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	**Claimant**
- and -	
Secretary of State for Foreign and Commonwealth Affairs	**Defendant**

- -
- -

Dinah Rose QC and Ben Jaffey (instructed by **Leigh Day**) for the **Claimant**

Thomas de la Mare and Martin Goudie (instructed by **The Treasury Solicitor's Special Advocates Support Office**) as **Special Advocates for the Claimant**

Pushpinder Saini QC and Karen Steyn (instructed by **The Treasury Solicitor**) for the **Respondent**

Guy Vassall-Adams (instructed by Jan Johannes) for the **Guardian News and Media Ltd, British Broadcasting Corporation, Times Newspapers Limited, Independent News and Media Ltd, The Press Association (The UK Media)**

Geoffrey Robertson QC and Kate Annand (instructed by Finers Stephen Innocent LLP) The New York Times Corporation, The Associated Press, the LA Times, the Washington Post and the Index on Censorship (The International Media)

Guy Vassall-Adams (instructed by **Bindmans LLP**) for **The Incorporated Council of Law Reporting**

David Rose in person

Hearing dates: 11 February, 22 April , 22 May and 29 July 2009

Judgment No. 5 as redacted and Approved by the court for handing down (subject to editorial corrections)

Note: The judgment has redactions at paragraphs 38 iv), 74 ii), 79 vii), 81 and 102. We made the draft judgment available on Friday, 9 October 2009 to the Security Services for checking in accordance with the initial Order of Sullivan J. We made clear we intended to release the judgment to the other parties on Wednesday, 14 October 2009 and hand it down on Friday, 16 October 2009. We were informed on Tuesday, 14 October 2009 that there were concerns on grounds of national security; we gave consent for these to be discussed with Mr Saini QC and Miss Steyn. We received at noon on Thursday, 15 October 2009 a letter from the Treasury Solicitor which set out the passages which it was contended should be redacted. It explained the concerns of the Security Services in the following terms:

> **"Their concerns .. are directed at ensuring the Secretary of State's position on any appeal is not prejudiced by inclusion of text in the judgment which might reveal the content of the 7 paragraphs. It is also their assessment that placing the particular parts of the judgment .... Into the public domain would give rise to damage to national security."**

We were told that the parties had agreed that if we could not resolve the issue by the time at which we had agreed to hand the judgment down, we should make it available in a form where the paragraphs which the Security Services had requested us to redact were redacted, pending argument and decision.

It is accepted by the Security Services that the redacted paragraphs are crucial to our reasoning. Indeed we take the view the reasons why we reached our conclusion cannot be fully understood without these paragraphs. In the circumstances it is impossible to resolve the issue as to redaction without further argument which cannot take place today. We are therefore, in accordance with the agreement of parties, handing down the judgment in a redacted form, pending our further ruling on this issue.

Lord Justice Thomas:

1. This is the fifth open judgment of the Court in this action.

Introduction

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 for the reasons set out in Part I of this judgment at paragraphs 7 to 35 and announced that decision on 6 May 2009.

4. Further evidence was served including the Foreign Secretary's third Public Interest Immunity Certificate (PII Certificate) in which he 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 in that regard the position of the Obama Administration was no different to that of the position of the Bush Administration. The evidence supporting it was also served; all the material evidence was open. We set out what happened in this period in Part II of this judgment at paragraphs 36-64 below.

5. We held a final hearing on 29 July 2009. Our conclusions on whether the redacted paragraphs should be made public are set out at Part III of this judgment at paragraphs 66-108 below.

6. In Parts IV, V and VI we consider the application made by the international media to make public our closed judgment dated 21 August 2008, general issues raised in relation to closed judgments and the position of the special advocates in this action – see paragraphs 109-121.

I THE RE-OPENING OF OUR FOURTH JUDGMENT

(1) The legal principles

7. There was no dispute about the applicable legal principles in relation to the reconsideration and re-opening of a judgment after it has been handed down, but not perfected. Where, as in the case of our fourth judgment, the judgment has not been perfected, it is open to a court to re-open the judgment, although such a power has to be sparingly exercised. In *Robinson v Fernsby* [2003] EWCA Civ 1820 May LJ set

out a full review of the authorities and concluded at paragraph 94 that there might very occasionally be circumstances in which a judge not only could, but should make a material alteration in the interests of justice. He made clear that it would only very rarely be appropriate for the court to do so; a court would only be persuaded to do so in exceptional circumstances. He pointed out that the expression "exceptional circumstances" by itself was no more than a relatively uninformative label, but it would not be profitable to debate what was meant in isolation from the facts of a particular case. Peter Gibson LJ, in agreeing with May LJ that a judge could correct an error, said at paragraph 120:

> "No doubt that will happen only in exceptional circumstances, but I have serious misgivings about elevating that correct description of the circumstances when that occurs as an exception into some sort of criteria for what is required for the recalling of an order before it is sealed."

In a further judgment of the Court of Appeal in *Paulin v Paulin* [2009] EWCA Civ 221 Wilson LJ conveniently set out at paragraph 30 examples of the application to particular facts of the jurisdiction to reverse an error prior to the perfection of a judgment.

8. As Mr Saini QC accepted, these were all private law cases where finality was of much greater importance. In a public law case, such as the present where wider interests are at stake, the test of exceptional circumstances may be susceptible of more generous application.

9. The issue before us was whether the circumstances were such that, having regard to the authorities, we should re-open our judgment.

(2) The basis upon which PII was claimed by the Foreign Secretary

10. Although the Foreign Secretary had signed two Public Interest Immunity Certificates prior to the handing down of our fourth judgment, the principal reason for his view that the redacted paragraphs should not be made public was set out at paragraphs 10 and 11 of his first Certificate dated 26 August 2008. The Foreign Secretary, after referring to the work his officials and others had done, continued:

> "10. ...Their advice has been clear and unanimous and my judgement is the same; disclosure of these documents by order of our courts or otherwise by United Kingdom authorities would seriously harm the existing intelligence sharing arrangements between the United Kingdom and the United States and cause considerable damage to national security. I have also assessed that it may damage international relations of the United Kingdom more generally in liaison arrangements with third parties.
>
> 11. In reaching my assessment I have taken into account the fact that the US administration on the basis of clear, consistent and forceful communications, both written and oral, from senior officials, including at the highest national security levels

> from all of the departments and agencies concerned, have indicated that such damage was likely to occur...."

He then referred to a letter dated 21 August 2008 to Mr Daniel Bethlehem QC, the Legal Adviser to the Foreign and Commonwealth Office, from John Bellinger, the then Legal Adviser to the then United States Secretary of State, which stated in the clearest terms that the public disclosure of the documents or the information contained therein:

> "is likely to result in serious damage to US national security and could harm existing intelligence information sharing arrangements between our two Governments."

11. In his second certificate dated 5 September 2008 the Foreign Secretary referred to correspondence to the court from Mr Bethlehem QC where Mr Stephen Mathias, the then Assistant Legal Adviser of the State Department, had set out in writing the position of the United States Government. In reliance on that, the Foreign Secretary said at paragraph 12:

> "This correspondence also underlines publicly the wider US concerns going to "serious and lasting damage to the US-UK intelligence sharing relationship" that would be caused by the disclosure of the information in question by order of our courts."

12. We reached our conclusions on the risk of serious prejudice to the national security of the United Kingdom on the basis of those statements and the closed evidence underlying them. It was evident the Bush Administration had made very clear to the United Kingdom Government that if the information contained in the 42 documents or the 7 redacted paragraphs was made public there would be a re-evaluation of the existing intelligence information sharing arrangements between the two Governments, thereby giving rise to the real risk of serious harm to national security.

13. We characterized at several paragraphs in our fourth judgment the reaction of the Bush Administration as a "threat". After the handing down of our judgment, the Foreign Secretary made a number of public statements disagreeing with our assessment that the statement made by the Bush Administration of the consequences which would follow could be characterized as a threat. In our judgement that is merely a matter of semantics. Whether this is characterised as "a threat" or as "a statement of consequences which would follow", what matters is its substance.

14. On the evidence placed before us, it could not be disputed that the Bush Administration had made it clear that if the information in the redacted paragraphs was made public then reconsideration would be given to intelligence sharing arrangements. It was that specific matter, given the importance of intelligence sharing arrangements to the national security of the United Kingdom, that led us to conclude that the balance lay in favour of maintaining the redaction of the paragraphs from the first judgment.

(3) The need to distinguish between the principle of control over intelligence and the statement of consequences which would follow (the threat)

15. In the light of what followed, it is important to distinguish the general principle of control that attaches to communications between States as a result of intelligence sharing and the threat or statement of consequences which would follow which was made by the Bush Administration.

    i) **The principle of control over intelligence:** There can be no doubt that there is a general principle or convention that intelligence information received by one State from another will not be released into the public domain or otherwise used without the consent of the state supplying it. This principle is often referred to as the "principle of control over intelligence" and we shall refer to it as such. For example, that principle was very clearly expressed by Baroness Neville-Jones in the debate in the House of Lords on 5 February 2009 in the following terms:

        > "[The Minister] is also right to say that by convention the sensitive information of another country is not and should not be publicly disclosed without that country's permission. That is well established practice."

