Neutral Citation Number: [2015] EWHC 166 (Admin)

Case No: CO/3663/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2015

Before:

THE RT HON LORD JUSTICE BURNETT
THE HON MR JUSTICE WYN WILLIAMS

- -

Between :

KHALID AL FAWWAZ	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Danny Friedman QC and Blinne Ní Ghrálaigh (instructed by **Quist Solicitors**) for the **Claimant**
Mukul Chawla QC and Oliver Sanders (instructed by **The Treasury Solicitor**) for the **Defendant**
Martin Chamberlain QC and Esther Schutzer-Weissmann as **Special Advocates**

Hearing dates: 17 – 19 December 2014

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Judgment

LORD JUSTICE BURNETT:

1. On 19 December 2014 we finished a three day rolled up application for permission to apply for judicial review of the Secretary of State's refusal on grounds of national security to accede to Letters Rogatory issued by District Judge Kaplan in New York by which he sought intelligence material said to be held by the Security Service ("MI5") relating to Khalid Al Fawwaz ("the claimant"). He is presiding over the claimant's trial. The claimant faces a number of counts of conspiracy relating to terrorist attacks in the late 1990s, in particular the bombing of the embassies of the United States of America in Kenya and Tanzania. There were two other defendants, Adel Abdel Bary and Anas al-Liby. Adel Bary has pleaded guilty to a single conspiracy count. Following the hearing in this case and before the beginning of the trial Mr al-Liby, who had been seriously ill for some time, died.

2. The Letters Rogatory relate to specific material that the claimant asserts that the MI5 holds relating to him, the existence of which has been neither confirmed nor denied. The policy of neither confirming nor denying the existence of material held by the

intelligence agencies is known by the acronym "NCND". Nothing in this judgment should be read as implying either confirmation or denial of the existence of particular material held by MI5, or of any person identified by the claimant as working for MI5. By contrast, the Secretary of State has repeatedly confirmed that MI5 generally does have material relating to the claimant. The refusal to provide any material was on grounds of national security. We heard argument in open session and also in closed session, from which the claimant's legal team was excluded. In the closed session, which was a closed material procedure ordered on an application made by the Secretary of State without opposition from the claimant, pursuant to section 6 of the Justice and Security Act 2013, we were assisted by Special Advocates. At the conclusion of the argument we granted permission to apply for judicial review but dismissed the claim.

3. These are my open reasons for my decision. Closed reasons have also been produced and provided to those party to the closed part of these proceedings.

4. In a helpful document produced by the parties three issues were identified for resolution in these proceedings:

   i) Is the Secretary of State's refusal to produce any or all of the materials requested by Judge Kaplan, including through a closed or semi-closed process, lawful?

   ii) Was the Secretary of State's conduct in dealing with the requests, particularly with regard to delay, lawful?

   iii) Even if the refusal was lawful, should the court mitigate the consequences for the claimant in the American proceedings by stating its view of the relevance of any material and elaborate on why the disclosure was refused?

   On behalf of the claimant, Mr Friedman QC seeks a quashing order in respect of the underlying refusal and a mandatory order requiring the Secretary of State either to provide the material sought by Judge Kaplan or a gist of it. He seeks a declaration that the delay in dealing with the requests was unlawful. In the event that the refusal was lawful, the claimant seeks the further relief identified in (iii) above. Mr Chawla QC, for the Secretary of State, resists the claim on the basis that the decision on grounds of national security not to disclose any material and to maintain NCND was lawful in the circumstances of this case. The time taken to consider the Letters Rogatory, culminating in the decision of refusal, was understandable given the nature of the requests, the complex issues they raised and the efforts made by the Secretary of State to accommodate them. There was no illegality. He submits that the relief requested under issue (iii) is inappropriate if the underlying decision was lawful.

The Underlying Facts

5. The claimant is a Saudi national who moved to London in the 1990s. He regarded himself as a Saudi dissident and was closely involved with an organisation called the Advice and Reformation Committee ("ARC") with premises in London. He knew and had a relationship with Osama bin Laden but maintains that his contact with bin Laden was in connection with a shared endeavour to mount lawful opposition to Saudi human rights abuses. The claimant asserts that the ARC was a legitimate

organisation with peaceful purposes. He did not support or advocate violence. In 1996 bin Laden issued his declaration of jihad against the United States. The claimant says that he disagreed fundamentally with the line taken by bin Laden and had nothing to do with furthering that agenda. It is part of the prosecution case against him that he was instrumental in distributing the declaration. The case he faces in New York alleges that the ARC was bin Laden's London office and that the claimant was installed by bin Laden at its helm. He is alleged to have provided bin Laden with a satellite telephone and to have stored and circulated the 1996 declaration.

6. In September 1998 the Government of the United States of America sought the claimant's extradition from the United Kingdom to stand trial in the Southern District of New York for conspiracy to murder United States nationals and internationally protected persons. The committal charge considered in the extradition proceedings was:

> "That you between the 1 January 1993 and 27 September 1998 agreed with Usama bin Laden and others that a course of conduct would be pursued, namely:
>
> (a) that citizens of the United States of America would be murdered in the USA and elsewhere;
>
> (b) that bombs would be planted and exploded at American embassies and other American installations;
>
> (c) that American officials would be killed in the Middle East and Africa;
>
> (d) that American soldiers deployed in the United Nations peacekeeping missions would be murdered;
>
> (e) that American diplomats and other internationally protected persons would be murdered;
>
> Which course of conduct would necessarily involve the commission of the offence of murder within the jurisdiction of the United States of America."

7. Two other individuals present in the United Kingdom were sought in respect of the same matter. They were Abdel Bary and Ibrahim Eidarous. Eventually the claimant and Mr Bary were extradited in October 2012 following protracted and multiple judicial proceedings. Mr Eidarous died before he could be extradited.

8. The claimant's extradition was governed by the Extradition Act 1989 which required the requesting state to provide evidence of a *prima facie* case. Extradition was resisted at every step. It will be necessary to return to the circumstances of the extradition hearing in the Magistrates' Court. At this stage I do no more than outline the course of the extradition proceedings. On 8 September 1999 Nicholas Evans, the Metropolitan Stipendiary Magistrate, concluded that there was a *prima facie* case and found against the claimant on a number of other issues. The claimant challenged the magistrate's conclusions in *habeas corpus* proceedings which were heard in the Divisional Court

November 2000: [2000] EWHC Admin 424; [2001] 1 WLR 1234 There were three grounds of challenge. The first concerned whether it was necessary for the crime for which the claimant was wanted to have been committed in the United States. Secondly, there was an issue relating to the evidence of two witnesses who were anonymised in the material produced by the United States. Thirdly, there was a challenge to the finding by the magistrate of a *prima facie* case. The application was dismissed. The extradition requests relating to Mr Bary and Mr Eidarous had also proceeded through the Magistrates' Court and the Administrative Court to the same effect. All three were granted leave to appeal to the House of Lords. Their appeals were dismissed on 17 December 2001: [2001] UKHL 69. Thereafter the claimant made a series of ten sets of representations to the Secretary of State between the end of 2001 and the end of 2005 seeking to make good his contention on multiple grounds that it would be unlawful to extradite him to the United States. On 12 March 2008 the Secretary of State rejected those submissions. There followed an application for judicial review which was heard in the High Court in February and July 2009. Judgment was delivered on 7 August 2009. The grounds of challenge can be summarised in this way. The claimant suggested that his removal to the United States and into their penal estate would violate Article 3 of the European Convention on Human Rights ("the Convention"). He also contended that there was a realistic possibility of his being tried in the United Kingdom, that various assurances given by the United States were unreliable together with an argument arising from his designation as a global terrorist. The claim was dismissed by Scott Baker LJ and David Clarke J. His application for permission to appeal to the Supreme Court was dismissed on 17 December 2009. Mr Bary was in the same position.

9. Both then made applications to the Strasbourg Court, as did a number of others who were resisting extradition to the United States. The essence of the argument advanced was that the detention conditions in the United States and the likely sentences which would be handed down on conviction were incompatible with the Convention. There were arguments under Article 6 fair trial provisions in addition. On 6 July 2010 the Strasbourg court declared the applications admissible but on 10 April 2012 the Fourth Section dismissed them. The claimant and his fellow applicants sought to take the case to the Grand Chamber, but on 24 September 2012 it declined jurisdiction.

10. It was in those circumstances that in October 2012 further applications were made on behalf of the claimant (and the others) for permission to apply for judicial review to stop their extradition to the United States. Again all relied on the prison conditions argument, but then each developed individual grounds and arguments. Following an oral hearing permission was refused. The result was that the various applicants were very quickly flown to the United States, including the claimant.

11. The claimant sought to argue that there was new evidence available which "cast doubt" on or "undermined" the *prima facie* case which had been accepted by the magistrate in 1999 and also cast doubt on the good faith of the United States Government. It was argued that there was a proposal to remove the claimant's name from the United Nations consolidated list of terrorists and that a man named Kherchtou, who had given evidence in another trial in the United States, had not implicated the claimant. All arguments were roundly rejected by the court (Sir John Thomas P and Ouseley J): [2012] EWHC 2736 (Admin). The claimant also made what was described as "a very extensive application for disclosure" founded upon a

report from a journalist named Nicholas Fielding. That report was described in the judgment as "little more than a commentary on existing material which concluded, quite without relevance, that there never was a *prima facie* case." This was the culmination of a longstanding suggestion by the claimant that the intelligence agencies, in particular MI5 or the secret intelligence service ("MI6"), must have material which would exculpate him.

