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Case No: CO/7645/2011 & CO/951/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2012

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE BURNETT

- -

Between :

The Queen on the Application of **Omar Awadh Omar** **Habib Sulieman Njoroge** **Yahya Suleiman Mbuthia**	**Claimant**
- and -	
The Secretary of State for Foreign and Commonwealth Affairs	**Defendant**

- -

Philippa Kaufmann QC and **Tom Hickman** (instructed by **Public Interest Lawyers**) for the **Claimant (Omar)**
Philippa Kaufmann QC and **Ben Cooper** (instructed by **Bhatt Murphy**) for the **Claimants (Njoroge and Mbuthia)**
James Eadie QC, **Jonathan Hall** and **Karen Steyn** (instructed by **Treasury Solicitor**) for the **Defendant**
Angus McCullough QC and **Ben Watson** (instructed by the **Special Advocates Support Office**) - **Special Advocates**

Hearing dates: 25, 26 and 27 April and 16 and 17 May 2012

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Approved Judgment

President of the Queen's Bench Division :

This is the judgment of the court.

INTRODUCTION

1. The applications before the court under *Norwich Pharmacal* principles seek evidence from the Foreign Secretary for use in proceedings before the Constitutional Court of Uganda.

2. The issues raised were of some complexity and a closed procedure was adopted for part of the proceedings, as we shall explain. This is an open judgment, but produced in such a form that the closed evidence, findings and conclusions are contained in annexes.

3. We will first set out the factual and procedural background.

THE FACTUAL AND PROCEDURAL BACKGROUND

(i) The bombing in Kampala on 11 July 2010

4. On 11 July 2010 during the FIFA World Cup Final taking place in South Africa, bombs were exploded in Kampala, Uganda, which resulted in the deaths of 76 people. Responsibility was claimed by Al-Shabaab. The Ugandan authorities asked for assistance from neighbouring and overseas police forces, including New Scotland Yard, the FBI and Interpol. They gave assistance.

(ii) The transfer of some suspects from Kenya to Uganda

5. On 22 and 23 July 2010, Mr Hussein Hassan Agade (Mr Agade) and Idris Magondu were detained in Kenya in connection with the bombing. It has been acknowledged by the Anti-Terrorism Police Unit of Kenya (the ATPU) in proceedings in Kenya that Mr Agade and Mr Magondu were transferred to Uganda. On 13 August 2010 Mohammed Hamid Suleiman was detained in Kenya and on the following day (as it is accepted by the Ugandan police), he was handed over to them by the ATPU. On 25 August 2010 the third claimant in these proceedings (Mr Mbuthia) was arrested in Nairobi; it is accepted by the Ugandan and Kenyan police that he was transferred to Uganda on 26 August 2010. In none of these cases was there any extradition or other judicial process in relation to the transfers.

(iii) The allegations of rendition and ill treatment

6. Although the transfers of those five persons from Kenya to Uganda are not disputed by the Government of Uganda, the Government of Uganda does dispute: (i) the claim of the second claimant (Mr Njoroge) that he was detained in Kenya by the ATPU on 4 September 2010 and transferred on 5 September 2010 to Uganda into the custody of the Rapid Response Unit (RRU); and (ii) the claim of the first claimant (Mr Omar) that he was detained in Kenya on 17 September 2010 by the ATPU and transferred immediately to Uganda into the custody of the RRU. It is claimed by the Government of Uganda, in evidence to which we refer at paragraph 43, that both were arrested in Uganda; indeed on 21 September 2010, the Kenyan and Ugandan press reported that Mr Omar (described as a top Al-Shabaab commander) had been arrested in Kampala.

7. Each of the three claimants, Mr Omar, Mr Mbuthia and Mr Njoroge, as well as Mr Suleiman, Mr Agade, Mr Magondu and others, were charged in Uganda on 30 November 2010 with murder and other offences arising out of the Kampala bombing on 11 July 2010. They allege that they were subjected to ill-treatment of a brutal nature which amounted to torture or cruel, degrading and inhuman treatment at the hands of intelligence and/or security agents of Kenya, Tanzania, Uganda, the USA and the UK.

8. In September 2010, the claimants and others were indicted before the International Crimes Division of the Ugandan High Court on charges of terrorism, murder and other offences.

9. They initially brought proceedings in the Administrative Court of Uganda in November 2010 alleging that they were unlawfully rendered from Kenya to Uganda.

(iv) The proceedings in the Constitutional Court of Uganda

10. In November 2011, they petitioned the Constitutional Court of Uganda. The Petition is pending in that court. The Petition contends that their rendition was illegal and that they were tortured and ill-treated. They argue that their rendition makes the proceedings against them unlawful and an abuse of process on principles similar to those set out in the judgments in *R v Horseferry Road Magistrates' Court ex parte* Bennett [1994] 1 AC 42 and *R v Mullen* [2000] QB 520. They also contend in the Petition that the treatment to which they were subjected by the Ugandan authorities not only makes statements they made inadmissible as evidence against them but also amounts to an abuse of process. In the proceedings the Government of Uganda denies torture or ill-treatment and asserts that Mr Omar and Mr Njoroge were arrested in Uganda.

11. The criminal proceedings have been stayed pending a decision on the Petition. The Petition has been listed for hearing but no date given.

(v) The commencement of Norwich Pharmacal proceedings in the Administrative Court

12. On 10 August 2011 Mr Omar began proceedings seeking information and evidence from the defendant (the Foreign Secretary) on *Norwich Pharmacal* principles in relation to his alleged rendition and his alleged ill-treatment. That information and evidence were sought for use in the criminal proceedings and judicial review proceedings in Uganda. That application was refused by Collins J, but on appeal on 21 December 2011 the claim was allowed to proceed in respect of information relating to rendition but not in respect of ill-treatment [2011] EWCA Civ 1587.

13. On 27 January 2012, Mr Njoroge and Mr Mbuthia began judicial review proceedings for *Norwich Pharmacal* relief similar to that brought by Mr Omar but for use also in the Petition to the Constitutional Court; Mr Njoroge sought relief in respect of his alleged ill-treatment and his alleged rendition; Mr Mbuthia only in respect of his alleged ill-treatment, as the fact that he had been the subject of rendition was not in issue in Uganda, as we have set out at paragraph 5.

14. On 20 March 2012, this court granted permission in respect of Mr Njoroge's claim for *Norwich Pharmacal* relief in respect of rendition, but refused it in respect of ill-treatment as it did in the case of Mr Mbuthia [2010] EWHC 681 (Admin). The Single Judge of the Court of Appeal, however, granted Mr Njoroge and Mr Mbuthia permission to bring judicial review proceedings in respect of ill-treatment.

15. Mr Omar seeks permission to amend his claim to pursue his claim for information and evidence relating to ill-treatment even though, as we have said, permission was refused both by Collins J and the Court of Appeal.

(v) The conduct of the proceedings

16. The charges the claimants face in respect of the Kampala bombing in the criminal courts of Uganda carry the death penalty; the proceedings in Uganda assert very grave breaches of their human rights. They contend that the proceedings in this court are proceedings where, because of the gravity of the consequences that might be suffered by them and the very serious breaches of their human rights, relief should be granted provided the conditions set out in *Norwich Pharmacal* are met.

17. They say that those conditions can be satisfied because officers of the UK intelligence services were mixed up in the rendition and ill-treatment, any evidence held by the Foreign Secretary which would show they were rendered or mistreated would be necessary in the Ugandan proceedings and that this court ought, in the circumstances to which we have referred, exercise its discretion to grant relief.

18. In the light of the fact that it is the claimants' case that intelligence officers were those who were mixed up, and in the light of reports that UK intelligence officers were present in Kenya and Uganda because of the threat to the UK from terrorist organisations, including Al-Shabaab, the necessary enquiry which would enable them to obtain *Norwich Pharmacal* relief would obviously involve issues that touched upon the national security of the United Kingdom.

