

ONTARIO
SUPERIOR COURT OF JUSTICE

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| B E T W E E N: |) | |
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| THE UNITED STATES OF AMERICA |) | Robin Parker and Howard Piafsky, for the |
| |) | Extradition Partner |
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| Extradition Partner |) | |
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| - and - |) | |
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| ABDULLAH AHMED KHADR aka ABU |) | J. Silver, D. Edney and N. Whitling, for the |
| BAKR |) | Person Sought |
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| Person Sought |) | |
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| |) | |
| |) | HEARD: December 22 and 23, 2005 |

2006 CanLII 585 (ON S.C.)

MOLLOY J:

REASONS FOR JUDGMENT

A. INTRODUCTION

[1] On December 17, 2005, Abdullah Ahmed Khadr was arrested in Toronto pursuant to a Provisional Arrest Warrant issued the previous day. The United States of America requested Mr. Khadr's arrest and will be seeking his extradition to the United States on charges of conspiracy and possession of a destructive device in furtherance of a crime of violence. Mr. Khadr applied for release on bail pending the extradition proceedings. That application proceeded before me on December 22 and 23, 2005. At the conclusion of the hearing, I dismissed the application with brief oral reasons, indicating I would deliver more extensive written reasons later. In addition to my Reasons for denying bail, these Reasons also address three rulings I made during the course of the hearing: 1. finding that the onus was on Mr. Khadr to justify his release; 2. declining to

issue a publication ban; and 3. directing the proposed surety to answer questions as to the information she received from Mr. Khadr's lawyers about the nature of the allegations against him.

B. PUBLICATION BAN

Position of the Parties

[2] At the outset of the hearing, counsel for Mr. Khadr requested a ban on the publication of all evidence heard before me, either until the extradition request is rejected, or if surrender for extradition is ordered, until the trial in the United States is concluded. Mr. Whitling, on behalf of Mr. Khadr, conceded that I would have no jurisdiction to prevent publication by media outside of Canada. Apparently, a press release was issued by the United States Department of Justice when Mr. Khadr was arrested. Mr. Whitling conceded that there has been substantial press coverage of these proceedings already and that the contents of the supporting affidavits filed on the bail hearing have already been reported extensively in the media. There are also many reports about this case on the Internet. Mr. Whitling proposed that the publication ban apply to any direct evidence heard in the courtroom and any new evidence introduced before me, but not to information already in the public domain.

[3] The Crown opposed any ban. I also heard submissions on this issue from Mr. Wong, who appeared as counsel on behalf of the Toronto Star. He opposed any ban on publication and indicated this position was supported by other media representatives including the Globe and Mail, CanWest Global Communications and the Canadian Broadcasting Corporation.

[4] I refused to issue the publication ban sought. However, I did order that there be no publication of any addresses of various members of the Khadr family, if such addresses were disclosed in the course of the evidence.

Is a Publication Ban Mandatory Under s. 517 of the Criminal Code?

[5] Mr. Whitling argued that I am required in these circumstances to order a publication ban, citing s. 517 of the *Criminal Code*. Section 19 of the *Extradition Act*, S.C. 1999, c.18 provides that Part XVI of the *Criminal Code* (which includes the judicial interim release provisions) applies in this proceeding "with any modifications that the circumstances require". Section 517 of the *Criminal Code* is within Part XVI and thus presumptively applicable unless the circumstances require a modification as contemplated by s. 19 of the *Extradition Act*. Under s. 517 of the *Criminal Code*, if an accused on an application for judicial interim release requests a ban on publication, the presiding judge is required, by mandatory language, to make an order prohibiting the publication of "the evidence taken, the information given or the representations made and the reasons, if any, given or to be given" until the accused is discharged at the preliminary or, if ordered to stand trial, the trial is ended. Mr. Whitling submitted that the only modification necessary to import this provision into an extradition proceeding is to make the ban on publication mandatory either until the extradition request is denied, or if extradition is

ordered, until the completion of the foreign trial. Otherwise, he submitted, the mandatory language requires that the publication ban be issued if requested by the person sought.

[6] Ms Parker, supported by Mr. Wong, argued that s. 517 of the *Criminal Code* does not apply, but rather is ousted by the more directly applicable publication ban provision in s. 26 of the *Extradition Act* itself which states:

26. Before beginning a hearing in respect of a judicial interim release or an extradition hearing, a judge may, on application by the person or the Attorney General and on being satisfied that the publication or broadcasting of the evidence would constitute a risk to the holding of a fair trial by the extradition partner, make an order directing that the evidence taken not be published or broadcast before the time that the person is discharged or, if surrendered, the trial by the extradition partner has concluded. (Emphasis added)

[7] There is support for Mr. Whiting's position in the decision of the North Territories Supreme Court in *Federal Republic of Germany v. Ebke*, [2000] N.W.T.J. No. 45. Richard J. held in that case that s. 517 of the *Criminal Code* applied, notwithstanding s. 26 of the *Extradition Act*, and that the Court has no discretion. He stated, at paragraph 122, that "when a so-called fugitive is brought before the Court on an *Extradition Act* and requests the [non-publication] order, he is entitled to it."

[8] I was not referred to and am not aware of any other case authority to that effect. Two judges of this Court have considered the issue of a publication ban in an extradition proceeding. Neither was of the view that the ban was mandatory if requested by the person sought. The issue was also directly addressed by the British Columbia Supreme Court, which declined to follow the decision in *Federal Republic of Germany v. Ebke*.

