

Leigh Day & Co

Rt Hon Bob Ainsworth MP
Secretary of State for Defence
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Your Ref:

Our Ref: **JB/RS/Rendition**

Date: **13th August 2009**

Dear Sir,

Iraqi Renditions

We write further to the letter of 2 March 2009 from Mr Clive Stafford Smith to Mr John Hutton MP, then Secretary of State for Defence, and the reply to that letter dated 4 June 2009 from Mr Gareth Martin to Mr Stafford Smith.

The position, in summary, is as follows. In February 2004, the UK detained two individuals in Iraq. The two individuals were then transferred into US custody, and subsequently rendered to a detention facility in Afghanistan, where they remain to this day. The UK knew that the unlawful rendition was planned before it took place, but did nothing to prevent it. The UK then did nothing about their situation until briefly before Mr Hutton's statement.

As far as we are aware, the two individuals have no access to legal advice or representation. They are being held incommunicado. Like many other detainees in the especially unpleasant prison at Bagram Air Force Base, they may well have been tortured or subjected to cruel, inhuman and degrading treatment. Without legal representation or any access to the courts, they have no way of challenging their detention or safeguarding their basic rights.

The only way that these two individuals stand any chance of accessing justice is if their next of kin bring proceedings in their name for *habeas corpus*. That, of course, cannot happen unless their next of kin know that it is their relatives that have been detained, and they have access to lawyers who can bring such a challenge.

The UK government, which detained the two individuals, knows their identities. It could provide this information to Reprieve, which is expert in these types of cases,

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to enable Reprieve to find the individuals' next of kin and begin the process of seeking justice.

However, the UK government has refused to provide this information. In his letter of 4 June 2009, Mr Martin explained that releasing the individuals' names would, among other things, breach their rights under the Data Protection Act 1998. This is plainly absurd.

The refusal to disclose the identity of the two individuals is unlawful. We therefore invite you to reconsider your decision. What Reprieve seeks is simply sufficient information to enable it to identify the individuals' next of kin. It may be that the individuals' full names will be sufficient. Or, it may be that Reprieve will need more information – for example, their names and the town which their family is from, plus any other identifying information. Once Reprieve has this information the charity will be able to find the families and assist them to commence legal proceedings in order to provide these two individuals with legal advice and representations with the aim of securing a fair hearing as to whether their continued detention is proper and lawful. However, without disclosure of information that would allow Reprieve to identify these two individuals, their prospect of a fair judicial consideration of their continuing incommunicado detention is, at best, slight.

Factual Background

The transfers

On February 26, 2009, Mr Hutton made the following statement to Parliament:

"[I]n February 2004... two individuals were captured by UK forces in Iraq. They were transferred to US detention, in accordance with normal practice, and then moved subsequently to a US detention facility in Afghanistan. ... Following consultations with US authorities, we confirmed that they transferred these two individuals from Iraq to Afghanistan in 2004. They remain in US custody there. I regret that it is now clear that inaccurate information on this particular issue has been given to the House by my Department on a small number of occasions. ... The individuals transferred to Afghanistan are members of Lashkar e Tayyiba, a proscribed organisation with links to al-Qaeda. The US Government has explained to us that they were moved to Afghanistan because of a lack of relevant linguists necessary to interrogate them effectively in Iraq. The US has categorised them as unlawful enemy combatants, and continues to review their status on a regular basis. We have been assured that the detainees are held in a humane, safe and secure environment meeting international

standards consistent with cultural and religious norms. The ICRC has had regular access to the detainees. ... The review has established that officials were aware of this transfer in 2004. ... In retrospect, it is clear to me that the transfer to Afghanistan of these two individuals should have been questioned at the time."

Following further parliamentary questions, the current Defence Secretary has confirmed that the individuals were transferred to Bagram Air Base in Afghanistan.¹

It is also now clear that HM Government knew about the US' intention to transfer the individuals to Afghanistan before they were transferred:

"British officials became aware of an intention to transfer in March 2004, although this was some days after the initial capture had occurred. British officials had learned by mid-June 2004 that the individuals had been transferred to Afghanistan."²

The transfers were governed by a Memorandum of Understanding (MOU) between the US and the UK. As Mr Martin stated in his decision letter of 4 June 2009:

"Since March 2003 we have had in place an MOU [Memorandum of Understanding] with the US and Australia covering arrangements for the treatment and transfer of detainees. We worked on the mutual understanding that the key provisions of the MOU continued to apply until it was replaced last year by a further MOU with the US. The individuals you refer to were transferred under the terms of the earlier MOU."

