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FOR THE ATTENTION OF THE COURT
AND THE SPECIAL ADVOCATES ONLY

Foreign &
Commonwealth
Office

King Charles Street
London SW1A 2AH

Telephone: +44-20-7008 3052
Facsimile: +44-20-7008 3071
E-mail: Daniel.Bethlehem@fco.gov.uk

From the Legal Adviser
Daniel Bethlehem QC

25 August 2008

The Rt Hon Lord Justice Thomas
Mr Justice Lloyd Jones
Royal Courts of Justice
Strand
London WC2A 2LL

Dear Lord Justice Thomas and Mr Justice Lloyd Jones

Binyam Mohamed: US disclosure letter of 21 August 2008 and related matters

I write further to the letter of 22 August 2008 from Adam Chapman, for the Treasury Solicitor, transmitting to the Court the letter dated 21 August 2008 from the Legal Adviser of the US Department of State, John Bellinger ("Bellinger letter"), setting out certain formal commitments by the Chief Prosecutor in the Office of Military Commissions in respect of the provision of the documents in issue in our proceedings. In Mr Chapman's letter, he indicated that I would be writing to the Court to provide further details of the discussions we have been having with the US on these matters. I apologise for not getting this letter to you sooner but, having had to travel out of London to brief the Foreign Secretary on these matters on Friday, I was not in a position to complete this letter before now.

I am copying this letter to the Special Advocates. As some of the issues addressed herein are sensitive, notably to do with high level [redacted] exchanges [redacted], and also go to issues addressed in the closed hearing, I am not copying this letter to Leigh Day.

I make no substantive comments here on the Bellinger letter, which I anticipate will be the subject of submissions in the hearing on Wednesday.

In addressing the details of the discussions that we have been having with the US authorities over the past weeks, I am mindful of the Court's concerns, expressed most recently in the closed hearing following the handing down of the Judgment on Thursday, 21 August, [redacted]

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[redacted] I hope that I can shed some further light on this. In endeavouring to do so, however, I should note, both for reasons of propriety and for the avoidance of doubt, that the observations below going to aspects of the US military commissions system should not be taken as "evidence" on such points but only as reflecting my understanding of the issues in the light of a considerable number of quite fast moving exchanges with various elements of the US Government. I address these issues in an attempt to assist the Court in a transparent manner in respect of the difficult decision on disclosure that it must now take.

As the Court's open Judgment in this case notes, HMG has been having extensive exchanges with various elements in the US Government on Mr Mohamed's case. This initially took place within the framework of our request to the US authorities for Mr Mohamed's release and return to the United Kingdom, going back to the Foreign Secretary's formal correspondence to this end of 7 August 2007. Subsequently, in the period prior to the swearing of charges against Mr Mohamed, these discussions also addressed concerns relating to the possibility that Mr Mohamed might be charged and that this would be inconsistent with our request for his release and return. These discussions were extensive and, although in important aspects conducted by the FCO, notably through [redacted], and me, on the legal side, they also included significant elements that were Whitehall-wide. [redacted] There are no easy issues in this case, with every policy option posing questions going to the United Kingdom's national security, to our relations with the United States, and to due process as regards Mr Mohamed, whether in the United States or in this country. I make this observation to underline what will become apparent in the formal submissions that will be made on behalf of the Foreign Secretary in Wednesday's hearing, on the basis of a PII Certificate and associated papers, that every alternative avenue open to the Foreign Secretary, in consultation with other Departmental colleagues, would require a difficult balancing of issues.

As will have been apparent from the submissions to the Court during the hearing, HMG had extensive engagement with the US Government on the matters in issue in this case in the period running up to and during the hearing. As the Court noted in its open Judgment, I travelled (with [redacted]) to the United States on 16 June 2008 for discussions with senior US officials from the Departments of State and Defense. These discussions, which engaged the most senior officials, including political-level officials, concerned with these matters in these Departments, both reiterated HMG's request for Mr Mohamed's release and return and also addressed the issues that would be engaged by a hearing on Mr Mohamed's

application to the English courts. I had further discussions with the US on these matters in the days following 16 June. I also had discussions on these matters in Washington with officials [redacted] Both in the intervening period and subsequent to this latter meeting, we continued to engage with US officials about our request for Mr Mohamed's release and return and the issues associated with this case.

