IN THE CITY OF WESTMINSTER MAGISTRATES' COURT

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

- V –

ABID NASEER

Ruling of District Judge Purdy dated 21st January 2011. Extradition request-terrorism offences:
Issue: "refoulement" i.e. absent any assurance come acquittal or concluded sentence there will not be onward removal to Pakistan without due process by U.S. Courts and there subject to torture.-section 87(2) Ex Act 2003.

Advocates: Pros: D. Perry Q.C. & Ms M. Cumberland
Def: E. Fitzgerald Q.C. & B. Cooper

1. Background.

Abid Naseer is a Requested Person by virtue of a U.S. Government Request for extradition dated 1st September 2010 and certified by the Secretary of State per S.70 Ex Act on 7th September 2010. Arrest took place at Middlesborough Police Headquarters by officers from West Yorkshire Police on 7th July 2010. This arrest was based on a provisional warrant issued by Deputy Senior District Judge Wickham. Abid Naseer is now 24 years of age being born on 15th April 1986 in his native Pakistan of which he is a national. No challenge was advanced to the procedural formalities on production before this court. Consent to extradition was not forthcoming. Abid Naseer has been in custody throughout these proceedings. The U.S. authorities seek a trial in New York City following a Grand Jury indictment from the Eastern District of New York dated 30th June 2010 alleging three counts as follows:

(i) providing material support to a foreign terrorist organisation, specifically al-Qaeda, in violation of 18 U.S.C. section 2339B (a) (i), punishable by a maximum penalty of 15 years imprisonment.

(ii) Conspiracy to provide material support to a foreign terrorist organisation, specifically al-Qaeda, in violation of 18 U.S.C. section 2339B (a) (i), punishable by a maximum penalty of 15 years imprisonment.

(iii) Conspiracy to use a destructive device during and in relation to one or more crimes of violence, specifically providing and conspiring to provide material support to a foreign terrorist organisation, in violation of 18 U.S.C. sections 924(c), (i) (B) (ii) and 924 (0), punishable by a maximum penalty of life.

The affidavit of the Prosecutor, Jeffrey Knox, – Assistant U.S. Attorney for the Eastern District of New York – dated 1st September 2010 summarises the U.S. complaints as follows (@ para 72):-

"The evidence at trial will establish that Naseer specifically provided "personnel" – himself and others… to act under the "direction and control" of al Qaeda." U.S. evidence suggested al-Qaeda ***"…attacks in the United States, England and Norway during 2009, and that communications in the e-mails about weddings, marriage, girlfriends, computers and weather were codes that referred to attacks, bomb ingredients travel documents and target sites"*** then @ para 73 ***"In addition, e-mails, surveillance and other documentary and physical evidence will show that between December 2008 and April 2009, Naseer, Rehman and their associates prepared to conduct a terrorist attack in Manchester, England – likely in the vicinity of St Anne's Square – in the middle of April 2009. Naseer received training and tasking from al Qaeda in Pakistan, and Naseer and others purchased ingredients and components for explosives, conducted reconnaissance at several possible target locations, transported reconnaissance photographs back and forth to Pakistan and maintained frequent e-mail contact with al Qaeda during the entire period."***

Material to the background is that on 9th April 2009 Abid Naseer was arrested for alleged terrorist activity by U.K. police in respect of the alleged planned Manchester bombing. No charges followed. Following the instant extradition arrest Abid Naseer's solicitors wrote to the Director of Public Prosecutions (D.P.P.) inviting him to proceed against Abid Naseer as a domestic U.K. terrorist trial. The D.P.P. has declined to accept that invitation. On 14th December 2010, the day before this hearing was fixed for oral submissions, a *letter before action* was sent to the DPP threatening judicial review proceedings if no U.K. prosecution is commenced/pursued or an explanation why such proceedings have not been instigated. On 15th December 2010 Mr Edward Fitzgerald,Q.C., applied for an adjournment of *these extradition* proceedings pending any response from the D.P.P. or the outcome of any judicial review. I refused the application. All parties were present, leading and junior counsel on both sides, three days set aside and a very substantial bundle of documents filled the court. Abid Naseer was in custody and had been for many months. Any adjournment would be on a purely speculative basis both factually and legally. The D.P.P. was obviously long since aware of the April 2009 arrest and these extradition proceedings and had had ample opportunity to commence domestic proceedings but chosen not to do so. Case law, so far as one needed it, plainly required these proceedings to continue.

