IN HIGH COURT OF JUSTICE **Claim Nos. HQ08X01180, HQ08X01416, HQ08X01686, HQO8X03220**

QUEEN'S BENCH DIVISION

BETWEEN

(1) BISHER AL RAWI
(2) JAMIL EL BANNA
(3) RICHARD BELMAR
(4) OMAR DEGHAYES
(5) BINYAM MOHAMMED

Claimants

- and -

(1) THE SECURITY SERVICE
(2) THE SECRET INTELLIGENCE SERVICE
(3) THE ATTORNEY-GENERAL
(4) THE FOREIGN AND COMMONWEALTH OFFICE
(5) THE HOME OFFICE

Defendants

SKELETON ARGUMENT FOR THE FIRST TO FIFTH CLAIMANTS
For Case Management Conference fixed for 13-15 July 2010

(NB the First to Fifth Claimants do not consider that 3 hearing days should be required for the resolution of the issues set out below and are instead of the view that 2 days should suffice)

Introduction

1. At this CMC the Claimants wish to revisit those matters raised at the April hearing which the Court was then unable to resolve, and to address certain developments which have occurred in the interim. They wish to drive this case forward with the greatest expedition possible, and seek the following orders from the Court:

   (a) That the Defendants do provide a substantive response to the Claimants' Request for Further Information by 23 July 2010, and the Claimants have liberty to seek a peremptory order in respect of this matter in writing thereafter;

(b) That there be a trial of the following issues as preliminary issues:

i. When, after September 11th 2001, information known to the Defendants first showed that individuals suspected of involvement in terrorism related activity faced a real risk of incommunicado detention, inhuman and degrading treatment or torture, or rendition, by or at the behest of the United States authorities;

ii. What level of direct or indirect contribution was made by the Defendants to the Claimants' detention or its continuation thereafter;

iii. What level of direct or indirect participation occurred on the part of the 1st and 2nd Defendants in the interrogation of the Claimants during the period of their detention;

iv. What efforts were made by the Defendants to secure the release of the Claimants or to protect them from ill-treatment[1];

(c) That the following directions be given in respect of the trial referred to at (b):

i. The Defendants give standard disclosure in respect of the said issues by 1 October 2010;

ii. The parties exchange witness statements relevant to the said issues by 17 December 2010;

iii. There be a trial of the said issues with a provisional time estimate of 6 weeks to be fixed on the first open date after 6 April 2011;

[1] Subject to the disclosure ordered by the Court on 21 June 2010 it may also be convenient to add a further preliminary issue in respect of the nature and lawfulness of any guidance provided to officers of the 1st or 2nd Defendants in relation to information sharing with the law enforcement agencies of the United States, Pakistan, the Gambia or Morocco, participation in the questioning of individuals in the custody of such countries and attendance at places of detention in such countries. That is a matter which can be revisited once any PII issues in relation to this material have been resolved.

iv. There be a further CMC fixed for the first open date in November 2010 to resolve any issues relating to Public Interest Immunity raised by the Defendants' disclosure. Such hearing to take place with the assistance of Leading and Junior Special Advocates;

v. For the purposes of disclosure the Claims should be treated as a part of one action, and each Claimant shall be entitled to receive all documentation served by the Defendants in relation to each of them.

2. Each of the directions sought by the Claimants is addressed in turn. In order to avoid unnecessary repetition, a copy of the Claimants' skeleton argument before the Court at the last CMC, and a small clip of relevant correspondence referred to below are attached hereto. They are contained in a single slim paginated file also including the Claimants' Request for Further Information dated February 2010, the Defendants' Skeleton Argument from the last hearing, the Defendants' Response document dated 13 May 2010, and the Court's Order at the last hearing.

Claimants' Request for Further Information

3. At the April CMC the Defendants asserted to the Court that such was the breadth and reach of the Claimants' Requests that they needed until at least 13 May 2010 to respond to the same, but they undertook to provide a full explanation where a Request was not being answered. Against that background the Court made the following order in respect of this Request:

"*The Defendants shall respond to the Claimants' Requests for Further Information dated February 2010 by 13 May 2010. If and in so far as the Defendants wish to say that they cannot comply because of disproportionate expense or for any other reason, then they should set out every fact and matter relied upon in this regard.*"

4. On 13 May 2010 the Defendants purported to comply with this Order by service of a document headed "*Response to the Request dated 26 February 2010*". Regrettably the Claimants submit that this document was quite inadequate and

displayed an approach on the part of the Defendants which was, given their status as responsible public bodies engaged in litigation of the utmost gravity, surprising, unhelpful and unconstructive in the extreme.

5. In order to avoid some of the problems which have occurred in the past (of the Defendants contending that they had insufficient time to engage with matters raised for resolution before the Court) the Claimants set out their concerns in detail at an early stage in correspondence dated 28 May 2010. The Claimants' letter used trenchant terms in characterising the Defendants' stance to be inadequate, but it is submitted that those terms were fully justified and the Court is respectfully invited to consider the Defendants Response document with particular care.

6. The Defendants replied to the Claimants' correspondence by letter dated 8 June 2010, indicating that they would consider the matters raised with Counsel and that they would "aim" to respond within 14 days (i.e. by 22 June 2010). There was no response within this timescale but on 30 June 2010 a further letter was received. Again, regrettably, this was inadequate. Each Request in issue is addressed in turn:

Requests 1 & 2

These requests related to the formal guidance and Ministerial approval provided to the Security Services in the period with which this dispute is concerned. The 30 June letter offers no response to the substance of the Claimants' criticisms set out in their 28 May letter and merely asserts that they are not accepted. This is, however, a matter which may be clarified in the light of the Court's Order of 21 June 2010.

