CO/4241/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 29th July 2009

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)

Mr Ben Jaffey (instructed by Messrs Leigh Day & Co) appeared on behalf of the **Claimant**
Mr Guy Vassall-Adams (instructed by Jan Johannes) appeared on behalf of the Guardian News and Media Ltd
Mr Thomas de la Mare and Mr Martin Goudie (instructed by SASO) appeared as **Special Advocates on behalf of the Claimant**
Ms Karen Steyn (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

OPEN PROCEEDINGS

(10.05am)

1. MR DE LA MARE: My Lord, at the risk of incurring your enmity and probably the enmity of all of the law reporters here, can I make a request that we deal with some of the closed issues first. There are two reasons for that request. One is entirely personal:

my wife was admitted to hospital last night and I would really dearly like to get out of court and be with her, thereby narrowing the issues so Mr Goudie can cover. The second is that it seems to me that clearing up some of the issues in closed in relation to the corrections, if any, to be made to the first open judgment --

2. LORD JUSTICE THOMAS: There are undoubtedly corrections to be made to the closed judgment.

3. MR DE LA MARE: Yes, that may well --

4. LORD JUSTICE THOMAS: It is only the form in which they are made that we have to discuss.

5. MR DE LA MARE: Indeed, my Lord. That may well have a bearing upon the open arguments about the rebalancing of the PII, because there may be certain factual matters that are disclosed, for want of a better word, as a result of those corrections that are thought material --

6. LORD JUSTICE THOMAS: How long is it going to take?

7. MR DE LA MARE: For my part about five minutes.

8. LORD JUSTICE THOMAS: Ms Steyn?

9. MS STEYN: My Lord, without wishing to underestimate the closed hearing, I would be surprised if it was over within less than about 40 minutes.

10. LORD JUSTICE THOMAS: Well, shall we say a hour. What we have done -- we have our own ideas about how we should amend the judgment and we shall go through those with you seriatim -- it may not take that long -- and, if there are problems, it may give an opportunity for instructions to be taken during the course of the day. We wish to amend -- obviously if an amended judgment can be made available, but there may be one or two problems, which all turns on partial amendment.

11. What do the others say?

12. MR VASSALL-ADAMS: In view of my learned friend's personal situation we would not oppose the application. We would just simply ask that the court is fairly draconian in terms of the timing --

13. LORD JUSTICE THOMAS: Well, shall we say 11.15? I am sorry to everyone else.

14. MR JAFFEY: It is the only sensible course, my Lord.

15. LORD JUSTICE THOMAS: OK, 11.15.

(10.08am)

(A closed session followed)

(12.10am)

16. LORD JUSTICE THOMAS: Mr Jaffey, we are in a position where we have got a substantial way through looking at changes we should make to our first judgments but, quite naturally, those sitting behind Ms Steyn want to have a look at precise wording and there may be one issue that may be difficult but we hope that can be resolved.

17. MR JAFFEY: My Lord, what myself and Mr Vassall-Adams have agreed, with your Lordships' permission, is that he will go first and deal with general principles and then I will deal with the facts of the case, if that is acceptable to your Lordship.

18. LORD JUSTICE THOMAS: How very nicely put, Mr Jaffey, and are you going to leave us, Mr de la Mare?

19. MR DE LA MARE: I am, if that is acceptable.

20. LORD JUSTICE THOMAS: Of course, and we do hope that your wife is better soon.

21. MR JUSTICE LLOYD JONES: Yes.

22. LORD JUSTICE THOMAS: Mr Vassall-Adams, thank you very much for your submissions.

23. MR VASSALL-ADAMS: Thank you very much, my Lord. There are two further bundles to be passed up for your Lordships.

24. LORD JUSTICE THOMAS: Let us just clear the decks for a moment.

25. MR VASSALL-ADAMS: To add to your collection in this case. **(handed)**

26. LORD JUSTICE THOMAS: Yes.

27. MR VASSALL-ADAMS: And I today will be referring to this bundle, which I will be calling bundle B, and I will also be referring to the hearing bundle for 22nd April, which was the big thick bundle you have and I will be calling that bundle A.

28. Before developing my submissions, your Lordships, it is sometimes helpful to apply what one might call a common sense test, without the benefit of the law or the learned arguments of counsel, and in my submission the common sense test would approach this case as follows. The defendant's case is that disclosure of seven paragraphs of the court's own judgment, the contents of which are not themselves damaging to national security, would cause serious harm to US/UK intelligence sharing because the US would be so upset and shocked by this action of the court that they might seriously refuse to share vital intelligence with the UK in the future and, if one just steps back from that a moment, not thinking of it in a legal way, but just thinking a bit about the relationship between the US and the UK in matters of foreign affairs, and one thinks of the fact that the US and the UK fought alongside each other in World War II, were key allies throughout the Cold War, that the UK is a key ally of the US as a permanent member of the UN Security Council, then one mentions Iraq, Afghanistan, international terrorism and the acceptance that the UK is the US's key international intelligence ally, enjoying an exceptional degree of co-operation enjoyed by less than a handful of other

states, if you look at that case with a real world perspective and you ask yourself would the US jeopardise all of that for seven paragraphs of the court's judgment, moreover in a case that has already been very highly publicised, in my submission it fails the common sense test. It is a proposition that lacks all credibility and the key question therefore for the court is, and for the UK media, in its submissions today, is how has the defendant managed to construct an apparently credible legal case against disclosure and in my submissions the media's contention will be that the defendant's case is based on a series of propositions which, when closely examined, simply do not withstand scrutiny and I am going to take each of these in turn, but I am going to give your Lordship the list of those contentions advanced -- a list of these central aspects of the defendant's case.

29. Firstly, the defendant, we say, misleadingly advances a case of potential harm to national security on an entirely false premise, namely that the control principle applies and has been understood by the US to apply to UK courts of law. Secondly, the defendant's PII evidence completely overlooks the fact that the seven paragraphs did not contain any information damaging to national security, when in fact it is the crucial consideration. Thirdly, the defendant seeks to portray the position of the Obama administration on disclosure of the seven paragraphs as being the same in fact as that of the Bush administration. When properly analysed, this is not the case. Fourthly, the defendant presents a misleadingly incomplete picture of US/UK intelligence sharing which results in an exaggerated and unrealistic assessment of risk and fifth is the defendant's tendency to equate the disclosure of paragraphs of the court's judgment with disclosure of the underlying evidence on which the judgment is based, a confusion which we say is incoherent and has the consequence of failing to give insufficient weight to the specific public interest in disclosure of a court's findings of fact.

30. Developing those submissions, my Lords, the first submission, the control is -- under the heading the control principle and your Lordships will recall that the submission is the defendant misleadingly advances a case of potential harm to national security on a false premise and that false premise is that the control principle applies and has been understood by the US to apply to UK courts of law and, taking up my skeleton argument, your Lordships, at paragraph -- this, the section that deals with this, which I will develop more fully in my submissions, starts on page 7 at stage two of the analysis and in paragraph 21 of the skeleton argument the defendant's case is set out in the three PII certificates, and has been that if the court were to order disclosure of the 42 documents and the seven redacted paragraphs, contrary to US wishes, that it would introduce a new element of uncertainty into intelligence sharing relationships that would cause the US and other UK analysts to doubt whether the UK could be trusted with sensitive information and thereby undermine the UK's intelligence sharing relationships and, turning to the first PII certificate, it is in your Lordships' bundle A, namely the 22nd April hearing bundle, tab 1. Page 1 is where the first certificate starts --

31. LORD JUSTICE THOMAS: Tab 1, page 1. OK.

32. MR VASSALL-ADAMS: And, following through that certificate through to page 5 of the certificate, you will see paragraph 12 and the material parts are intelligence

relationship with the United States is vital to the national security of the United Kingdom. It saves lives. It is essential that the ability of the United States communicating confidence with the United Kingdom is protected. Without this confidence, they simply will not share information in the open manner which is currently the case:

> "It is important to me that the court understands the reasoning that would inform such a change in practice. Exchange of information between the US and UK is comprehensive but very strictly controlled. As set out in the sensitive schedule, this strict control occurs in and to the benefit of both countries."

and this is the crucial passage:

> "Disclosure by order of our courts would introduce a new, and in the minds of our US partners..."

Note, and in the mind of our US partners it is not contended apparently at this point by the Secretary of State that it would be introducing an uncertain dimension, but:

> "... in the minds of our US partners, uncertain dimension into a set of practices that rely upon certainty."

And then it goes on to describe the implications that that would have and, at page 7 of the certificate, actually your Lordships will recall that those paragraphs were dealing primarily with the issue of disclosure of the 42 documents, but the issue of disclosure of the paragraphs, although they are never described as such in the certificate, is dealt with on page 7, paragraph 17 to 19, and it is implicit, although never stated explicitly there, that the Secretary of State is relying upon the same reasons in relation to opposing the disclosure of the paragraphs as he did in relation to the documents, but it is not explicitly stated there. However, in the second PII certificate, it is explicitly stated and that certificate starts on page 9 and on page 16 of the certificate, at paragraphs 29 to 35, are the crucial paragraphs in terms of setting out the Secretary of State's analysis, and, again, in the first instance here, they are directed to the disclosure of documents issues. The paragraphs I am particularly concerned with in this context are at 31 to 32 and I will give your Lordships a moment to read those through. But essentially they relate to the control principle. **(pause)**

33. It is not simply confidentiality and the secrecy of intelligence material that is in issue, however, but also the issue of the control that one government has over the intelligence information it shares with another government in expectation of confidentiality.

34. LORD JUSTICE THOMAS: Yes.

35. MR VASSALL-ADAMS: And, if your Lordships turn to page 21 of that certificate, you can see that here the court is explicitly dealing with disclosure into the public domain and is talking about the closed paragraphs of the court's judgment and in paragraph 48 deals with the second question, whether there is a likelihood of real damage to national security and international relations and it says, halfway through

paragraph 48, the reasons for this assessment, ie for his assessment that there would be such damage, correspond to those set out and referred to in paragraph 29 to 35 above, ie the reasoning -- the arguments about the control principle, arguments he relies upon explicitly in relation to the issue of disclosure of the paragraphs.

36. LORD JUSTICE THOMAS: Yes.

37. MR VASSALL-ADAMS: And at paragraph 50, just turning very briefly to that on the following page, the final sentence of that paragraph, I emphasise again that it is not simply a question of the confidentiality and the secrecy of intelligence material but also one of the US expectation to be able to retain control of its intelligence information and, where disclosure is required, to handle this within its adjudicatory system and subject to its own protective measures.

38. The third PII certificate is on page 39 of bundle B, the small bundle that I handed up to your Lordships a moment ago.

39. LORD JUSTICE THOMAS: Yes.

40. MR VASSALL-ADAMS: And it starts at page 7 of that bundle.

41. LORD JUSTICE THOMAS: Yes.

42. MR VASSALL-ADAMS: I apologise, it does not start at page 7. It starts at page 39 of that bundle and on page 7 of that certificate, which is page 45 of the bundle, the -- we get the national security assessment and you will see at paragraph 20 there is an express reference back to the assessment made in the second certificate and, quoting the passage that itself refers to paragraphs 29 and 35 as being part of the analysis, and then he says, paragraph 21, it explicitly refers back to paragraphs 29 and 35 of the second certificate in terms of his assessment and he describes "my judgment across those two certificates was the public disclosure of the information now in issue before the court would seriously harm the intelligence sharing arrangements between the United Kingdom and the United States, causing considerable damage to the national security of the United Kingdom" and so forth, and then paragraph 22 is the crucial paragraph:

> "I have carefully reviewed my assessments and conclusions as expressed in these early certificates, taking into account the further advice that I have received. I consider that the judgments expressed therein were then and remain correct. It is my continued view that real harm to the national security and international relations interest of the United Kingdom would be caused were there to be public disclosure of the seven paragraphs in issue in these proceedings. The critical issue is the principle of trust and the fundamental requirement of confidentiality that lies at the heart of intelligence liaison relationships, an aspect addressed in greater detail in the sensitive schedule."

Then in paragraph 23 the Secretary of State refers again to:

> "... the long established practice within intelligence communities that

> information passed along intelligence channels cannot be publicly disclosed without the consent of the state providing it. Trust is of fundamental importance to the intelligence relationships maintained by the United Kingdom in protecting its national security. It is a custom which has always to the best of my knowledge and preference been respected by the UK courts."

43. Paragraph 24, halfway down:

> "If the court was to disclose the seven paragraphs in the current circumstances, this would cause a loss of confidence in the United Kingdom's ability to comply with this custom, ie the control principle custom, not only by the United States but also by other foreign governments which would cause considerable damage to our national security."

Not a question of the United States merely taking umbrage, as it has been described to the court, but the United States and other foreign governments reevaluating the extent to which they believe they can safely provide the UK with information in the light of what would be a highly significant breach by the UK of the control principle. Failure of the UK legal system to respect and protect information disclosed in the intelligence relationship will have serious consequences for intelligence liaison.

44. Now, in paragraph 25 of my skeleton argument, I describe the control principle as being the principle that where government A provides government B with intelligence information, government A will expect government B not to disclose that information to anyone else without its prior consent, hence control of information provided to the recipient government always vests with the originating government and the essential point in relation to this is this, and it is dealt with in paragraph 26: the control principle is a rule of practice that governs intelligence sharing between governments. It does not extend a power to an originating country to control dissemination by an independent court of law in the receiving country and the problem -- and in our submission it is a fundamental problem with the whole way the Secretary of State has constructed his case on this point, is that it overlooks the basic constitutional principle of the separation of powers, namely the separation of powers between the powers of the executive and the powers of the courts and that principle in itself lies at the heart of the exercise that the courts are required to undertake when reviewing Public Interest Immunity and in this respect I rely on the case of Conway v Rimmer and it is at the third tab of your Lordships' bundle provided by -- the media bundle that I handed up this morning.

45. LORD JUSTICE THOMAS: Yes. Which bit do you want to go to?

46. MR VASSALL-ADAMS: Bear with me, my Lord.

47. LORD JUSTICE THOMAS: Do you want to just give us a reference?

48. MR VASSALL-ADAMS: Can I deal with it very quickly. I am aware that this was cited in arguments at an earlier stage in the case --

49. LORD JUSTICE THOMAS: Yes, of course.

50. MR VASSALL-ADAMS: -- but it is of some importance. The facts are dealt with in the headnote. The claimant was a former probationary police constable. He was accused of stealing a torch. He said he did not steal the torch. He was subsequently prosecuted. He was acquitted at trial but sacked from his job and he began a claim for malicious prosecution, sought access to various documents and the Home Secretary relied on Public Interest Immunity to seek to prevent him from having access to them and the essential holding can be seen from the headnote and it is one with which your Lordships will be familiar. But the essence of why I rely upon it in this context is that in Conway v Rimmer, the dicta of Lord Simon in Duncan v Cammell Laird were overruled and the court said the ultimate decision in a PII is not a matter for the minister but it is a decision that the court takes and that is because of the separation of powers. If I can deal with the relevant passages very briefly from the judgment of Lord Morris, because, although he was not the only one to refer to it, he deals with it most fully and it is at paragraph 954 of the judgment. It is page 954, it is the start of his judgment:

> "My Lords, stated in its most direct form the question - one of far-reaching importance - which is raised in this case is whether the final decision as to the production in litigation of relevant documents is to rest with the courts or with the executive. I have no doubt that the conclusion should be that the decision rests with the courts."

51. LORD JUSTICE THOMAS: I do not think Ms Steyn disputes that.

52. MR VASSALL-ADAMS: Nobody disputes it, but what -- but the significance I attach to it in this context is that the principle derives from the principle of the separation of powers and of the particular role in the constitution that the courts play and that is made very -- it is analysed in this judgment and in particular I rely upon the passages given on page 955 and 956 and I will turn to them very briefly. At 955E, Lord Morris says:

> "We could have a system under which, if a Minister of the Crown gave a certificate that a document should not be produced, the courts would be obliged to give full effect to such certificate and, in every case and without exception, to treat it as binding, final and conclusive. Such a system (though it could be laid down by some specific statutory enactment) would, in my view, be out of harmony with the spirit which in this country has guided the ordering of our affairs and in particular the administration of justice. Whether in some cases the law has or has not veered towards adopting such a system is a matter that has involved the careful and detailed review of the authorities which was a feature of the helpful addresses of learned counsel."

Then he goes on to analyse the possibility that there would be friction between the courts and the minister and he says, no, they both operate in the public interest:

> "Some aspects of the public interest are chiefly within the knowledge of

some Minister and can best be assessed by him."

And the court would obviously take those into account but ultimately someone has to make the final decision. He says at the bottom of the following paragraph "Should it be the court or should it be the executive?" and then he deals with the submission of the Attorney General, essentially to say -- which were to the effect that the primary duty to determine whether public interest rests with the government and essentially that the court, you can see further down, had no discretion:

> "... to reject a statement of the executive government (if put forward in appropriate form and in good faith and without mistake or misdirection) recording a determination that the public interest requires that a document be withheld. The court, he submitted, must give conclusive effect to such a statement..."

But Lord Morris says no at G:

> "I am unable to regard these submissions as being acceptable. It is one of the main functions of courts to weigh up competing evidence and considerations. I see no peril in leaving such a process to the courts. They are well qualified to [do so and so forth] ... It is said that a statement by the executive to the effect that the public interest requires that a document should be withheld is a statement upon a matter peculiarly within the knowledge and competence of the executive government and must therefore be accepted by a court."

A court would always pay the greatest heed to such a statement and there are many matters upon which the executive will be likely to be best qualified to form a view:

> "It will be easy for a court to recognise this and to give full weight to this consideration. The court, however, will be in a position of independence and will as a result often be better placed than a department to assess the weight of competing aspects of the public interest including those with which a particular department is not immediately concerned."

