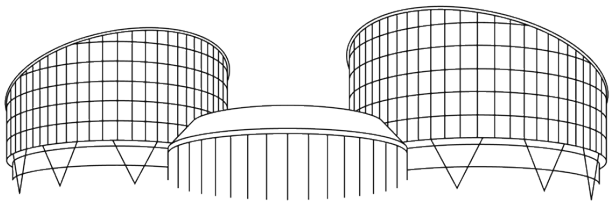

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 31411/07
by Mustafa Kamal MUSTAFA (ABU HAMZA) (No. 1)
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 18 January 2011 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi,
Vincent A. de Gaetano, *judges,*

and Lawrence Early, *Registrar,*

Having regard to the above application lodged on 13 July 2007,

Having deliberated, decides as follows:

THE FACTS

1. The applicant is Mr Mustafa Kamal Mustafa, known more commonly as Abu Hamza. He was born in 1958. The applicant is currently detained at HMP Belmarsh. He was represented before the Court by Ms M. Arani, a lawyer practising in Middlesex.

2. The United States Government have requested his extradition to stand trial on charges related to international terrorism. The extradition request is the subject of a separate application to this Court (see *Babar Ahmad and*

others v. the United Kingdom (dec.) nos. 24027/07, 11949/08 and 36742/08, 6 July 2010). The present application concerns only his trial and conviction in the United Kingdom for separate offences.

A. The circumstances of the case

3. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Events prior to the applicant's prosecution

4. The applicant has lived in the United Kingdom since 1979. After initially working as a civil engineer, he started preaching Islam and teaching the Qur'an part-time. He began working full-time as a preacher in 1996 and from 1997-2003 was Imam at the Finsbury Park Mosque, London. Between 1996 and 2000 he delivered a number of sermons and speeches which later formed the basis for charges of soliciting to murder, using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred, possessing a document or recording with the same intent. He was also charged with possessing a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism (possession of the eleven volume Encyclopaedia of Afghani Jihad). Those charges are set out in part 2 below.

5. The applicant's speeches, sermons and other activities brought him to the attention of the United Kingdom Security Service. Six meetings took place between the applicant and officials of the Security Service between May 1997 and November 1998. Notes of those meetings were disclosed to the applicant and are before the Court in redacted form. At the first meeting, on 28 May 1997, in response to comments he made about terrorism in France, the applicant was told he was walking a “dangerous and delicate tightrope” and incitement to terrorism or other violence was “fraught with peril”. That warning was repeated at the second and third meetings on 9 June and 14 July 1997. At the fourth meeting, on 1 October 1997, the applicant was again told that he had been walking a dangerous tightrope and had come close to being culpable for incitement to violence. He was also told that, if he overstepped the mark, he would undoubtedly come to the attention of the authorities. A similar warning was delivered at the sixth meeting on 24 September 1998. During the same period a series of meetings took place between the applicant and the Metropolitan Police Special Branch. The applicant maintains that, at those meetings, it was never suggested that he would be prosecuted for any sermons he had given.

6. The applicant was arrested and interviewed between 15 and 18 March 1999 by the Metropolitan Police as part of an inquiry into the taking of sixteen hostages in Yemen in December 1998. He was released without charge. When he was arrested material, including videotapes of his

sermons, cassette tapes and the Encyclopaedia of Afghani Jihad were seized and analysed. The materials were subsequently returned to him.

7. In 2002 the applicant's funds were frozen by the Bank of England and he was also designated as a global terrorist by the President of the United States. The Charity Commission for England and Wales also suspended him from his post as Imam at Finsbury Park Mosque.

8. In January 2003, Finsbury Park Mosque was raided by police. The raid was widely reported in the United Kingdom media. On 4 April 2003, the Secretary for the Home Department notified the applicant of his intention to remove his British citizenship on the grounds that he was satisfied that the applicant had provided support and advice to terrorist groups and individuals; encouraged and supported the participation of individuals in jihad; provided, through the mosque, a centre for extremism; and promoted anti-Western sentiment and violence through his preaching. This too was extensively reported.

9. On 21 May 2004 the United States Government requested the applicant's extradition *inter alia* in relation to his alleged role in the Yemeni kidnapping. The full details of the charges he faces are set out in the Court's decision in *Babar Ahmad and others*, cited above, §§ 7–9.

2. The applicant's prosecution and trial in the United Kingdom

10. The extradition proceedings were adjourned when, on 19 October 2004, the applicant was charged by the Crown Prosecution Service with fifteen offences. These were:

(i) nine counts of soliciting to murder, contrary to section 4 of the Offences Against the Person Act 1861;

(ii) four counts of using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred contrary to section 18(1) of the Public Order Act 1986;

(iii) one count of possessing threatening, abusive or insulting recordings of sound with intent to stir up racial hatred contrary to section 23(1) of the Public Order Act 1986; and

(iv) one count of possessing a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism contrary to section 58 of the Terrorism Act 2000 (the Encyclopaedia of Afghani Jihad).

