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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
SIR JOHN THOMAS, PQBD and BURNETT J
REF: CO/7645/2011/CO951/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2013

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division
and
LORD JUSTICE RICHARDS

- -

Between :

THE QUEEN (oao) OMAR & ORS	**Appellants**
- and -	
THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS	**Respondent**

- -

Ms Phillippa Kaufmann QC and **Mr Tom Hickman** (instructed by **Bhatt Murphy** for **Njoroge** and **Mbuthia** and **Public Interest Lawyers** for **Mr Omar)**) for the **Appellant**
Mr James Eadie QC and Mr Jonathan Hall (instructed by **Treasury Solicitors**) for the **Respondent**
Mr Angus McCullough QC and **Mr Ben Watson** : **Special Advocates**

Hearing dates : 10, 11, 12 December 2012

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Approved Judgment

The Lord Chief Justice of England and Wales:

1. In *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2011] QB 218 the objective of the litigation was similar to that which arises in the present appeal from the decision of the Divisional Court. Binyam Mohamed was seeking information and documents believed to be in the possession of the United Kingdom Security Services which he believed would assist him to establish that his admissions to terrorist charges then being adjudicated before a United States Military Commission had been obtained by torture or by cruel, inhuman or degrading treatment. This claim was founded on the principles explained in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133 and succeeded before the Divisional Court. Thereafter this court, differently constituted, but in a constitution of which I was a member, considered an appeal by the Secretary of State on a deceptively simple question, which was whether seven sub-paragraphs of the open judgment of the Divisional Court should be redacted or published. Notwithstanding the issue of more than one public interest immunity certificate by the Foreign Secretary that publication would cause a real risk of serious harm to national security, for the reasons which appear in the judgments, we concluded that the seven short sub-paragraphs of the judgment of the Divisional Court should be published.

2. Perhaps because when Mr Binyam Mohamed was removed from Afghanistan to Guantanamo Bay he had already established connections with this country as a resident with, from 2000, exceptional leave to remain, or perhaps because it was alleged that the wrongdoing to which he had been subjected had been facilitated by the United Kingdom Security Services, the question whether there was a statutory prohibition against the grant of *Norwich Pharmacal* relief when he was outside the jurisdiction, and the proceedings in which he was involved were taking place abroad, was not raised as an issue for consideration either before the Divisional Court or in this Court on appeal. None of us was invited to consider, and we did not consider the statutory arrangements in the Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Crime (International Co-operation) Act 2003. In short, therefore, the decision in the *Binyam Mohamed* litigation does not and cannot open a path to the grant of *Norwich Pharmacal* relief to the present appellants if the effect of the statutory provisions is to close it. Similarly, notwithstanding the need for continuing flexibility in the development of *Norwich Pharmacal* principles, if in relation to the jurisdiction question, its development to cases where relief is sought by a defendant in criminal proceedings abroad is prohibited by statute, the prohibition cannot be circumvented.

3. The jurisdiction issue has been examined in the judgment of Maurice Kay LJ. I find it entirely persuasive on this and the remaining questions which arise for consideration. I therefore agree with him and have nothing further to add.

Lord Justice Maurice Kay:

4. *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 gave life to a remedy, derived from nineteenth century authorities, enabling a litigant to obtain from a non-party information required for use in his primary litigation. Initially, the remedy was sought in cases where the primary litigation was entirely domestic and between private parties. However, its subsequent development has seen its extension to cases where the primary litigation is taking place in a foreign jurisdiction and/or where it is of a public law nature. In the present case, the primary

litigation is essentially criminal, albeit with constitutional issues, and is taking place in Uganda.

5. For immediate purposes, I can set the scene with brevity. On 11 July 2010, there was a terrorist atrocity in Kampala in which many lives were lost. The appellants stand charged in Ugandan criminal proceedings with murder and other offences in connection with the bombings. They have petitioned the Ugandan Constitutional Court claiming that the prosecution is an abuse of process and unconstitutional. Their case is that, after the bombings, they were the subject of unlawful rendition from Kenya to Uganda and that they have been subjected to torture and other cruel and inhumane treatment. Their allegations are denied by the relevant authorities in Uganda. In these proceedings in our jurisdiction, they seek *Norwich Pharmacal* relief, claiming that the Secretary of State for Foreign and Commonwealth Affairs has material in the form of information or evidence which, if provided to the appellants, would assist or enable them to establish their case in the Constitutional Court. In some respects, their case here resembles the one advanced with success in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 WLR 2579 (DC), [2011] QB 218 (CA), to which I shall refer as *Binyam Mohamed*.