[9] In *United States of America v. M.(D.J.)* (2001), 156 C.C.C. (3d) 276 (Ont.S.C.J.), Whealy J. had issued a provisional arrest warrant and made a sealing order. Publication of the name of the person sought in that case would have revealed the identities of the complainants, who were minors. The original sealing order was continued by Grossi J. at the time of the bail hearing and he also made a further order banning publication of the evidence at the bail hearing. Subsequently, a media company moved before Grossi J. seeking rescission of the sealing orders and the publication ban. In the result, Grossi J. dismissed the application because it was not properly before him, but rather should have been brought before the Supreme Court of Canada, following the procedure set out in the case of *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.). Although Grossi J.'s observations on the publication ban issues are therefore *obiter* and not binding, they do have persuasive value. Grossi J. referred to, but did not adopt, the reasoning of the Northwest Territories Supreme Court in *Federal Republic of Germany v. Ebke*. Rather, he rested his decision to order a publication ban on his common law power to do so in order to protect the privacy interests of the complainants, again relying on *Dagenais*. He ruled that s. 26 of the *Extradition Act* does not constitute the only situation in which a publication ban can be made and that it does not oust the common law jurisdiction. The

issues before Grossi J. were somewhat different than those before me, and, as I have noted, his decision on the issues is *obiter*. He did not specifically address whether s. 517 of the *Criminal Code* removed any discretion in this situation and mandated a publication ban, although the argument was raised before him and *Ebke* was cited. However, given the fact that he based his opinion to continue the ban on the common law power to do so, it is a reasonable inference that he was not of the view that the publication ban was mandatory in any event by operation of s. 517 of the *Criminal Code*.

[10] The issue also arose before Nordheimer J. in *United States of America v. Pannell*, [2004] O.J. No. 5715 (Ont.S.C.J.). In that case, Mr. Pannell had been ordered detained at his initial bail hearing. A publication ban was not sought at that time and there was extensive media coverage of the circumstances Mr. Pannell found himself in and the evidence at the bail hearing. Subsequently, Mr. Pannell brought an application before Nordheimer J. for a review of the detention order based on a material change in circumstances and, for the first time, sought a publication ban. His counsel argued that the publication ban was mandatory under s. 517 of the *Criminal Code*. Nordheimer J. refused to order a publication ban, in part because there had been so much coverage already it would be impossible for the media to determine what they could and could not report in the future. However, he also held that s. 517 of the *Criminal Code* did not fetter his discretion in this matter. He first noted the underlying purpose of s. 517 of the *Criminal Code*, which is to avoid the possibility of influencing or tainting the jury pool for the eventual trial in this jurisdiction. He then went on to observe that a publication ban made in Canada has no operation outside our borders and that there is no practical way to ensure that potential jurors outside Canada do not hear about particulars of the case before the trial in the foreign jurisdiction. He then held (at para 25):

I would question whether section 517 has any effective role to play in an extradition proceeding. The rationale for the section, if there be one at all, is certainly considerably lessened in an extradition proceeding, for the reasons I have mentioned. It is, therefore, open to conclude that one necessary modification to the application of Part XVI to extradition proceedings is that section 517 ought not to apply. Given the constitutional guarantee, contained in section 2(b) of the Canadian Charter of Rights and Freedoms, regarding freedom of the press and other media, any infringement on that freedom would have to be demonstrably justified. That fact provides a further rationale against importing that particular provision into extradition proceedings. (Emphasis added)

[11] A similar approach was taken by Koenigsberg J. of the British Columbia Supreme Court in *United States of America v. Amhaz*, [2001] B.C.J. No. 2319 (B.C.S.C.). This was also a case in which there had been extensive coverage of the facts before the Canadian court in the press and on the Internet. Koenigsberg J. held that because of the extensive media coverage already in existence, a publication ban under s. 26 of the *Extradition Act* was untenable and would have no effect on the protection of Mr. Amhaz's right to a fair trial in the United States. He then considered the effect of s. 517 of the *Criminal Code*, which counsel before him had argued was mandatory. He considered, but distinguished, the Northwest Territories Supreme Court decision

in *Federal Republic of Germany v. Ebke*, on the grounds that the Court in that case was apparently not directed to the modifying words of s. 19 of the *Extradition Act*. Koenigsberg J. referred to the “apparent” conflict between s. 19 and s. 26 of the *Extradition Act*, but held that the two sections could be reconciled because of the language of s. 19, which permitted modifications of the imported *Criminal Code* provisions to suit the circumstances of the particular extradition case. He also made reference to the *Charter* and noted the importance of protecting freedom of the press in accordance with the principles laid down by the Supreme Court of Canada in *Dagenais*. In the result, Koenigsberg J. concluded that modification of the mandatory language in s. 517 was required and refused to order a publication ban under s. 517 of the *Criminal Code*. He held (at para 21):

I do not say that s. 517 of the Criminal Code is ousted by s. 26 on Charter principles – I do say that the analysis I have engaged in to achieve the result of modifying the application of s. 517 to meet the circumstances in this case is consistent with the application of Charter principles. In my view, it is unnecessary and unwise to suggest that s. 517 should never have application in bail proceedings under the Extradition Act. There may very well be circumstances where the jeopardy to a fair trial in Canada faced by a person sought may make a publication ban the only means of ameliorating that jeopardy.

[12] I agree with the approach taken by Nordheimer J. in *United States of America v. Pannell* and by Koenigsberg J. in *United States of America v. Amhaz*. Section 19 of the *Extradition Act* does not simply import all of Part XVI of the *Criminal Code*. It specifically provides for modification of the *Criminal Code* provisions where appropriate. This modification power must be read in light of s. 26 of the *Extradition Act*, which provides a test for determining whether to issue a publication ban in respect of a judicial interim release hearing in an extradition case. The extradition judge is empowered to do so in permissive, not mandatory, language “on being satisfied that the publication or broadcasting of the evidence would constitute a risk to the holding of a fair trial by the extradition partner”. The order may be made on application by the person sought or by the Crown, with the same test being applied in each case. If s. 517 of the *Criminal Code* applies without modification, there would be a mandatory publication ban on a judicial release hearing every time a person sought in an extradition case requested one. If that were the case, the application of s. 26 to an application by the person sought would be rendered nugatory. It is a well-known principle of statutory construction that the Court must strive to give meaning to every provision in a statute. Any construction that would render a provision meaningless, or that would put provisions of a statute in conflict with one another, is to be avoided. Accordingly, the importation of s. 517 of the *Criminal Code* into an extradition proceeding, if it is to happen at all, cannot operate to oust the specific discretionary language of s. 26 of the *Extradition Act*.

