CO/4696/2006

Neutral Citation Number: [2007] EWHC 639 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Wednesday, 14 February 2007

B E F O R E:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

MR JUSTICE LLOYD JONES

- - - - - - -

THE QUEEN ON THE APPLICATION OH PHILIP HARKINS
(CLAIMANT)

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(DEFENDANT)

- - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

- - - - - - -

The applicant appeared in person assisted by a McKenzie Friend, Esther Hutchison
MISS C DOBBIN (instructed by the Treasury Solicitors) appeared on behalf of the DEFENDANT

MISS A EZEKIEL (instructed by the CPS, London EC4M 2NG) appeared on behalf of the Interested Party, the Government of America

- - - - - - -

J U D G M E N T

1. THE PRESIDENT: I shall ask Lloyd Jones J to give the first judgment.

2. MR JUSTICE LLOYD JONES: This is an application for judicial review by Philip Harkins, the claimant, who seeks to challenge the decision of the Secretary of State for the Home Department communicated by letter dated 1 June 2006 to extradite him to the United States of America on a charge of murder. Permission to apply for judicial review was granted by Goldring J on 24 October 2006.

3. Although Mr Harkins had the assistance of solicitors and counsel at earlier stages of his application, he has appeared in person to present his arguments at the hearing before us. He has produced two skeleton arguments and has presented his arguments ably and efficiently in circumstances which have not been easy for him. The Secretary of State, and the Government of the United States of America, have been separately represented by counsel.

The factual background

4. The claimant is 28 years of age. He was born in Scotland and raised by his grandparents. At the age of 14 he was taken at the request of his mother and stepfather to the United States of America, where they then resided. On 11 August 1999 the claimant was arrested in Florida on suspicion of the murder and attempted robbery of Mr Joshua Hayes on 10 August 1999. He was interviewed and he informed the police that he had spent the night at home with his fiance, Keisha Thompson, having been dropped there by an acquaintance by the name of Terry Glover.

5. As a result of the information given by the claimant, Mr Glover was arrested and interviewed. The claimant understands that at first Mr Glover denied all knowledge of the claimant and the incident. Later Mr Glover alleged that Mr Randle and the claimant had been responsible for the murder of Mr Hayes. He then gave a third version of events in which he alleged that the claimant had, in fact, carried out the crime.

6. As a result of Glover's account the claimant was further interviewed and the new version of events was put to him. The claimant denied these matters completely. At the time of his arrest the claimant's clothes were seized and were subjected to forensic examination. The results were negative. The claimant's fiance was interviewed. She confirmed his presence in her company at the alleged time.

7. Other persons were interviewed, including a Mr Randle and a Mr Madden. Both of these persons admitted to being at the scene of the crime. They stated the claimant had not been present at the scene and that he did not fit the description of the killer. At that stage the case was dropped against the claimant. On 22 September 1999, the claimant was notified that the District Attorney was not going to prosecute him for any involvement in the killing of Joshua Hayes. On 18 November 1999 a formal notice was entered on the record as to the discontinuance of the prosecution.

8. In January 2000 a different prosecutor, Angela Corey, Assistant State Attorney, revisited the case. She arranged an interview with Glover on 31 January 2000. As a result of that meeting a written agreement was produced on 31 January 2000. It

recorded that Glover had agreed to allow the police to conduct an investigation with his full co-operation. Due to the unusual nature of the case, the procedural history and the fact that Glover wanted to co-operate at that time, but could not consult with an Attorney, the prosecutors who signed the agreement agreed that any conversation that occurred as a result of Glover's co-operation would only be used against Philip Harkins in the prosecution of Harkins' case or cases. None of the conversation would be used against Glover since he was willing to help without the benefit of counsel. It added that this procedure was extremely rare and was only being done due to the unusual circumstances of the case.

9. The following day, 1 February 2000, a further agreement in writing was entered into between the State of Florida and Glover. On the basis of this agreement the State agreed not to charge Glover with murder but agreed to charge him, and he agreed to plead guilty to, the offences of robbery with a weapon and being an accessory after the fact to first degree murder. The agreement recorded that the defendant could receive any sentence up to and including 15 years in a Florida State prison. Sentencing would be deferred. It recorded that the defendant's sentence would be determined by a judge and that the State of Florida would make a recommendation to the court at sentencing. It stated that the State's sentencing recommendation would be based upon the defendant's co-operation by providing truthful testimony regarding the armed robbery of Joshua Hayes that resulted in the death of Joshua Hayes.

10. On 2 February 2000 the claimant was charged with capital murder and attempted robbery. The claimant, at that stage, had not been provided with any disclosure and he was further advised that the death penalty would be sought in his case. The defence raised objections against the late filing and a pre-trial conference was scheduled. The claimant was subsequently released on unconditional bail on his own recognisance. Several hearings took place during 2000 and 2001. Several dates were set for trial and then vacated. Disclosure of evidence was provided during this period. That included statements from Mr Randle and Mr Madden. Mr Madden in his statement claimed he had been at the scene and stated that the murderer had not been the claimant.