        As we set out at paragraph 69.iv) below, the evidence is that while the receiving State will normally be expected to resist the making of a court order for disclosure, such court ordered disclosure is well understood by the Governments of the United States and the United Kingdom to be an exception to the principle of control which, accordingly, cannot be considered an absolute principle. As a result, court ordered disclosure would not ordinarily have adverse consequences to the national security of the United Kingdom.

    ii) **The statement of consequences which would follow (the threat):** In the communications from the United States Government leading to the two PII certificates of August and September 2008, the Bush Administration made clear the consequences that would follow to the United Kingdom if the court disclosed the redacted paragraphs. We were satisfied that there was evidence for the Foreign Secretary's claim in his Certificate that the court should not order disclosure because there was a risk of serious harm to United Kingdom national security. The Bush Administration was not merely taking the position that there would be a breach of the principle of control over intelligence; it was making clear that, if the court ordered disclosure, specific consequences would follow, namely the reconsideration of the intelligence sharing relationship. It was the fact that the Bush Administration was making clear that specific consequences would follow which led us to reach the decision we did. We did not make our decision on the basis of a breach of the principle of control over intelligence. We made it because of the specific consequences spelt out by the Bush Administration which we characterised, in the language of everyday life, as the threat it undoubtedly was.

16. An appreciation of this distinction is essential to an understanding of what subsequently occurred and, in particular, of the questions asked of and answers given by the Governments of the United States and the United Kingdom.

(4) The submission by Mr David Rose in November 2008 as to the possible effect of a change of Administration in the US

17. The argument in relation to the disclosure of the 42 documents and the 7 redacted paragraphs took place in October 2008. In the light of the important issues at stake in relation to the 7 redacted paragraphs, we gave the media the opportunity of making representations. Amongst the written representations received was one from Mr David Rose on 30 November 2008. At paragraph 11 he pointed out that the position had changed significantly with the election of

> "a US President avowedly determined to eschew torture and inhuman and degrading treatment and to close Guantanamo Bay. The Administration of Barack Obama is unlikely to protest at further confirmation that its predecessor saw the inhuman and degrading treatment of detainees as acceptable."

18. The response of the Foreign Secretary on 18 December 2008 to that suggestion was made at paragraph 15 of his counsel's submission:

> "Mr Rose suggests that the national security concerns no longer arise following the Presidential election. He is not in a position to give evidence to the court on that issue. But, in any event, the situation has not changed since the election of President-elect Obama. The concern relates to the disclosure of closed information; it is not a concern that criticism of the treatment of detainees may be levelled at the Administration of President Bush. The Secretary of State's assessment of the likelihood and severity of the damage to national security has not changed. All the developments since the Secretary of State's further certificate of 5 September 2008 have tipped the balance more firmly in favour of safeguarding UK national security."

19. On receipt of that response solicitors for BM wrote on 18 December 2008 to the Treasury Solicitor pointing out that the assertion by the Foreign Secretary that his assessment of the likelihood and severity of damage to national security had not changed was a matter that needed to be proved by evidence. They said:

> "As we understand it, the national security objection to disclosure arises out of a concern that the US authorities would respond by limiting their security and intelligence co-operation in the event that details of their unlawful conduct were to be made public. Given that President-Elect Obama has committed to ending the current US practice of torture, it is doubtful that the incoming administration would view the disclosure of evidence of torture by an English court in the same manner as the administration of President Bush. If it is genuinely the assessment of the Secretary of State that the position will be entirely unchanged under the incoming administration, evidence should be provided to that effect. If necessary, there can be a closed annex to a further PII certificate."

Unfortunately the letter was not copied to the court. No response was made by the Treasury Solicitor on behalf of the Foreign Secretary. That omission proved, in the event, to be regrettable.

(5) The inauguration of President Obama

20. It was, however, clear to us that an important issue had arisen given the impending change of Administration. Whilst we were finalising our draft judgment President Obama was inaugurated and his Administration assumed office on 20 January 2009. On 22 January 2009, as we set out in paragraph 9 of our fourth judgment, President Obama issued an Executive Order requiring the Secretary of State for Defense to ensure that no new charges were sworn pending a review of the position of all those detained at Guantanamo Bay.

(6) The making available of the draft judgment

21. The draft of our fourth judgment was made available to those acting for the Foreign Secretary in accordance with the initial order made by Sullivan J so that a check could be made as to whether it contained any matters from the closed evidence which might be considered by the Foreign Secretary as damaging to the national security of the United Kingdom. At paragraph 78 of the draft we drew attention to the submission made by Mr Rose and set out our understanding that the position had not changed from the position taken by the Bush Administration, despite the making of the Executive Orders by President Obama on 29 January 2009.

22. After we had received confirmation that there were no matters damaging to the national security of the United Kingdom in our draft of the fourth judgment, we released the judgment to the other parties on 30 January 2009. We were then requested by the Foreign Secretary to grant permission for the draft to be shown, prior to the handing down of the judgment to certain named officials of the Obama Administration. We gave that permission and a copy of the draft judgment was sent to the individuals concerned on the evening of Tuesday, 3 February 2009 prior to handing down the judgment at 1.45 p.m. on Wednesday, 4 February 2009.

23. Although some points were raised on our draft in a letter written on behalf of the Foreign Secretary on 3 February 2009, there was no suggestion that our understanding of the position of the Obama Administration was wrong.

(7) Enquiries of the Obama Administration prior to the handing down of the fourth judgment

24. It is clear from the evidence now before us that, prior to the handing down of the judgment, there was no discussion on the subject with the officials of the Obama Administration, save a discussion between the acting Legal Adviser to the State Department and Mr Bethlehem QC referred to in his letter on 24 March 2009. In that letter to the court he made clear that neither the Foreign Secretary nor his officials had made any representations to us about the attitude of the new US Administration on any aspect of the case, although the Foreign Secretary and other departments of the United Kingdom Government had continued to engage with US officials on the subject of BM's release and return.

25. As we understand it diplomatic convention dictated that there could be no dealings with President-elect Obama or his staff in the period between his election on 4 November 2008 and his inauguration on 20 January 2009. It is also evident that it

was expected by the Foreign Secretary that we would hand down our judgment prior to the inauguration of President Obama and so no issue would in any event arise.

26. In the event therefore, prior to the handing down of our judgment, no enquiry was made of the Obama Administration as to whether, if we made the information contained in the redacted paragraphs public, the Obama Administration would reconsider the intelligence sharing relationship between the United Kingdom and the United States.

27. It appears clear now that:

i) The Foreign Secretary was referring in the submission made on 18 December 2008 to the view that there would be no change between Administrations in respect of the general principle of control over intelligence.

ii) The Foreign Secretary had not intended to represent (as he had made no enquiry for the reasons we have set out) that there would be no change to the position on threat (or the consequences that would follow) made by the Bush Administration in relation to the redacted paragraphs, namely that if the 7 redacted paragraphs were made public, the United States would reconsider its intelligence sharing relationships with the United Kingdom.

28. Immediately after the handing down of our judgment Mr David Rose enquired of the Foreign and Commonwealth Office as to how the Foreign Secretary could know that the threat made by the Bush Administration that the US would re-consider the intelligence sharing relationship with the UK if the 7 redacted paragraphs were published was being maintained by the Obama Administration. The spokesman for the Foreign Secretary informed Mr Rose:

> "We haven't made any representations to the court regarding the new Administration's approach to this case. We have not approached the new Administration about these paragraphs. We haven't made any representations about their attitude and we haven't been asked by the court to do so, despite the new Executive Orders and the attitude that may now prevail in Washington."

It appears that when questions were asked of the Foreign Secretary, both by the media and in Parliament, as to whether there was any change of position of the Obama Administration, his response was made in relation to the general principle of control over intelligence and not in relation to the specific statement made by the Bush Administration that it would reconsider its intelligence sharing relationship.

(8) The initial statements made by the Obama Administration after the hand down of our fourth judgment

29. In the period following the delivery of our judgment a number of statements were made by spokesmen on behalf of President Obama. It is clear that none of those statements went beyond restating the general principle of control over intelligence, namely that the United States expected the United Kingdom Government to keep the documents confidential. Mr Bethlehem QC referred us in his letter of 24 March 2009

to a statement made by the Press Office of the National Security Council on 4 February 2009:

> "The United States thanks the UK government for its continuing commitment to protect sensitive national security information and preserve the long-standing relationship that enables both countries to protect their citizens."

30. No statement reiterated the position taken by the Bush Administration that if we did make the 7 redacted paragraphs public, then there would be consequences in the form of a reconsideration of the intelligence sharing relationship. An exchange with the media, to which Mr Bethlehem QC referred us in his letter of 24 March 2009, illustrates that position. In the State Department daily press briefing on Thursday, 5 February 2009, the following question was put to the State Department spokesman:

> "I wanted to ask you about the case of the British resident Binyam Mohamed, who is currently in Guantanamo Bay. Can you tell us from the point of view of the United States Government, would it do serious harm to intelligence information sharing arrangements between the US and the UK if the documents that describe his treatment as a detainee were to be made public in the UK?"

