Neutral Citation Number: [2009] EWHC 2973 (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: 19/11/2009

Before :

LORD JUSTICE THOMAS
and
MR JUSTICE LLOYD JONES

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Between :

The Queen on the Application of Binyam Mohamed	**Claimant**
- and -	
Secretary of State for Foreign and Commonwealth Affairs	**Defendant**

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- -

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, Kate Annand and Alex Gask (instructed by **Finers Stephen Innocent LLP**) for **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

Approved Judgment 6

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Lord Justice Thomas:

1. This is the sixth open judgment of the court.

Handing down fifth judgment

2. On Friday 9 October 2009 we made our fifth judgment available in draft to the Security Services for checking in accordance with the initial order of Sullivan J, making clear that we wanted a response by the following Tuesday or Wednesday and that we would hand down the judgment on Friday 16 October 2009. On Wednesday 14 October 2009, shortly before the scheduled hand down, we were told that the Security Services had expressed concerns and considered that certain passages in the draft judgment should not be made public on grounds of national security. It was not until noon on Thursday 15 October 2009 that we were advised which passages it was considered should be redacted. It was accepted, at that time, by the Foreign Secretary that the passages in question are crucial to our reasoning. Indeed, we take the view that the reasons why we reached our conclusion cannot be fully understood without these passages.

3. There was, however, insufficient time for matters relating to the proposed redactions to be argued in advance of the hand down. In those circumstances, with the agreement of the parties, we handed down the judgment in a redacted form pending further argument and our further ruling on the matter.

4. The handing down of the judgment in that redacted form was an interim measure. At the hearing on 16 October 2009 we gave directions to enable us to decide the remaining issues:

   i) The question whether the redacted passages in the fifth judgment should be made public.

   ii) Permission to appeal and any terms on which it should be granted.

   iii) An application that the entirety of the fifth judgment be provided to counsel and solicitors on the basis of a "confidentiality club".

   iv) Costs.

We did so with the consent of counsel for the Foreign Secretary and set the timetable to accommodate the timing the Foreign Secretary then desired. We sent out a draft order embodying those directions that evening asking for responses by close of business on Monday 19 October 2009. The Foreign Secretary asked for more time and we received his submissions on Tuesday 20 October 2009. In the light of those further submissions from the Foreign Secretary we reconsidered the agreed directions.

5. The Foreign Secretary stated in his further submissions of 20 October 2009 that he did not wish to address to this court any further submissions on the redaction issue beyond those set out in that document. He submitted that, if this court rejected those it should find against the Foreign Secretary, without requiring any further hearing, and stay the disclosure of the passages pending an appeal. In addition the Foreign Secretary stated that he did not intend to submit "any further evidence" on the reasons justifying the redactions of the passages in question from the fifth judgment. The other parties objected to the Foreign Secretary's stance.

6. We agreed with the other parties. We were surprised that, having obtained interim relief, the Foreign Secretary was not prepared either to produce evidence or address argument to us to support his contention that the redacted passages might reveal the content of the seven paragraphs redacted from our first judgment and that placing them in the public domain would give rise to damage to national security. We considered that it was not open to the Foreign Secretary to withdraw from this issue or to reserve his submissions and evidence for the Court of Appeal on any appeal. Subject to considerations of confidentiality and national security, the other parties were entitled to be given the opportunity to respond to the Foreign Secretary's case, particularly in the light of our decision on the confidentiality club set out at paragraphs 18-24 which we made known to the parties on 26 October 2009.

7. In the light of those conclusions, we considered that it was important for us to test the argument on the Foreign Secretary's submissions and to try and see if we could employ some other wording in the judgment which could express more of our reasoning without endangering the concerns on grounds of national security advanced by the Foreign Secretary. We considered that it was for us, as authors of the judgment, to attempt to do this in the first instance.

8. In these circumstances, we were not prepared to dismiss summarily the Foreign Secretary's application that the fifth judgment be redacted, subject to a stay pending his application to the Court of Appeal. We wished to consider, as we have set out above, whether we could put more into the public domain with a view to expanding the scope of open argument before the Court of Appeal. We provided the parties with a note of our decision on this on 26 October 2009 and gave further directions. In accordance with those directions we received further submissions. We indicated we might need a further short hearing, but in the event it has not proved necessary.

