

IN THE HIGH COURT OF JUSTICE

Claim No. CO/4241/2008

DIVISIONAL COURT

ADMINISTRATIVE 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

DETAILED GROUNDS OF RESISTANCE

Preliminary: since the claim was filed the United States Supreme Court in *Boumediene v Bush* (12 June 2008) and the United States Court of Appeals for the District of Columbia Circuit in *Parhat v Gates* (20 June 2008) have issued opinions which provide a legal basis for the Claimant to seek his immediate release from custody via the writ of habeas corpus or to challenge his enemy combatant designation before the Federal Courts. It is essential that the Court and the Defendant be provided with details of any applications made on the Claimant's behalf to the District Court and when such applications are to be heard since the present application for judicial review may be premature or may in fact shortly become academic. On 8 July 2008 the Treasury Solicitors wrote to Messrs Leigh Day & Co seeking information as to the latest information in this regard.

A. Overview

1. The Claimant contends that the Secretary of State for Foreign and Commonwealth Affairs is obliged in law to disclose to his legal advisers, Clive Stafford Smith OBE and Lt. Colonel Bradley of the US Air Force, 9 broad categories of document described in the appendix to the letter before claim of 28 March 2008 as “exculpatory evidence in the possession of the UK government which would assist Mr Mohammed in defending against charges before a US Military Commission in Guantanamo Bay”.
2. These categories of document have been further expanded upon by the Claim Form and the witness statement of Mr. Stafford Smith of 1 May 2008 in support of the claim. In order to assist the Court and to collect in one place the documents sought, Annexe I to these Detailed Grounds contains what is intended to be a complete¹ list of the categories of document sought by the Claimant (drawing upon the 28 March 2008 letter, the Claim Form and the witness statement of Clive Stafford Smith).
3. The Court will note that in Annexe I, a distinction has been drawn between two types of documents, Type A and Type B. Type A documents are documents which are specifically referable to the Claimant and his alleged treatment. Type B documents are documents which are not specific to the Claimant (such as documents on the subject of rendition generally or claimed treatment of persons other than the Claimant).
4. The distinction between Type A and Type B is made for the purpose of analysis of the Claimant’s legal bases for contending that the Defendant is obliged to provide general discovery of the form sought in the application. The Claimant alleges that this obligation to give general discovery arises on three bases and does not distinguish in his arguments between Type A and Type B documents:
 - (1) He claims that the Secretary of State’s decision not to disclose the requested information to his defence lawyers is irrational;
 - (2) He claims an entitlement to disclosure of both types of information on *Norwich Pharmacal* principles; and

¹ In the Appendix to the letter before claim the Claimant also sought to interview UK agents who visited the Claimant in Pakistan (para. 4 of the Appendix). It is unclear as to whether any legal relief is sought in this regard.

- (3) He claims that the Secretary of State is under an obligation pursuant to customary international law to disclose all of the requested information.

For the reasons developed below, the Defendant submits that he is under no obligation to disclose any of the requested information and the Court should make no order for disclosure in the form sought.

B. Evidence and documents before the Court

5. The Defendant intends to submit both open and closed evidence for the purposes of the hearing (the closed evidence will be supported by a PII certificate and is to be served only on the Court and on the Special Advocate appointed pursuant to the Order of Sullivan J dated 20 June 2008). These grounds will cross-refer where appropriate to the closed evidence without making any submissions as to the content thereof.
6. It is intended that there will be exhibited to the open and closed evidence of the Security Service witnesses documents falling within Type A. These documents are principally before the Court to enable it to rule on the *Norwich Pharmacal* claim which is premised (see Statement of Grounds §55b) on three claimed factual elements which are said to show that the Secretary of State, the Security Service and the Secret Intelligence Service have become “mixed up” in wrongdoing alleged to have been committed by the US and Moroccan authorities.
7. The exhibited documents are the product of searches undertaken with the assistance of security cleared Counsel for any documents specific to the Claimant and which even arguably support the Claimant’s allegations of mistreatment and rendition. Specific attention was directed in the search to identifying any documents which could arguably be said to support the claim that the UK authorities “facilitated” or were “mixed up” in any way or otherwise “involved” in the alleged torture and extraordinary rendition of the Claimant either in the manner pleaded in his Statement of Grounds at §55b or in any other arguable way.
8. Other than as stated above, the Defendant has not undertaken² a search for information of Type B. That would be a mammoth task and as the Court will see from the evidence the

² Save to the extent that searches have been made in the separate context of dealing with the Claimant’s Freedom of Information and Data Protection Act requests to the FCO.

scope of that task was one of the reasons underlying the Secretary of State's refusal to provide disclosure on a discretionary basis which is challenged on rationality grounds.

9. Accordingly, save to the extent that the requested information is before the court, the court will be asked to make a decision, in principle, as to whether or not the Secretary of State is under any obligation to disclose any of the requested information, and if so, in relation to which categories. Any obligation to disclose would, of course, be subject to further consideration in the light of any particular documents revealed by such search as the court may require the Defendant to undertake.

