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UK: Court of Appeal rules that secret procedures violate fair trial rights in civil proceedings

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The Court of Appeal ruled on 4 May 2010 that the UK government cannot rely on closed material procedures in the civil lawsuit brought by six former Guantánamo Bay detainees over alleged complicity in torture by UK government authorities. Closed material procedures would allow courts to consider secret material presented by UK authorities in closed sessions; claimants and their lawyers of choice would not have access to the material or the closed sessions and would, instead, have a court appointed Special Advocate to represent their interests. The Special Advocate would be prohibited from discussing any part of the secret material with the claimant or taking instructions from them after seeing the material, seriously impeding their ability to serve the interests of the claimant or render the proceedings fair.

In a strongly worded judgment Lord Neuberger, the Master of the Rolls who headed a panel of three appeal judges hearing the case, stated “firmly and unambiguously” that the appeal should be allowed, on the grounds that permitting a closed material procedure in the absence of a statutory power to do so, would undermine one of the most fundamental principles of common law, that of fair trial.

In the judgment, Lord Neuberger stated: “In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it ... So far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial.”

The Court of Appeal's judgment increases the pressure on the UK government to end its attempts to resort to secret court procedures that undermine the rule of law and impede accountability for human rights violations committed by its agents abroad. Amnesty International reiterates its call for an independent commission of inquiry into allegations of serious human rights violations by UK authorities in the context of counter-terrorism operations overseas since 11 September 2001.

The civil claim concerns six former Guantánamo Bay detainees, all UK nationals or UK residents – Bisher al-Rawi, Richard Belmar, Omar Deghayes, Binyam Mohamed, Jamil el-Banna and Martin Mubanga – who are seeking damages from the UK government on the basis that British intelligence agencies were complicit in their detention, torture and other mistreatment. The six men and one other former Guantánamo Bay detainee had lodged a civil claim against the Security Services (MI5), the Secret Intelligence Service (MI6), the Foreign and Commonwealth Office, the Home Office and the Attorney-General (the latter only in a representative capacity) for human rights violations they suffered during their rendition to and detention at various locations, including Guantánamo Bay.

In November 2009 a High Court judge had ruled that the UK government could in principle rely on secret evidence in closed hearings, from which the claimant and their lawyers would be

barred. Six of the claimants subsequently appealed this judgment to the Court of Appeal. Amnesty International observed the hearings both before the High Court in October 2009 and the Court of Appeal in March 2010.

During both hearings, lawyers acting for the UK authorities argued in favour of the unprecedented step of introducing secret material procedures into civil proceedings for damages, invoking “national security” grounds.

The 4 May judgment of the Court of Appeal reiterated that the principle of fair trial under English common law requires that each party be allowed to see and hear all the evidence put before the court, and that all the arguments are put before the court in an open and transparent manner.

In the judgment Lord Neuberger states, “the trial process must be fair, and must be seen to be fair”.

The judgment represents a blow to the UK government’s repeated attempts to block the disclosure of documents by invoking “national security” grounds, frustrating efforts to discover the truth about the UK's involvement in grave human rights violations. It is also a significant step towards redress for the former Guantánamo detainees, insofar as it seeks to ensure that the procedure by which they pursue their civil claim is a fair one.

Amnesty International has called for an independent commission of inquiry into the credible allegations of grave human rights violations by UK authorities in the context of counter-terrorism operations overseas since 11 September 2001 and for those responsible to be brought to justice. Accountability for violations is fundamental to the promotion and protection of human rights. (See the report: *Time for an inquiry into UK's role in human rights violations overseas since 11 September 2001*, AI Index: EUR 45/001/2010, March 2010.)

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