12. In paragraphs 95 and 96 of the judgment of the court Sir John Thomas P said

> "95. … The witness statement of Ms Kundert on behalf of the CPS asserts that the [disclosure] duties have been complied with. She says that the CPS with the assistance of counsel has undertaken a disclosure exercise which involved considering materials held by the security service and the secret intelligence service. The CPS is satisfied that their disclosure obligations in these extradition proceedings were complied with in relation to materials held by the United Kingdom. … .
>
> 96. We are wholly unpersuaded that Mr Al Fawwaz can show any failure in the duty of disclosure of significant exculpatory material, such as could suggest that there was no *prima facie case*…. If any more specific disclosure point arises in the United States that is an issue for the trial court. Indeed the full width of the application was not seriously pursued by Mr Fitzgerald, especially in the light of the refusal of Al Fawwaz before the Magistrates' Court to pursue some issues to which the application relates with the witnesses who did attend. Some rather overheated allegations by Mr Al Fawwaz's solicitors in respect of that were not pursued by Mr Fitzgerald QC."

13. That last observation was directed towards events which occurred in the Magistrates' Court in 1999. At the heart of the claimant's argument is an assertion that an MI5 officer attended the extradition hearing with a file relating to him upon the contents of which he was prepared to be cross-examined. There is much material in the papers before us concerning an attempt made on behalf of the claimant to obtain evidence of his alleged dealings with the intelligence services to aid him in resisting the extradition request. It is the claimant's case that he had dealings with a man known to him as Paul Banner and made clear to him his disapproval of the 1996 declaration by bin Laden. In a recent statement, Edward Fitzgerald QC, who appeared for the claimant in the extradition proceedings in September 1999, records that a subpoena was issued for Paul Banner to testify in relation to the claimant's relationship with MI5. He does not recollect any assertion on behalf of the intelligence agencies of the policy of neither confirming nor denying contact with the claimant. He recollects an alternative witness being provided because Mr Banner was said to be out of the jurisdiction. That witness brought a file to court. David Perry of counsel appeared on behalf of MI5. Mr Fitzgerald recollects being told by Mr Perry that there was nothing in the file that would assist the claimant's case. On the contrary his case would be damaged by it. Mr Akhtar Raja, the claimant's solicitor, has a contemporary attendance note relating to the proceedings in the Magistrates' Court on 8 and 9 September 1999. During the morning of the 8 September an application was made on behalf of the claimant for a subpoena to require the attendance of Paul Banner to give

evidence about his alleged dealings with the claimant. The Government of the United States was represented by James Lewis of counsel who resisted the application. Mr Raja's note records that there was extensive legal argument about various matters which extended through the morning until the lunchtime adjournment. The note records that after lunch Mr Fitzgerald read out his draft witness summons. There was extensive further argument. At about 15:50 the magistrate gave a ruling and indicated his willingness to issue a witness summons requiring the attendance of Mr Banner. The note records that later that afternoon, that is after the ruling had been given, Mr Perry arrived. He indicated that he represented the Home Office. The substance of the note then suggests that he explained that the Home Office had been given notice that afternoon in relation to the witness summons. They needed time to consider the argument on questions of materiality and whether any information held by them was in fact hostile to the claimant. This was the beginning of a consistent line of statements accepting the fact that MI5 had material relating to the claimant. He indicated that there would be some discussions between the parties and invited the magistrate to adjourn the matter overnight. The note does not record by whom he was accompanied. The matter went over to the next day.

14. The draft witness summons read by Mr Fitzgerald was in these terms:

> "The application to witness summons by Mr. Paul Banner is made on the basis that he could confirm:-
>
> (i) That he was a member of MI5.
>
> (ii) That he had numerous meetings with Mr. Al-Fawwaz, some at the Old War Office Building, others in numerous hotels since arriving in this country in 1994.
>
> (iii) That at these meetings Mr. Al-Fawwaz was warned by Mr. Banner that there was a serious threat to his safety, and that there was, in fact, to Mr Banner's knowledge such a serious threat; that this threat was known to Mr. Banner to come from the Saudi government and other governments; and that MI5 had warned the Saudi embassy against any attack on Mr. Al-Fawwaz on British soil.
>
> (iv) That Mr. Banner advised Mr. Al-Fawwaz as to the precautions he should take to protect his own safety. Mr. Banner further offered the services of MI5 officers to visit Mr. Al-Fawwaz premises and assist in this regard.
>
> (v) That Mr. Al-Fawwaz complained about the fact that his home telephone number was monitored, but that he made it clear that he did not object to the A.R.C. number being monitored.
>
> (vi) That his phone was in fact monitored and nothing to connect him with any terrorist activity was detected.

> (vii) That in his conversations Mr. Al-Fawwaz gave an in-depth account of the ARC's activities; and made it clear that the organisation was committed to peaceful change."

15. The note for the following morning records Mr Fitzgerald talking of the claimant's belief that his phone was being monitored and also mentioning that Mr Banner was outside the jurisdiction. The note is not easy to follow but suggests that the witness summons application was withdrawn on the basis of information provided to Mr Fitzgerald by Mr Perry. On behalf of the Secretary of State, Sarah Jane Dubs has provided evidence in both an open statement (No. 3) and a closed statement relating to what occurred in the Magistrates' Court in September 1999. She notes that the contemporary materials produced by the claimant do not suggest that Mr Perry confirmed or denied any matter relating to a Mr Banner, or that an MI5 officer attended court with a file. Mr Raja believes that Mr Perry attended with someone from MI5 and with a file. I have noted that to be Mr Fitzgerald's current recollection. Ms Dubs says that both are mistaken and mistook a Home Office lawyer for an MI5 official.

16. Ms Dubs records that on 8 September 1999 Mr Perry and Mr Lewis together with officials from the Home Office legal adviser's branch and MI5 legal advisers met in conference. This followed Mr Perry's attendance at the Magistrates' Court. Its purpose was to discuss a proposal made by Mr Fitzgerald that he would not press for Mr Banner's attendance if the matters set out in the draft witness summons could be dealt with by way of admissions. On the following morning, Mr Perry informed Mr Fitzgerald that no admissions could be made and, furthermore, that such material as was held by MI5 would not assist the claimant. It was in those circumstances that Mr Fitzgerald decided to withdraw the application for the summons. In the course of the hearing before us further information was disclosed into open from the closed case. It was a gist of an MI5 file note from September 1999. It records the author's involvement in the events in September 1999 from notification by telephone on 8 September that the witness summons had been issued to notification the following day that it had been withdrawn. It confirms the content of the evidence of Sarah Dubs just summarised and also that Mr Perry was instructed to apply to set aside the summons if it were pressed. The only witness evidence that was contemplated from an MI5 officer would have confirmed that the admissions sought on behalf of the claimant could not be made, and that such information as was available to MI5 was not material to the issues and was not helpful to the claimant. Nobody from MI5 attended court on either day.

17. The understanding that an MI5 officer attended with a file to enable him to be cross-examined on its content would, if correct, be remarkable. In my view, the contemporaneous material available through Ms Dubs and from MI5 shows conclusively that the claimant's legal team was mistaken. Mr Raja's own contemporaneous notes do not evidence the recollection. In saying that I do not suggest that the current recollection is other than genuine. The Secretary of State does not suggest otherwise. The only continuing significance of the recollection is that the applications to Judge Kaplan for Letters Rogatory were supported by a statement from Mr Raja which repeated this understanding and asserted that

> "the UK government appeared to be prepared to allow the defense to view materials from MI5's files and to examine an

> officer of MI5 about those materials in the extradition proceedings. Thus it seems fair to say that the UK government has indicated by responding to the subpoena that it is not taking the position that its national security would be compromised of the materials were released [or an office testified about the interactions]."

It was on that mistaken basis, coupled with the claimant's assertions, that in the Letters Rogatory the judge described the material sought as "relevant" or "potentially relevant". The judge does not appear to have been told that in 1999 and 2008 the position of the British authorities was that such material as was held by MI5 did not assist the claimant.

18. The question of disclosure of material relating to the claimant held by MI5 was pressed in the representations made on his behalf to resist extradition. The substance of the representation recorded in the Secretary of State's decision letter of 12 March 2008 is a demand that any material held by the agencies in relation to the claimant should be disclosed. The Secretary of State's primary answer to the representation was that it was too late. The issue had been raised but not pursued before the Magistrate (whose function was to determine whether there was a *prima facie* case). She went on to indicate that whilst it was not possible to confirm or deny the existence of any particular material held by the agencies an exculpatory review had been carried out. Even were the Secretary of State in the same position as a domestic prosecutor, which she did not accept, there would be nothing to disclose. She went on to deal with the suggestion that Mr Banner could assist the claimant on the basis of the alleged discussions and repeated that "nothing had emerged in the course of the review which exculpates Mr al Fawwaz." The Secretary of State also dealt with surveillance and telephone tapping:

> " 84. To the extent that Mr al Fawwaz alleges he was subject to surveillance by the UK Government before his arrest in September 1998 and, particularly that his telephone was monitored:
>
> a) in accordance with the Regulation of Investigatory Powers Act and UK Government policy, the Secretary of State neither confirms nor denies whether Mr al Fawwaz was subject to such surveillance
>
> b) in relation to the request for disclosure of any files that the Secretary of State may have or in relation to Mr al Fawwaz, the Secretary of State's position is as above. In the light of that review, the Secretary of State is unaware of any material that would make it wrong, unjust or oppressive to order the surrender of Mr al Fawwaz
>
> c) further and specifically in relation to any alleged intercept material:
>
> (i) the existence of any material is neither confirmed nor denied

(ii) disclosure of such material would in any event be barred under RIPA."