19. They therefore agreed that that part of the proceedings necessary to protect the national security interests of the United Kingdom could be subject to closed proceedings. Mr McCullough QC and Mr Watson were therefore appointed as special advocates for the purpose of those proceedings. Although it was held by Ouseley J in *AHK v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin) that closed proceedings are not generally permissible in Judicial Review, it was common ground before us that proceedings such as this fell into a different category and a Closed Material Procedure was permissible. We were referred to the written case of the Respondent's before the Supreme Court in *Al Rawi and others v The Security Service and others* [2011] UKSC 34; [2012] 1 AC 531 (where it was accepted that there was no objection to the use of such a procedure in a case such as *Binyam Mohamed No1).* The Closed Material Procedure adopted in this case was agreed without any consideration or argument based on the implications of *Al Rawi.* There was no dissent before us that *AHK* could be distinguished. Ouseley J handed down his judgment on 2 May 2012 and the matter may be considered elsewhere. He distinguished between a Closed Material Procedure at a Public Interest Immunity hearing and the substantive hearing of a judicial review application. We did not hear argument on *Al Rawi* or *AHK* and should not be taken as deciding that a consensual

Closed Material Procedure of the breadth agreed in this case is necessarily consistent with the decision in either case.

20. The Foreign Secretary has addressed the two parts of the claim, that relating to rendition and that relating to ill-treatment in different ways. As to the claim relating to rendition, he contends that the claimants are seeking evidence; they are therefore not entitled to circumvent the statutory regime for obtaining evidence in overseas proceedings by bringing *Norwich Pharmacal* proceedings for that purpose. In the alternative and if such a claim can be brought, he does not dispute that the claimants have made out a sufficient case of alleged wrongdoing. He neither confirms nor denies, in accordance with well established NCND policy, the allegations in respect of the presence of intelligence officers in Kenya and Uganda. He contends that no case has been made out by the claimants that there is any activity for which he is responsible that amounted to being mixed up in the alleged wrongdoing. He asserts that the test of necessity is not met and that the court should exercise its discretion against the granting of relief. As to the claim relating to ill treatment, he states that a proportionate search has been carried out and he has no information.

21. It is convenient to consider the two parts of the claim for relief quite separately. The claim in respect of evidence relating to ill-treatment has centred upon the issue of whether a sufficient search has been made by the Foreign Secretary. It is not therefore necessary in respect of that part of the claim to consider questions of being mixed up, necessity or discretion. All that is presently in issue is the adequacy of the search. However in respect of the alleged rendition the issues are much more extensive. It is convenient, therefore, to begin with the issues in respect of rendition.

THE ISSUES ON THE ALLEGED RENDITION

The provision of material in the course of the conduct of Norwich Pharmacal proceedings

22. It was not unsurprising that in the light of the speed with which these proceedings came to be heard that the issues that the court had to determine were clarified during the course of the proceedings.

23. Before turning to the main issues it is necessary first to consider an important issue as to the conduct of *Norwich Pharmacal* proceedings.

24. It is in our view self-evident that the claimant in *Norwich Pharmacal* proceedings can only obtain the information or evidence that is sought if the claim is determined as a whole in the claimant's favour. It is necessary therefore to consider the problems that can arise from applications for disclosure and from the content of a judgment, either of which might result in the claimant in effect obtaining what he seeks, even if the overall decision is against him. It is convenient first to consider the issue of disclosure.

25. It was the submission made by Miss Kaufmann QC on behalf of the claimants when she opened the case that, although the proceedings had been begun by way of judicial review, the claim was in fact an ordinary civil claim which could be brought under Part 7 or Part 8 of the CPR. A claim under Part 7 or Part 8 of the CPR entailed the giving of discovery in accordance with Part 31. The Foreign Secretary should

therefore produce, in accordance with Part 31, a list of documents, having conducted a search in accordance with that Part.

26. In the course of argument on this issue, it was suggested that an analogy could be drawn with orders for disclosure against a person not a party made under Part 31.17. Under that part, there is no suggestion that disclosure in aid of disclosure sought under that Part can be made. As the origin of *Norwich Pharmacal* was in the proceedings of the courts of equity, disclosure in aid of *Norwich Pharmacal* proceedings in our view must be considered on equitable principles.

27. There is no decided authority in relation to *Norwich Pharmacal* proceedings which are *sui generis*. They are not, in our view, proceedings to which the rules set out in Part 31 apply. Whether disclosure should be granted in aid of *Norwich Pharmacal* proceedings, is a matter which must rest within the discretion of the court to be exercised in the circumstances of each case to enable the issues to be fairly determined and justice to be done. However, in determining the extent of any disclosure, the court must ensure that the process of disclosure does not result in pre-emption by providing the claimants with the information which it is the object of the proceedings to determine.

28. In the conduct of the trial of this claim, that has not generally been a point which has caused difficulty. In accordance with the discharge of the duty of candour expected of a defendant in public law proceedings (see e.g. *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1490 per Laws LJ at [50])*, the Foreign Secretary has provided disclosure in the closed proceedings.

29. Nor does any question of pre-emption arise in this case. For example, the provision of a judgment in a *Norwich Pharmacal* application might, depending on the court's findings, give rise to similar issues and enable a claimant to obtain what is sought even if, on an overall consideration of the issue, the claimant is not entitled to the evidence or information. In any such application a confidential annex to the court's judgment might be required. Even were pre-emption a danger in this case, the procedure agreed between the parties avoids the possibility. We heard evidence and argument in closed session. We decided to produce this judgment in a form which would be open, consigning to closed annexes any material which, at least at this stage, we consider should remain closed. In accordance with the procedure agreed between the parties this open judgment was provided to the special advocates and those representing the Secretary of State to ensure that nothing was in it which should be closed. The first of the closed matters, which we deal with in Annex A, relates to an issue as to the extent of disclosure. We determined the issue in favour of the Foreign Secretary.

The main issues on rendition

30. The issues that arose can be summarised as follows:

    (1) Can the court order the provision of evidence for proceedings in overseas courts other than through the statutory regime?

    (2) Should the court grant relief when the claimants have decided not to seek relief in Uganda?

(3) Is the requirement of necessity satisfied?

(4) Was there alleged wrong doing?

(5) Were those for whom the Foreign Secretary is responsible mixed up in it?

(6) How should the discretion be exercised?

(1) Can the court order the provision of evidence for proceedings in overseas courts other than through the statutory regime?

31. In the course of the proceedings, the issue arose as to whether the court should entertain the claim in view of the statutory regime through which the court can order the provision of evidence for proceedings in overseas courts. It was not an issue raised by the Foreign Secretary at the outset, but arose from a question by the court as to the interpretation of *Norwich Pharmacal* proceedings and the statutory regime. Four questions or sub-issues were identified.

(1) What is being sought in these proceedings?

(2) Could Mr Omar and Mr Njoroge have availed themselves of the statutory scheme?

(3) Does the existence of the statutory regime exclude the use of *Norwich Pharmacal* proceedings to obtain what the claimants seek for use in the proceedings in Uganda?

(4) Are the requirements and exceptions set out in the statutory regime matters that have to be taken into account under *Norwich Pharmacal* proceedings, on the assumption that such proceedings can be brought?

32. As one of the sub-issues raised the issue of principle as to whether the claimants could in the circumstances pursue the *Norwich Pharmacal* claim, it is convenient to consider this issue first. It is necessary at the outset to give an outline of the statutory schemes.

(a) The statutory regime

33. The statutory regime for criminal and civil proceedings is different.

(1) Criminal proceedings are governed by the Crime (International Co-operation) Act 2003 (the 2003 Act).

(2) Civil proceedings are governed by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the 1975 Act) save in relation to Member States where provision is made by EC 1206/2001. The 1975 Act was passed for several purposes including giving effect to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. Until the enactment of a separate statutory regime for criminal proceedings, the 1975 Act also covered criminal proceedings.

