IN HIGH COURT OF JUSTICE **Claim Nos. HQ08X01180, HQ08X01416, HQ08X01686, HQO8X03220**

QUEEN'S BENCH DIVISION

BETWEEN

(1) BISHER AL RAWI
(2) JAMIL EL BANNA
(3) RICHARD BELMAR
(4) OMAR DEGHAYES
(5) BINYAM MOHAMMED

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

SUBMISSIONS OF THE FIRST TO FIFTH CLAIMANTS ON THE DEFENDANTS' APPLICATION FOR A STAY PENDING MEDIATION AND IN RESPONSE TO THE DEFENDANTS OBSERVATIONS ON PRELIMINARY ISSUES AND MR MACKIE'S 11TH WITNESS STATEMENT

Introduction

1. The Claimants have noted the Prime Minister's very recent indication that the Defendants wish to settle the Claimants' claims by mediation and by the payment of compensation. The prospect of a successful mediation is of course a welcome development, and it is one which the Claimants are giving active and constructive consideration to.

2. Despite this, they very firmly oppose the Defendants' application for a 3 month stay to 15 October 2010. It would be wrong in principle, counter-productive in practice, and quite premature for such a stay to be ordered:

   (a) As a matter of practical effect a stay would actually impede the prospect of a successful mediation rather than the converse: the very limited nature of the Defendants' disclosure to date, and their persistent refusal to provide

substantive answers to the Claimants' Request for Further Information, makes it difficult to advise the Claimants on the overall merits of their claims for the purpose of considering any settlement offers which are made;

(b) Such disclosure as has been provided to date underscores why even limited further disclosure could be particularly significant in assisting a fruitful mediation. A series of obvious and striking examples of this can be easily provided from material only disclosed to the First to Fifth Claimants in recent days. They are addressed in more detail below but in summary some of this disclosure appears to show direct involvement by the Prime Minister's office in March 2002 frustrating the release of at least one of the Claimants prior to his transfer to Guantanamo Bay, some consists of material dating back to February 2002 showing United States authorities to consider the fate of the detainees to be a matter for the United Kingdom to determine, and one document, a Home Office note from 14 January 2002, describes an unnamed detainee as "*cold and beaten up*" and lists options going forward as including "*collusive extradition*";

(c) The Court has already observed that everything possible should be done to expedite these claims. The Defendants' approach automatically delays their progression for three months, with no guarantee that a further period of delay would not be sought in October 2010;

(d) Even in an ordinary case, as a matter of principle, a stay to allow mediation should only be considered where it will lead to some material saving of cost to the parties, or of Court time. This is anything but an ordinary case, and in circumstances where a judge led inquiry requiring access to all relevant documentation would follow even a successful mediation, and where there is no imminent trial date, there would be no such saving of cost or time here in any event;

(e) The absence of a set of directions down to trial would remove an important element of discipline from the mediation context. It appears clear from the Prime Minister's statement that it is the discipline of the litigation process

which has brought the Defendants to propose mediation in the first place. That discipline should be maintained now;

(f) Finally, as the questions raised by the Court on 8 July 2010 exemplify, and as is inevitable given the very recent nature of the Defendants' proposal, much detail remains to be considered as to how a mediation will work, and it of course cannot be assumed that it will succeed. The Claimants are vulnerable individuals who have suffered torture. Any mediation will have to be carefully and sensitively structured and any attempt to rush it through on the basis of an approach which might be appropriate in a commercial mediation would be unhelpful to all sides.

3. In the Defendants' Skeleton Argument (served at 4pm on 7 July 2010) reference was also made to the 11th Witness Statement of David Mackie relating to disclosure. That statement was not itself served until just before 5.30 pm on 8 July 2010. These submissions contain some preliminary observations in response to it and to the Defendants' opposition to the direction sought by the Claimants and relating to preliminary issues.

Defendants' application for a stay pending mediation

Imposition of stay would frustrate mediation

4. The Court is invited to read the 4th Witness Statement of Sapna Malik dated 12 July 2010 filed in hard copy and by email.

