[2011] UKPC 23
Privy Council Appeal No 0048 of 2010

JUDGMENT

Rhett Allen Fuller (Appellant) *v* The Attorney General of Belize (Respondent)

From the Court of Appeal of Belize

before

LORD PHILLIPS
LORD MANCE
LORD CLARKE
LORD HAMILTON
SIR HENRY BROOKE

JUDGMENT DELIVERED BY
Lord Phillips
ON

9 August 2011

Heard on 11-12 April 2011

Appellant
Edward Fitzgerald QC
Eamon Courtenay SC
Ben Silverstone

(Instructed by Allen & Overy LLP)

Respondent
James Lewis QC
Rachel Scott

(Instructed by Charles Russell LLP)

LORD PHILLIPS :

Introduction

1. On 22 March 1990 a man called Larry Miller was shot and killed in Miami, Dade County, Florida. On the following day a warrant was issued in Miami for the arrest of the appellant on charges which included the first degree murder of Mr Miller. The appellant was not then apprehended. He left the United States and went to Belize. On 28 January 1998 a Grand Jury in Florida indicted the appellant for the first degree murder of Mr Miller. On 17 August 1998 the United States Embassy in Belize made a formal request for the appellant's extradition to the United States. The appellant was arrested and remanded in custody on 21 October 1998. On 26 February 1999, after a hearing, the Chief Magistrate ordered his extradition, remanding him to prison to await this. On 5 May the appellant was granted leave to apply for a writ of habeas corpus and on 16 June he was granted bail, pending the hearing of his application. The application was refused by the Chief Justice, sitting in the Supreme Court, on 29 April 2002. Leave to appeal to the Court of Appeal was granted on 20 May 2002, bail was granted pending appeal and a Notice of Appeal was filed on the following day. Nearly 6 years of inertia followed. On 27 March 2009 the Court of Appeal dismissed the appellant's appeal. His appeal comes before the Board pursuant to leave to appeal which was granted by the Court of Appeal on 2 March 2010.

2. The major issue raised by this appeal relates to the extent of the jurisdiction of the Supreme Court of Belize on an application for habeas corpus in an extradition case. It was and is the appellant's contention that this case has various features, not least the delay that has occurred, which render the application for extradition an abuse of process. This was, in essence, the basis of his application for habeas corpus. The Chief Justice rejected his application on the ground that the Supreme Court had no jurisdiction to entertain a challenge to extradition based on abuse of process. The discretion to discharge a person, committed in extradition proceedings, on the ground of abuse of process was vested exclusively in the Minister of Foreign Affairs of Belize.

3. In the Court of Appeal the appellant contended that not merely the Supreme Court, but also the Chief Magistrate, had had jurisdiction to entertain a challenge to extradition proceedings, based on abuse of process. The Court of Appeal rejected this submission, holding that neither the Supreme Court nor the magistrates' court has jurisdiction to entertain such a challenge. It was for the Minister of Foreign Affairs to consider any question of abuse of process when making the executive decision of whether to accede to a request for extradition. The Minister's decision was subject to

judicial review, but at no earlier stage of the extradition process did a court have jurisdiction to consider an allegation of abuse of process.

4. Before the Board Mr Fitzgerald QC for the appellant has argued that the Supreme Court and the Court of Appeal erred in holding that the former had no jurisdiction to entertain the abuse of process challenge. He invites the Board to remit the case to the Supreme Court for consideration of that matter. He has further argued, in support of his submission in relation to the jurisdiction of the Supreme Court, that the Chief Magistrate had also had jurisdiction to entertain an abuse of process challenge. If consideration of abuse fell within the jurisdiction of the Chief Magistrate, it must, a fortiori, have fallen within the jurisdiction of the Supreme Court.

5. The Board observes at the outset that part of the problem raised by this appeal lies in the fact that "abuse of process" is not a term that sharply defines the matter to which it relates. It can describe (i) making use of the process of the court in a manner which is improper, such as adducing false evidence or indulging in inordinate delay, or (ii) using the process of the court in circumstances where it is improper to do so, as for instance where a defendant has been brought before the court in circumstances which are an affront to the rule of law, or (iii) using the process of the court for an improper motive or purpose, such as to extradite a defendant for a political motive. In this case the allegation of abuse of process is founded largely, though not exclusively, on the delay that has occurred. In so far as this delay has occurred in the judicial process in Belize, the allegation is of abuse of process that falls into the first category, but the reliance on delay amounts also to an allegation of abuse of process that falls into the second category, in as much as Mr Fitzgerald has argued that it is unjust or oppressive that the appellant should be subjected to the process of extradition when such a lengthy period has been allowed to elapse since the crime that he is alleged to have committed.

6. A subsidiary issue was raised before the Supreme Court and the Court of Appeal. This was whether the admissible evidence before the Senior Magistrate sufficed to found a request for extradition. Both courts were in no doubt that it did. In his written case Mr Fitzgerald has also attacked the findings of the courts below on this issue, but in his oral submissions he concentrated on the primary issue, which is that of jurisdiction.

7. The argument advanced on behalf of the appellant on the jurisdiction issue can be summarised as follows. The Constitution of Belize provides for the separation of powers. It also provides for the protection of fundamental rights and freedoms, which reflect those protected by the European Convention on Human Rights. One of those rights is the right to personal liberty. Habeas corpus is the procedure by which the right to personal liberty is protected. Abuse of process in extradition proceedings is capable of rendering the detention of the person whose extradition is sought unlawful.

The separation of powers requires the courts and not the executive to rule on the legality of detention. It follows that, under the Constitution of Belize, the courts must have jurisdiction to consider abuse of process.

8. If the Board accepts this argument, it will be necessary to consider whether there is, on the facts, an arguable case of abuse of process that requires that this case be remitted to the Supreme Court of Belize.

The Constitution of Belize

9. The Constitution of Belize, came into force when Belize obtained its full independence from the United Kingdom on 21 September 1981. Section 1(1) provides that Belize shall be a sovereign democratic state. Section 2 provides that any law that is inconsistent with the Constitution is to be void to the extent of the inconsistency. Section 3 sets out the fundamental rights and freedoms to which every person in Belize is entitled. These include:

> "(a) life, liberty, security of the person, and the protection of the law. "

10. Section 5 provides:

> (1) A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say-
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> …(i)…for the purpose of effecting his expulsion, extradition or other lawful removal from Belize.
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> (2) Any person who is arrested or detained shall be entitled –
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> …(d) to the remedy by way of habeas corpus for determining the validity of his detention.

11. The Constitution has separate parts that make provision for "the Executive", "the Legislature", and "the Judiciary". Section 94 in Part VII, which deals with the judiciary, establishes the Supreme Court and the Court of Appeal.

