

CO/4241/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 29th July 2008

B e f o r e :

LORD JUSTICE THOMAS

MR JUSTICE LLOYD JONES

Between:

BINYAM MOHAMED

Claimant

v

SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

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(Official Shorthand Writers to the Court)

Ms Dinah Rose QC and Mr Ben Jaffey (instructed by Messrs Leigh Day & Co) appeared on behalf of the **Claimant**

Mr Pushpinder Saini QC and Ms Karen Steyn (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

Mr Thomas De La Mare and Mr Martin Goudie (instructed by SASO) appeared as special advocates for the Claimant

Mr Duncan Penny (instructed by Kingsley Napley) appeared on behalf of **Witness B**

OPEN PROCEEDINGS
(Evidence of Witness B)
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(11.10am)

LORD JUSTICE THOMAS: Ms Rose, I am very sorry for the delay that has occurred. It has almost entirely been caused by the fact that the court service failed to provide either a microphone or a stenographer to enable the evidence to be recorded. In accordance, a stenographer has not come but I was not prepared to proceed with this part of the case without an accurate transcript of what was said. I am very, very sorry bearing in mind your personal position, that the incompetence of others has led to this.

Ms Rose, the witness is here. He has affirmed. I merely wanted to ask you one question: I have been told that you may wish to put the allegation in relation to what your client says was said to the agent about where he went to be taken. Is that right?

MS ROSE: Yes, with your Lordship's permission.

LORD JUSTICE THOMAS: I think, out of an abundance of caution, bearing in mind the uncharted waters in which we are, that I should warn the witnesses in those circumstances, and I hereby warn him, that if a question was put to him which he feels might incriminate him, then of course he need not answer it.

MS ROSE: I am grateful. My Lord, before I start, can I also formally record that we would expect that this witness should not discuss his evidence or the case with anybody until the finishing of the closed cross-examination, because obviously there is going to be a interval of time --

LORD JUSTICE THOMAS: Well, that would be the ordinary rule and unless -- of course, at any stage an application can be made to the court to vary that but ordinarily that would be the rule and I would say so. But, of course, it is always in the court's power, if good reason is given, to permit certain matters to be raised by counsel or solicitors with him if that is explained to the court. It procedurally quite often happens.

MS ROSE: My Lord, can I then invite everybody to turn up open bundle 2, where we find witness B's witness statement. Witness B, can I ask you, do you have your witness statement open?

A. I do.

Q. And, if we just go to the first paragraph, you tell us that at the time that we are concerned with, which is of course May 2002, you were a member of the Security Service's international terrorism-related agent running section, which was the section routinely responsible for conducting interviews of terrorist suspects. Were you personally experienced in conducting interviews of terrorist suspects?

A. Yes, I was.

Q. And had you been trained in the conduct of these interviews?

A. I had been given training in carrying out interviews, yes.

Q. Including interviews of terrorist suspects?

A. The nature of my training was more general.

Q. And did it include training in the interviews of detainees?

A. No, it did not.

Q. Would you regard yourself as a conscientious and careful performer of your job?

A. Yes, I would.

Q. You explain to us, if we just turn over to paragraph 4, that before you travelled to Pakistan you would have reviewed the Service's record relating to Mr Mohamed and discussed the case with the investigative desks and line managers, so that you were clear about the areas in which the Service was interested. Now, it was very important, was it not, that you had full knowledge of the facts concerning Mr Mohamed before you went to interview him. Is that correct?

A. I would have endeavoured, under the circumstances, to possess myself of as many facts as possible. That is not to say that I would necessarily have been able to have gathered all the facts.

Q. No. Clearly there might be material that was not within the knowledge of the Security Service and that you could not get hold of, but conscientiously, it was an essential part of your job to acquaint yourself with as much information about Mr Mohamed as possible, was it not?

A. I would have done my best under the circumstances.

Q. Because, as any investigator or cross-examiner knows, knowledge is power, is not it? If you want to get information out of somebody, it is easier to do that if you know about them before you do. Is that not right?

A. In general that is the case.

Q. And, of course, as far as you were aware, there might be vital national security interests at stake relating to this interview, is that right?

A. That is correct.

Q. So would it be fair to say that you were very careful to ensure that you had fully apprised yourself of the available information before you went to Pakistan?

A. As I said, I would have done the best under the circumstances and in the time available.

Q. How much time was available.

A. I would have had some days to prepare.

Q. Well, two days or a week or how long are we talking about?

A. I cannot recall.

Q. If we go to paragraph 6 of your statement, you refer to some

limited material that has been identified in the possession of the Security Service and the Secret Intelligence Service relevant to Mr Mohamed's detention in Pakistan at this time and that is material that I know you appreciate that I have not seen. You understand what I am talking about, do you not?

A. I do.

Q. Now, obviously, I am not going to ask you to say anything that cannot be said in open and I would anticipate that this is a matter that Mr De La Mare may wish to pursue with you. You tell us that this material is addressed to you. You see that?

A. I do.

Q. And you say that you cannot recall if you read it at the time. It would be quite surprising in the circumstances if you did not read it at the time, would it not?

