Neutral Citation Number: [2019] EWHC 3849 (QB)

Case No: HQ13X01841
& HQ15P01285

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2020

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

YUNUS RAHMATULLAH	**1st Claimant**
- and -	
AMANATULLAH ALI	**2nd Claimant**
- and -	
(1) THE MINISTRY OF DEFENCE **(2) THE FOREIGN AND COMMONWEALTH OFFICE**	**Defendants**

AGREED OPEN VERSION OF THE CLOSED JUDGMENT FOLLOWING CLOSED HEARING ON 15 OCTOBER 2019

- -
- -

Richard Hermer QC, Nikolaus Grubeck and **Andrew McIntyre** (instructed by **Deighton Peirce Glynn**) for the **1st Claimant**
Angus McCullough QC and **Martin Goudie QC** (supported by **Special Advocates' Support Office**) for the **1st Claimant**
Dan Squires QC and **Julianne Morrison** (instructed by **ITN Solicitors**) for the **2nd Claimant**
Shaheen Rahman QC, Zubair Ahmad QC and **Rachel Toney** (supported by **Special Advocates' Support Office**) for the **2nd Claimant**
Derek Sweeting QC, Ben Watson, James Stansfeld (instructed by **Government Legal Department**) for the **Defendants**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

1. The claimants in this case are Pakistani nationals both of whom allege that they were captured by British forces in Iraq in February 2004. They contend that they were subsequently handed over to United States' control and, thereafter, taken to Afghanistan where they were subjected to prolonged detention, torture and mistreatment.

2. The case against the defendants is based upon three broad categories of allegation:
   i. mistreatment by UK personnel upon arrest and before the claimants were transferred to United States' control;
   ii. transfer to United States' control; and
   iii. failures thereafter to intervene to bring the claimants' detention to an end and/or stop the United States' authorities from further mistreating them ("the return claim")

3. The claims are strenuously denied.

4. As the claims proceed towards trial, two important issues have arisen between the parties relating to disclosure and applicable law respectively. For the sake of convenience and ease of reference, I have set about the task of giving separate written judgments on each issue. The applicable law issue is the subject of an open judgment. On the issue of disclosure, it has been necessary to provide an open and a closed judgment. This is the open version of the closed judgment.

5. The issue of disclosure has given rise to a good deal of mutual recrimination between the defendants and the Special Advocates (SAs) each accusing the other of taking bad points and causing unnecessary delay. I see no purpose in adjudicating on these matters and propose to concentrate on addressing the way forward. Furthermore, it is important that my decision should be promulgated as soon as practicable so as not to risk derailing the procedural timetable. As a result, it has been necessary for me to articulate my analysis in as succinct a way as remains consistent with my duty to provide proper reasons. One consequence of this approach is that I have not sought to resolve or comment on every argument raised either orally or in the voluminous written submissions presented to the court. However, the parties can rest assured that I have considered the full panoply of these arguments and, where I have not made express reference to them, it is because their resolution is not necessary for the purposes of reaching my conclusions.

6. Fortunately, the parties have made some progress in narrowing down the issues to be resolved. After the hearing of 15 October 2019, I invited the Defendants and the SAs to reformulate their submissions in writing to cover recent developments. So it is that the matters in issue have, at least for the time being, been attenuated. At this stage, the controversial areas cover three categories of documentation with which I propose to deal in turn.

<u>AGENCY REVIEWS</u>

7. The claimants allege that the defendants knew or ought to have known that detainees handed over to US authorities were liable to be rendered to third countries and there tortured or otherwise maltreated.

8. In response to concerns raised from other quarters, the Secret Intelligence Service ("SIS") and MI5 conducted a series of reviews into such complaints. These comprised:
   i. A review conducted by SIS and overseen by Sir Peter Gibson in 2009 [***]
   ii. A review conducted in 2009 by MI5 [***]
   iii. A further SIS review conducted between 2012 and 2014 [***] and
   iv. A further MI5 review conducted between 2012 and 2014 [***]

9. In addition, there is a residual category of cases which, for reasons of ongoing litigation or criminal investigation, did not form part of the earlier reviews.

10. The SAs contend that all of the case summaries generated by the agency reviews should be disclosed.

11. The defendants resist this approach and contend that some, but not all, of the case summaries are relevant on the application of the relevant and familiar test for standard disclosure.

12. The central issue is whether or not the defendants are applying too narrow a test for disclosure.

13. The defendants propose that the case summaries to be disclosed should be limited to:
    i. Cases demonstrating US rendition practices before March 2004;
    ii. Cases describing the detention conditions in the Battlefield Interrogation Facility (BIF) at BIAP, where the claimants were held, before mid-2004;
    iii. Cases going to the issue of alleged US mistreatment of detainees prior to mid-2004; and
    iv. Detention conditions at the US-run facility at Bagram throughout the relevant time (i.e. prior to the claimants' capture/detention until their release).

14. The SAs point out that there is a dearth of information presently available to them relating to what the defendants knew of US practice on rendition and with respect to the alleged failure to take steps to secure the claimants' return from US control. In particular:
    i. [***]
    ii. [***]
    iii. [***]

15. Against this background the SAs argue that:
    i. The time periods to which the defendants seek to limit the scope of disclosure are unduly restrictive. For example, cases relating to rendition and mistreatment after 2004 continue to be relevant to the return claim;
    ii. Disclosure should extend beyond cases involving Bagram to the extent that such cases were capable of informing the defendants more generally as to the extent of any risks that the US might have been involved in or condoned the mistreatment or unnecessarily prolonged incarceration of detainees;
    iii. Even in cases in which the US was not involved, the cases will serve to illustrate the extent to which the decisions of the UK adequately protected the rights of detainees which were handed over.