12. Section 20(1) provides:

(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction-

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution.

(3) If in any proceedings in any court (other than the Court of Appeal or the Supreme Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3 to 19 inclusive of this Constitution, the person presiding in that court may, and shall, if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion, the raising of this question is merely frivolous or vexatious.

13. Section 96(1) provides that, subject to specified exceptions, where, in any court in Belize a substantial question of law arises as to the interpretation of the Constitution, the court shall refer the question to the Supreme Court.

14. Transitional provisions include section 134(1), which provides that existing laws are to remain in force subject to such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution. This applied to the English Extradition Act 1870.

The Extradition Act 1870

15. It is now accepted, though it was not below, that the operation of the Extradition Act 1870 was extended to Belize by Order-in-Council. When giving the leading judgment in the Court of Appeal, Mottley P described the manner in which the Act had to be adapted in order to apply in Belize:

> "This Act provides for a scheme of extradition of a person whose presence is required in a foreign country to stand trial in respect of a criminal offence for which he is charged. Once the request is made and the warrant is issued, the person is brought before the magistrate. The magistrate is required to hear the case 'in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence' committed in Belize (section 9). Evidence must be produced which would, according to the Law of Belize, justify the committal of the person for trial of an indictable offence. If there is no such evidence, the magistrate is required to discharge the prisoner. The powers under the Extradition Act are to be exercised in Belize by the Chief Magistrate. In committing the person, the Chief Magistrate is required to inform him that he will not be surrendered until after the expiration of fifteen days. In addition, the Chief Magistrate must inform the prisoner that he has the right to apply to the Supreme Court for a writ of habeas corpus. The Act does not give the appellant any right of appeal. It requires the Chief Magistrate to inform him of his right to apply for habeas corpus. The Act does not create the right to apply for habeas corpus. The Act merely recognizes that the right exist. Such right, in my view would have existed as part of the common law of England and as such became part of the common law of Belize. It is noted that the right to apply for habeas corpus is enshrined in the Constitution of Belize. "

This summary, while contentious below, has not been challenged before the Board. Nor has the finding of the Court of Appeal that the Minister of Foreign Affairs for Belize ("the Minister") is the person vested with the authority to perform the functions conferred on the "Secretary of State" by the 1870 Act.

The reasoning of the courts below

16. In the Supreme Court the Chief Justice, referred to the delay that had occurred in the extradition of the appellant as "inordinate" – para 60. He held, however, after an extensive review of relevant authority, that the court had no power or discretion to hold that the appellant's extradition was thereby rendered an abuse of process. That power lay exclusively in the Minister pursuant to section 11 of the Extradition Act 1870.

17. This finding was affirmed by the Court of Appeal, Mottley P, Carey and Morrison JJA, in relation to both the jurisdiction of the Chief Magistrate and of the Supreme Court, after an even more extensive review of authority carried out by the President. Both courts also rejected the subsidiary point raised by the appellant in respect of the adequacy of the evidence.

18. The appellant contends that the approach of the English court to the jurisdiction of the courts to entertain an abuse of process challenge has changed as a result of the enactment of the Human Rights Act 1998 and that a similar approach to that now adopted in England must be applied under the Constitution of Belize, inasmuch as this incorporates requirements that mirror those of the Human Rights Act. This appeal requires detailed consideration of the relevant authorities.

The English jurisprudence

19. The relevant English authorities have to be read against the background of the English extradition legislation. The legislation has been designed to enable effect lawfully to be given to the obligations of the United Kingdom under either bilateral treaties or multilateral conventions, so that the provisions of the legislation have tended to mirror the terms of the treaties or conventions ("the convention requirements"). Parliament has, from time to time, expressly conferred on the courts the obligation to ensure that some of the convention requirements are satisfied before committing a person for extradition. The legislation has, however, been a changing and confusing scene. The courts, including the House of Lords, have had great difficulty in identifying what matters the magistrates' court, and the High Court on habeas corpus or judicial review proceedings, can or should consider in relation to the lawfulness of committal for extradition and what matters fall to the Secretary of State to consider when exercising his executive discretion in deciding whether to authorise extradition after committal, see by way of example, the summary of the jurisprudence in *Johannes Deuss v Attorney General for Bermuda and the Commissioner of Police for Bermuda* [2009] UKPC 38. Before turning to the authorities the Board will set out some, but only some, of the salient features of the legislation to which they have related.

20. The Extradition Act 1870 was passed at a time when any trial on indictment had to be preceded by committal proceedings in the magistrates' court. A criminal who was a fugitive from a foreign state with which this country had an extradition treaty would be arrested pursuant to a requisition by that state and brought before the magistrates' court, whose task it was to decide whether the prisoner should be committed to enable the Secretary of State, if so advised, to make arrangements for his extradition. Section 9 of the 1870 Act required the police magistrate to treat an extradition application in the same way as committal proceedings in respect of a man charged with an indictable offence. His task was to see whether there was evidence justifying the trial of the prisoner. If there was, he was committed to prison, subject to the right to apply for a writ of habeas corpus. Section 10 provided for the police magistrate to send to the Secretary of State such report on the case as he should think fit. Failing a successful application for habeas corpus, the Secretary of State had, under section 11, the power to issue a warrant for the surrender of the prisoner to the state seeking extradition. The Secretary of State had a discretion whether or not to issue the warrant, but the exercise of this discretion would be circumscribed by the terms of the treaty pursuant to which extradition was being effected. .

21. The Fugitive Offenders Act 1967 applied to extradition to Commonwealth countries and dependent territories. It made some variations to the scheme of the 1870 Act. Section 8(3) provided that, on an application for habeas corpus, the High Court might order the person committed to be discharged from custody if it appeared to the court that

> "(a) by reason of the trivial nature of the offence of which he is accused or was convicted; or
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> (b) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or
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> (c) because the accusation against him is not made in good faith in the interests of justice,
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> it would, having regard to all the circumstances, be unjust or oppressive to return him."

22. Section 9 provided that the Secretary of State should not order extradition if it appeared to him that it would be unjust or oppressive to do so for any of these reasons.

23. The Extradition Act 1989 consolidated and amended, inter alia, the earlier two Acts. Committal proceedings for trial on indictment were about to be abolished so a new test for committal in extradition proceedings was required. The magistrate was now required to commit if the evidence would have established a case to answer if the proceedings were a summary trial in England and Wales. Section 11 made it mandatory for the High Court to order the discharge of a person committed in the circumstances set out in section 8(3) of the 1967 Act.