C. The rationality challenge

10. In the Claim Form it was alleged that the Secretary of State's "refusal" to provide evidence was irrational, despite the fact that the Defendant had done no more than refute the contention, in correspondence, that he was under a legal duty to provide the requested information (save to the extent required by the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998 (DPA)).
11. The Secretary of State has subsequently considered whether it would be appropriate to exercise his discretion, on an exceptional basis, to disclose the requested information (or any part of it) to the Claimant. For the reasons given in the letter from the Treasury Solicitors to Leigh Day & Co of 20 June 2008³, the Secretary of State decided not to exercise his discretion in favour of disclosure.
12. The Secretary of State's decision was plainly a decision open to him bearing in mind the important public policy issues concerning alleged rendition and torture which the Claimant prays in support of his application for disclosure. The following points require emphasis:
 - (1) As stated above, a review has been undertaken of the information held by the FCO and relevant Government departments and intelligence agencies for any documents that refer *directly* to the Claimant and which support in any arguable way his claim of mistreatment and rendition. Part of that information is closed and cannot be discussed in the present document. The Secretary of State has considered the broad nature of that material and was not satisfied, bearing in mind its content and the

³ The Security Service has made its own decision not to exercise its discretion to disclose any of the requested information that it holds, which was also conveyed to the Claimant by the letter of 20 June 2008. The appropriate forum for any challenge to the Security Service's decision would be the Investigatory Powers Tribunal.

further points as set out below, that it would be appropriate to make disclosure of that material.

- (2) Further, whether or not the US authorities decide to make disclosure, the Secretary of State was entitled to proceed on the basis that the US legal system would safeguard the Claimant's right of access to exculpatory material. The Secretary of State was not willing to assume that the US judicial system is inadequate to this task.
- (3) In addition to those factors, the Secretary of State was entitled to attach substantial importance to his judgment, informed by the Security Services, that to disclose these documents would cause serious damage to national security.
- (4) The above points address the Claimant specific information. However, as regards information of a general nature (Type B documents), the Secretary of State's view that it would be an unreasonable and disproportionate use of public resources to undertake the very time-consuming and onerous review that would be required to search for the general (non-Claimant specific) information requested by the Claimant is reasonable, particularly given that such information, by its very nature, would be bound to carry less weight than evidence bearing directly on the Claimant's case.
- (5) Finally, it was not unreasonable for the Secretary of State to be concerned that acceding to the Claimant's request would be likely to lead to further onerous requests for confidential Government documents to be released to other defendants in proceedings in a range of foreign jurisdictions.

D. The Norwich Pharmacal application

13. The *Norwich Pharmacal* jurisdiction is an "exceptional one" per Lord Woolf CJ in *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2049 at [57]. Ordinarily, a person who is not a party to proceedings, or to proposed proceedings, and has not been subpoenaed, has no obligation to disclose any information that he might hold to a party to those proceedings or proposed proceedings.

14. Four threshold conditions must be satisfied before the court has the power, in the exercise of its discretion, to order *Norwich Pharmacal* relief:
- (1) A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer. **((1) Wrongdoing)**
 - (2) The person against whom the order is sought must be “mixed up” in the wrongdoing of others so as to have facilitated the wrongdoing. As King J observed in *Campaign Against Arms Trade v BAE Systems Plc* [2007] EWHC 330 (QB), at [12], the “key phrase...is that which describes the innocent third party as a “facilitator” of the wrong”. **((2) Facilitation)**
 - (3) The person against whom the order is sought must be able, or likely to be able, to provide the “crucial information” or “missing piece of the jigsaw” necessary to enable the Claimant to pursue some legitimate purpose: *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) at [19]. **((3) Ability to provide missing piece of the jigsaw)**
 - (4) It must be necessary for an order to be made in order to enable the Claimant to assert his legal rights against the wrongdoer. The *Norwich Pharmacal* jurisdiction is a “remedy of last resort...The jurisdiction is only to be exercised if the innocent third parties are the only practicable source of information” (*Mitsui* at [24]). **((4) Necessity)**
15. Only if these conditions are satisfied, the Court enjoys discretion to grant the relief sought. The court should only order disclosure if, and to the extent, that it is necessary and proportionate in all the circumstances to do so: *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 at 36. In considering whether to exercise this discretion the Court should take into account any public interest factors which make it inappropriate to make the order. **((5) Discretion)** The Defendant submits that the Claimant cannot satisfy any of the conditions apart from the first.

(1) Wrongdoing

16. The Claimant alleges that he was tortured following his “extraordinary rendition”⁴ to

⁴ The Intelligence and Security Committee report on Rendition defines “extraordinary rendition” as “the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and

Morocco and then Afghanistan. It is accepted that the Claimant has put forward an arguable case of wrongdoing.

17. However, the Claimant's attempt to widen the allegations of wrongdoing so that they are "not limited to wrongdoing against the Claimant" (Claimant's response para 7) is illegitimate and runs directly contrary to Lord Woolf's statement in *Ashworth* at [54] that *Norwich Pharmacal* relief should be confined "to the victim of the crime". This is an important point in the present case because it rules out those categories of document in Type B which do no more than evidence claims to general wrongdoing or practices. The Claimant's claim under the *Norwich Pharmacal* jurisdiction must necessarily be limited to such documents as demonstrate or provide clear support for allegations of wrongdoing specifically to him.

