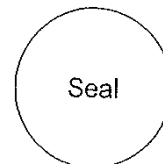


Judicial Review Claim Form

IN THE SUPREME COURT OF
THE BRITISH INDIAN OCEAN TERRITORY

Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.

For Court use only	
Administrative Court Reference No.	
Date filed	



SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name and address(es)

name Mr. Mohammed Saad Iqbal MADNI
--

address E526-14F, Ali Street, Akramabad, Nr. Rabbani Mosque, Academy Road, Walten, Lahore, Cant, Pakistan.
--

Telephone no.	Fax no.
----------------------	----------------

E-mail address

Claimant's or claimant's solicitors' address to which documents should be sent.

name Leigh Day & Co

address Priory House 25 St John's Lane London EC1M 4LB
--

Telephone no. 0207 650 1200	Fax no. 0207 650 1294
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E-mail address jbeagent@leighday.co.uk
--

Claimant's Counsel's details

name Nathalie Lieven QC, Ben Jaffey and Naina Patel
--

address (N. Lieven) Landmark Chambers, 180 Fleet St, London, EC4A 2HG (B. Jaffey) Blackstone Chambers, Blackstone House, London, EC4Y 9BW.

Telephone no. 0207 430 1221	Fax no. 0207 421 6060
---------------------------------------	---------------------------------

E-mail address

1st Defendant

name Her Majesty's Commissioner for the British Indian Ocean Territory

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name Treasury Solicitor

address One Kemble Street, London, WC2B 4TS

Telephone no. 020 7210 3358	Fax no. 020 7210 3214
---------------------------------------	---------------------------------

E-mail address mackie-prentis@tsol.gsi.gov.uk

2nd Defendant

name

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name

address

Telephone no.	Fax no.
----------------------	----------------

E-mail address

SECTION 2 Details of other interested parties

Include name and address and, if appropriate, details of DX, telephone or fax numbers and e-mail

name Secretary of State for Foreign & Commonwealth Affairs	name
address Treasury Solicitor One Kemble Street London, WC2B 4TS	address
Telephone no. 020 7210 3358	Telephone no.
Fax no. 020 7210 3214	Fax no.
E-mail address mackie-prentis@tsol.gsi.gov.uk	E-mail address

SECTION 3 Details of the decision to be judicially reviewed

Decision: Ongoing failure to provide the information sought in the claimant's pre-action protocol letter before claim dated 13th July 2009.
Date of decision: Ongoing

Name and address of the court, tribunal, person or body who made the decision to be reviewed.

name Secretary of State for Foreign and Commonwealth Affairs	address Foreign and Commonwealth Office King Charles Street London SW1A 2AH
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SECTION 4 Permission to proceed with a claim for judicial review

I am seeking permission to proceed with my claim for Judicial Review.

Is this application being made under the terms of Section 18 Practice Direction 54 (Challenging removal)?

☐ Yes ☒ No

Are you making any other applications? If Yes, complete Section 7.

☐ Yes ☒ No

Is the claimant in receipt of a Community Legal Service Fund (CLSF) certificate?

☒ Yes ☐ No

Are you claiming exceptional urgency, or do you need this application determined within a certain time scale? If Yes, complete Form N463 and file this with your application.

☐ Yes ☒ No

Have you complied with the pre-action protocol? If No, give reasons for non-compliance in the box below.

☒ Yes ☐ No

Have you issued this claim in the region with which you have the closest connection? (Give any additional reasons for wanting it to be dealt with in this region in the box below). If No, give reasons in the box below.

☒ Yes ☐ No

Does the claim include any issues arising from the Human Rights Act 1998?
If Yes, state the articles which you contend have been breached in the box below.