These statutory provisions are underpinned, outside the European Union, by treaties or diplomatic arrangements between the United Kingdom and overseas states.

34. Although the proceedings in which *Norwich Pharmacal* relief is sought by Mr Omar and Mr Njoroge are proceedings in the Constitutional Court of Uganda, it was common ground that the proceedings should be characterised as criminal proceedings both as a matter of the domestic law of England and Wales and the law of Uganda. We will therefore refer primarily to the 2003 Act.

35. The first part of chapter 2 of the 2003 Act (s.7-s.12) covers requests by those in the UK for assistance from overseas states in obtaining evidence in those states. S.7 provides that an application may be made by a prosecuting authority or, where proceedings have been instituted, by a person charged in those proceedings. The application is made to a judicial authority (any judge or Justice of the Peace); the request can be sent to a court exercising jurisdiction in the place where the evidence is situated or to an appropriate authority in that country or through the Secretary of State.

36. The second part of Chapter 2 (s.13-19) covers requests by overseas authorities for assistance in obtaining evidence in the United Kingdom. S.13 provides that the request can be made by a court exercising criminal jurisdiction or any other authority in a country outside the United Kingdom to the territorial authority for the part of the United Kingdom in which the evidence is sought. S. 29(9) defines the territorial authority for England and Wales as the Secretary of State; if the Secretary of State decides to provide assistance, then a court is nominated to receive the evidence under s.15. S.15(5) provides that proceedings are governed by Schedule 1. Paragraphs 5(4), (5) and (6) provide important exemptions:

> "(4) A person cannot be compelled to give any evidence if his doing so would be prejudicial to the security of the United Kingdom.
>
> (5) A certificate signed by or on behalf of the Secretary of State or, where the court is in Scotland, the Lord Advocate to the effect that it would be so prejudicial for that person to do so is conclusive evidence of that fact."
>
> (6) A person cannot be compelled to give any evidence in his capacity as an officer or servant of the Crown."

37. The diplomatic arrangement between the UK and Uganda relevant to the 2003 Act is the Harare Scheme - the agreement between Commonwealth Law Ministers last modified in October 2005. In essence the Scheme provides that assistance from a Commonwealth state may be obtained in criminal proceedings or in gathering evidence when a request is made by a law enforcement agency, public prosecution or judicial authority of another Commonwealth State which has competence to do so under the law of that state as the requesting authority. The request is transmitted by the agency or court in the requesting state to the central authority of the requesting state which, if it is satisfied that the request can be properly made, transmits the request to the central authority of the state from which the evidence is requested. Paragraph 8 of the Scheme provides that the requested state can refuse in certain

circumstances to comply with the request. Paragraph 8(2)(a) provides that the requested state can refuse,

> "(a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; ...."

38. Before turning to the four sub-issues which arise, it is convenient briefly to refer to the regime for civil proceedings. Note 34.21.1 to CPR Rule 34.16-34.21 summarises that regime:

> "The 1975 Act and these Rules should be read and applied in close conjunction, for together they provide a comprehensive, self-contained code for obtaining evidence in England for use in proceedings in foreign courts."

S.3(3) of the 1975 Act provides that a person cannot be compelled to give evidence, if doing so would be prejudicial to the security of the United Kingdom and that a certificate signed by the Secretary of State that it would be prejudicial is conclusive. S.9 (4) provides that a court cannot make an order that is binding on any person in his capacity as an officer or servant of the Crown. It is important also to note that under s. 2(4) there is very substantial restriction on the power of the court to order disclosure:

> "An order under this section shall not require a person –
>
> (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
>
> (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power."

39. We turn to the four sub-issues.

(ii) What is being sought in these proceedings?

40. As Miss Kaufmann QC made clear in her skeleton argument, what is sought is

> "disclosure of evidence that will support [the] claims of gross unlawful treatment by reason of [the claimants'] rendition and ill-treatment in detention."

During the course of oral argument, she made clear that the claimants' purpose was to seek all and any evidence that the Government of the United Kingdom may hold which suggests either that the claimants were removed from Kenya to Uganda without due process or were ill-treated thereafter. As we have set out, it was their intention to introduce such material before the Constitutional Court in support of their Petition.

Whilst hoping for chapter and verse about rendition it would be sufficient for the claimants' purpose to adduce a statement made by or on behalf of the Foreign Secretary that Her Majesty's Government is in possession of information which demonstrates that the claimants were rendered from Kenya to Uganda.

41. Whatever difficulties there may be in delineating the information that can be sought under *Norwich Pharmacal* proceedings and distinguishing it from evidence, they do not arise. What is sought is clearly evidence.

(iii) Could Mr Omar and Mr Njoroge have applied to the Constitutional Court in Uganda to obtain what they seek?

42. It is convenient next to consider whether Mr Omar and Mr Njoroge could have applied to the Constitutional Court in Uganda to use its processes to obtain the evidence they seek

(a) An application for disclosure

43. Two questions arise. The first relates to obtaining disclosure from the Ugandan authorities of their own documents. As we have set out at paragraph 6, both the Kenyan and the Ugandan Governments deny that Mr Omar and Mr Njoroge were arrested in Kenya and rendered to Uganda; they contend they were arrested in Uganda. Evidence has been served in support of this contention.

(1) In the Ugandan Judicial Review proceedings, a senior Commissioner of Police and Deputy Director of the CID has sworn an affidavit dated 1 December 2010 saying he knows that Mr Omar and Mr Njoroge were arrested in Uganda.

(2) In an affidavit sworn by the Acting Director of Civil Litigation of the Attorney-General of Uganda dated 28 November 2011, any wrongdoing on the part of the Uganda police, intelligence and security services is denied.

(3) Further affidavits were sworn by officials of the Government of Uganda on 22 March 2012 in which there were express denials of wrongdoing on the part of officials of the Government of Uganda. The Constitutional Court has, on the application of the Attorney-General, given leave for those affidavits to be withdrawn. No further evidence has yet been filed in their place, though we were told that such evidence would be filed.

(4) Inspectors of the ATPU in Kenya have sworn affidavits in the Kenyan Judicial Review and *habeas corpus* proceedings brought on behalf of Mr Omar and Mr Njoroge stating that neither Mr Omar nor Mr Njoroge was arrested in Kenya and their allegations are untrue.

44. As there is a clear issue on where the arrests took place and as arrests are normally well documented, it is necessary first to set out the position as to seeking disclosure in the proceedings before the Constitutional Court of Uganda. Although no provision is made for disclosure in the Constitutional Petitions Rules of the Constitutional Court, the evidence before us was that it was possible to make an application for disclosure under Order X of the Civil Procedure Rules. However it was the evidence of Mr

Walubiri, the lead advocate for the claimants, that such applications were not common in Uganda. Indeed, as far as he was concerned he had no knowledge of an order ever being made in Ugandan proceedings in circumstances where the court did not know that such documents actually existed.

45. He had not made any application for disclosure on behalf of the claimants. It was his evidence that it would not be in the interests of the claimants to make such an application. It could be very damaging. Miss Kaufmann QC accurately described the decision as a tactical one. The potential benefits were in his view clearly outweighed by the potential risks. At present there was no direct evidence to contradict what was said by the claimants as to where and by whom they were detained and what had happened to them. If an application was made for specific disclosure, there was a grave risk that the Government of Uganda would produce documents that had been fabricated to support that case. The very best the claimants could hope for would be that the Government of Uganda would untruthfully deny the existence of such documents and fail to produce any documents. Whilst that would be of some value that would not significantly advance their position. This submission was supported by a report from Mr David F K Mpanga, an advocate on the Uganda Roll of Advocates and also a barrister in England and Wales. Although he could not produce any statistics as to how regularly the Uganda police fabricated evidence used in criminal proceedings, his experience had been that in highly charged political cases evidence was fabricated. He referred to a case in which he had acted where the then Director of the Uganda CID had admitted she had authorised the falsification to police registers in a case of very significant political importance. He referred to another case where he gave further details of the alleged fabrication of evidence. His experience, however, was that the Uganda courts had seen through the fabrications when the authorities were tested.

