



Neutral Citation Number: [2011] EWCA Civ 1587

Case No: C1/2011/2588

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE QUEEN'S BENCH DIVISION,**  
**ADMINISTRATIVE COURT (COLLINS J)**  
**No: CO76452011**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/12/2011

**Before :**

**THE MASTER OF THE ROLLS**

**LORD JUSTICE MAURICE KAY (Vice President of the Court of Appeal, Civil  
Division  
and  
LORD JUSTICE SULLIVAN**

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**Between :**

<b>THE QUEEN (on the application of) OMAR</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>SECRETARY OF STATE FOR FOREIGN &amp; COMMONWEALTH AFFAIRS</b>	<b><u>Respondent</u></b>

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**Mr Raza Husain QC and Mr Ben Jaffey (instructed by Public Interest Lawyers) for the  
Appellant**  
**Mr James Eadie QC and Mr Jonathan Hall (instructed by the Treasury Solicitor) for the  
Respondent**

Hearing date : 8 December 2011  
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**Approved Judgment**

**Lord Justice Maurice Kay :**

1. In this case Mr Omar is seeking, by judicial review proceedings, to obtain *Norwich Pharmacal* disclosure by the Secretary of State in connection with proceedings in Uganda. He was refused permission to apply for judicial review by Collins J in the Administrative Court. However, on 12 October 2011 Sir Stephen Sedley granted him permission to appeal to this Court. In his carefully considered reasons Sir Stephen explained that because of the complexity and sensitivity of the issues he was limiting his order to a grant of permission to appeal against the refusal of permission to apply for judicial review rather than granting permission to apply for judicial review and returning the case to the Administrative Court. As a result, counsel have addressed us on the basis that our concern at this stage is solely with the question of permission to apply for judicial review. It is common ground that, if we grant permission, the matter should return to the Administrative Court for substantive hearing.
2. Mr Omar is a Kenyan citizen who lives in Nairobi. He alleges that on 17 September 2010 he was detained in a shopping centre in Nairobi and bundled into a waiting vehicle by the Kenyan Anti-Terror Police Unit (ATPU). He was almost immediately driven to the Ugandan border where he was delivered into the custody of the Ugandan security forces. He was taken to the headquarters of the Rapid Response Unit (RRU) in Kampala. The following morning he was interrogated by three men - two American and one British. In all he was interrogated at least twenty times, mostly by American and British intelligence services officers. They were attempting to elicit information from him about Muslim organisations or individuals involved in terrorist activities. He was severely ill-treated during the interrogations. He was told that if he cooperated and agreed to act as an informant his interrogators would ensure that he was returned to Kenya. However, if he failed to cooperate, he would be charged in connection with the World Cup bombings which had taken place in Kampala in July and in which seventy people had been killed while they were watching World Cup matches on television in two separate locations. The Somali-Islamist Al-Shabaab group has claimed responsibility for the suicide bombings. In the event, Mr Omar refused to cooperate with his interrogators and he was charged with participation in the bombings. He has pleaded not guilty to all charges. He is one of a number of defendants. The trial stands adjourned pending other legal developments.
3. The first application to be made on behalf of Mr Omar was for *habeas corpus*, his wife having filed such an application in the Kenyan courts on 20 September 2010. On 21 September a Kenyan judge issued a writ of *habeas corpus* returnable the following day. However, on 22 September, an ATPU inspector filed an affidavit emphatically denying Mr Omar's allegations concerning his initial detention and handover to the Ugandan security forces. Mr Omar also commenced judicial review proceedings in the Ugandan courts but these seem to have been overtaken by a petition to the Constitutional Court of Uganda on behalf of eight of the defendants in the criminal trial. Mr Omar is the first named petitioner. In a nutshell, the petition alleges unlawful rendition from Kenya to Uganda in disregard of extradition law, ill-treatment and other wrongdoing. Mr Omar claims to be a victim of state malpractice akin to that which resulted in the successful appeal in *Mullen* [2000] QB 520. In the Ugandan criminal proceedings he is seeking a stay on the basis of an abuse of process as a result of unlawful rendition. In the petition to the Constitutional Court he makes the same and other complaints. His claim for *Norwich Pharmacal* relief is directed to

obtaining disclosure from the Secretary of State of material which would assist in the Ugandan proceedings.