☐ Yes ☒ No

SECTION 5 Detailed statement of grounds

☐ set out below ☒ attached

SECTION 6 Details of remedy (including any interim remedy) being sought

1. A mandatory order compelling the Secretary of State to give disclosure of all evidence held or in control of the Secretary of State concerning Mr. Madni's initial detention and transfer to Egypt from Indonesia, as further particularised in the detailed statement of grounds.
2. A declaration that the refusal to disclose is unlawful.
3. Costs
4. Such other relief as the Court sees fit.

SECTION 7 Other applications

I wish to make an application for:-

SECTION 8 Statement of facts relied on


See attached.

Statement of Truth

I believe ~~XXXXXX~~ that the facts stated in this claim form are true.

Full name Jamie Beagent

Name of claimant's solicitor's firm Leigh Day & Co ,

Signed 
Claimant ('s solicitor)

Position or office held Solicitor
(if signing on behalf of firm or company)

4

SECTION 9 Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

- | | | |
|---|-----------------------------------|--|
| <input checked="" type="checkbox"/> Statement of grounds | <input type="checkbox"/> included | <input checked="" type="checkbox"/> attached |
| <input checked="" type="checkbox"/> Statement of the facts relied on | <input type="checkbox"/> included | <input checked="" type="checkbox"/> attached |
| <input type="checkbox"/> Application to extend the time limit for filing the claim form | <input type="checkbox"/> included | <input type="checkbox"/> attached |
| <input type="checkbox"/> Application for directions | <input type="checkbox"/> included | <input type="checkbox"/> attached |
| <input checked="" type="checkbox"/> Any written evidence in support of the claim or application to extend time | | |
| <input type="checkbox"/> Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision | | |
| <input checked="" type="checkbox"/> Copies of any documents on which the claimant proposes to rely | | |
| <input type="checkbox"/> A copy of the legal aid or CLSF certificate <i>(if legally represented)</i> | | |
| <input type="checkbox"/> Copies of any relevant statutory material | | |
| <input checked="" type="checkbox"/> A list of essential documents for advance reading by the court <i>(with page references to the passages relied upon)</i> | | |

If Section 18 Practice Direction 54 applies, please tick the relevant box(es) below to indicate which papers you are filing with this claim form:

- | | | |
|--|-----------------------------------|-----------------------------------|
| <input type="checkbox"/> a copy of the removal directions and the decision to which the application relates | <input type="checkbox"/> included | <input type="checkbox"/> attached |
| <input type="checkbox"/> a copy of the documents served with the removal directions including any documents which contains the Immigration and Nationality Directorate's factual summary of the case | <input type="checkbox"/> included | <input type="checkbox"/> attached |
| <input type="checkbox"/> a detailed statement of the grounds | <input type="checkbox"/> included | <input type="checkbox"/> attached |

Reasons why you have not supplied a document and date when you expect it to be available:-

n/a.

Signed _____ Claimant ('s Solicitor) _____

IN THE SUPREME COURT OF THE BRITISH INDIAN OCEAN TERRITORY

B E T W E E N :-

THE QUEEN

on the application of

MOHAMMED SAAD IQBAL MADNI

Claimant

- and -

HER MAJESTY'S COMMISSIONER FOR THE
BRITISH INDIAN OCEAN TERRITORY

Defendant

GROUNDS OF CLAIM

Introduction

1. The Claimant is a Pakistani national. He was detained in Jakarta, Indonesia on 9 January 2002. He was then handed over to the US authorities and subjected to "extraordinary rendition" to Cairo, Egypt so that he could be held incommunicado and tortured.
2. En-route to Cairo, the aircraft used to transport the Claimant stopped for refuelling. The Claimant believes that it is likely that the refuelling stop took place on Diego Garcia in the British Indian Ocean Territory.
3. Mr Madni remained in Cairo for some three months where he was subjected to particularly severe forms of torture. He was then transported to the United States detention facility at Bagram Air Force Base, Afghanistan, from where he was taken to Guantánamo Bay, Cuba. He was released from Guantánamo Bay on 31 August 2008.

