

Neutral Citation Number: [2009] EWHC 2549 (Admin)

Case No: CO/4241/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2009

Before :

LORD JUSTICE THOMAS
and
MR JUSTICE LLOYD JONES

Between :

The Queen on the Application of Binyam Mohamed	<u>Claimant</u>
- and -	
Secretary of State for Foreign and Commonwealth Affairs	<u>Defendant</u>

SUMMARY OF FIFTH OPEN JUDGMENT AS REDACTED.

This summary summarises the judgment handed down in this case. It forms no part of the judgment which should be read in full to understand the reasoning so far as can be made available in the redacted form of the judgment. The opening note explains the reasons why the judgment and this summary contain paragraphs which have been redacted.

1. This is the fifth open judgment of the Court in this action.
2. On 4 February 2009 we handed down our fourth judgment in this action [2009] EWHC 152 (Admin). In it we concluded that we should not make public seven short paragraphs which we had redacted from our first judgment at the request of the defendant (the Foreign Secretary). Those paragraphs summarised the account given in the reports by the United States authorities to the British Security Services about the treatment of the claimant (BM) by the United States authorities whilst he was held in Pakistan between his arrest in April 2002 and May 2002 prior to his interview by an officer of the Security Service (SyS), witness B, on 15 May 2002.

3. Shortly after handing down the judgment, an application was made to us that we should reconsider the decision that we had made on the basis that we had been misled or there had been a misunderstanding as to the evidence of the position of the United States Government in relation to action that they might take if we had decided to make public the redacted paragraphs of our first judgment. We decided to reopen our judgment and announced that decision on 6 May 2009. Our reasons for doing so are set out in Part I of the judgment. (paras. 7-35)
4. In Part II of the judgment we describe the procedural events in this action between April and July 2009. (paras. 36-64)
5. In Part III of the judgment we consider whether the redacted paragraphs should be made public. Our conclusions may be summarised as follows:
 - (1) Although the decision as to whether to put the paragraphs into the public domain is a decision for us, we should defer to the opinion of the Foreign Secretary on the consequences of doing so provided there is an evidential basis for the opinion of the Foreign Secretary and it is made in good faith. (para. 67)

The principle of control over intelligence.

- (2) The principle of control over intelligence shared by the intelligence services of States is a long established practice but it is not a matter of legal obligation. Furthermore, it is not an absolute principle. In particular, it is subject to an exception both in the United Kingdom and in the United States in the case of court ordered disclosure. That exception clearly applies here because it is necessary for us to explain what the United Kingdom Government and its agents actually knew about the treatment of BM and, in particular, what Witness B actually knew before he interviewed BM in Pakistan and what the SyS and others knew when they provided further information to the United States Government to be used in the interrogation of BM. (paras. 71-73)
- (3) Even if the disclosure of the redacted paragraphs would infringe the principle of control, it would not, contrary to the submission of the Foreign Secretary, be “highly significant”. There is nothing in the redacted paragraphs which identifies any agent, any secret means of intelligence gathering or any other matter which can be regarded as intelligence. **Remaining summary of reasoning in paragraph 74 redacted.**
- (4) The balance of the public interest would necessitate making the paragraphs public even if this would infringe the principle of control. (paras. 75-77)

The consequences of putting the paragraphs into the public domain.

- (5) We next consider whether, were we to make the paragraphs public, there is a real risk that the Obama Administration would take action against

the United Kingdom which would cause serious harm to the national security or international relations of the United Kingdom.

- (6) The letters from the CIA and General Jones do not provide the necessary evidence on which the Foreign Secretary could conclude that publication of the redacted paragraphs would cause a real risk of serious harm to the national security or international relations of the United Kingdom. In particular, the CIA letter states what could happen and not what would happen. It contains no threat or statement of the consequences which would follow. (paras. 79-80)
- (7) We find it impossible to believe that President Obama would curtail the supply of information to the United Kingdom when what would be made public would not be intelligence **Remaining summary of reasoning in paragraph 81 redacted.**
- (8) The statements of Secretary of State Clinton differ in significant respects from the other statements of the current US position. However, they proceed on the mistaken assumption that the principle of control is inviolable. Moreover, we are driven to the conclusion that her statement that intelligence sharing would be affected by publication of the redacted paragraphs was made without a proper analysis or understanding of their content. The evidence does not sustain the Foreign Secretary's opinion that these statements give rise to a serious risk. (paras. 83-95)
- (9) We are unable to accept the submission that the Foreign Secretary has shown any lack of good faith in the course of these proceedings. (paras. 96-100)
- (10) Considering the matter objectively on all the evidence and as a matter of reality, we are unable to accept that there is a real risk that the United States would reconsider or reduce its intelligence sharing with the United Kingdom if we made the redacted paragraphs public. (para. 104)

The balancing exercise.

- (11) For the reasons set out in our fourth judgment there is a compelling public interest in the disclosure of the redacted paragraphs. (para. 101)
- (12) We have considered with care the alternatives open to us. However, these afford no effective substitute for making the information public.(paras. 105-6)
- (13) The publication of the redacted paragraphs is necessary to uphold the rule of law in the United Kingdom and to secure democratic accountability in the United Kingdom for the actions of the British Security Services. As the public interest in making the paragraphs public is overwhelming and as the risk to national security judged objectively on the evidence is not a serious one, we shall reissue the first open judgment with the redacted paragraphs restored to paragraphs 87 and 88. (para. 108)

6. In Part IV of the judgment we consider the application by the international media that we should make public our entire first closed judgment.
7. In the light of the criminal investigation initiated by the Attorney General into the matter, the closed judgement (as revised) contains findings which it would be inappropriate to put into the public domain at this stage. However, when any resulting proceedings are at an end the question of release of the closed judgment will have to be resolved. (paras. 109-112, 118-120)
8. In Part V of the judgment we consider the general position in relation to closed submissions and judgments and, in particular, the problems which they create for law reporters. We conclude that the Rule Committee or the Lord Chief Justice may wish to consider making appropriate Rules or Practice Directions. (paras. 113-120)
9. In Part VI of the judgment we refer to the scope of the retainer of the Special Advocates in these proceedings. (para. 121)