(2) Facilitation

18. The person against whom the order is sought must be "mixed up" in the wrongdoing of others so as to have facilitated the wrongdoing. This requirement incorporates an element of causation. The person from whom disclosure is sought must have done something (however innocently) that was a causative factor in the occurrence of the wrongdoing.
19. This was the basis on which counsel for Norwich Pharmacal in *Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 133 contended that an order for disclosure of the identity of importers who had infringed their patent should be made. Counsel argued at 166H:

"A person is mixed up in the transaction if innocently or not he facilitates the commission of the wrong complained of. A test of whether a person is mixed up in a transaction is to see whether if that person had not acted as he did the tort would not have been committed."
20. This submission was clearly reflected in their Lordships' speeches. Lord Reid said at 174E-F:

"So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate position. Their conduct was entirely innocent; it was in the execution of

interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman and degrading treatment". The ISC observed that they would describe "transfer to a secret facility" as an extraordinary rendition.

their statutory duty. But without certain action on their part the infringements could never have been committed. Does this involvement make a difference?” [Emphasis added]

21. Lord Reid continued at 175B-C:

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

22. In *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, at [27]-[28], Lord Woolf CJ (with whom all their Lordships agreed) cited these passages from Lord Reid’s speech, having said that the “correct position” was made clear from the speech of Lord Reid. Lord Woolf CJ noted that the Commissioners in *Norwich Pharmacal* had “because of their statutory responsibilities become involved or mixed up in the illicit importation of the chemicals manufactured abroad which Norwich Pharmacal alleged infringed their patent” ([26]).

23. In *Campaign Against Arms Trade v BAE Systems plc* [2007] EWHC 330 (QB) King J at [12], having quoted from Lord Reid’s speech, said that the “key phrase” was “that which describes the innocent third party as a “facilitator” of the wrong”.

24. The other speeches in *Norwich Pharmacal* also support the conclusion that what is required amounts to facilitation or actual participation in the wrongdoing: see per Lord Morris of Borth-y-Gest at 178H (“At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information”) and 181C (the Commissioners were not “mere bystanders”); per Viscount Dilhorne at 188B-D⁵, observing that the Customs and Excise Commissioners were involved in the wrongful importation of the chemical because it was in their charge and they could control its movement until

⁵ Viscount Dilhorne observed that in *Orr v Diaper* (1876) 4 Ch.D. 92; 25 W.R. 23 the defendants, who had shipped goods that were being passed off as the plaintiffs goods, were involved; in *Upmann v Elkan* L.R. 12 Eq. 140 the defendants, who were forwarding agents and consignees of boxes of cigars that were falsely marked with the plaintiff’s brand, were involved; and in *Moodalay v Morton*, 1 Bro.C.C. 469 the East India Company, against whom discovery was sought, were involved because the plaintiff intended to sue them if the information revealed that the persons who dispossessed the plaintiff of their lease were acting as servants of the East India Company. It is plain from the facts of these cases that the reference to involvement in the wrongdoing means actual participation in (whether innocent or not) and causation of the wrongdoing.

cleared; per Lord Cross of Chelsea (at 197D-F), who considered that no relevant distinction could be drawn between the Customs and Excise Commissioners who had effective control of the goods and the defendants in *Upmann v Elkan* and *Orr v Diaper* (see fn 5 above) who “unwittingly facilitated the commission of the tort” (emphasis added)⁶; and per Lord Kilbrandon (at 204B-D) who considered that the Commissioners were bound to give disclosure because the goods (which had been imported in breach of patent) were under their control and removable only on their authority.

25. In *Ashworth Hospital Authority* Lord Woolf continued at [30] that “what is required is involvement or participation in the wrongdoing” (emphasis added) and he concluded that as MGN published the confidential medical records which had been wrongfully disclosed to them, they clearly participated in the wrongdoing [34]. Lord Woolf also emphasised (at [35]) that the requirement of involvement or participation in the wrongdoing is a “significant requirement” because it provides the justification for the intrusion upon a third party to the wrongdoing of requiring him to give disclosure. See, to similar effect, King J’s observation in *Campaign Against Arms Trade v BAE Systems Plc* [2007] EWHC 330 (QB) at [14]: “Whatever the precise formulation of this requirement, its rationale is the need to justify what would otherwise be an unjustifiable intrusion upon an innocent third party, and this must always be borne in mind”.
26. The first task of the Court is to identify the pleaded *facilitation* of wrongdoing. The wrongdoing is said to be rendition and torture committed by the US and Moroccan authorities in Morocco and Afghanistan. The acts of *facilitation* appear in the Statement of Grounds at §56(b). They are three in number:
- (a) provision of information used in interrogation and receipt of product of interrogations;
 - (b) the claim that an official of the Security Service told the Claimant that he would be rendered to an Arab country for torture; and
 - (c) concealment of full facts from the Claimant when the matter was investigated by the Intelligence and Security Committee and the claim that redactions from the report were undertaken by the Secretary of State so as not to embarrass the US; this is said to be an act of facilitation of wrongdoing.

⁶ See also 197E, where Lord Cross referred to Messrs Elkan as “unwitting facilitators of a fraud” (emphasis added).