4. The Defendant is Her Majesty's Commissioner of the British Indian Ocean Territory ("the Commissioner"), appointed by Her Majesty's Government of the United Kingdom ("HMG"). The Commissioner's representative on Diego Garcia is the British Representative and commander of the Royal Navy detachment on the BIOT. The Commissioner is responsible for the acts and omissions of the personnel of his administration and the members of the armed forces deployed on BIOT.
5. Mr Madni seeks:
 - (1) disclosure of material held by the Commissioner or within his control that evidence his extraordinary rendition through Diego Garcia and that would assist him in identifying and bringing proceedings against those US (and, if applicable, UK) personnel involved in his detention, unlawful rendition and torture; and
 - (2) Further and in any event, a mandatory order requiring the Commissioner to decide whether to disclose the said material to Mr Madni.

Facts

Diego Garcia

6. Diego Garcia is part of the British Indian Ocean Territory and has been made available to the US for certain defence purposes since 1967. Since then, the only inhabitants have been UK and US military personnel and civilian contract employees, all living on Diego Garcia. Approximately 50 British personnel work for the Diego Garcia civil administration under the Commissioner, carrying out policing and customs duties.

"Extraordinary rendition"

7. "Extraordinary rendition" is the extra-judicial kidnap and transfer of an individual to a covert location for prolonged incommunicado detention and torture. Following the attacks on 11 September 2001, the United States began a

programme of "extraordinary rendition" of detainees to secret prisons run by the US and by other states.

8. HMG has repeatedly made it clear that it expects and requires permission to be sought from the United States before any rendition operation takes place via the UK or its overseas territories. On 20 January 2006, then UK Foreign Secretary Jack Straw MP informed Parliament that:

"we have made clear to the US authorities, including in recent months:

That we expect them to seek permission to render detainees via UK territory and airspace (including Overseas Territories);

that we will grant permission only if we are satisfied that the rendition would accord with UK law and our international obligations, and

how we understand our obligations under the UN Convention Against Torture

We are also clear that the US would not render a detainee through UK territory or airspace (including Overseas Territories) without our permission".

"Extraordinary rendition" via Diego Garcia

9. In November 2003, in a letter to the Foreign Secretary, the Bar Human Rights Committee raised concerns about "the transit of any detainees across UK territory, for example, by landing by air on the island of Diego Garcia before being transported [off-shore]".
10. In response to these concerns, the HMG's position was initially that no rendition operations had taken place via Diego Garcia:

"The United States have repeatedly assured us that no detainees have at any time passed in transit through Diego Garcia or its territorial waters or have disembarked there and that the allegations to that effect are totally without foundation. The Government is satisfied that their assurances are correct" (statement of then Foreign Secretary, Jack Straw to Parliament on 21 June 2004) (emphasis added).

It has subsequently transpired that the assurances given by the United States were false.

11. In June 2007, the Council of Europe's published a report "*Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*", which stated:

"We have received concurring confirmations that United States agencies have used the island territory of Diego Garcia, which is the international legal responsibility of the United Kingdom, in the "processing" of high-value detainees. It is true that the UK Government has readily accepted "assurances" from US authorities to the contrary, without ever independently or transparently inquiring into the allegations itself, or accounting to the public in a sufficiently thorough manner".

12. On 21 February 2008, the Foreign Secretary admitted that two US rendition flights had stopped on Diego Garcia in January and September 2002. He told Parliament:

"Contrary to earlier assurances that Diego Garcia had not been used for rendition flights, recent US investigations have now revealed two occasions, both in 2002, when this had in fact occurred. An error in the earlier US records meant that these cases did not come to light. In both cases a plane with a single detainee on board refueled at the US facility in Diego Garcia. The detainees did not leave the plane, and the US government has assured us that no detainees have ever been held on Diego Garcia or any other Overseas Territory or through the UK itself since then."

Of the individuals in question, he said that "neither of the men was a British national or British resident. One is currently in Guantanamo Bay. The other has been released".

