THE CASE OF BINYAM MOHAMED: NATIONAL SECURITY OR NATIONAL EMBARRASSMENT?

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Contents

Introduction 1

1. Summary of the Facts and Background of the Case 2

2. The Attempts to Obtain Exculpatory Evidence 8
   a) Background 8
   b) Could Mohamed’s Attorneys obtain the exculpatory documents more easily under federal court rules than under the military commissions? 11
   c) Could evidence have been obtained through the Letters Rogatory process? 12
   d) Could Mohamed’s lawyers have obtained the evidence more easily through a possible Mutual Legal Assistance Treaty? 12
   e) Counsels’ creative legal approach to obtaining the exculpatory documents in the UK 14


4. Mohamed’s Alien Tort Statute action 26
   a) The Course of the Civil Litigation 27
   b) An Increase in Inappropriate Use of the State Secret Privilege 32

Conclusion 34

“There is no avoiding the essential relationship between law and politics.”¹

Introduction

This paper will focus on when the government claims a privilege in litigation for reasons of national security, by reviewing the case of Binyam Mohamed, a former

Guantanamo detainee who is now in the United Kingdom (“UK”). After Mohamed spent more than seven years detained and in confinement, the United States (“US”) dismissed all charges against him in October 2008. His case highlights a clash between law and politics² for reasons claimed to be for the protection of national security.

This paper will examine the legal issues and role of the two governments in the refusal to disclose evidence for alleged national security reasons, and discuss the unusual method used to seek exculpatory evidence from a foreign court, through litigation in the UK High Court. The paper will consider whether the US and the UK acted for reasons genuinely related to national security, or for other reasons, such as to avoid national embarrassment.

Mohamed’s case generated litigation in four different places: 1) proceedings in the military commissions court in Guantanamo Bay to try him under terrorist charges; 2) federal proceedings under an application for habeas corpus in the US District Court in Washington D.C.; 3) an application in the High Court in London where Mohamed’s lawyers sought disclosure of exculpatory material that the US had refused to provide to his US attorneys; and 4) a civilian litigation action under the Alien Tort Statute³ action in California in which the US Government invoked the state secrets privilege to block the lawsuit⁴. In each forum the government refused to hand over materials or evidence to Mohamed’s lawyers, or attempted to block the lawsuit. The refusal to

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² For the purpose of this paper “politics” means activities of the Government. This is derived from a definition of politics, inter alia, as “activities associated with governing a country or area.” Compact Oxford Dictionary of Current English, (3rd Ed. 2005).
provide the evidence and exculpatory documents or the attempt to block the litigation in each case was claimed to be for reasons of national security or state secrets.

In many cases where evidence is not disclosed for reasons of national security, such reasons are valid and the non-disclosure is totally appropriate. However, in the Mohamed case the non-disclosure may not be for reasons of national security at all. In cases like Mohamed the term “national security” seems to be used as a purely political catch-all phrase, designed to obscure an unwillingness to divulge activities of governments that are only questionably legal.

1. **Summary of the Facts and Background of the Case**

Binyam Mohamed is an Ethiopian national who sought political asylum in the UK with his family in 1994 on the basis of his family’s opposition to the then current regime in Ethiopia. Although that application was rejected, in 2000 he was given exceptional leave to remain in the UK for 4 years. In 2001 he went to Afghanistan, allegedly to try to kick a drug habit, and from there he went to Pakistan. In April 2002 he was arrested at Karachi airport by the Pakistani authorities, whilst trying to fly back to London using a British passport in another’s name into which Mohamed had inserted his own photograph.

He was held in the custody of the Pakistanis who reported the arrest to US authorities in Pakistan. Lieutenant Colonel Yvonne Bradley, who represented Mohamed in the

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5 Except as otherwise indicated, the statement of the facts of the case is derived from the judgment of Lord Justice Thomas in the first of four judgments issued by the High Court in London, R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs, [2008] WWHC 2048 (Admin.).
military commissions proceedings referred to below, believes this was because at that
time it was not unusual for foreign governments to bring persons arrested in
suspicious circumstances to the attention of US authorities.6

The US authorities interviewed Mohamed and contacted the UK security services and
asked them to verify Mohamed’s identity and status. Various pieces of “information”
passed between the UK and US authorities, including information that Mohamed had
trained at an Al Qaeda camp and was planning to construct and detonate a “dirty
bomb”. The UK wanted to question him in order to protect the national security
interests of the UK, as they thought he might fit the profile of someone who, whilst
innocuous in the UK, could have graduated to serious terrorist activity in Afghanistan.
In May 2002, with permission from US authorities, a British security officer went to
Pakistan and interviewed Mohamed to obtain intelligence about possible security
threats to the UK.

Mohammed alleges that whilst he was in Pakistan in Pakistani custody he was
tortured. He claimed that the British officer said he would make Mohamed’s
treatment better if he co-operated. After the visit of the British officer, he was
rendered to Morocco. Mohamed explained why he believed he was sent to Morocco,
in an interview with the British “Mail on Sunday” newspaper after his eventual return
to the UK. As the British authorities had told the US authorities that Mohamed had
lived in the UK in an area where there were many Moroccans, the Americans believed
that Moroccans might be more likely to make Mohamed talk and he might know what

6 Telephone Interview with Lt. Col. Yvonne R Bradley, Attorney for Binyam Mohamed, in
Moroccans were up to in London. He was held incommunicado by the Moroccans, and tortured further. Since his release he has given various interviews to media in the UK and has claimed that MI5 “was not only supplying his interrogators [in Morocco] with background information but making specific requests about what they wanted him to be asked.”

