No. 09-923

IN THE

Supreme Court of the United States

MAHER ARAR,

Petitioner,

—v.—

JOHN ASHCROFT,
FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE BAR OF ENGLAND AND WALES HUMAN RIGHTS COMMITTEE AND THE EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The first named *amicus*, the Bar Human Rights Committee of England and Wales ("the BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.

The second named *amicus*, the European Center for Constitutional and Human Rights ("ECCHR") is an independent, non-profit legal organization, registered with the Regional Court Berlin-Charlottenburg, dedicated to protecting civil and human rights. ECCHR also works to ensure that the absolute prohibition of torture is upheld across the world.

This brief is submitted in support of the Petitioner.

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[1] The content of this brief is entirely the work of the authors identified and no party other than the *amici* and their legal representatives have made a monetary contribution to the preparation or submission of this brief. The Counsel of Record received timely notice of the intent to file this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

It is recognised that the claim by the Petitioner is for damages arising from a specific incident (or incidents) and that the claim is not a generalised attack on the policy or practice known as "extraordinary rendition"[2]. Nevertheless this litigation is not taking place in a vacuum. When deciding whether to grant a writ of certiorari this Court must consider the broader international context.

This brief seeks to describe the impact in Europe of the practice of "extraordinary rendition" by the authorities of the United States and also to describe the reaction of Courts and other bodies to that practice.

In the light of Arguments I to III, as set out below:

(1) The "importance" of the Petitioner's case, cannot be measured by reference solely to the national United States context.

(2) It would be anomalous if the Supreme Court of the United States refused even to engage with the issues raised by the case of Mr Arar (by granting a writ of certiorari) in circumstances where: (a) "extraordinary rendition" is a practice that emanates from the United States; (b) Courts, National Authorities and Transnational Authorities outside the United States have conducted investigations,

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[2] In this document the phrase "extraordinary rendition" is used to mean the practice, implemented by the CIA, whereby individuals are transferred from one country to another, extralegally, for the purpose of detention and interrogation rather than for the purpose of being put on trial: see ECCHR Report on "Extraordinary Rendition", dated March 2008, p6.

made findings of fact and determined (or are in the process of determining) cases, including claims for damages, all relating to the practice of extraordinary rendition; (c) those Courts and Authorities have acted and are continuing to act notwithstanding arguments by the Executive based on "national security", "state secrecy" and "conduct of foreign relations".

ARGUMENT

I An Inquiry by the Council of Europe has concluded that European countries are involved in the practice by the United States of "extraordinary rendition". The Council of Europe and the European Parliament consider that this practice undermines human rights and have urged further investigations at national level.

The Council of Europe[3]

In November 2005 the Parliamentary Assembly of the Council of Europe appointed Senator Dick Marty[4] to conduct a parliamentary inquiry into "alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member State"[5]. On 7 June 2006 Senator Marty presented his first report[6]. The report analysed information

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[3] The Council of Europe is an international organisation in Strasbourg comprising 47 countries of Europe which was set up to promote democracy and protect human rights and the rule of law in Europe. It is distinct from the European Council and the Council of the European Union. The Parliamentary Assembly is the deliberative body of the Council of Europe, composed of representatives appointed by the 47 member states' national parliaments. It is distinct from the European Parliament, which is an organ of the European Union.

[4] Dick Marty is a Swiss politician and former state prosecutor of the canton of Ticino in Switzerland. He is a member of the Swiss Council of States and a member of the Parliamentary Assembly of the Council of Europe.

[5] Appointed by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.

[6] AS/Jur (2006) 16 Part II, at http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf (last reviewed on 3 March 2010).

received from national governments, NGOs, journalists, air traffic control authorities and certain confidential sources[7]. It concluded that: (1) the CIA's "rendition" programme involved a "spider's web" of aircraft landing points across the globe[8] (2) the purpose of the landing points ranged from re-fuelling to dropping-off detainees near to secret detention centres[9] (3) several European countries had actively participated in these activities, whilst others had "knowingly" ignored them[10] (4) there was good reason to believe that secret detention centres had existed and that inter-state transfers had taken place in Europe[11]. He argued that a number of European States had breached their "positive obligation to investigate diligently any serious allegations of fundamental rights violations"[12].

