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Case No: T1/2009/2331

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE MASTER OF THE ROLLS
and
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

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Between:

The Queen on the application of Binyam Mohamed
- and -
The Secretary of State for Foreign and Commonwealth affairs

The Lord Chief Justice of England and Wales:

1. This is the judgment of the court.

2. The circumstances in which it has become necessary to give a further judgment are highly unusual. In brief, the Secretary of State for Foreign and Commonwealth Affairs (the Foreign Secretary) appealed against the decision of the Divisional Court in the proceedings brought by Binyam Mohamed that seven redacted sub-paragraphs of its first judgment should be made public. The appeal was dismissed. Three separate judgments were given. Although the reasoning in these judgments was not identical, the emphasis of the Lord Chief Justice differing from that of the Master of the Rolls and the President of the Queen's Bench Division, the decision was unanimous. In total the judgments ran to 296 paragraphs. Unless the Foreign Secretary proposed a further appeal to the Supreme Court the litigation was at an end, and the redacted paragraphs could at long last be published.

3. The present judgment is concerned with one paragraph (paragraph 168) in the judgment of the Master of the Rolls. This paragraph has attracted huge public attention.

4. In view of this attention we shall briefly summarise the facts as they are known to us. The three Approved Judgments were circulated to counsel, solicitors and the parties on a confidential basis in accordance with well understood practice on 5th February 2010. The parties were simultaneously informed that the judgments would be handed down on Wednesday, 10th February 2010. These were and remained draft judgments. Just because any draft is a draft judgment the opportunity for correction is available, and from time to time it is taken, not only on the application of one of the parties, but also on the judge's personal initiative if, on re-reading his draft, he thinks it

appropriate to do so. In short, the judge is not bound by the terms of the draft judgment which has been circulated in confidence.

5. The primary purpose of this practice is to enable any typographical or similar errors in the judgments to be notified to the court. The circulation of the draft judgment in this way is not intended to provide an opportunity to any party (and in particular the unsuccessful party) to reopen or reargue the case, or to repeat submissions made at the hearing, or to deploy fresh ones. However on rare occasions, and in exceptional circumstances, the court may properly be invited to reconsider part of the terms of its draft. (see for example *Robinson v Fearsby* [2003] EWCA Civ 1820 and *R (Edwards) v The Environment Agency* [2008] 1WLR 1587). For example, a judgment may contain detrimental observations about an individual or indeed his lawyers, which on the face of it are not necessary to the judgment of the court and appear to be based on a misunderstanding of the evidence, or a concession, or indeed a submission. As we emphasise, an invitation to go beyond the correction of typographical errors and the like, is always exceptional, and when such a course is proposed it is a fundamental requirement that the other party or parties should immediately be informed, so as to enable them to make objections to the proposal if there are any.

6. At 19.03 on Monday 8th February, the clerk to the Master of the Rolls received an email from Mr Jonathan Sumption QC, counsel for the Foreign Secretary, addressing what was described as "an important matter of substance" for the court "to consider before handing down their judgment in final form". The crucial email was also received by the other members of the court. Perhaps the first major feature of this judgment is to emphasise that Mr Sumption's letter was not a secret or private letter to the court. As a matter of certainty we know that it was copied to counsel for Binyam Mohamed, and indeed his solicitors wrote to the clerk to the Master of the Rolls on 9th February that they had received Mr Sumption's letter "this morning".

7. It is an elementary rule of the administration of justice that none of the parties to civil litigation may communicate with the court without simultaneously alerting the other parties to that fact. Accordingly we assumed that Mr Sumption's letter was also copied to those who had been provided with copies of the draft judgments. In view of the date and appointed time when they were due to be handed down, we also assumed that all parties would address the issues raised by the letter as a matter of urgency, first thing on 9th February. In the absence of any intimation from any other party of the wish to respond or object to the observations contained in Mr Sumption's letter, the Master of the Rolls decided substantially to amend the draft of paragraph 168, with minor consequential amendments to paragraphs 169 and 170. This second draft (and it remained a draft) of these paragraphs was circulated on Tuesday around lunchtime. During the course of the afternoon it gradually became apparent that something may have gone awry with the arrangements for the delivery of Mr Sumption's letter, and in any event, that there were indeed objections both to the course taken by Mr Sumption and to his proposals for possible reconsideration of the original draft of para 168.