53. LORD JUSTICE THOMAS: Yes. Right.

54. MR VASSALL-ADAMS: I will not take your Lordships to it in view of the indication your Lordships just gave me, but essentially the judgment in Conway v Rimmer was analysed in ex parte Wiley by Lord Woolf and essentially it was analysed in the terms that Conway v Rimmer established that the decision was ultimately a matter for the courts and that the basis of that decision was about controlling the balance of power between the executive and the judicial branches of government and the judgment itself is at your Lordship's tab 4. I am just going to see whether I can find the one specific passage. Yes, it is page 296, my Lords, 296 at G and H.

55. LORD JUSTICE THOMAS: Yes.

56. MR VASSALL-ADAMS: At G:

> "It should be remembered that the principle which was established in Conway v Rimmer is that it is the courts which should have the final responsibility for deciding when both the contents of a class claim to immunity should be upheld..."

And then the following passage:

> "What was inherent in the reasoning of the House in that case was that, because of the conflict which could exist between the two aspects of the public interest involved, the courts, which have final responsibility for upholding the rule of law, must equally have final responsibility for deciding what evidence should be available to the courts of law in order to enable them to do justice."

57. Now, why do we say all of this is relevant and important at this stage of the proceedings? In our submission, it has two implications for the defendant's case. Firstly, the defendant's case is unsound as a matter of law. The control principle does not apply to courts of law, discharged with determining Public Interest Immunity for fundamental constitutional reasons concerning the separation of powers and the independence of the courts from the executive. Secondly, the defendant's case is unsound as a matter of fact, because Conway v Rimmer has been good law in this country for 40 years and it is inconceivable that the US would not understand that the UK government guarantees of confidentiality are not absolute but are subject to review by the courts and, of course, there is evidence before the court on this point. I will take your Lordships to it very briefly but it is the evidence put in by the international media at the April hearing and the witness statement of Morgan Halperin in your Lordships bundle A. I will take your Lordships to it very briefly at tab 4 so you have the reference.

58. The statement itself is at tab 4, starting on page 2, and in this context I rely in particular on paragraph --

59. LORD JUSTICE THOMAS: Tab 4 --

60. MR VASSALL-ADAMS: Yes. Sorry, my Lords. Tab 4, page 3.

61. LORD JUSTICE THOMAS: Yes.

62. MR VASSALL-ADAMS: And, so I do not have to take your Lordships back to it again --

63. LORD JUSTICE THOMAS: No, we have looked at that.

64. MR VASSALL-ADAMS: -- perhaps your Lordships should read paragraphs 5 and 6, which describe the relationship between the UK and the US governments. I do not know whether your Lordships have noted the credentials of the writer.

65. LORD JUSTICE THOMAS: Yes, we read this on the last occasion and it is obviously someone -- what he is really saying, I think, is that the US government must have appreciated that the ultimate authority is in this court.

66. MR VASSALL-ADAMS: Indeed. That in a nutshell --

67. LORD JUSTICE THOMAS: I doubt whether that could be contested.

68. MR VASSALL-ADAMS: In a nutshell that is it and, of course, this evidence has not been challenged --

69. LORD JUSTICE THOMAS: All this argument, Mr Vassall-Adams, I think goes to your point that, although the Foreign Secretary -- well, it is the difference between what the Foreign Secretary says may happen. The US documents by and large show that he could do this, you could do this, and your point is, well, no-one could ever conclude rationally that they would do it. Is that it? I mean, that is what this goes to, is it not?

70. MR VASSALL-ADAMS: I am sorry, I --

71. LORD JUSTICE THOMAS: Sorry. Your argument is this: if we look at all the documents, although there are expressions of view couched in the documentation that there are of the principle of inviolability, if you look at it as (a) the US court must appreciate it, (b), you look at the kind of them and then you ask yourself at the end of the day could a Foreign Secretary reasonably conclude that they would do it, because if they would not carry out the threat or would not breach intelligence sharing relationships, then there is no doubt. That is your argument, is it?

72. MR VASSALL-ADAMS: That is where my argument leads to.

73. LORD JUSTICE THOMAS: And this is all part of that?

74. MR VASSALL-ADAMS: And this is all part of that.

75. LORD JUSTICE THOMAS: That really this is --

76. MR VASSALL-ADAMS: Of that analysis, because ultimately --

77. LORD JUSTICE THOMAS: It is all a statement of grand principle but, when push comes to shove, if this court makes these paragraphs available, it is not rational to conclude that anyone will do anything.

78. MR VASSALL-ADAMS: Exactly.

79. LORD JUSTICE THOMAS: That is it, is it not?

80. MR VASSALL-ADAMS: Well, that is where we get to. That is where we get to and, if I may deal with a third --

81. LORD JUSTICE THOMAS: What you are looking at, I think -- it is obviously clear from the cases which were dealt with at length -- is that we must accord the upmost

respect to the Foreign Secretary's view but, at the end of the day, if we were to conclude that his view was not one that could properly be sustained on analysis, then we ought to override it and the US government must appreciate that.

82. MR VASSALL-ADAMS: Indeed, and that is explicit --

83. LORD JUSTICE THOMAS: I think it is much better to put it that way than to talk of irrationality, because no-one could ever -- it is a lawyer's term.

84. MR VASSALL-ADAMS: Indeed, and that much is conceded in paragraph 27 of our skeleton argument. We readily accept that the US and any other country providing intelligence to the UK is generally entitled to assume that the court will be highly deferential to the views of the minister and take them very, very seriously. But what they are not entitled to assume is that the decision will always fall one way.

85. LORD JUSTICE THOMAS: Yes.

86. MR VASSALL-ADAMS: A third aspect of the defendant's argument which is problematic, the control principle argument as it relates to this case, is that it has ignored what has happened in these proceedings, because clearly the court's first three judgments made it very clear that the court would have ordered disclosure of the 42 documents to Binyam Mohammed's lawyers if the US had not made the concessions it did and clearly the US administration can have be left in no doubt, both of the court's powers and of its willingness to exercise them.

87. LORD JUSTICE THOMAS: But that goes, I think -- there is no absolute principle. There is a reference, I think, in one of these documents to it being an inviolable principle, but if you subject that to analysis, it cannot conceivably be right, because, for example, if the US intelligence service has supplied to the United Kingdom Government information that showed -- or should I put it the Republic of Ruritania -- it is easier to do it in these terms -- supplied to the United Kingdom security services, through their security services, information in relation to some action that was to be taken by that government in the UK, it would be inconceivable that the UK Government was not free to disclose it to the general public. I mean, the principle of inviolability as an absolute cannot be right. Although it is mentioned, I think we would have to look at the context. So it is a balancing exercise.

88. MR VASSALL-ADAMS: It is a balancing exercise, my Lords. I am just going to see which of my submissions I can cull --

89. LORD JUSTICE THOMAS: Because I think at the end -- I am sorry I took you to the point. It is simply the really difficult issue in this case is the assessment of the Foreign Secretary's judgment. I think what you have said is that you have started this -- as you say, you stand back you and you have said, in the light of everything you have mentioned, it really is absurd to think that the United States administration would, if we put paragraphs into the public domain, that have absolutely no damage to anyone, that might be politically embarrassing to some, that they would do anything.

90. MR VASSALL-ADAMS: That is right, my Lord.

91. LORD JUSTICE THOMAS: I think that is the argument and it is the question of reality of what -- I think the question is, looking at these documents very carefully, would the United States do something, that is the judgment that we have to examine, because the Foreign Secretary says, I think, that they would.

92. MR VASSALL-ADAMS: Indeed, and --

93. LORD JUSTICE THOMAS: And you say, well, no, the foreign Secretary was wrong, completely wrong, in reaching that view.

94. MR VASSALL-ADAMS: Indeed.

95. LORD JUSTICE THOMAS: OK. Well, that is quite a hurdle to overcome.

96. MR VASSALL-ADAMS: That is the hurdle that we have to overcome and, if I may essentially summarise --

97. LORD JUSTICE THOMAS: I do not want to take you out of the order, but I think these sort of basic building blocks are clear. It comes to the very principal point, which is an examination of the material which is before us to decide whether we should accord due deference to the Foreign Secretary or conclude that he had no proper basis for reaching that decision given the change of administration of the United States, because I think there is -- in our earlier judgment we distinguished between a breach of the ordinary principle of confidentiality and any particular statements that might be made that would show that an action could be taken as a result of breach. There are two -- and I think it was **Dame Neville-Jones** in their Lordship's house, or their Lordship and their Ladyships house, who can distinguish between the ordinary principle and consequences flowing from that and any special statement that may be made over and above it.

98. MR VASSALL-ADAMS: Yes. I mean, in essence, I will take your Lordships, if I may, through those propositions that I set out at the outset, because they do ultimately lead to the conclusion that you are asking me to address. Now, the significance of the point that I have just been developing in relation to the control principle is this, that, if we are right that the defendant's case on the control principle is legally and factually unsound and it is in fact a smokescreen, the defendant's attempt to construct a general argument about the damage to national security arising from court order disclosures must fail and that takes us back to what we say should have been the exercise all along, namely focusing in on whether disclosure of this particular information would create a real risk of serious harm to national security in this case and in that regard we say, and this is my second heading, it is remarkable -- or perhaps not remarkable, it is noteworthy -- that the defendant's PII evidence completely overlooks the fact that the seven paragraphs do not contain any information damaging to national security and we say that is really the crucial consideration. What you would expect in a PII certificate in a case of this kind would be to look closely at what it was proposed to disclose and identify the damage that would actually arise from the disclosure of that information.

99. MR JUSTICE LLOYD JONES: So would you say, Mr Vassall-Adams, that this is a class claim as opposed to a contents claim?

100. MR VASSALL-ADAMS: We do say it is a class claim. It is a class claim in effect because what the Secretary of State is saying is, because this information was supplied in confidence by the United States under the expectation that we would not disclose it, therefore disclosing it would be harmful to national security, so it is because it falls within the class of that kind of document, rather than looking at the actual contents of the statement, as the court is required to do.

101. LORD JUSTICE THOMAS: I do not think -- you make the point, I think, that there is nowhere suggested by the Foreign Secretary that anything in the seven paragraphs could of itself be damaging to the national security of anyone.

102. MR VASSALL-ADAMS: Nowhere. Not in -- one can go through the PII certificates line by line and there is not a single reference --

103. LORD JUSTICE THOMAS: Well, Ms Steyn will obviously tell us if you have got that wrong.

104. MR VASSALL-ADAMS: Yes. So, turning back to my skeleton briefly, we say that the failure to -- this is at page 11. Paragraph 32 deals with the point your Lordship has just addressed, and notes the fact that the defendant has at no stage demurred from the court's previous finding that the disclosure of the paragraphs would not be harmful to national security, contained no specific information harmful to national security, and at paragraph 33, the -- we set out reasons why we say this is significant. Firstly, the court is required, when determining where the balance of the public interest lies, to look at specific information questioned and form its own judgment as to the likely harm to national security if disclosure is ordered and in that respect we rely upon Shayler. The relevant part of the judgment is set out at paragraph 35 of the skeleton argument.

105. Now, why do we say this is relevant? Well, I do not propose to take your Lordships to Shayler. It is in your Lordships' bundle. Your Lordships will recall the context for that case. The court in that case was seeking to determine whether the Official Secrets Act, the prohibition of the disclosures under the Official Secrets Act, the absolute act was Human Rights Act compliant in terms of Article 10 and ultimately held that it was, because the backstop was always that a former member of the intelligence services could go to the High Court and challenge a refusal to make the disclosure which he said would be in the public interest and the argument was made judicial review is not really a very effective remedy, because the courts are so deferential when it comes to national security considerations and Lord Bingham dealt with that submission in the way that I have identified at paragraph 33. He says there are two answers to it, and the first is the court's willingness to intervene will very much depend on the nature of the material that it is sought to disclose:

> "If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the

> compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different. Usually, a proposed disclosure will fall between these two extremes and the court must exercise its judgment, informed by article 10 considerations."

106. Well, we say that is relevant because, although it is a different context, it is the court trying to weigh up the competing claims of national security and the competing claims of article 10 and Lord Bingham is very clear that one needs to focus in on the specific information that is sought to be disclosed.

107. Secondly, at paragraph 36 of the skeleton, the point that your Lordships have already identified: our submission is that the defendant's inability to point to any specific information in the seven paragraphs, the disclosure of which would be harmful to national security, reveals the defendant's PII claim to be in substance, if not in form, a class claim. The objection here is the disclosure of paragraphs, because they are based upon intelligence information provided by the US in confidence, a class, not because they actually contain information harmful to the national security, contents, and we say it is something of a throwback to the old law before ex parte Wiley in that respect and I will just give the reference, page 305E in ex parte Wiley, it is Lord Woolf saying that recognition of a new class based Public Interest Immunity requires clear and compelling evidence that it is necessary.

108. The third, and perhaps, your Lordships might think, rather important, issue concerns the defendant's portrayal of the position of the Obama administration and essentially the defendant's case is this: the Obama administration's position is the same as that of the Bush administration and therefore you should come to the same conclusion as you came to in your fourth judgment and at paragraph 37 I refer to the fact that in the fourth judgment were various communications from the Burn administration. Much of the evidence was in closed but there were two important documents in open and if I may take your Lordships to them very briefly, because they do demonstrate, we say, a very significant difference of language. In, again, your Lordship's bundle A, at tab 1 --

109. LORD JUSTICE THOMAS: Yes, page...?

110. MR VASSALL-ADAMS: Pages 24 to 25.

111. LORD JUSTICE THOMAS: The Bellinger letter.

112. MR VASSALL-ADAMS: The Bellinger letter. It must be heavily marked by now, my Lords, but it is this famous first paragraph:

> "We note the classified documents identified in your letters of June 16th and August 1st 2008. We want to affirm in the clearest terms that the public disclosure of these documents and the information contained therein is likely to result in serious damage to US national security and

> could harm existing intelligence information sharing arrangements between our two governments."

And then there is the email from Mr Mathias. It is at page 32, where an extract from it is provided in the letter of Mr Bethlehem to the court of 27th August and, on page 33, one can see the 3rd paragraph of this email and the final sentence of which is as follows:

> "Ordering the disclosure of US intelligence information now would have only the marginal effects of serious and lasting damage to the US-UK intelligence sharing relationship, and thus the national security of the United Kingdom, and of aggressive and unprecedented intervention in the apparently functioning adjudicatory processes of a longtime ally of the United Kingdom, in contravention of well established principles of international comity."

Well, in our submission, the language there is clear and unambiguous. We would say it is a threat and it is interesting to see what the defendant himself said at the time. If we can turn back to the defendant's first PII certificate and page 4 of the same. So this is the defendant's position back in August 2008. Paragraph 10.

113. LORD JUSTICE THOMAS: Paragraph 10.

114. MR VASSALL-ADAMS: Paragraph 10, page 4 of the certificate.

115. LORD JUSTICE THOMAS: Yes, paragraph 10. Yes.

116. MR VASSALL-ADAMS: "My officials and those of others in the UK government departments and agencies have worked very closely on this case. Their advice..."

117. LORD JUSTICE THOMAS: I am sorry, paragraph --

118. MR VASSALL-ADAMS: Sorry, paragraph 10, my Lord.

119. LORD JUSTICE THOMAS: Sorry, we had gone to page 10.

120. MR VASSALL-ADAMS: Halfway --

121. LORD JUSTICE THOMAS: On page 5.

122. MR VASSALL-ADAMS: Sorry, it is my page 4.

123. LORD JUSTICE THOMAS: Page 4, yes.

124. MR VASSALL-ADAMS: Paragraph halfway down, paragraph 10:

> "My officials and those from others in the UK government departments and agencies have worked very closely on this case. Their advice has been clear and unanimous in my judgment. Disclosure of these documents by order of our courts or otherwise by United Kingdom

> authorities would seriously harm the existing intelligence sharing arrangements between the United Kingdom..."

125. LORD JUSTICE THOMAS: That is a would, is it not?

126. MR VASSALL-ADAMS: Yes, indeed it is, a would.

127. LORD JUSTICE THOMAS: Because we have to look carefully.

128. MR VASSALL-ADAMS: It is a would, not a could. In this case --

129. LORD JUSTICE THOMAS: This will become, as we will look in a moment, as a highly crucial difference.

130. MR VASSALL-ADAMS: Your Lordships are ahead of me and at paragraph 11 he says in reaching his assessment he has taken into account the fact, and this is the way he characterises the position of the US at the time:

> "The US administration, on the basis of clear, consistent and forceful communications, both written and oral, from senior officials, including at the highest national security levels, please note, from all of the departments and agencies concerned, have indicated that such damage was likely to occur."

That is the Secretary of State's assessment of the situation as it obtained under the Bush administration.

131. LORD JUSTICE THOMAS: Bellinger talks of could, but you say the balance of this is would. It talks about it could happen. The critical question that we have to ask ourselves, I think, is does the "could" become a "would", because you cannot decide that there is a risk unless you form a judgment that there is a real risk the "could" could become a "would".

132. MR VASSALL-ADAMS: Without getting caught up in language, there is a preliminary question, which is is the "would" still a "would", or is it now a "could", and in my submission it is now a "could". It has gone from being a "would" to a "could" --

133. LORD JUSTICE THOMAS: Well, we are not sure.

134. MR VASSALL-ADAMS: -- on the Obama evidence but we say -- and that is the analysis I would like to now deal with.

135. LORD JUSTICE THOMAS: OK, let us come to that.

136. MR VASSALL-ADAMS: Turning back to the -- turning back to bundle B very briefly, if I may, page 47 of that bundle in the defendant's third PII certificate. Paragraph 29:

> "I have carefully considered, together with those advising me, whether the recent US correspondence indicates a different approach to that indicated

in the earlier US correspondence. It is my view and that of my advisers that there is no difference in substance between the earlier and recent correspondence."

