IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT (Thomas LJ and Lloyd Jones J)

ADMINISTRATIVE COURT (Claim No. CO/4241/2008)

BETWEEN:

THE QUEEN (on the application of

BINYAM MOHAMED)

Respondent

-v-

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Appellant

SUBMISSIONS ON BEHALF OF LIBERTY AND JUSTICE

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1. The issue in the proceedings was whether the Secretary of State for Foreign and Commonwealth Affairs ("SOSFCO") should disclose certain material to the lawyers acting for the Applicant Binyam Mohamed (''BM'') which were said to show that his confessions of involvement in terrorist activities, the basis of charges against him in the USA for offences carrying the death penalty, were obtained in consequence of inhuman or degrading treatment or torture at the hands of or with the connivance of the

Government of the United States of America (''US'') in which the Government of the United Kingdom (''UK'') were involved by facilitating its occurrence.

2. In its First Judgment the Divisional Court held that the SOSFCO was under a duty of disclosure on the basis of the so-called Norwich Pharmacal principle (see *Norwich Pharmacal v Customs and Excise Commissioners* 1974 AC 133) ("the substantive order''). That issue has now become moot because the US Government has provided the material to BM's lawyers.

3. The main issue in this Appeal is whether the Divisional Court were correct to decide that the interests of national security did not require continued redaction of seven redacted paragraphs in their First Open Judgment or redaction of four paragraphs in their Fifth Judgment, said by the SOSFCO to indicate what is in the seven paragraphs (The Divisional Court's summary of what those sets of paragraphs contain is in their Sixth Judgment para 13(i), (ii) and (iii)). The SOSFCO contends in favour of the redaction of both the seven and the four paragraphs on the grounds of national security. Other parties seek to uphold the decision of the Divisional Court. Liberty and JUSTICE, who intervene with the permission of this Court, submit that in determining whether or not to give an unredacted judgment even where the UK Government relies upon

a Public Interest Immunity (''PII'') Certificate which rationally specifies national security as the grounds for redaction, the Court is entitled to take account that the passages in respect of which redaction is sought will explain that it was the involvement of the UK Government in acts of inhuman or degrading treatment or torture which justified the substantive order.

4. JUSTICE, founded in 1957, is a UK-based human rights and law reform organisation. It is also the British section of the International Commission of Jurists. Liberty (the National Council for Civil Liberties) was formed in 1934 and is an independent, non-political body whose principal objectives are the protection of civil liberties and the promotion of human rights in the UK. Both organisations have a particular interest in issues arising from closed proceedings and the use of closed material, as well as in matters relating to the domestic and international prohibition on torture. They have intervened in many of the leading cases on these issues including *A v Secretary of State for the Home Department (No.2)* 2006 2 AC 221, *A and others v United Kingdom* (ECtHR, 19 February 2009), *RB (Algeria) and others v Secretary of State for the Home Department* (2009) UKHL 10, *Secretary of State for the Home Department v AF and others* (2009) UKHL 28 and *Al Rawi and others v the Security Service and others* [2009] EWHC 2959

(QB). In June 2009 JUSTICE published Secret Evidence, a 238-page report on the use of closed proceedings and closed material in UK courts.

5. The Court is respectfully referred to paragraph 67 of the First Open Judgment as to what BM had established by way of arguable case as to his detention and treatment, and paragraphs 87 and 88 of the same judgment in relation to the involvement and facilitation of the UK Government. It was in relation to that latter paragraph that redaction took place. (See paras 4 and 86 of the First Open Judgment)

6. It is well established, at any rate since the seminal judgment in *Conway v Rimmer* (1968 AC 911), that

> *''Courts have and are entitled to exercise a power and a duty to hold the balance between the public interest, as expressed by the Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice''.*

(per Lord Reid at p.952 A-B). [See too *ex p. Wiley* 1995 1 AC 224 per Lord Woolf at p.296G.]

7. It is submitted that the proper administration of justice embraces more than the interests of the parties to the litigation; not only because of the width of the phrase, but also because in an earlier passage Lord Reid himself referred to the risks in allowing the Ministerial say-so to be dispositive as "*not only that very serious injustice may be done to the parties* ***but also*** *that the due administration of justice may be gravely impaired for quite*

inadequate reasons" (p.951 A-B). The suggestion in the SOSFCO's skeleton argument ("ASkA") that reinstatement of the seven paragraphs (and by parity of reasoning retention of the four paragraphs) would be an *"entirely gratuitous breach of confidence on the part of the Court" (*para 30*)* has as its apparent premise that the only aspect of the administration of justice engaged is the need to do justice between the parties (para 30). It is accepted that such is the paradigm case. It is disputed that such is the only case.

8. The presumption in favour of open justice as an essential ingredient in the administration of justice is deeply rooted in the English common law. In *Scott v Scott* 1913 AC 416 ("*Scott*") Viscount Haldane LC referred to it as *''the broad principle''* (p.437). It has two aspects.