11. On behalf of the claimant it is said that Mr Randle made a sworn statement alleging that he had been offered an inducement by the Assistant State Attorney, Angela Corey, and a Police Officer, Detective Davis. Mr Randle claimed that he had been asked to make a statement falsely placing the claimant at the scene of the murder. He stated that in return for making such a statement he had been promised that other charges, unrelated to the index offence, would be dropped against him and that Mr Randle would be granted immunity in respect of the Hayes' murder charges.

12. Throughout 2000 and 2001 the claimant attended all the court hearings in his case. On or about 11 December 2001 the claimant left the United States of America. He travelled to the United Kingdom and resided with his grandparents. On 26 January 2003, the claimant was concerned in an incident in Scotland, which resulted in his being charged with an offence of causing death by dangerous driving. The claimant's car was involved in a head-on collision with another vehicle whilst the claimant had been driving on the wrong side of the road. The passenger in the other car was killed. The claimant himself suffered severe injuries.

13. On 3 February 2003 the claimant was arrested in the Clyde Royal Hospital as a result of the provisional arrest warrant issued by the Bow Street Magistrates' Court pursuant to the Extradition Act 1999. On 30 July 2003, the United States Government made an extradition application against the claimant alleging that he had murdered Joshua Hayes and attempted to rob him on 10 August 1999. The claimant appeared at the Bow Street Magistrates' Court for his extradition hearing in July 2003. He was represented by counsel. There was before the court confirmation that the State of Florida had withdrawn its notice of intention to seek the death penalty and was pursuing a life sentence. It was argued by the claimant that the evidence produced by the Government for the United States was unreliable because of the agreement with Mr Glover and that it lacked credibility. The only evidence that was submitted by the Government of the United States in the proceedings was the evidence of Mr Glover.

14. Counsel, on behalf of the claimant, submitted at that hearing that there was insufficient evidence upon which a reasonable jury, properly directed, could return a verdict of guilty. She submitted that the statement of Glover made on 1 February 2000, a transcript of his evidence and the deposition of 17 January 2002 were at variance with his affidavit sworn on 26 February 2003. The differences, it was submitted, between these various accounts were fundamental so as to render Glover's evidence unreliable. Counsel submitted that the unusual circumstances surrounding the agreement between the prosecutor and Glover were such as to taint the totality of the testimony and to render it unreliable.

15. The claimant maintains that his counsel did not at that hearing make any reference to the absence of the claimant's alibi witness and that she did not make reference to the statements of Mr Randle and Mr Madden or the absence of any forensic evidence. It is further said that she did not put forward the fact that Mr Randle had made a subsequent statement implicating Assistant District Attorney Corey and Officer Davis in an attempt to pervert the course of justice. The claimant also submits that the District Judge at that hearing was not told that the evidence of Glover was obtained in breach of the Florida Rules of Criminal Procedure.

16. District Judge Tubbs in a written judgment, dated 21st July 2003, concluded that the evidence before her did establish a prime facie case. She upheld the submissions of the United States Government and she ordered that the claimant should be committed to prison to await the warrant of the Secretary of State for his surrender to the United States of America. The District Judge advised the claimant that he had a right to make an application for a writ of habeas corpus and invited him to make an application for bail, if he was so minded. No such application was made.

17. On 22 February 2003 the claimant appeared before the Edinburgh High Court where he pleaded guilty to the offence of causing death by dangerous driving. He was sentenced to a term of five years' imprisonment. The claimant was subsequently released on parole licence with effect from 3 April 2006. On 20 March the Home Office responded to a letter from the claimant's solicitors. The letter indicated that the Secretary of State would be invited to make his decision as to whether to surrender the claimant to the United States shortly afterwards, and the Secretary of State invited representations before a decision would be considered.

18. By a letter, dated 3 April 2006, the Extradition Section of the Home Office extended the time limit for the submission of representations to 26 April 2006. The claimant says that the reason for the extension was to allow the claimant's solicitors to make enquiries of his former legal representatives in the United States in respect of the current situation regarding his alibi witness, Miss Keisha Thompson. These enquiries, the claimant says, established that she was no longer resident in Florida and that her last known address had been in New Orleans. The claimant says that despite extensive enquiries by the claimant's representatives Miss Thompson has not been traced.

19. On 24 April 2006, the claimant's solicitors lodged formal representations. On 1 June 2006, the Secretary of State rejected the submissions and concluded that the extradition should proceed. That is the decision challenged in these proceedings.

The present application

20. It is necessary to say something about the application before the court. This is an application for judicial review, however the claimant purports to be making an application for habeas corpus. A number of documents before the court refer to such an application. In fact there is no such application formally before the court. It would have been open to the claimant to make an application for habeas corpus following the order for his committal by the District Judge. Such a procedure is expressly contemplated by section 11 of the Extradition Act 1989. In this case no such application was made. As a result the extradition proceeded to the next stage, which was consideration by the Secretary of State of whether to make an order for the claimant's surrender.

21. In the circumstances of the present case I consider that an application for habeas corpus would add nothing to the application for judicial review which is before the court. The application for judicial review is a challenge to the Secretary of State's decision, but it relates largely to matters which were canvassed at the committal hearing. In addition the challenge raises the issue of the passage of time, a matter which the Secretary of State is required to consider by reason of section 12(2) of the 1989 Act. As no additional grounds are advanced which go to the lawfulness of the claimant's intention which are not intrinsic to the judicial review application, I consider that the matter should proceed solely on the basis of the application for judicial review. This will enable all the matters raised by the claimant to be considered by the court and will not result in any disadvantage to the claimant.

