

Judgment

*The Rt Hon
the Lord Judge*

*The Rt Hon
the Lord Neuberger*

These excerpts are taken from the two judgments of the Court of Appeal when it found for Binyam Mohamed in an appeal brought by the Secretary of State for Foreign and Commonwealth Affairs, David Miliband, who had challenged the publication of written reports of Mr Mohamed's torture at the hands of US personnel.

David Miliband, the Foreign Secretary, tried three times to claim Public Interest Immunity, and prepared three separate immunity certificates for the Court, in an attempt to prevent publication of seven paragraphs detailing what the British Security Services knew about the torture of Binyam Mohamed as a result of reports they had received from US intelligence sources in May 2002. But the Foreign Secretary's claims were rejected by the Court on grounds of genuine public interest in what the paragraphs revealed about the treatment of Mr Mohamed, and also because of the unreliability of information contained in the certificates which had been supplied by the Security Services.

Once the Foreign Secretary had finally accepted the judgment of the Court that the world might know what tortures United States personnel had been inflicting on Binyam Mohamed, and in which the British authorities were complicit, another storm broke over Mr Miliband's head. The Master of the Rolls, Lord Neuberger, had prepared his draft judgment in Binyam Mohamed's case, dated 10 February 2010. This contained criticisms of the conduct of the British Security Services. At a late hour, paragraph 168 of the draft judgment was challenged by a barrister acting for the Foreign Office. This eventually caused the High Court to publish a further judgment, on 26 February 2010. Such a step, as the Lord Chief Justice, Lord Judge, explains, is 'highly unusual'. We reprint excerpts from this further judgment of the Lord Chief Justice of England and Wales, the Master of the Rolls, and the President of the Queen's Bench Division between The Queen on the

application of Binyam Mohamed and The Secretary of State for Foreign and Commonwealth affairs.

The Lord Chief Justice of England and Wales

1. This is the judgment of the court.
2. The circumstances in which it has become necessary to give a further judgment are highly unusual. In brief, the Secretary of State for Foreign and Commonwealth Affairs (the Foreign Secretary) appealed against the decision of the Divisional Court in the proceedings brought by Binyam Mohamed that seven redacted sub-paragraphs of its first judgment should be made public. The appeal was dismissed. Three separate judgments were given. Although the reasoning in these judgments was not identical, the emphasis of the Lord Chief Justice differing from that of the Master of the Rolls and the President of the Queen's Bench Division, the decision was unanimous. In total the judgments ran to 296 paragraphs. Unless the Foreign Secretary proposed a further appeal to the Supreme Court the litigation was at an end, and the redacted paragraphs could at long last be published.
3. The present judgment is concerned with one paragraph (paragraph 168) in the judgment of the Master of the Rolls. This paragraph has attracted huge public attention ...

Lord Neuberger, Master of the Rolls

29. ... the final version of paragraphs 168 to 170 in my judgment of 10th February 2010 is as follows:
 - '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 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.

169. My concern on this point is mitigated by the fact that the certificates appear to be supported by communications from the US, most pertinently the CIA letter and what was recorded as having been said by the Secretary of State. The US Government, like any other Government, plainly has an interest in ensuring that it controls the flow of any information which it provides to the SyS [Security Services] on a confidential basis, and the fact that it (and other Governments) may well be motivated in this case by embarrassment is not the point: one is concerned with hard facts, not moral judgements.
170. My conclusion on this half of the balancing exercise is this. While there are strong reasons for scepticism, I accept that the Foreign Secretary genuinely believes, and has some grounds for believing, what he has stated in the three certificates, namely that the flow of information from foreign Government intelligence services to the SyS [Security Services] could be curtailed if the redacted paragraphs are published, because that publication would be regarded by those Governments as an unjustifiable breach of the control principle. The normal reasons for deferring to his views on such an issue are diluted by the fact that there is nothing inherently sensitive in the information in those paragraphs, the very narrow and technical nature of the breach, the fact that the US must have appreciated the risk of intelligence material being disclosed pursuant to the law, the fact that other material apparently subject to the control principle has been revealed in the first judgement without objection, and a concern which arises from the apparent involvement of at least one Security Services agent in the mistreatment of Mr Mohamed. However, it is right to weigh against these factors the fact that the Foreign Secretary's opinion is reinforced by the CIA letter and the notes of the views of the Secretary of State.'