JUDICIARY OF
ENGLAND AND WALES

Divisional Court Judgment

5 October 2012

Before:
Sir John Thomas, President of the Queen's Bench Division
and
Mr Justice Ouseley

Between:
Abu Hamza and others
-v-
Home Secretary

Summary of judgment

The President of the Queen's Bench Division:

This is the judgment of the court.

INTRODUCTION

1. Each of the five claimants is the subject of an extradition request issued by the Government of the United States of America, in order that each of them may stand trial in that country for terrorism related offences. Each has brought separate claims for judicial review and for stays of their extradition, raising different issues in each case except for an issue common to four of them relating to the prison conditions they would experience at ADX Florence, Colorado.

2. These proceedings are the latest and, if we refuse permission, the last, in a lengthy process of appeals and applications that has continued for some eight years in the case of three and 14 years in the case of two. The background procedural facts of each individual may briefly be summarised as follows.

Al Fawaz and Abdel Bary

3. Al Fawaz's extradition was requested in September 1998, some 14 years ago. The District Judge ruled on 8 September 1999 that his extradition could proceed. His appeal to the High Court by way of an application for a writ of *habeas corpus* was rejected on 30 November 2000.

4. Abdel Bary's extradition was requested in July 1999. The District Judge ruled on 25 April 2000 that his extradition could proceed. His appeal to the High Court was dismissed on 2 May 2000.

5. Both of those proceedings are governed by the old law applicable under the Extradition Act 1989.

6. Both Al Fawaz and Abdel Bary appealed to the House of Lords where their appeal was dismissed on 17 December 2001, with the court finding that the applicants were liable to extradition to the United States on the existence of a *prima facie* case of conspiracy to murder, of which the most terrible manifestation was the bombing of two US Embassies in East Africa, in which over 200 were killed and 4,500 injured. After several representations to the Secretary of State between November 2001 and December 2005 the Secretary of State rejected both claimants' representations on 12 March 2008 finding

that United States assurances could be relied on and that the applicants were not at risk of the death penalty.

7. Al Fawaz and Abdel Bary subsequently applied for judicial review of the Secretary of State's decision. On 7 August 2009 Lord Justice Scott Baker found that there had been effective judicial oversight of 'supermax' prisons and considered that neither of the claimants' cases crossed the Article 3 threshold. Although a point was certified for the Supreme Court in relation to the compatibility of ADX prison conditions with Article 3, on 16 December 2009 the Supreme Court refused permission to appeal.

Abu Hamza

8. Abu Hamza's extradition was requested by the United States on 21 May 2004, now over eight years ago. The case against him is that he conspired to take hostages in the Yemen, set up a terrorist training camp in Oregon and to give other support to terrorists. He was arrested in London on 5 August 2004. Abu Hamza served seven years imprisonment after being convicted of offences in the United Kingdom. Thereafter extradition proceedings were resumed with the Senior District Judge ruling on 15 November 2007 that his extradition could take place. The Secretary of State ordered his extradition on 7 February 2008. The High Court rejected Abu Hamza's appeal on 20 June 2008, and also refused leave to appeal to the House of Lords on 23 July 2008.

Babar Ahmad

9. Babar Ahmad was arrested in London on 5 August 2004. The case against Babar Ahmad is that through websites operated from the UK and a mirror website in the US and by extensive e-mail correspondence, he solicited funds

for terrorism for the Taliban and other Mujahideen. A material part of that effort was directed at the United States. The most serious allegation is communication with an enlistee in the US Navy when on patrol, his encouragement of that person and the possession of details of the vulnerability of a US battle formation in the Straits of Hormuz; the allegation is to the effect that the enlistee was encouraged to betray his fellow crew members and his country.

10. The CPS declined in 2004 to prosecute on the basis that there was insufficient evidence in the UK for a successful prosecution. He was charged in the United States. On 17 May 2005 the Senior District Judge ruled that his extradition could proceed. On 15 November 2005 Babar Ahmad's extradition was ordered. Babar Ahmad's appeal to the High Court was rejected on 30 November 2006. On 6 June 2007 the House of Lords refused permission to appeal.

