



[Neutral Citation Number]

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0049-0051

ON APPEAL FROM:

**The Information Commissioner's
Decision Notices : FS50262409; FS50279042; FS50296953
Dated: 24 January 2011**

**Appellant: The All Party Parliamentary Group on Extraordinary
Rendition**

Respondent: Information Commissioner

Second Respondent: Foreign and Commonwealth Office

Heard at: Field House, London

**Date of hearing: 10, 11, 14 and 15 November 2011
27 and 28 February 2012**

Date of decision: 12 April 2012

Before

**John Angel
(Judge)
Rosalind Tatam
John Randall**

Attendances:

**For the Appellant: Ms Joanne Clement
For the Respondent: Mr Robin Hopkins
For the Additional Party: Ms Karen Steyn and Mr Julian Blake**

Subject matter: Ss.23 and 24 national security; s.35(1)(a)-(d) formulation and development of government policy, ministerial communications, law officers advice and ministerial private office; s.27(1) and (2) international relations; s.42(1) legal professional privilege.

Cases:

APPGER v Ministry of Defence [2011] UKUT 153 (AAC)

R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office [2009] 1 WLR 2653

R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office (No. 2) [2011] QB 218

R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 152

Durant v Financial Services Authority [2003] EWCA Civ 1746

The Commissioner of Police of the Metropolis v Information Commissioner (2010/EA/0008)

Cabinet Office v Information Commissioner (EA/2008/0080)

Sugar v BBC [2012] UKSC 4

Kennedy v Charity Commission [2012] EWCA [2011] Civ 367

Commissioner of Police of the Metropolis v Information Commissioner EA/2010/0008

Baker v Information Commissioner and the Cabinet Office EA/2006/0045

Regina (A) v Director of Establishments of the Security Service [2009] UKSC 12

DFES v Information Commissioner and Evening Standard [2011] 1 Info LR 689

HM Treasury v Information Commissioner [2009] EWHC 1811 (Admin) [2011] 1 Info LR 815

R v Shayler [2003] 1 AC 247

Hogan and Oxford City Council v Information Commissioner [2011] 1 Info LR 588

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the Appellant's appeal against Decision Notices FS50279042 (DN2) and FS50296953 (DN3) both dated 24 January 2011. In respect of Decision Notice FS50262409 (DN1) dated 24 January 2011 the Tribunal substitutes the following decision in place of that decision notice.

The Tribunal upholds the cross-appeal of Second Respondent in relation to DN1 and DN2 – see §§45 to 49 of the Reasons for the Decision.

SUBSTITUTED DECISION NOTICE

Dated 12 April 2012

Public authority: Foreign and Commonwealth Office

Address of Public authority: King Charles Street, London. SW1A 2AH

Name of Complainant: The All Party Parliamentary Group on
Extraordinary Rendition

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal largely dismisses the appeal but orders the disclosure of the following documents:

Document 18: letter dated 17 January 2003;
Document 43: the first two paragraphs only of the email dated 9 March 2003;
Document 56: letter dated 20 April 2006; and
Document 86: the second bullet point on the second page of document dated 31 January 2007.

Action Required

These documents to be disclosed to the Appellants within 28 days of this substituted decision.

Dated this 12th day of April 2012

Signed

John Angel
Judge

REASONS FOR DECISION

Introduction

1. The Appellant is an unincorporated cross-party association of Members of Parliament (“APPGER”). The APPGER was established by Mr Andrew Tyrie MP in December 2005 in response to allegations that the United Kingdom had been involved in the US extraordinary rendition programme. The APPGER are concerned in this case to get to the truth of the UK’s involvement, if any, in extraordinary rendition (the extra-judicial transfer of a detained person, usually across state boundaries or between different authorities within them for the purposes of interrogation often in circumstances where s/he faces a real risk of torture).
2. The Upper Tribunal in a previous appeal brought by the present Appellant - *APPGER v Ministry of Defence* [2011] UKUT 153 (AAC) (“*APPGER I*”) - considered whether requests for memoranda of understanding between governments, policies, reviews and statistics should be disclosed and dealt with many of the considerations faced by this Tribunal. However the appeals in the present case largely deal with requests to the Foreign and Commonwealth Office (“FCO”) for information about individuals subject to extraordinary rendition.
3. On behalf of APPGER we received evidence from Mr Tyrie, Mr Nicholas Cooper the Coordinator of APPGER, Mr Ian Cobain a senior reporter with The Guardian and Mr Clive Stafford Smith of Reprieve (a charity that seeks to enforce the human rights of prisoners). Messrs Cooper and Stafford Smith were not subjected to cross-examination. On behalf of the FCO, Mr Jonathan Sinclair, a member of the Diplomatic Service and a Senior Civil Servant, gave evidence both in open and closed sessions.

Background to the requests

The US Approach to Extraordinary Rendition

4. Mr Cooper explained the history of the involvement of the US in extraordinary rendition; and its increasing use as part of the US’s “War on Terror” following the 9/11 attacks. In summary he said:-
 - (i) As is well known, the Bush Administration established a detention facility at the US naval base at Guantanamo Bay. US legal advice was that those suspected of being insurgents could be detained and excluded from the legal protection of the Geneva Convention. The US sought to keep them outside the US legal system by rendering detainees to

Guantanamo. In total, more than 800 detainees would enter Guantanamo from January 2002 onwards.

- (ii) Alongside Guantanamo, the CIA made use of secret prisons (known as “black sites”) to detain and interrogate so-called “High Value Detainees” in various parts of the world from early 2002 onwards. Many detainees, including Binyam Mohamed, Bisher al-Rawi and Jamil el-Banna (individuals to whom many of the requests in this case relate) have made allegations of torture and cruel, inhumane or degrading treatment while in these prisons. These men all spent years in Guantanamo Bay.
- (iii) “Enhanced interrogation techniques” were employed by the US authorities at secret prisons. These techniques included beatings, prolonged standing in “stress positions”, sleep deprivation, confinement in boxes, exposure to cold, waterboarding and other methods. The application of such techniques to fourteen High Value Detainees – including Khalid Sheikh Mohammed, Abu Zubaydah and Abd al-Rahim al Nashiri – was documented by the International Council of the Red Cross (“ICRC”)¹ after it had access to the men for the first time soon after their arrival in Guantanamo in September 2006. The ICRC detailed numerous concerns about the treatment of the High Value Detainees, including the circumstances of their arrest and transfer; continuous solitary confinement and incommunicado detention for periods of up to 4 and a half years; suffocation by water; prolonged stress standing; beatings by use of a collar; beating and kicking; confinement in a box; prolonged nudity; sleep deprivation and use of loud music; exposure to cold temperature/cold water; prolonged use of handcuffs and shackles; threats; forced shaving; deprivation/restricted provision of solid food. The treatment of these three individuals, and the information obtained as a result of this treatment, forms the basis for the APPGER’s requests 16-22 which are set out below.
- (iv) Many of these techniques had been approved in advice from the US’s Office of Legal Counsel, which have become notorious as the “Torture Memos”. Extracts from the Torture Memos had been leaked during the Bush Administration, but were first officially published in the early days of the presidency of President Obama.²
- (v) President Bush and senior members of his Administration claimed that the United States and its allies had been able to thwart a number of planned terrorist attacks in light of information obtained as a result of the “Enhanced interrogation techniques”.³ However, a number of individuals (including the Director of the FBI and the former Head of Scotland’s Yard’s Anti-terrorist Branch) have queried whether this was the case.

¹ ICRC Report on the treatment of fourteen “High Value Detainees” in CIA custody, February 2007.

² Department of Justice Office of Professional Responsibility Report *Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists*, 19 July 2009.

³ *Summary of the High Value Terrorist Detainee Programme* published by the Office of the Director of National Intelligence.

Requests 16-22 below seek information to determine whether these claims are correct.

- (vi) The matters referred to above took place under the Bush Administrations. President Obama took office on 20 January 2009.

UK's role in US's extraordinary rendition programme

5. The UK has always condemned extraordinary rendition and its abuse of human rights. Mr Cooper, however, raised a number of concerns about the UK's involvement via international investigations (including the Council of Europe Reports) and at a parliamentary level. Mr Cooper detailed how a number of assurances given by the UK Government about its role in extraordinary rendition have subsequently been shown to be incorrect. For example:-
- (i) UK stated policy on extraordinary rendition was "categorical": rendition to torture was condemned. However, an FCO memorandum on detainees in Afghanistan, dated 10 January 2002 – subsequently disclosed in legal proceedings – appeared to confirm that the UK Government had accepted "*...that the transfer of UK nationals held by US Forces in Afghanistan to the US base of Guantanamo is the best way to meet our counter-terrorism objective...*"⁴
- (ii) The FCO, including the then Foreign Secretary, Mr Jack Straw, had given assurances that there was no truth in the claims that the UK had been involved in rendition and that no detainees had at any time passed in transit through Diego Garcia. However, on 21 February 2008, the then Foreign Secretary, Mr Miliband, had to correct these statements on the basis of new information.⁵
- (iii) In December 2004, the Ministry of Defence had given assurances to the House of Commons that all persons apprehended by UK forces in Iraq and transferred to United States forces, remained in Iraq. However, the Secretary of State for Defence subsequently had to make a statement to the House of Commons admitting that previous statements on this topic were incorrect. He acknowledged that two individuals captured by UK forces in Iraq were transferred to US detention and were subsequently transferred by the US to Afghanistan, where they remained in custody. Furthermore, disclosure ordered by the Upper Tribunal in *APPGER 1* shows that, under its Memorandum of Understanding with the US, the UK was not under any obligation to track those individuals it had captured and detained in Iraq, but had then transferred to the US authorities.
- (iv) The Intelligence and Security Committee ("ISC") conducted an inquiry into whether UK intelligence and security agencies had any knowledge of, and/or involvement in, rendition operations. It published a report on

⁴ *Bisher al-Rawi and others v The Security Services and others (claim no HQ08X91180 and other)* in the High Court (QBD).

⁵ Hansard, 21 February 2008: Column 458 et seq.

Rendition in 2007. However, this report has been found wanting in a number of respects. On 4 February 2009, in *R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office* [2009] 1 WLR 2653 the Divisional Court stated:-

“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.”

6. These credibility issues led to the Prime Minister announcing to Parliament on 6 July 2010 the setting up of what became known as the Detainee Inquiry to be chaired by a judge (Sir Peter Gibson) in order to try to restore the confidence and trust of the public in the security services.

Al-Rawi and El-Banna

7. Mr Cooper set out the background to the extraordinary rendition of Mr Bisher al-Rawi and Mr Jamil el-Banna.
8. Mr al-Rawi is an Iraqi citizen who became a British resident in the 1980s. Mr el-Banna is a Jordanian citizen with refugee status to remain in Britain. They were both detained in the Gambia in November 2002, transferred to US custody, and rendered to detention in Bagram Air Base in Afghanistan. They were subsequently rendered to Guantanamo Bay in February 2003. Mr al-Rawi was not released from Guantanamo Bay until late March 2007. Mr el-Banna was released in December 2007.
9. Both men were known to the security services prior to their detention in the Gambia. On 1 November 2002, they attempted to fly from Gatwick to the Gambia. The stated purpose of the trip was to join al-Rawi's brother who was planning to develop a peanut oil business. They were both detained under the Terrorism Act at Gatwick Airport before boarding their flight, allegedly after suspicious items were found in Mr al-Rawi's luggage. The same day, telegrams were sent by the UK to the US describing the men as associated with known extremists and that they were in possession of a "home made electronic device" that "may be a timing device or part of a car-based IED [improvised explosive device]."
10. The men were held and questioned between 1 and 4 November 2002. According to their lawyer, the device was a home-made battery charger, apparently for use in connection with the peanut project and, "...this was confirmed by the Anti-terrorist squad at 5:22pm on 4 November who informed their solicitors that they had found it to be 'an innocent device' and that they were therefore being

released".⁶ On the day of their release (4 November 2002), a further telegram was sent to the US with an assessment of the men and the fact that they were due to travel to the Gambia in the near future. The telegram asked the US authorities to pass the information to the Gambian security services, and to ask the Gambians whether they would be able to "cover" these individuals whilst they are in Gambia.

