Case No: T1/2009/2331

Neutral Citation Number: [2010] EWCA Civ 65

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DIVISIONAL COURT
Lord Justice Thomas and Mr Justice Lloyd-Jones

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE MASTER OF THE ROLLS
and
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

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Between :

The Queen on the application of Binyam Mohamed	**Respondent**
- and -	
The Secretary of State for Foreign and Commonwealth Affairs	**Appellant**

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- -

Jonathan Sumption QC, **Pushpinder Saini QC** and **Karen Steyn** (instructed by **The Treasury Solicitor**) for **the Secretary of State for Foreign and Commonwealth Affairs**;
Dinah Rose QC, Ben Jaffey and Tom Hickman (instructed by **Leigh Day**) for **Binyam Mohamed**;
Thomas de la Mare and **Martin Goudie** (instructed by **The Treasury Solicitor's Special Advocates Support Office**) as Special Advocates for **Binyam Mohamed**;
Gavin Millar QC and **Guy Vassall-Adams** (instructed by **Jan Johannes**) for **Guardian News and Media Ltd, British Broadcasting Corporation, Times Newspapers Limited, Independent News and Media Ltd** and **The Press Association**;
Geoffrey Robertson QC and Alex Gask (instructed by **Finers Stephens Innocent**) for **The New York Times Corporation, The Associated Press, the Washington Post, the LA Times and Index on Censorship**.
Michael Beloff QC (instructed by **Liberty** and **JUSTICE**)
by way of written submissions.

Hearing dates: 14 -16 December 2009

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Judgment

The Lord Chief Justice of England and Wales:

1. Every manifestation of the ghastly terrorist attack against the United States of America which took place on 11th September 2001 shocked us all. The international dimension of terrorism was subsequently demonstrated by murderous attacks elsewhere, not least in Madrid and then, in July 2005, in London. The threat of further terrorist attacks, and the desperate need to defeat terrorism, if possible through international co-operation, forms the unchanging background to the issues which arise in this litigation.

2. This is an appeal brought by the Secretary of State for Foreign and Commonwealth Affairs ("the Foreign Secretary"), against a decision of the Divisional Court (Thomas LJ and Lloyd Jones J) to include seven short subparagraphs ("the redacted paragraphs" which are now set out in an appendix at the end of the judgments) in the open version of a judgment ("the first judgment"), notwithstanding the fact that the Foreign Secretary had stated in more than one Public Interest Immunity Certificate ("certificate") that such publication would lead to a real risk of serious harm to the national security of the UK.

3. The issue whether or not the redacted paragraphs should be published has required us to address fundamental questions about the relationship between the executive and the judiciary in the context of national security in an age of terrorism and the interests of open justice in a democratic society.

4. I have studied the judgments of Lord Neuberger MR and Sir Anthony May PQBD in draft. I gratefully adopt their summaries of the essential facts and arguments. In view of the important issues which arise in the appeal, I shall give a relatively brief judgment of my own, from which it will emerge that, subject to differences of emphasis, I agree that the appeal should be dismissed.

5. The working relationships between the intelligence services of different countries (in this case, the United Kingdom (UK) and the United States of America (USA)) are subject to an understanding of confidentiality, described as the control principle. This confidentiality is vested in the country of the services which provides the information: it *never* vests in the country which receives the information. The redacted paragraphs are based on information derived by our intelligence services from the intelligence services of the USA. The Foreign Secretary was unable to persuade the Divisional Court that their publication would constitute a danger to the national interest and public safety in this country of such magnitude that it overwhelmed any other considerations. The appeal was advanced by Mr Jonathan Sumption QC on the basis that the Divisional Court's decision was in many respects "unnecessary and profoundly damaging to the interests of this country", and indeed that part of the reasoning of the Divisional Court was "irresponsible".

6. Like any other litigant, but no more than any other litigant, the Foreign Secretary, through counsel instructed on his behalf, was and remains entitled to advance robust submissions before this court, critical of the decision. The question for us is whether this appeal should be allowed. No advantage is achieved by bandying deprecatory epithets. Nevertheless at the very outset I shall record that even a cursory examination of the history of this litigation demonstrates the painstaking care with which the Divisional Court addressed the public interest arguments advanced by the

Foreign Secretary. The approach of the Divisional Court to the questions requiring its decision represented an exemplary model of judicial patience. Even if at the end of the argument I had disagreed with the Divisional Court there can be no doubt that its judicial responsibilities were discharged with scrupulous regard to the many difficult questions to which the litigation gave rise and with a clear understanding of the potential significance of an order that the redacted paragraphs should be published.

7. The following open judgments were given by the Divisional Court: 21st August 2008 [2008] EWHC 2048 (Admin); 29th August 2008 [2008] EWHC 2100 (Admin); 22nd October 2008 [2008] EWHC 2519 (Admin); 4th February 2009 [2009] EWHC 152 (Admin); 31st July 2009 [2009] EWHC 2048 (Admin); 16th October 2009 [2009] EWHC 2549 (Admin); 19th November 2009 [2009] EWHC 2973 (Admin). The open judgments extended to over 500 paragraphs, themselves in many cases then divided into sub-paragraphs. They cover nearly 150 closely typed pages of the Weekly Law Reports [2009] 1WLR 2579 and 2653. In the first judgment issues of principle were addressed and decided: none is the subject of an appeal. In the subsequent judgments the redaction question was reconsidered more than once in the light of ongoing developments and unanticipated problems. Anyone seeking a close understanding of the detailed facts as well as the issues which arose for decision should examine the open judgments in chronological order.

8. In addition to these open judgments, two further judgments require attention. First, on the same day that the first open judgment was handed down, a detailed comprehensive judgment, addressing evidence which had been given in closed session was prepared by the Divisional Court. The court recognised that it would be contrary to the public interest for its contents to be published. Whether or not the redacted paragraphs are published, the status of the closed judgment will be maintained.

9. The second judgment was delivered in the USA on 19th November 2009 in the District Court for the District of Columbia (Civil Action No. 05-1347 (GK) in *Farhi Saeed Bin Mohamed v Barack Obama*. Although some parts of the judgment are redacted, it is a public judgment which addresses issues of material importance to this appeal. Self evidently it was not before the Divisional Court when its sixth open judgment was handed down, and it was drawn to our attention after the conclusion of the arguments on the appeal.

Terrorism

10. Terrorism is a constant threat both here and abroad. An incident in an aeroplane flying to the USA over this Christmas period demonstrates its ever present nature. In this country some terrorist plots have succeeded, with catastrophic results. They have succeeded abroad, with similar catastrophic results. Other plots have failed. And thanks to reliable intelligence and meticulous investigation, yet other plots have been identified and foiled before they could come to fruition. It is difficult to exaggerate the value of good intelligence and its contribution to the safety and wellbeing of the nation. Just as terrorism is international, so the process of intelligence gathering needs to be international. Intelligence comes from many sources, some at home, some abroad. Co-operation between the intelligence services of friendly nations is a critical element in the battle against the terrorist and without mutual inter-dependence based on trust, the risks would be almost irremediably heightened.

11. Mr Sumption observed that "the intelligence relationship between the United Kingdom and the United States is by far the most significant relationship the United Kingdom has from the point of view of internal security and the protection of broader international interest". He reminded us that the relationship had, for many years, been "highly productive". There is no reason to minimise the inestimable contribution made to public safety by the longstanding co-operation between the intelligence services of this country and those of the USA. It is a relationship between allies, and the provision of valuable assistance is not one-way traffic.

12. The opinion of the Foreign Secretary, expressed in unequivocal terms in three PII applications, is that the publication of the redacted paragraphs would damage the intelligence sharing arrangements between this country and the USA, between this country and our allies, and the USA and its allies. If the redacted paragraphs are published the USA will "review" the workings of the present intelligence sharing arrangements. Quite apart from any formal "review", publication may also serve to stultify many of the less formal arrangements which currently work to the advantage of the battle against terrorism. Accordingly the control principle must be upheld in its full rigour. On the findings of the Divisional Court, this opinion is formed and held by the Foreign Secretary in good faith.

13. To put these contentions into immediate perspective, it is not suggested that there is anything in the redacted paragraphs themselves which would involve a breach of security, or disclose what may be summarised as intelligence material, such as names, or places, or means of communication, the disclosure of which would, of itself damage the national interest. Moreover it is no secret – and indeed it has been an unbroken theme of the Foreign Secretary's position – that there is a close intelligence sharing arrangement between the UK and the USA. If the redacted paragraphs do not themselves contain secret or intelligence material, and the intelligence sharing arrangements between the UK and the USA are publicly declared, one may enquire why the redaction is necessary. In essence it comes to this: unless the control principle prevails, the intelligence sharing arrangements between the USA and the UK will be reviewed, and following the review may, not will, become less "productive" to presumably, the disadvantage of both countries, although I shall assume to the much greater disadvantage of the UK. The Foreign Secretary believes that such consequences will inevitably follow any contravention of the control principle, whatever the circumstances in which or the reasons for the court's decision that it should be disapplied. The difficulty therefore arises from the control principle itself, and its application in troubled times.

Torture

14. Information about terrorist plots is needed in sufficient time to expose them before they come to murderous fruition. The urgency notwithstanding, the use of torture – and any of the euphemisms which describe it – to obtain information from those believed to be in possession of useful information about terrorist plots is outlawed. The prohibition against torture has two facets. First, it is condemned, in effect on the grounds of common humanity, perhaps best illustrated in the principles which underpin the Geneva Conventions and provide protection against the ill-treatment of prisoners of war. One of the problems with those detained with Mr Mohamed in Guantanamo Bay is that they were originally described as "enemy combatants" who were not prisoners of war and whose treatment was therefore not governed by the

Geneva Conventions. Second, in any event, the fruits of torture cannot provide incriminating evidence against the defendant. The United Nations Convention against Torture or other Cruel Inhuman or Degrading Treatment or Punishment requires that the administration of justice 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". In short, it cannot be used as incriminating evidence against the person who has been subjected to torture.

15. In the proceedings by *Farhi Saeed Bin Mohamed* the USA Government was required to address both federal and international law about the admissibility of evidence procured by torture and evidence procured from an individual who had been tortured prior to providing the evidence upon which the Government intended to rely. In response the Government represented that it "recognises torture to be abhorrent and unlawful, and unequivocally adheres to humane standards for all detainees…consistent with these policies and with the treaty obligations imposed by the Convention on the United States as a State Party, the Government does not and will not rely on statements it concludes were procured through torture in the Guantanamo habeas litigation". (p58)

16. In doing so, although the Government of the USA referred to the United Nations Convention, it was endorsing ancient common law principles to which it is perhaps worth emphasising, both our countries are the heirs. In his Third Institute, Sir Edward Coke wrote:

> "There is no law to warrant tortures in this land, nor can they be justified by any prescription being so lately brought in",
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> and referring to Chapter 39 of Magna Carta he continued:
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> "…All the said ancient authors are against any paine or torment to be put or inflicted on the prisoner before attainder, nor after attainder, but according to the judgment. And there is no one opinion in our books, or judicial record (that we have seen and remember), for the maintenance of torture or torments."

Sir Thomas Smith, Queen Elizabeth I's Secretary of State, declared:

> "Torment…, which is used by order of the civill lawe and custome of other countries, to put a malefactor to excessive paine, to make him confesse of himselfe, or of the fellowes or complices, is not used in England, it is taken for servile. The nature of our nation is free, stoute, haulte prodigall of life and bloud; but contumelie, beatings, servitude, and servile torment and punishment it will not abide. "

17. It is irrelevant to this judgment to investigate how both writers were able to reconcile these observations with the warrants of torture which based on the Royal Prerogative, emerged from the Privy Council. In any event the Civil War disposed even of these warrants, and by then, brave souls had already made the hazardous journey across the Atlantic to avoid them.

18. In *A No (2)* [2006] 2AC 221 these ancient principles were re-emphasised in the House of Lords. Lord Bingham of Cornhill observed:

> "It is, I think, clear that from its very earliest days the common law of England set its face firmly against the use of torture…it trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained torturing another human being may lawfully be admitted against a party to proceedings in a British court irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer…the principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention…. "

19. Lord Nicholls of Birkenhead expressed the principle in equally robust terms.

> "My Lords, torture is not acceptable. This is a bedrock moral principle in this country. For centuries the common law has set its face against torture…"

He noted that following Felton's case in 1628, no further torture warrant was issued by the Privy Council, nor, after 1640, was any warrant for torture issued by the King under his own signet.

He continued:

> "If an official or agent of the United Kingdom were to use torture, or connive at its use, in order to obtain information this information would not be admissible in court proceedings in this country. That is not in doubt."

20. Lord Hoffmann, after noting that Blackstone had recorded the historic decision of the judges in Felton's case, emphasised

> "The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of suspects to countries where they would be tortured…"

The rejection of torture has "a constitutional resonance for the English people which cannot be over-estimated". Lord Hoffmann's reference to Blackstone was not accidental. Published in 1765, his Commentaries on the Laws of England "had a significant influence on the legal profession in Britain, but it was in North America that his work made its greatest impression" (Jean Edward Smith in the Life of Chief Justice John Marshall at p77).

21. No further citation is necessary, but there is an equal resonance in the USA, well illustrated by the way in which the language in which the House of Lords condemned the use of torture was echoed by the then Senator Obama in April 2007, when he said:

> "The secret authorisation of brutal interrogation is an outrageous betrayal of our core values, and a grave danger to our society…when I am president America will once again be the country that stands up to these deplorable tactics. When I am president, we won't work in secret to avoid honouring our laws and constitutions, we will be straight with the American people and true to our values."

Following his inauguration President Obama issued a statement recording that one of his first acts as president will involve the prohibition of:

> "The use of these interrogation techniques by the United States because they undermine or moral authority and do not make us safer. Enlisting our values in the protection of our people makes us stronger and more secure. A democracy as resilient as ours must reject the false choice between our security and our ideals, and that is why these methods of interrogation are already a thing of the past… "

22. In expressing himself in this way, President Obama was reflecting a visceral, intuitive view of the principle identified in the United States Supreme Court in *Rochin v California* [1952] 342 US 165 which, after referring to the due process clause of the Constitution of the USA, spoke of proceedings which "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples (p169) and endorse the "general principle" that "states in their prosecutions respect certain decencies of civilised conduct" (p173). Most graphically, in *Brown v Mississippi* [1936] 297 US 278, referring back to ancient days before the foundation of the United States, the Supreme Court asserted in terms "the rack and torture chamber may not be substituted for the witness stand".

23. The problem in this case is not that Mr Mohamed was tortured in the UK. He was, however, subjected to torture. In *Farhi Saeed Bin Mohamed*, it is publicly recorded that "the Government does not challenge or deny the accuracy of Binyam Mohamed's story of brutal treatment (p58)…the account in Binyam Mohamed's diary bears several indicia of reliability (p61)." Note is taken of his "willingness to test the truth of his version of events in both the courts of law as well as the court of public opinion" (p62). Towards the end of its judgment two specific matters are recorded:

> "(a)…[Mr Mohamed's] trauma lasted for 2 long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculpate himself and others in various plots to imperil Americans. The Government does not dispute this evidence."(p64)

> "(b) In this case, even though the identity of the individual interrogator changed (from nameless Pakistanis, to Moroccans, to Americans, and to special agent (the identity is redacted)), there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States (p68)…The court finds that [Mr Mohamed's] will was overborne by his lengthy prior torture, and therefore his confessions to special agent…do not represent reliable evidence to detain petitioner".

24. True to our shared traditions the District Court of Columbia made its findings publicly available. The courts in the United States, upholding the principles of open justice, have publicly revealed the essence of Mr Mohamed's complaint and the circumstances of his detention. This provides an important aspect of my examination of the Foreign Secretary's reliance on public interest immunity based on the control principle. Although Mr Mohamed is now discharged from the danger of proceedings in the USA, whether capital, or otherwise, there was a time when he was exposed to a genuine and serious risk that if convicted he would be executed. It was to address the risk of his conviction for a capital offence that the present proceedings were launched in this country against the Foreign Secretary. The redacted paragraphs formed part of the reasons of the court in a judgment which vindicated Mr Mohamed's assertion that UK authorities had been involved in and facilitated the ill-treatment and torture to which he was subjected while under the control of USA authorities.

The claim for disclosure

25. The claim for an order quashing the refusal of the Foreign Secretary to provide Mr Mohamed with the evidence held by the UK Government and intelligence services which supported his claim that he had been subjected to torture and cruel inhuman or degrading treatment by or on behalf of the USA government and for disclosure of material in the hands of the UK was based on *Norwich Pharmacal Co, The Customs and Excise Comrs* [1974] AC 133. The principle identified by Lord Reid (at p175) remains as secure now as it did some 35 or so years ago:

> "If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing 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 a

> voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. Justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

26. Lord Morris of Borth-y-Gest spoke of such liability arising where an individual became "actually involved (or actually concerned) in some transactions or arrangements as a result of which he has required the information" (p178): Viscount Dilhorne brought the person involved in the transaction or involvement or participation in the wrongdoing within the principle (p188): Lord Cross supported the principle, and referred to the "nature of the relation which subsists or subsisted between the defendant to the action for discovery and the person the disclosure of whose name is sought" (p199): Lord Kilbrandon (at p203) described how the plaintiff was seeking to establish that third parties to the litigation had unlawfully caused him damage, and the order was sought to assist him to justify a claim in law, "the policy of the administration of justice demands this service from him".

27. The principles were again summarised in *Ashworth Hospital v MGN* [2002] 1WLR 2003, where at paragraph 30, Lord Woolf derived this principle from the speeches in *Norwich Pharmacal*:

> "They make it clear that what is required is involvement or participation in the wrongdoing and that, if there is the necessary involvement, it does not matter that the person from whom discovery was sought was innocent and in ignorance of the wrongdoing by the person whose identity it is hoped to establish."

28. The initial response of the Foreign Secretary was to resist the *Norwich Pharmacal* claim. In his Summary Grounds of Resistance the claim was said to be "unarguable", and the allegation "that the UK government has been "mixed up" in, so as to facilitate it, the alleged wrongdoing (by USA authorities) is untrue". It was averred that "no department or agency of the UK government was involved in the claimant's alleged torture in Morocco and Afghanistan. Nor has the UK government done anything to facilitate the Claimant being subjected to torture". The contention was effectively repeated in the Detailed Grounds of Resistance. "…the pleaded case on facilitation wholly fails. That is an end of the application….".

29. Identifying the essential question as, "did the United Kingdom Government through the SyS or SIS and its agents become involved in or participate in the alleged wrongdoing through facilitating it?", the Divisional Court reached conclusions adverse to the UK services on the issue of their facilitation and involvement in Mr Mohamed's wrongful detention and treatment by the USA authorities. The *Norwich Pharmacal* principle applied even if Mr Mohamed established no more than that the UK services had participated innocently in the wrongdoing to which Mr Mohamed was subjected by the USA authorities. Knowledge of such wrongdoing was not an essential ingredient of the claim. "Relief under the *Norwich Pharmacal* principle is an exceptional remedy and its application to the present circumstances is unprecedented. We have carefully weighed all the circumstances and considered whether we should extend the relief to the claim made in this case. We have concluded, subject to issues

of public interest immunity and similar considerations that would also affect the exercise of our discretion, that we will, in the unique circumstances of this case, order the provisions of the specific information" relevant to Mr Mohamed himself rather then more general information framed in wider terms.

30. The present claim arose from a combination of circumstances which were not directly addressed in *Norwich Pharmacal,* nor indeed in any of the subsequent decisions where the *Norwich Pharmacal* principle was applied. Given the involvement of the UK authorities in the wrongdoing of which Mr Mohamed was a victim when he was in the control of USA authorities, the Divisional Court concluded that the *Norwich Pharmacal* principle is wide enough to encompass the disclosure of material in the possession of UK authorities which would enable Mr Mohamed to demonstrate that he had a genuine answer to the allegation against him, and/or that major elements of the evidence against him were inadmissible. Indeed the conclusion of the Divisional Court on this issue (with which I agree) is not questioned in this appeal. If it was appropriate for the order to be made, the fact that it arose in unprecedented circumstances is, as it seems to me, irrelevant to the redaction issue.

31. For the avoidance of doubt, I do not seek to impose on the Foreign Secretary, or indeed any other Minister of the Crown, some sort of disclosure obligation, similar to that owed in this jurisdiction by the prosecutor, to disclose any material available which may assist the defence or undermine the prosecution. Any claim must be substantiated as it was here, to the satisfaction of the Divisional Court, in proceedings directly addressing the claim for disclosure based on involvement or facilitation of wrongdoing in accordance with *Norwich Pharmacal* principles, and further, as here, that there were indeed solid grounds for believing that the UK Government was in possession of exculpatory material.

32. The redacted paragraphs therefore arise for consideration in the context of the findings relating to the involvement and facilitation by UK authorities in wrongdoing. Paragraph 87 of the first judgment summarises the findings of the Divisional Court on this issue. It follows a close analysis of the relevant principles and a summary of the oral evidence. Sub-paragraph (iv) explains, as far as possible in the context of the redacted paragraphs, what the seven redacted paragraphs contain. The entire paragraph reads:

> " (i) The SyS and the SIS were interested in [Mr Mohamed] because of his residence in the United Kingdom, his connection with suspected persons in the United Kingdom, the period of time spent in Pakistan and Afghanistan, those whom he was said to have been with and the gravity of the allegations made against him at the time.
>
> (ii) We have no doubt that on the basis of that information the SIS and SyS were right to conclude that [Mr Mohamed] was a person of great potential significance and a serious potential threat to the national security of the United Kingdom. There was therefore every reason to seek to obtain as much intelligence from him as was possible in accordance with the rule of law and to co-operate as fully as possible with the US authorities to that end.

(iii) It was clear from reports that [Mr Mohamed] was held incommunicado from 10 April 2002 whilst a series of interviews was conducted by the US authorities in April 2002 during which he had asked for a lawyer and had been refused.

(iv) In May 2002, the SyS and the SIS received reports containing information relating to [Mr Mohamed's] detention and treatment in Pakistan. The details of the reports are set out in the closed judgment.

(v) Our finding after the hearing was that the probability is that Witness B read the reports either before he left for Karachi or before he conducted the interview. Since the hearing we have been provided with the documents to which we have referred at para 17 above, which show a briefing document was prepared for sending to him.

(vi) If contrary to the finding which we made after the hearing, Witness B had not read them prior to going to Karachi or after arrival at Karachi and prior to the interview, we have no doubt that other persons within the SyS, including persons senior to Witness B, must have read the reports and must have appreciated what they said about [Mr Mohamed's] detention and treatment at Karachi. Those officers should have drawn to the attention of Witness B these matters either before or after the interview. It is now clear that the reports were studied by other desk officers.

(vii) In the light of Witness B's continued involvement with [Mr Mohamed] and the importance attached to [Mr Mohamed] by the SyS, it is inconceivable that he did not carefully read the materials after his return.

(viii) During the interview Witness B saw himself as having a role to play in conjunction with the US authorities in inducing [Mr Mohamed] to co-operate by making it clear that the United Kingdom would not help unless [Mr Mohamed] co-operated. We can well understand why, given the exigencies of the time Witness B put matters in such stark terms as he did. It is clear that what he said to [Mr Mohamed] was, in effect, that the United Kingdom would not attempt to assist him unless [Mr Mohamed] persuaded him that he was co-operating fully with the US authorities.

(ix) By 20 September 2002, it was clear to the SyS that [Mr Mohamed] was being held at a covert location (either by the authorities of the United States or under the direct control of the United States) which was not a US military facility, such as Bagram. It is clear to us that they knew that he was not in a regular US facility, that the facility in which he was being detained and questioned was that of a foreign government

(other than Afghanistan) and that the US authorities had direct access to information being obtained from him.

(x) The SyS were supplying information as well as questions which they knew were to be used in interview of [Mr Mohamed] from the time of his arrest whilst he was held incommunicado and without access to a lawyer or review by a court or tribunal. They continued to supply information and questions after they knew of the circumstances of [Mr Mohamed's] detention and treatment as contained in the reports of the series of interviews in May 2002 and after September 2002 when they knew the circumstances related to his continued detention which we have described in (ix) above. "

33. The first open judgment plainly proceeded on the basis that the redacted paragraphs should be included. At the date of the fourth judgment the Divisional Court was persuaded otherwise, but having re-opened the fourth judgment and re-examined the problem, the conclusion was that the redacted paragraphs should be included in the open judgment: hence this appeal.

Open Justice

34. The omission of the redacted paragraphs will have a number of undesirable consequences. A public judgment will be incomplete. Mr Mohamed will be deprived of the full reasons which led the court to conclude that, notwithstanding the initial rejection of his claim of involvement in wrongdoing by UK authorities, it was not merely sustainable, but amply vindicated, whereas the Foreign Secretary, whose initial stance was to deny that there was any basis or justification for Mr Mohamed's claim, will have access to all of the court's reasoning. This facility will extend to the UK intelligence services, notwithstanding that the redacted paragraphs are directly relevant to the adverse findings against them. As already recorded, the Divisional Court acquitted the Foreign Secretary of any element of bad faith or improper manipulation of the process. However the stark fact remains that if the redacted paragraphs are not revealed to Mr Mohamed, the parties to this litigation will not be treated equally. Although this may be a necessary consequence of the application of the wider public interest, as a matter of principle, and for obvious reasons, this is always undesirable, not least because it almost inevitably and unsurprisingly leads to a sense of grievance in the mind of the party subjected to this disadvantage. In this particular case, the problem is aggravated by the reality that the claim for continued redaction is advanced by the Foreign Secretary who has ultimate responsibility for the SIS whose conduct is successfully impugned by Mr Mohamed

35. Mr Mohamed has undoubtedly achieved the objective of the litigation he brought against the Foreign Secretary. He no longer needs the material which was in the possession of the UK authorities to achieve his acquittal. It can indeed be safely assumed that proceedings based on the confessions while he was held incommunicado at the behest of the USA authorities will never again be contemplated. It therefore follows that later events made disclosure of the redacted paragraphs "unnecessary" and "gratuitous" in the limited sense that Mr Mohamed is no longer at risk of prosecution on a capital charge. Putting it shortly, he has won. That however is not

the whole story. At the time when the redacted paragraphs (excluding the redacted paragraph from the sixth judgment which was based on the redacted seven sub-paragraphs themselves) were intended to be included in the open judgment, Mr Mohamed was still held in Guantanamo Bay, at risk of a capital charge, and the redacted paragraphs formed an essential part of the court's reasoning that he was entitled to the relief he was seeking.