The nine counts of soliciting to murder and the four counts of stirring up racial hatred related to speeches and sermons given by the applicant at Finsbury Park Mosque and other locations between 1997 and 2000.

11. When the trial began in July 2005, the defence applied for the prosecution to be stayed as an abuse of process. It was argued that, as a result of his dealings with the Security Service and Metropolitan Police, the applicant had either been given assurances that he would not be prosecuted or left with the legitimate expectation that he would not be. This, he argued,

was reinforced by the decision to revoke his citizenship and allow his extradition to the United States. The applicant further argued that, as a result of these actions of the United States and United Kingdom Governments, the publicity surrounding him had grown to such an extent that it would be impossible for him to receive a fair trial by jury. It was also argued that the delay made it impossible for him to defend himself.

12. The trial judge, Mr Justice Hughes, refused the application on 13 July 2005. Having reviewed the notes of the discussions between the applicant and the Security Service, the trial judge held that it was quite clear that the discussions did not amount to an assurance, express or implied, nor did they give rise to a legitimate expectation that the applicant would not be prosecuted. The same was true for meetings between the applicant and the Metropolitan Police. The warnings about walking a tightrope did not arise in the context of any investigation into the applicant or from any consideration of possible prosecution; they were not assurances that the applicant was committing no offence but non-legal warnings by a Security Service officer whose concern had nothing to do with possible prosecution. There was also no evidence from the applicant that he regarded these conversations as having given him any kind of assurance that he was safe from prosecution, nor that he relied on them in deciding how to conduct himself.

13. The trial judge also found that the decisions to revoke the applicant's citizenship and accede to his extradition did not make the decision to prosecute him an abuse of process: there was no reason why revocation of citizenship and prosecution could not be done simultaneously, nor was there anything unlawful in prosecuting someone who was subject to an extradition request.

14. The trial judge found that, by 2000, the police would have had almost all the evidence that the prosecution was now based upon and, in the absence of any explanation for the passage of time, some criticism could be made for the delay in bringing the prosecution. However, it was not an affront to justice to bring the prosecution: provided that the trial could be fair it was in the public interest that it should take place. Since the prosecution case consisted entirely of recordings of what the applicant had said in his speeches and sermons, and the applicant's defence was that there was theological justification for what he had said, there was no danger that the applicant would be unable to mount his defence.

15. The trial judge also rejected the applicant's submission that the adverse publicity to which he had been subjected would prejudice any jury. It was acknowledged that the media's coverage of the applicant had amounted to a sustained campaign against the applicant and, before the prosecution had been brought, various public figures had made adverse statements about him. However, the trial judge was satisfied that, with a

proper direction, a jury would be able to try the applicant impartially. He found:

> "Almost universally, [juries] approach their task and their oath with conspicuous conscientiousness....Extensive publicity and campaigns against potential defendants are by no means unknown in cases of notoriety. Whilst the law of contempt operates to minimise it, it is not always avoidable, especially where intense public concern arises about a particular crime and a particular defendant before any charge is brought. Jurors are in such cases capable of understanding that comment in the media might or might not be justified ... They are not surprised to be warned not to take at face value what appears in the media, nor are they these days so deferential to politicians as to be incapable of understanding that they should make no assumptions about whether any statements made by such people are justified or not."

16. However, since the ruling was given just after the London bombings of 7 July 2005, and there had been recent references in the media to the applicant, the trial judge acceded to an application to defer the trial until the end of the year. He observed:

There will by then have been more than a year since the most intense of the publicity.

> "It remains likely, as it seems to me, that any trial will have to be approached on the basis that the jurors will, or certainly may, remain generally aware that this is a defendant who was the object of intense publicity and of a campaign against him, although I doubt they will recall, as a lawyer interested in the case might recall, the detail of specific allegations such, for example, as those made at the time of the extradition request in mid-summer of 2004.
>
> That will mean that the jury must be warned carefully about how they are to approach the case. What exactly needs to be said to them will fall to be considered after submissions by the parties and at the time and, particularly, in the light of any submissions made on behalf of the defendant, but I record now that I would expect it to go significantly beyond a formulaic injunction to put out of their minds anything they have read in the papers. It seems to me likely that it will need to involve a careful explanation of the difference between their task in the sifting and evaluation of the evidence, on the one hand, and indiscriminate hostile labelling of a suspect by public commentators, on the other hand."

The trial judge also gave a general warning that any further references to the applicant and terrorism by the media would risk a finding of contempt of court.