So that is --

137. LORD JUSTICE THOMAS: And that is a matter of great importance to the Secretary of State.

138. MR VASSALL-ADAMS: That is a matter of great importance to the Secretary of State. Now, we submit otherwise, we will ask the court to make up its own mind and we invite the court first to take a close look at the CIA letter, as I shall now call it, as we now know it is a CIA letter, which is on page 117 in its latest version. Page 117 of bundle B, my Lord.

139. LORD JUSTICE THOMAS: We are told, because we wanted to be sure about this, but in the redacted parts of this there is no language that converts the word "could" to "would".

140. MR VASSALL-ADAMS: Thank you very much, my Lord.

141. LORD JUSTICE THOMAS: Otherwise -- we anticipated from your skeleton this was the argument you were going to make, but there is nothing in the redacted parts of this document that in any way change the balance of the "could" to "would".

142. MR VASSALL-ADAMS: Thank you, my Lords.

143. LORD JUSTICE THOMAS: I think that is very -- we just wanted to check that was the Secretary of State's position, because otherwise we would have to consider whether, in the light of your skeleton, whether we would have to open more of this document up.

144. MR VASSALL-ADAMS: Thank you very much, my Lord. I can deal with this relatively briefly. Paragraph 4 of the letter, I will give your Lordships a moment to read that --

145. LORD JUSTICE THOMAS: We have read it on so many times. I would not say it is inscribed in our hearts but we have read it on numerous occasions.

146. MR VASSALL-ADAMS: I will just deal with my submissions. I will not take your Lordships to it in any great detail. What we say is the fourth paragraph is a generic objection to disclosure of classified information shared between two countries. It treats the proposed disclosure as if it was a disclosure by the UK government itself, shared between our countries, public disclosure of this information, which it clearly is not a disclosure by the UK government itself. The language used is could reasonably be expected to cause serious damage, "could" reasonably be expected to cause serious damage, not "would" cause serious damage to our intelligence sharing relationship. Following that, may result in a constriction of the US/UK relationship, as well as the UK relationships with other countries, and then it goes on to talk about the impact on the relationship with other countries, which certainly, so far as the open case is

concerned, is not a matter that the Secretary of State has been placing particular emphasis on, but in any case most of this letter --

147. LORD JUSTICE THOMAS: Well, you see, the problem is that in -- if the balance is up to us, one obviously has to take -- one would naturally take a difference between, in assessing the likelihood of what a democracy and all our tradition is likely to do as opposed to what the Republic of Ruritania might do, assuming Ruritania not to have those democratic traditions. That is why I think that is the relevance, is it not, that it is, in assessing the risk, the fact that the United States is a democracy and has longstanding issues of freedom of information, it goes to the judgment which we are going to have to make as to whether this Foreign Secretary's assessment of what will happen, subject to one matter to which we will refer you in a moment, is right.

148. MR VASSALL-ADAMS: Yes, my Lords, that is exactly it, and in the following paragraph I just note the fact that it is suggested -- there it is again dealing with the impact on 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 ally. As a consequence if foreign partners -- emphasis 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. Well, it is again expressed in the language of "could", but there is no suggestion there that the US could, let alone would, take steps to withhold sensitive information from the UK government. No suggestion there whatsoever, and, in the final paragraph of the letter, which is in a sense the sort of high point in the sense for the Secretary of State, public disclosure of the information contained in the seven paragraphs withheld from the High Court's earlier decision, as well as the documents from which the information is drawn, ie it runs the two together and does not consider the paragraphs separately, so it runs together the issue of the paragraphs, as well as the issue of the underlying documents, could, again could, likely result in serious damage to the UK and US national security and then this suggestion that it might have to review the sensitivity of information provided in the future and your Lordships have my submission at paragraph 40 of my skeleton argument about what we should understand by the use of the word review, that review is a term --

149. LORD JUSTICE THOMAS: All of this is a judgment and what we were disclosing -- obviously if we were putting into the public domain, you know, the name of a lot of agents who were in foreign power, one could well understand it --

150. MR VASSALL-ADAMS: Of course, absolutely.

151. LORD JUSTICE THOMAS: -- if anyone would ever do such a thing. It is all a question of this very careful balance of actually what we are doing in the context of the democracy that is taking this line.

152. MR VASSALL-ADAMS: Indeed, and the use of the word review we say is an interesting choice, because it is the phrase the governments like to adopt when they want to imply that they might possibly take some action but not commit themselves to

doing anything in particular. That is essentially what it is. It is not a commitment to doing anything. The review could be discharged by simply reading the court's fifth judgment and asking whether it changes anything, to which the only rational answer could be, we submit, it does not. It is an application of well established principles on the very unusual facts of this case.

153. LORD JUSTICE THOMAS: Well, your submission really is, I think, if we have understood this, that all of this is very carefully couched in terms of "could" and if you then stand back and ask yourself the question, in the light of what the Obama administration has disclosed in relation to the practices of the CIA, is it remotely credible that, if we describe what happened to one individual, that they will stop intelligence sharing in relation to the protection of the British public and that is the ultimate question that has to be asked.

154. MR VASSALL-ADAMS: That is the ultimate question that has to be asked.

155. LORD JUSTICE THOMAS: And the Foreign Secretary's view that it is and is that view one that a reasonable -- you know, for which there is credible evidence, if the United States government will act as it will. That, I think, is the issue. That is the attack you are making.

156. MR VASSALL-ADAMS: That is exactly the attack that I am making.

157. LORD JUSTICE THOMAS: I thought we had understood. I just wanted to make certain we had understood it, because I want to take you in a minute to one paragraph of the certificate which you have overlooked and I think because it contains the word "would".

158. MR VASSALL-ADAMS: Very well.

159. LORD JUSTICE THOMAS: Can we go back to the certificate?

160. MR VASSALL-ADAMS: Which one is this, my Lord?

161. LORD JUSTICE THOMAS: The recent one.

162. MR VASSALL-ADAMS: The third certificate.

163. LORD JUSTICE THOMAS: Yes, and if you go to paragraph 27 and read it, there are "woulds" in that sentence and not "coulds".

164. MR VASSALL-ADAMS: Where --

165. LORD JUSTICE THOMAS: Paragraph 27, page 47.

166. MR VASSALL-ADAMS: I am on page 47, my Lords.

167. LORD JUSTICE THOMAS: Page 47, paragraph 27.

168. MR VASSALL-ADAMS: Paragraph 27.

169. LORD JUSTICE THOMAS: If you read it, you will see that the words would are in that, not could.

170. MR VASSALL-ADAMS: Please bear with me, my Lord, I am trying to find the particular part --

171. LORD JUSTICE THOMAS: Just read it through. **(pause)**

172. The source of that statement is the understanding of the conversation of the Foreign Secretary with the Secretary of State, because she says the US Secretary of State indicated further that public disclosure in this case would, not could --

173. MR VASSALL-ADAMS: Yes.

174. LORD JUSTICE THOMAS: Now, I do not know the -- now does that not -- does not the statement of Secretary of State Hilary Clinton make it clear that this is not a "could" case, but a "would" case.

175. MR VASSALL-ADAMS: No, my Lord, it does not, for this reason: you have to look extremely carefully at what is actually being said here, look at the language, and you have to turn back to paragraph 26.

176. LORD JUSTICE THOMAS: Yes.

177. MR VASSALL-ADAMS: US correspondence accords with the position of the administration communicated to me in the more general terms, important, by US Secretary of State Clinton on 2nd March 2009 in my discussions with her. She was clear then that the position of the new administration on the disclosure of US intelligence material had not changed. That is what we are talking about, the position of the US -- of the new administration on the disclosure of US intelligence material, indicating an inviolable principle that one state should not publicly disclose the intelligence information shared with it by a liaison partner. So this is simply a reaffirmation of what we already know to be US policy.

178. LORD JUSTICE THOMAS: She is not talking about -- because obviously if Mrs Secretary Clinton was taking the view that disclosure of these seven paragraphs would affect the intelligence relationship and if she told Mr Miliband that, as we have no doubt, that would obviously undermine your argument.

179. MR VASSALL-ADAMS: It would be a serious matter counting against me.

180. LORD JUSTICE THOMAS: But you say this paragraph should be read as not referring to the seven paragraphs and then presumably we have to ask ourselves the question, if it is not clear, and we will obviously have to hear Ms Steyn on the subject, what did Mrs Clinton mean. Is it to be inferred that she meant, if we disclosed these paragraphs, that it would affect the intelligence sharing or is she meaning that if we disclosed real intelligence it would affect you.

181. MR VASSALL-ADAMS: Well, in my submission, your Lordships cannot read into those paragraphs words that are not there. There are no references to the court's judgment, there are no references to the paragraphs of the closed judgment. This is an indication that they are -- they stand by the control principle and they do not want information being disclosed by their allies without their permission. That is the public position of the United States.

182. LORD JUSTICE THOMAS: But is she taking the position that indicates further public disclosure in this case "would", because she actually says "would" affect, it is not a question of "could", and as she is a very senior official of the Obama administration, is she meaning that -- because this is what troubles us about your argument. But if she does mean that -- if she is talking about the paragraphs, then her position is really no different to that of the Bush administration to which you earlier referred, or was she referring to the disclosure of the broad intelligence. Presumably we have to ask the question what do we think she meant, which is not a very -- which is not a question really that we are really happy to do.

183. MR VASSALL-ADAMS: Can I make the submission in this way, my Lord. This certificate is directed to the issue -- this certificate was produced in relation to the disclosure of the court's paragraphs. If that matter had been discussed with Secretary of State Clinton and she had expressed a view on it, it is inconceivable that that would not have been said in terms in this certificate. The words have been chosen extremely carefully to leave it ambiguous, as to what the US -- what the Secretary of State was actually talking about and what -- the words actually used are the public disclosure of US intelligence information in this case. Well, my Lords, I think your Lordships would be surprised if it was suggested that paragraphs of your own judgment are US intelligence information. They are not. They may be based on it but they are the court's findings of fact in relation to the evidence, they are not the evidence, and so --

184. LORD JUSTICE THOMAS: No, I think what you really say is that, what we are not -- that if there is nothing in it that is of an intelligence nature, then that is not the disclosure of intelligence information of the kind she is referring to. But it is very difficult -- what the Secretary of State meant in this discussion is -- it is unfortunate we have reached this position in this case that we do not know she really -- you say it is clear what she meant. It is pure intelligence.

185. MR VASSALL-ADAMS: It is, and in my submission it really would have been best evidence if the Secretary of State could provide it, if there had been a letter from Ms Clinton saying we would seriously review UK intelligence sharing if this information were to be disclosed, but of course there is not evidence --

186. LORD JUSTICE THOMAS: No, it is not to review it. It would affect it.

187. MR VASSALL-ADAMS: Would affect it.

188. LORD JUSTICE THOMAS: I mean, the words are not reviewing it. This is much clearer. What the Secretary of State is saying is public disclosure would affect the intelligence sharing and so it is not -- whose intelligence sharing, of course, it lies open

to question, but this rather crucial sentence has -- in the context of your argument has turned out to be rather important.

189. MR VASSALL-ADAMS: My argument does not only, respectfully, hinge on the difference between would and could, there are a number of stages of the analysis, and you have to look at the totality of the evidence, including the CIA letter and the very, very careful language that is adopted in that. In relation to this matter, our submission is that these words will have been drafted with great, great care and if there had been comments specifically corrected to this court making public aspects of its judgment, those would have been recorded. That is our submission.

190. LORD JUSTICE THOMAS: So you are saying what we should interpret Secretary Clinton to be saying is it is public disclosure of what is intelligence information in its true sense and not information that is a very bland summary of the treatment of an individual, which may have been derived --

191. MR VASSALL-ADAMS: Well, there are two ways of interpreting it. One is the way your Lordships has just identified, that it is directed towards true intelligence information and not towards the -- and the other is that this is still in the context of the disclosure of the underlying documents as opposed to the parts of the court's judgment.

192. LORD JUSTICE THOMAS: OK. It is unfortunate that it is ambiguous.

193. MR JUSTICE LLOYD JONES: It might be said, Mr Vassall-Adams, that the only disclosure proposed in this case is of the seven paragraphs.

194. MR VASSALL-ADAMS: It is.

195. MR JUSTICE LLOYD JONES: In which case, what else can it refer to?

196. MR VASSALL-ADAMS: Well, if only it was that straightforward.

197. LORD JUSTICE THOMAS: But what it would mean is that what you have in Secretary of State Clinton is a very serious statement which we would have to take into account, that she was saying that if we did it it would affect intelligence sharing and that your argument therefore that it is inconceivable that the Obama administration would cut off intelligence if we made seven paragraphs public, becomes more difficult to sustain.

198. MR VASSALL-ADAMS: Well, I am entirely with -- I share your Lordship's concerns --

199. LORD JUSTICE THOMAS: I am sorry, I did not know whether you had picked this up, but it is in the light of --

200. MR VASSALL-ADAMS: The ambiguity, but I have no doubt whatsoever that, if there had been explicit discussion of the court's judgment that that would have been faithfully recorded and would have been at the forefront of the Secretary of State's case, not as in fact happens, not mention the Secretary of State's case --

201. LORD JUSTICE THOMAS: OK. Yes, Ms Steyn?

202. MS STEYN: My Lord, I just wonder whether I could slightly shorten this point by saying that this point has been checked. The statement made, as recorded, was made in relation to the seven paragraphs.

203. LORD JUSTICE THOMAS: So the position is very clear, that Mrs Clinton is saying that, if this court discloses these documents -- these seven paragraphs -- I mean, it is a very, very serious thing to say, because it comes from the US Secretary of State. If we disclose these seven paragraphs it will affect the intelligence sharing. It is no question of issue could any more, it is would.

204. MR VASSALL-ADAMS: Well, my Lord, let me put it like this. It is entirely unacceptable for evidence to be given through counsel on a matter of this kind --

205. LORD JUSTICE THOMAS: Well, obviously this is not a matter --

206. MR VASSALL-ADAMS: -- at this stage of the hearing.

207. LORD JUSTICE THOMAS: Well, no doubt Mrs Steyn can confirm this after lunch in a letter or something signed by a responsible official or the Foreign Secretary, that that was the best of his recollection, because it is critical -- this is central to your argument because it goes back to the decision we made, initially in January, that there is one, which I think **Dame Neville** illustrates quite clearly that it is general -- **Dame Pauline, I mean, Neville-Jones**, distinguished between the ordinary principle and some specific statement and what we are here in this open paragraph, have a specific statement that it would affect it. This is not theory any more. It is the actuality of the statement by Secretary of State Clinton.

208. MR VASSALL-ADAMS: Well, it would be --

209. LORD JUSTICE THOMAS: Well, it is a matter for the Foreign Secretary to clarify what it means --

210. MR VASSALL-ADAMS: It is.

211. LORD JUSTICE THOMAS: But it does make a very, very real difference to your arguments, because, if the Foreign Secretary is told by the Secretary of State that it would have the consequence, how can we possibly say that he was not right in reaching the view that he did.

212. MR VASSALL-ADAMS: Well, if you regard it as a hollow threat, it might be that he should not have regarded it as high as --

213. LORD JUSTICE THOMAS: Let us not call it a threat, because that may be an emotive term, but a statement of consequences, which may be a more palatable expression than a threat, but we are not certain what it is, the difference, but, if you look at this question, this is why we have raised this, because we have read your argument, we have raised this question here, and it is -- I am afraid, Mr Vassall-Adams, over the luncheon

adjournment you had better think about this, because this makes your argument, with respect, rather difficult.

214. MR VASSALL-ADAMS: Well, my Lords, we would like -- we would wish to indicate that if it is the defendant's contention that Secretary of State Clinton specifically referred to the seven paragraphs in this context, we would wish to see that in evidence, in a sworn witness statement in the usual way. Regrettably, it has been the case in these proceedings that counsel, through their submissions, have effectively given evidence and it is not acceptable.

215. LORD JUSTICE THOMAS: Well, no doubt Ms Steyn will have the luncheon adjournment, we might give her a few more -- but this is absolutely central to the decision in this case and, you know, this is now a statement -- this is a public statement, as recorded here, by a very senior official of the US government about which there can be no doubt to which we should have very great regard. It takes us back to the way -- fortunately on this occasion this is in the open, so it is easy to look at it, as to what is on the face of it a very clear statement and the Secretary of State's position --

216. MR VASSALL-ADAMS: Well, if it is directed toward the seven paragraphs, if indeed it is, it is clearly inconsistent with the CIA letter, which is the latest evidence on which the defendant relies. But we would take a lot of persuading on this side of the court that that indeed is the position.

217. LORD JUSTICE THOMAS: We have to look at the evidence and if there is evidence by someone who is, you know, closely -- at the centre of the US administration, it is very difficult for us to say, surely, that the Foreign Secretary was not entitled to pay the highest regard in reaching his judgment to what he was told by the US Secretary of State. He may be surprised at what she was told, or what his recollection on the question was. That is not a matter for us.

218. MR VASSALL-ADAMS: No, I --

219. LORD JUSTICE THOMAS: And we just have to gone on this very important paragraph in this certificate.

220. MR VASSALL-ADAMS: Indeed, my Lord, well --

221. LORD JUSTICE THOMAS: Would it be sensible if we were to break now, to enable you to look at this, and Ms Steyn, because we are actually quite anxious to give -- also to sort out so we can give to the Secretary of State at least a version of the open judgment which we need to correct, so if there are any issues we can resolve those today. You are not going to very much longer, are you?

222. MR VASSALL-ADAMS: I am not going to be very much longer. I am essentially coming towards the end of my submissions.

223. LORD JUSTICE THOMAS: And then, Mr Jaffey, maybe you could think about this issue, and then we start again at 2 o'clock. Thank you.

(12.51am)

(The luncheon adjournment)

(2 o'clock)

224. LORD JUSTICE THOMAS: Ms Steyn, Mr Goudie, we have produced drafts along the lines we discussed this morning. There are three copies in one for Ms Steyn and two copies for you. If you do want other copies, Ms Steyn, could you please let us know and we can get some more run off, but we thought if we gave you three that might be enough. But if you want more.

