In a democratic society governed by the rule of law, great issues of moral principle often take an abstruse legal form. The most important decision about the liberty of the subject during the Second World War, *Liversidge v Anderson*, was an action for further particulars of the defence case in an action for damages for false imprisonment. In *R (Binyam Mohamed) v The Secretary of State for Foreign and Commonwealth Affairs,* decided by the Administrative Court last week, the Claimant (a British resident) was not directly challenging any UK action in the normal legal sense, and nor was he resisting any criminal charges against him. He was not even in British custody, launching his case from Guantanamo Bay where, whatever the outcome of these proceedings, it was not thought he would long remain. The only issue before the court was whether to restore to an earlier judgment on his case paragraphs omitted at that time which contained 'a gist of reports made by the United States Government to the United Kingdom Government in relation to the detention and treatment of the claimant .. while in custody by or on behalf of the United States Government in the period 2002-2004.' This was a time when Binyam Mohamed had been held incommunicado in first Pakistan and then Morocco, and during which he had made a confession about his supposed involvement in various terrorist offences, including a dirty bomb plot.

It was at a time when US charges were still in the offing against him that this judicial review had been launched in Britain. (These had since been dismissed, with no fresh charges having been brought.) Binyam Mohamed claimed that he had been both tortured and subjected to cruel, inhuman and degrading treatment when in Pakistan and Morocco. It became apparent that the UK security services had been involved and that there were as many as 42 secret documents which if revealed may well have proved very helpful to Binyam Mohamed's then case before the US military authorities. The Foreign Secretary filed a public interest immunity certificate saying there would be a real risk of serious harm to UK national security if the documents were revealed. The court accepted this at the time, subject to argument.

The issue before the English Admin Court last week concerned whether now to set out in full twenty five lines from its earlier judgment which had been redacted at the request of the Foreign Secretary. These covered US reports on Binyam Mohamed's treatment during the critical period. The question related not to any fair trial that the suspect might or might not have but rather 'a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability'. And under the surface of that question a further and deeper one: if it were to become undeniably apparent that UK officials might have been complicit in torture or other forms of degrading treatment, how could domestic proceedings against

those involved (under various international conventions translated into UK law) be avoided, even where (as would be the case) the consent of the Attorney General would be required – how could such consent not be given?

Rejecting a set of powerful submissions from independent lawyers involved in such cases, the Administrative Court denied that the evidence should automatically be required to be made public. Instead a balancing test was required, one which would have come down firmly in favour of inclusion of the omitted lines had it not been for the Foreign Secretary's continued assertion of the need for secrecy. Assessment of compromises to national security was a matter on which he rather than the court was 'expert'. His sincere judgment was that the threat to UK national security interests from the potential American reaction to disclosure was real and serious. It was 'unrealistic' to expect the Foreign Secretary to 'resist the threat made'. Moreover the position did not appear to have changed with the coming to power of the Obama administration. There was accordingly 'no basis on which the judgment of the Foreign Secretary as to the danger to national security [could] properly be questioned'. This is being the case, the balancing of interests continued to come down against publication.

It was clear the judges had no liking for the conclusion to which they felt they were driven. They acknowledged that the 'suppression of reports of wrongdoing by officials ... would be inimical to the rule of law and the proper functioning of a democracy' and also that '(c)hampioning the rule of law, not subordinating it, [was] the cornerstone of a democracy.' Their lordships even went so far as to remind the Foreign Secretary of his own view – explicitly stated to them in court papers – that 'the protection of human rights [was] central to the efforts of the United Kingdom to counter radicalisation'. But in the end they forbore from making the order sought by Binyam Mohamed's legal team; in a direct challenge to the new government in Washington the court's judgment ends by asserting that if 'the information ... which we consider so important to the rule of law, free speech and democratic accountability is to be put into the public domain, it must now be for the United States Government to consider changing its position or itself putting that information into the public domain.'

The ruling in Binyam Mohamed's case is less novel than some of the journalistic coverage might seem to suggest. Old hands may recall the GCHQ case in 1984 when the banning of trade unions without consultation at the government's listening centre was upheld by the House of Lords on national security grounds, and it had been in the Sarah Tisdall/*Guardian* case decided shortly

before that. Even older readers may recall the prosecution of the Peace Movement's Committee of One Hundred members for conspiracy to breach section 1 of the Official Secrets Act 1911 in the early 1960s, a draconian prosecution which absolutely required that the government's version of national security be taken entirely at face value – which it duly was when the case reached the House of Lords in 1964. It is very hard for unelected judges to beat the government's national security card when it is played in this fashion, as a trump designed to end the game.

More novel and perhaps also even more disturbing is the drift towards private court proceedings which the case exemplifies, something which the judges themselves noted and which drew a concerned comment from no less an august personage than the editor of the law reports himself. As happened after a House of Lords judgment last Summer on anonymous witnesses, there is surely a need for some kind of principled approach to be taken to this whole issue, which has somewhat sneaked up on lawyers unnoticed. There are nowadays simply too many confidential edges to what used to be our entirely open system of justice. This is especially important when the stakes – allegations of connivance with torture – are as high as they were in this case. Much has been made of the Bush Administration's determination to put itself above the law, rather less of the UK's statutory achievement (via provisions in the Criminal Justice Act 1984 and the Intelligence Services Act 1994) of exactly this kind of immunity. Is it fear of the lawful authority that may have been formally extended to the security services that is causing ministers to be so determined to keep all this under wraps? In a system wedded to so much secrecy, such unthinkable thoughts can no longer be as easily discounted as would be the case if justice were open in practice as well as in theory.