[13] I also agree with the conclusion of Grossi J. in *United States of America v. M.(D.J.)* that the court’s common law jurisdiction to order a publication ban in accordance with the principles in *Dagenais*, is not ousted by any provision of the *Extradition Act*. The test for whether to impose a publication ban developed in *Dagenais* involves the balancing of competing interests

and *Charter* values. The Court is directed to be mindful of the objectives of the publication ban (e.g. whether it is necessary in order to prevent a real or substantial risk to the fairness of a trial or the privacy interests of a party or whether other reasonable alternatives exist to protect those interests) and the proportionality of the ban to its effect on protected *Charter* rights (i.e. whether the salutary effects of the publication ban outweigh the deleterious effects to the freedom of expression of those affected by the ban): *Dagenais* at pages 317, 320-321 and 326-327.

[14] I therefore conclude that there is no mandatory publication ban in this case. In my view, s. 517 of the *Criminal Code* has no application in these circumstances. I have jurisdiction to issue a publication ban if the test in s. 26 of the *Extradition Act* is met. I also have a common law jurisdiction to order a publication ban in accordance with the principles set out in *Dagenais*.

Is a Publication Ban Appropriate in this Case?

[15] The onus is on the party seeking to ban publication to justify the ban: *Dagenais* at p. 327.

[16] Under s. 26 of the *Extradition Act*, the burden is on Mr. Khadr to demonstrate that publication of the proceedings before me would constitute a risk to the fairness of his ultimate trial in the United States. He has not discharged that burden. There has already been extensive coverage of the bulk of the material before me, both in Canada, in the United States and on the Internet. In my view, publication of anything additional from this hearing would not contribute materially to the information already in the public domain and would therefore have no material impact on the fairness of his trial in the United States. Further, I have no jurisdiction to prevent broadcast outside Canada, and it is there that the most significant risk of an impact on the trial would occur anyway.

[17] A court ought not to make an order that is vague, unworkable or incapable of enforcement. Given the extent of the media coverage to date, it would be very difficult, if not impossible, for members of the media to determine whether a particular piece of information was already in the public domain (and therefore not covered by a publication ban) or new information from this hearing (and therefore caught by the ban). Responsible journalists and media organizations recognize that breach of a court order is a serious matter. Imposing the kind of ban sought here would put the media in an untenable position, which is a factor militating against making the order: *United States of America v. Pannell* at para 27.

[18] The United States trial, if there is to be one, is some time into the future. To the extent there is any risk to a fair trial by information from this hearing becoming known to potential jurors in the United States, the process of screening during jury selection is a more effective means of eliminating that danger than a broad-based publication ban issued now in Canada.

[19] In addition to the difficulties I have mentioned above, I am mindful of the importance of the constitutionally protected right to freedom of the press. Freedom of the press is a public right, not simply a right belonging to journalists. Court proceedings are almost invariably conducted in public. Public confidence in our judicial system is not enhanced if justice is dispensed behind closed doors and for reasons that are kept secret. The vast majority of the

public do not attend in person as spectators at court. The media are their representatives in that regard and it is from media reports that most members of the public obtain information about judicial proceedings. Ordering a ban on publication prevents those members of the public unable to attend court in person from finding out what has happened here. The effect of this curtailment of *Charter* freedoms must not be minimized and should only occur in those rare circumstances when it is demonstrated to be necessary in the interests of justice. This is not such a case. The interests of justice here do not require secrecy. On the contrary, the issues raised are matters of broad public concern and these proceedings ought to be subject to public scrutiny. Accordingly, I find that the test for granting a non-publication order under s. 26 of the *Extradition Act* is not met.

[20] There is considerable overlap in considering whether the test for a ban on publication at common law, as opposed to under the statute, is appropriate. To the extent the justification for the ban is to prevent risk to the fairness of the ultimate trial, the analysis is the same. There is no justification for a ban on that basis either under the statute or at common law.

[21] However, there are privacy interests involved that are separately deserving of protection, particularly with respect to witnesses and families of the parties involved: *Dagenais* at p. 321. In this case, an issue arose as to the possible disclosure in the course of the hearing of personal information about third parties, such as the residential addresses of Mr. Khadr's family members. Given the notoriety of this case, disclosure of such information could well have a substantial and negative impact on those family members. Protecting that information would have little, if any, impact on the public's general right to know what is happening in the courts and constitutes a very minimal impairment of the right of freedom of the press. Accordingly, under my common law power, I have issued an order banning publication of any evidence before me as to the residential addresses of any members of Mr. Khadr's family.

C. ONUS

Position of the Parties

[22] Counsel for Mr. Khadr took the position that the usual rules for judicial interim release apply in this situation and that the onus is on the Crown to justify Mr. Khadr's detention pending the determination of the extradition proceeding. The Crown argued that this is a reverse onus situation, with the onus resting upon the person sought. I ruled that the onus lies upon Mr. Khadr.

Legal Analysis

[23] As stated above, s. 19 of the *Extradition Act* incorporates Part XVI of the *Criminal Code* into the *Extradition Act*. This Part of the *Code* includes the provisions relating to judicial interim release, or bail. The usual rule is that a person charged with an offence is entitled to be released without conditions upon providing a standard form undertaking, unless the Crown "shows cause" why he should be subject to additional conditions or detained pending trial: *Criminal Code* s. 515. That general rule, however, is subject to a number of exceptions in which

the onus is reversed. In those situations, the accused is required to be held in custody pending trial unless he “shows cause why his detention in custody is not justified”: *Criminal Code* s. 515(6). Included in the exceptions which create a reverse onus is where “an accused is charged with an indictable offence, other than an offence listed in section 469 . . . that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence”: *Criminal Code* s. 515 (6)(a)(iii).

[24] Section 515(6) of the *Criminal Code* contemplates a situation in which a person is “charged with an indictable offence” under the *Criminal Code*. In an extradition proceeding, the person before the court is not charged with an offence in Canada. This is therefore a situation which requires the *Criminal Code* provision to be applied with modifications to suit the circumstances, as provided for in s. 19 of the *Extradition Act*.

