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Case No: CO/4241/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2009

Before :

LORD JUSTICE THOMAS
and
MR JUSTICE LLOYD JONES

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Between :

The Queen on the Application of Binyam Mohamed	**Claimant**
- and -	
Secretary of State for Foreign and Commonwealth Affairs	**Defendant**

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- -

Dinah Rose QC and Ben Jaffey (instructed by **Leigh Day**) for the **Claimant**

Thomas de la Mare and Martin Goudie (instructed by **The Treasury Solicitor's Special Advocates Support Office**) as **Special Advocates for the Claimant**

Pushpinder Saini QC, Max Hill QC and Karen Steyn (instructed by **The Treasury Solicitor**) for the **Respondent**

Andrew Nicol QC and **Guy Vassall-Adams** (instructed by Jan Johannes) for **Guardian News and Media Ltd, British Broadcasting Corporation, Times Newspapers Limited, Independent News and Media Ltd** and **The Press Association;** (instructed by Finers Stephens Innocent) for **The New York Times Corporation** and **The Associated Press**.

Clive Scowen, Editor of the **Law Reports** and the **Weekly Law Reports**, in person

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David Rose, Contributing Editor, **Vanity Fair**, in person

Hearing dates: 13-17 October 2008

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Judgment Approved by the court for handing down

Lord Justice Thomas

1. This is the judgment of the Court on the issue of whether we should restore to our first judgment [2008] EWHC 2048 (Admin)) paragraphs containing a gist of reports made by the United States Government to the United Kingdom Government in relation to the detention and treatment of the claimant (BM) whilst in custody by or on behalf of the United States Government in the period 2002-2004.

THE COURSE OF THE PROCEEDINGS

2. BM, an Ethiopian national resident in the United Kingdom, was arrested in Pakistan in April 2002. He was then held incommunicado, initially in Pakistan and then at secret and undisclosed locations, until May 2004. During that time he was subject to interrogation by officials of the United States Government and others acting on their behalf. BM alleges that during the interrogations in Pakistan he was tortured and subjected to cruel, inhuman or degrading treatment by or on behalf of the United States Government; that he then was subjected to extraordinary rendition to Morocco where torture continued in a severe form. It was rightly accepted on behalf of the Secretary of State for Foreign and Commonwealth Affairs (the Foreign Secretary) that BM had an arguable case that he had been subject to torture and cruel, inhuman and degrading treatment by or on behalf of the United States Authorities during his two year period of incommunicado detention.

3. Between May and September 2004, BM made confessions as to his involvement in Al-Qaida and in terrorism to officials of the United States Government at Bagram Airbase, Afghanistan, and at Guantanamo Bay. BM alleges that he made those confessions as a result of the torture or cruel, inhuman or degrading treatment to which he had been subjected in the period between April 2002 and May 2004. On the basis of those confessions, he was charged under the United States Military Commissions Act with terrorist offences, including a dirty bomb plot. Before these charges could be considered by a Military Commission, the Convening Authority established under that Act, the Honourable Susan Crawford, had to decide whether the charges should be referred for trial.

4. In May 2008 lawyers on behalf of BM commenced these proceedings against the Foreign Secretary seeking information to assist in the defence of the charges brought against him. A hearing took place between 29 July and 1 August 2008. Some part of the proceedings were held in private at which counsel and solicitors for BM were present and others in camera at which Special Advocates represented BM in the absence of his legal advisers. We heard evidence from Witness B, an officer of the Security Service (SyS) both in private and in camera. The reasons for the evidence being given in private were explained at paragraph 53 of our first judgment ([2008] EWHC 2048 Admin). We have been asked to make the transcript of the examination in private (as distinct from the examination in camera) available to the media and to the public. There is no opposition by the Foreign Secretary to that request and we grant it.

5. In our first judgment given on 21 August 2008 we decided that:

   i) The SyS had facilitated interviews of BM by or on behalf of the United States Government in the knowledge of what had been reported to them in relation to his detention and treatment in Pakistan in May 2002 and after September 2002 when they knew BM was still being held incommunicado (see paragraphs 86-88 of our first judgment).

   ii) The provision to BM's lawyers in confidence of information held by the United Kingdom Government, and in particular 42 documents which were classified as secret, was essential if BM was to have his case fairly considered by Ms Crawford (as the Convening Authority) and any subsequent trial before a Military Commission (see paragraph 105 – 107 of our first judgment).

   iii) The information would not be made available by the United States Authorities within a proper time, given the length of the detention of BM and the deterioration in his health (see paragraph 126 of our first judgment).

   iv) On the basis of these findings, BM was entitled under principles established in *Norwich Pharmacal* [1974] AC 133 to the disclosure of a number of documents, including the 42 secret documents, subject to the exercise of our discretion and claims to public interest immunity (see paragraphs 135 and 147 of our first judgment).

6. Subsequent to that judgment, the United States Government made various concessions, details of which are set out in our second judgment ([2008] EWHC 2100 (Admin)). The most important concession was that the 42 documents would be disclosed, if the charges were referred for trial before a Military Commission. However, the United States Government refused to allow the documents to be made available for use by BM's lawyers for the purposes of proceedings before Ms Crawford, the Convening Authority (see paragraphs 15-16 of our second judgment). In the light of those concessions, the Foreign Secretary submitted that we should not order disclosure. He provided a Public Interest Immunity Certificate dated 26 August 2008 identifying a real risk of serious harm to the national security of the United Kingdom if the documents were disclosed; he expressed the view that in the light of those concessions the 42 documents should not be disclosed to BM's lawyers, as disclosure would seriously harm the existing intelligence arrangements between the United Kingdom and the United States. The Certificate was supported by a Sensitive

Schedule provided to the Court in camera. After a hearing on 27 August 2008, we concluded in our second judgment given on 29 August 2008 that, given the speed at which the Certificate had had to be produced, it did not adequately cover the issue of torture and so we were not in a position to decide whether we should order disclosure so that the documents could be used in submissions by BM's lawyers to Ms Crawford, the Convening Authority. We gave the Foreign Secretary time to provide a further certificate and fixed a hearing for the week of 13 October 2008.

7. On 6 October 2008, in the course of *habeas corpus* proceedings brought against the United States Government by BM's lawyers, the United States Government abandoned that part of the charges against BM that related to the dirty bomb plot (referred to at sub-paragraphs 47(i)(4 and 5) of our first judgment), filed an amended pleading in the *habeas corpus* proceedings (the contents of which confirmed our view that the 42 documents were essential to his defence) and disclosed to BM's lawyers for the purposes of the *habeas corpus* proceedings in a redacted form 7 of the 42 documents. Despite the efforts of the United Kingdom Government, not only did the United States Government withhold from this court information as to which those documents were or what the redactions were (see paragraph 17-20 of our third judgment ([2008] EWHC 2519 (Admin)), but they also refused to allow those 7 documents to be used for the purpose of the proceedings before Ms Crawford, the Convening Authority. A further hearing in the *habeas corpus* proceedings was then fixed to take place on 30 October 2008 before the Honorable Judge Emmet G Sullivan on an application that the United States Government make available all exculpatory material.

8. At the hearing before us in the week of 13 October 2008, it was argued on behalf of BM that it was very important to BM that the documents be available for use before Ms Crawford, the Convening Authority, in part on the basis of evidence from Mr Stafford Smith that it was believed that Ms Crawford had refused to refer the case of Mohamed Al Qahtani for trial where there had been evidence of torture (See paragraph 112 of our first judgment). In the circumstances it was contended that this court had to order disclosure of the documents as the conduct of the United States Government was such that it would do all it could to avoid disclosure of the 42 documents (See paragraphs 28-30 of our third judgment). Grave as those allegations were, we made it clear that they could not be dismissed as fanciful. The Foreign Secretary contended that, as he considered that it was more appropriate for the United States Government to be given the opportunity to make disclosure in the United States, we should grant a short stay of these proceedings pending the decision of Judge Sullivan.

9. After the conclusion of the hearing before us, we were informed that on 21 October 2008, the charges against BM had been dismissed by Ms Crawford, the Convening Authority, without prejudice. This meant that new charges could be referred. BM's lawyers were told that new charges would be brought within 30 days. We were informed by counsel for the Foreign Secretary in the written submissions provided to us on 18 December 2008 that BM had not in fact been re-charged as at that date. The position remained the same, so far as we are aware, as at 22 January 2009. On that day President Obama issued an Executive Order requiring the Secretary of State for Defense to ensure that no new charges are sworn pending a review of the position of all of those detained at Guantanamo Bay.