This MOU is not in the public domain. Please provide us with a copy, redacted if necessary to protect any matters that genuinely raise national security issues.

Conditions of detention

As is well known, the US has held numerous detainees without fair process, and has mistreated and tortured detainees in Iraq and Afghanistan. The US authorities have not been forthcoming about the treatment of prisoners, and have routinely asserted that prisoners in Guantánamo Bay and elsewhere have been treated well. Once lawyers have been able to visit the prisoners, these assertions have often

¹ United Kingdom Parliament, Publications, *Daily Hansard, Written Answers for July 6 2009 (pt0010)*, Column 549W, 6 July 2009. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090706/text/90706w0010.htm>

² United Kingdom Parliament, Publications, *Daily Hansard, Written Answers for July 6 2009 (pt0010)*, Column 549W, 6 July 2009. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090706/text/90706w0010.htm>

been exposed as untrue. There can be no doubt that the two individuals handed to the US by the UK, and subsequently transported to Afghanistan, may have suffered illegal ill-treatment of some sort, and potentially very serious torture. Indeed, they may still be suffering such treatment. Without any access to legal representation, it is impossible to say.

The allegations about mistreatment of detainees by the US in Afghanistan were well known to HM Government even prior to the transfer of the two individuals to Afghanistan in 2004. The ISC's 2007 report on Rendition confirms that by 2003 at the latest, HM Government was well aware that rendition led to a real and substantial risk of ill-treatment by the US Government.

The legal regime in Bagram

The best information regarding the procedures at Bagram comes from the recent US federal court decision in *Maqaleh v Gates*, No. 1:06-c-01669-JDB (D.Ct.D.C, 2 April 2009). Comparing the Bagram procedures unfavourably to the procedures at Guantánamo Bay, the Court said (pages 36-37):

"The process used to determine a detainee's status at Bagram is described in the Tension Declaration. The initial "enemy combatant" determination is made "in the field." Tension Decl. ¶¶ 11-12. For detainees at Bagram, the initial determination is reviewed within 75 days, and then every six months thereafter.¹⁹ Id. ¶ 13. The reviewing body is the Unlawful Enemy Combatant Review Board ("UECRB"), a panel of three commissioned officers. The UECRB reviews "all relevant information reasonably available," and detainees have the opportunity to make a written statement.²⁰ Id. ¶¶ 12-13. The UECRB then makes a recommendation by majority vote to the Commanding General as to the detainee's status. Id. ¶ 13. There is no recourse to a neutral decision-maker.

Respondents concede, as they must, that the process used for status determinations at Bagram is less comprehensive than the CSRT process used for the Guantanamo detainees. Tr. at 53. Focusing the inquiry on the flaws Boumediene identified in the CSRT process, the UECRB process is plainly less sophisticated and more error-prone. Unlike a CSRT, where a petitioner has access to a "personal representative," Bagram detainees represent themselves. Obvious obstacles, including language and cultural differences, obstruct effective self-representation by petitioners such as these. Detainees cannot even speak for themselves; they are only permitted to submit a written statement. But in submitting that statement, detainees do not know what evidence the United States relies upon to justify an "enemy

combatant" designation -- so they lack a meaningful opportunity to rebut that evidence. Respondents' far-reaching and ever changing definition of enemy combatant, coupled with the uncertain evidentiary standards, further undercut the reliability of the UECRB review. And, unlike the CSRT process, Bagram detainees receive no review beyond the UECRB itself.

This Court need not determine how extensive process must be to stave off the reach of the Suspension Clause to Bagram. It suffices to recognize that the UECRB process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo.”

Challenging the detention

Maqaleh establishes that persons transferred into US custody by another country and subsequently detained in Bagram can challenge their detention in the US courts by way of habeas corpus.

However, it is not possible to bring habeas proceedings in the US unless the identity of the person detained is known. See, in particular, *Coalition of Clergy v Bush* 310 F.3d 1153 (9th Cir. 2002), and *John Does 1-570 v Bush*, 2006 U.S. Dist. Lexis 7915 (D.Ct.C.C. October 31, 2006). Accordingly, unless Reprieve can identify the two detainees, and find their families, it is impossible for a claim for *habeas corpus* to be made on their behalf under US law.