[25] The charges against Mr. Khadr in the United States are set out in a Warrant of Arrest issued by the United States District Court in the District of Massachusetts on November 23, 2005. That document provides a brief description of the offences as being “Possession of a Destructive Device in Furtherance of a Crime of Violence and Aiding and Abetting; and Conspiracy to Possess a Destructive Device in Furtherance of a Crime of Violence”. The charges are then further particularized as follows:

Count One

From a date unknown through in or about October, 2004, in Afghanistan and Pakistan and elsewhere outside the United States, Abdullah Ahmed Khadr knowingly possessed a firearm, that is, a destructive device, in furtherance of a crime of violence for which he may be prosecuted in a court of the United States, that is, conspiracy to murder a United States national outside the United States, in violation of Title 18, United States Code, Section 2332(b)(2), and conspiracy to use a weapon of mass destruction, that is, a destructive device, against a national of the United States while such national was outside of the United States and against property that was owned, leased and used by the United States outside the United States, in violation of Title 18, United States Code, Sections 2332a(a)(1) and (3), all in violation of Title 18, United States Code, Sections 924(c) and 2.

Count Two

From a date unknown through in or about October, 2004, in Afghanistan and Pakistan and elsewhere outside the United States, Abdullah Ahmed Khadr did knowingly and intentionally combine, conspire, confederate and agree with other co-conspirators, both known and unknown, to commit an offense under Title 18, United States Code, Section 924(c), that is, to possess a firearm, that is, a destructive device, in furtherance of a crime of violence for which he may be prosecuted in a court of the United States, that is, conspiracy to murder a United States national outside the United States, in violation of Title 18, United States

Code, Section 2332(b)(2), and conspiracy to use a weapon of mass destruction, that is, a destructive device, against a national of the United States while such national was outside of the United States and against property that was owned, leased and used by the United States outside the United States, in violation of Title 18, United States Code, Sections 2332a(a)(1) and (3), all in violation of Title 18, United States Code, Section 924(o).

[26] To determine where the onus lies for purposes of the bail application it is necessary to determine what the equivalent offences would be under our *Criminal Code*. Since the actual request for extradition has not yet been made in this case, there has not yet been a determination by the Minister as to which are alleged to be the equivalent offences under our *Criminal Code*. Counsel agreed that for purposes of the bail application, this is a preliminary issue I must determine.

[27] Counsel were not aware of any case law addressing what a judge can or should take into account in determining the equivalent charge under our *Criminal Code*. Mr. Whitling, on behalf of Mr. Khadr, submitted that for this purpose I should look no further than the wording of the United States charges themselves and should not take into account any of the additional details of the offences provided in the affidavit material. Based solely on the wording of the charges, he suggested that the equivalent *Criminal Code* offences would be possession of a weapon for the purpose of committing an offence (s. 88 of the *Criminal Code*) or possession of weapons for the purpose of weapons trafficking (s. 100) of the *Criminal Code*). Ms Parker, for the Crown, submitted that I should look beyond the technical wording of the United States charges and consider all of the circumstances set out in the affidavits to determine the substance of the offences alleged. The Crown took the position that the charges are in substance allegations of terrorism and that the equivalent provisions under our *Criminal Code* are s. 83.18 (participation in activity of a terrorist group) and s. 83.2 (commission of an offence for the benefit of a terrorist group). If Mr. Whitling's position is correct, the onus would be on the Crown to establish why Mr. Khadr should be detained pending the extradition hearing. If Ms Parker's position is correct, there is a reverse onus requiring Mr. Khadr to justify his release.

[28] In my opinion, it is not appropriate to confine my analysis to the strict wording of the United States charges. It is obviously important to take those charges into account, and indeed they must inform the rest of my analysis on this issue. However, it is also relevant to consider the substance of the allegations against Mr. Khadr in determining the equivalent Canadian offence for purposes of this bail hearing. No evidence proving foreign law was before me. I do not know the significance of the American authorities charging Mr. Khadr in the manner they did. I do not know whether there is an American equivalent to the Canadian *Criminal Code* terrorism provisions. I do not know which offences might carry higher penalties under United States law. However, I do know that in the supporting material filed on the request for the arrest warrant the American authorities saw fit to include substantial information with respect to Mr. Khadr's activities in support of Al Qaeda, a known terrorist organization. Those activities are said in the material to be directly relevant to the charges upon which Mr. Khadr's extradition is sought. Further, the United States prosecutor who authorized the provisional arrest warrant

request and signed the material on behalf of the United States Government is James Farmer, whose title is “Chief, Anti-Terrorism Unit”. It is clear from the material that the United States is treating this matter as a crime linked to terrorism. It would not be appropriate in these circumstances to ignore the evidence related to terrorism, as it forms the very essence of the conduct alleged to give rise to the charges.

[29] This is not a situation where the evidence filed discloses a separate offence under our *Criminal Code* that is unrelated to the essence of the charges laid by the foreign state. On the contrary, the stated subject matter of the United States charges is that Mr. Khadr supplied firearms, ammunition and components for landmines to Al Qaeda terrorist forces abroad, which weapons were intended to be, and were actually, used in combat against United States and Coalition Forces. These allegations are the very core of the United States case against Mr. Khadr. They also fall squarely within the terrorism provisions of the *Criminal Code* of Canada, in particular sections 83.18 and 83.2, which state:

83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

83.2 Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.

[30] Al Qaeda is specifically listed as a terrorist group under our legislation. Supplying arms and ammunition to Al Qaeda is clearly contributing to the ability of Al Qaeda to carry out its terrorist activities and, as such, would violate s. 83.18(1) of the *Criminal Code*. Engaging in the sale of weapons and ammunition of this nature is an indictable offence in Canada. Doing so for the benefit of Al Qaeda is therefore also an offence under s. 83.2 of the *Criminal Code*.

[31] I therefore conclude that terrorism is the underlying essence of the offences for which the United States seeks Mr. Khadr’s extradition and that the corresponding provisions in our *Criminal Code* are sections 83.18 and 83.2. Accordingly, there is a reverse onus in this situation, with the burden being on Mr. Khadr to establish on a balance of probabilities that his release pending the completion of the extradition proceedings is appropriate.

D. PRIVILEGE CLAIM: COMMUNICATIONS BETWEEN KHADR’S COUNSEL AND SURETY

[32] The proposed surety for Mr. Khadr, if I were to order his release, is his grandmother, Fatmah Elsannah. Mrs. Elsannah filed an affidavit in support of the application. She was also called as a witness at the hearing before me and was cross-examined by the Crown. In the course of that cross-examination, Ms Parker (for the Crown) asked Mrs. Elsannah about her knowledge of the allegations against Mr. Khadr in this case. Mrs. Elsannah testified that the

first she heard of her grandson having admitted purchasing rocket launchers and grenades, training in Al Qaeda camps and learning how to make explosives was in the court that same day. Ms Parker then asked Mrs. Elsannah whether she had asked her grandson's lawyers about the allegations against him. Mr. Edney, on behalf of Mr. Khadr, objected to that question and took the position this information is protected by solicitor-client privilege.

