



**Foreign &
Commonwealth
Office**

King Charles Street
London SW1A 2AH

Telephone: +44-20-7008 3052

Facsimile: +44-20-7008 3071

E-mail: Daniel.Bethlehem@fcdo.gov.uk

27 August 2008

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

From the Legal Adviser

Daniel Bethlehem QC

Dear Lord Justice Thomas and Mr Justice Lloyd Jones

Binyam Mohamed: information just received from the US

I write immediately to the Court, with copies to Leigh Day and to the Special Advocates, to note some further information that has just been drawn to my attention by the US State Department which I anticipate will be relevant to the hearing due to take place later today.

First, in email correspondence addressed to me from Mr Stephen Mathias, the Assistant Legal Adviser of the State Department who has responsibility for these issues, Mr Mathias notes as follows:

"By way of update:

1. The Legal Advisor to the Convening Authority today requested the documents at issue. He has now received all of the documents and has committed to turn them over to the Convening Authority when he presents his pretrial advice to her for her decision on whether to refer the case for trial. Thus, the Convening Authority will have all of these documents before her prior to making a decision on whether to refer the case. (Importantly, the Convening Authority, under the laws and rules governing military commissions, cannot refer charges without first receiving formal advice from the Legal Advisor to the Convening Authority, which we now know has not yet occurred. Accordingly, the Convening Authority will, without question, receive the documents before she makes her referral decision).
2. In accordance with the Manual for Military Commissions Rule 701, the papers accompanying the pretrial advice are automatically disclosed to defense counsel in the event that the case is referred. Accordingly, if the case is referred for trial, defense counsel will be provided with all the documents. Since the documents are classified, this disclosure would be made under the rules and protections for the disclosure of classified information established in the Military Commissions Act and a protective order issued by the military commission judge. Because of



General Hartmann's commitment, Rule 701 guarantees that the documents will be disclosed to defense counsel by operation of law if the case is referred for trial. This development supplements the firm commitment of the Chief Prosecutor (which was memorialized in John Bellinger's letter of August 22) to disclose these documents to defense counsel at the discovery phase of military commission proceedings, whether they were exculpatory or not, if the case is referred for trial.

3. Needless to say, this is a significant development. To the extent that the UK proceedings are currently aimed at ensuring that the documents at issue will be before the Convening Authority before she makes her referral decision, this development further demonstrates that the relief sought through these proceedings has been otherwise accomplished and no further action by the court is required. Ordering the disclosure of US intelligence information now would have only the marginal effects of serious and lasting damage to the US-UK intelligence sharing relationship, and thus the national security of the United Kingdom, and of aggressive and unprecedented intervention in the apparently functioning adjudicatory processes of a longtime ally of the United Kingdom, in contravention of well established principles of international comity."

Second, on receipt of Mr Stafford Smith's Seventh Witness Statement yesterday, I sought clarification from the US Government on one point set out in that Witness Statement. The point was that set out in paragraph 53 of the Witness Statement, ie, in the confidential section of that Statement, concerning the apparent offer by Lt. Col. Vandeveld to share classified information with defence counsel without the requirement of a protective order. In raising this matter with the US Government, I noted in operative part as follows:

"A new piece of information has been submitted by the other side in advance of the hearing tomorrow. It is contained in a confidential submission to the Court and to us that I emphasise has not been put into the public domain by Clive Stafford Smith. On your (USG) side, please therefore also treat this as confidential.

The assertion is that, in November 2007, one of Col. Morris's prosecutor's, Lt. Col. Vandeveld, whom I presume was (is) handling the BM case, offered to disclose classified information to BM's defence counsel based on counsel having the proper security clearances (and, I speculate, perhaps also an *ad hoc* undertaking) but in the absence of the need for a protective order. This offer was apparently made in the context of plea discussions."

My email correspondence to the US Government on this point late last night also contained a further paragraph, which identified the reasons why I considered it important to get further information on this matter. I do not attach that text as it goes to the Defendant's appreciation of its legal case which it is not appropriate to disclose more widely. I concluded my note by requesting an urgent response.

In Mr Mathias's email to me overnight, he addressed this aspect in the following terms (which I set out in full):

"On the new issue: We are informed that LT COL Vandeveld's discussions with one of BM's counsel involved certain other documents (which may or may not have included any of those



at issue in the UK proceedings) and that the discussion was in the way of a suggestion to counsel to get the appropriate security clearance that would allow her to see classified information that would clearly outline that her client had not been abused, as he had described. We understand that in having this discussion, LT COL Vandeveld was not setting out (nor did he feel competent to set out) all of the procedures involved in making the classified information available to her and protecting it, but rather that he was simply encouraging her to obtain the clearance which would be "one" of the preconditions of her reviewing the information. We understand that a protective order would have been a fundamental part of any such procedures. We understand that to the extent that Lt. Col. Bradley construed the conversation as an offer to disclose classified information should she obtain a security clearance (and no other events had occurred, such as the referral of charges or the entry of a protective order by a military judge detailed after the referral of charges), Lt. Col. Bradley is mistaken."

I set out these points for the Court, Leigh Day and the Special Advocates without comment. As appropriate, these elements will be the subject of submissions by counsel during the course of the hearing.

Yours sincerely,

Daniel Bethlehem QC
Legal Adviser

cc. Leigh Day
Special Advocates