A. I do not recall whether I read it. That is the fact.

Q. But, given the circumstances we have just been through of what your job was and the care that you were taking to perform it conscientiously, would you agree with me that it would be quite surprising if you had not read it?

A. No, I would not agree.

LORD JUSTICE THOMAS: Ms Rose, the word recall has two meanings: it could mean he does not now recall but there can be, "well, I do not actually remember it but my usual practice would be", and you may wish to clarify that in questions with the witness.

MS ROSE: I am grateful, my Lord. Did you catch the drift of what Lord Justice Thomas was saying there?

LORD JUSTICE THOMAS: I think you should put it rather than assuming I have -- that was there any suggestion to you, since it sometimes happens in cross-examination of witnesses as to what is meant by recollection, whether he actually recalls it or whether I usually do it and I probably did it on this occasion.

MS ROSE: The point that Lord Justice Thomas is making, witness B, is that there is a difference between saying well, I cannot actually recall something and saying my usual practice would have been to read relevant material that was addressed to me but I cannot actually remember whether I did on this occasion. Which is your evidence at paragraph 6?

A. It was my usual practice to read all the material available. However, I should make clear that, under the circumstances, that may not have been possible.

Q. You are not denying that you did read it, are you?

A. I am saying I do not recall.

Q. At this time in 2002, were you aware that there might be

legal or ethical problems for you or for the Service if the Security Service became involved in interviewing suspects who are unlawfully detained or who had been mistreated in detention?

A. It was made clear to me at the time that, as far as the Security Service was concerned, and, I believe, Government, it was proper and appropriate to interview detainees under such circumstances.

Q. If they had been mistreated? It was made clear to you that that was acceptable, was it?

A. No, that is not the case.

LORD JUSTICE THOMAS: I think you are at cross purposes and I think you need to put the question again. Sorry, Ms Rose.

MS ROSE: The question I am asking is were you aware at the time that there might be legal or ethical problems for the Security Service if you were involved in interviewing suspects who had been unlawfully detained or mistreated.

A. I would have in every circumstance made clear that the individual I was speaking to was not suffering from any form of mistreatment, otherwise I would not have interviewed him. However, in the general case, it had been made clear to me that interviewing individuals who had been detained under such circumstances in countries such as Pakistan was proper and appropriate.

Q. What do you mean by "under such circumstances"?

A. What I mean is that individuals who had been detained under suspicion of being involved in terrorist activity.

Q. You are saying that was made clear to you by whom? By legal advisers or by who in the Service?

A. By my line management and senior management.

Q. Were you given any advice about the steps you ought to take to ascertain whether a detainee under such circumstances had been mistreated?

A. I was always clear that in every interview I should establish to my own satisfaction whether the individual was fit to be interviewed.

Q. That is not the question I asked, witness B.

A. If I may go on. Had I observed any indications of mistreatment in the interview, I would, in line with the guidance which I have received, have reported it back to my superiors and sought instruction.

Q. Witness B, that is not the question I asked. The question I asked was whether you were given any guidance as the steps you ought to take to ascertain that a detainee had not been mistreated.

A. I understand.

Q. Were you given such guidance?

- A. My guidance was simply to ascertain whether there were any indications that individuals were suffering from any ill effects, including effects of mistreatment.
- Q. And how were you to do that?
- A. Simply by making a judgment at the time based on observation and the questions that I would have asked at the outset of an interview.
- Q. Did you ask Mr Mohamed have you been mistreated?
- A. I do not recall asking him exactly those words, no.
- Q. Did you ask him the equivalent?
- A. What I recall doing, as was my normal practice at the time, is engaging in what I would describe as rapport building conversation at the outset of the interview to help me establish whether he was in a fit state to be interviewed.
- Q. Does that mean that the answer is that, no, you did not ask that or words to that effect?
- A. I would have given myself the opportunity to determine whether he was being -- whether he was suffering from any ill effects.
- Q. Witness B, the question I am asking you is whether you asked witness B anything along the lines of have you been mistreated in detention. Is the right answer to that no?
- A. I do not recall whether I asked him in exactly those terms.
- Q. Not in exactly those terms but in -- the substance of the question?
- A. I do not recall whether I asked him in the substance of that question.
- Q. The truth is that you did not, did you?
- A. As I said, I do not recall whether I did or not.
- Q. There is no reference to it in your contemporaneous note, is there?
- A. That is the case.
- Q. You were aware at this time, were you not, that Mr Mohamed had been detained on 10th April 2002, is that correct?
- A. From reviewing the documents, yes, that is correct.
- Q. And you saw him on 17th May, correct?
- A. That is correct.
- Q. Just over five weeks later. Yes?
- A. Yes, that is correct.
- Q. Was it your understanding that he had been in the custody of the Pakistani authorities or the US authorities during that time?
- A. My understanding was that he was the custody of the Pakistani authorities.
- Q. Did you understand that he had been charged with any criminal offence?
- A. Not as far as I can recall.