8. The question for us was not whether the opportunity should, as a matter of elementary justice, be made available for these responses – because that went without saying - but the mechanics of how to do so in the context that two drafts of the relevant paragraph had now been circulated. Well before 9.30am on 10th February we were notified that the Foreign Secretary would not be seeking leave to appeal to the Supreme Court.

That meant that this litigation was, subject to any costs orders, and the perfecting of paragraph 168 of the final judgment, at an end, and that no further inhibition against the publication of the seven redacted sub-paragraphs remained. On one view this meant that there was no particular hurry for the judgment to be given, and in the context of over 18 months of protracted litigation, an additional delay of two weeks or so, while the rival submissions relating to the terms of paragraph 168 were considered, was not of major importance. On the other hand, these long withheld redacted sub-paragraphs demanded immediate publication, not only in the interests of Binyam Mohamed himself, but also because of the broad public interest considerations to which each of our judgments referred.

9. We decided that publication of the redacted paragraphs should take place immediately. That inevitably meant that the reasons for our decision to reject the claim by the Foreign Secretary for public interest immunity should also be published. Copies of the seven redacted sub-paragraphs were prepared. They were read out in open court. Copies of the text were made available. The paragraphs were, as I then explained, "annexed to the judgment which we have just handed down and any further copies of the judgment in whatever form it may take".

10. As soon as that process was completed we immediately turned to the objections to Mr Sumption's letter, and to the consequent changes following that letter to the terms of paragraph 168 (with the minor amendments to paragraphs 169 and170) in the judgment of the Master of the Rolls. It was made absolutely clear that this part of the judgment would be further addressed and considered in the light of any submissions which had yet to be advanced. A strict timetable was laid down. It must have been obvious to anyone in court on the morning of 10 February that paragraph 168 in its amended form did not constitute the final word of the Master of the Rolls on the subject, and that in the form in which it was included as part of his judgment, this paragraph remained a draft. He explained twice that the matter would be dealt with as it should have been dealt with, rather than how it had been dealt with. On behalf of the court he acknowledged that we had been "over-hasty". On reflection, once the judgment and redacted paragraphs had been handed down and published, it would have been open to us to adjourn the hearing into chambers, or to have considered ordering some form of prohibition on publication of these discussions, but that would have been inconsistent with the principles of open justice.

11. Within a short time of the court adjourning, it became apparent that the letter from Mr Sumption but not, it is fair to record, any part of paragraph 168 in its original form, was circulated widely and was or was about to be published. Rather less attention was subsequently directed to the fact that paragraph 168 of the judgment as handed down did not represent paragraph 168 in its final form, and that it would be subject to reconsideration and amendment, if necessary, in the light of further submissions.

12. Draft judgments are necessarily circulated in confidence. It follows that all communications in response are covered by the same principle. In this case that confidentiality was broken when the letter from Mr Sumption to the court was circulated beyond the parties to the litigation, and published. Our attention was directed to CPR Part 31.22 by Miss Dinah Rose QC. We have reflected on this provision. Not least for the avoidance of any doubt in future, our clear conclusion is that this order is not directed to submissions and discussions about draft judgments which take place in open court, and does not justify any contravention of the

confidentiality principle, whether in relation to draft judgments, or responses to them. The observations on the draft by any of the parties continue to be covered by the same confidentiality principles which govern the circulation of judgments in draft. The minimum requirement before wider circulation is permissible must be an application to the court for the confidentiality principle or understanding to be reviewed in the context of the individual case.

