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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: 22/10/2008

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, Max Hill QC and Karen Steyn (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates: 13, 14, 15, 16, 17 October 2008

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Judgment 3 Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Lord Justice Thomas :

1. This is the judgment of the court.

2. BM was arrested in Pakistan on 10 April 2002; he was thereafter held incommunicado and denied access to a lawyer. The United States authorities informed the United Kingdom Security Service (SyS) of his arrest; there was an exchange of information between the SyS and the United States authorities culminating on 17 May 2002, when BM was seen by an officer of the SyS in Pakistan. Thereafter there is no evidence whatsoever of BM's location until 2 years later in May 2004 when he was transferred to Bagram in Afghanistan. BM alleges that during that period of two years he was tortured and as a result he made a confession to various terrorist activities. He has been held at Guantanamo Bay since 20 September 2004 as an enemy combatant in the "war on terror". Based on the confessions, he has been charged under the US Military Commissions Act of 2006 with offences of terrorism which carry the death penalty, though it has not been decided whether to seek the death penalty. There is the clearest evidence that BM is suffering from a continuing deterioration in his mental health as a result of his detention without trial for over 6½ years.

3. By an action begun on 6 May 2008, lawyers acting on BM's behalf sought information and documentation from the United Kingdom Government which might help him in defending the proceedings under the Military Commissions Act. They did so on the basis the United Kingdom had become mixed up in the wrongdoing of the United States Government, relying on BM's evidence about the visit of the SyS officer to Pakistan.

4. In our first open and public judgment in these proceedings [2008] EWHC 2048 (Admin) which we handed down on 21 August 2008, we decided that exculpatory information which related to the alleged treatment of BM after his arrest in Pakistan, to the visit by the SyS officer to interview BM in Pakistan, to intelligence subsequently provided about him and to his movement in the period after April 2002 should be provided in confidence to BM's lawyers for the purposes of proceedings under the Military Commission Act in the United States. Our decision was subject to the exercise of our discretion and any claim for Public Interest Immunity. We did so in circumstances where:

   i) It was common ground that BM was detained unlawfully and incommunicado in Pakistan; he was denied access to a lawyer and his detention was not reviewed by a court or tribunal (see paragraph 66).

   ii) It was accepted on behalf of the Foreign Secretary that BM had established an arguable case that (a) he was subject to torture and cruel, inhuman or degrading treatment in Pakistan and thereafter unlawfully rendered from Pakistan to Morocco by the United States authorities; (b) whilst in Morocco he was subject to unlawful incommunicado detention and torture or cruel inhuman or degrading treatment and during his interrogation there by or on behalf of the United States authorities; (c) he was thereafter rendered by the United States authorities from Morocco to Afghanistan in January 2004; (d) he was detained unlawfully and incommunicado at the "Dark Prison" near Kabul where he was subject to torture or cruel, inhuman or degrading treatment by or

on behalf of the United States; (e) he was unlawfully detained incommunicado at the United States Air Force base at Bagram (see paragraph 67).

iii) Under the charges which were brought on 28 May 2008 under the Military Commissions, there are two broad categories of charge, first that he had trained with Al-Qaida in Afghanistan and secondly that he had conspired with Al-Qaida and in particular named individuals to plot attacks against the United States, including an attack involving a dirty nuclear bomb (see paragraph 47 of the first judgment).

iv) BM alleged that the statements he had made were the result of the unlawful detention, torture and cruel, inhuman or degrading treatment he had suffered in the period between April 2002 when he was arrested in Pakistan and thereafter as we have set out in sub paragraph ii) above (see paragraph 38 of the judgment).

v) On the totality of the open and closed evidence before the court, it was clear that the United States authorities have never informed the British Intelligence Service or any other part of the United Kingdom Government about BM's whereabouts in the period between 17 May 2002 (when he was seen by a UK security officer) and his transfer to Bagram in May 2004 (see paragraph 31). This remains the position.

vi) The United States had refused to provide BM's lawyers with any information as to where he was or indeed what they contend happened to him within the period of two years between May 2002 and May 2004. (See paragraph 33.) This remains the position.

vii) On 6 June 2008, Mr Bethlehem, QC, the Legal Adviser to the Foreign and Commonwealth Office, made it clear to the United States Government that it was possible that material it had discovered "could be considered to be exculpatory or might otherwise be relevant" under various provisions of the Military Commissions Act. That material was supplied to the United States Government (see paragraph 47ii)).