22. The papers lodged on behalf of the claimant make a number of references to the Extradition Act 2003. I consider that that statute has no application to the request for the extradition of the claimant or to the present proceedings. The request for extradition was presented to the United Kingdom on 7 March 2003. Article 3 of the Extradition Act 2003 (Commencement and Savings) Order 2003 provides:

> "The coming into force of the Act shall not apply for the purposes of any request for extradition… which is received by the relevant authority in the United Kingdom on or before 31st December 2003."

In these circumstances the provisions of the Extradition Act 1989 apply to the present case.

23. The amended grounds upon which relief is sought, which were lodged with the court on 10 November 2006, advance the following grounds. First, submissions are made on the basis of the insufficiency of the evidence at committal. It is said that the evidence before the District Judge was such as to make the claimant's conviction extremely improbable. Secondly, it is said that the manner in which the evidence of Glover was obtained is an abuse of process by the prosecution. Thirdly, it is said that the extradition of the claimant would be unjust or oppressive by reason of the passage of time. Fourthly, it is said that the undertaking given in respect of the death penalty is inadequate. I shall consider each of these grounds in turn.

The improbability of conviction

24. A number of arguments were advanced by the claimant in relation to the strengths and weaknesses of the case against him. He submits that the evidence before the District Judge was such as to make his conviction in the United States of America extremely improbable. He complains that the only evidence against him was that of Glover and that the various statements of Glover contained major inconsistencies. In addition, he contends that other evidence in the case, particularly that of Mr Randle and Mr Madden, exonerates him.

25. The evidence served by the United States of America in support of its request for extradition was essentially an affidavit of Terry Glover. The account given by Glover in his affidavit was that on 10 August 1999 he went to see the claimant. As he arrived Joshua Hayes, the deceased, was leaving. Leon Madden and Tommy Randle were also at the flat. Hayes wanted to buy marijuana and had cash to buy it, some $750 to $900. The claimant simply planned to take the money. Glover was to drive the claimant to a meeting at a boat ramp to get the money. The claimant took his rifle with him. Randle and Madden were in a vehicle with Hayes at the boat ramp. The claimant and Glover got out of their vehicle shouting it was a robbery and telling everyone to get on to the floor. Hayes refused. The claimant fired his rifle and killed Hayes. Glover and the claimant left the scene.

26. However, the papers before the District Judge also included the first affidavit to David Barksdale, a lawyer in Florida acting on behalf of the claimant. Mr Barksdale produced his DP3: the sworn statement of Glover under examination made on 1 February 2000. It will be noted that that was the day of the second agreement between Glover and the prosecuting authorities, to which I have already referred. In that sworn statement Glover accepted that the account he had previously given to the police explaining his role in the robbery was, as he put it, not entirely true. He stated that the claimant had told him of a plan to rob Hayes and that Glover agreed to assist only if he got paid. He knew that the claimant was intending to use a gun. He explained that Hayes was shot when the claimant swung the rifle towards his face hitting him.

27. There was also before the District Judge Exhibit DB4: the deposition of Glover's examination by Mr Barksdale. In this account Glover states that the claimant shot Mr

Hayes having swung his gun hitting Hayes in the face. The claimant draws attention to inconsistencies between these statements. He also alleges that Glover had given previous accounts in which he had initially denied all knowledge of the claimant at the incident, but then alleged that Randle and the claimant had been responsible for the murder of Hayes. Then in a third version he had alleged that the claimant had carried out the murder.

28. The claimant also draws attention to the evidence of Mr Randle and Mr Madden. It is said that Mr Randle made two depositions. In his second deposition, when questioned by the claimant's lawyers in Florida, he stated that his first statement was incorrect and that he did not identify the claimant as the murderer. Moreover, he complained that he had received fresh inducements from the Assistant District Attorney to give evidence against the claimant. Mr Madden had made two depositions. At no time had Mr Madden identified the claimant as the murderer. Mr Madden testified that the murderer could not have been the claimant as the murderer was much larger in stature and height and his voice was deeper than the claimant's voice.

29. The claimant submits that in the circumstances of this case it is highly improbable that he would be convicted in the United States of America and that accordingly he should not be extradited. In my judgment this incorrectly states the test which the District Judge is required to apply. The correct test is whether the evidence would be sufficient to warrant the claimant's trial if the extradition crime had taken place within the jurisdiction of this court. The question is whether there is a prima facie case. Moreover, as Auld LJ observed in Fernandez and Others v Governor of HM Prison Brixton [2004] EWHC 2207 (Admin) at paragraph 42:

> "…District Judges should be wary before embarking on the trappings of a trial, in particular the testing of credibility of complainants by reference to alleged inconsistencies in their accounts and to their previous conduct, lest they offend the principles of comity and reciprocity that give rise to this jurisdiction and pre-empt the function of the court of the state seeking extradition."

