AMNESTY INTERNATIONAL
PUBLIC DOCUMENT

10 February 2009
AI Index: EUR 45/001/2009

The case of Binyam Mohamed: 'championing the rule of law'?

The case of Binyam Mohamed presents the governments of both the United Kingdom (UK) and the United States of America (USA) with an urgent challenge. Will they live up to recent commitments to restore respect for human rights to the heart of their efforts to combat terrorism? Or will they continue to resort to secrecy in the name of national security to obstruct attempts to bring public scrutiny and accountability to bear on evidence of serious human rights violations?

On 15 January 2009 the UK Foreign Secretary, David Miliband, wrote in a newspaper article:

> *We must respond to terrorism by **championing the rule of law, not subordinating it, for it is the cornerstone of the democratic society**. We must uphold our commitments to human rights and civil liberties at home and abroad.*[1]

On 4 February 2009 the High Court in London delivered a judgment in which almost identical language was used:

> *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**.*[2]

The Court did so in the course of deciding not to make public a number of paragraphs from an earlier judgment, prepared by the judges hearing the case, summarizing 42 secret intelligence documents that the Court found would support an "arguable case [that Binyam Mohamed had been subjected to] cruel, inhuman or degrading treatment or torture" while in custody in Pakistan. The summary was described by the Court as:

> *a summary of reports by the United States Government to the [UK intelligence and security agencies, often referred to as MI5 and MI6] on the circumstances of [Binyam Mohamed's] incommunicado and unlawful detention in Pakistan and of the treatment accorded to him by or on behalf of the United States Government.*

The Court was not considering releasing the documents themselves, but only its own summary of them. The Court reaffirmed that in its view it had carefully drafted the summary to avoid revealing any information which could harm the national security of the UK or the USA, and that it did not name any individual agents or disclose the location of any facility. Thus, said the Court, nothing "in the redacted paragraphs [could] possibly be described as 'highly sensitive classified US intelligence'", and as a result, "the ordinary business of intelligence gathering would not be affected by putting into the public domain the redacted paragraphs".

The Court described in emphatic terms the strong public interest in allowing this summary to become known:

> *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*

[1] Link to '"War on terror"' was wrong', *The Guardian*, 15 January 2009: http://www.guardian.co.uk/commentisfree/2009/jan/15/david-miliband-war-terror

[2] *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin), para. 72; link to http://www.bailii.org/ew/cases/EWHC/Admin/2009/152.html

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.

Yet the Court ultimately decided against ordering publication, as it understood lawyers acting for the UK Foreign Secretary to have told the court that there was a threat or risk that the USA would drastically reduce or halt cooperation with UK intelligence services if the summary were published; and that this would endanger the national security of the UK.

The Court saw evidence which, it found, supported the Foreign Secretary's opinion. The Court considered it was not within its powers to evaluate whether the US government's position was unreasonable or irrational, whether the motivation of the USA was to cover up wrongdoing, nor to consider whether the Foreign Secretary should resist the threat.

It also specifically noted that counsel for the Foreign Secretary had informed the Court that the position of the new administration in the United States was no different from that of the previous administration:

It was submitted to us […] 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.

After this judgment was given on 4 February, considerable doubt was thrown on whether the UK had actually taken any steps to find out whether the position of the USA had changed with the coming to power of a new administration – so much so that the lawyers for Binyam Mohamed have applied to the High Court requesting it to reconsider its judgment, in part on the grounds that:

No approach had been made by the UK Government to the new US administration of President Obama, and no representations had been made to the Court about the attitude of the new administration.[3]

Regardless of the ultimate outcome of the case in the UK courts, there is an opportunity here which the new administration in the USA must not miss. The new administration can and must abandon its predecessor's indefensible opposition to the publication of information about the circumstances of Binyam Mohamed's incommunicado and unlawful detention in Pakistan, and about the way he was treated in detention – information which, as the High Court said, is "so important to the rule of law, free speech and democratic accountability".

The immediate response has not been encouraging. On 5 February, the US State Department spokesman said that "we really thank the United Kingdom for its continued commitment to protecting sensitive national security information and to preserve our long-standing intelligence-sharing relationship", adding that "the British have been very steadfast in agreeing to preserve the confidentiality of the intelligence that we share with them"[4].

