IN THE HIGH COURT OF JUSTICE **Claim No. CO/9212/2009**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N :-

THE QUEEN

on the application of

MOHAMMED SAAD IQBAL MADNI

Claimant

- and -

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

SUPPLEMENTAL SKELETON ARGUMENT FOR THE CLAIMANT

Introduction

1. At 5.21pm on Wednesday evening, after much chasing, the Treasury Solicitor emailed the Secretary of State's note and proposed directions to the Claimant and the Court. No explanation has been forthcoming for the lateness of the response. This application for directions was issued on 5 February. The note and proposed directions are the Secretary of State's first response to the application.

2. The Defendant's proposed directions raise important and significant issues. If accepted, they will undermine the Court's ability fairly to determine the case.

3. It should be noted that the Defendant has now abandoned his proposal for a trial of three preliminary issues, as set out in his letter of 2 February 2010 [B185]. The Claimant has been put to considerable wasted time and cost in drafting a

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skeleton argument and preparing for a hearing on issues which are not now being pursued.

4. A chronology is attached to this supplemental skeleton argument.

Duty of candour

5. In paragraph 4 of his note, the Secretary of State admits for the first time that:

> "... the defendant has possession of documents which have a bearing (to use a neutral phrase) on whether any British or American authorities were mixed up in wrongdoing against the claimant."

6. This represents a fundamental change of position:

(1) In his Summary Grounds, the Secretary of State omitted to deal with whether he was mixed up in serious wrongdoing [B18/footnote 1]:

> "... he reserves his position on whether any of the other threshold conditions are met in the present case..."

(2) This ambiguity was identified and challenged in the response to the Summary Grounds [B56/2(3)(ii)].

(3) In paragraph 3 of his Rejoinder, the Secretary of State made clear that he denied being mixed up in wrongdoing [B74]:

> "... the defendant does not accept that he was mixed up in any wrongdoing. On the contrary, he denies that he, or the Commissioner or any officer of Her Majesty's Government, was".

(4) On the basis of that denial, the Secretary of State maintained his position that there was "no basis for a *Norwich Pharmcal* order" [B13/7] and the "court should refuse permission to apply for judicial review" [B11/1] and that the claim was "unfounded" [B74/1] because "the claimant does not even arguably meet the threshold criteria for a *Norwich Pharmacal* order" [B76/9].

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(5) These assertions (all verified by a statement of truth) were supported by two witness statements from Mr Adam Chapman, then Team Leader of the Public Law group within the Treasury Solicitor's Department. Mr Chapman informed the Court that there was no relevant material that contradicted the arguments advanced in the Summary Grounds and Rejoinder. He noted that careful searches for documents had taken place but reported that [B22/2]:

> "The defendant, having given the most anxious scrutiny to the conduct of these searches and to their results, is satisfied that neither CPR 31.6, nor the defendant's duty of candour, requires the disclosure to the court in these proceedings of anything that has emerged from those searches".

Mr Chapman's second witness statement [B142/3] contains a further assurance to the same effect.

(6) In the Rejoinder it was stated that:

> "The claimant has no basis for going behind Mr Chapman's evidence that the defendant has complied with his duty under CPR 31.6 and with his common law duty of candour and holds no documents that might reasonably be thought to assist the claimant's case..."[B76/9].

7. The scope of the duty of candour is (or should be) well understood by the Secretary of State and the Treasury Solicitor's Department. On 18 January 2010, the Treasury Solicitor published guidance on the duty of candour and disclosure [Tab 10]. This guidance was produced "following difficulties which had been encountered with disclosure in the *Binyam Mohamed* litigation" and "further difficulties in the *Al Sweady* case".

8. The guidance explains the duty of candour accurately:

> "When responding to an application for judicial review public authorities must be open and honest in disclosing the facts and information needed for the fair determination of the issue. The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge" (p. 2)

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9. The guidance emphasises that the duty of candour applies "to every stage of the proceedings including... summary grounds of resistance [and] witness statements" (p. 3). The duty of disclosure is "even more acute" (p. 5) in cases where infringements of basic human rights are involved, particularly the right not to be tortured, subjected to cruel, inhuman or degrading treatment, or being detained unlawfully. Each of those fundamental rights are in issue in the present case. The "wrongdoing" that the Secretary of State is alleged to have become mixed up in is (so-called) 'extraordinary rendition' – kidnapping for the purpose of indefinite extra-judicial detention and torture.