36. Mr Mohamed is now taking civil proceedings for damages against the UK government, in effect for their tortious involvement in the wrongdoing of the USA authorities. Disclosure of the redacted paragraphs is therefore said to be the more imperative. However Mr Mohamed's civil proceedings should and will take whatever course is appropriate in those proceedings. If and when it becomes necessary to address the material relevant in those proceedings through the discovery process, the problem will have to be addressed. The fact that civil proceedings have been taken by Mr Mohamed does not, of itself, advance the argument for the open publication of the redacted paragraphs. If the Foreign Secretary will not make the desired concession in Mr Mohamed's civil proceedings, the court will make whatever decision is appropriate in those proceedings.

37. Quite apart from Mr Mohamed's personal interest in seeing the full and complete reasoning of the court, there was considerable discussion about the principle of open justice generally, and as it might affect the media. This developed along familiar lines. From time to time judges of the highest distinction have identified the reasons which underpin this principle, naturally enough, in the overall context of the possible application of the principle to the individual case. For present purposes I derive the following principles from the authorities.

38. Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.

39. There is however a distinct aspect of the principle which goes beyond proper scrutiny of the processes of the courts and the judiciary. The principle has a wider resonance, which reflects the distinctive contribution made by the open administration of justice to what President Roosevelt described in 1941 as the "…first freedom, freedom of speech and expression". In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.

40. Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights. Each element of the media must be

free to decide for itself what to report. One element would report those matters which reflect its distinctive social or political stance, and a different section of the media will report on different matters, reflecting a different, distinctive position. This may very well happen with this judgment, reflecting the diversity of the media, and symbolising its independence. In short, the public interest may support continuing redaction, or it may not. If it does not, each element of the media will decide for itself what, if anything, to publish. In the context of two further features of the evidence I should add that the investigative role of the media exists independently of the principle of open justice, and that the right of the media to enlist the assistance of legislation like the Freedom of Information Act to acquire access to information is similarly distinct. Neither diminishes the principle of open justice.

41. Although expressed in wide and general terms – and perhaps inevitably so expressed – in my judgment the principles of freedom of expression, democratic accountability and the rule of law are integral to the principle of open justice and they are beyond question. They do not enable the media to require parties to litigation to continue it if they do not wish to do so in order for the media to have a better story, or permit the media to study material which has been made subject to non-disclosure on well established PII principles, or to report proceedings where, in the interests of justice, by operation of law, such reporting is prohibited. It is, of course, elementary that the courts do not function in order to provide the media with copy, or to provide ammunition for the media, or for that matter private individuals, to berate the government or the opposition of the day, or for that matter to berate or laud anyone else. They function to enable justice to be done between parties. However where litigation has taken place and judgment given, any disapplication of the principle of open justice must be rigidly contained, and even within the small number of permissible exceptions, it should be rare indeed for the court to order that any part of the reasoning in the judgment which has led it to its conclusion should be redacted. As a matter of principle it is an order to be made only in extreme circumstances.

42. The open justice principle (by which I include the ordinary right of all the parties to litigation to know the reasons for the decision of the court) is undiminished either by the possible exercise by the Intelligence and Security Committee of its responsibilities to inquire into possible wrongdoing by the intelligence services or by the responsibility of the Attorney General to authorise criminal proceedings against any member of the services who may have committed a criminal offence. These are distinct elements of our arrangements which serve to ensure that the rule of law is observed, but they do not impinge on the principles of open justice.

Control Principle

43. The effective combating of international terrorism involves mutual co-operation and intelligence sharing. There is no obligation on the intelligence services of any country to share intelligence with those of any other country. The relationships cannot be considered in contractual or commercial terms. The process is entirely voluntary. The arrangements are not permanent, and they are not set in stone. Either country can end the relationship, or alter it, and certainly review it at any time, for good reason, or for none. Although in the modern world national safety is almost inevitably linked with the defeat of terrorism and international crime whenever and wherever they may arise, the first responsibility of any intelligence service is the safety of the country it serves.

44. At the risk of repetition, in general terms, it is integral to intelligence sharing arrangements that intelligence material provided by one country to another remains confidential to the country which provides it and that it will never be disclosed, directly or indirectly, by the receiving country, without the permission of the provider of the information. This understanding is rigidly applied to the relationship between the UK and USA. However although confidentiality is essential to the working arrangements between allied intelligence services, the description of it as a "control principle" suggests an element of constitutionality which is lacking. In this jurisdiction the control principle is not a principle of law: it is an apt and no doubt convenient description of the understanding on which intelligence is shared confidentially between the USA services and those in this country, and indeed between both countries and any other allies. If for any reason the court is required to address the question whether the control principle, as understood by the intelligence services, should be disapplied, the decision depends on well understood PII principles. As the executive, not the judiciary, is responsible for national security and public protection and safety from terrorist activity, the judiciary defers to it on these issues, unless it is acting unlawfully, or in the context of litigation, the court concludes that the claim by the executive for public interest immunity is not justified. Self evidently that is not a decision to be taken lightly.

45. The Foreign Secretary's first PII certificate referred to the uncertainty which would be introduced into the working relationship between this country and the USA if disclosure were ordered. The second PII certificate stated in terms that "disclosure of US intelligence information by order of our Courts would breach the trust and the fundamental requirement for confidentiality that lies at the heart of the UK's liaison relationship with the US intelligence agencies…it is not simply confidentiality and the secrecy of intelligence material that is an issue, however, but also the issue of the control that one government has over the intelligence information that it shares with another government in the expectation of confidentiality…Breaching this principle will have significant implications that run far more broadly than this case". The third PII certificate, acknowledging that the UK courts had power "in principle to disclose information provided by a foreign liaison service or derive from such information without the consent of the provider (and even against its expressed will)", concluded that the exercise of the power would be "extraordinary". That was close to the Foreign Secretary's assertion in the meeting with Secretary of State Clinton on 12 May that "the British Government would continue to make the case that it continued to be an inviolable principle of intelligence co-operation that we did not give away other people's secrets". An "inviolable" principle does not appear to acknowledge or permit of any exceptions. Expressed in this way the control principle assumes a level of primacy which diminishes the responsibility of the court as the ultimate decision maker virtually to extinction.

46. It is nevertheless accepted by and on behalf of the Foreign Secretary in this litigation that in our country, which is governed by the rule of law, upheld by an independent judiciary, the confidentiality principle is indeed subject to the clear limitation that the government and the intelligence services can never provide the country which provides intelligence with an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so. The acknowledgement that the control principle is qualified in this way is plainly correct, and it appears to be accepted that the same

limitation on the control principle would apply in the USA. Presumably therefore our intelligence services accept that although the control principle applies to any information which they disclose to their colleagues in the USA, the ultimate decision on disclosure would depend on the courts in the USA, and not the intelligence services, or for that matter the executive. Although the Foreign Secretary accepts that the principle is not absolute, he contends that, having made his own examination of the overall interests of justice, the control principle should be upheld. On the basis of all the evidence including the Sensitive Schedules, I have been unable to eradicate the impression that we are being invited to accept that once the Foreign Secretary has made his judgment of all the relevant considerations, including the interests of justice, and notwithstanding that in law the control principle is not absolute, so far as the court is concerned, as a matter of practical reality, that should be that. However although in the context of public safety it is axiomatic that his views are entitled to the utmost respect, they cannot command the unquestioning acquiescence of the court.

47. In the present appeal the Divisional Court made the judgment that in all the circumstances, notwithstanding that the responsible Minister acting in good faith asserted that the interests of national security required the redaction of the relevant paragraphs, they should nevertheless be included in the open judgment. The question is whether that judgment was correct.

Conclusion

48. In agreement with the Master of the Rolls and the President of the Queen's Bench Division, in my judgment, this appeal should be dismissed. By way of emphasis, and so as to disclose my own approach to the problem, I shall briefly highlight what seem to me to be the most important considerations.

49. I have no difficulty in acknowledging the centrality of the control principle or confidentiality to intelligence sharing arrangements and no inclination to underestimate their importance to national security. I am therefore acutely conscious of the arguments advanced and information provided by the Foreign Secretary in the open applications for PII and indeed in the Sensitive Schedules.

50. Nothing in this judgment should be seen as devaluing the confidentiality principle, and the understanding on which intelligence information is shared between this country and the USA. It is clearly established that the publication of the redacted paragraphs will result in a review of these sharing arrangements. The review might or might not produce a change. There is a clear risk, and the Foreign Secretary believes, that any such review would culminate in new, and from the point of view of national security, disadvantageous arrangements. However that risk would be the inevitable concomitant of any occasion when the court decided to reject the claim to preserve confidentiality on public interest immunity grounds.

51. The enormous concentration on the redacted paragraphs may have led us to overlook that this litigation has endorsed the application of public interest immunity and the maintenance of confidentiality over secret information. The Divisional Court has in effect upheld and applied PII principles to a vast body of material. Set against the redacted paragraphs over which the argument has ranged for something like 18 months there is, it must be remembered, a very lengthy closed judgment, not the subject of any further litigation, produced by the Divisional Court when the first open

judgment was handed down. It is clear that the crucial importance of the confidentiality principle was recognised by the Divisional Court and in overwhelmingly large measure applied by it. This litigation therefore demonstrates that the courts in the UK treat the confidentiality principle with the importance it requires, and have endorsed it in this litigation.

52. I therefore repeat that (and unless the redacted paragraphs are published, what follows depends on my assertion) publication of the redacted paragraphs would not reveal information which would be of interest to a terrorist or criminal or provide any potential material of value to a terrorist or a criminal. The redacted paragraphs do not, for example, identify methods of surveillance currently unknown to potential terrorists, or reveal the methods employed by the security and intelligence services to penetrate terrorist groups. Indeed it seems right to emphasis that the publication of the redacted paragraphs would not and could not, of itself, do the slightest damage to the public interest. Equally, again by way of repetition, it is public knowledge, and clear from the open judgments and the submissions made on behalf of the Foreign Secretary, that there is and for many years has been an intelligence sharing relationship between the UK and the USA. No one can doubt it. Certainly, no on can conceal it. Moreover a close analysis of the redacted paragraphs in the context of all the open judgments would demonstrate that in reality they do not contain anything which cannot be read or inferred from the existing open judgments. For example, paragraph 87(iv) of the first open judgment is itself revealing about the detention of Mr Mohamed and the involvement of our intelligence services with him. It records that the "details of the reports" are set out in the redacted paragraphs. It is also clear from the open judgments that these reports were received by the intelligence services while Mr Mohamed was detained in Pakistan, when he was being interviewed by US authorities.

53. Without going into this material in detail, it increasingly appears that the issue is the control principle rather than the confidentiality of any information within the redacted paragraphs themselves. In other words the appeal concerns an application for PII, not for the purposes of protecting secret material, but to ensure that the control principle is upheld.

54. If it is not, the inevitable review would presumably reflect that the Foreign Secretary had done everything he lawfully could in the UK to prevent publication, as well as the considerations which led the court, exercising its independent jurisdiction, in large measure to uphold the confidentiality principle in the context of huge quantities of "secret" evidence in the closed judgment, and only after the most remarkably patient analysis of all the relevant considerations, to reject his PII applications. Presumably, too, the review would take into account the potential disadvantages to the battle against terrorism and the security of both countries if the intelligence sharing arrangements were reduced, and address the relationships between allies in a common cause, and with a common understanding of the possibility that it remained open to a court, whether in the UK or the USA, to refuse the PII application.

55. There is no secret about the treatment to which Mr Mohamed was subjected while in the control of the US authorities. We are no longer dealing with the allegations of torture and ill-treatment: they have been established in the judgment of the court, publicly revealed by the judicial processes within the USA itself. And this serves to highlight that the redacted paragraphs represent part of the Divisional Court's

reasoning, directed not to wrongdoing by the USA authorities but involvement in that wrongdoing by our own intelligence services, and the successful argument by Mr Mohamed that he was entitled to the relief he had sought against the Foreign Secretary. In the context of intelligence sharing arrangements, the decision to disclose evidence critical of the USA authorities by a court in the USA does not reflect identical considerations to its possible disclosure by a court in the UK. Nevertheless, there is at least one common theme. The former represents the proper working of the judicial processes in the USA, and although the latter would constitute a breach of the confidentiality arrangements, the breach would be consequent on the proper working of the judicial processes in this country.

56. There is an attractive argument that Mr Mohamed has nothing further to gain from publication of the redacted paragraphs. That, however, is a consequence of his vindication through the operation of the litigation process and the prolonged delay consequent on the apparently endless arguments about the possible publication of the redacted paragraphs. The successful party is no less entitled to know the reasons for the court's judgment than the unsuccessful parties. I have already noted the strange consequence that if the redaction is maintained, Mr Mohamed will know less about the reasons for the court's decision than the intelligence services which, even if innocently, were involved in or facilitated the wrongdoing of which he was the victim. There is a clear interest in Mr Mohamed knowing, and the community at large also knowing, not only that his allegations were vindicated, but also the full reasons (even if not the entirety of the evidence) which led the court to its conclusion. The redacted paragraphs are integral to the reasoning that Mr Mohamed's entitlement to relief fell within the ambit of executive involvement in wrongdoing.

57. In my view, the arguments in favour of publication of the redacted paragraphs are compelling. Inevitably if they contained genuinely secret material, the disclosure of which would of itself damage the national interest, my conclusion might be different. However dealing with this appeal as a matter of practical reality rather than abstract legal theory, unless the control principle is to be treated as if it were absolute, it is hard to conceive of a clearer case for its disapplication than a judgment in which its application would partially conceal the full reasons why the court concluded that those for whom the executive in this country is ultimately responsible were involved in or facilitated wrongdoing in the context of the abhorrent practice of torture. Such a case engages concepts of democratic accountability and, ultimately, the rule of law itself.

58. This appeal should be dismissed.

Lord Neuberger MR:

59. This appeal raises points of fundamental importance, in terms of both practical reality (risk of terrorist attacks, the Government's involvement in alleged torture, international security service cooperation) and constitutional principle (the roles of the executive and the judiciary, the tension between freedom of speech and open justice as against national security and international comity). However, the specific issue

between the parties below seems to me to have been within a very narrow compass indeed, not least because the essence of the content of the redacted paragraphs, set out in the appendix at the end of these judgments, could have been gleaned from available open material, and was in any event already in the public domain. Indeed, in the light of a recent US District Court decision, I question whether there is now any real issue at all.

The factual and procedural history

The background to the first judgment

60. On 6th May 2008, Mr Binyam Mohamed, an Ethiopian national, who had been resident in the United Kingdom between 1994 and 2001, issued proceedings in the High Court for an order that the UK Government supply certain documents on a confidential basis to his lawyers in the United States. He was at that time detained in Guantanamo Bay, and required the documents in order to assist in his defence against charges which he anticipated would be brought against him by the US Government. Those charges, which were essentially based on the allegation that he was involved in terrorist activities, were formally raised on 28th May, and, if established, they could have carried the death penalty. The charges were based, at least in part, on confessions which Mr Mohamed was alleged to have made. He denied any involvement in terrorism and claimed that his confessions were false, having been made to US interrogators as a result of his being subjected to torture, or at least inhuman treatment, and that the documents would help him establish this.

61. As the court explained in paragraph 26 of the first judgment, Mr Mohamed's evidence was that he had been unlawfully arrested in Pakistan on 10th April 2002, and that he was then detained for some 15 weeks from April 2002, without access to a lawyer or a court. During that period, he said that he had been interrogated by US officials, beaten, threatened with a gun, fed only every other day, suspended by his wrists, and given limited access to the lavatory, by the Pakistani authorities, and threatened by US officials with worse treatment elsewhere. As the court went on to say in paragraph 35, Mr Mohamed's evidence was that, in July 2002, he was sent by way of so-called extraordinary rendition by the US authorities to Morocco, where he was interrogated further by US officials, and was beaten, subjected to sleep deprivation and cut on his private parts with a scalpel. In paragraphs 36 to 40, the court recorded that, in January 2004, he was transferred by the US authorities to Afghanistan, first to the "Prison of Darkness" in Kabul, where he was again interrogated by US agents, and "deprived of sleep, starved, and then beaten and hung up", and thence to Bagram in May 2004, where he said he was tortured and subjected to "cruel, inhuman and degrading treatment". He was transported from Bagram in September 2004 to Guantanamo Bay.

62. He was then charged, but the charges were dropped as the procedure involved was condemned as unconstitutional by the US Supreme Court *Hamdan v Rumsfeld* (2006) 548 US 757. It then became apparent that he would be charged again under a new procedure. The charges were, at least in part, based on his alleged confessions. His lawyers decided to seek documentation and information from the UK Government, which they believed would establish that his alleged confessions had been obtained as a result of torture, or at least mistreatment. The UK Government refused to comply with the request on the grounds of national security, and Mr Mohamed accordingly brought an application for disclosure of the documentation in May 2008.

63. Mr Mohamed's application was based on the court's jurisdiction to order a third party who has become involved in wrongdoing to give the victim of the wrongdoing any documentation in the custody of the third party to assist the victim in identifying and pursuing the wrongdoer – see *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, 175 and *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033, paragraphs 30 and 35. As the Divisional Court pointed out in paragraph 72 of the first judgment, it was "not necessary for Mr Mohamed to establish anything more [on the part of the UK Government] 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."

64. The Foreign Secretary voluntarily put written material before the court, much of which was provided on a confidential basis, including 42 documents ("the 42 documents") which comprised information which had been given by the US intelligence services to the Security Service ("SyS"), and the Secret Intelligence Service ("SIS"), on the basis of a well and long established custom and understanding, often called "the control principle", that such information will not be disclosed without the consent of the Government which provided it. The Foreign Secretary's position was that he was not prepared to release these 42 documents without the consent of the US Government, but that he would do his best to encourage the US Government to release them to Mr Mohamed's US lawyers.

The first judgment

65. The hearing of Mr Mohamed's application took place between 28th July and 1st August 2008, and the Divisional Court handed down the first judgment on 21st August (to which it made some amendments in 2009) - [2008] EWHC 2048 (Admin); [2008] 1 WLR 2579. In deciding whether to grant Mr Mohamed the relief which he sought, the court had to consider a number of questions.

66. The first question was whether any wrongdoing had occurred. The court set out Mr Mohamed's evidence on that issue in some detail, and in particular, his descriptions of his mistreatment in Pakistan, Morocco, Kabul, and Bagram (paragraphs 26, 35, 37, and 38 respectively). The court then recorded in paragraph 67 that, as the Foreign Secretary realistically accepted, Mr Mohamed had established an arguable case that he had suffered as a result of wrongdoing, and in particular that:

> "i) After being subject to torture and cruel, inhuman or degrading treatment in Pakistan, he was unlawfully rendered from Pakistan to Morocco by the [US] authorities.
>
> ii) Whilst in Morocco he was subject to unlawful incommunicado detention and torture during his interrogation there by or on behalf of the [US] authorities.
>
> iii) He was unlawfully rendered by the [US] authorities from Morocco to Afghanistan on 21st or 22nd January 2004
>
> iv) He was detained unlawfully and incommunicado at the 'Dark Prison' near Kabul and thereafter at the [US] Air Force base at Bagram.

v) He was tortured or subject to cruel, inhuman or degrading treatment by or on behalf of the [US] authorities in the 'Dark Prison'."

67. In paragraph 68, the court added this:

> "In the light of the concession that there was an arguable case of wrongdoing and in the light of the further concession that it was sufficient for the purposes of obtaining *Norwich Pharmacal* relief if an arguable case of wrongdoing was advanced, it was not necessary for us to determine whether there was in fact any wrongdoing by or on behalf of the [US] Government. It is important to emphasise that we therefore do not do so."

68. The court secondly had to consider whether the UK Government was "involved, however innocently, in the arguable wrongdoing". As the court explained in paragraph 77, Mr Mohamed's case involved alleging "the commission of offences under the criminal law given the very wide scope of the International Criminal Courts Act 2001", and those offences included crimes against humanity and war crimes, and ancillary offences, as identified in sections 51, 52 and 55 of that Act.

69. Having considered the evidence, the court reached conclusions which it set out in ten subparagraphs of paragraph 87 of the open version of the first judgment. Those ten subparagraphs, which are set out in paragraph 32 of the judgment of Lord Judge LCJ, reveal, in very summary terms, that Mr Mohamed was detained in Pakistan and interviewed by the US authorities, who gave the SyS particulars of his detention and treatment in reports "details of [which] are set out in [the redacted paragraphs]", and that SyS personnel had read the contents before one of them (known as "witness B") went to Karachi to interview Mr Mohamed, that witness B told Mr Mohamed that the UK would not assist him unless he cooperated with the US authorities, and that the SyS were supplying information about, and questions for, Mr Mohamed to the US authorities "from the time of his arrest whilst he was held incommunicado and without access to a lawyer or review by a court or tribunal" both while he was detained in Pakistan and after he had been removed to "a covert location" (i.e. in Morocco). In particular, in paragraph 87(iv), the court said that: "[i]n May 2002, the SyS and the SIS received reports containing information relating to [Mr Mohamed's] detention and treatment in Pakistan. The details of the reports are set out in the closed judgment."

70. Accordingly, the court said in paragraph 88 that it had little difficulty in concluding that, "by seeking to interview [Mr Mohamed] in the circumstances described and supplying information and questions for his interviews, the relationship of the [UK] Government to the [US] authorities in connection with [Mr Mohamed] was far beyond that of a bystander or witness to the alleged wrongdoing".

71. The third, fourth and fifth points for the court were whether the information and documents sought by Mr Mohamed were "reasonably necessary", whether they were "within the scope of the available relief", and whether the discretion which the court had should be exercised in favour of granting Mr Mohamed the relief he was asking for. On those three points, as on the first two points, the court found in favour of Mr Mohamed. The court did not however grant the relief which he sought. As the court

explained in paragraph 149 of the first judgment, it did "not propose to make an order until the Foreign Secretary has had the opportunity to consider whether in all the circumstances he will invoke public interest immunity in respect of the disclosure of the information which would otherwise follow from [the] decision", and if such a certificate was issued, there would have to be further argument.

72. As mentioned above, the evidence and arguments in connection with Mr Mohamed's disclosure application in part included documents which the Foreign Secretary contended should not be in the public domain on grounds of national security. Accordingly, pursuant to an order which had been made by Sullivan J on 20th June 2008, the hearing of the application was partly held in closed session, Mr Mohamed was represented by "special advocates" in connection with the closed material, and the draft judgment of the court was first shown to SyS officials to enable the Foreign Secretary to argue that certain passages should not be included in the open version of the judgment. In accordance with this arrangement, the first judgment, when handed down in public on 21st August 2008, was edited by the removal of the redacted paragraphs (and two or three small consequential redactions), over Mr Mohamed's objections.

73. In view of those objections, the judgment which the court handed down had the redacted paragraphs removed on the basis that there would be a further hearing to determine whether they should remain removed for the open version of the first judgment.

The first and second certificates and events leading up to the fourth judgment

74. On 26th August, the Secretary of State provided the court with a certificate ("the first certificate"), in which he concluded that it was in the public interest that Mr Mohamed was not provided with the documents or information which he sought, and that the redacted paragraphs remained excised from the first judgment. Accompanying the first certificate was a letter dated 21st August 2008 from Mr Bellinger, legal adviser to the US Department of State, to Mr Bethlehem QC, legal adviser to the Foreign Office, and a letter of 25th August from Mr Bethlehem to the court. Mr Bethlehem wrote a further letter to the court on 27th August.

75. In the first certificate, after referring to the control principle, the Foreign Secretary said in paragraph 12 that "disclosure by order of the court would introduce a new, and in the mind of our US partners, uncertain dimension into a set of practices which rely upon certainty. The inhibition which this would place on the sharing of information would in my judgment be profound. We would have the same concerns. There is also a risk of wider repercussions to the international relations of the UK more generally and to liaison relationships with third parties." He also said, in paragraph 15, that, "on the balance of public interest", he "may well have been inclined" to supply Mr Mohamed's lawyers with the documentation he sought, if "the US authorities [had not] made the commitments to make the documents in question available" to Mr Mohamed's US lawyers, given the court's conclusion on the first judgment "that it [was] essential to [Mr Mohamed's] defence to any charges that may be brought against him that he has access to [such] material".

76. In his letter, Mr Bellinger wrote that he "want[ed] to affirm in the clearest possible terms that the public disclosure of [the 42] documents or of the information contained

therein is likely to result in serious damage to US national security and could harm intelligence information-sharing arrangements between our two governments." The letter went on to explain that at least some of the documents would be made available to Mr Mohamed's US legal advisers (albeit on a confidential basis and in a redacted form), and that Mr Mohamed could apply in the courts of the US for the documents on a fuller or more open basis.

77. In his letter, Mr Bethlehem quoted from an email from Mr Mathias, the assistant legal adviser of the State Department, which stated that "[o]rdering disclosure of US intelligence information now would only have the marginal effect of serious and lasting damage to the US-UK intelligence sharing relationship".

78. As was apparent from these documents, things had been happening in the US. In particular, on the very day the first judgment was handed down, the legal adviser to the State Department confirmed that at least some of the documents and sought by Mr Mohamed would be provided to his US defence lawyers if the charges against him proceeded. On 22nd September 2008, the US court ordered the US Government to supply the 42 documents to Mr Mohamed's lawyers, and the most serious charge against him was dropped on 6th October.

79. During this period, on 5th September, the Foreign Secretary filed a further certificate ("the second certificate"), dealing with developments in the US since the first certificate, and with other matters, and confirming the conclusions reached in that first certificate.

80. In the second certificate, the Foreign Secretary said in paragraph 31 that "[d]isclosure of US intelligence information by order of our Courts would breach the trust and fundamental requirement of confidentiality that lies at the heart of the UK's liaison relationship with the US intelligence agencies as well as both countries' liaison relationship with other countries." He immediately went on to say that "It is not simply confidentiality and the secrecy of intelligence material that is in issue …, but also the issue of the control that one government has over the intelligence material that it shares with another government in expectation of confidentiality. It is quite clear that the [US] considers it paramount that it is able to retain control of its intelligence information and, where disclosure is required, to handle this within its own adjudicatory system and subject to its own protective measures. We would have exactly the same concerns. Breaching this principle would have significant implications that run far more broadly than this case." In paragraph 48, he added that the "disclosure would be perceived by the [US] to be gratuitous as it would not secure any additional benefit for [Mr Mohamed]."

