IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

(CRIMINAL)

Nos 78-82 of 2012

BETWEEN:

EARL "BOB" HODGE
CHAD SKELTON
CARLSTON BEAZER
ROBERT HARRIGAN
JUAN FIGUEROA-VALDEZ

Applicants

and

THE SUPERINTENDENT OF PRISON
THE HONOURABLE ATTORNEY GENERAL

Respondents

Appearances:

Mr. Julian Knowles Q.C. and Mr. Herbert McKenzie for Mr. Earl Hodge
Mr. Edward Fitzgerald Q.C. and Mr. Patrick Thompson for Mr. Robert Harrigan
Lord McDonald Q.C. and Mrs. Tana'ania Small-Davis for Mr. Chad Skelton
Mr. Richard Rowe for Mr. Carlston Beazer and
Mr. Steven Daniel for Mr. Juan Figueroa-Valdez
Mr. Alan Jones Q.C., Mr. Terrence Williams and Mr. Valston Graham for the Superintendent of Prison
Dr. Christopher Malcolm and Mr. David Penn for The Attorney General

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2012: July 12, 13, September 17

JUDGMENT

The Extradition – Committal proceedings – Whether the Learned Magistrate could properly commit the applicants for extradition under Section 9 (8) paragraph (a) of the Extradition Act 1989. Whether the Learned Magistrate could lawfully correct the order for committal two days later and say that the committal order was made under Section 7 (1) of the Extradition Act. Whether the requesting state has established that there was a conspiracy by the alleged drug smugglers to smuggle cocaine into the U.S. Whether cocaine being on board a U.S. registered aircraft, by itself gives the U.S. jurisdiction to try the alleged drug smugglers.

[1] REDHEAD J. (Ag.) On 29th September 2010 Chad Skelton was arrested by the Royal Virgin Islands Police. He was charged with the offences of importation of a controlled drug into the Territory of the Virgin Islands, conspiracy, money laundering and offences under the Drugs (Prevention of Misuse) Act Cap 178.

[2] On 23rd August 201, Earl Delville Hodge was arrested by the Royal Virgin Islands Police and was charged with the offences of Conspiracy to Import Cocaine, Possession of Prohibited Firearm, Acquisition of Possession or Use of Proceeds of Criminal Conduct, possession of cocaine with intent to supply, unlawful importation of cocaine.

[3] Robert Harrigan was arrested by the Royal Virgin Islands Police on 24th August, 2011 and was charged with the offences of money laundering, conspiracy to import a controlled drug, to wit cocaine into the Territory, acquisition or use of the Proceed of Criminal Conduct contrary to Section 29 of the Proceeds of Criminal Conduct Act Arbitrary of a Public Officer contrary to Section 80 (1) of the Criminal Code, Abuse of Authority Contrary to Section 84 (1) of the Criminal Code.

[4] Juan Figueora-Valdez was arrested by the Royal Virgin Islands Police on the 15th July, 2011. He was charged with the offences of conspiracy to distribute cocaine into the Territory, intending that such substance will be unlawfully imported into the United States or within a distance of 12 miles of the coast of the United States in violation of Title 21 of United States Code, Section 959 (a) (1) and possesses with intent to distribute cocaine, a schedule 11 controlled substance while on board an aircraft registered in the United States and with a United States Citizen on board in violation of Title 21, United States Code, Section 957 (b) (1).

[5] Carlston Beazer was arrested by the Royal Virgin Islands Police on 29th September, 2010. He was charged with the offences of conspiracy to import cocaine, unlawful possession of cocaine with intent to supply. Mr. Beazer was granted bail in respect of these three charges on 5th October 2010. However, he was rearrested on 24th August, 2011 and charged with the following offences. Conspiracy to import cocaine, acquisition, possession or use of proceeds of criminal conduct, possession of cocaine with intent to supply, unlawful importation of drug.

[6] The Government of the United States of America (USA) seeks the extradition of all five of the accused persons from the British Virgin Islands (BVI) to the U.S. so that these accused persons could be tried by the United States for the violation of the Laws of the USA.

[7] That are of the defendants to stand trial in the U.S. District Court for the Southern District of Florida except for accused Earl Hodge to stand trial in the U.S. District Court of North Carolina and the U.S. District Court of Southern District of Florida.

[8] The extradition hearings of these accused persons began before the Chief Magistrate Ms. Valerie Stephens on 3rd February, 2012. On 13th February, 2012, the Learned Magistrate issued an oral ruling which states inter alia -

> "On reviewing the affidavit evidence of Elton Turnbull, James Springette and Sandra Harrison, I am satisfied on the evidence of James Springette as to the identity of Earl Hodge. And I am satisfied by the evidence of Elton Turnbull that he knew Mr. Hodge from when he was a child living in Frenchman's Cay, and I find on the supplemental affidavit of Sandra Harrison, that there is a photograph of Earl Hodge wearing a hat and Earl Hodge was also identified by Chief Inspector Murray. I find, therefore, sufficient evidence of identification of Mr. Earl Hodge…
> I find that the extradition is not precluded or prohibited by law. I am therefore going to commit Earl Hodge to Her Majesty's Prison at Balsum Ghut to await a decision of His Excellency, The Governor, as to whether he should be extradited to the United States of America. I am therefore going to make an order of committal under Section 9 (8) paragraph (a) of the Extradition Act …
> I am satisfied that a prima facie case has been made out against Earl Hodge, Chad Skelton, Carlston Beazer, Juan Valdez and Roberto Harrigan."

[9] The Learned Magistrate's written ruling dated 13th March, 2012 she wrote in addition:

> "I find on the Affidavit evidence of Mr. Diaz that there was a conspiracy to import cocaine into the United States of America that existed between Hurtado and others. The Affidavit evidence disclosed that Mr. Earl Hodge was part of that operation and Mr. Roberto Harrigan joined the operation by assisting Mr. Diaz to enter the British Virgin Islands. The evidence disclosed that Mr. Earl Hodge and Mr. Roberto Harrigan turned over proceeds of the drug trafficking to Mr. Diaz for delivery to Hurtado. The evidence further disclosed that Mr. Harrigan transferred money on Mr. Diaz's instructions. In addition, on the evidence I find that Mr. Valdez was a part of the operation. That money was handed to Mr. Valdez by Mr. Diaz that had been collected from Mr. Hodge.
> The evidence disclosed that Mr. Hodge, Mr. Beazer and Mr. Skelton collected cocaine from an airdrop in late June 2010 and that the witness Mr. Diaz was present during this operation.
> The evidence of Special Agent Corinne Martin disclose that an account was opened in Florida and a titan aircraft was purchased and registered in the USA and delivered to Hurtado and this aircraft on the evidence was tracked

from South America and was seen on the monitoring system to be circling in an area off Tortola. The aircraft had a tracking device. The evidence is that cocaine was dropped into the water and picked up by individuals in 2 boats. The boats were pursued and one boat stopped which Mr. Beazer, Mr. Skelton and Mr. Valdez were in.

