

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2009

Before :

LORD JUSTICE STANLEY BURNTON
MR JUSTICE WILKIE

Between :

THE QUEEN ON THE APPLICATION OF

GARY MCKINNON

Claimant

- and -

SECRETARY OF STATE FOR HOME AFFAIRS

Defendant

and between

THE QUEEN on the application of

GARY MCKINNON

Claimant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

Summary of the judgment on the judicial review by Gary McKinnon of the decision of the Secretary of State for the Home Department to extradite him to the USA and on his application for permission to apply for judicial review of the decision of the Director of Public Prosecutions not to prosecute him in this country.

THIS SUMMARY IS NOT PART OF THE JUDGMENTS OF THE COURT

1. As is well known, Gary McKinnon's extradition is sought by the Government of the USA on charges arising out of his hacking into US Government computers. His alleged conduct was summarised in the House of Lords when it gave judgment on his appeal to it in July 2008 as follows:

"The appellant's alleged criminality

11. Using his home computer the appellant, through the internet, identified US Government network computers with an open Microsoft Windows connection and from those extracted the identities of certain administrative accounts and associated passwords. Having gained access to those accounts he installed unauthorised remote access and administrative software called "remotely anywhere" that enabled him to access and alter data upon the American computers at any time and without detection by virtue of the programme masquerading as a Windows operating system. Once "remotely anywhere" was installed, he then installed software facilitating both further compromises to the computers and also the concealment of his own activities. Using this software he was able to scan over 73,000 US Government computers for other computers and networks susceptible to similar compromise. He was thus able to lever himself from network to network and into a number of significant Government computers in different parts of the USA.

12. The 97 computers the appellant accessed were: 53 army computers, including computers based in Virginia and Washington that control the army's military district of Washington network and are used in furtherance of national defence and security; 26 navy computers, including US Naval Weapons Station Earle, New Jersey, which was responsible for replenishing munitions and supplies for the deployed Atlantic fleet; 16 NASA computers; one Department of Defense computer; and one US Air Force computer.

13. Having gained access to these computers the appellant deleted data from them including critical operating system files from nine computers, the deletion of which shut down the entire US Army's Military District of Washington network of over 2000 computers for 24 hours, significantly disrupting

Governmental functions; 2,455 user accounts on a US Army computer that controlled access to an Army computer network, causing these computers to reboot and become inoperable; and logs from computers at US Naval Weapons Station Earle, one of which was used for monitoring the identity, location, physical condition, staffing and battle readiness of Navy ships, deletion of these files rendering the Base's entire network of over 300 computers inoperable at a critical time immediately following 11 September 2001 and thereafter leaving the network vulnerable to other intruders.

14. The appellant also copied data and files onto his own computers, including operating system files containing account names and encrypted passwords from 22 computers comprising: 189 files from US Army computers, 35 files from US Navy computers (including some 950 passwords from server computers at Naval Weapons Station Earle); and six files from NASA computers.

15. The appellant's conduct was alleged to be intentional and calculated to influence the US Government by intimidation and coercion. It damaged computers by impairing their integrity, availability and operation of programmes, systems, information and data, rendering them unreliable. The cost of repair was alleged to total over \$700,000.

16. Analysis of the appellant's home computer confirmed these allegations. During his interviews under caution, moreover, he admitted responsibility (although not that he had actually caused damage). He stated that his targets were high level US Army, Navy and Air Force computers and that his ultimate goal was to gain access to the US military classified information network. He admitted leaving a note on one army computer reading:

"US foreign policy is akin to government-sponsored terrorism these days . . . It was not a mistake that there was a huge security stand down on September 11 last year . . . I am SOLO. I will continue to disrupt at the highest levels . . ."

2. He was arrested as long ago as March 2002. The prosecution authorities in this country decided then that he would not be prosecuted here. The US authorities offered a plea bargain, which he refused. He unsuccessfully resisted his extradition in proceedings before District Judge Nicholas Evans, on appeal from his order before a Divisional Court (Maurice Kay LJ and Goldring J) of the Queen's Bench Division of the High Court. He appealed from the judgment of the Divisional Court to the House of Lords, which dismissed his appeal on 30 July 2008.