11. On 8 November 2002, the men flew out to The Gambia. On the day of their departure, a third telegram was sent from the UK to the US authorities, which appeared to follow on from a telephone conversation, confirming that the men had departed and including their flight information.
12. Mr al-Rawi and Mr el-Banna were arrested by the Gambian authorities at the airport. They were subsequently transferred into American custody. In evidence to the ISC, it was stated that the UK was informed by US authorities that they intended to conduct a rendition operation, to transfer the men from The Gambia to Afghanistan. It was said that the security services registered strong concerns at this suggestion and alerted the FCO. The men were rendered by the US authorities to the "dark prison" near Kabul on 8 December 2002, to Bagram Air Base on 22 December 2002, and to Guantanamo Bay in February 2003.
13. In 2004/05, the British government made formal requests for the return of British nationals from Guantanamo Bay, but not British residents. The families of al-Rawi and el-Banna applied for judicial review of this decision. In May 2006, the Court⁷ dismissed this application, holding that British residents were not entitled as of right to have the Foreign Secretary make representations on their behalf. (Since then the UK government has changed its policy and is now prepared to make representations on behalf of lawful British residents in Guantanamo Bay). However, just before the hearing, the Treasury Solicitor informed Mr al-Rawi's lawyers that, on the basis of a "fact specific claim" by al-Rawi the Foreign Secretary would approach the Americans to ask for his release.
14. Mr Cooper says that significant questions remain about the UK's involvement in the rendition of al-Rawi and el-Banna. Some of the requests below were made by the APPGER to obtain further information about this involvement.

Binyam Mohamed

15. Mr Cooper explained that Binyam Mohamed ("BM") is an Ethiopian national given leave to remain in the UK for four years in 2001. He was seized by the Pakistani authorities in Karachi airport on 10 April 2002. On 26 April 2002, the US authorities informed the UK's security services that they held a person claiming to be BM and requested that the security services assist them in identifying him and verifying his claims. The UK authorities sent a list of

⁶ APPGER briefing pack relating to information session on Bisher al-Rawi, Jamil el-Banna and Rendition, 28 March 2006.

⁷ *R (on the application of Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (Admin).

questions to the US authorities to put to BM, and asked if they could interview him. On 10 May 2002, the US authorities agreed to allow the UK authorities to interview BM, and, in advance of this meeting, sent a composite report detailing his interrogation by the US authorities during April 2002. BM was interviewed by a security service person "Witness B". The concerns about the contents of this report have been addressed by the Court of Appeal in *R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office (No. 2)* [2011] QB 218, at 316 (Appendix to the first judgment recording that BM had been intentionally subjected to continuous sleep deprivation, threats and inducements, and he was shackled during his interviews). The Court of Appeal concluded that, "*...the reports provided to the SyS (security services) made clear to anyone reading them that BM was being subjected to the treatment that we have described and the effect upon him of that intentional treatment.*"

16. For over two years, BM was held incommunicado and was denied access to a lawyer. He was rendered to Morocco in July 2002, where he contended that he was tortured, subjected to sleep deprivation, was severely beaten and his penis was cut with a scalpel. In January 2004, BM was transported to a CIA prison outside of Kabul, where he was mistreated. In May 2004, he was transferred to Bagram where he was again subjected to mistreatment. On 20 September 2004, BM was transferred to Guantanamo Bay. He was detained for nearly four years before he was charged under the US Military Commissions Act with terrorist offences.
17. In November 2009, in the District Court for the District of Columbia (Civil Action No 05.1347 (GK) in *Farhi Saeed Bin Mohammed v Obama*, a judge found that BM's evidence as to his mistreatment and torture was true. It was publicly recorded that, "*...the (US) Government does not challenge or deny the accuracy of Binyam Mohamed's story of brutal treatment*" (pg 58). Towards the end of the judgment, two specific matters are recorded:-

"(a) [Mr Mohamed's] trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans. The Government does not dispute this evidence": p 64.

(b) "In this case, even though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans, and to special agent [the identity is redacted]), there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States ... the court finds that [Mr Mohamed's] will was overborne by his lengthy prior torture, and therefore his confessions to special agent ... do not represent reliable evidence to detain petitioner": pp 68–70.

[See R (Binyam Mohamed) v Secretary of State for the Foreign and Commonwealth Office (No 2) [2011] QB 218, at [23]].

18. Requests 14-15 seek information from the FCO about its knowledge of BM's treatment during this time.
19. Mr Cooper explained that the second request ("the BM Letter Request") arose out of the judgment of the Divisional Court in the case of *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin) (4 February 2009). This litigation has had a long history, and some 9 judgments have now been delivered by the Divisional Court and the Court of Appeal.
20. In essence, on 6th May 2008, BM issued proceedings in the High Court for an order that the UK Government supply certain documents on a confidential basis to his lawyers in the United States. He required the documents in order to assist in his defence against terrorism charges which he anticipated would be brought against him by the US Government. The charges were based, at least in part, on confessions which BM was alleged to have made. He denied any involvement in terrorism and claimed that his confessions were false, having been made to US interrogators as a result of his being subjected to torture, or at least inhuman treatment, and that the documents would help him establish this.
21. The first three open judgments in this litigation considered the application made by BM, namely whether the documents should be disclosed to his US lawyers. On 26 August 2008, the Foreign Secretary had provided the Court with a Public Interest Immunity certificate ("PII certificate"), in which he concluded that it was in the public interest that BM was not provided with the documents or information which he sought. Accompanying that PII certificate was a letter dated 21 August 2008 from Mr Bellinger, legal adviser to the US Department of State, to Mr Bethlehem QC, legal adviser to the FCO. In this letter, Mr Bellinger stated,

"We want to affirm in the clearest terms that the public disclosure of these documents or of the information contained therein is likely to result in serious damage to US national security and could harm existing intelligence information-sharing arrangements between our two governments."
22. In late October 2008, the documents sought were subsequently made available to BM's US lawyers in habeas corpus proceedings in the US. The only live issue in the litigation was whether the Divisional Court should restore 7 short paragraphs to its first judgment. The Court stated that those paragraphs contained a summary of reports by the United States Government to the Security Services and the Secret Intelligence Service on the circumstances of BM's incommunicado and unlawful detention, and of the treatment accorded to him by or on behalf of the United States Government. The Foreign Secretary continued to oppose their restoration to the judgment for reasons set out in the two PII certificates that he had served (on 26 August 2008 and 5 September 2008), which asserted that the position of the US Government was that, in the event of their publication, it would re-evaluate its intelligence sharing relationship with the

United Kingdom, which would, in effect, seriously prejudice the national security of the United Kingdom.

23. On 4 February 2009, the Divisional Court concluded that the information in the redacted paragraphs was of crucial importance to the rule of law, free speech and democratic accountability. Nevertheless, the Court concluded that because of the “continuing threat made by the Government of the US”, that it would not be in the public interest to expose the UK to what the Foreign Secretary still stated was “the real risk of the loss of intelligence so vital to the safety of our day to day life”⁸. The “threat” from the US Government was accordingly of critical importance in the balancing exercise conducted by the Court.
24. On 15 February 2009, the Observer published allegations that the FCO had “solicited” the letter from the US State Department “that forced British judges to block the disclosure of CIA files documenting the torture of Binyam Mohamed held in Guantanamo Bay.” The article quoted an unnamed former senior State Department Official, who stated that, “Far from being a threat, it was solicited [by the Foreign Office].” The FCO had initiated the “cover up” by asking the State Department to send the letter so that it could be introduced into the court proceeding. It was noted that the revelation that the Foreign Office solicited the letter contradicted the Secretary of State’s statement that Britain was responding to American pressure.
25. Mr Cobain gave evidence that he was aware of the identity of the source of the allegations and considered the source to be impeccable. He was not prepared to disclose the source or his position in the State Department.
26. The APPGER made the second request (§29 below) in order to obtain information relevant to the Observer allegations and to dispel the impression of a “cover-up”.

The Requests

27. There are three sets of requests which are the subject of these consolidated appeals. A set of 22 requests was sent to the FCO on 20 May 2008. The first five were responded to and are not the subject of this appeal. Requests 6 to 13 of the remaining requests were renewed on 15 October 2008 and relate to the UK’s involvement in the extraordinary rendition of Bisher al-Rawi and Jamil el-Banna from The Gambia, to Afghanistan and ultimately to Guantanamo Bay:

“6. The date on which the purpose of the modified battery charger, that was discovered during the detention of Bisher al-Rawi at Gatwick airport and noted in the telegrams of 1 November 2002 and 11 November, was first known.

7. All information relating to the decision to detain the group including Bisher al-Rawi and Jamil el-Banna at Gatwick Airport on 1 November 2002.

⁸ See *R (Mohamed) v Foreign Secretary (No 2)(DC)* [2009] EWHC 152 and 2549 (Admin) – para 107.

8. *All information relating to the threat to the security of Britain or any other nation posed by Bisher al-Rawi and Jamil el-Banna; the work allegedly carried out for the intelligence services by Bisher al-Rawi; and the location of Abu Qatada, between 11 September 2001 and 1 November 2002.*
9. *All information received from the Gambian authorities, including that received via the US authorities, regarding Bisher al-Rawi and Jamil el-Banna, between 1 November 2002 and 6 December 2002.*
10. *All records of communications between US and UK officials regarding the "operation" cited in the Loose Minute of 6 November 2002, Subject: Baggage Search of Abu ANAS, between 1 October 2002 and 6 November 2002.*
11. *All records of communications between US and UK officials regarding Bisher al-Rawi and Jamil el-Banna, between 8 November 2002 and 6 December 2002, including records of the telephone conversation of 8 November 2002, and records of the telephone conversation referred to in the 6 December 2002 telegram "Islamists in Detention in the Gambia".*
12. *All information relating to any visits made by UK officials to Bisher al-Rawi or Jamil el-Banna, the progress of the US investigation into Bisher al-Rawi and Jamil el-Banna's activities, and the intention of the US authorities to render Bisher al-Rawi and Jamil el-Banna to Bagram Airbase, between 1 November 2002 and 8 December 2002.*
13. *The "matters" that enabled Jack Straw to approach the US authorities on Bisher al-Rawi's behalf."*
28. The FCO responded to these requests on 25 February 2009 by providing the APPGER with a digest of the information falling within the scope of requests 6 to 9 and 11 to 13. For the remaining information the FCO claimed a number of exemptions namely ss 23(1), 27(1)(a), 31(1)(a), 31(1)(b), 32(1), 35(1)(a), 35(1)(b), 40(2) and 42(1) FOIA. APPGER asked for an internal review on 2 April 2009. The FCO upheld its refusal notice on 2 June 2009.
29. The second request was made on 18 February 2009 and the relevant sections are below:
- "The latest allegations, published in the Observer and elsewhere on 15 February, are of considerable concern to the APPG.*
- The specific allegation is that the Foreign Office solicited a letter from the US Administration to substantiate its claim that the publication of a summary of Binyam Mohamed's treatment would lead to a reconsideration of the intelligence sharing relationship between the US and the UK. This can only entrench the suspicion of a cover-up.*
- The UK Courts have already substantiated claims made by me, among others, that the UK "facilitated" the interrogation of Binyam Mohamed at a*

time when they knew he was being detained incommunicado and without access to a lawyer. These further allegations, if true, would lend support to those who argue that the UK Government has been attempting to conceal the extent of its involvement in extraordinary rendition, that is, the kidnapping of people and the taking of them to places where they may be maltreated or tortured.