10. In the light of the imminent hearing before Judge Sullivan on 30 October 2008 and the further events to which we have referred, we stayed the proceedings for a short period pending that hearing, as explained more fully in our third judgment. We indicated that if disclosure was not given as a result of that hearing, we would rule on the application that we should order disclosure, including the issue as to whether the United States Government was deliberately seeking to avoid disclosure of the 42 documents. There were other matters which formed part of the proceedings before Ms Crawford, the Convening Authority, to which we referred in an annex to our third judgment which we were not then in a position to make public. We stated we would make it available as soon as possible (see paragraph 27 of our third judgment).

11. Prior to the hearing before Judge Sullivan on 30 October 2008, the United States Government made the 42 documents available in redacted format in the *habeas corpus* proceedings. In the course of the hearing before Judge Sullivan, the United States Government raised no objection to an order being made permitting their use in the proceedings before Ms Crawford, the Convening Authority. We understand further requests for discovery of documents and photographic material in relation to the period of BM's incommunicado detention remain pending. Judge Sullivan ordered the United States Secretary for Defence to provide an affidavit addressing the issue of exculpatory information in the possession of the United States Government.

12. Subject to the resolution of any issues arising out of the redaction by the US Government of the 42 documents beyond that referred to in paragraph 11 of our second judgment or other issues arising out of those documents, there is therefore no further remedy sought by BM in these proceedings, as his lawyers are in a position to use the documents before Ms Crawford as the Convening Authority. It is important to note in the light of the evidence to which we referred at paragraph 8 above and for other reasons set out below that Ms Crawford in a record of an interview published in the *Washington Post* on 14 January 2009 made public the reason why she refused to allow the charges against Al Qahtani to be referred to a Military Commission - the cumulative effect of the interrogation techniques employed at Guantanamo Bay on him in 2002 amounted in her view to torture in the light of the extreme effects they had had on him.

13. We have been informed that BM and 11 others have commenced proceedings against Her Majesty's Government relating, amongst other matters, to the events which were considered in these proceedings.

THE OUTSTANDING ISSUE

14. The only issue that remains outstanding in these proceedings is whether we should restore to our open judgment seven very short paragraphs amounting to about 25 lines. In these paragraphs we provided a summary of reports by the United States Government to the SyS and the Secret Intelligence Service (SIS) on the circumstances of BM's incommunicado and unlawful detention in Pakistan and of the treatment accorded to him by or on behalf of the United States Government as referred to in paragraph 87(iv) of our judgment. We did so as the summary was highly material to BM's allegation that he had been subjected to torture and cruel, inhuman or degrading treatment and to the commission of criminal offences to which we referred in paragraph 77 of our first judgment and to which we refer at paragraph 20 below. As

explained at paragraph 4 of our first judgment, we redacted these paragraphs at the request of the Foreign Secretary, pending further argument.

15. The Foreign Secretary's further Certificate issued on 5 September 2008 specifically set out his reasons why disclosure of the redacted part of our judgment should not be made public by restoration of those paragraphs to the judgment.

16. We heard further argument from the Special Advocates and counsel for the Foreign Secretary in camera on this issue in the course of the argument on disclosure of the 42 documents for use before Ms Crawford, the Convening Authority and on some of the other issues we determined in our third judgment. At paragraph 57 of our third judgment and by letter to the Press Association dated 7 November 2008 we invited representations from the media on the issue. We did so in the light of the fact that the media had had no opportunity to make representations on an issue of such importance to them, as the argument had taken place in camera, and it would not be just to arrive at a decision on keeping the redacted paragraphs out of the public domain without hearing from them. (Cf. the practice of hearing submissions from the media in relation to reporting restrictions. See *C v CPS* [2008] EWHC 854 (Admin) at paragraph 4, the judgment of Brooke LJ in *Ex parte Guardian Newspapers* [1999] 1WLR 2130 at 2147H and Rule 16 of the Criminal Procedure Rules). As the Editor of the Law Reports has pointed out in his submissions to us, there has been a marked increase in the number of hearings held in secret, with the court being closed to law reporters and the press; consequently they have often been denied the opportunity of making submissions.

17. We received written submissions from Counsel instructed on behalf of media organisations, from the Editor of the Law Reports (as we have mentioned) and by one journalist in person in early December. A written response was provided by counsel for the Foreign Secretary on 18 December 2008.

18. The issue which arises here is not the balance between the public interest and fairness to a litigant by making material available to him to enable a fair trial to take place (as has been the position in most cases – see for example *Secretary of State for the Home Department v MB* [2007] UKHL 46 ([2008] 1 AC 440). It is a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability. Furthermore what is in issue is not a temporary withholding from the public of that information as often occurs in the course of an investigation. It will be permanent, unless the United States Government changes its position. We are therefore very grateful to all for the very helpful submissions on this important issue.

19. It is evident from the submissions made that the increase in the number of in camera hearings and closed judgments has raised a number of issues such as access by law reporters to legal submissions made in camera and the custody and eventual release of closed judgments. These plainly require wider consideration and clear rules. It has also been submitted that we should put as much as possible into the public domain in this judgment on such an important issue; we have endeavoured to do so.

THE FACTUAL BASIS FOR THE DETERMINATION OF THE ISSUE

20. It was accepted by the Foreign Secretary for the purposes of the determination of the issue that:

i) There was an arguable case disclosed by the documents that cruel, inhuman or degrading treatment had been inflicted on BM.

As regards this, we note that s.52 of the International Criminal Court Act 2001 (set out at paragraph 77 of our first judgment) provides that a prosecution can be brought against a person who aids and abets a war crime (or assists in concealing a war crime) in the United Kingdom or against a United Kingdom national or resident who so acts anywhere in the world. A war crime is defined to include grave breaches of the Geneva Conventions of 1949 such as torture or inhuman treatment. Clearly a high standard of proof would be required, if a criminal prosecution under s.52 of the International Criminal Court Act 2001were to be pursued against officials acting on behalf of the United Kingdom Government; there would have to be proof of the ingredients of knowledge and intent. The consent of the Attorney General is needed for proceedings.

ii) The boundary between torture and cruel, inhuman or degrading treatment could not be drawn with precision. A detailed factual enquiry would be necessary. In the circumstances, it was not possible for the Foreign Secretary to express a concluded view as to whether what was alleged was or was not torture.

As regards this we note that under s.134 of the Criminal Justice Act 1988, which implemented provisions of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Cm 1775) (The Torture Convention), the offence of torture is committed if a public official or a person acting in an official capacity, whatever his nationality, intentionally inflicts severe pain or suffering on another whether in the United Kingdom or elsewhere in the performance or purported performance of his official duties. Again a high standard of proof would be required if a prosecution were to be pursued. The consent of the Attorney General is necessary for such a prosecution.

21. It was submitted by the Special Advocates that we could be satisfied on the basis of the information reported (and summarised in the redacted passages of our judgment) that the treatment of BM amounted to torture. They relied on

i) The decisions of the European Court of Human Rights in *Ireland v UK* [1978] 2 EHHR 25 (referred to in paragraph 143 (iv) of our first judgment) and *Meneshheva v Russia* (2007) 44 EHHR 56 (where the Court again considered what amounted to torture) and the decision of the House of Lords in *A v Secretary of State for the Home Department (No 2)*[2005] UKHL 71 ([2006] 2 AC 221).

ii) The decision of the UN Committee Against Torture in *Re Israel* 9 May 1997, A/52/44 and the summary of other decisions in *Greenberg & Dratel: The Torture Papers* at pp 565-9.

We cannot accept that submission. The question as to whether treatment amounted to torture or cruel, inhuman or degrading treatment depends on whether the techniques deliberately employed occasioned such a degree of suffering in intensity, duration and cruelty to constitute torture (See paragraph 143(iv) of our first judgment). There is insufficient material for us to reach the conclusion that what was reported did inflict that degree of intense and cruel suffering necessary to constitute torture.

22. We will proceed therefore on the basis that what is contained in the summary in the redacted paragraphs gives rise to an arguable case of torture or cruel, inhuman or degrading treatment. Nonetheless it is important that, as the reports of the detention and treatment of BM summarised in the redacted passages are reports by officials of the United States Government, they amount to admissions by those officials of the way in which BM was detained and the treatment accorded to him during that part of his detention in April and May 2002. Given their source and detail, they would also amount to powerful evidence, if admissible as hearsay in proceedings for example under ss.114-126 of the Criminal Justice Act 2003.

THE APPLICABLE PRINCIPLE

23. It was common ground that the issue of restoring the redacted paragraphs should ordinarily be determined by balancing the various interests in accordance with the tests set out in *R v Chief Constable of the West Midlands ex p Wiley* [1995] AC 274 to which we will refer in more detail at paragraph 34 below.

24. However, it was contended by the Special Advocates that in the circumstances of this case, there was no need to balance the various interests, as there was an absolute bar to a claim to keep the information contained in the redacted paragraphs out of the public domain on the grounds of public interest, because public interest immunity could not be invoked in the United Kingdom to prevent disclosure of evidence of serious criminal misconduct by officials of the United Kingdom. If this is right, then there would be no need for us to balance the various interests exercise. It is therefore convenient to consider this argument first.