17. The trial in fact took place in January and February 2006. On 9 January 2006, the eve of the trial, the trial judge rejected a renewed application for a stay. This was based on further media coverage of the London bombings that had included some references to the applicant as someone who was likely to have contributed to the willingness of some to make such attacks. Adopting the reasoning of his earlier ruling, the trial judge held that this publicity would not prevent the jury from objectively considering the allegations made against the applicant. A further warning was given to the media as to the risk of a finding of contempt of court. The trial judge also indicated that he would refer certain articles to the

Attorney-General for consideration as to whether any past contempt of court had or had not been committed.

18. At the conclusion of the trial the trial judge's summing up, which lasted two days, contained the following direction to the jury:

> "I warned you at the beginning [of the trial] to ignore anything that anyone has said about this defendant in the press before the trial or during it. You may be aware that over the years there was a campaign in some sections of the press against [the applicant]. Whether it was fair or unfair comment about his opinions, whether it was informed or uninformed comment about him, is simply irrelevant. No one at that time was undertaking the task which you have been given, which is to sift the evidence, to look at the speeches, evaluate the evidence and say whether he has committed these offences or not. It may be quite easy, you may think, to attach a label to somebody in a newspaper article, but it is a different exercise from the task which you have of examining the evidence to see whether he has committed particular offences. The only thing that matters to any of us is whether the evidence demonstrates that he has or has not proved that he committed these offences. So be careful not to be affected, again even subconsciously, of intensive criticism of him. Concentrate on the evidence, try him on that, and make your own decision."

19. On 7 February 2006, after they had retired to consider their verdict, the jury were given a further direction by the trial judge in response to further adverse publicity. That publicity included a comment made by a participant on the BBC's *Newsnight* programme that the applicant should be deported and other media references to a connection between Zacharia Moussaoui (who was at that point about to be tried in the United States for his role in the attacks of 11 September 2001) and Finsbury Park Mosque. At that time there had also been extensive coverage of the international reaction to the publication of cartoons in Denmark of the Prophet Mohammed. This adverse publicity also prompted the defence to renew its application for the proceedings to be stayed. The trial judge refused that application, finding that there was no risk that the jury would be swayed from reaching its verdict on the basis of the evidence presented at trial. On the contrary, the indications at that stage were that the jury were working their way through the considerable volume of evidence that was before them.

20. Later that day the jury found the applicant guilty of six counts of soliciting to murder; three counts of using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred; one count of possessing threatening, abusive or insulting recordings of sound with intent to stir up racial hatred; and one count of possessing a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. They acquitted the applicant of three counts of soliciting to murder and one count of using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred.

21. The applicant was sentenced to seven years' imprisonment.

3. The Court of Appeal judgment

22. The applicant appealed against his conviction to the Court of Appeal, which dismissed the appeal on 28 November 2006 ([2006] EWCA Crim 2918).

23. The Court of Appeal found that the trial judge had been correct to refuse the defence applications to have the proceedings stayed as an abuse of process. Nothing that had been done by the authorities could be treated as an assurance that he would not be prosecuted. There was also no basis for inferring that the Secretary of State, in deciding to deprive the applicant of his citizenship, had taken a personal policy decision that the applicant should not be prosecuted and it could not be taken as an assurance of non-prosecution. In respect of the police's decision to return the applicant's cassettes and encyclopaedia after his arrest in 1999 the Court of Appeal observed:

> "It would have been open to the police to initiate a prosecution in 1999 in relation to the possession of the cassettes and the Encyclopaedia that were seized, albeit that the charge in the case of the latter would have had to have been brought under an earlier statute. The fact that they did not do so could not, however, be taken as an assurance, let alone an unequivocal assurance, that they would not do so in the future. It is significant in this context that these materials were seized, not in the course of some general investigation, but in an investigation aimed specifically at the possibility that the appellant was implicated in the events in the Yemen. The appellant was aware of this.
>
> It is not clear why, in 1999, the police did not attach the significance to the appellant's speeches and possession of cassettes and the Encyclopaedia that they, and the Crown Prosecution Service, were to give them in 2004. The judge remarked that, in the absence of any explanation for the passage of time, the conduct of the prosecution was vulnerable to some criticism for the delay since 2000 in bringing charges. We agree. But any shortcomings on the part of those responsible for the prosecution in this respect could not be treated as an assurance that the appellant was not in breach of the law nor that, if he was in breach of the law, this would not give rise to a prosecution.
>
> There is no reason to conclude that the appellant placed any reliance on the reaction, or lack of reaction, of the police to the cassettes and the Encyclopaedia when deciding to retain them in his possession. He was simply continuing a course of conduct that had commenced before the police had intervened."