5. The effect of a stay would be to prevent any further material of any kind being provided to the Claimants prior to the mediation. This would mean that the Defendants would not be required to provide any further answer to the Claimants' Request for Further Information, no PII process could be undertaken in relation to the Guidance documentation ordered for disclosure on 21 June 2010, and the Defendants would be required to give no further disclosure at all prior to any mediation, even though (in Mr Mackie's 11th Witness Statement see

e.g. paragraphs 23, 26, 34, 37, 39, 46) they have now openly acknowledged that they could provide further disclosure by September and October 2010.

6. Unless the Defendants are prepared to approach any mediation on the basis that the Claimants' allegations are well-founded, this lack of progress will frustrate rather than facilitate the progression of any mediation. The Claimants would be left in the following unsatisfactory position:

(a) They would not know whether the Defendants had any serious basis for resisting the Claimants' central case that the Defendants were, by early 2002, aware that there was either a likelihood or a real risk that any individual identified as a terrorist suspect to the United States could face incommunicado detention, rendition and torture;

(b) They would not know the full extent of the Defendants' direct and indirect participation in their interrogation;

(c) They would not know the full extent of the Defendants' role in impeding or seeking the Claimants' release from detention or in actively contributing to the Claimants arbitrary incommunicado detention in the first place.

7. It is for these reasons that the Claimants contend that the Defendants must answer the Claimants' Request for Further Information, must provide supporting disclosure in respect of it, and must proceed with their disclosure exercise. It is worth emphasising in this regard that it can be no answer to say that even by October 2010 only a small amount of further disclosure might actually reach the Claimants. As the very recent disclosure addressed below indicates – and as the Court has observed at previous hearings – a small amount of documentation <u>can</u> make a significant difference as to how the merits of a claim may be viewed:

(a) This much was already evident from the material disclosed prior to the last hearing, and the apparent acknowledgment that the United Kingdom Government was actually <u>content</u> that the unlawful transfers to, and detentions at Guantanamo Bay occurred, because it did not wish to take

responsibility for the custody of the detainees (Memorandum dated 10 January 2010 at Bundle 4 Tab 67 LC13 p. 202);

(b) Disclosure given in June 2010 in relation to the 6th Claimant (but relevant to all Claimants' claims and disclosed to the 1st to 5th Claimants on 8 July 2010) ("the Mubanga disclosure") provides a stark example of how a small amount of disclosure can be of potentially determinative importance. See e.g. the following documents annexed to the 4th Witness Statement of Sapna Malik:

- 16 May 2002 email expressing the hope that interest in some aspect of Mr Mubanga's treatment would "*die away completely*" **[Ex. 'SM20', p 50]**;
- 17 May 2002 email internally characterising the handling of Mr Mubanga's case in London as "*schizophrenic*" and referring to "*edicts from London*" which had apparently placed the Lusaka embassy in an "*impossible position*" **[Ex. 'SM20', p 51]**;
- 21 May 2002 memorandum stating that "*instructions from London were unequivocal. We should not accept responsibility for or take custody of him. This was subsequently reinforced by the message from No. 10 that under no circumstances should Mubanga be allowed to return to the UK. ... It became clear to us that if we requested consular access thereby de facto acknowledging him as a UK national, he would have been handed over to us. This would have gone against all other instructions from London.... our hands were tied by policy directed from London*" **[Ex. 'SM20', p 52]**;
- 13 August 2002 email stating "*we were clearly instructed by London to take no responsibility for him though Consular Division wanted us to seek Consular access. Had we done so, the Zambians ... would have promptly handed him over to us*" **[Ex. 'SM20', p 49]**;
- 15 August 2002 email acknowledging that the United Kingdom might be open to "*charges of concealed extradition*" **[Ex. 'SM20', p 48]**;