As the Court will be aware, by letters of 16 June and 1 August addressed to Mr Dell'Orto, and copied to Mr Bellinger, I drew to the attention of the US Government [redacted] The Court will also be aware of other HMG-USG correspondence on this matter. Other extensive engagement at the level of senior officials also took place [redacted] In addition to this engagement at the level of senior officials, [redacted] As the Court will also know, the Home Secretary submitted a PII Certificate to the Court in respect of the documents disclosed in closed evidence. She has accordingly been very fully engaged in key aspects of this case throughout.

I should also add, for the avoidance of doubt, that the Foreign Secretary has been fully engaged with these proceedings at every stage. My trip to brief him on Friday, almost immediately upon his return from Georgia, illustrates this.

I note the extent of these exchanges in the event that it reassures the Court that this matter has indeed been receiving the close attention of the senior political level in the United Kingdom. It will similarly be apparent that senior levels in the US Government have also been actively engaged on this matter. That this engagement has not been visible to the Court, and that it has not, until Mr Bellinger's letter of 21 August, been reflected in a commitment to disclose the documents in issue in the proceedings, may be more readily appreciated by the Court in the light of what follows below.

During and following the hearing, there were on-going high level exchanges with senior US Government figures [redacted] about the possibility and modalities of disclosure of the documents in question within the US system. The reason for this range and complexity of exchanges is that, as represented to me, disclosure in a form and at a point that would meet the concerns of the Court would not normally be contemplated within the US system. Disclosure within the US system in a manner that would satisfy our Court would therefore, I am told, have required (and indeed would now require, consistent with the Bellinger letter) a novel *ad hoc* arrangement. I am told, also, that the US has a settled legislative framework that addresses post-charge discovery / disclosure of classified documents in criminal proceedings that imposes or contemplates the possibility of protective measures. Against this background, it has been represented to me that the possibility of an *ad hoc* disclosure arrangement to accommodate the concerns of our Court has given rise to considerable concerns in various

quarters in the US system for the reasons that, first, it may not be sufficiently amenable to robust protective measures, and, second, it may set a highly problematic precedent in favour of pre-charge disclosure in other spheres of US military and criminal justice.

A further, related consideration that has been represented to me is that, whatever might be the United Kingdom view of the merits or otherwise of the disclosure rules relating to classified information, including of an exculpatory nature, under the Military Commissions Act, these rules are based on those applicable in US Courts Martial proceedings under the US Uniform Code of Military Justice, which applies to a very considerable number of men and woman in the US Armed Services. As noted, I am told that any effort to craft an *ad hoc* arrangement for pre-referral discovery in the military commissions process would run the risk of being read across to the Courts Martial system with potentially destabilising effects on that settled system of military justice.

Further, it has also been represented forcefully to me that, if there are flaws in the US approach relating to the use of classified information in military commission proceedings, this will be subject to appellate review by the US federal courts, including by the US Supreme Court. Moreover, our US interlocutors have also made plain that matters in the nature of those at issue in these proceedings are of special sensitivity because of the possibility that actions of non-US courts may affect the adjudicatory processes laid down in US legislation.

Separately, the point has also been made to me that, just as the United Kingdom has been endeavouring to address such difficult issues in the context of our SIAC proceedings, and is having to defend its approach through our courts, so also is the US trying to grapple with these issues in its system.

I set out these arguments merely for purposes of providing to the Court an appreciation of why addressing the question of disclosure within the US system to meet the concerns of an English court has not been straightforward. This may also go some way towards explaining the point that was the subject of criticism levelled against the Defendant, in paragraphs 101 and 123 of the open Judgment, that no evidence of US law was provided to the Court on these points during the hearing. The wider issues of US federal military and criminal law surrounding the MCA and MMC which may potentially have a bearing on the issues in contention in our proceedings are myriad, and while, on the basis of legal advice provided to the Defendant, we considered that the position we were advancing was sound and a fair reflection of the issues, it would simply not have been possible to have engaged with the rolling evidential submissions to the Court by Mr Stafford Smith in the course of the hearing.