> "*As respects the proceedings in the Court itself it requires that they should be held in open court to which the press and public are admitted and that in criminal cases at any rate all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.''*

AG v Leveller Magazine 1979 AC 440 ("*Leveller*") per Lord Diplock at p.450 A-B. Publication of a full judgment is an element of the second aspect.

9. The common law position is fortified by the incorporation into domestic law by the Human Rights Act 1998 ("HRA") of Article 6 of the European

Convention on Human Rights ("ECHR") which provides, in an unqualified form, that "*Judgment shall be pronounced publicly*".

10. Not all the reasons in favour of "*the full glare of a public hearing*" (the first aspect) *R v Legal Aid Board ex p. Todner* 1999 QB 966 per Lord Woolf MR at p.977E ["*Todner*"] apply to publication of an unredacted judgment (the second aspect). But a substantial number do. They include:

    (i) *''the danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism*''. (*Scott* per Earl Loreburn at p.449)

    (ii) that it is *''the best security for pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect*''. (ditto per Lord Atkinson p.463)

    (iii) *''it makes uninformed and inaccurate comments about the proceedings les likely*''. *Todner* per Lord Woolf MR 1999 QB at p.977F

("the three reasons").

11. It is not in dispute that the seven redacted paragraphs form part of the Divisional Court's reasoning in explaining why it acceded to BM's application made under the Norwich Pharmacal principles. In its fourth judgment that Court explained

> *''in these paragraphs we provided a summary of reports by the United States Government to the SyS and the Secret Intelligence Service on the circumstances of BMs incommunicado and unlawful detention in Pakistan and of the treatment accorded to him by or on behalf of the United States Government as referred to in paragraph 87(iv) of our judgment. We did so as the Summary was highly material to BM's allegation that he had been subjected to torture and cruel, inhuman or degrading treatment and to the commission of criminal offences*[1] *to which we referred in paragraph 77 our first judgment*". (para 14)

As already noted in para 5 above the same Court had also earlier made clear that the redacted paragraphs bore on the facilitation or involvement of the UK Government. The same is true of the four paragraphs in the Fifth Judgment whose redaction is sought by the SOSFCO. *"We take the view that the reasons why we reached our conclusions cannot fully be understood without these passages"*. (Sixth Judgment para 1 and see para 13(vi))

12. If those paragraphs formed part of their reasoning, their insertion into the open judgment could not properly be described as *''gratuitous''*. All the three reasons in favour of public judgment apply to this case and were recognised as doing so by the Divisional Court (Fourth Judgment paras 36, 37, 39, 45(i)). They are of particular importance given the gravity of the matter i.e. the alleged involvement of the UK Government in treatment which may amount to torture of a British resident. Even if (which is disputed) the SOSFCO is correct in saying that the Divisional Court could not justify denying redaction by reference to wider considerations of the promotion of the rule of law, public debate and democratic accountability,

[1] In context this meant offences against him, not by him.

he provides no satisfactory answer to the point that a Court ought to be able to explain its resolution of the issues before it (see ASkA para 32).

13. However, Liberty and JUSTICE do indeed assert that there is a further reason less closely related - but not unrelated – to the administration of justice, which needs to be weighed in the scales in favour of an unredacted judgment. The judiciary is, under the partly unwritten constitution of the United Kingdom, one of the three arms of government. It has therefore a shared responsibility with the other arms of government, legislative and executive for upholding the rule of law. [See Halsbury's Laws 4 ed Reissue Vol. 8(2) paras 301 and 302, which instructively differentiates between the judiciary's function of providing for the orderly resolution of disputes and upholding the rule of law and *R v Horseferry Road exp. Bennett* 1994 1 AC 42 ("*Bennett*") per Lord Griffiths at pp61-62.] Such a role can be performed in a multiplicity of ways; by judicial review; by – as in *Bennett* - enlarging the boundaries of abuse of process to prevent prosecution of a person whose presence within the jurisdiction was engineered by illegitimate means; by sending papers to the Director of Public Prosecutions where apparently criminal behaviour is exposed in the course of civil proceedings. By clarifying rather than (partly) concealing the extent to which the UK Government may have been involved in the unacceptable treatment of BM the Court's unredacted

judgments contribute to the rule of law by focusing public attention on the issues so as to assist in ensuring that anyone who ought to be brought to account is brought to account. In *Scott* Lord Shaw cited the historian Hallam with approval

> "*civil liberty in this kingdom has two direct guarantees: the open administration of justice according to known laws truly interpreted and fair constructions of evidence: and the right of Parliament without let or interruption to inquire into and obtain redress of public grievances*". (p.422)

It is a step, but not, it is submitted, a step too far, to perceive a link between the two guarantees, the one, the open administration of justice leading to the other, the rectification by Parliament of public grievances.

