

IN THE HIGH COURT OF JUSTICE

Claim No. CO/4241/2008

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

B E T W E E N:

THE QUEEN

on the application of

BINYAM MOHAMED

Claimant

-and-

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendant

**SUBMISSIONS ON BEHALF
OF THE CLAIMANT**

1. Following the publication of the Court's Fourth Judgment in these proceedings on 4 February 2009, statements have been made by the Defendant and other representatives of the United Kingdom Government which call into question the factual findings on the basis of which the judgment was made. The Claimant accordingly invites the Court to reopen its judgment, pursuant to the jurisdiction outlined at CPR paragraph 40.2.1, and to require the Defendant as a matter of urgency to clarify the position by evidence.
2. The Court's decision not to place in the public domain certain redacted paragraphs from its First Open Judgment was based on two key findings of fact, namely:
 - a) The finding at paragraphs 62 and 73 - 77 that the United States Government, in correspondence from senior officials, had made a threat that if the paragraphs were made public, the United States would re-evaluate its intelligence sharing relationship with the United Kingdom, with the real risk that it would reduce the intelligence

provided. The Defendant had in good faith, and on the basis of evidence, evaluated that threat as real.

- b) The finding at paragraph 78, based on the written submissions on behalf of the Defendant made on 18 December 2008, that the position in relation to the threat referred to above had not changed following the election of President Obama, and that the Court's understanding was that the position remained the same even after the making of the Executive Orders by President Obama on 22 January 2009.
3. Since the judgment has been made public, however, the Defendant and his spokesmen has stated that:
 - a) No threat was made by the US Government; and
 - b) No approach had been made by the UK Government to the new US administration of President Obama, and no representations had been made to the Court about the attitude of the new administration.
 4. The Claimant submits that these statements call seriously into question the accuracy and completeness of the evidence and submissions given by the Defendant on which the Court relied in reaching its judgment.

The existence of a threat

5. The Claimant understands that detail of the position adopted by the US Government on which the Defendant's assessment that there was a real risk of damage to national security was contained in the closed sensitive schedule to the First PII Certificate, which has not been made available to the Claimant's representatives (see the references at paragraphs 30 - 33 of the second PII Certificate).
6. The Court's conclusion, having reviewed this material, was that it amounted to a threat by the US Government that if the redacted paragraphs were made public, the US Government would re-evaluate its intelligence sharing relationship with the UK, with a real risk that it would reduce the intelligence provided (judgment, paragraph 62).
7. It is clear from paragraphs 73 - 77 of the judgment that the making of this threat, and the assessment of the Defendant, based on evidence, that the threat was real, was crucial to

the Court's conclusion that the paragraphs should not be made public, notwithstanding the very powerful public interest in making their contents known.

8. However, the Defendant publicly stated on 4 February 2009 that no such threat had been made by the US Government. The BBC has reported him as stating:

"There has been no threat from the US to break off intelligence co-operation. Intelligence co-operation depends on confidentiality. We share our secrets with other countries and they share our secrets with us. It is US information and it is for the US to decide when to publish their information."

9. Similar statements were made by the Defendant to Channel 4 News and Newsnight on 4 February 2009.
10. The Court will note that the question at issue was not in fact the disclosure of any US documents, but, rather, the making public of paragraphs in a judgment of the Court.
11. Further, a Downing Street spokesman was quoted in the Daily Mail on 4 February 2009 as stating that Gordon Brown was "not aware" of the threat.
12. The Claimant submits that these statements made by the Defendant personally, as well as the statement made on behalf of the Prime Minister, call into question the completeness and accuracy of his statements made in the PII certificates on which the judgment is founded.