He then alleges that he was rendered once more by the CIA to Kabul, placed in a black hole in the Prison of Darkness, and was tortured and interrogated further whilst in US custody. After being transferred to Bagram and suffering further mistreatment, Mohamed made various signed confessions. He has stated that he told the interrogators anything they wanted him to say, in order to get the torture to stop.

Finally he was transferred to Guantanamo in September 2004 where he made further confessions. He was charged in November 2005 before the first incarnation of the military commissions and was assigned a US military attorney, Lieutenant Colonel Yvonne Bradley. The procedure for those military commissions was struck down by the Supreme Court in *Hamdan v Rumsfeld* in June 2006. In the summer of 2007, although they managed to procure the release of most of the British nationals held at Guantanamo, the UK government were unsuccessful in their efforts to get Mohamed released back to the UK.

In early May 2008 it became apparent to Mohamed’s UK lawyers that new charges were imminent under the Military Commissions Act of 2006. Mohamed had

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8 David Rose, id. at 8.  
10 10 U.S.C.A §948a
previously told his military attorney, Lt Col Bradley, about the involvement of the MI5 officer in his interrogation in Pakistan. The legal team believed that there might be some documents relating to what happened in Pakistan to support and corroborate Mohamed’s claims of torture, rendition and abuse. Mohamed’s US lawyers helped retain UK counsel to request disclosure of UK documents from the Foreign Secretary. After the initial request was denied, a civil law suit was filed in the UK High Court on May 6 2008, seeking disclosure.11

On May 28, 2008, Mohamed was re-charged under the Military Commissions Act of 2006 as an alien unlawful enemy combatant with a number of terrorist offences that may carry the death penalty, including participation in a “dirty bomb” plot. After the charges were filed, the UK authorities wrote to Mohamed’s UK lawyers and said that they were continuing to seek Mohamed’s return to the UK, and that they had written to the US authorities, asking them to investigate Mohamed’s claims of mistreatment, and to draw to the attention of the US a number of documents that might be exculpatory or otherwise relevant under the Military Commissions Act. After a review of records and consultations the US government informed the UK government that they considered that Mohamed’s allegations of torture in the documents were not credible, but no reasons were given for this.12

In the US, Mohamed’s military attorney tried unsuccessfully to get disclosure of the documents through the US District Court where Mohamed had an application for habeas corpus pending, (but all records of this are sealed). Counsel wanted disclosure

12 R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin), paragraphs 47 ii) and iv).
of all and any exculpatory evidence in order to make representations to Susan J. Crawford, the Convening Authority (“CA”), who was expected to make a decision whether the charges would formally be referred to a military commission. However, as Mohamed’s US attorneys could not obtain disclosure of the documents in the US, Mohamed’s UK lawyers tried a novel approach to obtain the evidence in the High Court in London.

The UK court ordered disclosure of the documents in a redacted form to protect the identity of two MI5 witnesses and omitting details of where Mohamed was detained in Pakistan. However, they stayed the order pending representations from the Foreign Secretary about whether the documents could be withheld on the grounds that they would damage the national security of the UK and its intelligence sharing arrangements with the US. This historic decision of the UK court appeared to prompt the US District Court to order the disclosure of the documents\textsuperscript{13}. The actual reasons why the US District Court ordered the disclosure are not known as the US proceedings were sealed. Even after the US federal court ordered the disclosure the government refused to comply immediately. Again, the reasons for the initial non-compliance are unknown.

Whilst litigation and final resolution on disclosure were still pending in both the UK and US courts, the US government (i.e. the Department of Justice) suddenly dismissed the most serious charges against Mohamed, including the “dirty bomb” charges on October 6, 2008. Two weeks later the CA dismissed all military

\textsuperscript{13} While the UK High Court clearly believed that the documents should be released to Mohamed’s lawyers, appeals by the UK government and political pressure by the US government required the UK court to refrain from disclosing the documents to Mohamed’s US attorneys. While matters were still pending in the UK court, the US federal court ordered disclosure of the exculpatory documents.
commissions charges without prejudice. Mohamed’s military counsel was informed that new charges would be brought within thirty days. No new charges were ever preferred.

The Department of Justice then disclosed the documents to Mohamed’s US attorneys in the light of the still pending habeas proceedings. Lt Col Bradley says the disclosed documents were heavily redacted. From what she knew about the redactions to the documents (which had been seen only by the Special Advocates and the UK judges) from the description set out in the High Court judgment, she believes that the documents disclosed to her contained significantly more redactions than there were in the documents that might have been disclosed by the UK court.14

With a change in the US Administration in January 2009, and along with pressure from the UK authorities the US finally agreed to release Mohamed. On February 23, 2009 Mohamed arrived back in the UK. He was debriefed by the UK authorities, he was neither arrested nor charged with anything, and he has been given temporary leave to remain in the UK for two years.

2. The Attempts to Obtain Exculpatory Evidence

a) Background

“The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment15.

In the landmark 1963 case of Brady v Maryland, the Supreme Court enshrined the

right of defendants in US domestic criminal cases to be given exculpatory evidence. Yet even *Brady* "does not necessarily require that the prosecution turn over exculpatory material before trial",\(^{16}\) but this was exactly what the Mohamed legal team sought in order to prevent charges being referred against Mohamed in the military commissions courts.

The US intended to try Mohamed in the military commissions. Such trials consist of a two step process. First, formal charges are completed by prosecutors and are formally read to the accused. This is known as preferral of the charges. After charges are formally brought against an accused, the charges are sent to the CA for referral. At this stage the CA decides if there is sufficient evidence to send the charges to trial by military commissions.