6. The application in the present case was heard by the Divisional Court (President of the Queen's Bench Division and Burnett J) over five days in April and May 2012. The judgment of the Court was handed down on 26 June 2012 : [2012] EWHC 1737 (Admin). It contains a fuller exposition of the facts. There was also a closed judgment, as there is now in this Court.

7. The Divisional Court refused the application. First and foremost, it did so on the ground that it lacked jurisdiction to grant relief. This was a new point, not foreshadowed in *Binyam Mohamed* or, indeed, in the initial submissions on behalf of the Secretary of State to the Divisional Court in the present case. Notwithstanding that the Court said that it lacked jurisdiction, it proceeded to consider the merits. It was satisfied that the appellants had made out a sufficient case of alleged wrongdoing in respect of removal from Kenya to Uganda without judicial process. Indeed, that was not disputed. However, it held that it would have refused relief in any event because (1) the appellants had chosen not to seek comparable relief which was potentially available in the Ugandan proceedings; (2) they could not satisfy the test of necessity; and (3) relief should be refused as an exercise of discretion. There was also an issue as to whether the Secretary of State, through his officials or agents, was "mixed up" in the alleged wrongdoing for *Norwich Pharmacal* purposes. The legal principles relevant to that were dealt with in the open judgment but conclusions of fact were set out in the closed judgment.

8. Numerous aspects of the open judgment are criticised in the appellants' grounds of appeal. For reasons which will become apparent, it is not necessary for us to deal with all of them.

Jurisdiction

9. In the *Binyam Mohamed* litigation, the claimant succeeded in obtaining *Norwich Pharmacal* relief in the form of an order that the Secretary of State disclose material which might support his defence in American proceedings to the effect that a confession had been obtained by torture and cruel, inhuman and degrading treatment

to which he claimed to have been subjected by the United States authorities and others on their behalf and which the United Kingdom security services were said to have facilitated. The wrongdoing had occurred in Afghanistan and Guantanamo Bay. It did not occur to anyone as the Lord Chief Justice has explained, in the course of protracted proceedings in the Divisional Court and in this Court that there might be a jurisdictional problem. Indeed, it was not until the proceedings in the Divisional Court in the present case were at an advanced stage that the Court raised the issue, thereby necessitating an adjournment for further submissions some weeks later. In its judgment, the Divisional Court concluded that it lacked jurisdiction.

10. The issue can be encapsulated in short form. There is domestic legislation which deals with circumstances and procedures wherein and whereby the courts of this country will assist in obtaining evidence required for use in proceedings in other jurisdictions. It is currently found in the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the 1975 Act) and the Crime (International Cooperation) Act 2003 (the 2003 Act). The question is whether *Norwich Pharmacal* relief is excluded where a statutory regime covers the ground. Put another way, do the terms of the statutory regime preclude the judicial development of an overlapping or adjacent remedy? In order to answer this question, it is first necessary to determine whether the relevant foreign proceedings are criminal or civil. In the present case it is common ground that both the prosecution of the appellants in Uganda and the petition to the Constitutional Court to which it has given rise are "criminal proceedings" within the meaning of the 2003 Act. The common ground also extends to acceptance of the proposition that whether or not a statutory regime is comprehensive so that it precludes the application of a common law alternative remedy is ultimately a question of statutory interpretation.

11. The judgment of the Divisional Court includes an historical survey of the development of the law from its judicial origins in the nineteenth century, particularly in the Court of Chancery, through the early statutory innovations (the Foreign Tribunals Evidence Act 1856, the Evidence by Commission Act 1859, the Extradition Acts 1870 and 1873) up to the repeal of almost all of that legislation by the 1975 Act: Divisional Court, paragraphs 57-62. Its conclusions appear in the following passages:

> "63. Outside those statutes the courts had and have no jurisdiction to use their processes for the purpose of providing evidence for proceedings in foreign states …
>
> 64. … the power of the courts to use *Norwich Pharmacal* proceedings must, in our view, be developed within the confines of the existence of the statutory regime through which evidence in proceedings overseas must be obtained. *Norwich Pharmacal* proceedings are not ousted, but where proceedings, such as the present proceedings, are brought to obtain evidence, the court as a matter of principle ought to decline to make orders for the provision of evidence, as distinct from information, for use in overseas proceedings. It cannot permit the statutory regime, with [its] safeguards … to be circumvented …

….