4. Since *Norwich Pharmacal Company v Customs and Excise Commissioners* [1974] AC 133, the principle has been developed in a number of cases including *Arab Monetary Fund v Hashim* (No5) [1992] 2 All ER 911; *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033; *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All ER 511; *President of the State of Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7; *R (Binyam Mohamed) v Secretary of State for Foreign & Commonwealth Affairs (No1)* [2009] 1 WLR 2579; and *Shaker Aamer v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 3116 (Admin). In *Binyam Mohamed*, Thomas LJ, giving the judgment of himself and Lloyd-Jones J, stated (at paragraphs 133-134):

“It seems to us, therefore, that although the action cannot be one used for wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information, and the court must always consider what is proportionate and the expense involved, the scope of what can be ordered must depend on the factual circumstances of each case. In our view the scope of the information which the court may order be provided is not confined to the identity of the wrongdoer nor to what was described by Lightman J in *Mitsui* ... as ‘a missing piece of the jigsaw’. It is clear from the development of the jurisdiction in relation to the tracing of assets that the courts will make orders specific to the facts of the case within the constraints made clear in *Norwich Pharmacal* and the cases to which we have referred.

We accept that the justification for the extension to the provision of more information than merely the identity of the individual or a certain specific fact was justified on the basis that equity was always prepared to assist the tracing of assets. However, where in this truly exceptional case information is said to be necessary to exculpate an individual facing a possible death penalty if convicted, we consider that a court is entitled to exercise the jurisdiction to order certain specific information be made available to serve the ends of justice, without the narrow circumscription that some observations suggest. A system of law under which it is permissible to order the provision of information to trace a person’s property, but under which it was not permissible to order the provision of information to assist in the protection of a person’s life and liberty, would be difficult to justify.”

In the present case, as in *Binyam Mohamed*, Mr Omar faces the possibility of the death penalty in the event of conviction in Uganda.

5. The stance of the Secretary of State in the present case is that, consistent with his general practice, he will “neither confirm nor deny” that a British agent was involved in the interrogation of Mr Omar in Kampala. He disputes that Mr Omar can satisfy

the necessity test and suggests that the present application is being advanced inappropriately “for wide-ranging discovery or the gathering of evidence”. Mr James Eadie QC emphasises that he is limiting his submissions to potential “knock-out” points because this is no more than a permission application. In the event of permission being granted, he would have far more to say at any substantive hearing. At this stage, he is not inviting us to conclude that Mr Omar’s account is inherently incredible.

6. In their helpful and commendably succinct submissions, counsel have addressed us by reference to four issues. I propose to adopt the same structure.

**Issue 1: Is relief “necessary” by reference to unlawful rendition/abuse of process?**

7. Nothing we have been shown leads to the conclusion that the Ugandan authorities will admit the unlawful rendition of Mr Omar. The point made on his behalf is that his chance of establishing unlawful rendition and, therefore, *Mullen*-style abuse of process, will be significantly enhanced if the Secretary of State discloses material confirming interrogation by a British intelligence officer in Kampala on the morning after the Kenyan ATPU handed him over to the Ugandan security forces. The case for the Secretary of State is that disclosure of such information (if it exists) is not “necessary”. The Ugandan authorities are facing an allegation of unlawful rendition and they will only be able to resist it by adducing evidence of due extradition from Kenya or arrest within Uganda unassisted by any unlawful rendition. If the Ugandan authorities cannot establish due extradition or lawful arrest, the inevitable inference will be one of unlawful rendition.
8. It seems to me that it is highly unlikely that there will be evidence of due extradition from Kenya. When the Kenyan authorities were faced with a writ of *habeas corpus* their response was not by reference to due extradition but was a flat denial of the facts asserted by Mr Omar in support of the allegation of unlawful rendition. The claim was described as “outrageous”. However, that does not lead to the inevitable conclusion that the Ugandan authorities, in the absence of due extradition, would offer no defence to the charge of unlawful rendition. The most that can be gleaned of the stance of the Ugandan authorities is to be found in an affidavit by a Senior Commissioner of Police in the Ugandan judicial review proceedings. It contains these passages:

“6. Following these investigations Kenyan government officials handed over the fourth and fifth applicants ... to the Uganda police force in Kampala, who I received on the 14<sup>th</sup> August 2010 and 26<sup>th</sup> August 2010 respectively in Kampala ...

8. I know that the sixth, seventh and eighth applicants were arrested as suspects in the bombings by Ugandan police while they were in Uganda.”

Mr Omar is the person referred to as the seventh applicant. The fourth applicant was a man called Suleiman. It would be difficult for the Ugandan authorities to deny unlawful rendition in his case because on 30 September 2010 a Kenyan judge held:

“There was no formal request by the Ugandan authorities for him. There was no warrant issued by a court in Uganda seeking his arrest. All extradition provisions were disobeyed in his connection. In short, all the evidence indicates he was illegally arrested, detained and removed from Kenya.”

9. It is a permissible reading of the affidavit of the Ugandan Senior Commissioner of Police that he was drawing a distinction between Mr Suleiman who had been handed over by the Kenyan authorities and Mr Omar and others who “were arrested ... while they were in Uganda”. For what it is worth, we have also been shown a Ugandan newspaper report suggesting that Mr Omar had been “arrested on September 15 in a city hotel” and that he had “entered the country on September 7”. The report appears to have been based, at least to some extent, upon information from police and security agencies.
10. At a late stage in the hearing Mr Eadie drew our attention to a completed medical examination form compiled in relation to Mr Omar’s remand in custody in Kampala. It refers to his date of arrest as 17 September 2010, the date which he gives for his capture and rendition.
11. At this permission stage, our concern is simply with whether it is arguable that Mr Omar can satisfy the “necessity” test. In my view, it is. Merely to say that he will be able to prove unlawful rendition and abuse of process by inference if the Ugandan authorities will not be able to produce documentary confirmation of due extradition is to view the matter too narrowly at this stage. We simply do not know whether, eventually, the Ugandan authorities will be relying on due extradition or lawful Ugandan arrest. The latter seems to be at least a distinct possibility. Either way, if Mr Omar is giving a truthful account, his prospect of establishing unlawful rendition and abuse of process will be greatly enhanced if the Secretary of State is able to disclose material which in any way confirms the circumstances and timeline advanced by Mr Omar. For these reasons I am persuaded that disclosure is arguably necessary in the particular circumstances of this case. Of course, I have no means of knowing whether the Secretary of State has any relevant material or whether, if he has, it might attract public interest immunity. That is all for another day.
12. In the course of his submissions, Mr Eadie advanced a prematurity argument. He suggested that necessity is not established at this stage but that, if events moved on in the Ugandan courts, and disclosure became arguable, Mr Omar could make a further application. I am unpersuaded by that approach. It seems to me that it leaves too much to chance in proceedings which are developing in another jurisdiction. It does not dissuade me from favouring a grant of permission. If circumstances were to change so that the necessity could be seen to have abated, that could be raised in this jurisdiction as appropriate.

## **Issue 2: disclosure of material relating to alleged ill-treatment**

13. This is not a case in which it is suggested that ill-treatment resulted in an unreliable confession. It seems that, before Collins J, the disclosure was sought solely by reference to the criminal proceedings. Collins J rejected the submission in paragraph 19 of his judgment:

“No admissions were made, and thus the ill-treatment, albeit wrongful, albeit, if it happened to be deprecated, was not such as would have rendered any evidential material upon which the prosecution would want to rely inadmissible, and in those circumstances it would not add to the abuse of process argument – at least, it would not add more than the claimant already asserts. Thus, ... in my view it is not necessary.”

