



Neutral Citation Number: [2008] EWHC 2048 (Admin)

Case No: CO/4241/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2008

Before :

LORD JUSTICE THOMAS
and
MR JUSTICE LLOYD JONES

Between :

The Queen on the Application of Binyan Mohamed **Claimant**
- and -
Secretary of State for Foreign and Commonwealth **Defendant**
Affairs

Dinah Rose QC, Philippe Sands QC and Ben Jaffey (instructed by Leigh Day) for the
Claimant

Thomas de la Mare and Martin Goudie (instructed by The Treasury Solicitor's Special
Advocates Support Office) as Special Advocates for the Claimant

Pushpinder Saini QC, Vaughan Lowe QC, Karen Steyn and Tim Eicke (instructed by The
Treasury Solicitor) for the Respondent

Michael Birnbaum QC as Amicus Curiae

Mr Duncan Penny (instructed by Kingsley Napley) was present for Witness B

Hearing dates: 28, 29, 30 and 31 July and 1 and 18 August 2008

OPEN JUDGMENT AS REVISED ON 31 JULY 2009

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Lord Justice Thomas:

I INTRODUCTION

1. This is the judgment of the Court. **It was handed down by us on 21 August 2008. In the course of further hearings in 2009, further documents were disclosed by the defendant which have caused us to make the revisions to the judgment set out at paragraphs 17, 29, 30, 31, 32, 35A, 87 and 88. They are shown in bold.**

The issue

2. The issue in this case is whether the defendant, the Secretary of State for Foreign and Commonwealth Affairs (the Foreign Secretary), must make available certain information and documents in confidence to lawyers acting for Binyan Mohamed (BM), who is not a British national, though he was resident in the United Kingdom. He was arrested in Pakistan on 10 April 2002 and has been held by the United States at Guantanamo Bay since September 2004. On 28 May 2008 he was charged with offences which may carry the death penalty. He faces an imminent decision on the reference of those charges for trial before a Military Commission established under the United States Military Commissions Act of 2006. He contends that the only evidence against him is confessions made by him at the United States base at Bagram in Afghanistan between May and September 2004 and further confessions prior to November 2004 which were made shortly after his transfer to Guantanamo Bay in September 2004. He claims that these were made after a two year period of incommunicado detention after his arrest in Pakistan, during which he was subject to cruel, inhuman or degrading treatment and torture at the hands of Pakistani and Moroccan authorities with the connivance of the United States Government and to similar treatment by the United States Government.
3. It is accepted by the Foreign Secretary, as is set out at paragraph 47.ii) below, that it is possible that documents which the United Kingdom Government has recently found could be considered exculpatory or might otherwise be relevant in the context of proceedings before the Military Commissions. BM's lawyers contend that the importance of the documents or the information contained in them is that they may provide essential support to BM's account of what happened to him. The information or the documents should therefore be disclosed to them in confidence, as the United States Government has refused to provide any information whatsoever in relation to his detention between April 2002 and May 2004, not even his location during that period. The Foreign Secretary contends that he is under no duty to disclose the documents or the information contained in them and to do so would in any event cause significant damage to national security of the United Kingdom. He contends

that there is no disadvantage to BM, as the documents will be made available during the proceedings under the United States Military Commissions Act of 2006. That forum will therefore provide the proper remedy for BM consistent with the interests of the United Kingdom's national security. The efficacy of that process is challenged on behalf of BM.

4. The hearing before the court took place in open and closed sessions. In the closed sessions the interests of BM were represented by Special Advocates. Wherever possible without endangering interests of national security we heard argument in open session. The nature of the material placed before us has required us to produce open and closed judgments. Once again, wherever possible without endangering interests of national security we have set out in the Open Judgment our reasoning and conclusions and the evidence on which they are based. We have redacted for the time being, at the request of the Foreign Secretary, from this open judgment certain passages summarising part of our findings in the closed judgment. We did so despite submissions from the Special Advocate to the contrary, pending consideration at the further hearing to which we refer at paragraph 149. At that hearing we will decide whether to add a further summary of part of what is contained in the closed judgment and make it available as part of the open judgment. That hearing has been presently fixed for Wednesday 27 August 2008