Mohamed’s attorneys sought the disclosure of the exculpatory documents while the case was at the referral stage when the CA had to review the evidence and decide if the case should be referred for trial. Mohamed’s lawyers wanted to find out what was contained in the exculpatory documents at this early stage in the hope of preventing the case from being sent to the military commissions.

The lawyers believed that the exculpatory documents would support Mohamed’s account of torture, and his claim that all the government’s evidence against him had been extracted through torture and abuse, and thereby persuade the CA to dismiss the charges. Defense lawyers believed that it was crucial for the CA to consider this exculpatory evidence before she issued a decision on referring the charges.

\(^{16}\) *U.S. v. Gordon*, 844 F. 2d. 1397, 1403 (9th Cir. 1987).
As mentioned above, Mohamed’s lawyers knew from their conversations with him that MI5 had assisted in his interrogation whilst he was detained in Pakistan.

Moreover, the letter referred to above sent by the Foreign Office to the UK lawyers mentioned sending the US authorities documents that might be exculpatory. Both the US and UK lawyers believed that the documents also contained exculpatory evidence corroborating Mohamed’s account of the torture he had undergone. As a result both sets of attorneys sought to obtain these documents from either government so that the CA had them during referral. The legal team believed “if this is done it is likely that the Convening Authority will refuse to refer charges to a Military Commission. …..It is believed…that, although the Convening Authority did not give reasons, it was likely that it refused to refer charges in the case of Mohamed Al Qahtani because of the highly publicized evidence that he had been tortured at Guantanamo Bay.” 17 Thus the lawyers hoped that the CA would refuse to refer charges in Mohamed’s case, just as it had done in Al Qahtani’s case.

However, the Rules in the Manual for Military Commissions make it clear that there is no duty on the CA to disclose any documents at the referral stage – this is a review procedure conducted by the CA alone 18. Exculpatory evidence can only be given to the defense at a pre-trial stage 19, i.e. once charges have been referred, and evidence may be withheld if “disclosure is detrimental to the national security”. 20 Because of this provision dealing with withholding, Mohamed’s military attorneys had concerns that none of the torture evidence would ever be forthcoming, either before the CA or

17 R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin), paragraph 112.
19 Manual for Military Commissions, Part II, Rule 701(e).
at a military commissions trial where the rules of evidence are more relaxed and perhaps more favorable towards the prosecution.

At the same time the Department of Justice also refused to disclose the exculpatory documents in the habeas proceedings in the US District Court in Washington D.C. Mohamed’s habeas case was pending at the same time as CA was going through the referral process. With all avenues blocked to obtain the exculpatory documents in the US in a timely fashion, another lawful way had to be found to obtain the exculpatory evidence outside both the Military Commission Rules and the Federal Rules of Criminal Evidence.

b) Could Mohamed’s Attorneys obtain the exculpatory documents more easily under federal court rules than under the military commissions?

If Mohamed’s case had been solely in the US federal criminal court system as a criminal case rather than a habeas application, would the lawyers have had other procedures at their disposal to obtain the documents? Could the lawyers have tried to persuade a judge to order disclosure or stop the prosecution? National security privilege would have undoubtedly been raised in a federal criminal court, but this would be a matter for the individual judge on the particular facts of the case. Trying to persuade a judge to dismiss a case because of non-disclosure cannot be relied upon as a guaranteed tactic. In any event, because the CA was not obliged to consider this type of evidence at the referral stage, such a tactic would not have helped Mohamed.
c) Could evidence have been obtained through the Letters Rogatory process?
Could his lawyers in either country have tried to persuade a court to request the
documents from the other country using the letters rogatory procedure? This would
not have worked unless there was a willingness to hand over the documents, as no
state can be compelled to comply with such a request. Also, even if the system works,
it often takes months to get a result.

d) Could Mohamed’s lawyers have obtained the evidence more easily through a
possible Mutual Legal Assistance Treaty?
In some cases evidence can be obtained across borders through Mutual Legal
Assistance Treaties (MLATs), but the MLAT between the UK and the US\textsuperscript{21} would
not have helped Mohamed. His UK lawyers could not have obtained such evidence
from the US, even if he had been a defendant in UK criminal proceedings and even if
there had been no national security issue. Article 1 (3) states “The provisions of this
Treaty shall not give rise to a right on the part of any private person to obtain,
suppress, or exclude any evidence, or to impede the execution of a request.”\textsuperscript{22} Further,
“the Mutual Legal Assistance Guidelines, Appendix M3, p 758, explain that the UK-
US Mutual Legal Assistance Treaty cannot be used by UK courts as a legal base to
seek the execution of a request in the United States on behalf of a defendant.”\textsuperscript{23}
Similarly a defendant in the US cannot use the treaty to obtain evidence from the UK,
as the relevant UK statute makes it clear that a request for assistance from abroad may
only be made by a court or a prosecuting authority.\textsuperscript{24}

\textsuperscript{22} Id. Article 1 (3).
\textsuperscript{24} Section 13(2) Crime (International Co-operation) Act 1993 (Eng.).
As L. Song Richardson has written, “MLATs regularize foreign evidence gathering for prosecutors and explicitly prevent their use by criminal defendants….. MLATs create inequities in evidence-gathering capabilities that affect the accuracy of criminal trials by distorting the evidence available for fact finding.”

The Mohamed case is another example of how the MLAT procedure would not have helped a defendant.

If Mohamed had been a defendant in the UK, he would have faced the same public immunity interest roadblock. Would he have had any way of obtaining the evidence from the US, together with any other exculpatory evidence in the possession of the US authorities? Again, the answer is probably not, if national security privilege is claimed. The Mutual Legal Assistance Guidelines say “When a defendant is unable to secure assistance on a voluntary basis, he may formally request assistance pursuant to the US international assistance statute Title 28, section 1782….”

