity are essential when evidence (much of which is gisted) is provided to the Claimant and the court.

32. These qualities have repeatedly been shown to be difficult for the Defendant to achieve in this case:

- a) The summary grounds of resistance were misleading. They contended that it was unarguable that HM Government was mixed-up in wrongdoing without disclosing to the court the fact that the Defendant held substantial evidence of being mixed-up and was in possession of the exculpatory material sought. These failures were deprecated by Sullivan J at the first directions hearing.
- b) The original statements and explanations given to the ISC were false in key respects. These errors were not corrected until Mr Bethlehem QC's first letter was sent to the Claimant.
- c) The Court was originally informed that the US prosecutors could be relied upon to disclose exculpatory material. That suggestion was subsequently retracted.
- d) The Court was informed that the 42 documents had been passed to the ISC when this had not been done.
- e) Witness A asserted that no records of interviews were received after those he referred to in February 2003. This statement is now acknowledged by the Defendant to have been false. It appears that further interview reports were sent by the US Government to the UK intelligence agencies after this date, although a corrected witness statement from Witness A has not yet been received.
- f) The Court and the Claimant were repeatedly informed that all relevant documents had been disclosed. It has now transpired that this was not correct. 9 further documents have now been provided to the Court.
- g) The Court was informed that the position had not changed under the Obama administration, but in fact no enquiry as to the position of the new administration had been made. The relevant information is only within the knowledge of the Defendant. In these circumstances, it was incumbent on the Defendant to inform the Court in the clearest possible terms that the Defendant was not aware of the position that would be adopted by the Obama administration in relation to the threat to re-evaluate intelligence sharing, since the question had not been raised with the new administration.

h) The Obama administration was wrongly informed that no representations as to its position had been made to the Court.

33. In matters as important as the present case, there can be no room for ambiguity or for matters to be assumed. In order for the Court to be able fairly to dispose of this application to re-open the fourth judgment, the Defendant must be required to state in simple and clear terms his answers to the key questions before the Court, so that the Court can perform the public interest balancing test based on complete and accurate information. The proper course is to require the Secretary of State to give a plain and complete account of the factual basis of the 18 December 2008 submission and the Secretary of State's current assessment of the position of the US administration on whether intelligence sharing arrangements would in fact be reconsidered by the US government if the Court were to disclose the 7 paragraphs. Given the unfortunate history of this matter, it is submitted that the answers to the questions ought to be verified by an affidavit.

Submissions

34. The Court's decision not to place in the public domain the 7 paragraphs from its first judgment was based on two key findings of fact, namely:

a) The finding at paragraphs 62 and 73-77 that the United States Government, in correspondence from senior officials, had made a threat that if the paragraphs were made public, the United States would re-evaluate its intelligence sharing relationship with the United Kingdom, with the real risk that it would reduce the intelligence provided. The Defendant had in good faith, and on the basis of evidence, evaluated that threat as real.

b) The finding at paragraph 78, based on the written submissions on behalf of the Defendant made on 18 December 2008, that the position in relation to the threat referred to above had not changed following the election of President Obama.

35. It is clear from the admissions made in Mr Bethlehem QC's letter that the statement made the Defendant in the submission dated 18 December 2008 was not based on any contact with the administration of President Obama, or any knowledge of whether his

administration would or would not maintain the position adopted by the previous administration.

36. Further, it must have been apparent to the Defendant and his legal representatives on receipt of the draft judgment that the Court was relying on the submission made, and had drawn an inference from it as to the continuing position of the Obama administration. It was incumbent on the Defendant at that stage to correct the Court's misunderstanding. It is regrettable that the Defendant did not correct the error, which would have materially altered the Court's reasoning. Now that the true position has been disclosed, the Court is invited to reconsider its decision on a more accurate and complete factual basis.
37. However, the true position of the new US administration remains opaque. The US government has expressed its appreciation for the UK government's commitment to protect the information in the 7 paragraphs from disclosure. The US administration also appears to oppose any disclosure of the information in issue. But considerable care has been taken both by the US government and by Mr Bethlehem QC to avoid making any statement as to whether the current US administration would reconsider its intelligence sharing relationship with the UK if the court were to restore the 7 paragraphs into its judgment.
38. The ambiguity should be resolved by directing the provision of further information from the Secretary of State as set out above. In the alternative, the lack of clarity in the Defendant's submissions and evidence should lead the Court to infer that there is no proper factual basis for concluding that the US authorities would in fact reconsider the UK-US intelligence sharing relationship. The Court should expect to see clear evidence before concluding that the US government would act in such an extraordinary manner in response to the judgment of the independent court of its leading ally, in a matter of overwhelming public interest, and in circumstances in which, as the Court has found, the publication would not raise any national security issue. Numerous opportunities have been given for the new administration to make a clear statement to this effect. Unlike the former administration, it has carefully avoided doing so. Similarly, the Defendant has avoided placing before the Court any assessment to this effect, preferring instead to make carefully crafted and ambiguous statements through Counsel and Mr Bethlehem QC.