Q. Were you aware that he had been unable to contact anybody while detained?

A. I do not recall whether I was aware of that or not.

Q. Were you aware that he had not had access to a lawyer?

A. I do not recall whether I was aware of that.

Q. Were you aware that he had not been brought before a judge?

A. I do not recall being made aware of that.

Q. Did you make any enquiries to ascertain any of those facts?

A. I do not recall doing so.

Q. Did it occur to you that those were enquiries that you ought to have made before you spoke to him?

A. I would not have believed it to have been my responsibility at the time. My responsibility at the time was to deploy to Pakistan and carry out an intelligence interview with Mr Mohamed.

Q. From your experience of detainees, detained in what you have described as such circumstances, would you consider it normal for people detained in these circumstances to have been able to contact lawyers or to have been charged or brought before any legal process, or were they just being held? Was that not the reality?

MR SAINI: My Lord, Ms Rose appears to be straying beyond the specific areas.

MS ROSE: Absolutely not.

LORD JUSTICE THOMAS: Ms Rose, can you put the question again and just leave -- OK, what do you want to ask?

MS ROSE: What I want to ask is, from your knowledge, as an experienced operative in the field, would have you assumed that he would not have been through any legal process because people in this situation were simply being picked up and held, is that not right?

LORD JUSTICE THOMAS: I think she is entitled to ask that, Mr Saini, because it is within the scope of the condition prior to detention and condition refers -- I had understood it to refer to his physical condition and the legal circumstances in which he --

MS ROSE: And of course the incommunicado detention was in itself and important --

LORD JUSTICE THOMAS: Yes, carry on.

MS ROSE: Thank you. Can you answer the question please, witness B?

LORD JUSTICE THOMAS: No, put it again. It is only fair to him, Ms Rose. I am sorry to ask to you do it a third time.

MS ROSE: It is the short term memory issues, my Lord.

LORD JUSTICE THOMAS: Well, the transcriber can always read it back.

MS ROSE: From your experience as an operative interviewing

detainees in these circumstances, was it your normal understanding that the situation was that people who had been detained were not being brought before judges or given access to lawyers, they were just being held. Is that right?

- A. My understanding in this case is that Mr Mohamed had been detained by the Pakistani authorities on suspicion of using a false passport.
- Q. But you were not aware of any further legal process?
- A. I was not, no.
- Q. And he was now being detained as a suspected terrorist, is that not right?
- A. That appeared to be the case.
- Q. And from your knowledge of other suspected terrorists, were they being held without legal process?
- A. I am afraid I was not qualified to comment on the legal processes operating in Pakistan.
- Q. Will you agree with me that when somebody is being held in secret without access to lawyer there is a risk of mistreatment in that situation?
- A. I would agree that there is potentially a risk of mistreatment in any situation, which is why --
- Q. But the risk is -- sorry, I beg your pardon.
- A. Which is why I believed it to be a primary objective of carrying out this interview to ascertain whether he was fit and well to be interviewed, which I did.
- Q. Were you aware at the time that the Pakistani authorities had a reputation for mistreating detainees?
- A. I was aware that it was believed in some circles that the Pakistani authorities had demonstrated poor human rights records.
- Q. Including the physical abuse of detainees, correct?
- A. I was not aware of any specific instances.
- Q. In general terms?
- A. In general terms, I think it would be fair to say that the Pakistani authorities were not held to be particularly high paradigms of human rights. For that reason, interviewing any individual in Pakistani custody, I would have sought, as a matter of priority, to establish that they were not suffering from any ill effects.
- Q. In other words, you appreciated there was a significant risk that Mr Mohamed would have been ill treated in detention. Is that not right?
- A. I would say that I would be alert to any signs that that had been the case when I interviewed him.
- Q. Did you make any enquiries at all about the way in which Mr Mohamed had been treated before you spoke to him?

A. I do not recall what discussions I had about his condition of ill treatment prior to interviewing him.

Q. Does that mean you cannot remember whether you made any of those enquiries or was it your normal practice to make such enquiries?

A. I cannot remember making any enquiries.

Q. Would it have been your normal practice to do so?

A. No, it would not.

Q. Let us go to the note that you made of this interview. You will find it immediately behind your statement, but some of us will find it, I think, more convenient to look at it behind witness A's statement.

LORD JUSTICE THOMAS: For the purposes of the transcript, therefore, we are looking at page 1349 and following.

MS ROSE: Yes, do you have page 1349, witness B?

LORD JUSTICE THOMAS: No, he does not. He knows what it is. You have the note that you sent back, we understand?

A. I do, my Lord.

MS ROSE: You have said, at paragraph 2 of your note, that he looked noticeably thinner by comparison with the photograph of him that you have been provided with. Do you see that?

A. I do.

Q. Did that fact cause you any concern?

A. It caused me sufficient concern for me to have noted it and recorded it.

Q. Did it make you think that he might have been deprived of food while in detention?

A. I was unable to come up with an explanation as to why he looked thinner in person at the time. I would have been extremely alert to any suggestion that he would have been deprived of food. He made no such suggestion and no complaint.

Q. Did you ask him?

A. I did not, to the best of my recollection.

Q. Why not?

A. I was careful to make sure that he had plenty of opportunity to make any complaint. I also checked, as is made clear here, I believe, at the outset of the interview that he was in a fit state to be interviewed.