225. Yes, Mr Vassall-Adams?

226. MR VASSALL-ADAMS: My Lords, addressing the points that your Lordship raised with me just before the luncheon adjournment, may I deal with it by way of looking at a chronology of events and explain why we say this is significant.

227. Your Lordships will see that paragraph 26 of the third PII certificate makes reference to two meetings with the Secretary of State. The first was on 2nd March 2009 and the second was on 12th May 2009. In relation to the first meeting, two days later the UK media wrote a letter to the defendant and it is at your Lordship's bundle A. Tab 2 --

228. LORD JUSTICE THOMAS: Sorry, this is the big bundle, is it not, bundle A?

229. MR VASSALL-ADAMS: It is, my Lord.

230. LORD JUSTICE THOMAS: Yes, page...?

231. MR VASSALL-ADAMS: Page 24 to 25 at tab 2 and in that letter, which is postdating the first meeting with the Secretary of State, the UK media explicitly asked the defendant whether the issue -- question number 3, has the US government ever been asked by the UK government to consider the specific question of whether the seven paragraphs should be redacted from the court's judgment of 21st August 2008. That was the question we asked on 4th March and then, at page 39 of the bundle, we got the defendant's response, a very short letter:

> "I am writing further to your letter of 4th March 2009 to my colleague David Mackie concerning the above proceedings. Your questions do not appear to have any bearing on any matters currently in issue and our clients therefore do not propose to answer them."

232. So the defendant was specifically invited, immediately after the meeting with the Secretary of State, to address the question of whether that issue had specifically been canvassed with the US administration and at that point declined to provide any answer at all. Then, following on the sequence, the defendant's third PII certificate, your Lordships will note, is of course dated 15th May and so that certificate came three days after the second meeting with the Secretary of State.

233. LORD JUSTICE THOMAS: Yes.

234. MR VASSALL-ADAMS: But your Lordships will recall the slightly unhappy history of what -- of the defendant's response to the court's ruling that the identity of the sending entity and the receiving entity should be disclosed and, of course, the defendant sought to open that up and the defendant did so in a letter which is at page 94 of your Lordship's bundle and is actually highly relevant, it turns out, to the issue that we are now being called upon to consider.

235. MR JUSTICE LLOYD JONES: Sorry, page 94 of --

236. MR VASSALL-ADAMS: Sorry, in the small hearing bundle for today, bundle B.

237. Now, what the defendant was doing here was seeking to anticipate the claimant's argument made at the previous hearing that a letter from the CIA would not reflect the views of the administration as a whole, or may not reflect the views of the administration as a whole, and so the defendant was in contact with the US and this following letter arrived. It says:

> "Following the court's indication of your second paragraph that your Lordships proposed to make, in light of the court's reasons the defendant sought fresh confirmation from the US government that an understanding stated in his third PII certificate that the communication of 30th April 2009 reflected the views of the US government, was accurate. A response to this request was received late yesterday afternoon in the form of an open letter from General Jones, national security adviser to the President, to Simon McDonald, foreign affairs adviser to the Prime Minister, see copy attached hereto."

In the following paragraph:

> "The only issue to which the identity of the entity from which the communication [and so on and so forth] was said to be relevant was the question whether the views set out therein reflected the views of the US administration. If, despite the Secretary of State's clear and uncontroverted statement that it did indeed reflect the views of the US administration as a whole..."

ie the Secretary of State had already said to the defendant the CIA letter reflected the views of administration as a whole:

> "... there was any room for doubt, the question has been addressed definitively in the letter from General Jones. There is no rational basis on which any of the parties could seek to maintain the argument that the communications of 30th April 2009 does not reflect the views of the US administration as a whole."

238. And then if you turn to the actual letter of June 29th 2009, at page 96 of your Lordships' bundle, two pages on:

> "Dear signer,

> The FCO has informed members of my staff in this case. The court has questioned whether the 30th April 2009 letter from a senior United States official appointed by President Obama is indeed the official position of the United States Government. Members of my staff reviewed that letter prior to its despatch and have been following this in the court's actions closely.
>
> The author and recipient of the former letter were chosen because they were best able to recognise and articulate the concerns and potential for damage to the national security of both of our countries in the event the court refuses to protect the information at issue.
>
> I wish to thank you and your government for taking all necessary steps to help protect US information. To allow United Kingdom officials to correct any misperception that the court and parties in this case may hold, allow me directly and emphatically to affirm that a senior United States official appointed by the President indeed speaks on behalf of the United States government."

239. So this is a letter from the assistant to the President for national security affairs. You will see at the bottom it CCs in the Secretary of State. There can be absolutely no doubt from this letter that the CIA letter represents official US policy in relation to this matter. Whatever the Foreign Secretary and Secretary of State Clinton may have discussed, whatever views she may have expressed back in -- earlier on in May, by June 2009 the US administration had firmly, unequivocally and emphatically placed on the public record the fact that the CIA was what represented US policy in relation to this issue.

240. LORD JUSTICE THOMAS: So what you say is that, whatever this may mean, we do not pay a great deal of attention to it, because the views of the CIA -- the view of the administration are those of the CIA.

241. MR VASSALL-ADAMS: On this occasion the CIA has been articulated because they are best able to recognise and articulate the views of the administration as a whole. They are the views of the administration as a whole. When we saw this letter, we knew that was the end of the argument, the potential argument, that had been canvassed earlier on in these proceedings.

242. LORD JUSTICE THOMAS: Is therefore what you say about paragraph 27 that it is to be read as referring -- to make it consistent, to be read as referring not to the seven paragraphs but to the general principle.

243. MR VASSALL-ADAMS: Indeed. Indeed, and, you know, what we would say in relation to the PII certificate as well is that, you know, it is by far from being an unambiguous statement. It is completely unclear what it means. It is second-hand hearsay and it predates the decision of the US administration to put on the record beyond any reasonable doubt that it is the CIA letter that represents official policy in relation to this matter. There is simply no other way of reading General Jones's letter.

244. LORD JUSTICE THOMAS: So you say what we should do is to read this letter as being "coulds" only.

245. MR VASSALL-ADAMS: I am sorry, my Lord, being...?

246. LORD JUSTICE THOMAS: We read the letter from the CIA as a "could" letter and we then have to assess whether it was reasonable to interpret that as -- although it is full of "coulds", in the light of all circumstances, whether the Foreign Secretary, within the margin that must be accorded to him, was reasonable in concluding that the "coulds" would become "woulds".

247. MR VASSALL-ADAMS: Indeed, my Lord.

248. LORD JUSTICE THOMAS: OK.

249. MR VASSALL-ADAMS: I believe I can deal with my further submissions very shortly.

250. LORD JUSTICE THOMAS: OK.

251. MR VASSALL-ADAMS: And I am going to ask your Lordships -- sorry, the fourth heading was that the defendant presents a misleadingly incomplete part of the US/UK -- a picture of US/UK intelligence, resulting in an exaggerated and unrealistic assessment of risk. I have dealt with that in my skeleton argument -- in my written submissions and essentially the emphasis throughout the defendant's case -- and I do not propose to take your Lordships to the documents that back this up unless your Lordships wish me to do so. I can provide the references -- but the emphasis throughout the defendant's case is on UK reliance on the US and the references are first PII certificate, A1(4), paragraph 10, and see also paragraph 12, and the second PII certificate at A1(17), paragraph 32, and so the emphasis is how dependent the US is on the UK intelligence -- sorry, the UK is on US intelligence. But, of course, that is only half the picture. The US also benefits greatly from the UK sharing its intelligence. It is a two way street, not a one way street, and that is dealt with in the evidence of Morgan Halperin, again, which has never been challenged by the defendant, and the reference there is bundle A, tab 4, page 3, the two crucial paragraphs being paragraphs 5 and 6, which I have extracted in my skeleton argument for the court at paragraph 41 and none of this is evidence that has been contested, that:

> "The relationship between the US and UK governments, in particular on matters relating to intelligence sharing and co-operation, is unprecedented in its interdependence and depth of over 60 years of security communications(?) from a statement of mutual trust and the commitment to open dialogue and communication. Intelligence sharing between these two nations is far more extensive than with all but one or two others, which are also part of the same sharing arrangements. The benefits from this relationship with the United States are as great as they are to the UK. These benefits are well understood by senior US officials would who would be loath to lose access to shared intelligence. Any contention that

> the UK/US intelligence relationship could be jeopardised by the reasoned determination of the British court that the public interest demands disclosure of information concerning the individual known to have been in US custody, that to a great deal is already publicly known, lacks credibility on its face."

252. Now, we say that the significance of the fact that the defendant has always emphasised, if I can put it like this, the one way street rather than the two way street, is that an one sided portrayal lends itself better to the defendant's case that disclosure would create a real risk of serious harm and in fact the genuinely objective assessment of the risk of intelligence sharing being withheld, we would have to ask what the US would have to lose by withholding intelligence sharing from the UK and so the problem, my Lords, is again that, if you start with an unrealistically one sided picture of the US/UK relationship, that inevitably, in our submission, leads to an erroneous and/or misleading assessment of the degree of risk, ie you end up with an exaggerated and unrealistic assessment of risk.

253. The fifth submission relates to the defendant's tendency to equate the disclosure of paragraphs of the court's judgment with disclosure of the underlying evidence on which the judgment is based and we say that that is incoherent and it means that the Secretary of State inevitably gives insufficient weight to the public, the specific public interest, in disclosure of a court's findings of fact. We submit it is significant that nowhere in any of the three PII certificates does the defendant state that a relevant factor that he is taking into consideration is that the paragraphs represent the court's own findings of fact. On the contrary, there is a general tendency in them to treat the judgment as if it was the same thing or paragraphs of the judgment as if it was the same thing as the underlying information on which it was based and that becomes very clear, if I just take your Lordship's briefly, in tab A -- sorry, bundle A, at tab 5.

254. LORD JUSTICE THOMAS: This is the big bundle again.

255. MR VASSALL-ADAMS: Yes, it is the big bundle again.

256. LORD JUSTICE THOMAS: Tab 5. This is Mr Rose's contribution.

257. MR VASSALL-ADAMS: Sorry, no, it is not tab 5, I am sorry, my Lords, it is tab 3. Bear with me a moment. Sorry, my Lords, tab 3, page 9, and this is the statement put out on behalf of the -- in fact the statement made to the House of Commons on 5th February, immediately after the fourth judgment was handed down, and at the bottom of that page one can see:

> "As anyone who has read the judgments will appreciate, in circumstances in which Mr Mohamed's access to the information relevant to his defence has been secured, the sole question for my consideration concerned the publication of classified material received from a foreign intelligence service, in this case the US."

Well, one would get no indication whatsoever from this public statement that what in

fact was before the court's fourth judgment was paragraphs of the court's own closed judgment and the statement then goes on to "Our intelligence relationship with you United States is vital", and so on and so forth, and it sets out the control principle, again, and then at the very bottom it says:

> "The issue at stake is not the content of the intelligence material but the principle at the heart of all intelligence relationships that a country retains control of its intelligence information and that it cannot be disclosed by foreign authorities without its consent. The issue at stake is not the content."

Well, that goes directly to my Lordship's point about class versus context. We rely upon it in that context as well. But specifically in relation to this issue, there was a debate in the House of Commons and, on page 16, you now have part of the transcript of that debate and the final -- above Mr Edward Davey, the final comment of the Foreign Secretary in relation to -- in relation to this matter, he says:

> "To that extent, this case hinges not on the content..."

258. LORD JUSTICE THOMAS: Sorry, where are we now? Which page?

259. MR VASSALL-ADAMS: I am sorry, my Lord, it is page 16, in the same tab. So this is the debate in the House of Commons on 5th February that followed the making of the statement which I just read out to your Lordships.

260. LORD JUSTICE THOMAS: Above Mr Davey.

261. MR VASSALL-ADAMS: Above Mr Davey:

> "To that extent, this case hinges not on the content of the redacted paragraphs but on their nature, which is that they are American paragraphs — American evidence — in the same way that our intelligence sources are our property. We have approached the issue on that basis, which is the only basis on which to preserve the confidentiality and trust on which such a relationship depends."

Well, I hardly need to pass comment on the nature of those observations to indicate that this -- the defendant appears utterly to have failed to appreciate the fact that the disclosure in this case concerns a court's findings of fact based on underlying evidence and obviously that there is a particular status that a court's finding of fact has and, put simply, there is a far stronger public interest in disclosure of the court's reasons in a judgment than in disclosure of specific bits of evidence on which those findings were made.

262. My Lords, I can now deal briefly with the public interest factors which we say favour disclosure in this case, and I am just going to give your Lordships a list, if I may.

263. LORD JUSTICE THOMAS: Yes.

264. MR VASSALL-ADAMS: I refer briefly, but I am not going to take your Lordships through it, to paragraphs 40, paragraphs -- my apologies, it is paragraphs 14 to 16 of my skeleton argument, where I set out the general Article 6 and Article 10 reasons why open judgments should be given and so forth and I rely upon some of the factors that the court has identified as general reasons why judgments should be given in public. But what I want to identify here is the reasons specific to this case, why we say there is a particular public interest in disclosure of these redacted paragraphs. One, they would help the public to understand why the court was prepared to order disclosure of the 42 documents to Binyam Mohamed in its first judgment. So they put the first judgment in its proper context.

265. Two, it is a summary of the information in possession of the Security Service before its decision to get involved and puts in context its own apparent failure to secure assurances regarding Mr Mohamed's treatment. Three, it is directly relevant to public understanding of why officer B's case was referred to the Attorney General and then to the DPP and now is the subject of a police investigation. Four, it is directly relevant to the Intelligence and Security Committee's decision to reopen its inquiries into this case in the light of earlier assurances on behalf of the Security Service that they had no information at the material time to believe that US detainees were being ill treated. Five, it is directly relevant to the Prime Minister's decision to revise guidance to the intelligence services regarding the treatment of detainees. Sixth, the court's findings of fact relate to allegations of torture and inhuman and degrading treatment, particularly significant crimes under both UK and international law. I rely on the relevant parts of the fourth judgment. Seven, such conduct was contrary to UK policy and indeed the prevention of such conduct is an integral part of the UK strategy in terms of countering radicalisation.

266. My Lords, my concluding submissions are these. This case is not about the disclosure of intelligence documents or American evidence. It is about disclosure of parts of the court's own judgment. In our submission, the stakes are high. If the paragraphs stay out of the public domain now, they will probably stay out of the public domain for good. The Foreign Secretary in his PII certificate, and I will just give you the reference, it is the third certificate at B50, paragraphs 33 and 34, makes reference to the fact that the underlying documents could be applied for in the US, without saying anything about what the prospects of success there would be in relation to that. But obviously no legal process in the US could hope to achieve disclosure of part of this court's judgment. In our submission, if the defendant's case was accepted, it would send a very unfortunate signal. There can be no expectation by the CIA or the UK government or anyone else that the UK courts will seek to suppress embarrassing information about unlawful conduct by the UK's allies when that information is not itself inherently damaging to national security.

267. The PII procedure exists to prevent real damage to the public interest; see the Attorney General's written statement from 1997 at tab 6 of the media authorities bundle for today. It does not exist to give perpetrators of human rights abuses a veto on adverse findings of fact entering the public domain. My Lord, we respectfully invite you to restore the redacted paragraphs.

268. LORD JUSTICE THOMAS: Thank you. Yes.

(2.30pm)

269. MR JAFFEY: My Lords, I can be brief, if I may. Most of the time, those on this side of the court sort of spend our time stumbling around in the dark wondering exactly what is actually going on in this case and there are moments when occasionally the blindfold is taken off and two of the moments in this case when that happened are first of all when we received the CIA letter and secondly when we received the judgment, and it is when those two documents are put together that it suddenly becomes clear what in fact is going on here, particularly when those two documents are prepared side by side with what the previous US administration have relied on: the Bellinger letter and the email from Mr Mathias.

270. What I propose to do is very briefly cover two topics. First of all, and very briefly, because Mr Vassall-Adams has already covered it, deal with what I call the Clinton issue, which is whether or not the comments in the Public Interest Immunity certificate, which are referred to by the Secretary of State, represent the views of you United States government reporting on his conversation with the US Secretary of State or whether the best guide to the actual position of the US government is in the CIA letter as understood once the Jones letter is read alongside it. The second issue, which I propose to deal with, again, briefly, is to take your Lordship to the CIA letter again, hopefully for the last time, at least on this side of the court, and the way in which I will ask your Lordships to approach the construction of that letter is not that it is a document designed to assist the court, which deserves a generous and liberal construction, but it is a document which has been very carefully prepared by diplomats and intelligence experts to have many meanings which is deliberately and calculatedly ambiguous, designed for that particular purpose, and it is only by understanding that that it is possible to work out in my submission what on earth is actually going on in this case, because in my submission the key feature of the CIA letter, as we are calling it, is that it contains a limitation and the limitation is, as your Lordship referred to this morning, "could" not "would". There is a boundary which the United States government has made clear in that letter that it will not cross.

271. LORD JUSTICE THOMAS: You take the same point, that if you stand back and ask yourself the question is it conceivable that if we put these paragraphs into the public domain that the United States government would stop intelligence sharing, the answer is no. That is your submission.

272. MR JAFFEY: Precisely.

273. LORD JUSTICE THOMAS: And the fact that it is drafted in terms of could is strongly indicative of that answer.

274. MR JAFFEY: Absolutely.

275. LORD JUSTICE THOMAS: I thought that was -- it is the same --

276. MR JAFFEY: It is a very simple submission, I hope, my Lord.

277. LORD JUSTICE THOMAS: No, it is the same as Mr Vassall-Adams'.

278. MR JAFFEY: Indeed it is, and it is notable and it is possible to get useful insight into what is going on from comparing the previous administration's documents which were provided to the court, which your Lordships in their fourth judgment characterised as threats, with the documents that have been produced by the new administration, because, of course, it would have been the simplest thing in the world to simply say "see the letter of Bellinger, that is our position too", and that is not the position which this US administration has elected to adopt. They have chosen to reword the matter in their own terms and it is the terms of the drafting of the CIA letter which I submit is the proper guide to the issue before your Lordships.