13. On 11 February 2009, the Minister of State at the Foreign Office responded to a parliamentary question from Andrew Tyrie MP:

"Mr Tyrie: To ask the Secretary of State for Foreign and Commonwealth Affairs whether one of the detainees rendered through Diego Garcia is still being held in the Guantanamo Bay detention centre.

Bill Rammell: Both of the individuals rendered through Diego Garcia in 2002 have been returned to their countries of nationality."

Mr Madni's Detention and "Extraordinary Rendition" to Egypt

14. Mr Madni was detained in Jakarta at approximately 4 am on 9 January 2002 by Indonesian officers. At around 8 pm on 10 January 2002 he was taken to the airport where he was met by Egyptian and US intelligence personnel, beaten, kicked in the chest and thrown against the wall, leaving him bleeding from his nose, mouth and ears and with blood in his urine. He was then hooded and boarded onto an aircraft. Once on board, Mr Madni was then tightly shackled and put in a coffin-shaped wooden box that was bound with plastic. The aircraft took off approximately two hours later.
15. Several hours later, the aircraft landed. Mr Madni was told the stop was for refuelling. Several people boarded the aircraft and took photographs of Mr Madni. Approximately half an hour later, the aircraft took off again before landing in Cairo on the morning of 11 January 2002.

Mr Madni's Detention and Torture in Egypt

16. In Cairo, Mr Madni reports that he was subjected to intense torture sessions in which electric shocks were given to his head and knees, and he was denied food and medicine for his continued bleeding. Four US personnel assisted the Egyptian interrogators by handing them questions to ask Mr Madni. Mr Madni was forced to drink tea laced with drugs which disoriented him, before being interrogated through a glass wall.
17. On many separate occasions, Mr Madni was hung from metal hooks from the ceiling and beaten, regularly bleeding from his mouth, nose and ears.

Mr Madni's "Extraordinary Rendition" to Afghanistan

18. On or around 11 April 2002, Mr Madni was asked to sign a document confirming that he had not suffered any ill-treatment. He was taken to Cairo airport where he was handed over to some US personnel.

19. After several hours, the aircraft landed. Mr Madni was unshackled and made to run to another aircraft. The second aircraft flew them to the US Air Force Base in Bagram, Afghanistan.
20. On arrival at Bagram, Mr Madni spent seven months in solitary confinement, in a room about six foot by 4 foot with no sunlight. He was regularly beaten and hung from the ceiling in the "strappado" position.

The Claimant's Rendition to Guantánamo Bay

21. On 22 March 2003, Mr Madni was flown to Guantánamo Bay where he arrived on 23 March 2003. There, he was subjected to a regime of sleep deprivation and frequent moving from cell to cell that has subsequently described as "the frequent flyer programme". During this time, Mr Madni was interrogated by a range of personnel including, he believes, in April 2003, one UK national.
22. Throughout his time, Mr Madni complained of serious medical problems, including problems with his bladder and knees and continued bleeding from his mouth, ears and nose and in his urine.

Mr Madni's Release and Return to Pakistan

23. Mr Madni was released from Guantanamo Bay and returned home to Pakistan on 31 August 2008.

Investigations by Reprieve

24. The legal charity, Reprieve, has carried out investigations on behalf of Mr Madni into his rendition. The results of its investigation are set out in the witness statement of Ms Gutteridge. Taken together, there is considerable circumstantial evidence that indicates that the Claimant may have landed on Diego Garcia.

Flight records

25. Reprieve have obtained Eurocontrol flight records, which record the origin and destination of flights transiting European airspace.

