England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2008] EWCA Civ 72
Case No: C1/2007/0694/QBACF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL
14/02/2008

[Instances with:

FBI (17): 2,3,4,6,7,8,9,12

Arvinda Sambir, or
Arvinder Sambei (4): 5,9

James Lewis QC (4): 8,9,10

CPS (Crown Prosecution Service)
(104): 2,3,4,5,7,8,9,10,12,13,14,15]

B e f o r e :

MASTER OF THE ROLLS
LADY JUSTICE SMITH DBE
and
LORD JUSTICE HOOPER

Between:
The Queen on the application of Lotfi Raissi — **Appellant**
- and -
Secretary of State for the Home Department — **Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Edward Fitzgerald QC and Mr Stephen Cragg (instructed by Tuckers Solicitors) for the Appellant
Mr Khawar Qureshi QC (instructed by The Treasury Solicitors) for the Respondent
Hearing date: 5 December 2007

HTML VERSION OF JUDGMENT

LORD JUSTICE HOOPER:

This is the judgment of the court to which all members of the court have contributed.

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Introduction

1. This is an appeal in judicial review proceedings. From 28 September 2001 until 12 February 2002, the appellant, Mr Lotfi Raissi, was detained in custody pursuant to extradition proceedings initiated by the United States of America. Extradition was eventually refused. On 3 March 2004, the appellant sought compensation under an ex gratia scheme operated by the respondent, the Secretary of State for the Home Department, for the benefit of persons who have lost their liberty as the result of a miscarriage of justice. The respondent rejected the application and the appellant sought judicial review of that decision. His application failed before the Divisional Court and he now appeals to this Court.

2. On 21 September 2001, the appellant, who was then 27 years old, was arrested at his home under the Terrorism Act 2000 on suspicion of having been concerned with the World Trade Centre atrocity ("9/11") ten days earlier. Following questioning, he was 'de-arrested' seven days later and was immediately re-arrested under a provisional extradition warrant issued at the request of the United States. The warrant related to what can only be described as minor charges, for which the appellant would normally have been entitled to bail. He was remanded in custody because it was said that he was a terrorist, involved in the 9/11 atrocities and that the charges were only "holding charges". He remained in custody until 12 February 2002, a period of some 4.5 months. On that date he was granted bail contrary to the objections of the Crown Prosecution Service (the "CPS") representing the United States. He was granted bail because the CPS was unable to say whether or when he would be charged with terrorist offences. On 24 April 2002, Senior District Judge Workman ("DJ Workman") discharged the appellant in relation to all the extradition charges. According to the clerk's notes, on that occasion, the district judge said:

> "Your client appeared before me on a number of occasions when allegations of terrorism were made - the court has received no evidence at all to support that allegation."

3. The public labelling of the appellant as a terrorist by the authorities in this country, and particularly by the CPS, over a period of many months has had and continues to have, so it is said, a devastating effect on his life and on his health. He considers that, unless he receives a public acknowledgment that he is not a terrorist, he will be unable to get his "life back together again". For that reason, he has sought compensation from the respondent. As May LJ said in *The Queen on the application of Niazi and others v. SSHD* [2007] EWHC 1495 (Admin), payments under the ex gratia scheme, which had its historical origins in the 19th century, were offered in recognition of the hardship caused by a wrongful conviction or charge notwithstanding that the circumstances might give no grounds for a claim for civil damages. This appellant is unable to sue the US Government in the United States because, under the relevant legislation, that Government is not liable for any claims arising in a foreign country. The appellant has sued the Metropolitan Police in connection with his original arrest and 7 days detention and also for misfeasance in relation to an alleged failure to investigate a matter concerning a Mr Kermani (to whom reference will be made later). Those claims have been stayed pending the outcome of an investigation by the Independent Police Complaints Commission. Neither claim could result in compensation for loss of liberty between 28 September 2001 and 12 February 2002.

The Ex Gratia Scheme

4. The ex gratia compensation scheme was introduced and explained by Mr Douglas Hurd, as Home Secretary, in a statement to Parliament on 29th November 1985. Mr Hurd said:

> "There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction."
>
> *[The next passage of the Home Secretary's answer referred to his preparedness to pay compensation as required by the government's international obligations. The wording of the quoted article 14.6 of the International Covenant on Civil and Political Rights was to be very closely followed in subsequent legislation – that is section 133 of the Criminal Justice Act 1988.]*
>
> "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 sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."

We will refer to the last two paragraphs as the first and second paragraphs of the scheme.

The Claim in Summary

5. The appellant's contention is that the extradition charges which he faced were a device to enable him to be detained in custody whilst the United States authorities investigated whether he was involved in 9/11. They were trivial and, of themselves, would never have warranted extradition proceedings or detention in custody. The allegation was that these minor charges were associated with his involvement with the 9/11 atrocity which was the real charge he faced and the real reason for his loss of liberty. This was an unfounded or wrongful charge. 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.

6. Further, the appellant contended that his 4.5 months' detention on trivial extradition charges was a breach of Article 5 of the ECHR and a device to get round the law of this country which prevented him from 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.

7. The extradition proceedings were also a device, so it is submitted, to enable the United States authorities to bring the appellant back to the United States for intelligence-gathering purposes about his role and that of others in the United States. As an example of the material relied on in support of his allegation that the aim of the US authorities was to secure his presence in the US for the purposes of questioning about terrorism, the appellant relied on a report in the Washington Post for 18 December 2001 reporting an official of the Federal Bureau of Investigation (FBI) as saying, of the appellant's involvement in terrorism:

> "We put him in the category of maybe or maybe not, leaning towards probably not. Our goal is to get him back here and talk to him to find out more".

The appellant's solicitor was told by the Washington Post that the statement was made on condition of anonymity.

8. The kernel of the appellant's case on 'serious default' is that, in order to ensure that he remained in custody, the CPS made out to the courts and to the public at large that he was definitely involved in 9/11, knowing that the material available to them did not support such an allegation and/or being reckless as to its accuracy.

9. If the appellant is right in these claims then, it appears to us that it is strongly arguable that the appellant has been the victim of a serious miscarriage of justice.

10. Following the hearing before us, a significant amount of further and hitherto undisclosed material has been served by the respondent. This included further documents and submissions. The last document contained a submission dated 4 January 2008 served by the respondent in response to post-appeal hearing submissions of the appellant.

11. Amongst those documents is a CPS background note dated 31 January 2005 which was sent to the respondent at that time and in which the appellant's claims are disputed. The appellant's counsel complains about the fact that this document had not been disclosed earlier. He also makes a number of detailed criticisms about the contents to which the respondent has replied. It is not necessary for us to decide whether those criticisms are well-made. It is sufficient to say that they seem to have force and call for an answer.

The Home Secretary's Decision

12. The appellant's application was refused on 25 April 2005 and again in more detail on 12 July 2005. In brief, the Secretary of State maintained that the ex gratia scheme applies only to domestic criminal charges and criminal proceedings, not to extradition proceedings. It was said that the scheme could not apply because an extradition charge is not a charge within the meaning of the policy behind the scheme. Also, the scheme does not apply because the conduct of prosecutions in extradition cases is in the hands of the foreign government, for which the United Kingdom prosecuting authorities are merely acting as a solicitor; they bear no responsibility for the acts and omissions of their clients. Thus there could be no serious default by a UK public authority. In the alternative, it was said that, as a matter of fact, there was no serious default on the part of the police or CPS. The application was also refused under the exceptional circumstances provision on the ground that the appellant had not been completely exonerated of the charges which he had actually faced and, although it might be said that he had been exonerated of the allegation of terrorism, that had not been the charge he had faced.

Judicial Review Proceedings

13. The appellant instituted proceedings for judicial review. Ouseley J, when considering the application for permission to proceed, rejected as unarguable the suggestion of default on the part of a public authority, with the result that Mr Raissi could not qualify under paragraph 1 of the ex gratia scheme as a person who had "spent a period in custody following a wrongful … charge … [resulting] from serious default on the part of a member of a police force or of some other public authority". Ouseley J added that he did not think that it was arguable that there had been an abuse of process.

14. In the Divisional Court (Auld LJ and Wilkie J), Auld LJ noted:

> "... it seemed to me that he sought to re-open his application to proceed on the serious default ground".

Auld LJ, with whom Wilkie J agreed, went on to say that he, like Ouseley J, saw no merit in the serious default allegation.

15. Before us, Mr Fitzgerald QC for the appellant sought permission to appeal out of time the part of the judgment dealing with serious default. Mr Qureshi QC for the respondent, in written submissions made after the hearing, submitted that the application (made more than 20 months after the refusal) should not be granted. He relied upon considerations of finality and certainty. For reasons which we shall give later, we give permission to appeal and permission to apply for judicial review in respect of the serious default issue.

16. Ouseley J did grant permission on the ground that it was arguable that the ex gratia scheme applied in the extradition context in respect of a "charge", namely the "terrorist background", of which the appellant might be said to have been completely exonerated, so as to qualify as an exceptional circumstance under paragraph 2. It was, he said, arguable that "the holding charges" against Mr Raissi were not the cause of his detention, but rather "the more serious terrorist background". He decided that it was "at least arguable" that the scheme applies to extradition offences and, on the facts, that Mr Raissi should be regarded as completely exonerated of the potential charges that underlay the detention.

17. The Divisional Court dismissed the application for judicial review, holding that the ex gratia scheme did not apply to extradition proceedings. From that decision the appellant appeals to this Court.

The Factual Background- Arrest and Detention by the Police

18. We shall first set out the factual background to the claim as disclosed on the papers before us. It is necessary to do so having regard to the alternative reasons given for rejecting the claim (no serious default and no exoneration).

19. Born in Algeria, the appellant was resident in this country at the time of his arrest. He is married to a French national. The appellant had qualified in the Unites States as a commercial pilot in 1997 and was at an aviation school in this country in order obtain a European pilot licence.

20. The arrest in the early hours of 21 September 2001 followed a detailed letter of 17 September from the United States Embassy in London asking the Metropolitan Police for information about Raissi. The letter says that the FBI believed that Raissi may have been involved in 9/11.

21. The thrust of the letter was that Raissi had attended Boeing 737 flight training in the spring of 2001 at the same time as a hijacker named Hanjour and had spent considerable time on a flight simulator "during the same period the [hijacker] used the simulator." The letter also suggested that there was a link between a man called Abu Doha whose house in this country had been searched by the police (and whose extradition for terrorist offences was then being sought) and Raissi. Abu Doha's address book, so it was said, contained an entry for "Red One Dahmani" and a telephone number. "Red One Dahmani" had been identified, according to the letter, as Redouane Dahmani. The letter said that the telephone number had been identified as that of Raissi.

22. The police were asked not to alert Raissi to the US Government's interest in him. However journalists from the Sunday Times had told the appellant before he was arrested that he was wanted for questioning in connection with the events of 9/11.

23. We have now seen another letter dated 19 September 2001 from the United States Embassy in London to the Metropolitan Police. It seems to add nothing material to the issues in this appeal.

24. Following arrest, the appellant was interviewed by officers of the Metropolitan Police. An FBI agent observed the interviews from a remote location via a television link.

25. Mr Egan, solicitor for Mr Raissi, said in a later witness statement that a number of written disclosure notices were served during Raissi's interviews. A number of allegations were made. We set them out because Mr Egan claimed that he was able to contradict some of them there and then. They were, however, to be resurrected later in submissions opposing bail.

26. One allegation was that Mr Raissi had undertaken flight training with a person, Hani Hanjour, who was believed to have been on the aeroplane that crashed into the Pentagon on 9/11. During the interviews on 23 September 2001, the records of a flying school called Arizona Aviation were put to Mr Raissi as evidence to support the contention that Mr Raissi and Hanjour had both been students at the school and that on three occasions they had been at the school on the same day. It was conceded by the police and was clear from the documents (so Mr Egan stated) that, on all three occasions, the two men had flown in separate planes and were instructed by separate instructors. Hanjour's instructor could be seen to be called Mr Kalichi. According to Mr Egan, the police also acknowledged that Mr Raissi had enrolled at the school separately from Hanjour and considerably earlier. No evidence was produced to show that they had ever met.

