STATE v MINISTER FOR FOREIGN AFFAIRS, Ex parte REGINALD ALLEN LYNDON

HIGH COURT — CIVIL JURISDICTION

PATHIK J

12 April 2002

[2002] FJHC 80

Criminal law — extradition (overseas) — application for leave to apply for judicial review — no right to be heard at stage before authority to proceed was issued by the minister — natural justice — Extradition Act (Cap 23) ss 7, 8(1)(b), 10(3) — High Court Rules 1988 O 53 r 3(2).

Applicant sought an application for leave to apply for judicial review. The decision impugned was that of the Respondent to issue an authority to proceed (made under s 7 of the Extradition Act, Cap 23) to enable the Chief Magistrate to continue with extradition proceedings (Criminal Case No 1 of 2001) instituted by the Director of Public Prosecution for and on behalf of the Government of the United States of America.

Held — The Act provides the procedure to be adopted in extradition cases as far as the duties of the minister are concerned. There was no need for the Applicant to be given the opportunity to be heard at this stage before authority to proceed was issued by the minister. The allegation of denial of natural justice was rejected outright.

Application dismissed.

Cases referred to

Government of the United States of America v Bowe [1990] 1 AC 500; *Harikisun Ltd v Dip Singh and Ors and Director of Town and Country Planning and Suva City Council* Civil Appeal No ABU 19/95S; *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, considered.

R v Governor of Brixton Prison, Ex parte Kahan [1989] QB 716; *R v Governor of Brixton Prison, Ex parte Schtraks* [1964] AC 556; *State v Secretary of Public Service Commission, Ex parte Kotobalavu* Judicial Review No HBJ 31/01S, cited.

A. K. Singh for the Applicant

J. Udit and *Rakuita* for the Respondent

Decision

Pathik J. This is an application by the Applicant Reginald Allen Lyndon for leave to apply for judicial review under O 53 r 3(2) of the High Court Rules 1988.

Decision impugned

The decision impugned is that of the Minister for Foreign Affairs (the Respondent) given on 21 September 2001 to issue an authority to proceed (made under s 7 of the Extradition Act, Cap 23) to enable the Chief Magistrate to continue with extradition proceedings (Criminal Case No 1 of 2001) instituted by the Director of Public Prosecution for and on behalf of the Government of the United States of America.

The order of authority to proceed reads as follows:

The Chief Magistrate

A request having been made to the Fiji Government by the Government of the United States of America for the return to that country of Phillip Edward Hastings aka Henry Addison aka Steve Addison aka Henry Davidson who is accused of the following offences:

(1) Conspiracy to import marijuana, contrary to Title 21 USC ss 952, 960 and 963;

(2) Conspiracy to distribute marijuana, contrary to Title 21 USC ss 841(a)(1) and 846;

(3) Criminal Forfeiture, contrary to Title 21 USC ss 853 and 853(a)(1).

It being alleged that in and about early 1995 to September 1995, Phillip Edward Hastings together with others conspired to illegally import 18,000 pounds of controlled substance namely, marijuana from Thailand into the United States of America and distribute the same substance throughout the United States, and criminal forfeiture. The said Phillip Edward Hastings had been identified as a principal conspirator and principle in the alleged importation and distribution of the aforesaid substances.

I hereby order that a Resident Magistrate proceed to hear the committal proceedings. In accordance with the provisions of the Extradition Act, Cap 23.

DATED at Suva this 21st day of September, 2001

The relief sought

The relief sought are: (a) an order of certiorari to quash the said decision; (b) an order for costs and damages and (c) a further order that if leave is granted it should operate as a stay of the said extradition proceedings.

Grounds of relief

The grounds upon which the relief is sought are contained in the affidavit in support of the application sworn by the Applicant on 20 December 2001 and filed herein. In short they are:

(a) That the Respondent failed to consider the delay which could result in not being given a fair trial and/or the Applicant will not be able to conduct his trial properly because of unreasonable delay.