The redactions

9. The Foreign Secretary accepted on 20 October 2009, in the light of submissions that he had received from the Special Advocates prior to the handing down of the judgment in a redacted form, that the redactions in the fifth judgment as handed down were more extensive than was required. He agreed that there could be no objection to the publication of the following passages which were previously redacted:

Paragraph 38(iv):
"One of those memoranda dated 1 August 2002, from Mr. J. S. Bybee, Assistant Attorney-General, to Mr. John Rizzo, acting General Counsel of the Central Intelligence Agency, made clear that the techniques described were those employed against Mr. Zubaydah, alleged to be a high-ranking member of Al-Qaida"

Paragraph 79(vii):
"As the paragraphs relate to the actions of the United States itself, disclosure of the redacted paragraphs is consistent with the publication of the CIA interrogation technique memoranda (to which we referred at paragraph 38(iv) and does not publicise any information about foreign States."

10. The Foreign Secretary, however, maintained (in his further submissions sent then and on 28 October 2009) his position that four passages should remain redacted - the remaining part of paragraph 38(iv), paragraph 74(ii), part of paragraph 81 and part of paragraph 102. No new evidence was relied upon.

11. We set out in our fifth judgment our reasons for rejecting the contentions of the Foreign Secretary that the seven redacted paragraphs in the first judgment should remain redacted for reasons relating to national security. It must follow that for the same reasons, we reject the argument that the four passages should be redacted from the fifth judgment on the basis of national security.

12. The other basis on which the argument was advanced by the Foreign Secretary is that the four passages in the fifth judgment indicate what is in the seven paragraphs redacted from the first judgment. We assume for these purposes, contrary to the decision we reached in our fifth judgment, that what is in the seven redacted paragraphs of the first judgment should remain redacted for the reasons of national security argued before us by the Foreign Secretary.

13. Nonetheless we consider that the four passages redacted from our fifth judgment should be disclosed, even if the seven paragraphs from the first judgment should remain redacted. Our reasons are as follows:

    i) Our existing public judgments make clear:

        a) The seven paragraphs redacted from the first judgment contain a short summary of our closed judgment (see paragraph 4 of our revised first judgment).

        b) Those seven paragraphs include a short summary of reports of the treatment accorded to BM by officials of the United States Government during his unlawful and incommunicado detention in Pakistan in April and May 2002 (see paragraph 14 of our fourth judgment).

        c) That was the period during which he was interviewed by the United States Officials and was refused access to a lawyer (see paragraphs 15 and 87(iv) of our first judgment).

d) What is contained in those seven redacted paragraphs gives rise to an arguable case of torture or cruel, inhuman and degrading treatment (see paragraph 22 of our fourth judgment).

e) The reports so summarised in those seven redacted paragraphs are admissions by officials of the United States Government as to BM's treatment by them (see the same paragraph).

f) There is nothing in those seven redacted paragraphs about actions by the Government of Pakistan (see paragraph 79 (vii) of our fifth judgment)

ii) It is also important, once again, to emphasise the nature of the content of what is in the seven paragraphs redacted from our first judgment and withheld from the public domain:

a) The seven paragraphs simply contain a short summary of the treatment of BM in April and May 2002 and our conclusion on its characterisation.

b) There is therefore nothing secret or of an intelligence nature in the seven paragraphs redacted from the first judgment. In providing the summary of the treatment of BM in those seven redacted paragraphs, we were not in the judgment "giving away the intelligence secrets of a foreign country" or making public "American secrets".

c) The claim to redact the information about BM's treatment was advanced on the basis that the summary of BM's treatment in the seven paragraphs redacted from our first judgment is contained within communications between intelligence agencies which must always remain secret or confidential, unless the originator of the communications consents. Of itself, the treatment to which BM was subjected could never properly be described in a democracy as "a secret" or an "intelligence secret" or "a summary of classified intelligence".

iii) The entire content of the four passages redacted from the fifth judgment is already in the public domain. No contention has or could be advanced to the contrary.

iv) In the period between the handing down of our fourth and our fifth judgments, much was put into the public domain by the United States Government in 2009 about the actions of officials of the United States Government. Of greatest significance were the memoranda made public on 16 April 2009 – see paragraph 38(iii) of our fifth judgment.

v) It was argued by BM and the media that the putting of these memoranda into the public domain not only demonstrated that the position of President Obama was different to that of President Bush, but also that there could be no proper objection to putting into the public domain details of the actions of United States officials in relation to BM when interrogating him, as President Obama

had put details of interrogation techniques into the public domain. This argument was addressed in the CIA letter of 30 April 2009 in the sixth paragraph quoted at paragraph 79 (vii) of our judgment.