The wording of the statute covers defendants: “The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.” (Italics supplied).

Nancy Hollander and John Boyd suggest that the process is simple. “Here is how a criminal defendant in a foreign country may obtain documents from a person, business or institution in the United States for use as evidence in a foreign proceeding,

without going through a treaty. Title 28 U.S.C. § 1782 provides a simple and effective method for criminal defendants in foreign courts to request depositions or subpoenas *duces tecum* from persons or organizations within the jurisdiction of the United States.”

They point to a Seventh Circuit case where an application under §1782 worked: “Michael McKevitt is being prosecuted in Ireland for membership in a banned organization and directing terrorism. He asked the district court for an order pursuant to 28 U.S.C. § 1782 to produce tape recordings that he thinks will be useful to him in the cross-examination of David Rupert, who according to McKevitt's motion is the key witness for the prosecution. The district court obliged.”

However it does not always work out for defendants. In *United Kingdom v United States* the defendants first persuaded a court in the UK to apply under the MLAT to a US court for disclosure of documents, and succeeded in obtaining some documents, and then personally applied under §1782 for additional documents. The court refused to exercise its discretion to make the order on the grounds that the documents were privileged or protected by statute.

e) Counsels’ creative legal approach to obtaining the exculpatory documents in the UK

As the outlook for disclosure using conventional methods looked bleak, Mohamed’s UK lawyers very creatively tried a totally different tack. They decided to make an application to obtain the material in the UK by applying the principles of a British

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29 *McKevitt v. Pallasch* 339 F.3d. 530 (7th Cir. 2003).
31 *United Kingdom v. United States* 238 F. 3d. 1312, (11th Cir. 2001).
civil case, *Norwich Pharmacal v Customs and Excise*\(^{32}\) to “novel circumstances”.\(^{33}\)

An explanation of those principles and the application to Mohamed’s case are set out below.

In the alternative they claimed disclosure pursuant to an alleged duty under public international law on two bases: first, that Article 15 of the Torture Convention imposes an obligation to the UK disclose documents and that this obligation has attained the status of customary international law; and second, that status of the prohibition on torture as a rule of jus cogens binding on States erga omnes gives rise to a duty on the UK to disclose. Both of these alternative claims failed.

The British Foreign Secretary denied that he had “any duty under either the *Norwich Pharmacal* principle or under public international law to disclose the documents or the information contained in and to do so would in any event cause significant damage to national security of the United Kingdom.”\(^{34}\)

*Norwich Pharmacal* concerned an alleged patent infringement. The patent owners sought disclosure of the names of the importers suspected of infringement, from Customs and Excise, who had records of every importation into the UK. Customs resisted disclosure on the grounds that the information was confidential and it was against the public interest to disclose it. They were ordered by the court to supply the requested information.

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\(^{33}\) *R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin), paragraph 63.

\(^{34}\) *R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin), paragraph 3.
The principle in *Norwich Pharmacal* was described by Lord Reid in that case as follows: “If through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did….But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”\(^{35}\) In *Norwich Pharmacal* Customs had inadvertently become involved in the tortious acts of the alleged patent infringers, and they were obliged to assist the wronged patent owners. Lord Justice Thomas in *Mohamed* applied the principles of *Norwich Pharmacal* as described below.

The *Mohamed* judgment does not explicitly deal with how the British court had jurisdiction to hear the case. The jurisdiction could not have related to Mohamed himself, as he was not a UK national, he was not physically in the UK and his exceptional leave to remain had expired four years before the application was made. Although the documents that were the subject matter of the application were physically in the UK, perhaps that was enough, but it seems from the judgment of Lord Justice Thomas that the key to the jurisdictional puzzle may be found in the examination of the tortious acts element of the principle.

Lord Justice Thomas in *Mohamed* set out five issues that had to be addressed for the principle in *Norwich Pharmacal* to apply:

i) Was there wrongdoing?

ii) Was the United Kingdom Government, however innocently, involved in the arguable wrongdoing?

iii) Was the information necessary?

iv) Was the information sought within the scope of the available relief?

v) Should the court exercise its discretion in favor of granting relief?"°

In order to evaluate these questions, the court had to see the relevant documents and question two witnesses. Because the Home Secretary had issued a certificate claiming public interest immunity for the documents and the identities of the witnesses, the court had to conduct separate closed proceedings with Special Advocates. This system of dealing with sensitive evidence is thus rather different to the US system under CIPA ³⁷ where the defendant’s own counsel participates in any motion relating to disclosure of classified evidence, sometimes in camera.

The Special Advocate system was established by the UK Special Immigration Appeals Commission Act 1997 and since 2001 has been used in various terrorist related cases. If, as in the Mohamed case, there is an application to prevent documents being disclosed on grounds of national security, the Attorney General decides that Special Advocates must be appointed. The defendant’s solicitors will be contacted and given a list of special security cleared lawyers who have to deal with applications concerning classified material. The main difference between Special Advocates and regular attorneys is that a “Special Attorney acts in the ‘best interests of an [appellant]. He does not act for the [appellant] and the [appellant] is not his client. He

³⁶ R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin) paragraph 64.
owes the [appellant] no duty of care in relation to the role he undertakes.”

The Special Advocate may not discuss the documents under consideration with, or show them to the defendant’s regular lawyers. The hearing is closed and a closed judgment will be issued.

In the Mohamed case, the Special Advocates were able to see all the documents under consideration and questioned two witnesses, known only as Witness A and Witness B, (the latter was the MI5 officer who had interviewed Mohamed in Pakistan). The judges issued both closed and open judgments, and the open judgment does make reference to some non-contentious parts of what occurred in the closed session. The result of that closed session was that the judge decided that in principle some documents with minor redactions could be the subject of the open application made by Mohamed’s regular lawyers.