I find on the evidence that Mr. Edurado Diaz was an accomplice. I recognize the dangers of relying on the evidence of a person of this character and I warn myself of the dangers. Having warned myself. I find on the evidence that there is sufficient evidence against each accused person to make out the offence of conspiracy to possess cocaine on board an US aircraft. I find on the evidence that the United States would have jurisdiction in this matter based on the overt acts such as the opening of an account in the United States. The purchase and registration of the titan aircraft and the transporting of drugs on a United States registered aircraft. I am relying on the decision in DPP v Doot and others 1973 A.C. 807 and paragraph 14 (1) of the first schedule of the 1989 Extradition Act. I find that the acts alleged by the United States government are sufficient to establish territorial jurisdiction.

I find that the evidence against each accused person would be sufficient to warrant a trial in this jurisdiction if the BVI was in the same position of the USA. I am satisfied that a prima facie case has been made out against Earl Hodge, Chad Skelton , Carlston Beazer, Juan Figueroa Valdez and Roberto Harrigan.

The offence for which extradition is sought carries a penalty of over 12 months.

I find that the accused person's committal are not precluded or prohibited by law.

I am therefore committing each accused person, Earl Hodge, Chad Skelton, Carlston Beazer, Juan Figueroa Valdez and Roberto Harrigan to H.M. Prison at Balsum Ghut to await a decision of His Excellency, The Governor on whether they should be extradited to the United States of America.

Order for committal is made under section 7 (1) of the Extradition Act in relation to each accused person."

[10] The Learned Magistrate committed the applicants on her oral decision under and by virtue of Section 9 (8) paragraph (a) of the Extradition Act, whereas in her written decision, the Learned Magistrate, purported to commit them, under and by virtue of Section 7 (1) of the Extradition Act.

[11] Learned Queen's Counsel, Mr. Julian Knowles on behalf of Earl Hodge in his oral submissions before the court, with which Mr. Edward Fitzgerald Q.C. Lord McDonald Q.C. and other learned counsel on behalf of the other applicants associated themselves with these submissions and arguments. Mr. Knowles Q.C. argues that once the Governor receives the request and he is satisfied that the request is genuine, there are no grounds for the Governor to turn down that request at an early stage.

[12] The Governor therefore granted authority to the Magistrate to hold extradition proceedings. In my opinion, that is understandable and it is the proper procedure and thus far cannot be faulted.

[13] However, Learned Queen's Counsel, Mr. Knowles argues that the Governor issued to the learned Magistrate an "Authority to Proceed" which was fundamentally flawed because what the governor ought to issue was "an order to proceed".

[14] I questioned at the hearing whether or not these two terms were interchangeable. It was pointed out that an authority to proceed was fundamentally flawed because the Governor purported to issue it under Section 7 (4) of the Extradition Act which is in Part 3 of the Extradition Act 1989 which has no application to the BVI so far as the United States is concerned, in that Part 3 is completely different legislative regime and applies to different circumstances. Mr. Knowles Q.C. argues that the governor purported to exercise a power which he did not have, namely an authority to proceed.

[15] Learned Counsel, Mr. Knowles Q.C. contends that the learned magistrate expressly based her ruling on the authority to proceed which is the foundation of her ruling.

She purportedly committed the Applicants under Part 3 of the Extradition Act to the extent that she had no jurisdiction to do so. Mr. Knowles Q.C. further argues that his client Mr. Hodge was committed on the basis of a document which does not apply and committed by the Magistrate who believed that she was operating under a piece of legislation which is inapplicable. The applicant's committal was therefore unlawful.

[16] I now turn to examine the Extradition Act 1989. Section 2:

> "In this Act except in Schedule 1 'Extradition Crime' means –
> (a) Conduct in the Territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom would constitute an offence punishable with imprisonment for a term of 12 months, or, any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony is so punishable under the law."

[17] Section 7 provides in part:-

> "Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with under this Part of the Act except in pursuance of an Order of the Secretary of State (in this Act referred to as an "authority to proceed") issued in pursuance of a request (in this Act referred to as an "Extradition request") for the surrender of a person under this Act made-
> (4) On receipt of any such request the Secretary of State may issue an authority to proceed unless it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made in accordance with the provisions of this Act."

[18] Mr. Knowles in outlining the Legislative Framework of the Act contends as follows:-

> "By virtue of the Extradition Act[1] read together with the Extradition (Tokyo Convention Order[2]), extradition from the Virgin Islands to the United States is governed by Sch.1 to the Extradition Act 1989 and the Order in Council (made pursuant to S.2 of the Extradition Act 1870 as amended). The relevant

[1] **Cap 121**
[2] **(1997) S.1. 1997/1998**

> Order in Council is the United States of America Extradition Order 1976 S1 1976/2 144. This annexes the 1976 UK/US Extradition Treaty in Schedule 1. Sch. 2 of the order expressly extends the operation of the 1976 Treaty to BVI."

[19] Mr. Knowles Q.C. further argues that Schedule 1 of the Extradition Act 1989 is derived from the Extradition Act 1870. Section 2 of the 1870 Act provides:-

> "Where an arrangement has been made with any foreign state with respect to the surrender to such state of the fugitive criminal, Her Majesty may, by Order in Council, direct that this Act shall apply in case of such a foreign state.
> Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to the fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions and qualifications as may be deemed expedient.
> Every such order shall recite or embody the terms of the arrangement and shall not remain in force for any longer period than the arrangement."

[20] In his Skeleton Arguments Mr. Knowles Q.C. contends that "Extradition Crime is defined in Section 26 of the Extradition Act 1870 as a crime which, if committed in the Virgin [Islands] or within the [Virgin Islands] jurisdiction would be one of the crimes described in Schedule 1 of this Act." (referred to above).