viii) Later that month, after examination of that material, the Government of the United States informed the United Kingdom Government that the allegations of torture made by BM were not credible. (See paragraph 47iv).)

ix) Under the Military Commissions Act, the decision to refer charges for trial is made by the Convening Authority (described at paragraph 110-112). The decision was said to be imminent when we heard the argument in late July 2008 and at the time of our first judgment. If charges were referred, they would be heard by a Military Commission (described by us at paragraphs 115-118).

x) The United Kingdom Government made clear that they did not contend United States military prosecutors would disclose the material of their own motion (despite the fact that it had been provided to them by the United Kingdom Government) (see paragraph 47(v)).

xi) We could see no rational basis for the refusal by the US Government to provide the documents. We found that although at some point in the future the material might be provided through the Military Commissions procedure once charges were referred, there was a real need for BM to have that documentation (see paragraph 126).

5. Some information and documentation was provided to BM's lawyers for the purposes of arguing their application. The Court was provided with 42 unredacted documents. Some of these were documents provided to BM's lawyers in redacted format; most were documents provided only to us and to the Special Advocate appointed to represent the interests of BM. All the documents we saw were unredacted. We also heard evidence including cross-examination from the SyS Officer who visited BM on 17 May 2008, substantially in closed session.

6. We had a lengthy opportunity of detailed scrutiny of the documents during the cross-examination of the SyS Officer and considered that documentation further with the assistance of the Special Advocate. In a closed judgment of 33 pages, we set out in some detail the passages in the documentation material to the allegations made by BM as to his treatment and the evidence we heard. We set out our findings of fact based on that documentation and that evidence.

7. In a draft of the first open judgment we summarised what we considered could be put into the public domain about our findings without any damage to the national security of the United Kingdom. The United Kingdom Government submitted to us that we should remove some key sub-paragraphs (see paragraphs 4 and 87 of our first judgment) summarising further the reports sent by the United States authorities to the United Kingdom authorities relating to BM's detention and treatment in Pakistan. The submission was made that to include those short sub-paragraphs in an open judgment would seriously damage the national security interests of the United Kingdom, not because the paragraphs disclosed anything of a nature relating to intelligence techniques or intelligence issues but because of the stance taken by the United States summarised at paragraphs 11 and 49 below. We agreed to remove those sub-paragraphs from the open judgment pending further argument (see paragraph 56 below). The reasons for the contention of the United Kingdom Government were set out in Public Interest Immunity (PII) certificates of the Foreign Secretary on 26 August and 5 September 2008. We refer to this further at paragraphs 11 and 14 below.

8. The key conclusions which we have so far been able to make public in our open judgment were the following:

i) It was clear that the United Kingdom Government had facilitated the interrogation of BM for part of the period in which he was unlawfully detained in the knowledge of reports of interviews at Karachi which contained information relating to his detention and treatment (see paragraph 147 vi)).

ii) The United States Government was using confessions made after a two year period of unlawful incommunicado detention as evidence against BM on charges where the death penalty might be sought. There was no dispute that that was being done in circumstances where the United States Government had refused to provide any information whatsoever about the location of BM

during that period or to provide documentation in relation to that period. In our open judgment we stated that it was inconceivable that the United States Government had no such documents or information (see paragraph 126(v)). We made further findings in our closed judgment as to why it was inconceivable by reference to specific documents in the 42 unredacted documents provided to us in closed session.

iii) The provision of information held by the United Kingdom Government to BM's lawyers in confidence was essential if BM was to have his case fairly considered by the Convening Authority and a fair trial before the Military Commission if his case was referred (paragraph 105). As we stated, our full reasons are set out in the closed judgment. It is only part of those reasons that we were able to make public, namely the critical point that it provides the only support independent of BM in some material particulars for his general account of events which led to the confessions.

iv) At the heart of the systems of justice that the United Kingdom and United States share is the principle that involuntary confessions obtained by torture or cruel, inhuman or degrading treatment are inadmissible at trial. We summarised the strength and antiquity of this rule on both sides of the Atlantic in the authorities to which we referred at paragraph 147 v). As is clear from the document now made public by the United States Government (see paragraph 17.v) below), the case against BM is based on the confessions.

v) The documents were therefore essential to his defence as they provide the only independent evidence that is potentially capable of helping him undermine the case against him (see paragraph 105).

vi) We could think of no good reason why the materials had not been made available by the United States Government to BM's lawyers in confidence (see paragraph 147 x)).

vii) To leave the issue of disclosure to the process of the Military Commissions at some time in the future would be to deny to BM a real chance of providing some support to a limited part of his account and other essential assistance to his defence. To deny this at this time would be to deny him the opportunity of timely justice in respect of the charges against him, a principle dating back to at least the time of *Magna Carta* and which is a basic part of our common law and of democratic values (see paragraph 147 xii)).