10. It is now apparent that there has been a serious breach of the duty of candour:

(1) The Secretary of State invited the Court to refuse permission on the basis that it was unarguable that HM Government was mixed up in wrongdoing.

(2) This denial was supplemented by Mr Chapman's statements asserting that there were no documents required to be disclosed by the duty of candour. That can only have meant that there were no documents relevant to the issue of being mixed-up in wrongdoing that would have (even arguably) contradicted the Secretary of State's case.

(3) When queried by the Claimant, the Secretary of State assured the Court in his Rejoinder that Mr Chapman's evidence was correct and that he "holds no documents that might reasonably be thought to assist the claimant's case..." [B76/9].

(4) It is now admitted that there <u>are</u> relevant documents on this issue that were not produced to the Court or the Claimant. This should have been clearly and unambiguously explained in the Summary Grounds and in Mr Chapman's evidence. As Girvan J put it in *Downes* [2006] NIQB 77 at [21]:

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> "The duty of good faith and candour lying in a party in relation to both the bringing and defending of a judicial review application is well established. The duty imposed on public bodies and not least on central government is a very high one. That this should be so is obvious. Citizens seeking to investigate or challenge governmental decision-making start off at a serious disadvantage in that frequently they are left to speculate as to how a decision was reached. As has been said, the Executive holds the cards. If the Executive were free to cover up or withhold material or present it in a partial or partisan way the citizen's proper recourse to the court and his right to a fair hearing would be frustrated. Such a practice would engender cynicism and lack of trust in the organs of the State and be deeply damaging of the democratic process..."

(5) No explanation has been offered as to why the Court was not informed that there were relevant documents "which have a bearing" on the issues. Indeed, the court was (falsely) assured by Mr Chapman in two witness statements verified by a Statement of Truth and in the Rejoinder that there were no relevant documents.

(6) It is very concerning that:

i) these breaches have occurred despite the recent experience in *Binyam Mohamed* and *Al-Sweady*; and

ii) no explanation or apology has been offered.

11. It is fortunate that Mr Justice Cranston directed a rolled up hearing. Had he accepted the invitation of the Secretary of State to dismiss the case as unarguable, the falsity of the assurances in Mr Chapman's statements and in the Rejoinder would never have come to light.

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Secretary of State's proposed directions

Claim in the Supreme Court of BIOT

12. The Claimant has brought parallel proceedings for a *Norwich Pharmacal* order against the Commissioner of the BIOT. It is common ground that duplication of proceedings should be avoided.

13. The Claimant has proposed on several occasions (in his response to the Summary Grounds [B61/7(2)] and in correspondence [B109, B159 and B177])that the BIOT proceedings be stayed on receipt of an undertaking that the Secretary of State:

    (1) accept responsibility for all acts and omissions of British personnel on Diego Garcia and for the Commissioner; and

    (2) procure that the Commissioner fully co-operates with these proceedings by provision of evidence and disclosure as if he were a party.

14. However, the Secretary of State apparently refuses to give an undertaking that he will procure the full co-operation of the Commissioner and his officers. This is essential to ensure that all relevant material is disclosed, and that where material is alleged to have been destroyed full evidence as to the material circumstances is filed. The undertaking offered in the draft directions is inadequate. This continued refusal is somewhat difficult to understand:

    (1) Relevant documents and evidence may well be found on Diego Garcia. Without the full co-operation of the authorities in BIOT relevant materials and evidence may not be produced.

    (2) There is no doubt that the Secretary of State has power to procure the co-operation of the Commissioner. He can issue him with a direction under Article 5 of the BIOT (Constitution) Order 2004.[1]

[1] The current Commissioner, Mr Colin Roberts, is a civil servant based in the Foreign and Commonwealth Office in London.