30. It is clear from the decision of District Judge Tubbs that the court was presented at the extradition hearing with a close analysis of the various statements of Glover, and was addressed in detail on the alleged inconsistencies between the statements. Indeed these were presented on behalf of the claimant in tabular form. The District Judge concluded:

> "I find that the evidence contained in Terry Glover's affidavit establishes a prima facie case on the charges against Philip Harkins. The differences between the accounts given by Terry Glover are not fundamental, in my view, and not such as to completely undermine the evidence he can give and so justify rejecting or eliminating his evidence. The other matters raised on Mr Harkins' behalf are matters for consideration at the trial in the United States. The evidence produced would, according to the law of England and Wales, make a case requiring an answer by the defence if the proceedings were for trial here on these charges so there is sufficient

evidence to justify an order for committal."

31. While I would accept that situations may arise in which inconsistencies or contradictions between the various accounts given by the witnesses may justify or require the elimination of that evidence, as the District Judge indicated in her decision**,** to my mind the alleged contradictions in the various accounts of Glover do not fall into this category.

    I consider that the District Judge directed herself correctly as to the applicable test and having taken account of all of the evidence before her came to a conclusion which was reasonably open to her.

32. So far as the evidence of Mr Randle and Mr Madden is concerned, I am unable to see how this could have made any difference to the conclusion of the District Judge that there was a prima facie case to answer.

33. This court is, of course, concerned with a challenge to the decision of the Secretary of State. I consider that it was entirely appropriate for the Secretary of State when considering the claimant's submissions, in relation to the strength of the case against him, to have regard to the decision of the District Judge that there was a prima facie case. As Russell LJ observed in R v The Secretary of State for the Home Department, ex-parte Hagan and Croft (Divisional Court (unreported) 15 December 1993) at page 123C:

> "…there is no obligation on the part of the Home Secretary to reconsider the facts presented to the Magistrate and it is no part of his function to review the decision of the Magistrate, or for that matter in this case the decision of the Divisional Court. On the contrary, the Secretary of State is entitled to have regard to the fact that the Magistrate and the Divisional Court have found a prima facie case to exist. They are relevant factors in his decision-making process."

34. The Secretary of State, of course, has a wide discretion. He will be required to take account of other considerations. He is certainly not a rubber stamp for the District Judge. However, in the present case I am satisfied on the evidence of the decision letter itself that the Secretary of State has given careful consideration to the submissions made in relation to the strength of the case against the claimant. He was entitled to conclude that a prima facie case had been made out and that, beyond that, the determination of evidence, including questions as to the reliability of witnesses, was not a matter for him but for the court of the trial.

    The agreements with Glover

35. I turn to the plea agreements with Glover. I referred earlier in this judgment to the plea agreements entered into between the prosecution authorities and the State of Florida and the witness, Glover. We have been told by the claimant that Glover was in fact sentenced to a term of five years' probation with a term of two years house arrest to run

concurrent. The claimant contends that the manner in which the evidence of Glover was obtained was an abuse of process.

36. There was before the Magistrate an affidavit of Mr Barksdale. He states that when Angela Corey, the Assistant State Attorney, took over the case she interviewed Glover on the night of 31 January 2000. Glover was not represented by a lawyer and the interview was not recorded. Mr Barksdale states that it is "an unusual state of affairs for the prosecutor to meet in person, off the record, with an unrepresented homicide suspect." The next morning Glover made a sworn statement implicating the claimant as the murderer. Mr Barksdale also refers in his affidavit to the progress of the proceedings against Mr Glover on a wholly distinct charge of aggravated assault with a weapon, alleged to have been committed on 13 January 2003. He states that as of the date of that affidavit, sworn on 24 June 2003, the case had been continued through several court dates without discovery being taken, or a trial being set. He suggests that the State was using the case as further leverage against Glover and that Glover hoped for leniency on the new case if he testified against the claimant in the homicide case.

37. In these circumstances the claimant submits, first, that the affidavit of Glover should not have been admitted on the extradition application. In particular, it is said that it should have been excluded under section 78 of the Police and Criminal Evidence Act 1984. Secondly, he submits that the Secretary of State should have declined to extradite him on the basis of evidence which has been obtained by means which constitute an abuse of process.

38. The application of Section 78 of the Police and Criminal Evidence Act 1984 to extradition proceedings seems to be a moot point. The differing views are expressed by Lord Hoffmann in R v Governor of Brixton Prison, ex parte Levin (1997) AC 741 at pages 747G to 748F and Lord Woolf CJ in Wellington v Governor of HM Prison Belmarsh [2004] EWHC 418 (Admin) paragraph 17.

39. However, I do not consider it necessary to embark on a consideration of this issue for the following reasons. First, even if section 78 did apply to the proceedings before the District Judge I do not consider that the evidence of Glover should have been ruled inadmissible in those proceedings. It does not appear to me that the admission of the evidence of Glover in the committal proceedings would have had such an adverse effect on the fairness of those committal proceedings that the court ought not have to admitted it. This is not a case in which a prosecution authority relies on evidence obtained in a way which violates civilised values, such as was contemplated by Lord Hoffmann in ex-parte Levin. On the contrary, it would, in my judgment, be inappropriate, in the particular circumstances of this case, and, in particular, given the nature of the objection to the evidence in this case, to superimpose local notions of fairness by excluding the evidence in the committal proceedings. To do so would undermine the effectiveness of the treaty relations established by the United Kingdom and the international framework of extradition arrangements to which the United Kingdom is a party.