27. Each of the pleaded acts of facilitation can be demonstrated to be either factually incorrect or factually irrelevant. Restricting these submissions to the open materials, the Defendant submits as follows.
28. As to (a), the acts of providing information and receiving records of interview are admitted. The reasons for which the UK asked for questions to be put to the Claimant cannot be addressed in an open document but the Court will see from the closed material why there was a need to do so. But those reasons, and the questions, are immaterial. The acts of providing information and receiving records of interview neither caused nor facilitated either the rendition or the torture which is said to have occurred after the Claimant was transferred to another jurisdiction. The UK did nothing that made it easier for the alleged wrongdoers to render the Claimant as he alleges, or to subject the Claimant to torture. Nor did the UK undertake any act that assisted the claimed wrongdoers in torturing him in Morocco or Afghanistan.
29. As to (b), this is factually incorrect. A member of the Security Service interviewed the Claimant once on 17 May 2002 with a view to obtaining information necessary for the protection of the UK's national security. At no stage did the member of the Security Service who interviewed the Claimant say or suggest to him that he would be rendered for torture to an Arab country. Nor did he make any remark to the effect that where the Claimant was going he would need a lot of sugar. It is intended that this will be addressed in the evidence of Witness B. In any event this is irrelevant. Even if (which is not the case) Witness B **had** made the alleged remark, such a remark could not in any sense be said to have facilitated torture.
30. As to (c), the Court and Special Advocate will be provided with a copy of the unredacted part of the Intelligence and Security Committee's Report on Rendition that was laid before Parliament. That report "excludes any parts of the report...that would be prejudicial to the continuing discharge of the functions of the three intelligence and security Agencies" and the Committee itself states, "no material has been excluded without the Committee's consent" [113]. This redaction post-dated and plainly did not facilitate the alleged wrongdoing. In any event, the Court will see that there is no basis for the allegation that this redaction conceals evidence of the alleged wrongdoing.
31. The Defendant submits that the pleaded case on facilitation wholly fails. That is an end of the application and makes further consideration unnecessary. However, the claim still fails under the further *Norwich Pharmacal* criteria.

(3) Ability to provide missing piece of the jigsaw

32. In *Norwich Pharmacal Co v Customs and Excise Comrs* [1975] AC 133 the information sought was the identity of the alleged wrongdoers. Lord Cross of Chelsea observed in *Norwich Pharmacal*, at 199E:

“In the course of the argument fears were expressed that to order disclosure of names in circumstances such as exist in this case might be the "thin end of the wedge," that we might be opening the door to "fishing requests" by would-be plaintiffs who want to collect evidence or the requests for names made to persons who had no relevant connection with the person to be sued or with the events giving rise to the alleged cause of action but just happened to know the name. I think that these fears are groundless. In the first place, there is a clear distinction between simply asking for the name of a person whom you wish to make a defendant and asking for evidence. This case has nothing to do with the collection of evidence.” [Emphasis added.]

33. It is accepted that a *Norwich Pharmacal* order can be made in respect of information going beyond the identity of the wrongdoer. For example, in *Arab Monetary Fund v Hashim (No.5)* [1992] 2 All ER 911 Hoffmann J considered that an order requiring a bank to disclose whether it held certain misappropriated monies, and if not, where they had gone, was justified by the reasoning in *Norwich Pharmacal* (914e-g). However, he observed at 914d:

“The reference [in *Norwich Pharmacal*, per Lord Reid at 175D] to ‘full information’ has sometimes led to an assumption that any person who has become ‘mixed up’ in a tortious act can be required not merely to disclose the identity of the wrongdoer but to give general discovery and answer questions on all matters relevant to the cause of action. In my view this is wrong. The principle upon which Lord Reid distinguished the ‘mere witness’ rule was that unless the plaintiff discovered the identity of the wrongdoer, he could not commence proceedings. The reasoning of the other members of the House is the same. The Norwich Pharmacal case is not authority for imposing upon ‘mixed up’ third parties a general obligation to give discovery or information when the identity of the defendant is already known.” [Emphasis added.]

34. Hoffmann J added at 919g that “the third party should be entitled to the same specificity in the documents he is asked to produce as he would be if served with a subpoena”.

35. In *Mitsui Lightman J* noted that the basic principle expressed in *Norwich Pharmacal* had been extended so that relief could be ordered where the claimant knew the identity of the wrongdoer but “where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw” (at [19] – emphasis added).

36. In this case, the Claimant is not seeking a specific piece of information which he alleges is the missing piece of the jigsaw which will enable him to assert his legal rights against the wrongdoer but seeks “any information which [the Secretary of State] is able to give by way of discovery” (Statement of Grounds for Judicial Review §53). He is already in a position to assert in the US proceedings that he was tortured, and to give evidence himself to support that claim. In fact, the Claimant confirms that his lawyers have identified the names of “at least some of the agents involved” (Statement of Grounds for Judicial Review, para [32]). Rather, he asks the Defendant to undertake a trawl through all the information held by the Government, including each of the security and intelligence services, for broad categories of information (not confined to information relating to the Claimant) which the Claimant defines as “exculpatory evidence”.
37. The Claimant criticises the Defendant for being “glib”, arguing that evidence is required to corroborate the Claimant’s account (Claimant’s response, para 8). This criticism is unfair. The point made by the Defendant is that the imposition of a general obligation to search for and disclose to a defendant in foreign criminal proceedings any and all evidence which is consonant with his defence would go well beyond the boundaries of the *Norwich Pharmacal* jurisdiction. A *Norwich Pharmacal* order should only be made if, in the absence of an order, the claimant will be unable to assert his legal rights.
38. The limits of the *Norwich Pharmacal* jurisdiction may be deduced from the reasoning upon which that jurisdiction is distinguished from the ‘mere witness’ rule, namely, that unless the claimant discovered the identity of the wrongdoer he could not commence proceedings at all. Equally, “the disappearance of the subject matter of the action could in practice make the trial nugatory”: see *Arab Monetary Fund v Hashim (No.5)* [1992] 2 All ER 911 at 914a, 914g and 918e.
39. As Lightman J observed in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) at 24:
“The whole basis of the jurisdiction against them [ie innocent third parties] is that, unless and until they disclose what they know, there can be no litigation in which they can give evidence”. [Emphasis added]
40. This was the position in *Norwich Pharmacal*: without disclosure of the identity of the wrongdoer, the claimant was entirely unable to bring a claim alleging infringement of the patent. It was also the position in *Ashworth Hospital*: without disclosure of the identity of