> 66. The statutory regime is the only means by which evidence for use in foreign proceedings may be obtained and, save in *Binyam Mohamed No.1* and *Shaker Aamer*, where the point was not taken, *Norwich Pharmacal* proceedings have never been used to obtain evidence for use in proceedings. The jurisdiction of the court is confined to the statutory regime."

Shaker Aamer [2009] EWHC 3316 (Admin) was a case substantially similar to *Binyam Mohamed*.

12. It is apparent from paragraph 63 of its judgment in the present case that the Divisional Court attached some importance to the fact that what the appellants are seeking here was expressly referred to as "evidence" rather than "information". I do not consider that anything turns on that taxonomy. I consider that the distinction is elusive or illusory or, to adopt the word of Mr James Eadie QC, "ephemeral". Today's information often ripens into tomorrow's evidence.

13. At this stage it is convenient to refer to chronology. *Norwich Pharmacal* was decided in June 1973. The disclosure of information which it facilitated was required for use in domestic civil proceedings. Extension of the remedy to foreign civil proceedings was established in December 1983: *Smith Kline & French Laboratories Ltd v Global Pharmaceuticals Ltd* [1986] RPC 394, in which no reference was made to the 1975 Act. These developments in the civil sphere therefore preceded the 2003 Act, the reach of which is exclusively criminal. At this point, it is necessary to refer to the provisions of the 2003 Act.

The 2003 Act

14. Chapter 2 of the 2003 Act is headed *Mutual Provision of Evidence*. Sections 7 to 12 are concerned with requests <u>from</u> the United Kingdom to a foreign state for assistance in obtaining evidence abroad for use in an investigation or proceedings in this country. A request may only be made by a domestic judicial authority. However, an application to the judicial authority for such a request to be made may come from the prosecuting authority or, once proceedings have been instituted, from the person charged: section 7(1) and (3).

15. Sections 13 to 19 are concerned with requests from overseas authorities for the obtaining of evidence in the United Kingdom. Three important features are present. <u>First</u>, a request has to be directed to "the territorial authority", who is the Secretary of State or, in Scotland, the Lord Advocate: section 28(9). He then has a discretion as to whether to arrange for the evidence to be obtained: section 13(1)(a) – "<u>may</u> arrange". When he so arranges he may nominate a court to receive the evidence: section 15. <u>Secondly</u>, the request for assistance can only be made by "a court exercising criminal jurisdiction, or a prosecuting authority, in a country outside the United Kingdom" or by a similar authority: section 13(2). It cannot be made directly by or on behalf of a defendant in the foreign criminal proceedings. He would need to persuade the foreign court or prosecuting authority to make a request in his interests. <u>Thirdly</u>, proceedings

in the nominated court are governed by Schedule 1, paragraph 5 of which includes the following provisions:

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

16. Arrangements between Commonwealth countries dealing with diplomatic and administrative arrangements in this context are governed by the Harare Scheme, paragraph 8(2)(a) of which permits a requested state to refuse a request "to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country …"

The core submissions

17. The submissions on this threshold issue are wide-ranging and, on both sides, formidable. Their essentials come down to this. Ms Phillippa Kaufmann QC submits that, properly construed, the 2003 Act is not comprehensive or exhaustive. It leaves "a justice gap", particularly in relation to the protection of a defendant in foreign criminal proceedings. *Norwich Pharmacal* is able to fill that gap. It provides a flexible remedy which can be adapted to meet the interests of justice, as it was in *Binyam Mohamed*, where (albeit without reference to the present jurisdictional point) the Divisional Court said (at paragraph 134):

> "… where in this truly exceptional case information is said to be necessary to exculpate an individual facing a possible death penalty if convicted, we consider that a court is entitled to exercise the jurisdiction to order certain specific information be made available to serve the ends of justice, without the narrow circumspection that some observations suggest. A system of law under which it was permissible to order the provision of information to trace a person's property, but under which it was not permissible to order the provision of information to assist in the protection of a person's life and liberty, would be difficult to justify."

