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Clerk to the Lord Chief Justice
Clerk to the Master of the Rolls
Clerk to the President of the Queen's Bench Division

8 February 2010

Dear Sirs,

Case No.: TI/2009/2331/QBACF: R (Binyam Mohammed) v. Secretary of State for Foreign and Commonwealth Affairs

Judgment is due to be delivered in this case on Wednesday 10 February 2010. The Court will be receiving a separate letter about typing corrections and other obvious errors. The purpose of this present letter is to deal with an important matter of substance, which I would invite the Court to consider before handing down their judgment in final form. I would be grateful if you would lay it before them.

At paragraph 168 of his Judgment, the Master of the Rolls makes some observations about the previous 'form' of SyS. I assume from the context that he is referring to the Security Service, although in paragraph 64 the Master of the Rolls defines SyS as including the Secret Intelligence Service as well, and a reader less familiar with the context might assume that he was referring to both.

The Master of the Rolls's observations, to whichever service they relate, are likely to receive more public attention than any other part of the judgments. They will be read as statements by the Court (i) that the Security Service does not in fact operate a culture that respects human rights or abjures participation in coercive interrogation techniques; (ii) that this was in particular true of Witness B whose conduct was in this respect characteristic of the service as a whole ('it appears likely that there were others'); (iii) that officials of the Service deliberately misled the Intelligence and Security Committee on this point; (iv) that this reflects a culture of suppression in its dealings with the Committee, the Foreign Secretary and indirectly the Court, which penetrates the service to such a degree as to undermine any UK government assurances based on the Service's information and advice; and (v) that the Service has an interest in suppressing information which is shared, not by the Foreign Secretary himself (whose good faith is accepted), but by the Foreign Office for which he is

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responsible.

The first point that I would make about this is that the conduct of Witness B, was referred by the Attorney-General to the Crown Prosecution Service and is currently under investigation by the police. If the observations in the draft Judgment appear in the final version, the publicity likely to be given to them would be highly prejudicial to any criminal proceedings that might subsequently be brought, as well as to the current civil proceedings brought against the United Kingdom Government by Binyam Mohammed among others.

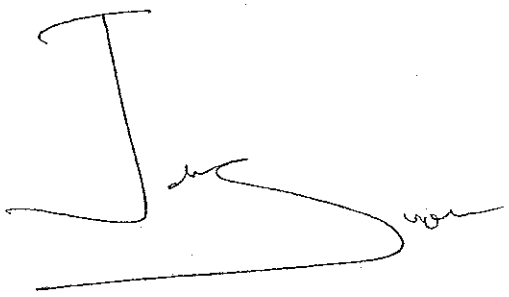
More generally, the Master of the Rolls' observations, which go well beyond anything found by the Divisional Court, constitute an exceptionally damaging criticism of the good faith of the Security Service as a whole. In particular, the suggestion that the Court should distrust any UK government assurance based on the Service's advice and information will unquestionably be cited in other cases and, if applied more widely, would mark an unprecedented breakdown in relations between the Courts and the executive in the area of public interest immunity. The statements of ministers in this area, although embodying their own judgements, are often necessarily based on the information and advice of the Security Service. I am bound to suggest, which I do with genuine and not just forensic respect, that such grave criticisms of a public service and those who work in it should be made only if the issue is fairly raised in advance and the Court has an exact knowledge of the relevant circumstances. To categorise a problem as systemic is rarely a straightforward matter. In this case, it would be necessary at the very least to examine the methods and procedures of the Security Service in relation to the interviewing of detainees as well as the giving of information and advice to ministers; the basis on which the statement to the Intelligence and Security Committee was made, and what further information was provided to them, in particular about the treatment of detainees; what (if any) other instances there are of the Service's knowledge of ill-treatment of detainees interviewed by them, how information of this kind is stored, on what occasions it is retrieved, how widely it is disseminated within the Service and what the Service's response was. The Court has not been in a position to do any of this. It simply does not have the material. Even if it had, ordinary considerations of natural justice would suggest that those responsible for the management of the Security Service should have had a proper opportunity to respond. No submission as extreme as this was made during the hearing, let alone supported by evidence. The Service has received no notice whatever of the Court's intention to make such sweeping criticisms.

As to the statement that the Foreign Office has an interest in suppressing information, in its present form this reads like an accusation of bad faith against those

Foreign Office officials who have advised the Foreign Secretary. It may be that this was not intended. Certainly I am not aware of any material before the Court which suggests that such an interest exists, or that any Foreign Office official has allowed it to influence advice given in the public interest to the Foreign Secretary, in this or any other case.

I respectfully invite the Court to reconsider whether paragraph 168 is necessary to its decision, and whether it really does justice to those involved.

Yours faithfully,



Jonathan SUMPTION Q.C.

cc. Nicola Smith, Treasury Solicitor
Dinah Rose QC