3. In the normal course of events, the dismissal of Mr McKinnon's appeal to the House of Lords would have brought to an end legal proceeding in this country challenging his extradition. However, in August 2008 his solicitors asked Dr Thomas Berney, a consultant in developmental psychiatry, to assess him with a view to determining whether he has a developmental disorder, and in particular Autism Spectrum Disorder ("ASD"), and if so to comment on the implications for his extradition. Dr Berney concluded that Mr McKinnon has Asperger Syndrome. Mr McKinnon subsequently saw Professor Simon Baron-Cohen, who agreed with this diagnosis.
4. Professor Baron-Cohen describes Asperger Syndrome as follows:

Asperger Syndrome (AS) is a major subgroup on the autistic spectrum. The other major subgroup is classic autism. Both are diagnosed on the basis of difficulties in social and communication skills, from childhood onwards. Both also share the features of unusually narrow interests and strongly repetitive behaviour/resistance to change/need for sameness. These lead to what are called 'obsessions', though the term 'strong, narrow interests' is a preferred term. AS differs from classic autism in that the latter can include additional learning difficulties (below average IQ) and invariably includes a history of language delay, whereas the former does not. Both AS and autism are the result of atypical brain development, and the ultimate cause is largely genetic, though there may be an interaction with the susceptibility genes and some environmental factor(s).
5. The judgment handed down today includes extensive extracts from Dr Berney's and Professor Baron-Cohen's reports. Undoubtedly, if Mr McKinnon is extradited to the USA and if he is convicted and receives a prison sentence, as must be assumed, he will suffer from his detention there to a much greater extent than a person who does not suffer from Asperger Syndrome or other ASD condition. According to Professor Baron-Cohen, there would be a high risk of serious deterioration in his mental health and a risk of suicide.
6. Mr McKinnon's diagnosis led to a further application by his solicitors to the Home Secretary to refuse to extradite him, on the basis that his rights under Article 3 and Article 8 of the European Convention on Human Rights would be infringed by his extradition. At that time his solicitors contended that if he received a custodial sentence in the USA, he would be detained in a so-called supermax high security prison, in which the conditions of his detention would bear particularly hard on him. That contention is no longer put forward.
7. Article 3 of the European Convention on Human Rights prohibits torture and inhuman or degrading treatment or punishment. There was and is no suggestion that Mr McKinnon would be the subject of torture if extradited to the USA. His contention is that his detention in prison there would amount to inhuman or degrading treatment or punishment.

8. Article 8 of the Convention establishes that “everyone has the right to respect for his private and family life, his home and his correspondence”. However, that right is subject to Article 8.2 which permits interference with that right in accordance with the law and where necessary in a democratic society in the interests of the prevention of crime. Extradition is in the absence of very special circumstances permitted by Article 8.2.
9. The Home Secretary accepted that if there were a real risk that if extradited Mr McKinnon would suffer inhuman or degrading treatment or punishment prohibited by Article 3 he should not be extradited, but he rejected his contention that he would so suffer. The claim based on Article 8 was rejected on the basis that his rights under Article 8 are qualified by Article 8.2, and that his extradition would be in accordance with the law and an appropriate response to his alleged offending. The Secretary of State declined to seek an assurance that Mr McKinnon would be released on bail in the USA pending his trial or any further assurance beyond the limited assurance that had already been given as to his repatriation.
10. Mr McKinnon’s solicitors also requested the Director of Public Prosecutions to reconsider his decision not to prosecute him in this country. If he were prosecuted in this country, convicted and sentenced, he would not be extradited to the USA for prosecution in respect of the same offending conduct. The DPP rejected this request, among other reasons because most of the evidence required to establish the consequences of Mr McKinnon’s offending is in the USA, and he could not be properly prosecuted in this country; and the USA was the appropriate jurisdiction for his prosecution. In addition, the DPP contends that he owed no legal duty to Mr McKinnon, as an alleged offender, to prosecute him.
11. Mr McKinnon applied to this Court for permission to apply for judicial review of the refusal of the DPP to prosecute him in this country, and sought judicial review, for which permission had already been given, of the refusal of the Home Secretary to accept that he should not be extradited to the USA.
12. Having heard full argument, this Court decided to refuse Mr McKinnon permission to apply for judicial review of the DPP’s decision, on the basis that such a judicial review has no real prospect of success. The Court agreed with what had been judicially observed previously, namely that the USA is the appropriate jurisdiction for the prosecution of Mr McKinnon’s alleged offending conduct. The Court held that the question whether his rights under the European Convention on Human Rights would be infringed by his extradition was for the Home Secretary and the Courts to decide, not the prosecuting authorities in this country. In addition, while the DPP must consider the interests of victims of crime when deciding whether to prosecute an alleged offender, and the physical and mental health of an alleged offender may lead to a decision *not* to prosecute, at least in a non-serious case, the DPP is not under a duty to prosecute by reason of the condition of an alleged offender such as Mr McKinnon when otherwise he would not wish to do so.

