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Court of Appeal rules secret trial of torture claims would be 'pyrrhic victory' for government

The Court of Appeal this morning unanimously rejected the government's request to hold a secret trial to determine the claims of seven UK residents (including Moazzem Begg and Binyam Mohamed) that the British government had been complicit in their torture overseas.

In a powerful rejection of the government's arguments, the Court of Appeal overturned an earlier High Court ruling last November, in which the judge ruled that a civil claim for damages could in principle be held using a so-called 'closed material procedure', in which key parts of the trial would be held in secret with the claimants and their lawyers prevented from knowing the government's evidence. The Court of Appeal today ruled that such a move would undermine the right of a party to know the case against him, which the court described as one of the 'most fundamental principles' of the common law.

The government had argued that the use of secret evidence would be necessary because of the sheer volume of classified material involved. Either the material would have to be disclosed, endangering national security, or it would be withheld, meaning that the government would be unable to rely upon it in court. However, the Court of Appeal held that the idea of a secret trial 'cuts across absolutely fundamental principles (the right to a fair trial and the right to know the reasons for the outcome), initially hard fought for and now well established for over three centuries' (para 70 of judgment).

The Court of Appeal also rejected the government's argument that a secret trial would be more practical. On the contrary, it found that adopting a 'closed material procedure' would only complicate the existing PII procedure and would likely 'add to the uncertainty, cost, complication and delay in the initial and interlocutory stages of proceedings, the trial, the judgment, and any appeal' (para 70).

The Master of the Rolls, Lord Neuberger, said that it was important for the Court to declare 'firmly and unambiguously' there was no power for an English court to adopt such a procedure without the sanction of an Act of Parliament:

> [T]he principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, *a litigant's right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial* (para 30, emphasis added)

Lord Neuberger warned that, if the government were to win on the basis of secret evidence, it would likely damage the reputation of both the government and the courts:

> there is a substantial risk that the defendants would not be vindicated and that justice would be seen to have been done. *The outcome would be likely to be a pyrrhic victory for the [government], whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater* (para 56, emphasis added).

Eric Metcalfe, JUSTICE's director of human rights policy, said:

> **The appeal court has made clear that a civil trial based on secret evidence runs contrary to centuries of common law principle.**

The Court of Appeal also rightly pointed out that a fair trial in open court is ultimately in the government's best interests as well. Any victory that came from a secret trial would be a defeat for our system of justice.

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Notes to editors

1. JUSTICE and Liberty intervened both before the High Court and the Court of Appeal to argue against the use of the so-called 'closed material procedure'. JUSTICE and Liberty were represented pro bono in the appeal by John Howell QC and Jessica Boyd of Blackstone Chambers.

2. Until the present case, the use of so-called 'closed hearings' had been limited to proceedings authorised by Act of Parliament, e.g. before the Special Immigration Appeals Commission (SIAC) or in control order cases before the High Court. If the High Court ruling had been upheld, this would have meant that any civil court could, in principle, use secret evidence and special advocates whenever a case concerned government information that was too sensitive to be disclosed in public.

3. The spread of the use of so-called 'closed proceedings' and special advocates throughout the civil justice system was detailed in JUSTICE's 2009 report *Secret Evidence.* They have now been used in control order hearings, deportation proceedings, parole board cases, asset-freezing hearings, and even employment tribunals. The Coroners and Justice Act 2009 also raises the prospect of their use in secret inquests. PDF copies of the report are available on request.

4. A central issue in the appeal was the law governing 'public interest immunity' ('PII'). This is a long-standing legal principle governing the disclosure of sensitive government information in civil and criminal cases. In civil cases, PII requires the judge to decide which sensitive government material needs to be disclosed in the interests of justice, and which material is too sensitive to disclose. If information is too sensitive to be disclosed, it cannot be used by either party. PII was the focus of the Scott Report following the Matrix Churchill case. It also played a central role in the recent *Binyam Mohamed* decision.

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