The spokesman responded as follows:

> "Well, look one of the things that I want to make clear is that we really thank the United Kingdom for, you know, its continued commitment to, you know, protecting sensitive national security information and to preserve our longstanding intelligence-sharing relationship. You know, it's the best I can tell you on that."

In response to a follow up question on the same subject, the State Department spokesman said:

> "Well, look, the best way I can describe it to you is that the British have been very steadfast in agreeing to preserve the confidentiality of the intelligence that we share with them.

In response to a further question as to the attitude of the Obama administration, the spokesman said:

> Well, I've just outlined to you what our position is with regard to intelligence sharing. And you know, President Obama has – as you know, through an executive order, has, you know, basically requested a review of the detention of, you know, or should I say detention conditions at Guantanamo. But beyond that, I just don't have anything more I can give you."

31. It became clear during the course of argument at the hearing of the application on 22 April 2009 that despite the meetings that had taken place between officials and Ministers of the United Kingdom and United States, no-one on behalf of the United Kingdom Government had, in the period between the handing down of our judgment on 4 February 2009 and the hearing before us on 22 April 2009, asked the Obama Administration whether, in the event of our making the information in the redacted paragraphs public, his Administration would reconsider the intelligence sharing relationship. It appears to be the position that it was assumed, in the absence of a statement by the Obama Administration, that the position had not changed, but no-one sought any confirmation.

32. It was suggested in submissions made to us by Miss Rose QC that there had been a lack of candour on behalf of the Foreign Secretary and his officials and that the court had been deliberately misled as to the position. We consider that submission at paragraph 96 below, as it is of relevance to a consideration of the Foreign Secretary's present position.

(9) The understanding upon which we acted

33. It is clear that, as a result of what transpired between the making of the submission by Mr David Rose on 30 November 2008 and the handing down of the fourth judgment on 4 February 2009, we had understood 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. It is evident that that understanding was shared by others.

34. 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 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.

35. Our judgment that the redacted paragraphs should not be made public was made on the understanding that the continuing position of the United States was that the specific statement of the Bush Administration stood, namely it would reconsider its intelligence sharing relationship if the redacted paragraphs were made public. Despite the change of Administration, the serious risk of substantial harm to the national security of the United Kingdom thereby posed remained. That understanding was fundamental to our decision. However at 6 May 2009 (when we announced our decision to re-open our fourth judgment) there was no basis for affirming that conclusion. In these circumstances we are plainly entitled to re-open that aspect of the judgment.

II THE PROCEDURAL EVENTS: APRIL to JULY 2009

(1) The order for directions: further evidence served before the hearing on 22 April 2009.

36. At a hearing on 11 February 2009, we gave directions for service of evidence. In accordance with that order, on 4 March 2009,

    i) The UK media served the statement of Jan Johannes setting out the public exchanges that had taken place immediately after the handing down of our fourth judgment, and statements of Gillian Phillips and Valerie Nazareth setting out interviews between the Foreign Secretary and various journalists.

    ii) The international media served the witness statements of Morton Halperin, who had served in the Clinton, Nixon and Johnson Administrations at a high level in National Security, David Schultz, a US lawyer with extensive experience of US constitutional law relating to the media and a lecturer at Columbia University School of Law, and James Bamford, an investigative reporter.

37. The Foreign Secretary did not serve any evidence in response. Instead he put before the court the letter from Mr Bethlehem QC dated 24 March 2009 to which we have referred, in part, at paragraphs 24, 29 and 30. Although objection was taken to this by the claimants as not being the correct way to provide evidence in response, we treated the letter as evidence given the help which Mr Bethlehem QC has always so candidly provided in these proceedings.

(2) The submissions made to us on 22 April 2009 as to the position of the Obama administration

38. The evidence produced for the hearing on 22 April 2009 made it clear that President Obama had publicly expressed very different views on issues of torture, interrogation techniques and transparency from those of officials of the Bush Administration, including Mr Bellinger, legal adviser to the State Department, and Secretary of State Rice.

    i) We were referred, for example, to the views expressed by Senator Obama (as he then was) on 11 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."

    ii) The translation of that commitment into action was foreshadowed by the Executive Orders made on 22 January, two days after his inauguration.

    iii) His commitment to transparency and the rule of law in relation to the treatment of detainees suspected of terrorist activity was made clear by a statement made by him on 16 April 2009 and the release of a number of memoranda issued by the United States Department of Justice's Office of Legal Counsel dealing with the treatment of Al-Qaida detainees. In his statement President Obama said:

> "The Department of Justice will today release certain memos issued by the Office of Legal Counsel between 2002 and 2005 as part of an ongoing court case. These memos speak to techniques that were used in the interrogation of terrorism suspects during that period, and their release is required by the rule of law.
>
> .....
>
> My judgment on the content of these memos is a matter of record. In one of my very first acts as President, I prohibited the use of these interrogation techniques by the United States because they undermine our 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 ....."

iv) The memoranda that were released set out details of the treatment inflicted on detainees by the CIA and a minute legal analysis as to whether those techniques would constitute an infringement against the prohibition on torture.

REMAINDER OF SUB-PARAGRAPH REDACTED

39. It was submitted on 22 April 2009 by Mr Vassall-Adams and supported by Mr Robertson QC and Miss Rose QC that, in the light of the making public of these memoranda, it was quite impossible to contend that the Obama Administration would ever have contemplated reconsidering the intelligence sharing relationships with the United Kingdom if we made the redacted paragraphs public.

40. It was of course possible to understand why the Bush Administration was prepared to state that the United States would reconsider the intelligence sharing relationship if this court had made public a summary of the treatment accorded to BM. The memoranda made available by President Obama on 16 April 2009 described in considerable detail the techniques employed under the Bush Administration. Statements made immediately after the release of these memoranda by very senior officials of the Bush Administration explained why they wished to keep the matters secret.

41. It was also submitted at the hearing on 22 April 2009 that there was no unequivocal statement in any of the material submitted on behalf of the Foreign Secretary that it

was the position of the Obama Administration that consequences would follow from the publication by the court of the 7 redacted paragraphs

(2) The request of the Foreign Secretary at the hearing of 22 April 2009 for an adjournment

42. Mr Bethlehem's letter of 24 March 2009 referred to the matters we have set out at paragraphs 24, 29 and 30 and to unspecified exchanges between United Kingdom and United States officials on the issue of disclosure of the information set out in our fourth judgment. His letter then stated:

> "The Foreign Secretary also discussed this with US Secretary of State Clinton on 2 March 2009. Secretary Clinton made clear that the position of the US Administration on the disclosure of US intelligence material had not changed."

He then stated that on the basis of these exchanges, his understanding was that the position of the United States remained as previously represented in the open and closed proceedings.

43. Mr Saini QC, on behalf of the Foreign Secretary, drew to our attention the fact that these memoranda had only just been made public and asked that the Foreign Secretary be allowed an opportunity of consulting further with the Obama Administration. He therefore applied to adjourn the matter until such consultation could take place.

(3) Our refusal of an adjournment

44. After hearing submissions from all the parties, we refused that request on the basis that it was not necessary for there to be an adjournment, given the stage at which the argument had reached and the time we would take to consider our judgment. We concluded that it was better for us to complete the argument and to give the Foreign Secretary the opportunity to communicate with the Obama Administration in the period between the conclusion of the argument and the handing down of the judgment which we indicated would not be before the week commencing 4 May 2009. The Foreign Secretary had had since 11 February 2009 ample time to obtain evidence. The evidence set out in Mr Bethlehem QC's letter of 24 March 2009, including the Foreign Secretary's account of his conversation with Secretary of State Clinton on 2 March 2009, did not contain any reiteration by the United States of the threat (or statement of the consequences that would follow) if we made the redacted paragraphs public. However, the correspondence following that letter must have made it clear to the Foreign Secretary that the real issue was what the Obama Administration's position would be as to the threat (or consequences which would follow), if the 7 redacted paragraphs were made public. He had taken no steps to deal with that.

(4) The further request for a further delay in handing down our judgment

45. On 29 April 2009, a week after our decision of 22 April 2009, we received an application from the Foreign Secretary to defer the handing down of our judgment for a further period. We were informed that the Obama Administration had provided an interim statement. It made clear that the United States Government was "considering the decision on the public disclosure of the US intelligence information that is

summarised in the seven paragraphs in issue in the UK proceedings". The matter was under active consideration, but for operational reasons it was not in a position to take a final decision for another week. It was made clear for the avoidance of doubt that:

> "the USG will not consent to any disclosure of the underlying US intelligence documents or the information therein, consistent with the approach the USG has adopted in proceedings before its own courts. The USG will document its position in respect of the 7 paragraphs and the underlying documents in correspondence to HMG by 6 May."

46. Objection was made by the other parties to the request for an adjournment on the basis that those acting on behalf of the Foreign Secretary had not asked the important question, namely:

> "whether the threat which was so clearly enunciated on behalf of the Bush Administration by Mr Bellinger and Mr Mathias is being maintained by the Obama Administration".

47. We responded on 29 April 2009 to state that we declined the application. We notified the parties that a draft of the judgment would be sent on 5 May 2009, but if the Foreign Secretary had further information, the court should receive it as soon as possible.