26. Those records show a Gulfstream V jet registered to a CIA controlled front company with tail registration N379P departing Washington on 9 January 2002, arriving in Cairo on the following morning. Taking into account the time difference, and allowing time to refuel, the jet could have reached Jakarta by the evening of 9 January 2002. It may have needed to stop to refuel en-route. N379P is one of the small number of aircraft used by the CIA for carrying out rendition flights.
27. A Washington Post report from March 2002 speaks of eye-witnesses seeing a man being bundled aboard a US-registered Gulfstream V jet at a military airport in Jakarta.
28. The return flight from Jakarta to Cairo may have required a fuel stop en route. If so, the likely locations for such a stop are Diego Garcia or another US military facility in central Asia, such as Bagram Air Force Base in Afghanistan.
29. There is no Eurocontrol log until 13.31 on 15 January 2002 (meaning that N379P did not pass through European airspace again), until the aircraft returned to Washington after refuelling at Prestwick Airport in Scotland.
30. In these circumstances, it is likely that this aircraft was used in the rendition of the Claimant, especially given that it stopped in Cairo en-route, presumably to collect Egyptian intelligence officers. Its route is consistent with a stop-over in Diego Garcia, and the Claimant's account of events.

Detainee records

31. Further circumstantial support for the Claimant's rendition flight having stopped in Diego Garcia is provided by analysis of detainee records. From the public statements made by the Foreign Secretary, it is clear that two detainees passed through Diego Garcia. Both ended up at Guantanamo Bay. Both have now been released, but only one had been released at the time of the initial admission. By a process of deduction, eliminating cases where Diego Garcia would not have been

a sensible stop-off point, it is again likely that the Claimant was rendered via Diego Garcia. See paragraphs [] of the witness statement of Ms Gutteridge.

Legal Framework

The Applicable Law on Diego Garcia

32. The BIOT was originally created by the British Indian Ocean Territory Order, SI 1965/1920, made under the Colonial Boundaries Act 1895. This was revoked and replaced by a subsequent British Indian Ocean Territory Order, SI 1976/893 which, has since been revoked and replaced by the British Indian Ocean Territory (Constitution) Order 2004. The 2004 Order presently governs Diego Garcia (see Article 2(1) and the Schedule). Article 4 of this Order creates the Commissioner, who has the power to make laws under Article 10. Article 15 reserves a power to Her Majesty to make laws for the BIOT. Article 3(2)(a) expressly preserves law made under previous Orders.

33. BIOT Ordinance No. 3 for 1983 ("the Courts Ordinance") is one such law made by the Commissioner under a previous Order. Article 3(1) of the Courts Ordinance states:

"Subject to and so far as is not inconsistent with any specific law for the time being in force in the Territory and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England."

34. The 1976 Exchange of Notes between the UK and US Governments concerning a US Naval Support Facility on Diego Garcia are an agreement entered between Her Majesty, acting on behalf of the BIOT, and the US ("the Agreement"). The Agreement gives the US the right to develop the facility, subject to the observation of various terms. Paragraph 3 states:

"...the Commanding Officer and the Officer in Charge of the United Kingdom Service element shall inform each other of the intended movements of ships and aircraft".

35. The British Indian Ocean Territory Ordinance No.4 of 2000 provides that:
- (1) The Commissioner's Representative shall be the Principal Immigration Officer for the Territory and shall have the superintendence and control of all immigration officers (Article 3(1));
 - (2) No person shall enter the Territory, or, being present in the Territory, shall remain there, unless he is in possession of a permit issued under section 6 or his name endorsed is on a permit under section 8 (Article 4(1)).
36. These provisions of BIOT law aside, three elements of English law are relevant to these claims:
- (1) English common law, given the absence of a domestic Civil Code.
 - (2) Customary international law, forming part of the common law of England.
 - (3) UK legislation such as the Criminal Justice Act 1988 and the International Criminal Courts Act 2001.

In each case, the relevant principles of English law form part of the law of the BIOT pursuant to Article 3(1) of the Courts Ordinance.