2. <u>Issue.</u>

Three days of hearing time and very extensive paperwork existed on 15th December 2010. Mr David Perry, Q.C., had a 40 page 77 paragraph skeleton argument dated 13th December 2010 responding to Mr Fitzgerald's 9 page 31 page skeleton argument dated 2nd December 2010 plus substantial supporting documents. However, upon due reflection, the Defence conceded many matters, to which they had self evidently devoted great industry, could not be successfully argued before me as clear precedent, in some instances from numerous cases (including the House of Lords and European Court of Human Rights) bind **all** parties to one conclusion before **this** court. Accordingly Mr Fitzgerald asked me to *"note"* points he accepts are legally

unarguable before this court but which he *may* wish to pursue elsewhere. To those I shall return. The single point actually argued and upon which my decision is now required is an **assertion of a breach of human rights under Section 87(2) Ex Act 2003 and breach of Articles 2 and 3 ECHR** i.e. torture and/or inhuman and degrading treatment. The unusual element is that the concern is not from U.S. authorities or on U.S. soil but from those in Pakistan if deported there following acquittal or the conclusion of any sentence. This is sometimes called "refoulement". Mr Fitzgerald's skeleton argument puts the position (@ para 21) succinctly – ***"Risk of refoulement and thereafter torture and death penalty – Articles 2 and 3. The defendant faces a real risk of suffering torture and the death penalty if acquitted at trial and refouled to his home country of Pakistan."*** To this I will return.

3. <u>Procedural Requirements.</u>

Save for the substantive issue just outlined I find, for the avoidance of doubt, **all** procedural requirements of part 2 Ex Act 2003 in order unchallenged and resolved in favour of the U.S. Government. I stress guilt or innocence is not for this a court, exercising an extradition jurisdiction, but for a trial court in the appropriate country.

4. <u>Matters Unargued/Conceded but Noted at Defence Request.</u>

(i) abuse of process/forum;
(ii) extraneous considerations – S.81 Ex Act;
(iii) human rights – S.87 Ex Act:-

<u>Article 3</u> (ECHR) – pre trial and supermax conditions, life without parole.
<u>Article 5</u> (ECHR) – "imminent" introduction to mainland U.S.A. of "indefinite detention of terrorist suspects without trial".
<u>Article 6</u> (ECHR) – unfair "draconian" pre trial conditions and undue pressure to plead guilty.

5. <u>"Refoulement".</u>

Means simply "turning back". In the context of these proceedings Mr Fitzgerald's submission has already been summarised. A contention is advanced that, absent an express assurance, Abid Naseer is at real risk of eventual return to Pakistan – being a national thereof and not a US citizen- and torture or death at the hands of the Pakistan State for his actual or believed al Qaeda activities. Mr Perry makes clear no assurance from the U.S. authorities has been sought or will be. He argues such is unnecessary and inappropriate. During submissions Mr Fitzgerald honed his argument to contend, as I understood him, that Abid Naseer either faces being spirited out of the U.S.A. to Pakistan *without any recourse to due process* seeking the U.S. courts protection from his feared risks in Pakistan. Or that, even if he seeks judicial intervention, the record shows an alarming indifference by the U.S. domestic courts of protecting individuals facing such removal from the kind of intervention the U.K. courts have engaged in to ensure Convention compliance for all in this jurisdiction irrespective of origin/citizenship.