9. In our first judgment given on 21 August 2008, we therefore indicated that we were prepared to order the provision of the material held by the United Kingdom Government to BM's lawyers in confidence, subject to our determination that we would exercise our discretion in favour of providing it in the light of any arguments on Public Interest Immunity and other considerations relating to the exercise of our discretion.

10. On the same day, shortly after we had given judgment, Mr Bellinger, the Legal Adviser to the State Department, wrote a letter on behalf of the United States to Mr Bethlehem QC, Legal Adviser to the Foreign Office. It was received on 22 August

2008. It gave assurances that the office of the Chief Prosecutor in the office of Military Commissions had agreed that

i) the 42 documents seen by us and referred to in the closed judgment would be provided to the Convening Authority (subject only to "the redaction of the names of British and American Government officials and the location of intelligence facilities") if the Convening Authority requested the documents.

ii) the same documents as redacted in the above way would be produced to BM's military counsel within the Military Commission proceedings if charges were referred.

iii) The letter made clear that it would not be appropriate for the documents to be used before the Convening Authority because that phase was limited to the decision to refer and not to the adversarial trial. (See paragraphs 2 and 3 of our second judgment [2008] EWHC 2100 (Admin) delivered on 29 August 2008.)

11. In the light of that letter the Foreign Secretary provided on 26 August 2008 a PII Certificate which we summarised at paragraphs 4 and 5 of the second judgment. In essence it concluded that in the light of the letter of 21 August 2008 to Mr Bethlehem QC and the fact that the United States Government had made it clear that disclosure of the documents beyond that would seriously harm the existing intelligence sharing arrangements between the United Kingdom and the United States and thereby cause considerable damage to the national security of the United Kingdom, that:

> "disclosure of the information in question should take place in a manner consistent with the undertaking of the United States to provide this material and should not take place by order of our Courts or otherwise by the United Kingdom authorities. In so concluding, I underline the conclusion in the Court's judgment that the United Kingdom Government considers that the material in question should be made available to [BM]'s US counsel. Consistent with the undertaking of the United States, and my conclusion as to the proper balance of the public interest, the United Kingdom Government will continue to engage with the relevant US authorities to ensure that such disclosure does indeed take place."

12. In the light of evidence served in late August 2008 by BM's lawyers exhibiting correspondence from the Office of the US Army Chief Prosecutor which we summarised at paragraph 7 of our second judgment, a further letter was sent to us on behalf of the Foreign Secretary dated 27 August 2008 setting out an extract from a letter from the Assistant Legal Adviser to the State Department making clear that the Convening Authority had requested the 42 documents, that they had been sent, and the Legal Adviser to the Convening Authority would provide them to the Convening Authority when he presented his advice; that if a decision was made to refer charges, the documentation and the advice would be provided to BM's defence counsel (see paragraph 8 of our second judgment). As we concluded at paragraph 10 of our second judgment:

> "the two letters from the State Department constitute a significant and welcome change in position by the Government of the United States."

13. We concluded that

    i) if charges were referred by the Convening Authority, the documents would be provided in a redacted form which did not in our judgement disadvantage BM in any material way (see paragraphs 11 and 12 of our second judgment).

    ii) As regards the provision of documents in relation to the proceedings before the Convening Authority we concluded that the decision not to provide the documents to BM's lawyers for the purposes of submissions before the Convening Authority (although we considered it necessary and essential), was the one respect in which the assurances provided by the Government of the United States had failed to satisfy what we considered fair and proper. We added,

    > "It is perhaps surprising that there is this remaining dispute over what is apparently an issue of mechanics."

14. For reasons which it is not necessary to summarise, we concluded that the PII Certificate, given the very rapid speed at which the proceedings had moved had not sufficiently covered the issue of torture; that it would be in the interests of justice if the Foreign Secretary was given time to provide a fuller certificate, given the very serious concerns in relation to the national security interests of the United Kingdom on the one hand and the allegations made by BM of torture, cruel, inhuman and degrading punishment on the other. That further certificate was provided on 5 September 2008.