This is not the change that the world is hoping to see after President Obama's welcome assertion in his inaugural address that governments can and must "reject as false" the choice between safety and ideals. The time is long past for the facts of Binyam Mohamed's case and others like it to be put in the public domain, and for those responsible for grave human rights violations to be brought to justice. Instead of prolonging the secrecy which has for too long frustrated all efforts to secure accountability for violations committed in the name of counter-terrorism, both the UK and the US governments should establish without further delay independent investigations into the programme of rendition and secret detention: in the case

[3] Link to http://www.leighday.co.uk/documents/Binyam%20Mohamed%20submissions%205-2-09%20-2.doc
[4] Link to State Department Press Briefing 5 February 2009, http://www.state.gov/r/pa/prs/dpb/2009/02/116142.htm

of the USA, Amnesty International is calling for a full independent commission of inquiry to be set up into all aspects of the USA's detention and interrogation practices in the context of what the Bush administration called the "war on terror"; in the UK's case, the investigation should look into allegations of UK involvement in the programme, including allegations that the UK was complicit in the torture and ill-treatment of Binyam Mohamed.

Given the findings of the High Court in this case, Amnesty International believes that its summary of the evidence of torture or other ill-treatment should be published in order to give effect to the right of the public to know the truth about any grave human rights violations committed in its name.

The UK Foreign Secretary should not shelter behind the possibility of some reduction in cooperation between US and UK intelligence agencies, whether in the form of specific threats or a general risk, to allow the UK to be party to the concealing of such evidence from the public. The Foreign Secretary should undertake to exert what influence he can to persuade his US counterparts to abandon their objection to the publication of this information.

At the same time, the Foreign Secretary should acknowledge that the information in question here is not solely, in his words, "American paragraphs—American evidence"[5]; it is information which could show the extent of the knowledge that the UK intelligence agencies had of the conditions in which Binyam Mohamed was detained, at a time when a UK agent travelled to Pakistan to interview him, and when the UK agencies were supplying their US counterparts with information for use in the continued interrogation of Binyam Mohamed. As the High Court said in an earlier decision, "the relationship of the [UK] Government to the [US] authorities in connection with [Binyam Mohamed] was far beyond that of a bystander or witness to the alleged wrongdoing"[6].

The facts[7] of Binyam Mohamed's case – as far as they are known – are disturbing. The way in which those facts have become public is both a testament to the tireless efforts of family members, lawyers, journalists and human rights activists, and an indictment of the inadequacy of the official investigations instigated to date.

In 2007 the Intelligence and Security Committee (ISC) – a committee of UK parliamentarians appointed by the Prime Minister and reporting directly to the Prime Minister – published its report[8] into UK involvement in rendition, including in Binyam Mohamed's case. The report was subject to extensive redaction (censorship) before publication. Amnesty International criticized the investigation for lacking the necessary independence from the government. The ISC did, however, confirm that an agent of the UK security service had interviewed Binyam Mohamed while he was detained in Pakistan.

In May 2008 lawyers for Binyam Mohamed in the UK initiated High Court proceedings in an attempt to secure disclosure of any information in the possession of the UK government which might support Binyam Mohamed's claims to have been tortured. Such information could have helped his lawyers to argue for exclusion of statements that were to be used against him in military commission proceedings in Guantánamo Bay, on the grounds that they were obtained by torture or other ill-treatment.

These proceedings eventually led – after prolonged resistance from the governments of both the UK and the USA – to Binyam Mohamed's lawyers being given access to the documents in question, subject to strict promises that they would keep their contents confidential. It is in the High Court that much of what we now know about this case has been made public. The most recent High Court judgment confirmed what had long been suspected – that the ISC

[5] Link to Foreign Secretary's statement to Parliament, http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090205/debtext/90205-0007.htm
[6] *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin) , para. 88; link to http://www.bailii.org/ew/cases/EWHC/Admin/2008/2048.html
[7] Link to e.g. http://www-secure.amnesty.org/en/library/info/AMR51/058/2008/en
[8] http://www.cabinetoffice.gov.uk/media/cabinetoffice/corp/assets/publications/intelligence/20070725_isc_final.pdf

failed to turn up large amounts of evidence which was highly relevant to Binyam Mohamed's case:

> *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.*

It has been suggested by the High Court that the ISC should now re-examine Binyam Mohamed's case, in light of this new evidence. On 5 February the current chair of the ISC, the Rt Hon Kim Howells MP, a former Foreign Office minister, confirmed that the ISC had not yet been given the documents which were at the centre of the High Court proceedings[9]. In any event Amnesty International does not believe that the ISC is able to carry out the kind of independent and effective investigation which is urgently needed in Binyam Mohamed's case and others.