(4) The provision of the statement from the United States Government on 1 and 6 May 2009

48. On 1 May 2009 the court and the other parties were informed by The Treasury Solicitor on behalf of the Foreign Secretary that a classified statement had been received overnight from the United States setting out the Obama Administration's position on disclosure. The statement was in a letter dated 30 April 2009 from an entity of the United States Government to an entity of the United Kingdom Government. The court was provided with a copy of that letter, but only a two paragraph summary was provided to the parties. We were asked to allow the Foreign Secretary until 15 May 2009 to submit any further evidence to the court he might consider appropriate.

49. The solicitors for BM submitted in a letter to the Court on 5 May 2009 that the language in the two paragraphs did not spell out any statement of what would follow if the court disclosed the redacted paragraphs. It was pointed out that in contrast to the stance taken by the Bush Administration where the specific consequences had been spelt out in unequivocal terms, the two paragraphs stating the position of the Obama Administration merely stated what **could** happen; it did not state what **would** happen. We were asked to give judgment on the request to re-open the judgment and to consider various alternatives including the provision to the parties of the full letter written by the United States Government and the production of a further PII Certificate by the Foreign Secretary. The solicitors for the international media submitted that the two paragraphs made no difference for much the same reasons. On 6 May 2009 we received further submissions from the Special Advocates. A letter from the Treasury Solicitor was sent to the parties enclosing, in place of the two

paragraphs text, a seven paragraph text extending over three pages, abstracted from the letter. We set the material parts of that text out at paragraph 79 below.

50. By this time we had reached the conclusion set out at paragraph 35 that we should re-open our fourth judgment. The position taken by the Obama Administration in the letter of 30 April 2009 was by no means the same as that previously taken by the Bush Administration and there was a clear issue as to whether it was maintaining the threat (or consequences which would follow), if we made public the 7 paragraphs.

51. We therefore informed the parties that we had decided to re-open our fourth judgment. We permitted the Foreign Secretary to provide a further PII Certificate by 15 May 2009 and invited the Foreign Secretary to make further submissions as to whether the full letter sent on 1 May 2009 should be made available. We fixed a hearing for 22 May 2009.

52. On 11 May 2009 a revised version of the text was provided with the addition of one further phrase. On 15 May 2009 the Foreign Secretary provided his third PII Certificate to which we refer at paragraph 66.

(5) The hearing on 22 May 2009

53. A further hearing took place before us on 22 May 2009. In the course of the open and closed parts of that hearing submissions were made to us that the full text of the letter sent by the US Government should be made available to those acting for BM and the media and that the identity of the sender and the identity of the recipient should be made known. It was argued that different entities of the United States Government often had different views and the identity of the sender had to be known so a proper evaluation could be made.

54. It did not appear to us that there was anything in the redacted parts of the letter which was in any way relevant to or which supplemented the evidence on which the Foreign Secretary relied in support of his case that we should not make public the 7 paragraphs. That position was confirmed to us on his behalf at the hearing on 29 July 2009. It was therefore not necessary to make the full letter available.

(6) The identity of the sender and recipient of the letter of 30 April 2009

55. We decided on 3 June 2009 that the identity of the entity sending the document and the identity of the entity receiving the document should be disclosed as there was no justifiable reason for withholding that information. However we concluded that there was no need to disclose the identity of the individual recipient and individual sender as they were very high officials in the entities and acting in an official capacity on behalf of the entity. We therefore ordered limited further disclosure.

56. We were then asked by the Foreign Secretary to provide reasons. We did so on 19 June 2009. The three relevant paragraphs are as follows:

> "5. ..as it is in issue before us whether the communication does represent the concluded view of the Obama administration and the weight to be attached to the statements made, it is necessary that the other parties

know the nature of the communication and the nature of the entities between which it passed in order that they should be able to make effective submissions.

6. Moreover, no reason has been advanced by the Secretary of State for keeping this information in relation to the identities of the entities confidential other than that it was a confidential communication and the US source has not consented to its disclosure. There is no basis on which we could conclude that the disclosure of this information could cause any risk of serious harm to national security or the international relations of the United Kingdom. Furthermore, we consider that it is necessary for these matters to be disclosed, despite the fact that the communication was originally confidential. This follows from the reliance which the Secretary of State now seeks to place upon it.

7. The difficulty with the version of the communication which has been disclosed by the Secretary of State is that it is not itself an original communication between the two governments. It is a modified version of an actual communication designed to withhold certain matters. One of these is the nature of the source entity and recipient entity. To the extent that amendments have been made to withhold the identity of the entities, they are unnecessary and unjustified in the light of our decision that there is no basis for withholding the identity of the entity which sent the letter and the identity of the entity that received it."

57. The Foreign Secretary did not at first comply with our order of 3 June 2009. Instead the Foreign Secretary sought fresh confirmation from the United States Government that the understanding stated in his third PII Certificate that the letter of 30 April 2009 reflected the views of the United States Government was accurate. A response was sent to us by the Treasury Solicitor on 30 June 2009 enclosing a letter signed by General James L Jones, the Assistant to the President for National Security Affairs to Mr Simon McDonald, Foreign Affairs Adviser to the Prime Minister making it clear that the letter of 30 April 2009 reflected the views of the United States Administration. We set the text out at paragraph 87. We were asked by the Foreign Secretary to re-visit our order of disclosure of the identity of the entity from which the 30 April 2009 letter originated and the entity to which it was sent and not to make such an order. That application was opposed by BM and the UK media.

58. On 13 July 2009 we provided reasons why we would not reconsider our decision. We concluded that the Foreign Secretary had advanced no reason for keeping the identities confidential other than that the communication was confidential and that the United States had not consented to its disclosure. These reasons provided no basis whatsoever on which we could conclude that the disclosure of the information could

cause any risk of serious harm to the national security or international relations of the United Kingdom.

59. On 15 July 2009 the Foreign Secretary complied with our order of 3 June 2009. He stated that the sending entity was the CIA and the receiving entity was the SIS.

(7) The provision of further documents relating to the original claim

60. In the period between the delivery of our fourth judgment and 14 July 2009, further searches of the documentary electronic archive system used by the British Intelligence Services brought to light a number of very significant documents which made parts of our first open judgment inaccurate. Further PII Certificates with significant closed evidence were provided by the Home Secretary and Foreign Secretary in relation to the documents.

61. We took the quite exceptional step of correcting parts of our first judgment which were, in the light of the documents, incorrect. Extensive revisions were also required to our closed judgment.

62. If the documents had been available at the time of the original hearing in July 2008, there can be little doubt but that counsel for BM and the Special Advocates would have cross-examined Witness B further on the basis of those documents. It is inevitable that we would have made further findings some of which we would have put into the open judgment. However, given the stage of the proceedings at which the further documents were disclosed, it was entirely inappropriate for us to do any more than correct inaccuracies.

63. Explanations were given to us for the failure to find these highly significant documents in July 2008. Although it is readily understandable that mistakes in finding documents can occur when there is a complex electronic archiving system, we have not enquired into the accuracy of the explanations given to us in relation to the highly significant documents, as it was inappropriate for us to do so.

64. It is against that protracted procedural history that we turn to consider whether in the light of the evidence now before us we should make the redacted paragraphs public or maintain the position in our fourth judgment.

PART III: SHOULD THE REDACTED PARAGRAPHS BE MADE PUBLIC?

65. It is necessary first to refer to the third certificate of the Foreign Secretary before setting out the submissions made to us.

(1) The Certificate of the Foreign Secretary

66. In his third Certificate dated 15 May 2009 the Foreign Secretary concluded that the balance had shifted further against putting the 7 redacted paragraphs into the public domain:

    i) The change of administration in the United States had not changed the position.

    ii) He made clear his reliance on the principle of control over intelligence:

> "It is my continued view that real harm to the national security of and international relations of the United Kingdom would be caused were there to be public disclosure of the seven paragraphs in issue in these proceedings. The critical issue is the principle of trust and the fundamental requirement of confidentiality that lies at the heart of intelligence relationships
>
> ...
>
> ..in coming to my conclusion I began by paying regard to the long established practice within intelligence communities that information passed on intelligence channels cannot be publicly disclosed without the consent of the State providing it. This custom is of fundamental importance to the intelligence relationships maintained by the United Kingdom in protecting its national security. It is a custom which has always to the best of my knowledge, in practice been respected by UK courts"

iii) He spelt out the consequences, as he believed them to be, of publication in breach of this principle which he considered to be a custom:

> "If the court were to disclose the 7 paragraphs in the current circumstances, that would cause a loss of confidence in the United Kingdom's ability to comply with this custom (not only by the United States but also by other foreign governments) which would cause considerable damage to our national security. It would not be a question of the United States taking "umbrage", as it has been described to the court, but of the United States and other foreign governments re-evaluating the extent to which they believe they can safely provide the UK with information in light of what would be a highly significant breach by the UK of the control principle. A failure of the UK legal system to protect and respect information disclosed in an intelligence relationship will have serious consequences for the intelligence liaison."

iv) He then turned to consider the position of the Obama Administration and the letter of 30 April 2009.