27. In interview, it was suggested that a video image found on Raissi's computer showed him together with a man they believed to be Hanjour, the hijacker. It was clear to Mr Egan that the man said to be the hijacker was not the hijacker and he later proved that not only could it not have been the hijacker but it was in fact a cousin of Mr Raissi.

28. In the interview, it was suggested that, when the appellant's house was searched by the Metropolitan Police, a piece of paper was found in his wardrobe with the name "Dahmani Redoune" on it. It was alleged that this showed a link to Abu Doha.

29. It was also said that Mr Raissi had been seen in the company of four Arabic males at a flight school in the United States. Further it was suggested by the police that alterations had been made to the appellant's flight logbook and that certain pages were missing. Raissi was asked about how he had financed the June 2001 flight training. According to Mr Egan, Raissi explained that his mother and other members of his family had paid for it.

30. Raissi was "de-arrested" at 2.17 am on 28 September. At that time, therefore, it can be inferred that the police in this country had no reasonable cause to believe that he was a terrorist; otherwise he would have been charged. Nothing on the papers suggests that thereafter they had such reasonable cause. If they had reasonable cause, it is difficult to believe that they would not have re-arrested him when he was eventually released on bail or when he was later discharged on the extradition charges.

The Commencement of the Extradition Proceedings

31. On 27 September, the day before the appellant had to be released from the custody of the Metropolitan Police, the UK received a request from the United States Embassy that the appellant be provisionally arrested for the purpose of extradition. It was said that the appellant was wanted to stand trial on criminal charges. A warrant had been issued for his arrest. The charges related to false statements to a governmental agency. Details were given which we will set out below.

32. The UK authorities moved quickly and, on the following day, 28 September 2001, following his 'de-arrest', Raissi was immediately re-arrested on a provisional warrant issued by District Judge (Magistrates' Court) ("DJ") Evans under paragraph 5 of Schedule 1 of the Extradition Act 1989. The warrant stated that there was evidence that Raissi was accused of the offences identified in the attached sheet of three "charges". The attached sheet stated that he was accused of extradition crimes which if committed in England would amount to offences of knowingly and wilfully making a statement which was false in a material particular. There is no dispute that the crime alleged was an extradition crime.

33. The relevant English offence was one under section 5(b) of the Perjury Act 1911. Section 5(b) makes it an offence for a person knowingly and wilfully to make a statement false in a material particular in a document which a person is required to make, attest or verify. The offence is punishable with two years' imprisonment.

34. Extradition charge 1 alleged that the appellant had, on or before 19 June 2001, omitted to disclose previous surgery on a Federal Aviation Administration ("FAA") Form "that you were required to make, attest or verify by Act of Parliament." Charge 2 was similarly worded and alleged an omission to disclose "that you have been to a health care professional in the preceding three years". Charge 3 alleged the making of a statement which was false in a material particular in that the appellant had said that he had no previous criminal convictions.

35. According to the warrant, the district judge stated that he had been supplied with "such information and such evidence as would, in (*his*) opinion, justify the issue of a warrant for the arrest of a person accused of an offence in the United Kingdom".

36. We have been shown a statement made by one Michael Grabber, dated 27 September 2001 and apparently faxed to the authorities in this country at 15.35 on that day. It is to be assumed that this material was before the DJ who issued the warrant. According to this statement, Raissi, within the jurisdiction of the FAA "did knowingly and wilfully make a materially false, fictitious and fraudulent statement and representation, by not disclosing any information regarding his previous knee surgery on "a specified FAA Form" described as a medical certificate "which defendant completed and signed in violation of Title 18, United States Code, Section 1001". The detailed facts were said to be contained in an attached affidavit of probable cause. Within that affidavit, Mr Grabber explained that the FAA required an annual medical certificate to permit the appellant to use his pilot's licence. The appellant had had a pilot's licence since 1997.

37. According to the affidavit of probable cause, Michael Grabber was a Special Agent with the FBI, assigned to the division in Phoenix, Arizona. His duties were to investigate the terrorist acts that caused the collapse of the World Trade Centre in New York and the Pentagon in Virginia. He wrote:

> "On September 25 2001, I received all the pilot records for Lotfi Raissi from Special Agent Don McMullen, Federal Aviation Administration (FAA), Civil Aviation Security Division, Los Angeles, CA. A review of these records indicate that on April 5 2000, Raissi signed and completed a medical certificate application (FAA Form 8500-8) in which he advised he had knee surgery performed on December 7, 1999. On June 19, 2001, Raissi signed and completed a subsequent medical certificate application ... in which he did not disclose his previous knee surgery nor that he had been to a health professional in the last three years to have that knee surgery. This medical certificate application (FAA Form 8500-8) was then submitted to Dr John E McCarville, 4426 E. Osborn Road, Phoenix, Arizona for his flight physical.

38. It appears from this that the appellant had had knee surgery in 1999 and had disclosed that fact in his 2000 application for a medical certificate. But, it was alleged, the appellant had omitted to refer to the knee surgery in the June 2001 application. We observe that, if Raissi had committed an offence in these circumstances, it is difficult to categorise the offence as other than trivial, albeit that, in the view of the FAA Regional Flight surgeon, this was, according to the affidavit, a material misrepresentation.

39. The affidavit also stated:

> "On September 27 2001, I telephonically contacted the receptionist at the office of Dr Bowman, 8618N, 35th Avenue, Phoenix, Arizona. She advised that Dr Bowman had first seen Raissi on November 16 1999 for a consultation. Dr Bowman then performed knee surgery on Raissi's right knee on December 7 1999. Raissi then came into Dr Bowman's office for two post-op follow-up visits in 2000."

40. Thus, so it appears, the knee surgery charge and the "health professional" charge almost completely overlapped. The health professional whom the appellant had visited was apparently the surgeon who had operated on his knee.

41. The previous conviction relied on for the third charge related to the theft of a briefcase from Heathrow Terminal 3 in 1993 when the appellant was aged 19. Raissi had given a false name on his arrest for that offence. We do not know whether the conviction had been revealed by the appellant in any earlier application for a pilot's licence or in earlier applications for a medical certificate.

42. Mr Grabber's affidavit made no allegation against Raissi of involvement in terrorism, but the link was obvious. To begin with, Mr Grabber was working on the investigation of 9/11. But for the fact that the authorities wished to investigate Raissi in connection with 9/11, it seems to us most unlikely that extradition would have been sought on these charges. Of the three charges, the third appears the most serious, but is difficult to imagine that, but for the alleged terrorist connection, anything would have been done other than, perhaps, the suspension of the appellant's pilot's licence.

43. We note in passing that Mr Grabber's statement reveals that the enquiries on which the extradition request were based took place within the period in which the appellant was in police detention in London and were completed on the very day before the Metropolitan Police were obliged to release him from detention. The speed with which the extradition offences were investigated and the request made and processed is striking.

44. Paragraph 5(1)(a) of Schedule 1 of the Extradition Act 1989 empowers a magistrate to issue a warrant on receipt of an order of the Secretary of State. There was no such order in this case although we have now been provided with the request to the Secretary of State for the "provisional arrest" of the appellant.

45. Paragraph 5(1)(b) authorises the issue of what is called a provisional warrant in the circumstances there set out - circumstances which are reflected in the wording of the warrant to which we have already referred. To issue a provisional warrant, the district judge must be satisfied that the circumstances are such that a warrant of arrest should be issued immediately rather than waiting for the order of the Secretary of State. It is hard to imagine that the district judge would have thought that a provisional warrant ought to be issued immediately in respect of the non-disclosure offences. The only sensible explanation is that he decided so to do on account of the alleged terrorist association.

46. By virtue of paragraph 5(2), after he has issued a provisional warrant, the district judge must forthwith send a report to the Secretary of State with the evidence and information. We have now seen that report. The Secretary of State may "if he thinks fit order the warrant to be cancelled." It appears that the Secretary of State did not think fit. Realistically, that cannot have been because of the non-disclosure offences; it must have been because of the perceived importance of the terrorist allegation.

Court Appearance - 28 September 2001

47. Raissi appeared on 28 September at Bow Street Magistrates Court. The United States Government was represented by the CPS. The CPS sought a remand in custody for 60 days pending receipt of the formal extradition request. The 60 day period was due to expire on 27 November. What was said in support of the application to remand in custody is

important in the context of the allegation of 'serious default' by the CPS.

48. According to the clerk's notes, most of the submissions made by the CPS advocate related to the alleged terrorist background rather than the offences charged. The notes record that the advocate said that Raissi had instructed four of the five hijacker pilots. He had failed to disclose material information in order to get a pilot's licence. (In fact, as we have said, he had had a licence since 1997 but the law required him to have an annual medical certificate. The difference is perhaps semantic.) It was said that there were pages missing from his log book and that those pages related to the time that he was training the dead pilots, with whom he had conspired. As we shall see, this allegation relating to the missing pages was withdrawn in late November/early December 2001 when it was realised, so it appears, that someone had taken the log book apart for copying and had reassembled it in the wrong order.

49. According to the notes, the defence advocate protested: "These charges are a device". No formal application for bail was made.

50. That brief account from the notes was supplemented for the purposes of these proceedings with a chronology prepared on behalf of the appellant. We have no reason to think that it is inaccurate. In respect of the hearing on 28 September, it says:

> "The prosecution stated that there was telephone evidence linking the Claimant to all of the hijackers. Reference also to video evidence linking Mr Raissi to Mr Hanjour (one of the 9/11 pilots). Various newspapers quote Ms Sambir (CPS lawyer) stating that Mr Raissi's job was to ensure that the pilots were capable and trained. A Guardian Unlimited article quoted her as saying:
>
> > "It is no secret that we are looking at charges of conspiracy to murder, what we say is that Mr Raissi was in fact an instructor for four of the pilots responsible for the hijackings and the one we are particularly concerned about is the one that crashed into the Pentagon, Hani Hanjour."

51. We have seen a schedule of media stories which set out similar remarks said to have been made by Ms Sambir or Sambei (as her name is spelt in the recently disclosed background note to which we have referred). According to the background note, Ms Sambir denies having spoken to the press.

52. We have not been shown any contemporaneous document which supports the allegation made by the CPS that Raissi was involved in 9/11. The letter dated 17 September had said no more than Raissi may have been involved. Notwithstanding his "de-arrest" on 28 September, it was being said later that day that he was involved. On the face of the documents we have seen, there does not appear to have been any justification for the submissions advanced by the CPS on this first occasion.

53. According to the chronology, the appellant's advocate submitted that the allegations were not proved, that there was no justification for keeping him in custody and that the arrest was "only a device".

54. At the conclusion of the hearing on 28 September, the appellant was detained in custody.

The Law relating to Remand in Custody and Bail Applications within Extradition Proceedings

55. We interpose in this account of the extradition proceedings, an explanation of the law applicable to the question of the appellant's liberty. We do not understand this to be controversial.

56. The Bail Act 1976 applies expressly to extradition proceedings, although the right to bail applicable in 'normal' criminal proceedings enshrined in section 4(1) of the 1976 Act (subject to Schedule 1 to the Act) does not apply: section 4(2). However this appears to be of no significance because Article 5 of the ECHR applies and the Strasbourg jurisprudence imposes strict conditions before pre-trial detention can be justified: see e.g. *MacKay v. UK* (2006) *(Application no.543/03);* Blackstone's Criminal Practice, 2008 D7.25 and the Law Commission's Guide "Bail and The Human Rights Act 1998" (Law Com 269) (http://www.lawcom.gov.uk/docs/guide.pdf). By virtue of section 6 of the Human Rights Act it is unlawful for any public authority to act in a way which is incompatible with a Convention right, in this case the rights given to a detained person before trial under Article 5. In *Kashamu* [2001] EWHC 980 (Admin), Rose LJ held that Article 5 requires the judge in extradition proceedings to determine the lawfulness of detention and, relying on the speech of Lord Hope in *Ex parte Evans* (No 2) [2001] 2 AC 19, at 38, he held that detention would be unlawful if it was arbitrary because, for example, it was resorted to in bad faith or was not proportionate. It follows that DJ Workman was under a duty to consider whether detention in custody was justified notwithstanding that no application for bail was made on the 28 September.