14. That, it seems to me, was the correct response to the submission then made. Perhaps in recognition of this, Mr Raza Husain QC now seeks to put this part of his case on a wider basis. The case for Mr Omar is that not only did he not confess to the Kampala bombings; he was never even asked about them. His interrogation was aimed at his recruitment as an informant backed up by the threat of a sham prosecution in the event of his refusal. Thus, it is submitted, he needs disclosure of material tending to confirm his ill-treatment because it will enable him to establish not only in the criminal court but also in the Constitutional Court that there has been an abuse of process and of power resulting in a sham prosecution.
15. In the Summary Grounds of Defence it is stated:

“... in response to pre-action correspondence the Secretary of State has chosen to conduct reasonable and proportionate searches from material held that might tend to support an allegation that the Claimant was tortured or deliberately ill-treated in the manner alleged; these searches identified no such material.”
16. Mr Husain is critical of this statement because it suggests that the investigation was limited to a documentary search and did not extend to an attempt to identify and interview the person referred to by Mr Omar as a British agent called “Frank”.
17. It is important to keep in mind the nature of the prosecution case against Mr Omar. A Case Summary dated 8 August 2011 and signed by a Senior State Attorney on behalf of the Director of Public Prosecutions in Uganda includes allegations that Mr Omar attended meetings in Nairobi the object of which was to plan the execution of the bombings; that, after the bombings, he attended a meeting in Mombasa where the success of the operation and the finding of alternative routes to Somalia were discussed; that, following his arrest, the police ascertained that in April 2010 he had had in his possession a passport belonging to a known Al-Qaeda operative who had facilitated the travel of one of the Al-Shabaab recruits who later participated in the Kampala bombings; that the police had also discovered a list of items typically used in military operations and training and a tactical load-bearing vest with compartments for magazines and military equipment; and that part of the funds used to facilitate the operation had been provided by Mr Omar. If the matter proceeds to trial, it seems that those are the allegations which Mr Omar will have to resist. We do not have details of the evidence upon the prosecution will seek to rely. There has been a degree of disclosure in Uganda and, as I understand it, we have not been shown the entirety of all that has been disclosed.
18. To the extent that Mr Omar is seeking to meet the prosecution by asserting unlawful rendition and abuse of process, his needs will be met if he succeeds in securing

disclosure pursuant to issue 1, above. The case for the Secretary of State is that, when one turns to issue 2, there is not an arguable case for ordering disclosure, partly for the reason given by Collins J which I have adopted, but also because what is now being sought falls into the category of “wide-ranging discovery or the gathering of evidence” such as to take it outside the bounds of relief obtainable pursuant to *Norwich Pharmacal*. The principle is not co-extensive with the duty of disclosure which exists in domestic criminal proceedings. Whilst the principle has been extended, it has not been permitted to embrace (and I borrow Mr Eadie’s words) full-blown discovery of anything which might help in defending a foreign prosecution. In my judgment, Mr Omar is seeking more than that to which he is at present arguably entitled by reference to the necessity test. I reach the same conclusion for the same reasons in relation to disclosure of ill-treatment of other suspects in this case. I would refuse permission on this ground.

### **Issue 3: Exculpatory material**

19. Mr Husain seeks to put flesh on the bones of this submission by referring to evidence provided by a co-accused, Yahya Suleiman Mbuthia, who alleges that he was ill-treated in custody in an attempt to make him implicate Mr Omar as a leading figure who “master-minded the bombings”. Mr Mbuthia further alleges that a British official was present at the relevant interrogations. However, Mr Mbuthia states that he did not implicate Mr Omar in any wrongdoing.
20. Another accused, Mohammed Ali Mohammed, is said to have told the police that Mr Omar was implicated as a funder. However, Mr Mohammed has stated in an affidavit that it was not Mr Omar but another man. Moreover, Mr Mohammed does not suggest that the alleged mistreatment of himself was perpetrated by or in the presence of British personnel.
21. In my judgment, an arguable case for disclosure has not been established under this heading. My reasons for saying that are essentially the same as those set out under Issue 2 above. The necessity test has not been established, even on an arguable basis.