24. The applicant also submitted that because of the delay in bringing the prosecution, events had occurred before his trial that prejudiced the holding of a fair trial. The Court of Appeal considered that this submission was most appropriately considered in the context of the applicant's further submission that his trial had been prejudiced by the adverse publicity he had received. In respect of that submission, the Court of Appeal considered that

the trial judge had been correct to rule that any adverse publicity could be cured by an appropriate direction to the jury. The Court of Appeal found:

> "The risk that members of a jury may be affected by prejudice is one that cannot wholly be eliminated. Any member may bring personal prejudices to the jury room and equally there will be a risk that a jury may disregard the directions of the judge when they consider that they are contrary to what justice requires. Our legal principles are designed to reduce such risks to the minimum, but they cannot obviate them altogether if those reasonably suspected of criminal conduct are to be brought to trial. The requirement that a viable alternative verdict be left to the jury is beneficial in reducing the risk that the jury may not decide the case in accordance with the directions of the judge. Prejudicial publicity renders more difficult the task of the court, that is of the judge and jury together, in trying the case fairly. Our laws of contempt of court are designed to prevent the media from interfering with the due process of justice by making it more difficult to conduct a fair trial. The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties.
>
> In the present case, the judge rejected on three occasions an application for a stay on the ground of abuse of process. The first application was in the process of being heard when the London bombings took place on 7 July 2005. It had been intended that the trial should proceed at once if the application failed. The judge held that a fair trial would be possible but that, because of the prejudice that might be caused by the bombings and attendant publicity, the trial should be adjourned until January. On 9 January, on the eve of the trial the judge again rejected a stay application, holding that a fair trial was possible. The final application was made on 7 February, because of further adverse publicity after the jury had retired. Once again the judge rejected the application. It remains to consider whether he was correct to conclude, on each occasion, that a fair trial was possible.
>
> [Counsel for the applicant] does not rely simply on adverse media publicity when arguing that a fair trial was impossible. He relies upon changes in attitude and public perception in relation to terrorism that followed first the destruction of the World Trade Centre on 11 September 2001 and subsequently the London bombings on 7 July 2005. The critical issues before the jury were whether the appellant's speeches constituted incitements to kill and whether he intended to incite to kill and to stir up racial hatred. [Counsel for the applicant] argues that after 11 September and 7 July it was impossible for the jury fairly to judge the appellant's utterances in the context in which they were made. The adverse publicity compounded the jury's difficulties, quite apart from the fact that it itself made a fair trial impossible.
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> ...
>
> We have no need to deal separately with the rulings given by the judge on the second and third occasion that he dealt with stay applications, for [Counsel for the applicant] has not contended that this appeal should succeed in respect of either of these rulings if it fails in respect of the first, and most substantial, ruling. The question remaining for this court is whether the judge was correct to conclude that, with his assistance, the jury would be able to try the issues fairly without being prejudiced or distracted by the events that had occurred since 2000 and by the media coverage of those events.

> The judge was correct to conclude that the adverse media publicity attendant upon the events that had occurred between 2000 and the bringing of charges against the appellant in October 2004 had put at risk the fairness of his trial. The challenge posed to the judge of taking appropriate steps to neutralise the effect of these matters by appropriate directions and guidance in the course of his summing up was considerable. The task was an exacting one. The judge was confident that he would be able to discharge it. We have concluded that his assessment of the position was correct. The circumstances did not require the judge to stay the prosecution on the ground that there could not be a fair trial.
>
> We have read the judge's summing up to the jury with admiration. As we have observed, [Counsel for the applicant] has made no criticism of it. The defence had been permitted to call an expert witness to provide the context in which the various speeches had been made. The judge reminded the jury of this evidence. He set the various speeches in their context and drew attention to the issues that the jury had to resolve with pellucid clarity. He gave a careful and skilful direction in relation to media coverage.
>
> There is no reason to believe that the jury were not able to consider and resolve the relevant issues objectively and impartially. It is not without significance that they recorded verdicts of not guilty on [four of the counts in the indictment]. [Counsel for the applicant] submits that the conviction on some counts but not on others reflected a determination on the part of the jury that the appellant should not escape wholly unpunished. We can see no basis for this submission. The jury's verdicts appear to us to reflect a rational differentiation between the stronger and the weaker counts.
>
> For the reasons that we have given, this appeal is dismissed."

25. The Court of Appeal certified two points of law of general public importance for consideration by the House of Lords but refused leave to appeal to the House of Lords. The applicant then petitioned the House of Lords for leave to appeal. This was refused by the House of Lords on 29 January 2007.

