

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

Claim No. CO/4241/2008

BETWEEN

THE QUEEN
on the application of
BINYAM MOHAMED

Claimant

- and -

THE SECRETARY OF STATE FOR
FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

CERTIFICATE OF THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

1. I am Her Majesty's Secretary of State for the Home Department and I make this certificate on behalf of the Crown.

2. I am aware of the proceedings brought by Binyam Mohamed against the Secretary of State for Foreign and Commonwealth Affairs. I am advised that in connection with those proceedings:
 - (a) disclosure may be required and evidence may be sought of documents relating to the work of the security and intelligence agencies of the Crown; and
 - (b) Security Service officers ("Witness A" and "Witness B") have provided witness statements.

3. I have formed the view that a claim for public interest immunity (PII) ought to be made for documents in respect of which disclosure may be required or evidence may be sought, and to protect Witness A and Witness B's identities. I make this certificate for the purpose of assisting the Court to determine the questions that arise in relation to PII.

4. In reaching my view in relation to PII, I have had regard to three distinct questions that the law requires to be taken into account when considering whether to make a PII claim:

- i. The first question is whether the material passes the threshold test for disclosure in the relevant proceedings. Unless it does so, no PII issue can arise.
- ii. If the threshold test is passed, the second question is whether the material attracts PII. The distinction between class and contents claims is no longer regarded as helpful as far as PII claims by the Government are concerned, and the approach now adopted by the Government is to focus specifically on the damage that would be done by disclosure. In this regard, the then Attorney General stated in a Written Parliamentary Answer on 11th July 1997 that public interest immunity will not be asserted by the Government unless the relevant Minister believes that disclosure of a document or piece of information will cause real harm to the public interest. The Attorney General added that this test is to be applied rigorously.
- iii. If, applying the real harm test, the material attracts PII, the third question is whether the public interest in non-disclosure is outweighed by the public interest in disclosure of the material for the purposes of the proceedings. It is open to me to consider and balance the relevant competing public interests and to agree to the disclosure of material that attracts PII, if I am satisfied that the overall public interest favours disclosure. However, if I consider that the material attracts PII but am not satisfied that the overall public interest favours disclosure, the

proper course is to make a Certificate for the assistance of the Court, which is the ultimate decision maker as to whether the material should be disclosed in the public interest (see R v Chief Constable of the West Midlands Police, ex parte Wiley [1995] 1 AC 274 at 288, 295 – 298, per Lord Woolf, and at 281, per Lord Templeman).

The material in issue

5. I have been referred to the material identified as “Bundle A”, which consists of:

At TAB A: the Closed Witness Statement of Witness A

At TAB B: Exhibit RP 1 to the Closed Statement of Witness A

At TAB C: The Open witness statements of Security Service Witnesses A and B.

I am informed that Counsel advises that the statement at TAB A and Exhibit RP1 at TAB B, which relate to the work of the security and intelligence agencies in connection with matters under consideration by the Court, contain material relevant to the Court. They therefore pass the threshold test for disclosure. I have personally examined the material and, with the benefit of advice from the security and intelligence agencies, Home Office officials and Counsel, have satisfied myself that the Statement and Exhibit attract PII to the extent and for the reasons set out below. I have also been referred to two Open witness statements of Security Service witnesses, identified as Witness A and Witness B. I am further satisfied for the reasons set out below that they should be given anonymity.

The public interest in non-disclosure

6. The very nature of the work of the security and intelligence agencies of the Crown requires secrecy if it is to be effective, and there is an obvious and widely recognised need to preserve that effectiveness. The Government's approach to PII requires me to focus specifically on the damage which would be done by disclosure of the particular material in issue, and to assert PII only if satisfied that the disclosure of that material would cause real harm. Having adopted that approach, I am satisfied that disclosure of the closed statement at TAB A and the documents within TAB B

without redactions or summaries, and disclosure of the identity of Witnesses A and B, would cause real harm to the work of the security and intelligence agencies.

(a) Disclosure of documents/information

7. The reason why disclosure would cause such harm is that the material in Bundle A for which PII is claimed includes information of one or more of the following kinds:

- a. information relating to methods, techniques or equipment of the security and intelligence agencies, disclosure of which would reduce or risk reducing the value of the method, technique or equipment in current or future operations;
- b. information relating to persons providing information or assistance in confidence to the security and intelligence agencies, disclosure of which would endanger or risk endangering the persons concerned or other persons or would impair or risk impairing their ability or willingness to continue providing information or assistance, or the ability of the security and intelligence agencies to obtain information and assistance from the person concerned or other persons;
- c. information relating to operations and the capabilities of the security and intelligence agencies, disclosure of which would jeopardise present and future intelligence gathering operations and capabilities;
- d. information relating to the identity, appearance, deployment or training of current and former members of the security and intelligence agencies, disclosure of which would endanger or risk endangering them or other individuals or would impair or risk impairing their ability to operate effectively as members of the security and intelligence agencies or the ability of the security and intelligence agencies to recruit and retain staff in the future;

- e. information received in confidence by the security and intelligence agencies from foreign liaison sources, disclosure of which would jeopardise or risk jeopardising the provision of such information in the future;
- f. other information likely to be of use to those of interest to the security and intelligence agencies in pursuit of its functions, including terrorists and other criminals, disclosure of which would impair or risk impairing the agencies' performance of their functions.