IS THERE AN AB SOLUTE BAR TO K EEPING THE PARAGRAPHS OUT OF THE PUBLIC DOMAIN?

The argument advanced by the Special Advocates

25. The arguments were made at the closed hearing for two reasons. First they were intertwined with the issue of whether the 42 documents should be disclosed to BM's lawyers for use before Ms Crawford as the Convening Authority. Second, they were advanced by reference to the facts and matters set out in the redacted paragraphs, in our closed judgment of 21 August 2008, the Sensitive Schedule to the Foreign Secretary's Certificate and other materials.

26. We understand from the Editor of the Law Reports that it was the practice some time ago to allow law reporters to listen to argument in camera so that they might produce a record of the argument addressed to the court. A record of the argument forms an important part of the report of each case reported in the Law Reports. Nowadays, given the issues in many cases heard in camera, attendance of a law reporter is no longer possible, unless that reporter had security clearance. However it is important

that the argument be recorded and in this case it is particularly important that the argument made by the Special Advocates be made public in view of its novelty and significance. We will therefore summarise it without referring to the facts and matters set out in the redacted paragraphs and closed evidence and judgment. That argument proceeded on the basis we have set out, namely that there was an arguable case of cruel, inhuman or degrading treatment or torture.

i) The common law enforced the public international law prohibition on torture which had attained the status of *jus cogens*: see the decision in *A (No 2)* and in particular the speech of Lord Bingham at paragraphs 51-2.

ii) The prohibitions on torture were so basic that they formed part of the principle of legality identified by Lord Hoffmann in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 at 131 D-G. Not only did statutory powers have to be interpreted by reference to the principle of legality, but the common law had to be developed in a manner consistent with the principle of legality.

iii) The position in relation to cruel, inhuman or degrading treatment was similar to that of torture.

a) Although not a crime under international law (see Article 16 of The Torture Convention) nor prohibited by the *jus cogens*, the prevention of cruel, inhuman or degrading treatment was a right and value entrenched in the United Kingdom constitution and domestic law.

b) S.10 of the Bill of Rights Act (1688) had prohibited the infliction of "cruel and unusual punishments". Article 3 of the ECHR prohibited "inhuman and degrading treatment". There were similar prohibitions in the Universal Declaration of Human Rights (article 5) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment 1987.

c) In addition, s.31 of the Criminal Justice Act 1948 made it a crime for a United Kingdom state official to do abroad what would be an indictable offence if done in the United Kingdom. It thus extended the ambit of domestic criminal law and subjected officials of the United Kingdom Government to its standards when they were overseas in relation to crimes such as false imprisonment, assault occasioning actual bodily harm and other more serious offences of violence against the person.

d) In *Williams v Home Office* [1981] 1 AER 1211, Tudor Evans J had concluded in relation to prison regimes that whatever the mischief the authorities aimed to prevent or punish, there was an "irreducible minimum, judged by contemporary standards of public morality" below which standards of treatment should not fall (see page 1242).

e) Although Lord Bingham had made clear in *A (No 2)* that the authorities on the Torture Convention did not justify the assimilation of cruel, inhuman or degrading treatment and torture at present (see paragraph

53), he had made it clear that if and to the extent the development of the common law was called for, the development should be in harmony with the international obligations of the United Kingdom (see paragraph 27).

The court should therefore proceed on the basis that cruel, inhuman or degrading treatment was to be treated on the same basis as torture in the circumstances of the present case.

iv) There was a general public interest in the exposure of evidence of any serious criminality by the State. It would therefore be contrary to the public interest to claim public interest immunity to conceal evidence of such criminality, as the rule of law demanded the investigation of such wrongdoing and the open and public adjudication of it. A claim to conceal evidence of cruel, inhuman or degrading treatment or torture under the guise of public interest immunity could not be countenanced as it was incompatible with international law and values relating to the prohibition of torture and cruel, inhuman or degrading treatment, the effective enforcement of the Criminal Justice Act 1988 and the International Criminal Court Act 2001.

v) A further consideration was that the abhorrence of torture and cruel, inhuman or degrading treatment and the vital interest in preventing it entailed that any information showing the State had been engaged in or assisted such practices was of constitutional importance. The provision of information in relation to such matters guaranteed accountability and transparency of the State in relation to a matter of a fundamental human right that had a long and historic protection in our democracy.

vi) Article 6 read with Article 10 of the ECHR accorded the very highest protection to this type of information. The Articles not only required the provision of information as to wrongdoing by the State as necessary to the maintenance of the rule of law, but as essential to the facilitation of free speech and democratic accountability.

vii) The Foreign Secretary's position was inconsistent with these basic principles:

a) His judgement on the damage to the relationship with the United States was based on the need to protect the confidentiality of intelligence sharing. However there could be no confidentiality in evidence tending to show the commission of a crime. The United States Government could not properly ask the United Kingdom Government to protect confidentiality in such circumstances.

b) As the United States Government was a democracy based on the rule of law, it could not expect the courts of the United Kingdom to keep out of the public domain information in relation to a matter so basic to the rule of law as the prevention of torture and cruel, inhuman or degrading treatment, when the provision of such information would not endanger any of the matters ordinarily the subject of protection for national security such as the identity of agents.

viii) Even if in the circumstances, the United States Government was prepared to reconsider or reduce its intelligence sharing facilities with the United Kingdom, the court could not sanction a claim to public interest immunity in the circumstances of this case where concealment of the facts was inimical to fundamental values, the rule of law, free speech and democratic accountability.

ix) The principles of public interest immunity recognised absolute values in at least two contexts:

a) In *R v H* [2004] UKHL 3 ([2004] 2 AC 134 the principles set out by Lord Bingham at paragraph 36 recognised the absolute value of a fair criminal trial;

b) In *MB* the importance of a fair civil trial was recognised as an absolute value, requiring disclosure of material despite national security interests where fairness required disclosure (see in particular the speech of Lord Brown where he made clear that the right to a fair trial was too important to be sacrificed on the altar of terrorism control).

Both these cases showed that some values were treated as absolute. It followed that it was but a small extension to treat the value which attached to prohibiting or reporting or discussing or deterring torture in the same way .

There was therefore an absolute bar to the claim for public interest immunity. It followed that the redacted paragraphs should be made public. To do otherwise would be to conceal the gist of the evidence of serious wrongdoing by the United States which had been facilitated in part by the United Kingdom Government.

27. Counsel for the Foreign Secretary contended that there was no such principle and the issue had to be resolved by balancing the various interests.

Our conclusion

28. Powerful and cogently argued though the submissions of the Special Advocates were, we cannot accept there is an absolute bar to considering a claim for public interest immunity in determining whether the redacted paragraphs should be made public.

29. By contrast with cases where the necessity of a fair trial inevitably defeats a claim for public interest immunity (whether the former interest is characterised as an absolute value, as in *R v H* by Lord Bingham at paragraph 36 or in *MB* by Lord Brown at paragraph 91, or one which will inevitably prevail in a balancing exercise, as was said by Lord Taylor CJ in *R v Keene* [1994] 1 WLR 746 at pages 751-2), we consider that the competing interests in play in the present case require as a matter of principle to be addressed in the context of a balancing exercise. Nothing in any of the leading cases from *Conway v Rimmer* [1968] AC 910 to *ex p Wiley* supports a different approach. Indeed, there is no suggestion in any of the authorities that criminal conduct by officials of the State, even of the very serious type in issue in this case, gives rise to an absolute bar to considering whether disclosure of documents or information relevant to that criminality would damage the public interest of the State. Nor have the researches of counsel found any authority suggesting a departure from

the balancing test in other common law jurisdictions where such issues of public interest immunity arise.

30. It makes no difference, in our view, that the allegations of serious criminality are allegations of torture or cruel, inhuman or degrading treatment or other war crimes. It is clear from the opinions expressed in *A (No 2)* that although there is an absolute prohibition on the use of evidence obtained by cruel, inhuman or degrading treatment or torture against any person, there may be circumstances where the State may have to consider using information obtained in such a way for the protection of its citizens: see paragraph 47 (Lord Bingham), paragraphs 67-69 (Lord Nichols) and paragraph 160 (Lord Brown). Furthermore, for reasons which we have set out at length in our first judgment, we are unable to accept that the particular status of the prohibition on torture in public international law as a rule of *jus cogens* gives rise to an overriding duty to make disclosure of material evidencing such wrongdoing. On the contrary we note that Article 72 of the Rome Statute of the International Criminal Court sets out detailed provisions for dealing with evidence which may prejudice national security, including hearing evidence in camera or refusing disclosure. Similarly, s.39 of the International Criminal Courts Act 2001 expressly provides that nothing in the Act requires the production of documents which would be prejudicial to the security of the United Kingdom.