57. For the sake of completeness while on this topic, we mention that under both the Strasbourg jurisprudence and English law, the prosecution have an obligation to disclose material relevant to an application for bail. In the words of the Law Commission in the Guide:

> *"Ex parte Lee* [1999] Cr App R 304 recognises an ongoing duty of disclosure from the time of arrest. The Court of Appeal emphasised that at the stage before committal, there are continuing obligations on the prosecutor to make such disclosure as justice and fairness may require in the particular circumstances of the case, that is, where it could reasonably be expected to assist the defence when applying for bail. This will ensure that the defendant enjoys "equality of arms" with the prosecution."

Court Appearance – 5 October 2001

58. We turn to 5 October, the next appearance, taking what happened from the chronology:

> "Unsuccessful bail application on the ground that Mr Raissi would fail to surrender. Allegations on the arrest warrant still described as "holding charges" and that he would shortly be charged with conspiracy to murder. The "lead instructor" claims were reduced to asserting that Mr Raissi had flown together with Hanjour between 1997 and 2000 on three unspecified occasions.
>
> 4. In relation to telephone contact, the allegation was reduced to the assertion that Mr Raissi and Mr Hanjour were in regular 'telephone' contact between 1997 and 2001. Reference again to video evidence linking the Claimant to Mr Hanjour."

59. It was alleged that pages had been torn out of the appellant's log book. It was said that, during the period covered by the torn pages, he and a hijacker were training together. Further, it was said that the only inference to be drawn from the huge number of flying hours recorded for Raissi was that he was training others.

60. Bail was refused. Nothing that this court has seen could be said to justify the CPS statement that the appellant was 'shortly to be charged with conspiracy to murder'.

Court Appearances – 26 October and 27 November

61. On 26 October 2001, there was a further hearing and, according to the chronology, the prosecution's stated position was as before. No bail application was made, presumably because there had been no change in circumstances.

62. The next hearing took place on 27 November. This was 60 days after arrest and detention and the formal extradition request had been received. The US Government sought an adjournment of the hearing as they had only just received the papers. They sought a remand in custody. There was before the court an affidavit from Mr Thomas Fink of the US Department of Justice, sworn on 20 November. It outlined the charges, the alleged facts and the procedural history of the case. We have now seen that affidavit. It deals only with the non-disclosure offences and says nothing about the terrorist background.

63. According to the clerk's notes, the position of the United States as advanced by the CPS in respect of remand in custody can be summarised as follows. There were substantial grounds for believing that the appellant would abscond, having regard to the nature and seriousness of the offences, his character and antecedents and the strength of the case against him. The maximum penalty for the offences of making a false statement was five years' imprisonment. The alleged (non-disclosure) offences were described but it was said that there was a continuing investigation. It was said that: "There has been an investigation, the likes of which we will never see in the UK". The court was told that eleven further counts were to be preferred alleging that the defendant conspired with Dahmani who was in custody in Arizona, to complete false immigration application forms. There was reference to Doha whose extradition from this country was being sought on the grounds of conspiracy to use weapons of mass destruction. It was claimed that one of Doha's co-conspirators had told the US that Doha was one of a cell of Algerians who had links to al-Qaeda; further that when Doha's house was searched (*in February 2001 by British police*), materials found had linked him to Dahmani. When Mr Keith (representing the appellant) asked what this material was, it was said that the linking material was a

telephone number recovered in a bag. The clerk's notes recorded: "The Government will seek to show that Raissi was trained with one of the people who flew the aircraft into the Pentagon. Raissi trained on thirty aircraft at four different flying schools." There was then reference to the theft of the briefcase in the UK in 1993 and the appellant's use of a different name on arrest. The note continued: "Raissi knows that (*sic - what?*) the investigation in the United States will uncover". "Raissi and D were, on at least one occasion, trained in the same aircraft."

64. According to the clerk's notes, Mr Keith for the appellant said:

> "Papers have not yet been served on the defence. The defendant's treatment at hands of United States Government is nothing short of outrageous. The United States Government originally opposed bail on the grounds that these were holding charges only. Bail was opposed for post September 11 considerations. Prospect of fuller charges was held out. Now that the request has been received [23 November], we know the truth. Failure to disclose a knee injury and theft in another jurisdiction. D disclosed the knee injury to other United States departments including the Department of Justice.
>
> The United States Government seeks to rely on an unspecified connection with Doha. Still no details of the persons with whom he trained. The flying log has not been received. There must be a connection between the grounds of bail and matter alleged. Cannot allege on-going investigation. The on-going investigation is not linked to charges D faces.
>
> The United States Government has had sixty days to produce evidence. Grand Juries meet in secret. The defendant did not know of the immigration allegations until today. Last time we were told Raissi and the other person (Heszler?)(*we think this must mean Hanjour)* were seen on a video image. This is no longer asserted. No charge on the flying school allegation has been made. Cannot therefore use it as an objection to bail. The defendant has strong community ties; he has never failed to surrender. £10,000 security offered. Passport will be surrendered. Condition of residence. If the defendant simply charged with two counts of perjury, he could not be? <u>There has been a grotesque abuse of this court.</u> No further evidence has been forthcoming. (Underlining added)

65. According to the notes, DJ Workman denying bail said:

> "It is alleged a terrorist connection with those concerned in the atrocity on 11 September. Although (?tenuous) I think it may deter the Defendant from attending".

Application for Bail to High Court Judge

66. The appellant applied to the High Court for bail. The application was heard by Ouseley J on 10 December, following an adjournment on 30 November to allow the appellant to respond to allegations in the affidavit of a Mr Ryan Plunkett (an employee of the FBI) dated 27 November 2001.

67. According to Mr Plunkett's affidavit:

> "Raissi is the subject of an on-going investigation into the September 11, 2001 terrorist attack … in violation of several Federal statutes, including, but not limited to providing material support to terrorists…; acts of terrorism transcending national boundaries…; the destruction of, and conspiracy to destroy, aircraft…; bombing and bombing conspiracy…; murder and conspiracy to murder officials and employees of the United States…; and air piracy".

The affidavit went on to say that the FBI had interviewed one Ahmed Ressam, an Algerian national arrested in December 1999 in the United States. After his conviction for terrorist offences, Ressam had agreed to co-operate with the Government. He had stated that he became acquainted with an individual known as Abu Doha, who was understood by Ressam to be heavily involved in the terrorist activities of an Algerian cell linked with al-Qaeda. It was said that Abu Doha had been indicted and was in custody in the United Kingdom pending his extradition.

68. On about 13 February 2001, according to the affidavit, police searched a residence in London used by Abu Doha and, amongst many other things, found a telephone number for Redouane Dahmani, namely (602) 586 9816. According to the affidavit, this number differed by only one digit (602) 58*0* 9816) from one which was "subscribed to an apartment used by Raissi between November 1996 and September 1998" at a named complex in Phoenix. According to the affidavit, in order to disguise the "true assignee" of a telephone number, terrorists are taught to change at least one digit of the number. It was said that Dahmani had used the address of the same apartment when he applied for a driver's licence.

69. On 27 November 2001, so the affidavit stated, Raissi and Dahmani were charged by a Grand Jury with making and conspiring to make false statements in Dahmani's political asylum application. Dahmani was in custody in the United States having entered that country illegally, so it was said, on 10 October 1999. We interpose to say that what this amounts to is that there is evidence that the appellant associates with Dahmani (an illegal immigrant) and that Dahmani is an associate of Doha, who is believed to be a terrorist. But it was not being said that there was any evidence that Dahmani was a terrorist.

70. According to paragraph 15 of the affidavit, one of the hijackers, Hani Hanjour, "took extensive flight training (some of which was with Raissi) which would have enabled him to take control of the flight." Paragraph 17 stated that, over several years, Hanjour continued his flight training in the Arizona area "at times and places where Raissi, an associate of Hanjour, was also undertaking training." It was stated that records showed that Raissi had enough training to qualify him as a flight instructor. "At least one employee of Arizona Aviation, a facility at which Hanjour also trained, recognised Raissi as a freelance flight instructor, who often brought two or three other Middle Eastern males with him for training."

71. In paragraph 19 of the affidavit, it was said that records of the Arizona Aviation training school showed that Hanjour was enrolled "from 29 December 1997 through 15 April 1999" and again in December 1999. Raissi was there for about six months at the beginning of 1998, for two days in September 1998, one day in October 1998 and from 3 February until 20 February 1999. Raissi was also there after Hanjour was no longer enrolled at the school. Records indicated that both Hanjour and Raissi took flight simulator training on the same days, namely 29 May 1998, 1 June 1998, 17 June 1998, 30 September 1998 and 7 October 1998. "As part of the on-going investigation, efforts are being made to determine whether it was coincidence that Raissi and Hanjour happened to take training on these five days, or whether they undertook this training in concert. Records from another aviation school (called Sawyer's) appeared to indicate that Raissi and Hanjour enrolled at that school on the same day, 23 June 2001. Hanjour remained enrolled there until about 29 June 2001 and Raissi until about 30 June 2001. Paragraph 21 of the affidavit stated:

> "Although it has not yet been determined whether Raissi and Hanjour actually trained together at [*this second school*] records do indicate that they each used the AST-300 simulator".

Also, it was said that a member of Raissi's simulator club at this second school reported that he knew Hanjour and that, in about 1999, he had attended a party at which he saw Raissi together with Hanjour.

72. The affidavit stated that the investigation of Raissi had also revealed that Hanjour, Raissi and a man named Hassan had used an aeroplane together for flight training. Hassan was a flight instructor. From about 8 March 1999 Hanjour had rented a particular aircraft and "the log books for Hanjour, Hassan and Raissi indicate that they each logged flight time on that plane that day, indicating that they trained on that plane together on that day".

73. According to paragraph 22:

> "In or about January 2001 Raissi attended an aviation school in the United Kingdom and one of the individuals familiar with him has reported that Raissi asked fellow students 'if a plane were to fly into something would it be the pilot or aircraft that did it'. Another person said that Raissi expressed bitterness towards the United States and the United Kingdom and stated that 'America's time is coming' or words to that effect. An associate of Raissi in Phoenix, Arizona had reported to the FBI that Raissi had been outspoken in his opposition to US foreign policies, particularly those towards Israel and the Palestinians. A second associate in Phoenix had reported that he was outspoken and angry concerning US foreign policy and the presence of United States troops in Saudi Arabia".

74. In paragraph 23 it was said:

> "The investigation of Raissi and his activities that <u>may</u> have been in furtherance of or ... facilitating Hanjour and his confederates is continuing. Given the secretive nature of the activities of the al Qaeda terrorist network, this investigation is complex and time-consuming. (Underlining added)

75. It should be noted that it was not being said by the US authorities that the appellant was going to be charged with any activity related to terrorism, merely that his activities required investigation.

76. According to the CPS background note there was material contradicting Mr Plunkett, namely:

> "5.8 In December 2001 it was noted by a fellow agent that some errors existed in Special Agent Plunkett's affidavit. Raissi did not enrol at Arizona Aviation until the November, and the school did not have a simulator, although they both took flight training there. It was also stated that the records at Sawyer's were unclear and it was an error to indicate that the records held there indicated that Hanjour and Raissi each used the simulator at that school. Hassan had however indicated to the FBI that both Hanjour and Raissi had both used the simulator.
>
> The noted errors appear important. We do not know if or when this material was disclosed to the appellant or the court.

77. In his affidavit in response to Mr Plunkett's affidavit, Mr Egan noted in paragraph 5 that it was now apparent that some of the matters upon which the United States Government had previously objected to bail were no longer relied upon. It was not now being said that the missing pages of the log book had any significance or that a video image on Mr Raissi's computer showed him to be in the company of Mr Hanjour.