(b) That the Respondent erred and misdirected himself in law in coming to his decision because the request to extradite was made to prosecute him on account of his race or political opinion.

(c) That the Respondent erred and misdirected himself in not coming to the conclusion that the Applicant might be prejudiced at the trial by reason of his race or political opinions.

(d) That the Respondent erred in law and misdirected himself in not coming to the conclusion that it would be unjust and/or oppressive to extradite him because of the passage of time the alleged offences were committed and because of non-disclosure of Independent evidence on the part of the American Government.

(e) That there was inordinate delay and that the present efforts to extradite the Applicant are not to prosecute him but to assist its case against some other alleged co-accused.

Facts

More on the facts and the present situation of the case are set out in detail in the "Chronology of Events" document filed herein by the learned counsel for the Respondents. I set it out as hereunder:

(1) 19 July 2001 — Letter from the Embassy of the United States to Ministry of Foreign Affairs & External Trade requesting Extradition of Philip Edward Hastings with details and description. Ref: (Note 20)

(2) 20 July 200 — Application by the Director of Public Prosecutions before the Chief Magistrate for a provisional warrant under s 8(1)(b) of the Extradition Act. Warrant issued. Case adjourned to 24 July 2001.

(3) 24 July 2001 — Philip E Hastings (fugitive) brought to court. Confirmed to court that he had been in Fiji for the past 3 months on business affairs.

Business partners being William Gock and David Karan operating in the name Fiji Fun Cruise Wavelengths Investment.

Fugitive remanded in custody. Case adjourned to 7 August 2001.

(4) 25 July 2001 — Letter sent to the US Embassy requesting necessary papers and documents.

Memo to Commissioner of Prisons informing him to provide directory to fugitive to contact a lawyer and allowing him necessary phone call to contact Australian or British Embassies for assistance as per order of the court.

(5) 7 August 2001 — Mr Tunidau for the State. Mr Kafoa Muaror for Fugitive.

Accused remanded to 21 August 2001 for disclosures of documents to defence counsel.

Tendered copy of letter from US Embassy enclosing delay of remainder of documents for committal to court.

(6) 21 August 2001 — Mr Tunidau for the State before CM. Extradition documents furnished to court and defence. Adjourned to 04 September 2001.

(7) 4 September 2001 — Application made by Mr Tunidau under s 9(3) of the Extradition Act for a committal date pending the court's notice to Minister for Foreign Affairs for an "Order to: Proceed."

Adjourned for committal hearing on 1 October 2001

Fugitive remanded to 18 September 2001.

(8) DPP for State before CM. Mr Abhay Singh for Fugitive.

Matter adjourned till 24 December 2001 for submissions on issue of Full Oral PI State ready to fix a PI date. Adjourned to 24 December 2001.

(9) DPP for State. Mehboob Raza for Mr Singh.

Mr Raza informed the court that Mr Singh had filed papers in High Court for judicial review against Ministers authority to proceed on notice of motion in Magistrates Court.

No documents had been served to state. Asked for committal date. Matter adjourned to 08 January 2002.

(10) Oral committal dates — 01 October 2001 and 22 October 2001.

Matter adjourned to 05/03/2002.

The facts in so far as they are relevant to the issue before me relating to the Applicant are concerned have been stated by the learned counsel for the Applicant in his motion for application for leave and which are as follows:

(a) That on 18 July 2001, the Applicant was arrested and kept in custody without any authority, summons or warrant of arrest.

(b) That on 20 July 2001, this matter was called before the Honourable Chief Magistrate and in the Applicant's absence and without the authority of the Ministry of Foreign Affairs, a bench warrant was duly issued under s 7 of the Extradition Act Cap 23.

(c) That the provisional warrant of arrest was issued while the Applicant was kept in custody and on 24 July 2001, the Applicant appeared before the Chief Magistrate for the first time.