18. Ms Kaufmann further submits that (1) the *Norwich Pharmacal* jurisprudence itself contains sufficient checks and balances to ensure that important national interests are properly considered, for example by the necessity test, the requirement that the potential discloser was "mixed up" in the wrongdoing and, ultimately, in the discretionary nature of the remedy (to some of which matters we shall return later in this judgment); and (2) if we shut out the appellant, at this jurisdictional stage, we would be putting at risk of stultification other well-established examples of judicial

willingness to assist litigants in foreign proceedings, including circumstances such as those in *Smith Kline & French* (above), domestic search orders in support of foreign civil litigation (*Sony Corporation v Anand* [1981] FCSR 388) and the remedy illustrated by *Bankers Trust Co v Shepira* [1980] 1 WLR 1274 and *Omar v Omar* [1995] 1 WLR 1428.

19. Mr Eadie's central submissions are crystallised in this extract from his skeleton argument:

> "Parliament has seen fit to set up a detailed regime in the field and has considered and enacted certain requirements and exceptions. The statutory regime cannot then legitimately be used to assert consequent injustice and to invite the Court, through the common law, to disapply that regime."

The "requirements and exceptions" to which he refers include the exclusion of the defendant in the foreign criminal proceedings from the list of eligible applicants and the exceptions in relation to national security and Crown servants, together with the discretionary nature of the Secretary of State's role. In his oral submissions, Mr Eadie describes these as important constraints, not incidental matters. They represent "sovereignty limits on the extent of assistance".

20. In truth, the rival submissions can be reduced to a question formulated with the use of the most striking forensic flourishes from two powerful leading counsel: Are we to "fill a justice gap" or "respect a sovereignty limit"?

21. The developmental potential of the *Norwich Pharmacal* remedy (and its limitation by the criterion of necessity) were described by Lord Woolf CJ in *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, [2002] UKHL 29, (at paragraph 57):

> "The *Norwich Pharmacal* jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised. New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy."

On the other hand, and axiomatically, it cannot penetrate an area fenced off by statute.

22. It is pertinent to relate the way in which the issue of statutory exclusivity has been viewed in relation to the 1975 Act in the context of civil litigation. In *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, Lord Diplock began his speech with these words (at pages 632G – 633A):

> "My Lords, the jurisdiction and powers of the High Court to make the orders that are the subject of this appeal are to be found in sections 1 and 2 of the Evidence (Proceedings in other Jurisdictions) Act 1975 <u>and nowhere else</u> … The jurisdiction of English courts to order persons within its jurisdiction to

> provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory."

23. That was said on 1 December 1977, two years after the enactment of the 1975 Act and four years after *Norwich Pharmacal*. Although Ms Kaufmann seeks to diminish its authority by reference to a passage in which it was considered by Lord Goff in *Re State of Norway's Application* [1990] 1 AC 723, 796C-F, that, it seems to me, was at most a disagreement about interpretative technique rather than substance. Distinguished leading counsel and this Court in *Re Pan American World Airways Inc* [1992] 1 QB 894 took Lord Diplock's propositions to be authoritative: at page 859A. Moreover, in the recent case of *Schlaimoun v Mining Technologies International Inc* [2012] 1 WLR 1276, upon which Ms Kaufmann seeks to place reliance, Coulson J did not fly in the face of Lord Diplock's proposition. He considered (at paragraph 24) that it was "dealing principally with proceedings in foreign jurisdictions which are up and running by the time of any possible crossover with the powers of the UK courts". The present proceedings in Uganda are plainly "up and running" and so, to the extent to which Coulson J may have identified a limitation upon the width of Lord Diplock's proposition, his judgment does not dilute the relevance of *Rio Tinto* in the present case.

24. Ultimately, we are concerned not with the 1975 Act (which is structurally different from the 2003 Act but which also contains national security and Crown servant exceptions: sections 3(3) and 9(4)), but with the 2003 Act. The approach to interpretation when considering the relationship between a statutory remedy and a common law remedy has recently received attention in the Supreme Court in *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15, which does not appear to have been cited in the Divisional Court in the present case. The *Child Poverty Action Group* case was concerned with whether the Secretary of State could avail himself of a restitutionary remedy at common law to recover overpaid benefits or whether a purpose-built statutory remedy was exclusive. Lord Dyson's judgment contains statements of principle in a number of passages. The following will suffice for present purposes:

> "33. If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication. To do otherwise would circumvent the intention of Parliament …
>
> 34 The question is not whether there are any differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme … The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and could therefore not have been intended [to] co-exist with it."