19. Despite the repeated indications that the agencies have no material which would assist the claimant, his applications to Judge Kaplan were founded on his assertion that such material exists. Four applications were made for Letters Rogatory, to which I will refer as LR1-LR4. On the basis of the arguments advanced by the claimant before Judge Kaplan, as I have noted, he was satisfied that the material evidence might exist and was relevant. The claimant argued that the material would be "exculpatory and important for his defense." The Letters Rogatory in issue in this claim for judicial review are LR1, LR2 and LR3. LR4 sought the assistance of the United Kingdom Central Authority in securing the witness testimony of two lay witnesses. That request has been dealt with by utilising the procedure found in the Crime (International Co-operation) Act 2003 ("the 2003 Act"). There was a hearing at Westminster Magistrates' Court on 2 October 2014.

20. LR1 is dated 2 October 2013. It is directed to MI5. It sought:

> "1. All documents that concern or memorialise any and all conversations between security service (MI5) officers (including Mr Banner) and Mr. al-Fawwaz during the period 1994-1998;
>
> 2. All information and recordings obtained from any electronic surveillance of Khaled al-Fawwaz's home and/or telephone and/or of the Advice and Reformation Committee's telephones during the period 1994-1998.
>
> 3. Certification of the materials…"

The term "document" was defined within LR1 as "including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained either directly or if necessary after translation by the responding party into a reasonably usable form."

21. LR2 was directed towards MI5 and to Paul Banner and an unnamed employee who it is said replaced Mr Banner in 1998. It is dated 18 February 2014:

> "1. Make available for testimony Mr. Paul Banner or provide sufficient information to locate and serve him with compulsory process;
>
> 2. Identify and make available for testimony the security service officer who replaced Mr. Banner in dealing with Khalid Al Fawwaz ('the replacement officer') or provide sufficient information to locate and serve him with compulsory process.
>
> The request further seeks the following testimony from Mr. Paul Banner: Testimony identifying and authenticating the documents/information provided pursuant to a prior Letters

> Rogatory directed to the security service (MI5) to the extent he is able and testimony concerning his conversations and interaction with Khaled Al Fawwaz during the period 1994-1998"

The request goes on to seek similar information from the unnamed second officer. Mr Kirby, one of the claimant's United States team of lawyers, explains that the need for live evidence stems from the relatively strict hearsay rules that apply in American criminal trials. It appears that American hearsay rules are stricter than those which now apply in English criminal trials.

22. LR3 was issued on 22 April 2014. It was directed to MI5 and also to the Metropolitan Police. It sought:

> "1. All information and recordings obtained from any electronic or physical surveillance of Khaled Al Fawwaz's home …and/or telephones therein, and/or the Advice and Reformation Committee's premises and telephones during 1998;
>
> 2. All information and recordings obtained from any electronic and physical surveillance of Adel Abdel Bary's home … and telephones therein;
>
> 3. All information and recordings obtained from any electronic and physical surveillance at Adel Abdel Bary's office… and/or telephones therein during 1998
>
> 4. All information and recordings obtained from any electronic or physical surveillance from Ibrahim Eidarous' home… and/or telephones therein during 1998;
>
> 5. All information concerning any electronic or physical surveillance of Khaled Al Fawwaz … Adel Abdel Bary… and/or Ibrahim Eidarous during 1998;
>
> 6. Certification of the materials…"

23. The Metropolitan Police surveillance logs referred to in LR3 had already been provided to, and were available through, the prosecutors in the United States. Nonetheless, further copies were given directly to the claimant's solicitors.

The Legal Framework for dealing with requests for Mutual Legal Assistance

24. The United Kingdom Central Authority ("UKCA"), a department within the Home Office, is responsible for dealing with requests for mutual legal assistance. Mutual legal assistance is provided to foreign states, through their central authorities, courts or prosecutors. It is not something which private persons may request. In 2013 there were 3,600 requests received by the UKCA, the majority from Europe. Most were routine. The UKCA does not hold information itself or carry out investigations.

25. It is happenchance that the Secretary of State for the Home Department is at the same time the embodiment of the UKCA and also has statutory authority over MI5. That statutory authority was confirmed in section 1 of the Security Service Act 1989. It is unnecessary to explore its reach in this judgment.

26. The Secretary of State, acting through the UKCA, has long-standing non-statutory powers to provide legal assistance to foreign states which may be done without utilising the statutory powers and procedures found in the 2003 Act. Material may be forwarded to a requesting state which its owner in the United Kingdom has voluntarily provided to the UKCA for that purpose. The UKCA has no coercive powers to require any individual or organisation, private or governmental, to provide it with material. The United Kingdom has bi-lateral treaties with a number of states, including the United States, relating to mutual legal assistance. It is party to a number of multi-lateral international instruments on the subject. It is largely through the mechanisms of the 2003 Act that the United Kingdom honours its treaty obligations. All such treaties provide for a number of circumstances in which the State parties may refuse to assist, amongst which is national security.

27. As material sections 13 to 15 of the 2003 Act provide:

> "**Requests for assistance from overseas authorities**
>
> 13(1) Where a request for assistance in obtaining evidence in a part of the United Kingdom is received by the territorial authority for that part, the authority may –
>
> (a) if the conditions in section 14 are met, arrange for the evidence to be obtained under section 15, or
>
> (b) direct that a search warrant be applied for under or by virtue of section 16 or 17 or, in relation to evidence in Scotland, 18.
>
> (2) The request for assistance may be made only by –
>
> (a) a court exercising criminal jurisdiction, or a prosecuting authority, in a country outside the United Kingdom,
>
> (b) any other authority in such a country which appears to the territorial authority to have the function of making such requests for assistance,
>
> (c) any international authority mentioned in subsection (3).
>
> (3) The international authorities are –
>
> (a) the International Criminal Police Organisation,
>
> (b) any other body or person competent to make a request of the kind to which this section applies under

any provisions adopted under the Treaty on European Union.

Powers to arrange for evidence to be obtain

14(1) The territorial authority may arrange for evidence to be obtained under section 15 if the request for assistance in obtaining the evidence is made in connection with –

(a) criminal proceedings or a criminal investigation, being carried on outside the United Kingdom,

(b) administrative proceedings, or an investigation into an act punishable in such proceedings, being carried on there,

(c) …

(2) In a case within subsection (1)(a) or (b), the authority may arrange for the evidence to be so obtained only if the authority is satisfied –

(a) that an offence under the law of the country in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and

(b) that proceedings in respect of the offence have been instituted in that country or that an investigation into the offence is being carried on there,

An offence includes an act punishable in administrative proceedings.

(3) …

(4) …

Nominating a court etc. to receive evidence

15(1) Where the evidence is in England and Wales or Northern Ireland, the Secretary of State may by a notice nominate a court to receive any evidence to which the request relates which appears to the court to be appropriate for the purpose of giving effect to the request.

(2)…

(3)…

(4)…

(5) Schedule 1 is to have effect in relation to proceedings before a court nominated under this section."

28. Paragraph 5 of Schedule 1 to the 2003 Act is entitled "privilege of witnesses". It provides:

> "(1) A person cannot be compelled to give evidence which he could not be compelled to give –
>
> (a) in criminal proceedings in the part of the United Kingdom in which the nominated court exercises jurisdiction, or
>
> (b) subject to sub-paragraph (2), in criminal proceedings in the country from which the request for the evidence has come.
>
> (2) Sub-paragraph (1)(b) does not apply unless the claim of the person questioned to be exempt from giving the evidence is conceded by the court or authority which made the request.
>
> (3) Where the person's claim is not conceded, he may be required to give the evidence to which the claim relates (subject to the other provisions of this paragraph); but the evidence may not be forwarded to the court or authority which requested it if the court in the country in question, on the matter being referred to it, upholds the claim.
>
> (4) A person cannot be compelled to give evidence if his doing so would be prejudicial to the security of the United Kingdom.
>
> (5) A certificate by or on behalf of the Secretary of State … 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 evidence in his capacity as an officer or servant of the Crown.
>
> (7) Sub-paragraphs (4) and (6) are without prejudice to the generality of sub-paragraph (1)."

29. Section 30 enables evidence to be given via television link from the United Kingdom to a foreign criminal court. Schedule 2 to the 2003 Act invests the court nominated under section 15 with power to compel the attendance of a witness for that purpose. However, the same privileges as are identified in paragraph 5(1)(a), (4), (6) and (7) of schedule 1, together with the certification process in 5(5), are repeated. The 2003 Act covers much else not material to this claim, including the application for search warrants and freezing orders.

