STATE v MINISTER FOR FOREIGN AFFAIRS, Ex parte MELANIA LEWAQILAQILA TUNIDAU

HIGH COURT — CIVIL JURISDICTION

PATHIK J

9 August 2002

[2002] FJHC 143

Criminal law — extradition — application for leave to apply for judicial review — authority to proceed — Extradition Act (Cap 23) ss 5, 5(1)(c), 6(1)(c), 7, 7(3), 10(3) — High Court Rules 1988 O 53, r 3 — Penal Code s 368(e).

Melania Lewaqilaqila Tunidau sought an application for judicial review on a decision made by the Minister for Foreign Affairs whereby he issued an authority to proceed to extradite the Applicant from Fiji to the United States of America.

Held — (1) The Minister is the proper person to issue authority to proceed. The general categories of offences committed by the Applicant clearly come within general offences extraditable under the Extradition Treaty between the USA and UK of 1935 as applied specifically to Fiji in 1974 or are covered by s 5(1)(c) of the Extradition Act. The issue of whether or not the offences are extraditable is a matter that clearly can be raised further by the Applicant at the committal proceedings. The decision whether to extradite or not would only be made after the committal hearing is over.

(2) In the circumstances of this case, a judicial review against the extradition procedure before the committal stage of the extradition process is rare in practice. It is 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.

Application for judicial review dismissed.

Cases referred to

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 Minister for Foreign Affairs, Ex parte Lyndon* Judicial Review No HBJ 43/01S; *State v Secretary of Public Service Commission, Ex parte Kotobalavu* Judicial Review No HBJ 31/01S, cited.

Government of the United States of America v Bowe [1990] 1 AC 500; *Harikisun Ltd v Dip Singh and Ors andDirector 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; *Minister for Foreign Affairs & Government of Hong Kong v Tam Suk-Chong Tammie* Civil Appeal No 42/92; *Pearlberg v Varty (Inspector of Taxes)* [1972] 1 WLR 534; *Wiseman v Borneman* [1971] AC 297, considered.

I. Tuberi for the Applicant

S. Banuve with *Z. Sahu Khan* for the Respondent

Decision

Pathik J. This is an application by Melania Lewaqilaqila Tunidau (the Applicant) for leave to apply for judicial review under O 53, r 3 of the High Court Rules 1988.

The alleged decision that is impugned was made by the Respondent on 18 March 2002 whereby he issued "authority to proceed" to extradite the Applicant from Fiji to the United States of America.

Relief sought

The Applicant seeks the following relief:

An order of certiorari to remove the decision made by the Minister for Foreign Affairs to issue an Authority to proceed under section 7 of the Extradition Act, Cap 23 to continue with the Extradition Proceedings in the Criminal Miscellaneous Case No 001 of 2002 at the Magistrate's Court in Suva so as to extradite the Applicant from Fiji to the United States of America be quashed.

Grounds for review

There are three main grounds on which the Applicant relies. First, the Respondent acted ultra vires the provisions of s 7(3) of the Extradition Act, Cap 23 in:

(i) Failing to let the Applicant show cause why an authority to proceed should not have been issued.

(ii) Failing to give an opportunity to the Applicant to show that an order for extradition of herself "could not lawfully be made, or would not in fact be made in accordance with the provisions of this Act".

The second ground is that the Respondent was in breach of the rules of natural justice by:

(i) Failing to give an opportunity to the Applicant to show the nature of the legal advice she received in the criminal proceedings that she went through and the same would show that the said proceeding was unfair.

(ii) Failing to give an opportunity to the Applicant to give him evidence that the nature of legal advice given to her in the cell at Placer County Gaol, California would constitute restriction in s 6(1) (c) of the Extradition Act, Cap 23 in that her trial would be prejudicial.

(iii) Failing to hear the Application as she would tell the Respondent that she denied writing any cheques but was advised by the assigned Public Defender to plead no contest.

(iv) Failing to hear the Applicant who would inform him that the Applicant's family had offered to repay the sum but the granddaughter of the victim refused.

(v) Failing to hear the Applicant who would show that despite denying writing any cheques she was nevertheless advised by her assigned Public Defender to plead No Contest to counts 19–22.

(vi) Failing to give an opportunity to the Applicant to show that her legal adviser visited her at the cell and spent only 2–3 minutes and then advised her to plead No Contest to all the charges.

(vii) Failing to hear the Applicant who would show that she pleaded No Contest on the promise that she would be deported to Fiji.

(viii) Failing to give an opportunity to the Applicant to show that she is now pregnant and the difficulty that she will face in an American jail.

The third ground is that the Respondent was unreasonable in:

(i) Misdirecting himself in coming to the decision that the 18 counts of Theft by Caretaker from Elderly Adult, Contrary to s 368(e) of the Penal Code, do not fall within the description of extraditable offences set out in the schedule of the Extradition Act, Cap 23 and referred to in s 5 thereof.