(c) The Mubanga disclosure would be of grave concern even if it stood alone. Unfortunately it appears to have quite significant echoes in some of the

material already pleaded in the Particulars of Claim served on behalf of the other Claimants, and apparently showing (in months and years that followed) the Security Services or the Prime Minister's office playing some kind of role in determining the scope of consular access to be sought in respect of the Claimants, or in intervening in a negative manner on specific issues relating to their potential release from detention, (see e.g. Al Rawi Particulars of Claim at Bundle 1 Tab 1 paragraphs 48-50, 135, 137, 172, 276.5, 279 and 342);

(d) Disclosure given to all Claimants by the Home Office on 2 July 2010 further illustrated the importance of this process not being artificially interrupted by reference to any mediation, containing, as it did, a series of other documents of a striking nature:

- A manuscript document dated 14 January 2002 described the conditions of an unidentified detainee in the following terms "*Interview conditions cold beaten up*" and included in what appeared to be a range of options going forward the words "*collusive deportation extradition*" **[Ex. 'SM21', pp 62-3]**;
- A Home Office document from 26 February 2002 addressing the fate of United Kingdom nationals held at Guantanamo Bay described the "*ball [as being] in the UK court*" and included the comment that "*UK should not be in a hurry to take back the detainees though FCO was quiet on the point*" **[Ex. 'SM21', p 64]**;
- A document bearing the manuscript date '17/1/02', and sent to Sir Christopher Meyer, set out the United Kingdom's positive preference for United Kingdom nationals to be transferred to Guantanamo Bay **[Ex. 'SM21', p 60]**;
- A heavily redacted Home Office document dated 12 April 2002 (erroneously headed 12 April 2001) addresses the "*level of protection to be afforded to British citizens held*" and records a Foreign Office desire to seek legal access and being "*overruled by No. 10*") **[Ex. 'SM21', p 55]**.

(e) Most recently, on 9 July 2010, the Defendants disclosed part of the Guidance the subject of the Court's Order on 21 June 2010. While a detailed analysis of this important documentation is still required it is immediately apparent that the Guidance in place in the important period running from 2001 through to (at least) 2005 was inadequate in a series of obvious respects. Three examples may be provided:

- The guidance of 11 January 2002 (such as it was) contained no detailed list of forbidden interrogation techniques and it was only in April 2005 that Guidance informed Security Service officers of forbidden techniques such as "*hooding*", "*use of stress positions*" and "*torture methods such as thumb screws*" **[Ex. 'SM22', pp 67-8]**;
- The guidance of 11 January 2002 stated in terms that "*the law does not require you to intervene to prevent*" ill-treatment of prisoners (paragraph 4). The new Consolidated Guidance published last week states in terms that any Intelligence Officer knowing or believing that torture would take place would be obliged to "*try and prevent torture occurring unless in doing so you might make the situation worse*" (see paragraph 11 & Table);
- A document headed "*Liaison with Security and Intelligence Services of countries with poor human rights record*" dated 31 August 2002 only barred the Secret Intelligence Service from passing on intelligence if it "*believe[d] it is <u>likely</u> to lead to an abuse of human rights*" (emphasis added) **[Ex. 'SM22', p 83]**. Even the now superceded Guidance from 28 July 2006 (also just disclosed) implicitly acknowledged that this was too high a threshold. It made it clear that consideration would need to be given to any "*real possibility*" of action leading to torture or mistreatment, identified the risk of criminal liability if action was taken without appropriate assurances or caveats in place, and concluded that even the use of caveats might not be reliable (see paragraphs 14, 30 & 36) **[Ex. 'SM22', pp 72-81]**.

8. At a more general level the Court will be aware that it is a common feature of many successful mediations that the parties' minds are focused on what the

consequences will be if the mediation fails, and by the existence of a clear and defined framework leading down to trial. The Defendants' approach would eliminate that feature by requiring the mediation to take place against the background of proceedings without full pleadings, without full disclosure, without any timetable and without any trial date even of preliminary issues. That would, it is submitted, be unhelpful and counter-productive.