31. Nor does the principle of legality point to an absolute bar. The principle of legality, as identified in *ex p Simms* by Lord Hoffmann and as there applied, is a principle that the courts will presume that even the most general words in a statute were intended to be subject to the basic rights of the individual. Even applying the principle more generally, it does not support the argument advanced.

32. Nor as a matter of principle can there be an absolute bar. Public interest immunity exists, as was made clear in *Duncan v Cammell Laird and Company* [1942] AC 624 at 641-2, to protect the interests of the State as a whole. It is not the United Kingdom as a State that is alleged in the present case to have facilitated serious criminality, but the Government of the United Kingdom - the Executive branch of the State. The argument for an absolute bar confuses the interests of the State and the position of one of the branches of the State - the Executive. It must be open to find a way to compel the Executive to act in accordance with the rule of law, or to punish its officials for any wrongdoing or hold it democratically accountable if this can be achieved without endangering the wider interests of the State as a whole where those wider interests may be damaged by disclosure. As we shall discuss below, there are alternatives to the protection of the public interest of the State as a whole, as distinct from the Government, as the Executive branch of the State, such as reference of the matter to Parliament as the legislative branch of the State or to an independent prosecuting authority or by limited disclosure by the judicial branch of the State. Indeed the acceptance of the ability of the Court to provide the summary contained in the redacted passage rather than put the whole of the evidence into the public domain demonstrates that there is no absolute prohibition of restricting the disclosure of evidence of alleged wrongdoing by the Executive branch of the State, the Government or its officials, when the interests of protecting the State as a whole and in particular its citizens require it.

33. However, although we have reached this conclusion, all the submissions put forward in the Special Advocates' powerful argument have great force to the alternative

contention that, in balancing the various interests, the balance comes down firmly in favour of making the redacted paragraphs public. Indeed in the arguments advanced by the media, the emphasis was on the clear balance of the public interest favouring disclosure.

THE APPLICATION OF THE BALANCING TEST

34. We therefore turn to consider, in the novel circumstances of the case, where the balance lies in accordance with the principles set out in *ex p Wiley,* the ministerial statements by the Lord Chancellor and Attorney General to Parliament on 18 December 1996 and the accompanying paper. Four questions arise.

    i) *Is there a public interest in bringing the redacted paragraphs into the public domain?* In the usual case where the issue arises in relation to making material available to a litigant, the first question which arises is formulated in relation to whether there is a duty of disclosure. Such a duty normally arises from the public interest in ensuring justice is done in a particular case by ensuring that the duty of disclosure is satisfied. It seems to us that in the circumstances before us the question is better addressed by examining the public interest that is at the foundation of the duty. As applied to the present issue, it is common ground that the general principle is that justice must be openly conducted and therefore what happens in court must be made public, subject to other public interest considerations. However, as was clear from the submissions of the Special Advocates and the media, it is necessary to consider in a little more detail the public interest in open justice and in particular its importance to the rule of law, free speech and democratic accountability. We do so at paragraphs 35 to 60 below.

    ii) *Will disclosure bring about a real risk of serious harm to an important public interest, and if so, which interest?* This question is derived from the Ministerial Statements by the Lord Chancellor and Attorney General in 1996 and the opinion of the Appellate Committee given by Lord Bingham in *R v H* [2004] UKHL 3 ([2004] 2 AC 134 at paragraph 38(3). In his certificate dated 5 September 2008, the Foreign Secretary made clear that there was a real risk of serious harm to the national security and international relations of the UK in the event that we made public the redacted parts of the judgment. We consider this issue at paragraphs 61 to 80 below.

    iii) *Can the real risk of serious harm to national security and international relations be protected by other methods or more limited disclosure*? The question as to the use of other means has arisen in cases where the issue is making documents available to a litigant. In *ex parte Wiley*, Lord Woolf referred at page 288 and 306-7 to the possibility of seeking alternatives to disclosure, such as providing the information without producing the document or providing only the essential part of what was needed. (See also the observations of Baroness Hale in *Secretary of State for the Home Department v MB* at paragraph 66 and of Lord Brown at paragraph 90.) The opinion of the Appellate Committee given by Lord Bingham in *R v H* referred at paragraphs 36(4) and 36(5) to the questions to be addressed when considering whether alternatives to disclosure could properly protect the interest of the litigant. It was again common ground that the principle should be applied to the question

before us as to whether alternatives would sufficiently protect the identified public interest. In the course of the argument before us various alternatives were canvassed and after the conclusion of the argument action was taken on one of these. We consider these issues at paragraphs 84 to 98 below.

iv) *If the alternatives are insufficient, where does the balance of the public interest lie?* This issue is for decision by the court. In approaching it, we must have particular regard to Articles 6 and 10 of the ECHR and also be satisfied that, if we do not restore the redacted paragraphs, this is a proportionate restriction. We consider these issues at paragraphs 101-107 below.

(1) The public interest in the placing the redacted paragraphs into the public domain: the rule of law, free speech and democratic accountability.

(i) The public hearing

35. It is accepted both as a matter of common law and of obligations under Articles 6 and 10 of the ECHR that courts must do justice in public unless it can be shown justice could not otherwise be done or there are other good reasons for privacy.

36. The reasons most commonly expressed as to why the courts must sit and do justice in public are as a safeguard against judicial arbitrariness, idiosyncrasy or inappropriate behaviour and the maintenance of public trust, confidence and respect for the impartial administration of justice. It has also been noted that sitting in public can make evidence become available. Furthermore the public sitting of a court enables fair and accurate reporting to a wider public and makes uninformed and inaccurate comment about the proceedings less likely. (See *Scott v Scott* [1913] AC 417 and in particular the speeches of Viscount Haldane at 437-438, Earl of Halsbury at p.440, 442, Earl Loreburn at p.449 and Lord Atkinson at p.463; the opinion of Lord Diplock in *AG v Leveller Magazine* [1979] AC 440 at page 477; and the judgment of Lord Woolf MR in *R v Legal Aid Board ex p Todner* [1999] QB 966 at 977.)

37. The longstanding and historic origin of this principle is powerfully set out in the opinion of Lord Shaw in *Scott v Scott*. After criticising the decision of the lower courts to hold the proceedings in camera as

> "constituting a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security",

he explained at p.477.

> "It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps

> the judge himself while trying under trial." " The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."
>
> I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary - and they appear to me still to demand of it - a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law."

38. The requirements of Article 6 of the ECHR have the same effect. For example in *Pretto v Italy* (1984) 6 EHRR 182, the European Court of Human Rights said at paragraph 25 of its judgment:

> "The public character of proceedings before the judicial bodies referred to in Article 6(1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."

(ii) Making decisions and reasons public

39. In addition to the public nature of hearings, there is also the principle that decisions and reasons must be made public. Indeed, as this present judgment demonstrates, it is particularly important that where there is a hearing in private, the court must consider how much of its reasons must be given in public. In *Campbell & Fell v UK* (1985) 7

EHHR 165, the court held that whilst there had been no breach of Article 6 in holding the hearing in private, there had been a breach in not making the decision public:

> "91. The Court has said in other cases that it does not feel bound to adopt a literal interpretation of the words 'pronounced publicly': in each case the form of publication given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of special features of the proceedings in question and by reference to the object pursued by Article 6 in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial."

(iii) Public justice, the rule of law, free speech and democratic accountability

40. Although the general rationale for hearings being in public is as a safeguard against inappropriate judicial behaviour and to ensure that there is public confidence in the system of the administration of justice through judges being seen to conduct hearings fairly and impartially, there are two further reasons for justice to be done in public and decisions made public.

41. First, it must be and is the duty of a judge in upholding the rule of law to ensure that not only is a particular dispute between parties decided openly, but that matters that come to the attention of the court during the course of a hearing of the proceedings which *prima facie* constitute an infringement of the rule of law are dealt with openly. That principle applies the more strongly the more serious is the alleged infringement of the rule of law. As Lord Griffiths observed in *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42 at pp 61-2:

> "…the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

It is the upholding of the rule of law in this way that is a factor of the greatest public interest in this case, given the allegations against officials of the United States Government and the role of officials of the Government of the United Kingdom in facilitating what is alleged.

42. Second, facts relating to issues of public interest which would not otherwise emerge are brought into the public domain. The public sittings of the courts and their public decisions are one of the means through which, in a democratic society information enters into the public domain. Such information can be important in a democracy as forming the basis of free speech that promotes political debate or as a means by which the government can be held to account.