[21] Mr. Knowles Q.C. submits:

> "Paragraph 7 of Sch. 1 of the 1989 Act as amended in effect by paragraph 16 of Sch. 1 and Cap 121 provides that in the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such a criminal is duly authenticated, and such evidence is produced as subject to the provisions of Sch. 1 would according to the law of the Virgin Islands justify the committal for trial of the prisoner if the crime of which he is accused had been committed in the Virgin Islands, the magistrate shall commit him to prison, but otherwise shall order him to be discharged.
> Additions to the list in Sch. 1 to the 1870 Act were made by S.8 of the Extradition Act 1873 and S.1 of the Extradition Act 1906. Section 1 of the Extradition Act 1932 provided that the Act of 1870 should be construed as…if

> offences against any enactment for the time being in force relating to dangerous drugs, an attempt to commit such offences were included in the list of crimes in Schedule 1 of that Act."

[22] Section 33 of the Misuse of Drugs Act 1971 (UK) which by virtue of the Misuse of Drugs Act 1971 (Commencement No.2) Order 1973 (S1 1973/795) came into force on 1 July 1973 provides:

> "The Extradition Act 1870 shall have effect as if conspiring to commit any offence against any enactment for the time being in force relating to dangerous drugs were included in the list of crimes in Schedule 1of that Act."

[23] Mr. Knowles Q.C., in my opinion, rightly concluded in his written submissions conspiracies in relation to dangerous drugs are deemed to be included in the list of offences in Schedule 1 to the 1870 Act.

[24] He contends, however that Section 2 of the 1870 Act provides that the order in council may impose extra and narrower conditions before extradition can be granted. Article 3 of the 1976 Order provides that the 1870 Act shall apply with the terms of the 1976 UK/US Treaty, and Article 3 of the Treaty provides that extradition may be granted for an act or omission of the facts which disclose an offence within any of the descriptions listed in the Treaty.

[25] Mr. Knowles Q.C. argues that as was made clear in Government of the USA v Bowe[3], in order that a defendant may be extradited to stand trial in the US it is necessary that the offence i.e. the conduct of which he is accused in respect of which his extradition is sought shall be both:

(a) an extradition crime within the meaning of Sch. 1 to the Act of 1870 and

[3] **(1990) A.C. 500 at 521**

(b) an extraditable offence within the meaning of the list of offences in the 1976 UK/US Treaty.

[26] It is settled law that conspiracies in relation to dangerous drugs are also included in the list of offences annexed to the 1935 UK/US Extradition Treaty (See Bowe Supra), as the reasoning in that case applies to the list of offences annexed to the 1976 UK/US Treaty. The offence listed at number 12 on the list speaks to "Any offence against the law relating to narcotic drugs…"

[27] In summary, says Mr. Knowles Q.C., by virtue of paragraphs 7 and 20 of Schedule 1 to the 1989 Act, the following conditions need to be satisfied before a defendant can be committed to await extradition.

(a) He must be accused of an extradition offence.

(b) The evidence must be sufficient to amount to a prima facie case. In other words, sufficient to justify a committal for trial under BVI law. This requires that there be prima facie evidence that the conduct he is accused of in the extradition request, would in equivalent circumstances be an offence under the Virgin Islands law.

[28] In relation to the latter, the court must conduct a transposition exercise i.e. the court must (i) suppose that the criminal conduct alleged against the defendant in the foreign state occurred in the BVI and (ii) suppose that any conduct in the request alleged to have occurred in the BVI, occurred abroad.

[29] The Learned Magistrate in her oral judgment on 13th March 2012 ruled that she has considered the evidence and authorities relied on by all parties. Exhibit through Stan Evans was properly authenticated. Each of the men was properly identified by Eduardo Diaz and Det. Insp. Thomas Murray.

[30] On 15th March 2012 the learned magistrate wrote to the lawyers representing the applicants in the following terms:

> "Re: Decision in the request for extradition of Earl Hodge, Chad Skelton, Carlston Beazer, Robert Harrigan and Juan Valdez
> Please find attached a copy of my decision delivered on Tuesday 13 March in respect to the request from the Government of the United States of America. In relation to the above named gentlemen.
> Also accompanying the decision is a copy of the committal order in respect to your client. As outlined in my written decision, the committal order is made in accordance with paragraph 7(i) of Schedule 1 of the Extradition Act 1989.
> Reference to Section 9 (8) (a) of the Act in my oral decision delivered on 13th March 2012 was an error. I have accepted and advised myself that Schedule 1 of the 1989 Act is appropriate provision for the conduct of these extradition proceedings.
> Valerie R. Stephens
> Senior Magistrate"

[31] The committal order of each of the five defendants was made on 13th day of March 2012, the same day as the oral judgment and signed and stamped by the learned magistrate on that date. The written decision on 15th March 2012, I regard as an extension of her oral decision. In this regard, I referred to her written decision of 15th March 2012. [see paragraph 9 above]

[32] I make one observation that under the oral judgment the learned magistrate ruled, "I therefore make an order for committal under Section 9 (8) (a) of the Extradition Act" whereas the learned magistrate in her written decision, "order for committal is made under Section 7(1) of the Extradition Act in relation to each accused person."

[33] The Learned Magistrate's mandate for extradition proceedings was a confidential memorandum from the Governor – 26th October 2011 – Authority to proceed with Extradition Proceedings.

[34] The hearing of the extradition proceedings commenced on 3rd February 2012. An adjournment was taken. On 24th February 2012 the hearing was resumed. The Magistrate was presented with Supplementary Orders directed to her from the Governor dated 23rd February 2012.

[35] Learned Counsel, Mr. Knowles Q.C. for the Applicant Mr. Hodge, submits that the governor purported to exercise a power which he did not have, namely a power to issue an authority to proceed which was fundamentally flawed as the Governor purported to issue it under Section 7 of the Extradition Act which is to be found in part 3 of the Extradition Act 1989. This has no application in BVI so far as United States is concerned. Mr. Knowles Q.C. contends that so far as that is concerned there is common ground between the Respondents and the Applicants.

[36] Mr. Knowles Q.C. in his written Skeleton Arguments submits, "What was required by way of initiating process was an order to proceed issued under paragraph 4 of Schedule 1 to the Extradition Act 1989."