II THE FACTS, THE ALLEGATIONS OF BM AND THE COURSE OF THE PROCEEDINGS

(1) The facts and the allegations made by BM

5. It is necessary first to provide an outline of the facts that emerged from the open part of the hearing. In doing so, we will also provide a summary of the material allegations made by BM as to what he contends happened to him during the two year period he was held by or on behalf of the United States Government in the period from 10 April 2002 to May 2004.
6. As we shall explain in more detail at paragraph 51, witness statements by Witness A and Witness B were provided on behalf of the United Kingdom Security Service (the SyS) for the hearing; annexed to those statements were redacted versions of contemporaneous documents. We made an order prohibiting the reporting of the contents of those documents during the course of the hearing for the reasons set out in paragraph 53, but in order to explain as much of the matter as is possible in the open judgment, we shall refer to the documents in their redacted form.

(a) BM's period in the United Kingdom

7. BM is an Ethiopian national and not a British national. He was born in Ethiopia on 24 July 1978. He came to the United Kingdom on 9 March 1994 after a short period in the United States and sought asylum on the basis of his family's opposition to the then government of Ethiopia. Although the application was rejected, in May 2000 he was given exceptional leave to remain in the United Kingdom for 4 years. During that period he lived in London. He worked and studied. His studies included vocational studies for electrical and electronics engineering. Other members of his family sought asylum in the United States; this was granted and some are now United States citizens and reside in the United States. He was converted to Islam. In 2001 he left the United

Kingdom to travel to Pakistan. He went on to Afghanistan in June 2001. His account is that he wanted to try and “kick” a drug habit by moving away from the places he frequented in London and to see the Taliban with his own eyes to see if it was a good Islamic country or not. He then returned to Pakistan.

8. It is alleged in the charges brought against him in May 2008 (see paragraph 47.i) below) that whilst in Afghanistan he trained in Al-Qaida camps and was brought to the front line to participate in combat operations between the Taliban and the Northern Alliance. That he was thereafter chosen by Al-Qaida, because of his refugee status in the United Kingdom, to train for and participate in terrorist actions; he was then trained in the building of remote controlled devices to be used to attack United States forces in Afghanistan. That when he went to Pakistan he worked with others on the construction of an improvised radioactive bomb to be detonated in the United States and other matters to which we refer at paragraph 47.i).

(b) *The UK Security Services and their position after 11 September 2001*

9. Before setting out the circumstances in which BM was arrested, it is necessary to refer to the conditions prevailing at the time in the light of the events of 11 September 2001.
 - i) The United Kingdom Armed Forces are trained in the laws of armed conflict set out in the Geneva Conventions. The Joint Services Intelligence Organisations’ training documentation states that the following techniques are expressly and explicitly forbidden: (a) physical punishment of any sort; (b) the use of stress positions; (c) intentional sleep deprivation; (d) withdrawal of food, water or medical treatment and three other specified techniques.
 - ii) The United Kingdom Government has a very strong record in advocating the case against torture and urging other States not to use torture. There is, as the Intelligence and Security Committee (the ISC) established by the Intelligence Services Act 1994, concluded in its report of 1 March 2005 on the handling of detainees in Afghanistan, Guantanamo Bay and Iraq (Cm 6469), a debate as to whether intelligence which may have been obtained by torture or cruel, inhumane or degrading treatment should be rejected as a matter of principle or whether the Government should use such intelligence to protect the safety of its citizens. It is most certainly not urging States to use torture and pass that information to the United Kingdom (see paragraph 32 of the Report). Although the ISC did not attempt to answer those difficult questions on which it is clear opinions were divided, the ISC drew attention to the evidence of the then Foreign Secretary given on 11 November 2004 that there were circumstances in which intelligence was obtained from a liaison State where the Government knew that their practices were well below the line; however the Government never got intelligence which stated “Here is the intelligence and, by the way, we conducted this under torture”. What was important was to consider whether the intelligence is credible. In *A v The Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221 Lord Bingham made clear his view at paragraph 34:

“There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where