40. Secondly, the questions as to the admissibility or fairness of evidence at trial are, in general, matters for the court of the trial, in this case Florida.

41. Many decisions of English courts on extradition contain statements to the effect that such questions are for the court of the requesting state. Thus, in R v (Kashamu) v Governor of Brixton Prison [2002] QB 887 Rose LJ observed:

> "Extradition proceedings do not, nor does fairness require that they should, involve resolution of trial issues. Self-evidently, extradition contemplates trial in another jurisdiction according to the law there. It is there that questions of admissibility, adequacy of evidence and fairness of the trial itself will be addressed; and, if the Secretary of State has concerns in relation to these or other matters, it is open to him to refuse to order a fugitive's return."

Similarly Lord Woolf CJ in Wellington observed at paragraph 17(3):

> "The fairness of the use of evidence at trial is a question for the trial court, not for the committing magistrate."

42. Furthermore, there is evidence before this court that it would be open to the claimant to file a motion before the Florida court challenging the admissibility of this evidence. Moreover, it is clear from the letter dated 16 July 2003 from Mr Barksdale, for the Secretary of State, that, as would be expected, if the claimant is extradited and stands trial in Florida and if Glover's evidence is relied on by the prosecution, the claimant's counsel will argue strenuously at trial that Glover shifted the blame to the claimant in exchange for the State giving him a lenient sentence. These safeguards will be available to the claimant before the courts in Florida.

43. In these circumstances I consider that it was open to the Secretary of State to conclude that arguments in relation to the admissibility of the evidence of Glover should more appropriately be left for consideration by the courts of Florida. Moreover, for these reasons I consider that the Secretary of State was entitled to conclude that this was not a case in which the claimant's extradition is barred because the application of his return is not made in good faith in the interests of justice.

The passage of time

44. The claimant submits that the Secretary of State erred in law or acted irrationally in ordering his return notwithstanding the fact that by reason of the passage of time since he is alleged to have committed the offence it would be unjust or oppressive to return him. He contends that he would be prejudiced at his trial because of the delay which has occurred. In particular, he criticises the Secretary of State for not taking into account the passage of time before he absconded from the United States of America. Furthermore, he relies on his inability to trace his alibi witnesses. Section 12(2)(a)(ii) of the 1989 Act provides:

> "(2) Without prejudice to his general discretion as to the making of an order for the return of a person to a foreign state, Commonwealth country or colony—
>
> (a) the Secretary of State shall not make an order in the case of any

person if it appears to the Secretary of State in relation to the offence, or each of the offences, in respect of which his return is sought, that—

...

(ii) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be ..."

45. In Kakis v The Government of the Republic of Cyprus [1978] 1 WLR 779 Lord Diplock addressed the meaning of unjust and oppressive in the Fugitive Offenders Act 1967. He said:

> ""Unjust" I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.
>
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude." (782H to 783B)

These considerations apply equally under the 1989 Act.

46. I am entirely satisfied that the Secretary of State did not err in law and that he did not reach an irrational decision in concluding that it would not be unjust or oppressive to return the claimant to the United States of America, having regard to the passage of time. The passage of time from 12 July 2002, at the latest, was entirely the responsibility of the claimant. In this regard I refer to the observations of Lord Diplock in Kakis v the Government of the Republic of Cyprus, which I have cited, and the observations of Woolf LJ, as he then was, in R v Governor of Brixton, ex parte Osman (No 4) [1992] 1 All ER 579.

47. In the present case the claimant deliberately absconded knowing that he faced a murder trial. He then committed a very serious criminal offence in Scotland, which resulted in his imprisonment. The effect of paragraph 1(4) of Schedule 1 of the 1989 Act was that he could not be surrendered until after the expiration of his sentence. Furthermore, I accept that there was no culpable delay on the part of the prosecuting authorities in the United States. They acted with expedition in identifying that the claimant had fled to Scotland. The Scottish authorities were unable to trace the claimant until the accident on 25 January 2003. Accordingly the passage of time since, at the latest, 12 July 2002 is entirely attributable to the claimant and therefore he may not pray it in aid in support of his argument in relation to the effect of the passage of time.

48. The claimant criticises the Secretary of State for failing to take account of the passage of time prior to the date on which he absconded from the United States of America. However, it is clear from the evidence before the court that during this period proceedings were in train. Following the indictment and arraignment of the claimant a number of hearings took place. In his own account the claimant accepts that the case was listed on numerous occasions and that several hearings took place throughout 2000 and 2001. He even makes complaint of the impact of these hearings on his employment. In January 2002, shortly after the claimant fled from the United States, Glover was deposed on behalf of the defence. This quite clearly was not a case where the proceedings had been allowed to go to sleep.