(b) Obtaining evidence from the UK

46. The second question is whether an application had been or could be made to make use of the statutory regime in the UK to obtain the evidence they seek. No such application had been made. This issue was also covered in Mr Mpanga's report. His evidence was that the Uganda Police Force and the Ugandan Prosecuting Authority did make requests to other Commonwealth countries for assistance in criminal proceedings under the Harare Scheme. However there was no municipal legislation in Uganda to give direct effect to the Harare Scheme. Without such legislation, there were only inter-state administrative arrangements. He was unaware of any instances in which a judicial authority in Uganda had made a request under the Harare Scheme. There was no statutory or other formal mechanism by which an accused person could evoke mutual legal assistance under the Harare Scheme; Mr Omar and Mr Njoroge could not therefore apply in the courts of Uganda to obtain documents or evidence which was in the jurisdiction of the United Kingdom under the Harare Scheme.

47. It was contended on behalf of the Foreign Secretary that it might be possible for an application to be made to the Constitutional Court, but no evidence was submitted by him.

48. However, it was clear from Mr Walubiri's affidavit that the Ugandan Constitutional Court has an overriding concern for justice to be achieved, particularly in cases concerning human rights and a capital charge. His evidence was that the court was

especially concerned to ensure that the state has not committed any abuse of power or contravention of the constitution or the rule of law.

49. As this is the position in the Constitutional Court, we consider that, despite the evidence of Mr Mpanga, the issue should have been raised with the Constitutional Court, as in an unprecedented situation, the issue ought to have been raised before it. Furthermore there are good reasons of comity why this step was necessary. We consider those reasons at paragraphs 73-79 below.

(iii) Does the court have jurisdiction outside the statutory regime or does the existence of the statutory regime preclude the exercise of the Norwich Pharmacal jurisdiction?

50. It was next contended on behalf of the Foreign Secretary that as Parliament had legislated in relation to the provision of assistance to overseas states in connection with legal proceedings, the courts should be respectful of the statutory regime and should not permit the statutory regime to be bypassed through the use of the *Norwich Pharmacal* procedure.

51. He first relied on the statement of principle as to the exclusive nature of the statutory regime:

(1) by Lord Diplock In *Rio Tinto Zinc Corporation v Westinghouse* [1978] AC 547 (where the House of Lords was considering the 1975 Act) at page 633:

> "The jurisdiction of English courts to order persons within its jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory."

(2) by Lord Donaldson MR in *Re Pan American Word Airways Inc and others application* [1992] QB 854 at 859.

> It is common ground that any power to make the order sought must be found in the [1975] Act, since the English courts have no inherent jurisdiction to act in aid of a foreign court and, as a matter of English domestic law, treaties only take effect as part of that law to the extent they are incorporated by statute, with or without modification."

As therefore there was a statutory regime, the courts should not develop or exercise their own jurisdiction for such a purpose.

52. It was submitted by Miss Kaufmann QC that the *Norwich Pharmacal* jurisdiction had never prohibited the disclosure of information which was to be used as evidence; she relied on a passage in the speech of Lord Reid at page 147 C. The courts had, as in *Bankers Trust v Shaprio* [1980} 1 WLR 1274 and in *Binyam Mohamed (No 1)* ordered disclosure where documentation was necessary to prevent dissipation of assets or to ensure a fair trial. The distinction between evidence and information was a self limiting principle which prevented information being obtained when it might in the ordinary course of events be obtained as evidence. This was not a case where the information could be obtained from British officials either in Uganda or through the

procedure under the Harare scheme. There was no reason therefore to confine *Norwich Pharmacal* proceedings, as the obtaining of relief was subject to stringent requirements, including the discretion of the court.

53. In our view, the decision of the Court of Appeal in *Smith Kline Ltd v Global Pharmaceuticals Ltd* [1986] RPC 394 clearly shows that *Norwich Pharmacal* proceedings can be brought to obtain information as to the identity of persons and other details about them so that proceedings can be brought in a foreign state; this is the practice in intellectual property cases and such orders are included with Freezing or Search Orders. In *Manufacturers Life Insurance Company v Harvest Hero* [2002] HKCA 430 and *Secilpar SL v Fiduciary Trust* [2003-4] Gib LR the Courts of Hong Kong and Gibraltar have accepted that *Norwich Pharmacal* proceedings can be used to obtain information, as distinct from evidence, for the purposes of overseas proceedings. The distinction between evidence and information in these decisions is not entirely clear, but it is of no relevance in the present case because what is sought is evidence as we have set out at paragraphs 42 to 43 above.

54. In *President of the State of Equatorial Guinea* (27 February 2006), no point was taken in the Privy Council that *Norwich Pharmacal* proceedings could not be used to obtain information to commence proceedings. In that case, Equatorial Guinea brought *Norwich Pharmacal* proceedings in Guernsey to discover information and documentation about the identity of two foreign companies that had a place of business in Guernsey and banked with the defendant Bank in Guernsey. They sought this information as they wished to identify who had financed an attempted coup for the purpose of civil proceedings in Guernsey, Equatorial Guinea, Spain, Jersey and England and Wales. The two foreign companies intervened. They contended that the court had no jurisdiction to grant *Norwich Pharmacal* proceedings in aid of foreign proceedings. The argument failed in the courts of Guernsey on the basis that the jurisdiction should be widely interpreted. It was important for Guernsey as a financial services centre to ensure it did not become a safe haven for those who sought to evade financial liabilities. The contention was not pursued in the Privy Council. The Privy Council determined the appeal on other issues, one of which is referred to at paragraph 82 below.

55. In *Binyam Mohamed (No. 1)* there is an extensive discussion of the scope of the information that could be ordered to be provided (see paragraphs 127-138). The wide ranging scope of the information of type A described in paragraph 135 was in effect evidence. The issue raised in this case as to whether the court can order the provision of evidence was not raised and no objection was taken on that ground. The issue was also not raised in *Shaker Aamer v Foreign Secretary* [2009] EWHC 3316 (Admin). Nor was the issue raised in the Court of Appeal in the permission proceedings in this case. Nonetheless it seems to us that the argument is well founded, now that the issue has been raised and examined in this jurisdiction.

56. The legislative history of the statutory regime makes clear in our view that the scheme for compelling evidence for use outside the jurisdiction is exclusively statutory as the statement of principle articulated in *Rio Tinto Zinc* set out at paragraph 51 above makes clear. The greater part of that history is outlined in the speech of Lord Goff of Chieveley in *re Norway's Application* [1990] 1 AC 723.

57. It is first helpful to consider the power of the courts, before the statutory regime, to order the taking of evidence overseas for the purposes of suits in England. Until a statute passed in 1830 (1 Wil 4 c.22), the superior courts of common law had no machinery for ordering the examination of witnesses overseas in places not within the dominions of the Crown. However, the Court of Chancery had developed that power for proceedings in the Court of Chancery and in the superior courts of common law. A litigant in a superior court of common law would file a bill in equity for discovery and include within that a prayer to examine a witness overseas whether in the Crown's dominions or not. The manner of so doing was developed in part by legislation and in part as the practice of the judges: see Daniel's Chancery Practice 1845, p 894- 897 and *Crofts v Middleton* (1852) 9 Hare App 1 xviii which sets out the practice of appointing an examiner to take the evidence overseas. The statute 1 Wil 4 c 22 gave the courts of common law a more limited power: see Hume- Williams: *The Taking of Evidence on Commission* (1903), Chapter 1.