General importance of expedition

9. This litigation has already been beset by substantial delay. It is almost two years since the Defendants were served with the Claimants' Particulars of Claim. Those particulars were, quite deliberately, pleaded on a very full basis so as to facilitate the Defendants' task in knowing the case they had to meet. Despite that, in the period which has followed, the Defendants have failed to serve their full defences (choosing instead to adopt an entirely novel procedure involving the service of "open defences"), they have failed to apply the *Wiley* balance to a single document potentially attracting public interest immunity other than the Guidance documentation disclosed on 9 July 2010, they have given only very limited disclosure, and they have still failed to offer a firm, final date when they will definitely provide standard disclosure by. The result is that, at an inter partes level at least, very little progress in the litigation has been made.

10. Unsurprisingly, against that background, the Court's most recent judgment relating to historic Guidance documents concluded that "*the extraordinary past and anticipated delays in disclosure of the Guidance documents requires the Court to take decisive actions to ensure that the claims progress and that means making the orders now sought by the claimants*" (see 21 June 2010 judgment at [35]). Consistent with that conclusion the Court should, it is submitted, be very slow indeed to exacerbate the delay to date by imposing any form of stay in the absence of the most compelling arguments. No such arguments are present here.

No material saving of cost or court time would result from stay

11. The Defendants' "*simple position*" in seeking a stay is that it would be "*wrong for the Court to require that time and public money be expended on both the litigation and the mediation process*" and that the effect of the stay would be "*to put pressure above all on the Defendants themselves*" (see Defendants' skeleton argument paragraph 13).

12. Every aspect of the Defendants' reasoning in this regard is flawed:

    (a) There will in fact be no significant saving of public money as a result of a stay. The only activity the Defendants would be undertaking between July and October but for any stay would be to progress disclosure. On their approach, and even leaving out of account any application of the *Wiley* balance, this will involve reviewing documentation for relevance and application of the first stage of the PII test. Both exercises will be necessary for the proper conduct of the inquiry to be chaired by the Rt Hon Sir Peter Gibson. The Prime Minister has made it clear that the Inquiry will have access to all relevant documentation, that it will be able to "*follow the evidence where it leads*" (see Hansard extract p. 8 in answer to Rt Hon David Davis MP), and that it will be able to express its views as to whether particular material should be made public (see Hansard extract p. 12 in answer to Tom Brake MP);

    (b) As explained above the imposition of a stay will actually hinder, rather than facilitate, the successful pursuit of mediation;

    (c) The imposition of a stay will place no pressure whatever on the Defendants. It would instead simply relieve them from their disclosure obligations. The Defendants have identified no burdensome steps required on their side in order to prepare for any mediation at all, and it is difficult to envisage what they might be. They have also made it clear that their large disclosure team is dedicated to that disclosure exercise, and so there is no reason why their

continuing work should divert any members of the legal team from any work necessary in preparing for mediation.

13. There is, furthermore, no imminent trial date and the Claimants' own directions do not seek a further hearing date (over and above that already provided for by the Order of 21 June 2010) before November 2010 (see Skeleton Argument paragraph 1). There would accordingly be no significant saving of Court time were a stay to be ordered.

14. In these circumstances the Court has to approach the Defendants' application on the basis that both of the conventional factors which are sometimes said to favour a stay in favour of mediation – material saving of costs or material saving of court time – are, on a proper analysis, entirely absent. Even if all other factors were neutral (which, for the reasons already explained, they are not) that would dispose of the Defendants' application.

Prematurity

15. The Defendants' application is, in any event, quite premature. The Prime Minister's announcement of an intention to mediate, and the Defendants' stated "*hope*" for a mediation scheduled for "*mid-September*", leaves a host of important questions unanswered. Some of these questions were in fact immediately identified by the Court on sight of the Defendants' application, and it is submitted that there should be no possibility of a stay in favour of mediation until those questions have been properly addressed.

