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Litigation and Employment
Group

Treasury Solicitors
One Kemble Street, London WC2B 4TS

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

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

By e mail

Please Quote: DMM/1C

Your Reference:

14 August 2009

Dear Lord Justice Thomas and Mr Justice Lloyd Jones

Binyam Mohamed – Transcript of the Hearing of 29 July 2009

In the hearing on 29 July 2009, the Court indicated that a transcript of the hearing should be made available to the Foreign Secretary to give him an opportunity to review and confirm, or clarify, the arguments put in his name.¹ This concerned notably the terms in which US Secretary of State Clinton expressed the views of the Obama Administration in the meeting of 12 May 2009 and the Foreign Secretary's assessment of the likelihood of serious harm to the national security of the United Kingdom.

The Foreign Secretary was out of the country until the end of last week. For his return, the FCO provided him with the transcript of the hearing and other associated papers relevant to the issues before the Court. Daniel Bethlehem QC, the FCO Legal Adviser, discussed the issues with him in person on Sunday, 9 August.

I am instructed to confirm that the Foreign Secretary has read the transcript carefully and has also refreshed his memory of his 3rd PII Certificate and sensitive Schedule and other papers relevant to what is said therein. I am further instructed to confirm that the Foreign Secretary is content that the arguments advanced by counsel for the Defendant in the hearing accurately reflect both what was said by Secretary Clinton, and in other US material, and the Foreign Secretary's assessment, set out in his 3rd PII Certificate, that serious harm to the national security of the United Kingdom would result from the disclosure of the 7 paragraphs.

The Foreign Secretary has asked that two points be made. First, for the avoidance of doubt, as the email from Jean Curtin to Karen Steyn of 31 July 2009 suggests some uncertainty on the point, I am asked to clarify that there is a (classified) record of the Foreign Secretary's discussions with US Secretary of State Clinton of 2 March and 12 May 2009. The purpose of paragraphs 26 and 27 of the Foreign Secretary's 3rd PII Certificate was to convey formally what was said at those meetings. They faithfully reproduce the records of those discussions.

David Dunleavy – Head of Division
Adam Chapman – Team Leader



Given the importance that the Court attached to these discussions, and that these records fundamentally informed the drafting of paragraphs 26 and 27 of the 3rd PII Certificate, the Foreign Secretary has decided that exceptionally the records of these discussions should be disclosed, without prejudice to the Defendant's position that there is no need to do so as a matter of formality. To this end, I attach hereto the records of both discussions.

Second, the Foreign Secretary is concerned that there should be no misunderstanding of his position on the matters at issue in paragraphs 446 to 464 of the transcript. An important element of his responsibility in the PII process is to balance the interests of national security with the interests of justice. The interests of justice clearly demanded that the underlying documents in question be shown to Mr Mohamed's US legal counsel. The level of disclosure in question is highly material to the balancing that the Foreign Secretary is required to undertake. In the circumstances addressed in paragraphs 446 to 464, it was closed disclosure to Mr Mohamed's US-security cleared counsel, subject to safeguards against public disclosure, and for use in closed US proceedings. Public disclosure was not in issue. Ms Steyn was therefore correct to say at paragraphs 447 and 449 that the comment of the Foreign Secretary that he might be inclined to agree to closed disclosure shows the extent to which he took seriously his public interest responsibilities.

Yours sincerely

David Mackie
For the Treasury Solicitor

Cc by email : SASO
Leigh Day
Jan Johannes
Mark Stephens
David Rose

Records of Discussions Between the Foreign Secretary and the US Secretary of State on Binyam Mohamed disclosure issues

The following set out unedited and in full the email records of the discussions between the Foreign Secretary and the US Secretary of State on BM disclosure issues. The records were produced by the Private Secretary to the Foreign Secretary participating in the meeting. Addressee and copy addressee information is omitted as not relevant.

Discussions of 2 March 2009

[Extract from email note of meeting by Stephen Hickey, Private Secretary to the Foreign Secretary, dated 3 March 2009. Elements of the note which are not reproduced address non-BM issues.]

"Guantanamo

11. The Foreign Secretary explained the concern in the UK over the Binyam Mohamed case. We were grateful for the Administration's decision to return Mr. Mohamed to the UK. We would have no objection to the US making public the 42 intelligence documents related to the case. We would welcome any further details on the review of state secrets privilege.

12. Clinton confirmed that it was an inviolable principle that it should be for the US to decide on the release of its own intelligence material. She would arrange for US experts to provide a briefing on the review. The new Administration simply didn't know what information there was on the files."

Discussions of 12 May 2009

[Email note of meeting by Matthew Gould, Principal Private Secretary to the Foreign Secretary, addressed to Daniel Bethlehem dated 13 and 14 May 2009. The note of 14 May responded to a request for clarification.]

Note of 13 May 2009

"1. On 12 May the Foreign Secretary raised the Binyam Mohamed legal case with Hillary Clinton. Clinton was accompanied by Dan Fried (Assistant Secretary, State Department) and Tobin Bradley (NSC); the Foreign Secretary by Nigel Sheinwald, Ian Bond and me.

2. The Foreign Secretary said that the Court had questioned the continuing non-release of the US documents in the case given (1) the arrival of the Obama Administration, and (2) the release of the 4 DoJ memos. The Court had said it could not see how, in the light of the publication of these memos, anything in the US papers could be regarded as sensitive.

3. The Foreign Secretary said that the British Government would continue to make the case that it continued to be an inviolable principle of intelligence co-operation that we did not give away other peoples secrets, and that doing so would cause serious harm to the UK/US intelligence relationship.

4. Clinton (who was clearly well aware of the case and the associated issues) said that the US position had not changed, and that the protection of intelligence went beyond party or politics. The US remained opposed to the UK releasing these papers. If it did so it would

affect intelligence sharing. This would cause damage to the national security of both the US and UK.

5. Bradley said that this was also the position of the White House. They appreciated that this left the British Government in a difficult situation. But they did not see it as being affected by the release of the DoJ memos."

Note of 14 May

"For clarity, I should record that both Clinton and Bradley were explicit that the US Government was opposed to the release by the UK of any US intelligence material, whether in the form of the actual documents or the 7 summary paragraphs."