The events since the second judgment

(a) The Habeas Corpus Proceedings before the US District Court

15. When we described the remaining dispute as one apparently in relation to "an issue of mechanics", the parties had not been in a position to draw our attention to the significance of the *Habeas Corpus* proceedings before the Honourable Judge Emmet G Sullivan in the United States District Court for the District of Columbia, because it seems that material information was classified and subject to a protective order of that court. Those proceedings had been filed in April 2005 and were, as we understand it, one of a number of proceedings in which lawyers on behalf of those detained in Guantanamo Bay sought to challenge the legality of their detention under *Habeas Corpus*. One of these cases, *Boumediene v Bush* was argued before the Supreme Court of the United States and decided on 12 June 2008 547 US … (2008). The majority decision enabled those seeking *Habeas Corpus* to continue with their applications.

16. On 30 July 2008 Judge Sullivan ordered a status conference on the case to take place on 22 September 2008. On 12 August 2008 the respondent to the *Habeas Corpus* proceedings, various persons in the United States Government, gave notice of filing an amended factual return; at that stage the document remained subject to restrictions.

At the status conference on 22 September 2008 Judge Sullivan directed that the United States Government disclose exculpatory material held by any part of the United States Government by 6 October 2008.

17. On 6 October 2008 three events occurred. First, the United States Government gave notice filing a redacted portion of the amended return in those proceedings. This is an important document.

i) It set out the case of the United States that BM is detained on various grounds, including his association with Al-Qaida, including training in Afghanistan, subsequent training in explosives and the allegation that he met with others to plan various attacks against the United States including a dirty nuclear bomb plot, exploding a gas tanker and releasing cyanide gas in nightclubs.

ii) The return makes clear that the factual basis for BM's detention was supported by numerous documents, but primarily documents from two sources – (1) interviews of BM known as Criminal Investigation Taskforce reports and (2) BM's statement provided to a law enforcement officer running to some 21 pages. With extensive redactions these are exhibited to the amended return.

iii) The Criminal Investigation Taskforce documents bear dates between 24 September 2004 and 18 November 2004

iv) BM's statement was taken between 28 and 31 July 2004. Much of the statement is either in BM's own hand or initialled by him. We would point out that it was taken shortly after he had been transferred to Bagram. This was after the period which is agreed to be a period of over 2½ years of incommunicado detention without access to a lawyer and during which BM alleges he was tortured.

v) Having now had the opportunity of reading these statements and interviews, they serve to confirm the conclusion that we set out at paragraph 147 (i) of our first judgment that there was plainly a case for BM to answer if the confession was voluntary. But that conclusion also serves to reinforce our view that the 42 documents are essential to his defence as they do lend some independent support to parts of his case about the treatment to which he was subjected and which led him, as he alleges, to make the confessions.

vi) The importance of this is underlined by the following extract on the penultimate page of BM's statement:

> "Q. Have you made this statement of your own free will, without benefit, promise or reward?
>
> A. Yes. BM
>
> Q. Has the interviewing agent promised you anything?
>
> A. No. BM

Q. Has the interviewing agent treated you fairly, humanely, with respect and decency?

A. Yes. BM

Q. During your interviews with the interviewing agent have you been provided and/or offered food, beverage and toilet facilities?

A. Yes. BM

Q. Have you been treated well since you have been in U.S. Military custody?

A. Yes. BM

Q. While in U.S. Military custody have you been treated in any way that you would consider abusive?

A. No. BM

Q. Has your ability to practice your religious beliefs been prevented since you have been in U.S. Military custody?

A. No. BM

Q. What would you say is your current state of health?

A. I feel healthy. BM

Q. While in U.S. Military custody, have you had access to medical care?

A. Yes. BM

Q. Are you willing to assist the U.S. Government by providing co-operative testimony and/or information during judicial proceedings and/or other legal processes?

A. I still haven't made up my mind. BM

Q. Has your co-operation thus far been of your own free will without benefit, reward or promise?

A. Yes. BM

Q. Is the information contained in this statement the truth?

A. Yes. BM"

vii) Whether or not these were carefully phrased questions, they plainly are intended to make clear to a court (whether civilian or military) reading the documents that the statement was voluntary and therefore admissible against BM.

18. The second event on 6 October 2008 was the filing of a notice by the United States Government that it was no longer relying on part of the narrative set out in the factual return, namely the allegations relating to the plans to launch a terrorist attack in the United States.