### **Issue 4: Investigatory Powers Tribunal (IPT)**

22. Part of the application for permission to seek judicial review is in the form of a complaint that Mr Omar was the victim of a serious breach of the *Consolidated Guidance to Intelligence Officers* in that he was tortured and mistreated in the course of interrogation to which a British agent was party. Collins J held that the appropriate venue for a complaint about breach of the *Consolidated Guidance* is the IPT rather than the High Court. This issue does not impact upon the current proceedings in Uganda. I do not minimise the seriousness of the unproven allegation when I say that any question of redress is not exactly urgent. Mr Husain does not dispute that the IPT would have jurisdiction. However, he complains that Mr Omar should not be diverted into that jurisdiction where the proceedings would be governed by a statutory closed procedure. Instead, he should be able to seek redress in judicial review proceedings in relation to which no closed procedure could apply: *Al-Rawi v Security Service* [2011] 3 WLR 388. In my view, this submission is utterly unsustainable. The IPT jurisdiction was designed to process complaints such as Mr Omar’s. It is compliant with Article 6 of the European Convention on Human Rights and Fundamental Freedoms: *Kennedy v United Kingdom* [2011] 52 EHRR 4. I have no doubt that

Collins J was entitled and correct to hold that this alternative remedial route should prevail. Indeed, in what would no doubt be fiercely contested proceedings, judicial review strikes me as being the worst possible remedial route.

### **Conclusion**

23. It follows from what I have said that I would grant permission to apply for judicial review by reference to Issue 1, above. I would refuse it on all other grounds. I would remit the case for substantive hearing on that limited basis.

### **Postscript**

24. Since writing this judgment, I have been supplied with further material by Mr Omar's solicitor. It includes the Ugandan Government's response to the Petition to the Constitutional Court. It describes the Petition as "misconceived, frivolous and vexatious" and an abuse of process. It is apparent from its terms that the Government's case is a denial of rendition from Kenya and an assertion of lawful arrest in Uganda although neither the pleaded Answer nor the supporting Affidavit describes the date or place of arrest. However, it does refer to "joint investigations by Ugandan police with foreign security officers, which included joint interrogations led by Ugandan Police officers". None of this undermines anything I had concluded in the judgment as drafted. Indeed, it seems to me to give strong support to the grant of permission as I would frame it. The general tenor of the Ugandan Government's pleading leaves a number of questions unanswered.

### **Lord Justice Sullivan:**

25. I agree.

### **The Master of the Rolls:**

26. I readily agree with Maurice Kay LJ's reasons for rejecting Mr Omar's case on Issues 2, 3 and 4. I must, however, confess to more difficulty on Issue 1.
27. The evidence which Mr Omar hopes to get from the Secretary of State is for the purpose of helping to establish his case in his Ugandan judicial review and/or Constitutional proceedings ("the Ugandan proceedings") that he was unlawfully kidnapped in Kenya and forcibly taken to Uganda. If such evidence exists, the support which it may be able to give his case is (i) to assist in establishing that he was in Ugandan custody on 17 September 2010, only a day after he was, according to his own and, apparently, other witnesses' evidence, in Kenya, and (ii) more speculatively and more generally, to help establish that he was unlawfully rendered into Uganda.
28. So far as point (i) is concerned, if Mr Omar establishes that he was happily in Kenya on 16 September, and in a Ugandan prison a day later, that would provide a degree of support for his case in the Ugandan proceedings. However, even if accepted, it would not be conclusive: he could have travelled voluntarily to Uganda late on the 16 September, and been arrested immediately. As to point (ii), if a British security officer was waiting to interview Mr Omar as soon as he arrived in the Ugandan prison, that officer may have provided information to his superiors in London which would, either directly or indirectly, support Mr Omar's case (e.g, the officer may have reported in

terms that Mr Omar had been kidnapped, or he may have reported something which supports such a notion).