16. The full range of questions and issues which may arise is not difficult to identify once it is appreciated that this particular litigation has several layers of complexity absent from ordinary litigation:

    (a) It is concerned with victims of torture. It is quite inconceivable that they could be required to attend a single mediation without some detailed advance indication as to what might be available by way of settlement, in the way that might be the case with ordinary litigants. The Court has already seen

evidence about the need to proceed with caution to avoid re-traumatisation. In these circumstances it seems inevitable that any mediation would have to proceed in stages;

(b) The identity of any mediator or mediators will require the most careful consideration. Individuals of international stature and experience would be required in order to address claims of this substance and to have the confidence of all parties. Until a mediator has been identified, his or her availability ascertained, and an appointment made, it would be impossible to determine how long any stay should be for. So far as the Court's involvement in appointment of a mediator is concerned the Claimants do not consider this to be necessary or appropriate. They are considering the Defendants' stated position responsibly and constructively, and note the statement in the supplementary skeleton argument that the Defendants "*anticipate no difficulty in agreeing the identity of the mediator(s)*". So far as the mediation costs are concerned it is anticipated that these would be funded either jointly by the Legal Services Commission and the Defendants, and thereafter be treated as costs in the case, or that they would be paid by the Defendants' alone;

(c) The mediation could embrace a range of matters absent from an ordinary mediation of a civil claim, not least consideration of the nature and scope of the proposed Inquiry;

(d) Any mediation will require consideration of the claims of a range of individuals other than the active Claimants before the Courts ("the stayed Claimants"). Careful consideration as to the presentation of their cases and their representation will have to be undertaken;

(e) Against this background the Defendants' "*hope*" for a mediation in September is unrealistic. Subject to the Defendants providing adequate disclosure, the Claimants' current view is that it is likely that the earliest that a first mediation meeting could take place would be mid-October 2010, with

the potential for a further meeting in late October or early November 2010. If other matters of detail can be addressed satisfactorily they are willing to work hard to facilitate such a mediation. But it can be in no party's interest to force a mediation at an artificially early stage.

Defendants' submissions on preliminary issues

17. The Defendants' observations on the Claimants' proposed preliminary issues are noted. The following observations are made in response:

(a) The preliminary issues were drafted in order to avoid the difficulty raised by the Defendants at the last hearing in relation to a severance of liability from quantum. If the Court is more attracted by a simple division of liability and quantum the Claimants would have no objection to that course;

(b) The detailed objections to preliminary issue 1 are noted. Notwithstanding the Defendants' submissions it is clear (and appears to be partially acknowledged) that the issue of knowledge will be of central importance at least to the Claimants' case of joint liability, to the existence and breach of any duty of care in negligence, to the issue of misfeasance in public office and to the tort of torture. The Defendants' concerns that the wording of the issue might leave matters unresolved, and at the breadth of the issue, could, furthermore, be addressed by reformulating the Issue in the following way:

"*When (if at all), between 11 September 2001 and 9 February 2004*[1] *information known to the Defendants first showed that individuals suspected of involvement in terrorism related activity were likely to be subjected to incommunicado and arbitrary detention, inhuman and degrading treatment or torture or rendition by or at the behest of United States authorities or faced a real risk of the same*."

[1] The end date of February 2004 coincides with the Security Services' termination of their interviews at Guantanamo Bay. If necessary an earlier end date (e.g. December 2002) could be considered if this would facilitate the efficient progression of the litigation. That would come after the detention of all of the Claimants and would embrace the period in which the first deaths at the Bagram detention facility are known to have occurred (see further paragraph 18(a) below).