[33] The purpose of solicitor-client privilege is to protect the communications between a client and his solicitor so that the client can obtain legal advice without worry of jeopardizing his legal position. It is of the utmost importance that the lawyer have full and truthful information in order to properly advise the client. The protection of the communications between them is designed to ensure that there is frank and full discussion between the lawyer and the client. When pressed, Mr. Edney conceded that Mrs. Elsannah was not his client and that he did not give her advice. Accordingly, the communications between them are not communications between a solicitor and client and do not fall directly within the privilege. Indeed, disclosure of privileged communications to a non-client usually constitutes waiver of the privilege.

[34] Mr. Edney, however, submitted that the information provided by counsel to Mrs. Elsannah was nevertheless protected as part of the "work-product" privilege, because it was disclosed in the course of counsel's preparation of Mr. Khadr's case.

[35] There can be situations where counsel's interviews with witnesses and third parties for the purposes of assisting the client are protected from disclosure, although this is more in the nature of litigation privilege than pure solicitor-client privilege. Typically, this privilege attaches to the information received by the solicitor in the preparation of a case for litigation and recorded, for example, in the solicitor's notes and working papers. This has been held to extend to criminal cases: see *R. v. Swearngen* (2003), 68 O.R. (3d) 24 (S.C.J.) and cases referred to therein.

[36] The information received by Mrs. Elsannah does not fall within work-product privilege. This is not a matter of information gathered by the solicitor in order to prepare his client's case. The issue is whether the solicitors advised Mrs. Elsannah of the allegations against her grandson. The allegations are in the public record filed in this proceeding. There is nothing privileged about them. Mrs. Elsannah came forward as a surety for her grandson. The Crown seeks Mr. Khadr's detention on a number of grounds, including that he may flee the jurisdiction rather than face extradition and that his close ties to the Al Qaeda network may facilitate that effort. In determining whether Mrs. Elsannah understands the nature of the risk she is undertaking as surety for her grandson, it is relevant to consider the extent to which Mrs. Elsannah is apprised of the allegations against Mr. Khadr. The information she received, regardless of its source, is relevant and not privileged. The fact that information may have been provided by the solicitors does not make it privileged for that reason alone, and that is the only basis upon which privilege is sought.

[37] Further, whether Mrs. Elsannah received such information from her grandson's solicitors is directly relevant to her credibility. She at first testified that she knew nothing of these

allegations until the very day of the hearing, although she filed her affidavit days before. In testing her credibility on this point, it was appropriate for the Crown to suggest to Mrs. Elsamnah that some information must surely have been given to her by her grandson's solicitors at the time she agreed to be his surety.

[38] Finally, even if work-product privilege did attach to those communications initially, such privilege was surely waived when Mrs. Elsamnah was called as a witness. Her evidence as to her faith in the terms of bail being complied with is dependent on whether her opinion of her grandson's trustworthiness is an informed one and on whether her evidence is credible. On both points, the information provided to her is relevant and essential evidence. Once the party relying upon her evidence in that regard calls her as a witness, that party can no longer claim that the information given to the witness in preparation for her testimony is privileged: *R. v. Giroux*, [2001] O.J. No. 5495 (S.C.J.); *R. v. Stone* (1999), 134 C.C.C.(3d) 353 (S.C.C.) at paras 96-99.

E. RELEASE OR DETENTION PENDING EXTRADITION HEARING

General Principles and Positions of the Parties

[39] The starting point in any application for bail (judicial interim release) must be the recognition that in our system of justice all persons charged with offences are protected by the presumption of innocence. In this case, I must bear in mind that Mr. Khadr has not been convicted of any offence.

[40] The detention of an accused in custody pending trial can only be justified on one or more of three specified grounds set out in s. 515(10) of the *Criminal Code*. The primary ground is where detention is necessary to ensure the accused will attend in court as required. The secondary ground is where there is a concern for the protection or safety of the public, including a concern that there is a substantial likelihood of the accused committing a further criminal offence if released. The tertiary ground is where detention is necessary in order to maintain confidence in the administration of justice, having regard to all of the circumstances including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

[41] Because of the nature of the charges against Mr. Khadr, there is a reverse onus and he bears the burden, on a balance of probabilities, of showing cause why his detention is not justified under any of the three grounds for detention in s. 515(10) of the *Code*.

[42] Counsel for Mr. Khadr argued that his detention was not justified under any of the grounds. The proposal for Mr. Khadr's release is to have him reside with his maternal grandparents. His grandmother Fatmah Elsamnah is the proposed surety. She and her husband are both retired and own their own home, which was recently assessed at \$302,000. There is no mortgage. She and her husband do not have significant other assets and live on pension income. She is prepared to pledge \$250,000 to ensure her grandson's compliance with the terms of his bail. This is virtually the entire life savings of Mr. Khadr's grandparents. The proposal is that Mr. Khadr would be under 24-hour house arrest with limited exceptions for attending court,

attending his lawyers' office, religious observance daily at the Sallah Eddin Islamic Centre, and medical appointments with prior notice to the police. In addition he would report weekly to the police. On all such excursions from the home he would be in the company of his surety. There is no computer in his grandparents' home. He would not have access to the Internet. Although the possibility of Mr. Khadr being excused from house arrest to attend work was referred to in the affidavit material, this was not seriously pursued in oral argument.

[43] The Crown relied on all three bases for detention, but focused principally on the primary and tertiary grounds.

Primary Ground---Flight Risk

[44] Mr. Khadr failed to satisfy me that he would likely appear for his extradition hearing if I released him on bail. On the contrary, I believe there is a substantial risk he would flee this jurisdiction if released.