43. In the present case, this second factor is self evidently also of great importance. If the redacted passages containing a gist of what was reported by officials of the United States Government were made public that would enable more informed and accurate public debate to take place and Governments to be held to account. The fact that the

issues raised relate to torture and cruel, inhuman or degrading treatment have a particular resonance as Lord Hoffmann pointed out in *A (No 2)* at paragraph 83:

> "Just as the writ of habeas corpus is not only a special (and nowadays infrequent) remedy for challenging unlawful detention but also carries a symbolic significance as a touchstone of English liberty which influences the rest of our law, so the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system. Not only that: the abolition of torture, which was used by the state in Elizabethan and Jacobean times to obtain evidence admitted in trials before the court of Star Chamber, was achieved as part of the great constitutional struggle and civil war which made the government subject to the law. Its rejection has a constitutional resonance for the English people which cannot be overestimated."

Similarly at paragraph 11 Lord Bingham characterised the common law's condemnation of torture as a "constitutional principle".

44. There has been extensive interest and public debate on the treatment of detainees, interrogation techniques used and rendition by or on behalf of the United States Government in Afghanistan, Pakistan, Guantanamo Bay and elsewhere and any facilitation of such treatment by the United Kingdom Government. As Lord Hope observed in *A (No 2)* at paragraph 126:

> "Views as to where to draw the line differ from state to state. This can be seen from the list of practices authorised for use in Guantanamo Bay by the US authorities, some of which would shock the conscience if they were ever to be authorised for use in our own country."

It is submitted by Mr David Rose that it is evident from our first judgment that the redacted passage is of importance to this public debate, as well as raising issues of democratic accountability, for two particular reasons:

i) There have been numerous statements by officials of the United States Government in the period prior to 20 January 2009 that such detainees have been humanely treated and such treatment has been in accordance with the spirit of the Geneva Conventions.

ii) The SyS has denied that it knew of any ill treatment of detainees interviewed by them whilst detained by or on behalf of the United States Government.

The submissions of the media have also stressed the important public interest that has, in the light of the matters already disclosed in our first judgment, arisen in relation to the Report of the Intelligence and Security Committee which set out the SyS's denial of knowledge of the way the United States treated detainees in 2002 (See paragraph 87 below).

45. Indeed, in our judgement, the publication of the redacted passage which contains a summary of reports made by officials of the United States Government on the treatment of BM, should:

    i) put an end to uninformed speculation as to what was in fact reported by the United States Government in April and May 2002 to have happened to one detainee whilst in incommunicado detention.

    ii) facilitate, on the basis that what is summarised are US Government reports, debate on whether the treatment accorded to detainees was humane and accorded with the spirit of the Geneva Conventions; and

    iii) address the issue of the information provided to the United Kingdom as to techniques employed by the United States Government in 2002 and what was actually known about such techniques by officials of the SyS at the time (See paragraphs 86-87 below).

46. The provision of information of this kind which enables public debate to take place and democratic accountability to be made more effective is one of the bases on which democracy rests. As Lord Bingham made clear in *R v Shayler* at paragraphs 21-26, there can be no assurance that government is carried out for the people unless the facts are made known and issues publicly ventilated.

47. The consideration that information will enable an informed debate to take place will generally make it the more important to ensure that it enters the public domain and is not suppressed. Lord Bridge of Harwich pointed out in *Hector v AG of Antigua* [1990] 2 AC 312 (a case involving the constitutionality of a provision criminalising the making of a false statement likely to undermine public confidence), at p.318 that:

> "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office."

The importance of a democratically elected public body being subject to open uninhibited public criticism was again emphasised by Lord Keith in *Derbyshire County Council v Times Newspapers* [1993] AC 534 at page 547F.

48. Quite apart from these common law principles, the rights under Article 10 of the ECHR also encompass the right to receive and impart information: see Sedley LJ's observation in *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, ([2003] EMLR 88) at paragraph 55.

> "Art. 10 of the ECHR is not just about freedom of expression. It is also about the right to receive and impart information, a right which (to borrow Lord Steyn's metaphor in *ex p Simms* at 126) is the lifeblood of democracy."

49. The fundamental nature of the rights under Article 10 are such that restrictions on the freedom of speech, political debate and the information needed to enable such debate to take place can only be justified after careful consideration by the courts: see *Castells v Spain* (1992) 14 EHRR 445 at paragraphs 42-46. In *R v BBC ex parte Pro Life Alliance* [2003] UKHL 23, ([2004 1 AC 225), Lord Nicholls made clear at paragraph 6:

> "Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts. The courts, as independent and impartial bodies, are charged with a vital supervisory role. Under the Human Rights Act 1998 they must decide whether legislation, and the conduct of public authorities, are compatible with Convention rights and fundamental freedoms. Where there is incompatibility the courts must grant appropriate remedial relief."

(iv) The role of the media

50. We accept the submission that the media has a vital role in communicating what takes place in court and the decision of the court for all the reasons we have set out. It has been acknowledged in many well known passages in addition to those to which we have referred at paragraph 36. (See for example *R v Felixstowe Justices ex p Leigh* [1987] 1 QB 582, *A-G v Guardian Newspapers* [1990] 1 AC 109 at 183, and *Observer and Guardian v UK* [1991] ECHR 1385 at paragraph 13.) They are, as Lord Steyn explained in *Re S (A child)* [2005] 1 AC at pages 602-4 the watchdog of the public.

51. The importance of this role to the proper functioning of a democracy was elucidated by Lord Bingham in *McCartin, Turkington Breen v Times Newspapers* [2001] AC 277, when giving reasons why he considered a press conference was a public meeting within the provisions of the Defamation Act (Northern Ireland) 1955, at p 290:

> "In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course

> the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.
>
> In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule. ”

52. Furthermore, as was pointed out by Lord Bingham at paragraph 21 of *R v Shayler:*

> “Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred. The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.”

53. Indeed, as has been said in *Arlidge and Eady on Contempt* at page 80:

> “It has become apparent that the courts (and indeed Parliament) are now willing to accord to the press a ‘constitutional’ significance that was largely unrecognised at common law.”

The importance to the rule of law, freedom of speech and democratic accountability of the media’s role in freely reporting what happens in court and the decisions of the court demonstrates such constitutional significance.

(v) Conclusion on the importance of making the redacted paragraphs public

54. For all the reasons set out in the preceding paragraphs, it is our clear view that the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture and its historic link from the seventeenth century in this jurisdiction to the necessity of open justice.

(vi) The ordinary exceptions

55. However the principle of justice being done in public and judgments of the court being made public are subject to ordinary and everyday exceptions for the reasons explained by Lord Diplock in *A-G v Leveller:*

> "However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice"

(vii) The position of those directly involved in these proceedings

56. Before turning to the public interest of national security relied upon by the Foreign Secretary, it is necessary to consider whether the interests of justice in relation to those directly involved in this litigation militate against or support the conclusion we have reached.

(a) The position of BM

57. We have, as indicated at paragraph 10 above, kept private for the time being at the request of all the parties an annex to our third judgment. We acceded to the request because to have made that part of the judgment public would have frustrated a remedy BM was seeking, but we did so only on the basis that the public interest in the administration of justice required us to make that part of that judgment available as soon as circumstances permitted.

58. The claim by BM in these proceedings was for the information sought to be made available only for use by his lawyers in the proceedings under the United States Military Commissions Act. He did not seek any wider disclosure and indeed relied heavily on the fact that his US lawyers were subject to conditions of secrecy in the United States and would be subject to implied undertakings of confidentiality under the law of England and Wales. We do not consider that the ability of BM to use the documents for the purposes of the actual proceedings under the Military Commissions Act would be affected by keeping private the redacted paragraphs. Indeed the statement by Ms Crawford, the Convening Authority, published on 14 January 2009, to which we referred at paragraph 12, makes clear that private provision of information is effective in the procedure under the Military Commissions Act. We therefore accept the submission of the Foreign Secretary that the decision in *Secretary of State for the Home Department v MB* is of no real assistance on the issue of making public the redacted passage.

59. Nonetheless we cannot accept the Foreign Secretary's submission that the public has no right to the information withheld because BM only sought the information (which he now has) in confidence and the proceedings in the United States will be unaffected by our decision. This ignores the vital public interest in the open administration of justice. It is important to record that instructions have been expressly given that BM wishes the passages to be made public. We should therefore take into account the

view often held by a person who considers that he has been the victim of serious injustice and wrongdoing, that he is entitled to have the evidence relating to that injustice and wrongdoing made public.

(b) The position of Witness B and other officials of the SyS

60. We have firmly in mind the need to protect the legitimate interests of Witness B and other members of the SyS. However, we cannot conceive how it can be argued in any way that publication of the redacted paragraphs could prejudice them in respect of any potential criminal investigation or any possible trial.

(2) The public interest in keepin g the information out of th e public domain: national security and international relations

(i) The Certificates provided by the Foreign Secretary

61. We therefore turn to consider the public interest that the Foreign Secretary considers could be seriously damaged by making the redacted paragraphs public.