The most appropriate way that the Foreign Office can dispel this impression would be to publish all relevant information on this issue, including correspondence with the US Administration, redacted where necessary.

With that purpose in mind, by this letter, I am requesting a copy of all information relevant to the above allegation....”

30. APPGER received a response from the then Foreign Secretary David Miliband on 10 March 2009 in which he noted that:

“You raised the specific allegation that the “the Foreign Office solicited a letter from the US Administration” implying that FCO did this in an underhand way. This is not true. The US position was always consistent and clear in respect of the damage of disclosure. In the context of discussions with the US, where my officials made clear the importance of disclosure to Mr Mohamed’s legal team, my officials also explained that the proper course of action would be for the US to make an authoritative statement of their position.

The State Department’s Legal Adviser, John Bellinger, wrote to the FCO’s Legal Adviser, Daniel Bethlehem, on 21 August. We provided this letter immediately to the Court, Special Advocates and subsequently to Binyam Mohamed’s solicitors. Leigh Day & Co. Extensive quotations from the letter are included in 29 August open judgment of the Court. I am enclosing the letter from Mr Bellinger, which I have also placed in the Library of the House, following a request from Rt Hon William Hague MP.”

31. The FCO later confirmed it was holding the information but refused to disclose it on the basis that it was exempt under ss. 23(1), 27(1)(a), 35(1)(a) and 42(1) FOIA. The subsequent internal review on 13 September 2009 upheld the refusal notice.
32. The third request concerned sub-requests 14-22 of the requests originally made on 20 May 2008 and renewed on 2 April 2008. These covered the UK’s involvement in the extraordinary rendition and torture of BM while he was being held in Pakistan and Morocco, information passed to the Government by the US authorities following the waterboarding of three detainees and information received from the US authorities about claimed or reported foiled attacks on the UK:

“Binyam Mohamed al-Habashi

14. *All information relating to any visits by UK intelligence officers to British resident Binyam Mohamed al-Habashi while he was being held in Karachi in 2002.*

15. *All information passed between UK authorities and Moroccan authorities, during the detention of Binyam Mohamed al-Habashi in Morocco between 2002 and 2004.*

US Interrogation Practices

16. *All information received as a direct result of the US interrogation of Khalid Sheikh Mohammed, between March 2003 and 6 September 2006.*

17. *All information received as a direct result of the US interrogation of Abu Zubaydah, between March 2002 and 6 September 2006.*

18. *All information received as a direct result of the US interrogation of Abd al-Rahim al-Nashiri, between November 2002 and 6 September 2006.*

19. *All information received from US authorities concerning the so-called "Heathrow airport plot" in February 2003, including the source of the information received, from March 2002 to February 2003.*

20. *All information received from the US authorities concerning the so-called "chemical bomb plot" in April 2004, including the source of the information received, from April 2003 to April 2004.*

21. *All information received from US authorities concerning the so-called "2004 UK Urban Targets Plot" in mid-2004, including the source of the information received, from April 2003 to November 2004.*

22. *All information received from US authorities concerning the alleged foiled attack on Canary Wharf in November 2004, including the source of any information received, from November 2003 to November 2004."*

33. The FCO responded on 2 June 2009. In relation to request 14 the FCO noted that it had been publicly acknowledged that the security services interviewed Mr Mohamed in Pakistan in May 2002 and details were published in the ISC 2007 Report on Rendition and provided a website link to the Report. For all further information relating to that meeting the FCO claimed 23(1) FOIA. In respect of the other requests the FCO claimed that the duty to confirm or deny whether it held information did not apply by virtue of ss.23(5) and 24(2). Following an internal review on 5 November 2009 the FCO upheld the refusal notice.

The complaint to the Information Commissioner

34. The present appeal is an appeal from three decisions of the Information Commissioner ("the Commissioner") dated 24 January 2011, namely:-

- (1) Decision Notice 1: Decision Notice FS50262409 in respect of requests 6-13 made by letter dated 15 October 2008 (“**the Al-Rawi and El-Banna Request**”);
 - (2) Decision Notice 2: Decision Notice FS50279042 in respect of the request dated 18 February 2009 (“**the BM Letter Request**”); and
 - (3) Decision Notice 3: Decision Notice FS5026953 in respect of requests 14-22, made by letter dated 2 April 2009 (“**the BM and US Interrogation Practices Request**”).
35. By Decision Notice 1, the Commissioner upheld the FCO’s reliance on the exemptions contained in sections 23(1), 27(1)(a), 32(1)(a), 32(1)(b), 35(1)(a), 35(1)(c), 40(2) and 42(1) to withhold the majority of the documents. The Commissioner required the FCO to disclose documents numbered 2-8 and 15 to the APPGER. These documents have been disclosed by way of a digest and some redacted letters.
36. By Decision Notice 2, the Commissioner held that the FCO had been entitled to rely on sections 23(1), 27(1)(a), 35(1)(a) and 42(1) of FOIA to withhold the information. The Commissioner did not uphold the exemptions in respect of 4 documents (documents 4, 12, 21 and 24). These documents have been disclosed some with redactions.
37. By Decision Notice 3, the Commissioner held that the FCO was entitled to refuse to provide the information sought in request 14 under section 23(1) of FOIA. For requests 15-22, the Commissioner upheld the FCO’s reliance on both sections 23(5) and 24(2) of FOIA (national security) to neither confirm nor deny (“NCND”) whether it holds such information.
38. In each Decision Notice, the Commissioner found that the FCO had breached section 17(1) of FOIA.

The appeal to the Tribunal

39. APPGER appealed to the Tribunal in February 2011 against all three Decision Notices. The FCO was joined as a party. By agreement with the parties the appeals were consolidated and have been heard together. Because of the sensitivity of the disputed information the Tribunal has had to operate in a way which suitably protects the information. This has resulted in a longer and more complicated process than is usual in FOIA appeals.
40. The Tribunal by way of directions required the FCO to provide an open schedule of the disputed information without disclosing any content. This so far as is possible identifies documents by numbers, relating them to particular requests and whether parts have been disclosed in the open digest referred to above. References in this decision to documents by number is taken from this schedule.

41. The hearing on the advice of the parties was set down for 4 days. The Tribunal spent most of the first two days in open session followed by two days in closed session examining the disputed materials in some detail. Ms Clement for the APPGER was excluded from the closed session as is usual in such cases in order not to undermine the legislation. She submitted a list of issues to be raised in closed session. Mr Hopkins (the IC's counsel) comprehensively ensured that these issues were put to Mr Sinclair in closed session. Also Ms Clement made various other submissions during the course of the first part of the hearing which included an application to admit new evidence from Mr Clifford Smith. The Tribunal dealt with this application and further directions for the appeal at a telephone hearing with counsel for all the parties on 9 December 2011. The Tribunal agreed to admit the new evidence and issued directions for the remaining management of the case.
42. The Tribunal directed that it would provide its reasons in this open decision with two confidential annexes. (However it has been possible to provide only one confidential annex.)
43. The hearing resumed on 27 February 2012 when the parties made open final submissions. Ms Clement made an application to stay part of the proceedings on the Article 10 issue – see §§ 116 to 127 below, following the Supreme Court's decision in *Sugar (deceased) v BBC* [2012] UKSC 4 and the Court of Appeal's decision to grant leave to appeal on a similar issue to the appellant in its recent decision in *Kennedy v IC* [2011] EWCA Civ 367. The Tribunal refuses the application on the grounds given below.
44. We would just comment that Ms Clement heavily criticised Mr Sinclair for what she described as his evasive answers to cross-examination in open session. Although we can understand her reaction, we would like to put on record that he answered questions in closed session extremely candidly and came across as a very credible witness and demonstrated complete frankness with the Tribunal in closed session. It is in the nature of our hearings, particularly on such important matters as national security, that witnesses cannot be as frank as they would like in open session, and this may create an appearance of being evasive.

FCO's cross-appeal

45. The FCO cross-appealed on a few matters relating to the Decision Notices. As a result of further disclosures in the FCO's skeleton argument served in advance of the hearing in November 2011, the Commissioner noted that a small number of documents within the scope of the requests giving rise to Decision Notice 1 were inadvertently not disclosed to the Commissioner during his investigation and therefore were not considered in Decision Notice 1. During the course of these proceedings these documents have been disclosed to the Commissioner who now upholds the FCO's reasons for not disclosing them.
46. The FCO contends (though not strictly by way of cross-appeal) that certain information in documents attached to document 4 of Decision Notice 2 should be

redacted on ss 23(1) and 27(1)(a) grounds. The Commissioner now agrees. We have reviewed the information and accept these exemptions are engaged.

47. Another point of cross-appeal concerns the redaction, on s. 40(2) grounds, of the names and/or email addresses of some of the recipients of documents 4, 12 and 24 which the IC ordered to be disclosed in the Decision Notice 2. Three of the data subjects are civil servants at grade 7/B and A. The Commissioner's general position is that it is appropriate to disclose the names of civil servants at that level of seniority, on the basis it would not breach the data protection principles. He therefore indicated, at the outset of the hearing in November, that he resisted the FCO's cross-appeal to that extent.
48. The Commissioner still stands by his general position. However in this case due to the sensitive national security issues with which these appeals are concerned, the Commissioner now agrees with the FCO that disclosure of these data subjects' identities in the circumstances of this case would breach the first data protection principle. Accordingly, the Commissioner no longer resists the FCO's cross-appeal in this respect.
49. To summarise the Commissioner now accepts all the FCO's grounds of cross-appeal. Having considered the disputed information concerned and the FCO's arguments we agree.

The legal framework

(a) FOIA: the General Framework

50. Under s.1(1) of FOIA, a person who has made a request to a public authority for information is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request; and (b) if that is the case, to have that information communicated to him.
51. The general rights in s.1(1) FOIA have effect subject to s. 2, which in turn sets out the effect of the exemptions in Part II of FOIA. The exemptions contained in Part II fall into two classes: absolute exemptions and qualified exemptions. S. 2(1) states that:

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,*

section 1(1)(a) does not apply.”

52. S. 2(2) considers the effect of the exemptions in Part II on the duty in s.1(1)(b) of FOIA to disclose the information. S. 2(2)(b) states that:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

53. The FCO relies on a number of exemptions to (a) justify withholding the information; and (b) in response to much of the BM and US Interrogation Practices Request, refusing to confirm whether the FCO even holds this information.

(b) Section 23 (National Security)

54. S. 23(1) is an absolute exemption. It states that:-

“Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).”

55. Unlike where a qualified exemption is engaged, the Tribunal does not undertake any assessment of the weight to be given to the public interests for and against disclosure. Parliament has determined that there should be no question of requiring the disclosure of any information which was directly or indirectly supplied by, or which relates to, any of the specified security bodies.
56. The 13 bodies specified in subsection (3) include the three security and intelligence agencies, the special forces and various other bodies with responsibility for dealing with security matters. The Security Service (MI5) (“SyS”) and the Secret Intelligence Service (MI6) (“SIS”) are bodies which are not directly subject to FOIA as they are not included in the list of “public authorities” set out in Schedule 1 of FOIA.
57. By s. 23(2), a Minister of the Crown may sign a certificate certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3). Subject to an appeal to the Tribunal under s.60 of FOIA, such a certificate shall be conclusive evidence of that fact. No such certificate has been signed in the present cases.
58. Ms Clement on behalf of APPGER contends the exemption under s. 23(1) should be given a narrow construction because it is an absolute exemption and that we should consider the three limbs, namely

- (1) *directly* supplied to the public authority by the SyS/SIS
- (2) *indirectly* supplied to the public authority by SyS/SIS, or
- (3) *relates to* the SyS/SIS

separately when examining the disputed information to see whether the exemption is engaged.