Grounds

We consider that it would be unlawful to continue to refuse to provide information to Reprieve that would enable these detainees' family to be identified.

Common law duties

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.”

The decided cases on the *Norwich Pharmacal* jurisdiction do not address the particular situation where a person mixed up in wrongdoing knows but refuses to disclose the identity of the injured party, and where it will be impossible for the injured party to seek redress without assistance because he is being held in indefinite incommunicado detention. It is clear, however, that the reasoning of the House in *Norwich Pharmacal* was predicated on what was required to ensure that justice was done. Lord Reid said at 175B:

“justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”

Furthermore, *Norwich Pharmacal* order is a flexible equitable remedy, capable of adaptation to ensure that the interests of justice are fulfilled. Lord Woolf CJ for the Appellate Committee in *Ashworth Hospital Authority* held that:

“57. The *Norwich Pharmacal* jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised. New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and useful remedy.”

Accordingly, the situations in which an order can be granted are not fixed, nor are the principles to be interpreted and applied in a narrow and technical fashion. As Templeman LJ put it in *British Steel v Granada Television* [1981] AC 1096 at 1132 (cited with approval by Lord Woolf CJ in *Ashworth Hospital* at [46]):

“The remedy of discovery is intended in the final analysis to enable justice to be done.”

The wide jurisdiction of the Court to grant disclosure exists to serve the interests of justice, and is therefore capable of development and adaptation, where necessary to satisfy those interests. The underlying principle is that an order for disclosure is available to the extent necessary to right the wrong unwittingly facilitated by an otherwise innocent third party (paraphrasing Lord Reid in *Norwich Pharmacal*). Any order is granted in the Court’s discretion.

Applying the *Norwich Pharmacal* principles to the present case:

Wrongdoing

Rendition without extradition proceedings, and incommunicado detention in secret facilities clearly constitute wrongdoing of a most serious kind. Secret detention was described by Blackstone in the following terms:

“To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”

In *R v Mullen* [2000] QB 520 the Court of Appeal held that the SIS's involvement in the incommunicado detention and rendition of an Irishman in Zimbabwe to the United Kingdom without judicial safeguards or access to legal advice was unlawful and improper (“a blatant and extremely serious failure to adhere to the rule of law”):

“This court is firmly of the view that it must have been appreciated by the S.I.S., and probably the police in Britain, that the vital element in the operation, the insulation of the defendant from any legal advice following his detention, was in breach of specific provisions of the law of Zimbabwe, or, at the least, was contrary to the defendant's entitlement as a matter of human rights (p. 535D).”

Mixed-up

The Secretary of State has become mixed up (unwittingly or otherwise) in the wrongdoing committed by the US authorities:

- (a) The two individuals were first detained by the UK;
- (b) The UK handed the two individuals into US custody;
- (c) The UK knew about the individuals' proposed rendition to Afghanistan prior to its occurrence, but failed to object to it or to raise any question about it;
- (d) When the individuals were transferred into US custody, and when they were rendered to Afghanistan, the UK was aware that the US had and continued to subject detainees to torture and cruel, inhuman and degrading treatment in Iraq and Afghanistan;
- (e) The UK has taken no meaningful steps to redress the wrong committed against these men in the subsequent five years.

Necessity

It cannot be doubted that disclosure of identifying information about the two individuals is essential to protect their legitimate interests. Without this information, these two detainees will be unable to challenge their detention in any forum. They will continue to be held, incommunicado and without access to a lawyer or fair judicial process, indefinitely. The importance of legal representation and a claim for *habeas corpus* can be demonstrated by reference to the experience at Guantanamo Bay. Both of the two individuals here are accused of being members of Lashkar e Tayyiba. Reprive is aware of 13 cases where this allegation has been made in respect of detainees in Guantanamo Bay. None was released prior to the intervention of counsel in 2004. Since then, 8 have been cleared and released, and 2 further detainees have been cleared for release but are still detained because they are at risk of persecution if returned to their country of origin. While the status of the other three is not yet resolved, this means that in 77 percent of cases the intervention of lawyers helped ensure that the individual was cleared for release. Thus, the effect of proper legal representation is often that serious allegations of terrorist activity are abandoned and the individual is cleared for release.