13. Lord Neuberger has reflected on the substantial body of submissions which have addressed the terms of paragraph 168. In a moment he will promulgate paragraph 168 in open court in its final and perfected form. That we emphasise will be his judgment. Strictly speaking therefore neither of the earlier drafts has any further relevance; they always were and they remain drafts. However, in the circumstances of this particular case, which is exceptional in so many of its aspects, the circulation of Mr Sumption's letter has created yet another exceptional feature, which requires us to address the question whether the original draft of paragraph 168 should be made available, or putting the issue another way, and perhaps more accurately, whether the court should waive the confidentiality which still attaches to paragraph 168 in the first draft and which, in its original form has, so far as we know, been scrupulously maintained by all those to whom it was circulated.

14. The circulation of draft judgments under strict terms of confidentiality has produced greater efficiency in the administration of justice (both civil and criminal) and improved convenience for the parties involved in the litigation, without any corresponding disadvantages to the legitimate public interest in the decisions reached by the court and the reasons for those decisions. We acknowledge the temptation to declare that the confidentiality principle as it applies to draft judgments should never be waived. However in the context of judicial processes directed to the better administration of justice adamantine rigidity of this kind would fail to allow for cases of high exceptionality.

15. The starting point is that for the reasons addressed in the three judgments of the court, this is indeed a case of high exceptionality. In relation to publication of the first draft of paragraph 168, the crucial fact is that there has already been public disclosure of the second draft. As we have explained, it was included in the judgments handed down on 10th February in circumstances in which it would have been entirely reasonable for anyone present in court to believe that even if it was still a draft, and subject to possible amendment, it was no longer subject to the confidentiality principle. Therefore the second draft is in the public domain.

16. The publication of the second draft was followed by what, at the very least, can fairly be described as the partial, but incomplete disclosure of the first draft. This was the inevitable consequence of the publication of Mr Sumption's letter and his observations about the first draft of paragraph 168. Whether or not this disclosure contravened the confidentiality principle, his letter represented Mr Sumption's forensic submissions about how the first draft might be interpreted if it was handed down unamended. As it is, publication has resulted in public comment based on Mr Sumption's observations about paragraph 168 in its first draft rather than on the actual text of the first draft itself. If the first draft is not made publicly available, comment on paragraph 168 of the judgment in its finalised form, and any comparison between the first draft and the final judgment, will continue to be informed by deductions and inferences based on Mr Sumption's letter. For this reason it would be better by far

that the original draft should be disclosed and available for comment in the precise form in which it was written. In this way it will speak for itself without the forensic gloss put on it by Mr Sumption in his letter.

17. The final and compelling feature bearing on the question whether the first draft of paragraph 168 should be published arises from the stark fact that after some 18 months of substantial litigation, the seven redacted sub-paragraphs have been made public and that each of our judgments proceeded on the principle of open justice and its contribution to the preservation of the rule of law in our society. Ever since the publication of the seven redacted paragraphs, part at least of the discussion has understandably focussed on the events narrated in this judgment and the amendment to paragraph 168 following receipt of Mr Sumption's letter. That discussion will continue, and unless it is fully informed a damaging myth may develop to the effect that in this case a Minister of the Crown, or counsel acting for him, was somehow permitted to interfere with the judicial process. This did not happen, and it is critical to the integrity of the administration of justice that if any such misconception may be taking root it should be eradicated. Perhaps the most obvious indication that there was no such ministerial interference in this litigation is that all five judges involved in it have rejected the Foreign Secretary's claim for public interest immunity in respect of the seven redacted paragraphs. However in the context of Mr Sumption's letter, and the events described in this judgment, the most effective way of dispelling any lingering public perception of ministerial interference will be that, notwithstanding that Lord Neuberger's judgment will take the form in which it is finalised, the first draft of paragraph 168 should be published. In this situation, effectively for the same broad reasons that helped to inform our decision that the redacted sub-paragraphs should be published, the interests of open justice must prevail. We shall therefore waive the confidentiality understanding on which the first draft was circulated and include it as part of the present judgment.