81. During this period, there were two hearings at which the court gave judgments effectively standing matters over while the proceedings in the US took their course – [2008] EWHC 2100 (Admin) and [2008] EWHC 2519 (Admin).

The fourth judgment

82. Between 13th and 17th October 2008, the Divisional Court heard argument as to "whether [they] should restore to [the] first judgment" the redacted paragraphs, which they described as "containing a gist of reports made by the [US] Government to the [UK] Government in relation to the detention and treatment of [Mr Mohamed] whilst

in custody by or on behalf of the [US] Government in the period 2002-2004" – paragraph 1 of the judgment given on 4th February 2009 – [2009] EWHC 152 (Admin); [2009] 1 WLR 2653 ("the fourth judgment"). Just after the hearing, on 21st October, all charges against Mr Mohamed in the US were dismissed (without prejudice to the prosecutor's right to prefer further charges). Nine days later, just before a US court hearing, the US Government provided all 42 documents to Mr Mohamed's US lawyers.

83. Meanwhile, on 4th November 2008, Barack Obama was elected President of the United States, whereupon further written representations were made to the court on behalf of UK media, and by David Rose, contributing editor of Vanity Fair, essentially suggesting that the attitude of the forthcoming Obama administration would be different from that of the outgoing Bush administration. This evidence was answered in written representations on behalf of the Foreign Secretary, on 14th December 2008 (before President Obama had taken office) in which it was said, in relation to "the national security concerns" that "the situation has not changed since the election of President-elect Obama".

84. In the fourth judgment, the court first set out the history, and explained in paragraph 14 that, in the redacted paragraphs, it had "provided a summary of reports by the [US] Government to the SyS … on the circumstances of Mr Mohamed's incommunicado and unlawful detention in Pakistan and of the treatment accorded to him by or on behalf of the [US] Government as referred to in paragraph 87(iv) of [the first] judgment". It went on to say that it had done so "as the summary was highly material to [Mr Mohamed's] allegation that he had been subjected to torture and cruel, inhuman or degrading treatment and to the commission of criminal offences [which was referred to] in paragraph 77 of [the] first judgment."

85. The court then considered whether there was a public interest in bringing the redacted paragraphs into the public domain. It emphasised in paragraphs 36 and 37 the importance of a hearing and a judgment being in the public domain, citing the well-known observations of Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417, 477. It then referred to the importance of "public justice, the rule of law, free speech and democratic accountability". The court said that this included the need to deal openly with infringements of the law which come to the court's attention during a hearing (paragraph 41), and the benefit of putting issues of public significance into the public domain, particularly in relation to a topic such as torture and inhuman treatment, above all in relation to detainees such as Mr Mohamed, given the release of the memoranda in the US and the SyS's "denial of knowledge of the way the [US] treated detainees in 2002" (paragraphs 42 to 46). The court further relied on "the importance of a democratically elected public body being subject to open uninhibited public criticism" (paragraphs 46 and 47), and made the point that Article 10 of the Convention "is also about the right to receive and impart information" (citing observations of Sedley LJ in *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491; [2003] EMLR 88, paragraph 55). The court also accepted that, for those reasons, "the media has a vital role in communicating what takes place in court and the decision of the court" (paragraph 50).

86. Accordingly, in paragraph 54 of the fourth judgment, the court had little difficulty in concluding that: "it is our clear view that the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest

in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture and its historic link from the seventeenth century in this jurisdiction to the necessity of open justice". The court also considered that Mr Mohamed was "entitled to have the evidence relating to [the] injustice and wrongdoing [of which he had been the victim] made public" – paragraph 59.

87. The court then turned to "[t]he public interest in keeping the information out of the public domain: national security and international relations". In paragraph 62, the court summarised the effect of the Foreign Secretary's view in the first and second certificates as making it "clear that the [US] Government's position is that, if the redacted paragraphs are made public, then the [US] Government will re-evaluate its intelligence sharing relationship with the [UK] with the real risk that it would reduce the intelligence provided. It was and remains (so far as we are aware) the judgement of the Foreign Secretary that the [US] Government might carry that threat out and this would seriously prejudice the national security of the [UK]".

88. The court found it "difficult to understand how objection can properly be made" by any foreign government to the release of the information in the redacted paragraphs. This was because, at least on the face of it, "the reports summarised in the redacted paragraphs gave rise to an arguable case of cruel, inhuman or degrading treatment and torture", and it would not appear to affect the ability of any country's intelligence service to gather information or to disseminate it to other intelligence services (paragraph 71).

89. However, in the light of the second certificate, the court accepted in paragraph 74 (in a passage fully set out in paragraph 235 of the judgment of Sir Anthony May PQBD) that there was "powerful evidence that intelligence is shared on the basis of a reciprocal understanding that the confidence in and control over it will always be retained by the State that provides it. It is a fundamental part of that trust and confidentiality which lies at the heart of the relationship with foreign intelligence agencies." The court then made the point in paragraph 76 that there was evidence supporting the Foreign Secretary's views "that the [US] Government would perceive making public the redacted passages as 'gratuitous'", and "that the threat is real, and serious damage to national security may result". The court also considered the argument that the position had changed with the election of President Obama, as his attitude to inhuman treatment differed markedly from that of his predecessor, President Bush. The argument was rejected in paragraph 77 on the basis of the Foreign Secretary's written submission referred to above.

90. After considering and rejecting the possibility of accommodating the Foreign Secretary's concerns by rewording the redacted paragraphs, the court turned to the balancing exercise, and concluded that the redacted paragraphs should be removed from the open version of the first judgment. The conclusion was expressed thus in paragraph 107 of the fourth judgment:

> "[W]hatever views may be held as to the continuing threat made by the Government of the [US] to prevent a short summary of the treatment of [Mr Mohamed] being put into the public domain by this court, it would not, in all the circumstances we have set out and in the light of the action taken, be in the public interest to expose the [UK] to what the Foreign Secretary still considers to be the real risk of the loss of intelligence so vital to the safety of our day to

day life. If the information in the redacted paragraphs which we consider so important to the rule of law, free speech and democratic accountability is to be put into the public domain, it must now be for the [US] Government to consider changing its position or itself putting that information into the public domain."

The third certificate, the CIA letter, Mr Halperin, and Secretary of State Clinton

91. On 22nd January 2009, very shortly after taking office, President Obama issued an executive order to ensure that no new charges were brought against those detainees held in Guantanamo Bay pending a review. On 23rd February 2009, Mr Mohamed was released from Guantanamo Bay and arrived back in the UK. On 16th April 2009, President Obama announced that the US Department of Justice would release memoranda prepared by its officials under the previous administration, between 2002 and 2005, dealing with interrogation techniques which had been cleared for use by US Government employees and agents, and which were now accepted as being illegal. Those memoranda set out details of the treatment meted out to detainees by the US Central Intelligence Agency ("CIA"). One memorandum related to an alleged high-ranking member of Al-Qaida, Abu Zubaydah, and specified ten techniques which were said to be permissible: in summary terms, these were attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, insects in a confinement box, and waterboarding.

92. Meanwhile, very shortly after the fourth judgment was handed down, an application was made for the court to reconsider the conclusion reached in the fourth judgment, and, after hearing argument on 11th February and 6th May 2009, the court decided to accede to that application. The reason for this was given essentially in paragraphs 33 and 34 of a judgment handed down on 16th October 2009 ("the fifth judgment"), [2009] EWHC 2549 (Admin); [2009] I WLR 2653. The court said that, when coming to its conclusion in the fourth judgment, it had understood from what had been written on behalf of the Foreign Secretary "that the position was unchanged in that the Obama Administration was maintaining the same position as that of President Bush, not only as to the principle of control over intelligence but also in relation to the specific statement that it would reconsider the intelligence sharing arrangements, if we made the redacted paragraphs public". However, the court said, "all the Foreign Secretary could properly have stated to the court (because he had no basis for saying any more) was that he did not expect there would be any change in the position of the Obama Administration in relation to the general principle of control over intelligence, namely that information obtained as a result of intelligence sharing is not to be made public without the consent of the State of origin. He should have informed the court that he did not know what the position of the Obama Administration was as to the specific consequences of publication."

93. The court received a declaration dated 7th March 2009 from Morton Halperin, who had served three previous US Presidents (Johnson, Nixon and Clinton) challenging the notion that the US Government would review its communication of intelligence to the UK Government if the redacted paragraphs were released into the public domain. In his declaration, Mr Halperin explained that he had been "exposed to the

intelligence relationship between the [US] and the [UK] at the highest levels", most recently between 1998 and 2001, as director of Policy Planning Staff at the Department of State. He described the intelligence relationship between the two countries as "unprecedented in its interdependence and depth" and "staked on mutual trust and commitment to open dialogue and communication" for more than 60 years. He emphasised the benefits to the US, as well as the UK, of this relationship. He pointed out that both governments "have always understood that the commitment to keep secret what was provided by the other could not be an absolute commitment", and referred to requests made under Freedom of Information legislation, the fact that both governments understand that "some information may reach the press and the public by leaks" and the fact that they "also understand that courts in both countries have the right to order the disclosure of information under constitutional or statutory procedures." He said that "while the US government would expect the UK government to resist disclosure of classified information in this proceeding", "a respect for the rule of law would prevent the US government from taking umbrage at a reasoned decision by a UK court finding that public interest demands disclosure of information regarding [Mr Mohamed]". He also referred to cases where US courts had ordered disclosure of "classified information obtained from foreign sources".

94. The decision to hold a further hearing resulted in another certificate from the Secretary of State dated 15th May 2009 ("the third certificate"), maintaining the position that the redacted paragraphs should remain excised from the open version of the first judgment. That certificate was accompanied by a letter of 30th April ("the CIA letter") from the CIA to the SIS.

95. The CIA letter was two closely typed pages. It included the statement that the "seven paragraphs … are based upon classified information shared between our two countries" and that "[p]ublic disclosure of this information reasonably could be expected to cause serious damage to the [UK's] national security" in that it "may result in a constriction of the US-UK relationship, as well as UK relationships with other countries." The letter went on to say that "if foreign partners learn that information it [sic] has provided is publicly disclosed these foreign partners could take steps to withhold from the [UK] sensitive information that could be important to its safety and security." The CIA letter ended by saying that if the SyS were "unable to protect information we provide to you even if that inability is caused by your judicial system, we will necessarily have to review with the greatest care the sensitivity of information we can provide in the future."

96. In paragraph 20 of the third certificate, the Foreign Secretary confirmed the view he had expressed in his second certificate, that there was "a likelihood of real damage to the national security and international relations interests of the [UK] in the event of any Court ordered [sic] disclosure of the classified information in issue into the public domain".

97. He referred to "the long established practice within intelligence communities that information passed on intelligence channels cannot be publicly disclosed without the consent of the State disclosing it", the Foreign Secretary accepted that "the UK courts have the power in principle to disclose [such] information … or [material] derived from such information". However, he went on to state that if "the Court was to disclose the redacted paragraphs in the current circumstances, that would cause a loss of confidence in the [UK]'s ability to comply with the custom (not only by the [US]

but also by other foreign governments) which would cause considerable damage to our national security." In paragraph 24, he went on to say, in what was clearly a reference to Mr Halperin's declaration, that it was "not a question of the [US] merely 'taking umbrage', … but of the [US] and other foreign governments re-evaluating the extent to which they believe that they can safely provide the UK with information in the light of what would be a highly significant breach by the UK of the control principle".

98. In paragraph 27 of the third certificate, the Foreign Secretary referred to a meeting he had had with President Obama's Secretary of State, Hillary Clinton ("the Secretary of State") on 12 May 2009, where she emphasised that the position of the US Government had not changed as a result of the change of administration. "She indicated that the US remained opposed to the public disclosure of US intelligence information in this case", and that such disclosure "would affect intelligence sharing and cause damage to the national security of both the US and the UK".

99. In paragraph 29 of the third certificate, the Foreign Secretary addressed the question whether the CIA letter "indicates a different approach" from that indicated by the correspondence sent from the previous US administration, and then said that in his view, and in the view of his advisers, it did not, reiterating "the absolutely essential issue of the confidence that other governments, including notably the US Government, can have when they share intelligence with us" in paragraph 32 of the second certificate.

100. The court heard argument on 22nd May. Following that, it was supplied with a letter from General Jones, White House Assistant to the President for National Security Affairs, sent on 29th June to Mr McDonald, Foreign Affairs Adviser to the Prime Minister, effectively confirming the accuracy of the CIA letter. The letter from General Jones confirmed that he and "members of his staff [had] reviewed [the CIA] letter before its despatch", and confirmed that it represented "the official position of the [US] Government".

101. The court then heard further argument on 29th July. Following that, the Foreign Secretary decided, exceptionally, to disclose extracts of a note recording discussions he had had with the Secretary of State on 2nd March and 12th May 2009. The note of the meeting of 2 March records that the Secretary of State "confirmed that it was an inviolable principle that it should be for the US to decide on the release of its own intelligence material". The note of the 12th May meeting records that the Secretary of State was told that "the Court had said it could not see how, in the light of the publication of [the Department of Justice memoranda on 16th April], anything in the US papers could be regarded as sensitive", and that "Clinton (who was clearly well aware of the case and associated issues) said that the US position had not changed, and that the protection of intelligence went beyond party or politics", so that "[t]he US remained opposed to the UK releasing these papers", and "[i]f it did so it would affect intelligence sharing [which] would cause damage to the national security of both the US and UK." It was also recorded that "[Tobin] Bradley [who represented the US National Security Council at the meeting] said that this was also the position of the White House". On 14th May, the note-taker added "[f]or clarity" that "both Clinton and Bradley were explicit that the US Government was opposed to the release by the UK of any US intelligence material, whether in the form of the actual documents or the 7 summary paragraphs."

102. These extracts from the notes of the meetings of March and May 2009 with the Secretary of State were sent to the court on 14th August under cover of a letter from the Treasury Solicitor. This led to further submissions on the part of Mr Mohamed, the UK media and the international media, (and a second declaration from Mr Halperin, which the court disregarded).

The fifth judgment

103. In the fifth judgment, the court decided that the redacted paragraphs should, after all, be included in the open version of the first judgment. This conclusion was based on a number of factors.

104. First, in paragraph 72, the court said that the control principle could not be "an absolute principle". This was because (i) The Foreign Secretary had made it clear in the first certificate that he might have released the information and documentation sought by Mr Mohamed if the US Government had not agreed to do so; (ii) "the detail of the evidence of Mr Halperin [had] not been addressed", and the court could "not accept the oral assertion [that 'the principle of control was inviolable'], even from the Secretary of State"; and (iii) "a significant part of the narrative of [the first] judgment" was based on information communicated by the US authorities to the UK authorities, and was not objected to by the Foreign Secretary.

105. Secondly, in paragraph 73(i), the court said that the findings made in the redacted paragraphs were "necessary and justifiable", essentially because Mr Mohamed's case was that the UK Government, and the SyS through witness B in particular, "knew of the wrongdoing" and indeed had "facilitated further wrongdoing". The court said that the communication to the SyS of the treatment Mr Mohamed was suffering at the hands of US officials was relevant "as witness B disputed what he knew about the treatment of Mr Mohamed." The court also made the point that "the suppression of wrongdoing by officials which cannot in any way affect national security is inimical to the rule of law." Thirdly, in paragraph 73(ii), the court made the point that the case was "exceptional".

106. Fourthly, the court stated in paragraph 73(iii) that the US, like the UK, had "a ready understanding of the necessary qualification of the principle of control in the case of court ordered disclosure". Fifthly, in paragraph 74, the court said that publishing the redacted paragraphs would put no sensitive information into the public domain; in a passage which the Foreign Secretary now accepts can be in the open version of the fifth judgment, the court also said that publication of the redacted paragraphs "would … put into the public domain matters relating to interrogation techniques that have been widely discussed and made public by the [US]". Sixthly, the court said that the debate stimulated by the Presidential statement and release of documents in April 2009 made the public interest in publication of the redacted paragraphs even greater than at the time of the fourth judgment – paragraph 76. The court, in paragraph 77, therefore reaffirmed the view reached in the fourth judgment that, subject to the Foreign Secretary's concerns expressed in the certificates, it would be in the public interest to publish the redacted paragraphs.

107. The court then turned to the evidence from the US since January 2009 and relied on by the Foreign Secretary. The court first considered the CIA letter, which, it said in

paragraph 79, it was in as good a position to interpret as was the Foreign Secretary. The court carefully analysed the CIA letter and concluded, in paragraph 80:

> "The letter states in essence what could happen not what would happen. If it were just the letter alone, it would be difficult to see any basis for rejecting the submission of [Mr Mohamed] and the media that there was insufficient evidential basis for the Foreign Secretary's view that there was a real risk of serious damage. The letter was very carefully phrased so that no statement of the consequences that would follow or, in other words, no threat was made."

108. The court then said in paragraph 81 that the redacted paragraphs contained "information that related to interrogation techniques carried out by officials of the [US] which are no different from those which [President Obama] put into the public domain", and made the point that the President had said in his statement of 18th April 2009 that the release of the memoranda recording the unlawful interrogation techniques "was required by the rule of law in the [US]". It was therefore, said the court, "impossible to believe that he would take action against the [UK], the [US's] closest ally, when the release of similar information is required to uphold the rule of law in the [UK]". Accordingly, at least in the absence of any other evidence, the court concluded in paragraph 82 that it was "difficult on an objective basis to see any grounds for rejecting the submission … that there is any evidence of any real risk of serious harm to the national security of the [UK]".

109. The court then turned to the notes of the meetings with the Secretary of State. It concluded that the CIA letter and General Jones's letter, both of which post-dated those meetings, and confirmed that the White House adopted what was said in the CIA letter, was a more accurate and up to date representation of the US Government's position than the relatively brief notes of meetings with the Secretary of State – paragraphs 87 and 88. The court then said (in the course of a discussion which is fully set out in paragraph 256 of the judgment of Sir Anthony May PQBD) that "the statements of both the Foreign Secretary and Secretary of State Clinton proceeded on the erroneous basis that the principle of control of intelligence was inviolable", that the notes of the discussion were directed to the 42 documents, and therefore "the statement made by Secretary of State Clinton that intelligence sharing would be affected was made without a proper analysis or understanding of what the [redacted] paragraphs contain" – paragraph 96.

110. The court then went on to consider, and reject, allegations that the Foreign Secretary had not acted "with candour" at the time leading up to the fourth judgment, and that he had not acted "in good faith" subsequently.

111. The court then addressed the central question of how to balance the competing public interests for and against publishing the redacted paragraphs. In paragraph 103, it emphasised that "in the light of the disclosure of the [US] Department of Justice memoranda on 16th April 2009 …. , it is now impossible to contend that details of the interrogation methods are themselves matters of intelligence". In paragraph 104, it accepted that "[t]here must be some risk, particularly in the light of the statement by Secretary of State Clinton, that the Obama Administration would reduce intelligence sharing with the [UK]". However, the court then said that it "[could] not accept looking at the matter objectively on all the evidence … and as a matter of reality, that

there is a risk that the [US] would reassess its intelligence relationship or reduce its intelligence sharing if … the [redacted] paragraphs [were made] public", in the light of (i) the relationship between the two countries, (ii) the fact that "this court would be doing no more than putting historic material into the public domain against the wishes of the [US] Government", (iii) the fact that there would be "no infringement of the principle of control", and (iv) the "fact that the statement of Secretary of State Clinton was based on a misunderstanding and lack of analysis of what was contained in the [seven] paragraphs". The court accordingly concluded in paragraph 108 that "as the public interest in making the paragraphs public is overwhelming, and the risk to national security is not a serious one", it should "restore the redacted paragraphs to [the] first judgment".

The sixth judgment

112. The fifth judgment was made available for checking by the intelligence services in accordance with the directions given by Sullivan J. Some of the redactions requested by the intelligence services were accepted, and some were challenged, by Mr Mohamed, the UK media, and the international media. The Foreign Secretary accepted that some of their requested redactions could not stand, but there was disagreement about their request that four paragraphs of the fifth judgment be partly redacted. Accordingly, the fifth judgment was handed down with those four paragraphs partly redacted, on the basis that there would be a subsequent hearing on that issue, as well as on the issue of whether the Foreign Secretary should have permission to appeal against the fifth judgment. This resulted in a judgment ("the sixth judgment"), given on 19th November 2009, [2009] EWHC 2973 (Admin).

113. In paragraph 13(i) of the sixth judgment, the court explained that the redacted paragraphs "include a short summary of reports of the treatment accorded to [Mr Mohamed] by officials of the [US] Government during his unlawful and incommunicado detention in Pakistan in … 2002", that this "was the period that he was interviewed by [US] officials and was refused access to a lawyer", that what was in the redacted paragraphs gives rise to an arguable case of torture or cruel, inhuman and degrading treatment", that "the reports as summarised … are admissions by officials of the [US] Government as to [Mr Mohamed's] treatment by them", and there is "nothing in the seven redacted paragraphs about actions by the Government of Pakistan". The court then repeated in paragraph 13(ii) its view that there was "nothing secret or of an intelligence nature in the redacted paragraphs", and that, "[o]f itself, the treatment to which [Mr Mohamed] was subjected could never properly be described in a democracy as 'a secret' or an 'intelligence secret' or 'a summary of classified intelligence'."

114. The court then stated in paragraph 13(iii) of the sixth judgment that "[t]he entire content of the four paragraphs redacted from the fifth judgment is already on the public domain." The court then concluded that the four paragraphs of the fifth judgment should be included in full in the open version of the fifth judgment, and that this conclusion obtained even if the redacted paragraphs were redacted from the first judgment. The court granted the Foreign Secretary permission to appeal against the fifth and sixth judgments on the ground that the issues involved "raise important points of principle" (paragraph 26).

This appeal and Judge Kessler's memorandum opinion in the US

115. Pursuant to that permission, the Foreign Secretary appealed against the decisions reached by the Divisional Court in the fifth and sixth judgments. On his behalf, Mr Sumption QC maintained his position in relation to the first judgment, contending that the redacted paragraphs should all remain redacted. However, during the course of the oral argument, he accepted that three of the four redactions he had been seeking of the fifth judgment were not required, and he adheres to the concession that the remaining redaction he claims to the fifth judgment, namely that in respect of paragraph 38(iv), cannot be maintained unless the redacted paragraphs are excised from the first judgment.

116. Mr Sumption summarised the Foreign Secretary's case in this way in paragraph 41(6)(a) of his skeleton argument:

> "The redacted paragraphs were not of course themselves intelligence material. But they are unquestionably a summary of intelligence material provided to the [UK] under confidential intelligence-sharing arrangements …. . They do not cease to be a summary of intelligence material because the [US] has itself chosen to disclose other secret material on a related subject."

In paragraphs 39(2) and 39(3) of the same document, the information in the redacted paragraphs was described as "intelligence material belonging to the [US]" and "information derived from its intelligence", and as "sensitive material provided by the [US]".

117. During the course of the argument before us, these points were reiterated, and it was said that, in the light of what was contained in the three certificates, the CIA letter and the notes of the meetings with the Secretary of State, the conclusion reached in the fourth judgment was right, and that there were no grounds for departing from it in the fifth judgment. Indeed, it was submitted that the Divisional Court had been "irresponsible" to conclude in the fifth judgment that the redacted paragraphs should be published.

118. Ms Rose QC, for Mr Mohamed, ~~(~~supported by Mr de la Mare, special advocate, as well as Mr Millar QC for ~~the~~ some UK media publishers and Mr Robertson QC for some ~~the~~ international media publishers~~)~~, contended, in essence, that the Divisional Court reached the right decision in the fifth and sixth judgments for the right reasons. She accordingly said that neither the redacted paragraphs, nor paragraph 38(iv) of the fifth judgment should be excised, and that, even if the redacted paragraphs are excised, paragraph 38(iv) should not be.

119. This is merely a very sketchy outline of the arguments contained in the cogent and well expressed written and oral submissions presented on the appeal.

120. Meanwhile, on the same day as the sixth judgment was handed down, Judge Kessler in the US District Court for the District of Columbia gave a Memorandum Opinion in *Farhi Saeed Bin Mohammed v Barack Obama* (Civil Action No 05-1347 (GK)). This Opinion, which was dated 19th November 2009, but was not released in open version until some time thereafter, was given in connection with the petition of a Guantanamo Bay detainee, Farhi Saeed Bin Mohammed ("the Petitioner"), for *habeas corpus,* which had been filed in July 2005. The Opinion came to the attention of Mr

Bethlehem after this appeal was heard, and he brought it to the attention of Mr Mohammed's solicitors and counsel through the Treasury Solicitor after the argument had concluded. Having received brief written submissions by letter from the solicitors acting for Mr Mohammed and for the Foreign Secretary on the effect of the Opinion on the issue in this case, we offered counsel the opportunity to make oral submissions, but they all declined.

121. The effect of the US court decision was that *habeas corpus* was granted, but the centrally relevant aspect for present purposes is the findings made by Judge Kessler in the course of her Opinion about the treatment of Mr Mohamed at the hands of the US authorities. This was relevant because much of the evidence upon which the US Government relied to resist the application was based on incriminating evidence against the Petitioner said to have been provided by Mr Mohamed while he was detained in Bagram and Guantanamo Bay. The Petitioner's case was that that evidence was unreliable as it had been, in effect, infected by the interrogation and torture of Mr Mohamed when he had been detained in Pakistan, Morocco and Kabul. That case was supported by testimony before Judge Kessler from Mr Mohamed.

122. Over pages 47 to 57 of her Opinion, Judge Kessler set out Mr Mohamed's evidence as to his arrest and detention in Pakistan, his subsequent removal to Morocco, and thence to Kabul and Bagram in Afghanistan, and finally to Guantanamo Bay, and, in particular, she set out considerable detail what he said about his interrogation and mistreatment in those various locations. She began by referring to his "sworn declaration that he was brutalized for years while in US custody overseas at foreign facilities", and his "[t]orture allegations", and then set out "the harrowing story that [Mr Mohamed] has told about his case". That story which included, in summary, being beaten with a leather strap, being subjected to a mock execution by shooting, being threatened with torture, being beaten, punched and kicked to the extent that he vomited and urinated, being tied to a wall, being left hanging, being left in darkness listening to other prisoners screaming, being cut on the chest and then on the penis and the testicles with a scalpel (about once a month for over a year), being subjected to a campaign of persistent very loud music, sleep interruption, drugs in his food, and sexually disturbing noises and sights, being chained and locked up in complete darkness, being "hung up" by the wrists for two days, and being deprived of food and sleep. During this time he was interrogated by FBI and CIA agents, and "his captors coached [him] on what to say during interrogations".