the wrongdoer, the claimant was wholly unable to assert its legal rights against the wrongdoer, by dismissing him or her.

41. For the court to make a *Norwich Pharmacal* order requiring the disclosure of evidence to corroborate the account that the Claimant and his lawyers are able to put forward would be unprecedented and contrary to principle.

(4) Necessity

42. No order should be made unless it is *necessary* to enable the Claimant to assert his legal rights. The “questions are whether such information is vital to a decision to sue or an ability to plead and whether or not, even if it is, it can be obtained from other sources. The purpose of an order is to enable an applicant to take action which could not otherwise effectively be taken”: see *Nikitin v Richards Butler LLP* [2007] EWHC 173 (QB), per Langley J at 18(ii) and 20-24 (underlined emphasis supplied). The Defendant submits that the Claimant cannot establish necessity for two reasons (each of which is developed below): (a) the claim is speculative and premature; and (b) it is appropriate to leave questions of access to exculpatory material relevant to the Claimant’s case before a Military Commission to the US legal process and the English Court cannot assume this system will fail.
43. First, the claim is speculative and premature. Although the Claimant anticipates that the US Government will rely before the Military Commission on statements given by him which he alleges are the product of torture, and therefore inadmissible under the US Military Commissions Act 2006, at present it appears that the Claimant does not know what evidence the US Government proposes to rely upon. Specifically, the Claimant and his advisers have not identified which statements made by Mr Mohamed will in fact be relied upon in the Military Commission proceedings, nor what form such statements may take, nor when or under what circumstances they may have been made by the Claimant.
44. Turning to the second reason why the Claimant cannot establish necessity, the Defendant submits that it is appropriate to leave questions of disclosure to the US legal process. The Claimant is asking the Secretary of State to disclose “exculpatory evidence” to assist him in US Military Commission proceedings, in case it is not disclosed to him or his lawyers by the US authorities. It would be wrong in principle for the court to pre-empt the decisions of the US authorities as to what material may properly be regarded as exculpatory, having regard to the evidence on which they propose to rely, or to assume that the US legal system would not safeguard the Claimant’s right of access to exculpatory material. The Military

Commission rules provide an elaborate system for provision of precisely the evidence which the Claimant seeks in these proceedings. A summary of the material provisions of the Military Commission is as follows:

- (a) The Military Commissions Act, 10 U.S.C. §948a et seq. (MCA) establishes procedures governing the use of Military Commissions to try alien enemy unlawful combatants engaged in hostilities against the United States. 10 U.S.C. § 948b(a). The MCA provides that the Secretary of Defense shall prescribe procedures and rules of evidence to be used before, during, and after a trial by military commission, and requires that such procedures shall track those used in general courts-martial, so far as practicable and consistent with military and intelligence activities: 10 U.S.C. § 949a(a). Pursuant to this authority and in consultation with the Attorney General of the United States, the Secretary of Defense published the Manual for Military Commission (MMC). The MMC includes the Rules for Military Commissions (RMC), and the Military Commission Rules for Evidence (MCR Evid).
- (b) The prosecutor must provide the defence with the following: the papers accompanying the charges when they were referred to military commission; the convening order or any amending order; any sworn or signed statement relating to an offence charged in the possession of the prosecution; documents, papers, tangible items as well as reports or results of physical or mental examinations and of scientific tests or experiments that are in the possession, custody or control of the Government which are material to the preparation of the defence or intended for use at trial; and the contents of all relevant statements made or adopted by the accused that are in the custody or control of the Government which are material to the preparation of the defence or are intended for use at trial: See RMC. 701(b) & (c). The Defence are also entitled to the production of any available witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary: See RMC 703(b)(1).
- (c) The prosecution must disclose to the defence, as soon as practicable, any exculpatory evidence, which is defined as evidence known to the trial counsel which reasonably tends to: (1) negate the guilt of the accused of an offence charged; (2) reduce the degree of guilt of the accused of an offence charged; or (3) reduce the punishment: see 10 U.S.C. 949j(d), RMC 701(e). All unclassified exculpatory evidence must be produced and, in the event such evidence is classified, the trial counsel must provide an adequate substitute to the defence: 10 U.S.C. 949j(d)(1). The alternatives may include: deletion of the portion of the

document specified as classified; the substitution of an unclassified portion or summary of the classified portion; or the substitution of a statement admitting relevant facts that the classified information would tend to prove. Any alternative to the production of exculpatory evidence must be approved by the military judge. In the event the proposed alternative does not meet the judge's approval, he or she may exercise a variety of sanctions including dismissal of the charges: see RMC 701(f)(7), MCR Evid. 505(e)(4)