B. Relevant domestic law and practice

1. Abuse of process

26. English criminal courts have the power at common law to stay proceedings indefinitely if a prosecution amounts to an abuse of the process of the court. This was defined in *Hui Chi-Ming v. R* [1992] 1 AC 34, PC as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceedings". This test will be met either: (i) where the court concludes that the defendant cannot receive a fair trial; or (ii) where the court concludes that it would be unfair for the defendant to be tried (*R v. Beckford* [1996] 1 Cr App R 94). The second category was considered in *R v. Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42 where the accused had been brought to the United Kingdom unlawfully by deliberate misconduct by investigators. In finding that to be an abuse of process, Lord Griffiths stated:

> "If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

There will be circumstances in which a stay should be granted even though a fair trial could be conducted, for example where the court is faced with unlawful acts by police or prosecutors which are so great an affront to the integrity of the justice system, and therefore the rule of law, that the associated prosecution is rendered abusive and ought not to be countenanced by the court (see *R v. Grant* [2005] 2 Cr App R 28). However, a stay will not be granted where the trial process is itself equipped to deal with the matters complained of such as through the regulation of the admissibility of evidence (*R (Ebrahim) v. Feltham Magistrates Court*; *Mouat v. DPP* [2001] 2 Cr App R 23).

a. Assurances of non-prosecution

27. A stay may be granted when a defendant is prosecuted after he has been induced to believe that he will not be prosecuted. In *R v. Croydon Justices, ex parte Dean* [1994] 98 Cr App R 76 it was found to be an abuse to prosecute a youth of seventeen for destroying evidence after a murder when he had been invited by the police to give evidence at the murder trial on the assurance that he would not himself be prosecuted.

In *R v. Bloomfield* [1997] 1 Cr App R. 135 prosecuting counsel had told the court that it would offer no evidence because it was accepted that the defendant had been the victim of a set-up. The Crown Prosecution Service later decided that it intended to continue the prosecution. The Court of Appeal quashed the defendant's conviction: whether or not there was prejudice to him, it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was.

In *R v. Townsend, Dearsley and Bretscher* [1997] 2 Cr App R 540 the Court of Appeal approved *inter alia* the proposition that, where a defendant has been induced to believe he will not be prosecuted, this is capable of founding a stay for abuse. The Court of Appeal considered, however, that breach of a promise not to prosecute did not necessarily and, *ipso facto*, give rise to abuse, but might do so if circumstances had changed.

b. Delay

28. A stay may also be granted on grounds of delay in bringing the prosecution. Guidance as to when a stay should be granted was given by the Court of Appeal in *R v. S* [2006] 2 Cr App R 23. The court stated that the correct approach was for the trial judge to bear in mind the following

principles: (i) even where delay was unjustifiable, a permanent stay should be the exception rather than the rule; (ii) where there was no fault on the part of the complainant or the prosecution, it would be very rare for a stay to be granted; (iii) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial could be held; (iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from delay would be placed before the jury for their consideration in accordance with appropriate direction from the judge; (v) if, having considered all these factors, a judge's assessment was that a fair trial would be possible, a stay should not be granted.

29. In *Attorney General's Reference (No. 2 of 2001)* [2004] 2 AC 72 the House of Lords was asked to consider whether Article 6 § 1 of the Convention required a stay to be ordered when there had been excessive delay in criminal proceedings. The House of Lords held that the appropriate remedy for a breach of the right to determination of a criminal charge within a reasonable time was not necessarily a stay on proceedings. It would be appropriate to stay or dismiss the proceedings only if either a fair hearing was no longer possible or it would be, for any compelling reason, unfair to try the defendant. The public interest in the final determination of criminal charges required that such a charge should not be stayed or dismissed if any lesser remedy would be just and proportionate in all the circumstances. The category of cases in which it might be unfair to try a defendant included cases of bad faith, unlawfulness and executive manipulation but was not confined to such cases. However, such cases would be exceptional, and a stay would never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's rights under Article 6 § 1.

c. Adverse publicity

30. Finally, a stay may also be granted where there has been such publicity surrounding the case that a fair trial is not possible. For example, convictions were quashed in *R v. McCann* [1991] 92 Cr App R 239 and *R v. Taylor and Taylor* [1994] 98 Cr App R 361 *inter alia* due to adverse publicity during the trial. *McCann* concerned a terrorism trial during which the Government had announced plans to change the law on the right to silence, a right of which the defendant had availed himself. In *Taylor and Taylor*, the press coverage was found by the Court of Appeal to be "unremitting, extensive, sensational, inaccurate and misleading" and created a real risk of prejudice against the defendants. Later cases have considered that directions from the trial judge to the jury and the nature of the trial process would operate to prevent the jury being prejudiced by publicity. Thus in *R v. West* [1996] 2 Cr App R 374, a case where the defendant was convicted of ten counts of murder, it was found that a fair trial could be held

after intensive publicity adverse to the defendant. The Court of Appeal observed that:

> "To hold otherwise would mean that if allegations of murder were sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd. Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise."