19. The third event on 6 October 2008 was that the United States Government disclosed 7 documents of the 42 under the terms of a protective order. As we shall explain at paragraph 25, we have not seen these documents, or been permitted by the United States Government, despite the efforts of the United Kingdom Government, to know which of the 42 documents they are. The evidence before us given by BM's lawyers is that they have been heavily redacted. As the documents have been seen by BM's lawyers under conditions of secrecy stipulated in the order of the United States Federal District Court, they are unable to provide us with details of the redactions. The fact that there are redactions is especially important as a document filed on 8 October 2008 in the *Habeas Corpus* proceedings makes clear that the documents have been provided in this format to the Convening Authority.

20. Judge Sullivan gave BM's lawyers until 20 October 2008 to bring to his attention any documents they consider necessary properly to defend BM. The fuller status conference is fixed for 30 October 2008.

(b) The resignation of Lt Col Vandeveld

21. It was clear from the documents provided to us in the hearings in late August 2008 that the military prosecutor with a significant role in the day to day conduct of these proceedings was Lt Col Vandeveld. He has since that hearing requested to resign from the Office of Military Prosecutors. In a statement dated 22 September 2008 made in other proceedings, *United States v Mohamed Jawad*, he has set out the reasons specific to that case for his resignation, but has made clear that he has been highly concerned about the procedures for affording defence counsel discovery in cases before the Military Commissions and the failure to provide potentially exculpatory material. He gave an example of the information he had disclosed – relating to the placing of Mr Jawad in what was described as a "frequent flyer programme" - but added that his personal practice was not universally followed at the office of military prosecutors. The reference to a frequent flyer programme is a euphemism for a sleep deprivation programme. This is a practice which the United Kingdom expressly prohibits – see paragraph 9 (i) of our first judgment.

(c)The ability to use the documents disclosed in the Habeas Corpus proceedings in the proceedings before the Convening Authority

22. The evidence of Mr Stafford Smith was that he had initially been told that the US Government would work with BM's lawyers to find a way of moving documents

provided at a secure facility for the *Habeas Corpus* proceedings to the secure facility used in the military commission proceedings.

23. It seemed to us that this might address the issue of "mechanics" which was how we had described what was needed to overcome the issue over the provision of the documents for use before the Convening Authority under provisions of United States law rather than by order of this court. We could readily understand why the Government of the United States favoured such a course.

24. However on 16 October 2008, the United States Government stated in an e-mail:

> "The Government cannot consent to you sharing the 7 documents or information contained therein provided in the context of the habeas litigation with LTC Bradley for use in the military commission proceedings. Any access by LTC Bradley to the documents provided with regard to the habeas litigation must be through the habeas case and consistent with the terms of the habeas protective order, which limits use of the information for purposes of the habeas litigation only. For LTC Bradley to have access to the documents for purposes of the habeas case, she must comply with the prerequisites for access to classified information under the habeas protective order. She must enter her appearance in the habeas case, her clearance must be verified by the court security officers, and she must execute and file an appropriate MOU/Acknowledgement with the Court. Of course, as you are aware, LTC Bradley's access to those documents and in the context of and for purposes of the military commission proceedings has been addressed separately in that context."

(d) The information provided to the court about the 7 documents and the redactions

25. It became apparent to us at a directions hearing we held on 7 October 2008 that it was likely that difficulties might arise if we could not be told in camera what documents had been provided to Judge Sullivan. We asked the United Kingdom Government if this could be resolved with the United States Government. Despite the efforts of the United Kingdom Government, it is clear a decision has been taken by the United States Government not to supply this information to this court.

(e) The withdrawal of charges by the United States Government

26. On 21 October 2008, we gave notice to the parties of our intention to hand down this judgment on 22 October 2008. Shortly after we had given that notice we received a letter from BM's English solicitors setting out developments that had occurred on 20 October.

i) There was a direction of the Covening Authority signed by Susan J Crawford which stated:

> "The recommendation of the Legal Adviser in the Military Commission case of [BM] is approved. All charges and specifications are dismissed without prejudice."

ii) Mr Michael C Chapman, Legal Adviser to the Convening Authority for Military Commissions provided an advice also dated 20 October 2008. This advice referred to the charges and stated that the maximum punishment that might be imposed is confinement for life. The advice then went on to state:

> "A new team of trial counsel has taken over the case and they need to review all the available material for potential discovery and to assess any potential impact on national security. Also, the government continues to seek release authority for additional information that is essential to litigation. I find the prosecution has been unable to complete its preparation for this case. For these reasons, it is premature for me to offer an opinion on whether the specifications allege offenses under the [Military Commissions Act], whether the allegation of each offense is warranted by the evidence, whether a military commission would have jurisdiction over the accused and the offense, or whether trial of the charges would be harmful to national security. Therefore, I conclude that dismissal of charges without prejudice is appropriate."

iii) The advice concluded by stating that he recommended to the Convening Authority that the charges and specifications were dismissed without prejudice.

iv) As we understand it, a dismissal without prejudice is a dismissal without prejudice to the prosecutor's rights to refer further charges.

v) Lieutenant Colonel Bradley was informed by the new prosecutors that they intended to refer new charges in about 30 days.