45. The MCA also provides for four layers of appellate review for an accused convicted by a Military Commission. The accused may raise any legal issues decided by the commission proceedings. First, the accused may appeal findings of guilty and the sentence to the Convening Authority. 10 U.S.C. § 950b; see RMC. 1105. The accused may submit material not presented at trial for the Convening Authority's review and may argue factual, as well as legal, matters. In her sole discretion, the Convening Authority may negate any finding of guilty and/or may reduce the sentence: See R.M.C. 1107(c) & (d). The accused also has an automatic right of appeal to the Court of Military Commission Review: 10 U.S.C. § 950c(a). An accused may further appeal any conviction by military commission to the United States Court of Appeals for the District of Columbia Circuit and ultimately to the United States Supreme Court: 10 U.S.C. § 950g, *see* RMC. 1205.
46. Whatever complaints the Claimant may have about the military commission process, the US Federal Courts including the Supreme Court have shown themselves to be responsive to the position of those detained at Guantanamo Bay on several occasions: see *Rasul v Bush*, 542 US 466 (2004), *Hamdan v Rumsfeld*, 548 US 557 (2006), *Boumediene v Bush* (12 June 2008) , and the 20 June 2008 decision of the United States Court of Appeals in *Parhat v Bush* (amongst many other decisions of the Federal Courts). The English Court cannot assume that the US legal system will fail adequately to address requests for disclosure of exculpatory evidence. Mr. Stafford Smith refers to “the decades old US legal rule of the “fruit of the poisonous tree”, *Wong Sun v United States*, 371 U.S. 471 (1963) and to the seminal US case regarding disclosure of exculpatory evidence to the defence, *Brady v Maryland*, 373 U.S. 83, 88, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) (permission bundle p.38, paragraphs 30-31). There is no reason to believe that the US legal system will disapply these principles when the Claimant is tried.

47. Specifically, the documents which are the product of the review of Claimant specific material (exhibited to the Defendant's evidence) are with three exceptions⁷ all documents which will be in the possession of the US authorities. The English court should proceed on the basis that if they are relevant to the proceedings the Military Commission or the Federal Courts will require disclosure of those documents by the prosecution. The broad Type B documents in respect of which there has been no search by the Defendant may not be in US possession (insofar as any exist) but they in any event fall far outside the *Norwich Pharmacal* jurisdiction because they do not concern wrongs committed against the Claimant
48. For the above reasons, the Claimant cannot establish that disclosure of the requested information is *necessary* to enable him to assert his legal rights.

(5) Discretion

49. Even if the Claimant were able to overcome the facilitation and necessity hurdles, the Defendant respectfully submits that the court should, in the exercise of its discretion, refuse to order the Defendant to disclose (or undertake further searches for) the requested information. The Court should be astute to avoid a third party who has become involved innocently in alleged wrongdoing by another from being subjected to a requirement to give disclosure unless this is established to be a necessary and proportionate response in all the circumstances: see *Ashworth Hospital Authority* per Lord Woolf at [36].
50. Contrary to the Claimant's assertion, in so far as any of the information sought is held by the Defendant, disclosure of information of this nature in these circumstances would be a risk to national security. The potential advantage of the order to the Claimant should be balanced against the damage to the public interest consequent on requiring the Government to disclose information in breach of obligations of confidence to others: *Arab Monetary Fund v Hashim* [1992] 2 All ER 911, per Hoffmann J at 919j.
51. Furthermore, the Claimant's requests are extremely broad. An order to process the Claimant's wide requests for general information (as opposed to information specifically related to him in Type A form) would necessitate a trawl of records that would be likely to take months to complete and, by its very nature, would not produce information bearing directly on the Claimant's case.

⁷ The exceptions are UK internal documents relating to the Claimant's location which appear in the open Exhibit.

E. International law

52. The third and final basis for seeking the documents, is reliance on alleged rules of customary international law which are said to impose an obligation on the Defendant to provide the Claimant with the information sought and/or to provide the basis for his assertion that the Defendant's discretionary decision is unlawful.
53. The Claimant's case as put in this third way is wrong in law:
- (1) In so far as the obligations asserted by the Claimant are said to have their origin in the provisions of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), those provisions do not support the existence of the obligations for which the Claimant contends [(1) CAT]; and/or
 - (2) While it is accepted that the prohibition against torture as defined in Article 1 of CAT constitutes a rule of customary international law, there is no basis on which the alleged obligations asserted by the Claimant could be classified as rules of customary international law [(2) CIL];
 - (3) Even if public international law provided for the obligations as asserted by the Claimant, they do not form part of English domestic law [(3) domestic law].