On 11 June 2007 Senator Marty presented his second report[13]. It concluded: (1) the evidence established that secret detention facilities run by the CIA did exist in Europe, in particular in Poland and Romania[14] (2) these facilities were run directly and exclusively by the CIA[15] (3) the CIA had committed a

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[7] Report, paras 14-18, 280. Senator Marty did not have any special investigatory powers, for example to require the release of documents from governments or individuals (para 14).

[8] Para 280.

[9] Para 281-282.

[10] Para 285.

[11] Para 287. Senator Marty's conclusion in this regard was based on inference rather than on direct evidence (para 287).

[12] Para 287.

[13] Doc. 11302 rev., at http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf (last reviewed on 3 March 2010).

[14] Para 7.

[15] Para 8.

series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques tantamount to torture[16] (4) the acts took place with knowledge or active assistance of government agencies in the countries concerned[17]. The report expressed grave concerns about the consequences of these practices:

> "The commission of unlawful acts - abductions, the exporting of torture to other countries even though they are regarded as "rogue states", the setting up of detention centres beyond any judicial supervision-has severely affected the moral authority of the United States. Worse still, the world's greatest power is becoming a negative role model for other countries, which feel that they may legitimately follow the same path and flout human rights. The systematic exporting of such activities outside American territory also constitutes a form of contempt for the rest of the world, and the reservation of such methods exclusively for non-Americans is an expression of an "apartheid" mentality in the legal sphere."[18]

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[16] Para 9.
[17] Para 8.
[18] Para 337.

The European Parliament[19]

On 30 January 2007 a Temporary Committee of the European Parliament presented its report "on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners."[20] On 14 February 2007 the European Parliament approved the report[21]. It described "extraordinary rendition" as an illegal practice, in breach of international human rights standards, whereby an individual is abducted in one country and transferred to another for interrogation, which often involved incommunicado detention and torture[22]. It urged Member States of the European Union[23] to

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[19] The European Parliament is the parliamentary body of the European Union which comprises 785 Members of Parliament of the 27 European Union countries, elected by universal suffrage. Together with the Council of the European Union (which is distinct from the European Council and the Council of Europe), it forms the bicameral legislative branch of the European Union.

[20] See (2006/2200(INI)) for the text of the report, at http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2007-0020&language=EN#title2 (last reviewed on 3 March 2010). The Temporary Committee was set up further to the decision of 18 January 2006 of the European Parliament, see http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0012&language=EN (last reviewed on 3 March 2010).

[21] European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-0032 (last reviewed on 3 March 2010).

[22] Para 36.

[23] As at 5 March 2010, the Member States of the European Union are Austria, Belgium, Bulgaria, Cyprus, Czech Republic,

investigate any allegations of extraordinary rendition in which they were implicated, pursuant to their obligations under the European Convention of Human Rights[24].

II. National Parliaments and other national authorities in Europe have conducted or are conducting inquiries of investigations into the practice of "Extraordinary Rendition". They have condemned the practice and found evidence of involvement by their respective States

Despite the conclusions and recommendations set out in the Council of Europe and European Parliament reports cited above, not all European countries have been quick to initiate or pursue proper inquiries. Nevertheless at least the following significant inquiries or investigations have taken place or are in progress.

Germany

On 7 April 2006 the German Parliament established a "Committee of Inquiry" to clarify *inter alia* the nature and scope of involvement by German executive agencies[25] with CIA rendition flights and

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Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

[24] Para 186.

[25] In particular the Federal Intelligence Service (BND), Federal Office for the Protection of the Constitution (BfV), Federal Armed Forces Counterintelligence Office (MAD),

secret prisons for terror suspects and the nature and scope of oversight and control in this regard.[26]

One of the cases considered was that of Mr Khaled El Masri, a German citizen, allegedly abducted in Macedonia in December 2003 and then transferred via Baghdad to Kabul. During the transport and his detention he is said to have been subjected to beatings, stress positions, forced feeding and other forms of mistreatment. In May 2004 he was released without any charges[27].