14. There is too a general right, recognized in the common law, and fortified by Article 10 of the Convention i.e. the right to impart and to receive information, colloquially termed the right of freedom of expression see *LRT v Mayor of London 2001 EWCA Civ* 1491 per Sedley LJ para 55. *''In a democracy it is the primary right. Without it an effective rule of law is not possible*'' (*R v Home Department ex p. Simms* 2000 2 AC 115 ("*Simms*") per Lord Steyn at p125). It is unnecessary to explore to what extent the exercise of that right to impart information by judges qua judges is circumscribed by the nature of the judicial function. It is sufficient for present purposes simply to say that the exercise of such right in addressing and explaining issues of which they are seized judicially itself

demands protection. Freedom of expression is in, and is conducive to, the public interest. *R v Shayler* 2003 1 AC 247 ("*Shayler*") Lord Bingham of Cornhill said pertinently at para 21:

> "*The fundamental right of free expression has been recognised at common law for very many years. The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.*"

15. These benefits were properly recognised by the Divisional Court (see Fourth Judgment paras 41-42, 44, 45(ii)(iii), 46-47). The SOSFCO states that this involves "*a regrettable confusion between the object of judicial proceedings and their incidental consequences in some cases*" (AskA para 32). Liberty and JUSTICE would respond that as long as those consequences are indeed incidental to and not disconnected from a judgment, they

should be weighed in the balance. It is not, and cannot be asserted, that the Divisional Court was misusing its function of delivering a judgment on the issues before it to publicize certain information, merely because it thought it in the public interest that it should be known, notwithstanding that it was irrelevant to the resolution of the dispute before it. The information in the redacted passages was indeed integral to the judgment.

16. As Lord Steyn said in *R (Daly) v Home Secretary* 2001 2 AC 532 at p.548A "*in law context is everything*". The attitude of both UK domestic law and public international law towards the practice of torture can be simply stated. It is one of unqualified opposition. In *A No.2* 2006 2 AC 221 Lord Hoffmann said "*the rejection of torture by the common law has a special iconic importance as a touchstone of a humane and civilized legal system. Its rejection has a constitutional resonance for the English people which cannot be overestimated*'' (para 83). In the same case Lord Bingham stated "*There can be few issues on which international legal opinion is more clear than on the condemnation of torture*" (para 33). The explanation was given, again in the same case, by Lord Hope *''Torture has no place in the defence of freedom and democracy whose very existence depends on the denial of the use of such methods to the executive*'' (para 112). The opposition towards the subjection of a person to inhuman or degrading treatment, which differs from torture, only in degree not kind, is no less. Article X of the Bill of Rights 1689

prohibits ''*cruel and unusual punishments*'' see *Williams v Home Office* No.2 1981 1 All ER 1211 at 1242ff. Article 3 of the ECHR, also part of UK law, prohibits it in the same way as it prohibits torture. The Convention against Torture has been incorporated municipally by sections 134 and 135 of the Criminal Justice Act 1988 with extra territorial reach, and the International Criminal Courts Act 2001 creates domestic offences of an extra-territorial nature which embrace involvement in inhuman or degrading treatment. The importance of an unredacted judgment to protect and promote the administration of justice and the rule of law is intensified by this context.

17. The relevant law on PII is usefully summarized in Cross and Tapper on Evidence 11th ed

> "*While the only basis for immunity from disclosure in the English Courts in the public interest of the United Kingdom, and the interests of a foreign state are thus not, in principle alone sufficient, two qualifications might be made … the second is that a government may regard its own interests as being affected, and so certify by the disregard of its own courts for the public interests of a foreign state. This is particularly likely where the foreign state is a confidential source of vital information that is likely to dry up if revealed.*" (p.513)

18. The second qualification is here engaged. It is accepted that, as the Divisional Court held in its Fourth Judgment, there is a public interest in the receipt by the United Kingdom Government of intelligence from the US Government, and that the "*consequences of a reconsideration of and a potential reduction in the information supplied by the United States under the*

shared intelligence relationship at this time would be grave indeed" (para 74); and in assessment of the risk, what matters is the view that the US Government take of disclosure (paras 75-6). In its Fifth Judgment the Divisional Court on scrutiny of the evidence discounted the reality of the risk, concluding that "*the risk to national security judged objectively on the evidence is not a serious one"* (para 108). Liberty and JUSTICE will assume – solely for the purposes of argument – that it was wrong to do so.

19. Liberty and JUSTICE will further accept that in assessing a risk to national security a Court will necessarily defer (to a large extent) to the perception of the executive for reasons of lack of equivalent expertise. *Rehman* 2008 1 AC 153 per Lord Hoffmann at paras 51-54. However it does not follow that the Court is required to show similar deference when it weighs up "*the two aspects of the public interests involved"* (the phrase of Lord Woolf in *ex p. Wiley* at p.296H), that relied on by the SOSFCO and those referred to in this submission under the rubric the administration of justice the rule of law and democratic accountability ("the rival interests"); on the contrary that is its constitutional function.

20. Liberty and JUSTICE respectfully urge this Court in evaluating those two aspects against each other, to give full weight to the rival interests set in the context of alleged involvement of the UK Government in treatment of BM which was prohibited by well recognised legal norms.

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4 DECEMBER 2009