(d) That there is an extradition warrant issued against one Philip Edward Hasting aka Henery Addison aka Steve Addison aka Henry Davidson by the United States District Court of Southern District of California.

(e) That the United States Government is looking for a person called Philip Edward Hasting aka Henry Addison aka Steve Addison aka Henry Davidson born on 7 December 1951 who is a completely different person from the Applicant.

(f) That the Applicant is not Philip Edward Hasting aka Henery Addison aka Steve Addison aka Henry Davidson as alleged by the United District Court because:

(i) The Applicant is a British citizen born on 5 October 1958 at Londonderry.

(ii) That the Applicant is holding a British passport No 702143538.

The Applicant complains that (as stated in the said notice of application for leave):

> That the Minister for Foreign Affairs did not follow the proper procedure at the time of issuing the said Authority to the Chief Magistrate to proceed under s 7 of the Extradition Order Cap 23.
>
> That the Chief Magistrate had no authority to issue the provisional warrant for arrest without first receiving the authority to proceed from the Minister for Foreign Affairs under s 7 of the Extradition Act Cap 23
>
> That the Minister for Foreign Affairs without perusing the evidence against the Applicant issued the authority to proceed under s 7 of the Extradition Act Cap 23.

Consideration of the issues

I shall first state the principles governing the grant of leave in judicial review. Order 53 r 3 of The High Court Rules 1988 makes it perfectly clear that no application for judicial review shall be made unless the leave of the court has first been obtained. As the Fiji Court of Appeal has said:

> *The rule does not lay down any criteria upon which the Court must proceed; so on the face of the rule the discretion of the court is unfettered. That does not mean of course, that the Court's discretion is wholly subjective. Surely it must act in accordance with judicial principles and is subject on appeal to review if it fails to observe them.* (*Harikisun Ltd v Dip Singh and Ors and Director of Town and Country Planning and Suva City Council,* Civil Appeal No ABU 19/95s)

It is only on the hearing of the substantive application for review that Court can grant the relief sought. At the leave stage, as far as substantive merits are concerned, the court only indulges in a brief preliminary examination. The test is whether or not there is an arguable case. The need for leave has been well stated by Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 in the following terms:

> *The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the Court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities could be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.* ([1982] AC 642H to 643A)

And

> *The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the Court were to go into the matter in any depth at that stage. If on a quick perusal of the material then available, the Court thinks that it discloses what might turn out to be an arguable case in favour of granting the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.*

The question now arises is whether on the facts of this case and the circumstances which led to the Minister's warrant, the grant of leave for judicial review should be granted or not.

This case involves the application of the Extradition Act Cap 23 of the Laws of Fiji (hereafter referred to as the *Act*). The Applicant here is being dealt with pursuant to an Order of the Minister after he had issued authority to proceed, the full text of which already appears hereabove. The applicant is being dealt with under s 7 of Act which provides:

> *7 (1) Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with thereunder except in pursuance of an order of the Minister (in this Act referred to as an Authority to proceed) issued in pursuance of a request made to him by or on behalf of the treaty State or the designated Commonwealth country in which the person to be extradited is accused or was convicted.*
>
> *(2) There shall be furnished with any request made for the purposes of this section on behalf of any treaty State or designated Commonwealth country —*
>
> (a) In the case of a person accused of an offence, a warrant for his arrest issued in that State or country;
>
> (b) In the case of a person unlawfully at large after conviction of an offence, a certificate of the conviction and sentence in that State or country, and a statement of the amount if any of that sentence which has been served.
>
> Together, in each case, with particulars of the person whose extradition is requested and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to satisfy the issue of a warrant for his arrest under s 8.
>
> (3) On receipt of such a request the Minister may issue an authority to proceed unless it appears to him that an order for extradition of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act.