Common Law

37. Torture and inhuman and degrading treatment are actionable at common law. The prohibition against torture is a fundamental principle of the common law (see Lord Bingham in *A v Secretary of State for the Home Department (No.2)* [2006] 2 AC 221, at §11) and involvement in torture or inhuman and degrading treatment involve (as a minimum) the commission of the torts of trespass to the person (*Stubbings v Webb* [1993] AC 498), assault, battery (*Re F (Mental Patient: Sterilization)* [1990] 2 AC 173; *Wilson v Pringle* [1987] QB 23) and conspiracy to use unlawful means conspiracy (*Lornho v Fayed* [1992] 1 AC 448) or to injure.

38. Further, the common law will intervene to assist the victim of wrongdoing obtain evidence needed to identify or pursue a wrongdoer.

Customary International Law

39. The prohibition against torture is a peremptory norm of customary international law (*R v Bow Street Magistrates ex p Pinochet* (No.3) [2000] 1 AC 147, 198A-E citing *Prosecutor v Furundzija* (unreported), 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T 10). Moreover, it is a norm which has two aspects: a right of individuals not to be tortured but also a duty upon States to take effective measures for the prevention of torture, cruel, inhuman or degrading treatment or punishment.

UK Statutes

40. Torture and involvement in torture is a crime of universal jurisdiction. Under section 134 of the Criminal Justice Act 1988, torture of anyone, anywhere in the world, is a crime.
41. Complicity in torture also involves the commission of criminal offences under the International Criminal Courts Act 2001.¹ The material provisions are as follows:

s. 51 Genocide, crimes against humanity and war crimes

(1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.

(2) This section applies to acts committed:

(a) in England or Wales, or

(b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to United Kingdom service jurisdiction...

s.52 Conduct ancillary to genocide, etc committed outside jurisdiction

¹ The 2001 came into force on 1 September 2001 pursuant to Article 2 of the International Criminal Court Act 2001 (Commencement) Order 2001 SI 2001/2161.

(1) It is an offence against the law of England and Wales for a person to engage in conduct ancillary to an act to which this section applies.

(2) This section applies to an act that if committed in England or Wales would constitute -

(a) an offence under section 51 (genocide, crime against humanity or war crime), or

(b) an offence under this section

but which, being committed (or intended to be committed) outside England and Wales, does not constitute such an offence...

s. 55 Meaning of ancillary offence

(1) References in this Part to an ancillary offence under the law of England and Wales are to:

(a) aiding, abetting, counselling or procuring the commission of an offence,

(b) inciting a person to commit an offence

(c) attempting or conspiring to commit an offence, or

(d) assisting an offender or concealing the commission of an offence.

42. A war crime is defined by section 50(2) to be a war crime as defined by Article 8.2 of the ICC statute as set out in schedule 8 to the Act. In so far as material Article 8.2 provides:

For the purpose of this Statute, 'war crimes' means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Conventions:

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

43. The scope of the 2001 Act is very wide. Aiding or abetting torture, assisting an offender who has committed torture or concealing the commission of torture are war crimes. Similarly, aiding and abetting or assisting in the unlawful confinement of a person or the deprivation of a fair or regular trial amount to war crimes.

Grounds

44. It is well-established common law principle that a person (or state 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]:

"... 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."

45. In *Norwich Pharmacal*, HM Customs and Excise were ordered to disclose details of the importers of a drug, who were importing in breach of *Norwich Pharmacal*'s intellectual property rights. They had only become 'mixed up' in the wrongdoing to the extent that pursuant to statute, they held records of the identity of the importer.