> "The US correspondence accords with the position of the Administration communicated to me in more general terms by US Secretary of State Clinton on 2 March 2009 in my discussions with her as indicated in paragraph 14 of Mr Bethlehem's correspondence to the Court of 24 March 2009. She was clear then that the position of the new US Administration on the disclosure of US intelligence material had not changed, indicating that it was an inviolable

> principle that one State should not disclose publicly the intelligence information shared with it by a liaison partner.
>
> Since receipt of the US correspondence on 1 May 2009, the matter also arose for discussion when I met Secretary of State Clinton in Washington on 12 May 2009. She was fully aware of the issues and reiterated the US position on public disclosure in this case had not changed with the change in Administration, the protection of intelligence going beyond party politics. She indicated that the US remained opposed to the public disclosure of US intelligence information in this case. The US Secretary of State indicated further 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. Comment by those representing the National Security Council at the same meeting made it clear, if further clarification was needed, that this was also the position of the White House." (emphasis added)

v) He concluded that there was no difference in substance between the earlier and more recent correspondence. He then referred to the fifth paragraph of the CIA letter of 30 April 2009 set out at paragraph 79.vi) below and observed that this was central to his assessment.

vi) He set out at length the factors that favoured making the 7 redacted paragraphs public and those that weighed against that course.

vii) The certificate was accompanied by a Sensitive Schedule; it set out detailed reasons why the identity of the sender and recipient of the letter of 30 April 2009 should not be disclosed and why its full content should not be disclosed. As we have set out at paragraph 54, there is nothing further of relevance in the letter. It set out further arguments in relation to the principle of control both from the perspective of the US and UK intelligence services all of which are addressed in this open judgment.

viii) He also sets out reasons why the intelligence sharing arrangements are so valuable. No one has doubted this or the impact the loss of intelligence sharing would have.

(2) The status in law of the Certificate.

67. At paragraphs 63 and 66 of our fourth judgment we set out the approach of the court to a Certificate from the Foreign Secretary. In summary, although the decision as to whether to put the paragraphs into the public domain was a decision for us, we should defer to the opinion of the Foreign Secretary on such an issue provided there was an evidential basis for the opinion of the Foreign Secretary and it was made in good faith. As we pointed out at paragraph 66 of our fourth judgment, it was made clear by Lord Bingham in *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 at paragraph 33 that the court's willingness to intervene depended on the nature of the material in issue.

68. It was submitted on behalf of BM and the UK and international media that there was no evidential basis for the opinion of the Secretary of State as set out in his third certificate on the further evidence submitted (see paragraph 90). It was also submitted that he had not acted in good faith. We will examine each of these contentions in turn, for if there was no evidential basis for his opinion or he had not acted in good faith, we would be free to differ from his opinion, particularly as the 7 paragraphs do not contain any material of an intelligence nature (see paragraph 68 of our fourth judgment). No real argument has been advanced that they do (see paragraph 71(ii) of our fourth judgment).

(3) The submission of BM and the UK and international media in relation to the lack of evidence for the Foreign Secretary's certificate

69. The broad thrust of the submission of BM and the media was that if the letter of 30 April 2009 from the CIA and the letter of 30 June 2009 from General Jones were read as a matter of ordinary English against the background of the relationship between the United Kingdom and the United States, then there would be no basis for concluding that disclosure of the 7 paragraphs would cause a real risk of serious damage to the security of the United Kingdom or its relationship with the United States. The steps in the argument can be summarised:

i) As everyone had been at pains to point out, the relationship between the United States and the United Kingdom had been very close. Quite apart from the bond of two societies founded on the rule of law and sharing democratic values and a common legal heritage, the United States and the United Kingdom had been close allies in two World Wars and the United Kingdom had supported the United States in the invasion of Iraq and was currently fighting alongside the United States in Afghanistan.

ii) The text of the CIA letter dated 30 April 2009 had been very carefully drafted. It referred to what **could** happen if the court made the 7 paragraphs public. There was no reference in any passage as to what **would** happen – no threat or statement of consequences which would follow.

iii) The Obama Administration had made public on 16 April 2009 the CIA memoranda dealing with interrogation techniques to which we have referred at paragraph 38.iv); President Obama had made clear that he had prohibited such techniques as they undermined the moral authority of the United States and did not make it safer.

iv) The evidence of Mr Halperin was that it is well understood between the United States and the United Kingdom that, although intelligence provided would not be disclosed without the consent of the state supplying it, that principle could not be an absolute principle, but was subject to a court deciding to order disclosure. His evidence was that where requests for intelligence information provided by other states such as the United Kingdom were made under the provisions of United States law, the commitment of the Executive branch of the United States Government was to resist such requests, but that it was well understood that such efforts might not always be successful and that the US courts might order such information to be disclosed under the provisions of US law including the Federal Freedom of Information Act (5USC § 552). The

United States Government recognised and accepted that a similar outcome could result under the laws of the United Kingdom. His evidence was specifically supported by the more detailed analysis of United States law contained in the evidence of Mr David Schultz.

v) The Foreign Secretary had himself made clear in his second PII Certificate that he would have been prepared to hand over the underlying 42 documents, if the United States Government had not made them available. It followed therefore that he accepted that the principle of control was not inviolable and that the United States Government knew that there were circumstances in which much more sensitive information than that contained in the 7 paragraphs could have been provided against its wishes. No adverse consequences had followed.

vi) It was therefore inconceivable that the Obama Administration would actually reconsider the intelligence sharing relationship, thereby putting the citizens of the United Kingdom at risk.

vii) Neither the Foreign Secretary's recollection of what Secretary of State Clinton had told him on 12 May 2009 nor the subsequent note of the conversation referred to at paragraph 90.ii) could supersede the letter from the CIA, as General Jones had made it clear in his letter of 30 June 2009 that what was in the letter of 30 April 2009 represented the concluded view of the Obama Administration.

70. It was vigorously submitted on behalf of the Foreign Secretary that there was evidence for his view, that he had plainly acted in good faith and there was therefore no basis for a court to differ from conclusions on matters on which he was the expert.

(4) Our conclusions

(i) The principle of control

71. We will first examine the principle of control which the Foreign Secretary describes as a long established practice and custom. We accept that it is a long established practice in the relationships of some States, including the United Kingdom and the United States. However it is a convention as opposed to a matter of legal obligation. It clearly does not have the status of a rule of customary international law. Furthermore it has not been submitted in the present case that the disclosure of the content of the reports (or a summary of the reports) would place the United Kingdom in breach of any agreement or undertaking binding in international law.

72. It is clear that this is not an absolute principle.

i) The Foreign Secretary was prepared to consider disclosing to BM's lawyers the 42 documents. At paragraph 15 of his first PII Certificate dated 26 August 2008, the Foreign Secretary stated that he might have reached a different conclusion with regard to the release of the 42 documents, if the United States had not agreed to make the documents available.

ii) The evidence of Mr Halperin (to which we have referred at paragraph 69.iv) is unchallenged. Secretary of State Clinton told the Foreign Secretary on 2

March 2009 that the principle of control over intelligence was inviolable (see the extract from the PII Certificate set out at paragraph 66.ii) above and the note of the meeting which we set out at paragraph 90.i) below). However, we cannot accept the oral assertion, even from the Secretary of State, when the detail of the evidence of Mr Halperin has not been addressed in the evidence given on behalf of the Foreign Secretary.

iii) In the exceptional circumstances of the present case, it would not have been possible to put a significant part of the narrative of our original first judgment into the public domain had the principle been absolute. For example, the information at paragraphs 10 and 11 of our first judgment as to the arrest and identity of BM was information provided to the United Kingdom authorities by the United States authorities. No objection was made to the publication of such information.

73. We consider that, viewed objectively, a decision by a court in the United Kingdom to put the redacted paragraphs into the public domain in the circumstances of this case would not infringe the principle of control over intelligence. The principle admits of an exception in the case of court ordered disclosure which is plainly applicable in the present case for the following reasons:

i) It is necessary and justifiable:

a) It was BM's case that the United Kingdom Government had facilitated or become mixed up in wrongdoing of the United States, alleged to amount to cruel, inhuman or degrading treatment or torture.

b) Although it was accepted by the Foreign Secretary that there was an arguable case of such wrongdoing by the United States, it was part of BM's case that the United Kingdom Government knew of that wrongdoing and in the light of that wrongdoing facilitated further wrongdoing by interviewing BM when it knew of the treatment that had been accorded to BM and thereafter providing information to the United States authorities about BM.

c) It was therefore necessary for us to explain what the United Kingdom Government actually knew about what was alleged to be cruel, inhuman or degrading treatment or torture, in particular what Witness B knew before he interviewed BM whilst BM was held in Pakistan and what the SyS and others knew when they provided further information to the United States to be used in the interrogation of BM whilst he was under the effective control of the United States authorities.

d) As the knowledge of Witness B was in dispute, it was necessary to refer to the source of the information – that is to say information supplied to the SyS by the United States authorities as to what officials of the United States Government admitted actually doing to BM in the period immediately before Witness B interviewed BM. It was not possible, as we have done elsewhere, simply to state that the SyS was aware of a fact; it was necessary to set out the source of that

information as Witness B disputed what he knew about the treatment of BM.

e) As we pointed out at paragraph 72 of our fourth judgment the suppression of reports of wrongdoing by officials in circumstances which cannot in any way affect national security is inimical to the rule of law. Championing the rule of law, not subordinating it, is the cornerstone of democracy.

ii) It is exceptional. The proceedings in this case are, we believe unprecedented. We have addressed the need to refer to information supplied by the United States. The information related to matters of great public importance for reasons we set out in our fourth judgment

iii) As between the United States and the United Kingdom, it is accepted that the court of each State can order there be put into the public domain information otherwise subject to the principle of control. The information with which we are concerned in this case is derived solely from the United States and relates solely to the activities of officials of the United States. It is not information supplied by any other State or relating to the activities of any persons acting on behalf of other States. Both the United States and the United Kingdom have a ready understanding of the necessary qualification of the principle of control in the case of court ordered disclosure.

