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Sir Bernard Hogan-Howe
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Your Ref:

Our Ref: REC/NQE/00091770/1

Date: 25 April 2014

VIA POST

Dear Sirs,

Re: Ali Babitu Kololo – Pre-action letter

This letter is sent on behalf of Mr Ali Babitu Kololo. Mr Kololo was sentenced to death in Kenya, on the basis of an investigation and prosecution materially contributed to by the United Kingdom (UK) authorities. The involvement of the UK authorities was unlawful in that it was in breach of (i) s 6 of the Human Rights Act 1998 and Article 2 of the European Convention on Human Rights (ECHR), Article 3 ECHR, and Article 1 Protocol 13 ECHR, (ii) the stated UK policy for abolition of the death penalty, and (iii) common law principles of fairness and natural justice.

This letter has been prepared under the Pre-Action Protocol for Judicial Review (the Protocol) and accordingly adopts the form set out in the Annex to the Protocol.

1. To:
 - a. The Commissioner of Police of the Metropolis
 - b. The Secretary of State for the Home Department
 - c. The Secretary of State for Foreign and Commonwealth Affairs
2. The claimant: Mr Ali Babitu Kololo of Shimo La Tewa GK Prison, Mombasa, Kenya
3. Reference details: As per the above letterhead.
4. Details of the matter being challenged:

The Defendants' involvement in and contribution to the investigation and subsequent prosecution of Mr Kololo, resulting in his death sentence on 29 July 2013.

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5. The issue:

Factual background

- 5.1 Mr Kololo is a 35 year old father of two small children. He is a Kenyan national from Lamu County and a member of the minority Boni tribe. Mr Kololo has little formal education and is effectively illiterate. His first language is Boni, although he also speaks some Swahili. Previously, he supported himself and his family by working as a woodcutter and honey gather.
- 5.2 On 11 September 2011 Mr Kololo was arrested on suspicion of being involved in an attack on two British nationals the night before.
- 5.3 Judith and David Tebbutt had been staying at the holiday resort Kiwayu Safari Village on the Kenyan coast near the Somali border. Early in the morning on 11 September 2011 they were attacked in their bungalow. David Tebbutt was shot and killed by the attackers. Judith Tebbutt was kidnapped and taken by boat to Somalia. She was held hostage for six months before being released.
- 5.4 Ms Tebbutt confirmed that Mr Kololo was not amongst the men who entered the bungalow, shot her husband and then abducted her. He was, however, accused of leading the attackers to the camp and helping them identify the only occupied bungalow. The case against him was based on circumstantial evidence.
- 5.5 On 13 September, Mr Kololo was charged with the offences of 'robbery with violence' and 'kidnapping in order to murder.' Under Kenyan law, the former offence carries a mandatory sentence of death by hanging.
- 5.6 At trial, Mr Kololo was unrepresented until after the close of the prosecution case. He was convicted on 29 July 2013, on the basis of circumstantial evidence. Mr Kololo was sentenced to death the same day.
- 5.7 To date, he remains on death row in the high-security Shimo La Tewa GK Prison in Mombasa, Kenya. His imprisonment and the uncertainty of facing execution is causing him and his family severe hardship.

UK involvement

- 5.8 Soon after the attack on the Tebbutts, a team of UK officials, primarily or exclusively from the Metropolitan Police, was deployed to Kenya to support the

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local investigation. They arrived at Kiwayu Safari village on 13 September 2011, apparently led by Detective Superintendent Neil Hibberd of the Metropolitan Police (**DCI Hibberd**).

- 5.9 The UK team conducted investigations and then supported the prosecution case against Mr Kololo. This included (i) a substantive witness statement by DCI Hibberd dated 19 June 2012 in support of the prosecution, and (ii) live evidence given by DCI Hibberd on 25 June 2012 as Prosecution Witness 14.
- 5.10 Further, the British High Commission in Kenya provided funding to support the prosecution, including funding to meet the travel expenses of at least one Kenyan prosecution witness.
- 5.11 It is unclear under what authority and on what legal basis the UK authorities provided such support. Despite repeated requests, none of the documents setting out such authority were ever disclosed to Mr Kololo (or to his lawyer, after he eventually obtained legal representation).
- 5.12 Following Mr Kololo's conviction and death sentence British officials, including those from the Foreign Office and the Metropolitan Police, described the outcome as 'welcome' and as a 'positive development' and praised the 'great skill and tenacity' of the British team supporting the case.