30. In *R (Omar) v Foreign Secretary* [2014] QB 112 the Court of Appeal was concerned with an appeal from the refusal of this court to entertain an application seeking disclosure from the Foreign Secretary of intelligence material which the claimant suggested would assist him in his defence to terrorist charges in Uganda. The claimant relied upon the common law principles for seeking disclosure against a non-

party found in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133. The Court of Appeal agreed with the Divisional Court that the statutory scheme found in the 2003 Act admitted of no parallel common law jurisdiction enabling a court to order disclosure of evidence into foreign proceedings. In coming to that conclusion the Court of Appeal identified a number of features of the statutory scheme which were decisive. First, the Secretary of State has a discretion whether to arrange for the evidence to be obtained; secondly, the ability of the Secretary of State to exercise a degree of control over sensitive material; thirdly the Crown servant exception; and fourthly that the statutory scheme allows an application for assistance only from official sources (see paragraphs [15] and [25] of the judgment of Maurice Kay LJ).

31. No Crown witness can be compelled to give evidence as such in a nominated court. The certificate referred to in paragraph 5(5) of schedule 1 (and its analogue in schedule 2) would in any event be conclusive evidence in the court nominated to receive evidence under section 15 of the 2003 Act if deployed by the Secretary of State in the expectation that otherwise evidence would be given that was prejudicial to national security. Its effect would be to prevent a witness being compelled to give evidence judged damaging to national security. Nonetheless, such a certificate would in theory be capable of challenge in judicial review proceedings. It has not been suggested that paragraph 5(5) is a provision which ousts the jurisdiction of the High Court. Similarly, not to nominate a court could be challenged because it amounts to a decision not to exercise a statutory discretion.

This challenge

32. In this claim for judicial review the challenge is to the non-exercise of the Secretary of State's power to transmit material directly, it being assumed by the claimant that she has the authority to require MI5 to provide disclosure of the material under consideration. I have indicated that the question of the extent of her authority to direct MI5 does not need to be determined although I note that Mr Chawla QC, for the Secretary of State, canvasses the possibility that she could not require MI5 to produce anything. It does not matter because on this occasion there is no suggestion of any lack of unanimity of approach between the Secretary of State and MI5, quite the contrary. She has decided not to provide assistance in response to LR1, LR2 and LR3 (save to the limited extent I have indicated) on grounds of national security. The central question is whether there was any legal flaw in that decision. The same question would arise whether in the context of a challenge to a refusal to exercise the statutory power, a notional challenge to a refusal to nominate a court for the purposes of section 15 of the 2003 Act or a notional challenge to a certificate under paragraph 5(5) of schedule 1.

33. In considering that question it is of importance to focus on the different categories of material requested by Judge Kaplan. They are:

    i) Documents (widely defined) evidencing the alleged dealings between the claimant and a man said to be Mr Banner and his unnamed successor;

    ii) Intercept material, particularly phone taps relating to a number of sites and individuals;

iii) Surveillance material relating to the claimant and others;

iv) Live testimony from Mr Banner and his successor, alternatively contact details to enable the United States Court to serve a summons.

34. Intercept material of the sort identified in the Letters Rogatory is subject to the Regulation of Investigatory Powers Act 2000 ["RIPA"]. Section 17 prohibits the use of such evidence in "any legal proceedings" subject to series of exceptions. None of the exceptions applies to this case. It is clear that such evidence could not be provided to any requesting state through a nominated court under section 15 of the 2003 Act. We did not hear full argument on the question whether "legal proceedings", which is not defined in that act, includes legal proceedings overseas. The policy considerations which underlie the prohibition found in section 17 would apply with equal force to such evidence sought for use in an overseas court. If the term is wide enough to encompass overseas proceedings, then section 17 would create an absolute bar to providing intercept material for the purposes of or in connection with the claimant's trial in New York. However, even were that not the case, a decision refusing to provide such material for use in foreign criminal proceedings would be unassailable on the basis that the Secretary of State was respecting the policy considerations which inform the statutory bar. Indeed, it may very well be perverse for the Secretary of State to provide for use in foreign proceedings intercept material which could not be used in domestic proceedings. However, it is unnecessary to go that far. In my judgment, to the extent that the Letters Rogatory asked the Secretary of State to produce intercept material which is prohibited from use in domestic criminal proceedings, or to confirm or deny its existence, she was entitled to rest upon the RIPA and the policy underlying its provisions relating to intercept material. That is precisely how the matter was dealt with in paragraph 84 of the decision letter in March 2008.

35. LR 2 asks the United Kingdom Government to make available two witnesses or otherwise provide their contact details. If the witnesses exist, were asked to go to New York and were content to give evidence that would be one thing. In theory such witnesses could be authorised to do so. But otherwise their evidence would fall to be taken in a court nominated under section 15 of the 2003 Act. However, as Crown servants or former Crown servants being asked to give evidence in that capacity, irrespective of any privileges arising out of the nature of the evidence sought from them, they could not be compelled by the court to give evidence. Neither could their current (or former) employer require then to do so.

36. The UKCA deals with requests pursuant to guidance which makes clear that assistance may be refused for various reasons, including national security. The United Kingdom and the United States of America operate pursuant to the Treaty for Mutual Legal Assistance signed on 6 January 1994 which entered into force on 2 December 1996. The parties to the treaty were the two Governments. By Article 1.3 the Treaty applies only to requests for mutual legal assistance between the parties. It has no direct application to the Letters Rogatory from Judge Kaplan. It provides for Central Authorities to be established. In the United States that is the Attorney General or his designate; in England and Wales it is the Secretary of State. It recognises that assistance may be refused on grounds of national security (Article 3). Mr Friedman draws my attention to Article 8(5) which enables documentation to be authenticated "by the attestation of a person competent to do so" and Article 9 which enables

"official records" to be authenticated by the Central Authority to reinforce his submission that the involvement of a court under section 15 of the 2003 Act is not the only way in which documents may be transmitted and authenticated. I have noted that the Metropolitan Police surveillance logs sought in LR3 had already been provided to the American prosecutors. That was an example of the use of the Secretary of State's non-statutory powers and co-operation pursuant to the terms of the 1994 Treaty.

37. Challenges to the way in which the Secretary of State exercises her powers relating to mutual legal assistance have hitherto been brought by persons seeking to stop material being sent to a foreign state. In that context this court has repeatedly indicated that a request should be dealt with as expeditiously as possible and should be acceded to absent a compelling reason: *R (Abacha) v Secretary of State for the Home Department* [2001] EWHC 787 (Admin) at [17]; *R (Van der Pijl) v Secretary of State for the Home Department* [2014] EWHC 281 (Admin) at [112]; *JP Morgan Chase v Director of the SFO* [2012] EWHC 1674 (Admin) at [52]. It cannot be in doubt that the interests of national security provide such a reason. Mr Chawla does not dispute the need for the UKCA to act expeditiously. Indeed the guidance available publicly relating to mutual legal assistance indicates that the UKCA aims to accede to requests within 30 days albeit that it cautions this will not always be possible, depending on their nature.

Consideration of the requests

38. The evidence on behalf of the Secretary of State has been provided in a series of statements from Ms Dubs, a solicitor working for the UKCA. She has summarised how the Letters Rogatory were dealt with by the UKCA. So far as she is aware, this is the first occasion on which requests have been received in respect of material said to be held by MI5. Requests may be refused on a number of grounds, in addition to national security, including on what is described as a *de minimis* basis. The reach of that term for these purposes is explained in the guidance. A decision to refuse to provide assistance will be made by a minister personally, save for one based upon *de minimis* grounds. Ms Dubs explains that the overwhelming majority of requests are unexceptional and are acted upon swiftly by activating one or more of the processes found in the 2003 Act.

39. LR1 was received by the UKCA on 13 November 2013. At that time the claimant's trial was listed for hearing in April 2014. That date was moved to November 2014 and then to January 2015 for reasons unconnected with the progress in obtaining information pursuant to the Letters Rogatory. This being entirely novel territory for UKCA, it took some time to establish an appropriate chain of communication with MI5. When that was done LR1 was forwarded to them on 10 December 2013. Ms Dubs remained in contact with the legal advisers at MI5 throughout January and February and was aware that MI5 was dealing with the matter including by communicating with the prosecutors in the United States. On 12 February 2014 the claimant's solicitors indicated that the trial date had slipped to November 2014. Ms Dubs received LR2 on 26 February. As she explains, this considerably expanded the scope of the request. The view was taken that it would not be possible to deal with the two requests in isolation from each other. That was a reasonable view.