(f)Other matters before the Convening Authority

27. We refer in an annex (which it is not possible to make public now but which we will make public as soon as we can) to other matters before the Convening Authority.

The case made by BM for immediate disclosure

28. On behalf of BM Miss Rose QC submitted that the only way in which the documents would be provided for use before the Convening Authority for the purposes of its decision to refer and other matters, was by order of this court. Her submissions (developed during the course of the hearing last week as more evidence became available and yesterday, 21 October, in the light of the information received as to the dismissal of the charges without prejudice as set out at paragraph 26 above) was that it could be inferred that the only reason why the United States Government had withdrawn the allegations in respect of the "dirty bomb plot" from the *Habeas Corpus* proceedings and subsequently on 20 October 2008 obtained dismissal without

prejudice of the charges before the Military Commission was to avoid disclosure of the remainder of the 42 documents. She relied upon:

i) The way the allegations in relation to the dirty bomb plot had been treated. As we have set out they had originally been contained in both the answer to the *Habeas Corpus* application and the charges before the Military Commission. They were only abandoned on 6 October 2008 at a time when the United States Government made available 7 of the 42 documents. No explanation was given.

ii) The documents had been heavily redacted (see paragraph 19 above); the assurance given to this court was that the redactions would be limited to names of officials and locations of intelligence facilities (see paragraph 10.ii) above). As so much had been redacted, there was a strong case that the assurance had not been honoured.

iii) There was no good reason why the United States Government could not inform the United Kingdom Government which 7 of its 42 documents had been made available to BM's lawyers in the *Habeas Corpus* proceedings and what was the extent of the redactions.

iv) There was no explanation for what was submitted to be the extraordinary conduct of the United States Government in obtaining the dismissal without prejudice of the charges against BM. The charges had been brought over 6 years after his initial arrest and just under 4 years after his alleged confession. Over 3 months had elapsed since the United States Government had been provided by the United Kingdom Government with the 42 documents.

29. It was submitted that the court could not therefore rely on the *Habeas Corpus* proceedings as being a route by which disclosure of the 42 documents could be provided so that BM could use them to make submissions to the Convening Authority when they considered whether charges should be referred and discharged their other functions. Furthermore the withdrawal by the United States Government of the dirty bomb plot allegations so as to avoid disclosing the 42 documents strongly supported BM's submissions that assurances given by the United States Government could not be relied upon to disclose the documents in a timely manner and that the United States Government would do all it could to avoid disclosure.

30. It was also submitted that, given what the United States Government was doing and given that their conduct underlined the overall submission that torturers do not readily hand over evidence of their conduct (see paragraph 126(i) of our first judgment), this court had to order the immediate provision of the documents to BM's lawyers, including Lieutenant Colonel Bradley, who had top secret clearance on terms as to their use.

31. The allegations made by Miss Rose QC, grave as they are, cannot be dismissed as fanciful. There is a clear evidential basis for them and they call for a detailed explanation. Where such allegations are made against a person not party to the proceedings, fairness would dictate that we give notice to that party and give them an opportunity of comment (see *Rustenberg Platinum Mines v Pan American Airways* [1977] 1 Lloyd's Rep 564 at pages 570-571.

32. However, in this matter these serious allegations are made against the Government of a foreign friendly State and our oldest and closest ally. We therefore asked whether there was any precedent for such a situation. We have not been told of any. Nor has any explanation been provided by the Government of the United States. There has been ample time. The suggestion made by the United Kingdom Government that a large number of questions be answered by BM's lawyers before any questions were asked of the United States Government would only serve to compound the delay, given the course we have decided to adopt.

The submission of the United Kingdom Government

33. It was the submission of the Foreign Secretary that we should not reach any conclusions on the submissions made by Miss Rose QC, but stay the matter pending the status conference before Judge Sullivan on 30 October 2008.

Our decision

34. In our view, despite our real concern about the matters raised by Miss Rose QC, the appropriate course is to stay the proceedings until after the outcome of the status conference before Judge Sullivan on 30 October 2008.