[37] Mr. Jones Q.C., Learned Counsel for the Respondents, having outlined the steps and procedure which the Governor must follow submits:

> "…the Governor may then issue an order to proceed under Schedule 1 paragraph 4(1) of the 1989 Act and specify that the relevant law of the Virgin Islands that the conduct would have contravened the Law if it had been committed in the Virgin Islands – Re: Nielsen[4], R v Bow Street Magistrate, ex parte Government of Denmark[5].

[4] **(1985) A.C. 606**
[5] **(1983) All ER 79**

[38] Mr. Knowles Q.C. in his arguments before me makes the point that we are dealing with the liberty of the subject and if the authority to proceed is defective then the committal is bad and habeas corpus should follow. He contends that the Governor did not even have the right statutory power in mind when he issued his authority to proceed to the learned magistrate. The respondents contend that the Governor did not need to express what power he was acting under.

[39] Mr. Knowles Q.C. argues that, "Whether he needed to have done that or not is not the issue. The fact is, we know what he thought he was doing, issuing an authority to proceed under Part 3, because that is what he said he was doing and we know that he does not possess that power, and therefore, it must follow that the document that was issued was an ultra vires document. It does not matter what the contents of it were, whether it complied with the statutory [provision] or not. The fact is it was the wrong statute that he was invoking." He argues that this strict approach was adopted in Re: Farinha[6].

[40] Mr. Jones Q.C. on behalf of the respondents argues that the order to proceed (I think he meant authority to proceed) fulfils all those functions of the order to proceed except that it refers to the wrong section in the penultimate line and describes itself as an authority rather than an order. A duck is a duck if it is quacks as a goose.

[41] Mr. Jones Q.C. argues that if I were to agree with the applicants and say this was a technical flaw, and it is appealed against, if it goes all the way up to the Privy Council and that ruling is upheld, then the matter has to start all over. He contends "starting all over again, would involve a colossal expenditure when the procedure will be exactly the same in substance as they were before… the law can't be so stupid as to

[6] **(1992) 1MM AR 174**

permit that to happen where nobody alleges that there is any prejudice to anyone in these proceedings."

[42] I make the comment that the rights of the individual cannot be sacrificed on the alter of colossal expenditure.

[43] In addition Mr. Jones Q.C. refers to The Law of Habeas Corpus [7]

> " (ii) Patent Defects in the Warrant of Commitment Following Conviction.
> There are now very few situations where an applicant will be able to succeed on the grounds of some patent defect in the warrant of commitment, unless that defect relates to a real error in the proceedings, or might affect the length of time the applicant will be detained.
> Where imprisonment follows a valid conviction, it will be virtually impossible to make out a successful case based on a defect in the committal documents. [8] Legislation in most jurisdiction [9] requires the court to refuse the writ if there is a proper conviction which could support the detention. The source of so many habeas corpus proceedings in the nineteenth century has been effectively plugged. Even where no such statutory provision is applicable, it would seem that the court may refuse to order the release of the applicant where there is a valid conviction.[10] Warrants of commitment tend now to be regarded as a piece of machinery to implement the court's order, and unless an error which vitiates the conviction itself is revealed, relief will be refused. [11]"

[44] In my judgment the case at bar the Learned Magistrate had not convicted the applicants of any charge. Her mandate was to decide whether a prima facie evidence what which would warrant her to order extradition of the applicants and that is which she did.

[7] Second Edition by R. J. Sharpe
[8] Supra, pp. 30-1; Olson v. The Queen [1980] 1 S.C.R. 808
[9] For the English provision, see supra, pp. 30-1
[10] R. v. Governor of Lewes Prison, ex p. Doyle [1917] 2 K. HB. 254
[11] See also R. v. Mount (1875) L. R. 6 P. C. 283, discussed infra, p. 148; Pearson v. R. (1978) 5 C. R. (3d) 264 (Que. S.C.)

[45] In view of the above, I have absolutely no doubt that Schedule 1 paragraph 4 (1) of the Extradition Act is the authority under which the learned magistrate should have proceeded and would have given authority to proceed to determine the extradition proceedings. I have no doubt also that the learned magistrate committed the five applicants under S 9 (8) (a) of the Extradition Act 1989. And having made and signed the order for committal of the five applicants on 13th March 2012, the learned magistrate purported to correct that order two days later. This, in my considered opinion, she could not lawfully do, as by then she was functus officio.

[46] Learned Counsel Mr. Jones Q.C. argues that this was a clerical error. But, in my opinion, it could not have been as the learned magistrate based her ruling on the document which was before her i.e Authority to Proceed, issued by the Governor. In her ruling the Learned Magistrate actually recited the authority of Part 3 of the Extradition Act, Section 9 (8) (a). This is the same authority Part 3 that the governor relied on in purporting to invest the learned magistrate with authority to proceed as Mr. Fitzgerald Q.C. observed in his written submission.

[47] The Authority to Proceed issued by the Governor to the Learned Magistrate is in the following terms, "In accordance with Sections 7(4) and 30(3) of the United Kingdom Extradition Act 1989, I give you authority to proceed with extradition proceedings", in my view, this must be accepted as the wrong authority. The Governor, in my opinion, accepted that that was not the proper authority when on the 23rd February 2012 he issued Supplementary Order to proceed to the magistrate. The magistrate, of course, did not act on it, as she felt that the Authority to Proceed issued by the Governor on 26th October 2011, provided her with the appropriate authority for her to proceed with the extradition proceedings.

[48] In so far as I am concerned, the order to proceed subsequently issued by the Governor is of no relevance because the learned magistrate did not act on it. I shall not consider it further, except to say that the Governor had the legal authority to issue the Supplementary Order (See Rees v Secretary of State[12]).

[49] Mr. Knowles Q.C. in his skeleton arguments submits that it is a fundamental rule of extradition law that the Magistrate's jurisdiction to entertain extradition proceedings only arises where a valid and lawful order to proceed is in existence. In the absence of such a document the magistrate has no jurisdiction. Re: Farinha. (supra)

[50] In the Law of Extradition and Mutual Assistance by Clive Nicholls Q.C., Clare Montgommery Q.C. and Julian B. Knowles Q.C. At paragraph 4.52 the learned authors state:

> The decision whether or not to issue an authority to proceed is an extremely important step in the extradition process. Without an authority to proceed the magistrate cannot commence hearing committal proceedings. This is because Section 7 provides that "…a person shall not be dealt with under this part of this Act except in pursuance of an order of the Secretary of State [Governor in the case of the BVI] (in this Act referred to as an "Authority to Proceed") issued in pursuance of a request (in this Act referred to as an "extradition request") for the surrender of a person under this Act…"

[51] The learned authors opine:

> "This must obviously be interpreted to mean a 'lawful authority to proceed', and so any defect in the authority will render the subsequent committal proceedings unlawful and committal is liable to be quashed on application for habeas corpus…"

[12] **[1986] 83 CAR 128**

[52] Learned Counsel for the Respondents, Mr. Jones Q.C., in his Skeleton submissions argues that the correction by the Magistrate was to clarify her oral statements consistent with her written decision. He refers to Regina v Wesminster City Council Ex Parte Ermakov[13]. Hutchinson L.J. at page 12 of the judgment opines:

> "The Court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in ex p Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, a word or words inadvertently omitted, or where the language used may be in some way lack in clarity. These examples are not intended to the exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction."