59. The IC and FCO argue that the Tribunal should give these words their ordinary meaning, the three limbs should be considered together and whether information has been supplied by a s.23(3) security body or relates to a security body is a question of fact for the Tribunal to decide. As Mr Hopkins, on behalf of the IC, puts it the Tribunal should ask itself: "how did the FCO come to have this information?" If the answer is that it received it from a security body, or that it received it from someone else who in turn received it from a security body, then s.23(1) is engaged. In other words a broad construction should be used.
60. Ms Clement in pursuance of her narrow construction contention argues in relation to information that originated elsewhere and was not created by SyS/SIS, whether directly or indirectly supplied, that if the security services merely forward information to the FCO without assessing its content or considering its dissemination in an active way, this does not constitute a meaningful act of "supply" to the FCO "by" the security body for the purposes of s. 23(1). She says it is not enough that the information formerly in the hands of the security services inadvertently makes its way into the hands of the FCO (or indeed, arrives there through another source entirely). The security services must, she argues, intend to supply the information to the FCO, albeit indirectly through a third party.
61. We consider this interpretation is too narrow. In our view this is not what Parliament intended. Whether the information is "supplied" is simply a question of fact for us to determine. In any case it may be difficult on the face of such information to know whether the security services assessed or considered it in some way without calling additional evidence. This could involve the Tribunal having to consider evidence on national security matters beyond the scope of the request and to make judgements on how the security services dealt with information supplied by others. This in our view goes far beyond what Parliament intended and the ordinary meaning of the words in s.23(1).
62. Among her other arguments Ms Clements suggests the phrase "relates to" the security services is ambiguous. First, she says it must mean something different than "directly or indirectly supplied to" the public authority by the security services. Secondly, where the words are used in relation to an absolute exemption, they should be given a purposive interpretation. The rationale for the exclusion of the security bodies from the application of FOIA is, Ms Clement says, that disclosure of such information would harm the operational effectiveness of the security bodies and hence harm national security. She continues if disclosure would not have this result, then there is no basis for

interpreting the exemption of “relates to” the security services as preventing disclosure.

63. Ms Clement also refers to a data protection case to support her contention that a narrow interpretation should be given to the third limb of the exemption – *Durant v Financial Services Authority* [2003] EWCA Civ 1746. This decision is not a direct FOIA matter, but is concerned with the definition of “personal data” under the Data Protection Act 1998 (“DPA”). We consider the reliance upon *Durant* is inappropriate. There is no basis in this case for borrowing restrictions from this DPA case. What we do find helpful is the decisions of other Tribunals.
64. In *The Commissioner of Police of the Metropolis v Information Commissioner* (2010/EA/0008) (“*MPS*”) at [15] the First-tier Tribunal found that:
- “s.23 provides absolute protection to information coming from or through the specified security bodies or which, “relates to” any of those bodies. Significantly for this appeal, that very broad class of information plainly embraces, not just the content of information handled by a specified body but the fact that it handled it. It is, moreover, an exemption which applies without proof of prejudice. Parliament decided that the exclusionary principle was so fundamental, when considering information touching the specified bodies that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned.”*
65. Applying the ordinary meaning of the words “relates to”, it is clearly only necessary to show some connection between the information and a s.23(3) security body; or that it touches or stands in some relation to such a body. Relates to does not mean ‘refers to’; the latter is a narrower term. Thus, for example, a response that no information is held may create a sufficient connection between the response and a security body for the purpose of s.23(5): see *Cabinet Office v Information Commissioner* (EA/2008/0080) at [21]-[23] and [27] (“*Cabinet Office*”).
66. In *MPS*, the Tribunal rejected a contention that “nothing short of certainty” that the information was supplied by or relates to a s.23(3) body should suffice. The Tribunal applied the balance of probabilities standard, observing that they had “no doubt that the normal principles as to the standard of proof apply” ([19]-[20]).
67. We agree with and adopt the Tribunal’s approach in *MPS* and *Cabinet Office*.
68. Also we prefer Mr Hopkins’ explanation of the distinction between “supply” and “relates to”. “Supply” is about the origins of the information – how does the FCO come to hold it?; “Relates to” is about its contents – is the information about something to do with the security bodies. As a result “relates to” must be given a broad interpretation.
69. Finally Ms Clement contends that information supplied directly by the SyS/SIS which “triggers” a series of subsequent events, about which information is recorded by the public authority, does not “relate to” the SyS/SIS. We consider

this is a matter of fact for the Tribunal to determine taking a broad approach to the construction of s.23.

70. To sum up we consider that the Tribunal should adopt a broad, although purposive approach to the interpretation of s.23(1). However this should be subject to a remoteness test so that we must ask ourselves whether the disputed information is so remote from the security bodies that s.23(1) does not apply.
71. The Tribunal have considered the disputed information where s.23(1) has been claimed in some detail. We find, following the legal principles set out above, that where the FCO has claimed the s.23(1) exemption that it is engaged. We observe that the FCO could, in our view, have claimed the exemption for even more information in this case.
72. Ms Clement then says whatever the construction of s.23(1) it is an infringement of Article 10(1) of the European Convention on Human Rights ("ECHR"). We consider this submission below starting at §115.

NCND (neither confirm nor deny)

73. The FCO also claim s. 23(5): Neither Confirm nor Deny ("NCND") is engaged in relation to Decision Notice 3 (the BM and US Interrogation Practices Request):

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."

74. In *MPS* the Tribunal helpfully explained why there is a need for public authorities to be able to claim NCND

"4. Part 2 of FOIA provides exemptions from the duty to confirm or deny (s.1(1)(a)) in almost all cases where there is an exemption from the duty to supply information (s.1(1)(b)). The object of such a refusal is, of course, to protect the public authority from the drawing of inferences, whether from a confirmation or a denial, which might cause the same kind of prejudice as disclosure of the exempt information. The fact that exempt information is or is not held may often be a clue as to all or some of its content, or, where such information is protected, its origin. A denial in response to one request will enable a later requester to draw the obvious conclusion, if no denial is then forthcoming."

75. In *MPS* the Tribunal found at §16 that

"It is the accepted practice of public authorities such as MPS when confronted with requests for information which might engage sections 23 or 24, to rely on the two provisions in conjunction, that is to say without specifying which of the two applies. That approach is calculated to avoid disclosure of the fact that a s.23 body is or might be involved and was

approved in Baker v Information Commissioner and the Cabinet Office EA/2006/0045. (“Baker”)

76. Ms Clement questions whether the FCO was entitled to claim s.23(5) in this case. If the involvement of a security body in response to a particular request is in the public domain, the FCO’s evidence (and it would appear the Government’s standard practice) is that s.23(1) will be relied on, and not s.23(5). This is what happened in this case in respect of request 14.
77. S.84 of FOIA defines “information” as meaning “information recorded in any form.” S. 23(1) is concerned with information held by a public authority recorded in any form. S. 23(5) applies to information whether or not already recorded and therefore applies to a wider definition of “information”.
78. Mr Sinclair in evidence recognises that where the involvement of a security body in respect of a particular request has been officially confirmed in the public domain, then there is no scope for applying s. 23(5). In respect of request 15, Mr Sinclair acknowledged in cross-examination that the FCO had informed the Divisional Court in the BM litigation that no part of the UK Government knew that BM was in Morocco during the relevant time. He admitted that the Government could not have said that if it had had discussions with the Moroccan Government about BM. It had therefore been confirmed in the public domain that the Secretary of State and the SyS could not have had communications with the Moroccan Government about BM. In respect of request 16, Mr Sinclair accepted in cross-examination that there had been official confirmation that the Security Service held information passed by the US authorities about Khalid Sheikh Mohammed: Mr Sinclair also admitted that he did not know that this information was in the public domain before he was taken to it in cross-examination.
79. Ms Clement considers this evidence gives rise to serious concerns on the part of APPGER as to whether the FCO has applied its own approach to NCND properly.
80. In respect of requests 19-22, the President of the United States had publicly confirmed that information was received from the US authorities concerning various plots, including the Heathrow airport plot, the UK Urban Targets Plot and the attack on Canary Wharf. Mr Sinclair’s open evidence is that information about plots would ordinarily be passed from US intelligence agencies to UK intelligence agencies. Mr Sinclair also acknowledged that such communications may take place at diplomatic level.⁹ APPGER accepted that information supplied directly or indirectly to the FCO by the security bodies about such intelligence would be likely to fall within s.23(1). However Ms Clement maintains that the FCO should not be permitted to rely upon s. 23(5) in these circumstances.
81. The importance of the NCND approach was accepted by the Tribunal in *Cabinet Office*, in particular §§19-22. A useful illustration of the underlying logic of s. 23(5) comes from *MPS* which concerned a request for information about an

⁹ Transcript 11 November 2012 pages 124 to 125

alleged terrorist plot to attack Canary Wharf, as referred to in a speech by then US President George Bush. The Tribunal concluded that:

“21. Given that it is highly likely that information of the kind involved here would have come wholly or partly from the CIA to MPS via a s.23 body, if it came to MPS at all, what inference would a member of the public draw from a confirmation or denial that MPS held it? That depends on whether he or she knew or would readily conclude that MPS normally liaised with, for example, the CIA, through the Security Service.

22. Armed with the literature and media coverage of these matters available today, we have no real doubt that many readers and viewers would appreciate that, if MPS held the information to which President Bush referred, so did the Security Service and that it was through that agency that it had been supplied to MPS. Equally, a denial would, by parity of reasoning, indicate that the information had probably not reached either body, since it is hard for the layman to suppose that intelligence as to a planned attack on two of London’s most obvious targets would not be passed to the police force responsible for their safety, if it reached the Security Service or any other s.23 body.

23. If that is so, confirmation that MPS held the information would not involve the disclosure of information which was directly or indirectly supplied to MPS by a s.23 body but the fact that this information had been passed by such a body to MPS would be information “relating to” that body.

24. By the same token, as a result of the deduction referred to in paragraph 22, a denial would amount to a statement that the Security Service (or other s.23 body) did not hold information; that is equally information “relating to” that body.”

82. The same Tribunal also concluded that a balance of probabilities test suffices for the engagement of s. 23(5): see §20.
83. Other Tribunals have recognised that ss. 23(5) and 24(2) may be – and will often need to be – relied upon in conjunction rather than in isolation: see for example *Baker* at §34.
84. Mr Hopkins argues that very careful attention must be paid to (a) the specific terms of the request (as opposed to the general subject area of the request), (b) exactly what is in the public domain (again, as opposed to more general statements of “involvement”), (c) whether that “public domain” information has been officially confirmed, and (d) whether the fact of the FCO’s holding or not holding the requested information at the time of the request (as opposed to the fact of “involvement of a security body”) would, if disclosed, result in s. 23(1) material being disclosed.