vi) The redactions to our fifth judgment essentially set out our reasoned decision on these arguments. They are central to an understanding of our judgment. Although the Foreign Secretary had accepted that the four passages in our fifth judgment were "essential to the court's reasoning" (see paragraph 20 of his submissions of 20 October 2009), it was contended in his submissions of 28 October 2009 that the court's reasoning clearly emerged from the judgment handed down in redacted form. We reject this new submission by the Foreign Secretary. His first view was plainly correct. We consider the four redacted passages essential to the reasoning of our fifth judgment.

vii) We consider the four redactions from our fifth judgment viewed sensibly do not put the content of the seven paragraphs of our first judgment into the public domain anymore than is obvious from what has been argued before us and what is already in the public domain and well known.

14. We therefore will finalise our fifth judgment with the four redacted passages restored to it. However, as the Foreign Secretary has made clear that he intends to appeal against our decision on the redactions from the fifth judgment, we will reissue our judgment for the public with only the passage to which he originally objected, but to which he does not now object, restored; the remaining four passages will remain redacted in the public version of the judgment to abide the decision of the Court of Appeal.

15. Nonetheless, in order to assist the understanding of our judgment in these circumstances and for the benefit of the open argument on the appeal, we drafted passages that summarise the gist of what we set out in the four redacted passages in a way to which we considered no objection could be taken. We sent these in draft to the Foreign Secretary and to the Special Advocates on 9 November 2009.

16. We were informed by the Special Advocates that they could not improve upon the gist if an alternative had to be found to inclusion of the four contentious passages. We were also informed by the Treasury Solicitor that there were no objections to the gist on national security grounds.

17. We have therefore incorporated a further part of paragraph 38(iv) and paragraph 79(vii) (as the Foreign Secretary has withdrawn his objections) and the following gist into a revised version of our fifth judgment as redacted.

A: paragraph 38 (iv): The redacted passage is a verbatim quotation from the memoranda made public on 16 April 2009 illustrating the detail of what is set out in the memoranda.

B: paragraph 74(ii): The redacted subparagraph explains that what is in the redacted paragraphs is akin to what is already public.

C: paragraph 81: The redacted passage explains (1) the relationship of what has been placed into the public domain to what is in the redacted paragraphs, (2)

why in the light of that relationship it is impossible to believe that President Obama would take action against the United Kingdom and (3) why publication of the redacted paragraphs is necessary to uphold the rule of law and democratic accountability.

D: paragraph 102: The redacted passage explains the reasons why the position is different because of the action of President Obama in releasing the memoranda (at paragraph 38(iv) above) and because the redacted paragraphs do not refer to anything about actions of authorities of the State of Pakistan (as set out at paragraph 79. vii).

Confidentiality club

18. At the hearing on 16 October 2009 counsel canvassed with the court the possibility of the disclosure of the redacted passages in the fifth judgment to counsel and Mr. David Rose, who acts in person, subject to undertakings of confidentiality. We have now had the advantage of considering the further submissions on this matter.

19. BM submits that without sight of the redactions, which are crucial to the court's reasoning, it will be impossible for him to make any meaningful response to the proposal to redact or on any appeal. Accordingly, he proposes that there be a confidentiality ring. This proposal is supported by Mr. Vassall-Adams on behalf of the United Kingdom media.

20. Mr. David Rose is willing, with considerable reluctance, to contemplate participation in a confidentiality ring.

21. Such disclosure is opposed by the Foreign Secretary. First he refers to an earlier proposal that the seven paragraphs redacted from the first judgment be disclosed on undertakings of confidentiality which was refused by the court. Secondly, he submits that nothing could be achieved by disclosing to the other parties the redacted passages of the fifth judgment in isolation.

22. Contrary to the Foreign Secretary's submission, we do not consider that this issue has already been determined by our earlier refusal to permit disclosure on undertakings of confidentiality. The present circumstances are very different. In particular, although nothing in the seven paragraphs redacted from our first judgment was of an intelligence nature (as set out at paragraph 13ii) above), we are not concerned here with anything which was set out in intelligence communications or in any closed evidence.