18. The first draft of paragraph 168 reads:

> "Fourthly, it is also germane that the SyS were making it clear in March 2005, through a report from the Intelligence and Security Committee that "they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training" (paragraph 9 of the first judgment), indeed they "denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government" (paragraph 44(ii) of the fourth judgment). Yet that does not seem to be true: as the evidence in this case showed, at least some SyS officials appear to have a dubious record when it comes to human rights and coercive techniques, and indeed when it comes to frankness about the UK's involvement with the mistreatment of Mr Mohammed by US officials. I have in mind in particular witness B, but it appears likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by SyS personnel. Regrettably, but inevitably, this must raise the

> question whether any statement in the certificates on an issue concerning such mistreatment can be relied on, especially when the issue is whether contemporaneous communications to the SyS about such mistreatment should be revealed publicly. Not only is there an obvious reason for distrusting any UK Government assurance, based on SyS advice and information, because of previous "form", but the Foreign Office and the SyS have an interest in the suppression of such information."

19. Like each of us the Master of the Rolls is responsible for the contents of his own judgment. It remains however for me to underline that the President of the Queen's Bench Division and I were fully aware of the course proposed to be taken by the Master of the Rolls in relation to the letter from Mr Sumption and we agreed with him. All the decisions about how we should proceed were collective decisions of the court.

20. We should add finally that we see no advantage in now conducting an inquiry into all the criticisms and counter criticisms advanced against different counsel. Too much satellite litigation has already been spawned. The circumstances here, are, we believe, unique. They will not be repeated.

21. We shall deal with costs after Lord Neuberger has finalised paragraph 168 of his judgment.

Lord Neuberger MR:

22. The parties to this appeal have all now had a full opportunity to make written submissions as to the contents of paragraph 168 of my judgment, and I have considered those submissions. I have also revisited the first judgment of the Divisional Court, including the closed parts (that is, the parts which have not been published). As a result, I have finalised the contents of paragraph 168.

23. Before setting that paragraph out, I consider that it would be right, in the light of the unusual degree of publicity it has received, to explain the context of the paragraph, briefly and in very summary terms, and, also briefly, to explain the thinking behind it.

24. As to the context, the ultimate issue on the appeal was whether the Foreign Secretary was right in arguing that the seven redacted sub-paragraphs should not be published, as their publication would, as he had certified, breach the so-called control principle. As explained in my judgment, it seemed to me that in order to rule on that issue, two questions had to be resolved. The first question was whether to adopt the Foreign Secretary's certified opinion on the facts as they stood when the Divisional Court gave its decision. On that question I was in favour of the Foreign Secretary. The second question was whether the seven redacted sub-paragraphs should nonetheless be made public in the light of subsequent events. On that question, I rejected the Foreign Secretary's case, and accordingly, in agreement with the Lord Chief Justice and Sir Anthony May, concluded that his appeal should be dismissed.

25. Although I decided that the Divisional Court should have adopted the Foreign Secretary's certified opinion, I did not find the point easy, for four specific reasons. It seemed to me appropriate to explain those reasons, and paragraph 168 relates to the fourth of them.

26. In the draft judgment as circulated on 5th February, paragraph 168 was in the terms set out in paragraph 18 above. I had already made some amendments to various paragraphs in that draft judgment, including, as it happens, to paragraph 168, when I got Mr Sumption's letter on the evening of 8th February. After considering that letter overnight, and having received no objections to it, I decided that, as there appeared to be force in Mr Sumption's concerns, the draft paragraph should be substantially amended. My concerns were then, as they have been at all times, to ensure that my fourth reason was identified and properly explained, and that the explanation was not expressed in a way which was unfair, or could be interpreted as unfair, to anyone. The second draft paragraph 168 was in these terms:

> "Fourthly, the Foreign Secretary must have prepared the certificates on the basis of advice from members of the SIS and the SyS, whose involvement in the mistreatment of Mr Mohamed has been the subject of findings by the Divisional Court. Having said that, witness B is currently under investigation by the police; and it is impossible, at any rate at this stage, to form a clear or full view as to precisely what his involvement was in the mistreatment of Mr Mohamed."