29. Before we were supplied with the recent evidence referred to in para 24 above, I had strong doubts whether it would have been right to permit Mr Omar's present application for judicial review to proceed.
30. As to point (i), there was no suggestion that Mr Omar's case that he was in a Ugandan prison by 17 September is inherently unlikely for some specific reason, or that his statement on the point is open to attack on the basis of some specific evidence to the contrary. Nor was there any suggestion in any of the evidence we had seen that the Ugandan authorities would challenge his evidence that he was in a Ugandan prison on 17 September. As mentioned in para 8 above, the Ugandan Senior Commissioner's affidavit does not deny that Mr Omar was in a Ugandan prison on 17 September, which would seem to me that, unless the Ugandan authorities put in further evidence, Mr Omar's case on that point would go by default. Finally, there is the evidence contained in the Ugandan prison medical records, which are referred to in para 10 above, where Mr Omar is recorded as having been rendered on 17 September and examined on 19 September.
31. Point (ii) seems to me to be based on greater speculation, although it is not unreasonable speculation. If a British security officer interviewed Mr Omar as soon as he arrived, it is not very speculative to suggest that he would have reported the interview, together with its date, back to London. It is much more speculative to suggest that he would have said, or said something which implied or supported the contention, that Mr Omar had been rendered unlawfully from Kenya. However, before we received the further evidence, it was by no means clear that the Ugandan authorities were denying that Mr Omar had been unlawfully rendered: I refer again to the evidence of the Ugandan Senior Commissioner in para 8 above.
32. On the basis of the evidence as it originally appeared, therefore, at any rate subject to one point, it seemed to me rather hard to justify the contention that the evidence which Mr Omar is seeking from the Secretary of State is "necessary", even bearing in mind the protean nature of that word, and the seriousness of the charge which he is facing and the fact that he could be executed if he is convicted.
33. The one point which concerned me was that it may transpire that the Ugandan authorities would challenge his case that he was in a Ugandan prison by 17 September, or that he was unlawfully rendered from Kenya. I was attracted by Mr Eadie's contention that the answer to that point was that if such a challenge were mounted, Mr Omar's application could be renewed. I see the force of Maurice Kay LJ's riposte that such a course would leave "too much to chance in proceedings which are developing in another jurisdiction". However, if a person wants *Norwich Pharmacal* disclosure to obtain evidence to support his case on a matter which is not in issue in foreign proceedings, but might become in issue, there is much to be said for the view that it is for that person to show that, if he were required to wait for the matter to be in issue before he applied for such disclosure, there would be a substantial risk that he could be prejudiced – most obviously because the delay would prevent him from receiving and producing the evidence before the foreign proceedings will have been heard.

34. In the light of the recent further evidence summarised in para 24 above, it is unnecessary to reach a firm conclusion on what decision I would have arrived at on the basis of the facts as they appeared before that further evidence was put in. This further evidence establishes quite unequivocally that, in the Ugandan proceedings, the Ugandan authorities are challenging Mr Omar's contention that he was unlawfully rendered from Kenya. That considerably strengthens Mr Omar's case on point (ii). Indirectly and more questionably, it also strengthens his case on point (i), as the two points are not entirely distinct.
  
35. Because (a) we are only being asked to grant permission to make an application for judicial review, (b) the charges and consequent penalty faced by Mr Omar are so serious, (c) it seems quite probable that a British security officer interviewed Mr Omar very shortly after he was incarcerated in a Ugandan prison, at least on his case, and (iv) it is now clear that the Ugandan authorities are challenging his case that he was unlawfully rendered, I consider that it is appropriate to allow this appeal.