58. Although the Court of Chancery had this power, nothing suggests that the Court of Chancery had a power through the bill in equity for discovery to compel a person in England to give evidence for the purposes of overseas proceedings. There is a reference in *Bray: The principles and practice of discovery* (1885) in the chapter on actions for discovery to bills of discovery not being obtainable in aid of an inferior or foreign court, citing *Bent v Young* (1838) 9 Sim 180. In that case a bill of discovery was sought in aid of proceedings in Surinam. The fact that the foreign court was an inferior court was one of the three reasons why the bill was not granted: the Vice Chancellor observed:

> "I should be extremely sorry to be the first judge to decide that this court is, in all cases to give its aid in compelling discovery in aid of the prosecution or the defence of an action in a foreign court.

This decision was applied by Kay J in *Dreyfus v Peruvian Guano Co* (1889) 41 Ch D 151 in holding that an action for discovery in aid of a foreign court could not be entertained. The principle of not assisting inferior courts was applied to arbitrations, unless a reference was ordered by the court: *Bray* (page 574). Furthermore the Court of Chancery would not grant a bill in aid of a suit which was not purely civil (see *Snell's Principles of Equity* (3rd edit, 1874 pages 519-520, *Bray* page 3).

59. However, in *Post v Toledo Cincinnati and St Louis Railroad* 11 NE 540c (1887), a decision cited with approval by Lord Cross and Lord Kilbrandon in *Norwich Pharmacal* (see paragraph 94 below), the Supreme Court of Massachusetts after referring to *Bent v Young* held that a bill of discovery could be used to obtain the names of persons whom the claimants wished to sue in Ohio and other information about them which could be obtained in Massachusetts; the courts of Ohio were powerless to provide discovery to that end and so the plaintiffs were entitled to seek the assistance of the courts of Massachusetts. The court observed:

> " in modern times it is the policy of states to afford aid to foreign tribunals in the taking of testimony to be used in suits pending therein...The jurisdiction which courts of equity exercise as ancillary to that of other courts is not, either on

principle or authority, confined to other courts of the same state"

60. As we have set out at paragraph 52, the decision in *Smith Kline* is to the effect that it is possible to use *Norwich Pharmacal* proceedings to obtain information for the purpose of bringing proceedings overseas. The decision in *Smith Kline* relied on *Post v Toledo* in concluding *Norwich Pharmacal* proceedings could be used as that was the information actually sought in *Toledo*. It is also clear that the courts of England and Wales have made orders ancillary to freezing and search orders for information to be provided for use in overseas proceedings. However, the wider observations of the Supreme Court of Massachusetts in 1887 as to the power to assist in obtaining testimony, which are applicable to the United States, appear to have no precedent in the English Court of Chancery or in any other decision to which we were referred or have ourselves found.

61. It therefore appears that legislation was necessary to confer on the courts power to compel the giving of evidence to be used in overseas proceedings and that therefore the jurisdiction has always been exclusively statutory.

(1) The first enactment was the Foreign Tribunals Evidence Act 1856; it appears to have had its origins in the Treaty of Paris and its associated protocols concluded earlier in 1856 (see Kerr LJ in *Re State of Norway* [1987] 433 at 474). The Act conferred power on the superior courts of common law at Westminster and Dublin, the court of Session and other Supreme Courts in the colonises and Crown possessions to order the examination of witnesses and to produce documents in relation to foreign proceedings in civil or commercial matters. The terms of the Act made it clear that such an order could only be obtained if the foreign court wanted such evidence for the proceedings in its court.

(2) In 1859 the Evidence by Commission Act enabled evidence to be taken in relation to any action, suit or proceedings before courts elsewhere in Her Majesty's dominions; Lord Goff concluded that must have been intended to embrace all kinds of proceedings, whether civil or criminal.

(3) It appears from the very brief debate on the 1859 Act (Parliamentary Debates, Vol. 152 (Feb 3, 1859-Mar 10, 1859): Hansard HC, 22 February 1859, coll.715-6.) that prior to 1856 the way evidence was obtained for use in colonial courts was for a commission to be issued by the superior courts of a colony; all went well if the witness appeared, but the witness could refuse to appear or to refuse to answer questions without giving any reasons. That "evil" had been remedied in respect of a foreign court by giving the superior courts of common law powers under the Foreign Tribunals Evidence Act 1856 to make it obligatory to appear, but in error that Act had only dealt with foreign courts and not included colonial courts.

(4) In 1870 s.24 of the Extradition Act 1870 extended the power under the 1856 Act so that evidence could be taken for criminal proceedings in any court or tribunal in a foreign state. S.5 of the Extradition Act 1873 gave the Secretary of State power to require a magistrate to take evidence for the purpose of any criminal matter pending in any court or tribunal in a foreign state.

(5) Rules of Court were made governing the procedure in 1903. Prior to that time, it is clear from the *Annual Practice* that proof had to be given that the foreign court wanted the evidence. The Rules made in 1903 specified a form of affidavit which included this requirement.

62. These legislative provisions remained in force until the repeal of all of these provisions by the 1975 Act, save s.5 of the Extradition Act 1873. Lord Goff concluded the Act of 1873 was not repealed because it did not affect the jurisdiction of the High Court in England and Wales, the Court of Session or the High Court of Northern Ireland and the purpose of the 1975 Act, as shown by its title, was to make provision in one statute for the jurisdiction of those courts in relation to obtaining evidence for the assistance of courts and tribunals in other jurisdictions, whether criminal or civil. Section 5 of the Act of 1873 enabled the Secretary of State to require a Magistrate to take evidence.

63. Outside those statutes the courts had and have no jurisdiction to use their processes for the purpose of providing evidence for proceedings in foreign states. The decision in *Re Pan American* is striking, as the court quashed an order requiring a retired civil servant employed as a forensic scientist who had investigated the Lockerbie disaster to give evidence for the purpose of New York proceedings relating to that disaster. It did so on the basis that he was covered by the exemption in s.9(4) to which we have referred at paragraph 38 above. The court made clear it had no power to compel the provision of evidence by a Crown Servant.

64. Thus the power of the courts to use *Norwich Pharmacal* proceedings must, in our view, be developed within the confines of the existence of the statutory regime through which evidence in proceedings overseas must be obtained. *Norwich Pharmacal* proceedings are not ousted, but where proceedings, such as the present proceedings, are brought to obtain evidence, the court as a matter of principle ought to decline to make orders for the provision of evidence, as distinct from information, for use in overseas proceedings. It cannot permit the statutory regime, with the safeguards to which we have referred, and will refer in more detail, to be circumvented.

65. We therefore turn to consider the question of whether it makes a difference that the claimants may not be able to obtain the information it seeks through the statutory scheme both because there was no procedure in Uganda and a defendant could not in any event use the scheme unless the prosecutor or the court agreed. As we have set out at paragraph 52, the thrust of Miss Kaufmann QC's argument was that this was the decisive factor because the use of *Norwich Pharmacal* proceedings did not offend against any requirement to use the statutory regime. On the contrary, it filled a gap.

66. In our judgment it matters not that there may be no procedure in Uganda for obtaining evidence from the UK to be used in those courts. For the reasons we have set out the statutory regime is the only means by which evidence for use in foreign proceedings may be obtained and, save in *Binyam Mohamed No 1* and *Shaker Aamer*, where the points was not taken, *Norwich Pharmacal* proceedings have never been used to obtain evidence for use in proceedings. The jurisdiction of the court is confined to the statutory regime.

(iv) The requirements and exceptions in the statutory regime

67. If, contrary to the view we have expressed it is permissible in principle, to make an order for the provision of evidence to be used in overseas proceedings, should the court permit *Norwich Pharmacal* proceedings to be used in circumstances where the statutory requirements and exceptions would defeat its use?