Nor is there any prospect of obtaining this information from other sources. The US itself will not provide it, and any attempt to extract the information through US freedom of information laws would be likely to be prolonged and ultimately unsuccessful. Further, the US Courts have already refused to accept *habeas corpus* applications save from the individual concerned or a family member or close friend.

As for whether it would be possible to identify the individual by other means, Reprive has made detailed and extensive investigations. In particular, it has interviewed individuals previously released from Bagram to try and identify who these two detainees might be. Piecing together the information from these sources, the best information available is that the partial name of one prisoner may be "Salah Hudin" (or perhaps "Salah el Din") from the Balochistan area of Pakistan; and the other may have a first name of "Saifullah" from the Punjab region of Pakistan, the last name being unknown (although none of the sources used are sure that any of this information is accurate, in part because of the rules imposed by the Americans on communications between prisoners in Bagram).

Needless to say, this is insufficient to track down and identify the family. While *Reprive* does have an investigator in Pakistan, Balochistan covers roughly 48 percent of the territory of Pakistan (over 134,000 square miles) and has a

population of roughly 12 million. The name Salah Hudin or Salah el Din is one of many variations of a name well known in the west, Saladin. It is a very common name, and without more information, *Reprive* would be searching for a needle in a haystack.

While the size of the Pakistan Punjab is somewhat smaller than Balochistan, its population is much larger – over 80 million. The name Saifullah is a common one. It means literally sword (sayf) of God (Allah). Without more information, it would be impossible to find his family.

If the information that *Reprive* has been able to gather is correct, at least one of the two men is suffering from serious physical and mental disorders as a result of his seizure and subsequent mistreatment.

Human Rights Act

The failure to provide the requested information also constitutes a violation of the Secretary of State's duties under the ECHR and the Human Rights Act 1998.

It is clear that indefinite detention without any access to legal advice or due legal process, together with the real risk of torture or other ill-treatment which the two individuals face, constitutes a flagrant breach of the individuals' human rights.

The fact that this breach is being perpetrated overseas by the US does not absolve the UK of its legal responsibility. As the ECtHR said in *Soering v United Kingdom* (1989) 11 EHRR 439:

"87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.'"

In that case, the Court held that if a decision to extradite a person would, if implemented, be contrary to Article 3 by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure

the effectiveness of the safeguard provided by that Article (§90). In relation to the Article 6 right to a fair trial, the court said:

“88. The right to a fair trial in criminal proceedings, as embodied in Article 6 holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial ...”

It is consequently unlawful to deport where there is a real risk that there would be a fundamental breach of the right to a fair trial, constituting a flagrant violation of fundamental rights: *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10.

Furthermore, the ECHR imposes on the Secretary of State an obligation, in certain circumstances, to take positive steps to prevent or bring an end to a violation of Article 3 or Article 6. The ECtHR has held, for example, that the state may be under a positive duty to assist claimants in defamation proceedings to present their case effectively before the court: *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

The circumstances of this case are exceptional. Two individuals are suffering a flagrant abuse of their fundamental human rights. The UK government is mixed up in the wrongdoing. All that is being asked of the government is to make their identities known to a charity that wishes to approach their relatives with an offer to make a *habeas corpus* application on their behalf. In those circumstances, the government is obliged by the Human Rights Act 1998 to offer this small assistance.

Data Protection Act

The suggestion that the Data Protection Act 1998 prevents disclosure of the identity of the names of the two detainees is patently absurd. To put it at its very lowest, it would be surprising if Data Protection legislation were to prevent disclosure of the identity of two individuals, so that their families could be contacted so they could make an application for *habeas corpus* to secure their freedom from indefinite and unlawful incommunicado detention. We trust this argument is not being seriously pursued.

Reply

If you decline to reconsider the decision then please treat this as a letter before action in accordance with the pre-action protocol for judicial review. We request a full and substantive reply by 1 September 2009. In the event that you do not provide the information requested, we are instructed to issue proceedings against you for disclosure of the names forthwith.

Preservation of documents

Please confirm by return that your department, and all other government departments and agencies, and divisions of the armed forces, will search for and preserve any documents relevant to the detention, rendition and identity of these two individuals. Given the disturbing failures in the disclosure process by the Ministry of Defence in recent months, we hope and expect that all reasonable steps will immediately be taken to comply with this request.

Disclosure

Please provide us with a copy of the Memorandum of Understanding referred to above.

Yours faithfully,



Leigh Day & Co

Cc: Treasury Solicitor