[45] Abdullah Khadr was born in Ottawa in April 1981 and is now 24 years old. Although he is by birth a Canadian citizen, he has very little connection to Canada. His family moved to Saudi Arabia in 1982 (the year after his birth) and two academic years later, moved to Pakistan. He has lived almost all of his life in Pakistan. His grandparents have strong roots in the community, having lived in Scarborough since 1961 and having run their own bakery from 1983 to 1996. However, they have not had much contact with their grandson Abdullah. Mrs. Elsamnah visited her daughter's family in Pakistan for one month in 1995, but not thereafter. Her grandchildren, sometimes including Abdullah, visited her in Scarborough occasionally in the summers and Abdullah lived with her for one year while attending high school here (1995-1996). Mrs. Elsamnah was vague about how often she has seen Abdullah since 1996. She said he visited "once or twice" but was unable to recall which years.

[46] Mr. Abdullah's mother (Maha Khadr) also resides in Scarborough with four of his siblings (Zaynab, Abdul, Abdurahman, and Miriam), although as I understand it the family's return to Canada was a relatively recent one.

[47] On the positive side, then, Mr. Khadr does have a family connection here in Canada, even though his own ties to this country are remote. Also on the positive side, Mr. Khadr has no criminal record and no history of difficulties with legal authorities in Canada.

[48] On the other hand, it would appear that Mr. Khadr has strong connections to the Al Qaeda terrorist organization, as do other members of his immediate family. The material before me contains extensive uncontradicted evidence of these terrorist links. Abdullah Khadr attended an Al Qaeda training camp for four months in the mid 1990s. In 1997 and 1998 the Khadr family, including Abdullah, visited Bin Laden frequently at Bin Laden's family compound near Jahalabad and lived at the compound for a month in 1999. Abdullah Khadr, on several occasions, has admitted procuring firearms and explosives and supplying them at a profit to Al

Qaeda forces for use in combat. His father operated at a high level in the Al Qaeda network, was an associate of Osama Bin Laden, and was killed in clash with Pakistani forces near the Afghanistan/Pakistan border in October 2003. His mother considers her husband to have been a martyr to Islam. In a television interview in February 2004, Abdullah Khadr said he dreams himself of becoming a martyr for Islam, expressed his admiration for the terrorists who crashed into the World Trade Buildings on September 11, 2001 and referred to Osama Bin Laden as a “saint”.

[49] Prior to his recent arrival in Canada, Mr. Khadr was held in custody in Pakistan for approximately 15 months, during which time he was never charged with an offence and was prevented from consulting with legal counsel. Many of Mr. Khadr’s admissions about Al Qaeda involvement referred to in the affidavit material were made during questioning by American officials while he was in prison in Pakistan. Mr. Khadr made similar admissions to Canadian authorities who interviewed him during that same time period. His counsel, on his behalf, urges me to discount that evidence as it was obtained in breach of his constitutional rights and under torture.

[50] There are two references in the material to Mr. Khadr being tortured in Pakistan. The first reference is in the affidavit of Corporal Jenkins of the RCMP, filed by the Crown. He reported that when Mr. Khadr arrived in Canada on December 2, 2005, he was interviewed by Sergeant Shourie of the RCMP. When asked about his incarceration in Pakistan, Mr. Khadr claimed that shortly after his arrest he was tortured by the Pakistanis for about two hours, that he had bleeding from his ears for two weeks after that, and that he continues to have problems with his ears. He also told Sergeant Shourie that his feet were shackled for three months after he asked to speak to his family. The only other reference to torture is in the affidavit of Mrs. Elsamnah. She refers to her grandson’s time in jail in Pakistan and states, “He was never charged with an offence, he never saw a lawyer, and, as I understand it, he was tortured by Pakistani authorities.”

[51] Although Abdullah Khadr filed an affidavit on this application for judicial interim release, he did not refer to being tortured in Pakistan and he did not deny any of the allegations in the material about his ties to Al Qaeda. He did not testify at the hearing before me.

[52] According to Corporal Jenkin’s affidavit, Mr. Khadr was interviewed by Sergeant Shourie on December 2, 2005 at the Toronto airport for two and a half hours. The affidavit alleges that Mr. Khadr was advised of all of his *Charter* rights at that time. Notwithstanding that, he gave extensive information to Sergeant Shourie about his Al Qaeda ties, information which is consistent with the other evidence referred to in the American material. Two days later, he was interviewed in Toronto by American law enforcement authorities, in the presence of representatives of the RCMP. At that time he was again provided with his Canadian *Charter* rights as well as a Miranda warning by the FBI interview team. Again, he gave a statement confirming much of the previous evidence about his connections to Al Qaeda. There is no evidence before me from any source suggesting that the statements on December 2 and 4 were not voluntarily given.

[53] For purposes of the hearing before me, it is not necessary to determine whether the statements made by Abdullah in Pakistan were coerced or obtained in breach of his constitutional and international human rights. There is ample other evidence of Mr. Khadr's connections to the Al Qaeda terrorist network, including the television interview in February 2004 and his statements to police here in Canada after his release from the Pakistani prison.

[54] In her oral evidence at the hearing, Mrs. Elsamnah said she had not spoken to her grandson since his arrest. She did see him immediately after his arrival in Canada on December 2, 2005, as he was delivered to her home by the RCMP. She said he told her he had been interviewed by the police at the airport, but that she did not ask him what he had been asked. She said she did not remember whether he told her he had answered the questions freely. She said when Abdullah arrived he hugged his brother and that she thought he then went back to his mother's apartment, but she was not sure. She claimed to know nothing about his connections to Al Qaeda.

[55] Mrs. Elsamnah acknowledged that another grandson (Abdullah's brother Abdurahman) was captured in Kabul and spent some time at the American detention center in Guantanamo Bay, but said any Arabic person moving in the street was captured. She acknowledged her son-in-law (Abdullah's father) was killed by Pakistani forces, but denied he had been fighting at the time, stating that he had a disabled right hand and left leg since 1992. She acknowledged accompanying Abdurahman to a press conference after he was released and returned to Canada, but claimed she went to a different room and did not listen to what he said. When asked if Abdurahman told the press his father wanted him to become a suicide bomber, she said she did not remember and that she does not watch television often. She denied any knowledge of what her daughter Maha and granddaughter Zaynab have said to the press. She denied hearing any discussions in the family about Al Qaeda training camps. She said nobody in the family talks about politics.