The position of the new US regime

13. Mr David Rose at paragraph 11 of his written submissions in support of the making public of the redacted paragraphs suggested that the national security concerns relied on by the Defendant no longer arose following the election of President Obama.
14. This submission was addressed by the Defendant in its written submissions dated 18 December 2008, in which it was stated, at paragraph 15:

"Mr Rose suggests that the national security concerns no longer arise following the Presidential election. He is not in a position to give evidence to the court on that issue. But, in any event, the situation has not changed since the election of President-Elect Obama. The concern relates to the disclosure of closed information; it is not a concern that criticism of the treatment of detainees may be levelled at the administration of President Bush. The Secretary of State's assessment of the likelihood and severity of damage to national security has not changed. All the developments since the Secretary of

State's further certificate of 5 September 2008 have tipped the balance more firmly in favour of safeguarding UK national security."

15. The assertion of fact in this paragraph, that the situation had not changed since the election of President-Elect Obama, was not supported by any evidence or a revised PII Certificate.
16. Leigh Day & Co on behalf of the Claimant pointed out this deficiency in their letter dated 18 December 2009. No response was received to that letter.
17. The draft judgment was made available to the Defendant and his legal advisers well over a week ago, and significantly before it was made available to the Claimant's representatives.
18. At paragraph 78 of the judgment, the Court expressly relied upon the submission made to it by the Defendant's Counsel that the position had not changed following the election of President Obama, and set out the Court's understanding based on that submission that the position remains the same even after the making of the executive orders of 22 January 2009. The "position" referred to by the Court in this paragraph could only be the position that the US Government was maintaining the threat to re-evaluate its intelligence sharing relationship with the UK in the event that the paragraphs were made public.
19. This finding was critical to the Court's decision not to make the paragraphs public, and gave rise to the Court's statement at paragraph 107:

"If the information in the redacted paragraphs which we consider so important to the rule of law, free speech and democratic accountability is to be put into the public domain, it must now be for the United States Government to consider changing its position or itself putting that information into the public domain."

20. Detailed proposals for amendments to the judgment were made on behalf of the Defendant. However:
 - a) No amendment was suggested to the paragraphs stating that a grave threat had been made by the US Government;
 - b) No amendment was suggested to paragraph 78. It was not suggested by the Defendant that the Court had in any way misunderstood the submissions made to it about the position of the Obama administration.

21. However, as the attached witness statement of Mr Rose indicates, the FCO Spokesman yesterday stated:

"We haven't made any representations to the court regarding the new administration's approach to this case. We have not approached the new administration about these paragraphs. We haven't made any representations about their attitude and we haven't been asked by the court to do so, despite the new executive orders and the attitude that may now prevail in Washington."

22. The Daily Mail's report also quotes the Downing Street Spokesman as stating: "We have not engaged with the new administration on the detail of this case. We have a very strong intelligence relationship with the US and this will continue."

23. It is thus apparent that the statement made by Counsel for the Defendant in the submission dated 18 December 2008 was not based on any contact with the administration of President Obama, or any knowledge of whether his administration would or would not maintain the position adopted by the previous administration.

24. The Claimant submits that the submission of 18 December was made in circumstances in which the Defendant was under an obligation of candour and frankness even greater than that which normally applies in judicial review proceedings. The issues engaged are of the utmost seriousness and importance. The relevant information was only within the knowledge of the Defendant. Much of the evidence has not been made available to the Claimant at all. In these circumstances, it was incumbent on the Defendant to inform the Court in the clearest possible terms that the Defendant was not aware of the position that would be adopted by the Obama administration in relation to the threat to re-evaluate intelligence sharing, since the question had not been raised with the new administration.

25. Further, it must have been apparent to the Defendant and his legal representatives on receipt of the draft judgment that the Court was relying on the submission made, and had drawn an inference from it as to the continuing position of the Obama administration. It was incumbent on the Defendant at that stage to correct the Court's misunderstanding.

Conclusion

26. For the reasons set out above, the Claimant invites the Court to reopen its judgment in this matter, and to order the Defendant to swear evidence setting out the complete and

accurate factual position as to the making of a threat; and the maintenance of any threat by the Obama administration.

DINAH ROSE QC

BEN JAFFEY

5 February 2009