What is actually being achieved by "extradition", according to the definition of the word, "is the delivery on the part of one state to another of those of whom it is desired to deal with for crimes of which they have been accused or convicted and are justifiable in the courts of the other state". (Halsbury, 3rd ed, para 1149)

It is the Applicant's contention that the Magistrate followed the wrong procedure when he issued a warrant for arrest. The Applicant cannot overlook the fact that s 8(1)(b) of the Act permits him to do that and he did not need an "authority to proceed" from the Minister at that time. However, an authority to proceed was subsequently issued and the matter took its normal course. There does not appear to be any "procedural impropriety" which includes failure to observe basic rules of natural justice and failure to act with procedural fairness.

For the purposes of leave, upon a brief preliminary examination of the affidavit evidence, bearing in mind the provisions of said s 7 and upon considering the useful written submissions from all counsel I do not find that there is an arguable case at this stage nor is there any need to go into the merits of the case.

The Act provides the procedure to be adopted in extradition cases as far as the duties of the minister are concerned. There is no need for the Applicant to be given the opportunity to be heard at this stage. I reject the allegation of denial of natural justice outright.

In the circumstances of this case, in view of the procedure laid down for extradition challenges by way of "judicial review proceedings **before** the committal stage of the extradition process … are rare in practice, and are discouraged by the courts which will allow them only in **clearest of cases**" although "it is possible to bring habeas corpus or judicial review proceedings before the committal stage". [Emphasis added.] [Jones on Extradition, 1995 Cap 10, p 229.]

In the context of this case, which is an extradition case, the application is premature and the following extract from Jones (above or at 229) is pertinent and worthy of note:

> In *Government of the United States of America v Bowe,* [1990] 1 AC 500 at 526 the Privy Council, in an appeal from the Court of Appeal of Bahamas, gave the following guidance as to applications for judicial review, *obiter*, after full argument:
>
> > *Their Lordships here take the opportunity of saying that, generally speaking, the entire case, including all the evidence the parties wish to adduce, should be presented to the magistrate before either side applies for a prerogative remedy. Only when it is clear that the extradition proceedings must fail (as where the Order to Proceed is issued by the wrong person) should this practice be varied.* [Underlining mine.]

The two cases in which the Courts preferred that the examination of the issues proceed before the Magistrate at the committal are *R v Governor of Brixton Prison, Ex parte Kahan* [1989] QB 716 and *R v Governor of Brixton Prison, Ex parte Schtraks* [1967] AC 556 at 585.

On the affidavit evidence before me, the learned Magistrate has followed the correct procedure as laid down in the Act and he had set the hearing of the committal proceedings when the Applicant made this application for judicial review. Therefore there is no procedural impropriety when the Minister issued the authority to proceed. There was no need for the Minister to call the Applicant and hear him in person as the Applicant expected. Not having done so there is no denial of natural justice in the procedure adopted so far by the Respondent. I must say that this application is definitely premature (see on this my judgment in *State v Secretary of Public Service Commission, Ex parte Kotobalavu* Judicial Review No HBJ 31/01S).

By this interlocutory and premature application the Applicant has brought about a halt to the proceedings. He has not allowed the Respondent and the Chief Magistrate to proceed with the committal proceedings in accordance with the provisions of the Act. His application is actually an abuse of the process of the court. The Applicant will have the opportunity to come to Court if he has a grievance once the committal proceedings are over and the Minister has exercised his powers under s 10(3) of the Act which enunciates three circumstances where the Court may find that an extradition would be unjust or oppressive, namely, (a) the nature of the offence is trivial; (b) the delay involved

in either prosecuting him or since he has been unlawfully at large; and (c) accusations against him are not made in good faith.

Before I conclude, the Applicant has raised the issue of identity that is he is not the person referred to in the authority to proceed. This is his strong ground for the relief he is seeking.

On this issue I agree with the learned counsel for the Respondent that the committal proceedings is the proper forum for the issue of identity to be determined and that would be going into the merits which is not the function of judicial review.

For these reasons the application for leave to apply for judicial review is refused and is dismissed with a direction that the Chief Magistrate is at liberty to proceed with the committal proceedings which is pending before him.

Application dismissed.