(a) The role of the United States Courts

35. BM is held in the custody of the United States at Guantanamo Bay. It is clear on the evidence we have seen that since his initial detention on 10 April 2002 the Government of the United States has had effective control of his custody, even though other Governments may have acted on their behalf.

36. BM is detained as an enemy combatant in the "war on terror"; we understand that he is so held on the authority of the President of the United States as Commander in Chief under the war powers of the US Constitution and other legislative provisions. The legality of that detention, considering he has been detained for over 6 years without trial, is being challenged in the *Habeas Corpus* proceedings before Judge Sullivan.

37. BM was charged under the United States Military Commissions Act; those charges were dismissed without prejudice on 20 October 2008; the decision as to how to dispose of any new charges is a decision to be made under that Act. If BM is sent for trial, he will be tried by a military commission under that Act.

38. In our view the challenges made to the conduct of the United States Government and the legality of its actions should, save in the most exceptional circumstances, be determined by the judiciary of the United States.

(b) The issues

39. It is against that background that we have to address the submission of the United Kingdom Government that we should stay the matter until Judge Sullivan has had an opportunity of considering the issues relating to the provision of the 42 documents. In particular, these issues include:

i) Why only 7 of the 42 documents have been provided

ii) The reasons for the redaction

iii) The making available of the 42 documents to BM's lawyers for use before the Convening Authority in relation to any decision it may make to refer to trial and in the discharge of its other functions.

(c) The provision of the7 documents

40. As we have explained,

i) Our closed judgment sets out the passages in the 42 documents we consider relevant to the allegation made by BM that his confession had been the result of conduct that amounts to torture or cruel inhuman or degrading treatment (see paragraph 6 above).

ii) The open judgment, as we have emphasised, contains only part of our reasons why we considered the information held by the United Kingdom Government and contained in the 42 documents is essential if BM is to have a fair trial and a fair consideration of his case by the Convening Authority (see paragraph 8.iii) above).

We came to the view that the documents were relevant to all the charges made – both those relating to the dirty bomb plot and the allegations of participating in the war in Afghanistan and associating with Al Qaida.

41. We have considered with the assistance of counsel in closed session whether the decision to provide only 7 can be explained on the basis that only 7 documents provide exculpatory evidence that supports BM's account. We are satisfied that that cannot be so. In any event all the documents need to be read in sequence to see the proper context. As the United Kingdom Government has made clear since the time when the documents were found and sent to the United States Government in June 2008, all are relevant and potentially exculpatory. We agree with that view and our view is reinforced by reading BM's confession and interviews.

42. We have also considered whether it could be argued that some of the documents are material only to the dirty bomb plot and others are material only to the allegations of association with Al Qaida and training in Afghanistan. We are quite unable to find any basis upon which such an argument can be advanced. The confession made by BM goes to both aspects. The documentation, which lends some support to his claim that the confession was obtained after a period of 2 years incommunicado detention during which he was tortured and subject to cruel inhuman or degrading treatment, applies to all parts of the confession.

43. We have set out at paragraph 17.vi) an extract from his confession. This makes it clear that when he signed that statement he accepted that he had been properly treated when in US Military Custody. Almost all of the allegations made by BM relate to the period prior to his transfer to Bagram in May 2004 when he was transferred to the custody of the US Military. Thus if this statement is to be relied on, as we assume it is, to show that the confession was voluntary, we would take the view, based on our

understanding of fundamental principles of the common law shared by our two nations, that fairness and justice demand that the 42 documents be made available as they are the only independent support in some material particulars for BM's case that the confessions were induced in the manner he alleges. A refusal to disclose would in the circumstances now made clear to us by the provision of BM's statement form the basis of a powerful contention that the prosecutors were not acting in good faith in discharging their duties to the Court.

44. We understand that Judge Sullivan will be able to see all 42 documents. He will receive the benefit of an answer from the United States Government (denied to us) as to why only 7 documents have been provided. There also may be an explanation for the abandonment of the dirty bomb plot allegation which is in fact wholly unconnected with the decision to disclose only 7 documents. The United States Government will also be able to explain to Judge Sullivan why after all this time the charges have been dismissed and are to be preferred again.

(b) The redactions

45. We do not know what redactions have been made. The 42 documents we have are without any redactions. As we have explained, the redactions were only to be of names of United States and United Kingdom intelligence personnel and the location of facilities. We have again reviewed the 42 documents. As there are only very few names mentioned and only one or two references to the location of any facility, we would have expected minimal redactions. It is possible that by the reference to names, the United States Government also intended to cover the code number of each agent; that is not how we understood the assurance, but a misunderstanding is possible. However, although that would account for more redactions, it would not explain the evidence that there were heavy redactions.