Q. I want to explore this point with you a little further, because it is obviously a matter to which you attach considerable significance. You have said in response to a number of questions that you made efforts to ensure that he was fit and willing to be interviewed and you say it at paragraph 6 of your witness statement. You also say at paragraph 6:

"Whatever I knew of the circumstances of

Mr Mohamed's treatment and conditions of detention at that time, I would have considered it necessary and proper to form a view, having met Mr Mohamed, as to whether it was appropriate to proceed with the interview."

Is it right to say that your only concern was whether on the day he appeared to be alert and *compos mentis*, is that right?

A. I would have been sensitive to all issues concerning his well-being.

Q. But you see, you say whatever I knew of the circumstances of his treatment in detention, but surely if you had known that the circumstances of his treatment and detention were that he had been in some way treated unlawfully or mistreated, was that not relevant to the question of whether it was appropriate to interview him whether or not he was alert or willing to be interviewed? Do you see the point?

A. I do. I can only reiterate that my key objective was to determine whether he was fit to be interviewed, which I did.

Q. Do you accept now that that was not really an adequate basis for founding the question of whether it was appropriate to interview him.

A. I believed at the time it was an adequate basis.

Q. Do you believe it now?

A. Yes, I do.

Q. Let us just explore it for a moment. Supposing -- he had been in the custody of the Pakistanis for over five weeks. Supposing they tortured him but then stopped torturing him for a few days before your arrival but threatened him that they would torture him again after you left if he did not co-operate with you. That is a plausible scenario, is it not?

A. It is a hypothetical scenario.

Q. Yes, but it is quite a plausible strategy, is it not?

A. I have no comments as to whether it is plausible or otherwise.

Q. But, you see, if they did that he might well appear fit and alert on the day of the interview but already having been tortured and in fear of further torture. Do you understand the point?

A. I do, but my very clear recollection from the interview, supported, I believe, by my notes, is that he was showing no signs of having been mistreated in any way. I would also comment strongly that the nature of the interview was such that he would have had ample opportunity to raise any concerns with me, which he did not.

MS ROSE: I want to return to that point, but let us just take

your first point. You are saying no signs of being mistreated but in fact, of course, he was. His weight loss was that sign, was it not?

- A. I do not think that you can draw that conclusion from the fact that he looks thinner.
- Q. It was enough to give cause for concern?
- A. Sufficient cause for concern for me to notice, indeed.
- Q. But the point I was making to you was that, if he had been tortured a reasonable interval before you arrived, there might not be any other signs of mistreatment. Do you see the point?
- A. I do, but I am unable to comment further than to say that I took in my view necessary and appropriate steps to establish that he was not suffering from any ill treatment.
- Q. You see, the point I am making to you is that, just looking at someone's physical condition, is not an adequate way of establishing whether they have been mistreated when they have been in custody for five weeks. Do you see the point?
- A. I do and in response I would say that I did more than merely look at the interviewee when I interviewed him.
- Q. The next point that you make at paragraph 6, and that you have also made to us today, is that you say that you gave him the opportunity to raise his concerns with you and that you felt that the atmospherics of the interview were such that he could and would have raised any issues if he wished. That is your evidence, is it not?
- A. That is the case.
- Q. You knew, did you not, that after you left he would be returned to the Pakistani authorities' custody, right?
- A. I assume that to be the case, yes.
- Q. The same people in whose custody he had been before you arrived?
- A. Indeed.
- Q. You were only going to be there for three hours? Right?
- A. I was intending to interview him again if possible.
- Q. Yes, but then you were going to leave, right?
- A. I am sorry, could you clarify whether --
- Q. Yes. After the interview you were going to leave him in the custody of the Pakistanis again?
- A. Yes.
- Q. Now, if the Pakistanis had mistreated him, do you not think he might reasonably have been rather afraid to say that to you?
- A. That is not the conclusion I drew from the interview.
- Q. But do you see it as a general point that, if somebody is being held incommunicado by authorities who are subjecting him to torture, then he might be afraid to report that

torture at an interview if he is then going to be delivered back into the custody of the same people. Do you see that point generally?

- A. I can see the point generally and that it is therefore possible to construct a hypothetical scenario in which that is the case. In this case I can only emphasise that I saw no sign that those events had pertained when I spoke to Mr Mohamed.
- Q. But is that not the reason, witness B, why it is necessary to speak to the people detaining them to try to ascertain the conditions in which he has been detained. It is not enough just to talk to him, is it?
- A. I would suggest that actually talking to him is the key thing to do under those circumstances, because, if the scenario which you outlined had been the case, then presumably I could not have relied on the version of events provided to me by those detaining him, so I would regard the forming of an independent judgment by myself on a one-to-one basis with the interviewee as being absolutely the key thing to do under these circumstances.
- Q. Are you saying that it is essential to make an assessment of whether a detainee has been mistreated before you can assess the value of intelligence obtained from that detainee? Is that the point you are making?
- A. The point I am making is a rather more general one, which is that I would not consider it proper to interview an individual who is suffering from the effects of mistreatment.
- Q. What do you mean by suffering from the effects of mistreatment. Do you mean the immediate physical effects or the fear that it might be repeated?
- A. Any effects.
- Q. But, of course, if those effects were not manifested to you in the interview, you had no other means of discerning whether he was suffering from those effects. That is correct, is it not?
- A. Well, it is, I would suggest, an obvious thing that if they were not manifest then I could not detect them.
- Q. But there were other things you could have done to try to find out if there had been mistreatment but you did not do them, did you?
- A. As I said, the key thing for me was to determine from Mr Mohammed whether he was fit to be interviewed.
- Q. You see, that is the point that I am troubled by: that whether he is fit to be interviewed is a separate question from the question of whether he has been mistreated. Do you understand that point?