31. The fairness of trial after adverse publicity was considered by the Judicial Committee of the Privy Council, though not in the context of an application for stay on grounds of abuse of process but rather in a Scottish appeal in *Montgomery v. HM Advocate*; *Coulter v. HM Advocate* [2003] 1 AC 641. The appeal concerned the proposed prosecution of two men for murder. Comments had been made by a trial judge in a related trial, in which he criticised the Crown for not charging the two men with murder. Those comments received a great deal of publicity and subsequently the two men were in fact charged with murder. The issue for the Privy Council was whether the proposed trial of the two men would be compatible with Article 6. Lord Hope giving the lead judgment found that it would be. He stated:

> "It needs to be emphasised, as was pointed out in *Pullar v. United Kingdom* (1996) 22 E.H.H.R. 391, that the rule of law lies at the heart of the Convention. It is not the purpose of article 6 to make it impracticable to bring those who are accused of crime to justice. The approach which the Strasbourg court has taken to the question whether there are sufficient safeguards recognises this fact. It does not require the issue of objective impartiality to be resolved with mathematical accuracy. It calls instead for "sufficient" guarantees or safeguards and for the exclusion of any "legitimate doubt": *Pullar v. United Kingdom*, pp. 402-403, 405 paras. 30, 40. Account is taken of the fact that certainty in these matters is not achievable.
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> ...
>
> I am not persuaded that the judges in the court below were in error in their assessment of the effect of the publicity that has been given to this case and of the question whether, despite that publicity, the jury can be expected to act impartially. Recent research conducted for the New Zealand Law Commission suggests that the impact of pre-trial publicity and of prejudicial media coverage during the trial, even in high profile cases, is minimal: Warren Young, Neil Cameron and Yvette Tinsley, *Juries in Criminal Trials; Part Two*, Chapter 9, para. 287 (New Zealand Law Commission preliminary paper no. 37, November 1999). The lapse of time since the last exposure may increasingly be regarded, with each month that passes, in itself as some kind of a safeguard. Nevertheless the risk that the widespread, prolonged and prejudicial publicity that occurred in this case will have a residual effect on the minds of at least some members of the jury cannot be regarded as negligible. The principal safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witnesses may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the media. This impact can be expected to be reinforced on the other hand by such warnings and directions as the trial judge may think it appropriate to

give them as the trial proceeds, in particular when he delivers his charge before they retire to consider their verdict.

...

[T]he entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence.

The Scottish judges are not alone in proceeding upon this assumption. In the Supreme Court of Canada, in *Reg. v. Corbett* [1988] 1 S.C.R. 670, 692, Dickson C.J. said that jury directions are often long and difficult but that the experience of trial judges is that juries do perform their duty according to law. In *R. v. Vermette* (1988) 50 D.L.R. (4th) 385, 392 La Forest J., under reference to the *Corbett* case, said that dicta in that case underlined the confidence that may be had in the ability of a jury to disabuse itself of information that it is not entitled to consider. In the High Court of Australia, in *The Queen v. Glennon* (1992) 173 C.L.R. 592, 603 Mason C.J. and Toohey J. said that the law proceeds on the footing that the jury, acting in accordance with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence and that to conclude otherwise would be to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge. In the Irish High Court, in *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476, 496 Hamilton P., drawing upon his experience as counsel and as a judge, said that he shared in the confidence that his legal system has in juries to act with responsibility in accordance with the terms of their oath, to follow the directions given by the trial judge and a true verdict give in accordance with the evidence. I consider that the judges in the court below were entitled to draw upon their experience, and I see no reason in the light of my own experience to disagree with their assessment."

COMPLAINT

32. The applicant complained under Article 6 of the Convention that his trial had been unfair. He advanced three grounds in support of that complaint.

First, he argued that the decision to prosecute him was unfair because it was in breach of a legitimate expectation of non-prosecution which had been created by the authorities. His dealings with the Security Service and others had led him to believe his speeches were unwelcome but lawful. He was warned that further legislation might make them unlawful but that, at the relevant time, no issue would arise and, in any event, no prosecution would be brought. He also alleged that notes of further meetings with Special Branch officers had not been disclosed and he had not be given full copies of the notes of the Security Service meetings, even though he had sought full disclosure. In addition, he submitted that he had been entitled to rely on the fact that, after his arrest and release in 1999, recordings of his speeches and the Encyclopaedia of Afghani Jihad were returned to him. All these events had led him to give further speeches in 2000, which formed

the basis of certain of the charges against him. The applicant further submitted that the Secretary of State's decision to deprive him of his British citizenship implied that the authorities had made a choice to deal with him administratively rather than through the criminal courts.

Second, he argued that the delay in prosecuting him rendered his trial unfair because his speeches had been given before 11 September 2001. This irretrievably destroyed the context in which they had been given and made it impossible for him to explain properly his actions at the time.