46. Judge Sullivan will be able to see the 42 documents. No doubt he will be provided with an explanation denied to this court by the United States Government of what has been done.

(c) Use before the Convening Authority

47. We have already expressed the view that the provision of the documents for use before the Convening Authority is a matter of mechanics.

48. Although we understand how the e-mail of 16 October 2008 could be read as a firm objection to the protective order being varied to permit the use before the Convening Authority, it could also be read as a refusal to give consent to that course, but leaving the decision to Judge Sullivan and making no positive objection. We have not been told what the case of the United States Government is. No doubt Judge Sullivan will be able to ascertain the position of the United States Government and to make the necessary decision.

49. Although this is in one sense an issue of mechanics, it is important to see this in the broader context of the issues relating to public interest immunity. In that context it is a far more serious matter. The stance taken by the Government of the United States is that it will reconsider the intelligence relationship with its oldest and closest ally if we, as a court in England and Wales, order the documents be provided to BM's

lawyers, to enable justice to be done. This stance is, we are told, being taken not because there is any desire to delay the provision of documentation that is potentially exculpatory, but because it wishes to do so under the procedures of the Courts and Tribunals of the United States. Thus this "issue of mechanics" could affect the national security of the United Kingdom, if we were to order disclosure.

50. We expressed the view at the hearing on 26 August 2008 that we could not understand why a means could not be found of providing the documents to BM's lawyers for use before the Convening Authority. There would now appear to be a means under the United States' own procedures. This is an issue that will be before Judge Sullivan. On our present understanding of the situation, Judge Sullivan is best placed to resolve these issues, to devise a mechanism for appropriate disclosure and to bring this dispute to an early and just resolution.

(d) Delay

51. Miss Rose QC pointed out in her oral submissions that BM has been in detention for over 6½ years without trial, his mental health is deteriorating and the Convening Authority was about to make its decision. Plainly the decision will not be made until new charges are submitted.

52. However, we have no doubt that the delay will be at the forefront of the consideration by Judge Sullivan. We note that in *Boumendiene v Bush* the majority opinion of the Supreme Court and the concurring opinion of Souter J made clear the importance of delay. Souter J said at ....

> "A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years, *ante,* at 66 (opinion of the Court). Hence the hollow ring when the dissenters suggest that the Court is somehow precipitating the judiciary into reviewing claims that the military (subject to appeal to the Court of Appeals for the District of Columbia Circuit) could handle within some reasonable period of time. "

53. As to the imminence of the Convening Authority making a decision to refer the charges, we had understood that it had agreed to the postponement of its decision. The position is now different. In view of our hope that all outstanding issues can be resolved at the hearing before Judge Sullivan and the changed position in relation to the charges, a further delay, we would suggest, cannot but be in the interests of justice.

Conclusion

54. We therefore accept the submission of the United Kingdom Government that we should stay the matter for a defined period to allow the application to proceed before Judge Sullivan. We will hear the parties on the length of that period. In the light of his decision, the issue may become academic. If not we will have the benefit of understanding the position of the United States Government and the benefit of Judge Sullivan's views when we proceed to determine the remaining issues in relation to the provision of the 42 documents. These issues include Miss Rose QC's submission that

the Government of the United States is deliberately seeking to avoid disclosure of the 42 documents.

55. We must record that we have found the events set out in this judgment deeply disturbing. This matter must be brought to a just conclusion as soon as possible, given the delays and unexplained changes of course which have taken place on the part of the United States Government.

Restoring the redacted paragraphs of our judgment

56. We heard argument in camera on the issue to which we referred at paragraph 7. The issue can be described as whether we should restore to our open judgment seven very short paragraphs amounting to about 25 lines in which we provided a further summary of the circumstances of BM's detention in Pakistan and the treatment accorded to him as referred to in paragraph 87(iv) of our judgment. This arose in the context of the allegation that BM had been subjected to torture and cruel, inhuman and degrading treatment and the scope of the offences to which we referred in paragraph 77 of our first judgment.

57. Although the argument took place in closed session, the issue is one of considerable importance in the context of open justice and we will in due course deliver an open judgment on the issue. We have asked the parties to consider whether, before we decide this issue, we should invite submissions in writing from the media in view of the importance of the issue to the rule of law.