Returning to the five questions posed by Lord Justice Thomas,

i) **Was there wrongdoing?**

The Foreign Secretary conceded that there was an arguable case of wrongdoing, in that the MI5 officers “facilitated interviews of Mohamed by or on behalf of the US when BM was being detained by the US incommunicado and without access to a lawyer” and “continued to facilitate the interviewing of BM by providing information and questions after 17 May 2002 until November 2002 in the knowledge of what had been reported to them in relation to the conditions of his detention and treatment …”

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39 R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin) paragraph 88 i) and ii).
ii) **Was the United Kingdom Government, however innocently, involved in the arguable wrongdoing?**

The court was requested by Mohamed’s lawyers to consider a situation where questions would touch on the commission of criminal offences by the British officers. Thus jurisdiction to hear this case may have been grounded in the ‘tortious acts’ of the British officers, even if some of those acts took place abroad, applying active personality nationality principles of jurisdiction.

In considering the matter, the court was referred to a number of sections of the International Criminal Court Act 2001, which provide that that it is an offence under UK law for a UK national or resident to commit a war crime outside the UK, or to engage in conduct ancillary to the committing of a war crime. Ancillary conduct covers aiding and abetting etc, incitement, attempt, assisting an offender or concealing the commission of an offence, and the relevant definitions of war crime for the purposes of this case were grave breaches of the Geneva Conventions including “torture or inhuman treatment”, “willfully causing great suffering or serious injury to body or health,” “willfully depriving a prisoner of war or other protected persons of the rights of fair and regular trial” and “unlawful deportation or transfer or unlawful confinement”. The court made a finding of fact that the UK government through the security services had facilitated the interviewing of Mohamed.

iii) **Was the information necessary?**

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40 International Criminal Courts Act, 2001, §51 (Eng.).
41 International Criminal Courts Act, 2001, §52 (Eng.).
42 International Criminal Courts Act, 2001, §55 (Eng.).
The court confirmed that the information sought by Mohamed was “not merely necessary but essential”\textsuperscript{45} to have his case fairly considered and to put forward a defense.

iv) **Was the information sought within the scope of the available relief?**

The court considered that forty two documents fell into the category that was within the scope of the relief available under *Norwich Pharmacal*.

v) **Should the court exercise its discretion in favor of granting relief?**

In principle the court decided to exercise its discretion and permit Mohamed’s lawyers to have disclosure of the agreed redacted documents, subject to hearing from the Foreign Secretary about whether he was prepared to reconsider his position on public interest immunity. He issued a further Public Interest Immunity Certificate on August 26 identifying a real risk of serious harm to the national security of the UK if the documents were disclosed, saying that “disclosure would seriously harm the existing intelligence arrangements between the United Kingdom and the United States.”\textsuperscript{46}

On October 6 2008 the Department of Justice, in the habeas proceedings, dismissed the most serious charges against Mohamed, including charges relating to the “dirty bomb plot”. The Department of Justice then disclosed only seven of the forty two documents to the defense. They refused to let the UK court know which documents had been disclosed and what redactions had been made. However, just prior to the

\textsuperscript{45} R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin), paragraph 105.

next hearing before the federal judge the Department of Justice disclosed all forty-two documents, with heavy redactions. Again, the Department of Justice refused to let the UK court know what redactions they had made to the documents. Moreover, Mohamed’s attorneys were still not allowed to use the documents for the purposes of the proceedings before the CA and military commissions. As a result, the hearings continued in the UK in the week of October 13.

Prior to the UK court making a ruling, on October 20 the CA dismissed all military commissions charges without prejudice, (although new charges were expected to be filed within thirty days). By the end of October the CA had dropped all charges at least temporarily as far as the defense had been informed.

The Department of Justice too had dismissed the most serious charges against Mohamed in his habeas case, and they finally provided counsel with the remaining UK exculpatory documents (which were still relevant for the remaining charges in the US habeas proceedings).

One can only speculate why the US changed their minds about disclosure. Perhaps the US thought there was a real possibility that the UK court would order disclosure to the attorneys of documents that were less redacted than those held in the US, and these would potentially be more damaging. To this day the US still warns the UK government and courts not to disclose documents on Mohamed’s case.

Thus the application in the UK for disclosure ultimately failed because the Public Immunity Interest certificate prevented the court from ordering disclosure, i.e.
politics, here the claim relating to national security, trumped law. The court decided that it was in the public interest to halt the disclosure until the Foreign Secretary had had further time to reflect on whether or not to invoke the public interest immunity.

Do the *Norwich Pharmacal* principles actually add anything to the armory of defendants who need disclosure of exculpatory evidence? These principles are strictly limited in the UK to a case that can fit all the elements of the test set out by Lord Justice Thomas. Is it a new principle? Perhaps it is nothing more than a novel way of interpreting active personality jurisdiction in very limited specific circumstances.

By way of completeness, the UK action is not totally moot, as there remains yet another novel issue. The court still has to decide whether it can disclose the redacted part of its first closed judgment, a decision “which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability.”