78. In paragraph 7, Mr Egan stated:

> "At the same time, certain matters upon which the US Government continues to rely differ in the way in which they are now put. On 5 October 2001, during the bail application, it was said that Mr Raissi had flown together with Mr Hanjour on three occasions; on 27 November 2001 it was suggested that they had trained together on one occasion. Now it is said that both men took 'flight simulator training on the same days at Arizona Aviation' on five occasions. Although it is said that 'efforts are being made to determine whether it was coincidence', no evidence to demonstrate whether they did train together or, if they did, whether it was an innocent association has been produced despite the fact that it is now two months since this straightforward allegation was first raised on his arrest. I am particularly concerned as it is my belief that there is no flight simulator at Arizona Aviation at all.
>
> I note that W Ryan Plunkett asserts in paragraph 2 that Mr Raissi 'is the subject of an on-going investigation into the September 11 2001 terrorist attacks…' and gives, in paragraphs 3 to 11, an account of al Qaeda's alleged terrorist activities. However it is absolutely plain that the United States Government simply do not, and cannot, seek Mr Raissi's return in relation to any alleged terrorist activity whatsoever. The implied reference to the possibility that there may, in the future, be evidence linking Mr Raissi to those events is, in my opinion, an attempt simply to prejudice his chances of bail in relation to those relatively minor matters for which his return is actually being sought".

79. As to the allegation that Mr Raissi used a plane with Hanjour and Hassan on 8 March 1999, Mr Egan had this to say:

> "This is a disingenuous interpretation of events. Documents now disclosed by the FBI (as a result of a request made by me on Friday 30 November 2001) establish that although Mr Raissi's log book erroneously gives 8 March 1999 as the date upon which he flew in the relevant plane (the one in which Hanjour and Hassan flew, according to their own log books, on 8 March 1999), he in fact flew in that plane on 9 March 1999:
>
> Mr Hanjour's log book shows that he flew for 1½ hours on 8 March 1999, the same amount of time demonstrated on the plane's rental agreement which Mr Hanjour signed. For his part, Mr Hassan's log book confirms that he similarly was in the plane for 1½ hours that day. Indeed he has notated his logbook to show that he was flying with Mr Hanjour that day and accordingly also countersigned Mr Hanjour's log book for that day. Neither on the rental agreement or on the log books of either man is there any mention of Mr Raissi. Nor is his log book counter-signed by Mr Hassan.
>
> An examination of a second rental agreement dated 9 March 1999 shows, however, that the plane was rented the next day by Mr Samir Hariri who was Mr Raissi's student. In addition, an entry in the rental agreement shows that the plane was flown for 1.7 hours. Mr Raissi's log book also correctly shows that he flew for 1.7 hours. However, the date of that flight is erroneously given as 8 March 1999 and not 9 March 1999. Subsequent entries in the log book have not been disclosed by the FBI. There is now produced and shown to me as Exhibit RWE/3 a copy of the above records.
>
> In addition, the flight movements and manoeuvres revealed by the log book entries for 8 March 1999, in respect of both Mr Hanjour and Mr Hassan, reveal a completely different RWC destination and pattern of flying from that entered in Mr Raissi's log book for that day, thus supporting the conclusion that Mr Raissi did not in fact fly on 8 March 1999 with the other two men".

80. In paragraph 13, Mr Egan stated that he had approached the Commander of the anti-terrorist squad, asking whether it would be possible to ascertain from Mr Hassan who exactly was in the aeroplane on 8 March 1999. The Commander had replied that it was his understanding that the FBI had not spoken to Mr Hassan. That, according to Mr Egan, turned out not to be right, as he stated in paragraph 14:

> "I telephoned Mr Hassan on 2 December 2001. He told me that he had in fact been interviewed twice by the FBI and had fully co-operated with their enquiries. He confirmed to me that he had never flown a plane with both Mr Raissi and Mr Hanjour, and indeed did not know whether they even knew each other. He told me he had told this to the FBI."

81. In paragraph 16 Mr Egan wrote of the allegations that the appellant was hostile to the United States:

> "The revelation, for the first time, that Mr Raissi is said to have expressed bitterness towards the United States is one such example. These specious allegations appear to have only the weakest foundations and are clearly inconsistent with the amount of time that Mr Raissi spent in the United States (including his honeymoon). It is said that 'given the secretive nature of the activities of the al Qaeda terrorist network, this investigation is complex and time consuming'. Yet the United States Government is not seeking Mr Raissi's return on charges relating to terrorist activity. The most that is alleged is that he may have attended flight training at the same time as Mr Hanjour. So, no doubt, did many others."

82. Finally, in paragraph 17 Mr Egan said that he had made enquiries in the United States about the 11 further charges. In respect of them, he said:

> "Lastly, I have been informed of the true nature of the eleven further charges upon which Mr Raissi was charged by a grand jury on 27 November 2001. Although no indictment has been disclosed to me by the United States Government (despite the fact that reliance is placed in this bail application upon the fact of those charges), I have obtained a copy from America. It reveals that four charges (1, 2, 9, 11) concern the alleged submission by Mr Raissi and Mr Dahmani of a false asylum application on behalf of Redoune Dahmani (not Mr Raissi), while the majority of the remainder (4, 5, 6, 7, 8) simply repeat the allegation contained in one of the charges before this court, namely that he failed to disclose to the FAA the fact of his 1993 UK conviction. Charges 3 and 10 similarly allege failure to disclose the conviction on his visa application. None of the charges are relatively serious and none relate to alleged terrorist activity."

83. In refusing bail, Ouseley J said that the medical non-disclosure charges were not ones which would in normal circumstances lead to a denial of bail. He considered that the same applied to the charges that had been most recently brought by the Grand Jury in Arizona. There was nothing in them to give the court concern that Mr Raissi might not attend the extradition hearing. He then outlined what he saw as the difficulties:

> "What makes this a particularly difficult case is not the offences themselves but, first of all, the part that those offences in part are said to play or to demonstrate was played by Mr Raissi in relation to the terrorist attack in New York and Washington on 11th September, but, more particularly, Mr Gibbins says that there is an ongoing investigation which is a very complex drawing together of threads, a web of circumstantial evidence, which he contends will lead to a serious terrorist related charge, probably one of conspiracy to murder. It is that which gives the court concern."

84. It should be noted that, once again, the court had been told that the investigation would lead to a terrorism charge. The judge decided that, if there was real prospect that terrorist charges would be brought, then bail should be refused. He said:

> "Of course if there is a real prospect that charges of that nature will be brought then the inevitable conclusion is that it is very likely that the applicant will not attend the relevant proceedings and a court would have substantial grounds for believing that he would abscond. The very seriousness of the offences would lead to that."

85. We will return later to deal with that statement of principle. The judge then went on to look at the evidence to support a conclusion that there was such a real prospect. He noted how difficult was the position of Miss Malcolm who appeared for the appellant, who was complaining with justification that the appellant had been kept in custody since 21 September on the basis of allegations of association with terrorism about which the evidence was unsatisfactory but which allegations could not at present be refuted. He continued:

> "It is inevitable that a certain amount of leeway is given to somebody who is seeking to investigate a crime of that nature, both because of the nature of the crime and because of the complexity of the investigation. *(Miss Malcolm)* submits that Mr Raissi has been in custody long enough for there to be rather more produced than in fact has been, and she endeavours to meet the grouping of points raised by Mr Gibbins by pointing out a number of features of those which are not as strong as might be thought."
>
> She obviously faces the problem that a number of points which she said initially were dropped then came back, for example, the assertion that there were telephone communications between Mr Raissi and Mr Hanjour; a fresh allegation was made today that Mr Raissi had introduced Mr Hanjour, the pilot of the plane that crashed into the Pentagon, into the apartment where Mr Raissi was staying. There is very little that she can do to deal with an assertion of that sort, an assertion which is not backed up by explicit affidavit evidence but I am sure that as a key point would be."

86. It should be noted that the judge was (understandably) confident that, even though there was no explicit affidavit evidence to support one of the assertions made, such evidence must surely exist. On the basis of the evidence we have seen, his confidence was misplaced.

87. The judge then looked at the evidence said to link the appellant with terrorists. He noted that the evidence showed only that there was a link between Doha (who was believed to be a terrorist) and Dahmani who had been in custody on immigration charges and also a link between Dahmani and Raissi. He noted Miss Malcolm's submission that this did not demonstrate a link between Doha and Raissi. She had also submitted that there was no evidence that Dahmani was a terrorist; he had not been questioned about his links with Doha. Moreover, Dahmani had been released following questioning about 9/11.

88. As to the alleged links between the appellant and the hijackers, the judge analysed the evidence. By this time, the CPS had admitted that some of their previous assertions could not be right because there was in fact no simulator facility at Arizona Aviation. The judge appears to have thought that no clear conclusion could be drawn adverse to the appellant.

89. The judge then referred to the anti-American and other remarks allegedly made by Raissi. Later in his judgment he gave no weight to them, adding that "they do not sit very readily with all that is otherwise known about his background."

90. The judge then turned to the alleged missing six pages of the flight logs and noted that the allegation that the pages had been removed by the appellant had now been withdrawn; it was accepted that the pages had been photocopied and stapled in the wrong order. (We interpose that it appears that this serious allegation that the appellant had removed important pages covering the training of a hijacker had not been made by the United States authorities but by the CPS acting on its own initiative.)

91. The judge concluded that there was sufficient material for him to say that the terrorist background could not be dismissed. He relied first on the potential connection between Abu Doha and Raissi, through Dohmani. As for the flight training, the judge recognized that each individual evidential component had its weaknesses; nonetheless, he thought that the totality suggested a sequence of events which went beyond coincidence. When these two factors were considered with the appellant's failure to make commercial use of his flying qualifications, he concluded that there was 'a terrorist background here'. Thus, the judge asked himself whether, in the light of that, Raissi would fail to attend court and concluded that there were substantial grounds for thinking that he would. Bail was refused.

Further Magistrates' Court Hearings

92. On 14 December there was a further adjournment of the proceedings and a further bail application to DJ Workman. The advocate appearing on behalf of the appellant submitted that, once again, the material on which it was being alleged that he was a terrorist had been diluted. Whereas previously it was being said that the address book containing Dohmani's name had been found at Abu Doha's house, it was now being said that the house where the address book was found had some connection to Abu Doha. There had been a significant loss of a key element. It was said that the terrorist fear was theoretical and 'pure prejudice.' It was contended that it was an abuse of the court's function to use a 'holding charge'. Mr James Lewis QC for the CPS said that the telephone number in the address book was linked to an apartment used by Raissi in Arizona. He relied on the thorough examination of the evidence by Ouseley J. Mr Workman indicated his concerns about the case but said that there had only been a small change in the way the terrorism link was being presented. Bail was refused.

93. At a further hearing on 11 January 2002, Mr Keith on behalf of the appellant said that he had asked for further information from the US. If this was not provided and if his enquiries about bail were not dealt with there would be an allegation of abuse of process under Article 5 of the ECHR. Mr Keith observed that an allegation about the flight school had now been withdrawn - "each time we make an application for bail, the objections shift". The clerk's notes record that the CPS representative said: "I do not [know?] if it is the intention of the US Government to proceed on more serious matters" but continued: "There is a backcloth of terrorist activity in the United States". DJ Workman then said:

> "I am concerned that I have not been given as much information as I would have expected at this stage. You are not in a position to tell me whether the US is to proceed on serious charges?"

To that, the CPS replied: "I have no instructions to this effect". DJ Workman then said that the request to know what charges the appellant faced "seems a reasonable request" and continued:

> "If the Government are unable to give an assurance for the court, I will proceed [on the basis] that no information will be forthcoming, and deal with bail accordingly."

94. The case was adjourned to 12 February with the appellant remanded in custody. On that day, 4.5 months after the appellant's arrest on the extradition warrant, the appellant sought an adjournment so to give time for the collection of evidence from the US. The CPS did not oppose the adjournment which was granted. The CPS objected to the appellant's application for bail. The CPS representative said that the United States was not presently seeking extradition of the appellant on terrorist charges but that he continued to be the subject of an ongoing investigation regarding terrorism and if released on bail "he would abscond because of the background to the on-going investigation".

95. Mr Keith submitted that "every objection to bail has turned out to have no real foundation." He compared the various allegations made and withdrawn about the flying schools. He submitted that the link to one of the hijackers "has never been made good". As to the link with Abu Doha, it had been clear, he said, for a long time that the address book seized on 13 February 2001 did not belong to Abu Doha but to a Mr Kermani who had been interviewed by the FBI months before. On about 15 January 2002, the CPS had told the appellant's solicitors that the address book now formed no part of the case against him. There was no reason to think that the appellant would fail to attend court. He was of good family and only one conviction at age 19. He had not absconded in September although he had been told of his impending arrest by the Sunday Times, the day before it happened.