(1) CAT

54. The Claimant seeks to draw particular support from Articles 9(1)⁸ and 15 of CAT. However, neither of these provisions contains either expressly or by implication the obligations the Claimant contends for. The Claimant has not provided an accurate text of the CAT. While Article 9(1) of CAT expressly provides for an obligation on Contracting States to "afford one another the greatest measure of assistance in connection with criminal proceedings ... including the supply of all evidence at their disposal necessary for the proceedings", this obligation is expressly limited to:
- (1) criminal proceedings against the perpetrators of (a) acts of torture, (b) attempts to commit torture and/or (c) any act which constitutes complicity or participation in torture; and
 - (2) the evidence "necessary" for the proceedings.

⁸ Erroneously identified as Article 7(1) and misquoted in §59 of the Statement of Grounds.

Any obligation under Article 9(1) is also subject to the qualification under Article 9(2) that:

“States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.”

55. Therefore, it is clear that Article 9(1) does not create any positive obligation beyond assisting the prosecuting State in the context of any prosecution of an alleged torturer. In the light of the language used in Article 9, there is also no scope for any implication of the alleged obligation upon which the Claimant seeks to rely (and see *Brown v Stott* [2003] 1 AC 681, 703 (Lord Bingham): the courts should be astute not to impose by a process of interpretation and implication obligations which the Contracting States ‘did not expressly accept and might not have been willing to accept’).
56. The limited nature of the obligation in Article 9 has been confirmed by the Committee against Torture in its decision in Communication No 176/2000 *Roitman Rosenmann v Spain* (30 April 2002). That case concerned the refusal by the Spanish authorities to forward an extradition request made by the Spanish courts for General Pinochet to the British authorities. The Committee held:

“... while the Convention imposes an obligation to bring to trial a person, alleged to have committed torture, who is found in its territory, articles 8 and 9 of the Convention do not impose any obligation to seek an extradition, or to insist on its procurement in the event of a refusal.”
57. Further, the obligation of assistance is owed to other relevant states, and there has been no request for assistance from the USA. The Claimant’s request is neither made in the context of a relevant prosecution nor under the terms of the relevant Mutual Legal Assistance Agreement and so for these reasons also the obligation under Article 9 CAT does not arise.
58. The second provision in the CAT relied on by the Claimant is Article 15:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”
59. The purpose of this provision is the imposition of an obligation upon the Contracting State in whose jurisdiction the relevant proceedings are taking place (here, the USA). This is evident from the statement of the Committee against Torture in its Views on Communication No 193/2001 *P.E. v France* (2002) 10 IHRR 421. In the context of an

extradition from France to Spain of an alleged ETA member, the French government submitted that (even in the context of extradition proceedings pending before its own courts):

“... article 15 of the Convention in no way binds it to make enquiries of a third State in order to assess the validity of allegations of torture. With regard to extradition, it has never been accepted that a State should interfere in the course of adjudicatory proceedings taking place in a third country.” (4.14])

The Committee, while rejecting the French submissions as recorded above, confirmed that a Contracting State is only responsible under Article 15 for evidence adduced in proceedings before its own courts by holding that:

“... the generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture. The Committee finds that the statements at issue constitute part of the evidence of the procedure for the extradition of the complainant, and for which the State party is competent. In this regard, in the light of the allegations that the statements at issue, which constituted, at least in part, the basis for the additional extradition request, were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations.” ([6.3], emphasis added)

60. That the focus of Article 15 is upon the duty of each State Party to prevent the invocation of evidence procured by torture in proceedings within its own jurisdiction is evident from the language of the provision: “Each State Party shall ensure...”. It is simply not possible for a State Party to *ensure* that such a statement is not invoked in proceedings in another state. The focus is also evidenced by the *Guidelines on Reporting* under the CAT, which set out the content expected in the periodic reports on implementation that each State Party is obliged to submit: the entry relating to Article 15 is clearly directed to implementation by each State within its own legal order⁹.
61. Moreover, to construe Article 15 as imposing an obligation upon one State to intervene in criminal or other legal proceedings in another State, to the extent of providing evidence for use against the prosecuting authorities in that State, would involve a surprising requirement of intervention in an area (the conduct of legal proceedings in the domestic courts of the forum State) typically regarded as in the exclusive jurisdiction and responsibility of the forum State. It is not usual for States to intervene in legal proceedings in other States not

⁹ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture*, (OUP, 2008), p. 1317, at 1325.

involving them or their own nationals, and it should not lightly be assumed that the CAT States Parties intended by the adoption of CAT Article 15 to create a duty to do so.

62. In the present case the US is plainly subject to the duty under Article 15, and the English Court should not assume that it will not perform that duty. In these circumstances, Article 15 does not provide a basis for the alleged obligation upon the UK asserted by the Claimant in these proceedings.
63. Furthermore, as was noted in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, the “exclusionary rule that article 15 of the Torture Convention lays down extends to statements obtained by the use of torture, not to those obtained by the use of cruel, inhuman or degrading treatment or punishment. That is made clear by article 16(1) of the Convention. The borderline between torture and treatment or punishment of that character is not capable of precise definition” (*per Lord Hope* at [126]).
64. In any event, even if (contrary to the Defendant’s case) any provision of CAT could be interpreted as imposing a duty upon the UK to disclose the claimed exculpatory evidence in the circumstances of the present case, no such duty could conceivably be said to have arisen at this stage. First, the Claimant has not yet identified any statement which is being invoked against him and which he affirms was made as a result of torture. Secondly, the foreign forum State (the US) is obliged not to permit any statement which has been obtained by torture to be used in evidence and the US has not had an opportunity to decide whether it is necessary for it to disclose information to meet its obligations. In these circumstances, no form of remedial obligation on the UK to make good a potential violation by the foreign forum State of its own obligations under Article 15 could possibly arise.