85. With those points in mind, it is clear that APPGER's challenge to the FCO's reliance on s.23(5) for requests 16-22 is wide of the mark. In particular, it relies on public information which is: broader or different to that which has been requested, or says nothing about what the FCO held at the date of the request, or has not been officially confirmed. This is clear when APPGER's s. 23(5) challenge is considered in relation to each relevant request in turn.
86. Request 15 is for "All information passed between UK authorities and Moroccan authorities, during the detention of BM in Morocco between 2002 and 2004". APPGER says that s. 23(5) does not apply because the FCO had informed the Divisional Court during the BM litigation that no part of the UK government knew that Mr Mohamed was in Morocco during the relevant time. The request, however, was not for information about Mr Mohamed's detention in Morocco. Given this disjuncture between the request and what is in the public domain, the FCO's reliance upon s. 23(5) is not undermined.
87. Request 16 is for "All information received as a direct result of the US interrogation of Khalid Sheikh Mohammed, between March 2003 and 6 September 2006." APPGER relies on Mr Sinclair's accepting in cross-examination that the SyS held information passed by the US authorities about Khalid Sheikh Mohammed. Again, there is a substantial disjuncture between the request to the FCO and what is in the public domain. The FCO's reliance upon s. 23(5) is not undermined.
88. As regards requests 17 and 18, APPGER simply says Mr Sinclair did not know whether there was any evidence in the public domain which would undermine the FCO's reliance upon s. 23(5). One possibility is of course that he was not aware of any such public information because there is none. APPGER certainly points to none. It has no grounds for challenge as regards these two requests.
89. As regards requests 19-22, APPGER relies by way of "official confirmation in the public domain" on a speech by former US President Bush. That does not come near to constituting official confirmation capable of undermining the FCO's refusal to state whether or not it held the requested information at the time of the request. References in a speech by President Bush certainly did not undermine reliance upon NCND in EA/2010/0008 (the "Canary Wharf plot" case). In any event, APPGER notes that, if the FCO did hold such information, it would be likely to fall within s. 23(1).
90. For the above reasons we find that APPGER's challenges on the application of s.23(5) by the FCO fail and that the FCO is entitled to claim s.23(5) where it has done so.
91. The right neither to confirm or deny under s.23(5) whether information is held has been claimed in this case together with s.24(2)

S. 24 "(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

(2) *The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purposes of safeguarding national security.*"

92. However s.24 is a qualified exemption and subject to the public interest test.
93. The Tribunal has given careful consideration to whether the "Neither Confirm Nor Deny" provisions of s.23(5) and s. 24(2) may be claimed together. In a series of Tribunal cases, starting with *Baker* public authorities with responsibilities for security matters have routinely claimed both the s. 23(5) and s. 24(2) NCND provisions in respect of the same request. This enables the public authority to keep secret any involvement of a s.23 security body in a matter. The consistent use of ss. 23(5) and 24(2) together ensure that requests made for similar information some time apart do not disclose, through whether both or only one of the NCND exemptions is claimed, if a s.23 body has acquired, or ceased to have, an involvement in a matter.
94. APPGER argue that ss. 23 and 24 are mutually exclusive adopting the arguments in Coppel on *Information Rights*¹⁰ chapter 17, and that the NCND provisions of ss. 23(5) and 24(2) cannot be used in the alternative, without identifying which exemption is actually in play. APPGER argue that *Baker* was wrongly decided.
95. *Baker* was decided on the papers, without the benefit of oral submissions from counsel. Nevertheless, it has been followed in many cases since, and public authorities attach considerable importance to the ability to claim both NCND provisions together in matters where national security considerations are at stake. It will often be the case that information relating to national security has been supplied both by s.23 bodies and by other bodies, such as police forces, the Diplomatic Service or HM Revenue and Customs. These latter bodies may be covered by the qualified NCND provision of s. 24(2).
96. In the light of the submissions by Ms Clement, and the importance attached by public authorities to the ability to claim s. 23(5) and s.24(2) together, the Tribunal has reviewed carefully whether the conclusion reached in *Baker* is one it can follow.
97. It is in the nature of the security services that much or all of what they do is necessarily secret. That is why s.23 is an absolute exemption. Necessary secrecy also extends to keeping secret the fact of whether a security body has an involvement with a matter. The Tribunal was taken to the *dicta* of Lord Brown of Eaton-under-Heywood JSC in the Supreme Court case of *Regina (A) v Director of Establishments of the Security Service [2009] UKSC 12*. This concerned the jurisdiction of the Investigatory Powers Tribunal. Lord Brown spoke of:

¹⁰ Third Edition 2010.

“the self-evident need to safeguard the secrecy and security of sensitive intelligence material, not least with regard to the working of the intelligence services”

and of the need:

“to protect the ‘neither confirm nor deny’ policy (equally obviously essential to the effective working of the services).”

98. The Tribunal attaches considerable importance to the availability of NCND in national security matters. The Tribunal does not need to consider whether Lord Brown’s *dicta* is in any way binding upon us. It is sufficient to note his comments as an authoritative statement of a view we had reached independently on the evidence before us.
99. In support of APPGER’s case that the s. 24 provisions are an alternative to the s.23 provisions Ms Clement points to the introductory words of s.24 which provide that *“Information which does not fall within section 23(1) is exempt information if ...”*. This, she say, limits the scope of s. 24 to information not caught by s. 23. This argument requires s. 24 to be read as a whole (i.e. as one single “provision” for FOIA purposes, rather than as separate provisions) and that it and s.23 are mutually exclusive.
100. Mr Hopkins for the IC submits that this argument must fail, as s.1(1) sets out two distinct types of right to information. First, there is the right *“to be informed in writing by the public authority whether it holds information of the description specified in the request”* (s.1(1)(a)). Second, there is the right *“to have that information communicated to him”* if it is held (s.1(1)(b)). This second right only arises where the first one is engaged. Where NCND is correctly applied, the first right is disapplied, and the second never comes into play.
101. The exemptions in Part II of FOIA therefore should not be read as single monolithic provisions. Rather, they consist of distinct provisions, some of which go to the first type of access right, and some to the second. S.24(1) is a provision which, in terms, concerns only the s.1(1)(b) right. It arises only where s.23(1) does not. S.24(2), however, is a separate provision, concerned only with the s. 1(1)(a) right. It is not mutually exclusive with section 23(5).
102. Ms Steyn drew attention to the specific terms of the NCND provision at s.23(5). This is drawn more widely than many other NCND provisions in the Act in that it covers *“information (whether or not already recorded)”*. This contrasts with the definition of information in s. 84 *“Information ... means information recorded in any form”*.
103. The wider definition serves to protect information (which may not be recorded) that a s. 23 body is not involved. Such information could be of value to a hostile agency, and the terms of s. 23(5) put it beyond doubt that NCND may be used in such circumstances, rather than a simple denial. This serves further to reinforce the importance to be attached to the ability to make a NCND response.

104. It is in the nature of NCND that it covers circumstances in which information is not held, as well as circumstances in which information is held. It can be used to protect sources, and to avoid inferences being drawn from acknowledgement of the fact that certain information is not held. Moreover if NCND could not be used in circumstances in which information was not held, there would be little point in it, as it would then amount to an acknowledgement that information was held.
105. If no information is held, from either s.23 or s.24 sources, that absence of information is, by its nature, indivisible. As there is nothing to attribute separately to ss. 23(5) and 24(2), it is logical to claim them together.
106. Ms Steyn further argues that, had Parliament intended the use of s. 23(5) to debar the use of s. 24(2) (or *vice versa*) it would have said so on the face of the Act. The Tribunal agrees.
107. First, it is common for a public authority to claim more than one exemption in respect of a single request for information. If Parliament had intended the exemptions in ss. 23 and 24 to be an exception to this general rule, it would surely have said so.
108. Second, intelligence information, of the sort likely to be caught by ss. 23 and 24, is often made up of fragmentary data. In its nature, it may come from multiple sources. The overwhelming importance of the ability to use NCND responses in relation to national security matters, and to do so in relation to information from all sources, renders it highly improbable that Parliament would have intended the use of these exemptions to be, uniquely, subject to greater restrictions than other exemptions.
109. Therefore the Tribunal concludes that a proper construction of ss. 23 and 24 allows the NCND provisions of ss. 23(5) and 24(2) to be claimed together, in relation to a single request for information. The words "*information which does not fall within section 23(1)*" are not to be read as rendering the NCND provisions of ss. 23(5) and 24(2) as mutually exclusive, but rather as a means of defining national security information which comes from sources other than the bodies named in s.23(3).
110. On the facts of these appeals, the Tribunal finds that in all cases in which the NCND provisions of ss. 23(5) and 24(2) were claimed together, both provisions were properly engaged.
111. Ms Clement advances two further arguments in support of APPGER's position and, for completeness, the Tribunal addresses these.
112. First, Ms Clement argues that it is unsatisfactory to claim ss. 23(5) and 24(2) in tandem, as the APPGER cannot know if the NCND exemption is said to be absolute (s.23(5)) or dependent on proof of harm and subject to the public interest balancing test (s.24(2)). Clearly, this puts APPGER at some disadvantage, but such disadvantage stems from the nature of secret material relating to national security. The disadvantage can be overcome by the APPGER arguing (as, in general, they have done) the balance of public interests in all

cases in which both provisions are claimed. Beyond that, the remedy must lie with the Tribunal, in satisfying itself, with the benefit of having seen the material in question if any, whether an exemption has been properly claimed. (For s 24(2) we find that the information, if and to the extent that it exists, is subject to similar public interests and the same balance as we discuss below for s. 27.)

113. Second, Ms Clement argues that the “give away” effect relied upon by the Cabinet Office in *Baker* will always be very limited. The Tribunal does not accept that the limited nature of the “give away” effect is the only consideration. The potential consequences of “giving away” even fragmentary pieces of information must be considered. If in a hypothetical scenario the “give away” effect is limited, and the consequence is limited to, for example, some embarrassment to an official of a public authority, the balance of public interest might point to disclosure of information. However, if the result of “giving away” information is that a terrorist secures the final fragment of information which enables a plot to bring down a passenger airline to pass undetected, the consequences (not least in terms of loss of life) are enormous. A public interest balance must always consider the potential consequences and give them appropriate weight. In national security matters this weight is likely to be substantial.
114. The Tribunal’s reasoning, although slightly different from that in *Baker*, leads to the same conclusion, namely, that if justified by the facts in the case in question, and by the balance of public interests in the case of s. 24(2), ss. 23(5) and 24(2) may be claimed together. In this case the Tribunal finds that where ss. 23(5) and 24(2) are claimed together NCND has been claimed correctly.

Art 10 ECHR

115. Ms Clements argues that if the ordinary domestic law interpretation of s.23 would result in a breach of ECHR, the Tribunal is obliged to “read down” s.23(1) of FOIA to avoid that incompatibility – s.3 of the Human Rights Act 1998. Her argument is largely based on the Tribunal’s report to the Court of Appeal dated 18 November 2011 in *Kennedy v Information Commissioner* CI/2010/0283.