The issue

- 5.13 The support provided by the British authorities to the prosecution in Mr Kololo's case was unlawful for three cumulative reasons.
- 5.14 **First**, in providing such support your clients acted in breach of their obligations under s 6 of the Human Rights Act 1998 (HRA 1998).
- 5.15 The HRA 1998 applies by virtue of the fact that through the consent, invitation or acquiescence of the Kenyan government, the UK authorities involved in the case exercised all or some of the public powers normally exercised by the Kenyan government, namely executive functions relating to the investigation and prosecution of crime (see *Smith v Ministry of Defence* [2013] UKSC 41, para 34).
- 5.16 Given the mandatory capital punishment for the offence Mr Kololo was charged with, there was a real and immediate risk to his life resulting from your clients' actions in support of his prosecution. Further, there was a real and immediate risk that by being sentenced to death Mr Kololo would suffer inhuman or

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degrading treatment or punishment contrary to Article 3 ECHR. (See *Al-Saadoon v UK* (2010) 51 EHRR 9).

- 5.17 No, or no effective, steps appear to have been taken to protect Mr Kololo's life and ensure that the actions of the UK authorities would not cause or materially contribute to him receiving a death sentence. UK assistance was provided despite there being no undertaking or diplomatic assurances that Mr Kololo would not be sentenced to death in the event of a conviction.
- 5.18 In the circumstances, your clients' actions were in breach of Article 2 ECHR, Article 3 ECHR and Article 1 Protocol 13 ECHR.
- 5.19 **Second**, your clients' actions were in breach of the UK government's stated policy, *HMG Strategy for Abolition of the Death Penalty 2010-2015*.
- 5.20 This policy provides at para 1:

It is the longstanding policy of the UK to oppose the death penalty in all circumstances as a matter of principle because we consider that its use undermines human dignity, that there is no conclusive evidence of its deterrent value, and that any miscarriage of justice leading to its imposition is irreversible and irreparable.

- 5.21 The policy expressly identifies 'police assistance' as a 'tool' available 'to advance our objectives' of restricting the use of the death penalty and promoting its abolition. It emphasises that '*where the assistance we offer could lead to the death penalty, the assistance we may be able to offer will be limited.*'
- 5.22 Contrary to their express policy, however, your clients provided extensive and one-sided support to the prosecution in Mr Kololo's case – a case in which it was clear that a conviction would result in the death penalty.
- 5.23 **Third**, your clients acted in breach of the common law principles of fairness and natural justice.
- 5.24 As UK officials acting in the performance of their duties, the police officers and other personnel involved in this matter were required to conduct themselves in accordance with fundamental common law principles of fairness and natural justice regardless of whether they were acting inside or outside the UK. They failed to do so in several respects:

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5.24.1 Mr Kololo had no legal representative until after the close of the prosecution case. Your clients were aware of this, not least because DCI Hibberd was cross-examined by Mr Kololo in person at trial. Despite this clear inequality of arms no UK support was provided for the defence.

5.24.2 Mr Kololo was not provided with any advance disclosure of the evidence that the UK officials intended to rely on against him, or with exculpatory material in their possession.

5.24.3 Given DCI Hibberd's role and the circumstances of the trial, it would have been clear that his evidence would not be subject to proper challenge but would have a significant impact on the court and its findings. Despite this, DCI Hibberd's evidence was unfair, one-sided and prejudicial:

5.24.3.1 He did not contribute any original evidence but rather gave his opinion on Mr Kololo's role in the incident based exclusively on evidence provided by other witnesses. In doing so he presented personal conclusions on contested evidence as findings of fact. For instance, on page 4 of his witness statement, under the heading '*conclusion*,' DCI Hibberd (who was not present at Mr Kololo's arrest) asserts that '*Kololo was arrested wearing Tanga shoes*' and then goes on to link these to footprints found near the site of the incident¹. Yet, Mr Kololo asserted throughout that he was not wearing shoes when he was arrested and the arresting officer CPL Loldoss (Prosecution Witness 17) confirmed that 'the accused was not wearing any shoes' upon his arrest.

5.24.3.2 Important conclusions were not properly supported by evidence. For instance, DCI Hibberd in his analysis placed significant reliance on footprints allegedly made by Tanga shoes. Despite several police photographers (including one from the UK team) attending the incident site, there are no photographs or other records of these footprints. It appears that DCI Hibberd did not in fact see the footprints himself and had no particular expertise on footprints.

¹ In his oral evidence DCI Hibberd reiterated that 'it is important to note accused was captured while wearing Tanga shoes' and the link between these shoes and the footprints.

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5.24.3.3 DCI Hibberd's evidence failed to mention significant exculpatory information. For instance, his statement does not mention that sniffer dogs which were brought in by the UK team could not link Mr Kololo to either the site of the incident or to the Tanga shoe he allegedly wore. Similarly, DCI Hibberd accepted in cross-examination that he did not find Mr Kololo's prints in the Tanga shoe, while his earlier evidence makes no reference to this. Mr Kololo had no knowledge or experience of the law, speaks no English and had to conduct his defence in his second language, Swahili, when the Court was unable to provide him with the Boni interpreter he had requested. As such, it seems likely that further evidence in your clients' possession that may have supported Mr Kololo's defence case was also withheld.

