The Denning Law Journal 2008 Vol 20 pp 239-246

CASE COMMENTARY

GUILTY BY ASSOCIATION?

R Ex P Raissi v Secretary of State for the Home Department, Court of Appeal, (Civil Division) [2008] All ER (D) 215 (Feb)

Bolanle Opadokun[*]

THE FACTS

The case of Lotfi Raissi, an Algerian pilot, who was denied compensation under the ex gratia scheme has been reported by many national newspapers. It is likely that we have not heard the last of it, as it is possible for the Secretary of State to appeal against the decision of the Court of Appeal to the House of Lords. The case[1] concerned a judicial review appeal application by Mr Raissi. On September 21st 2001, he was arrested in his home following a letter dated September 17th 2001, from the United States Embassy in London addressed to the Metropolitan Police asking them for information about him. The FBI believed that Raissi may have been involved in the September 11th 2001 atrocities. There was also a further request, from the United States Embassy to the United Kingdom government on September 27th 2001, to arrest Raissi for extradition purposes. It was alleged that he had given false information to the Federal Aviation Administration (FAA) when he wanted to renew his licence.

Mr Raissi was born in Algeria and is married to a French national. He was residing in the United Kingdom at the time of his arrest. In 1997, he had qualified as a commercial pilot in the United States and at the time of his arrest was a student at an aviation school in the UK undergoing training in order to obtain a European pilot licence. The information in the letter sent from the Embassy to the Metropolitan Police stated that Raissi had attended the Boeing 737 flight training at the aviation school in the spring of 2001. It also said that a named hijacker, Mr Hanjour, was also engaged in training at the aviation school at the same time as Raissi. Furthermore, it was alleged that both of them had spent considerable time on a flight simulator together. There was also a further suggestion that there was a link between a Mr Abu Doha,

[*] LLB (2008) University of Buckingham; Postgraduate student studying for the degree of LLM in International and Commercial Law.

[1] *R. Ex P Raissi v Secretary of State for the Home Department* [2008] All ER (D) 215 (Feb).

who was to be extradited for terrorism offences by the United States' government, and the appellant. The police allegedly found in Doha's address book, a telephone number which was said to be that of Mr Raissi.

Mr Raissi was detained for approximately four and half months in custody pursuant to extradition proceedings which had been initiated by the United States of America. He was later granted bail because the Crown Prosecution Service could not say whether, if at all, he would be charged with a terrorism offence. District Judge Workman, on April 24th 2002, before whom Raissi appeared, discharged all "draft extradition charges" against him. He said that the evidence showed only that the FAA 'might have dealt' with the application differently but there was insufficient evidence that the deception by Raissi was material. The detention and subsequent proceedings had a devastating effect on Raissi's life, health and his reputation. He considered that to get his 'life back together again' there was a need for vindication and a public acknowledgement that he was not a terrorist. He therefore sought compensation through the ex gratia scheme.

The ex gratia scheme was introduced in 1976 by Douglas Hurd[2] as a discretionary monetary award payable to those who had been detained in custody following either a wrongful conviction or charge resulting from exceptional circumstances, including serious default by a member of a public authority, and /or the emergence of facts which completely exonerated the detained person. This scheme was introduced in response to the requirement set out in article 14.6 of the International Covenant on Civil and Political Rights.[3] The Home Secretary on the matter said:

> "I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority. There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts that may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not however, be prepared to pay compensation simply because at the trial or on appeal the prosecution was unable to

[2] The then Home Secretary.

[3] GA Resolution 2200A (XXI) 1966. Came into force on March 23 1976.

sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."[4]

DECISION OF THE COURT OF FIRST INSTANCE

In the Raissi application, counsel for the Home Secretary maintained that the scheme did not apply to him because the conduct of prosecutions in extradition cases is a matter in the hands of the foreign government requiring extradition. The Home Secretary stated further that United Kingdom prosecuting authorities were merely acting as a solicitor. Lord Justice Auld in deciding the matter agreed with the Home Secretary that the scheme was not construed under any statute and denied Raissi's right to claim under the scheme. He said that the scheme arose from the Crown exercising its prerogative to compensate those who had been wronged under domestic law and did not extend to extradition proceedings. Auld LJ[5] did not regard "the reasonable and literate person" formula as a helpful approach for determining on an objective basis what Mr Hurd had in mind when he originally formulated the ex gratia scheme. The primary concern of the court was to determine the intention of Mr Hurd and his successor as to the reach and the potential meaning of the scheme. Auld LJ was of the view that the circumstances of the detention of the applicant did not follow on from a wrongful conviction or charge within the meaning of the ex gratia scheme[6] and in support of the Home Secretary, he did not consider that Raissi's case fell under the second limb of "exceptional circumstances." Neither did he perceive abuse of the process by the CPS, nor of the court in conducting the proceedings on the extradition charges, nor in opposing bail in reliance on instruction about the terrorism allegation. Finally, Auld LJ did not consider that Mr Raissi was completely exonerated given the outcome of the extradition proceedings which was brought by the United States. Mr Raissi responded and filed an appeal.