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(3) It would save time and costs for there to be a single set of proceedings at which all the evidence is available.

Appointment of special advocates

15. The Defendant proposes that the Attorney General "shall be invited to appoint a security cleared friend of the court, alternatively special advocate". This proposal requires amendment:

(1) The proper course is to appoint special advocates, not a friend of the court. The role of a special advocate is completely different from that of an amicus:

i) A special advocate represents the interests of the Claimant in respect of closed (ie. secret) material. A special advocate is chosen by the Claimant from the list of security cleared advocates maintained by the Special Advocates Support Office (a Division of the Treasury Solicitor's Department with strict 'Chinese Walls' separating it from those Treasury Solicitors acting for the Defendant). The role of the special advocate is to make submissions as to whether closed material should be disclosed to the Claimant, or whether and to what extent it should be produced in a redacted or gisted form. Where materials remain closed, special advocates act in place of the Claimant's advocates. They make submissions, apply for further disclosure and examine witnesses.

ii) In contrast, an amicus assists the Court on issues of law that would not otherwise be properly argued. An amicus does not appear as an advocate for a party, but is solely present to assist the Court. Accordingly, the choice of amicus is in the hands of the Attorney General. An amicus is unnecessary.

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(2) The Secretary of State proposes to list the case for 5 days. It therefore appears that there will be extensive evidence and argument. Accordingly, two special advocates will be required. The order should be for leading and junior special advocates.

<u>Security Service Act/Intelligence Services Act</u>

16. Paragraph 4 of the Secretary of State's draft directions provide for disclosure of "certain documents" to the Court (and presumably the special advocates, although this is not expressly provided for) but not the Claimant or his lawyers:

> "certain documents that the Director-General of the Security Service has decided it is necessary to disclose to the court, but not to the claimant, under section 2(2) of the Security Service Act 1989..."

17. Section 2(2) (as amended) of the Security Service Act provides as follows:

> "The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure—
>
> > (a) that there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings..."

18. The implications of paragraph 4 of the draft order raise significant constitutional issues. It is wrong that they were raised for the first time after close of business on the evening before the hearing:

(1) The only disclosure that will be provided is "certain documents". There is no order for all relevant documents to be disclosed, even to the Court. The statement that "the defendant has come to the conclusion that the appropriate way forward is for him to show to the court, but not to the claimant, all the documents that he has in his possession" in paragraph 4 of the note is inconsistent with the terms of the proposed draft order.

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(2) All that will be disclosed is what the Director-General of the Security Service[2] (as opposed to the Secretary of State, the Treasury Solicitor, or even the Court) considers it is "necessary" to disclose.

(3) If section 2(2) permits the Director of the Security Service discretion as to what to disclose to the Court in litigation, the closed material procedure that would otherwise apply will be circumvented:

i) The essence of the proper procedure was helpfully summarised by Silber J in *Al-Rawi* [2009] EWHC 2959 (Admin)[3]:

> "[4] ... the closed material procedure is different and Sir Anthony Clarke MR described the roles of the special advocate, who is an integral part of this procedure and who represents the party who is not allowed to see the closed material, when he said in *AHK v Secretary of State for Home Department* [2009] 1 WLR 2049 that: -
>
>> "38… (4) They are well understood and include taking instructions from the claimant, but only before the special advocate sees any of the closed material, considering whether further documents are required and whether gisting is required, discussing the problems with counsel for the Secretary of State, making appropriate submissions to the court and testing and probing the evidence as the special advocate thinks fit".
>
> Of course, once the closed material is served on the special advocate, his or her ability to communicate with the appellant or his representative is severely curtailed. The closed material procedure in theory prevents one party from knowing the case against him, giving instructions on it, challenging it or knowing the full reasons for a court's decision. In practice, however, the courts have ensured that the rights of claimants under article 6 of the European

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[2] In respect of the Secret Intelligence Service, it seems that the Director General has not even given personal consideration to the question of what it is "necessary" to disclose. He has purported to act by the "Director General Security and Policy". The Claimant reserves his position as to whether this amounts to unlawful delegation. In any event, there is no indication that the Secretary of State has given any attention to what should be disclosed in this case – cf. the position if the ordinary PII regime were adopted.