40. Ms Dubs forwarded LR2 to the MI5 legal advisers and then met them with the American prosecutors on 6 March 2014. The purpose of the meeting was to explore with the prosecutors the scope for evidence to be adduced in an American criminal trial in a closed process. As she explains, this was considered by the UKCA with MI5 with a view to finding a way to provide material to Judge Kaplan. Ms Dubs was then engaged on other business until after Easter. On 15 April she asked MI5 for an update. LR 3 arrived at the UKCA on 5 May. Ms Dubs forwarded it to MI5 on 7 May. This once more expanded the scope of the requests, in particular by seeking material relating to Adel Bary and Ibrahim Eidarous. She involved the Metropolitan Police in the aspect of that request which concerned them, and obtained their surveillance logs (which the prosecutors already had). There was no sensitivity relating to them. LR4 was received on 19 May. One of the two witnesses it identified was not well enough to give evidence. Both, who were not Crown servants, were reluctant to do so. In due course Westminster Magistrates' Court was nominated under the 2003 Act to receive the evidence of the one who was well. The claimant's American legal team wished to travel to the United Kingdom and examine the witness with the whole process being filmed. Their aim was to have a record to play to the court in New York. They had to be reminded that filming and recording of evidence in English courts remains prohibited by statute. There is, by contrast, provision in the 2003 Act for live video-linked evidence.

41. Ms Dubs had further meetings with MI5 and the prosecutors on 2 and 19 June. The UKCA received the claimant's letter before action on 25 June 2014. In correspondence that followed, the UKCA indicated that it could neither confirm nor deny the existence of the material referred to in the Letters Rogatory, that sensitive material would not ordinarily be released if it were to be used in open court but that, mindful of the November trial date, urgent consideration was "being given to how this issue can be addressed." The claim form was issued on 4 August 2014. It attacked the UKCA's failure to respond to the various Letters Rogatory.

42. In a letter of 15 August 2014 from the UKCA to Judge Kaplan the then current position was explained:

> "**Sensitive Material**
>
> … [W]e can confirm that the Government of the UK holds information relevant to Mr Al Fawwaz, but we are unable to confirm or deny in open correspondence whether the specific evidence requested exists, or whether the assertions made in the request are true, as this would constitute a disclosure of sensitive information.
>
> We hope that you will understand that given the nature of the material requested, establishing whether there is a mechanism by which it could be adduced in Court has been a complicated and lengthy process. The UKCA has made strenuous efforts to identify the means by which such assistance could be provided and we have identified a possible resolution of the issue. We cannot go into detail in open correspondence, but we can say that the extent that any such material can be provided at all, it could be provided via the US Classified Information Procedure.

> Contact has been made with the US prosecutor in order to take this aspect of the case forward as a matter of urgency.
>
> …
>
> We are seeking to find a way to ensure that Mr Al Fawwaz's representatives have the opportunity to review such material requested as can be disclosed, in a manner which accords with my domestic law and policy. Any assistance you can provide to bring the relevant parties together to agree the mechanism for adducing the material will be very much appreciated."

In a statement dated 22 August 2014 Ms Dubs explains that whilst she could not set out the detail of the work done, research had been undertaken "with other branches of government and the issue that arises is how any material can be presented to the US court without causing harm to national security." The classified procedure identified is a statutory mechanism available pursuant to the Classified Information Procedures Act ("CIPA") in some circumstances in American trials designed to safeguard secret material. It provides a detailed code for the disclosure, management and use of classified material with some features similar to closed material procedures familiar in this jurisdiction. It gives the court a central role in determining relevance and admissibility and is designed to prevent the unnecessary or inadvertent disclosure of classified information. It requires material to be classified by the United States Government which in turn entails the material originating with them or being provided to them by a foreign government at their request.

43. Judge Kaplan brought the American teams of lawyers together and convened a closed trial management hearing on 3 September 2014. Mr Kirby is cleared to take part in Classified Information Procedures and thus represented the claimant's interests in the closed hearing. The judge invited Ms Dubs and Mr Chawla to New York. In was in those circumstances that they attended the hearing on 3 September. Ms Dubs explains that she and Mr Chawla went to New York to see whether, if relevant material existed, there was a way of providing it without prejudicing the national security of the United Kingdom. They spoke to the prosecutors and then attended the closed hearing during which Mr Chawla addressed the court. After the hearing they had further discussions with cleared defence counsel. All parts of the process were subject to strict confidentiality. In her statement of 16 September Ms Dubs explains

> "At the meeting we agreed to consider any proposal put forward by US defence counsel. Upon my return to London US defence counsel sent me a draft protective order which, they assert, would put in place sufficient protections to prevent the possibility of damage to UK national security to allow review of any relevant material held. …
>
> The contents of it are such that further consideration has been and continued to be given to the material which may fall to be considered under requests LR1 to LR3."

Ms Dubs went on to refer to sections 13 and 15 of the 2003 Act as the likely mechanism for providing any material but cautioned that the position regarding schedule 1(5) had not been resolved.

44. The draft protective order was sent under cover of an email dated 7 September 2014. Mr Kirby believed it would provide the 'concrete assurance' sought by the Government. Mr Kirby proposed a two stage process. Step one would involve security cleared counsel for all three defendants in the criminal trial reviewing such material as was held by MI5 which could be disclosed, subject to strict terms of confidentiality. It was envisaged that all three defendants' teams of lawyers would be bound voluntarily by its terms. The draft order made clear that it was concerned with a temporary procedure to enable the material to be reviewed by the American cleared lawyers and was not concerned with a second step, namely how to deal with any of it in the trial, in the event that any party wished to rely on it and the judge considered it admissible. In this regard I note an observation in an open statement made by Mr Kirby on 16 December 2014 in the New York proceedings in which he says that "the prosecutors have indicated that they hope to use the material from the Security Service at trial, as well". The prosecution have not themselves sought the material held by MI5 although it is clear that they have seen it.

45. The two step process envisaged by the claimant's advisers had been explained in a letter from Mr Raja to Ms Dubs on 29 August. He envisaged at the second stage an *in camera* process of some sort in the trial, with the defendants present, but recognised that would be a matter for the trial judge having heard submissions from all parties.

46. There was a hearing on 17 September in these proceedings at which permission to apply for judicial review was granted on the original grounds. The sentiment found in Ms Dubs' evidence was repeated on behalf of the Secretary of State: it was likely that the problem would be resolved. In her statement of 21 October 2014 Ms Dubs recapitulates the overall position in this way:

> "As will be apparent, UKCA, in consultation with M15 and in the light of information about US court procedures provided by the US prosecutors, gave active consideration to the scope for providing *some* material … It will also be apparent that the focus here was on the scope for doing this on a closed, protected basis … The ultimate judgement as to whether the provision of any such material would prejudice national security then depended on an assessment of its specific content, the means by which it might be disclosed, adduced or admitted and the adequacy and enforceability of any restrictions or measures … If I were to comment on any of these matters in this open statement, I would risk revealing information about the available material. Furthermore, if I were to disclose the content of the discussions with MI5 or the matters raised with the US prosecutors, I would immediately reveal whether and to what extent the material under consideration took the form of documents, evidence or information and thus allow the reader to differentiate LR1 and LR3 on the one hand, and LR2 on the other."

Ms Dubs was unable to provide a more detailed summary of the discussions and deliberations which led to LR1 to LR 3 being refused. She nonetheless identifies in her open statement a number of reservations about the closed procedure contemplated in the draft sent by Mr Kirby and suggestions canvassed by Mr Raja. First the undertaking relating to confidentiality imposed upon the claimant's lawyers would be amenable to "expansion" and "variation" and was without prejudice to the claimant's right to seek personal disclosure. Secondly, the claimant's advisers in the United Kingdom had always advanced the proposition that the claimant should ultimately be privy to any disclosed material in a way which would deny the United Kingdom authorities control over its use. Thirdly, the claimant recognised that the United States CIPA could have no direct application to any material provided in response to Judge Kaplan's Letters Rogatory. That was because the material would not be "classified information" within the meaning of the legislation. The United States Government have to classify information for the purposes of that Act. Mechanisms exist for classifying foreign material when it is provided to or through the United States Government but they do not cover what is contemplated by the Letters Rogatory. Ms Dubs explains that the application of the statutory regime was an essential feature so far as the Secretary of State was concerned.

47. The refusal was communicated to Judge Kaplan in letters of 29 September and 6 October 2014. The first stated:

> "With regard to [LR1 to LR3] we have done our utmost to see what assistance can be provided including travelling to New York for meetings with the prosecutors and cleared defence counsel.
>
> These meetings were extremely helpful. However, we are unable, in open correspondence, to confirm or deny the truth of the allegations made in the letters of request or whether any of the materials referred to therein exist. Unfortunately, apart from the materials provided by the Metropolitan Police Service in respect of [LR3] we have therefore been unable to find a way to assist.
>
> In view of this we write to inform you that these requests have been refused on grounds of national security."

Judge Kaplan responded by thanking the UKCA for the efforts it had made. Both letters were copied to the claimant's lawyers in both jurisdictions. The claimant's lawyers with conduct of these Judicial Review proceedings sought further reasons from the Secretary of State.

48. Ms Dubs wrote at length to Judge Kaplan on 6 October 2014. In that letter she confirmed that MI5 held material relating to the claimant, but indicated that the national security interests of the United Kingdom required the maintenance of NCND in respect of the volume, nature and content of the material and whether any of it fell within the scope of LR1 to LR3. She summarised the statutory functions of MI5 found in section 1 of the Security Service Act 1989. She explained the need for secrecy for it to be able to undertake those functions effectively. Disclosure which damages the effectiveness of MI5 prejudices the fulfilment of those functions and thus

national security. Ms Dubs went on to explain the rationale behind NCND. By reference to Schedule 3 paragraph 4 of the Intelligence Services Act 1994 (now superseded by Schedule 1 paragraph 5 of the Justice and Security Act 2013) she identified three sensitive categories of information:

i) Information which might lead to the identification of, or provide details of, sources of information, other assistance or operational methods of MI5;

ii) Information about particular operations pursuant to the statutory functions;

iii) Information provided by overseas liaison partners.

