

Blowing a hole through the 'Control Principle'

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The relationship of the Executive with the Courts in matters of national security has often been a somewhat uneasy one, particularly given its implications for civil liberties.

The case of Regina on the application of Binyam Mohamed –v- Secretary of State for Foreign and Commonwealth Affairs reported in The Times on 16th February 2010 illustrates both the reluctance but also the occasional willingness of the UK Courts to challenge public interest immunity certificates issued by the UK Foreign Secretary seeking to prevent the publication by the UK Courts of allegedly sensitive information.

In this case, information was supplied by the US Government to the UK Government about alleged torture treatment suf-

fered by Binyam Mohamed, a former UK resident, while in custody in Guantanamo Bay. The alleged information had been supplied by the US Government to the UK Government on a confidential basis in accordance with the so-called “control principle”, i.e. that such information, supplied by the intelligence services of one Government to the intelligence services of another Government, should never be disclosed, directly or indirectly, by the receiving country without the provider’s permission.

However, the UK Court of Appeal held that the so-called “control principle” was not a principle of law and could be overruled by the Courts in an appropriate case. Whilst the Courts would not normally

seek to interfere with the Executive’s role in safeguarding national security, the fact is that in the present case the relevant so-called information had already been published in a Judgment of the District Court for the District of Columbia on November 19th 2009. Bearing in mind, therefore, that the information was already in the public domain in the US, the UK Court of Appeal saw no reason to restrict its publication in the UK as part of a UK Court Judgment.

In a country such as the UK which has no comprehensive written constitution, the safeguarding of civil liberties by the Courts would seem to be a particularly vital task and the Court of Appeal has demonstrated in this Judgment that it is prepared to rise to the challenge. ■