13. In relation to his claim against the Home Secretary, Mr McKinnon faced the difficulty that Article 3 of the European Convention on Human Rights is restricted to treatment and punishment of the most serious kind. The hurdle is particularly high in a case in which the treatment or punishment in question will not be in this country, but abroad. In its judgment, the Court reviews some of the jurisprudence on this issue. The medical evidence should be viewed in its context, which is that although it is accepted that Mr McKinnon suffers and has always suffered from Asperger Syndrome, he has never required or received psychiatric or other medical treatment for his condition, and has been able to deal with the extradition process in this country. The Court considered the evidence put before it as to prison conditions in the USA, but also took into account the assurances that the Home Secretary had been given by the US authorities as to the care and treatment that would be available if he were to serve a sentence of imprisonment there. Those assurances are set out under paragraph 28 of the judgment.

14. The very high hurdle faced by a claimant who alleges that if deported or extradited his treatment will infringe Article 3 is illustrated by the decision of the House of Lords in *N v Home Secretary* cited in paragraph 68 of the Court's judgment in this case. *N* concerned the enforced expulsion and return to Uganda of someone suffering from HIV-Aids. Lord Hope summarised the position as follows:

20. The decision which your Lordships have been asked to take in this case will have profound consequences for the appellant. The prospects of her surviving for more than a year or two if she is returned to Uganda are bleak. It is highly likely that the advanced medical care which has stabilised her condition by suppressing the HIV virus and would sustain her in good health were she to remain in this country for decades will no longer be available to her. If it is not, her condition is likely to reactivate and to deteriorate rapidly. There is no doubt that if that happens she will face an early death after a period of acute physical and mental suffering. ...

In that case, too, the expulsion of the claimant did not infringe her rights under Article 3.

15. To similar effect is the judgment of the Court of Appeal in *J v Secretary of State for the Home Department*, cited at paragraph 69 of the judgment in the present case. In that case, the medical evidence was that if the claimant, who suffered from mental illness, was "prevented from killing himself either in the UK or while being returned [it was] likely that he would commit suicide upon his arrival in Sri Lanka to avoid falling into the hands of the authorities from whom he perceives he is in mortal danger". The Court of Appeal upheld the Secretary of State's decision that his Article 3 rights would not be infringed by his removal to Sri Lanka.

16. Having carefully considered all the evidence put forward by Mr McKinnon and the Home Secretary, and comparing Mr McKinnon's case with cases such as that of *N*

and *J*, and applying the test laid down in those and other cases, the Divisional Court concluded that there is no real risk that his imprisonment in the USA would reach the high level of severity inherent in Article 3. The claim under Article 8 must fail for the reasons given by the Secretary of State. It followed that his claim against the Home Secretary had to be dismissed.

17. The Court will consider at a later date whether to give leave to appeal to what will by then be the Supreme Court, and whether to certify that a point of law of general public importance is involved in this case.