[3] The appeal against the judgment of Silber J in *Al-Rawi* is due to be heard by the Court of Appeal next week. Accordingly, the Claimant reserves his position as to whether any closed material or special advocate procedure is appropriate at all in a case such as the present.

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Convention on Human Rights ("ECHR") are preserved which means that in practice the closed material procedure is modified. I have not heard submissions on how this could, should or would be done in this case but as is well-known in *Home Secretary v AF (No 3)* [2009] 3 WLR 74, Lord Phillips of Worth Matravers said of a recent decision of the Strasbourg Court that it:-

> "59…establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations".

[5] It is appropriate to mention now three matters relating to the preliminary issue. First, it must be stressed that the fact that a closed material procedure is used does not mean that the claimants will not see any of the material because the special advocate would be required to consider if any of the closed documents should not be withheld from open disclosure to the claimants in the light of the rights of the claimants under the ECHR and at common law and then to make submissions. If a closed material procedure was adopted in a private law claim, it would mean that the court would have to consider how the procedure would have to be modified to ensure that article 6 rights were respected either by following the procedure set out in *AF* (supra) or otherwise. After all any court adopting the closed material procedure in a private law claim for damages would have an obligation to ensure that the rights of litigants as set out in the ECHR are respected which is after all what the House of Lords did in *AF* (supra)..."

ii) If the Director General has the final say on what is disclosed, few of the protections of the closed material procedure will apply. The Court will not be able to direct partial disclosure or gisting of documents. Nor will the Court be able to insist on such disclosure as is necessary to ensure a fair trial.

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(4) The idea that the Security and Intelligence Services are free to decide what to disclose (or not to disclose) in cases concerning misconduct by those agencies or their officers is contrary to constitutional principle. One difficulty with this approach was identified by Lord Neuberger MR in *Binyam Mohamed* at [168] (the passage which the Government unsuccessfully sought to amend):

> "... some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed, when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly. Not only is there some reason for distrusting such a statement, given that it is based on Security Services' advice and information, because of previous, albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information."

Lord Neuberger MR was expressing concerns about the reliability of a PII certificate signed by a Minister based on advice from the Security Service. The Master of the Rolls' concerns apply with greater force if the decision as to what to disclose is being made by the Director General of the Security Service himself, without giving any reasons. This is particularly the case where the current Director General was "appointed to the Security Service's Management Board as Director of international counter terrorism - ten days before the 9/11 attacks on the World Trade Centre", a position he held until 2005 when he was appointed Deputy Director General.[4] The current Director General was the senior MI5 officer who

[4] https://www.mi5.gov.uk/output/director-general.html

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would have been responsible for any Security Service involvement in Mr Madni's 'extraordinary rendition'. He is potentially acting as a judge in his own cause.

(5) In short, the interpretation being placed on section 2(2) of the Security Service Act is that the Security and Intelligence Services (and the Secretary of State) comply with the duty of candour and court orders for disclosure as a matter of grace and discretion rather than necessity and obligation. If this were right, there would be a grave lacuna in the rule of law.

(6) It is not right:

i) Section 2(2) is irrelevant. The present claim is against the Secretary of State, not the Security and Intelligence Services. The Secretary of State is under the duty to give disclosure and it is likely that many of the relevant documents do not originate from the Security and Intelligence Services or are currently held by the Secretary of State. Nothing in the Act provides the Secretary of State with an excuse for non-compliance with his personal obligation to give full and candid disclosure to enable justice to be done.

ii) In any event, the "proper discharge of [the] functions" of any government agency such as the Security and Intelligence Services must include faithful compliance with orders of the Court and duties of disclosure under the law. This is particularly the case where valid and proper claims to secrecy will be upheld by the Court under the closed material regime in any event.

iii) Nothing in section 2(2) gives permission to ignore an order for disclosure made by the Court. Such an exceptional power would require clear words.