[53] In the case at bar, it is my view that what the learned magistrate purported to do in her written decision was a fundamental departure from her oral judgment. It was not to clarify any language in her oral judgment. Because to say as she did in her written decision, that Section 9 (8) (a) of the Act in her oral decision was an error and that Section 7 (1) of the Extradition Act is the relevant provision, is a complete departure from her oral decision. The written decision was a contradiction of her oral decision. It was not a case of taking evidence for reasons which she had given.

[54] I am unable to accept Mr. Jones Q.C.'s submission that the learned magistrate by her written decision was clarifying her oral statements. I accept that the governing law in the British Virgin Islands is a combination of Schedule 1 to the Extradition Act 1989, together with the relevant parts of the Extradition Act 1870 and the Order in Council made under S.2 of the Extradition Act 1870.

[13] **[1996] 2 All ER 302**

[55] Finally on this point, Mr. Knowles Q.C. submits, and the other lawyers on behalf of their clients associate themselves with the submission.

> "The October 2011 'Authority to Proceed" is invalid because the Governor purported to issue it under Part 3 of the Extradition Act 1989 which has no application in the Virgin Islands in relation to the United States. Hence, the magistrate committed the applicants on the basis of a defective authority to proceed and that her order for committal was made without jurisdiction."

[56] I yield to and I am in total agreement with this submission. Having so ruled, the applicants are entitled to the order of Habeas Corpus which they seek. However, having regard to the other issues which were strenuously ventilated in this application, I shall now go on to consider the conspiracy issue.

[57] Learned Counsel Mr. Knowles Q.C. in his Skeleton Arguments submits that there is no evidence that the alleged conspiracy was to import drugs into the United States. There is no evidence upon which a court could commit Earl Hodge if he were accused of the equivalent offences in the BVI. Mr. Knowles contends that the question is whether there is prima facie evidence of a conspiracy to contravene the prohibitions in Section 5 (1) (a) of the Drugs (Prevention of Misuse) Act (Chapter 178) contrary to Section 311 of the Criminal Code, as these are the crimes set out in the 'authority to proceed'. This in turn requires there to be prima facie admissible evidence that the conspiracy involved the movement of drugs into the United States. If there is no such evidence then there would be no crime under Virgin Islands Law.

[58] Mr. Fitzgerald Q.C. in his submissions before the court argues that there is no evidence that applicant Mr. Harrigan knew that the drugs allegedly imported were intended for importation to the United States. There is no evidence that Mr. Harrigan knew or intended that there should be the use of a US registered plane and therefore there is no mens rea.

[59] The Applicants through their counsel argue that by virtue of paragraphs 7 and 20 of Schedule 1 to the 1989 Act, the following conditions as stated above must be satisfied before they can be committed to await extradition.

(1) They must be accused of an extraditable offense.

(2) The evidence must be sufficient to amount to a prima facie case i.e. sufficient to justify a committal for trial in the BVI. This requires that there be prima facie evidence that the conduct they are accused of in the extradition request, would in equivalent circumstances be an offence under the British Virgin Islands.

[60] The latter requires the court to conduct a transposition exercise i.e. the court must suppose (i) that the criminal conduct alleged against the defendant in the foreign state occurred in the BVI. In other words, if the United States is seeking the defendants extradition for conduct in the British Virgin Islands, when transposition takes place the magistrate would pretend that that happened in a foreign jurisdiction and asked the question, 'could the Virgin Islands try the defendants for that crime?' If the answer is in the affirmative then, of course, that condition would have been satisfied.

[61] In Re Jingwa Aka Idris Ibrahim[14] a resident of the United States was persuaded by faxes sent by D to V at his home to fly to London for a meeting. At the meeting in London V was deceived into handing over money. His extradition was sought inter alia for obtaining property by deception. In considering whether the Magistrate had been correct to discharge the defendant, the High Court considered the matter on the basis that the conduct to be transposed to the UK was the receipt of the faxes in the United States, the deception and handing over of money – because it took place

[14] **Unreported**

in the UK- was assumed to have taken place abroad. The court held that no crime had thus been committed under English law. **Pill L.J.** in delivering the judgment at p.18 says:-

> "I have come to the conclusion that, with respect to the particular offences charged, this case falls on the other side of Smith. The defendants did not go to the United States at any time having received the false representations from Nigeria. Fullam was prepared to leave the United States and deal with the alleged fraudsters in England. In the circumstances of this case, there was insufficient activity in the United States, which if transposed to England, would confer jurisdiction on an English court to deal with the offences charged. I exercise this conclusion not on any high principle of comity between states but on what I would regard as an appropriate exercise of jurisdiction by an English court in the present state of the law."

[62] The Applicants contend that transposition is relevant in the present case. Mr. Knowles Q.C. points out that the respondents' skeleton arguments in which they assert that what this case is about, is flying an aircraft from South America and the allegation is that cargos of cocaine were dropped off shore and brought to the BVI. The applicants by their lawyers, argue, bearing in mind what is alleged by the requesting state that it is a plane flying near BVI dropping cocaine, bringing into the BVI. So when one does the transposition exercise, the question is, is it a crime under BVI law of either conspiracy to import or conspiracy to supply for a foreign plane to fly to a foreign state, drop the bales of cocaine in the waters off the state and for the cocaine then to be into the waters of that state for onward distribution?

[63] Mr. Knowles Q.C. in his arguments before the court says in the absence of evidence that these drugs were destined for the US, when one does the transposition exercise there is an absence of evidence that these drugs were intended for the BVI, and in the absence of any evidence, there is no crime under US law and no sufficient

evidence to establish a prima facie case. He contends that the admissible evidence has to come from the conspirators where the drugs were intended for.