8. The general nature of those concerns needs little elaboration. They are aimed both at protecting the integrity of security operations and at protecting the safety and usefulness of those who work for the service or provide information to it. Disclosure of information of the kinds referred to would be likely to assist those whose purpose is to injure the security of the United Kingdom and whose actions in the past have shown that they are willing to kill innocent civilians both inside and outside the United Kingdom in pursuance of their aims. As regards the gathering of intelligence information, it is important to note that those who supply such information do so on the basis that what is imparted is in confidence, and any disclosure in breach of confidentiality creates a serious risk that such information will be less readily forthcoming in the future. In addition, anything that might lead to identification of the individual source or sources of the information could result in grave danger to the persons concerned.

9. It is not possible for me to be more specific in this certificate about the information within Bundle A for which PII is claimed, or the precise harm that its disclosure would cause, since my doing so would be liable to cause the very damage that the certificate seeks to avoid. Full details are, however, given for the benefit of the Court in a Schedule to the certificate. Although this certificate is being made available to the Claimant, the Schedule is a highly classified document, which is being provided only to the Court and the Special Advocate.

10. To the extent that the Schedule contains information additional to that in Bundle A for which PII is claimed, that information is itself information of one or more

of the kinds referred to in paragraph 7 and I am satisfied that disclosure of that information would cause serious harm for the same reasons.

(b) Anonymity

11. I am satisfied that disclosure of the identities of Witnesses A and B would cause real harm to the work of the Security Service. The reason why disclosure of this information would cause such harm is that it would endanger or risk endangering Witnesses A and B, and would impair or risk impairing the witnesses' ability to operate effectively as members of the Service, or the ability of the Service to recruit and retain staff in the future.

12. It is not possible for me to be more specific in this Certificate about the precise harm that disclosure of the identities of Witnesses A and B would cause, since my doing so would be liable to cause the very damage that the Certificate seeks to avoid. Full details are, however, given for the benefit of the Court in a separate Schedule to the Certificate. Although this Certificate is being made available to the defendant, the Schedule is a classified document which is being provided only to the Court and the Special Advocate.

13. To the extent that the Schedule contains information additional to that set out here relating to the identity of the Security Service officers, I am satisfied that disclosure of such information would cause serious harm for the reasons set out in paragraph 7 above.

The balancing exercise

(a) Disclosure of documents/information

14. The material in Bundle A for which PII is claimed contains highly sensitive information, disclosure of which in unredacted form would be damaging to national security for the reasons given in the sensitive Schedule. Against those considerations I have weighed the relevance and importance of the material, having regard to the advice received from Counsel. I have also taken account of the fact that, even if withheld from the Claimant, the material will still be available for the

benefit of the Court and the fact that the Claimant's interests will be represented in relation to the material by a Special Advocate. After due consideration of the issues in the light of that advice, and applying the principles referred to above, I am satisfied that the overall balance of public interest does not favour disclosure of the material without the proposed redactions or summaries. I am also satisfied that the Schedule should not be disclosed.

15. In performing this balancing exercise, I have also had regard to the fact that it has been possible to disclose some information derived from the intelligence and security agencies in these proceedings in redacted form.

(b) Procedural Safeguards

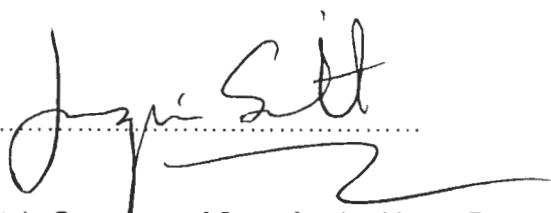
16. Where I have concluded that material should be disclosed, I have done so on the basis that the material in question should be produced only as redacted or summarised. If such material were to be disclosed without the proposed redactions or summarised form, then in my view serious damage would be sustained and would not be justified by the overall balance of public interest.

(c) Anonymity

17. Disclosure of the information relating to the identities of Witnesses A and B would be particularly damaging to the work of the Security Service for the reasons given in the Schedule. Against those considerations I have weighed the relevance and importance of the information, having regard to the principle of English justice that evidence in court proceedings should be given openly. After due consideration of the issues in the light of that advice, and applying the principles referred to above, I am satisfied that the overall balance of public interest does not favour disclosure of their identities. Accordingly, I have concluded that the information as to the identity of Witnesses A and B should not be disclosed. I am also satisfied that the Schedule should not be disclosed.

Conclusion

18. In making this claim, I accept that the Court has final responsibility for determining questions of disclosure and in particular for deciding whether the interests of justice outweigh the public interest that I have asserted. If the Court requires further assistance from me in order to reach its own determination, I am ready to provide it.

Signed..... 

Her Majesty's Secretary of State for the Home Department

Dated..... 11 / 7 / 08