(2) CIL

65. It is established law that, in order to identify a rule of customary international law, it is necessary to show that there is widespread state practice deriving from a general sense of binding obligation (*opinio juris*): see *In re North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3; and Brownlie, *Principles of Public International Law*, 6th ed, pp 489-490.
66. The parameters of the obligation deriving from customary international law (based on Article 1 CAT) to prohibit, punish and/or forestall torture were set out in [147] to [157] of the judgment of the International Criminal Tribunal for the Former Yugoslavia in

Prosecutor v Furundzija 121 I.L.R. pp. 213 which was quoted with approval by the House of Lords in *A (No 2)* (at [33]). The obligations in customary international law do not include those now alleged by the Claimant.

67. Contrary to the Claimant's submissions in [62] and [63] this was confirmed by the Court of Appeal in *R (Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs* [2007] 2 WLR 1219. Although that case was directly concerned with a different issue (the decision by the Secretary of State not to make diplomatic representations to the US authorities for the release of the claimants in that case) the Court of Appeal summarised the relevant content of customary international law (based on Article 1 CAT) in the following terms:

“This learning shows that, as a matter of international law: (1) the status of jus cogens erga omnes empowers but does not oblige a state to intervene with another sovereign state to insist on respect for the prohibition of torture: *Prosecutor v Furundzija* (1998) 38 ILM 317, para 151; ...” [102]

As a result the Court of Appeal concluded that “none of this imposes a duty on states, sounding in international law, of the kind for which the claimants must here contend” [103]. This conclusion applies with equal force in the present case where the Claimant is, in effect, seeking the disclosure of information from the Defendant in order to pre-empt consideration of these issues by the US legal system.

68. Going beyond those recognised parameters, there is no evidence at all of the necessary widespread state practice in relation to the obligation asserted by the Claimant, still less any evidence of widespread state practice combined with the necessary *opinio juris*.
69. Further, it should be noted that the House of Lords in *A (No 2)*, when confronted with a submission that Article 15 CAT had become part of customary international law (see pp. 227F-G, 236C-E and 237D), did not endorse that submission but held that, at best, the exclusionary rule under Article 15 CAT assumed effect under UK law, in relation to proceedings before UK courts, through Articles 3 and 5(4) of the ECHR: see per Lord Bingham at [56].

(3) Domestic law

70. Even if, contrary to the submissions set out above, the detailed and specific obligations asserted by the Claimant could be derived from the relevant provisions of the CAT, in so

far as they have not been incorporated into domestic law by an Act of Parliament, those provisions cannot be the source of right or obligations under domestic law: see *JH Rayner (Mincing Lane) Ltd v DTI* [1990] 2 AC 418 at 499-500 and, in relation to human rights treaties, *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 at [25], [48], [63], [80] and [90].

71. Furthermore, even if, contrary to the submissions set out above, the obligations asserted by the Claimant could be derived from customary international law, those obligations do not enter into the common law in such a way as to create absolute rights in the manner for which the Claimant contends. Customary international law is a source of the common law, but the precise manner in which it is received into English Law is a question determined by English Law: *R v Jones (Margaret)* [2007] 1 AC 136, [11], [23] (Lord Bingham), [65]-[66] (Lord Hoffmann). In the present context, the right to demand production of information from public authorities, including Government departments, is not an absolute right but is subject to balancing against other principles and interests. That balance is set out in the FOIA and the DPA regimes which Parliament has established, and those regimes are not to be overridden by reference to the UK's obligations under customary international law.

E. Other matters

72. The appropriate mechanism for dealing with a request for information such as that made by the Claimant is through the Freedom of Information Act 2000 and the Data Protection Act 1998. Those Acts make detailed provision for appeals to the Information Commissioner, then to the specialist Information Tribunal and then to the High Court on a point of law. Parliament has also specified in considerable detail the circumstances in which information should be exempt from disclosure. Parliament has considered where the balance of public interest lies in this area, and specified the tests that should be applied, according to the circumstances, and the person or body responsible for making that decision. It would be inappropriate for this statutory framework to be circumvented by granting the Claimant any relief.
73. Furthermore, insofar as (i) the Claimant makes allegations as to the conduct of any of the security and intelligence services, or any member thereof, and (ii) complains that the Defendant has not disclosed to him information held by any of the security and intelligence services, which they ought properly to disclose, the appropriate forum is the Investigatory Powers Tribunal established pursuant to the Regulation of Investigatory Powers Act 2000: see s.65(2)(b), (4), (4A) and (5)(a). Parliament has laid down the forum and procedure appropriate for such claims in that Act, and that scheme should not be subverted by judicial review as sought by the Claimant.

Pushpinder Saini QC

Vaughan Lowe QC

Karen Steyn

11 July 2008

Claim No. CO/4241/2008

IN THE HIGH COURT OF JUSTICE

DIVISIONAL COURT

ADMINISTRATIVE 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

DETAILED GROUNDS OF RESISTANCE

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