39. The context in which this issue arises is the parallel experience of the Canadian courts. In *Khadr*, the Canadian courts ordered wide-ranging public disclosure of highly classified US material showing the harsh interrogation of a minor held at Guantanamo Bay. Interrogation videos provided in confidence to the Canadian intelligence services by the US were made public. It is not suggested that there have been any adverse effects to the security and intelligence relationship between the US and Canada as a result. The US Government (whilst vehemently disagreeing with the decision to disclose and considering it to be an unjustified breach of the basis on which the intelligence was provided) understands and accepts that when it shares intelligence with another democracy a court in that country may direct disclosure in limited circumstances where necessary to uphold the rule of law.

Costs

40. The Claimant should be awarded his costs of the proceedings on the indemnity basis, reflecting the repeated failures of the Defendant to comply with his duty of candour and provide timely and accurate disclosure of relevant evidence:

- a) The acknowledgement of service filed by the Defendant was misleading and breached the duty of candour. The Claimant succeeded in obtaining an expedited hearing of the case before Sullivan J on 20 June 2008, who criticised the conduct of the case by the Defendant.
- b) The failure to comply with the duty of candour has continued throughout the case. On 9 April 2009, the Treasury Solicitor wrote to the Court enclosing a further 9 relevant documents. It is apparent from the Treasury Solicitor's letter of 9 April that there have been multiple failures by counsel, the Treasury Solicitor and by officials that led to the non-disclosure of these documents. In these circumstances, the ordinary and proper course is to make an award of indemnity costs to reflect the importance that the Court places on proper compliance with the self-policing duty of candour in public law litigation. See *R (Banks) v SSEFRA* [2004] EWHC 1031 Admin.

41. Further, the Claimant has succeeded on the central legal and factual points. It demonstrated that the Defendant had become mixed-up in arguable wrongdoing and that a *Norwich Pharmacal* order should be made. The Claimant has succeeded in obtaining the relief he sought in his claim.

42. The Defendant's first set of PII certificates were rejected as giving inadequate consideration to the importance of the prohibition on torture. A second PII certificate was then served. The Claimant contended that the balance of the public interest was in favour of limited disclosure to his US lawyers. These arguments were never determined because the issues became academic following disclosure of the 42 documents by the US authorities on 28 October 2008.
43. It was only after judgment on the *Norwich Pharmacal* issue that the Defendant made substantial efforts to petition the US authorities to disclose the documents to the Claimant's US lawyers. This was in marked contrast to the position of the Defendant in resisting permission and then vigorously (and incorrectly) resisting the claim on the law and the facts.
44. Finally, if the US government had not conceded and provided the documents to the Claimant's US lawyers, the Claimant would have been successful in obtaining such disclosure. The PII balancing exercise would lean towards limited disclosure to security cleared lawyers where an individual's right to a fair trial and liberty are at stake. To determine the PII application otherwise would have been to accede to an impermissible class exemption for intelligence materials received from the US. There can have been no weightier counter-balance to the claim for PII than the circumstances which subsisted in Mr Mohamed's case.

Conclusion

45. For the reasons set out above, the Claimant invites the Court to:
- a) reopen its judgment in this matter;
 - b) direct the provision of further information to the Claimant;
 - c) direct the restoration of the 7 redacted passages to the first open judgment; and
 - d) order the Defendant to pay the Claimant's costs of the proceedings on the indemnity basis.

DINAH ROSE QC

BEN JAFFEY

Blackstone Chambers

16 April 2009