74. But even if the making public of the redacted paragraphs were an infringement of the principle of control over intelligence, we reject the characterisation of it by the Foreign Secretary as "highly significant".

i) As we pointed out at paragraph 68 of our fourth judgment there is nothing in the redacted paragraphs that would identify any agent, facility, secret means of intelligence gathering, or any other matter relating to intelligence. There would therefore be no disclosure of any matter relating to intelligence. No court would contemplate putting a matter of that kind into the public domain.

ii) **SUB-PARAGRAPH REDACTED**

iii) The fact that any such breach would now receive publicity in the context of the current debate over action by the British Security Services carried out with knowledge of the use of unlawful interrogation techniques, would not make any infringement "highly significant".

75. We wish to make clear, without disclosing what is contained in our closed judgment, that our position has been different in respect of other information, as in respect of that information the principles applicable to the specific information in the 7 redacted paragraphs (as set out in paragraph 73 above) have not applied.

76. We set out in our fourth judgment why it was in the public interest to make the paragraphs public - see paragraphs 22, 35-59. Since the handing down of that judgment the debate over the use of interrogation techniques and the position of the

executive branch of the United Kingdom Government and its Security Services in relation to intelligence gained through the use of unlawful interrogation techniques has become more intense. The Attorney General of the United States has decided to refer the use of certain interrogation techniques by the CIA to a special prosecutor.

77. We therefore conclude, as we did in our fourth judgment, that in the circumstances, the balance of the public interest would necessitate making the paragraphs public, even if this would infringe the principle of control.

(ii) The consequences of putting the paragraphs into the public domain

78. We therefore turn to consider the submission that there is no evidence in the circumstances of this case that, if we made the paragraphs public, there is a real risk 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. It was the existence of evidence of the threat to the United Kingdom made clear by the Bush Administration that led us to conclude we should defer to the views of the Foreign Secretary and maintain the redaction of the paragraphs.

(a) The letter from the CIA and General Jones

79. We will first consider whether the letters from the CIA and General Jones provided the necessary evidence on which the Foreign Secretary could conclude that publication by us of the 7 paragraphs redacted from our judgment would cause a real risk of serious harm to the national security or international relations of the United Kingdom

i) As we have set out at paragraph 54 above, it was expressly confirmed to us that there was nothing additional to the open text in the terms of the full text of the letter from the CIA which added to the evidence on which the Foreign Secretary relied.

ii) It was submitted to us on behalf of the Foreign Secretary that the Foreign Secretary and his advisers, including the SIS to whom the letter was addressed, were better placed in interpreting the letter than other persons and the court. The Foreign Secretary's view, based on such advice, was that "**could**" should be read as meaning "**would**". The letter therefore contained an explicit statement of consequences.

iii) We cannot accept the view that the Foreign Secretary or his advisers are better placed than other persons or indeed ourselves to interpret the CIA letter. It is clear that the CIA letter was written for the court with the express purpose of providing the views of the Obama Administration on the consequences of disclosure by us of the 7 paragraphs. The letter from General Jones again makes clear that the CIA letter was intended to be read by the court. The United States Administration is well used to drafting documents to be provided to courts which operate on the same common law principles as our own. Both letters are written in ordinary English. They do not require expert interpolation to be placed between the drafter and the court.

iv) The first three paragraphs of the letter set out the background and refer to the previous occasions on which the United States Government had indicated its strong objection to public disclosure of "highly sensitive information". They also refer to the argument being made that the publication of the CIA memoranda on interrogation techniques on 16 April 2009 might be an indication that the United States Government would not object to the disclosure of the 7 paragraphs.

v) The fourth paragraph of the CIA letter stated:

> "The seven paragraphs at issue are based upon classified information shared between our countries. Public disclosure of this information, reasonably **could** be expected to cause serious damage to the United Kingdom's national security. Specifically, the disclosure of this information **may** result in a constriction of the U.S.-U.K. relationship, as well as U.K. relationships with other countries. Among the most crucial sources and methods in the collection of foreign intelligence are the relationships the United Kingdom maintains with foreign countries. Through these relationships, the United Kingdom's intelligence and security services are able to provide national security and foreign policy officials with information that is critical to informed decision making: information that the United Kingdom cannot obtain through other means. Without the assistance of these foreign governments, it is almost certain that the United Kingdom's ability to identify and arrest suspected terrorists and to disrupt terrorist plots would be severely hampered. Quite clearly, the information that the United Kingdom obtains from the United States and other foreign governments is a critical component of the United Kingdom's counterterrorist efforts." (Emphasis added.)

We have emphasised the words on which BM and the media relied in support of their contention that the letter did not contain any statement of what **would** happen as opposed to what **could** happen. It is important to note that the seven paragraphs relate to information derived from documents sent by the United States authorities about actions of United States officials and not those acting for other States whose understanding of the principle of control over intelligence may be different. Publication would therefore not have any impact on the provision of information by other States.

vi) The fifth paragraph of the CIA letter stated:

> "The cooperation and sharing of intelligence between the United Kingdom and United States, as well as with other foreign governments, exists under strict conditions of secrecy. Public disclosure by the United Kingdom of information garnered from such relationships **would suggest** that the United Kingdom is unwilling or unable to protect information or assistance provided by its allies. As a

> consequence, if foreign partners learn that information it has provided is publicly disclosed, 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 those foreign partners would adversely impact counterterrorism missions and other endeavours." (Emphasis added.)

It is self evident that intelligence sharing is carried out on the basis of secrecy. Making such information public could infringe the principle of control in relation to other States. If unexplained or unjustified, it could suggest that the United Kingdom was unable or unwilling to protect information. It is also self evident that a consequence **could** be that there would be a withholding of sensitive information. Nothing in the paragraph states that this **would** be the case if the 7 paragraphs were made public, particularly given the exceptional circumstances in which the information would be put into the public domain.

vii) The sixth paragraph states:

> "Quite distinct from the significant harm to the U.S.-U.K. partnership if the seven paragraphs--or underlying documents--are released, is the impact of President Obama's declassification of the OLC memoranda. The memoranda focused solely on intelligence-gathering methods previously utilized by the CIA. In releasing the memoranda, President Obama made clear his administration's intention that the enhanced interrogation techniques discussed therein would no longer be utilized by the United States Government. Neither in the memoranda, nor in any statements of the administration accompanying their release, was reference made to the identity of any foreign governments that might have assisted the United States. Given the declassification of the highly sensitive information contained in the memoranda, the fact that the President refrained from providing any information about foreign governments is indicative that the United States continues to preserve the secrecy of such information as critical to our national security."

The 7 paragraphs, as we set out at paragraphs 22 and 69 of our fourth judgment and paragraph 73.iii) and 79.vii) of this judgment, relate to admissions of what officials of the United States did to BM during his detention in Pakistan. The paragraphs do not contain anything about actions or assistance by other persons and in particular by the Government of Pakistan.

REMAINDER OF SUB-PARAGRAPH REDACTED

viii) The seventh paragraph states:

> "Public disclosure of the information contained in the seven paragraphs withheld from the High Court's open decision, as well as the documents from which the information was drawn, **could** likely result in serious damage to U.K. and U.S. national security. If it is determined that your Service is 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 future." (Emphasis added.)

The United States Government does not explain how disclosure of information in relation to the action of its own officials could damage United States national security. It is therefore difficult to see how it would damage that security or for the reasons we have given would cause a real risk of serious damage to the national security of the United Kingdom. The statement as to the review of the sensitivity of information provided is the furthest that this letter goes, but significantly, given the carefully chosen language, it does not suggest that there would be a curtailment of the supply of information.

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 BM 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.

81. As to the statements as to what could happen and in relation to the review, it is necessary to stand back and ask the question whether President Obama would curtail the supply of information to the United States' oldest ally when what was put into the public domain was not intelligence, ...

REMAINDER OF PARAGRAPH REDACTED

82. Viewed in this way, it is difficult on an objective basis to see any grounds for rejecting the submission of BM, the UK media and the international media that there is any evidence of any real risk of serious harm to the national security of the United Kingdom.

(b) The evidence in relation to Secretary of State Clinton

83. However, the letter does not stand alone. The Foreign Secretary relied on the statements of Secretary of State Clinton for his conclusion in his third certificate that there was no difference between the position of the Bush and Obama Administration as to the consequences that would follow.

84. The evidence in relation to Secretary of State Clinton related to meetings on 2 March 2009 (see paragraph 42) and 12 May 2009 (see paragraph 66.iv)). It is unfortunately necessary to analyse the evidence of those conversations in some detail because considerable significance attaches to them.