[64] Learned Counsel for the Applicants argue that the other points to note is that paragraph 7 of Schedule 1 refers to the evidence. The magistrate therefore needs to be satisfied on the basis of the evidence which means that the requesting state must present admissible evidence to satisfy that requirement.

[65] Mr. Knowles Q.C. points to a mixture of affidavits from alleged co-conspirators, FBI agents and prosecutors. He argues that this affidavit evidence is not admissible. It is hearsay. They are narrative statements to assist the court in understanding what the case is about.

[66] Mr. Fitzgerald Q.C. in his submission before the court argues that there is no evidence that there was a plan by the applicants to import drugs into the United States. He makes reference to the affidavit of Eduardo Enrique Diaz sworn on 7th October 2011[15]. In that affidavit at paragraph 4 he swore that in 2006 he began working for a Colombian-based trafficker, Roberto Mendez-Hurtado, as a money collector. He worked for Mendez-Hurtado mainly in South American countries until approximately 2010. While working for Mendez-Hurtado, he learned that he was utilizing a Caribbean based cell to receive cocaine via airdrops by private aircraft. He also learned that Hodge, located in Tortola BVI, was the leader of the Caribbean based cell. Hodge would collect the cocaine and distribute it to individuals while also collecting drug proceeds for Mendez-Hurtado. Hodge would arrange for the drug proceeds to be transported out of the BVI to Venezuela.

[15] **Second Supplemental Bundle p.49**

[67] Mr. Fitzgerald Q.C. contends there is no evidence from Diaz that the object of the purported agreement was to possess cocaine with intent to distribute for importation into the United States. I am in agreement with this contention that Diaz, being a money collector for Mendez-Hurtado, must have been a trusted lieutenant of Mendez-Hurtado and would have known if the drugs collected by Hodge were destined for the U.S. But he was careful not to depose of that fact. Mr. Fitzgerald Q.C. asserts that this is the only admissible evidence.

[68] As Lord McDonald Q.C. observes that Diaz in his affidavit is not shy of giving destinations. He is a cooperating witness of the United States. He is signing an affidavit in the United States District Court of Florida, that speaks volumes. If there had been an American end to this drug operation, he would have said so in his affidavit.

[69] Lord McDonald Q.C. argues that there is no sufficient evidence against Mr. Skelton of an agreement to commit an offence justiciable in the United States of America. He contends that the evidence that was relied upon as establishing the jurisdiction of the United States is a US registered plane with an US citizen on board.

[70] Lord McDonald Q.C. refers to Teixeira de Castro v Portugal[16], R v Looseley Attorney General's Reference No. 3 of 2001[17].

[71] In Teixeira (supra) This is a case brought in the European Court of Human Rights. At paragraph 5 (c) it was held

> "the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organized crime undoubtedly requires that appropriate measures be taken,

[16] **Application No. 25829/94**
[17] **[2001] WLR 2060**

> the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expediency. The general requirements embodied in Article 6 apply to proceedings concerning all types of criminal offences from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement."

[72] In R v Looseley (supra) at page 2063 Lord Nicholls of Birkenhead opines:

> "... every court has an inherent power to prevent abuse of process. This is a fundamental principle of the rule of law. By recourse to this principle Courts ensure that executive agents of the state do not misuse the coercive law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen."

[73] The Florida request focuses on the fact that the applicants were involved in a conspiracy involving a United States Citizen and/or a United States registered aircraft. Mr. Knowles Q.C. contends that the involvement of a United States Citizen and a US registered plane are adventitious circumstances that are to be disregarded in the process of transposition.

[74] As I understand the issue surrounding the acquisition of the plane, Mendez-Hurtado was desirous of acquiring a plane with a view, obviously, to my mind, of expanding his drug trafficking trade. I am of the view that CS-1, the American agent became aware of Mendez-Hurtado's desire to purchase a plane and the purpose for which it was required, CS-1 therefore facilitated Mendez-Hurtado's purchase of the plane.

[75] Lord Nicholls in Looseley expresses difficulty in identifying conduct which is caught by such imprecise words as “have” or ‘incite” or “entice’” or “instigate”. However, at paragraph 30 of Looseley, he instructs us:

> “Police conduct which brings about, to use the catchphrase, state created crime is unacceptable and improper. To prosecute in such circumstances would be an affront to the public conscience…In a very broad sense of the word, such a prosecution would not be fair.”

[76] At paragraph 22 Lord Nicholls opines:

> “…But surely it is going too far to say that a person who is ready and willing to commit a certain kind of crime, can never be entrapped into committing it. As Latimer J. observed in R v Mack[18] it is always possible that, notwithstanding a person’s predisposition, in the particular case it was the conduct of the police which led the defendant into committing the crime. In other words, the existence or absence of predisposition in the individual is not the criterion by which the acceptability of police conduct is to be decided. Predisposition does not make acceptable what would otherwise be unacceptable conduct on the part of the police or other law enforcement agencies. Predisposition does not negative misuse of state power.
> Accordingly, one has to look elsewhere for assistance in identifying the limits to the types of police conduct which in any set of circumstances, are acceptable. On this a useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. I emphasize the word unexceptional.”

[77] Lord McDonald Q.C. in his submissions before the court contends that the United States “providing the plane” is not an exceptional opportunity. It is a deliberate manipulation of the conspiracy to found jurisdiction in the United States which they now seek to achieve. In doing so they created a crime against United States law which they now allege Chad Skelton was complicit. He argues that the insertion of that plane is the only feature in the case that founds a claim of jurisdiction. And

[18] **44 CCC (3d) 513,523**

worse, the claim is being pressed in the face of domestic criminal proceedings in this country.

[78] Mr. Williams, Learned Counsel on behalf of the respondents argues that reliance was placed on Teixeira (supra) and Looseley (supra) and contends that it is notable that there is no or little evidential support from them for the proposition that the defendants would not otherwise have committed these offences without the US, as they are saying instigation, luring or incitement . In fact, there is no evidence of that. They have argued on the assumption that, the US purchased the plane as some ruse or device to found jurisdiction when otherwise there would be no jurisdiction in America.

[79] I do not understand that the applicants are saying that the US purchased the plane but rather the US agent facilitated the purchase of the plane.