27. Having amended paragraph 168 in this way, and having made some consequential amendments to the next two paragraphs of the draft judgment, I ensured that those amended draft paragraphs were circulated around lunch-time on 9th February to all the parties, in case there were any objections. There were, and so, when our judgments were handed down at 9.30 the following day, I made it clear that the paragraph remained in draft form, and that any of the parties who wished to do so could make submissions as to its final form.

28. After considering those submissions and revisiting the Divisional Court judgments, I reached the following conclusions:

a) Mr Sumption's concerns about the first draft paragraph 168 were justified, but to a significantly more limited extent than I had initially thought; in particular, I was concerned that (i) the first draft could have been read as being a general reference to the involvement of Security Service personnel with mistreatment, rather than being limited, as I had intended, to their involvement with Mr Mohamed's mistreatment, and (ii) the first draft contained a reference to the Foreign Office which was not really justified;

b) There was justification in the arguments of those representing Mr Mohamed and the interveners that (i) the second draft paragraph 168 was too attenuated to explain my reasoning properly, and (ii) subject to

the two concerns just mentioned, the contents of the first draft paragraph 168 were fully supported by the findings of the Divisional Court based on the evidence;

c) The amendments which I had already made to the first draft paragraph 168 before getting Mr Sumption's letter were appropriate;

d) Accordingly, it was right to revert to the first draft of paragraph 168, albeit (i) with amendments which made it clear that my observations relate to the facts of this case, (ii) by deleting the reference to the Foreign Office, and (iii) with various improvements to the drafting which I had already made, or now thought it right to make;

e) A small consequential adjustment to the closing part of the penultimate sentence of paragraph 170 was also needed.

29. In these circumstances, the final version of paragraphs 168 to 170 in my judgment of 10th February 2010 is as follows:

"168. Fourthly, it is also germane that the Security Services had made it clear in March 2005, through a report from the Intelligence and Security Committee, that "they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training" (paragraph 9 of the first judgment), indeed they "denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government" (paragraph 44(ii) of the fourth judgment). Yet, in this case, that does not seem to have been true: as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly. Not only is there some reason for distrusting such a statement, given that it is based on Security Services' advice and information, because of previous, albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information.

169. My concern on this point is mitigated by the fact that the certificates appear to be supported by communications from the US, most pertinently the CIA letter and what was recorded as having been said by the Secretary of State. The US Government, like any other Government, plainly has an interest in ensuring that it controls the flow of any information which it provides to the SyS on a confidential basis, and the fact that it (and other Governments) may well be motivated in this case by embarrassment is not the point: one is concerned with hard facts, not moral judgements.

170. My conclusion on this half of the balancing exercise is this. While there are strong reasons for scepticism, I accept that the Foreign Secretary genuinely believes, and has some grounds for believing, what he has stated in the three certificates, namely that the flow of information from foreign Government intelligence services to the SyS could be curtailed if the redacted paragraphs are published, because that publication would be regarded by those Governments as an unjustifiable breach of the control principle. The normal reasons for deferring to his views on such an issue are diluted by the fact that there is nothing inherently sensitive in the information in those paragraphs, the very narrow and technical nature of the breach, the fact that the US must have appreciated the risk of intelligence material being disclosed pursuant to the law, the fact that other material apparently subject to the control principle has been revealed in the first judgement without objection, and a concern which arises from the apparent involvement of at least one Security Services agent in the mistreatment of Mr Mohamed. However, it is right to weigh against these factors the fact that the Foreign Secretary's opinion is reinforced by the CIA letter and the notes of the views of the Secretary of State."