85. In the first of those meetings, Secretary of State Clinton did no more than to reiterate the general principle of control over intelligence. The account of that conversation in the third PII Certificate does go further than the account given in Mr Bethlehem's letter of 24 March 2009, as in the third PII Certificate Secretary of State Clinton is recorded as saying that the principle of control was inviolable, as indeed is recorded in the note of the meeting set out at paragraph 90.i). However the further details of the conversation do no more than assert a version of the principle of control over intelligence (as opposed to a statement of consequences) which we have already rejected – see paragraph 72 above.

86. It was, however, in the second of those meetings on 12 May 2009 (12 days after the CIA letter and 6 days after we had made clear that we would re-open our fourth judgment) that the Secretary of State made clear that consequences **would** follow when she stated that public disclosure would affect intelligence sharing.

87. It was submitted by BM and the media that we should not attach weight to that statement, as the general position of the Obama Administration was made clear in the letter from General Jones which went no further than to affirm the Obama Administration's position was set out in the CIA letter of 30 April 2009. The letter from General Jones states:

> "The Foreign and Commonwealth Office has informed members of my staff that in the case of the Queen on the application of Binyam Mohammed v. Secretary of State for Foreign and Commonwealth Affairs, the court has questioned whether the April 30, 2009 letter from a senior United States official, appointed by President Obama, is indeed the official position of the United States Government. Members of my staff reviewed that letter prior to its dispatch and have been following this case, and the court's actions, closely. The author and recipient of the former letter were chosen because they are best able to recognize and articulate the concerns and the potential for damage to the national security of both of our countries in the event the court refuses to protect the information at issue.
>
> I want to thank you, and your government, for taking all necessary steps to help protect sensitive U.S. information. To allow United Kingdom officials to correct any

misperception the Court and parties to this case may hold, allow me to directly, and emphatically affirm that a senior United States official, appointed by the President, indeed speaks on behalf of the United States Government."

88. We see the force of the submission on behalf of BM and the media in relation to the Foreign Secretary's further evidence that at the same meeting on 12 May 2009 those representing the National Security Council made clear that the position adopted by the Secretary of State was the position of the White House. On the contrary the position of the White House is set out in General Jones' subsequent letter and we should clearly prefer that carefully written letter.

89. The position as stated by Secretary of State Clinton may be seen to differ in significant respects from the other statements of the current US position. In the course of submissions to us, we put to counsel for the Foreign Secretary that the view might be taken that the Secretary of State went further than the CIA letter and the letter from General Jones. Counsel made it clear that the position of the Foreign Secretary was, in view of what had been stated by Secretary of State Clinton, that if we made the 7 paragraphs public, there was a substantial risk that the United States Government would restrict intelligence sharing relationships thereby putting the lives of ordinary British citizens at risk. In the light of that response we asked that a copy of the transcript of those submissions be considered by the Foreign Secretary and that he specifically consider the distinction between the breach of the principle of control and the explicit statement of consequences that **would** as opposed to **could** follow and in particular his reliance on the recollection of the conversation with Secretary of State Clinton of which there was no note. We took this step as we did not want there to be any room for the kind of misunderstanding that appears to have taken place after our fourth judgment.

90. On 14 August 2009 the Treasury Solicitor confirmed on behalf of the Foreign Secretary that the arguments advanced by counsel on his behalf reflected what was said by Secretary of State Clinton. Given the importance the court had stated it attached to the two meetings, the Foreign Secretary had decided that exceptionally the records of the discussions should be disclosed. The Treasury Solicitor annexed to the letter extracts from the notes made of the two meetings:

i) Meeting of 2 March 2009: Note of the Private Secretary to the Foreign Secretary:

"Guantanamo"

11. The Foreign Secretary explained the concern in the UK over the Binyam Mohamed case.

We were grateful for the Administration's decision to return Mr Mohamed to the UK. We would have no objection to the US making public the 42 intelligence documents related to the case. We would welcome any further details on the review of state secrets privilege.

> 12. Clinton confirmed that it was an inviolable principle that it should be for the US to decide on the release of its own intelligence material. She would arrange for US experts to provide a briefing on the review. The new Administration simply didn't know what information there was on the files."

ii) Meeting of 12 May 2009: Note of the Principal Private Secretary to the Foreign Secretary dated 13 May 2009:

> "1. On 12 May the Foreign Secretary raised the Binyam Mohamed legal case with Hillary Clinton. Clinton was accompanied by Dan Fried (Assistant Secretary, State Department) and Tobin Bradley (NSC); the Foreign Secretary by Nigel Sheinwald, Ian Bond and me.
>
> 2. The Foreign Secretary said that the Court had questioned the continuing non-release of the US documents in the case given (1) the arrival of the Obama Administration, and (2) the release of the 4 DoJ memos. The Court had said it could not see how, in the light of the publication of these memos, anything in the US papers could be regarded as sensitive.
>
> 3. The Foreign Secretary said 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 peoples secrets, and that doing so would cause serious harm to the UK/US intelligence relationship.
>
> 4. Clinton (who was clearly well aware of the case and the associated issues) said that the US position had not changed, and that the protection of intelligence went beyond party or politics. The US remained opposed to the UK releasing these papers. If it did so it would affect intelligence sharing. This would cause damage to the national security of both the US and UK.
>
> 5. Bradley said that this was also the position of the White House. They appreciated that this left the British Government in a difficult situation. But they did not see it as being affected by the release of the DoJ memos"

iii) Meeting of 12 May 2009: Further note of 14 May 2009 addressed to Mr Bethlehem QC in response to a request for clarification:

> "For clarity, I should record 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"

91. We received submissions in response from those acting for BM, the UK media and the international media and a further statement from Mr Halperin which characterised

as ridiculous the contention that the United States would withhold intelligence if we disclosed the 7 paragraphs. We had not envisaged the service of further evidence. As the Foreign Secretary objects to that further evidence from Mr Halperin, we have not taken it into account. As might be expected, Secretary of State Clinton was asked in August about the Foreign Secretary's evidence about her description of the position of the United States Government. Her reply was non-committal.

92. 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 judgement 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 are therefore capable of examination by the court.

93. 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 BM 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.

94. 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.

95. 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.

(v) The good faith of the Foreign Secretary

96. As we have set out at paragraphs 32 and 68 above, it was submitted that the Foreign Secretary had not acted with candour in his dealings with the court, that he had misled the court prior to the handing down of our fourth judgment and that he had subsequently failed to act in good faith.

97. It was submitted that the procedural events which we have set out showed that the Foreign Secretary was reluctant to act openly in a manner both the public and the court would expect. The timing of the meeting at which Secretary of State Clinton made the significant statement on which the Foreign Secretary relies took place after we had decided to re-open our judgment and therefore in circumstances in which it could be inferred we were not satisfied that the CIA letter was sufficient.

98. It was submitted that the Foreign Secretary and those advising him in the British Security Services have a clear conflict of interest in not wishing to put into the public domain matters for which the Security Services might receive criticism in relation to their knowledge of what was being done by the United States authorities. In the light of further allegations that have been raised in relation to other individuals whilst these proceedings have been pending, this was submitted to be a factor which is now of greater importance than when we handed down our first judgment.

99. We are satisfied that in the period prior to the handing down of our fourth judgment, there was no intention to mislead the court. It would have been more prudent if, in the light of the letter from BM's solicitors on 18 December 2008 (to which we referred at paragraph 19) a specific enquiry had been made of the Obama Administration prior to the handing down of our fourth judgment and we had been told of the actual position, but we cannot attribute what happened to a lack of good faith.

100. Nor can we conclude that either any seeming reluctance to make information available or the reliance on the further statement by Secretary of State Clinton was due to a lack of good faith. It may well be that those in the British Security Services advising the Foreign Secretary have, because of their historic position, been cautious in allowing these matters to be released into the public domain, but there is no evidence that this is due to a lack of good faith. They clearly now recognise the

importance of the timely provision of such information to public accountability and the rule of law. As we have set out the statement of Secretary of State Clinton was based on a misunderstanding and lack of analysis of what was contained in the 7 paragraphs. There was no lack of good faith on the part of the Foreign Secretary in relying on that statement. Any conflict of interest is a factor that can be resolved by the courts role in making the ultimate decision. We have also taken into account in reaching our conclusion the considerable efforts made by the Foreign Secretary and Mr Bethlehem QC in securing the release of BM from Guantanamo Bay and his return to the United Kingdom.

The application of the balancing test.

101. We do not propose to repeat the reasoning set out in our fourth judgment which led us to the conclusion that there was a compelling public interest in the disclosure of the paragraphs redacted from our first open judgment.

102. We cannot accept the contention of the Foreign Secretary that the position of the Obama Administration is the same as that of the Bush Administration ... **REMAINDER OF PARAGRAPH REDACTED**

103. Similarly we cannot accept the assertion that there is anything of an intelligence nature in the redacted paragraphs. The information was received as part of the provision of intelligence and thus was covered by the principle of control over intelligence, but in the light of the disclosure of the United Statements Department of Justice memoranda on 16 April 2009 (see paragraph 38.iv), it is now impossible to contend that details of the interrogation methods are themselves matters of intelligence. In these circumstances, following the guidance in *R v Shayler*, we should be the more ready to favour disclosure.

