IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Claim Numbers: HQ08X01180,
HQ08X01413
HQ08X01416
HQ08X03220
HQ08X01686

B E T W E E N :

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

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

EXHIBIT LC12

House of Lords
House of Commons

Joint Committee on Human Rights

Counter–Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In

Sixteenth Report of Session 2009–10

Report, together with formal minutes and oral and written evidence

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Chloe Mawson (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), John Porter (Committee Assistant), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

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3 Complicity in torture

The meaning of complicity

29. Our report, *Allegations of UK Complicity in Torture*, was published in August 2009.[24] We concluded that complicity in torture is a direct breach of the UK's international human rights obligations, and that, if the relevant facts are proved, complicity in torture exists where a state:

- asks a foreign intelligence service known to use torture to detain and question an individual;
- provides information to a foreign intelligence service known to use torture, enabling that intelligence service to apprehend an individual;
- gives questions to a foreign intelligence service to put to a detainee who has been, is being or is likely to be tortured;
- sends interrogators to question a detainee who is known to have been tortured by those detaining and interrogating him;
- has intelligence personnel present at an interview with a detainee in a place where he is being, or might have been tortured; or
- systematically receives information known or thought likely to have been obtained from detainees subjected to torture.

30. States are also complicit when they act in these ways in circumstances where they have constructive as well as actual knowledge – that is, they should have known of the use of torture.

31. We pointed out that the Government appeared to have been determined to avoid parliamentary scrutiny on this issue, and called on the Government to take a number of steps, including:

- Setting up an independent inquiry into the allegations about the UK's complicity in torture, without ruling out the possibility of future prosecutions;
- Publishing all versions of the guidance given to intelligence and security service personnel about detaining and interviewing individuals overseas;
- Publishing all relevant legal opinion provided to ministers; and
- Making the Intelligence and Security Committee a proper parliamentary committee, with independent legal advice, and reporting to Parliament not the Prime Minister.

24 Twenty-third Report of Session 2008-09, *Allegations of UK Complicity in Torture*, HL Paper 152/HC 230 (hereafter "Report on Complicity in Torture").

32. Shortly after the publication of the Committee's Report, on 9 August 2009, the Foreign Affairs Committee raised very similar concerns about the UK's complicity in torture in its Report on the FCO Annual Human Rights Report:[25]

> We conclude that it is imperative that the UK fulfils its legal obligations in respect of the prevention of torture, including any duty to act positively to prevent it, investigate allegations that it has taken place, and expose it. We further conclude that there is a risk that use of evidence which may have been obtained under torture on a regular basis, especially where it is not clear that protestations about mistreatment have elicited any change in behaviour by foreign intelligence services, could be construed as complicity in such behaviour.

33. The Government's Reply to our report on Complicity in Torture rejected all of our recommendations:[26]

> The Government unreservedly condemns the use of torture and our clear policy is not to participate in, solicit, encourage or condone torture.
>
> It would not be appropriate for the Government to comment on whether hypothetical examples would amount to complicity in torture or the provision of aid and assistance to the commission of torture. As the evidence before the Committee made clear, such hypothetical examples are generally not amenable to a straight yes or no answer in the abstract. Such matters need to be considered in light of all the facts and circumstances.
>
> With regard to the question of receipt of intelligence, the suggestion from some quarters that the Government has a policy of accepting intelligence gained through torture is misleading. The reality of the situation is that the precise provenance of intelligence received from overseas is often unclear. However, we ensure that our partners are well aware that we find the use of torture unacceptable. *The Government's position is that the receipt of intelligence should not occur where it is known or believed that receipt would amount to encouragement to the intelligence services of other States to commit torture.* (Emphasis added)

34. We were struck by the new formulation of the Government's position in the last sentence of the passage cited above. As far as we are aware, this goes beyond previous Government formulations relied on, which have tended to stay at the level of general assertion, such as that in the first sentence of the extract cited. The new formulation states the Government's position in relation to the specific example of receipt of intelligence. Our view, as stated in our Report, is that the systematic receipt of intelligence which is known or thought likely to have been obtained from detainees subjected to torture, or in circumstances where the use of torture should have been known, amounts to complicity in torture. The Government's view of what amounts to complicity, however, is very much narrower. Its view appears to be that receipt of intelligence obtained through torture only amounts to complicity "where it is known or believed that receipt would amount to encouragement to the intelligence services of other States to commit torture."