123. At page 51 of her Opinion, Judge Kessler recorded Mr Mohamed as saying that he had been told, while being mistreated in Pakistan, "that the British government knew of his situation and sanctioned his detention."

124. At page 64 of her Opinion, Judge Kessler said this:

> "[Mr Mohamed's] trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculpate himself and others in various plots to imperil Americans."

125. Judge Kessler then said at page 68 of the Opinion that there was "no question that throughout his ordeal [Mr Mohamed] was being held at the behest of the [US]" that he "was shuttled from country to country, and interrogated and beaten without having access to counsel", and that he had "no legitimate reason to think that [his] transfer to Guantanamo Bay foretold more humane treatment". Accordingly, although accepting that he did receive considerably less inhumane treatment in Guantanamo Bay, where he reiterated his alleged confessions, Judge Kessler concluded on page 70 that "[Mr Mohamed]'s will was overborne by his lengthy prior torture, and therefore his confessions to Special Agent 3 do not represent reliable evidence to detain the petitioner."

126. Judge Kessler not only set out Mr Mohamed's evidence as to the mistreatment to which he had been subjected, but she characterised it as "torture", and, importantly for present purposes, she said that it was true. At page 58, she said that "[t]he [US] Government does not challenge or deny the accuracy of [Mr Mohamed's] story of brutal treatment" and repeated that point at pages 62 and 64. On pages 61-2, she said that his "persistence in telling his story" and "very vigorous… and very public ... pursu[ance of] his claims in the British courts" indicated that his evidence was true and "demonstrates his willingness to test the truth of his version of events in both the courts of law and the court of public opinion". In the passage just quoted from page 70 of her Opinion, she referred to Mr Mohamed's "lengthy prior torture" as an established fact.

127. As will be apparent from the reference to "Special Agent 3", parts of the open version of Judge Kessler's Opinion were redacted. Apart from the identities of various Special Agents, passages amounting (varying in length between half a line and half a page) representing about four pages in a document running to 80 pages, were redacted from the open version of the Opinion.

128. As Judge Kessler's Opinion was not available until after the hearing of the appeal, the Foreign Secretary and Mr Mohamed made their submissions about its effect on this appeal by correspondence from their respective solicitors. In reply to a specific request from the court, Mr Sumption, Ms Rose, and Mr de la Mare each stated that they did not wish to make further oral submissions on that point. In the Treasury Solicitor's letter, the contents of Judge Kessler's Opinion are said to have no effect on the views of the Foreign Secretary or on the arguments that have been advanced on his behalf. Mr Mohamed's solicitors, on the other hand, submitted in their letter that Judge Kessler's descriptions of his mistreatment while "being held at the behest" of the US, mistreatment which she characterised in terms as "torture", must dispose of any suggestion that there could be "operational sensitivity" (an expression used in oral argument on behalf of the Foreign Secretary) in the contents of the redacted paragraphs, and that, even if it would have been possible before seeing Judge Kessler's Opinion, it is now impossible to believe that the US Government would take objection to the publication of the redacted paragraphs. Mr Mohamed's solicitors also say that, now that a US court has publicised the mistreatment, indeed torture, which he suffered at the behest of the US, "the principal effect of allowing this appeal would simply be to suppress findings detailing the degree of knowledge of [Mr Mohamed]'s mistreatment which the UK authorities had at the time in question, when they decided actively to participate in his interrogation."

Discussion and analysis

The role of the court and the executive

129. The Foreign Secretary has certified in three fully reasoned and carefully worded certificates, supported by accompanying documents, that, in his opinion, the inclusion of seven paragraphs in the open version of the first judgment would give rise to a real risk to national security, and that the redacted paragraphs should accordingly be redacted from the open version. The court has to decide whether to adopt or to override that view. This assessment potentially involves two steps. The first is to determine whether the publication of the redacted paragraphs would be against the national interest; the second step (which may not arise if the threat to the national interest would not exist or would be very significant) is to weigh that aspect of public interest against the public interest in the first judgment being fully open.

130. As to the first aspect, the Foreign Secretary's opinion that publication of the redacted paragraphs would be contrary to the national interest is that it would, albeit indirectly, enhance the risk of a successful terrorist attack within the UK. The reason he gives for this opinion is, in summary terms, that the redacted paragraphs self-evidently reveal information supplied by the intelligence services of the US to the SyS on a confidential basis, and, if they are released into the public domain, the future supply of information from the intelligence services of the US and of other countries to the SyS will be reviewed, and may consequently be constricted to the potential detriment of the security of this country.

131. While the question whether to give effect to the certificate is ultimately a matter for the court, it seems to me that, on grounds of both principle and practicality, it would require cogent reasons for a Judge to differ from an assessment of this nature made by the Foreign Secretary. National security, which includes the functioning of the intelligence services and the prevention of terrorism, is absolutely central to the fundamental roles of the Government, namely the defence of the realm and the maintenance of law and order, indeed, ultimately, to the survival, of the state. As a matter of principle, decisions in connection with national security are primarily entrusted to the executive, ultimately to Government Ministers, and not to the judiciary. That is inherent in the doctrine of the separation of powers, as explained by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, paragraphs 50 to 53. In practical terms, the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.

132. Nonetheless, the ultimate decision whether to include the redacted paragraphs in~~to~~ the open version of the first judgment is a matter for judicial, not executive, determination. Ever since the decision of the House of Lords in *Conway v Rimmer* [1968] AC 910, it has been clear that the question whether a document should be exempted from disclosure in legal proceedings on the ground that disclosure would damage the public interest should ultimately be decided by the court. That is because

it is ultimately for a judge, not a minister to decide whether a document must be disclosed, and whether it can be referred to, in open court. That decision is for a judge, not a minister, not least because it concerns what goes on in court, and because a judge is better able to carry out the balancing exercise (see per Lord Woolf in *R v Chief Constable of West Midlands Police ex p Wiley* [1995] 1 AC 274, 289C-G, citing Lord Pearson's observations in *Conway* [1968] AC 910, 985). Furthermore, practically any decision of the executive is subject to judicial review, and it would seem to follow that a minister's opinion that a document should not be disclosed in the national interest is, in principle, reviewable by a court.

133. The question whether a passage in a judgment should not be made available to the public on the sole ground that it would be contrary to the public interest is *a fortiori* a matter for the court. What is included in, or excluded from, a judgment is self-evidently a matter for a judge, not a minister. It is another aspect of the separation of powers that the executive cannot determine whether certain material is included in, or excluded from, the open material in a judgment. That must be a decision for the judge giving the judgment in issue, subject of course to the supervisory jurisdiction of any competent appellate court.

134. So far as such a decision is concerned, there is a very strong presumption indeed that a judgment, containing as it does the judge's reasons for his decision, should be fully available for all to see. In the absence of good reason to the contrary, it is axiomatic that a litigant should be able to see all the reasoning of the court in his case, that justice should be administered and dispensed openly and in public, and that the media should know, and be able to disseminate, all aspects of court proceedings. That was made clear in *Scott v Scott* [1913] AC 417, and is now reinforced by Articles 6 and 10 of the European Convention. But even this fundamental principle must occasionally yield to other factors, such as the need to safeguard children and other vulnerable people, the need to prevent the court's orders being thwarted, and the need to protect the public interest.

135. By analogy with the approach laid down in *Conway* [1968] AC 910, and indeed by Lord Templeman in *Wiley* [1995] 1 AC 275, 280F, where a minister has concluded that the public interest justifies excluding a passage from the open version of a judgment, the court must first consider whether there is anything in the suggestion, and, if there is, then, unless the inclusion of the passage would have a grave effect on the public interest (in which case that would be the end of the matter), the court must then carry out a balancing exercise. In a case such as the present, it is salutary to bear in mind what Lord Reid said in *Conway* [1968] AC 910, 943G, namely "cases would be very rare in which it could be proper [for a court] to question the view of the responsible minister that it would be contrary to the public interest to make public the contents of a particular document." Especially, I would add, when it comes to issues such as national security, and all the more so at a time when terrorism is such a threat and the sharing of intelligence of such importance in combating that threat, as emphasised by Lord Judge LCJ in paragraphs 10 to 12 above.

Summary of ~~my~~ conclusions on this appeal

136. Although the Divisional Court's decision not to redact the redacted paragraphs involved a balancing exercise, and a difficult one at that, we have to decide whether the decision was right or wrong. We are not simply reviewing the reasoning. But it

goes further than that. All parties are agreed, correctly in my view, that the issue must be assessed as at the date of the decision, so we must consider matters as at today, which inevitably involves a reconsideration of the issue. Further, in the fifth judgment, the Divisional Court said, and was I suspect influenced by its view, that, at the time it gave the fourth judgment, it had been misled by the Foreign Secretary, unintentionally albeit wrongly, as to the attitude of the Obama administration's attitude to the disclosure of the redacted paragraphs. It seems to me that there was indeed a misunderstanding, but it was one for which no blame whatever should attach to the Foreign Secretary or those representing him (and I am not thereby suggesting that it was the fault of anyone else).

137. Until receipt of Judge Kessler's Opinion, I had, albeit with severe misgivings, reached the conclusion that the decision reached by the Divisional Court in the fifth judgment should be reversed. This was because (a) the court's reasoning did not persuade me that it was justifiable effectively simply to dismiss the Foreign Secretary's opinion, (b) while publication of the whole of the first judgment was very important as a matter of general principle, the court had rather overestimated the importance of publishing the redacted paragraphs, and (c) the balancing exercise favoured excising the redacted paragraphs, even though there were real reasons for scepticism about the Foreign Secretary's view.

138. My conclusion has, however, changed as a result of reading Judge Kessler's Opinion. The effect of that Opinion is that, in proceedings in which one of the parties was the US Government, a US Judge has found as a fact in an open judgment that Mr Mohamed's evidence as to the mistreatment he suffered at the behest of US officials in Pakistan (and indeed in Morocco and Afghanistan) was true. It is therefore now in the public domain, as a fact found by a US court in proceedings in which the US Government was a party, that he was mistreated, indeed tortured, in the ways in which he has described, when under US control and interrogation, and that representatives of the US intelligence services knew of the mistreatment and must have observed the effect of such mistreatment of him. Whatever may have been the position before the Opinion was published, details of Mr Mohamed's mistreatment, and their effect on him, ~~as~~ have been publicly recorded by Judge Kessler, and cannot be said any longer to be in any way confidential information, or information which is somehow in the control of the US Government.

139. In the light of that, it appears to me that the whole basis for the Foreign Secretary's case for redaction of the redacted paragraphs, as advanced in the three certificates, and supported by the recorded views of the CIA, the White House, and the Secretary of State, and by the submissions to the Divisional Court and this court, has fallen away. In these circumstances, I am of the view that there is simply no longer any basis for the Foreign Secretary maintaining the case for excision of the redacted paragraphs. As Sir Anthony May PQBD vividly puts it in paragraph 295 of his judgment, as a result of Judge Kessler's Opinion~~,~~ the Foreign Secretary's case is now based on "a principle entirely devoid of factual content on which to hang it". It is true that he still maintains that case, but it is a case which is now no longer consistent with the evidence relied on, or with the arguments pursued by, the Foreign Secretary; indeed, it seems to me to be logically insupportable and therefore irrational. Accordingly, a court of law should not accede to it. It follows that the balancing exercise need not be carried out: the Foreign Secretary's case falls at the first hurdle, as this is one of those

very rare cases where the court cannot accept a minister's view (which is now expressed in a letter from his lawyers) that national security would be at risk if the material in issue were published against the wishes of the US. The reason for that unusual conclusion is that the material concerned has now been published by the US, and the Foreign Secretary's views, as expressed in the certificates, and the representations from the US on which it was based, were expressed before that publication, and that publication undermines the basis of those views and representations.

140. In these unusual circumstances, the appropriate course, as I see it, is to consider this appeal in two separate stages. The first stage involves considering the issue as it was at the time of the fifth judgment, and before Judge Kessler's Opinion had become publicly available. The second stage involves considering the issue in the light of that Opinion. I could go straight to the second stage, as the question whether the redacted paragraphs should be redacted must be determined as at the date of determination. However, I prefer to consider the issue as it was at the time of the fifth judgment as that raises a dispute of importance which has been fully argued, and it informs the present situation.

141. The first stage, disregarding Judge Kessler's Opinion, involves three steps. The first step is to assess the arguments raised in relation to the public interest in the redacted paragraphs being excised; it is convenient to do so initially by addressing the concerns I have about the reasons given in the fifth judgment for rejecting the Foreign Secretary's case for redaction, and then by turning to my concerns about the argument in favour of redaction. The second step is to consider the arguments in favour of publishing the redacted paragraphs. The third step involves striking a balance between the two competing sets of arguments. The second stage, which requires Judge Kessler's Opinion to be taken into account, is rather simpler.

Before Judge Kessler's Opinion: the risk to national security: the fifth judgment

142. There is, in my view, real force in a number of the Foreign Secretary's criticisms of the fifth judgment. Each of the three certificates is detailed and fully reasoned; ignoring the closed passages, the first runs to seven pages and 20 paragraphs, the second to 14 pages and 50 paragraphs, and the third to 13 pages and 40 paragraphs. I mention the length of the certificates because it helps to demonstrate the degree of detail in the reasoning they contain, and the care with which they appear to have been prepared. It is, however, fair to acknowledge that each certificate contains quite a lot of background material and a fair amount of repetition, no doubt at least in part for reasons of emphasis, but that does not seriously detract from the fact that they are detailed and closely reasoned.

143. To a significant extent, the Divisional Court in its fifth judgment by-passed the three certificates on the ground that the court was perfectly capable of interpreting the CIA letter, thereby forming its own view that the risk of any damage to the flow of information, if it existed at all, was very slight. That can fairly be said to have been dangerous for a number of reasons.

144. First, the ultimate question was not so much what, on a fair reading by a court of law, the CIA letter meant; it was whether there was a risk, and, if so, how great a risk, of the US intelligence agencies reducing the flow of information to the SyS. While I

agree that that assessment must take into account the terms of the CIA letter, it ultimately involves a judgment as to the likely attitude and actions of the CIA. I come back, therefore, to the point that, at least on the face of it, the Foreign Secretary, with the benefit of his Foreign Office and SyS and SIS advisers, is better able to assess that risk than a judge. Accordingly, the court would normally expect to give great weight to the views expressed in the third certificate, unless, of course, there are very solid reasons for doubting it.

145. Secondly, what was said in the CIA letter seems to me to amount to an indication of risk which is very similar to that which the court identified in its fourth judgment, in which, of course, it decided that the redacted paragraphs should be removed from the open version of the first judgment. The CIA letter stated that publication of the redacted paragraphs "could reasonably be expected to cause serious damage to the [UK]'s national security", that it "may result in a constriction in the US-UK relationship" and "could likely result in serious damage to UK and US national security", and that it would mean that the US "will necessarily have to review with the greatest care the sensitivity of information [the US] can provide in the future." In paragraph 15(ii) of the fifth judgment, the court said that the conclusion it reached in the fourth judgment was based on the understanding that "The Bush Administration … was making clear that, if the court ordered disclosure, specific consequences would follow, namely the reconsideration of the intelligence sharing relationship", which seems to me to amount to much the same as what was said in the CIA letter.

146. Thirdly, the court subjected the CIA letter to what, in a very different context, Lord Diplock referred to disapprovingly as "detailed semantic and syntactical analysis" (*Antaios Compania Naviera SA v Salen Rederierna SA* [1985] AC 191, 201D). I can well understand why the court was astute to enquire whether the letter, when properly analysed, actually did support the notion that there would be a real risk to national security if the redacted paragraphs were published. However, the fact that the letter contained no guarantee of any reduction in intelligence sharing in that event is nothing to the point. The fourth judgment did not proceed on that basis. Furthermore, the language of the two earlier certificates, like that of the third certificate, and even that of the more belligerently expressed email from Mr Matthias, was that of possible, rather than certain, disadvantages. It is also fair to say that a communication such as the CIA letter, sent by an arm of a foreign country's government with a view to being shown to, and influencing, an English court, could be expected to be moderately and diplomatically expressed. Any sensible person in the position of the writer of that letter would have been well advised to avoid saying anything which could be regarded as a threat or ultimatum to the court.

147. Fourthly, when focussing on the CIA letter, the court concentrated on the US intelligence services, effectively disregarding other sources of intelligence, although the letter, like the certificates, refers to information shared not only by the intelligence services of the US, but also to those of other countries. The basis for the sanguine view expressed by the court in paragraph 107 of the fifth judgment as to the likely reaction of the US to the publication of the redacted paragraphs does not apply to such other countries, about which far less information is available. I infer from what was said in the certificates and the CIA letter that the publication of the redacted paragraphs could impact adversely on (i) the information supplied by such other countries directly to the UK, (ii) the information supplied by such other countries to

the US, and hence to the UK, and (iii) the terms on which information is supplied by such other countries to the US, thereby preventing the US supplying it on to the UK. It may well be, of course, that no aspect of this three-pronged risk would eventuate, but that very fact highlights the difficulties involved in any judicial attempt to "second guess" the Foreign Secretary's assessment of the risk in this case. That, of course, brings one back to the certificates, and in particular the third certificate, with its plainly expressed opinion about the risk of "considerable damage to our national security", based on the breach of the control principle which would be involved by the publication of the redacted paragraphs.

148. Quite apart from the approach to the CIA letter, I have difficulties with the court's assessment of the views of the Secretary of State as recorded in the notes of the March and May 2009 meetings. The court's expressed rationale in the fifth judgment for going back on the conclusion which it had reached in the fourth judgment was its belief that the Obama administration would not adopt the same view as the Bush administration. Yet, the note of the meeting of 12th May 2009 reveals that, after being told that that was what the Divisional Court believed, President Obama's Secretary of State, who is described as having been "clearly well aware of the case and the associated issues", is recorded as saying in terms "that the US position had not changed".

149. The court said in paragraph 93(iv) of the fifth judgment that "the statement made by Secretary of State Clinton that intelligence sharing would be affected was made without a proper analysis or understanding of what the 7 paragraphs contain", reflecting what they concluded in paragraph 104 of that judgment, which is quoted above. While it is conceivable that the Secretary of State was under a misapprehension, it is hard to find satisfactory grounds for reaching such a conclusion, which, if correct, would also presumably apply to Mr Bradley, who spoke at the meeting for the White House. Further, it appears to me that the court may have overlooked the point that the concern was not about the contents of the redacted paragraphs, it was more a point of principle: as put on behalf of the Foreign Secretary in argument, the redacted paragraphs, while "not themselves intelligence material", are "unquestionably a summary of intelligence material" provided to the UK "under confidential intelligence-sharing arrangements" (as the court effectively accepted in paragraph 73 of the fifth judgment), and "do not cease to be so because the US has itself chosen to disclose other related material on a related subject."

150. The court also concluded that the Secretary of State's opinion as recorded in March 2009 could effectively be disregarded in so far as it conflicted with what is in the CIA letter, as the contents of that letter were formally confirmed by General Jones on behalf of an even higher authority, the White House, at a later date, namely July 2009. In my view, given that the Secretary of State herself, and Mr Bradley, who spoke on behalf of the White House, expressed views at the May 2009 meeting, it is appropriate to assume that the essence of the view expressed at that meeting and the essence of the view contained in the CIA letter are basically the same, or at least very similar. That assumption obviously could be rebutted by the words recorded at the meeting and contained the letter, but, in my view, on a fair reading, they are consistent with each other. There may be a difference of emphasis, but that is wholly unsurprising, but, equally unsurprisingly, the message is to the same effect, and it is reflected in the third certificate.

151. The court also placed weight on its view that "the Foreign Secretary and Secretary of State Clinton proceeded on the erroneous assumption that the principle of control of intelligence was inviolable" - paragraph 93(i). I do not think that that was an appropriate view to take. As the court itself pointed out, in the first certificate, the Foreign Secretary made it clear that he may well have been prepared to order the release of the 42 documents to Mr Mohamed's US lawyers, if the threatened charges were brought and the US authorities did not supply them with the documents. However, that point is blunted by the fact that it would have been a very limited publication. More importantly, it does not seem to me realistic to think that either the Foreign Secretary or the Secretary of State can conceivably have believed that there was an absolute rule that shared intelligence could never, in any circumstances, be revealed without the consent of the State which supplied it. As stated in Mr Mohamed's submissions on this appeal, "the US Government is well aware that independent courts can and will in appropriate cases disclose foreign intelligence material where it is in the public interest … to do so", and this is demonstrated by a number of cases in the US and other courts. In other words, the court's view, that the Secretary of State and the Foreign Secretary misunderstood the control principle, is wrong; I believe that the view was based on an over-literalistic interpretation of what the Foreign Secretary said in one or two places in the certificates and what the Secretary of State is recorded as saying on 12th March 2009.

152. Mr Halperin's declaration was described by the court as "unchallenged". But his evidence was answered, albeit in general terms, by the observation in paragraph 24 of the third certificate that, in his reference to the US "taking umbrage", he had missed the point. The Foreign Secretary's concern was and is that, although the US would appreciate that the courts in the UK might order the publication of intelligence material provided by the US to the SyS, that does not mean that, if it occurred, it would have no effect on the provision of intelligence material. As Mr Halperin also said, the US would appreciate that there might be unauthorised leaks from personnel in the SyS to the press; however, that obviously does not mean that, if such leaks occurred, it would have no effect on the US's approach to the supply of information to the SyS. No doubt, if one small leak occurred and its source was identified and shut down, that would be unlikely to have much effect, whereas a series of significant untraced leaks could well have a very serious effect. In the same way, the argument here is that, while an isolated and plainly justifiable disclosure made by the court or the Government (as was contemplated by the Foreign Secretary in paragraph 15 of the first certificate) may well be acceptable to the US Government, what they see as a "gratuitous" disclosure by the court might be taken as an indication that the UK courts set little store by the control principle, which could well cause the US Government to reconsider what information they provide to the SyS. Further, Mr Halperin's evidence does not touch on intelligence supplied to, or through, the US by other Governments.

153. I do not wish to be pernickety, particularly in relation to what I regard as an admirable judgment, and I may myself be guilty of detailed semantic and syntactical analysis, but it does seem to me that there was a degree of inconsistency in paragraph 104 of the fifth judgment in relation to the crucial issue as to the existence of a real risk to the provision of information if the redacted paragraphs were published. On the one hand, at the start of that paragraph, the court said that "[t]here must be some risk …that the Obama Administration would reduce intelligence sharing with the United Kingdom". On the other hand, at the end of the paragraph, the court said that it "cannot accept

looking at the matter objectively on all the evidence … and as a matter of reality, that there is a real risk that the United States would reassess its intelligence relationship or reduce its intelligence sharing". I mention this primarily to demonstrate the understandable difficulty the court appears to have had in persuading itself that it could find there would be no real risk, once the *bona fides* of the Foreign Secretary when providing the certificates, and in particular the third certificate, was accepted. This difficulty arises, I think from the serious reservations the court had about the justification for the Foreign Secretary's view, reservations which I share, for reasons to which I now turn.

Before Judge Kessler's Opinion: the risk to national security: assessment

154. In explaining my concerns about some of the reasoning in the fifth judgment, I have effectively identified the factors which support the contention that national security could be detrimentally affected if the redacted paragraphs are not redacted, namely the contents of the three certificates (above all, the third), the CIA letter and the note recording the views of the Secretary of State. The statements in these documents have considerable force, particularly bearing in mind their respective sources, at least if the statements are taken at face value. The certificates are very full, and it is unusual for the court to be provided with supportive documentation for a certificate. All these documents indicate, at least on the face of it, that, if the redacted paragraphs are published, there is a risk that the flow of confidential information to the SyS from the intelligence services of the US and of other countries could be reduced, and that this in turn could lead to a reduction in national security. This is no more than a possibility, and therefore may well not happen, but the assessment of the Foreign Secretary, who, at least on the face of it, is much better able to judge such matters than the courts, is that it could well come about. It would require unusual facts before a court could reject such an assessment (especially where the *bona fides* of the Foreign Secretary is not in issue), and, if the assessment could n ot be rejected, it would require an unusually powerful reason before a court could override it. Like the other arms of government, courts have a duty not to do anything which risks national security, unless there is a very good reason.

155. Nonetheless, there are very real and substantial grounds for sharing the scepticism of the Divisional Court, in the fourth and fifth judgments, as to the actual possibility of harm to national security if the redacted paragraphs are published.

156. First, by referring to various passages in the four judgments discussed above, it is easy to work out what, at least in general terms, the redacted paragraphs contain. It is clear from paragraphs 73 and 77 of the first judgment, paragraph 14 of the fourth judgment and paragraph 13(i) of the sixth judgment, that they are based on reports from the US intelligence services to the SyS about Mr Mohamed's treatment when he was unlawfully detained, incommunicado and without access to a lawyer, and that they are likely to support, at least in general, his evidence as to his mistreatment, which is detailed in paragraph 26 of the first judgment. In paragraph 74 of the fifth judgment and paragraph 13(i) of the sixth judgment, it is made clear that the redacted paragraphs record details of treatment similar to the treatment of detainees described in the US Department of Justice memoranda published on 16th April 2009, and that the treatment was arguably "torture or cruel, inhuman and degrading treatment".

157. I am not saying that the precise contents of the redacted paragraphs can be worked out from the first, fourth, fifth and sixth judgments, but it is clear not merely that they contain nothing new, and any sensible reader would think it likely that they substantially confirmed Mr Mohamed's evidence. It must therefore be clear to any conscientious reader of the four open judgments that the redacted paragraphs would be very likely to reveal that the US authorities told the SyS that Mr Mohamed was mistreated in at least some of the ways that he describes and as described in the memorandum relating to Al Zubaydah.

158. The Foreign Secretary concedes that there is nothing of a secret or confidential nature in the redacted paragraphs, and accepts, as he must, that Mr Mohamed has publicised details of his alleged mistreatment, and the US Department of Justice has publicised details of mistreatment of at least one other detainee. However, the fact that Mr Mohamed has alleged that he has been mistreated, and the US has accepted that another detainee has been mistreated, does not alter the fact that the mistreatment of Mr Mohamed in Pakistan is not an established fact, and in particular that the US has not admitted or stated that Mr Mohamed was mistreated in Pakistan or elsewhere. Accordingly, as was accepted by the Divisional Court and on behalf of Mr Mohamed before us, the control principle would be infringed by the publication of the redacted paragraphs. Accordingly, the Foreign Secretary says, irrespective of the contents of the information communicated, any breach of the control principle could lead to a reduction in the flow of intelligence information to the UK.