279. Can I just briefly deal the with Hilary Clinton point, before returning to raise a couple of points on the letter. Just a little background context, which is that the last time this court was given evidence on instructions by counsel it was to the effect that the position under the Obama administration had not changed, nothing had changed, and your Lordships saw that submission in the skeleton argument, which I think dates from, I think, last December, and your Lordships accepted that as the position and your Lordships relied on it in the judgment.

280. Now, that statement was made on an incorrect and false basis. The true position was that no-one had thought to ask the incoming Obama administration what their position was and that led very unfortunately to your Lordship's reopening their fourth judgment in this matter and, if a precedent is needed, that is a most unhappy precedent in this case as to why this court, on matters of international relations, should be very cautious indeed, in my submission, before accepting statements made on instructions at speed by counsel. The best guide which the court is likely to have to the actual position of the US administration are the documents which the US administration has produced specifically for the purpose of the court's consideration in this case.

281. My Lord, let us assume for the sake of argument that that evidence is produced by Ms Steyn this afternoon and that she is able to satisfy your Lordships that what Mr Miliband was saying in his Public Interest Immunity certificate and his position is that he was told by Secretary of State Clinton that there would be an effect on security intelligence co-operation if these seven paragraphs were released into open by your Lordships.

282. Now, the consequences of that are the consequences that have been identified by Mr Vassall-Adams. The US administration has since the date when that conversation took place been asked by the Secretary of State to clarify in writing what the position of the administration as a whole is and it has done so on request. No doubt great thought was given to the CIA letter and we do know that the drafting of the CIA letter was first of all considered by officials working for the national security council under the guidance of the President -- we were told that in General Jones' letter -- and we are also told that the letter was copied to the Secretary of State, Secretary of State Clinton. Now, it would be surprising if Secretary of State Clinton in those circumstances found this letter landing on her doormat out of the blue. Inevitably, it will have been the subject of cross departmental consultation and discussion because the purpose of this letter was

to set out the final considered position of the United States government as a whole. This is what was meant to be put before the court for the court to consider what to do in relation to these seven paragraphs. So in my submission it is the CIA letter that provides the source of the evidence before your Lordships and, of course, there is nothing in the PII certificate which would change that conclusion in my submission.

283. My Lords, can I turn now and deal, I hope briefly, with the CIA letter itself. I know your Lordship have it at page 117 and possibly in many other places.

284. LORD JUSTICE THOMAS: Yes.

285. MR JAFFEY: Can I pick it up at paragraph -- I have numbered my paragraphs. I do not know whether or not your Lordships have. I have numbered them from one to seven. Can I pick it up at the third paragraph and the third paragraph, of course, deals with the document that I think we call the torture memos, which are the memoranda which your Lordships have seen on a previous occasion and in paragraph 3 in the first line, there is a nod to the fact that the Obama administration released those four memoranda and, of course, as we know, it was the President who personally approves the release of those particular documents.

286. Then, underneath that, it says in the fourth paragraph, there is the words that we have all paid quite a lot of attention to and that is the word "could". It is said that the publication of the seven paragraphs could be expected to cause serious damage to the United Kingdom's national security and what the United States government are doing commenting on UK national security interests is not entirely clear, but there we go.

287. It raises two issues. The first issue is the constriction of the United States and the United Kingdom relationship and it also raises the UK's relationship with other countries and then the theme of discussion about third countries is continued in paragraph 5, because what the author of this letter does is there is an attempt to distinguish between the United States and the United Kingdom and what are called other foreign governments and it talks about the possibility of foreign intelligence partners -- and by foreign intelligence partners it must mean parties other than the United Kingdom or the United States -- withholding sensitive information. That is developed again in paragraph 6, where we get more clues about what the author of this letter is going on about and what the United States government say is that, when the torture memos were released, no reference is made to the identity of any foreign government that might have assisted the United States.

288. So, if there is a concern up to and including paragraph 6, the concern of the United States government seems to be a concern about the position of other foreign states and, in the context of this case, other foreign states must of course mean the position of Pakistan, because it was the state of Pakistan that, as can be seen from your Lordship's previous open judgments, held Mr Mohamed incommunicado and held him unlawfully, mistreated him in a manner which your Lordships found amounted to cruel, inhuman and degrading treatment and possibly to torture and then handed him over to the United States authorities for the purposes of his extraordinary rendition.

289. But all of that, of course, is already in the public domain. It is already public and it is simply too late in respect of embarrassing Pakistan because the horse has bolted and that of course is no doubt the reason why the Secretary of State's Public Interest Immunity certificate in this case does not rely on the response of the Pakistani government to the disclosure of the seven paragraphs.

290. So where that leads us, my Lord, is the very carefully worded paragraph 7. The first sentence of the final paragraph, paragraph 7, is very interesting because it is a sentence that elides two matters. It elides the seven paragraphs and the underlying documents. What it says is 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 UK and US national security.

291. What is not suggested, and of course it would have been the easiest thing in the world to do so, is that disclosure of the seven paragraphs alone would lead to potential adverse consequences and the reason why I say it is the easiest thing in the world is because that point was made very clear in the Bellinger letter and it is worth comparing and contrasting the two. If I can just ask your Lordships to take it up briefly. I think it is bundle A, the large bundle, at page 24.

292. Your Lordships can see in the first substantive paragraph of Mr Bellinger's letter, and the second line down, he says:

> "We want to affirm in the clearest terms that the public disclosure of these documents, or of the information contained therein, is likely to result in serious damage to the US national security... [and so on and so on]."

A point that is made clear in Mr Bellinger's letter that has not been made clear in this letter. In my submission that is not an accident.

293. It is also not as if the US authorities and the UK authorities have not had fair warning of this concern about what the CIA letter means, because we raised this concern as soon as we received an earlier draft of what we now know to be the CIA letter and if I can just briefly show your Lordships the relevant bits of correspondence. It is at page 12 in bundle B.

294. LORD JUSTICE THOMAS: Yes.

295. MR JAFFEY: If I can ask your Lordships to turn on to page 15 where the relevant paragraph is, and it is the paragraph in the middle of the page, starting the second paragraph, and what is said is that that paragraph is unclear. It commences by stating:

> "Public disclosure of the information contained in the seven paragraphs withheld from the High Court, as well as the documents from which the information was drawn, could likely result in serious damage to the UK and US national security."

296. This sentence elides the seven paragraphs and the underlying intelligence documents. The US government does not suggest that the disclosure of seven paragraphs alone by an independent court would lead to any harm, either to the UK or US national security, and then the letter goes on and deals with other points.

297. My Lords, we know that this is a letter that was read with some care by those acting on behalf of the Secretary of State and the reason we know that is because it was responded to and other points in the letter were not dealt with, so, for example, the words which have previously been redacted relating to the judicial system of England and Wales were added as a result of another point made in this letter.

298. LORD JUSTICE THOMAS: Yes.

299. MR JAFFEY: But no attempt was made to deal with this point, to go back to the US government and ask for further clarification of it. It was deliberately ambiguous. It was spotted, the deliberate ambiguity. It must have been drawn to the attention of the US government, but no further clarification was forthcoming.

300. My Lord, in opening my submission, it is what I called the limitation on this document. The wording respects the limits of how far the United States government is prepared to go in conveying to this court what its response will be if the seven paragraphs are disclosed. This ambiguous wording really only makes any sense at all once it is understood that there is indeed that limitation on what the United States government is prepared to do. They are not in fact in reality going to withdraw or reduce security and intelligence co-operation with the UK and, in order to maintain diplomatic wriggle room or room for manoeuvre, it is necessary to have ambiguous wording like this in the letter to maintain their position. It is the process which has taken place all throughout this case. It is not the first occasion in this case on which I have made that submission.

301. My Lord, then there is the final sentence of the CIA letter, which, again, I know your Lordships are wearingly familiar with and the question is what your Lordships are to makes of that: the consequence is that the United States government will review with the greatest care the security and intelligence co-operation relationship. Now, of course, it is notable that, even after all of this time, it is not actually said that there will be any reduction in intelligence sharing and that is quite interesting because it would be easier for them to put it a bit higher and say, look, we have been over this before, we have had months and months to think about this, as have you, but we have seen the seven paragraphs and if your independent judges decide that what they are going to do is to publish those seven paragraphs, this is exactly what we are going to do about it and then you will be sorry, or polite words to that effect. Or, to put it more simply, they could have just used the word "would", which they have against expressly chosen not to, in distinguishing the approach taken by Mr Bellinger on behalf of the previous administration.

302. What, in my submission, the court should be interested in is the court should be interested in the question of whether or not there will in fact be any effect on security and intelligence co-operation and in my submission there is nothing in this letter which indicates that there will be such an effect or even that there is any real risk of such

consequences. What is being contended for here, as Mr Vassall-Adams have said, and I do not go over, is a class PII claim over all documents emanating from the US intelligence agencies and that, if it is determined that the UK authorities are unable to protect such information from public disclosure by independent courts, a review will be triggered.

303. Now, I think my final submission to your Lordships is how should your Lordships approach that further careful bit of diplomatic language. Your Lordships are fortunate that in this case the answer to what will happen if information is disclosed by the UK courts is in fact already known because this point has already been put to the test in this case at least on two occasions. The first point, the first time it was put to the test was in the first Public Interest Immunity certificate which was produced by the defendant to your Lordships, and I know you have been shown that this morning, but I can show your Lordships one other part and your Lordships have that in bundle A, I think page 6, and the relevant passage I wanted to draw your Lordships' attention to was paragraph 15. As your Lordship will recall, this is the Public Interest Immunity certificate that was served by the foreign Secretary immediately after your Lordship's first judgment in this case and, in dealing with the question of whether or not versions of the relevant documentation should be provided to Mr Stafford Smith and Lieutenant Colonel Bradley only on the basis that such documents were necessary for Mr Mohamed's defence before the military commission and, as your Lordships will also remember, in the nick of time the United States authorities decided to voluntarily disclose those documents to Mr Stafford Smith and Lieutenant Colonel Bradley on the basis that they were disclosed no further and the passage with the part of paragraph 15 which I rely on is the Foreign Secretary's comments on what he might have done if that decision relating to voluntary disclosure had not been made by the US authorities and he says he may well have been inclined to reach a different conclusion on the balance of the public interest were the US authorities not to have made the commitments to make the documents in question available --

304. LORD JUSTICE THOMAS: That merely shows you cannot have a class claim.

305. MR JAFFEY: It does, but what it also shows is that, forget the wording in the CIA letter about your judicial system, this is the principal Secretary of State for Foreign and Commonwealth Affairs making it abundantly clear in an open PII certificate that he may well have ignored the supposedly inviolable control principle and handed over documents to Mr Mohamed's lawyers had the US not done so voluntarily. Mr Miliband could not have put the true nature of the control principle more clearly, that even the Secretary of State is prepared to ignore the control principle in appropriate cases and appropriate circumstances. It is not an absolute.

306. Now, that PII certificate dates from August 2008 and if the United States government had really thought that Her Majesty's Government and the British courts treated the control principle as utterly inviolable and sacred, they would have been thoroughly disabused of that false notion at the latest by last summer, when they saw that open PII. Yet to date no review, no reconsideration. The sky does not yet appear to have fallen.

307. Now, of course, in those circumstances, it is very difficult to give very much credence indeed to the last sentence of the CIA letter. The CIA already know well what the relevant principles are as a matter of English law. There are no class claims.

308. LORD JUSTICE THOMAS: What you are saying really is that, as Mr Miliband has said what he has said, that he might hand it over.

309. MR JAFFEY: Yes.

310. LORD JUSTICE THOMAS: Then why have they gone on supplying us with intelligence for the last eight years.

311. MR JAFFEY: Indeed. In those -- eight months. In those circumstances, how on earth can the CIA say there is some fundamental principle when Mr Miliband has told them himself that he is prepared to breach the control principle himself, let alone worrying about the independent courts doing it, if Mr Miliband judges it is appropriate and necessary to do so in order to ensure that the individual has a more fair trial before a US military commission.

312. MR JUSTICE LLOYD JONES: You would say that the only thing which is different is the competing obligations.

313. MR JAFFEY: Indeed. The only dispute in this case is the fact that the balance of public interest as contended for by client is different from the balance of public interest as assessed by Mr Miliband. The principle remains the same.

314. LORD JUSTICE THOMAS: Yes, but this evidence here goes to the credibility of Mr Miliband's assessment, because, if he was prepared to do this, how can he creditably state -- I mean, it goes to Mr Miliband's creditability.

315. MR JAFFEY: It does. It goes to two points --

316. LORD JUSTICE THOMAS: Have I -- I am just trying to make sure I have understood the point. Are you saying that, if Mr Miliband is prepared to say here I will hand the documents over, how can he credibly say that really the roof will fall in if you -- and we will not get any information if they know that the information is likely to be handed over. Is that the point, Mr Jaffey?

317. MR JAFFEY: That is the first point which I make, your Lordship, but there is a second point, and it also relates to the credibility of the last sentence of the CIA letter, which is that, if it is determined that your service is unable to protect information we provide to you, even if that inability is caused by your judicial system, we will necessarily have to review with the greatest care the sensitivity of information that we can provide in the future. My Lords, that pass was solved, if indeed in ever existed, in August 2008 and yet nothing has happened. So those are the two points which I make in relation to the first PII certificate. First of all --

318. LORD JUSTICE THOMAS: OK.

319. MR JAFFEY: Your Lordship has the point. My Lord, the same applies of course to your Lordships' decision to disclose that the sender of the letter was indeed the CIA. That is information which it appears the US government wanted to be withheld, that the US government believed had been provided in confidence to Her Majesty's Government and it was therefore a breach of the control principle for Her Majesty's Government to disclose that information. But, again, the court ordered that that be the case for reasons relating to relevance and, again, it is not suggested by any further PII certificate that the sky has fallen.

320. LORD JUSTICE THOMAS: But is that right? It cannot be control of intelligence as to who writes a letter. I mean, that is why the whole claim is completely absurd in the first place.

321. MR JAFFEY: But nonetheless it was the US government's position that it did not consent --

322. LORD JUSTICE THOMAS: But that is different. That is the control of intelligence. That was taking an absurd point on confidentiality. It is a different point.

323. MR JAFFEY: It is a different point and it does not go, of course, as far as the first PII certificate, but it is a further example where the inviolable control principle simply does not exist and the consequence of that must mean that at least part of the third PII certificate cannot be maintained, insofar as it takes that point; that what the court should do is it should reach its own PII balance, having considered the first PII certificate in the context of the submission in which I and Mr Vassall-Adams --

324. LORD JUSTICE THOMAS: But we can only do that, Mr Jaffey, surely on the basis of Lord Hoffman's observations in Rehman if we conclude that there is no reasonable basis for the Secretary of State's conclusion. But I think you are inviting us to say he had no reasonable basis for reaching the views he did.

325. MR JAFFEY: Indeed, I do.

326. LORD JUSTICE THOMAS: Well, we have to come to that view, do we not, that he had no reasonable basis for believing there was any -- that if we think -- you are really saying there is a Foreign Secretary who had not formed a reasonable view that, if we publish these paragraphs, the Obama administration would cease to -- would takes steps whereby the provision of intelligence information was constricted.

327. MR JAFFEY: I do not accept that that is the correct statement of the test, because ultimately the decision on the PII balance, even in a case involving national security, is a decision for the court and the court alone. The court, however, will accord the Foreign Secretary considerable deference on the question of the assessment of national security risk to the United Kingdom.

328. LORD JUSTICE THOMAS: But we would have to say he somehow got it wrong.

329. MR JAFFEY: Indeed.

330. LORD JUSTICE THOMAS: We would have to. We cannot escape that.

331. MR JAFFEY: Of course not, and I do not suggest your Lordships should escape that. My submission to your Lordship, as your Lordships know, is that on the very unusual facts of this case, it was a case where the Public Interest Immunity certificate on this narrow point, the seven paragraphs, should be rejected, for the reasons I have given to your Lordship.

332. Unless I can assist your Lordships any further, those are my submissions.

(2.55pm)

333. LORD JUSTICE THOMAS: You are not going to say anything now, Mr Goudie, are you?

334. MR GOUDIE: Not at this stage, no.

335. LORD JUSTICE THOMAS: Ms Steyn?

Submissions by Ms Steyn

336. MS STEYN: My Lord, before I go on to the question of the seven paragraphs, there was a question that your Lordships raised in an email which I think the intention had been to deal with it at 10.00am this morning. It related to whether or not there had been sufficient argument about what had been put in open --

337. LORD JUSTICE THOMAS: But in view of what you said this morning, that there is nothing in the redacted version upon which you rely that is germane to the issue, there is no point.

338. MS STEYN: No, and -- well, in my submission, in any event, it actually was a point that was dealt with in the open hearing on the last occasion.

339. LORD JUSTICE THOMAS: OK.

340. MS STEYN: So, turning then to the seven paragraphs, the application to reopen the fourth judgment was made on the ground that the claimant and the media parties questioned whether the US had threatened the UK, as the court put it in its judgment, over intelligence co-operation and whether the defendant's submission that the factual position remained the same following the change of US administration. Now, obviously at this stage the court had not yet explained its reasons for deciding to reopen the fourth judgment, but the defendant proceeds on the basis that the court must have accepted one or both of those two grounds.

341. So the primary question for the court is therefore whether, as a result of any factual change, less weight should be given to the risk of serious damage to the national security than the court accorded to that factor in its fourth judgment and in my submission, in reaching its view on that at this stage, the court must apply the legal principles set out in the fourth judgment.