24. The Extradition Act 2003 has made radical changes in the scheme for extradition to those countries to which it applies. Part 1 deals with Category 1 Territories, countries within the European Union, in respect of which extradition is granted in response to a European arrest warrant. Part 2 deals with Category 2 Territories, which are countries outside the European Union. The scheme under Part 1 differs from that under Part 2, but they have a number of common features. No longer is the magistrates' court required to consider whether there is evidence that supports the criminal charges in respect of which extradition is sought. This is taken on trust. In each Part there are a number of statutory bars to extradition. These include cases where extradition appears unjust or oppressive by reason of the passage of time since the commission of the extradition offence. Discharge of a person is mandatory if his extradition will not be compatible with his Convention rights under the Human Rights Act 1998. Extradition of a person is precluded where, by virtue of his physical or mental condition, it would be unjust or oppressive to extradite him. Each Part provides for a right of appeal from the decision of the extradition judge, but under Part 2 the hearing of this appeal is deferred until after the decision of the Secretary of State. As to this, while the Secretary of State has no role under Part 1, under Part 2 he is responsible for the decision whether or not to order extradition of a person whose case has been sent to him by the extradition judge. Section 93 and the sections that follow it lay down the criteria which govern his decision in terms which leave him no residual discretion as to whether or not to make the order.

25. Against this background the Board turns to the English authorities. The courts below founded their decisions on a line of authority that begins with *Atkinson v United States of America Government* [1971] AC 197. Mr James Lewis QC for the respondent contends that they were right to do so and that these decisions should result in the dismissal of this appeal.

26. In *Atkinson* the appellant had unsuccessfully sought habeas corpus challenging his committal for extradition to the United States on the ground that his extradition would be unjust and oppressive as the offences in respect of which this was sought had been dropped pursuant to a plea bargain. The House of Lords upheld this decision. In the leading speech Lord Reid held at p 232 that once a magistrate decided that there was sufficient evidence to justify committal he had no alternative but to commit. There was no provision in the 1870 Act giving him any wider power in extradition proceedings than he had when committing for trial in England. He held that

Parliament could not have intended to require extradition where this was contrary to natural justice, but must have intended that the Secretary of State should have regard to this when deciding whether or not to exercise his power to issue a warrant under section 11. The provision in section 10 permitting the magistrate to report to the Secretary of State would ensure that the former reported anything that had come to light that might make it improper to surrender the person committed. But for this Lord Reid would have held that the magistrate had power to refuse to commit if his extradition would be contrary to natural justice. The speeches of the other members of the House were to similar effect.

27. In *Atkinson* Lord Reid stated, obiter, that in domestic proceedings a magistrate had no power to refuse to commit a person for trial on indictment on the ground that it would be unjust or oppressive to require him to be tried. Subsequently, however, there was a series of decisions, below the level of the House of Lords, in which it was held that magistrates did have the power to stay domestic committal proceedings where there had been an abuse of the process of the court. This led the appellant in *R v Governor of Pentonville Prison, Ex p Sinclair* [1991] 2 AC 64, a case on the 1870 Act, to argue that magistrates enjoyed a similar power in relation to extradition proceedings. Lord Ackner in the only reasoned speech, with which the other members of the House agreed, rejected this submission. He observed at pp 80-81 that section 11 of the new 1989 Act had given to the High Court, at least in part, the same discretion as the Secretary of State in deciding whether or not to order extradition. He stated that this was the clearest possible recognition by the legislature that hitherto no such discretion had existed in the courts and, in particular, in the magistrates' court.

28. The extent of the power of magistrates to stay a domestic prosecution on the ground of abuse of process received further consideration by the House of Lords in *R v Horseferry Road Magistrates Court, Ex p Bennett* [1994] 1 AC 42. The defendant was a citizen of New Zealand, who was alleged to have committed criminal offences in England. His case was that he had been forcibly brought back to this country from South Africa, where he alleged that he had been kidnapped as a result of collusion between the South African and British police, and brought before a magistrates' court for committal for trial on indictment. For the true position: see *Warren v HM Attorney General of Jersey* [2011] UKPC 10, paras 64-68, per Lord Hope. The defendant sought unsuccessfully in the magistrates' court and the Divisional Court to challenge the proceedings on the ground that it would be unjust for the English court to exercise jurisdiction in these circumstances. In the House of Lords his challenge succeeded. Giving the leading speech, Lord Griffiths held that magistrates had power to refuse to try or commit a case on the grounds that it would be an abuse of process to do so. He held, however that it was a power to be most sparingly exercised:

> "In the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular

> accused with whom they are dealing, such as delay or unfair manipulation of court procedures" (p 64).

29. Lord Griffiths held that the abuse alleged in relation to the manner in which the appellant had been brought within the English jurisdiction was "a horse of a very different colour" and one which should be considered by the Divisional Court rather than the magistrates' court. Where such an issue arose, the magistrates should adjourn the hearing to permit an application to the Divisional Court. The Divisional Court could properly stay a prosecution and order the discharge of the accused on the ground that he had been brought within the jurisdiction in disregard of extradition procedures. The majority of the House agreed with these views.

30. In *In re Schmidt* [1995] 1 AC 339 the appellant sought unsuccessfully to persuade the House of Lords that in extradition proceedings the courts enjoyed a similar jurisdiction to that exercised in *Bennett.* The conclusions of Lord Jauncey of Tullichettle, with which all the other members of the House agreed, were as follows, pp 378-379:

> "My Lords, I summarise my conclusions on this branch of the case thus. *Atkinson v United States of America Government* [1971] AC 197 decided that Parliament had excluded the jurisdiction of the courts to refuse to surrender a person under the 1870 Act when to do so would be unjust or oppressive. *R v Governor of Pentonville Prison, Ex p Narang* [1978] AC 247 emphasised that the statutory powers conferred upon the courts by the 1881 Act in relation to the Empire had been considerably restricted by section 8(3) of the 1967 Act. *R v Governor of Pentonville Prison, Ex p Sinclair* [1991] 2 AC 64 pointed out that the re-enactment of section 8(3) in section 11(3) of the Act of 1989 demonstrated that in relation to foreign countries no discretion to refuse the return of a foreign fugitive had previously existed. The dicta in *Government of Australia v Harrod* [1975] 1 WLR 745 and *In re Osman,* 28 February 1992 were obiter. *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 related to the very different situation of the power to stay an English prosecution. Accordingly, the position now is that in extradition proceedings under the 1989 Act the High Court has power to intervene only in the circumstances predicated by the Act and has no inherent common law supervisory power as contended for by the applicant. The principal safeguard for the subject of extradition proceedings therefore remains in the general discretion conferred upon the Secretary of State by Parliament in section 12. It follows that the Divisional Court were correct in concluding that the decisions in *Atkinson* and *Sinclair* had not been affected by *Bennett* and should be followed."