On 18 June, 2009 the Committee presented its 1300 page final report. It concluded *inter alia* that the German Federal Intelligence Service had performed interrogations of a terror subject (Mr Mohammed Zammar) in a Syrian prison[28]. It also

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Federal Prosecutor General (GBA) and Federal Criminal Police Office (BKA).

[26] Mandate for the Committee of Inquiry, July 6, 2007, English version available at http://www.bundestag.de/bundestag/ausschuesse/ua/1_ua/auftrag/auftrag_erweiter_eng.pdf (last reviewed on 1 March 2010).

[27] The Munich district court issued 13 international arrest warrants against CIA employees in January 2007. However, so far the German government has not requested extradition. In the U.S., the American Civil Liberties Union filed a complaint with the District Court for the Eastern District of Virginia on behalf of El Masri against former CIA director Tenet, three CIA linked air transport companies and 20 employees of the CIA or the companies. The case was rejected in May 2006 and the appeal in October 2007. A petition to the Inter-American Court on Human Rights is still pending. In Albania, requests for information to the government were dismissed.

[28] Final report of the Committee of Inquiry, June 18, 2009, Deutscher Bundestag Drucksache 16/13400 , p. 382, available at http://dip21.bundestag.de/dip21/btd/16/134/1613400.pdf (last reviewed on 2 March 2010).

established the existence of two CIA-rendition-flights, one of which had stopped over on German territory and one of which flew over German airspace. It called the practice of extraordinary rendition illegal[29]. Nevertheless, as set out below, there were widespread complaints about the conduct of the German Government in relation to the work of the Committee.

Lithuania

In December 2009 an inquiry by a Committee of the Lithuania Parliament found that the Lithuanian "State Security Department" ("the SSD") had received requests from the CIA to "equip facilities in Lithuania suitable for holding detainees" and that two such facilities had been built, apparently with the assistance of the SSD but without approval from the appropriate political authorities[30]. The report also established that CIA airplanes had landed in Lithuania without proper border checks or inspections[31]. The report is based on testimonies of

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[29] Final report of the Committee of Inquiry, n. 28, pp. 398 and 403.

[30] "*Findings of the Parliamentary Investigation by the Seimas Committee on National Security and Defence Concerning the alleged transportation and confinement of persons detained by the Central Intelligence Agency of the United States of America in the territory of the Republic Of Lithuania*", at http://www3.lrs.lt/docs2/MMZSXOMO.DOC. The Committee was unable to determine conclusively whether or to what extent the facilities had in fact been used as secret detention facilities.

[31] http://www.amnesty.org/en/news-and-updates/news/lithuania-admits-existence-secret-prison-20091222.

politicians and national security officials.[32] In December 2009 the Head of the Intelligence Service resigned over the issue, whilst in January 2010 the Minister of Foreign Affairs also resigned. On 14 January 2010 the Lithuanian President urged prosecutors to launch their own investigation into the matter[33].

Poland

On 11 March 2008, the district Prosecutor's Office in Warsaw instituted proceedings relating to the alleged existence of secret CIA detention facilities in Poland and the illegal transport and detention of persons suspected of terrorism. On 1 April 2009, following the reorganization of the Public Prosecutor's Office, the investigation was referred to the Appellate Prosecutor Office in Warsaw. In the course of their investigation the prosecutors have gathered evidence but, for reasons of "confidentiality", have not yet made this evidence public[34].

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[32] http://www.nytimes.com/2009/12/23/world/europe/23lithuania.html.

[33] UN Doc A/HRC/13/42, para 122.

[34] This is based on the response given by the Polish authorities to a questionnaire sent by United Nations experts for the purposes of a UN Joint Study: UN Doc A/HRC/13/42 "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism", para 118. In their report, which was published on 19 February 2010, the experts expressed concern about "the lack of transparency" in the Polish

In February 2010, the "Air Navigation Services Agency" published flight logs as a result of a request under the "Freedom of Information Act". These logs provide further evidence of the existence of secret prisons in Poland and the transfer of detainees to the country. CIA airplanes used the Szymany military airport at least six times in 2003 for flights coming from Kabul, Afghanistan, and Rabat, Morocco[35].