[80] Mr. Williams referred to an Affidavit of Corrine Martin[19]. She deposes that she is Special Agent with the Drug Enforcement Administration (DEA) assigned to the Miami Field Division. Since assigned to Miami Field Division, she has become familiar with investigation of a Caribbean based drug trafficking organization (DTO) utilizing aircraft to transport large quantities of cocaine from South America to the Caribbean and Central America, and to the United States.

At the center of that cocaine organization are two individuals, Roberto Mendez-Hurtado and Alvaro Nino Bonilla. Mendez-Hurtado has been a major cocaine trafficker for over 20 years operating throughout the Caribbean including the Dominican Republic, Antigua, the British Virgin Islands and St. Maarten. Nino Bonilla

[19] **Hearing Bundle page 77**

coordinates the transportation of Mendez-Hurtado's cocaine as it arrives in Venezuela and is transported to final destination.

In February 2010, a confidential source (CS-1) working at the request of and under the control of Miami FD began communicating with Nino Bonilla by telephone. During their conversations CS-1 learned that Nino Bonilla was arranging for an aircraft to smuggle cocaine from South America to transshipment points located in the international waters near British Virgin Islands. Nino Bonilla invited CS-1 to Antigua to meet Mendez-Hurtado to discuss CS-1's willingness to work with the drug organization. On or about 13th April 2010 CS-1 travelled to Antigua to meet with Mendez-Hurtado. During this meeting Mendez-Hurtado requested CS-1's assistance with the purchase of a Cessna 404 Titan aircraft. CS-1 and Mendez-Hurtado decided that once the aircraft was operational CS-1 would ferry the aircraft from South Florida to Trinidad where the aircraft would be refueled and then flown to South America. Mendez-Hurtado asked CS-1 to be the caretaker of this aircraft. On or about June 16 2010 Miami FD, through CS-1, facilitated the purchase of a US Cessna 404 Titan Aircraft bearing the US registration number N155TT, for $380,000.00 on behalf of the Mendez-Hurtado DTO. Before delivering it to Mendez-Hurtado in South America law enforcement agents installed a GPS tracking device to the aircraft.

[81] Mr. Fitzgerald Q.C. makes the observation that it was an American confidential agent who produced the plane to Mendez-Hurtado. He travels to Trinidad and then flies the aircraft to South America. The CS-1 produced the registered plane which is the whole foundation of this being a crime in the US. He submits that not only is it artificial but it is an abuse of process.

[82] Mr. Williams submits that as regards Mendez-Hurtado, he was the one directly dealing with CS-1. There is no incitement, there is no persuasion for him to cause this aircraft to be purchased, it was a properly conducted investigation, a properly conducted infiltration of the enterprise.

[83] Mr. Williams refers to Liangsiriprasert v United States Government and Another[20]. Lord Griffiths at p872 dealt with the appellant's submission that it would be oppressive and an abuse of process and would not conform with international comity for a government agency to entice a criminal to a jurisdiction from which extradition is available, as having no merit. Lord Griffiths opines:

> "As to the suggestion that it was oppressive or an abuse of process, the short answer is that international crime has to be fought by international co-operation between law enforcement agencies. It is notoriously difficult to apprehend those at the centre of the drug trade; it is only their couriers who are usually caught. If the courts were to regard the penetration of a drug dealing organization by the agents of a law enforcement agency and a plan to tempt the criminals into a jurisdiction from which they could be extradited as an abuse of process would be a red-letter day for the drug barons."

[84] Mr. Williams, Learned Counsel, argues:

> "What is clear is that Mr. Skelton, Beazer, Valdez and Hodge; Hodge on one occasion, Valdez on one occasion, Skelton and Beazer on both occasions, went out to sea to receive cocaine that was dropped from an aircraft. There is no element of them being persuaded by any Government agent, local or US, to take to the sea or to receive the drugs that came from the aircraft. They did all of that of their own free will."

[85] I do not, for one minute, understand that Counsel for the applicants to be saying that the applicants were persuaded by anyone to go out and retrieve the drugs dropped from an aircraft or that it was not their free will. I understand the argument to be it

[20] **[1990] 2 All ER 866**

was a US registered aircraft that was involved with an American citizen on board which gave the US jurisdiction in this case. If, for instance, the airdrop was made from another aircraft which was not US registered the US would be unable to claim jurisdiction, according to the arguments of the applicants.

[86] Mr. Williams further submits that the conspiracy is not just limited to the dropping of the drugs in the BVI waters. The presence of Diaz here in the territory, the movement of money from the territory back to Mendez-Hurtado, and in fact, Mendez-Hurtado's own presence in the territory would make it patent that an inference can be drawn that they were aware of the wider conspiracy which was being engaged.

[87] Indeed these things may point to a wider conspiracy. However, could one draw from these actions an inescapable inference of a conspiracy to send cocaine to the US? I think not. The conspiracy of course, is largely a matter of inference. How do we know what the conspirators contemplated? What they intended? Mr. Williams argues that Mr. Springette and Mr. Turnbull tell us what was in their contemplation. Otherwise, we have to infer it from their actions.

[88] Mr. Williams contends that the acts of each conspirator are admissible against the others. I agree. He contends that the overt act that grounds US jurisdiction would be the cocaine on the American plane. Finally, Mr. Williams argues that because we are dealing with an overt act committed, we do not have to go to destination. The drug is on American territory while it is in the American plane. Doot v DPP[21].

[89] The Hon. and learned Attorney General Dr. Malcolm went further in his submission on this point. He submits that, what we need to bear in mind, is that the moment the

[21] **[1973] 1 All ER 940**

drugs got unto the airplane an offence was already committed; and whether or not there was an ultimate destination thereafter for instance, Belgium or anywhere else, is another question to be determined and possibly another offense was committed. But as an offence was already committed, and we need to be very clear insofar as the matter is concerned.

[90] These submissions, to my mind, treat conspiracy to distribute cocaine in USA and conspiracy to possess cocaine on board a US aircraft with intent to import it into the US as an absolute offence. The submissions also, to my mind, ignore S 311 (1) of the Criminal Code[22]. In my opinion, this is a statutory conspiracy, to commit this crime the defendants must know the factors that make it a crime – R v Saik Abdulrahaman[23].

[91] Mr. Fitzgerald Q.C. argues that supposing a plane, nothing to do with registration in the BVI, goes into the United States with a BVI Citizen on board, that would not make it an offence within the BVI jurisdiction or an offence in England. Just the mere fact that there is a British Citizen on board, it would not make any difference at all. So that certainly could not be the basis in the transposition exercise for saying that it is a justiciable crime. The only matter that they seek to rely on is the registration of the plane which is an adventitious circumstance which should be disregarded for the purpose of the transposition exercise.