96. The clerk's notes showed that the CPS submitted that only one matter had changed, the alleged link with Doha. Doha was linked with Osama bin Laden. For 12 months, the prosecution had not known who owned the address book (described in the notes as a diary) on which the alleged link depended. It had been found in a house which the prosecution believed was Doha's. It was now accepted that the house was not Doha's but Kermani's. Although implicitly accepting that Kermani had said that the address book was his, the prosecution was still not accepting that it belonged to Kermani; they did not concede that it was not Doha's. There was to be fingerprint investigation. The notes continue:

> "Matters in bail (sic) need not be relevant to the charge. The investigation into him as a suspect weighs for more than previous convictions or FTA. The fact that he is a suspect is a compelling reason that he will not appear on the charges. It is an irresistible conclusion that given his background as a suspect, he will fail to attend."
>
> We will return later to consider the correctness of that submission. DJ Workman granted the appellant bail notwithstanding the objections of the CPS.

The Extradition Hearing

97. On 24 April 2002, DJ Workman conducted the extradition hearing; he dealt with the application on its merits. He discharged the appellant on what by then were described as eight "draft charges" which, as the district judge said, relied in different ways on the appellant's allegedly false statements that he had no previous convictions and had not visited a health professional within the last three years. The district judge found that there was a prima facie case that the appellant had completed the application form for a medical certificate and had marked the form indicating that he had no history of what the form described as 'non-traffic violations' (misdemeanours or felonies) and that he had not visited a health professional within the last three years. However, he discharged the appellant in relation to the non-disclosure of the 1993 conviction because, by virtue of the Rehabilitation of Offenders Act 1974, there was no obligation under English law to disclose this spent conviction; thus the extradition offence charged would not amount to an offence in English law. As to the health professional charges, the DJ noted that the appellant had disclosed the knee surgery in 2000 and the medical certificate had then been issued on the same date as the application form was submitted and by the same doctor as issued the certificate in 2001. He said that the evidence showed only that the FAA "might have dealt" with the application differently and that there was therefore insufficient evidence that the deception was material.

98. According to the clerk's notes DJ Workman said:

> "Your client appeared before me on a number of occasions when allegations of terrorism made- the court has received no evidence at all to support that allegation. (Underlining added)"

In response to that, Mr Lewis said that it was perfectly right that there was no evidence of terrorism before the judge but the instructions of the US Government were that the appellant was the subject of on-going investigations into the 9/11 attacks.

99. Since the dismissal of these extradition proceedings, the appellant has not been the subject of terrorism charges either in this country, in the United States or elsewhere.

The Application for Compensation under the ex Gratia Scheme

100. In the submissions to the Home Secretary for compensation dated March 2004, it was said that there was a clear abuse of the process of the court because the proceedings were being used for an ulterior purpose. A number of factors indicating that the extradition proceedings were used for an ulterior purpose were then set out: the reference to holding charges, the nature of those charges and the deliberate 'talking-up' of the evidence by the CPS. The document gave a detailed account of how the terrorist allegations developed over the period that the appellant was in custody.

101. It is not necessary to set the document out in full. However, the document's account of events over that period can be summarised as follows:

> i) In court on 28 September 2001 the CPS described Raissi as a 'lead instructor' of the five 9/11 pilots. Records available to the CPS at that time showed that in fact Raissi had flown separately from Hanjour and that Hanjour was taught by other instructors. This was confirmed by interviews of Raissi conducted by DC Stevenson. The CPS' description of Raissi was therefore not only unsupported by the available evidence, but was in fact contradicted by it;
>
> ii) However, the CPS lawyer, Ms Arvinda Sambir, went further outside court and said that Raissi's job was to ensure that the pilots were capable and trained. Again, she had no evidence to support this statement;
>
> iii) At the next hearing on 5 October 2001, the CPS modified the allegation, saying simply that Raissi had flown together with Hanjour between 1997 and 2000 on three unspecified occasions. This was also misleading. The flight records showed simply that Raissi and Hanjour may have flown on the same day, and even used the same aircraft, but not at the same time, and therefore not 'together';
>
> iv) The statement of Ryan Plunkett asserted that Hanjour, Raissi and Mr Hassan trained together in a plane on the 8 March 2001. However, Richard Egan's statement explained that the 8 March 2001 entry in Raissi's log book was a mistake and that he in fact flew on 9 March 2001. He also observed that the log book showed that the flights undertaken by Hanjour and Raissi were for different durations and involved different manoeuvres;
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> v) At the hearing on 27 November 2001, the CPS asserted that Raissi trained Hanjour at least once. However, they admitted '*there were no flight records to support the allegation*';
>
> vi) Mr Plunkett said that Raissi trained Hanjour on a flight simulator, and that they had taken flight simulator training at Arizona Aviation on the same day on five occasions.
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> vii) At the High Court Bail application on 10th December 2001, the CPS conceded there was no flight simulator at Arizona Aviation. However, they stated that there was one at Sawyer Aviation and that Hanjour and Raissi *may* have undertaken simulator training together, although the records were unclear;
>
> viii) In fact, the flight training schools records, which had been available to the CPS from the beginning of the extradition proceedings, not only did not support their case that Raissi trained Hanjour, but contradicted it by revealing Hanjour's other flight instructors. In saying the records were unclear, rather than accepting that the allegation was unsubstantiated, the CPS misled the court;
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> ix) Mr Pontin of SO13 misled Mr Egan in telling him that the FBI had not spoken to Mr Hassan, Mr. Hanjour's instructor. In fact, as Mr. Hassan informed Mr Egan shortly after his conversation with Mr Pontin, the FBI had interviewed him twice, and he had told them he had never flown a plane with Raissi *and* Hanjour. He had also said he did not even know if they knew each other;
>
> x) The CPS never conceded that Hanjour and Raissi did not fly or train together. On 12 February 2002 they asserted that only one matter had changed in their reasons for opposing bail and that was the alleged link between Raissi and Mr Abu Doha. It was implicit in this that one of their grounds of opposition – that Raissi flew with or trained Hanjour – was maintained, despite there being no supporting evidence;
>
> xi) The CPS also stated in unqualified terms (on 28 September and 5 October 2001) that there was video evidence of Raissi and Hanjour together. However, it was clear from only a cursory examination of the material that the man photographed with Raissi was not Hanjour. The CPS had produced no evidence of anyone saying that the other man was Hanjour. Mr Egan explained in his statement of 28 November 2001 that the man was Raissi's cousin. Nonetheless, the CPS continued to maintain at the High Court bail application that it was Hanjour.
>
> xii) It is plain that the CPS neither produced nor possessed any evidence of any kind that showed that Raissi had trained Hanjour or any of the other hijackers.
>
> xiii) The broader allegation made by the CPS on 28 September 2001 of a general link between Raissi and the hijackers was also unsupported by the evidence. On 5 and 26 October 2001, and at the High Court bail hearings, they said simply that Raissi regularly telephoned Hanjour and that they travelled together. In fact Raissi's telephone bills, which the CPS had in its possession, indicated no contact at all with Mr Hanjour. No other evidence was provided to support any of these assertions;
>
> xiv) As for the alleged link between Raissi and Abu Doha, this was based on the misleading impression given by Mr Plunkett that an address book was found at a property in London belonging to Abu Doha, and contained a telephone number of a flatmate of Raissi. There was an implication in Mr. Plunkett's statement that the book belonged to Abu Doha. In fact, the tenant of the property in question was Mr Abdelaziz Kermani, who subsequently gave evidence that the address book was his, and that that would have been apparent to anyone recovering it. Among other things, it had his Home Office reference number on the front of it, was in a locked brief case in his bedroom, and was with his British and Algerian driving licences, his Algerian ID card and correspondence addressed to him;
>
> xv) The Metropolitan Police and the CPS were aware of the evidence strongly suggesting the address book belonged to Kermani, not Abu Doha. The misrepresentation of the book as providing a link between Raissi and Abu Doha must have arisen from the actions of either or both of those authorities;

102. The document then summarised the conduct of the police and CPS which was to form the basis of the allegation of serious default:

> i) It was not plausible for the CPS and the Metropolitan Police to assert that before interviewing Kermani they had inferred that the address book belonged to Abu Doha. The fact that the book had Kermani's Home Office reference number on the front, as well as the other circumstances in which it was found, pointed strongly

to it belonging to Kermani. If, despite these indicators, there was any doubt about Kermani's ownership, it was surprising that he was not questioned at an earlier stage (the book had been discovered between February 2000 and February 2001);

ii) The CPS' contention that the book had been found at the premises of Abu Doha, who was suspected of links to the Al-Qaeda network, and was awaiting extradition to the US on terrorism charges, became a main plank of their objections to bail. In the absence of disclosure, the best the Defence could do about the allegation was to argue that it was irrelevant;

iii) The possibility of a link with Abu Doha (otherwise known as Makalouf) was one of the two factors stated by District Judge Workman as supporting his decision to reject bail on 27 November 2001 (the other factor being "Hezler", or Hanjour). Ouseley J's reasons for rejecting bail on 10th December 2001 were similar. However, Mr James Lewis QC admitted to Mr Egan subsequently that Mr Plunkett's affidavit was wrong in that the address book was not found at Abu Doha's address, but at a house used by him. The Defence made a further bail application on 14 December 2001 on the basis that this admission gave rise to a change of circumstances. The application failed;

iv) On 25 January 2002, in the course of attempting to gain inspection of the book, Mr Egan was informed by DC Stevenson that the police knew of Kermani's ownership of the book from the immigration number on the front of the book. The gist of the conversation was that this had been known before Kermani was traced and interviewed. DC Stevenson subsequently informed Mr Egan that Kermani had admitted the book was his and that he had known Mr. Dhamani (whose contact details were found in the book) for some years;

v) Despite the fact that in those circumstances the ownership of the book could not be in any doubt, the CPS stated at court on 12 February 2002 that although they could not say it was Abu Doha's, they did not concede it was not his;

vi) The document concludes that the CPS initially presented the address book to the Courts as a substantial piece of evidence linking Raissi to Abu Doha in circumstances where this was not warranted on the available material. Either the CPS were misled by the Metropolitan Police and/or CPS representatives must have consciously exaggerated the state of the evidence. Further, if and in so far as the CPS were initially misled by the Metropolitan Police, by the end of January 2002 at the very latest, the true ownership of the book had been established beyond doubt and yet the CPS were still wrongly suggesting to the Court that the evidential position was unclear and that the book could belong to Doha. They must have known that this was inaccurate.

103. In conclusion, it was submitted that there had been a serious default on the part of the police and the CPS. The Home Secretary was invited to consider the application for compensation. As we have said, the Home Secretary refused the application, for the reasons we summarised at paragraph 12.

104. In an undated statement accompanying his application, the appellant gave a graphic and chilling account of his time in Belmarsh as an identified terrorist involved in 9/11. He suffered indignities at the hands of both fellow prisoners and prison officers. He further stated:

"The stress of the proceedings and my life in prison caused deterioration in my health. I lost weight and suffered physical and mental health problems. There were 10 court hearings. At them, in front of the world's media, allegations were made about how terrorist charges would follow relating to mass murder. I was not released on bail until 12 February 2002, almost 5 months after my initial arrest. The extradition proceedings against me did not conclude until 24 April 2002. The case was discharged by District Judge Workman on the basis that there was no case for me to answer. The district judge went on to say that throughout the proceedings no evidence had been put forward at all to support the allegation of terrorism. Despite this the prosecution barrister said that I continued to be the subject of their investigations which again made it look like I was guilty.

My personal and professional life has been ruined by the ordeal I was put through. It is unlikely that I will now ever be able to work as a commercial airline pilot; a dream that my family invested in when they paid for my training. My mental health and relationship with my family and wife also suffered because of what I went through. In many people's minds I am still seen as a terrorist linked to 9/11. I cannot travel abroad except to Algeria and even when I have done this, I have been stopped and questioned because of who I am at British airports. It is important that I am formally cleared of the allegations made about me and I receive restitution to enable me to get my life back together again.

