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SECRETARY OF STATE

Our ref: D/S of S/JH MC05268/2008

13 January 2009

Jean Andrew,

You engaged with my predecessor over a number of months with regard to the issue of extraordinary rendition. The Ministry of Defence took the issue of detention and extraordinary rendition extremely seriously under the stewardship of Des Browne and I will ensure that this approach continues. Your letter of 21 October 2008 raises three distinct points; I will address each in turn.

It is vital to ongoing operational capability that UK Special Forces operate in a discrete manner. This does not mean that UKSF operate without scrutiny of their activities or without regard for both UK domestic and international law. The policy position that the Ministry of Defence does not ordinarily comment on UKSF issues and the fact that we often refuse to confirm nor deny UKSF involvement are two of the key elements used to protect UKSF from public discussion of their activities, capabilities and membership.

The Freedom of Information Act clearly acknowledges the need to protect information supplied by, or relating to, bodies dealing with security matters. This specifically includes UKSF. The FOIA clearly states in Section 23 that:

23(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are—

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(d) the special forces,

(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

Section 23 is an absolute exemption. This means that there is no requirement in the Act to assess the prejudice that could be caused by disclosure, nor any requirement to consider the public interest in disclosure. I believe this shows clear direction on the merits of public discussion of UKSF related information.

Whilst we do not ordinarily comment on UKSF matters and the Ministry of Defence strives to ensure that UKSF issues maintain the appropriate level of discretion, I would like to reassure you that the level of MOD scrutiny of UKSF plans and operations is suitably robust. The rules and policies governing all military personnel are staffed through the appropriate directorates of the Ministry of Defence and receive the appropriate legal advice before being signed off. I will not accept any accusations that the Ministry of Defence does not provide suitable oversight and guidance of all military operations, exercises and training.

The Ministry of Defence takes all allegations of wrongdoing seriously and investigates appropriately. In particular, accusations of serious wrongdoing and breaches of the law are always investigated thoroughly. Where there is evidence to suggest that there is a case to answer, a referral for an investigation by the appropriate investigative authority will be made.

My predecessor took the decision, which I fully endorse, to decline to comment on UKSF. This is in line with the Departmental position regarding UKSF issues. The underlying allegations have been investigated; as such I see no reason to place any further details into the public domain. I remain confident that the processes currently in place are in accordance with UK policy and legal obligations.

Your second point relates to our assertion that our obligations with regard to arrest, capture and detention will vary depending on the circumstances. It should be obvious that the legal framework for, and remit of, operations will depend on the situation. Legal obligations may also vary as a consequence – for example, during an international armed conflict the Geneva Conventions will apply. A UN Security Council Resolution may also provide authorisations for particular military operations. This in turn will impact on the rules governing the conduct of operations in any particular case.

The underlying principle is that all UK Forces operate in compliance with both English domestic law and applicable international law. Every member of UK forces, as well as civilians accompanying them, are subject to the real and not potential application of the criminal law of England and Wales, and of specific military offences under the Service Discipline Acts, wherever in the world they are serving. The extraterritorial reach of the whole of English criminal law over all Service personnel is not derived from specific provisions.

Your third point relates to your request for confirmation that Ministry of Defence policy is consistent with the legal Opinion from Michael Fordham QC and others, which you enclosed with your letter.

Mr Fordham and his co-authors clearly have a particular point of view. They believe they are correct about the circumstances in which extraterritorial ECHR jurisdiction will arise, and therefore that the judges in the leading House of Lords authority on the subject - Al Skeini - were simply wrong in their shared analysis of the very narrow and exceptional basis on which, as a matter of ECHR law, it will do so. If you have not read it already, I would commend the House of Lords judgment to you; it provides useful clarification of the view taken by the highest UK domestic court of the strength of some of the arguments advanced in the Opinion, and their view of the legal impact of authorities to which the Opinion refers, such as Issa and Soering. It is also notable that the Opinion did not mention the recent jurisprudence of the European Court of Human Rights on the application of the ECHR to military operations (Behrami and Seramati). We would question a number of statements and points made in the Opinion, some of which are in issue in ongoing judicial proceedings currently before the courts. I can, however, give you the strong assurance you request that my Department takes very seriously the need to be ensure that the policies and operations of UK Forces are in compliance with UK law, and with applicable obligations under international law.



JOHN HUTTON