Requests 4 to 6

These requests sought to clarify the extent of dispute between the parties over a critical issue: whether the Defendants contended that it could ever be lawful to share information or raise questions with other agencies if there was a real risk

that such information sharing or questioning would be used in the torture and inhuman degrading treatment of individuals or would expose them to incommunicado detention or rendition. In their original Response document the Defendants refused to answer these questions. In their letter of 30 June they appeared to edge towards, but stop short of a fuller answer. The essence of their response seemed to be "yes in certain circumstances". If that is so the Defendants should say so in their statement of case, setting out the circumstances and supported by a Statement of Truth.

Requests 7 and 8 – foreign law

This is another area where the Defendants' approach to publicly funded litigation is, frankly surprising. In the manner in which they have pleaded their defences they have raised the possibility (but not asserted) that the ill-treatment complained of by the Claimants (whether torture, incommunicado detention or rendition) might be lawful under some system of foreign law. The Defendants should state in terms whether they really do make any such assertion and if so on what basis. Until they do so it is difficult to see that it is a responsible use of public funds to seek legal advice on these matters from a range of jurisdictions. That is particularly so in circumstances where the suggestion that an English Court could, as a matter of public policy, apply any foreign law purporting to treat such ill-treatment as lawful seems, to put it mildly, ambitious. The Defendants' citation (in their letter of 30 June) of authorities concerned with trusts and insolvency or the application of specific nationality laws does not materially advance this debate.

Requests 9 to 13 & 15

The Defendants' stance maintained in their letter of 30 June persists in avoiding a simple answer to an issue of very considerable importance: when (if at all) the Defendants' acknowledge that must be treated as having knowledge of the matters addressed in these Requests? It was in part to facilitate the Defendants' task in this regard that the Claimants set out their detailed case on knowledge in paragraphs 380 to 381 and Schedule 1 of the principal Particulars of Claim. They

contend that the combination of matters pleaded there show that the Defendants had the relevant knowledge of risk of torture, detention and rendition prior to the detention of any of the Claimants. Unfortunately the Defendants have still failed to plead to the Claimants' Schedule and have offered only the most generalised response to paragraphs 380 to 381. They should now be required to state what their position is on an issue going to the core of the case.

Request 14

This Request again goes to a core issue: the extent of the Security Services' participation in the interrogation of the Claimants. The Defendants' failure to answer it must now be addressed at Ministerial level and, if appropriate, dealt with in accordance with PII principles in the same way as the Court has considered appropriate in respect of the question of guidance.

Request 16

It is accepted that the 30 June letter appears to make a very surprising position clear. The Defendants do not admit, even now, that Mr Mohamed was ever detained in Morocco. Implicit within that stance is the assertion that the Security Services have never had any information from any official source which they consider to be reliable that he was so detained. If that is how the Defendants' stance is to be understood it would seem surprising to say the least. If it is not their stance they should say so now.

Request 20

The Defendants' position in relation to this Request is not understood for the reasons set out in the Claimants' 28 May letter. Their 30 June letter advances matters no further. They should be required to state their position now.

7. The upshot is that almost 5 months after service of a clear and specific Request for Further Information, drafted in order to assist the Court in ascertaining the true extent of contested issues between the parties by posing 20 core questions,

the Defendants have offered almost no response of any substance. The Court is accordingly now asked to grasp the nettle and to make a final Order in respect of the Claimants' Request. If this is not complied with a peremptory order will be sought in writing before the end of this term.

Preliminary issues

8. As the Court will recall, at the last hearing the Claimants sought a simple direction that there be a split trial of liability and quantum. The Defendants objected to that course contending that it was not possible to sever the issues in this way, and the Court did not consider that it had sufficient information to give a final decision on this matter. Consistent with their desire to avoid unnecessary controversy, but also to allow the core issues relevant to liability to be resolved at the earliest stage the Claimants have revisited this question. They now propose that the Court can and should direct that there be a trial of the four preliminary issues identified at 1(b) above. The resolution of these issues will, it is submitted, provide critical staging posts in the Claimants' pursuit of their overall claim. They will involve no overlap with issues of quantum and, if resolved in a manner favourable to the Claimants, are likely either to allow a formal determination on the issue of liability very shortly thereafter, or to increase the prospect of this litigation being settled. Their resolution will also avoid the risk of further traumatisation of the Claimants explained in the evidence adduced at the last CMC.

Ancillary directions

9. The ancillary directions set out at 1(c) above seek to facilitate a trial of the preliminary issues identified in the first half of 2011. By the proposed disclosure date the Defendants will have been in possession of the Claimants' very fully pleaded case for more than 2 years and will have had a year more than Holroyde J first decided should be sufficient for full disclosure[2], the critical witnesses

[2] As previously submitted the Defendants have also been on notice as to the documentation required for several years prior to this as a result of their obligations to report to the Intelligence and Security Committee and their duty of candour relating to earlier judicial review proceedings (see e.g. 12 April 2010 skeleton argument at paragraphs 19-21, 23-26).

within each Government department must have been identified, and it would be very surprising if the timetable proposed could truly not be met.

10. So far as the issue of common disclosure is concerned the Claimants submit that this is both necessary as a matter of practical case management, and also appropriate as a matter of principle in circumstances where the factual background to each Claimants' cases is inter-related. The material apparently disclosed to the Sixth Claimant's solicitors, and reflected in their correspondence dated 30 June 2010, provides one example of documentation relevant to one Claimant being of potential relevance to the claims advanced by others.

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2 July 2010
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