104. There 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 United Kingdom. But the reality of that risk must be judged against:

i) The background of the relationship between the United Kingdom and the United States to which we have referred.

ii) The fact that this court would be doing no more than putting historic material into the public domain against the wishes of the United States Government.

iii) The fact that there would be no infringement of the principle of control for the reasons we have set out.

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 7 paragraphs.

We cannot accept looking at the matter objectively on all the evidence (which is fully summarised in this judgment) 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 if we made the 7 paragraphs public.

105. We have considered the alternatives to making the redacted paragraphs public. The Foreign Secretary submitted that the parties should apply to the United States courts. However, we know of no principle on which a court in the United States could authorise the release of parts of our judgment. It would of course be possible for them to apply to obtain the 42 documents and the further United States documents that have since become available, but very different considerations might apply. In the first place, there is a great difference between the documents and the very brief summary contained in the redacted paragraphs. Secondly, the various public interests in play in the United States and the United Kingdom respectively may not be the same. In our view, as a court in the United Kingdom, a vital public interest requires, for reasons of democratic accountability and the rule of law in the United Kingdom, that a summary of the most important evidence relating to the involvement of the British security services in wrongdoing be placed in the public domain in the United Kingdom. A United States Court would not have the same interest.

106. We have re-considered the alternatives described at paragraphs 85-99 of our fourth judgment; a reference to the Intelligence Security Committee, the Director General of the SyS, the Attorney General and the Director of Public Prosecutions. However, as we pointed out, none of these alternatives will necessarily lead to these matters being placed into the public domain so as to permit the necessary public debate and public accountability in relation to matters that are not of an intelligence nature.

107. We have also reviewed the matters that have come into the public domain since our fourth judgment. As we observed at paragraph 105 (iii) of that judgment, much had been done by the media to enable informed debate to take place. However the debate would be much better informed, if the information in the redacted paragraphs was now made public. This is, in the light of developments since our fourth judgment, a stronger factor.

108. We have considered most carefully the views of the Foreign Secretary in all the circumstances we have set out. However as is accepted, the decision is ultimately for the court. The reason for this was expressed by Professor Sir David Williams in his masterly survey of access to information in a democracy *"Not in the Public Interest"* (1965) at page 216 in the following terms:

> "The public interest has many facets and it would be deplorable if the assessment of the public interest were to become the exclusive province of the executive itself. Secrecy and security have to be balanced against the legitimate demands for an informed public opinion which is, when all is said and done, the essential element in a country which claims to be democratic"

We have therefore concluded that, 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 should restore the redacted paragraphs to our first judgment by adding these to paragraphs 87 and 88 respectively. We shall therefore re-issue our first judgment with the paragraphs restored.

PART IV: APPLICATION TO MAKE PUBLIC THE CLOSED JUDGMENT

109. In the skeleton argument provided to the court and in the oral argument advanced on behalf of the international media, Mr Robertson QC submitted that we should not merely make public the redacted paragraphs from our judgment but that we should now make public the whole of the closed judgment.

110. This contention was set out in the skeleton argument served shortly before the hearing on 22 April 2009. No prior notice, as far as we are aware, was given to the Foreign Secretary. The argument advanced had a number of different strands. First it was contended that, as a matter of general principle, a court should always be prepared to make public what happened in private and should keep under review its obligation to do so. Mr Robertson QC relied upon the speech of Lord Diplock in *AG v Leveller Magazine* [1979] AC 440 at 449-450). Secondly there was no national security interest of the United Kingdom at stake. A court of the United Kingdom was not concerned with the security interests of another country, only its own security interests. Mr Robertson QC relied upon the decision of the High Court of Australia in *Attorney General (UK) v Heinemann Publishers Australia Pty Limited* ("the Spycatcher case") 1988 HCA 25, [1988] LRC (Const) 1007 at page 1018-19. Thirdly, no reliance could be placed on the confidentiality of the information, as there was no confidence in iniquity. (*Hubbard v Vosper* [1972] 1 All ER 10 at p.1029 and p.1032; *Lion Laboratories v Evans* [1985] QB 256 and *W v Egdell* [1990] Ch 59.) Fourthly, even if the matters were once confidential, they were no longer confidential as BM had published an account of his torture. Reliance was placed on three decisions of the European Court of Human Rights: *Vereinging Weekblad Bluf! v Netherlands* (1995) 20 EHRR 189 at paragraphs 40-45; *Weber v Switzerland* (1990) EHRR 508; *Observer v UK* (1991) 14 EHRR 153.

111. The closed judgment (as revised) contains findings which, in the light of the criminal investigation initiated by the Attorney General into the matter, it would be inappropriate to put into the public domain at this stage. It would receive considerable publicity and could prejudice any court proceedings brought after the conclusion of the police investigation.

112. However, when any such proceedings are at an end, the question of the release of the closed judgment will have to be resolved. This raises wider issues as to closed judgments which were specifically addressed by the Incorporated Council for Law Reporting (ICLR).

PART V THE GENERAL POSITION IN RELATION TO CLOSED SUBMISSIONS AND JUDGMENTS

(1) The difficulties faced in the law reporting of closed proceedings

113. It is submitted by the ICLR that there has been a growing number of cases which have involved closed hearings and closed judgments. This is causing an increasing problem for law reporting which should be of great concern to the courts, given the vital role that reports play in the development of the common law. It is of particular concern to the ICLR given its central role in reporting cases which meet the criteria set out by Nathaniel Lindley QC, later Master of the Rolls, – see *R v Erskine* [2009] EWCA 1425 Crim at paragraph 66.

114. The focus of the submissions was hearings that were partly open and partly closed, as they affected the ability of law reporters to produce the full and accurate reports demanded of them. Even where, as in these proceedings, the court heard as much of the case as possible in public and provided in the open judgment as full an account of the submissions and reasons as was possible, there remained a range of difficulties, including the following:

    i) Law Reporters struggle to understand the scope of the submissions made when there is no record of what was said in the closed hearing.

    ii) It is often impossible to establish which materials are open and which are closed. Reporters fail to get access to documents to which they are entitled, as had happened in the instant case.

    iii) As law reporters cover other cases, it is important that sufficient notice of closed hearings is given.

    iv) When a law reporter cannot be present for the argument, the law reporter often checks the argument by listening to the tape. It is therefore necessary that there be a clear record of that portion of the tape that is open and that which is closed.

115. It was submitted that the difficulties in relation to reporting legal submissions could largely be ameliorated by the following measures:

    i) The advocate for Her Majesty's Government should prepare a summary of the main legal submissions by the parties to be disclosed to the law reporters.

    ii) Skeleton arguments (redacted where necessary) should be made available to law reporters. In the previous proceedings in this case, counsel made these available, but this was the exception rather than the rule.

    iii) The court should record in its open judgment the legal submissions made. In the earlier judgments in these proceedings this had been done with the assistance of counsel following the submissions made by the ICLR to which we referred at paragraph 19 of our fourth judgment.

    iv) A schedule should be kept of open material so that reporters knew what they were entitled to receive.

    v) Better notice should be given and a clear record kept of which part of the hearing was open and which part closed.

116. We consider that these suggestions have very substantial merit. However the power to lay down practice must be exercised through a Practice Direction or through Rules: see *Bovale Ltd v Herefordshire District Council* [2009] EWCA Civ 171. It is therefore for the Rule Committee or the Lord Chief Justice to consider making the necessary Rules or Practice Direction.

117. The ICLR also submitted that, although the adoption of their proposals would improve matters substantially, there was no substitute for a reporter being able to attend closed hearings. It is unnecessary for us to set out the importance of law

reporting to the development of the common law. However it is clear that this proposal would require security clearance to an appropriate level. This is a matter for those Ministers involved in closed hearings to discuss with the Attorney General, and to consider with the Lord Chief Justice.

(2) The records and release of closed judgments

118. In the present proceedings, an application may be made in due course for the release of our closed judgment when there has been a final determination of any criminal investigation or proceedings. We would expect being able to hear such an application on notice to be given to all interested parties, but we cannot be certain of that.

119. It may be that an application may be made when we are not available or applications may be made to open other closed judgments (or parts of them) or for their release into the public domain on the expiry of a period of time in the same way as public records are released into the public domain. As far as we have been able to ascertain, there is no systematic archive of closed judgments in a registry at the Royal Courts of Justice or a procedure for their release either on application or after a fixed period of time.

120. These are also matters for the Lord Chief Justice and Rule Committee to consider.

PART VI: POSITION OF THE SPECIAL ADVOCATE

121. The Special Advocates were appointed by the Attorney General pursuant to the Order of Sullivan J. There may arise sometime in the future an issue as to the scope of their retainer and the assistance they are able to give to BM outside these proceedings. We have adjourned the matter generally with permission to apply should the issue ever become live.

Conclusion

122. We had hoped when sending this judgment out in draft that this judgment would bring these proceedings to an end, subject to paragraph 112. We will however have to rule on the application by the Foreign Secretary and opposed by the other parties that certain paragraphs be redacted. We would wish to express our deep appreciation for the assistance we have received from all counsel and solicitors who have conducted this litigation with exemplary skill and professionalism.