31. In *R v Governor of Belmarsh Prison, Ex p Gilligan* [2001] 1 AC 84 the issue was whether a magistrates' court could entertain an abuse of process complaint when hearing an application pursuant to the Backing of Warrants (Republic of Ireland) Act 1965 for endorsing arrest warrants issued in the Republic of Ireland. The House held, that on true construction of that Act, no such jurisdiction existed, either in the magistrates' court or in the Divisional Court. Lord Steyn, giving the leading speech, observed that section 2(2) of the Act expressly provided that no order should be made if there were substantial grounds for believing that the warrant was in fact issued in order to secure the return of the accused for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions. It was implicit that there was no wider abuse jurisdiction. The Irish courts were to be trusted to deal with any other question of abuse, p 97.

32. Thus, before the Human Rights Act 1998 came into force, the English authorities had drawn a clear distinction between the jurisdiction of the courts exercising domestic criminal jurisdiction and the courts sitting in extradition proceedings. In the former case the magistrates could stay the proceedings if they involved an abuse of process, in the narrow sense identified by Lord Griffiths in *Bennett.* The High Court had supervisory jurisdiction to consider wider issues of abuse of process. But in the case of extradition proceedings the matters into which the magistrate could inquire were restricted to those in respect of which the relevant legislation made express provision. The function of the Divisional Court in habeas corpus proceedings was to review the decision reached by the magistrate. There was no wider abuse jurisdiction. Questions of abuse were for the Secretary of State, whose decision would be subject to judicial review.

33. This approach did not survive the Human Rights Act. In *R (Kashamu) v Governor of Brixton Prison* [2001] EWHC Admin 980; [2002] QB 887 applications for habeas corpus and for judicial review were heard by the Administrative Court in relation to decisions of District Judge Workman in which he held that he had no jurisdiction to refuse to entertain extradition proceedings on the ground of abuse of process. He had held, however, that any challenge on this ground fell to be dealt with by the district judge on an application for habeas corpus. In *Kashamu* an application for habeas corpus was coupled with a claim for judicial review of the district judge's ruling that he had no jurisdiction to entertain the abuse of process challenge. Mr Fitzgerald, who appeared for the applicant in that case, argued successfully that the Human Rights Act required that a court should hear the abuse of process challenge. He relied, in particular, on the obligation under the Act to give effect to article 5(4) of the Human Rights Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

34. Article 5 of the Convention provides that everyone has the right to liberty and security of person. Article 5(1)(f) provides, however, that a person may be deprived of his liberty in the case of his "lawful arrest or detention…with a view to [his] deportation or extradition". Mr Fitzgerald submitted that detention was not lawful under English law if it was procured by abuse of process or bad faith or was otherwise arbitrary. The Administrative Court accepted these submissions. Giving the lead judgment Rose LJ summarised the position as follows

> "29 Having regard, as this court must, to the Strasbourg jurisprudence, it seems to me to be clear that a court and not the Secretary of State is the appropriate forum for a decision as to the lawfulness of a fugitive's detention and, provided the Extradition Act 1989 can be so read, the magistrates' court is to be preferred to the High Court. As I have said, the House of Lords in *Atkinson v United States of America Government* [1971] AC 197, *R v Governor of Pentonville Prison, Ex p Sinclair* [1991] 2 AC 64 and *In re Schmidt* [1995] 1 AC 339 held that a magistrate has no power to refuse to commit in extradition proceedings because of an abuse of process. The rationale of each of those authorities, however, is that it is open to the Secretary of State to respond to abuse by refusing to return the fugitive.
>
> 30 In my judgment, although that is so, it does not now, in the light of the provisions of article 5(4), provide a rationale for excluding the courts from exercising abuse jurisdiction in relation to the lawfulness of detention; and, whether section 11(3) is properly construed, as it was in *In re Schmidt*, as limiting the High Court's jurisdiction to the three matters identified in paragraphs (a), (b) and (c), or as preserving by its initial words, as Woolf LJ held in *In re Osman* [1992] Crim LR 741, the High Court's common law general reviewing power, neither interpretation provides a sufficient basis on which to oust the jurisdiction of magistrates which, at first blush is conferred by the wide language of paragraph 6 (1), to consider the lawfulness of a fugitive's detention. Put another way, both section 11(3) and paragraph 6(1) of Schedule I can, and in my judgment should, be so read as to enable both the High Court and a committing magistrate to consider the lawfulness of detention under article 5(4)….
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> 32 What is in issue in the present case is whether, when lawful extradition procedures are being used, a resultant detention may be unlawful by virtue of abuse of the court's process. The magistrates' court, rather than the High Court, is, in my judgment, the appropriate tribunal for hearing evidence and submissions, finding facts relevant to abuse and doing so speedily. Furthermore, as it seems to me, the district judge's obligation under section 6(1) of the Human Rights Act 1998 to

> act compatibly with Convention rights requires him to make a determination under article 5(4). It seems to me that that determination should be in accordance with Lord Hope's analysis in *R v Governor of Brockhill Prison, Ex p Evans (No 2)*[2001] 2 AC 19, that is he must consider whether the detention is lawful by English domestic law, complies with the general requirements of the Convention and is not open to criticism for arbitrariness.
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> 33 It does not, however, follow that the district judge can be addressed on all the issues which may arise in the course of a summary trial. Extradition proceedings do not, nor does fairness require that they should, involve resolution of trial issues. Self-evidently, extradition contemplates trial in another jurisdiction according to the law there. It is there that questions of admissibility, adequacy of evidence and fairness of the trial itself will be addressed; and, if the Secretary of State has concerns in relation to these or other matters, it is open to him to refuse to order a fugitive's return."

Rose LJ added that it would only be in a very rare extradition case, provided the statutory procedures had been followed, that it would be possible to argue that abuse of process had rendered the detention unlawful under article 5(4).

35. *R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin); [2007] QB 727 involved extradition under the 2003 Act. One of the many issues before the Administrative Court was whether the district judge had had jurisdiction to entertain a challenge to the proceedings on the ground of abuse of process. Laws LJ, in giving the lead judgment, answered this question in the affirmative. He distinguished the *Atkinson* line of authorities on the ground that they only applied to exclude an abuse jurisdiction on the part of the magistrate where such jurisdiction was vested in the Secretary of State. As, under the 2003 Act, he had no such jurisdiction, the magistrate, by implication, enjoyed this in his place. At para 97 Laws LJ expressed the *obiter* view that no such implication arose where the Secretary of State enjoyed a discretion whether or not to order extradition. Although reference was made to *Kashamu* in argument, Laws LJ did not refer to this decision.

36. In *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin); [2007] 1 WLR 1157 the Administrative Court approved Laws LJ's decision that, under the 2003 Act the magistrate had jurisdiction to entertain a challenge based on abuse of process. Indeed, the court held that the magistrate had a duty to consider this of his own motion if the court had reason to believe that its process may be being abused.