16. I bear in mind that the overriding principle is that disclosure should be restricted to what is necessary in any given case but I am satisfied that the SAs' contentions are correct. In this regard, it must not be forgotten that the parameters of standard disclosure cover not only documents adversely affecting the disclosing party's case but also those which adversely affect the other party's case (see Serious Organised Crime Agency v Namli [2011] EWCA 1411). I have read and taken into account the terms of reference of each of the agency reviews and have concluded that all the case summaries are relevant. It is, of course, impossible to predict in advance which will adversely affect the claimants' case and which the defendants' case but, taken as a whole, they will flesh out the picture the entirety of which is relevant to the pleaded issues. I readily accept that some summaries are bound to be more salient than others but their cumulative impact has a relevance which cannot be preserved intact by the process of selection advocated by the defendants.

17. I note, in passing, that the point is not taken that the exercise of disclosing the case summaries would involve the expenditure of disproportionate time and costs. The documents are readily to hand.

BELHAJ – OPERATION LYDD

18. In February 2004, Mr Belhaj and his wife were detained at Beijing Airport and flown to Kuala Lumpur whence they were rendered to Libya where both were imprisoned and maltreated. They alleged that the UK government had been complicit in these events and brought a civil claim for damages. On 10 May 2018, the Attorney-General read out in the House of Commons a letter of apology from the Prime Minister accepting that the "UK government's actions contributed to your detention rendition and suffering…"

19. The Metropolitan Police had earlier conducted a criminal investigation into the circumstances leading to the rendition of Mr Belhaj [***]. This investigation was codenamed Operation Lydd.

20. The CPS decided not to prosecute on the grounds that it was not satisfied that the conflicting evidence they had accumulated was sufficient to secure a conviction of the offence of misfeasance in public office by the application of the criminal burden and standard of proof. In summary, the CPS was, however, satisfied that a British official had passed on relevant information to those involved in the rendition of Mr Belhaj with some degree of political authority so to do.

21. The SAs contend that the circumstances of the UK involvement in the rendition of Mr Belhaj, occurring as it did at about the same time as the detention and rendition of the claimants, are relevant to their claims.

22. The defendants' response, with respect to the Belhaj material generally, is that "its only potential relevance would be to the broader question of "knowledge" [***]. Of the Operation Lydd report, it contends it is simply not relevant to the claimants' cases.

23. I take the view that the Lydd report is bound to be relevant to the issue of the extent, if any, to which UK authorities may, in the light of their knowledge at the time, have struck the wrong balance between their legal responsibilities to those likely to become the subjects of rendition and broader political considerations. Although the Operation Lydd report was not directed specifically at the claimants' cases, the contents will have a generic significance falling within the scope of standard disclosure. In this regard, reference may be made to the case of <u>Nickeln v Symmons</u> [1996] P.N.L.R 245 which, although decided under the RSC, confirmed that documents relating to incidents other than the one directly the subject of the dispute may be relevant as supporting or adversely affecting another party's case. I see no reason why the same approach should not apply to the CPR. For the avoidance of doubt, if, which is not the case, the Operation Lydd report were only potentially relevant to credibility, then I would very probably have taken a different view.

24. During the course of oral submissions, the defendants suggested that a two page summary of the report could be produced but I am satisfied that, as with the case summaries, the context is an important factor governing relevance and the whole report should be disclosed.

ISC CLOSED REPORTS

25. The Intelligence and Security Committee of Parliament ("ISC") produced a closed report of 2018 entitled "Detainee Mistreatment and Rendition: 2001-2010". The scope of the report is evidenced by the contents of the open version which is quoted from in detail in the SAs' closed submissions of 20 September 2019. There are earlier closed reports of 2005, 2007 and 2009.

26. I agree with the SAs' submissions that the closed reports are relevant and disclosable taking into account their subject matter. It may be that any opinions expressed therein will turn out to be of disputed admissibility but that is an issue for a later stage. Redactions to the reports serve to obscure a clear understanding of the material which they contain. The removal of references to individuals, countries, dates and the like is an impediment to a proper understanding of the documents as a whole. The procedural structure of the CMP is crafted to ring-fence material the open disclosure of which would be liable to harm the national interest. It is important that the balance which the procedure is intended to strike is not unnecessarily further tilted in favour of the party relying upon it by an unduly narrow interpretation of what is or is not relevant for the purposes of disclosure. My attention has been drawn to the case of WH Holding Ltd v E20 Stadium LLP [2018] 2578 (Ch) in which Snowden J cited with apparent approval the approach taken in Hollander Documentary Evidence 13th Ed at 10-16:

    "Where the material in the document is simply irrelevant, it is unlikely that there will be any point in blanking it out unless it is confidential."

27. I take the view that the approach of the defendants is antipathetic to the fulfilment of the overriding objective (as modified by CPR 82.2) in that it is liable to give rise to a disproportion between the time and money involved in piecemeal redaction compared with the dubious (if any) advantages to be gained from such an exercise. CPR 31.6 should not be so narrowly interpreted as to impair through redactions the intelligibility of the materials disclosed. Nor can it usually be appropriate for the resources of the court to be diverted into a prolonged and anxious scrutiny into the relevance of a catalogue of redacted material where there are no other grounds of exclusion than relevance relied upon.

CONCLUSION

28. It follows from the above that I accede to the SAs' applications for disclosure in the terms sought and will make an order to this effect the terms of which, I trust, can be agreed.