Of course, in the present case there had been no instance of the *Norwich Pharmacal* remedy being used before the enactment of the 2003 Act to obtain information or evidence from a court in this jurisdiction for use in foreign criminal proceedings.

25. When one considers the *Norwich Pharmacal* remedy alongside the regime set out in the 2003 Act, certain points stand out as differences. I refer again to the three features of the 2003 Act described in paragraph 7, above: 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. In my judgment, these are substantial differences such that, to use the words of Lord Dyson in *Child Poverty Action Group*, Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme in this area. 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. This leads me to the conclusion that Parliament did not and would not create a parallel procedure. It created an exclusive one in the area which it addressed. 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. I am in no doubt that, where the scheme of the 2003 Act is in play, *Norwich Pharmacal* does not run.

26. Our attention has been drawn to the Justice and Security Bill which is presently before Parliament. It is predicated on the hypothesis that *Binyam Mohamed* has exposed a governmental vulnerability to *Norwich Pharmacal* which calls for statutory correction. In my judgment, it casts no light on the jurisdictional issue in this case. On the legal analysis I have just expounded, *Binyam Mohamed* was a manifestation of *communis error*. The Bill assumes that there is a problem which requires resolution. If the problem does not exist, the Parliamentary assumption that it does is equally erroneous.

27. It follows from what I have said that, in my judgment, the Divisional Court was correct to conclude that it had no jurisdiction to entertain a *Norwich Pharmacal* application in the present case. Moreover, the appellants are not eligible applicants under the 2003 Act. On this threshold point, their appeals must fail. Having come to the same conclusion, the Divisional Court nevertheless went on to consider, in the alternative, the merits of the *Norwich Pharmacal* application on the hypothesis that it was not jurisdictionally barred. I suspect that if the jurisdictional point had been taken by the Secretary of State at the outset, it would have been considered as a preliminary issue and, upon its being resolved in his favour, the Divisional Court would have declined to address the merits of the *Norwich Pharmacal* application. However, the point having only arisen at the instigation of the Court at a point when the *Norwich Pharmacal* submissions were at an advanced stage, it is not surprising that the Court went on to adjudicate upon them. The question now arises as to whether we should involve ourselves in the *Norwich Pharmacal* application, having decided the jurisdictional point against the appellants. In view of the fact that the

judgment of the Divisional Court has been the subject of detailed submissions before us, it is appropriate that we should express a view on at least some of the main points so as to demonstrate that, even absent our decision on the jurisdictional point, this appeal would have failed.

28. The Divisional Court decided that if, contrary to its primary conclusion, it had had jurisdiction to consider the *Norwich Pharmacal* application, it would have refused the application for a number of reasons. One of these was a failure to satisfy the test of necessity. In fact, the Divisional Court dealt separately with necessity and with the question whether the court "should grant relief when the claimants have decided not to seek relief in Uganda". It seems to me that the two questions are closely related in the present case.

29. In *Ashwood Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, Lord Woolf CJ said (at paragraph 57):

> "The *Norwich Pharmacal* jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised. New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy. That new circumstances for its use will continue to arise is illustrated by the decision of Sir Richard Scott V-C in *P v T Ltd* [1997] 1 WLR 1309 (where relief was granted because it was necessary in the interests of justice albeit that the claimant was not able to identify without discovery what would be the appropriate course of action)."

30. Whilst necessity is sometimes referred to as if it were simply a matter for consideration in the exercise of discretion, in truth it is more than that. It is a test which must be satisfied if *Norwich Pharmacal* relief is to follow. The first sentence in paragraph 57 of Lord Woolf's speech makes that plain. Nevertheless, I agree with the statement of the Divisional Court in the present case (at paragraph 83) that

> "the requirement of necessity is a requirement that must be dictated flexibly in the circumstances of each case."