Principles governing leave

Under O 53, r 3 of The High Court Rules 1988 it is stated that no application for judicial review shall be made unless leave of the court has first been obtained. As the Fiji Court of Appeal 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 & Ors & Director of Town and Country Planning & Suva City Council, Civil Appeal No ABU0019 of 1995S)*

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 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 & 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–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.*

Consideration of the issue

The issue before me in this case is identical to the one which was for my determination in *State v Minister for Foreign Affairs, Ex parte Lyndon* in Judicial Review No 43/01S.

The issue at the leave stage is whether in law and on the facts on affidavit evidence and applying the principles pertaining to leave, leave for judicial review against the Minister's decision 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 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 this 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 section 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 justiciable in the courts of the other state*.": (*Halsbury*, 3rd ed, vol 16, para 1149).

The grounds on which the Applicant relies are fully set out hereabove. Bearing in mind the principles governing the grant of leave I find that on a "quick perusal of the material" available to me the application is not only *premature and misconceived* but it is also *frivolous*. There is no arguable case in favour of granting leave for judicial review. Hence for the reasons which follow leave will have to be refused.

The Minister is the proper person to issue authority to proceed; and as Mr Banuve says, the general categories of offences committed by the Applicant clearly come within general offences extraditable under the Extradition Treaty between the USA and UK of 1935 as applied specifically to Fiji in 1974 or are covered by s 5(1)(c) of the Extradition Act. The issue of whether or not the offences are extraditable is a matter that clearly can be raised further by the Applicant at the committal proceedings. The "decision" whether to extradite or not would only be made after the committal hearing is over.

The Respondent acted intra vires vested in him in the said s 7 of the Act. There was no "procedural impropriety" in the decision he came to in issuing "authority to proceed" and this means that there was no failure to observe the rules of natural justice or failure to act with procedural fairness.

On the alleged denial of natural justice, namely, the right to be heard, the Court of Appeal in the case of the *Minister for Foreign Affairs & Government of Hong Kong v Tam Suk-Chong Tammie* (Civil Appeal No 42/92) clarified the position in relation to s 7(3) of the Act when it stated:

But, if the decision is to issue the authority, the person will not be committed to await extradition unless the Magistrate is satisfied that the offence charged is an extradition offence and the evidence is sufficient to warrant his or her trial for it. He or she may then apply to the High Court pursuant to s 10(3) and if successful in that, will still not be extradited if it appears to the Minister that extradition would be unjust or oppressive. We have come to the conclusion that in those circumstances, natural justice does not require that generally the Minister, before issuing an Authority to proceed under section s7(3), should give the person concerned a chance to be heard. [Emphasis mine.]

At this stage in the application of s 7 by the Respondent, no arguable case arises nor is there the need for the Respondent Minister to go into the merits of the case. There was no need for the Minister to do all or any of those things which the learned counsel for the Applicant Mr Tuberi suggests in his grounds for leave to review. In other words 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 in person or otherwise at this stage. She will have the opportunity later when she appears before the Magistrate to show cause. The Applicant will also have the opportunity to come to Court if she 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 her or since she has been unlawfully at large; and (c) accusations against her are not made in good faith.

In considering the matter of "natural justice" arising out of the provision of s 7(3) of the Act I am influenced greatly by the judgment of Viscount Dilhorne in *Pearlberg v Varty (Inspector of Taxes)* (1972) 1 WLR 534 at 545 HL where by analogy on a somewhat similar section being s 6 of the Income Tax Management Act 1964, "*the function of the Commission in deciding whether or not to grant leave was an administrative one; and that natural justice did not require that the taxpayer should have right to be heard*". [Emphasis mine.]

In *Pearlberg* (above) at 545 Lord Viscount said:

> Even if I were of the opinion that it was a judicial or quasi-judicial function, I am far from satisfied that the requirements of natural justice necessitate the supplementing of the statutory provisions. In this connection counsel for the appellant relied very strongly on certain observations in *Wiseman v Borneman* [1971] AC 297.

It is pertinent to note what Lord Reid in *Wiseman* (above) at 308 said:

> *Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, … For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.*

Lord Reid at 308 went on to say:

> *It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.* [Emphasis mine.]

Since Mr Tuberi kept on emphasizing the need to accord "natural justice" even before the Minister issued authority to proceed, I consider that further authorities ought to be cited on when the principles of natural justice apply. In this regard the following passage from Professor Wade's book, Administration Law, 5th ed, p 472 is apt:

> *On the other hand, it must be emphasised that Ait is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter. The application of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility.*

Further light has been thrown on the subject of the procedure which would satisfy the public law requirement of procedural propriety by Lord Diplock as follows:

> *But in any event what procedure will satisfy the public law requirement of procedural propriety depends on the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made.*

I have said enough on this aspect to show that there was no need for the Minister to hear the Applicant in person before issuing authority to proceed under s 7(3) of the Act.

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, Ch 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 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:
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> > *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.*

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* [1964] AC 556 at 585.

I therefore reject the allegation of denial of natural justice outright. And as I said earlier this application for judicial review is premature (see my judgment in *State v Secretary of Public Service Commission, Ex parte Kotobalavu*, Judicial Review No HBJ 31/01S).

For these reasons the application for leave to apply for judicial review is refused and dismissed.

Application for judicial review dismissed.