46. The most recent restatement of the principles by the House of Lords is its decision in *Ashworth Hospital Authority v MGN* [2002] 1 WLR 2033. The House of Lords held that there is no requirement that the person against whom the proceedings have been brought should be an actual wrongdoer who has committed some civil or criminal wrongful act. Where a person, albeit innocently, and without incurring any liability, becomes involved in a civil or criminal wrong committed of another, that person thereby comes under a duty to assist the person injured by those acts by giving him any information which he is able to give by way of discovery. While therefore the exercise of the jurisdiction does require that there should be a *prima facie* case of wrongdoing, the wrongdoing which is required is not that of the person against whom the proceedings are brought (per Lord Woolf at [26]) who may well be entirely innocent.
47. In *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin) the Divisional Court applied the *Norwich Pharmacal* jurisdiction in circumstances similar to the present case. The Court held that the UK security and intelligence services had become mixed up in alleged wrongdoing (torture, *incommunicado* detention and 'extraordinary rendition') by the US authorities and that disclosure should be given to the Claimant to assist him in his defence of charges before a US military commission.
48. The present case falls four square within the *Norwich Pharmacal* principles as applied in *Binyam Mohamed*:
- (1) *Wrongdoing*: There is an arguable case that Mr Madni has been the victim of grave criminal and civil wrongdoing, namely torture, war crimes and prolonged *incommunicado* detention:
- a) US personnel carried out Mr Madni's rendition from Indonesia to Egypt in January 2002. The purpose of the transfer from Indonesia to Egypt was to facilitate Mr Madni's *incommunicado* detention and torture.

- b) US personnel were complicit in Mr Madni's unlawful interrogation and detention in Egypt. In particular, US personnel were present at his interrogations on 11/12 January 2002 where he was given electric shocks to his body and was denied medical treatment for his injuries. Those personnel actively participated in his interrogation by supplying information and questions for him to his Egyptian interrogators.
- (2) *Mixed-up*: The Commissioner and his officers have become mixed up in the serious criminal and civil wrongdoing committed by US personnel:
- a) The test for being mixed-up is whether the Commissioner or his officers "became involved in the wrongdoing (even if innocently) by facilitating that wrongdoing" (*Binyam Mohamed* at [70]). Facilitation is a lower test than causation ("there is nothing that requires the involvement to be causative of the wrongdoing" – *Binyam Mohamed* at [70b]). The relevant question is therefore:

"Did the United Kingdom Government through the [Commissioner and his] agents become involved in or participate in the alleged wrongdoing through facilitating it? ... it is not necessary... to establish anything more than innocent participation and certainly not knowledge of the alleged wrongdoing. However if a degree of knowledge were to be established, then the involvement or participation is the clearer" (*Binyam Mohamed* at [71-72]).
 - b) It appears likely that N379P landed on Diego Garcia whilst Mr Madni was unlawfully detained on board. Whilst on Diego Garcia, Mr Madni was unlawfully held captive on the aircraft, so as to facilitate his transfer to Egypt for torture.
 - c) The Commissioner and his agents became mixed-up in and facilitated serious criminal and civil wrongdoing in that, being aware of the arrival of the aircraft carrying Mr Madni from Jakarta

to Cairo in Diego Garcia, in accordance with paragraph 3 of the Agreement and the 2000 Immigration Ordinance:

- i) Gave permission to the aircraft to land and refuel on Diego Garcia, thereby facilitating Mr Madni's rendition to Egypt.
- ii) Did not protest or object to the proposal that the aircraft to land and refuel on Diego Garcia and/or Mr Madni be subjected to rendition to Egypt.
- iii) Failed to take proper steps to verify the identity of the aircraft and those on board, and in particular to note the severe mistreatment that Mr Madni had clearly suffered.
- iv) Failed to take proper steps to ascertain the origin and destination of the aircraft and the purpose of its flight, in particular the rendition of Mr Madni.
- v) Permitted the aircraft to depart Diego Garcia.

The position of the Commissioner and his officers is very similar to that of HM Customs and Excise in *Norwich Pharmacal*, save that the relevant act of facilitation involves a person rather than parallel importation of pharmaceuticals.