68. There are three relevant matters. First the statutory regime requires the application to the UK to be initiated by either the prosecutor or the court (section 13(2) of the 2003 Act). As the history of the statutory regime makes clear, the request of the foreign court has been a requirement of the schemes when proceedings are before the court and the evidence is sought for that purpose. In our judgment, the fact that no request has been made to the Constitutional Court in Uganda and that court has not expressed its wish that the United Kingdom assist is material. To permit these proceedings to proceed without a request from the Constitutional Court would evade a principal requirement of the statutory regime. The importance of that requirement is underlined by paragraph 5(1) of schedule 1 to the 2003 Act. Sub-paragraph (b) provides that a person cannot be compelled if he is not compellable in the country form which the request has come. No official or Minister of the Crown would on ordinary principles be compellable in Uganda, but by paragraph 5 (2) that sub-paragraph (b) is not applicable unless the claim of the person to be exempted from giving evidence is conceded by the court or authority which made the request. In our view therefore, it is not permissible to seek evidence through *Norwich Pharmacal* proceedings, if such proceedings are in principle permissible, without complying with that requirement.

69. Second, the diplomatic agreements under which states provide assistance are clear. Article 12 of the Hague Convention provides for the circumstances in which the execution of a letter of request may be refused, namely

> "only to the extent (a)... or (b) the state considers that its sovereignty or security would be prejudiced thereby".

The wide scope of this provision was considered in *Re Pan Am.* The scope of the similar exception in the Harare Scheme is set out at paragraph 37 above.

70. If the claimants were able to use the Harare Scheme, then if the Secretary of State issued a certificate that the provision of evidence would be prejudicial to national security, then their request would fail. They cannot, as a matter of principle, be entitled to more favourable treatment under *Norwich Pharmacal* proceedings. Thus in the present proceedings if the Secretary of State were to certify that the provision of the evidence would be prejudicial to national security, the claim would fail.

71. If therefore the Secretary of State were to issue such a certificate, then it seems to us as a matter of principle, the claim would fail on this further ground, as these proceedings cannot be used to obtain what cannot be obtained through the statutory regime.

72. Third, the prohibition on the court compelling evidence from a person in his capacity as an officer or servant of the Crown found in paragraph 5(6) of Schedule 1 to the 2003 Act was described in *Re Pan Am* as "a paramount provision which limits all other provisions in the Act", by reference to its statutory predecessor in the 1975 Act. Lord Donaldson added:

> "Noting in the Act ... prevents the Crown from facilitating the giving of evidence by its present or current officers ... but the courts have no power to order anyone to give evidence in circumstances where Section 9(4) applies."

By resisting these *Norwich Pharmacal* proceedings the Crown has made clear that it would not facilitate the giving of such evidence, even were it established that there was evidence capable of being given. As a matter of principle, the claimants cannot secure such evidence via equitable relief thereby defeating the plain terms of the Statute.

(2) Should the court grant relief when the claimants have decided not to seek relief in Uganda?

73. However, if contrary to our view, the claimants can bring *Norwich Pharmacal* proceedings to obtain evidence despite the existence of the statutory regime and the requirements and exemptions, it is necessary next to consider the further effect of the claimants not putting these matters before the Constitutional Court at a hearing of the court.

74. We have set out at paragraphs 42 to 47 above the circumstances in which the claimants have deliberately decided not to seek to use the processes of the Constitutional Court to obtain discovery from the defendants; nor have they sought to persuade that Court that a request ought to be made of the United Kingdom. The Registrar of the Court is aware of these proceedings, but as we understand the position, the issues have not been raised at a hearing of the Court itself.

75. The decision made by the claimants is of material importance to the submissions of Mr Eadie QC that where a foreign court is seized of proceedings, there are particular principles which needed to be applied. The courts of one state are entitled by reason of comity to assume that the courts of a foreign state will utilise sufficient procedural safeguards to ensure justice is done. Secondly, the courts of England and Wales can assume that a foreign court has procedures for getting at the truth. Third, a British court should be extraordinarily cautious with regard to the actions of a foreign sovereign: see *Buttes v Hammer* [1975] QB 577. Fourthly, a British court should be very cautious in interfering in matters where the foreign court is better able to reach a judgment on the means of obtaining information from its own Government.

76. He further submitted that where procedures existed in a foreign jurisdiction, it would be essential for a claimant in *Norwich Pharmacal* proceedings (assuming such proceedings lay) to demonstrate either their patent inadequacy or that there was some compelling reason for not invoking them.

77. We consider the broad thrust of these submissions to be well founded. It is evident from what we have already set out, that it is an integral part of the statutory scheme that assistance is sought by the requesting court. Furthermore, in exercising any interlocutory jurisdiction in aid of foreign proceedings, the court has to have regard to principles analogous to those considered in *Motorola Credit Corpn v Uzan* [2004 1 WLR 113, [2003] 1 EWCA Civ 572 at paragraph 113 of the judgment of the Court of Appeal as relevant to the application of s.25 of the Civil Jurisdiction and Judgments Act 1982. By analogy, we consider we should have regard to management and

conduct of the case in the Constitutional Court in Uganda, the policy of the Constitutional Court to the making of orders for disclosure and any risk of disharmony or confusion or inconsistent decisions between the proceedings before us and the proceedings before the Constitutional Court.

78. It is not in the interests of comity for this court to entertain this application when a tactical decision had been made not to make an application for disclosure against the Ugandan Government in the Constitutional Court. That court is seized of the dispute. It would no doubt expect the executive branch of the Ugandan state to supply it with documentation if it was so ordered. If there is no such documentation or the claimants allege it is fabricated, then it must be for that court to determine whether it should allow the claimants to seek evidence from the Foreign Secretary to be used in the proceedings to show that statements so far made on behalf of the Government of Uganda are untrue and that the Government of Uganda has been engaged in unlawful conduct. The principles of comity require this court in these circumstances not to act without a request from the Constitutional Court.

79. Moreover, in deciding whether to make that request, the Constitutional Court would, no doubt, have to consider the submissions of the Government of Uganda as a party to those proceedings. That process should not be circumvented in an area of judicial co-operation between states where, outside the regimes with the EU, intergovernmental relations play such a significant role.

80. As these steps have not been taken, we do not need to consider a separate analogous issue. It is a necessary step in the claimant's case that a finding be made by us that the Ugandan authorities cannot be trusted to comply with our order from the Constitutional Court. The propriety of this court doing so would be in issue. It is, however, not necessary to consider the point raised by Miss Kaufmann QC that the courts of England and Wales do criticise the conduct of foreign states (see, for example, *R (Abbasi) v Foreign Secretary* [2003] UKHRR 76).

(3) Is the requirement of necessity satisfied?

81. If contrary to the views we have expressed, these proceedings can be permitted to continue, we turn to consider the issue of necessity.

(a) The legal principles

82. The requirement of necessity was considered in *Binyam Mohamed (No.1)* at paragraphs 93-97. The unreported decision of the Privy Council in *President of the State of Equatorial Guinea v Royal Bank of Scotland International* decided on 27 February 2006 (to which we have referred at paragraph 54) was not cited in *Binyam Mohamed* though it was cited to the court in *Shaker Aamer v the Foreign Secretary* [2009] EWHC 3316 (Admin). In *President of the State of Equatorial Guinea* the court concluded at paragraph 16 in a judgment given by Lord Bingham and Lord Hoffmann:

> "It is true that in some of the cases the word "necessary" has been used, echoing or employing the language of Order 24, rule 13 of the Rules of the Supreme court. But, as Templeman LJ observed in *British Steel Corporation v Granada Television*

> *Limited* [1981] AC 1086, 1132, "The remedy of discovery is intended in the final analysis to enable justice to be done". *Norwich Pharmacal* relief exists to assist those who have been wronged but do not know by whom. If they have straightforward and available means of finding out, it will not be reasonable to achieve that end by overriding a duty of confidentiality such as that owed by banker to customer. If, on the other hand, they have no straightforward or available, or any, means of finding out, Norwich Pharmacal relief is in principle available if the other conditions of obtaining relief are met. Whether it is said that it must be just and convenient in the interests of justice to grant relief, or that relief should only be granted if it is necessary in the interests of justice to grant it, makes little or no difference of substance. In the present case the appellants were concerned to identify those who had financed the abortive coup in March 2004. It is not suggested that there was any legal means of doing so open to the appellants other than that which they chose."