Talha Ahsan

11. Talha Ahsan's extradition was requested on 15 September 2006. The case against him is similar to that against Babar Ahmad. The Senior District Judge ruled on 19 March 2007 that his extradition could proceed. The Secretary of State then ordered his extradition on 14 June 2007. His appeal was refused by the High Court on 14 April 2008, and a month later that court refused leave to appeal to the House of Lords.

The Claimants' ECtHR Appeals

12. Each of the claimants, after the decision of the UK courts permitting extradition, applied to the ECtHR.

13. On 6 July 2010 the European Court of Human Rights declared admissible the five claimants' complaints concerning detention at ADX Florence "supermax" prison and the imposition of Special Administrative Measures (SAMs) if convicted. Under Rule 39 of the Rules of that Court, the court indicated to the UK Government that it would be desirable in the interests of justice not to extradite the claimants until further notice.

14. The following issues were declared inadmissible by the Court. Abu Hamza's complaint in respect of ADX Florence was deemed inadmissible, with the court finding that as a result of his medical conditions there was no real risk of his spending more than a short period in ADX Florence. The court further declared inadmissible each of the applicants' complaints based on Articles 6 and 8 in respect of detention at ADX Florence.

15. Following the court's admissibility decision the Government of the United Kingdom and the complainants filed observations with the court, and also received third-party comments from various non-governmental organisations. On 10 April 2012 five judges of the Fourth Section of the Court dismissed each of the five complainants' cases. On 24 September 2012 the petition for the claimants' case to be referred to the Grand Chamber was refused.

16. As a result of this decision, and with the bar to extradition and Rule 39 order now being removed, each of the five claimants has brought proceedings before this court to challenge the refusal of the SSHD to delay or prevent their surrender to the United States.

Nature of the challenges

17. The four claimants other than Abu Hamza have sought to argue that the prison conditions they would face at ADX Florence 'super max' prison in Colorado would be incompatible with Article 3 of the European Convention on Human Rights. Abu Hamza does not face a real risk of more than a very short term detention there.

18. The individual challenges are as follows:

i) Al Fawaz seeks to challenge the order that exists for his surrender. He submits that new evidence casts doubt on the existence of a *prima facie* case against him, and on the US Government's good faith in continuing to seek his extradition. Proof of a *prima facie* case was required under the 1989 Act.

ii) Abdel Bary also submits that new evidence has arisen to cast doubt as to whether there is a *prima facie* case against him. In addition he contends that because of a deterioration in his psychiatric condition, extradition would be a breach of article 3.

iii) Abu Hamza seeks an injunction to give him time to seek to re-open the statutory appeal under Rule 52.17 of the Civil Procedure Rules 1998 that was determined against him on 20 June 2008. He submits that new evidence has arisen which shows he is unfit to plead, and that this issue should be resolved before his surrender to US authorities.

iv) Babar Ahmad and Talha Ahsan have each made submissions arguing that their extradition cannot take place as they submit there exists the possibility of a domestic prosecution in the United Kingdom, and also

that the possibility of a private prosecution exists under the Terrorism Act 2000. The decisions of the DPP on the question of prosecution, and of the DPP very recently in refusing consent to a private prosecution are said to be unlawful; they too are challenged. Each of these possibilities they submit means that they should not be extradited, and instead that UK based legal action should take precedence. Mr Watkin, a private individual, has sought to prosecute Babar Ahmad and Talha Ahsan in the UK, for terrorist offences for which the consent of the DPP is required. It has very recently been refused. He is an interested party to the claimants' challenge to that refusal of consent.

v) Mr O'Connor QC, on Mr Watkin's behalf, disavowed any intent to challenge the decision of the Senior District Judge given on Thursday morning (4 October 2012) to refuse to issue summonses for a private prosecution by Mr Watkin of Babar Ahmad and Talha Ahsan for solicitation to murder, an offence the private prosecution of which does not require the consent of the DPP. The Senior District Judge doubted whether the evidence provided was sufficient for that particular offence but also held that the application for the summonses was an abuse of the process of Court as an attempt to intermeddle with the extradition process.