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iv) If section 2(2) permitted the Security and Intelligence services to withhold disclosure of relevant materials, this would be a breach of Article 6 ECHR (the right to a fair trial). Article 6 requires a core irreducible minimum of disclosure, irrespective of national security concerns. See *AF (No .3)* [2009] 3 WLR 74 and *Al-Rawi*. Any domestic legislation that prevented such disclosure must be "read and given effect in a way which is compatible with the Convention rights", "so far as it is possible to do so" (section 3 of the Human Rights Act 1998). It is plainly possible to do so here for the reasons set out above.

(7) Notably, the section 2(2) point was never taken in *Binyam Mohamed*, either at first instance or in the Court of Appeal. Indeed, if the Secretary of State is right about section 2(2), none of the information or documents about Mr Mohamed's torture and the knowledge of the Security Service need ever have seen the light of day, or even have been provided to the Court on a closed basis. If the logic of the section 2(2) argument is right, that case proceeded on a false basis and the Court of Appeal's decision to disclose was wrong. If the section 2(2) point had any genuine merit, and given that the Secretary of State contended that irreparable damage to national security would result from disclosure, it is perhaps surprising that it was not taken.

(8) However, to the Claimant's knowledge, the Secretary of State has taken this point twice previously:

i) The first occasion was in the *Al-Rawi* case, where the Secretary of State relied on section 2(2) in his skeleton argument at first instance before Silber J. However, the Claimant understands that the point was not pursued at the oral hearing.

ii) The second occasion on which this point was taken was in the *Shaker Aamer* case [Tab 7, para. 77]. On 15 December 2009, the

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Divisional Court granted Mr Aamer's *Norwich Pharmcal* application, subject to questions of PII and the section 2(2) point which was raised at a very late stage and therefore held over for argument on a later date. Subsequently, the Secretary of State conceded Mr Aamer's case and granted the disclosure sought. Had the section 2(2) point been a sound one, it is unlikely that the Secretary of State would have taken this course.

(9) The fact that a point of some constitutional importance is raised after close of business on the eve of the hearing is telling. The Claimant invites the Court to reject it and make an ordinary order for disclosure in the form proposed by the Claimant in his draft order [B206]. If the Secretary of State objects to open provision of any particular documents or evidence, he should file those materials in closed. The Court will then consider and rule on whether some or all of this material should be disclosed openly, redacted or gisted in order to secure a fair trial, with the benefit of submissions from the parties and the special advocates in the normal way.

Timing

19. The Claimant agrees that there should be a further directions hearing before the substantive hearing. At that hearing the Court will be able to determine whether and to what extent materials disclosed by the Defendant should remain closed.

20. The Secretary of State proposes that the case be listed for 5 days. This seems generous, but the Claimant is not in a position to object. The Secretary of State is in a better position than the Claimant to assess the quantity of evidence and documentation that will be before the court.

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NAINA PATEL

Landmark Chambers

Blackstone Chambers

4 March 2010

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CHRONOLOGY

18.8.09	Claim lodged [A1]
25.9.09	Acknowledgement of Service [B24]
	First Witness statement of Adam Chapman [B21]
16.10.09	Response to Summary Grounds [B55]
29.10.09	Defendant's Rejoinder [B74]
9.12.09	Letter from Tsol withdrawing undertaking re BIOT Commissioner [B135]
11.12.09	Second Witness statement of Adam Chapman [B141]
16.12.09	Order of Cranston J for rolled up hearing [B149]
27.1.10	Defendant reinstates undertaking re BIOT Commissioner [B175]
29.1.10	Claimant sends draft directions [B177]
2.2.10	Defendant proposes directions for three preliminary issues [B183]
3.2.10	Claimant responds on Defendant's proposed preliminary issues [B191]
5.2.10	Claimant issues application for hearing for directions [B203]
2.3.10	Claimant serves skeleton argument on court and indicates ready to exchange with Defendant
3.3.10	(5.30pm) Defendant serves Note with new proposed directions
	(7.40pm) Claimant serves skeleton argument on Defendant
4.3.10	Hearing

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