83. It seems to us that the requirement of necessity is a requirement that must be dictated flexibly in the circumstances of each case. In *President of the State of Equatorial Guinea*, the objection of the bankers was a breach of the duty of confidentiality. The court concluded that it was in the interests of justice in the circumstances to grant *Norwich Pharmacal* relief. It is true that part of the paragraph which we have cited refers to the claimant having no straightforward or available or any means of finding out other than through the *Norwich Pharmacal* action but the words, "no straightforward or available means of finding out" must be read in the context of the words, "or any" and the concluding sentence of that paragraph where it is made clear that there was no suggestion in that case that there was any legal means of finding out other than through *Norwich Pharmacal* proceedings.

84. The issue on necessity on the facts of the present case centred on the issues of whether disclosure could be obtained in Uganda, whether there were good reasons why that had not been done and the availability of the statutory scheme.

85. On the assumption, contrary to the views we have expressed, the claimant is entitled to pursue *Norwich Pharmacal* proceedings to obtain evidence, the exemptions in the statutory scheme do not operate as a bar and the failure to apply to the Ugandan Court is not a bar for reasons of comity and harmony between jurisdictions, then it is our view the application does not meet the requirement of necessity and must fail for that further reason.

86. In our view, the test of necessity cannot be met until the claimants have applied for disclosure in Uganda in relation to their arrest. We cannot assume at this time that the courts of a friendly foreign state will fail properly to consider an application for disclosure. Tactical reasons, however well intentioned, cannot in the circumstances of a case such as this override the need to apply in Uganda first.

The admissibility in Uganda of information and evidence obtained

87. It is convenient to mention one other matter. It was the evidence of Mr Peter Walubiri, lead counsel in the Constitutional Petition being brought by the claimants in Uganda that a statement from officers of Her Majesty's Government would be admissible in the proceedings before the Constitutional Court.

88. His evidence was also to the effect that there were proceedings within the Constitutional Court of Uganda which would permit the evidence to be heard *in camera.*

89. It was submitted by Miss Kaufmann QC that if we were prepared to make an order for the provision of information, we could address any requirements of confidentiality or national security by making it a term of the order that the information would only be provided if the Ugandan Court was prepared to receive it on terms that protected national security or confidentiality.

90. It is not necessary for us to reach a view on this issue in the light of the decision to which we have come.

(4) Was there alleged wrongdoing?

91. As we have set out at paragraph 20, the Foreign Secretary does not dispute that the claimants have made out a sufficient case of alleged wrongdoing in respect of removal from Kenya to Uganda without judicial process.

(5) Were those for whom the Foreign Secretary is responsible mixed up in it?

(a) Legal principles

92. Although the issue as to whether those for whom the Foreign Secretary is responsible were mixed up in the alleged wrongdoing is a question of fact, there was a dispute between Miss Kaufmann QC for the claimants and Mr Eadie QC for the Foreign Secretary as to the applicable principles. The position of Mr Eadie QC was clear. He submitted that the principles were correctly stated in the judgment of this court in *R (Mohamed) v the Foreign Secretary (No.1)* [2009] 1 WLR 2579 at paragraph 70-73 where this court concluded that it ought to approach the issue by asking the question, "Did the UK Government through the SYS or SIS and its agents become involved in or participate in the alleged wrongdoing through facilitating it?".

93. It is important to point out, however, two matters. First, the conclusions in *Binyam Mohamed* were set out in the context of accepting the correctness of the change of position of the Foreign Secretary in that case. The initial argument had been that the claimant had to prove causation. It was conceded by the Foreign Secretary that it was not necessary for the claimant to establish that the actions were causative of the wrongdoing; the court concluded that the Foreign Secretary was right to accept it was sufficient if those for whom he was responsible became involved in the wrongdoing, even if innocently, by facilitating that wrongdoing. In effecting that change of position, the Foreign Secretary was accepting the submission made by the claimant. Second, on the facts of that case the court determined that there had been involvement through facilitation.

94. In the present proceedings, Miss Kaufmann QC did not accept that the decision in *Binyam Mohamed (No. 1)* was correct. She submitted that if the speeches in *Norwich Pharmacal* were examined, involvement through facilitation of the wrongdoing was not a requirement: involvement was enough. She referred to Lord Morris at page 178 and 180, Lord Dilhorne at page 188 and Lord Cross at page 197. It was sufficient if there was involvement through a relationship with the wrongdoing or wrongdoer. Miss Kaufmann QC pointed, in particular, to the speech of Lord Kilbrandon where he referred to the decision of the Supreme Court of Massachusetts in *Post v Toledo, Cincinnati and St Louis Railroad*, 11 N.E.Rep. 540 (1887) where the court stated:

> " "... the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring a suit, and brings a bill against persons who stand in some relation to them, or to their property, in order to discover who the persons are against whom he may proceed for relief. "
>
> These words appear to me to provide an apt, and by no means too wide, classification of those against whom discovery may in such circumstances be obtained, though I think the court, perhaps misled by the fact that they had available only the report at 4 Ch.D. 92, may have been wrong in saying that in Orr v Diaper the plaintiffs neither alleged that they had a cause of action nor intended to sue the defendants. But the state of the reports does not make this clear."

95. She then referred to the speech of Lord Woolf in *Ashworth Hospital v MGN* [2002] 1 WLR 2033 where he summarised the principles at paragraph 30 in these terms:

> "[The speeches in *Norwich Pharmacal]* make it clear that what is required is involvement or participation in the wrongdoing and that if there is the necessary involvement, it does not matter that the person from whom discovery is sought was innocent and in ignorance of the wrongdoing by the person whose identify it is hoped to establish."

Applying that principle to the facts of the case Lord Woolf concluded at paragraph 34:

> "It is sufficient that the source was a wrongdoer and MGN became involved in the wrongdoing which is incontestably the position. Whether the source's wrongdoing was tortious or in breach of contract in my judgment matters not. If there was wrongdoing then there is no further requirement that Mr Jones's and MGN's conduct should also be wrongful. It is sufficient if, in the words of Viscount Dilhorne in the *Norwich Pharmacal* case [1974] AC 133, 188C, that there was "involvement or participation". As MGN published the information which was wrongfully obtained, the answer as to whether there was involvement or participation must be an emphatic Yes."

She submitted that the court had been too restrictive of the nature of involvement in *Binyam Mohamed (No. 1);* all that was required was "involvement"; to require that involvement to have facilitated the wrongdoing put the test too high. Facilitation was not, in short, a pre-condition.

96. We are unpersuaded by her argument. The propositions set out in *Binyam Mohamed (No. 1)* were in significant part derived from the speech of Lord Reid where he said at 175(B):

> "They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identify of the wrongdoers."

97. Involvement is used in both *Norwich Pharmacal* itself and *Ashworth* as a word synonymous with participation. The speeches in the House of Lords are, of course, not statutes. The words used have to be looked at in the context of the facts of each case. What is clear from the facts of that case and *Ashworth* is that the person against whom relief was granted had in fact done something that in effect facilitated the wrongdoing. That was the phrase used by Lord Reid and in our judgment it correctly encapsulates that degree of involvement that gives rise to the duty to assist. Miss Kaufmann QC's submission would impose the duty on too wide a category of person.