159. No objection is taken to publishing details of the mistreatment accorded to Mr Mohamed as such, or to publishing the fact that there were communications about him from the US intelligence services to the SyS. What is said to be objectionable is to publish any details of the content of communications from the US intelligence services to the SyS, in so far as that material is "intelligence material", not because of the Foreign Secretary's opinion as such, but because of his concerns as to the way that the US Government (and other Governments) would view the publication, namely as a gratuitous breach of the control principle, and as to how such Governments would, or at least may, react, namely by restricting the flow of intelligence information to the SyS. That is a rather indirect and rather technical objection, but that cannot, of itself, justify simply dismissing the Foreign Secretary's concern, although it highlights the unattractive nature of the case for redaction.

160. Secondly, when the intelligence services of the US, or indeed of any other country, supply information to the SyS, they must appreciate that there is a risk of that information being supplied on, and even made public if it is in the interest of the UK, or if it is required by our law. For that reason, and also on the grounds of common sense, one would expect that foreign intelligence services would assess the effect of any publication on its own particular facts, and, in particular, whether it actually revealed any sensitive information. In this case, it would not do so.

161. The US authorities ought to have been aware, in particular, that, in so far as information passed to SyS involved evidence of mistreatment of detainees, it would be at risk of disclosure. US Supreme Court jurisprudence is clear the public interest in the publication of wrongdoing can outweigh the public interest in "the need for confidentiality of high-level communications … [a]bsent a claim of need to protect military, diplomatic, or sensitive security secrets" – per Burger CJ in *US v Nixon* (1974) 418 US 863, 94 SCR 3090, paragraph 36 It is also relatively easy to envisage

circumstances in which provisions of the UN Convention on Torture would require the UK Government to release information provided to them about the mistreatment of Mr Mohamed, at least if it amounted to torture. Article 7 stipulates that, where a person is alleged to have committed torture, or to have been complicit, or to have participated, in torture, the matter should be submitted to the prosecution authorities, and article 15 stipulates that nobody should have evidence obtained by torture used against them. The Divisional Court left open the question whether Mr Mohamed's treatment amounted to torture, but the possibility is one which ought to have occurred to the US intelligence, and the SyS, officials involved in the provision of information.

162. At least a partial answer to this point is to be found in the description of the publication of the redacted paragraphs as "gratuitous", for instance in paragraph 48 of the second certificate. The Foreign Secretary's argument is that, accepting that the control principle can be infringed by order of the court in the UK as in the US, the US Government (and maybe other Governments who supply the UK with information either directly or through the US) would, or at least might well, conclude that the publication of the redacted paragraphs, in circumstances where Mr Mohamed has no further interest in the relief he was seeking, and where the redacted paragraphs make no difference to the outcome, or even the reasoning, showed that the courts of this country were cavalier about respecting the control principle.

163. Thirdly, there is Mr Mohamed contention that the Foreign Secretary's case appears to be hard to reconcile with the attitude of the SyS on other matters. I am not particularly impressed with that contention in so far as it relies on the point that, in paragraph 15 of the first certificate, the Foreign Secretary stated that, if the US authorities had not been prepared to release the 42 documents to Mr Mohamed's US lawyers, then he "might well have been inclined" to do so. As already mentioned, the documents would not thereby have been made public. Furthermore, it can fairly be said that the fact that the Foreign Secretary might have been prepared to override the control principle if Mr Mohamed's life was at stake shows that he is prepared at least to consider overriding it in appropriate circumstances, which, in turn, can be said to lend some support to the notion that he has grounds for the views expressed in the second and third certificates.

164. A much more significant aspect of this contention is the fact that, as was understandably relied on by the Divisional Court in paragraph 72(iii) of the fifth judgment, the first judgment contained a number of statements which were said in terms to have been communicated by the US authorities to the SyS, and yet there was no objection to their inclusion in the open version of the first judgment. Together with other passages – which do not seem to me to be in point – the passages were referred to in a letter from Mr Mohamed's solicitors to the Treasury Solicitor and are to be found in paragraphs 10, 12, 29(ii), 29(v)(a), 30(i), 87(iii), and 87(iv) of the first judgment. They refer to Mr Mohamed's detention, confession, transfer, questioning, co-operation, request for a lawyer, and detention by US officials. It is true that they are briefly expressed, but then so are the redacted paragraphs.

165. The Foreign Secretary's explanation for not objecting to these passages being in the open version of the first judgment was set out in a letter dated 7th November 2009. The explanation was that, at the time the SyS considered the draft judgment, they knew that Mr Mohamed might be facing capital charges, and, in any event, they were "well able to judge what disclosures the [US] administration would regard as

objectionable", and the disclosures in question were "either completely innocuous … or made in such general terms as to disclose nothing of significance." This is said to be supported by the fact that, after the first judgment was handed down, the US intelligence services objected to the publication of the redacted paragraphs, but appeared content with the publication of the remainder of the first judgment.

166. I do not find either of those explanations particularly convincing. The Foreign Secretary's case is that the redacted paragraphs should be excised, not because their content is, as such, sensitive, but because the control principle should always be respected as a matter of principle. If that is right, it is very hard to understand either what difference Mr Mohamed's circumstances would have made, or why a number of express references in the first judgment to the contents of communications from US intelligence sources to the SyS about Mr Mohamed were thought to be acceptable by the SyS, and subsequently by the US intelligence services. The explanation proffered by the Foreign Secretary is based on the contents of the communications, but that is hard to reconcile with his concession that the actual contents of the redacted paragraphs are of themselves inherently innocuous.

167. Having said that, it is right to refer again to the fact that the Foreign Secretary's case is not that publication of the redacted paragraphs would be directly damaging to the UK because of what they contain. His case is that the UK's interests would be indirectly affected because the US Government (and other Governments) would object to the breach of the control principle, and this might result in a reduction in the supply of information. It seems to me just about comprehensible that the US Government might not object to the release of generalised information relating to Mr Mohamed, of no security value or which is already in the public domain, supplied to the SyS, while objecting to somewhat more specific information, even if it too has no security value, supplied to the SyS, if it is not clearly in the public domain, as it can still be seen to be "intelligence material". It is a very narrow point, but the only direct evidence of his mistreatment is Mr Mohamed's own evidence, and I can see how it can be said that that cannot be regarded as conclusive proof.

168. Fourthly, it is also germane that the Security Services had made it clear in March 2005, through a report from the Intelligence and Security Committee, that "they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training" (paragraph 9 of the first judgment), indeed they "denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government" (paragraph 44(ii) of the fourth judgment). Yet, in this case, that does not seem to have been true: as the evidence showed, 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.

169. My concern on this point is mitigated by the fact that the certificates appear to be supported by communications from the US, most pertinently the CIA letter and what was recorded as having been said by the Secretary of State. The US Government, like any other Government, plainly has an interest in ensuring that it controls the flow of any information which it provides to the SyS on a confidential basis, and the fact that it (and other Governments) may well be motivated in this case by embarrassment is not the point: one is concerned with hard facts, not moral judgements.

170. My conclusion on this half of the balancing exercise is this. While there are strong reasons for scepticism, I accept that the Foreign Secretary genuinely believes, and has some grounds for believing, what he has stated in the three certificates, namely that the flow of information from foreign Government intelligence services to the SyS could be curtailed if the redacted paragraphs are published, because that publication would be regarded by those Governments as an unjustifiable breach of the control principle. The normal reasons for deferring to his views on such an issue are diluted by the fact that there is nothing inherently sensitive in the information in those paragraphs, the very narrow and technical nature of the breach, the fact that the US must have appreciated the risk of intelligence material being disclosed pursuant to the law, the fact that other material apparently subject to the control principle has been revealed in the first judgement without objection, and a concern which arises from the apparent involvement of at least one Security Services agent in the mistreatment of Mr Mohamed. However, it is right to weigh against these factors the fact that the Foreign Secretary's opinion is reinforced by the CIA letter and the notes of the views of the Secretary of State.

171. There are, to my mind, probably two reasons why the US Government and some other Governments could have been genuinely concerned about the publication of the redacted paragraphs. First, it would have been an indication that the UK courts are prepared to breach the control principle not merely to protect its citizens, but in circumstances which those Governments would, or at least might, regard as gratuitous; secondly, embarrassment or sensitivity because the redacted paragraphs reveal communications about mistreatment of detainees by officials of the US (and other countries). The fact that I may think that there is no force in the first reason, that I may disapprove of the second reason, and that I may not consider either reason ought even to begin to justify any reconsideration of the sharing of intelligence with the UK, are not in point. When considering whether there is a threat to national security, at least where the threat is based on a logically coherent argument, it is the reality, not the morality, that matters - a point made in *R(Corner House Research)v Director of the Serious Fraud Office* [2009] 1 AC 756 (albeit that that was a case where the ultimate decision was for an arm of the executive, the Serious Fraud Office, and the court could only interfere if grounds for judicial review could be established). Of course, the morality may come into the picture at the balancing stage.

172. Having said that, I am nonetheless strongly sceptical about the notion that there would in fact be a reduction in the supply of information to the SyS, particularly in so far as that is a matter purely for the US Government. Bearing in mind that the UK and the

US are each the other's strongest intelligence partner, that the relationship goes back over 60 years, that the UK Government has done its best to have the redacted paragraphs redacted, that there is no sensitive information in the redacted paragraphs, it is hard to believe that the US intelligence services would really reduce the supply of information. In other words, Mr Halperin's opinion seems to me to be much more likely to be correct. But although the ultimate decision is for the courts, any judge must accord very substantial weight to the Foreign Secretary's view as to the existence and extent of such a risk.

173. Quite apart from this, it is also necessary to consider the information which is received from the intelligence services of other Governments, which will not have the long and close connection with the UK, the strong mutual dependency with the SyS, or the same notion of the rule of law, as the US. Particularly as officials of some of those countries must have been involved in the mistreatment of detainees, it is easier to believe that the publication of the redacted paragraphs could impinge either directly, or indirectly through the US, on the supply of information to the UK from those countries. Indeed, it is not difficult to deduce from the evidence that the most likely threat to the flow of information from the US may well, in fact, be in relation to information which had originally been provided to the US by other Governments, which may be supplied to the US on terms that it is not supplied to the UK. I am far from saying that this is a likely possibility, not least because the US courts seem to be just as robust as the UK courts about requiring information about mistreatment of detainees to be put into the public domain. The adverse reaction of other Governments is thus no more than a possibility which can fairly be deduced from the evidence, and it is a possibility about which I must confess to real scepticism. However, this brings me back to the point that it is very difficult, indeed impossible, for a judge to assess the likelihood of such a risk eventuating.

174. We are here concerned with a possible risk to the flow of information that may affect national security, which is an issue which is far graver than that in *Conway* [1968] AC 910 or *Wiley* [1995] 1 AC 275, both of which were concerned with domestic police records, and it is an issue on which the Foreign Secretary's opinion is both far more informed and experienced than that of any judge, and is supported by material, not merely from the US Government, but from the White House and the Secretary of State. Further, as I have explained, there are other Governments which are sources of information,

The public interest in the redacted paragraphs being disclosed

175. In the fourth judgment, the Divisional Court explained why it considered that there was considerable public interest in releasing the redacted paragraphs. I have summarised those grounds very briefly in paragraphs 85 and 86 above. On behalf of the Foreign Secretary, three initial points were made as to why there was no justification in publishing the redacted paragraphs. First, that the redacted paragraphs were unnecessary to the court's reasoning as a matter of law; secondly, that any issue in the substantive proceedings was academic as Mr Mohamed was now in this country and not facing any charges, so that releasing the redacted paragraphs would be "gratuitous"; thirdly, that the court should not operate as a sort of general guardian of the public interest: its role is to decide issues as between the parties to the litigation.

176. In my judgment, these three initial points are not persuasive, and, in any event, they should not detract attention from what is, in the present connection, the central point, namely that the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public. What goes on in the courts, like what goes on in Parliament or in local authority meetings or in public inquiries, is inherently of legitimate interest, indeed of real importance, to the public. Of course, many cases, debates, and discussions in those forums are of little general significance or interest, but it is not for the judges or lawyers to pick and choose between what is and what is not of general interest or importance (save where, as in the present instance, it is a factor to be placed in the balance, in a case where it is said that it is in the public interest to have the hearing in private or to redact material from a judgment).

177. I accept that, if one deletes the redacted paragraphs from the first judgment, the main conclusions reached by the court would remain the same, and the deletion would not even affect a fair summary of the reasons for those conclusions. In particular, they were unnecessary for the purpose of establishing Mr Mohamed's entitlement to the relief he sought as a matter of principle: he did not have to establish knowledge of, or involvement in, his mistreatment, on the part of UK Government officials. To that extent, they were not "necessary", but the fact remains that the redacted paragraphs were part of the court's reasoning, and litigants should not be entitled to challenge the appropriateness of the court including a statement in a judgment simply on the ground that it is not a strictly necessary ingredient of the reasoning. Quite apart from this, the findings in the redacted paragraphs were, as I see it, at least potentially relevant when the court came to the question of whether to exercise its discretion in favour of Mr Mohamed, once he had established a right in principle to the relief he was seeking.

178. I also accept that, given that he no longer needs any relief to assist him in connection with proceedings brought against him in the US, or indeed elsewhere, the facts contained in the redacted paragraphs are, in a sense, academic so far as Mr Mohamed is concerned. However, like any other litigant, he is entitled to know what findings the court made in a case in which he was a party. That point is particularly strong in the case of a litigant who credibly claims in proceedings are against the UK Government to have been seriously mistreated, and where the court's findings concern the UK Government's knowledge and participation in his mistreatment. An additional factor which is relied on is that Mr Mohamed has issued proceedings for damages against the UK Government and the SyS, who, in their Defence, do not admit his allegations of their contemporary knowledge of his mistreatment by the US authorities. I am disinclined to give that factor much, if any, weight. Even without the redacted paragraphs, the first judgment contains findings that the UK Government, and the SyS in particular, had contemporary knowledge of, and facilitated, Mr Mohamed's mistreatment; anyway, there would be nothing to prevent Mr Mohamed seeking disclosure in those other proceedings of the documents on which the redacted paragraphs were based, if he needs them.

179. There is some force in the Foreign Secretary's point that the court should not act as some sort of guardian of the national interest, in the sense that the court's primary

duty is to do justice between the parties to the action before it. However, one should not be too purist about that. It has long been the case that the court has responsibilities wider than its duties to the parties – obvious examples include a duty to protect witnesses (e.g. from bullying cross-examination or from self-incrimination), a duty to ensure the criminal law is enforced (e.g. sending papers to the Director of Public Prosecutions, or, indeed, to professional disciplinary bodies in some cases), a power to hand down judgment if in the public interest even where parties have settled and do not want the judgment published (as in *Prudential Assurance Co Ltd v McBains Cooper* [2000] 1 WLR 2000), and indeed a duty to declare, and where appropriate to develop, the law. It therefore seems to me to be quite unrealistic to pretend that, under the common law as it has developed, the court has had no general public duties.

180. The Human Rights Act 1998 has enlarged the court's role for present purposes. The courts have always been a branch of government (in the wider sense of that expression), and, as such, they now have a duty to comply with the Convention. As the Divisional Court said, article 10 carries with it a right to know, which means that the courts, like any public body, have a concomitant obligation to make information available. Of course, the obligation is not unqualified or absolute, nor does it involve the court arrogating to itself some sort of roving commission. But, where the publication at issue concerns the contents of a judgment of the court, it seems to me that article 10 is plainly engaged: the public's right to know is a very important feature. And that is not merely a point of principle. The court made findings as to what UK Government officials were told about serious and sustained mistreatment (conceivably amounting to torture) by a foreign government of someone resident in the UK, in circumstances where the court has also found such officials to have been involved in the mistreatment, when the UK Government had denied any such knowledge. In those circumstances, it seems to me little short of absurd to say that the court cannot take into account the public importance of, and the obviously justified public interest in, such findings, when deciding whether it is, on balance, in the public interest in publishing those findings. Indeed, in the light of the reasons and judicial observations contained in paragraphs 44 to 53 of the fourth judgment, the importance of putting into the public domain the facts relating to what the UK Government was told by the US Government about the wrongful treatment of detainees is clear.

181. I have read what Lord Judge LCJ says in paragraphs 37 to 42 above about the importance of all parts of a judgment being open; I respectfully agree with him.

182. However, I do not accept the more extreme point made on behalf of Mr Mohamed, that it is not open to the Foreign Secretary to raise public interest as a ground for redacting the redacted paragraphs, on the basis of the principle that there is no confidence in iniquity. That is, indeed, a well-established principle, but it is concerned with private confidences, not with claims for immunity from publication on the ground of public interest. The principle in a private law claim that the confidentiality of a communication between two persons should be maintained can be at least normally, defeated where there is a public interest in exposing a fraud or other crime is readily understandable and defensible. But in no way can it follow that the public interest in the confidentiality of a communication being maintained should be outweighed by the public interest in exposing a crime or other wrongdoing: the obviously correct course is to weigh the public interests against each other.

183. The final specific factor is that, just as it tells against redacting the redacted paragraphs, so it tells against publishing the redacted paragraphs that their essential content is already in the public domain, and that what is in the redacted paragraphs can, albeit in general terms, be gleaned from a considered perusal of the first, fourth, fifth and sixth judgments – see paragraphs 156 and 157 above.

184. In the light of all these points, I have no doubt that there is a substantial and very strong public interest, as a matter of principle, in having the redacted paragraphs published. In any case where a judgment is being given, there is a significant public interest in the whole judgment being published, and it is undesirable that the executive should be seen to dictate to the judiciary what can and cannot go into an open judgment of the court. Where the judgment is concerned with such a fundamental and topical an issue as the mistreatment of detainees, and where it reveals involvement– or worse – on the part of the UK Government in the mistreatment of a UK resident, there can be no doubt that the public interest is at the very top end of importance. In that sense, there is no difficulty in assessing the genuineness or importance of this half of the balancing exercise.

185. However, as reflected in the order made by Sullivan J, it was always recognised that the first judgment would contain sensitive material, and the court has a duty to ensure that material is not included in an open judgment, if it might harm the national interest if it were published, without at least considering whether it is nonetheless right to include it. More broadly, even without the redacted paragraphs, all the essential facts and findings are present in the first judgment (as stated in paragraphs 5 to 47, and discussed in paragraphs 74 to 91, of the first judgment, and as summarised very briefly in paragraphs 66 to 70 above). In particular, the first judgment mentioned Mr Mohamed's effectively unchallenged evidence as to the nature of his mistreatment by officials of the US and other countries, details of the knowledge, involvement, and assistance in that mistreatment by SyS officials, and the fact that there were written communications about Mr Mohamed and his treatment by US officials to the SyS. Further, as the court made clear, it is those communications which are referred to in the redacted paragraphs, and they reveal material which was already in the public domain.

Before Judge Kessler's Opinion: the balancing exercise

186. Where, as here, the public interest argument against disclosure is neither hopeless nor very compelling, the balancing exercise is often very difficult, not least because the competing factors are normally mutually incommensurate. In addition, as already mentioned, there was the peculiarity in this case that, while the issues of principle which are in play could not be more fundamentally significant in a modern democratic society, once one examines what material was already in the public domain as a result of available open material, the significance of the specific issue, namely whether to put the contents of the redacted paragraphs into the public domain, seems pretty marginal.

187. In the present case, I have reached the conclusion that the Divisional Court was right in initially concluding, essentially for the reasons it gave in the fourth judgment, that the redacted paragraphs should be excised, and that the reasons it gave in the fifth judgment for changing its view do not justify the decision to do so. In my view, in their otherwise carefully reasoned assessment of the risk to national security, the

Divisional Court in its fifth judgment gave insufficient weight to the views of the Foreign Secretary, took too dismissive a view of the CIA letter and the notes of the meetings with the US Secretary of State, did not really address the attitude of Governments other than the US, and overestimated the public interest in having the redacted paragraphs published.

188. Having made those points, I consider that the Divisional Court was right to conclude that this was not a case where the public interest in redacting the redacted paragraphs was plain and substantial enough to render it inappropriate to carry out the balancing exercise. Nonetheless, unless the court could have been confident that there was no appreciable risk to national security, then it seems to me that the redacted paragraphs should have stayed redacted, especially as the contents of the redacted paragraphs have very little value, whether in terms of understanding the reasoning and conclusions in the first judgment, in terms of contributing to the information publicly available or to the public debate, or in terms of their significance to Mr Mohamed. However important the issues of principle in this case, and however important the facts revealed in the first judgment, the argument in favour of publication must centre on the subject-matter of the dispute, namely the redacted paragraphs, and, once one analyses their contents, the argument for publication ultimately rests on the principle of open justice and the particular public importance of the first judgment.

189. It is of general and fundamental importance that all parts of a judgment are publicly available, and the importance is particularly great in the present case, in the sense that the redacted paragraphs were concerned with evidence relating to our intelligence services' involvement with torture, a topic whose importance is underlined by Lord Judge LCJ in observations in paragraphs 14 to 23 above, with which I respectfully agree. However, one must be careful of giving effect to such high general principle, however fundamental, when it has little significant practical content (because almost all the judgment is open, and redacted parts adds little, if anything, of substance), and could conceivably lead to a real risk to national security.

190. It is perhaps right to emphasise that I am not suggesting that the argument in favour of redaction should succeed because it is based on some high general principle; far from it. The argument in favour of redaction is clearly, almost brutally, practical: it is purely based on the stark fact that publication of the redacted paragraphs could conceivably result in harm to the UK's national security, as a result of it being seen by the US and other Governments to infringe the control principle for no good reason. The fact that the risk of harm results from the concern of the US and other Governments about the control principle, as opposed to the practical consequences of publication, (as well as possibly resulting from a sense of embarrassment, and, conceivably from other concerns) does not mean that my ultimate conclusion is based on that principle, other than indirectly.

191. In conclusion, therefore, and with no enthusiasm, I have concluded that, were it not for Judge Kessler's Opinion, the value in releasing the contents of the redacted paragraphs into the public domain would simply have been insufficient to justify running a risk, even what I regard as a pretty slender risk, to national security, given that the Foreign Secretary has certified that there would be such a risk, and his opinion is not irrational and is supported by material from the highest representatives of the US, the UK's largest, longest standing and closest intelligence partner.

The risk to national security in the light of Judge Kessler's Opinion

192. As explained above, Judge Kessler found as a fact in her Opinion that Mr Mohamed's evidence as to his mistreatment was true. That was a necessary finding in order to decide whether what he had said to US officials about the Petitioner before her could be relied on. (By contrast, in the Divisional Court, such a finding was unnecessary and was not made in the first, or any subsequent, judgment.) Accordingly, now the Opinion has been published, details of Mr Mohamed's mistreatment have become established publicly available facts, rather than merely being matters as to which Mr Mohamed had given evidence, as was the basis on which the court proceeded in the fourth, fifth, and sixth judgments. Further, the source of the publication of the facts is a Judge of the US courts, the very country which, according to the Foreign Secretary's case, should be "able to retain control of [what is in the present case the alleged] intelligence information and, where disclosure is required, to handle this within its own adjudicatory system."

193. The narrow point which the Foreign Secretary had been relying on was that the details of the treatment which had been meted out to Mr Mohamed at the behest of the US authorities were not in the public domain, although his allegations as to his treatment, and US Government information as to the treatment of at least one other detainee, were in the public domain. That narrow point is no longer available: the information contained in the communications to which the redacted paragraphs relate is no longer capable of being said to be, whether to a lawyer or to an intelligence operative, intelligence material in the control of the US.

194. In the letter from the Treasury Solicitor as to the effect of the Opinion on the issue on this appeal, the Foreign Secretary's case is that the conclusions expressed by Judge Kessler make no difference. This is said to be because

> "The sensitivity of the redacted paragraphs … arises entirely from the fact that they derived from material supplied by [US] intelligence sources … and from the [US's] concern about the security of information supplied by such sources if it is liable to be disclosed in circumstances such as these. The fact that [Judge Kessler's] finding[s were] based on material of a quite different nature and origin mean that it has no implications for any issue in these proceedings."

195. In my view, this contention is simply inconsistent with the Foreign Secretary's case as advanced in the certificates, as developed before us, and as supported by the CIA letter, and the Secretary of State's remarks. The notion that information passed by the US intelligence services to the SyS remains intelligence material, even after that information has been placed in the public domain and stated to be factually accurate by a US court in proceedings to which the US Government was a party, seems to me to be inconsistent with the Foreign Secretary's case as it has been so far advanced, as well as being inconsistent with common sense, and with the concepts of intelligence material, control and confidentiality.

196. If the Foreign Secretary's contention now is that it is a breach of the control principle to publish the fact that information, which has been made publicly available by US official sources, was communicated by the US intelligence services to the SyS, that contention is also inconsistent with the way in which his case has been put so far. In any event, there is, after all, nothing to "control", if the information is in the public

domain. The case advanced by and on behalf of the Foreign Secretary was consistently based on the proposition that the material revealed in the redacted paragraphs had been supplied by the US and was not in the public domain, in that it was "intelligence material" or "intelligence information", and should therefore not be placed into the public domain, other than by or with the consent of the US.

197. Thus, there is the view of Mr Mathias of the State Department, who referred to "[o]rdering disclosure of US intelligence information". So, too, in the second certificate, the Foreign Secretary referred to the "[d]isclosure of US intelligence information". The Foreign Secretary also said in the second certificate that "[i]t is not simply confidentiality and the secrecy of intelligence material that is in issue …, but also the issue of the control that one government has over [its] intelligence material". There is no "disclosure" of "US intelligence information" if one publishes information which has already been placed in the public domain by a US Judge finding as a public fact that it is true.

198. As just mentioned, the Foreign Secretary also made the point that "the [US] considers it paramount that it is able to retain control of its intelligence information and, where disclosure is required, to handle this within its own adjudicatory system". But what is in the redacted paragraphs is now "information" which has been disclosed by the US "adjudicatory system".