116. Article 10 of ECHR reads as follows:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the*

prevention of disorder or crime, for the prevention of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

117. Since Ms Clement first made this argument the Supreme Court in *Sugar v BBC* [2012] UKSC 4 (“*Sugar*”) and the Court of Appeal now in *Kennedy v Information Commissioner* [2011] EWCA Civ 367 (“*Kennedy*”) have decided that certain FOIA exemptions and designations did not establish any interference with the freedom to receive information under Article 10(1), where a public authority, acting consistently with domestic legislation governing the nature and extent of obligations to disclose information, refused access to such information. We are bound by these decisions and therefore reject Ms Clement’s argument.
118. Ms Clement however points out that Court of Appeal has given leave to appeal to the Supreme Court in *Kennedy* and therefore this is not the end of the matter and we should stay our decision on Article 10 until the Tribunal has the benefit of the Supreme Court’s decision in that case and further submissions from the parties. Also Ms Clement says if the APPGER is left with the only option of appealing our decision to the Upper Tribunal, in order to preserve its position should the Supreme Court in *Kennedy* find that Article is infringed, then that would have a disproportionately adverse effect on what is in effect a not for profit social watchdog.
119. In view of the clear decision in *Sugar* and the fact APPGER can still preserve its position if it so wishes by appealing to the Upper Tribunal we do not consider that we should stay this case. Even if we were in a position to make a finding that Article 10(1) was engaged, in the circumstances of this case, our view is that the interference with Article 10(1) is proportionate and justified under Article 10(2).
120. In assessing the proportionality of the provision, the Court is required to apply the familiar tripartite analysis established by well-known ECHR jurisprudence: (i) does the measure pursue a legitimate aim; (ii) is there a rational connection between the identified aim and the relevant measure; and (iii) is there a reasonable relationship of proportionality between any interference and the importance of the objective pursued. An overriding consideration in assessing the proportionality of any measure which interferes with a Convention right is whether it strikes a fair balance between the interests of society and the interests of individuals.
121. The first two elements of the proportionality test are satisfied. S.23 protects the confidentiality of material that relates to or has emanated from one or more of the security bodies. The need to safeguard the secrecy and security of sensitive intelligence material is “self-evident”, and Parliament is fully entitled to adopt restrictive rules that ensure this powerful public interest is met: see *R (A) v Director of Establishments of the Security Service* [2010] 2 AC 1, per Lord Brown at §14. The exemption plainly furthers this objective.

122. The critical question for us is therefore whether s.23 is proportionate in the third, substantive, Convention sense. Ms Steyn and Ms Clement have provided extensive arguments which we do not believe it is necessary to set out in this decision bearing in mind our finding that Article 10(1) is not engaged in this case. However we were particularly impressed by Ms Steyn's argument that s.23 is a provision of primary legislation which embodies the legislative choice of the democratically elected legislature. Parliament specifically addressed the question of whether FOIA should exempt this type of information and s.23 represents the legislature's considered and informed decision as to the appropriate balance between the various interests at stake. Ms Clement accepts that a degree of deference is due to primary legislation in the field of national security. However, she refers us to *R v Shayler* [2003] 1 AC 247 where the House of Lords considered such a measure and she says conducted precisely the kind of analysis required in this case. However that case determined whether the Official Secrets Act 1989 breached Article 10 of the Convention if it prevented disclosure of information by a former member of the security service if such disclosure was in the public interest. It is not based on FOIA, whose enforcement provisions did not come into effect until after the decision, and so in our view does not deflect us from the strength of Ms Steyn's argument.
123. We have considered all the arguments and would find that any interference with Article 10 in this case is proportionate and justified.
124. If we were wrong and it was found not to be justified then s. 3(1) of the 1998 Act provides "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Ms Clement says this is possible and proposes the words "save insofar as this would breach Article 10 of the Convention" should be read into s.23(1). We would say that we cannot agree. In our view this would make the section largely unworkable and would leave no alternative but for a court to make a declaration of incompatibility under s.4 of the 1998 Act. However Parliament has already considered whether to make national security an exemption under FOIA and as Article 10(2) clearly recognises that there can be a justified interference in the interests of national security we would be extremely surprised if Parliament would not still consider itself Convention compliant.

IC's approach in this case

125. The APPGER criticise the Commissioner for not having carried out any investigation of the disputed information itself and in effect accepting the word of the FCO that s.23(1) was engaged. This criticism of the procedure adopted by the Commissioner was considered by the Tribunal in *Beam v Information Commissioner and Foreign and Commonwealth Office* EA/2008/0079, where the same ground of appeal was pursued. The Tribunal observed:

"14. As we have decided that the conclusion reached by the Information Commissioner was correct, it is not material to our decision to consider how he chose to carry out his investigation. The FOIA does not include any specific direction on the point. Section 50 (setting out general

arrangements for investigations) simply requires him to decide whether the public authority in question dealt with the original information request in accordance with the statute, without imposing any requirement, or providing any guidance, as to how he should go about the task. And section 23 does not add any requirement, in terms of the process that should be followed, when the exemption is asserted by the certificate procedure set out in subsection (2) is not adopted. ...

15. We do not think that this Tribunal should tell the Information Commissioner how, in general, he should conduct his investigations. And we would certainly not suggest either that the Information Commissioner should in all circumstances personally inspect all disputed material or that public authorities should follow the Ministerial Certificate route in all cases in which section 23 is relied on. There will be cases in which those processes will be necessary, or at least appropriate, and others where they will be disproportionate.”

126. Although we agree that we should not instruct the Commissioner how, in general, he should conduct his investigations we do have some reservations in this case. There was no s.23 certificate. The exemption was claimed extensively on matters of high public interest. As found above it is largely a matter of fact whether information is directly or indirectly supplied by or relates to the security services. We do not understand how the Commissioner could establish the facts without seeing the disputed information in this case. We have had to spend two days considering the information (albeit not all relating to s.23(1)). We note that the Deputy Commissioner attended part of the hearing and we were informed that one of the reasons for his attendance was in relation to this issue. In the circumstances of this case we can understand why he would wish to attend the hearing and would recommend that in future such cases his office should take note of the way we have had to establish the facts in this appeal.

Section 27(1)(a) (International Relations)

127. S. 27(1)(a) of FOIA provides:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

relations between the United Kingdom and any other State

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom...”

128. In *Hogan and Oxford City Council v Information Commissioner* [2011] 1 Info LR 588, the Tribunal gave the following guidance on the prejudice test:

27. Under FOIA, disclosure of certain categories of information is exempt if such disclosure ‘would, or would be likely to, prejudice’ specified activities or interests. ...

28. *The application of the 'prejudice' test should be considered as involving a number of steps.*
29. *First, there is a need to identify the applicable interest(s) within the relevant exemption. ...*
30. *Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thornton has stated "real, actual or of substance" (Hansard HL, Vol.162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met.*
34. *A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in John Connor Press Associates Limited v Information Commissioner (EA/2005/005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. That Tribunal drew support from the decision of Mr. Justice Munby in R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin) [[2011] 1 Info LR 239], where a comparable approach was taken to the construction of similar words in the Data Protection Act 1998. Mr Justice Munby stated that 'likely':*
- "connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."*
35. *On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests... In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.*

(Emphasis added).

129. The Tribunal considered the nature of the prejudice at issue in s.27(1) in *Nicholas Gilby v Information Commissioner and Foreign and Commonwealth*

Office (EA/2007/0071). *Gilby* concerned information relating to the Kingdom of Saudi Arabia (“KSA”). At paragraph 23, the Tribunal held:

“However, we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for a particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk.”

130. This Tribunal adopts the approaches in *Hogan* and *Gilby*. Accordingly, s.27(1)(a) will be engaged if there is a real and significant risk (even if it is less than a probability) that disclosure would prejudice relations with another State in the sense of impairing relations or their promotion or protection.

131. In determining these matters, the Tribunal adopts the guidance of the Upper Tribunal in *APPGER v IC and MOD* [2011] UKUT 153 (AAC) at [56]:

“Appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by disclosure of particular information: see Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1 AC 153, [50]-[53] and see also R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65 at [131] per Master of the Rolls:

In practical terms, the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.”

132. APPGER allege that the IC erred in concluding that this exemption was engaged, but not because they disagree with the approach of the Tribunal in the above cases. What Mr Tyrie says in evidence is that

- a. documents sent by the UK to another nation, and
- b. documents which do not concern the relationship between the US and the UK or the conduct of the US itself

are outside s.27.

133. Mr Sinclair explained in evidence the material in this case can be separated into two broad categories:

- (1) The exemption is claimed over confidential exchanges between US officials and UK officials and certain documents that provide comment on US intentions. The release of these documents would, in his view, prejudice the UK's relationship with the US. This limb also applies to documents relating to The Gambia.
- (2) The exemption is claimed over communications that detail UK views on US policy, or outline steps that the UK has or will take in handling US requests. The release of these documents would be likely, in his view, to have a prejudicial effect.

134. We accept that Mr Sinclair as a member of the Diplomatic Service and a Senior Civil Servant in the FCO has a much better view of the effect of prejudice of disclosure than the Tribunal. We find no evidence in this case to seriously contradict his view notwithstanding the clear and strong public interest in issues around extraordinary rendition. We therefore find that s.27(1)(a) and s.27(2) are engaged for the materials where it has been claimed. We have applied the appropriate weight as set out in *Hogan* when applying the public interest test.

S.35 (*Formulation and development of government policy etc*)

135. S. 35(1) provides:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.”

136. S. 35(1) provides a qualified exemption for four distinct (albeit sometimes overlapping) classes of information. However it is a class based exemption and there is no harm or prejudice test so that if the exemption applies it is automatically engaged.

137. As far as the scope of this exemption is concerned, in *DFES v Information Commissioner and Evening Standard* (EA/2006/0006) [2011] 1 Info LR 689 (“*DFES*”), the Tribunal held at [53]-[54] in relation to s.35(1)(a) that “relates to”

and “formulation or development of government policy” should be given a “reasonably broad interpretation”, consistent with the “wide reach” of the terms themselves.

138. The application of the public interest balancing exercise, and in particular the extent to which an inbuilt public interest in maintaining the exemption should be recognised, varies according to the particular subparagraph relied upon.
139. As far as s.35(1)(a) is concerned, in *Office of Government Commerce v Information Commissioner and HM Attorney General on behalf of the Speaker of the House of Commons* [2008] EWHC 737 (Admin) [2011] 1 Info LR 743 at [79] (“the OGC case”) Stanley Burnton J as he then was rejected the proposition that there was a general presumption of public interest in favour of non-disclosure of information which relates to the formulation or development of government policy.
140. Mr Sinclair in his evidence explained that there was a change of policy in relation to the Government representing British nationals and others. Originally the Government only provided representation abroad for British nationals. By the time of the requests the policy had changed to also provide representation for lawful British residents in Guantanamo Bay. In *DFES* the Tribunal held at §75(iv):

“disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy.”

We accept that there is a need for a safe space for deliberations while policy is being formulated and developed. This would mean that the public interest in maintaining the exemption should be given more weight during this period. The issue in this case is whether there was further development of the representation policy or formulation of new policies in relation to detainees at the time of the requests which would also be deserving of a safe space.

141. Ms Clement says that the change in policy in relation to British residents came before the requests. She also points out we need to distinguish between “policy” formulation and development on the one hand and operational/implementing decisions on the other. Although accepting her point we do not consider in this case that such a clear distinction can be made.
142. But the same is not true of s.35(1)(c). In *HM Treasury v Information Commissioner* [2009] EWHC 1811 (Admin) [2011] 1 Info LR 815, Blake J considered the “Law Officers’ Convention” which is reflected in s.35(1)(c) and 35(3). The evidence regarding this Convention is set out at §6 to 14 of his judgment. Blake J overturned the Tribunal’s decision (purportedly relying on the OGC case) that there is no general presumption of public interest in favour of

non-disclosure of whether the Law Officers have given advice on an issue. He held:

“38. ...the context of the decision in OGC case and the present is very different. The statutory exemption relating to the formulation of government policy appears to have been so wide that any reliance on the words of the statute as an indication as to the weight to be attached in a particular case was likely to have little or no value.