Third, the applicant complains that the adverse publicity in his case rendered his trial unfair. He relied on the publicity given to the freezing of his funds by the Bank of England, his designation as a global terrorist by the President of the United States, his suspension as Imam by the Charity Commission, and the raid on Finsbury Park Mosque. The Secretary of State's decision to deprive him of his British citizenship was also widely reported: that decision in effect publicly convicted him of the events for which he was later to stand trial. As it was intended to be an alternative to prosecution, the decision had encouraged the media to publish negative stories about him without fear that they would be jeopardising any trial. For that very reason he was not entitled to the protection that a person charged with a criminal offence otherwise enjoyed from adverse publicity, and from executive prejudgment of guilt. The applicant submitted that, as such, his right to be presumed innocent was violated precisely because he was not thought to need it. Finally, the applicant relied on the intensity of the press campaign against him, which, he alleged, was conducted independently of these events. By the time of his trial, everyone in the United Kingdom was aware of the applicant and the views of the media and Government of him.

THE LAW

33. Article 6 §§ 1 and 2, where relevant, provides as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Assurances of non-prosecution

34. It is not normally for the Court to determine the appropriateness of a decision to prosecute (see, *mutatis mutandis*, *Patsuria v. Georgia*, no. 30779/04, § 42, 6 November 2007; *Biełaj v. Poland*, no. 43643/04, § 56,

27 April 2010). However, an issue may arise under Article 6 where a legitimate expectation is created by the actions of the authorities and a defendant acts upon that legitimate expectation to his detriment (see, for example, *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §§ 138 and 139, ECHR 2009-...). Consequently, the Court would not exclude the possibility that, if a defendant were given an assurance by the prosecuting authorities that he would not be prosecuted for certain offences and the authorities subsequently reneged on that assurance, the subsequent criminal proceedings would be unfair.

35. That is not, however, the situation which obtained in the applicant's case. The notes of the applicant's meetings with the Security Service raise questions as to why officials of the Service thought fit to give the applicant warnings as to his conduct and why they felt able to advise on whether that conduct amounted to incitement. However, it must have been clear to the applicant that the Security Service officials were not qualified to provide that advice. It must also have been clear that they were not in a position to provide assurances as to whether or not he would be prosecuted: the decision to prosecute him was not one for the Security Service to make. Furthermore, although the notes of his meetings with the Metropolitan Police Special Branch have not been disclosed and so are not before the Court, this of itself is of no consequence. The applicant has not alleged that those notes would demonstrate that he was given an unequivocal assurance by the police that he would not be prosecuted. It is unclear to the Court, as it was to the Court of Appeal, why in 1999 the police did not attach the significance to the cassettes and encyclopaedia that they did in 2004. However, as the Court of Appeal observed, this could not have been taken as an assurance, still less one that the applicant relied on. Equally, the Secretary of State's decisions to deprive the applicant of his citizenship and to accede to his extradition could not have been seen as assurances of non-prosecution. As the trial judge found, there was no reason why revocation of citizenship and prosecution could not be done simultaneously, nor was there anything unlawful in prosecuting someone who was subject to an extradition request.

The Court therefore agrees with the trial judge and the Court of Appeal that nothing that had been done by the authorities could be treated as an assurance that the applicant would not be prosecuted. Furthermore, had the trial judge reached a different conclusion as to whether such an assurance had been given, the case-law set out at paragraphs 26 and 27 above makes clear that it would have been open to him to grant a stay of proceedings. That case-law is entirely compatible with Article 6. No issue arises under Article 6 in respect of this ground.

B. Delay and adverse publicity

36. For the second ground, the applicant has not complained that the delay in itself made his trial unfair but rather that the delay meant intervening events made it impossible for him to explain the context of his speeches. This would only have been the case had the jury's assessment of his speeches been coloured by the events of 11 September 2001 and the publicity given to the applicant thereafter. As such, the Court agrees with the Court of Appeal that it is appropriate to consider the issues of delay and adverse publicity together.

37. The applicant's submissions as to the adverse publicity are, in essence, a complaint that the jury in his case could not have impartially tried his case because no jury could fail to have been influenced either by the events of 11 September 2001 or by the negative effect on his reputation of hostile media publicity. The Court has stressed that a tribunal, including a jury, must be impartial from a subjective as well an objective view (see *Sander v. the United Kingdom*, no. 34129/96, § 22, ECHR 2000-V). The personal impartiality of a judge must be presumed until there is proof to the contrary. The same holds true in respect of jurors (ibid., § 25).