199. The CIA letter stated that the "seven paragraphs … are based upon classified information", and referred to "[p]ublic disclosure of this information" causing "serious damage". It also referred to the SyS being "unable to protect information we provide to [them]". The information can no longer be regarded as "classified", it has now been publicly disclosed, and it makes no sense to talk about "protect[ing]" such information. Paragraph 20 of the third certificate referred to "any Court order[ing] disclosure of the classified information in issue into the public domain", and paragraph 24 referred to the "practice within intelligence communities that information passed on intelligence channels cannot be publicly disclosed without the consent of the State disclosing it". However, the information in the redacted paragraphs has been disclosed "by the State disclosing it". The CIA letter also said that the material contained in the redacted paragraphs "do not cease to be so because the US has itself chosen to disclose other related material on a related subject", but now the US has disclosed the material itself by a US Judge stating in public what that material is and that it is true.

200. The Secretary of State's view, summarised in paragraphs 41 and 44 above, is to the same effect. On 2nd March 2009, she said "it should be for the US to decide on the release of its own intelligence material", and on 13th March she was recorded as saying that she and Bradley were "opposed to the release by the UK of any US intelligence material." But the information, by being published as factually accurate by a US Judge, is no longer "intelligence material" and would not be "release[d]" if it was now repeated in an English judgment. On 12th May 2009, the Secretary of State said she was "opposed to the public disclosure of US intelligence information in this case". The information has now been "disclos[ed]" in Judge Kessler's Opinion.

201. Paragraph 41(6)(a) of the Foreign Secretary's skeleton argument describes the redacted paragraphs as "a summary of intelligence material provided … under confidential intelligence-sharing arrangements", and says that it "do[es] not cease to

be a summary of intelligence material because the [US] has itself chosen to disclose other secret material on a related subject." But it does cease to be a summary of intelligence material, once the US judiciary has "chosen" to disclose that very material. Again, in paragraphs 39(2) and (3) of the skeleton argument, the information in the redacted paragraphs is described as "intelligence material belonging to the [US]", "information derived from its intelligence", and "sensitive material provided by the [US]" (paragraph 59 above). It cannot be so described once it has been put into the public domain by a US Judge.

202. Finally, I come back to the letter written on behalf of the Foreign Secretary on 7th November 2009, which explained why no objection had been taken to certain passages in the first judgment which were expressly based on intelligence provided by the US – see paragraph 107 above. According to that letter, such passages were regarded as acceptable if they were "innocuous" or "reveal[ed] nothing of significance". Once details of Mr Mohamed's mistreatment, whether communicated by US intelligence services or not, have been identified and found to have occurred in an open judgment given by a US Judge, those details must similarly be "innocuous" and not "significant".

203. If, as I conclude, the publication of the redacted paragraphs would not infringe the control principle, it seems to me that there is no satisfactory reason for concluding that the publication would result in the US Government, or other Governments, reducing the flow of information to the SyS. There is no certificate from the Foreign Secretary, and no evidence from the ~~US~~ CIA, the White House or the Secretary of State, to support the contention that, once the information contained in the redacted paragraphs was openly held to be factually correct by a US court, the control principle would be infringed, or the flow of information from any source to the SyS would be threatened, if the redacted paragraphs were included in the open version of the first judgment. All that has happened is that the Foreign Secretary has reiterated his case in a letter from the Treasury Solicitor. Further, it appears to me that it is simply unrealistic to think that any Government, US or otherwise, would object or take exception, on the ground that it represented the unauthorised publication of US intelligence information, to the publication of facts in an English judgment when those facts have already been published in a US judgment.

Concluding remarks

204. I have not rested my reasoning on any of the closed material or argument put before us, because I reached my conclusions by concentrating solely on the open material (save that I have inevitably had regard to the contents of the redacted paragraphs). Having reached my conclusions, I then considered the closed evidence, which consists of the closed material in each of the three certificates, and certain portions of the CIA letter and other letters. Consideration of this closed material in no way caused me to doubt or reconsider the conclusion I have reached on the basis of the open material. The closed material spells out in a little more detail the Foreign Secretary's concerns about the attitude of the US Government and intelligence services if the redacted paragraphs are published, and it expands substantially, if pretty generally, on the risk of other Governments and intelligence services reducing the information they provide to the SyS, either directly, or through the US intelligence services, if the redacted paragraphs are published in breach of the control principle.

205. It is an open fact that there is such information in the closed material, and all I need (or can) say about it in this open judgment, is that, while it is not particularly specific or overwhelmingly convincing, it does, at least in my view, provide some further support for the views expressed by the Foreign Secretary in the certificates, and therefore for the conclusion I would have reached, but for Judge Kessler's Opinion. I should add that there is nothing in the closed material which calls into doubt my view that the control principle is no longer relevant now that Judge Kessler has delivered her Opinion.

206. Although I would (with considerable diffidence) have reached a different conclusion from that reached by the Divisional Court on the facts as they were as at the date of the fifth judgment, I would certainly not accept that the conclusion in the fifth judgment could fairly be described as "irresponsible", as suggested by Mr Sumption. As I have indicated, the issue being considered in the fourth and fifth judgment was hard to resolve, and I entirely agree with Lord Judge LCJ's remarks in paragraphs 6 and 51 of his judgment in this connection. I should add that, if a minister thinks it appropriate to attack a judicial decision in robust terms (or indeed at all), then the right place to do so is, as was done in this case, in an appellate court, rather than out of court. The Foreign Secretary's case on redaction before the Divisional Court was, to put it mildly, not assisted by the remarkably drip-fed way in which the evidence was presented, and I do not think that the arguments advanced below were entirely the same as those addressed to us.

207. In conclusion, for the reasons given above, I would dismiss this appeal.

Sir Anthony May:

Introduction

208. I agree that this appeal should be dismissed. My detailed reasons are in close accord with those of Lord Neuberger MR, whose account of the facts and circumstances of this unusual and important appeal I gratefully adopt. I also agree with and adopt the main substance of the judgment of Lord Judge LCJ. I shall not repeat much of the detailed exposition which he has undertaken, but give a rather shorter summary sufficient for the purposes of this judgment.

209. The issue now before the court is far removed from the issues before the Divisional Court when the litigation began. Mr Mohamed was then in US military detention at Guantanamo Bay and faced potentially capital terrorist charges as an alien unlawful combatant before a US Military Commission. To assist his contention that confession evidence against him had been obtained by torture or by cruel, inhuman or degrading treatment, these proceedings were begun on his behalf on 6th May 2008 seeking the provision of information and documents in the possession of the UK Security Services mainly relating to his detention and interrogation in Pakistan between 10th April 2002 and 22nd July 2002 and to his subsequent treatment by US authorities. The main basis of the claim relied on the principles in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133. The Foreign Secretary resisted the claim, denying that he was under any *Norwich Pharmacal* or other obligation, and contending that his decision not to make voluntary disclosure was taken on the basis that disclosure would cause grave damage to UK national security.

The Divisional Court's six judgments

210. Detailed material in the Divisional Court's first open judgment of 21st August 2008 ([2009] 1WLR 2579; [2008] EWHC 2048 (Admin)) describes the basis for a belief that Mr Mohamed may have been concerned with a security threat to the United Kingdom, apart from the matters relating to the United States with which he was to be charged before the US Military Commission, as he was on 28th May 2008. Details of these charges appear in paragraph 47(i) of the Divisional Court's first open judgment.

211. In a letter dated 6th June 2008 written at the request of the Foreign Secretary to Mr Mohamed's US lawyers, the Foreign Secretary in effect accepted that he had in his possession material relating to Mr Mohamed's detention in Pakistan which was potentially exculpatory or otherwise relevant to the proceedings before the US Military Commission – see paragraph 47 (ii) of the first open judgment. In July 2008, there was correspondence with Mr Mohamed's lawyers considering whether the material whose disclosure was claimed would be disclosed by the US prosecuting authority in those proceedings. There was very considerable urgency upon the Divisional Court to conclude its hearing and decide Mr Mohamed's claim for disclosure, because his lawyers regarded it as essential that, if the *Norwich Pharmacal* claim succeeded, the disclosed documents and information should be available for use before the US Convening Authority.

212. The Divisional Court decided for the purpose of the *Norwich Pharmacal* claim that Mr Mohamed had established an arguable case of wrongdoing by or on behalf of the United States to the extent accepted by the Foreign Secretary as arguable in paragraph 67 of the first open judgment. The arguable case included torture and cruel, inhuman or degrading treatment in Pakistan; unlawful rendition from Pakistan to Morocco; unlawful incommunicado detention in Morocco and torture there; unlawful rendition from Morocco to Afghanistan; and unlawful and incommunicado detention in Afghanistan and torture and cruel, inhuman or degrading treatment there.

213. The Divisional Court gave extended consideration to the relevant legal principles. They considered open and closed evidence relating to the role of the SyS in interviewing Mr Mohamed when he was unlawfully held incommunicado in Karachi in May 2002, and in providing information to the US which may have been used in his further interrogation. The Court made findings of fact set out in paragraph 87 of the first open judgment. On the basis of these findings, the Court concluded that the SyS facilitated the US military interviewing of Mr Mohamed and thus facilitated the arguable wrongdoing to an extent sufficient for *Norwich Pharmacal* purposes.

214. The Divisional Court considered at length whether the claimed disclosure of the documents and information was necessary; whether they would be provided to and considered by the Convening Authority if it were not produced by the Foreign Secretary; and whether they would be provided to Mr Mohamed's lawyers by order of the military judge during the course of hearings before the Military Commission. The Divisional Court concluded that disclosure was necessary to Mr Mohamed's defence, not least because there was scant other independent evidence to support his account of how he had been mistreated. As to procedures in the United States, the evidence before the Divisional Court was unsatisfactory and incomplete. But there were a number of features of the process which made it clear that the process might not produce the information or documents at all, and it certainly was unlikely to produce

them within a proper time. The Court concluded that the Foreign Secretary should now provide the information to Mr Mohamed's lawyers. They gave extended reasons for this conclusion in paragraph 126 of their first open judgment. The court then decided that 42 documents and information about and specific to Mr Mohamed's treatment and rendition, and information concerning the SyS visit to interview him in Pakistan on 17th May 2002 were within the scope of available relief, but that more general information was not.

215. As to whether the court should exercise its discretion in favour of making an order for disclosure, the Divisional Court decided in its first open judgment to defer to a subsequent hearing claims by the Foreign Secretary for public interest immunity. This was not least in the light of the Special Advocate's contention that there could be no public interest immunity for information pointing to the commission of serious criminal offences. The court considered the consequences to Mr Mohamed, who might face the death penalty if the information was not provided; the UK Government's knowledge as established by the evidence; the importance of the state prohibition on torture and cruel inhuman and degrading treatment; and general issues such as intrusion, time and cost. The court concluded that the *Norwich Pharmacal* conditions were satisfied for information relating specifically to Mr Mohamed, subject to agreement on the form of the provision of the information. The court gave detailed reasons for so concluding in paragraph 147 of its first open judgment. It indicated that, subject to public interest immunity issues, it would order disclosure.

216. Having dealt with *Norwich Pharmacal* claim the Divisional Court then considered and rejected a submission on behalf of Mr Mohamed that there existed an absolute rule of customary international law which in the circumstances required the United Kingdom to make disclosure to him.

217. On 26th June 2008, Sullivan J had made a case management order in the proceedings, which included provision for the lodging of closed evidence and a closed annex to any public interest immunity certificate. An annex to this order provided for the functions of the Special Advocate, and for successive public and private hearings with closed material to be referred to only in the course of a private hearing. The annex further provided that before the court were to serve an open judgment on the claimant and interested party, it must first serve a copy on the defendant and the Special Advocate. The defendant had permission to show the open judgment to the SyS and SIS, so that the defendant might apply to the court to amend the judgment, if he considered that it contained information which would be contrary to the public interest to disclose. There was further provision for the special advocate to apply to the court to amend open and closed judgments on the ground that the closed judgment contained material, the disclosure of which would not be contrary to the public interest. The annex provided for the Special Advocate and the defendant to make representations on these matters. These procedures in effect enabled one party to the litigation to seek to edit the court's judgments on public interest grounds and to attempt to redraw at the margins any division the court may have decided to make between its open and closed judgments. Although the procedure is no doubt important and necessary in public interest cases which concern national security, it has given rise to unfortunate consequences in the present proceedings. Attempts to edit or resist the editing of the court's judgment – on one view an intrinsically undesirable process – have taken on lives of their own quite distinct from the real original issues in the case.

218. At a hearing on 27th August 2008 which resulted in the Divisional Court's second open judgment dated 29th August 2008, the court considered a first public interest immunity certificate filed by the Foreign Secretary relating to the proposed disclosure under *Norwich Pharmacal* principles. The certificate asserted that general disclosure would seriously harm existing intelligence sharing arrangements between the UK and the US and would cause considerable damage to the national security of the UK. This certificate also supported the contention that seven subparagraphs of paragraph 87 of the first open judgment, now set out in an appendix to this judgment, should be removed, because of the very real risk of harm to the national security and international relations of the UK if they were to remain in the open judgment. Paragraph 87 of the open judgment was the paragraph in which the Divisional Court gave a summary of its findings necessary for that judgment in relation to the UK's involvement in and facilitation of the alleged wrongdoing of the US for the purpose of the *Norwich Pharmacal* analysis.

219. As to the disclosure of the documents and information to Mr Mohamed's lawyers, matters had moved on. A letter dated 21st August 2008 from the Legal Advisor to the US Department of State had stated that the Chief Prosecutor's Office had reviewed the 44 (sc. 42) documents and would provide them to the Convening Authority on request with the names of officials and location of intelligence facilities redacted. The documents would be produced within the Military Commission's process at the normal discovery phase of the process. The Foreign Secretary's public interest immunity certificate concluded that the public interest dictated that disclosure should take place in accordance with US processes and not by UK court order. The certificate in essence accepted the Divisional Court's judgment that the material should be made available to Mr Mohamed's US counsel. The Foreign Secretary might well have been inclined to reach a different conclusion on the balance of public interest if the US authorities had not agreed to make the commitment in the letter of the 21st August 2008. The Foreign Secretary's position lent heavily on the need to preserve the intelligence relationship with the US. It was supplemented by a sensitive schedule which essentially set out the evidence on which the Foreign Secretary relied.

220. Mr Mohamed's US lawyer made a witness statement explaining why the concession by the US Chief Prosecutor was inadequate. A further extract from a letter from the State Department received by the Divisional Court on 27th August 2008 explained that the Convening Authority would have the documents at issue and these would automatically be disclosed to defence counsel if the case was referred. The Divisional Court considered that, since the documents were to be provided to the Convening Authority, Mr Mohamed had in this respect obtained all that he could have obtained from the Divisional Court. Later disclosure to Mr Mohamed's US lawyers if the case were referred was said to curtail their ability to make effective submissions to the Convening Authority. This was the only respect in which the assurances of the US Government fell short of the requirements of Mr Mohamed's US defence team. Whether this was a legitimate requirement was a part of the eventual public interest immunity balance. It was submitted by the Special Advocate that the first public interest immunity certificate failed to address the abhorrence and condemnation accorded to torture and cruel, inhuman and degrading treatment. The Foreign Secretary accepted that this was relevant material. The Foreign Secretary and his legal adviser, Mr Bethlehem QC, had gone to considerable lengths to help Mr Mohamed. Justice required that the court should allow the Foreign Secretary time to

furnish a further certificate dealing with these matters. The remaining public interest immunity issue was therefore adjourned.

221. The Foreign Secretary then filed a second public interest immunity certificate which took into account developments in the matter and gave clearer consideration to the abhorrence of torture and cruel, inhuman or degrading treatment. He took account of a principle (referred to as "the control principle") whereby a government providing sensitive intelligence information to another government expects to retain control over the use and dissemination of that material. A breach of the control principle would have much wider implications than the facts currently under consideration. The Foreign Secretary concluded that the balance of public interest lay heavily in favour of disclosure of the documents and the information in the redacted paragraphs through the US system in a manner consistent with the assurances provided by the US Government, and against disclosure by order of the UK court. It was further noted in relation to the redacted paragraphs that they would not secure any additional benefit to Mr Mohamed.

222. At further hearings in October 2008, resulting in the Divisional Court's third open judgment of 22nd October 2008, the court considered further developments and evidence that had hitherto been unavailable. First, there had been *habeas corpus* proceedings before Judge Sullivan in the US District Court for the District of Columbia, in which lawyers on behalf of those detained in Guantanamo Bay challenged the legality of their detention. On 6th October 2008, the US Government gave notice that it was no longer relying in these proceedings on part of its narrative case, namely the allegations to plan to launch a terrorist attack on the US. On the same day, the US Government disclosed seven of the 42 documents, heavily redacted, under the terms of a protective order, whose effect included that the Divisional Court did not know which of the 42 documents the seven were, nor why those seven had been chosen for disclosure, nor what redactions had been made. It was further unclear whether the seven documents might be used before the Convening Authorities.

223. On 21st October 2008, shortly after the Divisional Court gave notice that they would hand down their third open judgment on 22nd October 2008, they were informed that the Convening Authority had dismissed the charges against Mr Mohamed as being premature for a decision by the Convening Authority. This was without prejudice to the prosecutors' right to bring further charges, which the prosecutors had said they would do. It was submitted to the Divisional Court on behalf of Mr Mohamed that these were manipulative moves to avoid disclosure of the remaining 35 documents, and that the court should order immediate disclosure. The Divisional Court considered that these submissions could not be dismissed as fanciful, but that fairness required that the non-party against whom they were made should have the opportunity to comment. The Foreign Secretary submitted that the matter should be stayed pending a status conference to be held before Judge Sullivan on 30th October 2008. The Divisional Court acceded to this submission despite real concerns, considering that challenges to the conduct of the US Government should, except in most exceptional circumstances, be determined by the judiciary of the US. Judge Sullivan should be able to make appropriate decisions about the 42 documents.

224. As a postscript to this third judgment, the Divisional Court said this about the issue now before this court on this appeal:

> "We heard argument in camera on the issue to which we referred in paragraph 7. The issue can be described as whether we should restore to our open judgment seven very short paragraphs amounting to about 25 lines in which we provided a further summary of the circumstances of [Mr Mohamed's] detention in Pakistan and the treatment accorded to him as referred to in paragraph 87(iv) of our judgment. This arose in the context of the allegation that [Mr Mohamed] had been subjected to torture and cruel, inhuman and degrading treatment and the scope of the offences to which we referred in paragraph 77 of our first judgment.
>
> Although the argument took place in closed session, the issue is one of considerable importance in the context of open justice and we will in due course deliver an open judgment on the issue. We have asked the parties to consider whether, before we decide this issue, we should invite submissions in writing from the media in view of the importance of the issue to the rule of law."

225. On 4th February 2009, the Divisional Court gave its fourth open judgment determining the question whether the court should restore to its first open judgment the seven subparagraphs of paragraph 87. It described these paragraphs as containing a gist of reports made by the US Government to the UK Government in relation to the detention and treatment by or on behalf of the US Government of Mr Mohamed in the period 2002-2004 while he was in US custody. Developments since the third judgment included that Mr Mohamed had not in fact been recharged before the Convening Authority; that Mr Obama had been elected President of the United Sates and had entered office in January 2009; and that the President had issued an Executive Order on 22nd January 2009 requiring that no new charges were sworn pending a review of all those detained at Guantanamo Bay. Before the hearing before Judge Sullivan on 30th October 2008, the US Government had made all the 42 documents available in redacted form for use in the *habeas corpus* proceedings. Subject to the matter of redaction, there was no further remedy sought or required in the *Norwich Pharmacal* proceedings before the Divisional Court. Mr Mohamed among others had started proceedings against the UK Government relating, amongst other matters, to the events considered in the Divisional Court proceedings. The only outstanding issue was whether the seven very short subparagraphs should be restored to the Divisional Court's first open judgment. The Divisional Court said in paragraph 14 of the fourth open judgment that:

> "In these paragraphs we provided a summary of reports by the United States Government to the SyS and the Secret Intelligence Service (SIS) on the circumstances of [Mr Mohamed's] incommunicado and unlawful detention in Pakistan and of the treatment accorded to him by or on behalf of the United States Government as referred to in paragraph 87(iv) of our judgment. We did so as the summary was highly material to [Mr Mohamed's] allegations that he had been subjected to torture and cruel, inhuman or degrading treatment

and to the commission of criminal offences to which we referred in paragraph 77 of our first judgment and to which we refer at paragraph 20 below."

226. The Foreign Secretary had relied on his second public interest immunity certificate of 5th September 2008. The Divisional Court had received written submissions on behalf of the media. The issue was a novel one, which required balancing the public interest in national security with the public interest in open justice, the rule of law and democratic accountability. The question was whether the information should be withheld permanently. There were problems generally concerning the increase in the number of hearings in private and closed judgments.

227. It was accepted by the Foreign Secretary that there was an arguable case disclosed by the documents that cruel, inhuman or degrading treatment had been inflicted on Mr Mohamed, and that the boundary between this and torture could not be drawn with precision. The Special Advocate submitted that the court could be satisfied on the basis of the reported information that the treatment amounted to torture. The court was unable to accept that there was sufficient material upon which to reach that conclusion.

228. It was accepted that the determination of the issue required a balance of various interests in accordance with *R v Chief Constable of the West Midlands, ex parte Wiley* [1995] AC 274, except that the Special Advocate submitted that public interest immunity could not be invoked to prevent disclosure of serious criminal misconduct by UK officials. Paragraph 26 of the fourth open judgment sets out a detailed summary of the submission that there is an absolute bar to the claim for public interest immunity in this case. The redacted paragraphs should be made public. To do otherwise would be to conceal the gist of the evidence of serious wrongdoing by the US which had been facilitated in part by the UK Government. The Divisional Court considered that, powerfully and cogently though the submissions were made, there was no such absolute bar. The court's reasons are in paragraphs 28 to 33 of their fourth open judgment. These included that the Special Advocate's submissions were not supported by authority, and that it must be open to find a way to compel the Executive to act in accordance with the rule of law or to punish its officers for wrongdoing or to hold the Executive democratically accountable, without endangering the wider interests of the state as a whole where those interests may be damaged by disclosure. The Special Advocate's submissions, however, had great force in support of the contention that, in balancing the various interests, the balance should come down firmly in favour of making the redacted paragraphs public.

229. In applying the balancing test, the Divisional Court properly addressed four questions, which were:

i) Is there a public interest in bringing the redacted paragraphs into the public domain?

ii) Will disclosure bring about a real risk of serious harm to an important public interest, and if so, which interest?

iii) Can the real risk of serious harm to national security and international relations be protected by other methods or more limited disclosure?

iv) If the alternatives are insufficient, where does the balance of the public interest lie?

230. Under the first of these heads, the Divisional Court considered at length (paragraphs 35 to 60) the public interest in placing the redacted paragraphs into the public domain, the rule of law, free speech and democratic accountability. It was accepted both as a matter of common law and of obligation under Articles 6 and 10 of the European Convention on Human Rights that courts must do justice in public unless it can be shown that justice could not otherwise be done or there are other good reasons for privacy. In addition to the public nature of hearings, there is also a principle that decisions and reasons must be made public. Under the rubric "Public justice, the rule of law, free speech and democratic accountability" the Divisional Court emphasised that it must be and is the duty of a judge in upholding the rule of law to ensure both that a particular dispute between parties is decided openly, but also that matters that come to the attention of the court which appear to constitute an infringement of the rule of law are dealt with openly. The court accepted the submission that the media has a vital role in communicating what takes place in court and the decision of the court. Having considered at length the importance of publishing the redacted paragraphs, the court expressed the clear view that the requirements of open justice, the rule of law and democratic accountability demonstrated the very considerable public interest in making the redacted paragraphs public. This was particularly so given the constitutional importance of the prohibition against torture and its historic link from the 17th century in this jurisdiction with the necessity of open justice. However, these principles are subject to ordinary and every day exceptions for the reasons explained by Lord Diplock in *Attorney-General v Leveller Magazine* [1979] AC 440, at 450B where he said:

> "However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of a particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice."

231. The court rejected a submission on behalf of the Foreign Secretary that the public had no right to the information withheld because Mr Mohamed only sought the information (which he now had) in confidence and the proceedings in the United States would be unaffected by the court's decision. This ignored the vital public interest in the open administration of justice.

232. The court then considered the public interest in keeping the information out of the public domain for reasons of national security and international relations. The Foreign Secretary's public interest immunity certificates, particularly that of 5th September 2008, made clear that the US Government's position was that, if the

redacted paragraphs were made public, then the US would re-evaluate its intelligence sharing relationship with the United Kingdom with the real risk that it would reduce the intelligence provided. It was and remained (so far as the court was aware) the judgment of the Foreign Secretary that the US Government might carry that threat out and this would seriously prejudice the national security of the United Kingdom.

233. The Divisional Court referred to *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 [2001] UKHL 47, and *R (Corner House Research v Director of the Serious Fraud Office* [2009] 1 AC 756, [2008] UKHL 60, to the effect that issues of national security are issues of judgment and policy for the Executive Branch of the State and not for judicial decision. A court should not therefore differ from the opinion of the Secretary of State on such an issue, provided there is an evidential basis for that opinion. It is open to a court to reconsider the assessment of a Secretary of State where there is no evidential basis for the assessment or there is evidence of a lack of good faith. As Lord Bingham of Cornhill said in *R v Shayler* [2003] 1 AC 247 at paragraph 33:

> "… the court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different."

Lord Bingham went on to say that usually a proposed disclosure will fall between these two extremes and the court must exercise its judgment, informed by Article 10 considerations.

234. The Divisional Court recalled its initial view that the seven subparagraphs should form part of the first open judgment as being essential to open justice and as preventing uninformed speculation. No agent or facility or secret means of intelligence gathering would be revealed. There was nothing in the paragraphs which could possibly be described as highly sensitive classified US intelligence. A democracy governed by the rule of law would not expect another democracy to suppress a summary of evidence in reports by its own officials where the evidence was relevant to torture or cruel, inhuman or degrading treatment. The court had no reason at the time to anticipate that there would be a threat of the gravity of the kind made by the US Government that it would reconsider its intelligence sharing relationship. Subsequent matters had lent support to that view. It would therefore have remained the court's view, absent the evidence adduced by the Foreign Secretary as to the position taken by the US Government, that there was every reason to put the paragraphs into the public domain. The suppression of reports of wrongdoing by officials in circumstances which cannot in anyway affect national security would be inimical to the rule of law and the proper functioning of a democracy.