105. As we have said, the application was refused and the application for judicial review failed.

The Appeal to this Court

106. The issues arising in this court are first whether, as a matter of interpretation, the ex gratia scheme is capable of applying to detention in the context of extradition proceedings or is limited to detention following wrongful conviction or charges under domestic law. If, as the Divisional Court held, it does not apply to extradition proceedings, that is an end to the matter. If it does, the second issue is whether there is evidence of serious default on the part of the Metropolitan Police and/or the CPS which the Home Secretary ought to consider. Ouseley J was of the view that this point was unarguable. We have given permission for the point to be reopened. The third issue is whether (if the application fails under the serious default provision) the circumstances of this case are so exceptional that the Home Secretary ought to reconsider the application under the second paragraph of the scheme.

Scope of the Scheme – Interpretation

107. We start with the issue of how policy statements such as this ex gratia scheme should be interpreted.

108. In *The Queen on the application of Daghir & Ors) v SSHD* [2004] EWHC Admin 243, which raised a number of issues concerning this *ex gratia* scheme, said:

24. It is agreed that the appropriate test (*for interpretation)* is to be found in a passage in the judgment of Lawton LJ in *R v Criminal Injuries Compensation Board, Ex parte Webb* [1987] QB, 74, 78 (approved by Dyson J in *R v Criminal Injuries Compensation Board, Ex parte K and Another* [1998] 1 WLR 1458 at 1462:

"The government has made funds available for the payment of compensation without being under a statutory duty to do so. It follows, in my judgment, that the court should not construe this scheme as if it were a statute but as a public announcement of what the government was willing to do. This entails the court deciding what would be a reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation for personal injury caused by a crime of violence."

109. I pointed out that in *Fitzpatrick v. Sterling Housing Association Ltd* [1994] 4 All ER 705, Lord Slynn had said, in relation to the interpretation of a word in the Rent Act that the ordinary person test "tended to bedevil this area of he law". He also said:

34. In the Court of Appeal (17th May 1994) [*R v SSHD ex parte Bateman and Howse*] Sir Thomas Bingham MR appears to have approached the issue by asking himself whether the interpretation adopted by the Secretary of State was one that he was reasonably entitled to reach. Mr Keith for the defendant does not seek to uphold today that method of determining the meaning of the 1985 statement.

110. Notwithstanding that concession by the respondent in *Daghir* and the agreed adoption of the *Webb* test in *The Queen on the application of Grecian & Ors v v SSHD* [2004] 3 December, CO/5706/02, at para 15, the respondent before the Divisional Court submitted that the Webb test was no longer to be applied in the light of *In re*

McFarland [2004] 1 WLR 1289. It was and is submitted that it is for the minister to decide to what his policy applies and what his policy means and provided that his interpretation is one which a reasonable minister could reach then that interpretation will be upheld by the courts. The adoption of the suggested test is not based on what could be described as a quibble with the 'ordinary person' test. It is a completely different test.

111. The Divisional Court accepted Mr Qureshi's submissions and rejected the *Webb* interpretation. Auld LJ concluded:

28. … A court should only intervene on an issue as to the reach and meaning of a policy where a minister, in his application and/or interpretation of it, strays outside the reasonable range of meaning, or where there is an ambiguity, in which considerations of law may or may not point in one direction rather than another, as

Brooke LJ suggested in *Woods,* at 968.

112. Auld LJ's conclusion was based upon his consideration of *McFarland.* At paragraph 27, Auld LJ said:

> "27. … *McFarland* is important because it focuses on the intention of the minister at the time of articulating his policy rather than on how his words would or might have been interpreted at a later date in the light of developments in the law. Their Lordships held by a majority (Lord Steyn dissenting on this issue) that a magistrate was not a member of a public authority within the meaning of the scheme since, at the date of the Home Secretary's statement of it in 1985, judges and magistrates would not have been so regarded. Three of their Lordships in the majority, Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe, appear to have looked at the question as a matter of the intention of Mr Douglas Hurd when enunciating the scheme in 1985 (see paragraphs 13, 15, 44 and 45).

113. *McFarland* concerned the meaning of the expression "public authority". A number of previous cases had decided, without using the reasonable meaning approach, that the expression "public authority" did not include the judiciary. Lord Bingham, having referred to those cases went on to say:

> 15. … It is in my opinion plain that when Mr Jenkins (*that is Mr Roy Jenkins, then Home Secretary*) referred in 1976 to "any action, or failure to act, by the police or other public authority" he was not meaning to refer to judges and magistrates. The same is true of Mr Hurd's reference to "serious default on the part of a member of a police force or of some other public authority". The contrary argument is, to my mind, wholly unpersuasive.

114. Lord Steyn, dissenting, held that the expression public authority did include judges, magistrates and juries. He did not agree with Lord Bingham's approach to the interpretation of the policy. He said:

> 24. Lord Bingham has observed that the Home Secretaries responsible for policy statements did not intend to include a court within the meaning of the concept of a "public authority": para 15. That I understand to be a reference to the personal views of the Home Secretaries. In my view, however, in respect of the many kinds of "soft laws" with which we are now familiar, one must bear in mind that citizens are led to believe that the carefully drafted and considered statements truly represent government policy which will be observed in decision-making unless there is good reason to depart from it. It is an integral part of the working of a mature process of public administration. Such policy statements are an important source of individual rights and corresponding duties. In a fair and effective public law system such policy statements must be interpreted objectively in accordance with the language employed by the Minister. The citizen is entitled to rely on the language of the statement, seen as always in its proper context. The very reason for making the statement is to give guidance to the public. The decision-maker, here a minister, may depart from the policy but until he has done so, the citizen is entitled to ask in a court of law whether he fairly comes within the language of the publicly announced policy. That question, like all questions of interpretation, is one of law. And on such a question of law it necessarily follows that the court does not defer to the Minister: the court is bound to decide such a question for itself, paying, of course, close attention to the reasons advanced for the competing interpretations. This is not to say that policy statements must be construed like primary or subordinate legislation. It seems sensible that a broader and wholly untechnical approach should prevail. But what is involved is still an interpretative process conducted by a court which must necessarily be approached objectively and without speculation about what a particular Minister may have had in mind.

115. Lord Steyn went on to say that Lord Bingham appears to have interpreted the policy "through the lens of an earlier era". He said:

> 25. … It is now settled that legislation, primary or secondary, must be accorded an always speaking construction unless the language and structure of statute reveals an intention to impress on the statute a historic meaning.

116. We interpose to observe that this appeal is not one of those cases where it is suggested that an "always speaking construction" might lead to a different result.

117. Auld LJ also referred to the speech of Lord Scott:

> "Lord Scott of Foscote, the fourth member of the majority, while agreeing with them, went further:
>
> > "40. In making *ex gratia* payments the Home Secretary is disbursing public money. But he is not doing so pursuant to any statutory duty or statutory power. There is no statute to be construed. He is exercising a Crown prerogative…
> >
> > 41. …the scope of the courts' powers of intervention are, in my opinion, limited by the nature of the prerogative power in question. The Secretary of State for the time being is not bound by the statement of policy made by his predecessor. He is not bound to make an *ex gratia* payment to a person whose case falls within the current statement of policy and he is not bound to refuse a payment to a person whose case falls outside it. Provided the Secretary of State avoids irrationality in his decisions about who is and who is not to receive *ex gratia* payments, and provided the procedure he adopts for the decision-making process is not unfair, I find it difficult to visualise circumstances in which his decision could be held on judicial review to be an unlawful one.
> >
> > 42. …. The policy, bar irrationality, is for the Secretary of State.""

118. The issue of what is the proper test to be applied in interpreting ministerial policy statements has been considered in a very large number of cases: see Fordham, Judicial Review Handbook, 4th Ed., paragraph 29.5.10 at page 611, entitled "Meaning of Policy Guidance, whether a hard edged question". The cases cited show a range of different approaches. For example, Mr Fordham quotes Sir Thomas Bingham MR, as he then was, in *R. v Director of Rail Passenger Rail Franchising, ex parte Save Our Railways* [1996] CLC 589, at 601D:

> "… the Court cannot … in case of dispute, abdicate its responsibility to give the document its proper meaning. It means what it means. Not what anyone would like it to mean."

119. As Mr Fordham shows, in planning cases, some cited by Auld LJ, the courts have in the past tended to ask only whether the meaning attributed to the words of the policy was a reasonable one. There are similar statements in immigration cases, although the modern appellate system in which the tribunal reconsiders the appeals afresh is likely to mean that the proper interpretation of policy will be decided by the tribunal.

120. Even in planning cases the courts are not unanimous. In *The First Secretary of State & another v Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520, Sedley LJ giving the judgement of the court (sitting with Mummery and Smith LJJ) said:

> "16. ... the interpretation of policy is not a matter for the Secretary of State. What a policy means is what it says. Except in the occasional case where a policy has been ambiguously or unclearly expressed (see *R v Derbyshire CC, ex p. Woods* [1997] JPL 958), so that its maker has to amplify rather than interpret it, ministers are not entitled to thwart legitimate expectations by putting a strained or unconventional meaning on it. But what ministers do have both the power and the obligation to do - and Miss Lieven (*for the Minister)* readily acknowledged that this is her real point - is to apply their policy from case to case, keeping in balance the countervailing principles (a) that a policy is not a rule but a guide and (b) that like cases ought to be treated alike."

121. We have some doubt as to whether Lord Steyn was right to interpret Lord Bingham's words in *McFarland* as adopting the reasonable range of meanings approach. Lord Bingham, it could be said, was doing no more than interpreting the document in accordance with the presumed intent of the maker, with the courts deciding what that intent was. That is not the same as saying that the minister can decide what the maker intended and, provided that his conclusion as to what the maker intended is a rational conclusion, the courts will not interfere.

122. We have some difficulty with the reasonable meaning approach. One presumes that, if the minister has applied a meaning to some part of the policy, then the minister, without announcing any change in the policy, could not in a later case adopt another meaning, arguing that both meanings are reasonable and it is up to him or her to choose which meaning to use in any particular case. If that is right, then the reasonable meaning approach would only benefit the minister when interpreting the meaning of a particular part of the policy for the first time.

123. We have reached the conclusion that *McFarland* does not prevent this court from deciding what the policy means. To that extent we disagree with the Divisional Court. We shall use the *Webb* text, whilst accepting that it could be worded in a more modern way.

124. What does the scheme mean? What was its purpose and scope? Who was the minister intending to compensate? We have already set out its terms at paragraph 4 above. The purpose of the scheme, as set out in the first paragraph, was self-evidently to compensate those who had spent a period in custody resulting from a serious default on the part of a police officer or of some other public authority, in this case, so it is alleged, the CPS. Such a period in custody could arise in many different circumstances, detention without trial being one example. Was the policy limited to a period in custody following a wrongful conviction or charge? If for example the charge was not wrongful but the claimant had spent a period of time in custody, his bail application having only been refused as a result of the serious default of a member of a public authority (e.g. a blatant lie) would the minister have refused to pay compensation simply because the charge was not wrongful? We doubt it very much. If a person had spent a period in custody following a proper conviction but he had only been imprisoned or detained because of such a serious default, would the minister have refused to pay compensation because the conviction was not wrongful? Again we doubt it very much. Having regard to what we believe is the purpose of the scheme, it is, in our view, quite wrong to approach it in the legalistic manner adopted by the Divisional Court. It should be interpreted purposively.

125. The most obvious circumstances in which such a period in custody could arise would follow a wrongful conviction or charge in a domestic criminal court. But it does not seem to us that the reasonable and literate person would require there to be wrongful charge or, alternatively, understand the word 'charge' to be limited to a charge presented in a domestic criminal court. In extradition proceedings, the defendant faces 'charges' in a UK court. True it is that the proceedings do not determine his guilt or innocence of those charges. The purpose is to determine whether he should be extradited but an important ancillary function is to determine whether he should lose his liberty in the meantime. If the defendant is not extradited for whatever reason, but, *as the result of a serious default of a police officer or member of a public authority* he spends time in custody, the wrong done to him is indistinguishable from the wrong done to the defendant who has spent time in custody following a charge in a domestic criminal court. We consider that it is quite artificial to draw a distinction between a person who faces a criminal charge in a domestic criminal court and one who faces a charge within extradition proceedings. No ordinary and reasonable reader of the scheme would think of drawing such a distinction.