Although in the judgment of February 4 the court ruled that considerations of national security should prevail, an application was made by Mohamed’s lawyers to reopen the case on the basis that the court had been “misled by the Government” and “no threat to end intelligence-sharing was ever made to Britain by the US” 48. “Lord Justice Thomas and Mr Justice Lloyd Jones said such threats were the main reason why they were convinced the US torture evidence should remain secret.”

press has very recently reported that in a further hearing before the UK court on July 31, 2009 (in which they reissued their judgment of August 21, 2008\textsuperscript{50} after making some factual additions), the lawyer for the British Foreign Secretary told the court that “in May 2009 Secretary of State Clinton said that if the seven page summary of CIA material was disclosed, the US would reassess its intelligence relationship with the UK, a move that would put lives at risk.” \textsuperscript{51}

Here then, is another instance of where, despite what was claimed by the government, there was no real national security reason why the documents could not have been disclosed. It was a case of national embarrassment rather than national security.

3. National Security, National Embarrassment, Politics or Law: Another Similar Case Reviewed

Nicholas Aroney asks: “what is and what ought to be the relationship between ‘politics’ and ‘law’? Here the debate often centers on the question of whether adjudication is, or can, or should be based upon law, and not politics.” \textsuperscript{52} Therefore, how much, if at all, should judges be swayed by what the government wants, in deciding a case, and do judges have the skills and experience to evaluate claims of national security?

\textsuperscript{50} R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs, [2008] EWHC 2048 (Admin).
\textsuperscript{52} Nicholas Aroney, Politics, Law and the Constitution in McCawley’s Case, 30 Melb. U. L. Rev 605, Dec. 2006.
What is the court’s role in assessing the validity of a claim by the government that disclosure would harm national interests? In the US, *Reynolds* suggests that the judiciary are the right people for the job, “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”

In the UK, it is the opposite. In *Mohamed*, the court stated that it was the Foreign Secretary who was the expert, not the Court, in deciding whether there was a risk to British national security interests.

The UK *Corner House* case that follows highlights the fact that sometimes neither the judiciary, nor even Ministers may have the skills and expertise required to evaluate a claim of national security – when such an issue is before a court the judges have to rely on expert evidence. In this case the House of Lords was asked to rule whether the decision of the Director of the Serious Fraud Office to discontinue a criminal investigation on national security grounds was lawful.

*Corner House* concerned allegations of corruption in violation of UK legislation enacted to give effect to the UK’s obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The UK Serious Fraud Office (SFO) was investigating an alleged bribe made by employees of British Aerospace (BAE) who were the main contractors.

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55 *Regina (on the Application of Corner House Research and others) v Director of the Serious Fraud Office*, [2008] UKHL 60.
involved in the Al Yamamah arms contract made between the British Government and the Government of Saudi Arabia. Pursuant to their statutory powers the SFO issued notices to BAE to supply details of payments to agents and consultants.

Not only did BAE make representations to the SFO that disclosure would adversely affect relations between the UK and Saudi Arabia because the Saudis would regard disclosure as a serious breach of confidentiality, but the British Ambassador to Saudi Arabia warned the SFO of threats to national and international security, saying that “British lives on British streets were at risk.” Then the Saudi Prince Bandar issued a specific threat to the British government that “if the investigation was not stopped there would be no contract for the export of Typhoon aircraft and the previous close intelligence and diplomatic relationship would cease.” The British Prime Minister asked the Director of the SFO to consider again the public interest issues and the Director reluctantly came to the conclusion that continuing the investigation would risk serious harm to the UK national and international security.

In considering whether the Director’s decision to discontinue the investigation exceeded the lawful bounds of discretion, Lord Bingham said “Courts have recognized (as cited in Matalulu) the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible to judicial review because it is within neither the constitutional

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58 Regina (on the Application of Corner House Research and others) v Director of the Serious Fraud Office, [2008] UKHL, paragraph 21.
59 Regina (on the Application of Corner House Research and Campaign Against Arms Trade) v Director of the Serious Fraud Office and British Aerospace Systems PLC, [2008] EWHC 714 (Admin), paragraph 4.
60 Matalulu v Director of Public Prosecutions, [2003] 4 LRC 712.
function nor the practical competence of the courts to assess their merits.”61 He went on to say that the Director “was obliged and entitled to rely on the expert assessments of others….He did not surrender his discretionary power but consulted the most expert source available to him… and the Director’s decision was one he was lawfully entitled to make.”62

The case sparked a maelstrom of outrage – the public believed the investigation had been halted because of a threat about losing the arms contract. As Baroness Hale put it in commenting on the decision of the Director to stop the investigation, “The great British public may still believe that it was the risk to British commercial interests which caused him to give way, but the evidence is quite clear that this was not so…..The withdrawal of Saudi security cooperation would indeed have consequences of importance for the public as a whole. I am more impressed by the threat to ‘British lives on British streets’ than I am by unspecified references to national security or the national interest. ‘National security’ in the sense of a threat to the safety of a nation as a nation state was not in issue here. Public safety was.”63

4. **Mohamed’s Alien Tort Statute action**

Up to this point I have addressed Mohamed’s litigation in three of the four forums: the military commissions under the Military Commissions Act of 200664; the federal habeas application in the US District Court; and the civil suit in the UK High Court for disclosure of documents. I now turn to the fourth forum, where litigation is

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61*Regina (on the Application of Corner House Research and others) v Director of the Serious Fraud Office*, [2008] UKHL 60, paragraph 31.
62 Id. Paragraphs 40 – 42.
63 Id. Paragraphs 52 – 53.
64 10 U.S.C.A §948a
pending in a civil lawsuit in California under the Alien Tort Statute. In this arena, instead of citing reasons of national security as in the other three forums, the US government is claiming state secrets privilege to prevent litigation and disclosure of evidence and documents to Mohamed’s attorneys.

a) The Course of the Civil Litigation

In this suit, *Mohamed v Jeppesen Dataplan Inc.* Mohamed, together with four other plaintiffs, is claiming damages under the Alien Tort Statute in connection with an alleged rendition program carried out by the United States.