[56] I find Mrs. Elsamnah's evidence on these points to be highly improbable. There has been extensive media coverage of various members of this notorious family. When asked why her husband had not filed an affidavit or attended this hearing with her, she said that he refused to become involved and that he became very angry when his family members talked to the press. It is hard to believe that Mrs. Elsamnah has no knowledge of what is being said about them.

[57] At the hearing on December 23, 2005, Mrs. Elsamnah testified not only that she had no knowledge of Abdullah's connections to Al Qaeda, but that she also had no knowledge of the allegations being made against him in this proceeding. She was asked on cross-examination whether she had asked her grandson's lawyers what the allegations were against him. Initially, counsel objected to her answering that question. Mrs. Elsamnah was excused from the courtroom while I heard submissions on the point. I then ruled that she must answer the question. When she returned to the courtroom and was asked the question again, she said that the first time she heard of the allegations was when it was mentioned in court that morning. Then she said actually she had read it in a newspaper the previous day (December 22). She said she picked up a paper on the subway on her way home and it contained an article about the

allegations against her grandson. She was then confronted with her affidavit sworn December 20 in which she stated, "I am aware from the news reports that the American government says that Abdullah had weapons for the purpose of harming Americans." Mrs. Elsamnah then recalled that the first time she heard the allegations was when she was accosted by a female reporter outside her home "four or five days ago" and prior to signing the affidavit. She said her husband had dropped her off outside the house at about 12:30 pm and the reporter was there. She said the reporter asked her if she was aware the American authorities were saying certain things about Abdullah and that this was the first she heard of it. She said she was "crying and crying" during the course of this discussion. She said her husband returned home at 2:00 pm and found her still talking to the reporter, at which point he became very angry with her. She said she had forgotten to mention this incident when first cross-examined about her knowledge of the allegations against Abdullah, claiming that she has memory problems when she is sad.

[58] Mrs. Elsamnah's evidence on this issue is simply incredible. It is highly improbable that she would not be aware of what her children and grandchildren have been saying in the press. It is also highly improbable that she did not know about the extensive connections between various members of her immediate family and Al Qaeda. Her evidence as to what her information was about the allegations against Abdullah was internally inconsistent and improbable. If the first time she heard of these horrific allegations was in a two-hour confrontation with a newspaper reporter, a confrontation which she said caused her to cry continuously and provoked an argument with her husband, it is inconceivable that she would forget all about it only four or five days later. I did not find Mrs. Elsamnah to be a truthful or reliable witness. She was, in my view, deliberately tailoring her evidence to avoid saying anything that could be potentially harmful to her grandson's case. I therefore find Mrs. Elsamnah's evidence to be of no assistance in determining whether her grandson Abdullah has Al Qaeda connections. My concerns about her credibility also cause me to have great reluctance to trust her to abide by her obligations as a surety.

[59] The Crown filed evidence from the United States Department of Justice that Abdullah Khadr told American law enforcement officials in July 2005 that he had purchased a fraudulent Pakistani passport, which he was intending to use to get from Pakistan to a country that did not have an extradition treaty with the United States, such as Iran or China. He told them that he believed the passport was with his sister Zaynab in Canada and that he thought if he could make it back to Canada he would be safe. Again, there is no evidence to rebut this. Zaynab was searched when she entered Canada, and her possessions (which arrived later) were also searched. No such passport was found. The defence points to this as evidence that there is no such passport. It could equally be seen as evidence that the passport has not been found by the authorities and is therefore still available for Abdullah Khadr's use in escaping the jurisdiction. The defence challenges whether Mr. Khadr could have the sophistication to know what countries have extradition treaties with the United States. He did not testify, so it is difficult for me to say whether he is unsophisticated. In any event, one might well expect a person affiliated with a terrorist organization engaged in the kind of activities alleged here to have that kind of information, regardless of his own level of sophistication.

[60] Counsel for Mr. Khadr noted Mr. Khadr did not have a police escort for his flight back to Canada and that upon his return on December 2 the RCMP released him into the community without restrictions and without charging him with an offence. He argued that this was an indication that the Canadian police were not concerned about him and there was no basis for this Court to conclude differently. I disagree. Mr. Khadr was not under arrest when he returned to Canada, but neither was he unsupervised. He was accompanied on the flight by two officers of the Canadian High Commission and he was met at the airport by the RCMP. By that time, the United States warrant for Mr. Khadr's arrest had already been issued. I therefore draw no inference from the fact that Canadian law enforcement authorities did not also elect to lay criminal charges against him. From the time Mr. Khadr arrived in Canada to the time of his arrest, he was under constant surveillance by the RCMP. That is hardly an indication of a lack of concern. On the contrary, the evidence before me is that one of the reasons the police maintained surveillance on Mr. Khadr was to ensure he did not flee the jurisdiction, which the RCMP considered to be a matter of national security.

[61] Counsel for Mr. Khadr also argued that he would have no opportunity to flee this jurisdiction if released as proposed, because he is under constant surveillance by the police. That proposition is completely inconsistent with the underlying premise of judicial interim release. If Mr. Khadr were to be released on bail, it would be because this Court was satisfied that he and his surety could be trusted to comply with the conditions of his release and to attend court when required. There would be no need for police surveillance if that were the case. If a person cannot be trusted to stay in the jurisdiction unless under constant police surveillance, then he is not a suitable candidate for bail.

[62] In determining whether or not to release an individual pending trial, the character of that individual and of the proposed surety is a key factor. Simply put, I do not trust Mr. Khadr, nor do I trust his grandmother. I do not believe Mrs. Elsannah's protestations that she had no knowledge of her grandson's connections to Al Qaeda. Even if I did believe her on that point, I would have concerns about whether her agreement to act as a surety was an informed and reasonable one in the circumstances. Furthermore, Mrs. Elsannah cannot supervise her grandson alone. She would need the assistance and cooperation of her husband. I have not met him, he did not testify and he did not file an affidavit. All I know about him is that he has refused to come to court and that he is angry about what his family members have been saying in the press. It was proposed that one of the exceptions to Mr. Khadr's house arrest was for him to attend for religious observance in the company of his surety. When I asked for more details about this, I was advised that this would require a daily attendance at the Islamic Centre and that women and men worship separately, so Mr. Khadr's grandmother could not be with him all the time. The cooperation of his grandfather or others unknown to me would be necessary. I have serious concerns that the plan proposed is not workable and that Mrs. Elsannah will simply not be able to properly supervise her grandson.