(c) The suggestion that the Defendants might have entertained any doubt as to the legality of detentions at Guantanamo Bay, Bagram and elsewhere is a surprising one which contrasts both with the observations of the Rt Hon Harriet Harman MP during the recent parliamentary consideration of this matter (as reflected in the Hansard extracts provided to the Court) and with the Government's position as recorded in previous judicial decisions considering the same, (see e.g. the observations of Collins J in *Hicks* [2005] EWHC 2818 (Admin) at [13] to the following effect: "*It is clear that English law regards the detention and proposed trial of the claimant to be contrary to the rule of law. It is equally clear from its statements and actions that the Government is of the same opinion. This is why it has negotiated the release of the nine British subjects.*"

(d) The Defendants' insistence that only preliminary issues capable of having a completely dispositive effect should be considered imposes too tight a straightjacket on the Court's case management powers in litigation which presents very particular challenges and, on the Defendants' case, unprecedented burdens;

(e) It is no answer to the proposed preliminary issues to contend that the procedural landscape might change if the Supreme Court agrees to hear, and then allows, the Defendants' appeal on the closed procedure issue. The Court can only give directions on the basis of the law as it stands. If the Defendants succeed in their appeal they will no doubt apply for a variation of directions but that should not prevent progression of the case now.

Mr Mackie's 11th Witness Statement

18. The Claimants have only had a limited time to consider Mr Mackie's 11th Witness Statement and the proposals there set out. Some of his proposals appear valuable and may well be of assistance, others less so. The Claimants' preliminary observations on the detail of Mr Mackie's statement are the following:

(a) In chronological terms the Claimants are of the view that the most critical period capable of casting light on the Defendants' conduct and its legality is likely to be the period from 11 September 2001 through to December 2002. By December 2002 all of the Claimants had been detained, the detention facilities in Afghanistan and Guantanamo Bay had been established and a wide range of examples of rendition to countries with a record of torture had occurred. Agents of the First and Second Defendants had also made repeated visits to detainees in Afghanistan, Guantanamo Bay and other locations. If priority is to be given to disclosure by reference to materials kept in chronological sequence it is suggested that it focus on this early period of 16 months, and within that on the first 7 months to April 2002 by which time Mr Begg and all of the active Claimants aside from Mr Al Rawi and Mr El Banna had been detained;

(b) The Claimants seek the Defendants' express confirmation that their approach to disclosure will include disclosure in respect of the stayed Claimants and, in particular, Mr Begg. Given the chronology of events (he was among the first United Kingdom nationals to be detained), the Defendants' treatment of him is of obvious importance in the light it may cast upon the policies adopted in relation to all the other Claimants thereafter;

(c) The Claimants are concerned at the "*streamlined*" approach contemplated at paragraph 16. The Mubanga disclosure identified above illustrates how important a full understanding as to a chain of events culminating in an agreed position could be;

(d) Of the 8 file groups held by the Security Service and addressed at paragraphs 21 to 24 of Mr Mackie's statement the Claimants make the following points:

- All of the 7 named file groups are of obvious importance;
- No reference is made to one category sought by the Claimants and of particular importance to the claims of Mr Al Rawi and Mr El Banna (communications with the Security Service prior to either man's

departure from the United Kingdom or detention and communications at around the same time with a third individual – Mr Yousif). Given the earlier judicial review proceedings brought by both men in 2006 there would appear no proper reason why this material is not already available for disclosure;

- The observations in relation to file group 3 (Policy re GTMO detainees) are noted;
- The Security Service is invited to explain why disclosure of file group 1 (Detainee interviews) need take place in tranches extending to January 2011 and to state when it would be able to disclose each of the other categories;
- The Security Service is invited to confirm that each of file groups 1, 3 and 4 embrace detentions in each of Afghanistan, the Gambia, Morocco, Pakistan and Zambia as well as in Guantanamo Bay Cuba;
- In the light of the recent disclosure set out above the Claimants are particularly anxious to have sight of any documents in file groups 5 and 6 casting light on the direct involvement of the Prime Minister's office in relation to these matters both in relation to the issue of consular access and in relation to the issue of potential recruitment of detainees as explained in Ms Malik's fourth statement at paragraph 8;
- In relation to each of the 8 file groups the Security Service is invited to state the approximate volume of material concerned and dates when it anticipates that disclosure could be provided;