23. However, we see force in the Foreign Secretary's submission that, so far as argument on the proper scope of the redactions is concerned, there would be no purpose in disclosure of the four redacted passages in the fifth judgment unless the recipient also had access to the seven redacted paragraphs of the first judgment, so as to permit comparison and a response to the Foreign Secretary's objection. The seven redacted paragraphs of the first judgment are, of course, subject to a claim for public interest immunity, which, although it has failed before this court, the Foreign Secretary has indicated he wishes to pursue on an appeal. Furthermore, if the four redacted passages in the fifth judgment do, as the Foreign Secretary contends, reveal the content of the seven redacted paragraphs of first judgment more than is already in the

public domain and if we are, in due course, held to be wrong in our rejection of the claim for public interest immunity, disclosure even on a confidential basis would not be in the public interest. In these circumstances, we do not propose to order disclosure of the four redactions to the fifth judgment on undertakings of confidentiality.

24. We appreciate that this means that BM, the media and Mr Rose will be hampered in making effective submissions, although we hope that the gist provided will ameliorate that position. It nonetheless remains a matter of real concern to us that BM, the media and Mr Rose have been denied full access to our reasoning, but the Court of Appeal can always reconsider our conclusion on confidentiality.

Permission to appeal

25. The Foreign Secretary seeks permission to appeal and submits that an appeal has now become a matter of urgency and that it should be expedited.

> " Whereas the intelligence liaison situation that pertained following the Court's 4th Judgment of 4 February 2009 was manageable by HMG, as the Court had upheld the Defendant's PII certificates against disclosure, the effect of the Court's 5th Judgment, in particular its conclusion that court ordered disclosure does not breach the principle of control of intelligence, and the substitution of its own views for those of the Secretary of State on the risk to national security, has been to increase the level of concern and uncertainty in the field of intelligence sharing, and goes directly to the United Kingdom's national security." (Foreign Secretary's submissions of 20th October 2009, paragraph 5)

26. The urgency of the appeal must be a matter for the Court of Appeal. It would not be appropriate for us to comment in any way on the statement of Mr Manley dated 28 October 2009. However, we agree for other reasons that it is in the public interest the appeal should be heard as soon as it can conveniently be heard.

27. The International Media submit that we should not grant permission to appeal. We do not accept this submission. The issues raise important points of principle which we consider ought for that reason to be heard by the Court of Appeal.

28. There is the further issue as to whether we should impose a condition as to costs. It is submitted on behalf of BM that permission to appeal should only be granted on the basis that his costs be paid in any event. The submission is made on the basis that where a public body has lost a case and wishes to pursue an appeal to obtain the authority of an appellate ruling, then the public body ought to be granted permission only on the basis that it pays the costs in any event. Reliance was placed on the judgment of Elias LJ in *Weaver v London & Quadrant Housing Trust* [2009] EWCA Civ 235.

29. The Foreign Secretary submits in reliance on the decision of the Supreme Court in *R(E) v Governing Body of JFS* [2009] UKSC 1 that BM should apply first to the LSC. He suggests that, if BM and his lawyers do not want to accept funding at the level provided by the LSC that is a matter for BM and his legal advisers.

30. We have been provided with no details as to the terms on which the LSC would be prepared to fund an appeal and so cannot assess whether there is any reason on this basis for making an exceptional costs order.

31. Secondly, the proceedings in this case were begun by BM with legal aid; as this is an appeal arising out of a legally aided action, there is no good reason for making an order without first ascertaining the view of the LSC.

32. As we have no details of the view of the LSC or of any funding offered by the LSC, it is premature to require the Foreign Secretary to pay BM's costs.

33. We will therefore grant permission on the basis that it is open to BM to apply to the Court of Appeal once the position of the LSC is known. We also grant permission to appeal from this judgment.

Costs of the action

34. The Foreign Secretary had agreed to pay the costs of BM up to 5 September 2008, with no order as to costs thereafter. BM's costs up to 15 September 2008 amounted to £189,113.57. An interim payment of £110,000 was requested. The Foreign Secretary agreed that an interim payment made within 14 days was appropriate. The sole issue was the amount of that payment. Each party put forward offers.

35. We have reviewed the figures and consider that an interim payment of £85,000 should be made within 14 days.

36. BM applies for his costs after 16 October 2009. It seems to us that as he has succeeded on the redaction issue, he ought to have the costs of that issue, but not the costs relating to the issue of the permission to appeal. As regards the costs of permission to appeal we consider that there should be no order.