37. So far as the Board is aware *Kashamu* has not received consideration in English proceedings by a higher court, no doubt because extradition in England is now governed by the 2003 Act. The Board considers, however, that the judgment of Rose LJ correctly distinguished the *Atkinson* line of authority on the ground that it was irreconcilable with the requirements of the Human Rights Act.

The constitutional principle of the separation of powers.

38. The principle of the separation of powers has progressively become part of the, largely unwritten, constitution of the United Kingdom. Final steps in this progression have been taken by the enactment of the Human Rights Act and the Constitutional Reform Act 2005. Mr Fitzgerald has referred the Board to a number of cases where the Judicial Committee has considered the effect of the separation of powers as entrenched in the so-called Westminster model of written constitutions.

39. In *Ahnee v Director of Public Prosecutions* [1999] 2AC 294 the issue was whether, under the Constitution of Mauritius the Supreme Court had an inherent power to punish for contempt of court. Giving the judgment of the Board, Lord Steyn at p 302 stressed the importance of the structure of the Constitution of Mauritius, stating that it was on the Westminster model and referring to features that are equally to be found in the Constitution of Belize. At p 303 he set out the significance of this:

> "First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary. Fourthly, in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its orders and to protect the administration of justice against contempts which are calculated to undermine it."

40. In *Director of Public Prosecutions of Jamaica v Mollison* [2003] UKPC6; [2003] 2 AC 411 the Board held that it was not compatible with the separation of powers, as entrenched in Jamaica's Constitution on the Westminster model, that the Governor General rather than the courts should have the function of determining when a young man convicted of murder should be released. At para 13, in giving the advice of the Board, Lord Bingham of Cornhill said:

> "Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as 'a characteristic feature of democracies': *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 890-891 para 50."

41. In *State of Mauritius v Khoyratty* [2006] UKPC 13; [2007] 1 AC 80 the Judicial Committee upheld a finding by the Supreme Court of Mauritius that legislation that purported to deprive the court of the power to grant bail in a drugs case was incompatible with the separation of powers and the principle that fundamental rights should be protected by an independent and impartial judiciary.

The primary issue

42. The primary issue is whether the Supreme Court of Belize has jurisdiction to entertain a challenge to extradition based on abuse of process. Mr Fitzgerald submits that the courts below were wrong to apply the *Atkinson* line of authorities in ruling that there was no power in the Supreme Court to entertain an abuse of process challenge. He argues that the court should have followed the reasoning of the Administrative Court in *Kashamu.* In that case the court applied the express requirement of article 5(4) of the Human Rights Convention that entitled a person detained to have the legality of his detention decided speedily by a court of law. No such provision is to be found in the Belize Constitution, but Mr Fitzgerald argues that the provisions of the Belize Constitution have the same effect. First he submits that the Constitution entrenches the separation of powers. It is implicit in the separation of powers that it is for the judiciary and not the executive to determine any issue of the legality of interference with the fundamental rights that are also entrenched in the Constitution. This principle is not satisfied by the power judicially to review the Minister's decision on extradition. The extradition process involves the deprivation of liberty of the person whose extradition is sought. To leave it to the Minister, in the first instance, to consider the legality of extradition is, improperly to confer a judicial power on the executive. As a remedy for unlawful detention the Minister's decision is impractical, unfair and ineffective, as the Minister has no natural fact-finding role, nor is his role protected by procedural safeguards. Furthermore, to defer consideration by the court until after the Minister's decision will result in delay that is not acceptable where the liberty of the subject is at stake.

43. More specifically Mr Fitzgerald relies on the express right to seek habeas corpus, conferred by section 5(2)(d) of the Constitution. That remedy is designed to enable the legitimacy of deprivation of liberty to be challenged without delay. Thus

section 5(2)(d) has the same effect as article 5(4) of the Human Rights Convention. Abuse of process renders the extradition process unlawful and thus an allegation of abuse of process falls within the remit of the Supreme Court on an application for habeas corpus.

44. Mr Fitzgerald submits that the provisions of section 20 of the Constitution apply where an application is brought for habeas corpus. On a habeas corpus application the court is required to consider any contention by the applicant that his fundamental rights have been infringed.

45. Mr Fitzgerald has buttressed his submissions by arguing that the magistrates' court itself has jurisdiction to consider an abuse of process challenge, relying on the reasoning of the Divisional Court in *Kashamu*.

46. In response Mr Lewis has submitted that the reasoning of the House of Lords in relation to the 1870 Act in *Atkinson* and *Sinclair* applies to that Act as applicable in Belize. The jurisdiction of the magistrate in extradition committal proceedings is restricted to the role expressly conferred on him by the statute. The role of the Supreme Court in habeas corpus proceedings is restricted to determining if the magistrate could lawfully have made the committal order – see *Schtraks v Government of Israel*[1964] AC 556, 585; *R v Governor of Brixton Prison, Ex p Armah* [1968] AC 192, 239 and 258; *Government of the Federal Republic of Germany, Ex p Sinclair* [1991] 2 AC 64, 91. The decision in *Kashamu* has no application in Belize because Belize has no constitutional guarantee equivalent to article 5(4) of the Human Rights Convention.

47. Mr Lewis submits that the appellant's reliance on section 20 of the Constitution is misplaced. First of all, no application has been made under section 20. In the second place it cannot properly be contended that the appellant's rights under section 5 of the Constitution are infringed when he has been granted bail. In any event, no complaint can be made that detention is a breach of the appellant's right to liberty when his detention is expressly authorised under section 5(1)(i) of the Constitution.

Discussion

48. Extradition will not be lawful if it will violate a fundamental right. In England this is recognised by the provisions of the 2003 Act which require the discharge of a person if his extradition will not be compatible with his Convention rights under the Human Rights Act. Any issue as to compatibility with Convention rights is a matter for the District Judge (Magistrates' Court) on the extradition hearing. *Norris v Government of the United States of America (No 2)* [2010] UKSC 9; [2010] 2

AC 487 is a recent example of an unsuccessful challenge to extradition on the ground that it would violate article 8 of the Convention.

49. The position is different in Belize. Section 20 of the Constitution provides for an application to the Supreme Court where a person alleges that a fundamental right has been or is likely to be violated. Section 20(3) makes provision for any other court to refer to the Supreme Court any question that arises of the contravention of a fundamental right. What is the correct procedure where a person wishes to resist extradition on the ground that it will violate a fundamental right? Can he raise the point at the committal proceedings before the Chief Magistrate? If so, should the Chief Magistrate refer the point to the Supreme Court. Alternatively, can and should the point be raised for the first time on a habeas corpus application to the Supreme Court? Or should the person resisting extradition raise the point by a separate constitutional motion under section 20?