235. However, the judgment of the Foreign Secretary was based on evidence, subsequently made available to the court, which had made clear the position taken by the US and the gravity of the threat it had made. Of this, the Divisional Court said:

> "It is self evident that liaison with foreign intelligence services, including the provision of information or access to detainees held by foreign governments, lies at the heart of the protection of the national security of the United Kingdom at the present time, particularly in the prevention of terrorist attacks in the United Kingdom. If the value of information is properly to be assessed by the United Kingdom intelligence services, it is also essential the intelligence services know the circumstances and means by which it was obtained. There is powerful evidence that intelligence is shared on the basis of a reciprocal understanding that the confidence in and control over it will always be retained by the State that provides it. It is a fundamental part of that trust and confidentiality which lies at the heart of the relationship with foreign intelligence agencies. This is particularly the case in relation to the United States where shared intelligence has been developed over 60 years. Without a clear understanding that such confidence will not be breached, intelligence from the United States and other foreign governments so important to national security might not be provided. The public of the United Kingdom would be put at risk. The consequences of a reconsideration of and a potential reduction in the information supplied by the United States under the shared intelligence relationship at this time would be grave indeed.
>
> It is evident from the materials with which we have been provided that the assessment of the risk to the intelligence relationship with the United States was made by the Foreign Secretary in good faith and on the basis of evidence including statements made by officials of the United States Government who held office at the highest levels in the period from July to October 2008. Indeed there is evidence for the Foreign Secretary's further view that the United States Government would perceive making public the redacted passages as "gratuitous".
>
> The only relevant considerations are that there is clear evidence that supports the Foreign Secretary's judgment that the threat is real and serious damage to national security may result and that that judgment was made in good faith. The powerful submission of the Special Advocate that the position of the United States Government is demonstrably unreasonable or irrational matters not; it is the judgment of the Foreign Secretary as to the reality of the threat not its rationality that is material. … It lies solely within the power of the United States to decide whether to share with the United Kingdom

> intelligence it obtains and it is for the Foreign Secretary under our constitution, not the courts, to determine how to address it."

236. It had been submitted to the court that the situation had changed significantly following the election of President Obama who was avowedly determined to eschew torture and cruel, inhuman and degrading treatment and to close Guantanamo Bay. The court had, however, been informed by counsel for the Foreign Secretary that the position had not changed. The court's current understanding was therefore that the position remained the same, even after the making of the Executive Orders by President Obama on 22nd January 2009. The concern of the United States pertained not to disclosure of the treatment of detainees that might be levelled against the administration of President Bush, but to the disclosure of information obtained through intelligence sharing.

237. The court considered that there was no basis on which the judgment of the Foreign Secretary as to the danger to national security could properly be questioned. They therefore proceeded to consider where the balance of public interest lay on the basis of his judgment that, if the redacted paragraphs were placed into the public domain, the future intelligence relationships between the United Kingdom and the United States would be reconsidered and that there was a real risk that national security would be compromised, and a further risk to other intelligence sharing arrangements.

238. The Divisional Court expressed the view of the Foreign Secretary on the balance of public interest as follows:

> "The Foreign Secretary has expressed the view in his certificate of 5 September 2008 that the balance of the public interest lies against disclosure. In reaching that view he took into account the allegations of mistreatment made by [Mr Mohamed], the importance of underlining the UK's abhorrence of torture and cruel, inhuman or degrading treatment. He accepted the importance of open public debate on these issues, but he considered that dialogue with the United States on such matters was best undertaken in confidence. Balancing those considerations against the real risk of serious damage to national security and his view that no further benefit would be secured for [Mr Mohamed], he considered that the balance lay against disclosure.
>
> However, it is common ground that his view on where the balance of the public interest lies is not conclusive. Although the Foreign Secretary has expressed his view of the balancing, the rule of law requires that the determination of where the balance lies is ultimately for the decision of the court. We must do so, however, on the basis of his judgment on that part of the public interest that relates to national security issues. We must also attach considerable weight to his judgment of the balance of the public interest. (See *Conway v Rimmer* at p 952B). Attaching weight to the view of the Foreign Secretary in this case is relevant, not only because we must act on the basis of his judgment as to the real risk to national security, but also

> because we should have regard to his actions, as set out in our previous judgments, where on behalf of the United Kingdom Government, both he and his Legal Adviser, Mr Bethlehem QC, have made so clear the United Kingdom's position on the abhorrence of torture and cruel, inhuman or degrading treatment and have gone to considerable lengths to assist [Mr Mohamed]."

239. The Divisional Court then considered the alternatives to disclosure of the redacted paragraphs, concluding that none of these would address all aspects of the public interest which they had identified. The court expressed its final conclusion as follows:

> "How is this judgment of the Foreign Secretary in relation to the public interest in national security to be balanced against the public interest in open justice as safeguarding the rule of law, free speech and democratic accountability? In our judgment the decisive factors are the other means which have resulted from these proceedings for safeguarding democratic accountability and the rule of law (the reference of the matter to the ISC and the Attorney General) and what has already been placed into the public domain which can engender debate. In the circumstances now prevailing, the balance is served by maintaining the redaction of the paragraphs from our first judgment. In short, whatever views may be held as to the continuing threat made by the Government of the United States to prevent a short summary of the treatment of [Mr Mohamed] being put into the public domain by this court, it would not, in all the circumstances we have set out and in the light of the action taken, be in the public interest to expose the United Kingdom to what the Foreign Secretary still considers to be the real risk of the loss of intelligence so vital to the safety of our day to day life. If the information in the redacted paragraphs which we consider so important to the rule of law, free speech and democratic accountability is to be put into the public domain, it must now be for the United States Government to consider changing its position or itself putting that information into the public domain."

240. After the Divisional Court's fourth open judgment had been given, there were applications for the court to reconsider its decision on the basis that the court had been misled or there had been a misunderstanding as to the position of the US Government following the election of President Obama. On 6th May 2009 the Divisional Court agreed to reopen its fourth judgment. Meanwhile on 23rd February 2009, Mr Mohamed was released from Guantanamo Bay and returned to the United Kingdom. On 16th April 2009, the US Government published memoranda disclosing CIA interrogation techniques which had been used under the previous administration, but which were no longer to be used.

241. The Divisional Court's eventual fifth open judgment was given on 16th October 2009 after hearings on dates in February, April, May and July 2009. The court then had the

Foreign Secretary's third public interest immunity certificate dated 15th May 2009, in which the Foreign Secretary maintained that there remained a real risk of serious harm to the security of the United Kingdom and its relations with the United States, and that the position of the Obama administration was no different from that of the Bush Administration.

242. The Divisional Court first explained why they had decided to reopen the fourth judgment. They had reached their conclusion on the basis of statements in the Foreign Secretary's second public interest immunity certificate and the closed evidence underlying them. From this they concluded that it could not be disputed that the Bush Administration had made it clear that, if the information in the redacted subparagraphs were made public, reconsideration would be given to intelligence sharing arrangements. They had characterised the reaction of the Bush Administration as a threat. It was that specific matter, given the importance of intelligence sharing arrangements, which had led the court to conclude that the balance lay in maintaining the redaction of the subparagraphs.

243. The evidence established that the principle of control over intelligence is a clear understanding that intelligence information received by one state from another will not be made public or otherwise used without the consent of the state supplying it. There is obvious security-related sense in this understanding. A state receiving intelligence information is expected to resist the making of a court order for disclosure, but the US and the UK both understand that court ordered disclosure is an exception to the control principle, which is an understanding between states, not a rule of law. The principle was to be distinguished from the consequences which might follow from court ordered disclosure.

244. In response to representations that the relevant position of the Obama Administration was likely to be different from that of the former Bush Administration, counsel for the Foreign Secretary had submitted at a hearing on 18th December 2008 that the situation had not changed since the election of President Obama. 18th December 2008 was after Mr Obama's election, but before his inauguration as President. The evidential basis for counsel's assertion on behalf of the Foreign Secretary was challenged in correspondence from Mr Mohamed's solicitors, but this had not then been brought to the court's attention. President Obama made his Executive Order relating to new charges against those detained in Guantanamo Bay on 22nd January 2009, two days after his inauguration. A copy of the draft fourth judgment, which included at paragraph 78 a statement of the court's understanding that matters had not changed, was made available before publication to the Foreign Secretary for comment. The copy was seen, with the court's permission, by named officials of the Obama Administration. There was no response to the effect that the court had misunderstood the position of the Obama Administration.

245. On the basis of subsequent enquiries and evidence, the Divisional Court concluded that there had at best been a misunderstanding. The statements on behalf of the Foreign Secretary had been to the effect that there would be no change in respect of the general principle of control over intelligence. There had been no inquiry of the Obama Administration as to whether it would maintain the position of the Bush Administration of the consequences which would follow from court ordered disclosure of the seven subparagraphs. In the period up to the hearing on 22nd April 2009, it was assumed by the Foreign Secretary that the position of the Obama

Administration remained the same, but no US official positively said so publicly, and no one on behalf of the UK Government asked the direct question. The court judgment was fundamentally premised on an understanding that the US position as to consequences had not changed. However

> "… all the Foreign Secretary could properly have stated to the court (because he had no basis for saying any more) was that he did not expect that there would be any change in the position of the Obama Administration in relation to the general principle of control over intelligence, namely that information obtained as a result of intelligence sharing is not to be made public without the consent of the state of origin. He should have informed the court that he did not know what the position of the Obama Administration was as to the specific consequences of publication."

Accordingly the court was plainly entitled to reopen that aspect of the fourth open judgment.

246. In accordance with an order for directions of 11th February 2009 for the service of further evidence, various witness statements were served on behalf of the UK and international media. One of these witness statements was that of Morton Halperin, who had served in the Clinton, Nixon and Johnson Administrations at high level in National Security. The Foreign Secretary relied on a letter dated 24th March 2009 from Mr Bethlehem QC.

247. The evidence produced for the hearing on 22nd April 2009 made clear that President Obama had expressed very different views on torture, interrogation techniques and transparency from those of officials of the Bush Administration. Examples are given in paragraph 38 of the fifth open judgment. It was submitted that it was quite impossible to contend, in the light of this material, that the Obama Administration would ever have contemplated reconsidering the intelligence sharing relationship with the UK if the seven subparagraphs were made public. It was also submitted that there was no unequivocal statement in any of the Foreign Secretary's material that it was the position of the Obama Administration that consequences would follow court ordered publication of the seven subparagraphs.

248. In these circumstances, the Foreign Secretary asked for an adjournment. Mr Bethlehem's letter had mentioned discussions between the Foreign Secretary and US Secretary of State Clinton on 2nd March 2009 as a basis for his understanding that the US position had not changed. The court refused an adjournment, concluding that it was better to give the Foreign Secretary the opportunity to communicate with the Obama Administration between the conclusion of the argument and the handing down of the judgment.

249. On 6th May 2009, the Divisional Court decided to reopen its fourth open judgment. The court had by then been provided with a classified statement from the US consisting of a letter dated 30th April 2009 from an entity of the US Government to an entity of the UK Government. These entities were subsequently disclosed by order of the court as the CIA and the SIS respectively. A two paragraph summary of this was provided to the parties, on the basis of which Mr Mohamed's solicitors submitted that

the position of the Obama administration was no more than to say what could happen if there was disclosure, not what would happen. A further hearing was fixed for 22nd May 2009 and the Foreign Secretary was permitted to provide a third public interest immunity certificate in advance of that hearing.

250. The third public interest immunity certificate was dated 15th May 2009. In it, the Foreign Secretary concluded that the balance had shifted further against publishing the seven subparagraphs. Substantial parts of this certificate are set out in paragraph 66 of the Divisional Court's fifth open judgment. The Divisional Court had set out the approach in law to a certificate such as this in paragraphs 63 and 66 of their fourth open judgment.

251. It was submitted on behalf of Mr Mohamed and the UK and international media that there was no evidential basis for the Foreign Secretary's conclusion that disclosure of the seven subparagraphs would cause a real risk of serious damage to the security of the UK or its relationship with the US. The arguments are summarised in paragraph 69 of the fifth open judgment. They included reliance on the evidence of Mr Halperin and a submission that the CIA letter of 30th April 2009 was very carefully drafted to refer to what could happen, not what would happen. There was no longer a threat or a statement of consequences.

252. The Divisional Court concluded that the principle of control over intelligence is not absolute and that, viewed objectively, a decision by a UK court to publish the seven subparagraphs would not infringe the principle. Publication was necessary for the reasons summarised in paragraph 73(i). Even if it were to be viewed as an infringement of the principle, it could not be characterised as highly significant. The balance of public interest would necessitate publishing the subparagraphs, even if that would infringe the principle of control.

253. The court then considered the submission that there was no evidence that, if the subparagraphs were published, the Obama Administration would take action against the UK which would cause serious harm to the national security or international relations with the UK.

254. The Divisional Court considered first the CIA letter, which a subsequent letter from General Jones dated 30th June 2009 had confirmed as giving the position of the US Government. The court did so on the basis of a confirmation that there was nothing in the full text of the CIA letter which was not in the open text which added to the evidence on which the Foreign Secretary relied. Paragraph 79 of the Divisional Court's judgment refers extensively to and sets out verbatim large parts of the text of the letter. The court concluded that the letter in essence stated what could happen, not what would happen. If it were just the letter alone, it would be difficult to reject the submission that there was insufficient evidence for the Foreign Secretary's view as expressed in the third public interest immunity certificate. The letter was very carefully phrased so that no statement of the consequences that would follow, that is no threat, was made. It was necessary to stand back and ask whether President Obama would curtail the supply of information to the United State's oldest ally when what was published was not intelligence.

255. The letter, however, did not stand alone. The Foreign Secretary relied on statements of US Secretary of State Clinton at meetings on 2nd March 2009 and 12th May 2009.

In the first of these, the Secretary of State did no more than reiterate the general principle of control over intelligence. In the second meeting, the Secretary of State made clear that consequences *would* follow when she stated that public disclosure would affect intelligence gathering. The material for this is given in the third public interest immunity certificate and quoted in paragraph 66(iv) of the judgment. It was pointed out that General Jones' letter went no further than to affirm the position given in the CIA letter of 30th April 2009. Counsel for the Foreign Secretary made clear in submission that the Foreign Secretary's position was that, in view of what Secretary of State Clinton had said, there was a substantial risk that the US Government would restrict intelligence sharing arrangements, thereby putting the lives of ordinary British Citizens at risk. The court asked for the Foreign Secretary specifically to consider the distinction between breach of the principle of control and the explicit statement of consequences which *would*, as opposed to *could*, follow. In response, the Treasury Solicitor confirmed that counsel's arguments reflected what the Secretary of State had said and the Foreign Secretary exceptionally decided to release the record of his discussions with the US Secretary of State. These are transcribed in paragraph 90 of the fifth open judgment. They included statements by the US Secretary of State that the US position had not changed; that the US remained opposed to the UK releasing the papers; that, if it did, it would affect intelligence sharing; and that this would cause damage to the national security of both the US and the UK.

256. The Division Court then said in paragraph 92(ff) of its judgment:

> "The question for us is whether the statement made by Secretary of State taken with the CIA letter and General Jones' letter provides evidence sufficient for the Foreign Secretary to conclude that there is a real risk of serious harm to the national security of the United Kingdom and its international relations. As we have set out above, we have been able to summarise in this open judgment the totality of the evidence on which the Foreign Secretary reached his judgment as to the risk to security of the United Kingdom, if we made the 7 paragraphs public. Unlike the position in relation to our fourth judgment, there is no relevant closed evidence. Moreover the reasons why the United States has taken the position it has have been provided to the court and therefore capable of examination by the court.
>
> We recognise that the Foreign Secretary and those advising him have a potential expertise in international relations, as we set out at paragraph 64 of our fourth judgment. However,
>
> i) The statements of both the Foreign Secretary and Secretary of State Clinton proceeded on the erroneous assumption that the principle of control of intelligence was inviolable for the reasons we have set out above.
>
> ii) The discussion between the Foreign Secretary and Secretary of State Clinton on 12 May 2009 was directed at the 42 documents which plainly contain important intelligence material and not at the 7

paragraphs which do not. That is made clear by a note which expressly records the Foreign Secretary's statement that the United Kingdom did not give away other people's secrets and Secretary of State Clinton's response that the protection of intelligence went beyond party or politics. Such statements can only have applied to the 42 documents that contained intelligence and not the 7 paragraphs. Although the further note sent to Mr Bethlehem QC to clarify the principal note stated that the same considerations applied to the 7 paragraphs, it is difficult to understand how that issue can have been properly discussed or analysed by those present at the meeting. The note makes no reference to any discussion on the critical distinction between the 42 documents which contain intelligence information and the 7 paragraphs which do not contain anything of an intelligence or secret nature. It cannot be suggested that information as to how officials of the US Government admitted treating [Mr Mohamed] during his interrogation is information that can in any democratic society governed by the rule of law be characterised as "secret" or as "intelligence".

iii) It is therefore very difficult objectively to discern any rational basis for the conclusion that the making public of 7 paragraphs (as opposed to the documents themselves) was action that would justify affecting intelligence sharing and putting the lives of British citizens at risk. On the contrary, a proper analysis of what was contained in the 7 paragraphs could not have led to such a statement being made, as no secrets and nothing of an intelligence nature was being made public.

iv) We therefore conclude that the statement made by Secretary of State Clinton that intelligence sharing would be affected was made without a proper analysis or understanding of what the 7 paragraphs contain.

The reality of the position can be further tested by standing back and taking into account the objective facts to which we referred in paragraph 81.

In these circumstances, while we accept on the basis of this evidence of the statement by Secretary of State Clinton that there must be some small risk that intelligence sharing would be reviewed or affected if we were to disclose the redacted paragraphs, we have been led to the conclusion that, on proper analysis, the evidence simply does not sustain the Foreign Secretary's opinion that there is a serious risk."

257. Although the court concluded that the statement of Secretary of State Clinton was based on a misunderstanding and lack of analysis of what was contained in the seven subparagraphs, there was no lack of good faith on the part of the Foreign Secretary in relying on that statement.

258. In the light of this finding, the Divisional Court concluded that the public interest in making the subparagraphs public was overwhelming, as the risk to national security, judged objectively on the evidence, was not serious. There was some risk that the Obama Administration would reduce intelligence sharing with the United Kingdom, but it was not, viewed objectively, a real risk.

259. The Divisional Court expressed the hope that this fifth judgment would bring the proceedings to an end. The hope was dashed by a yet further application to edit out four paragraphs of the fifth judgment. That resulted in a 6th judgment which rejected the application, the appeal consequences of which fizzled out during the course of the hearing before this court.

Satellite litigation

260. In my view, standing back, these proceedings have had an unfortunate and unduly protracted course. The original *Norwich Pharmacal* claim raised difficult and important issues. But those issues were largely resolved or had become academic by the autumn of 2008. Since then the Divisional Court has been engaged in arduous and prolonged satellite litigation, resulting in numerous hearings and four substantial judgments, concerning the quite short issue whether the court should agree to censor seven short subparagraphs of a judgment which it now considers it ought to publish uncensored. The requested censorship arises out of a court ordered procedure which enables the Intelligence Services, through the Foreign Secretary, to comb through a draft open judgment before it is published to request redactions which they consider to be required for national security reasons. Some procedure of this kind may well be necessary, although it is intrinsically unlikely that a judge will inadvertently put seriously sensitive material into a judgment intended to be open. This is not to diminish the importance of some of the principles at issue in this appeal; only to emphasise the unsatisfactory procedural consequences in this case and to suggest that what appears to be becoming an entrenched procedure may need re-examination.

261. The real eventual content of the satellite litigation has at times been overlain, and to an extent obscured, by forensic and procedural froth. It is, to my mind, no longer of significance whether the Divisional Court was misled by what counsel for the Foreign Secretary said by way of submission on 18th December 2008. The fact is that the Divisional Court decided that they may have reached their decision in their fourth open judgment upon a misunderstanding of the position of the Obama Administration, and as to any consequences of court ordered disclosure of the seven subparagraphs. In those circumstances, the Divisional Court was, in my judgment, plainly entitled to reopen its fourth judgment, and there is no appeal before this court from their decision to do so.

The issue and points of principle

262. The issue on this appeal seems to me to boil down to a stark clash of two principles. The first principle is that justice should be open, and that open justice generally

requires the court to publish its reasons for a decision. There may be exceptions to this principle – see the passage from Lord Diplock's opinion in *Attorney General v The Leveller Magazine* quoted in paragraph 230 above – but it seems to me that the grounds for making an exception need to be compelling, where the court considers that material considered for redaction is both necessary for the exposition of its reasons and of no relevant intrinsic national security significance. The second principle is that material should not generally be published, if its publication would give rise to a serious risk of damaging consequences to national security; and that the court should not substitute any view of its own of the existence or seriousness of such a risk for that of the Foreign Secretary (in this instance), unless it is persuaded that there is no proper basis for that view. In the present case, the Divisional Court took the bold step of rejecting, by a process of close analysis, the position of the Obama Administration as expressed by Secretary of State Clinton when, on one view, that expressed position did sufficiently sustain the Foreign Secretary's assessment in his third public interest immunity certificate. I read the Divisional Court's fifth open judgment as implicitly accepting that, if the US Secretary of State's recorded statement that "public disclosure in this case would affect intelligence sharing and would cause damage to the national security of both the US and the UK" were to be taken at face value, the court should adhere to the consequence of the balance which they struck in their fourth open judgment. I note that the substance of the statement as recorded in the third public interest immunity certificate appears in the fourth paragraph of the Note of the meeting of 12th May 2009 – see paragraph 90(ii) of the fifth open judgment. The Note of 14th May 2009 shows that this view applied both to the release of the 42 documents and to the publication of the seven subparagraphs. One important aspect of the issue before this court, therefore, is whether the Divisional Court were correct to reject as untenable the stated position of the US Secretary of State.

Grounds of Appeal

263. The Foreign Secretary's grounds of appeal, as advanced before this court on his behalf by Mr Jonathan Sumption QC, are that the Divisional Court made a number of errors of law as follows:

1) The Divisional Court's decision to include the seven subparagraphs was not necessary to determine any issue which arose at the time of delivering the first open judgment and was made before any consideration by the court of public interest immunity issues. The court's subsequent decision in its fifth open judgment ordering disclosure of these subparagraphs was an entirely gratuitous breach of confidence and was not necessary to serve the interests of justice in the public interest immunity balance.

2) The court was wrong to classify the contents of the seven subparagraphs as not being intelligence material. The subparagraphs are in fact a summary of material taken directly from intelligence documents provided in the course of a secret intelligence liaison relationship and which were described in the court's closed judgment.

3) The Divisional Court was wrong to decide that the disclosure would not amount to a breach of the control principle. It was a breach of the control principle and the Foreign Secretary's evidence was clear that it would cause serious damage to

national security. It was not in any event open to the court to decide that US Secretary of State Clinton had misunderstood the principle of control over intelligence – what mattered was her understanding, and the US Government's understanding, of the principle. The court was also wrong to state that the evidence of Mr Halperin on this subject was unchallenged. It was specifically addressed by the Foreign Secretary in his certificate. The CIA letter also made it clear that the US did not view differently a voluntary disclosure and a disclosure compelled by the UK courts.

4) The Divisional Court was wrong to substitute its view of the risk of damage to national security for that of the Foreign Secretary. On the legal principles which the Divisional Court itself set out in its fourth open judgment, it was required to accept the Foreign Secretary's assessment, unless there was no basis at all for that assessment – which the court did not conclude and which plainly was not the case.

5) The Divisional Court was also wrong to substitute its own assessment of the CIA letter of 30th April 2009 and of Secretary of State Clinton's views for that of the Foreign Secretary.

6) The Divisional Court was wrong to find that there was no evidential basis for the Foreign Secretary's assessment that disclosure of the seven subparagraphs would cause serious harm to national security. The Divisional Court reached an irrational conclusion by failing to take into account certain matters which included that the Foreign Secretary's assessment was based upon detailed closed evidence as to the likely consequences of disclosure which the Divisional Court appears to have ignored.

7) The Divisional Court was wrong to substitute its own assessment that disclosure of the seven paragraphs would not result in serious damage to US national security for the US Government's assessment that such damage was likely. The court had no right to question the US assessment, which was based on reasonable concerns as explained in the closed evidence and when the US in fact considered that its national security would be damaged by disclosure.

The relevant time

264. The first ground of appeal, if no other ground, raises the question of the time with reference to which the issue now before this court should be addressed. The first open judgment was given on 21st August 2008, but was subject to public interest immunity considerations. Subject to that, the court's decision was (or would have been) to order disclosure of the 42 documents. By the time of the third open judgment on 22nd October 2008, the public interest immunity emphasis was more on the inclusion or exclusion of the seven subparagraphs. By 30th October 2008, when the 42 documents had been disclosed in the US *habeas corpus* proceedings, the claim in these UK proceedings was largely resolved or academic. It remains, however, that the seven subparagraphs were part of the court's reasons for its provisional decision in the first open judgment. The issue therefore ought to be whether those paragraphs were necessary or appropriate as part of the reasons for that decision. The debate about the issue, however, extended over the best part of the next year. Things moved on, and evidence which was necessarily unavailable in August or October 2008 became

available and relevant. Mr Sumption submits that the time to consider the issue is now. With one qualification, I agree. The Divisional Court did not make the decision the subject of this appeal until 16th October 2009, and, in doing so, took account of the circumstances pertaining and the evidence available then. It is not suggested that they were wrong to do so. They did not in fact decide the issue in August or October 2008. The qualification is that the issue is whether the seven subparagraphs should be excluded as part of the court's reasons for a decision promulgated in August 2008, which provisionally decided that the 42 documents should be disclosed.

The first ground of appeal

265. Mr Sumption submits that the seven subparagraphs should never have appeared in the first open judgment, which was subject to public interest immunity considerations yet to be considered. Their inclusion, he says, was not necessary. It was enough for *Norwich Pharmacal* purposes that Mr Mohamed had an arguable case of wrongdoing, and it was always accepted that open material established this. He had to show that UK officials participated in or facilitated the arguable wrongdoing and were not mere bystanding witnesses. The material in the redacted paragraphs 87 and 88 of the first open judgment were quite sufficient to satisfy this part of the *Norwich Pharmacal* test. Innocent participation or facilitation was enough and the Divisional Court found that Mr Mohamed did not have to prove knowledge by UK officials. The case in paragraph 88 of the judgment was strong enough without knowledge, but if knowledge were relevant, a finding could have been made without disclosing confidential material and without a summary of it. For this purpose, Sullivan J had provided for closed judgments.