(e) So far as the Secret Intelligence Service is concerned the Claimants make the following observations in respect of paragraphs 25 to 27 of Mr Mackie's statement:

- The Claimants do not wish there to be further prioritisation in respect of Guidance documentation at this stage. As indicated above the disclosure to date indicates such limited guidance as existed to have been inadequate;
- The Secret Intelligence Service is, instead, invited to prioritise disclosure in relation to the Claimants' categories 2 to 6 as set out at paragraph 5 of

Mr Mackie's statement. and to indicate what timescale it envisages for disclosure in relation to these categories;

- The Claimants do not accept that the blanket claim to public interest immunity in respect of Category 4 (information supplied to foreign intelligence agencies) contemplated at paragraph 27 of Mr Mackie's statement is remotely appropriate. As is apparent from e.g. paragraphs 41 et seq. of the Al Rawi Claimants' Particulars of Claim (and the November telegrams which preceded the detention of Mr Al Rawi and Mr El Banna) some documentation in this category has already been disclosed and it would be quite wrong for there not to be proper scrutiny of each individual document within it for the purposes of further disclosure. Mr Mackie's categorical phraseology at paragraph 27 is itself a matter of serious concern. It is not clear who within the First and Second Defendants has taken this decision, or whether they have Ministerial approval for the stance there indicated. This should be made clear to the Court at the forthcoming hearing;

(f) So far as the disclosure of the Foreign and Commonwealth Office is concerned (see Mr Mackie's witness statement paragraphs 28-34):

- The Claimants would be assisted by knowing what categories of material will be disclosed in October 2010, what in December 2010 and what in February 2011;
- The Claimants are concerned that item a) (FCO Departments and Missions) does not appear to contain any reference to the United Kingdom missions in The Gambia, Morocco, Pakistan or the United States;
- Subject to that point, for their own purposes, and doing the best they can by reference to bare headings, the Claimants would wish priority to be given to the documents listed at a i) and viii), b i) – iii), xiii) – xiv), xvi), c ii) – ix), xi) – xv), and d xi). The Defendants are invited to state when the earliest they could provide this disclosure would be;

(g) So far as the disclosure of the Home Office is concerned (see paragraphs 35-37) the Claimants make the following observation:

- In addition to the "Guantanamo Bay General Series", the Claimants would wish priority to be given to the Director level files held within the Home Office and referred to at paragraphs 35 2) and 35 7);

(h) Finally, one further important matter relating to disclosure merits emphasis at this stage. As the Mubanga disclosure and other recent disclosure referred to above indicates, there is an increasing impression that the (former) Prime Minister's office played a very significant role in relation to the issues with which this claim is concerned, and descended to a level of detail which is perhaps surprising (including by the countermanding of a specific Foreign Office desire to provide consular access to individual detainees even if that meant release from custody. Such intervention was the more striking because it occurred at a time when the Claimants contend that a risk of rendition, arbitrary and incommunicado detention and ill-treatment must have been appreciated). The Claimants are giving careful consideration to the full implications of documentation of this nature. In the meantime the Defendants are invited to inform the Court of the full extent of searches made for relevant documentation held within the Prime Minister's Office in relation to these matters and to state whether the Defendants or the Treasury Solicitors have asked the former Prime Minister for his comments in respect of the Claimants' claims.

Conclusion

19. For all the reasons set out above the Claimants contend that the Defendants' application for a stay of the proceedings pending mediation should be dismissed. The Defendants' application would be quite counterproductive to the stated desire to mediate successfully, it has no solid foundation in principle, and is in any event premature. The Court should not be rushed into making an order which will, inevitably, give rise to months of delay in already protracted litigation and which would shut the Claimants out from receipt of potentially

critical disclosure prior to any mediation occurring. Instead, for the reasons set out above and in the Claimants' principal skeleton argument, detailed directions should be given for the further progression of the proceedings.

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12 July 2010

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