In October 2008 the UK Home Secretary asked the Attorney General to investigate possible criminal wrongdoing by UK agents in Binyam Mohamed's case. This request, prompted by revelations made in the course of the High Court proceedings brought by his lawyers, is a step in the right direction. Amnesty International is, however, concerned that an investigation conducted by the Attorney General risks giving rise to the perception that the conduct of the investigation and its outcome may be influenced by political considerations: the Attorney General, as well as being the UK's senior law officer and being expected by constitutional convention to act independently in that role, nevertheless ultimately remains a political official, and a member of the government whose actions are under scrutiny here. If the perception of lack of impartiality and independence is to be avoided it is crucial that the scope, methods and findings of the Attorney General's investigation should be made public as soon as possible.

Amnesty International continues[10] to call for a properly independent and effective investigation into all aspects of the UK's involvement in the practice of rendition and secret detention. This investigation has to be transparent and capable of ensuring public scrutiny of the nature of the evidence received.

Any investigation must also lead to any individuals responsible for violations being held to account. Under the domestic law of the UK prosecutions for offences of torture can only be brought with the consent of the Attorney-General. Amnesty International has criticized[11] this aspect of the law, and has called for its repeal. It is essential that prosecutions be brought if there is sufficient admissible evidence that any agents of the UK have indeed participated in or been complicit in torture.

Ensuring accountability for violations in the context of counter-terrorism is an obligation which must be lived up to by both the UK and the USA, if the recent and welcome statements of commitment to human rights are to be accompanied by concrete efforts to eliminate impunity for those responsible for violations of human rights. But the most urgent need is to ensure that Binyam Mohamed, along with other detainees at Guantánamo Bay, is immediately released if he is not to be charged at once with specific offences, leading to a fair trial before the ordinary criminal courts in the USA.

Binyam Mohamed remains in Guantánamo Bay. He has been unlawfully detained in harsh conditions for more than six years, and has allegedly been ill-treated and tortured over prolonged periods. His physical and mental health have reportedly declined alarmingly and dangerously. His lawyers, family and friends fear for his safety. The UK must step up its efforts on his behalf, including by allowing publication of the High Court summary. The new

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[9] House of Commons Hansard Vol. 487 Col. 997; link to http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090205/debtext/90205-0007.htm

[10] Link to *State of Denial: Europe's role in rendition and secret detention*, EUR 01/003/2008, http://www.amnesty.org/en/library/info/EUR01/003/2008/en

[11] Link to *International Criminal Court: The failure of states to enact effective implementing legislation* IOR 40/019/2004, http://www.amnesty.org/en/library/info/IOR40/019/2004

administration in the USA should abandon any opposition to publication of this information, examine the extent to which state secrets privilege has been used to conceal evidence of human rights violations.

A separate case involving Binyam Mohamed was dismissed by a US District Court in February 2008, at the request of the US government, “on the ground that the very subject matter of the case is a state secret”. This decision was subsequently appealed, and oral arguments were scheduled to be heard on 9 February 2009, in the US Court of Appeals for the Ninth Circuit in San Francisco.

The case was originally brought in 2007 by Binyam Mohamed and other victims of the CIA’s rendition program against Jeppesen Dataplan, Inc., a US company based in California. The lawsuit alleges that Jeppesen knowingly provided extensive flight services that enabled the CIA to carry out the renditions of Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Muhammad Bashmilah, and Bisher al-Rawi. The US government sought to intervene in the case and asserted “state secrets privilege” on behalf of itself and Jeppesen. Under US constitutional law, the government may assert state secrets privilege when “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged”.

In the name of national security, the Bush administration systematically exploited secrecy to obscure human rights violations and block accountability and remedy for them. President Obama has said that his administration will change "the culture of secrecy". The proceedings in the Ninth Circuit may provide an early indication of the extent to which his administration will break from the position of its predecessor on this question.