25 Seventh Report of Session 2007-08, *Human Rights Annual Report 2008*, HC 557 at para. 83.

26 *Government Reply to the Twenty-Third Report of the Joint Committee on Human Rights 2008-09*, Cm 7714 (October 2009), p.3.

35. We sought some clarification about the Government's apparent change of position on complicity from the Home Office Minister of State, the Rt Hon David Hanson MP, when he gave oral evidence to us on 1 December 2009. We thought it appropriate to ask him because, as the Home Office counter-terrorism minister, he is accountable to Parliament for the actions of officials of the Security Service in relation to counter-terrorism. We wanted to ascertain what the basis is for the Government's position, in its Reply to our Report, that the receipt of intelligence information obtained by torture only amounts to complicity where it is known or believed that receipt would amount to encouragement to the intelligence services of other States to commit torture. We asked him whether he agrees with our view, expressed in our report, that the systematic receipt of intelligence which is known or thought likely to have been obtained from detainees subjected to torture, or in circumstances where the use of torture should have been known, amounts to complicity in torture.

36. We regret to say that we found the Minister's answers to our questions on this subject unsatisfactory. In response to each of our questions[27] about whether different factual scenarios would, in the Government's view, satisfy the definition of "complicity" in international law, he repeated the formula that he and the Government "condemn the use of torture, do not endorse the use of torture, want to see the eradication of torture, will not support the use of torture by other regimes passing information to us and want to ensure that the information that we get has been secured through means which are supportive of human rights and are supportive of the non-use of torture."[28] This was not an answer to the questions we were asking. **We sought the Government's view as to whether a range of different situations would amount to complicity in torture, as defined in international law, if the relevant facts were proved. The Government refused to answer those questions in its response to our Report and the Minister's evasive replies maintained that refusal. These important questions therefore remain unanswered by the Government.**

37. The Minister did, however, candidly indicate that the Government was aware that some information which it had received and acted upon since 9/11 had come from sources of which it was not aware, and, implicitly therefore, that there was a risk that such information might have been obtained by torture:

> I think it is fair to say, Chairman, that there will be information supplied to the British Government which potentially could save lives at certain times in the cycle since 9/11, and sometimes it is not clear about where that information has originally derived from. However, I think it is the duty of the Government to use that information for the protection of British citizens, while still maintaining ... that we believe, overall, that the use of torture is not a thing that we would support.[29]

38. This acknowledgment by the Minister reflects similar statements made by the Director-General of the Security Service and the Home and Foreign Secretaries following the

27 Qs 2-17, Ev 1-3

28 Q2, Ev 1

29 Q15, Ev 3.See, to similar effect, Q3, Ev 1: "we have to look at these issues in the round; there will be occasions when information will come to us where we are not, occasionally, aware of the source of that information"; and Q6, Ev 2: "we will work with a number of regimes to secure information for the protection of the British public ... we have to look at what the security of the British public is and what regimes we work with, and there are regimes, occasionally, that we do not agree with, we do not support but, ultimately, we also have to work with."

publication of our report on complicity. In October 2009 the Director General of the Security Service, Jonathan Evans, addressed the question of complicity directly in his public lecture *Defending the Realm*. The significance of what he says warrants its citation at length:

> We had seen nearly 3000 people killed in the United States, 67 of them British. We were aware that 9/11 was not the summit of Al Qaida's ambitions. And there was a real possibility that similar attacks were being planned, possibly imminently. Our intelligence resources were not adequate to the situation we faced and the root of the terrorist problem was in parts of the world where the standards and practices of the local security apparatus were very far removed from our own.
>
> This posed a real dilemma. Given the pressing need to understand and uncover Al Qaida's plans, were we to deal (however circumspectly) with those security services who had experience of working against At Qaida on their own territory, or were we to refuse to deal with them, accepting that in so doing we would be cutting off a potentially vital source of information that would prevent attacks in the West? In my view we would have been derelict in our duty if we had not worked, circumspectly, with overseas liaisons who were in a position to provide intelligence that could safeguard this country from attack. I have every confidence in the behaviour of my officers in what were difficult and, at times, dangerous circumstances. This was not just a theoretical issue. Al Qaida had indeed made plans for further attacks after 9/11: details of some of these plans came to light through the interrogation of detainees by other countries, including the US, in the period after 9/11; subsequent investigation on the ground, including in the UK, substantiated these claims. Such intelligence was of the utmost importance to the safety and security of the UK. It has saved British lives. Many attacks have been stopped as a result of effective international intelligence co-operation since 9/11.
>
> I do not defend the abuses that have recently come to light within the US system since 9/11. Nor would I dispute the judgement of the Intelligence and Security Committee, in its 2005 Report on the Handling of Detainees and its 2007 Report on Rendition, that the Service, among others, was slow to detect the emerging pattern of US practice in the period after 9/11. But it is important to recognise that we do not control what other countries do, that operational decisions have to be taken with the knowledge available, even if it is incomplete, and that when the emerging pattern of US policy was detected necessary improvements were made. And we should recall that notwithstanding these serious issues, the UK has gained huge intelligence benefits from our co-operation with the US agencies in recent years, and the US agencies have been generous in sharing intelligence with us.

To quote the article written earlier this year by Alan Johnson and David Miliband:

> Intelligence from overseas is critical to our success in stopping terrorism. All the most serious plots and attacks in the UK in this decade have had significant links abroad. Our agencies must work with their equivalents overseas... we have to work hard to ensure that we do not collude in torture or mistreatment. Enormous effort goes into assessing the risks in each case. But it is not possible to eradicate all risk. Judgements need to be made.

That is the reality of the situation: we do not solicit or collude in torture. We do not practice torture. But we are operating in a difficult and complex environment.

39. It seems to us that the Minister (in his evidence to us), the Director General of MI5, and both the Home and Foreign Secretaries, in their recent public statements, come very close to saying that, at least in the wake of 9/11, the lesser of two evils was the receipt and use of intelligence which was known, or should have been known, to carry a risk that it might have been obtained under torture, in order to protect the UK public from possible terrorist attack. This is no defence to the charge of complicity in torture.

40. We cannot find any legal basis for the Government's narrow formulation of the meaning of complicity in its Response to our Report on Complicity in Torture. The

Government's formulation of its position changes the relevant question from "does or should the official receiving the information know that it has or is likely to have been obtained by torture?" to "does the official receiving the information know or believe that receipt of the information would encourage the intelligence services of other states to commit torture?" As we made clear in our earlier report, 'complicity', in the sense used in the relevant international standards, does not require active encouragement. The systematic receipt of information obtained by torture is a form of aquiescence, or tacit consent, and the relevant state of mind is whether the official receiving the information knew or should have known that it was or was likely to have been obtained by torture.

41. The Government's formulation appears to us to be carefully designed to enable it to say that, although it knew or should have known that some intelligence it received was or might have been obtained through torture, this did not amount to complicity in torture because it did not know or believe that such receipt would encourage the use of torture by other States.

Guidance on interrogation overseas

42. In March 2009 the Government agreed to provide the ISC with its guidance to the intelligence services on the detention and interrogation of suspects overseas. In September, the ISC expressed its disappointment at the delay in providing it with the guidance, despite repeated requests, which meant it could not begin its inquiry. Following the ISC's public criticism, the Government finally provided the ISC with the guidance on 18 November, a delay of 8 months. The ISC states on its website:

> We have been told that this delay was due to the complex legal nature of these issues, and the need to consolidate previously separate guidance into one version. The Committee will consider the material, take further evidence and seek independent legal advice, before reporting our findings to the Prime Minister.