126. In our view the scheme cannot be interpreted to exclude detention which results from the serious default of the police or a public authority in the context of extradition proceedings. Extradition proceedings take place in the courts of the UK and UK judges and magistrates are required to make important decisions affecting the liberty of the defendant. If those decisions are based on false information, resulting from the serious default of a police officer or the CPS, it is entirely likely that the court's decision will result in a miscarriage of justice and unjustifiable loss of liberty. It seems to us that the purpose of the scheme must encompass such a situation. If the default is that of a UK police officer or member of UK public authority, the fact that the proceedings take place at the request of a foreign state is nothing to the point. Of course, if the default (for example the advancement of false evidence) is the responsibility of the requesting state and the CPS has no reason to doubt its accuracy, then there would be no default by a UK public authority and no reason to expect the minister to pay compensation under the scheme. But in our view, the respondent cannot reject an application under the scheme merely because it arises out of extradition proceedings rather than criminal proceedings in the domestic courts. To that extent, we differ from the view taken by the Divisional Court and conclude that the respondent's reasoning was erroneous.

127. A further issue arises as to whether the 'wrongful charge' (if there has to be one) must be one which is actually laid or one is only advanced against the defendant. In the present case, the charges laid were minor matters, relating to non-disclosure. The real charge was never laid. It was the allegation of terrorism. It was that allegation that was the reason for his loss of liberty. That can now be seen to have been a wrongful charge and it led to wrongful loss of liberty. It does not seem to us that a reasonable reader of this scheme would expect a technical distinction to be drawn between a charge which was formally laid and one which was merely alleged. He would expect that the substance of the situation would govern the result rather than its form.

Serious Default

128. In refusing the application for compensation, the respondent said that it did not appear to him that there had been any compelling evidence that the proceedings had been brought for an ulterior purpose. He noted that DJ Workman had not said anything to that effect. That was indeed so. The appellant's counsel had made it plain that, if the extradition proceedings were not dismissed on the merits, an application for a stay based on abuse of process would be made. The application for extradition was dismissed on the merits and the abuse argument was never considered. However, the Home Secretary considered that, even if there were any ulterior motive it did not follow that that this was the fault of the British authorities. Further he expressed the view that the British authorities had acted reasonably in acting on instructions in relation to the non-disclosure charges. In any event, the CPS had had no power to discontinue the extradition proceedings. It was acting as a lawyer on behalf of a foreign client. The Home Secretary said that he was satisfied that the CPS had acted in an appropriate and professional manner in line with their instructions. Their instructions were based on affidavit evidence and the investigations of the FBI. There had been no serious default by the CPS.

129. We noted earlier that Ouseley J refused permission to apply for judicial review on this issue. The Divisional Court noted that the appellant had sought to argue the point but did not formally renew his application for permission. Accordingly the court did not deal with that issue. Before us, Mr Fitzgerald sought permission to reopen the issue. Mr Qureshi submitted that the delay of some 20 months between the decision of Ouseley J rejecting the application for permission on these grounds and the application now made is fatal.

130. For reasons which we will explain in some detail in the following paragraphs, we consider that there is real merit in the appellant's contentions on serious default. The issue is also one of some importance. That being so and because the respondent cannot claim any real prejudice if the issue were to be reopened, we have concluded that the application for permission to appeal that part of the decision relating to serious default can be granted notwithstanding the 20 months delay. The appellant should have his claim considered fully notwithstanding the failure to seek permission to appeal earlier.

131. In his second letter of rejection of the appellant's application, the respondent relied on the absence of any evidence of serious default. He said that he remained of the view "that there is no compelling evidence of any ulterior purpose". The letter continued: "In particular, the suggestion that evidence linking your client to the September 11th attacks was 'talked up' is not accepted." It appears to us that the respondent must at that time have been relying on the CPS background note, which had not until very recently been disclosed either to the appellant or to the court.

132. Auld LJ, who had not seen the background note or the appellant's recent response thereto, said:

> "… on the facts as they were put to the Home Secretary, I can see no basis on which he could have taken the view that the CPS abused the process of the court in conducting the proceedings on the extradition "charges" and in opposing bail in reliance on instructions about the terrorism allegation. As Ouseley J said in paragraph 17 of his ruling refusing permission to proceed on this aspect, it is unarguable on the facts placed before the Secretary of State that he should have found that the conduct of the United States Government or CPS had surmounted the very high threshold serious default required by the scheme, or such as to amount to abuse of process."

133. Having granted permission for the appellant to argue this point, we turn to consider whether there was any evidence of serious default such as would require the respondent to reconsider his decision.

134. Mr Qureshi submitted that, in extradition proceedings, the role of the police was simply to execute the warrant on instructions. No serious default could possibly arise on their part. We would accept that, in general, that will be the role of the police in an extradition case. However, what the role of the police is in any individual case must be a question of fact depending on the circumstances. As we have already said, there is evidence of involvement of the police in the investigation of the terrorism aspects of this case, although not in respect of the extradition charges. There is also evidence that actions of the Metropolitan Police resulted in false statements being made to the courts contributing to the decision to refuse bail. We consider that, for example, the serious allegation relating to the destruction of flight records covering the period of training with hijackers (allegedly resulting from carelessness or incompetence by the Police) would be capable of amounting serious default which had a causative effect on the decision to remand in custody.

135. What about the CPS? Mr Qureshi submitted that the CPS was acting as the legal representative of the requesting state and should therefore bear no responsibility for any default. The CPS was doing no more than acting on instructions. It seems to us that, even though the CPS was acting as representative of the requesting state, that does not mean that it did not owe a duty to the UK Court. It was not suggested by Mr Qureshi that the CPS ceased to be a public authority for the purposes of section 6 of the HRA 1988 when representing the United States. We are satisfied that it was.

136. Mr Qureshi relied on a number of authorities to establish the unchallenged proposition that the CPS acts as the requesting state's solicitor. (Since the Extradition Act 2003, the role of the DPP in extradition proceedings is now governed by statute, see section 3(2) (ea) and (eb) of the Prosecution of Offences Act 1995 as amended by that Act). He relied particularly on *R v DPP, ex p Thom* (1994) 21 December, Div. Court (CO/2894/94) in which Glidewell LJ said:

> "I agree [with Miss Clare Montgomery], too, that the position of the Director in extradition proceedings is quite unlike her position in criminal proceedings in England and Wales. She is not to be regarded as the prosecutor, but as a lawyer acting on behalf of a foreign client."

137. In the Divisional Court in this case Auld LJ said:

> "48. Extradition, though the subject of domestic legislation governing its procedures, is essentially a vehicle for the extraditing state to give effect to treaty arrangements with the requesting state. As Glidewell LJ, with whom Curtis J agreed, held in *R v DPP, ex p Thom* (1994) 21 December, DC, at pp 9E – 11B of the transcript, the Court could not judicially review a decision of the Director of Public Prosecutions not to discontinue extradition proceedings because, when acting in such proceedings on behalf of the requesting state, the Director does not act as a prosecutor, but as a lawyer on behalf of a foreign client whose instructions it is generally bound to follow. In my view, and notwithstanding Mr Fitzgerald's submission to the contrary, that proposition is of wide application and not limited to the facts in *Thom* on discontinuance."

Auld LJ recognised, however, that the CPS may have a wider responsibility. Later in the same paragraph, he said:

> "There may no doubt be circumstances in which the CPS's role, not only as advocate but also in its public capacity, is engaged, say, where the liberty of the subject on an issue of bail arises. In such an instance, in the event of conflict between its instructions from the requesting state and its duty to the court on such matters, it may be that, notwithstanding the principle of comity between states to give effect to extradition treaties, the CPS in a particular case should not act unquestioningly on its instructions. If and when that occurs, it seems to me that it would be a matter for consideration by the CPS whether to withdraw rather than defy or ignore those instructions.

138. We agree with Auld LJ when he said that the CPS's duty to the court might require it not to 'act unquestioningly' on its instructions. We respectfully doubt the correctness of his statement that *Thom* is of wide application but do not need to decide the point. So far as the CPS's duty not to act unquestioningly, we disagree only with the tentative way in which Auld LJ expressed his view. We are in no doubt that, in the event of conflict between its instructions from the requesting state and its duty to the court, the CPS's primary duty is to the court. To take but one example from the facts of this case, if as is alleged, the CPS said, in opposing bail, that the appellant had trained the hijackers, when the information available to it did not support such an allegation, then that would be in breach of its duty to the court.

139. The CPS's duty to the court will also, in our view, include a duty to ensure that the requesting state complies with its duty of disclosure. The issue as to the whether the requesting state has a duty of disclosure in extradition cases has recently been considered by the Privy Council in *Knowles* [2006] UKPC 38 at paragraphs 34-35:

> "34. Some doubt has arisen concerning a requesting state's duty of disclosure in extradition cases. Giving the judgment of the Divisional Court in *R v Governor of Pentonville Prison, Ex p Lee* [1993] 1 WLR 1294, 1300, Ognall J distinguished between extradition proceedings and domestic criminal proceedings, observing that "fairness is not a criterion relevant to the function of the committing court". It was suggested in *R v Governor of HMP Brixton, Ex p Kashamu* (Divisional Court, 6 October 2000, unreported) that this observation could not stand in the light of articles 5 and 6 of the European Convention, but in *Lodhi v Governor of HMP Brixton* [2001] EWHC Admin 178, paras 108-115, Ognall J's judgment was held by another Divisional Court to remain good law. This was because it had been held by the European Commission in *Kirkwood v United Kingdom* (1984) 6 EHRR CD 373 that article 6 has no application to extradition proceedings.
>
> 36. The Board would hesitate to adopt the full breadth of Ognall J's observation. There are many respects in which extradition proceedings must, to be lawful, be fairly conducted. But a requesting state is not under any general duty of disclosure similar to that imposed on a prosecutor in English criminal proceedings. It does, however, owe the court of the requested state a duty of candour and good faith. While it is for the requesting state to decide what evidence it will rely on to seek a committal, it must in pursuance of that duty disclose evidence which destroys or very severely undermines the evidence on which it relies. It is for the party seeking to resist an order to establish a breach of duty by the requesting state. The Board would endorse the general approach laid down by Mitting J (sitting with Lord Woolf CJ in the Divisional Court) in *Wellington v Governor of HMP Belmarsh* [2004] EWHC 418 (Admin), para 26. In the present case the appellant has failed to discharge the burden lying on him." (Underlining added)

140. It must follow, in our view, that the CPS has a duty to disclose evidence about which it knows and which destroys or severely undermines the evidence on which the requesting state relies. This would also apply in the context of contested applications for bail. To take an example from the facts alleged in the present case, if the CPS did not disclose the material in its possession which cast doubt on the accuracy of the affidavit of Mr Plunkett, that would be a breach of its duty of disclosure.

141. Mr Fitzgerald submitted that these extradition proceedings were an abuse of the process of the court *ab initio*. That is relevant to the application in two ways. First, the fact that the proceedings can now be seen to have been an abuse must be relevant to the exercise of the Home Secretary's discretion. Also, if the proceedings were an abuse, that would be relevant to the question of whether there had been any serious default by the CPS, who had presented the case for the US Government. If the proceedings were an abuse *ab initio*, the CPS would be in serious default to the extent that they knew or ought to have known of the abuse. We accept that submission. In our view, the duty of the CPS to the court extends also to a duty not to take part in proceedings which it knows or ought to know are an abuse of the process of the court.

142. It is now established that a judge conducting extradition proceedings has jurisdiction to consider an allegation of abuse of process, see e.g. *Kashamu* (see above paragraph 55), *Bermingham and others* [2006] EWHC 200 (Admin) endorsed in *Tollman* [2006] EWHC 2256 (Admin), paragraph 82. In the latter case, the Divisional Court said that a judge cannot order a requesting state to make disclosure (paragraphs 85-86). The court went on to say at paragraph 89:

> "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 information or evidence the judge requires in order to determine whether an abuse of process has occurred or not."

At paragraph 92, the court said:

> "If the judge concludes that fairness requires that the material be disclosed, but the requesting authority or State is not prepared to agree to this, then the appropriate course will be for the judge to hold that fair process is impossible, that to grant the application for extradition in the circumstances would involve an abuse of process, and to discharge the person whose extradition is sought."