A. I do and in response all I can say is that I interviewed Mr Mohamed in what I would describe as very cordial circumstances in which he volunteered to give me information over a period of three hours and if he had complained at any point of being mistreated then I would have taken action.

Q. What action would you have taken?

A. I would have immediately reported the matter to my superiors in London and, if necessary, I would have intervened with the authorities.

Q. So there was action you could have taken then to protect Mr Mohamed, is that correct?

A. Had he complained of mistreatment, yes.

Q. Or had you discerned from any other source that he had been mistreated, correct?

A. If I had significant concerns that he had been mistreated when I interviewed him, then I would have taken the steps that I have just outlined.

Q. Your principal concern in this interview in fact was to obtain information from Mr Mohamed, was it not?

A. Yes, that is the case.

Q. And the truth is, is it not, that, if he had been mistreated or if he was in fear of mistreatment, that might actually be an advantage to you in getting information out of him at this interview, is that not right?

A. No, that is not correct.

Q. Well, you could exploit his fear of torture or mistreatment to put pressure on him to talk to you, could you not?

A. I should like to make clear that I had no interest or advantage in doing so. I was conducting an intelligence interview and in every case an intelligence interview is founded on the basis of co-operation.

Q. Yes, but, of course, a person is more likely to co-operate if they are afraid that if they do not very bad things will happen to them, is that not right?

A. I do not accept that. I believe that information which is obtained through any form of duress is by its nature unreliable.

Q. That makes the history of the last six years a bit depressing, but we will leave that aside?

LORD JUSTICE THOMAS: Ms Rose, I do not think there is any need to comment in that way.

MS ROSE: I beg your pardon, my Lord. No, I accept that. I want to suggest to you that in fact what you did do in the interview was to put pressure on him by suggesting that, if he did not co-operate with you, he would be returned to the custody of those who would deal harshly with him, is that not right?

A. No, that is not the case. I put no pressure on Mr Mohammed whatsoever.

Q. Indeed, the purpose of your presence was to put pressure on him, was it not?

A. That is not the case.

Q. Do you have a bundle? Does the witness have a bundle?

LORD JUSTICE THOMAS: Yes, he does.

MS ROSE: Can you just turn in the bundle, please, to page 1340.

LORD JUSTICE THOMAS: Can I identify that? 1340?

MS ROSE: In fact it is 1339, is the beginning of the document.

LORD JUSTICE THOMAS: That, for the sake of the transcript, is a memorandum dated 1 May 2002 -- sorry, a telegram dated 1 May 2002. Do you have that?

A. I do.

LORD JUSTICE THOMAS: He does.

MS ROSE: This is an out telegram from the Security Service to the US authorities, is it not?

A. It appears to be.

Q. Discussing Mr Mohamed and, if you go to the second page of the document, paragraph 5:

"We would also like to explore the possibility of Security Service officers conducting a debrief of blank regarding his time spent in the UK. As has been the case with other UK nationals and residents detained in Pakistan and Afghanistan, we believe our knowledge of the UK scene may provide contextual background useful during any continuing interview process. This may enable individual officers to identify any inconsistencies during discussions. This will place the detainee under more direct pressure and would seem to be the most effective way of obtaining intelligence on Mohamed's activities/plans concerning the UK."

You see that?

A. I do.

Q. That was the purpose of your being there, was it not?

A. I should like to make clear I did not write this document. I am not sure I know exactly who it refers to, because of the redaction, but I would reiterate that my purpose was -- whatever was written in this document, was not to put pressure on Mr Mohamed.

Q. Can we go now back to your note of the interview, paragraph 29? You say:

"I told Mohamed he had an opportunity to help us and help himself. The US authorities will be deciding what to do with him and this will depend

to a very large degree on his degree of co-operation."

Now, you have explained to this court he was at this time in the detention of the Pakistani authorities, right?

A. That is correct.

Q. Why did you say to him that the US authorities would be deciding what to do with him?

A. Because I expected the Pakistani authorities to transfer him to the US authorities.

Q. Why did you expect that to happen?

A. Because that had happened in previous cases of which I was aware and also at some point I may have been told that that was the intention of the US authorities.

Q. Did you speak to any Americans before you interviewed Mr Mohamed?

A. I am not sure whether I can give a full answer to that in open session.

Q. I am content to leave that for Mr De La Mare to pursue. Was it your understanding that it was lawful for Mr Mohamed to be transferred to the US authorities in this way.