50. It is not necessary to resolve these procedural issues on this appeal, for Mr Fitzgerald has complicated the picture by his reliance on section 20 of the Constitution. The appellant raised his abuse of process challenge in the course of the habeas corpus proceedings before the Supreme Court. Habeas corpus is the remedy provided by section 5 (2)(d) where the fundamental right to liberty has been infringed by detention. But in reality it is not the detention that the appellant challenges but the extradition process itself. The lawfulness of the detention is not the same as the lawfulness of the extradition, albeit that the two are inter-connected. A person can be lawfully detained pending the determination of whether his extradition is lawful, but not if or when it is determined that the extradition is not lawful. Both the lawfulness of the detention and the lawfulness of the extradition are a matter for the courts and not the executive. The executive may or may not have a discretion as to whether to order extradition that is permitted by law.

51. For the reasons given by the Administrative Court in *Kashamu* the approach in the *Atkinson* line of authority cannot be applied in a State that has a Constitution on the Westminster model so as to confer on the executive rather than the courts the determination of any issue that goes to the legitimacy of extradition or of detention pending possible extradition. Which court has jurisdiction to determine any such issue is another matter. Both propositions are well illustrated by the decision of the Judicial Committee in *Knowles v Government of the United States of America* [2006] UKPC 38; [2007] 1 WLR 47. One issue in that case was whether a request for extradition by the United States Government involved an abuse of process. A further issue was whether that was a matter that the committing magistrate had jurisdiction to consider, applying the reasoning in *Kashamu.* As to the latter issue, Lord Bingham, giving the advice of the Board, said

“27……The Government seeks to distinguish that authority. It refers to article 19 of the Constitution, as set out in the Schedule to the Bahamas Independence Order 1973(SI 1973/1080), which, so far as material, provides:

"(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases…(g) … for the purpose of effecting the ... extradition or other lawful removal from The Bahamas of that person or the taking of proceedings relating thereto ..."

Thus the Constitution, it is argued, omits the references on which the decision in the *Kashamu* case particularly turned: there is no requirement of speedy decision nor of decision by a court. The appellant replies that such an approach is inconsistent with the principle of the separation of powers on which the Bahamian Constitution and other like constitutions are founded: it is the courts, not the executive government, which must protect the individual against subjection to proceedings which are an abuse of the court's process. The Government in response takes its stand on the Constitution itself. It provides, in article 28(3):

> ‘If, in any proceedings in any court established for The Bahamas other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the provisions of the said articles 16 to 27 (inclusive), the court in which the question has arisen shall refer the question to the Supreme Court.’

If, therefore, a person alleges that he is detained pursuant to proceedings which are an abuse, such that he ought not to be detained, his remedy lies in recourse to the Supreme Court to complain that his rights under article 19(1)(g) have been infringed. But the Constitution does not permit a magistrate to rule on such a complaint.

28. The Board does not find this an altogether easy question to resolve, but on balance it prefers the Government's argument, as did the courts below. In enacting section 10(2) of the 1994 Act, the Bahamian Legislature may be taken to have assumed the general correctness of the *Atkinson* line of authority. The Constitution does not include, in article 19(1) or elsewhere, the specific provisions which obliged the Divisional Court to distinguish the *Atkinson* line of authority in the *Kashamu* case. The Constitution allocates to the Supreme Court, not to magistrates, the jurisdiction to redress constitutional grievances. Thus the magistrate was right to rule as she did.”

52. The significance of this passage is not what was said about the jurisdiction of the magistrate. That is relevant to the subsidiary issue in the present case, to which the Board will come in due course. The significance lies in the acceptance by the Board in *Knowles* that abuse of process was a matter that could properly be raised before the Supreme Court.

53. The abuse of process argument goes to the legality of the extradition proceedings. Abuse of process is a paradigm example of a matter that is for the court and not for the executive. For these reasons the Board has concluded that the appellant has made out his case that the Supreme Court had jurisdiction to consider the issue of abuse of process.

54. Because it is not, in reality, the appellant's right to liberty that is at the heart of this appeal, Mr Lewis' submission that he has no cause to complain because he has been released on bail is off target. There is no merit in that contention in any event. It is well established that, on an application for habeas corpus an applicant on bail is to be treated as if he were in custody: see *R v Secretary of State for the Home Department, Ex p Launder (No 2)* [1998] QB 994, 1000-1001. The legality of bail depends upon the legality of the prior detention and it must be open to a person who has been bailed to challenge his being subjected to bail on the ground that this was a consequence of the violation of his right to liberty.

Abuse of process

55. It is the appellant's case that his detention was unlawful because the extradition proceedings to which it related involved an abuse of process. The Board referred at the outset to the imprecision of that phrase and it is necessary at this point to give it further consideration. Arrest, detention and forced removal to another country involve a serious invasion of fundamental rights. In England both Parliament and the courts have long recognised that the executive acts involved in complying with a request for extradition are subject to legal constraints. Some of these constraints have been expressly incorporated in the extradition legislation to which the Board has earlier referred. This has changed over the years. Broadly speaking the circumstances in which extradition is authorised under domestic legislation reflect the terms of the extradition treaties or conventions to which the United Kingdom is party. The 1870 Act reflected treaties which made provision for extradition where there was evidence tending to show that a person had been guilty of conduct in the requesting country that would constitute an indictable offence if committed in this jurisdiction. The magistrates' court had to consider the evidence of criminal conduct relied upon by the requesting state. Under the 2003 Act that is no longer the position.

56. The 1870 Act placed no restraint on extradition in circumstances where, although the necessary evidence of criminal conduct existed, there was some extraneous reason why it would be unjust that extradition should take place. Lord Reid considered that it would have been implicit that Parliament did not intend to authorise extradition in such circumstances had not Parliament catered for them by giving the Secretary of State a discretion to refuse extradition where in his view it would be wrong, unjust or oppressive to surrender the person. Lord Reid expressed the view that it was to Parliament and not to the courts that the Secretary of State would be answerable for the manner in which he exercised this discretion: see pp 232-233.

57. In subsequent legislation Parliament gave the courts the power or the duty to refuse to commit a person where, by reason of specified circumstances, extradition would be unjust or oppressive. Those circumstances have included the passage of time since the extradition offence was committed. They also now include circumstances where extradition would not be compatible with the Human Rights Convention.

58. The question arises in a country such as Belize, where fundamental human rights are entrenched in the Constitution but where extradition is governed by the 1870 Act, in what circumstances the Supreme Court can, or should, accede to a habeas corpus application on the ground that extradition would be so unjust or oppressive as to be unlawful, with the consequence that detention of the person whose extradition is sought cannot be justified. It is not necessary in this case to attempt to give any general answer to this question, but the Board considers that the circumstances might extend further than those that can naturally be described as amounting to an abuse of process. Where, however there has been an abuse of process in the narrow sense of the kind that the Board has described in para 5 above, the Supreme Court can properly grant the application for habeas corpus on the ground that it is contrary to justice that the court's process should be used in such circumstances.