Moreover, in this context there is no practical or substantial difference between a requirement of "necessity in the interests of justice" and a test of what is "just and convenient in the interests of justice": *President of the State of Equatorial Guinea v Royal Bank of Scotland International*, Privy Council Appeal No 59 of 2005, 27 February 2006, per Lords Bingham and Hoffmann, at paragraph 16. The latter is no less exacting than the former.

31. In *Binyam Mohamed*, the Divisional Court found the test of necessity to have been satisfied in what it described as "this truly exceptional case": [2009] 1 WLR 2579, at paragraph 134. In the present case, the Divisional Court came to the opposite

conclusion. Two passages explain its conclusion. Under the heading of necessity, it stated:

> "84. The issue of necessity on the facts of the present case centred on the issue of whether disclosure could be obtained in Uganda, whether there were good reasons why that had not been done and the availability of the statutory scheme.
>
> 85. On the assumption, contrary to the views we have expressed, the claimant is entitled to pursue *Norwich Pharmacal* proceedings to obtain evidence, the exemptions in the statutory scheme do not operate as a bar and the failure to apply to the Ugandan Court is not a bar by reason of comity and harmony between jurisdictions, then it is our view the application does not meet the requirement of necessity and must fail for that further reason.
>
> 86. In our view, the test of necessity cannot be met until the claimants have applied for disclosure in Uganda in relation to their arrest. We cannot assume at this time that the courts of a friendly foreign state will fail properly to consider an application for disclosure. Tactical reasons, however, well intentioned, cannot in the circumstances of a case such as this override the need to apply in Uganda first."

The comity point was further elaborated in an earlier passage:

> "78. It is not in the interests of comity for this court to entertain this application when a tactical decision had been made not to make an application for disclosure against the Ugandan Government in the Constitutional Court. That court is seized of the dispute. It would no doubt expect the executive branch of the Ugandan state to supply it with documentation if it was so ordered … The principles of comity require this court in these circumstances not to act without a request from the Constitution Court."

32. The references to "a tactical decision" adopt words used by Ms Kaufmann in the Divisional Court. I do not think that the Divisional Court was seeking to devalue the decision by adopting the epithet "tactical". It is plain that the decision had been a deliberate and, in my view, a rational one. It was no doubt considered to be on balance advantageous to the appellants. However, that does not in itself provide them with a free trip round the requirement of necessity. It was not the only rational decision that could have been made on their behalf.

33. At this point, it is appropriate to refer to the evidence of Mr Peter Walubiri, lead counsel for the appellants in the proceedings in the Ugandan Constitutional Court. Having described the establishment of the Constitutional Court in 1995, he states:

> "Since its inception, the Constitutional Court has matured significantly as a court. This has been reflected in its jurisprudence. At the beginning many cases were dismissed on technicalities but the Court has become increasingly liberal especially where fundamental rights are at stake. It will always seek to give practical effect to constitutional provisions and not allow them to be circumvented by procedural or technical arguments. It also increasingly considers foreign jurisprudence …
>
> As appears from the Constitutional Court Rules, the overriding concern is for justice to be achieved … This is a particularly important factor in a case concerning human rights and a capital change where the Court is especially concerned to ensure that the state has not committed any abuse of power or contravention of the Constitution or the rule of law."

Accordingly, this is not a case in which the fairness of a foreign court is called into question. Indeed, we are told that authorities such as *R v Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 AC 42 and *R v Mullen* [2000] QB 520 have been applied in Uganda.

34. The reason why Mr Walubiri decided against making an application to the Constitutional Court for disclosure of documents relating to the arrests of the appellants is that "there is a grave risk that the Respondent will produce documents that have been fabricated" or will produce no documents, in either case so as to bolster a false case. However, even if that risk were to materialise, it would be wrong for this court to assume that the forensic skills of the appellants' legal representatives and the astuteness of the Constitutional Court would fail to expose it. This flows from the concept of soundly based comity.

35. It seems to me that, in dealing with the issue of necessity, the approach of the Divisional Court was based upon a correct understanding of the law. I am entirely satisfied that it reached a justifiable, indeed I would say the correct, conclusion when applying that law.

***Norwich Pharmacal*: "mixed up"**

36. I propose to address this issue because the parties' submissions disclose a disagreement about an aspect of the legal test. It goes to the requisite degree of involvement on the part of a respondent to a *Norwich Pharmacal* application in the alleged wrongdoing. In *Norwich Pharmacal*, Lord Reid said (at page 175B):

> "[The authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes

> under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers … justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration."