Ms Dubs explained how disclosure might cause damage directly or indirectly, including the problems of providing confirmation or denials in one case but not another, and by raising concerns in the minds of actual or potential sources. She stated that if the material were to exist, and the Government were to confirm or deny publicly whether MI5 had been involved in conversations of the kind referred to, or whether any material it holds falls within the requests there would be damage to the operational effectiveness of MI5. A list of generic reasons followed:

> "The reason why disclosure would cause such harm is that the material requested includes information of one or more of the following kinds:
>
> (a) information relating to methods, techniques or equipment of the Security Service, disclosure of which would reduce or risk reducing the value of the method, technique or equipment in current or future operations;
>
> (b) information relating to persons providing information or assistance in confidence to the Security Service, disclosure of which would endanger or risk endangering the persons concerned or other persons or would impair or risk impairing their ability or willingness to continue providing information or assistance, or the ability of the Service to obtain information from the person concerned or other persons;
>
> (c) information relating to operations of the Security Service, disclosure of which would reduce or risk reducing the effectiveness of those operations or of other operations either current or future;
>
> (d) information relating to the identity, appearance, deployment or training of current and former members of the Security Service, disclosure of which would endanger or risk endangering them or other individuals or would impair or risk impairing their ability to operate effectively as members of the Service or the ability of the Service to recruit and retain staff in the future;

> (e) information received in confidence by the Security Service from foreign liaison sources, disclosure of which would jeopardise or risk jeopardising the provision of such information in the future;
>
> (f) other information likely to be of use to those interest to the Security Service in pursuit of its functions, including terrorists and other criminals, disclosure of which would impair or risk impairing the Service's performance of its functions;
>
> (g) information relating to the operations and activities of other UK intelligence agencies likely to cause damage similar to that described above."

49. Ms Dubs continued by explaining that despite those factors the question whether to apply NCND in any given case was the subject of individual consideration. The conclusion was that there was no justification in this case for departure from the NCND approach.

50. It is clear in this case that the Secretary of State, as the Minister with authority over MI5, took the view that disclosure of the material relating to the claimant held by MI5, which has been acknowledged, and confirmation or denial of its nature by reference to LR1 to LR3, would be damaging to national security. The result was that direct disclosure could not be made. The consequence was also that a decision was made not to nominate a court to receive any evidence. That was explained by Ms Dubs in her letter to Judge Kaplan:

> "We also considered whether the Service or any of its staff could be compelled to confirm or deny the existence of, or otherwise give, evidence falling within LR1-LR3 if called before a court nominated to receive such evidence under s. 15 of the [2003 Act].
>
> We concluded that there would be very strong grounds for the Service and the staff to claim privilege under paragraph 5(1)(a), (4) and (6) of Sch.1 to the 2003 Act, and that the Home Secretary would support such a claim, <u>if</u> a court were nominated under s. 15. Given that this support would inevitably extend to support for a public interest immunity claim under paragraph 5(1)(a) of Sch. 1 and the issue of a certificate under paragraph 5(5) thereof, we concluded it would be perverse for us to accede to or attempt to execute LR1-LR3 by nominating a court under s. 15."

Finally Ms Dubs explained that consideration had been given to providing a general indication of the nature and volume of material held by MI5 relating to the claimant, confirming or denying in general terms whether any of it falls within LR1 – LR3, or partial disclosure. Additionally she explained that consideration had been given to whether there could be disclosure, or departure from NCND, on a confidential, closed or *in camera* basis by providing information within a confidentiality ring. However,

the conclusion was that none of these options would avoid or mitigate the damage, in particular,

> "In relation to [a confidentiality ring] we considered the available options and representations made by Mr Al Fawwaz's advisers both in the United States and in the UK and we consulted the Service. On balance, we concluded that none of the possible confidentiality rings offered sufficient security or permanence adequately to ensure the maintenance of the requisite NCND position."

51. A transcript of a further open hearing on 22 October 2014 in New York shows that nobody was under any illusion regarding the fundamental reason for refusing these requests. Judge Kaplan himself observed:

> "… the bottom-line position of the British Government is, [there will be no disclosure] unless they have an iron-clad assurance that nothing that they might produce, if anything exists to be produced, will ever see the public light of day. That's their position. It is in writing. They have said it to me. You have seen it."

I respectfully agree that this encapsulates the essence of the position of the Secretary of State. She has taken the view that the confidentially ring option canvassed by the claimant's lawyers, and which was under active consideration from an early stage independently of Mr Kirby's proposal, does not provide the assurance necessary to enable the British Government to allow such material as is held by MI5 to be disclosed to the parties' lawyers in the United States with the possibility of its being used in the trial.

52. This rather lengthy review of the history enables us to turn to consider the submissions advanced by Mr Friedman on behalf of the claimant.

The arguments and my conclusions on them

53. There are a number of matters which I would deal with at the outset in connection with the central issue, namely whether the decision to refuse on national security grounds to disclose material or explain whether any of it falls within LR1 to LR3 is legally flawed.

54. A good deal of time was taken up in oral argument concerning the domestic mechanism through which the Secretary of State would have produced material held by MI5 relating to the claimant. Would it be by using the procedures found in the 2003 Act or outside them? A significant element of Mr Friedman's attack on the decision making process was to submit that the Secretary of State had fettered her discretion by focussing too much (he would suggest exclusively) on the statutory route rather than on her discretionary powers to provide material directly to Judge Kaplan or the parties to the trial in New York. I consider the argument has been something of a distraction. The reason why the Secretary of State said "no" was not bound up in domestic procedural concerns about how to get material to New York. Her decision was founded upon the assessment that sufficient protection against its

wider dissemination could not be guaranteed in the American criminal trial. Had she taken a different view, such material as MI5 holds and which she and they were willing in principle to disclose subject to suitable protection, would have been provided.

55. It is clear from a reading of the evidence filed on behalf of the Secretary of State (including the closed evidence) that the UKCA and Secretary of State, with the co-operation of MI5, were genuinely seeking a way to assist Judge Kaplan. She wished him to be able to consider the material held by MI5. Although there was no direct suggestion from Mr Friedman that the Secretary of State had acted in bad faith, the *volte face* leading to the decision not to accede to the requests at the least raised suspicions on the part of the claimant's wider team. There is no foundation for any suspicion of bad faith.

56. Mr Friedman submits that the Secretary of State could have used the procedures envisaged in the 1994 Treaty to authenticate or certify material held by MI5. Mr Kirby, whose evidence explains some of the difficulties surrounding admissibility of documentary and hearsay evidence in United States courts, states that some material, depending on its nature, could be rendered admissible in the United States if formally certified under article 9 of the 1994 Treaty. That may be so. But, as I have noted, the 1994 Treaty is not applicable to the Letters Rogatory from Judge Kaplan. Even if it were, the decision of the Secretary of State was not based upon difficulties in authenticating or certifying the material held by MI5. The objection to its production was more fundamental.

57. It was also submitted that the conduct of the Secretary of State, in particular in encouraging the claimant to believe that some material held by MI5 would be provided for use in the criminal proceedings, gave rise to an enforceable substantive legitimate expectation that it would be provided. The claimant says that the Secretary of State at no time suggested that there was a risk that it would not be. It is true that the Secretary of State, until very shortly before the decision to refuse was made, was expressing varying degrees of high confidence that a satisfactory mechanism would be found to enable material to be made available for use in the criminal proceedings in a closed or protected environment. However, those expressions did not amount to an unequivocal promise of the sort needed to found a legitimate expectation. To my minds it is clear that the disclosure of material was always expressed as being subject to the Secretary of State being satisfied as to protection from further disclosure; to finding a mechanism satisfactory to her.

58. I would mention also at this stage a recurring theme in Mr Friedman's submissions that the views expressed in September 1999 that the material held by MI5 would not assist the claimant, and repeated in unequivocal terms following an exculpatory review in the Secretary of State's decision letter in March 2008, were not to be trusted. He drew our attention to public reports which have adverted to historical problems with document management at MI5. The claimant is suspicious about whether the view taken by various counsel instructed by the Secretary of State in the past, to the effect that the material held by MI5 would not fall to be disclosed were he being prosecuted in England and Wales, still holds good. His suspicion flows from the absence of any consideration of this question in the evidence of Ms Dubs or the various communications emanating from the UKCA in the course of its dealings with the Letters Rogatory. Mr Friedman explains that the claimant infers that a mistake

was made at the earlier stages. He submits that we should infer the same and go on to conclude that the material held by MI5 exculpates the claimant. Mr Chawla's position is that the conclusions in the 2008 letter remain valid. A full exculpatory review has not been repeated.

59. I have seen nothing in the course of any part of these proceedings which leads us to conclude that the inference drawn by the claimant is justified. To the extent that the claimant submits that the integrity of the extradition proceedings has been called into question because the conclusion articulated in the decision letter of March 2008 was wrong, and that the Secretary of State should make good any shortcoming by disclosing material held by MI5, I reject it.