(b) The factual case advanced by the claimants

98. The case advanced by the claimants was that there was evidence which strongly pointed to an involvement of the British intelligence services in Uganda and Kenya and in relation to both Mr Omar and Mr Njoroge. It can be summarised as follows:

(1) As set out at paragraph 4 above, international police teams, including Scotland Yard, had been involved in the investigation. There was evidence in an answer by Lord Howell of Guildford to a Parliamentary Question and material dated 19 July 2010 on the FBI website which confirmed this involvement.

(2) A Detective Inspector of the Ugandan Police had sworn an affidavit in the proceedings in the Constitutional Court dated 23 March 2012 in which he had stated that there had been a joint investigation with security organs from other states with the USA, Kenya and Tanzania.

(3) A recent Royal United Security Institute report estimated that British citizens made up 25% of foreign fighters in Somalia. These would undoubtedly be of interest to the intelligence agencies of the United Kingdom. There were newspaper reports that three British nationals of Somali descent were suspects.

(4) Mr Omar's evidence was that he had been interrogated by someone he believed to be a United Kingdom official. He had been asked why his wife had obtained a transit visa and had been told that his house had been bugged and the intelligence services knew what he was, where he was going and what he was doing.

(5) In his account to his solicitor, Mr Njoroge had said that he had been interviewed by someone with a British accent.

(6) It could therefore be properly inferred that the British security services were not only involved in surveillance in Kenya and Uganda but also that they had been directly involved with Mr Omar and Mr Njoroge.

(7) The British security services must have been well aware of the risks of the Kenyan authorities rendering suspects, as those authorities had done so before.

(8) As a result of the *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees* published in July 2010 by Her Majesty's Government, those interviewing detainees in the custody of a foreign liaison service had to consider whether the detainee had been subject to unacceptable standards of detention or treatment.

(9) Her Majesty's Government's officials would therefore have had closely to monitor what was happening in relation to the investigation into the Kampala bombing if they were to continue to receive intelligence from detainees.

(10) It was to be inferred, therefore, that they must have known of the rendition or taken no steps to prevent it.

(11) They were therefore involved in the renditions or, if it was necessary to show this, had facilitated them.

99. There was no lawful justification for the NCND policy.

(iii) The case for the Foreign Secretary

100. The Foreign Secretary adopted the position in the open hearing that he would neither confirm nor deny the presence of British security personnel in Uganda or Kenya in accordance with well established NCND policy set out in the matter of *Freddie Scappaticci for Judicial Review* [2003] NIQB 53 and *Baker v Secretary of State for the Home Department* [2001] UKIT NSA 2. Miss Kaufmann QC disputed the application of NCND. She submitted that the fact that the Foreign Secretary had not disputed on the grant of permission the arguability of Mr Omar's claim that those for whom the Foreign Secretary was responsible showed that there must be some material. That was even more evident after there had been a lengthy closed hearing. Miss Kaufmann QC added that it was nonsensical to suppose that the United Kingdom Government did not have intelligence personnel on the ground in East Africa. In the light of the observations we made at paragraph 29 above, this is an issue we can address after the handing down of the closed judgment.

101. The Foreign Secretary's contentions were developed in the closed hearing.

(iii) The closed hearing and our conclusion of fact

102. The evidence given in the closed hearing and the conclusions of fact on this issue are set out in **Annex B**.

(6) How should the discretion be exercised?

103. If contrary to the views we have expressed, the claimants can maintain the proceedings despite the statutory regime, the exemptions in the statutory regime are inapplicable or immaterial as a bar, there is no infringement of the principles of comity and the requirement of necessity is satisfied, and on the assumption that there is material, it is necessary to consider how we should exercise our discretion.

(a) The principles

104. In *Binyam Mohamed (No. 1)* it was common ground that the factors the court should consider in relation to the exercise of the discretion, the knowledge of Her Majesty's Government, the significance of the prohibition against the wrong alleged and general issues such as intrusion, time and cost (see paragraph 140 of the judgment). The court did not decide in that case the extent to which the interests of national security and foreign relations and claims to public interest immunity should be taken into account as part of the exercise of the discretion or should be dealt with after the determination of the entitlement to relief.

(b) The factors to be taken into account

105. We will consider the exercise of the discretion on the basis that the claimants are entitled to use *Norwich Pharmacal* proceedings to obtain the evidence they seek, but we can have regard as factors to be taken into account in the exercise of the discretion the exemptions in the statutory scheme and the failure to seek disclosure in the Constitutional Court or raise with that Court at a hearing of the Court the application made to this court.

106. We also take into account:

(1) The serious nature of the alleged wrongdoing

(2) The fact that the claimants are at risk of the death penalty

(3) The evidence of Mr Sinclair, senior official at the Foreign Office as to the effect on relations between Her Majesty's Government and Uganda.

> "As with any foreign judicial proceedings, whether in Uganda or elsewhere, HMG is also highly conscious that such a prosecution is a matter for the Ugandan government and Ugandan courts, and that any intervention by the UK in those proceedings which had not been requested by the Ugandan authorities, or ordered by the Ugandan courts, would almost certainly be seen as meddling by a foreign government in domestic matters.
>
> Given the grave nature of the Kampala bombings, I have no doubt that were HMG in a position to provide evidence of the type sought by the Claimant for use before the Constitutional Court and were it to be

> ordered by the court to do so, it would be likely to be seen as a deliberate attempt by the UK to derail the Government of Uganda's efforts to bring terrorist to justice and as grave betrayal by the UK of its promise to stand with Uganda in its fight against terrorism.
>
> In these circumstances, it is my assessment that there would be serious damage to the relations between the UK and Uganda were an order to be made of the type sought by the Claimants."

(4) The matters set out in **Appendix C.**

We have not, at this stage, taken into account any issues relating to PII; if PII arises, then that will be the subject of a separate decision; the important issues raised by Miss Kaufmann QC as to the way in which the necessary evidence was adduced may then arise for decision.

107. In our judgment, despite the gravity of the alleged wrongdoing and the fact that the claimants are at risk of the death penalty, we should exercise our discretion and refuse relief. We attach very considerable weight to the evidence of Mr Sinclair. In the light of the factors set out in paragraph 105 and that evidence, we consider that we would exercise our discretion against ordering the provision of any information.

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108. It was common ground, on the assumption that *Norwich Pharmacal* proceedings lay, that the Foreign Secretary was bound to carry out reasonable and proportionate searches.

109. The suggestions of the claimants and the response made on behalf of the Foreign Secretary were debated in correspondence between the Treasury Solicitor and the solicitors for the claimants and clarified in the argument at court. In essence it was contended on behalf of the claimants that searches should be done with different spellings, that search strings were appropriate and the nature of the search strings should be disclosed and the court should be satisfied that there had been thorough searches in each of the relevant offices for which the Foreign Secretary was responsible, including the Security Service, the Secret Intelligence Service, GCHQ and the Home Office.

110. In our judgment, the searches undertaken were reasonable and proportionate. We accept the claimants' argument that, as there is the potential for the death penalty to be imposed in Uganda and as there are allegations of serious breaches of human rights, the requirement of searches conducted by the Foreign Secretary should be a high one. Nonetheless, taking into account what we have been told, both in open and in closed sessions, of what has been done we are satisfied, taking also into account the time taken and the cost, that the searches were reasonable and proportionate. An electronic search was the only practicable means for carrying out the main searches, but paper searches were also carried out and where necessary the databases were searched. We are also satisfied that search terms were sufficient. It was a further reassurance that independent counsel was involved throughout.

111. If we had been of the view that the searches had not been reasonable or proportionate, we would have permitted Mr Omar to amend his claim to put this issue back in to the judicial review proceedings. If the point was a good one, there would be no reason why Mr Omar should not have the benefit of it, just as there was no reason why Mr Njoroge should not have the benefit of the point taken by Mr Omar in relation to rendition being pursued by him.

Conclusion

112. For the reasons we have given these claims for judicial review are dismissed.