37. Ms Kaufmann submits that, to the extent that Lord Reid required proof of facilitation of the alleged wrongdoing, his speech exceeded the *ratio* of the House of Lords. Lord Morris referred (at page 178H) only to a need for the person in possession of the information "to have become actually involved (or actively concerned)" in the wrongdoing. Viscount Dilhorne spoke (at page 188C) of "involvement". Lord Cross (at page 197D) used the language of "unwitting facilitation". Lord Kilbrandon referred (at page 203F) to the Commissioners as "not mere bystanders". Thus, submits Ms Kaufmann, the true test, on a preponderance, requires no more than "involvement". She refers to *Ashworth Hospital Authority*, in which Lord Woolf said (at paragraph 26):

> "The *Norwich Pharmacal* case clearly establishes that where a person, albeit innocently, and without incurring any personal liability, becomes involved in a wrongful act of another, that person thereby comes under a duty to assist the person injured by those acts …."

Lord Woolf's speech attracted the concurrence of Lords Browne-Wilkinson, Nolan and Hobhouse. Lord Slynn also agreed with it, adding (at paragraph 1):

> "It is sufficient but, it is important to stress, also necessary that the person should be shown to have 'participated' or been 'involved' in the wrongdoing ...."

38. It seems to me that there will be cases where there is a real difference between, on the one hand, involvement or participation and, on the other hand, facilitation. A person present and involved may be attempting to discourage or prevent the wrongful act rather than facilitating it. He may nevertheless become aware or come into possession of the very material which the applicant seeks. I do not think that the *Norwich Pharmacal* remedy was intended to be put beyond his reach in such circumstances. Support for this view can be seen in another passage in the speech of Lord Woolf in *Ashworth* when he said (at paragraph 35):

> "Although this requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant requirement. It distinguishes that party from a mere onlooker or witness. The need for involvement (the reference to participation can be dispensed with because it adds nothing to the requirement of involvement) is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion."

I detect no insistence or facilitation in this passage which, it seems to me, is part of the ratio in *Ashworth*.

39. However, that is not the last word on the subject. Mr Eadie draws our attention to the recent decision of the Supreme Court in *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55 in which Lord Kerr (with the concurrence of Lord Phillips, Lady Hale, Lord Clarke and Lord Reed) founded (at paragraph 14) his exposition of the law on the speech of Lord Reid in *Norwich Pharmacal*, including the "facilitation" passage. However, the issues in that case required no analysis of the difference between "involvement" and "facilitation" and it seems to me that Lord Kerr's judgment did not, and was not intended to, undermine the approach in *Ashworth*. Moreover, Lord Kerr went on (at paragraphs 15-17) to emphasise "the need for flexibility and discretion in considering whether the remedy should be granted" and that "the essential purpose of the remedy is to do justice". His language was inconsistent with an intention to impose a more demanding test.

40. In the present case, the Divisional Court rejected Ms Kaufmann's submission on this point, concluding (at paragraph 97) that an applicant must establish facilitation. In our judgment it was wrong so to conclude. In this open judgment, it is not appropriate to state whether the application of the less demanding test would have made a material difference because the Divisional Court's factual conclusion on the "mixed up" issue is contained in its closed judgment. We shall address it in ours.

Other matters

41. Although we heard submissions on other matters, including the ultimate exercise of discretion by the Divisional Court, we do not consider it necessary or appropriate to address them in this judgment. They do not arise in view of our decision on the issue of jurisdiction and they are largely case-specific.

The cross-appeal

42. The Secretary of State seeks to raise a short point by way of cross-appeal. It does not go to the jurisdictional or substantive issues. It is a discrete point which may arise in other cases. For this reason, it remains appropriate for us to deal with it. It arises out of Orders made in the Divisional Court in advance of the substantive hearing.

43. From the outset, the parties appreciated that there would be relevant material which the Secretary of State would not be willing to disclose. On 28 February 2012, the Divisional Court made an Order which recited that the parties consented "to the appointment of a Special Advocate to represent the Claimant in any Closed Material Procedure". It directed that "a Leading and junior Special Advocate, to be appointed by the Attorney General, may act to represent the Claimant's interests in these proceedings".