38. In the present case, the Court notes that no allegation is made as to the subjective impartiality of the jury which tried the applicant; there is no allegation that any member of that jury demonstrated a lack of impartiality as a result of anything they might have read in the media about the applicant. On the contrary, as the trial judge noted in refusing to stay the proceedings on 7 February 2006, all the indications were that the jury were working their way through the evidence before them (see, in this respect, *Pullicino v. Malta* (dec.), no. 45441/99, 15 June 2000). As the Court of Appeal noted, it was not without significance that not guilty verdicts were returned on certain of the counts in the indictment and the jury's verdicts reflected a "rational differentiation" between the stronger and weaker counts. The jury's verdicts also show that, despite his submission to the contrary, even after the events of 11 September 2001 it was still possible for the applicant to explain his actions to the jury; had he not been able to do so, the jury would not have acquitted him of certain of the charges (cf. *Pullicino,* cited above,).

39. As regards the objective impartiality of the jury, the Court considers that there is a risk that adverse publicity in advance of trial may prejudice a jury, particular when, as in the applicant's case, that publicity is unremitting and sensational. However, as is demonstrated by the case-law of the Court of Appeal and the Judicial Committee of the Privy Council summarised at paragraphs 30 and 31 above, the United Kingdom courts are well aware of that risk. The Court shares their view that a fair trial can be held after intensive adverse publicity. In a democracy, high profile criminal cases will inevitably attract comment by the media. This cannot mean, however, that

any media comment will inevitably prejudice a defendant's right to a fair trial, otherwise the greater the notoriety of a crime, the less likely that its perpetrators will be tried and convicted. As Lord Hope stated in *Montgomery*, cited above, it is not the purpose of Article 6 to make it impracticable to bring those who are accused of crime to justice. Instead, this Court's approach has been to examine whether there are sufficient safeguards to ensure that the proceedings as a whole are fair. Indeed as its case-law indicates, the Court will require cogent evidence that concerns as to the impartiality of jurors are objectively justified before any breach of Article 6 § 1 can be found (*Pullar v. the United Kingdom*, 10 June 1996, *Reports* 1996-III; *Hardiman v. the United Kingdom* no. 25935/94, Commission decision of 28 February 1996, unreported; *Gregory v. the United Kingdom*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I).

The Court accepts that a virulent media campaign can in certain circumstances undermine the fairness of a trial by influencing public opinion and thus the jury which is called upon to decide on the culpability of the accused (*Craxi v. Italy (no. 1)*, no. 34896/97, § 98, 5 December 2002). However, in the majority of cases the nature of the trial process and, in particular, the role of the trial judge in directing the jury will ensure that the proceedings are fair (see, for example, *Noye v. the United Kingdom* (dec.), no. 4491/02, 21 January 2003). Moreover, in deciding whether such exceptional circumstances exist, domestic courts will be better placed to make this assessment than the Court. This is all the more so when, as in England and Wales, the courts enjoy wide powers to prevent adverse media reporting during trial and can, if necessary, stay proceedings on grounds of an abuse of process. As was noted in *Montgomery*, this approach reflects not only the experience of the United Kingdom courts, but that of criminal justice systems throughout the common law world. In the Court's view, that experience should be respected.

40. In the present case, the trial judge gave a full and unequivocal direction to the jury to ignore the adverse publicity the applicant had received and to concentrate instead on the evidence before them. A further direction was given after the jury had begun their deliberations. The Court of Appeal considered that direction to be “careful and skilful”. The Court shares that view: the direction given to the jury, when taken with the repeated warnings given by the trial judge to the media in the course of the trial, provided sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury. There is, therefore, no appearance of a violation of Article 6 of the Convention.

C. The presumption of innocence

41. Although the applicant has not expressly invoked Article 6 § 2 of the Convention, he has complained that his right to be presumed innocent was infringed by the Secretary of State's decision to deprive him of his citizenship. In the Court's view, there is no direct link between the Secretary of State's announcement of his intention to deprive the applicant of his citizenship and the later decision by the Crown Prosecution Service to bring criminal proceedings against him. It must be acknowledged that the grounds for the Secretary of State's decision include the allegation that the applicant had promoted anti-Western sentiment and violence through his preaching. There is, therefore, a degree of overlap between that allegation and the conduct for which the applicant would later be prosecuted. To that extent, if prosecution was contemplated at the time of the Secretary of State's decision, it may perhaps be said that a greater degree of circumspection was desirable. However, the Secretary of State's allegation was made in general terms without any specific reference to the particular speeches for which the applicant would later be prosecuted and an allegation that conduct makes a person's presence in a country undesirable does not mean that the maker of the allegation considers the same conduct to be a criminal offence. The Secretary of State's decision and the allegations made in support of it therefore fall some way short of the clear declarations as to the applicant's guilt which were made in *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, §§ 38–41, and which gave rise to a finding of a violation of Article 6 § 2 in that case. The same considerations apply to the applicant's designation as a terrorist by the President of the United States, which concerned quite separate allegations. In the present case, therefore, the applicant's complaint discloses no appearance of a violation of Article 6 § 2 of the Convention.

D. Conclusion

42. For the foregoing reasons, the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President