[63] Finally, the evidence demonstrates that Mr. Khadr has direct and high level connections to Al Qaeda, a terrorist organization without scruples. There is a real risk that he has the kind of criminal connections that would be able to assist in secreting him within this jurisdiction or

engineering his removal from Canada to a place beyond the reach of the United States. He has very little connection to this country and very little connection to his grandmother. This is an individual who has expressed his admiration for suicide bombers and indicated his hope and dream of becoming a martyr. How can any surety control the conduct of such a person? If he is prepared to die for his cause, he surely will not be deterred by the terms of any order I might issue, or by the fact that his grandparents might lose their home.

[64] I therefore find that Mr. Khadr has failed to discharge the onus of establishing any justification for his release on the primary ground. I consider him to be a serious flight risk. Further, I would have reached this conclusion even if the onus had been on the Crown.

[65] Having found a basis for detention under the primary ground, it is not necessary to determine whether grounds also exist under the other headings. My main concern was on the primary ground and I have therefore concentrated my Reasons on this point. However, I also have strong concerns on the tertiary ground, as well as some level of concern on the secondary ground, which I will address briefly.

Secondary Ground---Public Safety

[66] With respect to the secondary ground, there is no direct evidence of any threat to public safety, nor is there any direct evidence as to Mr. Khadr's likelihood of committing criminal offences while on bail. That said, the connections to terrorism and the stated desire to die for Islam are troubling. I have some level of concern here, but not to a point that would justify detaining Mr. Khadr on this ground alone.

Tertiary Ground---Confidence in the Administration of Justice

[67] Ms Parker opened her submissions at the end of the hearing before me by submitting that "this is a tertiary ground case, if ever there was one". I agree.

[68] In my opinion, a reasonable person apprised of all of the circumstances in this case would be disturbed to learn that Mr. Khadr had been released into the community under the supervision of his grandmother pending his extradition hearing. This case has attracted considerable public attention because of the nature of the allegations against Mr. Khadr and the strength of the evidence connecting him to Al Qaeda terrorists. This is a rare and extraordinary case. If Mr. Khadr were released in these circumstances and then disappeared from the jurisdiction before his extradition hearing, the consequences could be horrific and the Canadian justice system would decidedly be brought into disrepute.

[69] In determining whether maintaining public confidence in the administration of justice requires that Mr. Khadr be kept in custody, it is relevant to consider the strength of the case against him, the gravity and nature of the offences alleged, the circumstances surrounding the commission of the offences and the potential for a term of lengthy imprisonment if convicted. All of these factors point to the need for detention pending extradition.

[70] In assessing the strength of the case against Mr. Khadr at this point, it must be remembered that this is an extradition proceeding. The role of this Court in an extradition is a limited one and does not involve weighing the merits of the evidence against the person sought and determining whether his conviction in the foreign jurisdiction is likely. The extradition judge considers only whether there is some evidence which, if accepted, could cause a properly instructed jury to convict him of the charge. In determining the strength of the case against Mr. Khadr in this jurisdiction, the question is not whether he is likely to be convicted in the United States, but rather, whether this Court is likely to order his extradition. On that point, the evidence is very strong. There is no issue of identity. The person arrested here is clearly the person sought by the United States. The offences alleged would constitute a crime under Canadian law. There is evidence which if accepted would support a finding of guilt. There may be issues raised as to the admissibility of some of that evidence, and there may be constitutional arguments about abuse of process. However, on the state of the record now before me, the Crown's case for extradition is a very strong one.

[71] The crimes of which Mr. Khadr is accused are heinous: supplying weapons of mass destruction to a terrorist organization for the purpose of murdering American nationals abroad. If convicted, he faces a potential lifetime sentence of imprisonment. The Supreme Court of Canada held in *R. v. Hall* (at para 26):

. . . To allow an accused to be released into the community on bail in the face of a heinous crime and overwhelming evidence may erode the public's confidence in the administration of justice. Where justice is not seen to be done by the public, confidence in the bail system and, more generally, the entire justice system may falter. When the public's confidence has reasonably been called into question, dangers such as public unrest and vigilantism may emerge.

[72] Although the offence in *R. v. Hall* had no connections to organized crime or terrorism, the Court's comments at para 30 of the judgment are particularly apt here. Chief Justice McLachlin (writing for the majority) stated at para 30:

Bail denial to maintain confidence in the administration of justice is not a mere "catch-all" for cases where the first two grounds have failed. It represents a separate and distinct basis for bail denial not covered by the other two categories. The same facts may be relevant to all three heads. For example, an accused's implication in a terrorist ring or organized drug trafficking might be relevant to whether he is likely to appear at trial, whether he is likely to commit further offences or interfere with the administration of justice, and whether his detention is necessary to maintain confidence in the justice system. But that does not negate the distinctiveness of the three grounds. (Emphasis added)

[73] Canada has signed an extradition treaty with the United States. Our extradition partner seeks to have Mr. Khadr sent there to face charges of the most heinous nature imaginable. There is a strong extradition case against Mr. Khadr. There is extensive evidence of his connections to

the Al Qaeda terrorist organization. There is some evidence that he may have access to a fraudulent Pakistani passport. His proposed surety has either deliberately misled the Court as to the connections of her family members to terrorist groups, or has her head firmly planted in the sand. Mr. Khadr is not a person who can be trusted or controlled by court orders, or by his grandmother. He admires the bombers who massacred hundreds of people on September 11, 2001. His stated dream is to die as a martyr for Islam. In my view, it would shock public conscience if this Court were to grant him bail pending the extradition hearing. I therefore find there is a strong basis for ordering Mr. Khadr's detention on the tertiary ground. Again, I would reach the same conclusion regardless of which party bears the onus.

MOLLOY J.

Released: January 13, 2006

COURT FILE NO.: EX0037/05
DATE: 20060113

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE UNITED STATES OF AMERICA

Extradition Partner

- and -

ABDULLAH AHMED KHADR aka ABU
BAKR

Person Sought

REASONS FOR JUDGMENT

MOLLOY J.

Released: January 13, 2006