Following the hearing, in a range of exchanges with US officials, we sought to represent the concerns of the Court that meaningful disclosure would have to include disclosure to Mr Mohamed's counsel and to the Convening Authority. As noted, the apparent obstacles to this approach from the perspective of the United States were, first, that a military commission had not yet been constituted for purposes of any trial of the charges sworn against Mr Mohamed on 28 May 2008, for the straightforward reason that he has not yet formally been charged.

Second, absent the constitution of a military commission for the trial of the charges, the issue of pre-referral disclosure loomed large. On the first of these points, the representation was made to me that the role of the Convening Authority is akin to the role of a Crown Prosecution Service decision-maker, or the Director of Public Prosecutions, in England and Wales, ie, it is to consider whether the charges sworn give rise to a triable case and, if so, whether there are any public interest considerations that dictate that a trial should not take place. On this appreciation of the role of the Convening Authority, ordering pre-charge disclosure would be entirely novel.

We were not in a position to explain the Court's concerns to our US interlocutors before the handing down of the Judgment on 21 August, Prior to this point, I was engaged in extensive discussions with senior [redacted] lawyers about what would be sufficient to meet the Court's concerns. Indeed, the US had come to us with a draft letter of commitment regarding disclosure in advance of the publication of the Judgment. We had, however, to inform them that this would be insufficient to meet the concerns of the Court, notably as it undertook only to provide the material in question, albeit in full, to Mr Mohamed's cleared military counsel at the normal point of discovery within the US system. While we sought to explain our reasons for believing that this approach would not meet the Court's concerns, we were unable sufficiently to convey to our US interlocutors the concerns of the Court given that the Judgment was still embargoed.

Following the handing down of the Court's Judgment, I, together with [redacted] had extended discussions with senior [redacted] officials. [redacted] These discussions concerned the detail of the Judgment rather than the modalities of any possible disclosure within the US system. The Bellinger letter of 21 August was sent to us in the early hours of Friday, 22 August UK time. We had not seen this revised letter in draft or commented upon it but took the view that it would be relevant to the Court's consideration and thus forwarded it immediately to the Court, to the Special Advocates and, after a brief delay for reference to the US authorities, to Leigh Day.

As will be represented in evidence and argument on behalf of the Foreign Secretary on Wednesday, the US has represented to HMG that it is "committed to disclosing the material in question under its system and subject to its laws". The material in question is highly classified intelligence material. In the circumstances, the US is not in a position properly to evaluate the effectiveness of the protection that could or would be afforded under English law in respect of the disclosure of highly classified and sensitive US intelligence material to persons who are not or may not be within the jurisdiction of the English court. As they see it, disclosure of highly classified and sensitive US intelligence material pursuant to an order of an English court would call fundamentally into question the trust that is essential to an intelligence liaison relationship. These issues will be addressed by the Foreign Secretary in his PII Certificate and a classified annex to be filed shortly.

I should make plain, as will be addressed in the PII Certificate, that the Foreign Secretary appreciates with sharp clarity both the overwhelming importance to the national security of the United Kingdom of the cornerstone of trust on which the sharing of intelligence information is based and, on the other hand, the essential necessity of ensuring, as the Court has found, that Mr Mohamed has available to him such material as is necessary for his defence to any charges that may be referred for trial. Insofar as there is a balance to be addressed in respect of these matters, it will be addressed in the PII Certificate and associated papers to be filed shortly.

I trust that this explanation of developments over the past weeks, and more, in respect of this case will assist the Court for purposes of the hearing on Wednesday.

Yours sincerely.

[signed in the original]

Daniel Bethlehem QC
Legal Adviser

cc. Special Advocates