A. I consider that to be a matter for the Security Service top management and for Government.

Q. Had anyone ever told you that it was or was not lawful?

A. I do not recall being told that at all, no.

Q. Did it concern you at all?

A. I was always, whenever conducting an interview, careful to make sure that I had the clearance of my management to proceed and I did in this case. I was aware that the general question of interviewing detainees had been discussed at length by Security Service management legal advisers and Government and I acted in this case, as in others, under the strong impression that it was considered to be proper and lawful.

Q. My Lords, can I just note that there must therefore be documents concerning these processes and I would expect those to be produced to the special advocate if they have not yet been.

Now, at paragraph 29, you say:

"I said that if he could persuade me he was telling the complete truth I would seek to use my influence to help him. He asked how and said he did not expect ever to get out of the situation he was in. I said it must be obvious to him he would get more lenient treatment if he co-operated. I said that I could not and would not negotiate up front but if he persuaded me he was co-operating fully then and

only then I would explore what could be done for him with my US colleagues."

Now, you were saying to him that you would only assist him if he co-operated fully, is that not right?

A. What I was saying to him was that I could only assist him if he co-operated fully.

Q. Well, that is not what you say here, is it? You say "would not". You say "if he persuaded me he was co-operating fully then and only then I would explore what could be done for him". So you are not saying I cannot explore what can be done for him unless you co-operate fully, you are saying I will only explore if you co-operate fully, right?

A. Well, that is clearly what I said at the time.

Q. Yes. Are you saying you meant something different?

A. I am saying it meant that, in addition to me telling Mr Mohamed to his face that I would be able to seek to use my influence on his behalf if he was being honest and forthcoming, my reading of this now is that in addition I would have had in my mind the thought that no members of the US authorities would have taken any interest in what I had to say to them unless I could persuade them that he was being fully co-operative.

Q. Witness B, you are reconstructing that now after the event, are you not?

A. Well, I have clearly reread the document and that is the thought that occurred to me on rereading it.

Q. In 2008?

A. In 2008, yes.

Q. So it is not what you said at the time?

A. It is not what I said to Mr Mohamed, no.

Q. No, what you said to Mr Mohamed is I will not see if there is anything I can do for you unless you persuade me you are co-operating fully, right.

A. I did not put it in such stark terms to him.

Q. But that is what you meant and that is what he understood you to mean, right?

A. What I meant at the time is that, if he is prepared to be completely forthcoming and honest, then I would do what I could to help him.

Q. Yes, and if he was not then you would not.

A. I would suggest I would not be able to.

Q. Well, that is not what you said, is it? You said then and only then. Right?

A. As far as I can recall, Mr Mohamed did not effectively question me on this point. I told him what I said as set out here and that is what I told him. Had we engaged in

more of a discussion on this issue, as indeed we are in court right now, then I might have clarified and expanded on it. But to the best of my recollection, supported by the document that is here, I did not do so and he did not engage in that way.

- Q. Witness B, I am afraid I have to suggest to you that this is an ingenious attempt by you to get out of what is quite obviously on the page a threat to Mr Mohamed?
- A. This is not a threat.
- Q. Mr Mohamed was right in perceiving you to be a representative of the United Kingdom authorities, was he not?
- A. That is correct.
- Q. The only one to which he had access since his detention, right?
- A. At that time, yes.
- Q. On any view, he was in an extremely vulnerable position here, was he not?
- A. I think that would be fair to say, yes.
- Q. And you knew that?
- A. That was clear, yes.
- Q. You were effectively telling him the UK will only help you if you co-operate fully, otherwise you are on your own. That was the message, was it not?
- A. No, the message to him was that he should be as open and forthcoming and honest as he possibly could be.
- Q. Do you accept that that message is likely to put severe pressure on a person who has been tortured or who is at fear of torture?
- A. I do not accept that there is any pressure associated with that message at all, quite the reverse.
- Q. Try and put yourself in his position for a moment, witness B. Can you see why it might have looked very different from his perspective?
- A. If I was putting myself in his position in 2002, I would have seen the potential benefits of co-operating with the UK Security Service.
- Q. With the benefit of hindsight, do you think it is appropriate or proper for the United Kingdom authorities to say to a detainee we will only seek to assist you if you co-operate fully?
- A. I think it is entirely proper and appropriate to give an indication to interviewees that it is in their benefit to be as forthcoming and honest as possible.
- Q. Please will you answer the question I have asked. Do you think now, with the benefit of hindsight, that it is proper or appropriate to say to a detainee that the United Kingdom

authorities will only assist them if they co-operate fully?