III Courts in Europe have considered or are considering claims for damages, claims for disclosure of information and criminal prosecutions, all arising from the practice of "extraordinary rendition". Arguments by the Executive based on "state secrecy", or "national security" or the "conduct of foreign relations" have been dismissed, have not been determinative or, where accepted, have caused potential injustice

This section does not purport to be exhaustive but does set out what are considered to be the most important and relevant pieces of litigation in Europe.

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investigation because "after 18 months still nothing was known about [its] exact scope" (at para 119).

[35] Nicholas Kulish and Scott Shane, New York Times, "Flight Data Show Rendition Planes Landed in Poland", 22 February 2010, at http://www.nytimes.com/2010/02/23/world/europe/23poland.html (last reviewed on 3 March 2010).

Germany

On June 17, 2009 the German Federal Constitutional Court decided that the conduct of the German government in relation to the "Committee of Inquiry" referred to above violated the German Constitution[36]. The Government had refused to disclose information to the Committee and had restricted or refused permission for witnesses to give evidence before it. The Government gave two reasons for its actions. First, disclosure of the information and evidence would affect the "core of executive responsibility" (the so-called *Kernbereich exekutiver Eigenverantwortung*)[37]. Second, disclosure would endanger "essential national interests", particularly national security and foreign relations.

In the view of the Court, mere assertions that a certain class of evidence related to the process of decision-making in government or to another protected sphere did not, on their own, justify the refusal to disclose that evidence. Otherwise effective control of government would be impossible.[38] Instead, whether disclosure prejudiced the "core of executive responsibility" or not depended on the circumstances of the case in question. The "interest in control" of

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[36] BVerfG, 2 BvE 3/07 from June 17, 2009, available at http://www.bverfg.de/entscheidungen/es20090617_2bve000307.html (last reviewed on 1 March 2010).

[37] As a German legal term this responsibility concludes a necessarily protected sphere of the executive against the legislative and the judicial branch. It encompasses particularly the governmental decision making process. So it protects information regarding on-going processes, but under certain circumstances also information on closed issues.

[38] BVerfG, n. 36, para. 125.

the executive was particular strong if it concerned the investigation of potentially illegal actions.[39]

The Court also rejected the Government's claim of "essential national interests". All three branches of government are entrusted with the protection of essential national interests. Accordingly, a claim by the executive against the judicial or legislative branch of "essential national interests" was barred if procedural means were available to ensure secrecy.[40] Furthermore, the executive's unsupported claim that foreign relations would be affected was insufficient to justify non-disclosure. The executive had to show precisely how and why diplomatic relations and diplomatic cooperation by other states would be endangered; these matters would then still have to be balanced against the "interest in control".[41]

Italy

In February 2003 Mr Hassan Mustafa Osama Nasr, (an Egyptian citizen who had acquired refugee status in Italy), was allegedly abducted by CIA agents working in collaboration with the Italian Military Secret Service and forcibly transferred to a U.S. airbase in Aviano, from which he was rendered to Egypt and subsequently tortured. On 8 June 2007, a criminal trial began in Milan against U.S. and

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[39] BVerfG, n. 36, para. 127.
[40] BVerfG, n. 36, para. 130.
[41] BVerfG, n. 36, para. 214.

Italian agents accused of involvement in Abu Omar's abduction.[42]

President Romano Prodi[43] lodged a case before the Italian Constitutional Court, arguing that the Italian judiciary had broken state secrecy laws during their investigation by using classified documents related to national security that

[42]The accused were indicted "for having kidnapped, depriving [Nasr Osama Mustafa Hassan alias Abu Omar] of personal freedom... apprehending him by force and forcibly making him enter a van, thereafter taking him first to the US military airbase at Aviano, where the United States of America Air Force 31st FW (Fighter Wing) is stationed, and thence to Egypt" (Official English translation, Milan Tribunal, Judge Presiding over Preliminary Investigations, 11 March 2004, at http://www.statewatch.org/cia/documents/milan-tribunal-19-us-citizens-sought.pdf (accessed 1 March 2010)). Note that the prosecution's strategy was to prosecute both Italian and foreign officials not for their complicity in torture but for the crime of abduction.