342. LORD JUSTICE THOMAS: Yes.

343. MS STEYN: And the first point is, as the court acknowledged, applying the approach laid down by the House of Lords in Rehman and also more recently in the Corner House Research case, that under our constitution issues of national security are issues of judgment and policy for the executive branch of the state and not for judicial decision. So the question whether there is a real risk that disclosure of the material on the question would cause serious harm to national security or international relations is a matter, as your Lordship said, in which the Foreign Secretary, not the court, is the expert and that --

344. LORD JUSTICE THOMAS: But experts have to act on facts and if it was our view that he got it wrong and that -- you know, you have to -- as I think I put to Mr Jaffey, it has to be persuaded that -- I think the test should be -- that he had not reached a decision which on the facts was open to him and the principal argument advanced, as you have heard, is that, stood back and analysed, it is fanciful to think there is a threat.

345. MS STEYN: Well, I have heard that argument but what I am saying is that, in assessing whether this court -- whether it is open to this court to say that the Secretary of State's assessment of the likelihood of harm is simply unsustainable, the court has to have regard to the fact that he is the expert on this matter. He is the one, together with his advisors, who has had conversations about this with --

346. LORD JUSTICE THOMAS: But they are all in the open now, so we can examine them.

347. MS STEYN: Well -- but clearly neither of the other parties nor the court is in the same position as the individual who makes --

348. LORD JUSTICE THOMAS: No, but I do not agree with you, Ms Steyn. The Foreign Secretary has put the evidence before the court and the court must reach its judgment and the judgment -- you know, you might persuade us we should interpret letters in a certain way but you cannot say that now the material is not before us to make a judgment.

349. MS STEYN: My Lord, I am not saying that. What I am saying is that, in assessing the weight that needs to be given to the view of the Foreign Secretary, the fact that he and his advisers are the ones who have relationships with those individuals, whose views are being interpreted and who were there and were able to make assessments of what was meant and who have an expert understanding of what the US administration, what it intends or is likely to happen in this case, those are all matters that have to be taken into account in deciding whether it really is open to this court to say that what the Foreign Secretary has said is unsustainable and in my submission both the likelihood and the severity of harm are preeminently matters on which the court should accept the Foreign Secretary's assessment.

350. There are, as I say, two elements to the assessment. There is the likelihood and the severity. Taking the latter first, there is no dispute as to the severity of the harm. The

Foreign Secretary's first certificate explained that national security considerations weigh more heavily in the case of our relations with the United States than with any other country. Our level of co-operation is unique and our reliance on that co-operation to protect the security of British citizens is very great indeed and there is a reference to that in the first PII certificate at paragraph 10, a paragraph that has been incorporated by reference into both the second and third PII certificates.

351. The court itself acknowledged in its fourth judgment the grave consequences of a reduction in the information supplied by the US under the shared intelligence relationship. That is at paragraph 24.

352. LORD JUSTICE THOMAS: I do not think there is any dispute -- I do not any either Mr Vassall-Adams nor Mr Jaffey have sought to argue that if intelligence sharing was reduced, it would have a dramatic effect. That is not their argument. Their argument is that, actually, when you look carefully at the CIA letter and General Jones's letter, there is in reality no risk or --

353. MS STEYN: I will come on, of course, to likelihood, but it is, I think, important to have it clear that the severity is something that the Secretary of State has made an assessment and there is to dispute about it and it has been suggested that the intelligence sharing is a two way street. Of course, it is, but there is no suggestion of any risk of going the other way in terms of any reduction of the material that the UK would be providing to the US.

354. So, turning then to the likelihood of harm occurring, the Foreign Secretary's view, as he very clearly expressed in his third PII certificate, is that public disclosure of the seven paragraphs would seriously harm the existing intelligence sharing arrangements between the UK and the US to cause considerable damage to the national security of the UK. He has set that out at paragraphs 20 to 22 of the third PII certificate. In addition, it is his assessment that disclosure may damage international relations with the UK more generally and liaison relationships with third parties. It was suggested by Mr Vassal-Adams that the reference to liaison relationship with third parties was a new point. It is not. It has been in every one of the PII certificates. Throughout it has been clear that there is also that risk involved here and the Secretary of State has made absolutely clear that in his view the risk remains as set out in his earlier certificates; in other words, it is just as grave now as the court accepted it was in its fourth judgment.

355. LORD JUSTICE THOMAS: Yes, but do not forget the evidence before and there are two quite separate points, that there is the point -- is there an explicit statement that if the paragraphs are disclosed there will be harm, which is the view we reached on the last occasion, or is there somehow a breach of a principle which will cause harm, even if the information disclosed is of no consequence. They are two quite different points. If there is an explicit statement of consequences, which I think is a very neutral term, then it is easy, but if there is no explicit statement of consequences, then one is really back to the question of the breach of principle. I mean, is it likely that if the principle of the provision of information being kept confidential is breached in an exceptional case that some harm will result, some serious harm will result?

356. MS STEYN: Well, my Lord, we can obviously have a look in a moment at the question of the extent to which there is an explicit statement of the consequences, but my primary argument is that, if there is, as Mr Jaffey was suggesting, any ambiguity about the statements that have been made by the US, that is preeminently a situation in which your Lordship's should defer to the assessment of the Foreign Secretary.

357. LORD JUSTICE THOMAS: You mean he reads "could" as if it means "would", to put it bluntly?

358. MS STEYN: Well, my Lord, he has made an assessment.

359. LORD JUSTICE THOMAS: No, can you answer that. When we read "could" he means "would". It is written in this coded diplomatic language which, being a Foreign Secretary, he can understand and which we cannot.

360. MS STEYN: He has made an assessment --

361. LORD JUSTICE THOMAS: No, but is that not right? Is that not in effect what you are saying, that where they say "could" he realises that means "would".

362. MS STEYN: In short terms, yes, but his assessment is not simply based on a reading of that particular letter, it is based on more than that and ultimately what matters is his assessment based on the understanding that he has -- and the advice that he has received from those who are in a better position to understand what was being said in the CIA letter and in my submission it is rather bizarre for the court to be being told on the one hand that the CIA letter is ambiguous and on the other hand that the view of the Secretary of State as to what it means is unsustainable. In my submission, those are just inconsistent submissions.

363. LORD JUSTICE THOMAS: But let us go back to it, Ms Steyn, because the Foreign Secretary last time quibbled with our use of the word "threat". Let us use a neutral term: if you do something it will have certain consequences. What in effect Mr Miliband is saying is that, if we put the paragraphs into the public domain, the United States -- the consequence that would follow is that the United States would restrict the intelligence sharing relationships or there is a substantial risk that they will do so. He must be saying that.

364. MS STEYN: Yes, my Lord.

365. LORD JUSTICE THOMAS: Therefore, the Obama administration, if we do this, are making the position clear that, if these paragraphs are put into the public domain, the direct consequence is either they would or there is a real risk they would restrict the intelligence sharing relationship.

366. MS STEYN: Yes.

367. LORD JUSTICE THOMAS: That is what I thought.

368. MS STEYN: And in reaching his assessment the Secretary of State at paragraph 4 of the third PII certificate has made it clear. He says in undertaking these assessments I understand and fully accept that the threshold of whether there is a real risk of serious harm to the national security and international relations interests of the United Kingdom is high. He is not putting that low, but not only has he held that that level, the real risk level, is a high one, he understands that, but it should be emphasised that he has gone further. The Foreign Secretary has assessed that in this case it is not merely a real risk, but it will happen. He has said that that is what he believes would happen. There would be considerable damage --

369. LORD JUSTICE THOMAS: So there is no two words about it. The Foreign Secretary believes if we put these paragraphs into the public domain President Obama's administration would constrict the provision of information that could save British lives. I mean, that is effectively what you are coming to, is it not?

370. MS STEYN: Yes.

371. My Lord, your Lordships refer to the CIA letter as saying that it says "could". One point that is important to understand is firstly it says "could reasonably be expected to cause serious damage". It also goes on to say "could likely result in serious damage to UK and US national security" and it also refers in the sixth paragraph -- the first sentence says "quite distinct from the significant harm to US/UK partnership if the seven paragraphs and underlying documents are released", and so it is effectively saying there that the significant harm is a matter of fact, in my submission, and the references to "could likely result" and "could reasonably be expected to cause harm" is significantly stronger than simply saying could cause damage.

372. LORD JUSTICE THOMAS: But I think it has to be -- I mean, why what Mrs Clinton is reported as saying is so important is that actually, as the Foreign Secretary understood her, that she says public disclosure would affect the intelligence, ie the way he has read everything else, but actually, whatever the careful drafting of the letter may be, he believes that actually the consequence of our putting it in the public domain would be to restrict intelligence sharing and that is how he reads the letter and I think that is what I always thought this statement from Secretary Clinton is so -- his understanding of what Secretary Clinton says. This is very important because we were criticised on the last occasion that a threat was made. What you are saying is that the consequence -- take the word threat out, but the Foreign Secretary believes the consequence to this country of our doing it would be a reduction in the intelligence sharing relationship which everyone would recognise would be very serious for the United Kingdom.

373. MS STEYN: Yes.

374. LORD JUSTICE THOMAS: Yes, that is what I thought.

375. MS STEYN: That is right.

376. LORD JUSTICE THOMAS: That is your case.

377. MS STEYN: That is my case.

378. LORD JUSTICE THOMAS: Take the word threat out, would have the consequence. That is neutral and people can characterise it as they like.

379. MS STEYN: Yes, and the conversations that he has had with the US Secretary of State are obviously part of the information that he has taken into account in forming that assessment. He has also, as he says at paragraph 29 of the third PII certificate, carefully considered, together with those advising him, whether the recent US correspondence indicates a different approach to that indicated in the earlier US correspondence, which was before the court when it delivered its fourth judgment:

> "It is my view, and that of my advisers, that there is no difference in substance between the earlier and recent correspondence."

So he himself has done the exercise with his advisers of looking very carefully at the CIA letter and assessing what it means along with the other information that is before him and his view is that the position is precisely the same as it was before.

380. The UK media have in part based their submission that the Foreign Secretary's assessment of likelihood of serious harm is irrational on the evidence of Mr Halperin and his statement was obviously written for when the more recent communications from the current US administration report were put before the court and without sight of some of the communications from the former US administration. But Mr Halperin has stated that it is impossible for him to believe that the US government would withdraw from its intelligence sharing relationship with the UK government in response to the disclosure of information by a British court. Now, firstly, in my submission that is seeking to put up a straw man. It has never been suggested that there would be no relationship left --

381. LORD JUSTICE THOMAS: Yes, but there would be a substantial impairment. As you put it, British lives might be put at risk.

382. MS STEYN: Yes, but there is obviously a distinction --

383. LORD JUSTICE THOMAS: It is that serious, because we were criticised by the Foreign Secretary for saying on the last occasion there was no threat. Well, all right, take the word threat out, but the consequence is very clear.

384. MS STEYN: The consequence is very clear, yes, but the point I would simply make is that, yes, the consequences are very serious, as the Secretary of State has said, but for it to be put in terms of there being a wholesale withdrawal of any intelligence sharing relationship, that is not how the case has ever been put --

385. LORD JUSTICE THOMAS: No, but sufficiently serious, because it has to be sufficiently serious to pass the test that it would damage, cause serious damage to, the security of the United Kingdom. It cannot be just, well, I am very sorry, we will not come and see you tomorrow, but it is that real danger would be caused to it.

386. MS STEYN: Yes, and the assessment is that it is the same as the court recognised it was at paragraph 74 of the fourth judgment, that a reduction in intelligence sharing would itself put the British public at risk and that is how the court put it and that is still the position.

387. So the -- Mr Halperin --

388. LORD JUSTICE THOMAS: Because I wanted to be clear about this, it goes beyond -- because if we go back to **Dame Pauline Neville-Jones'** position, there was a distinct different between an ordinary breach of the principle of confidentiality, which might have caused a little fluttering in the dovecots, and this position of the Bush administration, now the Obama administration, is they regard this as so serious that they would -- it is the Foreign Secretary's judgment that, you know, it would damage seriously national security because it has that additional consequence.

389. MS STEYN: The next point made on behalf of the UK media, supported by the claimant, is the point in relation to the control principle and this echoes a point already made to your Lordships last year by Ms Rose. It is not in fact a new point. Mr Halperin suggests that, because the US government is aware that the disclosure decision would have been made by an independent court, no harm would in fact result and it was suggested by Mr Vassal-Adams that the Secretary of State has, as a matter of law, firstly, misunderstood the control principled.

390. Well, in my submission, the control principle is not a legal or constitutional principle, it is a real life principle --

391. LORD JUSTICE THOMAS: It is an exercise of naked political power --

392. MS STEYN: -- exercised on a day to day basis. Yes, it is not --

393. LORD JUSTICE THOMAS: I mean, it is an exercise of naked political power. It is if we give you information and if you tell anyone else about it you will not get any information any more. That is not constitutional, it is use of naked political power.

394. MS STEYN: Well, it is an understanding between those who share intelligence and there can be no question of there being some legal misinterpretation of what it is.

395. It is further suggested that it has been misunderstood as a matter of fact, but, far from there being no evidence contrary to that of Mr Halperin, as the UK media suggest, the Foreign Secretary himself has stated that he disagrees with that view. This is set out at paragraph 34 of the PII certificate, which is page 46 of bundle E. He says:

> "I am advised that it has been suggested in evidence before the court that, because the US government is aware that the disclosure decision is to be made by an independent court, no harm would in fact result if the court decided to exercise its power to disclose. I do not accept this view. Although in a case such as this one the UK courts have the power in principle to disclose information provided by a foreign liaison service or derived from such information without the consent of the provider and

even, as it would be here, against the express will of the provider, it would be extraordinary to do so."

And he has clearly expressed his view, and your Lordships have read this already today, that in his view disclosure in this case would be regarded as a highly significant breach by the UK of the control principle.

396. MR JUSTICE LLOYD JONES: Ms Steyn, could I ask you how the control principle works in circumstances where the recipient of the information does not have absolute control, absolute power over the dissemination or publication, but where the power ultimately lies with another body, the court.

397. MS STEYN: Well, how it works is that the provider will assess the degree to which it can trust and expects that information it provides will in fact remain confidential to those to whom it has been provided and that will be no doubt an ongoing assessment and, of course, there is a recognition that the UK courts have the power in principle to order disclosure of information provided by foreign liaison services but, as the Foreign Secretary has said at the end of paragraph 23 of his third PII certificate, the custom is one which has always to the best of his knowledge in practice been respected by the UK courts and so one has the situation where, yes, of course in principle the court has the power to disclose the information, but in my submission there is a gulf between having that power in principle and the provider realising a court has actually done so and if that actually happens then there would inevitably be a reassessment of the material that can be provided to the state that has been unable to control it and --

398. LORD JUSTICE THOMAS: I mean, what the state does, presumably, if it does not want the information disclosed, it says in words that cannot be misunderstood if you disclose it there will be consequences, which is effectively what is being said in this case.

399. MS STEYN: Yes.

400. LORD JUSTICE THOMAS: Not may be -- you know, this is the could and would.

401. MS STEYN: In my submission, for the court to in fact take the step of disclosing information provided by a foreign government which they have expressly made clear should not be disclosed, it would be extraordinary and all the more so in this unusual context where the defendant has no option of, for example, discontinuing a prosecution. The most usual situation with PII is that the defendant would actually have an option which would enable it to protect national security. But we are in an extraordinary situation here where there is no such option and so, for it to be said that the US administration will simply know that this is within the court's power, yes, of course, in principle, but in my submission there really is a huge difference between that principle and actually this ever happening in practice and, if it happens in this case, the Secretary of State's assessment is that that would lead to serious harm and, equally, the letter from the CIA itself makes clear that, even if the inability to protect information is caused by the judicial system, they have said that disclosure would suggest that the UK is unwilling or unable to protect information or assistance provided by its allies which

may constrict, and may result in a constriction of the US/UK relationship as well as leading to other states taking steps to withhold the UK-sensitive information that could be important to its safety and security, and those words, even if the inability to protect information is caused by your judicial system, were unilaterally included in the original classified letter by the US administration. As the replies to the request for information have made clear, UK officials did not draft or assist in drafting the letter or suggest the inclusion of those words.

402. LORD JUSTICE THOMAS: But the words on their own, there is a very strong case for arguing that they could be read as "could" and this is why what Secretary Clinton says is so important, that actually the certificate is a letter that was meant to be read as "would". Is it not? That is the real -- I mean, if we may want to put to you at the end -- because we do not want an application to reopen this judgment on the basis there has been a misunderstanding of the position of the United States government, because no doubt someone is going to ask Mrs Clinton or the CIA "did you really mean that if a few paragraphs of no value at all to intelligence was made public you would actually take steps to reduce intelligence sharing with a real risk to the lives of the ordinary man and women of the United Kingdom", the answer they would have to give is yes, because that is it how we understand the Foreign Secretary's decision.

403. MS STEYN: Yes.

404. LORD JUSTICE THOMAS: And I think we must be very clear about this because it seems to me that otherwise we would just be faced with someone going to ask the question as happened -- this is all deja vu as far as we are concerned -- someone will go and ask a question and we will be faced by an application to reopen our fifth judgment on the basis that the position was misunderstood. That is why I think we did -- **I would quite like to see, you know, this very precise statement of the Foreign Secretary's position, because I think I have put it very clearly to you, and it will be apparent from the transcript, a copy we will attain, to be sure that we are not faced with any mis -- I do not want a misunderstanding about this case.** We have had too many. I have tried not to use the word threat, because that is not right, and no doubt not a diplomatic word, but have the consequence that, and that, as long as there is no misunderstanding, the case becomes very easy to decide.

405. MS STEYN: Yes. In my submission it is very easy. Your Lordship has reached --

406. LORD JUSTICE THOMAS: The right answer last time and the true position is that the Obama administration would, if we made these paragraphs which have no intelligence value whatsoever public, take steps to review intelligence sharing relationships with the United Kingdom, with there being a very serious risk as a consequence to the national security of the United Kingdom which means in the vernacular a risk to the men, women and children of this country from terrorist attack. I mean, if that is what the position is, this case is extremely simple.