62. The Foreign Secretary's certificates, particularly the certificate of 5 September 2008, make clear that the United States Government's position is that, if the redacted paragraphs are made public, then the United States Government will re-evaluate its intelligence sharing relationship with the United Kingdom with the real risk that it would reduce the intelligence provided. It was and remains (so far as we are aware) the judgement of the Foreign Secretary that the United States Government might carry that threat out and this would seriously prejudice the national security of the United Kingdom.

(ii) The correct approach

63. In *SSHD v Rehman* [2001] UKHL 47 ([2003] 1AC 153), the issue before the House of Lords was the proper approach of SIAC to the determination of whether the presence in the United Kingdom of a foreign national was likely to be a threat to national security. The opinions made clear that although SIAC had powers of review, due weight had to be given to the assessment and conclusions of the Secretary of State in the light of his responsibilities, the means at his disposal of being informed of and his understanding of the problems. It was made clear that he was in the best position to judge what national security required. (See Lord Slynn of Hadley at paragraph 26 and Lord Steyn at paragraphs 28 and 31). As Lord Hoffmann explained, under our constitution issues of national security are issues of judgement and policy for the Executive branch of the State and not for judicial decision. A court should not therefore differ from the opinion of the Secretary of State on such an issue (see paragraphs 50-54), provided there is an evidential basis for the opinion of the Secretary of State. At paragraph 57, he said:

> "This brings me to the limitations inherent in the appellate process. First, the Commission is not the primary decision-maker. Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission, despite its specialist

> membership, cannot match. Secondly, as I have just been saying, the question at issue in this case does not involve a yes or no answer as to whether it is more likely than not that someone has done something but an evaluation of risk. In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained. Such restraint may not be necessary in relation to every issue which the Commission has to decide. As I have mentioned, the approach to whether the rights of an appellant under article 3 are likely to be infringed may be very different. But I think it is required in relation to the question of whether a deportation is in the interests of national security.
>
> "58 I emphasise that the need for restraint is not based upon any limit to the Commission's appellate jurisdiction. The amplitude of that jurisdiction is emphasised by the express power to reverse the exercise of a discretion. The need for restraint flows from a common-sense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and the Commission."

In *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, it was again emphasised that the duty of decision in relation to national security and foreign relations lay with the Executive branch of the State. (See paragraph 23)

64. The judgement as to whether the national security of the United Kingdom will be compromised in the circumstances described is a matter on which the Foreign Secretary is the expert and not ourselves.

(iii) The challenge made by the Special Advocates

65. It was submitted by the Special Advocates that we should treat the statement of the Foreign Secretary on the risk to the relationship with circumspection as the Foreign Secretary and those advising him have a conflict of interest. It was contended that the SyS and the SIS would not give impartial advice as they were at risk of criminal or civil liability for their actions in respect of BM. It was suggested that we should call for and examine the submissions and advice given to the Foreign Secretary and we should, in the light of the reaction to the disclosures in Canada and Australia, make our own assessment.

66. We accept that it is open to a court to consider the statement of a Secretary of State where there is no evidential basis for the assessment or there is evidence of a lack of good faith. In examining this issue, we have well in mind the observations of Lord Bingham in *R v Shayler* at paragraph 33:

> "… the court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If

> the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different."

(iv) Our view at the time of the publication of our first judgment in August 2008.

67. In considering the submission, we have reminded ourselves of our initial view that the redacted paragraphs should form part of our first open judgment as essential to open justice. It was also our view that making clear what in fact was reported by officials of the United States Government would prevent the uninformed speculation to which we have referred and which might be damaging to the SyS.

68. That view was formed in the light of the fact that there was nothing in the redacted paragraphs that would identify any agent or any facility or any secret means of intelligence gathering. Nor could anything in the redacted paragraphs possibly be described as "highly sensitive classified US intelligence." It followed that it was (and remains) our view that the ordinary business of intelligence gathering would not be affected by putting into the public domain the redacted paragraphs as they contain only a short summary of what was reported to the United Kingdom authorities by the officials of the United States Government as to what they say happened to BM during his detention in Pakistan in April and May 2002.

69. Moreover, in the light of the long history of the common law and democracy which we share with the United States, it was, in our view difficult to conceive that a democratically elected and accountable government could possibly have any rational objection to placing into the public domain such a summary of what its own officials reported as to how a detainee was treated by them and which made no disclosure of sensitive intelligence matters. Indeed we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence contained in reports by its own officials or officials of another State where the evidence was relevant to allegations of torture and cruel, inhuman or degrading treatment, politically embarrassing though it might be.

70. We had no reason at that time to anticipate there would be made a threat of the gravity of the kind made by the United States Government that it would reconsider its intelligence sharing relationship, when all the considerations in relation to open justice pointed to us providing a limited but important summary of the reports.

71. Since our initial view was formed, other matters have lent support to it:

   i) It is accepted that the reports summarised in the redacted paragraphs gave rise to an arguable case of cruel, inhuman or degrading treatment and torture.

ii) No argument has been made that any of the ordinary considerations relating to the secrecy of intelligence gathering (such as the identity of agents or the location of facilities) would be affected.

iii) No reason has emerged, particularly in the light of the statement made by Ms Crawford to which we have referred at paragraph 12, why the United States Government has not itself put the matters contained in the redacted passage into the public domain. There has been ample time for the United States Government to do so.

In the circumstances, it is still difficult to understand how objection can properly be made to a court in the United Kingdom doing so in all the circumstances we have set out.

72. It therefore would have remained our view, absent the evidence adduced by the Foreign Secretary as to the position taken by the Government of the United States, that there was every reason to put the paragraphs into the public domain. The suppression of reports of wrongdoing by officials (in circumstances which cannot in any way affect national security) would be inimical to the rule of law and the proper functioning of a democracy. Championing the rule of law, not subordinating it, is the cornerstone of a democracy. Moreover as the Foreign Secretary has made clear in his Certificate of 5 September 2008, the protection of human rights is central to the efforts of the United Kingdom to counter radicalisation.

(v) The judgement of the Foreign Secretary is based on evidence

73. However, the evidence since made available to us has made clear the position taken by the United States Government and the gravity of the threat it has made.

74. It is self evident that liaison with foreign intelligence services, including the provision of information or access to detainees held by foreign governments, lies at the heart of the protection of the national security of the United Kingdom at the present time, particularly in the prevention of terrorist attacks in the United Kingdom. If the value of information is properly to be assessed by the United Kingdom intelligence services, it is also essential the intelligence services know the circumstances and means by which it was obtained. There is powerful evidence that intelligence is shared on the basis of a reciprocal understanding that the confidence in and control over it will always be retained by the State that provides it. It is a fundamental part of that trust and confidentiality which lies at the heart of the relationship with foreign intelligence agencies. This is particularly the case in relation to the United States where shared intelligence has been developed over 60 years. Without a clear understanding that such confidence will not be breached, intelligence from the United States and other foreign governments so important to national security might not be provided. The public of the United Kingdom would be put at risk. The consequences of a reconsideration of and a potential reduction in the information supplied by the United States under the shared intelligence relationship at this time would be grave indeed.

75. It is evident from the materials with which we have been provided that the assessment of the risk to the intelligence relationship with the United States was made by the Foreign Secretary in good faith and on the basis of evidence including statements made by officials of the United States Government who held office at the highest

levels in the period from July to October 2008. Indeed there is evidence for the Foreign Secretary's further view that the United States Government would perceive making public the redacted passages as "gratuitous".

76. The only relevant considerations are that there is clear evidence that supports the Foreign Secretary's judgement that the threat is real and serious damage to national security may result and that that judgement was made in good faith. The powerful submission of the Special Advocate that the position of the United States Government is demonstrably unreasonable or irrational matters not; it is the judgement of the Foreign Secretary as to the reality of the threat not its rationality that is material. For similar reasons we cannot regard as in any way relevant to our decision on this issue the Special Advocates' submission that the position of the Government of the United States is evidently only motivated by the desire to conceal evidence of wrongdoing where disclosure would be politically embarrassing. Nor can the principle that there is no confidence in wrongdoing be relevant to the assessment of the likely damage to national security. Nor can we accede to the submission that the Foreign Secretary should resist the threat made. It is both irrelevant and unrealistic. It lies solely within the power of the United States to decide whether to share with the United Kingdom intelligence it obtains and it is for the Foreign Secretary under our constitution, not the courts, to determine how to address it.

77. In short, the judgement of the Foreign Secretary has been made in good faith and is based on evidence that the threat is real; the motives of the United States Government are irrelevant. It is the actuality of the threat that is alone relevant to national security.

78. It was submitted to us by Mr David Rose that the situation had changed significantly following the election of President Obama who was avowedly determined to eschew torture and cruel, inhuman and degrading treatment and to close Guantanamo Bay. We have, however, been informed by counsel for the Foreign Secretary that the position has not changed. Our current understanding is therefore that the position remains the same, even after the making of the Executive Orders by President Obama on 22 January 2009 to which we have referred at paragraph 9 above. The concern of the United States pertains not to disclosure of the treatment of detainees that might be levelled against the administration of President Bush, but to the disclosure of information obtained through intelligence sharing. However, as we have observed the United States Government will still not make the information public.

