

Neutral Citation Number: [2010] EWHC 1496 (QB)

Case No: HQ08X01180

HQ08X01416

HQ08X03220

HQ08X01686

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

21 June 2010

Before:

MR JUSTICE SILBER

Between:

(1) BISHER AL RAWI
(2) JAMIL EL BANNA
(3) RICHARD BELMAR
(4) OMAR DEGHAYES
(5) BINYAM MOHAMED
(6) MARTIN MUBANGA

Claimants

- and -

(1) THE SECURITY SERVICE
(2) THE SECRET INTELLIGENCE
SERVICE
(3) THE ATTORNEY-GENERAL
(4) THE FOREIGN AND
COMMONWEALTH OFFICE
(5) THE HOME OFFICE

Defendants

SUMMARY

(This is not part of the judgment)

Mr. Justice Silber:

The Issues

The issues which I have to resolve are whether the six claimants in this action, who were all detained at various locations including at the United States detention facility in Guantanamo Bay, are entitled to orders first for the disclosure and inspection of

certain Guidance materials relating to the interrogation and treatment of detainees, second (if the defendants oppose inspection on the grounds of public interest immunity (“PII”)) the issue of a PII certificate and the fixing of a date for the PII hearing and third the appointment of special advocates to assist the court at that hearing.

The orders are opposed not on the ground that the defendants do not have this material but on the grounds that they contend for a number of reasons that this application is premature and to grant it would not further the interests of justice.

The Facts

The claims of each of the claimants, although not identical, arise in each case as a result of their detention and their alleged mistreatment while detained. The claimants contend that they have been subjected to false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office and breaches of their rights under the Human Rights Act 1998.

The defendants to the claims are the Security Service, the Secret Intelligence Service (“the SIS”), the Foreign and Commonwealth Office, the Home Office and in a representative capacity the Attorney General. It is contended that each of the defendants caused or contributed towards the alleged detention, rendition and ill treatment of each of the claimants. The defendants in their “Open Defences” admit that each of the claimants were detained and transferred but they raise issues on the allegations of mistreatment while denying any liability in respect of the claimants’ detention or alleged mistreatment.

There have been a number of case management conferences and applications relating to among other matters the time when the defendants will complete discovery which still has not been completed. As I will explain in paragraphs 19 to 27 below, disclosure and inspection is unlikely to be completed for many years. The claimants are dissatisfied with the way in which disclosure has been handled by the defendant and not surprisingly they are anxious for the present claims to be pursued expeditiously.

At a case management hearing held on 22 and 23 April 2010, many procedural matters were dealt with but the claimants were also seeking substantial disclosure with the defendants saying that it was not possible or appropriate to order it at that stage. On the second day of the hearing, Mr. Richard Hermer QC, counsel for the claimants, sought as a compromise solution in the light of the way in which discovery has been carried out by the defendants and the lengthy period before it would be completed orders for much more limited disclosure but on the premise that if these orders were not made, he would then pursue his original application for much more extensive disclosure.

His modified application was for orders that:

- (a) the defendants should disclose and permit inspection of (i) the Guidance document(s) for the interrogation and treatment of detainees dated 11 January 2002 (“the 2002 Guidance”) referred to in paragraph 47 of the Intelligence and Security Committee (“ISC”) report of 2005 and (ii) the subsequent Guidance relating to 2004 onwards (“the 2004 Guidance”) referred to in paragraph 82 and footnote 65 to the ISC report of 2007;
- (b) if inspection of the 2002 Guidance and/or 2004 Guidance is opposed on grounds of PII, then this issue should be determined at a hearing to be fixed as soon as possible after discovery and a PII certificate should be served no later than 21 days thereafter; and
- (c) in the event that inspection is opposed, the court should also request the Attorney General to appoint senior and junior Special Advocates to assist the court in the determination of the issue of whether inspection should be ordered.

Mr. Rory Phillips QC counsel for the defendants explained that he needed to take instructions on one part of these claims and in particular the claims for disclosure and inspection of the 2004 Guidance. Accordingly, a timetable was set for the defendants and the claimants to file written submissions on these issues and I have had the benefit of these written submissions. Unfortunately and regrettably the delivery of this judgment has been delayed as I have been heavily involved in long trials on circuit since the April hearing until the middle of this month.

This is massive litigation in which I assume all parties are financed by public funds and anything which can be done which might assist in expediting the resolution of the dispute should be adopted unless it will cause unfairness. I consider that the Guidance documents, which are in the defendants’ possession, are not only relevant to the issues but their disclosure at this stage might assist in determining and resolving the dispute between the parties or expediting its resolution. I do not consider that the objections of the defendants are sufficiently justified to prevent me ordering disclosure.

Conclusion

I have concluded that I should order that:

- a. the defendant should disclose and permit inspection of the 2002 Guidance and the 2004 Guidance by 10am on 9 July 2010;
- b. if inspection of the 2002 Guidance and/or 2004 Guidance is opposed on grounds of PII, then the matter should be determined at a hearing to be fixed as soon as possible after discovery and a PII certificate should be served by 10am on 9 July 2010; and that
- c. in the event that inspection is opposed the court should request the Attorney General to appoint a Special Advocate preferably a Queen’s Counsel to assist the court in the determination of the issue of whether inspection should be ordered.

Ends