5.24.3.4 DCI Hibberd remained in the court room while another prosecution witnesses (Ms Tebbutt) gave evidence prior to him.

5.24.4 Throughout their involvement, the UK personnel involved in the investigation and prosecution made no attempt to obtain Mr Kololo's version of events or to consider their findings in light of it. They did not meet with or interview Mr Kololo, relying only on a short statement Mr Kololo allegedly made immediately after his arrest. Mr Kololo has consistently and repeatedly disputed the contents of the statement and claimed that it was obtained under torture. He made repeated allegations that he was severely beaten following his arrest and that he had his private parts squeezed and twisted such that he still suffers from urinary incontinence as a result. Despite the fact that they would have been aware of these (prima facie credible) allegations, however, the UK officials involved in the case still chose to rely on the statement without taking any further precautions and without the allegations having been investigated.

5.25 Considered together these matters render the conduct of the UK personnel involved in Mr Kololo's prosecution substantively unfair and therefore unlawful. The unfairness is particularly acute in a context where it entails a real risk to an individual's life, as it did in the present case.

Conclusion

5.26 In light of the above, your clients acted unlawfully.

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- 5.27 Further, Mr Kololo's conviction is arguably unsafe and your clients materially contributed to a miscarriage of justice. Mr Kololo is currently in the process of preparing an appeal against his conviction, which will be filed in the High Court of Kenya. This will deal with all Kenyan aspects of the case.
- 5.28 In relation to the conduct of the UK authorities, he seeks a declaration from the UK courts that such conduct was unlawful. If granted, he intends to rely on such a declaration in the Kenyan appeal proceedings.
6. Details of the action expected:
- 6.1 Please confirm that your clients accept that their actions were unlawful.
- 6.2 We invite you to agree that a declaration to this effect will be sought from the High Court by consent at the earliest possible opportunity. Such a formal declaration is required for Mr Kololo's appeal proceedings in Kenya.
- 6.3 Further, please confirm that you will not be providing any further support to the prosecution in Mr Kololo's case in the context of appeal proceedings in Kenya.
- 6.4 Failing your agreement, we intend to issue judicial review proceedings without further notice.
7. Details of the legal advisers dealing with this claim: As per above letterhead.
8. Details of any interested parties: None.
9. Details of any information sought:
- 9.1 In the event that your clients do not admit liability in this matter, please provide us with all documents relevant to the issues set out above.
- 9.2 In particular, we expect you to disclose:
- 9.2.1 Any and all material relating to the authority under which UK personnel were deployed to Kenya and participated in the investigation and prosecution of Mr Kololo, including but not limited to all correspondence between the UK and Kenyan authorities in relation to this matter.

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9.2.2 All material pertaining to any and all investigative steps taken by the UK police in this matter, including but not limited to full details of all personnel deployed, all tests conducted, all interviews carried out, all evidence collected and all experts consulted in connection with the case.

9.2.3 All material pertaining to DCI Hibberd's role as a prosecution witness and his attendance at trial in Kenya.

9.2.4 Full details of all funding provided to support any aspect of the investigation and / or prosecution case, including but not limited to funding for experts and other witnesses to attend trial, as well as all material pertaining to the decision to provide UK government funding for the prosecution case.

9.2.5 Full details of any steps taken by your clients to ensure that Mr. Kololo would not be sentenced to death if convicted.

9.2.6 All notes, police diary entries, emails and other communications relating to the case.

9.2.7 All policy documents, guidance or other documents relating to the provision of UK assistance in criminal proceedings overseas in situations in which there is a risk of the death penalty being imposed.

9.2.8 All policy documents guidance or other documents pertaining to the actions, duties and responsibilities of police officers involved in overseas prosecutions.

9.2.9 A full breakdown of the cost and source of funding for the assistance provided by the Defendants in this matter.

9.3 We remind you of the Treasury Solicitor's guidance on discharging the duty of candour, which confirms that *"the duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge... [and] applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of response under the pre-action protocol."*

9.4 Please confirm within 7 days that your clients have been notified of the need to preserve documents as per 31BPD.3 of the CPR.

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- 9.5 Please also treat this letter as a subject access request under the Data Protection Act 1998 in relation to all information held on Mr Kololo. We enclose the relevant fee with this letter.
- 9.6 Please also treat the information sought as requests under the Freedom of Information Act 2000.
10. Details of any documents considered relevant and necessary: See para 9, above.
11. Address for reply and service of court documents: As per above letterhead.
12. Proposed reply date:
- 12.1 We look forward to hearing from you within 14 days from the date of this letter.
- 12.2 We note that Mr Kololo remains on death row and that the matter therefore needs to be dealt with expeditiously. As such, we are not minded to grant any extension to this period.

Yours faithfully,

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