39. By contrast, the ground of exemption here relied upon is very specific. Parliament has precisely identified as exempt the issue as to whether or not the Law Officers have given their advice. ...this was statutory language intending to reflect the substance of the Law Officers’ Convention itself, a long-standing rule adopted by the executive for the promotion of good government. A consideration adopted by the draftsmen as a ground for exemption without having to prove specific prejudice, naturally fits into a regime where there is an assumption of a good reason against disclosure. The strength of the assumption and the weight to be attached to it in the light of the strength of competing considerations fall for determination by the public authority in the first instance and the Information Commissioner and Tribunal thereafter.

43. ...If Parliament had intended material of this kind to only enter the process of weighing the strength of rival public interests on proof of prejudice, it would have said so. It expressly did not. Moreover, a number of decisions of judicial bodies applying the FOIA have recognised precisely the weight to be attached to general considerations.”

(emphasis added)

143. At §52-53 Blake J cited a decision of the Commissioner, in which he said that there must be “exceptional circumstances” to override the public interest in neither confirming nor denying whether the Law Officers have given advice on an issue, and said that this was “indicative of the weight to be afforded to general considerations in the precise context of the present case”.
144. The public interest in not disclosing the actual advice provided by the Law Officers is in our view, at least as high, if not higher than, the public interest in not revealing the fact that the Law Officers have given advice on a particular issue. This exemption therefore has to be approached in a similar way to the s.42 legal professional privilege (“LPP”) referred to below when applying the public interest test under s.2 FOIA.
145. Ms Steyn argues that Blake J’s reasoning applies, by analogy, to s.35(1)(b) and (d). As Blake J said, where the ground of exemption is very specific, and no prejudice is required to be proved, it “naturally fits into a regime where there is an assumption of a good reason against disclosure”. Ms Steyn continues that the s.35(1)(b) exemption for Ministerial communications is very specific, unlike the broader s.35(1)(a) exemption. So too is the exemption in respect of the operation of any Ministerial private office. The Tribunal should, she argues, acknowledge

the strength of the general public interest in enabling Ministers to communicate confidentially with each other and to operate their private offices on a confidential basis.

146. We can agree with the latter proposition but should we elevate ss 35(1)(b) and (d) to having the same inherent weight in favour of maintaining the exemptions as that of s.35(1)(c) which reflects a long standing Convention? We consider Blake J was referring to the combination of specificity and convention as establishing a strong weight in favour of maintaining the Law Officer exemption and both of these factors are not present together for subsections (b) and (d). However we are prepared to accept that the weight we should attribute to the s.35(1)(b) and (d) exemptions because of their specificity is higher than for s.35(1)(a), but not as weighty as for s.35(1)(c).

S.42 (Legal Professional Privilege (LPP))

147. S.42 is claimed by the FCO. The section is a class based qualified exemption:

(1) Information in respect of which a claim to legal professional privilege ...could be maintained in legal proceedings is exempt information.

Ms Clement suggests that it is not clear whether the IC has applied s. 42(1) to pre-existing documents passed to a lawyer during the course of litigation. Ms Steyn says none of the documents in respect of which the FCO relies on this exemption were pre-existing documents. Mr Sinclair informs us that the information comprises notes of legal conferences, written advice from Counsel, notes of that advice and draft legal documents. These, he says, all relate to the Judicial Review claim brought by Mr Al Rawi and Mr El Banna. Ms Clement contends that the litigation in question was concluded a number of years before the requests were made (The Court of Appeal decision in the al Rawi litigation was handed down on 12 October 2006). Ms Steyn says it was very much ongoing at the time of the requests and we note that the civil claims were not settled until November 2010.

148. We find that where the exemption has been claimed that the exemption has been claimed correctly and is engaged. We would comment that in our view s.42(1) could have been claimed for more of the disputed information.
149. It is well established from case law that there is a strong inherent weight that must be given to maintaining this exemption and that there must be very weighty public interests in favour of disclosure for the public interest balance to tip in favour of disclosure.

S.40(2) (personal data)

150. As the IC has conceded the cross-appeal in respect of the information relating to where this exemption has been claimed in this case, and APPGER are not

appealing where this exemption is engaged, this is not a matter the Tribunal needs to consider further.

The Public Interest Test

151. In relation to the qualified exemptions which are engaged we need to apply the public interest test under ss. 2(1)(b) and 2(2)(b) whichever section is applicable.
152. In this open judgment we set out the key public interest factors we have taken into account when considering the public interest balance. Some of the inherent factors which are represented in the exemptions themselves and the weight we give to them have already been set out above. What we have also done below is to set out the key factors we have taken into account and the weight we have attributed to them in favour of disclosure as well as those in favour of maintaining exemptions from the evidence presented to us in this case.
153. We have highlighted these particular public interest factors in bold below and attributed a mark to identify each one, such as “F1” for a factor in favour of disclosure or “A1” for a factor against disclosure. This has been done for ease of reference and also because we have undertaken the final balancing exercise by adapting the open schedule of disputed information to set out the public interests taken into account and the result of the balancing exercise. Because the schedule in this form contains confidential and secret information it is only provided in a closed annex to this decision.

Public interest factors in favour of disclosure

154. In his evidence Mr Cooper explained that “rendition” is not a term defined by law. As stated earlier in this decision it describes the process by which a detainee is transferred from one State to another, outside normal legal processes (e.g. extradition, deportation etc). In some cases, when the detainee remains outside any recognised due process and the rule of law, the rendition is known as an “extraordinary rendition”. The individual concerned may have been transferred to secret detention or to a third country for the purposes of interrogation, often in circumstances where he or she faced a real risk of torture. The absence of access to any due legal process greatly increases the risk of maltreatment.
155. In APPGER 1 the Upper Tribunal said

“As the Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (2009) observed:-

“Extraordinary rendition violates numerous human rights, including the rights protecting individuals against arbitrary arrest, enforced disappearance, forcible transfer, or subjection to torture and other cruel, inhuman or degrading treatment. ... secret and unacknowledged detention itself constitutes a violation of some of

the most basic tenets of international law ... When a rendered person is held in secret detention, or held for interrogation by authorities of other States, with no information supplied to family members or others regarding the detention, this constitutes an enforced disappearance - a crime under international law.” (Chapter 4 pp 80-81, paragraph 3.1).

“ Accountability is not an obstacle to countering terrorism: it provides the crucial under-pinning of counter-terrorist measures if the latter are to secure the necessary public support and legitimacy to be truly effective. ... the authorities must be prepared to account fully for the use of their powers, and must be prepared to submit themselves to adequate independent scrutiny.” (Chapter 7 p162).

156. We recognise this amounts to a very weighty public interest factor in favour of disclosure particularly where allegations about the UK’s involvement in, and knowledge of, extraordinary rendition have caused great public concern over the past 8 years, despite the Government’s public policy of opposing extraordinary rendition. Mr Tyrie has explained that Government assurances that the UK has not been involved in, or had knowledge of, extraordinary rendition, have failed to give the public confidence that these allegations have been fully investigated and resolved. A number of Government statements denying UK involvement in rendition have been shown to be incorrect by subsequent Government statements and various court decisions as set out earlier in this decision. Also he refers us to the discovery of documents in Libya in the Autumn of 2011, which if genuine, appear to suggest that the UK may have worked with the Gaddafi regime to arrange the rendition of terror suspects and their families to Libya in 2004. Mr Tyrie in cross-examination and questioning by the Tribunal made it clear that because of the Government’s track record in relation to extraordinary rendition he, in effect, no longer trusts what the Government might say and considers the only way to get to the truth is to disclose the disputed information. Moreover he says we cannot rely on the 2007 ISC report on extraordinary rendition because as the Divisional Court in *R(Mohamed) v Foreign Secretary (No 2) (DC) [2009] EWHC 2549 (Admin)* stated:

“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.”

157. Mr Cooper and Mr Tyrie say that suspicions about the UK’s involvement in extraordinary rendition have made the country less safe. Mr Tyrie referred to the views of the former Head of MI6, Sir Richard Dearlove, that the rendition issue has meant that Western intelligence agencies are unable to recruit moderate Muslims because they think countries like the UK are no longer on the right side of the argument. He also referred to the joint Security and Intelligence Agencies’ policy document on “liaison with overseas security and intelligence services in

relation to detainees who may be subject to mistreatment,” to the effect that if the possibility exists that information has been obtained through the mistreatment of detainees, the negative consequences that may result include any potential adverse effects on national security. This could result in further radicalisation, leading to an increase in the threat from terrorism or could result in damage to the reputation of the agencies, leading to a reduction in the agencies’ ability to discharge their functions effectively.

158. Mr Tyrie says that where the US Administration has publicly stated that extraordinary rendition has helped to foil terrorist plots affecting the UK – see §80 above, the Government should provide the public with sufficient information to validate the truth of such claims. This would allow the effectiveness of extraordinary rendition to be assessed.
159. Also he says because the terms of reference of the Detainee (Gibson) Inquiry, which was set up to investigate the wider implications of ill treatment, are limited it cannot be relied on to cover the reasons for the requests, hence a further need for disclosure of the disputed information. It has recently been brought to our attention that the work of the Gibson Inquiry will not proceed beyond its preparatory stage, and that a new judge-led inquiry will only be held once further police investigations have concluded (which may take some time).¹¹ This means the concerns raised by the Prime Minister in his statement to Parliament in July 2010 announcing the setting up the Gibson Inquiry¹² will remain unanswered for the foreseeable future. Mr Sinclair in his evidence agreed with the concerns of the Prime Minister but said that they would be addressed soon by the Gibson Inquiry. This no longer appears to be the position.
160. **We therefore find that there is a very strong public interest in transparency and accountability around the application of the Government’s public policy opposing extraordinary rendition (ER). This interest is heightened where Ministers have had to correct earlier statements made to Parliament about the application of the policy and where there are claims that US ER has helped to foil terrorist plots in the UK. (F1)**
161. **We also find from the evidence that there is a particular weighty public interest in knowing whether the Government has been involved, and if so the extent of that involvement, in the detention of British nationals and residents the subject of the requests in this case, their rendition to Guantanamo Bay and the attempts by the Government to secure their release. (F2)**
162. We also take into account what Mr Clive Stafford Smith, who is described as Shaker Aamer’s (who is the last British resident in Guantanamo Bay) legal representative, says. Although Mr Aamer has been cleared for release since 2007 the UK is no closer to obtaining his release and

¹¹ The Justice Minister, Kenneth Clarke, announced this in the House of Commons on 18 January 2012 because of a new enquiry being undertaken by the Metropolitan Police.

¹² Hansard 6 July 2010 columns 175 and 176.

“It is therefore in Mr Aamer’s interest to get as much information of the sort requested by the APPGER out into the public domain so that more pressure can be applied.”

Mr Sinclair’s position in relation to Mr Aamer is that the disclosure sought would prejudice his release.

163. Mr Tyrie was very concerned about the matters referred to in §§19 to 26 above. He considers the process by which the Bellinger letter was obtained to be highly questionable and that if there was any impropriety then this would amount to a strong public interest in favour of disclosure. From questioning it was not exactly clear what he meant although he seemed to be mainly concerned with the way the UK Government went about obtaining the letter which he says amounted to a cover up, rather than the accuracy of its substance. If he is saying that the mere solicitation of the letter of 21 August, even if it expressed the US position, is improper then we cannot agree. We think what he is saying is that if the US administration did not believe what they were writing but wrote in these terms anyway only at the behest of and under pressure from the UK Government, and the letter was then used to mislead the Court, then that would amount to impropriety. We also consider that merely seeking to influence the Court without evidence of wrongdoing cannot amount to impropriety. Parties always seek to influence or persuade a Court as to their view. Moreover the letter cannot be considered without reference to the context in which it may have been obtained, such as legal proceedings.
164. **Therefore on the basis of our considerations in the previous paragraph we find there is a strong public interest in knowing whether there was any impropriety by the UK Government in relation to the Bellinger letter of 21.8.2008 to the Court. (F3)**
165. The parties have provided other factors favouring the public interest in disclosure. We have taken these into account but the factors we have given particular weight to are those set out in the previous paragraphs of this section of the reasons for the decision. When applying weight we have taken into account the evidence we have heard as to what information is already in the public domain. This is summarised in some detail in Ms Steyn’s closing submissions on behalf of the FCO.