- A. Well, that is not how I phrased the question to him.
- Q. Well, if you had phrased the question that way, would it have been proper or appropriate to do so?
- A. Well, I would not have phrased it in quite those terms and, as I have said, I would regard it as entirely proper and appropriate to make clear that it is in the interviewee's interest to be honest and forthcoming.
- Q. If we go to paragraph 8 of your witness statement, you seek to deal with paragraph 29 that we have just been looking at. Presumably you wrote your witness statement after you had looked at paragraph 29 again.
- A. Yes.
- Q. And after the thought occurred to you that you told us about today, about what you really meant, right?
- A. I cannot recall the sequence of thoughts at the time when I was writing this witness statement and reading the documents.
- Q. Well, we do not find that explanation at paragraph 8 or anywhere in your witness statement, do we, witness B?
- A. I'm sorry, what explanation?
- Q. The explanation that what you actually meant was that there will be no point in you talking to the Americans if you did not co-operate because they would not take much interest in what you had to say. That is not in your witness statement anywhere, is it?
- A. No, it's not.
- Q. What you do say, paragraph 8, is first of all that, when you said that the Americans would be deciding what to do with him, you meant they would be deciding whether to keep him in detention in Afghanistan or Guantanamo or consider his release and you have already told us that you thought that would have been perfectly proper and lawful. Then you say, "I also understood detainees could receive additional comfort items when they were seen by the US authorities to be co-operating", and you say that you were not intending to imply a lack of co-operation would result in mistreatment, simply that he would be treated more favourably if he were to co-operate, and then you say:
- "I told Mr Mohamed that I would seek to use my influence to help him if he could persuade me he was telling me the complete truth."

Now, that is exactly what you are trying to tell us today is not what you meant, is it not?

- A. No, I do not accept that.
- Q. Can I suggest that the reference to comfort items here is

- really nothing about what this interview was about, was it?
Your suggestions were nothing to do with comfort items?
- A. I apologise. I'm not sure I understand the question.
- LORD JUSTICE THOMAS: You have to ask him what he means by comfort items.
- MS ROSE: Yes, what do you mean by comfort items?
- A. Comfort items might include items of food, books, toiletries.
- Q. When you said you would be more leniently treated if you co-operate, you were not talking about comfort items, you were talking about much more fundamental questions like whether he was going to be transferred to Afghanistan or Guantanamo Bay, were you not?
- A. I was talking about his treatment in general in the sense that there were any range of possibilities to benefit him if he was seen by the US authorities to be fully co-operative and truthful. These would range from comfort items, if you like, at one end of the spectrum to unconditional release at the other end of the spectrum.
- Q. And what did you perceive to be the consequences if he did not co-operate?
- A. That he would continue to be in Pakistani custody or be transferred to US custody and then to Bagram would be likeliest course of action, in my view.
- Q. And in those circumstances there would continue to be a risk of mistreatment, right?
- LORD JUSTICE THOMAS: I think you need to put it separately, Ms Rose.
- MS ROSE: If he were to remain in Pakistan in custody, there would continue to be a risk of mistreatment by the Pakistanis, would there not?
- A. Well, I had seen, when I interviewed him, no sign that he had been mistreated by the Pakistanis, so that would not of itself have been a very strong concern. But I accept in the general case that when we are talking about countries which have poor human rights records that there is always a risk of mistreatment.
- Q. You say at paragraph 8 that you did not imply that Mr Mohamed would be transferred to an Arab country for torture, nor that a lack of co-operation would result in mistreatment. Let us take the second part first. You say you did not imply that a lack of co-operation would result in mistreatment. Do you accept that in fact it was obvious that there was a risk that Mr Mohamed would understand you to be implying precisely that, given the circumstances?
- A. No, I do not accept that.
- Q. The interview lasted for three hours, did it not?

A. That is correct.

Q. Did you offer Mr Mohamed any refreshments during that time?

A. I do not recall. I believe I did not.

Q. But you cannot say for certain that you did not offer him a cup of tea, can you?

A. I would not have been in the position to have offered him a cup of tea.

Q. You were trying, you say, to build up a rapport with him, right?

A. Exactly.

Q. And offering someone a cup of tea is perhaps the most traditional British way of trying to establish a rapport with somebody, is it not?

A. But without wishing in any way to be in any way factitious, I did not have any access to anything like tea making facilities under these circumstances.

Q. Well, you could have asked somebody to provide a cup of tea, could you not?

A. I could have done. I do not recall whether I did so.

Q. Yes, but there is no reason why you could not have.

A. I simply do not recall what facilities in those terms were available at the time. If refreshments were available they would have been bought in by the Pakistani guards.

Q. What sort of refreshments?

A. I do not recall what refreshments, if any, were on offer, but water, fruit juice, I have no idea.

Q. So there might have been tea?

A. There could conceivably have been tea but I do not recall tea being present.

Q. So you do not recall whether there was tea but you feel confident that you are able to deny making a comment in relation to the tea?

A. I do.

Q. You were not the only person present at this interview, were you?

A. There were other officials present at, as I recall, very short periods.

Q. At this space of time you cannot possibly be confident that neither of them made a comment about sugar and tea, can you?

A. I do not recall anyone making such a comment and I am sure that this did not happen in my presence.

Q. You see, it is very interesting, witness B, that you cannot remember very much about this except this particular point on which you are absolutely categorical? Is that fair?

A. I can be absolutely clear that the comment which I believe Mr Mohamed has attributed to me I did not make.

Q. Well, why can you be so clear? You thought he was at risk

of being sent to Afghanistan or Guantanamo, on your own evidence, right?

A. I accept that was a possibility.

Q. So it is quite reasonable that you might have said where you are going you will need a lot of sugar. What would have been so surprising about that?

A. But the fact is I did not say that.

Q. But you cannot even remember if there was tea or if there were refreshments or what they consisted of, so how can you be so certain?