[43] Mr Prodi was President of Italy at the time.

constituted 'state secrets.'[44] On 11 March 2009, Italy's Constitutional Court ruled that any evidence of contact between the Italian secret service and the CIA was covered by state secrecy and therefore inadmissible in trial[45].

Nevertheless, whilst awaiting a ruling by the Constitutional Court, the Milan judge had ordered all uncensored documents, which were the object of complaints before the Constitutional Court, to be expunged from the proceedings and replaced by censored versions. Accordingly the trial resumed on 20 May 2008 and proceeded to a final verdict, even though (ultimately) some uncensored evidence could not be admitted in the light of the Constitutional Court decision. On 4 November 2009, the Milan Court convicted 23 of 26 CIA agents, who were tried *in absentia*, for abduction and also found that two out

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[44] The President also argued that the prosecutor had ordered the wire-tapping of 180 phone numbers belonging to secret services agents, thus uncovering the whole communication network of the agency and the identity of 85 agents (Messineo, Francesco: "The *Abu Omar* Case in Italy: 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture under the UN Torture Convention" in *Journal of International Criminal Justice, Vol. 7, No. 5, 2009,* 22).

[45] Judgement of the Italian constitutional court No.106 Year 2009 at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_106_2009_EN.doc (last reviewed on 3 March 2010). In addition to excluding SIMSi documents and any testimonies that revealed any relation between SISMi and the CIA, key witnesses could also no longer appear in court to give evidence of this relation (Amnesty International 3).

of the seven Italian officials on trial had illegally collaborated in CIA abuses. [46]

In February 2010, the Milan Judge released a 200-page report in which he explained the reasoning behind his ruling. He stated that the fact that the CIA had conducted the mission on Italian soil with such impunity "leads to the presumption that such activity was carried out at least with the knowledge (or maybe with the complicity)" of the Italian secret service.[47] He added that it was "not possible" to prove those ties due to state secrecy, which he claimed created a kind of 'black curtain' over crucial parts of the trial[48]. He criticised the Constitutional Court

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[46] The judge handed down the following verdicts: an eight-year sentence for Robert Seldon Lady (former CIA station chief in Milan), 3-year sentences for two former members of SISMi charged with aiding and abetting (Pio Pompa and Luciano Seno), and five-year sentences for 22 other Americans. The court dropped charges for five Italian defendants charged with abduction, who are all former or current officials with SISMI, because the evidence against them is protected by state secrecy. Charges were also dropped for three Americans [Jeffrey Castelli, former CIA Rome station chief, and Betnie Medero and Ralph Henry Russomando (both former members of the CIA in Italy)] who were found to be protected by diplomatic immunity agreements. The seven Italian defendants were tried in person while the 26 Americans were tried *in absentia*. The Italian government provided legal representation for the American defendants, while two of them opted to hire private council. The 23 Americans defendants are considered fugitives and, on the basis of the European Arrest Warrant, will be arrested and removed to Italy should they set foot in the E.U.

[47] Rachel Donadio, "Judge Ties Italy's Secret Service to Cleric's Abduction", 1 February 2010, at http://www.nytimes.com/2010/02/02/world/europe/02italy.html (last reviewed on 3 March 2010).

[48] Ibid.

ruling for creating a "logical and juridical paradox"[49] and concluded that secret services should not be shielded from responsibility for crimes solely due to the involvement of foreign governments.

The United Kingdom

A damages claim is being brought against the UK "Security Service", the "Secret Intelligence Service" and other UK governmental authorities. The Claimants[50] say that they were the subject of "extraordinary rendition" to various locations around the world (including Guantanamo Bay) where they were detained and tortured and that the Defendants caused or contributed to this treatment. Various causes of action are alleged, including false imprisonment, misfeasance in public office and conspiracy to injure. The Courts are currently considering what procedure should be used for the disclosure of potentially sensitive evidence. On 18 November 2009 Mr Justice Silber, determining a preliminary issue, held that it can in principle be lawful and proper for a "closed material procedure" to be used in a civil damages claim, but such a procedure should only be used in exceptional circumstances and as a last resort[51]. This procedure was defined as one whereby a party to litigation can rely on evidence without disclosing it to any other party, if such disclosure would be contrary to the

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[49] Ibid.