60. Mr Friedman's further submissions on the question whether the refusal to provide any disclosure may be distilled to the following propositions:

i) The question whether to disclose material into the American criminal proceedings must be considered in the light of the need for the claimant to have a fair trial in the United States.

ii) The Secretary of State has failed properly to explore or understand the available closed or semi-closed procedures available in the American trial, or the possibility of making admissions or providing a gist. In particular, having embarked on an examination of the CIPA mechanisms, the Secretary of State should have followed it through. She had a duty to investigate but has produced no American legal opinion to support her view that the protection that might be available is inadequate. She failed to ask the right questions.

iii) It is for this court to review the decision of the Secretary of State for rationality, legality and procedural regularity notwithstanding the national security context.

iv) Her approach is irrational because the claimant has "self-reported" his relationship with MI5. Furthermore, the material relates to "a bygone era".

v) In any event, having refused to disclose material, the blanket reliance upon NCND is unjustifiable. The Secretary of State should explain the nature of the material held by MI5. No harm could flow from providing more particularity at this stage.

61. I do not accept the general submission that in deciding whether to accede to requests for mutual legal assistance the Secretary of State, through the UKCA, is obliged to weigh the question whether the evidence requested is needed for the purposes of a fair trial. The underlying premise of any request is that the prosecuting authority, court or other authorised body considers that the evidence sought is at least potentially relevant to the investigation or trial in question. However, the UKCA would rarely be equipped to make any informed evaluation about the importance of the material in the criminal process in the requesting state. In my view, there is nothing in the statutory scheme which would support a duty of inquiry in that regard. Indeed, it would be incompatible with the general operation of the scheme for mutual assistance which assumes that ordinarily requests will be complied with speedily as a matter of comity. No such duty could arise if the Secretary of State were considering providing

evidence directly outside the statutory scheme. Questions of a fair trial are for the court of competent criminal jurisdiction in the requesting state. Whilst the Secretary of State could properly decline to assist a state which does not subscribe to international fair trial standards, or which habitually disregarded them, requests overwhelmingly come from states which are party to the Convention or to the International Covenant on Civil and Political Rights ("ICCPR"), which contains provisions analogous to article 6 of the Convention. The United States of America is a State party to the ICCPR. Similarly, the Secretary of State would rarely be in a position to judge whether the *absence* of a piece of evidence would render a trial unfair. That proposition is difficult to make out in this jurisdiction when advanced in criminal trials, given the ability of the trial judge and trial process to ensure fairness despite evidence being unavailable. The Secretary of State is entitled to work on the assumption that the requesting state will secure a fair trial for the accused.

62. Whilst I conclude that is the general position, in the specific context of a refusal of mutual assistance on the grounds of national security in particular, I do not accept that the Secretary of State is obliged to weigh fair trial considerations against national security. That would be to equate her task with a domestic public interest immunity exercise. One of the reasons why the Court of Appeal in *Omar* held that *Norwich Pharmacal* relief was not available to secure evidence for use in foreign criminal proceedings was precisely because national security considerations, which are accorded primacy under the 2003 Act, are relegated to a factor to weigh in the balance (albeit a heavy one) for *Norwich Pharmacal* purposes. In paragraph [25], to which I have already referred, Maurice Kay LJ said:

> "…certain points stand out as differences. I refer again to the three features of the 2003 Act …: the discretion of the Secretary of State, the confinement of requests to foreign courts and prosecuting authorities and the national security and Crown servant exceptions. None of these features is built into the *Norwich Pharmacal* jurisprudence as a mandatory requirement. The most that can be said is that they may be considered as factors to be taken into consideration on a particular application …. The statutory scheme accords ministerial discretion, national security and Crown service a paramountcy which the *Norwich Pharmacal* remedy does not. The statutory scheme enables the Secretary of State to retain a degree of control over sensitive information or evidence which the *Norwich Pharmacal* remedy would loosen or might deny. … To relegate national security to the status of a material consideration to be weighed on a case-by-case basis at the stage of necessity or discretion in a *Norwich Pharmacal* application would be to subvert the carefully calibrated statutory scheme."

63. This reasoning applies with equal force to the question whether the Secretary of State is obliged to weigh national security considerations against arguments advanced by an accused that the evidence he seeks is vital for his trial when deciding whether or not to accede to a request either by nominating a court under the 2003 Act or transmitting material directly.

64. In any event, had the Secretary of State done so, she would have been entitled to have regard to the exculpatory review carried out on behalf of her predecessor in 2008.

65. Both parties relied upon the decision of this court in *JP Morgan Chase Bank National Association & Ors v The Director of the Serious Fraud Office & Another* [2012] EWHC 1674 (Admin) in connection with the argument that the Secretary of State should have continued to pursue a statutory closed procedure (or an analogous one supported by undertakings or court orders) beyond the date on which she decided not to accede to Judge Kaplan's request. That case concerned a request from Italian prosecutors which the banks (who were being investigated) argued was obviously unlawful as a matter of Italian law. Their object was to stop the evidence being transmitted to Italy. The Secretary of State received conflicting legal opinions on the question. At their heart was the issue whether, because of the stage the proceedings had reached in Italy, only the judge (and not the prosecutor) was empowered under Italian law to issue Letters Rogatory. The Secretary of State's decision to refer the request to a court pursuant to the 2003 Act followed her determination, having considered the conflicting Italian legal opinions, that the prosecutor was acting within his domestic powers. Her decision to refer the request to the court was challenged, *inter alia*, on the ground that the prosecutor was obviously acting unlawfully. It was accepted in argument on behalf of the Secretary of State that "it would be wrong to exercise discretion in favour of answering a request if it was obviously unlawful". The various Italian legal contentions were debated before the Divisional Court. The court concluded that there was only one answer under Italian law, namely that the request was unlawful. It also concluded that the request was "obviously unlawful". In those circumstances the decision to refer the request to a court under the 2003 Act was quashed.

66. In paragraph 52 of his judgment Gross LJ said:

> " …[I]n the overwhelming majority of cases, both as a matter of policy in fighting crime and the United Kingdom's international obligations, it can be expected that requests for mutual assistance under CICA 2003 will be acted upon – and as quickly as possible. The SSHD is not required to conduct a criminal trial on paper or decide disputed points of foreign law. The need to deal with such requests expeditiously will itself, at least in the vast generality of cases, tell against the SSHD becoming involved in, still less needing to determine, disputed questions of foreign law. These requirements of policy dovetail well with practical resource considerations which themselves strongly suggest that it would be unwise to impose some wider duty on the SSHD as to questions of foreign law for which she is simply ill-equipped. The good sense of this approach is underlined by the graphic words of La Forest J in *United States of America v McVey* [1992] 3 SCR 475, at p.528 (an extradition case) remarking on the need otherwise to contemplate "the joys of translation and the entirely different structure of foreign systems of law" (cited in *Norris v Government of the United States of America* [2008] UKHL 16; [2008] 1 AC 920, at [89]). No encouragement should be given to parties in such

> proceedings to embroil the SSHD in disputes as to foreign law – a course which would risk the system of mutual assistance failing to fulfil its important purpose."

67. In paragraph 53 Gross LJ accepted that, at least generally, it would be wrong for the Secretary of State to act upon an obviously unlawful request, by which he meant when the issue was not disputed or was not capable properly of being disputed. The circumstances in *JP Morgan* were unusual in that the prosecutor's own expert evidence confirmed that the course he had followed was not lawful under Italian law.

68. *JP Morgan* does not support the claimant's argument that the Secretary of State was obliged in public law terms to continue to investigate the possibility of securing a mechanism in New York which would provide the comfort she required. On the contrary it supports Mr Chawla's argument that there is no obligation upon her to become embroiled in disputes about foreign law. That said, I do not accept that there is a dispute about foreign law in this case. The evidence of Ms Dubs, which I have summarised, establishes that the Secretary of State investigated with MI5 and the American prosecutors whether there was a legal mechanism available to enable MI5 material to be provided. That option was pursued over a protracted period and in due course involved direct input from the claimant's American and English lawyers. The Secretary of State has reached no conclusion on the content of American Law, save that the CIPA cannot be used, which is not disputed. That is because the MI5 material has not been requested by the prosecuting authorities. There was a faint suggestion in oral argument that the Secretary of State should somehow unilaterally send the material to the United States authorities with a view to forcing the issue but I regard that as unreal. The position here is that the Secretary of State has reached an evaluative judgment about whether the procedures available in America outside their statutory framework provide sufficient comfort for the purposes of the national security interests of the United Kingdom. Her decision was that they do not. Her reasons were pithily summarised by Judge Kaplan at the hearing on 22 October 2014 (see paragraph [51] above).

69. The question becomes whether the Secretary of State was entitled to conclude that it was not in the interests of national security to accede to the Letters Rogatory and thus disclose material held by MI5, into the American criminal trial process. That is to be judged by *Wednesbury* standards (subject to the secondary argument about procedural irregularity stemming from delay). Decisions made on national security grounds are not immune from judicial scrutiny. However, that scrutiny is sensitive to the constitutional position that decisions on whether something is or is not in the interests of national security are for the executive, and not the judiciary. It is sensitive to the reality that the Secretary of State acts upon expert advice from the intelligence agencies in making such judgements. For these reasons great weight is given to the views of the executive on such questions.