143. In our view, 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 detention of the person whose extradition is being sought.

144. From the documents we have seen, (and we stress those words) it seems to us clear that, in the present case, the initial intention of the United States authorities (as expressed in the letter of 17 September 2001) was that the UK police should make some preliminary discreet enquiries about the appellant, without arresting him. However, within a short time, the appellant had been arrested on suspicion of terrorism, involvement in 9/11. During the 7 day period for which he could lawfully be held without charge, a case for extradition was put together and sent to London. On 28 September, the appellant was 'de-arrested' and re-arrested on a provisional extradition warrant where the charges were of a trivial nature and were only obliquely capable of being related to any act of terrorism. On that day, 28 September, the US government sought a 60 day adjournment of proceedings and applied for a remand in custody on the ground that the appellant would be charged with an offence of terrorism connected with 9/11. Clearly, the extradition charges could not themselves justify a remand in custody. The only 'charge' which could justify such a remand was involvement in terrorism. Viewed objectively, it appears to us to be likely that the extradition proceedings were used for an ulterior purpose, namely to secure the appellant's detention in custody in order to allow time for the US authorities to provide evidence of a terrorist offence. It should be noted that it would have been unlawful for the UK police to detain the appellant any longer without evidence to justify a charge; such evidence did not exist. Auld LJ was of the view that there could be no question of an abuse of process but we must respectfully disagree. We think it almost inconceivable that the US authorities would have bothered to bring extradition proceedings on the charges alleged. We note as a matter of interest that the charges had not been brought by the grand jury when the extradition proceedings were begun. The grand jury made its decisions on 27 November, the very day on which the extradition case had to be presented in the UK court. It looks very much as though events in London were driving events in Arizona. In addition, if the quotation from the Washington Post be accurate, it would appear that at least part of the motive of the US Government behind the extradition proceedings was not to secure the appellant's attendance at a trial of the non-disclosure offences but to secure his presence in the US for the purposes of questioning about 9/11. We do not for a moment doubt the honesty of the belief of either the US Government or the CPS as to need to investigate the appellant's possible involvement in 9/11 and we fully recognise the heightened emotional atmosphere of late 2001. But having said that, it seems to us that the extradition proceedings themselves were a device to secure the appellant's presence in the US for the purpose of investigating 9/11 rather than for the purpose of putting him on trial for non-disclosure offences. We also consider that the way in which the extradition proceedings were conducted in this country, with opposition to bail based on allegations which appear unfounded in evidence amounted to an abuse of process. The proceedings were used as a device to circumvent the rule of English law that a terrorist suspect could (at that time) be held without charge for only 7 days.

145. We said that we would return to deal with the basis on which Ouseley J refused bail and the submission advanced by the CPS on several occasions including 12 February 2002. The submission advanced was to the effect that it is proper to oppose or refuse bail (where the charges themselves would not warrant a remand in custody) on the ground that there is an absconding risk because of an ongoing investigation into more serious matters. In our view, a remand in custody for a significant period of time in those circumstances is likely to be a breach of Article 5. So also would be significant pre-trial detention on so-called holding charges. Whereas a short term detention in these circumstances may be permissible (see *Christie v Leachinsky* [1947] AC 573 at pages 593 Lord Simonds and 604-5 (Lord du Parcq); also *Chalkley and another* [1998] QB 848 at page 873C-F) or a short term detention for obtaining more information may be permissible (see Law Commission's Guide paragraphs 13-15), it is difficult to see how detention for several weeks could be lawful on charges which would otherwise not have prevented release on bail. However, because Ouseley J appears to have thought that it was acceptable to refuse bail because there was a risk of absconding arising out the existence of an investigation into more serious offences which was likely to result in charges, we do not criticise the CPS for advancing that proposition. We think that the proposition is unfounded but it does not amount to serious default that it was advanced by the CPS.

146. Notwithstanding that, on the papers before us, it appears that the proceedings were brought for an ulterior motive and that the opposition to bail, based on unsubstantiated assertions, was also an abuse. It does not appear to us that the CPS can be absolved from all responsibility for this state of affairs. The facts of this case, which we have set out in some detail, show how involved the police and the CPS were in the extradition proceedings. The log book had been seized at the time of the appellant's arrest. It had, so it appears, been copied by the police or CPS in this country. It was not, so it appears, the United States authorities which had copied the pages in the wrong order with the consequence that the false and very damaging allegation was made that the parts of the log book had been destroyed which covered the period when Hanjour was being trained. It was the police in this country that had seized the address book which in fact (so it appears on the material available to us) did not belong to the alleged terrorist Abu Doha but was found in the locked briefcase of the occupant of the house, Kermani. If, as alleged, the very damaging allegation that the address book belonged to Abu Doha was false, then the primary responsibility for the falsity lay not (so it appears) with the United States authorities but with the police and/or the CPS. Likewise, if the CPS "talked-up" the strength of the case against the appellant on terrorist charges (as alleged), then that would (so it seems) be the responsibility of the CPS and not the United States authorities. If the allegations made by the appellant in these and other areas are right, they would go directly to the lawfulness of the appellant's detention under Article 5 of the ECHR.

147. In conclusion, we consider that there is a considerable body of evidence to suggest that the police and the CPS were responsible for serious defaults. Of course, we do not reach firm conclusions on these points as the CPS and Police were not represented before this court and the findings of fact are for the respondent. We have already said that, in a case where there has been serious default by the CPS or police in the context of extradition proceedings, the ex gratia scheme must apply. Having reviewed the evidence, we are firmly of the view that there is sufficient evidence of serious default to require the respondent to reconsider his decision in the light of our ruling as to the scope of the scheme. That is a sufficient basis on which to conclude that this appeal should be allowed.

Exceptional Circumstances

148. In his second letter of rejection, the respondent said that the case was not one of exceptional circumstances because the appellant had not been completely exonerated from all the charges. He noted the argument advanced that the appellant had been exonerated from the real charge which was one of terrorism. He continued:

> "As you know, the ex gratia scheme covers wrongful conviction or charge. I would reiterate that the Home Secretary's view is that it relates only to charges brought in this jurisdiction, Notwithstanding that, your client was not charged with any offences directly related to alleged terrorist activity, and the Home Secretary regards it as reasonable to consider an application only on the basis of the charges that were actually laid. It would not be right for public funds to be expended on the compensation in respect of charges which were never actually brought."

149. Mr Fitzgerald submitted to the Divisional Court that this was the wrong approach. The second paragraph of the scheme gave rise to a free-standing route to an award of compensation, not dependent upon showing that the loss of liberty had resulted from a wrongful charge or conviction. The Divisional Court dealt with that submission, although its observations were *obiter*, as it had held that detention in the context of extradition proceedings was out with the scope of the scheme.

150. Having identified the issue, Auld LJ said:

> 29. Mr Edward Fitzgerald QC, on behalf of Mr Raissi, submitted that "exceptional circumstances, where referred to in the ex gratia scheme, are a free-standing alternative to detention whether or not it follows a wrongful conviction or charge. Thus, he maintained, even if extradition proceedings, such as those here, did not involve a "charge" or could not lead to conviction in our domestic criminal justice system, nevertheless, paragraph 2 of the scheme allowed for a discretionary payment to Mr Raissi because of "exceptional circumstances". The exceptional circumstances which he suggested arise for consideration were Mr Raissi's "complete exoneration" of any culpability in the extradition proceedings and/or because those proceedings were based on comparatively trivial holding charges as a cover for detaining him on an uncharged and never evidenced allegations of terrorism. He suggested that "exceptional circumstances" in the scheme were intended to form a broad residual category for cases falling outside the need for a "charge" and "serious default on the part of a member of a … public authority" in paragraph 1 of the scheme.
>
> 30. There are two difficulties in that argument.
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> 31. The first is that the whole of the ex gratia scheme is based on the Home Secretary's acceptance in any individual case that there are exceptional circumstances, of which those mentioned in paragraphs 1 and 2 of it are examples, as this Court held in *R v SSHD, ex p Garner & Ors* (1999) 11 Admin LR 595. There is clearly scope for others. For example, in *Garner* the Court held that misconduct of judge, though he is not a public authority within paragraph 2 of the scheme, could nevertheless amount to an exceptional circumstance justifying the payment of compensation.
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> 32. The second difficulty in Mr Fitzgerald's argument is that the ex gratia scheme, on its plain intention and terms - and as explained in the April 2003 ministerial guidance set out in paragraph 6 above - applies only to detention in custody following a wrongful conviction or charge. There is thus only one "limb" to the scheme. As Mr Khawar Qureshi QC, for the Home Secretary, rhetorically asked in argument, why else does it refer when instancing complete exonerations as a an exceptional circumstance in paragraph 2, to "facts [that] may emerge at trial, or on appeal within time", and why does it distinguish it from inability "at the trial or on appeal [of] the prosecution to sustain the burden of proof beyond reasonable doubt in relation to the specific charge brought"?
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> 33. In short, as Lord Bingham observed at paragraph 4 of his speech in *Mullen*:
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> > "It is apparent from their statements that Mr Jenkins and Mr Hurd were addressing the subject of wrongful conviction and charges. … The common factor in …[wrongful conviction] cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."
>
> 34. For those reasons, I have no doubt that the ex gratia scheme applies only to exceptional circumstances arising out of a wrongful conviction or charge.

151. Auld LJ did however say, and this is helpful to the appellant:

> "58. .. [The] loss of individual liberty – four and half months of it – on comparatively trivial and, in the event, unestablished extradition "charges" and a wholly unsupported allegation of terrorism, would, it seems to me to be worthy of consideration by the Home Secretary as an exceptional circumstance under the scheme, whether or not there was fault on the part of the part of the CPS or the United States Government – but only in the event, which I would reject, of his claim falling within the scheme as detention following a wrongful charge."
>
> 59. It follows that, if, contrary to my view, the Secretary of State should or could have approached the matter by exercising his discretion one way or another on the basis of an exceptional circumstance as a free-standing consideration, it may be that there is something in Mr Fitzgerald's suggestion that he could and should have considered Mr Raissi's detention for so long to so little purpose as in itself an exceptional circumstance justifying a payment under the scheme.

152. Before us, Mr Qureshi adopted the arguments and the conclusion of Auld LJ, although of course he did not embrace Auld LJ's suggestion that, if the scheme was wide enough to embrace events occurring in the context of extradition proceedings and that the exceptional circumstances provision was free-standing, the merits of this case would warrant consideration as exceptional circumstances.

153. Mr Fitzgerald submitted, as he did before the Divisional Court, that "exceptional circumstances" is a free-standing alternative route to compensation under the scheme and that the merits of this case demanded that the Home Secretary should accede to the application.

154. In our view, the Divisional Court was right on this issue. The 'exceptional circumstances' provision in the second paragraph of the scheme cannot be read as a free-standing route, entitling an applicant to compensation for unjustified detention provided that the merits were sufficiently strong. In our view, the second paragraph must be understood to provide flexibility to grant compensation where the circumstances do not fit entirely into the requirements of the first paragraph but are akin to those requirements and are of real merit. As we have already said, it is our view that it would be irrational for the Home Secretary to draw a distinction between a charge brought in the context of extradition proceedings and one brought in the context of domestic proceedings. We have also said that we do not consider that the Home Secretary could be justified in drawing a technical distinction between a charge that was actually laid and one which was merely advanced, if as here, it was the one which was advanced which led to the detention. But, if we were wrong about the interpretation of the first paragraph, we would say that the second paragraph entitled and indeed required the Home Secretary to consider a case of this kind where the substance of the allegation or charge against the appellant which resulted in his loss of liberty was that he was a terrorist, a charge of which he has been completely exonerated.

An additional matter

155. There is an additional reason why we consider that this matter must be referred back to the respondent for further consideration. This was not the subject of argument because the appellant was unaware of the additional ground. It appears to us that when the respondent made his decision, he had before him the CPS background note, to which we have referred above. This had not been disclosed to the appellant. It was only disclosed after the hearing of the appeal before this Court. It is at least arguable that the background note is seriously flawed and that the appellant should have the opportunity to refute it.

Conclusion

156. For the reasons we have given, this appeal will be allowed and the appellant's application for compensation will be referred back to the Home Secretary for reconsideration in the light of this judgment.