A. Because the comments that Mr Mohamed has attributed to me is clearly a threat. I did not make any threats, implied or otherwise, to Mr Mohamed at any time.

Q. I am afraid I have to suggest to you, witness B, that it is clear from the record that you made threats to Mr Mohamed?

A. I do not accept that at all.

Q. You are aware, are you not, that a criminal suspect has the right to remain silent? He is under no obligation to co-operate with you, is he?

A. Sorry, are you talking in general cases?

Q. In general terms.

A. I should like to be clear about what the question is --

LORD JUSTICE THOMAS: I think you want to ask him if he is aware of the right to silence.

MS ROSE: Are you aware that a criminal has the right to remain silent and not to incriminate himself?

A. In UK law, yes.

Q. Did you then, or do you now, see any ethical problem with making the provision of assistance to Mr Mohamed conditional on his co-operation?

A. I saw no problem with encouraging Mr Mohamed to be as open and as truthful as possible.

Q. Did you then, or do you now, see any ethical problem in making the provision of assistance to Mr Mohamed conditional on his co-operation?

A. I have to be clear, I do not regard this as a condition in that sense. I was simply encouraging him, as I would an interviewee in any circumstances, including in the UK, to be as open and as truthful with me as possible.

Q. Are you aware that the Security Service has said to the intelligence and security committee in relation to Mr Mohamed's case that his case --

LORD JUSTICE THOMAS: I think if you want to put something to him of this kind, he ought to be shown it.

MS ROSE: Yes, I will show it. It is in volume 1 --

LORD JUSTICE THOMAS: Well, a copy may need to be provided to him. Volume 1, page -- it is tab 6, is it not?

MS ROSE: It is tab 6, yes, my Lord.

LORD JUSTICE THOMAS: Could someone provide a copy. Which page? Which bit do you want?

MS ROSE: It is page 146 of the documents bundle.

LORD JUSTICE THOMAS: Just page 146, do you want? One will be provided. **(handed)** OK. He has page 146.

MS ROSE: This is referring to evidence given by the Director General of the Security Service to the Intelligence and Security Committee. It relates to the treatment of Mr Mohamed after he left Pakistan and he says he was rendered to Morocco and tortured there and that information supplied by the UK authorities was used in his torture in Morocco and the Director General of the Security Service says at paragraph 105, "That is a case where, with hindsight, we would regret not seeking proper full assurances at the time". Do you see that?

A. I do.

Q. And that relates particularly, and I should make it clear to be fair to you, to the question of not seeking assurances before information was supplied when he was in custody in Morocco. Can I ask you, with hindsight, do you regret not seeking proper full assurances about the treatment of Mr Mohamed before you interviewed him?

MR SAINI: My Lord, I do not see this as an appropriate question, given the subject of cross-examination. The Director General said what she said. I do not think it is appropriate for the witness to be in a position --

LORD JUSTICE THOMAS: Well, Mr Saini, we appreciate that, but I think that, bearing in mind what is being suggested, it is giving the opportunity for the witness of saying, well, seeing how things are now, do you regret the position. That is all. It goes to -- in fairness to the witness the matter can be put.

MS ROSE: Witness B, with hindsight, do you regret not seeking proper full assurances about Mr Mohamed's treatment before you interviewed him?

A. I believe that I acted properly in interviewing Mr Mohamed. I do not think that I have myself done anything wrong.

Q. Does that mean you have no regrets?

LORD JUSTICE THOMAS: I think that is not a fair question. He has given his answer to your question.

MS ROSE: My Lord, I have no further questions.

MR SAINI: My Lord, I have some re-examination but I am concerned that it will lead the witness into closed areas, therefore perhaps I should defer that to tomorrow.

LORD JUSTICE THOMAS: If Ms Rose is content with that, then we are.

MS ROSE: I am content with that, my Lord.

MR PENNY: My Lord, may I seek your Lordship's leave to consult with the witness between today and tomorrow?

LORD JUSTICE THOMAS: Only on matters that you identify to the court you want to consult on.

MR PENNY: I want to consult him upon the question of whether he should exercise his right that your Lordship has warned him of.

LORD JUSTICE THOMAS: I think you had better deal with this in closed session, for the moment, but we will do that at 2 o'clock. I am very concerned about the time.

MS ROSE: I need to finish my submissions.

LORD JUSTICE THOMAS: What we will do, I will say to witness B that he must not at the moment discuss the case with anyone and that we will continue his evidence at a time we can discuss and we will inform him about that as soon as possible. I will deal with your application. It is just purely that we have lost a lot of time this morning through no fault of anyone's in this room.

Witness B, thank you very much -- did you have any thing to ask him now?

MR PENNY: No, thank you.

LORD JUSTICE THOMAS: I was going to say thank you very much indeed for coming. We will resume your evidence at some convenient time. It is traditional in each court to tell a witness that they must not discuss the evidence they have given or are about to give with any person. That, of course, can be varied with the leave of the court and, if an application is made, the court will consider it. Thank you very much indeed. You are free to leave by the way you came. Thank you.

(Witness released)

(12.10)