(vi) Our conclusion

79. There is, in our view, no basis on which the judgement of the Foreign Secretary as to the danger to national security can properly be questioned in these circumstances.

80. We therefore proceed to consider where the balance of the public interest lies on the basis of his judgement that, if the redacted paragraphs were placed into the pubic domain, the future intelligence relationship between the United Kingdom and the United States would be reconsidered and there is a real risk that national security would be compromised; and that there is a further risk to other intelligence sharing arrangements. It is well recognised that such considerations can also be taken into account in relation to the rights under Articles 6 and 10 of the ECHR: see *R v Shayler* [2002] UKHL 11 ([2003] 1 AC 247) at paragraph 26.

(vii) The view of the Foreign Secretary on the balance of the public interest

81. The Foreign Secretary has expressed the view in his certificate of 5 September 2008 that the balance of the public interest lies against disclosure. In reaching that view he took into account the allegations of mistreatment made by BM, the importance of underlining the UK's abhorrence of torture and cruel, inhuman or degrading treatment. He accepted the importance of open public debate on these issues, but he considered that dialogue with the United States on such matters was best undertaken in confidence. Balancing those considerations against the real risk of serious damage to national security and his view that no further benefit would be secured for BM, he considered that the balance lay against disclosure.

82. However, it is common ground that his view on where the balance of the public interest lies is not conclusive. Although the Foreign Secretary has expressed his view of the balancing, the rule of law requires that the determination of where the balance lies is ultimately for the decision of the court. We must do so, however, on the basis of his judgement on that part of the public interest that relates to national security issues. We must also attach considerable weight to his judgement of the balance of the public interest. (See *Conway v Rimmer* at p 952B) Attaching weight to the view of the Foreign Secretary in this case is relevant, not only because we must act on the basis of his judgement as to the real risk to national security, but also because we should have regard to his actions, as set out in our previous judgments, where on behalf of the United Kingdom Government, both he and his Legal Adviser, Mr Bethlehem QC, have made so clear the United Kingdom's position on the abhorrence of torture and cruel, inhuman or degrading treatment and have gone to considerable lengths to assist BM.

83. But before we consider where the balance of the public interest lies, it is necessary to see if there are alternatives other than making the redacted paragraphs public which will protect the public interest in open justice, the rule of law, free speech and democratic accountability without damaging national security.

(3) The alternatives to disclosure of the redacted paragraphs

84. As is clear from the authorities to which we have referred at paragraph 34.iii), it is sometimes possible to protect the interests of a litigant and the interests of the State by some means other than full disclosure. It is common ground we should examine a similar approach to the present issue. Indeed the formulation of the redacted paragraphs was our initial view of the balance of the needs of open justice, free speech, the rule of law and accountability and interests of national security. In argument before us, three other means were put forward - reference to the ISC, a review by the Director General of the SyS and reference to the Attorney General.

(a) *The ISC.*

85. The ISC was established under s.10 of the Intelligence Services Act 1994 to examine the expenditure, administration and policy of the SyS and the SIS. It is required to make an annual report on the discharge of its functions to the Prime Minister and the Prime Minister is under a duty to lay the report before Parliament, subject to his right to exclude from the report any matter that may be prejudicial to the continued discharge of the functions of the SIS or SyS.

86. As is clear from the narrative set out in paragraph 9 of our first judgment, the ISC has very carefully examined issues relating to the treatment of detainees arrested in Pakistan and Afghanistan or held in Guantanamo Bay after the US military action commenced in Afghanistan in 2001. It has published two Reports on these matters – 1 March 2005 (Cm 6469) and July 2007 (Cm 7171). Highly material to the present issue is the reference at paragraph 54 of the ISC Report of 1 March 2005 to a United States report in June 2002 of treatment accorded to a detainee in Afghanistan, including hooding, withholding of blankets and sleep deprivation. We were told this US report was a public report. Paragraph 55 of the same ISC Report referred to a SyS officer reporting to senior management in July 2002 "that whilst in Afghanistan, a US official had referred to 'getting a detainee ready', which appeared to involve sleep deprivation, hooding and the use of stress positions.

87. The ISC considered the case of BM in its Report of July 2007 at paragraphs 98 to 106 after the allegations of torture and cruel, inhuman and degrading treatment made by BM had been made known to the ISC. The Report records at paragraph 105 that the Director General of the SyS expressed regret that assurances as to BM's treatment had not been sought from the United States; the Report expressed the view that this was understandable given the lack of knowledge at the time of any possible consequences of United States custody of detainees.

88. It is now clear that the 42 documents disclosed as a result of these proceedings were not made available to the ISC. The evidence was that earlier searches made had not discovered them. The ISC Report could not have been made in such terms if the 42 documents had been made available to it. However, as a result of these proceedings, the 42 documents have since been supplied to the ISC along with our closed judgment and the transcript of Witness B's open and closed evidence.

89. Although the express provisions of the Act do not, as the Special Advocates rightly submitted, permit the ISC to investigate particular cases, we understand that with the agreement of the Prime Minister, it has extended its remit to do so, as part of its general Parliamentary scrutiny of the operation of the SyS and the SIS. This is an important constitutional development as the ISC is being made a powerful means of ensuring that the SIS and SyS can be made democratically accountable for their conduct and of ensuring that they act in accordance with the rule of law and do not facilitate action by other States which is contrary to our law and values.

90. We also have little doubt that the ISC, in the light of the information from these proceedings, will conduct a further investigation into the illegal incommunicado detention of BM, his treatment in April and May 2002 and the role of the SyS in relation to it. When it does so, it will be able to ask searching and difficult questions of witnesses from the SyS and SIS on the very important issues identified. It will also be in a position to know from the 42 documents the kind of documentation that may be held in relation to other detainees and which it should therefore request. There can be no doubt that it is in a position to conduct a most thorough and wide ranging enquiry. As an important all party Parliamentary Committee possessed of the information available to us and in the position to seek much more, the ISC will be in a position, if the results of their investigation so require, to hold those in charge of the SIS and SyS and her Majesty's Government to account in Parliament in relation to all the matters, including those set out in the redacted paragraphs. All of this can be done

without exposing the United Kingdom to the real risks identified by the Foreign Secretary. This is a very significant means of democratic accountability.

91. However, s.10 of the Act permits the Prime Minister to delete from the annual report any matter which may be prejudicial to the continued discharge of the functions of the SyS and the SIS; this practice has been followed in relation to the specific reports to which we have referred. Thus, although the ISC will, as a result of what has emerged from these proceedings, be able to hold Her Majesty's Government and others to account for the actions of the SyS or SIS (if it finds on investigation there is reason to do so), it therefore will not be in a position to put the matters covered in the redacted paragraphs into the public domain, given the view that the Foreign Secretary has set out in his certificates to the Court, unless the United States Government changes its position. Thus information necessary for the purposes of debate on the important issues of torture and cruel, inhuman or degrading treatment or compliance by other states with provisions of international law cannot be brought into the public domain through the ISC.

(b) *A reference to the Director General of the Security Service, the Attorney General or the Director of Public Prosecution*

92. The longstanding practice of the courts is that where an arguable case of serious criminal conduct is disclosed by the evidence in the course of a civil trial, the court will consider referring the matter to the relevant prosecuting authority. It is part of the court's function in upholding the rule of law.

93. Where there are allegations of breaches of Article 3 of the ECHR, it is now well established that the State has a duty to investigate in order to punish those responsible for any breaches of the Article. (See the authorities cited in *Lester & Pannick*: *Human Rights Law & Practice,* paragraph 4.3.7.) In *Assenov v Bulgaria* (1998) 23 EHHR 652, the European Court of Human Rights observed at paragraph 102:

> "The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms in [the] Convention", requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible … If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."

94. It was suggested to us in the course of argument that the public interest in investigating the allegations that may give rise to a case of criminal conduct could be satisfied by the Foreign Secretary requiring the Director General of the SyS to

investigate and report on those allegations. We accept that the Director General would carry out a detailed and thorough investigation. However, it is difficult to see how such an investigation of wrongdoing would have a sufficient degree of the independence necessary to command public respect with which any official and effective investigation of allegations which may give rise to a case of criminal conduct must be carried out. Nor would the Foreign Secretary be in a different position in relation to putting matters into the public domain for the other purposes to which we have referred.

95. The question was then raised as to whether it would not be more appropriate that any such investigation should be carried out by Her Majesty's Attorney General or the Director of Public Prosecutions. If so, the matter could be referred to them for investigation and, if the evidence was sufficient, to consider a prosecution.