70. The answer to the question depends upon whether the Secretary of State was entitled to conclude that the protections available in the New York trial were insufficient to secure adequate control of the material. The open material confirms that MI5 holds material relating to the claimant of an unknown nature. I shall come to the issue of NCND shortly. We have seen that Ms Dubs identified a number of features of the type of closed or semi-closed two-stage process under consideration which caused concern to the Secretary of State and stated that the Secretary of State required the

CIPA procedure before any disclosure (even to cleared lawyers) would be made. Mr Friedman submits that something very close to the CIPA procedure could be replicated on the strength of undertakings given to, and orders made by, the court. I do not doubt that a parallel construct could be created that would have the appearance of providing some broadly similar protections, if not with the procedural detail and structural safeguards. But that falls far short of supporting a conclusion that the Secretary of State's insistence on the CIPA procedure to safeguard national security was unlawful.

71. There is an echo of the Secretary of State's concern in her personal Statement of Reasons in support of her application for a declaration under section 6 of the Justice and Security Act 2013. She considered whether the damage to national security of disclosure of secret material in these proceedings could be mitigated by a combination of *in camera* hearings with undertakings or court orders as to confidentiality. She concluded that the protection would not be adequate. She relied upon the shortcomings of such a system identified in *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin) by Ouseley J and in *CF v The Security Service and others* [2013] EWHC 3402 (QB) by Irwin J. Both are judges with very deep experience of closed material proceedings. I recognise that one of the shortcomings, namely that a lawyer-only confidentiality ring which excluded the party was seriously problematic, would not necessarily be in play. That is because the CIPA procedure does initially, and the parallel procedure could have been crafted to, exclude the claimant personally from a confidentiality ring. That is despite the claimant's lawyers not wishing that to happen, and quite apart from the attitude of the other defendants. Nonetheless, a statutory procedure in this jurisdiction is recognised to provide additional protections beyond those vouched safe by less formal arrangements.

72. It is reasonable to suppose that Congress and the President went to the trouble of enacting CIPA because they perceived the need to provide protection for sensitive material and procedural safeguards which otherwise were not available. The open evidence confirms that the UKCA has considered this question with both MI5 and the American prosecutors. It would not, I think, be irrational (or even surprising) were a foreign government asked to provide its intelligence material for use in proceedings in the United Kingdom to insist upon the best available protections, whatever they might be. That is what the Secretary of State has done with respect to CIPA. I am not impressed by the argument that any material MI5 has must relate to the mid or late 90s and so can no longer be in need of protection. Neither at a specific nor generic level does the age of secret material deliver a sure answer to whether its disclosure would cause harm. The Secretary of State was entitled to conclude that it was contrary to the interests of the national security of the United Kingdom to accede to Judge Kaplan's requests. The view she has taken is a lawful one.

73. I do not overlook that the claimant suggests that one of the factors which should lead to a contrary conclusion is that, on his case, at least some of the material consists of records relating to the meetings he has described. Mr Friedman argues that the fact of those meetings should at the least be confirmed and the content of their records provided to Judge Kaplan or gisted. That leads to the NCND issue. The starting point is that NCND is not being deployed as a blanket response to a request for confirmation whether MI5 holds material relating to the claimant. It is being

deployed at a subsidiary level to maintain confidentiality over the nature of material held. The reasons are set out in Ms Dubs' evidence. They were explained to Judge Kaplan and have been repeated in the Secretary of State's Statement of Reasons referred to in paragraph [70]. At the heart of the reasons, which recognise the flexibility in the policy, is an assessment that to depart from NCND in this case would be damaging to national security.

74. NCND is not a rule of law or legal principle but a practice which has been adopted to safeguard the secrecy of the workings of the intelligence agencies. It is also relied upon by others such as the police and HM Revenue and Customs in connection with some aspects of their work. There are numerous cases dealing with NCND which have arisen in a myriad of circumstances and often in connection with disclosure in criminal or civil proceedings. In this case the Secretary of State has concluded, for the reasons she has articulated so far as she is able in open evidence, that it would be damaging to the interests of national security to do more than provide confirmation that MI5 holds material relating to the claimant, even to the extent of confirming or denying whether he had direct contact with MI5 as he suggests and that some (at least) of the material relates to that contact.

75. The fact that an individual seeks confirmation of what he describes as self-reporting of a relationship does not without more undermine the application of NCND. The position is not as stark as confronted the High Court in Northern Ireland in *Re: Freddie Scappaticci's Application* [2003] NIQB 56. He wanted confirmation that he did *not* have a relationship with the security forces in Northern Ireland. Despite his personal denials it was being widely stated that he had been an agent for the British authorities and he feared a revenge attack. The issue for decision was whether the application of NCND gave rise to a breach of the applicant's rights under article 2 of the Convention. Carswell LCJ said:

> "To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger. … If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and carry no weight. Moreover, if agents become uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence … could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy." Paragraph [15]

76. In *R (AH) v Secretary of State for the Home Department* [2008] EWHC 1045 (Admin) Mitting J upheld NCND in a case where the claimant wished to rely upon the content of 12 alleged meetings with MI5. Similarly, in *Secretary of State for the Home Department v CE* [2011] EWHC 3158 (Admin) CE alleged that he been interviewed

by a member of the "Security Service" whilst he was held in custody in Kenya. It was a control order case which centred on CE's alleged activities in Somalia. CE wanted the notes of the alleged interview which he said would support his case. The Secretary of State applied the policy of NCND to whether there was an interview. Lloyd Jones J held:

> "In the present case the fact of the interview, if it took place, will of course be known to CE. However, that consideration alone will not justify a departure from the principle in the present case by requiring the Secretary of State to confirm or deny that it took place. In is necessary to have regard to wider considerations, in particular the likely implications in other cases."

77. Mr Friedman reminds us of the memorable dictum found in paragraph [20] of Maurice Kay LJ's judgment in *Mohamed v Secretary of State for the Home Department* [2014] EWCA Civ 559, [2014] 3 All ER 760 that "it is not simply a matter of a government party … hoisting the NCND flag and the court automatically saluting it." That is beyond doubt. The court's task is to consider whether the Secretary of State's insistence on NCND on national security grounds in the case in question is rational.

78. Mr Friedman's reliance on the claimant's alleged self-reporting of his relationship with MI5 does not carry him home, in my view. The position is similar to that encountered in both *AH* and *CE* where the argument did not prosper. The reasons for the NCND policy do not fall away in self-reporting cases. Neither does the extensive discussion in journalistic material of the claimant's alleged links with MI5 to which he drew our attention. He has pointed to other cases in which a relationship with the intelligence agencies has been confirmed to provide succour to the argument that there should be confirmation (or denial) in his case. A well-known instance relates to Abu Qatada (Mohamed Othman). In an appeal against a deportation order before the Special Immigration Appeals Commission (SC/15/2002) he relied upon the content of three interviews with MI5, which were confirmed and the records disclosed into the open proceedings. It is not clear from the report whether disclosure was resisted by the Secretary of State and ordered by SIAC, or volunteered by the Secretary of State.

79. Either way, that example provides an illustration of the flexibility of approach to NCND and that individual judgements are called for given the particular circumstances and legal context of the request for disclosure. There are instances, and Abu Qatada may have been one, where a departure from NCND was considered necessary in the context of the proceedings in hand or because it positively enhanced national security. One cannot know because the judgment does not deal with why disclosure was made.

80. I am far from persuaded that the Secretary of State's adherence to the policy in this case, which has the effect of refusing to identify the nature of the material relating to the claimant held by MI5, is inappropriate still less unlawful.

81. I have concluded that the refusal of the Secretary of State on national security grounds to accede to the Letters Rogatory was lawful as was the continuing reliance upon NCND. In consequence, I accept Mr Chawla's submission that it would be

inappropriate for us either to express any further view about the relevance of the material I have seen or to elaborate upon why the Secretary of State declined to assist.

82. Finally I turn to the question of delay. There are circumstances in which delay in taking a decision can result in illegality. Delay in taking a discretionary decision may become so unreasonable that a mandatory order might be appropriate to compel the public body to make a decision, or declaratory relief granted. There are circumstances in which delay might be considered to amount to an abdication of the decision maker's functions. There are numerous instances across the whole range of public law decision making in which unreasonable delay has been considered. A number of the cases are collected together in Fordham Judicial Review Handbook 6th edition at 57.3.5. Each proceeds from its own facts.

83. I have set out between paragraphs [38] and [51] a summary of the Secretary of State's handling of the Letters Rogatory as appears from the open evidence. It will be appreciated that the closed evidence provides further elaboration. I am satisfied that the UKCA and MI5 dealt with these requests conscientiously and with reasonable expedition, given in particular the timetable for the claimant's trial in New York, the novelty of the circumstances under consideration and the complex nature of the issues which arose. I see no justification for criticising those concerned for the pace of the decision making process. The picture painted by the evidence falls a long way short of establishing delay which could provide a foundation in public law for any relief.

MR JUSTICE WYN WILLIAMS

84. I agree.