49. In any event, I am wholly unpersuaded that the extradition of the claimant would be unjust or oppressive by reason of the passage of time. The claimant submits that the passage of time between 14 August 1999, the date of his initial arrest, and the 18 January 2002, a date which he selects as significant on the basis that on that date he received an e-mail from his lawyer informing him that he was required to attend the hearing, was such as to prejudice and render a fair trial impossible. However, this allegation is general and unparticularised. He claims that during this period crucial defence witnesses became untraceable, or would have suffered impairment in their recollection of events. However, with one exception no particulars are given of this. The exception is his submission that he had entered a new relationship with another woman, Tamika Adams, and was unable to contact Keisha Thompson, his alibi witness, and could not, as he puts it, be expected to restrict her movements owing to the delay of the prosecuting authority. However, the claimant was aware from 3 February 2000 that he faced trial on a charge of murder. In those circumstances he could reasonably be expected to maintain contact with the person he said was a vital alibi witness. No explanation has been provided as to the precise circumstances in which he lost contact with her.

50. The claimant further submits that the further period of time since he absconded from the United States of America has had the effect that every witness in the case, with the exception of the prosecution witness, will be unavailable at any trial. Here again no explanation has been provided as to why that should be the case, save that it is said that the last known address of Keisha Thompson was in New Orleans and that it is feared that she may have been a victim of the hurricane in 2005. In the event, for the reasons I have already given, I consider that it is not open to the claimant to rely on the effect of the passage of time since he absconded from the United States.

The death penalty

51. Finally, the claimant submits that the undertaking given by the requesting state that if convicted he will not be subjected to the death penalty is deficient. He submits that in these circumstances the decision of the Secretary of State to order his extradition is irrational and is an infringement of his rights under Articles 2 and 3 of the European Convention on Human Rights. Section 12(2)(b) of the 1989 Act provides in relevant part:

> (b)the Secretary of State may decide to make no order for the return of a person accused or convicted of an offence not punishable with death in Great Britain if that person could be or has been sentenced to death for that offence in the country by which the request for his return is made."

52. On 7 February 2000 the claimant was served with a notice by Angela Corey, Assistant State Attorney, to the effect that the State of Florida intended to seek the death penalty for the first-degree murder charge. The claimant was invited to provide a statement of particulars listing the mental mitigating circumstances he expected to establish in this regard. The papers lodged with the request for extradition included an affidavit by Charles Thomas Kimbrel, who was then a prosecutor for the Office of the State Attorney of the Fourth Judicial Circuit of the State of Florida with responsibility for the prosecution of Mr Harkins. It included the following statement:

> "In this case the State of Florida has withdrawn its notice of intent to seek a death penalty and is pursuing a life sentence."

53. That statement was relied on by the United States of America before the District Judge. More recently, by a diplomatic note, dated 3 June 2005, the Embassy of the United States of America communicated the following undertaking to the Foreign and Commonwealth Office in the United Kingdom:

> "The US Department of Justice has been informed by the State Attorney of the State of Florida that the death penalty will not be sought or imposed against Philip Harkins based on the assurance provided by the State Prosecutor and pursuant to Article 4 of the Extradition Treaty between the Government of the United States and the Government of the United Kingdom Great Britain and Northern Ireland and signed June 8th 1972. The Government of the United States assures the Government of the United Kingdom that the death penalty will neither be sought nor carried out upon Philip Harkins upon his extradition to the United States."

The matter was addressed by the Secretary of State in his decision letter in the following terms:

> "The Secretary of State has received an assurance from the US authorities by way of a letter dated 3 June 2005 that the State Attorney of the State of Florida had confirmed that the death penalty will not be sought or imposed against Mr Harkins. Based on the assurance provided by the

> State Prosecutor, and pursuant to Article IV of the 1972 US/UK Extradition Treaty, the US Government assured the UK Government that the death penalty will neither be sought nor carried out against Mr Harkins upon his extradition to the US. Given these assurances from the US authorities, the Secretary of State is of the opinion that an order for Mr Harkins' return to the US would not be unjust or oppressive or be in breach of the ECHR."

54. In Ahmad and Another v the Government of the United States of America [2006] EWHC 2927 (Admin), the Divisional Court considered the status of diplomatic notes. It concluded, in the light of an advisory opinion of the Permanent Court of International Justice, Advisory Opinion as to the Customs Arrangements between Germany and Austria, 5 September 1931, series A/B 41 at page 47, that international law recognises the use of diplomatic notes as a means of recording binding engagements between States. Such a note is capable of giving rise to an obligation binding in international law on the State that issues it.

55. In the present case the claimant contends that the assurance is clearly inadequate in that the diplomatic note was issued by the embassy on behalf of the Federal Government of the United States of America, whereas the prosecution will be conducted by the authorities of the State of Florida. He complains that there is no assurance from the relevant authorities in Florida. He says that the only sufficient assurance would be one from the State Governor.

56. In this regard the claimant relies on certain passages in the judgment of the European Court of Human Rights in Soering v United Kingdom, which refers to the fact that the offence charged there, being a State and not a Federal offence, comes within the jurisdiction of the State. There the Court of Human Rights drew the conclusion that no direction could by given by the Federal authorities to the State prosecuting authority.

57. The claimant also draws attention to the fact that Ahmad, where an assurance in similar terms to that in the present case was accepted by the Secretary of State, concerned the exercise of the Federal jurisdiction and not that of a State of the union. I also note in passing that Ahmad was not itself concerned with the death penalty.