96. Although the Attorney General is a Minister of the Crown and thus a member of the Executive branch of the state whose officials are alleged to have facilitated cruel, inhuman or degrading treatment or torture, the Attorney General continues, at present, to have a unique constitutional role as an independent guardian of the public interest in relation to breaches of the criminal law. The Attorney General acts in the interests of justice and not in the role of a member of the Executive branch of the State when determining the conduct of an investigation and whether any prosecution should be brought. The Attorney General is under a duty to take his or her own independent decision on such matters. The classic statement of the principle is that of Sir Hartley Shawcross, as Attorney General, to the House of Commons in 1951:

> "I think the true doctrine is that it is the duty of an Attorney General …to acquaint himself with all the relevant facts… and with any other consideration affecting public policy…..he may, although I do not think he is obliged to, consult with any of his colleagues in the Government and indeed he would in some cases be a fool if he did not…The assistance of his colleagues is confined to informing him of particular considerations… it must not consist in telling him what the decision ought to be. The responsibility for the ultimate decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter."

97. In the light of these submissions and the discussion in the in camera hearings, we were informed on 28 October 2008, after the conclusion of the hearing, but before we wrote to invite submissions from the media, that the Home Secretary had referred to Her Majesty's Attorney General the question of possible criminal wrongdoing to which these proceedings had given rise. The Attorney General had been supplied with the open and closed judgments, the transcript of all the evidence given by Witness B, who had given evidence before us, the other evidence and submissions made to us and the Foreign Secretary's Certificates together with their sensitive schedules.

98. It follows therefore that, as a result of these proceedings, a means of securing the public interest in upholding the rule of law by the United Kingdom has been set in motion by the reference of the issues in this matter to the Attorney General. Her investigation will not only discharge the obligation to investigate issues of torture and

cruel, inhuman or degrading treatment, but if the investigation shows that there is a case against officers of the SyS or others, the Attorney General will be under a duty to consider the initiation of a prosecution.

99. However, if we conclude that the balance of the public interest is against bringing into the public domain the gist of the matters contained in the redacted paragraphs and on which a prosecution would in part rest, it is difficult to see how in the course of any prosecution the matters contained in the redacted paragraphs could enter the public domain, given the danger to national security, unless the United States Government changes its position. If therefore part of any trial took place in camera to safeguard national security, that would plainly not be inimical to the rule of law, as there would be a full trial of the issues and if there was a conviction, the offenders would be properly punished. However, information necessary for the purposes of debate on the important issues of torture and cruel inhuman or degrading treatment or compliance by other states with international law could not be brought into the public domain in this way.

(iv) A further redaction of the content of the paragraphs

100. We cannot see in the light of all the evidence before us how a further redaction of the information could be achieved in such a way that meets the public interest in open justice, public debate and democratic accountability without endangering the threat to national security identified by the Foreign Secretary.

(4) The balance of the competing public interests.

101. As none of these alternatives addresses all the aspects of the public interest we have identified in favour of disclosure of the redacted paragraphs, we therefore turn to the final question as to where the balance lies, paying due regard to Articles 6 and 10 of the ECHR.

102. We have already expressed at paragraph 54 our clear view that the requirements of open justice, the rule of law, free speech and democratic accountability demonstrate the very considerable interests in making the redacted paragraphs public. However, although the open conduct of justice is under our constitution one means of achieving these purposes, our constitution provides other means by which the rule of law, free speech and democratic accountability can be safeguarded given what has already been placed into the public domain and what has resulted in consequence of these proceedings to date.

i) The Government and the SyS can be held to account through the ISC in respect of the matters set out in the redacted paragraphs in the manner we have already set out at paragraphs 85 to 91 above.

ii) A criminal investigation of the matters set out in the redacted paragraphs has, as set out in paragraphs 92 to 99 above, been initiated by the Attorney General who, if the evidence warrants, will be able to consider prosecution of any infraction of the criminal law by officials of the United Kingdom Government.

Neither of these entails endangering national security

103. Nonetheless as we have explained, these means do not address two other aspects of the public interest in upholding the rule of law and democratic principles:

   i) Provision of information that might enable others to be prosecuted in other jurisdictions.

   ii) Provision of information for an informed debate to take place on the issues of torture and cruel, inhuman or degrading treatment

104. As to the first,

   i) As we set out at paragraph 142 of our first judgment, the prohibition against State torture is a peremptory norm of the *jus cogens* which imposes obligations owed by States *erga omnes* to all other States which have a corresponding right an interest in compliance. Although acts constituting torture have been regarded with particular abhorrence, the acts of a State comprising cruel, inhuman or degrading treatment are the subject of international prohibition and stigmatism (see paragraph 143 of our first judgment).

   ii) It may be deduced from the authorities to which we referred at paragraphs 172-178 of our first judgment (in particular paragraphs 155-7 of the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija*, Case No. IT - 95- 17/T 10 (unreported), 10 December 1998, and paragraph 159 of the Advisory Opinion of the International Court of Justice in *The Palestine Wall Case*) that there is no duty on a State to make available information to a person who claims to be a victim of torture. However the Torture Convention imposes extensive obligations on Contracting States to bring to justice those who torture in an official capacity.

   iii) Although that jurisdiction in respect of torture is exercisable in the United Kingdom under s.134 of the Criminal Justice Act 1994 in the manner we have described and steps have been taken in respect of it, there remains the question of proceedings in other jurisdictions.

   iv) None of the documents disclosed to us identified any officials of the United States Government or other Governments who are alleged to have carried out acts which, depending on the intensity, duration and cruelty, might amount to torture; nor is there identified any person who consented to them or acquiesced in them. All such information was redacted from the documents supplied to us. It is therefore unrealistic to suggest that the provision of the information in the redacted paragraphs would assist in the prosecution of others elsewhere.

   v) Thus as a matter of reality, upholding the rule of law by investigation and, if the results of the investigation require it, prosecution, is most unlikely to depend on making the information public.

105. As to the second consideration,

   i) It is clear from documents such as the ISC reports to which we referred at paragraph 86 above, the reference to the "frequent flier programme" (as a deeply unattractive euphemism for sleep deprivation) in the proceedings in

Canada in *Khadr* and other documents referred to in the submission made by Mr David Rose that there is already much in the public domain about the treatment of those detained by the United States Government and the techniques used during their interrogation in circumstances similar to those in which BM was detained.

ii) The report of the statement of Ms Susan Crawford in relation to Al Qahtani (referred to at paragraph 12) has provided confirmation from a senior official of the United States Government of the treatment of detainees in the light of which the issues raised at paragraphs 44 and 45 can be better understood.

iii) It is plainly right that the details of the admissions in relation to the treatment of BM as reported by officials of the United States Government should be brought into the public domain. However, the media, in their clear reports of the other matters to which we have referred in subparagraph i) of this paragraph, have put sufficient into the public domain to enable informed public debate to occur even though that debate would be better informed by the information in the redacted paragraphs.

iv) There is one further consideration to which we must return. As we have indicated, the position of the SyS and SIS and its officials would be better understood by the public if the redacted paragraphs could be put into the public domain and the details of the reports of the treatment of BM made known. As Miss Dinah Rose QC submitted, it would end speculation and prevent assumptions that the reports of the treatment of BM contained descriptions of treatment that were worse than what was in fact reported. However, as it properly falls into matters which it was for the Foreign Secretary to consider in reaching his judgement on issues of national security, it would not be right for us to take it into account in the balancing exercise.

Conclusion

106. In the judgement of the Foreign Secretary there is a real risk that, if we restored the redacted paragraphs, the United States Government, by its review of the shared intelligence arrangements, could inflict on the citizens of the United Kingdom a very considerable increase in the dangers they face at a time when a serious terrorist threat still pertains. As Lord Hope made clear at paragraph 99 of *A v Secretary of State for the Home Department (No 1)* [2004] UKHL 56 ([2005] 2 AC 68):

> "It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle"

107. How is this judgement of the Foreign Secretary in relation to the public interest in national security to be balanced against the public interest in open justice as safeguarding the rule of law, free speech and democratic accountability? In our judgement the decisive factors are the other means which have resulted from these proceedings for safeguarding democratic accountability and the rule of law (the reference of the matter to the ISC and the Attorney General) and what has already

been placed into the public domain which can engender debate. In the circumstances now prevailing, the balance is served by maintaining the redaction of the paragraphs from our first judgment. In short, whatever views may be held as to the continuing threat made by the Government of the United States to prevent a short summary of the treatment of BM being put into the public domain by this court, it would not, in all the circumstances we have set out and in the light of the action taken, be in the public interest to expose the United Kingdom to what the Foreign Secretary still considers to be the real risk of the loss of intelligence so vital to the safety of our day to day life. If the information in the redacted paragraphs which we consider so important to the rule of law, free speech and democratic accountability is to be put into the public domain, it must now be for the United States Government to consider changing its position or itself putting that information into the public domain.