407. MS STEYN: Yes.

408. LORD JUSTICE THOMAS: Because the answer to our -- we know, because we said in our last judgment, no court could possibly make anything public if that was the consequence.

409. MS STEYN: The factual position is precisely as --

410. LORD JUSTICE THOMAS: As I said.

411. MS STEYN: Yes, as your Lordships have said, and as it was at the time of the fourth judgment and, in fact, this is -- your Lordship sort of raises the spectre of other parties going off and seeking further information. The Secretary of States's position has been clear throughout in our submissions back in December --

412. LORD JUSTICE THOMAS: Well, it was not so clear when he addressed, if we may respectfully say so, interviews and things. That is why I do not want a misunderstanding as to what we understand his position to be. There is no wriggle room here. None.

413. MS STEYN: The Secretary of State's understanding, in relation to -- at the time of his first and second PII certificate --

414. LORD JUSTICE THOMAS: No, we have put to you what our understanding is. I do not want -- I mean, we can go through this affidavit and there are words here, everywhere, but in the ultimate analysis it has to be put very clearly what his position is, and I think I have put it, namely, that the position, as he understands -- **the position of the United States government is that it would, not could, reassess the intelligence relationship with the United Kingdom with the result that there might be a very serious risk to the national security of the United Kingdom, and that is to say danger to the men, women and children of the United Kingdom. I do not think anything could be clearer. Because if that -- that is what I understand the gravamen and that is actually really what Mrs Clinton was saying, according to the Foreign Secretary.**

415. MS STEYN: And the Secretary of State makes it absolutely plain in his third PII certificate at paragraphs 20 through to 22 -- paragraph 21, he sets out his earlier judgment that --

416. LORD JUSTICE THOMAS: No, but this is all subject -- you see, the problem is some of these words are very carefully chosen, but the advantage of an oral hearing in this country is you can tie people down. Now, you are acting on the express instructions of the Secretary of State and **there are two distinct issues** and this is where the muddle occurred on the last occasion. What we do not want is yet another muddle. **There is the breach, the ordinary -- there is the principle of confidentiality of information supplied and control over it and a breach of it which may or may not have consequences: point 1. This case is that, but there is another bit, because the United States government has made its position clear, namely that it would, not could, reassess intelligence sharing relationships, what I have just said, and they are the two completely different points.** This is the elision that occurred on the last

occasion and I do not want -- it is not in anyone's interest that we have another error. I **do not mind what the Secretary of State's position is, as long as I know in absolutely clear terms because there is no doubt someone is going to go and ask is this the position of the Obama administration and we do not want a misunderstanding.**

417. MS STEYN: Well, Mr Saini threw down the gauntlet on the last occasion to the other parties and said, if they had one iota of evidence to --

418. LORD JUSTICE THOMAS: Well, no, the US administration's position is as set out in the CIA letter, which is subject to the submissions that have been made. Now, what you are telling us is that, as an expert in these matters, the Secretary of State has read that letter. He knows what all these diplomats mean by these nice words and therefore -- and he has listened to Ms Clinton and her words are very clear and it has -- I am sorry, I am not allowing you any wriggle room. I am quite prepared for you to go and say you want five minutes to think about it or go and take some instructions, but we cannot have another misunderstanding in this case.

419. MS STEYN: My Lord, I am not seeking any wriggle room. I am simply seeking to refer your Lordships to --

420. LORD JUSTICE THOMAS: No, that is not good enough. That is not good enough, Ms Steyn, because I have put in clear -- I want to tie the Secretary of State down. Now, if you say to me he needs a bit of time to think whether he should be tied down, I entirely understand that, but we cannot have a confusion about this. We cannot have a confusion between the general position, which **Dame Pauline Neville-Jones** made -- the control principle, you can breach it, well -- and this case, where there is an additional factor, namely it has been made clear what the consequences would be, and our decision on the second -- in whatever gloss people want you to put on it, our decision in our fourth judgment was based on the second part of it, namely that there was an explicit statement of consequences. We used the word threat. Maybe that was ill advised, we should have used the word explicit statement of consequences. What I really wish to know is have we understood the explicit statement of consequences clearly, because if there is, there is no doubt about our answer in this case. If we have not understood it, and that demolishes any argument that Mr Vassal-Adams wishes to canvas -- could possibly proceed.

421. MS STEYN: It is entirely right, there has been that explicit statement of consequences. Your Lordships have of course already referred to what the US Secretary of State has said. I have also referred to the fact that the CIA letter is something that the Secretary of State and those advising him has considered and he is understanding that that is an explicit statement of the consequences --

422. LORD JUSTICE THOMAS: Again, I want to be sure, because someone is no doubt going to go and ask did you mean this and the last thing one wants is for someone to come back and say, well there is a misunderstanding. Let me give you five minutes.

(3.40pm)

(A short break)

(3.45pm)

423. LORD JUSTICE THOMAS: Yes, Ms Steyn?

424. MS STEYN: My Lord, the position, I hope, is entirely clear, that the Secretary of State's assessment is that the disclosure, public disclosure, of the seven paragraphs would cause serious harm to the national security of the UK. He has made it absolutely clear that the only reason that he has opposed the disclosure of these paragraphs is in order to protect the national security and international relations of the UK.

425. LORD JUSTICE THOMAS: But that can only be, Ms Steyn, because the Obama administration have made it clear that disclosure has -- we used the word threat, can I use the same word but put in more diplomatic language, consequences. They mean the same, but the Foreign Secretary does not like the word threat, so we will use the word consequences.

426. MS STEYN: Yes, his assessment is that those consequences --

427. LORD JUSTICE THOMAS: And so if someone asks us --

428. MR JUSTICE LLOYD JONES: His assessment is that those consequences would follow?

429. MS STEYN: Yes.

430. LORD JUSTICE THOMAS: And so if someone asks Mrs Clinton or whoever it may be, at a press conference, or one of these advisers -- this all happened last time, so we do not want a mistake -- they will say, of course, if the British court puts in paragraphs to its judgment that have nothing to do with anyone's national security -- there is nothing in these paragraphs that affect's anyone's national security -- the US government would seriously consider the reduction -- reassess the intelligence relationship with a very serious risk to the national security of the United Kingdom. That is the lives of British subjects, because you talk about national security, but you had better put it in the vernacular, so people understand it, that is a very, very grave threat and I just want to make certain that no-one goes and asks the United States government and it says, no, of course, we did not mean that, because we should be back to square one.

431. MS STEYN: My Lord, that is the position, save that, as your Lordships will be well aware, the US administration does not accept that there is no national security implication in disclosure of the paragraphs. Now --

432. LORD JUSTICE THOMAS: No, but there is nothing in the paragraphs -- we have written them -- that could conceivably identify anything that is of a national security interest. The only thing that we are doing is breaching the principle of control and that is why **Dame Pauline Neville-Jones** drew the distinction between us disclosing things that were damaging to national security -- ie giving agent's names, location of facilities, things of that kind -- and putting something in which was simply a breach of the

principle of control -- that is all that we are doing, is breaching the principle of control -- and what I do not want to do is to be back here all over again, or to have the Foreign Secretary question whether we had -- that we have not properly understood it, because -- and this torpedos, as I thought it probably would, Mr Vassal-Adams and Mr Jaffey's argument, which is all depending on the word "could". You are saying, effectively what you are saying, is that when the CIA said "could", actually it is properly to be understood as "would".

433. MS STEYN: That is the Foreign Secretary's assessment, precisely.

434. As far as the question of the US administration's assessment of the national security implications of disclosure are concerned, your Lordships have already set out in the fourth judgment at paragraph 76 that the rationality or otherwise of their view in relation to that is not material.

435. LORD JUSTICE THOMAS: Of course not. We may think it is wholly irrational and I am sure you would find it very difficult to find anyone who, security analyst, who would think there was anything of a security nature in what we are doing, but, as they take such a -- what is happening is that the United States administration is taking the position that the breach of the principle of control, which discloses something of a security nature, is so serious that they are prepared to reassess the relationship with the United Kingdom with lives at risk. That is all I want to be clear about, because that is what we understood on the last occasion, and we got criticised for saying so, and I do not want there to be any misunderstanding it.

436. But you have made the position clear, it is as we understood it, and makes the case much easier to decide.

437. MS STEYN: Yes. My Lord, in my submission the position is clear, that the Foreign Secretary's assessment is based on his own considerable experience and expertise in this field, with clear and unanimous expert advice that he has received, direct conversations, as well as written communications on this very issue, and direct experience of working with this US administration and its predecessor. In my submission, it is not reasonably open to your Lordships to take a different view --

438. LORD JUSTICE THOMAS: No. Put in these very clear terms, the case is no different from the way we understood it the last time round. The last time round it was said that there was no threat. Well, maybe threat is not a word that is recognised, but the word consequences is exactly -- the consequences we understood on the last occasion are precisely the consequences we understand now, that there is a real risk, in the terms set out, to national -- **what I am so anxious that there is misunderstanding about, someone is no doubt going to go and ask him, did he mean this, or ask Mrs Clinton or ask anyone else, and I think it is very important that he has a transcript of this so there is no doubt about the gravity of what -- of the position.** I do not -- Ms Steyn, it is not in our interest, it is not in Mr Mohamed's interest, it is not in the newspapers' interest, that there is a misunderstanding. I want to be perfectly fair about this. **So I think we shall organise a transcript so people can actually -- so Mr Miliband and others can read it and just be sure that we have understood it. And**

if not, obviously you can -- we might have to have a further hearing. So we assume that we have not misunderstood it because you have reiterated on numerous occasions that we have got the message and it is the message we had in -- we had when we wrote our fourth judgment.

439. MS STEYN: Yes, and that message in my submission comes from --

440. LORD JUSTICE THOMAS: OK. If that is the understanding, and based on conversations, and based on -- it is exactly what Ms Clinton in fact is recorded as saying, then the case -- I suspect we do not need to hear any more argument on it.

441. MS STEYN: Yes. It may be that there is little more to say. I was just --

442. LORD JUSTICE THOMAS: OK. Well, carry on then.

443. MS STEYN: That, in my submission, is the nub of the issue in relation to the likelihood of the risk occurring. It is plain that your Lordships have to accept the evidence of the Secretary of State. When it comes to the balance, well, in my submission the balance is at least as far in favour of non-disclosure now as it was at the time of the court's judgment.

444. LORD JUSTICE THOMAS: The balance is clear. I mean, if lies are to be put at risk through the non-provision of intelligence, there cannot be any argument about it.

445. MS STEYN: Yes.

446. MR JUSTICE LLOYD JONES: Ms Steyn, what is the impact on this issue of the apparent fact that the Secretary of State would have been prepared to expose the United Kingdom to this risk had the documents not been disclosed to Mr Mohamed's lawyers?

447. MS STEYN: My Lord, that simply shows how seriously the Foreign Secretary took the possibility that Mr Mohammed, in circumstances where he was potentially facing capital charges, might not have been in the position to properly defend himself and the Secretary of State, taking on board your Lordship's view in the first judgment as to the importance that he should -- of him having those documents, clearly was prepared to conceive of circumstances in which such damage might have had to have been accepted. That does not in any way suggest that the damage is not, or would not be, as serious as the Foreign Secretary has explained that it would be --

448. MR JUSTICE LLOYD JONES: Does it tell us anything about the seriousness of the threat or about his assessment of the seriousness of the threat?

449. MS STEYN: My Lord, no. In my submission, what it says is how seriously he took the public interests that were on the other side of the balance at that stage. It should of course be remembered that what was in issue at that time was not public disclosure but disclosure to security cleared US lawyers. He took the view that -- he did not make a decision on this issue but clearly he made it clear that he might have had to take the view that the disclosure would have to be made.

450. MR JUSTICE LLOYD JONES: He might have been inclined, I think was what he said.

451. MS STEYN: He might have been inclined to order disclosure. That plainly is not a decision that the Foreign Secretary would have taken lightly because he had explained the real damage that would have occurred and, if I may just give your Lordship's the reference to paragraph 31 of the second PII certificate, where he explained his -- he refers to his detailed assessment, both to the nature of the damage that would be likely to occur and my appreciation that such damage would indeed be likely to occur, and he refers to his detailed assessments in the sensitive schedule. The position, as he has explained in the third PII certificate, is precisely the same now as it was then in terms of the damage that he believes would occur if there was public disclosure.

452. MR JUSTICE LLOYD JONES: But if he had made disclosure to security cleared lawyers in those circumstances, that would still have been a breach of the control principle and it would have been a flat contradiction to the wishes of the source of the information.

453. MS STEYN: Yes, it would, which is why there were clearly strenuous efforts to ensure that the control principle was not and has not been breached in this case and that remains the position. Obviously there was the possibility of it being breached, either potentially by the Foreign Secretary or by the court, but that has not at any stage occurred and so the position remains that the US administration will be aware of the very strenuous efforts that the UK has gone to to ensure that that principle is not breached.

454. MR JUSTICE LLOYD JONES: I understand that, but it is your position that that indication was given in that certificate, notwithstanding the continuous and constant assessment by the Secretary of State of the likelihood of the risk materialising.

455. MS STEYN: Yes. It has been suggested by my learned friend that that somehow shows that the damage was either not as likely or would not have been serious as the Foreign Secretary has explained that it is and in my submission that is simply wrong. It is a failure to understand how seriously the Foreign Secretary took the public interest in favour of disclosure to Mr Mohamed's lawyers at that stage in the proceedings.

456. LORD JUSTICE THOMAS: Ms Steyn, it could be put this way: that he was prepared to put the lives of men, women and children in the United Kingdom at risk to provide 42 documents to Mr Mohamed. That must inevitably follow, must it not?

457. MS STEYN: He was --

458. LORD JUSTICE THOMAS: It must follow. There is no wriggle room there.

459. MS STEYN: Well, there is -- to some extent there is a degree of difference between disclosure --

460. LORD JUSTICE THOMAS: No, there is not. I mean, one can understand why in the interests of justice, and making certain that one man was not wronged, he will be

prepared to put the lives of men, women and children in the United Kingdom at risk, but the risk must be the same.

461. MR JUSTICE LLOYD JONES: His assessment of the risk was the same throughout, would you say?

462. MS STEYN: His assessment of the risk was precisely the same and that was in circumstances where a British resident was facing the possibility of a capital charge and his assessment was that in those circumstances, yes, he might have to, if there was no other way, disclose the information, but that does not suggest that the damage or the likelihood of damage is less than he has explained it to be. It was as high --

463. LORD JUSTICE THOMAS: No. It was just testing the proposition, that the risk is, as you put it, the same, but he has come -- but he was prepared to take that risk to our intelligence sharing relationships with the risks it entailed to the citizens of this country in those circumstances, what he says, the risk is identical now, but he feels that, in making these matters public, of no intelligence value whatsoever, of being of no intelligence -- is too great a risk and one can understand how you can form a value judgment about that. But the real thing is the risk is the same.

464. MS STEYN: Yes.

465. LORD JUSTICE THOMAS: Good.

466. MR JUSTICE LLOYD JONES: Thank you.

(4.00pm)

467. MS STEYN: My Lord, unless there is anything else that I can --

468. LORD JUSTICE THOMAS: No, Ms Steyn, what we will do, I think, is, subject to anything that Mr Jaffey or Mr Vassal-Adams might say, **we will ask somebody to transcribe the hearing, to ask for a transcript to be made so that there can be no misunderstanding of the way in which we approach this case, because there apparently was on the last occasion, and it is not in anyone's interest that there should be a misunderstanding. The Foreign Secretary's evidence, or position, is absolutely crystal clear. There is not a mere breach of the principle of control, he is acting as he did because there would be consequences. I prefer to use that word, because it should not cause offence, rather than a threat, but I do not believe there is any material distinction.**

469. MS STEYN: Well, it should, my Lord, I think be clearly understood that the Secretary of State's assessment is based both on his understanding of the consequences as explained to him in the communications received and also on his understanding of the principle of control. He has made that very clear in his PII certificates, but his assessment is not just placed alone --

470. LORD JUSTICE THOMAS: Because we might take the view that, if we were really here by any rational analysis concerned with the breach of the ordinary principle of

control, it might be very difficult to conceive that anyone would rationally take the steps that had been set out, but, if the Secretary of State, as the expert in knowing how you read the documents, understands how the consequences have been spelt out by the Obama administration, then it is very difficult to see how, he being expert in reading such documents and knowing how you read the consequences, we could come to a different view, subject to any argument that may be made. **But I do not want there to be any misunderstanding, as was said to be on the last occasion, that this has something to do with the principle -- this turns on the principle of control. It does not, it turns on the consequences of the Obama administration have made clear to the Secretary of State's view. Good.**

(4.03pm){}

471. MR JAFFEY: Thanks to my Lord, Lord Justice Thomas' efforts, we are now told that the assessment of the Foreign Secretary is that could in the CIA's letter means would --

472. LORD JUSTICE THOMAS: I do not think it is my efforts. I think it is what the Foreign Secretary meant in his certificate, but it was not clear, but it now is clear. That is why I took Mr Vassall-Adams to the would paragraph, which underlines this whole thing, that it is not just a question of would, ie there are consequences.

473. MR JAFFEY: I have two submissions for your Lordships on that. The first submission is, whether or not the court should accept that conclusion in the Public Interest Immunity certificate, because, as your Lordship knows, the case that is put forward by the claimant and by the UK media is that the CIA letter, which is the final statement of view of the Obama administration, is a letter deliberately designed to mean many things to many people and it has always been the case that our concern about that letter has been expressed clearly and before the Public Interest Immunity certificate was provided to the court and to the other parties and I showed your Lordship in my submission --

474. LORD JUSTICE THOMAS: But Mr Jaffe, there is a very simple answer to that, which is, you know, we are mere judges, not diplomats. To a diplomat, versed in the way these things are done, the letter bears one meaning. That is the Foreign Secretary's point. We are not the expert in reading letters from the CIA.