Public interest factors in favour of maintaining exemptions

166. The public interest factors against disclosure require careful definition. S.27 represents the inherent public interest in the UK having effective and efficient relations with foreign states, particularly the USA. But it goes beyond that in this case. It goes to the willingness of the US to share with the UK all types of material relating to national security. This sharing is subject to what is known as the “control principle” whereby there is an understanding that secret intelligence material provided, on security or diplomatic channels, is not released without the specific consent of the provider. Material may range from warnings of a planned terrorist attack to the routine sharing of small pieces of intelligence. The latter

provide a 'jigsaw' or 'mosaic' enabling a larger and significant picture of a potential threat to be built up from smaller and, by themselves, apparently insignificant pieces of information.

167. **We find there is a very strong public interest in the maintenance of the "control principle" governing the use of secret intelligence information supplied to the UK through security and diplomatic channels, so as not to prejudice the supply of intelligence forming part of a 'mosaic' enabling a picture of potential terrorist activity, or threats to national security or UK interests abroad to be built up and countered. (A1)**
168. **We find there is an even weightier public interest where the United States is involved as the UK's most important bilateral ally and provider of much security information. (A2)**
169. **From the evidence set out earlier in this decision there is a public interest in protecting from disclosure deliberations within Government on the formulation and development of policy. The strength of that interest depends on whether there is a need to maintain a safe space for such deliberations. There is a weightier public interest for protecting ministerial communications in relation to detainees at Guantanamo Bay, given the sensitivity of the matter in diplomatic relations with the United States. (A3)**
170. **There is a strong public interest generally in maintaining the expectation of confidence for diplomatic exchanges. (A4)**
171. **There is an inherently strong public interest in maintaining legal professional privilege including Law Officers advice within government, which is particularly weighty when litigation is continuing on closely related matters. (A5)**
172. We set out below our findings in relation to the main three qualified exemptions claimed, namely international relations, legal privilege and formulation and development of policy.

Requests involving international relations

173. In relation to applying the public interest test where the exemptions at s.27(1)(a) and s.27(2) have been claimed in respect of a significant amount of information covered by the requests, and in particular information relating to the allegation that the FCO solicited a letter from the US administration to substantiate its claim that the publication of a summary of BM's treatment would lead to a reconsideration of the intelligence sharing relationship between the US and the UK, we do our best in this open judgment to explain how we have approached deciding the public interest balance in this case.
174. Firstly, the Tribunal agrees that these exemptions are engaged where claimed.

175. Secondly, it is clearly in the public interest that there should be public confidence in the Government's handling of BM's case. As the IC states in his applicable Decision Notice, the case touched upon the fundamental duty of the State to protect its citizens and residents, and in particular its obligations under international conventions not to be involved in torture, cruelty or inhumane treatment.
176. There is also a public interest in transparency and accountability, which may be heightened in matters touching upon extraordinary rendition, as Ministers have had to correct earlier statements made to Parliament about UK involvement.
177. The public interest against disclosure requires careful definition. It goes beyond the inherent public interest in the UK having effective and efficient relations with foreign states, and particularly the US. It goes to the willingness of the US to share with the UK all types of secret intelligence material relating to national security. This sharing is subject to the "control principle" described above whereby material provided, through security or diplomatic channels, is not released without the specific consent of the provider.
178. The absence of even the smallest piece of information could make it harder for the UK secret services to construct, from such small pieces of intelligence, a 'jigsaw' or 'mosaic' enabling a larger and significant picture of a potential threat to be built up from smaller and, by themselves, apparently insignificant pieces of information.
179. The nature of terrorist organisations, and their tendency to operate in self-contained cells, means that the development of pictures of potential threats from mosaics of small pieces of information is particularly significant. The reality of the threat to be countered is clear from information in the public domain, for example, about plots to bring down passenger aircraft on trans-Atlantic flights. There is a powerful public interest in the UK secret services having access to mosaic material as well as direct evidence provided by their US counterparts.
180. Another aspect is the US view that the release of information, provided through security or diplomatic channels, remains subject to the "control principle", even if it has otherwise been placed in the public domain. In evidence, examples were given of the order of the Court that material should be disclosed and the leaking of diplomatic cables by Wikileaks. In the current case, even if the Tribunal ordered the release of information which appeared to it to be already in the public domain, such release would be likely to be regarded by the US as breaching the control principle.
181. The reason for, or the reasonableness of, the attitudes adopted by the US does not form a part of the balancing exercise the Tribunal is required to undertake; it is the fact of the existence of those attitudes which matters. Similarly, it is not the fact that information released might be seen to be innocuous (for example, because it was already in the public domain) that has to be weighed in the balance, but that the release itself would be seen as a further breach of the control principle, and could result in a reduction in access to intelligence material.

In striking the balance of the public interest there must be regard to the strong desirability of not damaging the UK's access to intelligence material.

182. We have heard closed evidence and seen the disputed information which further strengthens our view, that like the Court in the BM appeal when faced with PII, that the information should not be disclosed because the public interest balance favours maintaining the exemption despite the very strong public interests expressed by F1 – F3 factors set out above.
183. Much of the disputed information subject to the s.27 exemption involves the **BM Letter Request**. We have read this information in detail. Mr Sinclair's evidence has also been scrutinised at length in closed session. We can find no impropriety by the FCO. We note that Lord Neuberger MR in *BM v FCO* [2010] EWCA Civ 65 seems to have come to the same conclusion at §136 of his judgment. In the letter dated 25.8.2008 from Daniel Bethlehem QC to the Court it sets out in the unredacted parts the extensive exchanges taking place between HMG (in important aspects conducted by the FCO) and the US Government over a number of weeks in relation to the case which form the basis of the disputed material.
184. Moreover much of this information, in our view, is also subject to legal privilege and either s.42(1) or s.35(1)(c) could be engaged.
185. We hope this finding of the lack of any impropriety will be of comfort to APPGER and their questions in relation to the Observer article can now be laid to rest.
186. For other disputed information where s.27 is claimed the Tribunal is satisfied also that there is nothing in the closed and secret material which would add in any way to the public knowledge of the mistreatment of BM. That information is already in the public domain as a result of earlier court hearings in the US and the UK. Were there new information in the material, that would weigh significantly in striking the balance of public interests, but there is not.
187. In favour of the release of the s.27 material is the public interest in having confidence in the Government's handling of the BM litigation; and in transparency and accountability of Government actions in relation to the Guantanamo detainees generally. That interest is given added weight by the mistreatment of BM whilst he was detained, and the need for the Government to correct earlier statements it had made to Parliament on extraordinary rendition. The weight to be given to this interest is lessened by the fact that the Tribunal's inspection of the closed and secret material disclosed no new information about mistreatment of detainees, beyond that which is already in the public domain.
188. In favour of maintaining the exemption is the strong public interest in the UK having access to secret intelligence capable of forming part of a 'mosaic' that may be used in identifying and frustrating future terrorist plots. This interest is given added weight by the fact that a further release of material, in breach of the 'control principle', could reduce access further. In weighing the public interest, the weight given to maintaining the exemption should be multiplied by the

magnitude of the adverse consequences should a terrorist plot aimed at causing loss of life go undetected.

189. All of the material in respect of which the s.27(1)(a) and s.27(2) exemptions are claimed relates to information covered by the 'control principle' in that it is either US sourced diplomatic or security material, UK material reporting on US diplomatic or security service views, or UK material responding to US diplomatic or security material. The public interest in maintaining the 'control principle' so as not to adversely affect the supply of secret intelligence on national security matters is very high indeed.
190. Although we accept that the weight to be given to diplomatic exchanges with The Gambia is less than that with the US, because in this case they are interwoven with relations with the US the weight cannot be significantly lessened.
191. For these reasons the Tribunal finds that the public interest in maintaining the s.27 exemptions outweighs the public interest in disclosure.

Requests involving LPP and legal advice of Law Officers

192. Mr Sinclair in evidence stated that there is a public interest in ensuring that the Government makes good decisions based on high quality legal advice. However, on the evidence before the Tribunal, it is submitted by Ms Clement that the public interest in maintaining the exemption is outweighed by the public interest in disclosure. In addition to the strong inbuilt public interest in maintaining the exemption referred to above identified in the cases, the following specific public interest factors increase the public interest in maintaining the exemption.
193. The Requests were made on 15 October 2008, at a time when the civil claims against HMG were being pursued by a number of former detainees. The release of advice on the merits of Mr Al Rawi and Mr El Banna's Judicial Review proceedings would prejudice HMG's position in relation to their subsequent civil claim as well as the claims of other detainees and former detainees.
194. It is important that the confidential relationship between lawyer and client is protected in cases of this nature. HMG will need to consult lawyers in order to rigorously assess the merits of a case and advise on a particular action. This relationship, in our view, would be undermined by the release of privileged material in this case.
195. In coming to this decision we have taken into account Ms Steyn's submission that Counsel for HMG are, when necessary, provided with access to highly confidential information in order to provide the most comprehensive advice. There is a risk that the release of this privileged information will result in a constriction of the amount of material that is provided to Counsel or a more limited demand for written advice from Counsel. This would affect both the thoroughness and the quality of legal advice, which cannot be in the public interest.

196. The advice in this case could not reasonably be regarded as old or no longer live.

197. As APPGER acknowledged, there is a strong element of public interest built into LPP in order to protect the confidentiality of communications between lawyers and their clients. We find that where s.42 or s.35(1)(c) is claimed that the public interest balance favours the maintaining the exemption.

Requests involving formulation and development of government policy

198. Here we are concerned with whether the Government is deserving of a safe space for the documents involved. We have taken into account:

- (1) The Detainee Policy regarding the release and return from Guantanamo Bay was very much live at the time of the relevant requests. We appreciate that there had been a change of policy by this time so that the Government were by then prepared to represent residents as well as nationals. However we find from the evidence that policy continued to be developed;
- (2) That there was still at least one detainee at Guantanamo Bay that the Government was attempting to get released; and
- (3) The disputed information includes documents that are only in draft form and do not necessarily reflect the Government's final position.

199. We find that at the time of the requests there was a very strong public interest in the Government having a safe space to develop its policy so as to obtain the release of detainees and that this outweighed the public interest in disclosing the information.

Confidential annex

200. As we have already explained we provide our findings as to which exemptions are engaged, the key public interest factors applied and where the public interest balance lies in schedules (based on the open schedule format) in the confidential annex to this decision. We would also mention that due to the narrow way a number of requests have been drafted that we find that a number of documents and information within documents in the disputed materials are outside the scope of the requests.

Conclusions

201. We uphold the Commissioner's DN2 and DN3, except in relation to where the FCO's cross-appeal applies which the Commissioner now concedes. In relation to DN1 we largely uphold the Commissioner's decision except in relation to 4

documents where we consider the whole document or parts should be disclosed because no exemption applies.

202. We issue a substituted decision notice in order to reflect this conclusion which is set out at the beginning of this decision.

203. Our decision is unanimous.

Signed

John Angel
Principal Judge

Date: 12 April 2012