[50] Mr Bisher Al Rawi, Mr Binyam Mohammed and four others

[51] [2009] EWHC 2959 (QB), para 92. He did not determine whether such a procedure should be adopted in this particular case.

"public interest"[52] and providing that the material is disclosed to "Special Advocates"[53] and, where appropriate, to the Court[54]. The claimants argued that such a procedure could not be lawful or proper in a civil claim for damages. It is understood that an appeal is pending against the decision of Mr Justice Silber.

One of the claimants in that case, Binyam Mohammed, has brought separate proceedings against the UK government seeking disclosure of certain documents relating to his treatment. He sought the documents in order to defend himself in Military Commission proceedings in the United States and to support his claim that his confessions were false and the result of torture or cruel, inhuman and degrading treatment by or on behalf of the United States government[55]. He sought disclosure on the basis that the UK authorities had become "mixed up" in the alleged wrong doing by the United States government and therefore were liable to provide disclosure under the "*Norwich Pharmacal*"

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[52] Disclosure was defined as being contrary to the public interest if "made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest" (para 2).

[53] "Special Advocates" are selected by the State and are appointed in order to "test and probe" closed evidence, but their ability to communicate with parties or their representatives is severely limited (para 4).

[54] Para 2.

[55] As summarised in the Judgment of the Court of Appeal in *The Queen on the Application of Binyam Mohamed v The Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, judgment of 10 February 2010, at paras 25 and 60.

principle[56]. In August 2008, on the basis of the evidence before it, the Divisional Court held that the UK authorities were "mixed up" in the alleged wrongdoing. The Court did not grant relief to Mr Mohammed but instead gave the Foreign Secretary the opportunity to consider whether to invoke "public interest immunity" in order to resist disclosure[57]. The Divisional Court delivered its judgment with certain paragraphs redacted, by reason of the special "closed procedure" that governed part of Mr Mohammed's application[58].

Thereafter there was further litigation, relating *inter alia* to the Government's use of "Public Interest Immunity Certificates"[59]. In particular, the Foreign Secretary sought to prevent publication of seven redacted paragraphs of the judgment of the Divisional Court by stating in "Public Interest Immunity Certificates" that such publication would lead to "a real risk of serious harm to the national security of the UK". In a judgment dated 10 February 2010, the Court of Appeal rejected his reliance on "Public Interest Immunity" and ordered disclosure of the paragraphs. The Court accepted that due respect must be accorded to the assessment of the Secretary State as to what would be contrary to the national interest, both on grounds of "principle and

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[56] That "If through no fault of his own a person gets mixed up in the tortuous acts of others so as to facilitate their wrongdoing . . . he comes under a duty to assist the person who has been wronged by giving him full information and disclosing his identity of the wrongdoers" (*ibid* at paras 25 and 63).

[57] *Ibid* at para 32, 65 to 73.

[58] *Ibid* at para 72.

[59] Summarised at *ibid*, paras 73 to 128.

practicality"[60]. Nevertheless that view was not determinative and (a) the Court was entitled to differ from that assessment if it had "cogent reasons" for doing so" and (b) even if did not differ the Court was entitled and obliged to weigh national security against the public interest in the judgment being open[61].

On the facts of the case the Court performed the balancing exercise and required publication of the redacted paragraphs, notwithstanding the assessment of the Foreign Secretary as set out above. The Court was particularly influenced by the fact that in separate proceedings in the US, a judge had found that as a fact in an open judgment that Mr Mohammed's evidence as to his mistreatment and torture at the behest of US officials in Pakistan, Morocco and Afghanistan was true[62]. One judge went as far as criticising evidence given by Security Service officials: ". . . some Security Service officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohammed when he was held at the behest of US officials"[63].

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[60] *Ibid* at paras 131-132.
[61] *Ibid* at paras 130-133.
[62] *Ibid* at paras 136 to 141.
[63] Ibid at para 168, as finally published on 26 February 2010.

CONCLUSION

This Court should have regard to Arguments I to III above when considering whether to grant a writ of certiorari in this case.

March 5, 2010

Respectfully submitted,

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