475. MR JAFFEY: I draw your Lordships' attention to these points. The first point which I make to your Lordships is that this is not a letter which is designed to convey diplomatic niceties. The CIA letter was deliberately designed to be an open letter which could be passed to the court. It is a communication from one state to another, for the purposes of informing the court as to the US government's position. It is not designed to be a clever diplomatic communication that can only be understood by someone who has a mastery of the workings of international relations. The request, and your Lordships have seen the request at page 94, the record of the request by the Treasury Solicitor and the Foreign Office, is that confirmation be given in the form of a letter as to the US government's final and considered position in a form which is suitable for presentation to the court for the court to see.

476. That is the first point which I make to your Lordship, and it is that confirmation in the form of General Jones' letter which confirms that the CIA letter does indeed represent the final and considered position of the US government that was before the court today and which has also -- General Jones' letter postdates the Public Interest Immunity certificate in this case. General Jones' letter has not been considered by the Secretary of State when producing the Public Interest Immunity certificate and the Secretary of State has not opined or even considered whether or not that letter, referring to the CIA letter, does indeed represent the final position. So when Ms Steyn says that the Secretary of State relies on the conversations with Secretary of State Clinton, that is quite a difficult submission from her, because it is not a submission which has been placed in the Public Interest Immunity certificate and it is made in the context where there is a letter from General Jones copied to Secretary of State Clinton, saying that this represents the final position of the US government. That is my first submission.

477. The third point which I make is that, all of the criticisms which we make of the CIA letter in terms of its analysis are not points which should have come to any surprise to the Secretary of State or indeed to the US government, because they have been set out, in writing, at the earliest possible stage and I have shown your Lordships the letter from those instructing me --

478. LORD JUSTICE THOMAS: Mr Stone's letter. Yes.

479. MR JAFFEY: And I draw attention to the differences between the CIA letter and the Bellinger letter. What I suggest is the deliberate ambiguities in the CIA letter and also why there was no attempt to clarify those ambiguities in the light of the concerns we expressed in correspondence. There is no explanation in a PII certificate why the apparently firmer views of Secretary Clinton were not copied or expressed in the CIA letter or put in that way and there is no explanation at all of why the United States government do not know that the control principle is not in fact sacrosanct based on what our Foreign Secretary said in the first PII certificate, where the Foreign Secretary made it absolutely clear that he was willing to consider handing over documents far more interesting than those seven paragraphs in issue in these proceedings today.

480. So, in circumstances where all of those arguments have been clear for a long time, and also the key material, namely the CIA letter and General Jones, is before the court, an unreasoned conclusion, which is what the court is faced with, in a PII certificate that this is the Secretary of State's view is in my submission entirely inadequate. The Secretary of State has not put forward any response as to why the points which I have just identified to your Lordships are wrong. It may well be that the Secretary of State in the exercise of his expert diplomatic judgment, based on the experience he has and the experience of those advising him, he can say, well, those points are very all interesting but this is the answer to them. But, in the absence of a coherent and sensible answer, it is my submission that the court should not accept this Public Interest Immunity certificate. Because there are so many obvious and plain concerns about the CIA letter, it is in my submission so clear that it has been drafted with two objects in mind, an object first of all to try and persuade this court not to disclose the information but equally not being prepared to go as far as making a threat, or whatever anyone

wants to characterise it as, in the way that the Bush administration was prepared to do. All of those are important points and none of them were dealt with --

481. LORD JUSTICE THOMAS: Ms Steyn has made it very clear, there is no difference between the position of the Bush administration as regards "consequences" and the Obama administration. I think she has made that -- the Foreign Secretary's position is it is the same.

482. MR JAFFEY: She has said that is the Foreign Secretary's position. The concern which I expressed to your Lordships is that conclusion is essentially unreasoned in light of all the concerns that have repeatedly been raised about the evidence on which it is based.

483. LORD JUSTICE THOMAS: The issue is clear, is it not, Mr Jaffey? We know very clearly, subject to anything the Foreign Secretary wish which to say, having read the transcript, what the Foreign Secretary's understanding is. We do not want there to be a misunderstanding. I did not think there was, but we must be as fair as we can in matters of this kind, take it slowly, but what you are really saying is, well, if that is his position, it is irrational.

484. MR JAFFEY: Indeed. It is a position which is untenable --

485. LORD JUSTICE THOMAS: No, when I say irrational, I do need to explain that is irrational in the legal sense and not in the layman's sense, that it is wrong --

486. MR JAFFEY: Your Lordship has my submission that that is not the appropriate test to apply. The test is not one of Wednesbury irrationality, but the test is one of whether the court, making its own decision on the question of Public Interest Immunity, and I emphasise that, has been satisfied that the Secretary of State, bearing in the mind the Secretary of State has expertise that the court does not, has reached a conclusion which is correct. It is the court's decision and the court is not acting as a court of judicial review considering a Wednesbury rationality claim, but the court is making its own decision on Public Interest Immunity and in those circumstances, where the Public Interest Immunity certificate which the court has been presented with, does not deal, and Ms Steyn's submission, in her submissions she has not even attempted to deal with, any of the points and concerns which have been raised by Mr Vassall-Adams and me today about the evidence justifying this so called threat. In those circumstances, the court should not accept this Public Interest Immunity as an appropriate statement, an appropriate conclusion as to what the response of the US authorities would be.

487. My Lords, the only other point which I wanted to deal with very briefly is the spectre that all of this is going to repeated ad infinitum -- this is what I call the Ground Hog Day point.

488. LORD JUSTICE THOMAS: The what?

489. MR JAFFEY: The Ground Hog Day point. There is a lovely film, a romantic comedy with Bill Murray, and he wakes up every morning and he is still in the same day, every single day.

490. MR JUSTICE LLOYD JONES: This case is starting to feel like that.

491. MR JAFFEY: He is still in the same day. Life just repeats itself indefinitely. He only escapes from this nightmare when he finally manages to get the girl, which I do not think is probably an option here. But there does have to be an end to this litigation at some point and in my submission the proper end to this litigation is in fact now, because what has happened in the letter at page 94 is it is made clear that the Secretary of State, the Foreign Secretary, that is, has asked the US authorities for their final definitive statement of position and General Jones has responded yes, the CIA letter is our definitive statement of position. The US authorities have had every opportunity to put this case in the C --

492. LORD JUSTICE THOMAS: I do not think it has ever been -- I have tried to put to Ms Steyn, because of this problem with clarity, actually what is being said by the Secretary of State in the vernacular, and it -- you know, he can think again is that what he is saying. I believe it is, because Ms Steyn has been very clear about it, but there cannot any longer be any -- there will not be a repeat of this, the battle line is now clear and we know where we are. The Foreign Secretary is very clear in his view of what is being said. You say that is not what they mean.

493. MR JAFFEY: What your Lordships have been told is your Lordships have been told in the submissions the view of the Foreign Secretary, not having had the benefit of any submissions or any explanation on all the issues which I have identified. It is my submission that the case should in fact end here, because your Lordship has been presented with a piece of drafting, the CIA letter, which had been produced by someone -- no doubt the most intelligent diplomats and intelligence expert that the world has to offer -- those people will have read your Lordships' fourth judgment where your Lordships set out what the position is, the threat if you like, made by the Bush administration, with absolute clarity and, if it was the position, the court having reopened its fourth judgment, that the position was exactly the same as it was previously, it would have been the simplest thing in the world for that to be said but that was not the course --

494. LORD JUSTICE THOMAS: But Mrs Clinton --

495. MR JAFFEY: -- which the Obama administration decided to take.

496. LORD JUSTICE THOMAS: Subject to what Mrs Clinton is saying.

497. MR JAFFEY: Subject to what Mrs Clinton says but, what Mrs Clinton said in a conversation with the Foreign Secretary, has clearly been overtaken by events. It has not been dealt with in the PII certificate--

498. LORD JUSTICE THOMAS: OK. Well, we have your submission.

499. MR JAFFEY: Your Lordship has my point on that. The reason why this letter, the CIA letter, is unclear and ambiguous of course is because that is a deliberate policy choice which has been made by the United States government. They chose to make it

an unclear letter because, of course, that serves everyone's purposes. It is useful for it to be unclear. It is beneficial to all concerned.

500. LORD JUSTICE THOMAS: But it is no longer beneficial, because the Foreign Secretary now has taken a stand. He has taken a stand that although this -- he has made his position abundantly clear that, although it may all seem very odd, but he has taken it. Here I stand.

501. MR JAFFEY: The consequence of that, my Lord, and the consequences in my submission are, that the PII certificate cannot be accepted in those circumstances because it simply does not deal with any of the relevant issues which have been around not just today but for a very long time. My Lords, unless I can assist your Lordships any further, those are my submissions.

502. LORD JUSTICE THOMAS: Mr Vassall-Adams, do you have anything -- I was going to be rude, but I would not be too rude -- anything new to add.

503. MR VASSALL-ADAMS: Very briefly, my Lord.

504. LORD JUSTICE THOMAS: Of course.

505. MR VASSALL-ADAMS: In your bundle I handed in today, at tab 2, there is a chronology and it may be helpful for us to remind ourselves, painful though it is, of the history of these proceedings in relation in this issue of what the true position of the Obama administration is, because in my submission it will shed some light on the submission now being made on behalf of the Secretary of State. Do you have that chronology, my Lord?

506. LORD JUSTICE THOMAS: Indeed.

507. MR VASSALL-ADAMS: 2008, 30th November, that is when David Rose first raised the issue of what the position of the Obama consideration would be and whether it would be the same as the Bush administration. We have the defendant's response of 18th December and your Lordships are very familiar with the submission that was made at that time.

508. LORD JUSTICE THOMAS: Yes.

509. MR VASSALL-ADAMS: Your Lordships handed down your fourth judgment on 4th February and on 5th February the claimants made the application to reopen the fourth judgment. From 5th February onwards, there can have been no doubt that there was going to be a challenge as to what the actual position of the Obama administration was in relation to the disclosure of these paragraphs and so that matter has been in issue since 5th February. On 11th February, this court ordered that the defendant's evidence in response to the claimant's application had to be provided by 11th March and you can see what happened in relation to that. It was never provided by 11th March and what we have on 24th March was a letter from Mr Bethlehem purporting to deal with the Obama administration position, Leigh Day then responding, making the point that there had been no evidence on what the true position was, and the defendant replied on 1st

April saying we are unwilling to elaborate on the Bethlehem letter. On 16th April, the Obama administration released the torture memos. The defendant did not see fit to draw the court's attention to that important development, but it all came up on the hearing date of 22nd April, when the court actually heard the application to reopen, and it was only at that stage that the defendant took the position to actually go away and get evidence about what the Obama administration position was.

510. That evidence is the CIA letter. There can be no question about that, because any doubt that may have existed as to whether that truly reflects the view of the Obama administration is settled by the letter on behalf -- CCed to the Secretary of State and said to be expressing her views, which is made by the assistant national security adviser, and in my submission the defendant is trying to do what it always has done in these proceedings, which is to have its cake and eat it, which is on the one hand this is -- the CIA letter is evidence on which the defendant relies. As Mr Jaffey has pointed out, in the context of this case, and the court having given judgment back in February, and this issue having been live now literally for months as to what the true position of the Obama administration is, it cannot be open to the defendant at this stage to say the CIA letter does not mean what it says. Everybody knew that the court would pour over the language in that letter and that the language chosen would be very important and it is a could not a would letter and in my submission it does mean what it says and if the Foreign Secretary's true analysis is something different, then it is founded on a false factual premise, or it is not made in good faith.

511. In relation to the issue of -- the issue that Ms Steyn sought to deal with, the point made by Mr Justice Lloyd Jones in relation to the willingness of the Secretary of State to order disclosure, it simply shows that even back in August 2008 the Secretary of State cannot possibly realistically have believed that the US would act on the threats, the serious threats, it was making at that time, because no Foreign Secretary in my respectful submission could possibly adopt the position that, in order to ensure a fair trial of one person, it was really going to put the lives of men, woman and children on the streets at risk --

512. LORD JUSTICE THOMAS: That is what he was saying: he was prepared to do that, prepared to consider it. You are not submitting, surely, that the Foreign Secretary, when he said that, did not mean it?

513. MR VASSALL-ADAMS: Well, there are so many difficulties with the way the Foreign Secretary has put his case in this case that in my respectful submission there is very little reliance on anything that the Foreign Secretary -- well, the court can place very little reliance on what the Foreign Secretary is in fact said to be saying.

514. My Lords, I cannot really add to those submissions, but I am happy to address any point that you wish to raise.

515. LORD JUSTICE THOMAS: Well, what we shall do, we have to hear a very short closed session, so we shall rise for a few minutes. **(pause)**

516. Ms Steyn, the transcriber -- I think it is important, because it is not -- we do not want what happened on the last occasion, for there to be any misunderstanding, it is not in anyone's interests. **So it would be desirable if Her Majesty's Principle for the Secretary of State for the Foreign Department does look at the transcript so he can see precisely what the argument is, that this is not a case being advanced by him about the control principle but a case that we are asked to decide on the basis of his assessment of, in language which you can choose, either there are these consequences or a threat, the words -- a play on words. But he needs to know and see and have a review of it, so that your position that he has put is absolutely clear** and we would then ask -- I do not know where he is at the moment, no doubt he may be taking a vacation or be elsewhere, I simply have no idea -- but maybe you could take some instructions when let us know when he will be able to have a look at it, make certain it is accurate and confirm it is so. If it is in any way inaccurate, we will have to address what we do then.

517. MS STEYN: Yes, my Lord. May I --

518. LORD JUSTICE THOMAS: But we do not want any misunderstanding. That is what I am most anxious, because **I think there was a muddle somewhere that arose between the breach of the principle of control, which this case has nothing to do about, it is the consequences we are concerned about, is it a could situation, where we will have to assess it, or is it a would situation, and I think we have made -- you have made the Foreign Secretary's position abundantly clear as to what he believes the Obama administration will do, but we want to be sure that is his understanding as well.**

519. MS STEYN: May I just very briefly respond to the suggestion that the Foreign Secretary -- that the view has not been put in good faith. That is utterly refuted. As your Lordships acknowledged at paragraph 82 of your fourth judgment, both the Foreign Secretary and his legal adviser, Mr Bethlehem QC, have made so clear the United Kingdom's position on the --

520. LORD JUSTICE THOMAS: I think Mr Vassall-Adams is putting that submission on the Foreign Secretary's conduct after and the interpolation -- he has really saying no person in good faith could read the CIA letter in the way in which he has done so. Have I understood it correct?

521. MR VASSALL-ADAMS: You have, my Lord.

522. LORD JUSTICE THOMAS: That is the position.

523. MS STEYN: Well, my submission is, as your Lordship will have understood, that that is a perfectly rational --

524. LORD JUSTICE THOMAS: We have absolutely got the point, but I just wanted to be clear, he was not criticising the respondent. Up to this day, it is his way, in which we have been over -- but the issues are crystal clear, I just want to make certain there is no

misunderstanding today, because it is very unfortunate and we must be as fair as we can.

525. MS STEYN: Yes. I understand that. I simply wanted to respond because the suggestion --

526. LORD JUSTICE THOMAS: Have I understood you correctly?

527. MS STEYN: -- that it was not made in good faith --

528. MR VASSALL-ADAMS: You have, my Lord.

529. MS STEYN: -- had not previously been put.

530. LORD JUSTICE THOMAS: OK. Well, look, we shall rise for a few minutes.

531. MR GOUDIE: My Lord, we have the document, but I think neither myself nor Ms Steyn have had any proper chance --

532. LORD JUSTICE THOMAS: Would you like about quarter of an hour, 20 minutes to have a look at it?

533. MR GOUDIE: I think that would be --

534. LORD JUSTICE THOMAS: Because the last thing -- I mean, these are revisions to our first judgment. If we can sort everything out, wonderful, if we can sort everything out except one point, that will be less wonderful but still enormous progress. So how long do you want. We are at your disposal, subject to the position of the court clerks.

535. MS STEYN: And I think quarter of hour will hopefully speed up what then happens thereafter.

536. MR JAFFEY: My Lord, does your Lordship want us back after that? There will be no more open issues to be raised today.

537. LORD JUSTICE THOMAS: No. It is highly unlikely, I think, that we will be able to clarify everything and we are not prepared to release a corrected judgment in two parts. There may be one issue to be resolved.

538. MR VASSALL-ADAMS: My Lord, two matters that will take less than one minute. The first is just to draw your Lordship's attention to the fact that at tab 7 of the latest media bundle are the ICLR submissions --

539. LORD JUSTICE THOMAS: Yes, we have read those very carefully and we see great force in the somewhat, I think someone might put it, way in which this whole jurisdiction has grown up without someone having stood back and said, now we have a few years experience, how do we handle all these issues, and, if we may say so, the position has been very clearly put.

540. MR VASSALL-ADAMS: Thank you very much.

541. LORD JUSTICE THOMAS: And we shall address them. Whether we are the right people to solve them is a different question. It may be a matter for the rules committee.

542. MR VASSALL-ADAMS: Thank you very much, my Lord.

543. MS STEYN: My Lord, before we go into closed, there is just one final point, which is that we would seek a formal order from the court at the end of this judgment dismissing the claim and making an agreed order that the defendant pay the claimant's costs of 5th December 2008 on the standard basis and thereafter there should be no order for costs.

544. LORD JUSTICE THOMAS: Very well. If you had agreed that. Have you?

545. MR JAFFEY: We have agreed the issues in relation to costs. I do not think we agreed to dismiss the claim. I think there is simply no legal grant.

546. LORD JUSTICE THOMAS: OK. Well, that is a terribly important point, about which we can have another day's argument.

547. MR JAFFEY: If not more.

(4.30pm)

(A closed session followed)