[4] *R. Ex P Raissi v Secretary of State for the Home Department* [2008] All ER (D) 215 (Feb) para 4.
[5] [2007] All ER (D) 278 (Feb) para 38.
[6] [2007] All ER (D) 278 (Feb) para 45.

DECISION OF THE COURT OF APPEAL

The issues before the court of Appeal were:

- Whether, as a matter of interpretation, the ex gratia scheme was capable of applying to detention in the context of extradition proceedings.

- Whether there was evidence of serious default on the part of the police and/or the Crown Prosecution Service.

- Whether, if the application failed under the serious default provision, the circumstances of the case were so exceptional that the Secretary of State ought to reconsider the application under the second paragraph of the scheme.

Lord Justice Hooper gave judgement on behalf of the Court of Appeal on the February 14th 2008. The Court of Appeal began by considering how policy statements such as the ex gratia scheme should be interpreted. They took their stand from an earlier decision in *Webb*[7] in which Lawton LJ had said that the court should not construe the scheme as if it were a statute but as a "public announcement of what the government was willing to do." This required the court to decide by employing the notion of a reasonable and literate man's understanding of the circumstances, whether an applicant should be paid compensation for personal injury caused by a crime of violence or an abuse of process? This was the same test used by the lower court in their rejection of Raissi's application. Theirs was based on their interpretation of the intention of the Minister at the time rather than on how his words would or might have been interpreted at a later date. The appeal court judges used the *Webb* text, although they accepted it could be worded and interpreted in a contemporary idiom to accommodate subsequent circumstances and cases. To assist them reach their conclusion they asked the following questions. What does the scheme mean? What is its purpose and scope? And who is the person concerned that the Minister is intending to compensate? Since the scheme was not a statutory scheme it was for the board, as a fact-finding body to apply a reasonable and literate man's understanding of the circumstances in which compensation could be paid.

Raissi's contention was that the extradition charges which he faced were a device to allow for his detention in custody whilst the United States authorities investigated whether he was involved in the 9/11 atrocities. The

[7] *R v Criminal Injuries Compensation Board, ex p Webb* [1987] QB 74, at 78.

charges he claimed were trivial and, of themselves, would never have warranted extradition proceedings or even detention in custody. He claimed that the way in which the proceedings were advanced against him amounted to a serious default by the Crown Prosecution Service (CPS) and/or officers of the Metropolitan Police. Further, the appellant contended that his four and half months detention on trivial extradition charges was a breach of Article 5 of the European Court on Human Rights (ECHR) and a device to circumnavigate the law of the UK, which otherwise would have not permitted a person being held without charge as a suspect for terrorism offences for more than 7 days (as the law then stood). As such, it was an abuse of the process of the court, which should entitle him to be compensated under the scheme.

The Court of Appeal said that the Divisional Court had adopted the wrong approach in the sense that the purpose of the scheme should not be interpreted in a legalistic manner but interpreted purposively. The appeal court observed that in extradition proceedings the defendant faced the charges in a UK court and that the purpose was to determine whether he should lose his liberty, or not. If afterwards he was not extradited as a result of serious default of a member of a public authority, the Court of Appeal said, " the wrong done to him would be indistinguishable from the wrong done to a defendant who was in custody due to a charge in a domestic criminal court."[8] In their view it would be difficult to exclude wrongful detention (resulting from the extradition process) from the scheme because the false information provided by the CPS or a police officer would to a large extent result in a miscarriage of justice and unjustifiable loss of liberty and the purpose of the scheme should include this type of situation.

On the second point of serious default, counsel for the Home Secretary submitted that there was no compelling evidence that the proceedings were brought for an 'ulterior motive.' The Home Secretary, went further, submitting that even if it was for an ulterior motive, it was not the fault of the British authorities since they were acting on behalf of the United States. The Court of Appeal concluded that the CPS's primary duty is to the court and this would include a duty to ensure that the requesting state complies with its duty of disclosure.[9] The case of *R. Ex P United States v Bow Street Magistrates Court*[10] was relied on, where the judge said, "the appropriate course for the judge to take if he has reason to believe that an abuse of process may have occurred is to call upon the judicial authority that has issued the foreign arrest warrant or the State seeking extradition in a part 2 case, for whatever

[8] Para 125.
[9] Para 139.
[10] [2006] EWHC 2256 (Admin).

information or evidence the judge requires in order to determine whether an abuse of process has occurred or not."[11] The Court of Appeal also held that the fact that a judge cannot order the requesting state to make disclosure does not exonerate the CPS from the "duty of candour and good faith" it owes to the court, particularly when the issue before the court is the lawfulness under Article 5 of the ECHR of the detention of the person whose extradition is being sought.