The subsidiary issue

59. Has the Chief Magistrate the same jurisdiction? Mr Fitzgerald has submitted that an affirmative answer should be given to this question. He seeks to distinguish this case from *Knowles* by pointing to the fact that article 28(3) of the Bahamas Constitution makes a reference to the Supreme Court mandatory where there is a question of the contravention of fundamental rights, whereas section 20(3) of the Belize Constitution only makes a reference mandatory if one of the parties requests this. There is no need in this case to resolve this subsidiary issue, but the fact that a party can insist on a reference to the Supreme Court makes it impossible to hold, as the Divisional Court did in *Kashamu*, that the magistrates' court is the obvious forum for the determination of an abuse of process challenge.

The appellant's case on the facts

60. In the light of the Board's finding on jurisdiction, it is now necessary to consider whether the appellant has established a case of abuse of process that calls for remission to the Supreme Court of Belize. The challenge that the appellant seeks to make to his extradition is based on the following alleged facts. These have not been agreed by the respondent but should be assumed to be true for the purpose of considering whether the appellant has a viable case of abuse of process. It is right to observe, however, that there are some inconsistencies in the facts alleged.

61. The United States alleges that on 22 March 1990, in Dade County, Florida, the appellant, together with Carlos Cuello and Alex Napolitano, attempted to carry out an armed robbery on Gerald Hiebert and Larry Miller and that, in the course of this, Mr Cuello shot and killed Mr Miller. Although a warrant for the appellant's arrest was issued on the following day, this was not executed and no extradition request was made until 17 April 1998. Thereafter over ten years elapsed before the extradition proceedings in Belize ended with the dismissal by the Court of Appeal of the appellant's appeal against the refusal to accede to his application for habeas corpus.

62. Between 1990 and 1998 the appellant had been living openly in Belize and had taken no steps to conceal the fact that he was doing so. Both the federal and the state law enforcement agencies of the United States were aware of his presence there. Indeed, during most of this period the appellant was contacted regularly by their officials, as described below.

63. Some time in 1990 Mr Ed Hill, a detective on the North Miami Beach police force, spoke to the appellant's mother. He informed her that he knew that the appellant was in Belize and that a plea bargain would be available to him provided that he gave evidence against Mr Cuello and Mr Napolitano. When his mother informed him of this conversation his response was that he would not be willing to agree to any such arrangement.

64. At about this time the appellant was himself visited in Belize by two men who said that they were FBI agents, Mr Tom Harvey Jr and Mr David Dillman. They told him to contact them on one of these numbers should he be prepared to "make a deal with them". He did not do so but none the less tried the numbers and found that these were indeed numbers for the FBI.

65. In 1991 or 1992 the appellant was charged by the police in Belize with possession of an unlicensed firearm. A separate charge was brought against him by the Belize Customs Authority for importing the firearm in breach of Customs regulations. In the course of investigating the provenance of the firearm Mr Earl Jones, a senior

Customs Examiner, sought the assistance of Mr Tuffy Van Briessen, the head of the US Drug Enforcement Agency's operation sin Belize and Mr Skip Taylor, the US Defence Attaché in Belize. He informed each of them of the charges being brought against the appellant and the appellant's home and work addresses.

66. While detained pending trial the appellant was introduced by Mr Edward Broadster, a Belize police officer, to Mr Kevin Hartman, who informed the appellant that he was a US Federal Agent. Mr Hartman asked the appellant to buy some drugs from a named individual as part of a "sting" operation and threatened that if he did not cooperate he would arrange for his extradition to the United States. He further stated that if the appellant cooperated in the prosecution of Mr Cuello a plea bargain could be arranged. The appellant refused both requests. He subsequently defended the charges by alleging that the firearm had been planted on him by United States law enforcement agents and was acquitted on both charges.

67. Between 1992 and 1997 the appellant received numerous telephone calls, estimated at 21 or more, from Detective Hill. He told the appellant that he was working on the Larry Miller case. He tried unsuccessfully to persuade the appellant to return to Florida to stand trial, promising a plea bargain if he testified against Mr Cuello. In the course of these conversations he was "given to understand" that he was not at risk of being prosecuted and that the police wanted him to return to give evidence against Mr Cuello. They also wanted him to testify in relation to an unrelated killing of the wife of an FBI agent. Detective Hill repeatedly told him that the North Miami Beach police did not care about Larry Miller's killing as he was "just a drug dealer". The appellant told Detective Hill of specific things that he had done on 22 March 1990, and about Mr Cuello and Mr Napolitano, although he could not remember the details of what he said.

68. In October 1997 Detective Hill and three other officers from the North Miami Beach police came to Belize to meet the appellant. One of these, Mr Donald Diecidue, left his business card. During the course of the interview they showed the appellant witness statements from the Larry Miller investigation and asked the appellant questions about these statements, which he answered. Two of the officers then had a separate interview with the appellant in the course of which they spoke to him about the murder of the FBI agent's wife and offered not to bring charges against the appellant if he agreed to testify against Mr Cuello. The appellant was never informed of his right to remain silent or to seek legal advice, and he did not do so.

69. It was not until the 28 January 1998 that the Grand Jury issued an indictment charging the appellant with first degree felony murder and not until 17 August 1998 that the United States made an extradition request. That request was supported by an affidavit sworn by Dawn Marie Cortese, which included the following passage:

> "25 Following the offense, law enforcement officers were unable to locate Rhett Allen Fuller because he fled the United States.
>
> 26 In October of 1997, law enforcement officials discovered Rhett Allen Fuller was in Belize, and notified Dade County State Attorney's Office that he was residing at Mile Marker 2 & ½ Northern Highway, Kings Park, Belize City, Belize; and was working at Triton Ads Limited at the Fiesta Inn Hotel in Belize City, Belize.
>
> 27 When law enforcement officials notified the Dade State Attorney's Office that they had located Rhett Allen Fuller, an assistant state attorney for the Dade County State Attorney's Office prepared to indict Rhett Allen Fuller…"

70. Events then proceeded, or failed to proceed, as set out in the first paragraph of this judgment.

The appellant's case on abuse of process

71. The appellant relies on four matters as rendering it unjust and oppressive to return him to Florida: (1) the delay of about 13 years that elapsed between the alleged offence and the extradition request, notwithstanding the fact that his presence in Belize was known to the US authorities; (2) the repeated contacts with the US officials in the course of which they led him to believe that his extradition would not be sought, inducing him to disclose facts to them which would otherwise have remained undisclosed; (3) the "deliberate concealment" by the US authorities of their knowledge of the appellant's presence in Belize and Miss Cortese's "untrue assertion" that his whereabouts were not discovered until October 1997; (4) the 12 year delay between the start of extradition proceedings and their resolution in the courts of Belize.