(3) *Necessity*: A *Norwich Pharmacal* order is normally sought to protect mere commercial interests. Here, the order is sought to enable action against those individuals who are alleged to have committed war crimes and torture. The information sought is necessary for several purposes. Mr Madni requires the above information to identify and secure the prosecution of individual criminal wrongdoers in the British Indian Ocean Territory, the United States and potentially in the United Kingdom. Without the information sought, Mr Madni is unable to

demonstrate that he was rendered through Diego Garcia, identify the wrongdoers concerned or evidence their criminal conduct.

49. Mr Madni seeks disclosure of:

- (1) All evidence held by the Commissioner concerning Mr Madni's initial detention and transfer to Egypt from Indonesia, in particular:
 - (a) Confirmation that Mr Madni was rendered through Diego Garcia on 11/12 January 2002 on board the Gulfstream V registered as N379P.
 - (b) Full particulars of when the Commissioner and his officers became aware of Mr Madni's detention, in particular whether they were aware of this at the time he was transferred through Diego Garcia.
 - (c) The identity of all those on board N379P during the rendition flights referred to above.
 - (d) The identity of all those UK and US personnel involved in the rendition flights referred to above.
 - (e) All communications, documents and records (including flight records, fuelling records and immigration records of all those on board the aircraft) relating in any way to the movements of N379P through Diego Garcia.
 - (f) All communications and records between the Commissioner, the US authorities and HMG, relating in any way to Mr Madni's flight through Diego Garcia.
 - (g) Details of what, if any, assurances were sought by the Commissioner and his officials and/or offered by the Americans in relation to Mr Madni's transfer through Diego Garcia.

- (h) The identity of any UK or US personnel that saw or spoke to Mr Madni whilst he was being transferred through Diego Garcia and their identities.
 - (g) Any evidence corroborating Mr Madni's account of his rendition and torture.
- (2) All evidence held by the Commissioner concerning Mr Madni's detention in Cairo and subsequent transfer to, and detention in, Bagram and Guantanamo, in particular:
 - (a) Any records and communications, including photographs, corroborating Mr Madni's account of these experiences;
 - (b) The identity of the US and UK agents involved in his interrogation, detention and torture, as set out above;
 - (c) Details of if and when any other US or UK personnel saw or spoke to Mr Madni at any time between his apprehension in January 2002 and his release on 31 August 2008.
- 50. Each of these requests is necessary and justified and within the scope of a proper Norwich Pharmacal application. See *Binyam Mohamed* at [133-138].
- 51. Finally, the Court should exercise its discretion to make a Norwich Pharmacal order. The public interest in the disclosure to the victim of evidence of torture or inhuman and degrading treatment is overwhelming. The prohibition on torture is a rule of *jus cogens*. Without the disclosure sought, there is no realistic prospect of the individuals who have committed torture or been complicit in it being brought to account. See *Binyam Mohamed* at [142-143].
- 52. The Commissioner has been requested to provide the information sought by letter dated 13 July 2009. Further, the Claimant requested that immediate steps be taken to ensure that relevant materials were preserved from loss or destruction. No substantive response has been received to either request.

53. The Treasury Solicitor wrote to solicitors for the Claimant on 31 July 2009 suggesting that "urgent enquiries" were being made, but no indication was given as to when a substantive reply would be forthcoming. In the absence of any indication of when a proper response would be provided, these proceedings have been issued.
54. The failure of the Commissioner to respond to the request for information and evidence and to provide evidence to Mr Madni's lawyers about his torture is irrational applying ordinary public law principles. No reasonable Commissioner, giving proper consideration to the importance as a matter of legal policy of preventing the use of evidence obtained by torture could properly refuse to provide a prompt and substantive response to Mr Madni's request. The Court is invited to make a mandatory order requiring the Commissioner to consider and respond substantively to Mr Madni's request.
55. To the extent that the information sought genuinely remains secret, Mr Madni is willing to agree appropriate security measures to protect the information from wider disclosure.

Conclusion

56. The Court is invited to grant permission and direct the provision of the information set out above.

BEN JAFFEY

NAINA PATEL