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LAW AT THE HEART OF GOVERNMENT

Litigation and Employment Group

Treasury Solicitors
One Kemble Street, London WC2B 4TS

DX 123242 Kingsway
Switchboard: (020) 7210 3000 (GTN 210)
Direct Line: (020) 7210 2948
Direct Fax: (020) 7210 3410
David.mackie@tsol.gsi.gov.uk

Please Quote: DMM/1C

Your Reference:

Lord Justice Thomas and Mr Justice Lloyd Jones
Royal Courts of Justice
Strand
London WC2A 2LL

BY email

1 May 2009

Dear Lord Justice Thomas and Mr Justice Lloyd Jones,

R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (CO/4241/08)

We write further to our letter of 29 April 2009 and the Court's response which, as matters stand, would not permit the Secretary of State for Foreign and Commonwealth Affairs any proper opportunity to consider whether and in what form further evidence is required from him on the national security interests of the United Kingdom (or to place such evidence before the Court) in the light of the statement received overnight from the United States setting out the Obama Administration's position on disclosure. A copy of this classified correspondence is being provided in parallel in closed to the Court and the Special Advocates. In summary, in terms cleared for open release, the Obama Administration states as follows:

> "The cooperation and sharing of intelligence between the United Kingdom and United States, as well as with other foreign governments, exists under strict conditions of secrecy. Public disclosure by the United Kingdom of information garnered from such relationships would suggest that the United Kingdom is unwilling or unable to protect information or assistance provided by its allies. As a consequence, if foreign partners learn that information it has provided is publicly disclosed, these foreign partners could take steps to withhold from the United Kingdom sensitive information that could be important to its safety and security. Any decreased cooperation from those foreign partners would adversely impact counterterrorism missions and other endeavors.
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> …
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> Public disclosure of the information contained in the seven paragraphs withheld from the High Court's open decision, as well as the documents from which the information was drawn, could likely result in serious damage to U.K. and U.S. national security. If it is determined that HMG is unable to protect information we provide to it, we will necessarily have to review with the greatest care the sensitivity of information we can provide in future."

David Dunleavy – Head of Division
Adam Chapman – Team Leader

This correspondence states the Obama Administration's position on disclosure without equivocation or ambiguity. It also addresses the US appreciation of the risks to the national security of both the United States (and the United Kingdom) from disclosure. It is consistent with the Defendant's understanding of the position of the new US Administration, represented to the Court in earlier correspondence.

In its judgment of 4 February 2009 the Court recognised that the judgement as to whether the national security of the United Kingdom will be compromised "is a matter on which the Foreign Secretary is the expert" and not the Court (§64). It is the Foreign Secretary, not the Court, who bears the constitutional responsibility of assessing the degree of risk that disclosure would damage UK national security, and the extent of damage that would be likely to result.

Following the public disclosure, on 16 April, by the US Administration of 4 Department of Justice memoranda on interrogation practices, and the Claimant's submissions that this indicated that the Administration would not object to the disclosure of the information in issue in our proceedings, the Defendant accepted that it would be appropriate for it to seek clarification of the position of the Administration on this matter. Immediately following the hearing on 22 April, the FCO Legal Adviser sought clarification of the Administration's position. The Defendant has in all respects acted promptly and with expedition, including writing to inform the Court on 29 April that the matter was under active consideration in the United States and requesting a brief period of time to allow the US to complete its internal review and for the Defendant thereafter to consider whether any further evidence was required in the light of any US statement of position.. It was, and remains, the Defendant's position that the additional period sought to permit this further consideration to take place was not unreasonable given the importance and sensitivity of the issues and the wider cross-governmental consultation that was required.

The US Administration has now set out its position. This statement has only just been received by the United Kingdom. An assessment of the national security interests of the United Kingdom is a matter for the Foreign Secretary, not for the United States. The Foreign Secretary will wish to be advised by those who have expertise in these matters before he takes a decision on whether and in what form it would be appropriate for him to provide any further evidence. In the circumstances, a further Public Interest Immunity certificate from the Foreign Secretary may be appropriate.

There is no time sensitivity to the issues now before the Court. Through the efforts of the Defendant, the Claimant's release from detention at Guantanamo Bay and his return to the United Kingdom was secured. In earlier correspondence to the Court over attempts to fix a hearing date (for the hearing that took place on 22 April), the Claimant's own Counsel proposed a hearing in June or July on the express grounds that any urgency was reduced by the return of the Claimant to the UK. There is no reason to believe that, if the Court's judgment was to be delayed by a matter of days or weeks, any disadvantage whatever would occur to anyone with any interest in this case, including the press and public.

It is necessary and appropriate that the Foreign Secretary be afforded a reasonable opportunity to be properly advised of these developments and of the UK national security interests that they engage. They require careful consideration, including as to the preparation of any evidence that may be appropriate. In the circumstances, and given travel schedules and other business, the Defendant requests that the Court permit the Defendant

at least until close of business on Friday, 15 May to submit any further evidence as may be appropriate.

In any event, the Defendant would be grateful for confirmation first, that as with all four earlier judgments, the draft 5th judgment will be made available to the Defendant and the Special Advocate for security checking, prior to the disclosure to the other parties and secondly, that neither the seven paragraphs, nor any part thereof, nor any other closed information, will be contained in any open part of the draft judgment that the Court intends to provide to the parties.

If the Court decides in due course to reverse its 4th judgment, the seven paragraphs and any other closed information should be placed in a confidential annex, to be provided only to the Special Advocate and the Defendant. The confidential annex should remain closed in its entirety for a period of 21 days following the day on which judgment is handed down, in order to enable the Defendant to appeal to the Court of Appeal. If the Defendant appeals, the confidential annex should remain closed pending the conclusion of the appeal. In the event that the Defendant does not appeal within the period specified above, the seven paragraphs (but no other information within the confidential annex) should be provided to the parties and the public at the end of that period. Any public disclosure of the seven paragraphs or other closed information to the other parties or more widely would unjustly frustrate the Defendant's right to appeal.

Yours faithfully,

David Mackie
For the Treasury Solicitor

Cc SASO
Leigh Day & Co.
D Rose Esq.
Mark Stephens
Jan Johannes