58. The claimant also points to the events which gave rise to the judgments of the International Court of Justice in Breard, (Paraguay v US), 9th April 1998 and La Grande (Germany v US), judgment of 27 June 2001. On this basis the claimant submits that Florida cannot be bound by the Federal Government as to whether or not it chooses to impose or carry out the death penalty.

59. The fact that the assurance which has been provided in this case comes from the Federal Government obviously reflects the fact that Florida is not a sovereign state and it is the United States of America which has diplomatic and treaty relations with the United Kingdom. The treaty under which the extradition of the claimant is sought is a treaty between the United Kingdom and the United States of America. In these circumstances all communications relating to its operation will necessarily be between the State parties.

60. However, the claimant's submission overlooks the fact that the communication from the Federal Government makes clear that the State Attorney of the State of Florida has confirmed that the death penalty will not be sought or imposed on the claimant. That confirmation was no doubt provided specifically for the purpose of communication to the United Kingdom by the United States of America in a diplomatic note pursuant to Article 4 of the Treaty of 8 June 1972.

61. The matter does not end there. There is an assumption in extradition cases that the requesting state is acting in good faith. There is no evidence to support any suggestion that the United States of America in providing this assurance is not acting in good faith. Moreover, as Laws LJ expressed the matter in Ahmad, we are here concerned with an assurance given by a mature democracy. The United States is a State with which the United Kingdom has entered into five substantial treaties on extradition over a continuous period of more than 150 years. Over this period there is no instance of any assurance given by the United States as the requesting State pursuant to an extradition treaty having been dishonoured.

62. This court in Ahmad referred to the critical importance of the integrity of diplomatic notes. That is a view to which I should certainly subscribe. In the present case the United States authorities will be well aware of the importance attached by the Secretary of State to the assurance which he has received and will appreciate that it is on the basis of that assurance that he is prepared to order the surrender of the claimant. Moreover, the United States' authorities will be in no doubt as to the importance which this court attaches to the undertakings given.

63. In a further submission the claimant has drawn our attention to various provisions of the Florida Statute, 775.082, 921.141, 3.171:

> "775.082 (1) A person who has been convicted of a capital felony shall be punished by death if the proceedings held to determine sentence according to the procedure set forth in s.921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole."
>
> "921.141 (1)SEPARATE PROCEEDINGS ON ISSUE OF PENALTY,- Upon conviction of adjudication of guilt of a defendant of a capital felony, the court -shall conduct a separate sentence proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082."
>
> "Rule 3.171 Plea Discussions and Agreements
>
> (a) **In General**. Ultimate responsibility for sentence determination rests with the trial judge. However, the prosecuting attorney and the defense attorney, or the defendant when representing himself or herself, are encouraged to discuss and to agree on pleas that may be entered by a defendant. The discussion and agreement must be conducted with the defendant's counsel. If

the defenant represents himself or herself, all discussions between the defendant and the prosecuting attorney shall be of record.

(b) Responsibilities of the Prosecuting Attorney.

(1) A prosecuting attorney may:

(a) engage in discussions with defense counsel or a defendant who is without counsel with a view toward reaching an agreement that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense or to a lesser or related offence, the prosecuting attorney will do any of the following.

(i) abandon other charges or

(ii) make a recommendation, or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding on the trial judge; or

(ii) agree to a specific sentence; and

(b) consult with the victim, investigating officer, or other interested persons and advise the trial judge of their views during the course of plea discussions.

(2) The prosecuting attorney shall;

(a) apprise the trial judge of all material facts known to the attorney regarding the offense and the defendant's background prior to acceptance of a plea: by the trial judge; and

(b) maintain the record of direct discussions with a defendant who represents himself or herself and make the record available to the trial judge upon the entry of a plea arising from these discussions."

64. On the basis of these provisions the claimant submits that these are mandatory provisions of the law of Florida and that their effect is to require the court, following a conviction for capital murder, to proceed to determine whether the death penalty shall be applied. He submits that this is not a matter in the discretion of the prosecutor. He further submits that the Executive Government of the State of Florida does not have the power to displace the operation of these provisions, whether by an undertaking given for the purposes of a request for extradition, or otherwise. In other words, he says that there is no dispensing power which can displace the operation of these provisions and the State Attorney does not in law have the power to bind the State of Florida in the way he has purported to do.

65. These further submissions were advanced by the claimant for the first time at the hearing on 8 February 2007. In these circumstances we granted an adjournment in order to permit counsel for the Secretary of State and the United States of America to consider the matter and to respond. At the hearing before us today counsel for the Secretary of State and the United States of America have been permitted to adduce further evidence in the form of an affidavit by Mark J Borello, an Assistant State Attorney in the Fourth Judicial Circuit in the State of Florida. Mr Borello has now assumed responsibility for the prosecution of the claimant.