Observations

19. Before turning to the decision in each particular case it is important to make six general observations.

20. First, as is apparent from what we have set out in summary, each of these claimants long ago exhausted the procedures in the United Kingdom. They then applied to the European Court of Human Rights on a number of matters. That failed. There can be no doubt that each has, over the many years, either taken or had the opportunity to take every conceivable point to prevent his extradition to the United States.

21. Second, there is an overwhelming public interest in the proper functioning of the extradition arrangements and the honouring of extradition treaties. It is also in the interest of justice that those accused of very serious crimes, as each of these claimants is in these proceedings, are tried as quickly as possible as is consistent with the interests of justice. It is unacceptable that extradition proceedings should take more than a relatively short time to be measured in months not years. It is not just to anyone that proceedings such as these should last between 14 and 8 years.

22. Thirdly it is necessary, to emphasise the importance of finality in litigation and the particular importance of that principle in extradition cases because of the public interest in an efficient process, the need to adhere to international obligations and to avoid a recurrence of the delays which have so disfigured the extradition process in the past and to which successive appeals over time can subject it.

23. Fourth, a necessary part of finality in litigation is that all parts of a case should be raised on the first occasion on which they properly can be raised; where subsequent events or significant evidence are said to give rise to a need for

further consideration, they must be deployed as soon as possible and not withheld until any preceding action has concluded.

24. Fifth, all of the applications were raised at the end of last week or the beginning of this week. We have been provided with over 15 files and have heard argument over three days on the applications now raised. Each of the applicants has therefore had a very full opportunity to put their applications to the Court so that we can consider whether there is anything to go forward. As was made clear by Mr Eadie QC on behalf of the Home Secretary at the conclusion of the second day of the hearing, if we refuse permission or refuse the stays, as these applications are all in criminal causes or matters, there is no appeal from our decision and the Home Secretary will be free to make arrangements for the extradition of each of the claimants. That position was not contested.

25. Sixth, we have carefully considered all of the arguments and the full judgment which we will give is necessarily long as it has had to examine all the points made. We considered that we should deliver that judgment orally as soon as we had reached our decision as the claimants and the Home Secretary are entitled to know whether these proceedings come to an end and extraditions can take place or, whether, in the case of each applicant there is a matter which justice requires is further considered and the extradition halted.

26. Finally, as we will observe in the course of our judgment in relation to Abu Hamza, there may well be a need to reconsider the inter-relationship of the statutory appeal scheme, the ability to re-open appeals and the role of judicial review. As has happened elsewhere, there may be real dangers in the structure

of a scheme which not only has a statutory appeal procedure but which has become complicated by judicial review proceedings which can be used to re-open or raise again issues that have already been decided.

27. The order in which we will deal with the claims and issues:

i) Prison conditions

ii) Khalid Al Fawaz

iii) Abdel Bary

iv) Abu Hamza

v) Babar Ahmad and Talha Ahsan

28. We shall explain in full in a few moments our reasons for our decision, but it may be helpful if we provide now a summary of our decision and an outline of the reasons.

(i) Prison Conditions

29. Each of the claimants (with the exception of Abu Hamza) argued before us that the European Court of Human Rights (ECtHR), in its judgment of the 10 April 2012, misunderstood the evidence provided to it about conditions and the length of time which would be spent within solitary confinement at ADX Florence Colorado and that we should therefore consider afresh whether the conditions amounted to a breach of Article 3.

30. In relation to this alleged error by the ECtHR, we are satisfied that the ECtHR had not fallen into error in its judgment. We are of the view that the ECtHR

had carefully considered the evidence before it and had conducted a detailed analysis of the length of time a person would spend in the differing conditions of ADX, and was thus entitled to draw the conclusion that it did.

31. We also consider that we cannot conclude that the ECtHR had violated Article 6 of the European Convention of Human Rights in the way it reached its decision.

32. We concluded that in all the circumstances in the light of the decision of the ECtHR, there is nothing to justify re-opening the issue in relation to whether the conditions to which the claimants may be subject if extradited to the United States would involve a breach of Article 3 of the European Convention.