The plaintiffs claim that Jeppesen provided flight planning and logistical support service to the aircraft and crew on all rendition flights carried out at the behest of the CIA, with actual or constructive knowledge of the objectives of the rendition program, i.e. knowledge that the plaintiffs were being transferred in secret to foreign countries for detention and interrogation, which permitted the US Government to use interrogation methods that would otherwise have been prohibited under federal or international law. As to Mohamed, his claim related to his rendition from Pakistan to Morocco, his detention and interrogation in Morocco and his rendition from Morocco to Afghanistan, as described above.

Before Jeppesen had an opportunity to answer the case, the US Government claimed state secrets privilege. The CIA Director filed two declarations in support of the motion, one classified and one public. The public declaration stated that “disclosure of the information covered by this privilege assertion reasonably could be expected to

65 28 U.S.C.§1350
cause serious – and in some cases exceptionally grave – damage to the national security of the United States” and moved for the dismissal of the claim in its entirety. The case was dismissed by the District Court on the basis that “the very subject matter of the case was a state secret.” Its explanation was that “the invocation of states secret privilege is a categorical bar to a lawsuit under the following circumstances: (1) if the very subject matter of the action is a state secret; (2) if the invocation of the privilege deprives a plaintiff of evidence necessary to prove a prima facie case; and (3) if the invocation of the privilege deprives a defendant of information necessary to raise a valid defense……Inasmuch as the case involves ‘allegations’ about the conduct by the CIA, the privilege is invoked to protect information which is properly the subject of states secret privilege.”

However, on April 29, 2009 the U.S. Court of Appeals concluded that the subject matter was not a state secret, allowed the appeal and remanded the case.

Judge Hawkins conducted a thorough review of state secret privilege. First he examined the Totten principle – that a suit predicated on the exercise and content of a secret agreement between a plaintiff and the government must be dismissed on the pleadings because the very subject matter of the suit is secret. He pointed out that Tenet v Doe confirmed that Totten only prohibits suits that would necessarily reveal a secret relationship between the plaintiff and the government. Here there was no

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70 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009.
71 Totten v United States, 92 U.S. 105 (1875).
such relationship between the plaintiffs and the government. The fact that Jeppesen
may have had a relationship with the government has no bearing on a case where third
parties are seeking compensation from a party other than the government.

Judge Hawkins went on to say that Tenet also confirms that what he described as the
“sweeping” holding in Totten only applied to suits where success depends on the
existence of the plaintiff’s secret espionage agreement with the Government and that
the state secrets privilege does not otherwise provide the ‘absolute protection’ from
suit available exclusively under the ‘Totten’ rule.”73

Judge Hawkins then considered the rule set out in US v Reynolds.74 In that case an
evidentiary privilege was established that prevents discovery of secret evidence when
its disclosure would harm national security. “Application of the Reynolds privilege
involves a ‘formula of compromise’ in which the court must weigh ‘the circumstances
of the case’ and the interests of the plaintiff against the ‘danger that compulsion of the
evidence will expose military matters which, in the interest of national security,
should not be divulged.’75 While the court should ‘defer to the Executive on matters of
foreign policy and national security’76 in making this determination, ‘[j]udicial
control over the evidence in a case cannot be abdicated to the caprice of executive
officers,’77 The court must therefore undertake an independent evaluation of the claim
of privilege to ensure the privilege properly applies. Once the court determines a

73 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009, quoting Tenet v Doe, 544
74 United States v Reynolds, 345 U.S. 1 (1953).
75 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009, quoting United States v
Reynolds, 345 U.S. at 9-10.
76 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009, quoting Al-Haramain
Islamic Found. Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007).
77 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009, quoting United States v
Reynolds, 345 U.S. at 9-10.
claim of privilege is legitimate, however, “even the most compelling [personal]
necessity cannot overcome it.”

Even if the Reynolds principle is used successfully it does not mean that a claim has
to be dismissed in its entirety. “Successful invocation of the Reynolds privilege does
not necessarily require dismissal of the entire suit. Instead, invocation of the privilege
requires ‘simply that the evidence is unavailable, as though a witness had died [or a
document had been destroyed], and the case will proceed accordingly, with no
consequences save those resulting from the loss of evidence.” Within the Reynolds
framework, the ‘litigation can proceed,’ therefore, so long as (1) the plaintiffs can
prove ‘the essential facts’ of their claims ‘without resort to [privileged evidence],’ and
(2) invocation of the privilege does not deprive ‘the defendant of information that
would otherwise give the defendant a valid defense.”

Judge Hawkins ruled that the District Court erred in deciding that the Reynolds
principle applied to secret information, as opposed to secret evidence. He pointed out
that Reynolds “specifically prevents the ‘compulsion of . . . evidence,’ the
introduction of which ‘will expose military matters which, in the interest of national
security, should not be divulged.’”

He continued: “a court may determine that evidence is subject to the Reynolds

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79 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009, quoting Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1204 (9th Cir. 2007), (quoting Ellsberg v. Mitchell, 709 F.2d 51, 64 (D.C. Cir. 1983)).
80 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009, quoting Kasza v Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).
81 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009, quoting United States v Reynolds, 345 U.S. 1, 10 (1953).
privilege because it contains secret information; nevertheless, the privilege applies to prevent discovery of the evidence itself and not litigation of the truth or falsity of the information that might be contained within it.82

Judge Hawkins also evaluated and dismissed the government’s argument based on Freedom of Information Act83 cases84 that privileged evidence is any evidence containing classified information, which remain secret unless and until such information has been officially disclosed by a high ranking government official. “Reynolds makes clear that ‘classified’ cannot be equated with ‘secret’ within the meaning of the doctrine. If the simple fact that information is classified were enough to bring evidence containing that information within the scope of the privilege, then the entire state secrets inquiry—from determining which matters are secret to which disclosures pose a threat to national security—would fall exclusively to the Executive Branch, in plain contravention of the Supreme Court’s admonition that ‘[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers’” without “lead[ing] to intolerable abuses.”85

Although at first blush the rulings in this case look as if there is some hope overcoming the obstacle of state secrets privilege, the rulings are limited by two factors.