66. We then heard further submissions by the claimant and by counsel for the Secretary of State and the United States of America. In view of the importance which I attach to this affidavit, it is right that I should set out the relevant paragraphs in this judgment:

> "6. Contrary to the representations made by Philip Harkins, he will not be subject to the death penalty if he is convicted of first degree felony murder.
>
> 7. As Harry L Shurstein, the State Attorney of the Fourth Judicial Circuit, has informed the State authorities, the Office of the State Attorney withdrew its notice of intention to seek the death penalty and will not seek the death penalty in this case.
>
> 8. As a matter of long-standing practice the circuit court of the Fourth Judicial Circuit will not conduct a sentencing proceedings pursuant to section 921.141 Florida Statutes in cases where as here the Office of the State Attorney does not seek the death penalty. Absent such a hearing the court cannot impose the death penalty.
>
> 9. I have personally handled or supervised other Assistant State Attorneys who have handled more than 25 capital felony cases where the Office of the State Attorney did not seek the death penalty. In none of those cases did the circuit court conduct the sentencing proceedings pursuant to section 921.141.
>
> 10. Furthermore, even if the court were to conduct such a proceeding, the Office of State Attorney would not present any evidence during the proceedings since there is no mechanism by which the circuit court, or any third party could present such evidence. There will be no basis upon which the circuit court could find that there were sufficient aggravating circumstances to warrant the death penalty, as required by section 921.141(3). As a result, even if the court were to depart from long-standing practice and conduct the sentencing proceedings pursuant to section 921.141, and there will be no basis in practice or any precedents to support such a departure, the death penalty would not and could not be imposed.
>
> 11. Finally, the death penalty assurances provided by the United States in this matter are binding on the State of Florida, pursuant to Article 4 of the

Extradition Treaty between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland."

67. Mr Harkins has sought to persuade the court today that there remains a possibility that, following a conviction in Florida of first degree murder, he may still be subjected to the death penalty. He also tells us that he has discovered a reported case in Florida in which, notwithstanding the fact that the prosecution did not bring proceedings requesting the death penalty, the court nevertheless went on to consider and to apply it. Unfortunately it has not been possible to identify this case or to provide a copy to the court. Nevertheless, we are prepared to assume, and I am prepared to assume for the purposes of this judgment, that such a case exists. However, in view of the clarity of the undertakings given in this case, I am entirely satisfied that there is no real risk of Mr Harkins being subjected to the death penalty.

68. Accordingly, for the reasons that I have given, I consider that the Secretary of State was entitled to accept the diplomatic note as an effective and reliable assurance that the death penalty would not be sought or imposed in the case. He was entitled to conclude that an order for the return of the claimant to the United States Of America would not be unjust or oppressive, or constitute a breach of the claimant's rights under the European Convention on Human Rights.

Conclusion

69. For these reasons I would refuse the application for judicial review.

70. THE PRESIDENT: I cannot usefully add anything to the detailed judgment which has just been given by my Lord, with which I am entirely in agreement. For the reasons given in that judgment the application for judicial review must be refused and, as my Lord explained, the application for habeas corpus will also fail.

THE PRESIDENT: Any there any applications? Yes, Mr Harkins, I understand you want to make an application to us for leave to appeal to the House of Lords?
THE APPLICANT: That is correct, my Lord.
THE PRESIDENT: Is there anything else you want to say?
THE APPLICANT: Yes, my Lord, on the basis of the diplomatic notes and the contents of their undertaking in the affidavit from the Florida prosecutor, the language contained therein and the applicability of the Florida law itself, and the imposition of the death penalty, I would like to appeal to the House of Lords basically on the death penalty point only and on the effect of the undertaking and the offence in that regard.
THE PRESIDENT: Thank you. I am afraid, Mr Harkins, that we do not think that there is any point of law which we should certify for consideration in the House of Lords, but, in any event, we should refuse leave.
THE APPLICANT: In the case of you refusing leave where does that leave me now?
THE PRESIDENT: As far as the proceedings in this country are concerned, that is the end of the line.
THE APPLICANT: Is there no application for me, or anything that I could make to go to the House of Lords? I understand just now the case of Ahmad and Aswat before the House

of Lords their case is currently being appealed. I mean it would be very unfortunate to myself if the American authorities come and pick me up and then that case was turned around in some form of fashion in my favour as to the diplomatic notes.

THE PRESIDENT: I am sorry I cannot help you about what the consequences are of our decision in relation to how the authorities will deal with the application for extradition because I do not know. So far as the court process is concerned in this country, you have now exhausted the remedies that are available to you.

THE APPLICANT: One more question: what about the European Court of Human Rights?

THE PRESIDENT: The short answer to that is I do not know.

MISS DOBBIN: I may be able to assist on that point. It is open to persons who are in this jurisdiction to apply to the Europe court for an interim measure to prevent them being removed whilst their application is pending to the European Court of Human Rights. It is an emergency procedure which has to be done within a short time. I do not know off the top of my head what it is.

THE PRESIDENT: Thank you very much. I think you can assume that Miss Dobbin is right.

THE APPLICANT: In that respect how would I proceed? I do not know what the time limit is now for anyone to come and pick me up and for me to, my Lord, engage in this emergency procedure.

THE PRESIDENT: There is a limit you see as to what I can tell you (a) because I cannot and (b) because I do not actually know. You are acting for yourself. If I were you my strong advice would be to get in touch with the solicitors, Levys, who have been acting for you right through until the hearing before us and take their advice. That is what I would do and that is the advice I would give you. Thank you both.