43. We asked the Minister and his official, Ms Byrne, a number of questions about exactly what guidance has been provided to the ISC and in particular whether it has been provided with unedited versions of all the guidance that existed at the time of the various allegations of complicity. However, we remained unclear about whether all of the earlier versions have been provided. Ms Byrne said, for example (Q32), that "they have all the sets of material that we were able to give."

44. We therefore wrote to the Minister after our evidence session asking him to confirm that the ISC has been provided with all versions of the guidance that were current at the time of the various allegations of the UK's complicity in torture, and that nothing had been deleted from those versions of the guidance. The Minister's response was that "all *current* versions of relevant guidance were provided to the ISC in May. These were then consolidated into a single version which was provided to the ISC on 18 November 2009".[30] If all relevant versions were indeed provided to the ISC in May 2009, why would the ISC complain publicly in September that they had not received the guidance and why was it necessary to provide a consolidated version in November 2009?

30 Letter from David Hanson, 13 January 2010, above n. 10 (emphasis added).

45. We regret to say that, despite the clear intent of our questions, the Government's answers leave us no clearer about whether the ISC has been provided with all versions of the guidance which was current at the time of the various allegations of complicity, which date back to 2002. We look to the ISC to provide clarification on this point.

46. It is, however, clear that the Government does not intend to make public the guidance which was current at the relevant time to which the various allegations relate. The Prime Minister, in his evidence to the Liaison Committee, confirmed that the Government is refusing to publish the earlier guidance.[31] Asked whether he will make public the guidance which was in place at the time the complicity in torture was alleged to have taken place, he said "I would not want to go back in time and publish previous recommendations. I would want to publish the recommendations that are going to be in force from now on." He gave no reason for that refusal, other than to refer generally to the fact that there are cases about the allegations of complicity being dealt with at the moment through the courts.

47. We welcome the Prime Minister's commitment to publish the new guidelines which will be drawn up by the Intelligence and Security Committee. However, the Prime Minister's statements on this issue, from his first written statement on 18 March 2009 on, are in the present tense. He draws a clear line between the new guidance, which will come out of the process that he has set in motion, and the old guidance, which the Government has decided not to publish. No convincing justification has been offered for the decision not to publish the previous guidance. As we have pointed out before, in the United States, the Obama administration has put into the public domain significant Justice Department memos, including legal advice, about matters as sensitive as interrogation techniques. In our view, there can be no justification for not publishing the guidelines that were in place at the time the alleged complicity in torture took place. In order to learn lessons for the future, as well as to ensure proper accountability for past wrongs where appropriate, it is essential that the earlier guidance be published. We also repeat our earlier recommendation that the relevant legal advice also be made public. The Government has not convincingly explained what makes the UK different from the United States, where the legal advice has been published.

The urgent need for an independent inquiry

48. In our report on Complicity in Torture, we concluded that, in view of the large number of unanswered questions, there was now no other way to restore public confidence in the intelligence services than by setting up an independent inquiry into the numerous allegations about the UK's complicity in torture.[32] Since the publication of our report, there has been a number of significant developments which have led to many further calls for a public inquiry into these allegations about complicity in torture, both from within and outside Parliament.

49. On 24 November 2009 Human Rights Watch ("HRW") published its Report, *Cruel Britannia: British Complicity in the Torture and Ill-Treatment of Terror Suspects in Pakistan*. The HRW Report contains accounts from victims and their families about the cases of five UK citizens of Pakistani origin who were tortured in Pakistan by Pakistani

31 Oral evidence taken before the Liaison Committee on 2 February 2010, HC (2009–10) 346-i, Qs 81-83

32 Report on Complicity in Torture, above n. 24, at para. 99

security agencies between 2004 and 2007. It claims that, while there is no evidence of UK officials directly participating in torture, UK complicity is clear. It argues that the UK government was fully aware of the systematic use of torture in Pakistan, and that UK officials knew that torture was taking place in these five cases. Some of the individuals are said to have met UK officials while detained in Pakistan, in some cases shortly after the individuals had been tortured. UK officials are said to have supplied questions and lines of enquiry to Pakistan intelligence sources in cases where detainees were tortured, and to have put pressure on Pakistani authorities for results, passing questions and offering other co-operation without ensuring that the detainees were treated appropriately. The Report claims that members of Pakistan's intelligence agencies have corroborated the information from the detainees themselves that UK officials were aware of specific cases of mistreatment.

