HM Government response to the House of Lords Select Committee on the Constitution 4th Report of Session 2010-2012: Justice and Security Bill [HL]: *Norwich Pharmacal* jurisdiction

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The Government is grateful to the House of Lords Constitution Committee for its report on the *Norwich Pharmacal* clauses in the Justice and Security Bill ("the Bill"). These clauses make provision about the courts' residual disclosure jurisdiction, including what is generally known as the *Norwich Pharmacal* jurisdiction, to order a person involved (however innocently) in apparent wrongdoing by another person to disclose information about the wrongdoing. The provisions in the Bill remove that jurisdiction in certain specified circumstances. The report provides the Committee's own account of the legal position relating to the *Norwich Pharmacal* jurisdiction and does not seek to make recommendations in respect of the clauses in the Bill. The Government is grateful to the Committee for its input to the debate.

The Committee concludes from its analysis that it knows of no PII case in which a court has ordered the disclosure of intelligence secrets contrary to the wishes of a Government Minister, and assesses that there is no credible risk that the judiciary of this country would order the disclosure of secret intelligence material under current arrangements. The Government disputes that conclusion for the reasons set out below; and notes that the Committee recognises that its own analysis of the legal position does not resolve the issues of policy which the Bill seeks to address. The Government welcomes the Committee's recognition of these policy issues and maintains that there are compelling reasons for enacting these provisions.

Binyam Mohamed

As the Committee notes, the *Binyam Mohamed* case was complex. It involved eight judgments in the UK courts: six of the Divisional Court and two of the Court of Appeal. The case began as an attempt by the claimant to invoke the court's *Norwich Pharmacal* jurisdiction in the national security context. Events in the United States meant that the UK courts did not make a final ruling on whether to order such *Norwich Pharmacal* relief. However, one of the crucial events in the litigation is that in February 2010, the Court of Appeal ordered that seven paragraphs redacted from the Divisional Court's August 2008 judgment should be restored to that open judgment, almost a year after Binyam Mohamed had been released from Guantanamo and returned to the UK. These paragraphs contained a summary of US intelligence reporting on the circumstances of the claimant's detention and of the treatment accorded to him. The Court of Appeal made this order notwithstanding the existence of a PII certificate from the Foreign Secretary asserting that publication would be damaging to UK national security, because of the breach of the control principle.[1] Therefore the Government believes that the *Binyam Mohamed* case is an example of a PII case in which the Court ordered the disclosure of intelligence secrets contrary to the wishes of a Government minister. At the time, the Secretary

[1] Para 158 of Court of Appeal judgment: "The Foreign Secretary concedes that there is nothing of a secret or confidential nature in the redacted paragraphs……. Accordingly, the Foreign Secretary says, irrespective of the contents of the information communicated, any breach of the control principle could lead to a reduction of the flow of information to the UK."

of State "accepted the Court's decision" and noted that the judgment upheld the control principle[2]: the statement went no further than that in commenting on the Court's judgment.

The Secretary of State's PII claim in the *Binyam Mohamed* case was not motivated by a desire to cover up wrongdoing. It was a desire to protect the control principle that prompted the application for PII, born out of concern to prevent damage to an intelligence-sharing relationship, rather than concern about disclosure of the content of the information. In fact, the UK had been seeking Binyam Mohamed's release from 2007, whereas, the *Norwich Pharmacal* proceedings were not brought until 2008. It did not take litigation to force the UK to engage in this issue.

What has become apparent over time is that the court's judgment in the *Binyam Mohamed* case has damaged the US-UK intelligence-sharing relationship, and consequently the UK's national security. The US reaction to the judgment was tempered by the UK government's early commitment to address the issue through legislation. Nonetheless, the judgment prompted a review of intelligence-sharing arrangements, the withholding of some material, and greater US caution in exchanges where the US felt that material might be at risk of disclosure.

The particular significance of the case is twofold. First, it established that *Norwich Pharmacal* relief was available in relation to national security-sensitive material (*Norwich Pharmacal* relief had previously only been used to obtain information in the commercial and intellectual property spheres). Since then there have been no fewer than nine further cases brought against the Government for sensitive information the disclosure of which would be damaging to national security. Secondly, the apparent rejection of the Secretary of State's claim of PII in the Court of Appeal judgment fundamentally changed our allies' perception of the ability of the UK legal system to protect control principle material from disclosure without their consent. This is particularly the case in relation to the *Norwich Pharmacal* jurisdiction which differs from ordinary civil damages cases in that the remedy at stake is disclosure. Consequently, unlike a civil damages case the Government does not have the option to seek to settle the claim, or admit liability rather than disclose sensitive material.

The problem also arises in cases which relate to intelligence gathered and generated by our own intelligence services. The collection of intelligence involves careful calculations of risk and benefit and is subject to Ministerial approval as set out in the Security Service Act 1989 and the Intelligence Services Act 1994. Court-ordered disclosure threatens intelligence sources and methods, and poses the serious risk of

[2] Para 50 of Court of Appeal judgment: "Nothing in this judgment should be seen as devaluing the confidentiality principle, and the understanding on which intelligence information is shared between this country and the USA."

eroding the confidence of both our own sources and foreign partners in sharing information with our intelligence service staff.

The decision of the High Court in *Omar*

The Committee suggests that the *Omar* case is an authoritative indicator of the limitation of the rulings in the *Binyam Mohamed* case. We agree that the number of such cases is small and that the class of cases concerned is narrow. However, as the Government noted in the Green Paper, since the *Binyam Mohamed* case, this has been a growing area of litigation, which is having a disproportionate impact on our international, diplomatic and intelligence relationships with foreign governments. The potential availability of *Norwich Pharmacal* relief for sensitive information is causing harm to our intelligence-sharing arrangements and to the UK's national security.

We are pleased that the Divisional Court has dismissed the claims in the *Omar* case: it is encouraging that the Court gave considerable weight to the evidence of damage to international relations. The *Omar* case found that where the claimant seeks evidence for proceedings overseas, they should follow the statutory procedure for doing so. The Claimants in that case now have permission to appeal to the Court of Appeal, and it would therefore be inappropriate to comment further.

Conclusion

At present, the legal position is that under the *Norwich Pharmacal* jurisdiction a court can be placed in the position of having to decide whether to order a disclosure of information by the Government that would cause damage to the interests of national security or international relations. This is despite the fact that the Freedom of Information Act 2000 (FOIA) Parliament explicitly ruled out a right to access intelligence material. Moreover, as cited in the *Omar* case, in the Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Crime (International Co-operation) Act 2003, Parliament expressly provided exceptions for the provision of evidence in overseas proceedings[3]. Statutory reform is necessary in order to bring the *Norwich Pharmacal* jurisdiction more in line with these statutory regimes, which allow the Secretary of State to refuse to provide evidence where to do so would prejudice the security of the United Kingdom. The clauses in the Bill propose similar protections for sensitive information within the sphere of *Norwich Pharmacal* relief.

[3] The Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Crime (International Co-operation) Act 2003 provide for assistance to be given where there has been a formal request from a court or other authority overseas to the Secretary of State. In such cases, the Secretary of State is entitled to refuse requests for assistance – and a person cannot be compelled to give evidence - if to do so would be prejudicial to the security of the United Kingdom.

The very fact that this avenue of disclosure of sensitive information exists, combined with the ongoing cases that are being taken through the courts, has created an unacceptable situation of uncertainty and nervousness on the part of our intelligence-sharing partners, which impacts on the UK's national security. There is therefore an inarguable case for legislative reform in this area, which will provide the certainty needed to restore the trust and confidence on which our vital intelligence-sharing relationships depend.

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