266. Mr Sumption submits that the public interest balance changed once the 42 documents were produced by the US and the charges against Mr Mohamed were dropped. There was no longer any interest in his right to a fair trial. The UK proceedings were redundant. There was no need for an order or further order and therefore no need for reasons. Less than a week after the fourth open judgment, Mr Mohamed was released. He had never asked for disclosure to others than his US security cleared lawyers. In the circumstances, these proceedings have been taken over for other purposes. It is not proper to order disclosure when this has no relevance to the proceedings.

267. Ms Rose QC, for Mr Mohamed, submits that the seven subparagraphs were integral and necessary to the Divisional Court's decision, and must have been so regarded by the court. The proper public promulgation of the reasons for the first open judgment is part of continuing justice to Mr Mohamed. The court does not have to justify what it has included as part of its reasons. It is sufficient that the court itself regarded the subparagraphs as necessary. Losing parties are often unhappy with the terms in which judgments against them may be expressed. They cannot be entitled to pare down adverse judgments by seeking to exclude unwelcome material on the basis that its inclusion is unnecessary to the decision against them. The summary grounds of defence had resisted the claim on the basis that no part of the UK Government had any role in Mr Mohamed's detention. It was not contended that the threshold for *Norwich Pharmacal* purposes was a low one. Knowledge was at least relevant to the exercise of the court's discretion.

268. In my judgment, this first ground of appeal, taken alone, is unpersuasive. The Divisional Court regarded these subparagraphs as an integral and necessary part of their reasons for their provisional decision. The procedure adopted - not, so far as I am aware, objected to at the time - was to promulgate the first open judgment before general public interest immunity matters had been addressed. In theory at least, public interest immunity considerations might have persuaded the court not to order the production of the 42 documents at all. The matter of the seven subparagraphs was ancillary. The possibility of their exclusion was catered for by Sullivan J's procedure. It is no part of a litigant's general privilege to seek to chip away evidence-based parts of a judgment delivered in draft on the ground that they are not necessary to the decision, when the court delivering the judgment considers that they are necessary, and when they may, for instance, be relevant to an appeal against the decision itself. Ms Rose's submissions are, in my view, persuasive. I would therefore reject the first ground of appeal. I accept that it is of some (but not much) relevance to the general public interest immunity issue that the original proceedings have become academic, and that the reasons for the provisional decision in the first open judgment no longer require scrutiny for the purpose of any outstanding decision.

269. Mr Sumption submits that the Divisional Court were wrong to observe a wider public interest in publication than that which is a proper by-product of justice between the parties. He accepts the principles of open justice referred to at some length in paragraphs 40 to 49 of the Divisional Court's fourth open judgment with reference to the rule of law, free speech, democratic accountability, informed debate and rights under Article 10 of the European Convention on Human Rights. But he submits that disclosure of the seven subparagraphs would now be made on a different basis from the reason why the paragraphs were there in the first place. The *Norwich Pharmacal* jurisdiction is based on a duty to disclose and is limited to that which is necessary to ensure that justice is done. It is not a tool for uncovering material of general interest. The media could not, he submits, have made a *Norwich Pharmacal* claim. He refers to *Norwich Pharmacal* itself at page 175F and to *Ashworth Hospital Authority v MGN* [2002] 1 WLR 2033 at paragraphs 46 and 57 for the uncontroversial point that the *Norwich Pharmacal* jurisdiction is to enable justice to be done, and that the requirements of justice are to be weighed against countervailing considerations. He submits that the present issue as to disclosure has nothing to do with the issues in the proceedings. Even if Mr Mohamed's claim were alive, the most he would have obtained was disclosure of the documents to his US security cleared lawyers. In *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274, both Lord Templeman at 280F-H and Lord Woolf at 288D-H emphasised that disclosure in litigation is limited to that which is necessary in the interests of justice. It was at page 280F that Lord Templeman said that public interest immunity is a ground for refusing disclosure which is relevant and material to the determination of issues in civil and criminal proceedings; but that a public interest immunity claim can only be justified if the public interest in preserving confidentiality of the document outweighs the public interest in securing justice.

270. Mr Sumption accepts that open justice includes publishing reasons. But giving reasons is part of the process of the administration of justice between the parties. The court is not a standing committee of inquiry. He submits that, when information is supplied in closed form, it is a serious step to publish it to promote debate when there is no other interest (or no remaining interest) of justice between the parties. He

submits that no court has previously overridden a claim for public interest immunity on any other basis than to do justice between the parties.

271. In my view, this submission compresses two different points so as to treat them as one. The original issue between the parties was the application of the *Norwich Pharmacal* principles to the disclosure of the 42 documents – as to which the court's concern was to enable Mr Mohamed to achieve justice to the extent that disclosure was necessary for that purpose subject to overriding public interest indemnity considerations. The present issue is different. It is whether public interest immunity considerations require a small part of the content of a court's judgment to be removed when, public interest immunity considerations apart, open justice plainly requires their content to be published. *Norwich Pharmacal* considerations are not central to this question other than to show that the original issue between the parties has been resolved since the open judgment was promulgated.

272. In this context, Ms Rose submits that Mr Mohamed is entitled to know the basis of the judgment, and open justice requires that the court's judgment should be made public. He was detained without charge or trial for seven years and has claimed that the UK Government knew of his ill-treatment but sent an agent to interrogate him. He has a right to be publicly vindicated in that claim. Publication of the subparagraphs is of continuing relevance to his civil claim against the UK Government, in which the Government are putting him to proof of what they seek in this court to suppress.

273. Ms Rose refers to private law cases in which the court has proceeded to give judgment or enable matters to be made public even after the action has settled. In *Bowman v Fels* [2005] 1 WLR 3083, the Court of Appeal held that it had jurisdiction to entertain an appeal even though the parties had settled the underlying private law litigation in the light of the great public importance of the issues in the appeal. Brooke LJ, giving the judgment of the court, referred at paragraph 11 to the opinion of Lord Slynn of Hadley in *R v Secretary of State for Home Department ex parte Salem* [1993] 1 AC 450 at 456, that in a case where there is an issue involving a public authority as to a question of public law, the House had a discretion to hear the appeal even if there was no longer an issue to be decided which would have directly affected the rights and obligations of the parties between themselves. See also *Prudential Assurance v McBains Cooper* [2000] 1 WLR 2000 and *Chan U Seek v Alvis Vehicles* [2005] 1 WLR 2965, where the media were permitted access to documents on a court file under CPR rule 5.4(5)(b) after the claim had been settled.

274. Ms Rose submits that there is a very strong public interest in the publication of a judgment even after the matters in issue have been resolved. This is stronger where it is a public authority seeking to suppress material in the judgment. I agree, and would add that no point was taken before us relying on the fact that the first open judgment, including the seven subparagraphs, was initially promulgated in draft under Sullivan J's order, other than Mr Sumption's submission that it should not have been so promulgated before the public interest immunity question had been resolved. The first open judgment in its redacted form has been delivered and is reported at [2009] 1 WLR 2579.

275. In my judgment, this second submission is no more than a variant of Mr Sumption's first submission, and again, taken alone, no more persuasive. It is, as I have said, of some relevance to the main issue in the appeal that the original claim for disclosure

has been resolved and is academic. The main issue in the appeal is not a *Norwich Pharmacal* issue, but one where it is contended that open justice should be curtailed in the interests of national security. There is a clear public interest in open justice in part comprising the requirement for courts to give publicly the full reasons for their decisions. This public interest can go beyond the confined domestic needs and requirements of the parties. The present case is not that one or more of the parties wish to stop the court giving any judgment. The Divisional Court has given its judgment. It is that one party wishes to have removed a part of the judgment which that party has seen and the other party has not seen.

The other grounds of appeal

276. Mr Sumption then submits that, even if the Divisional Court were correct to decide that there is a distinct public interest, it is outweighed by considerations of national security. The Divisional Court reached two opposite conclusions in its fourth and fifth open judgments respectively. The difference turns on their perception that the US position as to disclosure had changed with the advent of the Obama Administration. Certainly President Obama made changes of policy relating to Guantanamo Bay, interrogation techniques and the continued detention of Mr Mohamed in particular. But the US position relating to the control principle has not changed, nor has its insistence that court ordered disclosure of the seven subparagraphs would risk causing serious damage to the national security of both the US and the UK. US Secretary of State Clinton said as much and there was no proper basis for the Divisional Court to conclude that she did not understand what she was talking about. The unredacted CIA letter of 30th April 2009 and the sensitive annex to the third public interest immunity certificate provided material which justified that position, which, Mr Sumption submits, the Divisional Court either did not read or ignored. It was a question both of the control principle and of practical consequences if disclosure were ordered. The Divisional Court missed the point in their consideration whether court ordered disclosure was an exception to the control principle or an accepted part of it. The real question was what the practical consequences would be. The US are not obliged to pass on to the UK intelligence material which they acquire or receive, and disclosure may in fact result in the US withholding or having to withhold information. Whether they would be right to do so is irrelevant. What matters is the US assessment of the risk.

277. Mr Sumption referred in detail to the third public interest immunity certificate, the redacted CIA letter of 30th April 2009 and the record of the Foreign Secretary's meetings with the US Secretary of State. The US position had not changed. The Foreign Secretary did not regard the earlier or present position of the US as amounting to a threat. The material in the sensitive schedule shows that the Foreign Secretary's position has nothing to do with embarrassment if the seven subparagraphs were disclosed, but everything to do with protecting the flow of intelligence. Mr Sumption submits that the Divisional Court's statement in paragraph 92 of the fifth open judgment that there is no relevant closed material suggests that important closed material was overlooked. He submits that paragraph 95 of that judgment is extraordinary, in that it rejects as unsubstantiated the position of the Foreign Secretary, Secretary of State Clinton, the White House and the CIA. The Divisional Court were preferring statements by the media to the judgment of the Foreign Secretary.

278. Mr Sumption accepts that the public interest immunity certificate is not conclusive, but submits that the court will only override the Foreign Secretary's view of the risk to national security if it is irrational. He refers to Lord Hoffmann's opinion in *Rehman*. He says that there plainly was an evidential basis for the Foreign Secretary's judgment, which was a judgment about a future risk made by the responsible departmental minister. The Foreign Secretary and his advisers are in daily contact with the US and in a far better position to make this judgment than the Divisional Court. In fact the Foreign Secretary's concerns were perfectly rational. He was entitled to say that the UK cannot afford any risk in this area.

279. Mr Sumption submits that there is no difference between the US position which resulted in the Divisional Court's decision in its fourth open judgment and that set out in the CIA letter. He sought to demonstrate this with detailed reference to the fourth open judgment. He submitted that there is no way of reconciling the thought processes of the fourth and fifth open judgments. The Divisional Court said that the US Secretary of State did not understand that the control principle was subject to court ordered disclosure, nor that, whereas the 42 documents contained intelligence, the seven subparagraphs did not. The important point was that they contained information deriving from intelligence which is covered by the control principle. There was no point in the Divisional Court saying that this was not intelligence, when the US Secretary of State considered that it was. Although the Divisional Court wrongly concluded that Secretary of State Clinton did not know what she was talking about, they also found that there was no lack of good faith in the Foreign Secretary relying on her statement. If the Foreign Secretary was entitled to take what she said at face value, that should itself be a proper basis for the Foreign Secretary's public interest immunity conclusion.

280. Ms Rose submits that the balance between open justice and the public interest in national security is essentially one of fact. She says that little or no reliance was placed on the sensitive schedule to the third public interest immunity certificate before the Divisional Court. If it had been relied on, Ms Rose would have pressed for the gist of its contents to be disclosed. She refers in this respect to *Secretary of State to the Home Department v AF (No 3)* [2009] 3 WLR 74 for the proposition that there is a core irreducible minimum of closed material that must be disclosed for reliance on the closed material to be compliant with the fair trial requirements of Article 6(1) of the European Convention on Human Rights. *AF* concerned the rights of a person the subject of a control order to be given sufficient information about allegations against him of terrorism-related activity to enable him to give effective instructions to his special advocate. Ms Rose says that in the circumstances the Foreign Secretary cannot rely on the sensitive schedule now.

281. Ms Rose referred us to the Foreign Secretary's first public interest immunity certificate of 26th August 2008, and in particular its paragraph 11. This referred to clear, consistent and forceful communications from senior US officials to the effect that disclosure of the 42 documents would seriously harm existing intelligence sharing arrangements between the US and the UK which was likely to cause considerable damage to the national security of the UK. Particular reference was made to a letter of 21st August 2008 from John Bellinger, the legal adviser to the US Secretary of State, who affirmed that public disclosure of the documents or the information contained in them was likely to result in serious damage to US national

security and could harm existing intelligence sharing arrangements between the US and UK Governments. The Divisional Court's fourth judgment had categorised the US position in terms of a threat. Immediately the fourth open judgment was published, the Foreign Secretary had said publicly that there was no threat, and it appeared that there had been no contact with the Obama Administration. The court has misunderstood the position when it gave its fourth open judgment. It became of great importance for the court to have clear, unambiguous evidence. What "would" happen then appeared to shift to what "could" happen. It was only at this stage and in the face of the evidence of Mr Halperin that it was accepted that the control principle was not absolute, as it had appeared to be in the first public interest immunity certificate.

282. Ms Rose referred to the redacted CIA letter of 30th April 2009, saying that it did not answer the simple question which then concerned the court, that is whether, if the seven subparagraphs were published, intelligence sharing between the US and the UK would be reduced. To my reading, the redacted letter contains no unqualified statement that the flow of intelligence would be reduced by the US, but there is a statement to the effect that "foreign partners" could take steps to withhold from the United Kingdom sensitive information that could be important to its safety and security. I note that, if the question includes what steps foreign partners might take, any distinction between "could" and "would" becomes distinctly blurred. Ms Rose accepted that the CIA letter on its own might be enough to sustain the Foreign Secretary's public interest immunity judgment. But it had to be taken in the light of the history both of the radical changes made by the Obama Administration and the manner in which the Foreign Secretary's eventual position was reached. In particular the Obama Administration has never been prepared to repeat in clear terms the threat made on behalf of the Bush Administration. There is now no threat that there would be a reduction in intelligence, and the court was entitled so to conclude.

283. As to Ms Rose's submission that the Foreign Secretary cannot rely on the sensitive annex of the third public interest immunity certificate, Mr Sumption submitted that the court was bound to have regard to it because it was incorporated by reference and part of the Foreign Secretary's reasons. It was difficult to give the gist of it and there was no obligation to do so when Mr Mohamed, unlike those subject to control orders in *AF*, has no litigation risk depending on it. Mr Sumption noted that Ms Rose accepts that the CIA letter would sustain the Foreign Secretary's judgment if it is read alone, and he submitted that the history of the matter is irrelevant.

Discussion

284. As I said at the outset, the issue of the exclusion of the seven subparagraphs has taken on an unsatisfactory life of its own as satellite litigation. This derives from a procedure ordered by the court to take care that national security is not put at risk by inadvertent inclusion in an open judgment of truly sensitive material. But the procedure is apt to generate dispute at the margins which in the present case has taken the parties and the court way beyond any issue in the original litigation, thereby generating huge complexity and expense. This is not, as I have also said, to belittle the importance of the issue before the court. But the issue is within a fairly narrow compass.

285. I start from the position that open justice requires a court to give in public the reasons for its decisions that the court considers are required unless, in the present case, the risk of serious damage to national security requires parts of the reasons to be left out. That is uncontroversial. It is for the appropriate departmental minister, not the court, to judge and assert any risk to national security. It is for the court to judge whether the minister's judgment and assertion are rational and sufficiently evidence-based. In so far as the rationality depends on, or the evidence represents, views or asserted intentions of the government of another state, the question is what is likely to happen, not whether this would be sensible or rational. It is, I believe, most unusual for the court to have material directly from the government of another state, as the court has from the US in the present case. There is force in Mr Sumption's submission that the Foreign Secretary is entitled to take the US position as it is stated to be, without subjecting it to undue forensic dialectic, and that the court should do likewise.

286. It is asserted on behalf of the media that the content of the seven subparagraphs is probably already publicly known, or largely so. On this hypothesis, publishing the subparagraphs cannot rationally damage the national security of the UK or the US. It is submitted that it is not remotely credible for the US to assert that they might reduce the flow of intelligence information to the UK, if information which is largely already public is published as part of a UK court judgment; and that the court should read behind the US statement, in the light of the very different attitude of the Obama Administration, to discern the true position that no serious consequences adverse to the UK national security will occur or are now in contemplation. But the judgment of the Foreign Secretary is otherwise, and I am concerned that the court is being invited to substitute its view for that of the Foreign Secretary.

287. The control principle seems to me to have been elevated in this litigation into something that it is not. I conceive it to be a label for an understanding between intelligence agencies of generally cooperative states that, if one state passes on intelligence information to another state, the receiving state will not use the information, pass it on to a third state or otherwise publish it, without the agreement of the providing state. It is not, to my mind, particularly helpful to debate whether court ordered disclosure would be a "breach" of the understanding, nor to point out that there is an understood risk that a court in the receiving state may order disclosure in certain circumstances. A state may nevertheless share intelligence information on the basis that the receiving state will usually succeed in persuading its courts not to order disclosure. If a court does in fact order disclosure, the providing state may well take a very serious look at its intelligence sharing arrangements, even though it already knew that the possibility of court ordered disclosure existed. It therefore seems to me entirely rational for the US to state in this case that, if the seven subparagraphs are published, they will have to review their intelligence sharing arrangements. This is not so much because particular information, regarded as sensitive, has been published, but because the UK Foreign Secretary has been unable to persuade the UK court that the understanding should not be overridden. The UK intelligence operation would be regarded as to that extent potentially insecure, and a review would be necessary. Until the review is undertaken and concluded, no responsible US Government official is likely to predict its outcome, and I would be surprised if those officials were to communicate a clear predicted answer to the UK Foreign Secretary. I would not myself place undue emphasis on a distinction between "would" and "could", although I note that the US Secretary of State is recorded as

using the word "would". Although I can sympathise with the Divisional Court's procedural frustration in the early summer of 2009, I am inclined to think that the Divisional Court's (and Ms Rose's) search for an unqualified answer to the question whether the flow of intelligence information from the US to the UK *would* be diminished oversimplified an intrinsically complicated question.

288. It is, I think, over-facile to suppose that the outcome of such a review would necessarily result in an undiminished flow of intelligence from the US to the UK. Certainly it seems distinctly improbably that the US Government, left to itself, would alone take damaging umbrage because a bare summary of intelligence information about Mr Mohamed's treatment, all or most of which was regarded as publicly known, was included as being necessary in a UK court judgment. The fact that it is derived from intelligence sources ceases to be of much significance if the information is publicly known anyway. But US intelligence information no doubt comes from a variety of sources, including from foreign partners such as are referred to in the redacted CIA letter of 30th April 2009. Such information provided to the US is no doubt received by them on the same understanding as to control. As the CIA letter states, "these foreign partners could take steps to withhold from the United Kingdom sensitive information that could be important to its safety and security. Any decreased cooperation from these foreign partners would adversely affect counterterrorism and other endeavours". Thus, although the main question which appears to have been debated in the present litigation has been whether it is credible and rational to suppose that the US would reduce the flow of intelligence information, if material most of which is supposedly already public were included in the court's published judgment, another consideration is whether the flow of intelligence information originating elsewhere could diminish. The CIA letter asserts that it could, and there is no basis for using the word "would" in that statement. Nor is it this court's function to speculate how likely it may be that foreign partners might react to a perception that the UK intelligence operation is potentially insecure.

289. In these circumstances, it does not seem to me that the court should readily reject the Foreign Secretary's judgment as irrational or not based on evidence. Nor do I find wholly persuasive the Divisional Court's rejection of the position stated by the US Secretary of State. The reasons which I have given which lead to this view are rather different from those which comprised the main debate before the Divisional Court. But they are to be found in the redacted material which the Divisional Court had, and I, with Lord Neuberger MR, have not relied on or referred to closed material to reach this intermediate position, except that (a) I have looked at the seven subparagraphs themselves and (b) I have satisfied myself in general that, although the potentially relevant closed material enlarges on the Foreign Secretary's case, it does not, I think, make it intrinsically stronger.

290. I have referred to as an intermediate position my tentative, finally balanced provisional conclusion that there was, contrary to the decision of the Divisional Court, an evidence-based justification, capable of articulation, for the Foreign Secretary's national security judgment. This was to be taken with Ms Rose's acceptance that the CIA letter, taken at face value, could justify the Foreign Secretary's judgment; and the pervading assumption that, if the Foreign Secretary's judgment was justified, it would without more tip the balance against disclosure. I suppose that, on one view, if there is a real risk of serious damage to the UK's national security, there are no relevant

degrees to that risk. But in principle, a real risk of serious damage to national security, of whatever degree, should not automatically trump a public interest in open justice which may concern a degree of facilitation by UK officials of interrogation by US officials using unlawful techniques which may amount to torture or cruel, inhuman or degrading treatment.

Judge Kessler's Memorandum Opinion

291. As has so often happened in this case, things have moved on yet again, such that my provisional intermediate position now has to be seen in the light of Judge Kessler's Memorandum Opinion in the US District Court for the District of Columbia in *Farhi Saeed Bin Mohamed v Barak Obama* (Civil Action No 05-1347 (GK)), to which Lord Neuberger has referred at length in paragraphs 121 to 128 of his judgment. The essential point to be derived from this Opinion is that the US Government resisted *habeas corpus* proceedings brought by a person detained at Guantanamo Bay relying on evidence incriminating the petitioner which Mr Mohamed, the present claimant, had provided while he was detained in Bagram and Guantanamo Bay, which the petitioner claimed was unreliable and inadmissible because it was obtained under the continuing influence of torture inflicted on Mr Mohamed in Pakistan, Morocco and Kabul. Mr Mohamed and his US lawyer gave detailed evidence of the treatment to which he claimed he had been subjected. Lord Neuberger has summarised the details of this evidence in paragraph 122 of his judgment. The US Government did not seek to contradict or challenge this evidence. Judge Kessler accepted that it was true and that it had amounted to torture.

292. The parties to the present proceedings have made written representations to the court about the significance of this public US judicial determination that what has heretofore been no more than an arguable case of wrongdoing by the US authorities is true in the particulars alleged by Mr Mohamed. On behalf of Mr Mohamed, it is contended that these public findings of fact in the US mean that it cannot be maintained that US or UK national security requires the suppression by the UK courts of short summaries of precisely the same type of fact. The submission made on behalf of the Foreign Secretary that disclosure of the subparagraphs would risk the US reducing the sharing of intelligence is unsustainable when essentially the same facts are publicly found to be true in a US court. It is contended that the principal effect of allowing the present appeal would be to suppress findings giving details of the extent of the knowledge of Mr Mohamed's treatment which the UK authorities had at the time. That is scarcely a sustainable basis for the US authorities to be concerned about a departure from the control principle, when the sensitive information itself has been made public in the US.

293. Representations on behalf of the Foreign Secretary contend that it is wrong to suppose that the US District Court has in some way declassified the facts concerning Mr Mohamed's treatment. In finding that Mr Mohamed had been tortured, the District Court relied on and accepted his own account as recorded in his "Torture Diary", which is a public document which was before the Divisional Court and is before the Court of Appeal. The District Court's finding of torture was not based on material derived from US intelligence sources. The sensitivity of the seven subparagraphs arises entirely from the fact that they derived from material supplied from US intelligence sources to the UK agencies and from the US concern about the security of information supplied from such sources, if it is liable to be disclosed in circumstances

such as these. Since the finding of the US District Court was based on material of a quite different nature and origin, it has no implications for any issue in these proceedings.

294. I record that this court offered the parties the opportunity to make further oral submissions about the significance of the findings of the US District Court, but the parties were content to rely on their written representations.

295. In my judgment, the decision of the US District Court shifts the already fine balance in this case against the exclusion of the seven subparagraphs. I have given in paragraphs 288 to 290 above my understanding and assessment of the narrow persuasive basis supporting the Foreign Secretary's national security judgment. In a sense, the content of the seven subparagraphs does not matter to that case; rather, the concern is that, whatever the content, there is a risk that foreign partners may reduce or place constraints on the use which the US may make of intelligence information because the UK intelligence operation has been shown to be insecure. I can see the superficial logical force of the representation that the findings of fact in the US District Court make no difference to that position, because those findings are based on evidence derived from a different source. But I fear that angels are now dancing on a pinhead. The Foreign Secretary's case now seeks to defend a principle entirely devoid of factual content on which to hang it. In my view, the finding of the US District Court does make a difference because it changes what was an arguable case of torture into a case of torture which a US court has found to be true in proceedings in which the US Government had the opportunity to make a case that it was not true. In these circumstances, it would be quite absurd if the US Government itself decided to reduce intelligence sharing because a UK court had decided to publish summary material whose essential content has been publicly found to be true in a US court; and it would be fanciful to suppose that foreign partners would be concerned because the US Government had taken a stance in these proceedings which became untenable. I am not persuaded that court-ordered disclosure of publicly available material accepted in a US court to be true, one source of which was an intelligence source, could in any real sense properly be regarded as a breach of the control principle. This is especially so when Ms Rose is able to point to other material in the Divisional Court's open judgments to which the same arguments might have applied, had the Foreign Secretary chosen to make them. Relying on a bare principle in relation to material which now has no sensitive content is tantamount to saying that the Foreign Secretary's judgment should always determine the balance and that the court has no relevant balancing judgment of its own to make. That is not the law.

296. For these reasons, I would dismiss this appeal.

APPENDIX

(iv) It was reported that a new series of interviews was conducted by the United States authorities prior to 17 May 2002 as part of a new strategy designed by an expert interviewer.

(v) It was reported that at some stage during that further interview process by the United States authorities, BM had been intentionally subjected to continuous sleep deprivation. The effects of the sleep deprivation were carefully observed.

(vi) It was reported that combined with the sleep deprivation, threats and inducements were made to him. His fears of being removed from United States custody and "disappearing" were played upon.

(vii) It was reported that the stress brought about by these deliberate tactics was increased by him being shackled during his interviews.

(viii) It was clear not only from the reports of the content of the interviews but also from the report that he was being kept under self-harm observation, that the interviews were having a marked effect upon him and causing him significant mental stress and suffering.

(ix) We regret to have to conclude that the reports provided to the SyS made clear to anyone reading them that BM was being subjected to the treatment that we have described and the effect upon him of that intentional treatment.

(x) The treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972. Although it is not necessary for us to categorise the treatment reported, it could easily be contended to be at the very least cruel, inhuman and degrading treatment of BM by the United States authorities.