Mr Fitzgerald relies on expert reports and on two specific decisions of UK courts as a basis for this contention. Firstly the "open judgement" of the ***Special Immigration Appeals Commission*** involving *inter alia* Abid Naseer and reported on 18th May 2010

of Mitting J, sitting with Senior Immigration Judge Warr and Mr J. Daly. Secondly ***The Queen (on the Application of Adel Abul Bary and Khalid Al Fawaz v Secretary of State for the Home Department*** [2009] EWHC per Scott Baker, LJ, in which coincidentally three of the four counsel – and both leading counsel – in this case appeared. In the Special Immigration Appeals Commission ruling, after considering extensive evidence, some in closed session, Mitting, J., found @ para 32 ***"In summary… despite the restoration of a democratically elected Parliament and Government, after eight years of military rule, Pakistan remains a state dominated by its military and intelligence agencies. There is a long and well documented history of disappearances, illegal detention and of the torture and ill-treatment of those detained usually to produce information, a confession or compliance. Al Qaeda and the Taliban are now in active conflict with the Pakistan state. In 2009, there were 90 suicide bombs and 3000 killed. Anyone, such as Naseer, suspected of belonging to either would be at risk at the hands of the ISI. Legal controls are inadequate. Individuals suspected of terrorism can be held in preventative detention for up to a year subject, notionally, to three monthly review by a judicial board… To date, the Supreme Court, which has displayed a genuine interest in those who have been made to disappear, has not held a single military official accountable for abuses."*** At para 37 his Lordship held there did not exist ***"a sufficient safeguard against prohibited ill treatment for any of the appellants. For that reason, we allow Naseer's appeal on the issue of safety on return".*** So, argues Mr Fitzgerald, there is a clear factual finding of danger contrary to Articles 2 and 3 ECHR should *this* Requested Person be returned to Pakistan in current circumstances.

Turning to the second case ***Al Fawaz*** this involved persons being extradited to the USA under the heading ***"refoulement"*** @ para 78 Scott Baker, LJ, set out the position:

"The claimants contend there is a real risk that they would be removed from the United States to another country in particular Egypt or Saudi Arabia where the death penalty might be imposed or they might be tortured. The Secretary of State's response is that the United States Government has given an assurance that if acquitted or after serving their terms of imprisonment they will return the claimants to the United Kingdom should they so request". His Lordship concluded @ para 82 ***"In my view it is stretching imagination to breaking point to conclude that there is a real risk that following return to this country in pursuance of the undertaking the claimants will immediately be returned to the United States without any investigation by the Courts in this country and then sent to Egypt or Saudi Arabia".*** That court felt ***"complete confidence"*** the United States Government would honour assurances given.

Lastly Mr Fitzgerald invites consideration of the official Canadian Government Enquiry by a duly appointed Commissioner entitled ***"Report of the Events Relating to Maher Avar".*** This individual, a Canadian citizen of Syrian birth, was detained at John F Kennedy airport in New York, U.S.A. on 26th September 2002, held by U.S. officials for 12 days before being ***"removed against his will to Syria… where he was imprisoned for nearly a year, interrogated, tortured and held in degrading and inhumane conditions"*** (page 9) before returning to Canada on 5th October 2003 having been neither tried nor convicted of any offence. Reliance is placed on the

factual findings as evidence of the U.S. attitude to removal and indifferent or inadequate judicial intervention or control.

6. Conclusion.

I have reviewed **all the material provided** and weighed learned counsels' able submissions. Mr Fitzgerald's contention is clear, the U.S. courts, as he put it, *"from the Supreme Court down"* have demonstrated a *"reluctance"* to protect non US citizens from the serious risks Abid Naseer faces if returned to Pakistan. Those submissions are clear. Mr Perry submits assurances are unnecessary. He argues previous instances of U.S. removal are of little assistance, the test is on the facts of the instant case is there a real risk of removal without due process and appropriate effective judicial intervention if required.

Given the clear and fully reasoned judgement of Mitting, J, concerning Abid Naseer in May 2010 I must conclude, beyond peradventure, that if returned to Pakistan, as it is currently run, there is indeed a *very real risk* a torture and a plain denial of Convention rights this, and all U.K. courts, must protect. However, I am not of the view the U.S. judicial system is indifferent in providing appropriate intervention. I must proceed on the firm footing, absent *very* cogent direct evidence, the rule of law and due process exists for all persons within the jurisdiction of the U.S. courts, including Abid Naseer. Accordingly I reject this challenge to extradition.

Having considered **all submissions** I rule in favour of the U.S. Government's request and **send this case to the Secretary of State for her decision, pursuant to S.87(3) Ex Act 2003,** subject to Abid Naseer's right to appeal to the High Court subject to the strict provisions of S.103(9) Ex Act 2003.