The first factor is that the claim as it was pleaded was based on publicly available

82 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009.
84 Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990); Afshar v. Dep’t of State, 702 F.2d 1125 (D.C. Cir. 1983); Phillippi v. CIA, 655 F.2d 1325 (D.C. Cir. 1981); Alfred A, (4th Cir. 1975).
85 Mohamed v Jeppesen Dataplan Inc., 9th Cir. R. 08-15693, Apr. 29, 2009, quoting United States v Reynolds, 345 U.S. 1, 8-10, (1953).
evidence, so was not actually dependent on secret matters. A similar claim was made in *El-Masri v United States.*\(^86\) There the plaintiff’s claim against the Director of the CIA for compensation relating to his alleged rendition and torture was halted due to the successful claim of states secret privilege. In that case the plaintiff claimed that his case need not be dismissed because CIA renditions and his own rendition had been widely and publicly discussed. This of course may not be the same thing as basing a case on publicly available evidence. However in the particular circumstances of that case the Court of Appeals decided that El-Masri’s claim could not be litigated without recourse to privileged material.

The second factor is that in *Mohamed* the government intervened at a very early stage, during the pleadings, and asked the court to dismiss on the grounds that the plaintiffs could not succeed without using privileged evidence. The Court of Appeals was not prepared to make such a ruling at the pleadings stage and would not “prospectively evaluate hypothetical claims of privilege that the government ha[d] not yet raised and the district court ha[d] not yet considered.”\(^87\) Therefore the privilege may rear its head again at a later stage in the proceedings and adversely affect the plaintiffs’ claim. Indeed, the US government filed a petition on June 12, 2009 requesting a re-hearing en banc.

At this stage however, it could be said that the government’s claim that the information, if disclosed, would cause grave damage to the national security of the United States, amounted to nothing more than a risk of national embarrassment if the facts relating to the renditions were aired in public.

\(^{86}\) *El-Masri v United States*, 479 F. 3d 296 (4th Cir. 2007).

\(^{87}\) *Mohamed v Jeppesen Dataplan Inc.*, 9th Cir. R. 08-15693, Apr. 29, 2009.
b) An Increase in Inappropriate Use of the State Secret Privilege

Gary Wills has recently reviewed two books\(^88\) that have examined the use of state secrets privilege in U.S. v Reynolds.\(^89\) Wills notes the vast increase in recent years of the invocation of the state secrets privilege by the US government. It was invoked in five cases between 1952 and 1977, in sixty two cases between 1977 and 2001 and in thirty nine cases between 2001 and 2005.\(^90\)

He suggests that the inappropriate use of state secrets privilege in cases that do not concern national security at all is nothing new. “It has long been suspected, and even asserted by those in a position to know that the withholding of privileged information is a very convenient way to cover up executive crimes and bungling.”\(^91\)

He cites Attorney General Herbert Brownell telling President Eisenhower in 1953 that “classified procedures were so broadly drawn and loosely administered as to make it possible for government officials to cover up their own mistakes and even their wrongdoing under guise of protecting national security.”\(^92\)

He also cites an article by Erwin Griswold in which he said that there were no state secrets in the Pentagon Papers case,\(^93\): “the principal concern of the classifier is not


\(^{89}\) United States v Reynolds 345 U.S. 1 (1953).


\(^{91}\) Gary Wills, Id.


with national security, but rather with governmental embarrassment of one sort or another.”

In 2008 Senator Edward Kennedy introduced a bill to amend various aspects of the law relating state secrets privilege but it did not become law. On February 11, 2009 Senator Patrick Leahy introduced another similar bill with the aim of setting out a systematic approach to the privilege in order to bring uniformity and clarity to this area of the law. The report introducing the bill refers to “a strong public perception that has emerged that see the privilege as a tool for Executive abuse…..Indeed, in the burgeoning literature on the privilege it is hard to find a single positive view on the current state of the law.” This bill has been referred to the Senate Judiciary Committee.

**Conclusion**

In each issue described in this paper, the tension has been because of alleged national security interests. However, in the words of Clive Stafford-Smith, one of Mohamed’s UK legal team, the ‘national security’ issues raised in the *Mohamed* case “conflates national security with national embarrassment.” The *Mohamed* case is not alone in this – the pattern is seen in other domestic and transnational criminal cases, particularly those after 9/11. As David Luban explains: “The theory is that disclosing government crime or misconduct would embarrass the government in the eyes of the

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97 Id., 114-5.
98 Clive Stafford Smith, (UK attorney for Binyam Mohamed), Unclassified Letter re Binyam Mohamed from Reprieve to President Obama, Feb. 9, 2009.
world, and whatever embarrasses the government in the eyes of the world harms national security.”99 Few would dispute that politics should trump the law when real national security issues are at stake and where sources and intelligence have to be protected, but all too often the knee-jerk claim of national security, or state secrets is a cover-up for what a government has done on the fringes of the law. This does justice to neither law nor politics and comes at a great cost, in terms of damage to the reputation of governments, emotional distress caused to defendants and claimants, the waste of court and government time, and not least a vast amount of taxpayers’ money.

99 David Luban, You cover it up, you own it, Balkanization, Feb. 10, 2009.