50. On 10 February 2010 the Court of Appeal rejected the Foreign Secretary's attempt to prevent the publication of seven redacted sub-paragraphs in the judgment of the High Court in Binyam Mohamed's case.[33] The paragraphs were immediately published. In our view they represent strong evidence to suggest that the Security Service was complicit in the torture of Binyam Mohamed by the US authorities. Sub-paragraph (ix) states:

> We regret to have to conclude that the reports provided to the SyS [Security Service] made clear to anyone reading them that BM was being subjected to the treatment that we have described and the effect upon him of that intentional treatment.

51. The publication of the previously withheld paragraphs led to a renewed flurry of calls for an independent inquiry into the extent of the UK's complicity in torture. These calls were fortified by the suggestion in the Court of Appeal's judgments that the apparent complicity in Binyam Mohamed's case called into question the reliability of the Security Services's denials of allegations that there was a wider problem of the Security Services' complicity in torture. In particular, the Master of the Rolls, Lord Neuberger, said in para. 168 of his judgment:

> "168. Fourthly, it is also germane that the Security Services had made it clear in March 2005, through a report from the Intelligence and Security Committee, that 'they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training' (paragraph 9 of the first judgment), indeed they 'denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government' (paragraph 44(ii) of the fourth judgment). Yet, in this case, that does not seem to have been true: as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question whether

33 *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 (10 February 2010).

> any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly. Not only is there some reason for distrusting such a statement, given that it is based on Security Services' advice and information, because of previous, albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information."

52. Paradoxically, the case for a wide-ranging inquiry was forcibly made by the barrister representing the Foreign Office in the Binyam Mohamed case, Jonathan Sumption QC, in his letter to the Court of Appeal asking for the first draft of this paragraph in the draft judgment to be removed. The essence of his objection was that there is a limit to the extent to which the litigation of an individual case can lead to credible findings on systemic issues. Objecting to a part of the paragraph which suggested that there was an obvious reason for distrusting any UK Government assurance based on Security Service advice and information, because of previous 'form',[34] which Mr. Sumption said constituted an exceptionally damaging criticism of the good faith of the Security Service as a whole, he identified a number of questions which would need answering before the Court was able to make findings as to how systemic the problem was, for which a much wider inquiry would be needed:

> To categorise a problem as systemic is rarely a straightforward matter. In this case at the very least it would be necessary to examine the methods and procedures of the Security Service in relation to the interviewing of detainees as well as the giving of information and advice to ministers; the basis on which the statement to the Intelligence and Security Committee was made, and what further information was provided to them, in particular about the treatment of detainees; what (if any) other instances there are of the Services' knowledge of ill-treatment of the detainees interviewed by them, how information of this kind is stored, on what occasions it is retrieved, how widely it is disseminated within the Service and what the Service's response was. The Court has not been in a position to do any of this. It simply does not have the material.

53. To the extent that the analysis in the letter of Jonathan Sumption QC draws attention to the inherent limitations of litigation as a means of inquiring into a wider systemic problem, we agree. It powerfully makes the case for an independent inquiry into these grave matters, which would not be constrained from looking at the wider issues in the way that the court adjudicating on Binyam Mohamed's claims inevitably is. In our view, the case for setting up an independent inquiry into the allegations of complicity in torture is now irresistible.

34 The first draft of the relevant paragraph of Lord Neuberger's draft judgment (para 168) is set out in full at para 18 of the Court of Appeal's judgment in *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* (26 February 2010).