Lastly on the "exceptional circumstances" point, counsel for the Home Secretary argued that the appellant's case did not fall under exceptional circumstances because he had not been completely exonerated of all the charges. The Court of Appeal was of the opinion that it would be irrational for the Home Secretary to draw a distinction between charges brought in the context of extradition proceedings and one brought in the context of domestic proceedings, and that there is a need for the Home Secretary to consider a case of this kind where the substance of the charge against the appellant which resulted in his loss of liberty was that he was a terrorist, a charge of which he had been completely exonerated. They concluded that that there was a considerable body of evidence to suggest that the police and CPS were responsible for serious default and as such the ex gratia scheme must apply requiring the Home Secretary to reconsider his decision in the light of the court's ruling as to the scope of the scheme.

DISCUSSION

There are three points that emerge from this case. First, there is clearly an abuse of Article 5 of the ECHR, which provides that everyone has a right to liberty and security. Even in circumstances where the authorities are allowed to deprive someone of his or her liberty,[12] he or she is entitled to be told of the charges levelled against him or her in the manner and language he or she will understand.[13] Mr Raissi was held on extradition charges without knowing in detail what offences he was supposed to have committed. The CPS assertion that they were only acting as the legal representative of the US authorities is unsatisfactory. What is the implication of what they were saying? Does that mean US laws and actions supersede those of the UK? Even the Extradition Act 2003 allows that the extradition warrant should have among other requirements the particulars of the circumstances in which the person is allegedly to have committed the offence, including the time, and place at

[11] Ibid, at para 89.
[12] ECHR, Art 5(1)(f).
[13] ECHR, Art 5(2).

which he was alleged to have committed the offence.[14] Are the UK authorities afraid of the US to the extent of sacrificing their citizens without proper evidence that the citizen has committed the offence? Lord Anderson of Swansea during the House of Lords debate[15] on July 4th 2006 said this:

> "My Lords, does it not shriek with injustice and is it not grossly unfair that British citizens can be extradited to the US by the expedited process under the treaty, when the UK Government will have to provide prima facie evidence to the US? That is not, as my noble friend suggests, a rebalancing. Should we not have ensured at the time of negotiation that there was reciprocity in the coming into operation of the obligations? Would it not make sense and be just for us to give adequate notice to our US partners under the treaty that we intend to suspend its operation until such time as the US Senate ratifies it and puts the same obligations on their citizens as we have imposed on ours?"

The second point to consider is whether Raissi was guilty by association. One cannot but ask what the actual offence of Mr Raissi was. Was he guilty by associating with another student at the aviation school? The evidence shows that although Raissi went to the same aviation school with the alleged bombers, their training was held at different times. Even if they were in the same plane undertaking the same type of training at the same time, does that mean Raissi is automatically a bomber? The only information linking Raissi to Mr Abu was an address book with the supposed phone number of Mr Raissi. The evidence presented did not even establish the truth of this assertion.

The Court of Appeal themselves noted that Raissi's remand in custody for a considerable period in those circumstances was likely to be a breach of Article 5. They found it difficult to understand how detention for several weeks could be lawful on charges, of which the court would not have denied him release on bail. But they failed to reach a firm conclusion on this point because the CPS or police were not represented before the court. Maybe had their Lordships reached a firm conclusion, they could have also supported their judgement with the judicial remedy provided for in Article 5(5) of the 'ECHR' "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

[14] Extradition Act 2003, s 4(c).
[15] www.parliament.uk

Finally, peradventure a further appeal to the House of Lords comes down in favour of the Home Secretary that extradition charges did not fall within the scope of ex gratia scheme. What then will happen to people like Mr Raissi who are wrongly accused by the CPS? What genuine justification did the CPS have for the loss of liberty experienced by the appellant? Looking at it critically both the UK and US governments were negligent in their investigation procedure in that most of the information they provided was false and the UK government did not take reasonable steps to ascertain that the allegations were true prior to making the arrest. The Court of Appeal observed that the letter from the United States to the Metropolitan police was for the purpose of requiring the police to make discrete enquiries about Raissi but without arresting him. Also, that the extradition charges against Raissi were a means of taking him to the United States to question him about the 9/11 atrocity and not for the original non disclosure offence.