72. Mr Fitzgerald for the appellant has relied on these matters to advance a case of abuse of process on a number of different bases. First he contends that the Florida detectives who had dealings with the appellant gave him a legitimate expectation that he would not be prosecuted for the murder of Mr Miller. Lulled into a false state of security he divulged prejudicial information that he would not have disclosed had he anticipated the possibility that he might be prosecuted for Mr Miller's murder. Secondly Mr Fitzgerald submits that there has been a deliberate attempt by the United States authorities to deceive the court as to the reason for the delay in commencing extradition proceedings and that this of itself amounts to an abuse of process that should preclude the continuance of the proceedings. Thirdly he relies upon the delay

itself that has occurred in this case as making it unjust and oppressive to proceed with the extradition.

73. The Board does not consider that any of these submissions would or should have any prospect of success if this matter were remitted to the Supreme Court. So far as the alleged legitimate expectation is concerned, there is no factual basis for this, even if one assumes that all that the appellant has said is accurate. On his evidence, he was repeatedly offered the possibility of a plea bargain if he returned to the United States and gave evidence against the other two men who were charged with the murder, or alternatively provided assistance in relation to the case of the murder of the wife of an FBI agent. The appellant made it plain that he was not prepared to do either. The Board does not see how, in these circumstances, the appellant could possibly demonstrate that he had been given an assurance that he would not be prosecuted.

74. As to the alleged attempt to deceive the court, it is true that the affidavit of Miss Cortese was, if the appellant's version of the facts is correct, inaccurate where it states that it was not until 1997 that law enforcement officers discovered that the appellant was in Belize. It seems to the Board, however, that this was almost certainly the consequence of a breakdown in communications rather than an attempt to deceive the Belize court. Miss Cortese could not possibly have expected to conceal the contacts that had taken place between the US authorities and the appellant, had she been aware of these. In any event, the error in her affidavit could not, of itself, amount to an abuse of process calling for the rejection of the extradition request.

75. Mr Fitzgerald has put at the forefront of his case on abuse of process the delay that has occurred in this case. He has submitted that this would render impossible a fair trial in the United States. The Board is in no position to evaluate this submission, nor was the Supreme Court in Belize. It was not, however, a matter for investigation by that court. Extradition proceeds on the basis that the person whose extradition is sought will receive a fair trial in the requesting State. If it is plain that a fair trial will not be possible, it will obviously be unjust and oppressive to return the person, but that is not this case. If it is alleged that the delay that has occurred, or any other matter, has rendered a fair trial in Dade County impossible, the appropriate remedy is to apply to the court there for relief.

76. The relevant delay so far as an allegation of abuse of process is concerned is not the delay in commencing the extradition proceedings, but the delay in pursuing them. Inordinate delay in pursuing extradition proceedings is capable of amounting to an abuse of process justifying the discharge of the person whose extradition is sought. There is authority at the highest level on the circumstances in which delay will justify discharging such a person, albeit in the context of express statutory provisions as to this.

77. In *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 the House of Lords had to consider the effect of section 8(3) of the Fugitive Offenders Act, set out at para 21 above. In the leading speech, Lord Diplock held, at pp 782-783:

> " 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.
>
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8(3) is based upon the 'passage of time' under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case."

78. *Kakis* was recently considered in the House of Lords in *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21; [2009] 1 WLR 1038. Delivering the considered opinion of the Committee, Lord Brown of Eaton-under-Heywood said:

> "32 With regard to the concept of injustice, the law has moved on since *Kakis*, in part because of the developing abuse of process jurisdiction over the past 30 years. It is unnecessary to rehearse this at length. Rather it is sufficient to refer to the judgment of the Privy Council delivered by Lord Bingham of Cornhill in *Knowles v Government of the United States of America* [2007] 1 WLR 47, in particular para 31 where the

Board approved the Divisional Court's judgment in *Woodcock v Government of New Zealand* [2004] 1 WLR 1979 from which it extracted and endorsed the following propositions:

> 'First, the question is not whether it would be unjust or oppressive to try the accused but whether . . . it would be unjust or oppressive to extradite him (para 20). Secondly, if the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust or oppressive for the requested state to return him (para 21). But, thirdly, the court of the requested state must have regard to the safeguards which exist under the domestic law of the requesting state to protect the defendant against a trial rendered unjust or oppressive by the passage of time (paras 21-22). Fourthly, no rule of thumb can be applied to determine whether the passage of time has rendered a fair trial no longer possible: much will turn on the particular case (paras 14-16, 23-25). Fifthly, 'there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive' (para 29).'

33 The second of those propositions, it will be noted, invites consideration of whether, in any particular case, 'a fair trial is impossible', and that indeed we regard as the essential question underlying any application for a section 82 bar on the ground that the passage of time has made it unjust to extradite the accused. As was pointed out in *Woodcock* [2004] 1 WLR 1979 , para 17, a stay on the ground of delay in our domestic courts is only properly granted when 'there really *is* evidence of prejudice to the extent that a fair trial could not be held'. We acknowledge that in *Kakis*, [1978] 1 WLR 779 Diplock para 1 speaks of 'the risk of prejudice to the accused in the conduct of the trial itself'. But Viscount Dilhorne's leading speech in *R v Government of Pentonville Prison, Ex p Narang* [1978] AC 247, 276 the previous year had used the language of impossibility:

> 'I see nothing in the material before this House to lead to the conclusion that as a result of the passage of time it would be impossible for [the two accused] to obtain justice, and, that being so, I am unable to conclude that by reason of the passage of time their return would be unjust or oppressive."

79. In the present case there was a period of inertia of nearly 6 years after the filing of the appellant's notice of appeal. The first thing that should have happened, but did not happen, was the preparation of the record by the Registry. No explanation has been given as to why this did not happen. But the Board considers it significant that

what was delayed was the appellant's appeal against the judgment of the Supreme Court. Had the appellant wished to progress this appeal he could and should have made representations to the Registry. The fact that he did not do so indicates that, perhaps not surprisingly, he was only too happy that the hearing of his appeal should be delayed. In these circumstances the Board does not consider it arguable that justice demands that the extradition proceedings should be abandoned because of the delay that has occurred.

80. Mr Fitzgerald wisely did not pursue in oral argument the contention that the evidence against the appellant was inadequate to found a case against him. On this point there was no valid basis for attacking the conclusions of the courts below.

81. For these reasons, although the appellant has made good his submissions of law on the jurisdiction of the Supreme Court to entertain his abuse of process challenge, the Board will humbly advise Her Majesty that the appeal should be dismissed.