44. By a further Order dated 2 March 2012, the Court gave detailed directions governing the anticipated closed material procedure. The Order closely mirrors the provisions which apply in statutory closed material procedures such as the regime in the Special Immigration Appeals Commission (SIAC). It is preceded by the words "Upon the parties agreeing terms". The substantive hearings in the Divisional Court and in this Court were conducted pursuant to those directions.

45. Following judgment in the Divisional Court, by a further Order dated 8 August 2012, the Secretary of State was ordered to file and serve a public interest immunity (PII) certificate in relation to the withholding from publication of a summary of closed annexes to the Court's judgment. The Court rejected a submission on behalf of the Secretary of State to the effect that the Order of 2 March already provided for closed judgments to be withheld without the need for a PII process. The relevant provision in the Annex to the Order of 2 March stated:

> "If the Court's open judgment does not include the full reasons for its decisions, the Court shall serve on the [Secretary of State] and the Special Advocate a separate closed judgment including those reasons."

46. A further provision enabled the Special Advocate to apply for material in the closed judgment to be moved into the open judgment.

47. In the event, the Secretary of State later produced a PII certificate and on 1 November 2012 it was upheld by the Divisional Court.

48. The case for the Secretary of State is succinctly expounded in the ground of appeal:

> "The Divisional Court was wrong in law to require the Secretary of State to provide a PII certificate in relation to the closed summary because the Closed Material Procedure Order amounted to a complete code for dealing with the closed proceedings, including closed judgments. The … Order expressly provided for closed judgments … It provided for any public interest balance to be struck, if it were submitted that the closed judgment did not contain damaging material, with reference to the Court. The … Order did not require a PII certificate to be provided as a precondition for the Court considering whether to withhold its judgment. The Court was therefore wrong to require a PII certificate."

49. It seems that, before the Closed Material Procedure Order was made, the claimants had been contending for the need for PII certificates in relation to all the closed material. In the event, the point did not receive adjudication at that stage. The Court was anxious to avoid delay and, as I have related, the matter was resolved pragmatically on the basis of the Order of 28 February and 2 March. PII next reared its head in relation to publication of a summary of the closed annexes to the judgment of 26 June. The reasons for requiring a PII certificate at that point are set out only in a closed judgment. However, it can be safely assumed that the Divisional Court took the view that public interest considerations necessitated the added safeguard of a certificate at that point. It is not possible for me to be more explicit in this open judgment.

50. Can it be said that the insistence upon a PII certificate was wrong? In my judgment, it cannot. *Norwich Pharmacal* applications are not the subject of a statutory regime in the way that proceedings in SIAC are. The starting point is that such issues will be dealt with pursuant to CPR 31.19. Indeed, in *Binyam Mohamed*, at least some of the sensitive material was addressed in that way: [2008] EWHC 2048 (Admin), at

paragraph 52. In the present case, partly (it seems) for purposes of expediency, the substantive hearing and its preparatory stages were managed exclusively pursuant to the Closed Material Procedure Order. In this Court no one is taking exception to that. It seems to me that, neither as a matter of principle nor on a construction of the Closed Material Procedure Order was the Divisional Court constrained to deal with all subsequent issues exclusively pursuant to that Order. If the Court rationally considered that, at the stage of judgment, the interests of open justice demanded a more exacting regime, there was no reason why it should not impose the additional requirement of a PII certificate. Having read its closed judgment, I cannot say that it fell into any legal error in this regard. Accordingly, I would dismiss the cross-appeal. However, this is not to say that, in any similar case in the future, reversion to PII will always be necessary or justifiable.

51. There is a closed judgment of this Court covering points raised by the Special Advocates in respect of the closed annexes and the closed judgment of the Divisional Court. For reasons given in our closed judgment, none of those points affects the reasoning or conclusion of the Divisional Court or my own reasoning or conclusion in this open judgment. I am satisfied that the contents of our closed judgment should remain closed without the need for a further PII certificate.

Conclusion

52. It follows from what I have said that I would dismiss the appeal on the ground that, as the Divisional Court held, it lacked jurisdiction to hear and determine the *Norwich Pharmacal* application. I would also dismiss the cross-appeal.

Lord Justice Richards:

53. For the reasons given by Maurice Kay LJ, I too would dismiss the appeal and the cross-appeal.