(ii) Al Fawaz

33. Al Fawaz sought to challenge the order for his surrender submitting that new evidence had arisen casting doubt on the *prima facie* case against him. He contended that telexes released on Wikileaks in August 2011 suggest that he may be delisted from the UN1267 Consolidated List of Terrorists.

34. We consider that confirmation from the US Department of Justice on the 27 September 2012 confirming that no delisting had been sought means that there was no basis upon which the Secretary of State could lawfully have exercised her discretion to withdraw the Extradition Order against Al Fawaz. Further we were satisfied that the prima facie case against Al Fawaz was not undermined by the absence of inculpatory evidence from the witness in trials in New York so as to warrant the exercise of the Secretary of State's discretion.

(iii) Abdel Bary

35. Abdel Bary sought to argue that new evidence has arisen to cast doubt as to the *prima facie* case against him. We concluded that the claimant's arguments misunderstood the significance, or rather insignificance of the new evidence. They did not grapple with the overall picture of evidence presented against him. Specifically a prima facie case still exists against Abdel Bary. Moreover nothing has been shown to undermine the case in relation to timings of the receipt of faxes concerning the bombing in 1988 of the East African Embassies.

36. We have carefully considered the fresh psychiatric evidence of and the further evidence in relation to the availability of psychiatric evidence at ADX Florence placed before us. However in the light of the long standing nature of his illness and the decision of the ECtHR in relation to the psychiatric facilities at ADX Florence, we have concluded that there is no material change of circumstances.

(iv) Abu Hamza

37. Abu Hamza sought an injunction to give him time to re-open his statutory appeal, and raised the issue of his fitness to plead. As regards the issue of fitness to plead, it is a well established principle that this issue should in general be determined by the courts of the state where he is to be tried.

38. We considered first the arguments on the basis that it was an application to re-open the appeal and therefore we should consider whether it would be unjust and oppressive to extradite him. We were wholly unpersuaded that on the

evidence that he was unfit to plead. We concluded that if Abu Hamza might be unfit to plead, because of sleep deprivation and physical conditions at HMP Belmarsh, then this condition being treatable could be treated in the United States. If any potential unfitness to plead was emerging from a degenerative condition of the brain, the Court concluded that the sooner he is put on trial the better.

39. In either case therefore there is nothing to suggest that extradition in this case would be unjust or oppressive. In light of this, we also found that there had been no material or significant change in circumstance of the kind to render it unlawful, or in breach of Convention rights, for Abu Hamza to be extradited.

(v) Babar Ahmad and Talha Ahsan

40. Babar Ahmad and Talha Ahsan sought to argue that their extradition could not take place as they submitted there existed the possibility of a domestic prosecution against them in the United Kingdom, and also the possibility of a private prosecution.

41. Both contend that the Director of Public Prosecutions had made an unlawful decision in refusing to prosecute them in the UK, as the evidence was or could be made sufficient. Mr Watkin who had tried to bring a private prosecution supported their contention that the decision to refuse consent was unlawful as the Director of Public Prosecutions should, before making a decision, ask the US Prosecutor to provide the necessary evidence with which to prosecute.

42. On the facts we concluded that there was no prospect of the decisions of the Director being challenged; the decision made in 2004 was lawfully made as there was insufficient evidence. At this point in time, even if the Director had a duty to request evidence from the US Prosecutor, it was unreal to expect that now to be provided when it would thwart the extradition which the US had sought for so many years.

43. We concluded in each case that the Secretary of State, and the Court, possessed only a residual power to intervene. In light of our conclusion on the merits of the case made for prosecution in the United Kingdom, there was no arguably sufficiently grave interference with the claimants' Article 8 rights, such that extradition should be refused as a disproportionate interference with those rights.

44. Finally we have noted that we have considerable reservations about Judicial Review of a decision not to prosecute, in particular as it had difficulty seeing how a decision would engage the human rights of a person that it decided not to prosecute.

Conclusion

45. We have therefore concluded that each of the claimants' applications for permission to apply for judicial review or for a re-opening of the statutory appeals be dismissed. It follows that their extradition to the United States of America may proceed immediately.