[92] Mr. Fitzgerald Q.C. then refers to the Civil Aviation Act 1982, and questions whether the language of paragraph 14 was ever intended for situations of this sort. The expression crimes committed on board an aircraft in flight was intended for crime such as high jacking, assault and murder. This seems to me to be a sensible and

[22] **Laws of the BVI Chapter**
[23] **[2007] 1 AC 18**

rationale interpretation. Certainly, in my view, it cannot embrace Dr. Malcolm's submission that once the cocaine gets on board the aircraft, the crime would have been committed. Suppose, for example, the drugs get on board the aircraft which is not in flight, whilst the aircraft is on the ground for instance, then the requirements of the statute would not have been met. No offence would have been committed. I therefore prefer Mr. Fitzgerald Q.C.'s interpretation of the 1982 Civil Aviation Act chapter 14.

[93] I turn to question what the requesting state is required to prove in order to establish that the applicants intended to import cocaine into the US. In Delroy Boyd v Director of Public Prosecutions[24], Cooke J.A. at page 9 opines:

> "There is undoubtedly, evidence that the appellant was involved in a conspiracy to import cocaine into the Bahamas from Jamaica. But was he a party to a conspiracy of those same drugs into the United States? This is the critical question."

[94] I pause here, to say that the same critical question should be asked in the case at bar. In my opinion, there is no doubt that the defendants/applicants may have conspired to import cocaine into the BVI. Were they parties to a conspiracy to import cocaine into the United States? This is the critical question.

[95] At page 10 of the judgment Cooke J.A. continues:

> "If Cambridge had actual knowledge of the scope of the drug operation it does not follow that the appellant was privy to that scope. What the evidence in the affidavit reveals is that the appellant was a supplier of drugs which were destined for the Bahamas. Interestingly, nowhere in the full court was it sought to impute to this appellant knowledge of the scope of the drug operations. The full court seemed to have concluded that since the appellant was a party to "international narcotics trafficking" he must necessarily be

[24] **Civil Appeal No 47 of 2003 Jamaica**

aware of the ultimate destination of the drugs. This is an unwarranted leap. There is no evidential basis upon which such an inference can be drawn."

[96] Similarly, in the case at bar, nowhere in the affidavit evidence of Diaz, could the inference be drawn that the applicants had knowledge that the drugs were consigned to the US.

[97] As Mr. Fitzgerald Q.C. observes that it is a notable feature of this case that the American authorities very boldly assert that these drugs were destined for the United States without supplying any evidence to substantiate that important assertion.

[98] The requesting authority, in my opinion, seemed to have concluded that since the applicants were engaged in a Caribbean based trafficking organization, they must have been aware that the drugs were destined for the United States. This, to my mind, is a quantum leap. In my considered opinion, it could never seriously be contended with certainty or by inference that because a US registered aircraft was involved that the destination of the drugs was for the US. No evidence was put forward that the applicants knew or suspected that the plane was a registered US plane bearing in mind that they were not involved in its purchase.

[99] Finally I now turn to the question of oppression. The Applicants argue that it is oppressive of the requesting state to ask for their extradition to United States to be tried for these offences. The applicants argue that they are before the court in the BVI for the same offences which began before the US stepped in to have them extradited to stand trial on virtually the same charges.

[100] Mr. Fitzgerald Q.C. argues that an order for extradition to face trial in an inappropriate foreign forum, when criminal proceedings in relation to the same matter have already been initiated in the home jurisdiction and are ongoing, is both an abuse of the process and a breach of fundamental rights protected by the BVI constitution. He argues that this is justiciable by the court in these habeas corpus proceedings.

[101] Mr. Jones Q.C. submits that under the Extradition Act 1870, the Fugitive Offenders Act of 1881 and the Extradition Act 1989, the Secretary of State (and in our case the Governor) possesses a general discretion whether or not to surrender the fugitive to the requesting state. Accordingly he was, on the face of it, in a position to consider issues of forum conviencies as he thought fit. See R v Birmingham Director of the Serious Fraud Office[25].

[102] I agree with the submission of Mr. Fitzgerald Q.C. that the court should decide this because it goes to the legality of detention. And of course BVI has a written constitution. I also agree with his argument that it would not be right nor consistent with the principle of separation of powers to postpone consideration of the constitutionality of extradition to a later stage or leave it to the executive rather than the Courts. (See Greene Browne v R[26])

[103] Mr. Fitzgerald Q.C. in his skeleton arguments submits that given the forum issue is justiciable in these proceedings; the next question is whether the BVI is so clearly the appropriate forum that it would be an abuse of process to permit the extradition proceedings to continue. He contends that the determination of the appropriate

[25] **(2007) QB 727**
[26] **[1999] UK P 621**

forum where there is a conflict between the competing claims of a domestic prosecution and extradition proceedings is governed by the application of the criteria identified by the Canadian courts in the case of Cotroni v USA[27] (referred to as the Cotroni factors).

[104] Mr. Fitzgerald Q.C. in reliance on the Cotroni factors argues that the alleged criminal conduct by the applicants occurred in the BVI. There is no evidence of any impact on the United States but there is considerable impact in the BVI. There is a public interest in the trial of these matters here given the alleged misuse of the territorial waters of the BVI to import drugs, the distribution of the proceeds here and the alleged role of the Applicant, Harrigan as a Customs Officer. All but one are BVI Citizens and resident here. The Domestic Criminal proceedings predated the extradition request and the majority of the evidence is located here.

[105] Mr. Fitzgerald Q.C. argues that the respondents rely on a number of cases by the UK courts in which the forum issue has been considered, but the case at bar is quite different from the English cases. The respondents relied on R v Birmingham Director of the Serious Fraud Office[28], Lucy Wright v The Government of Argentina (2012)[29], R (McKinnon) v DPP[30], Norris v Government of the United States (No.2)[31], Emmanuel Onwuzulike v Government of the United States[32]

[106] Mr. Fitzgerald Q.C. argues that in none of the above mentioned cases were there competing domestic charges in the UK or a competing domestic prosecution there. The extradition proceedings started by the United States were the only set of

[27] **[1989] 1 SCR 1469**
[28] **(2007) QB 727**
[29] **[EWHC] 669**
[30] **[2009] EWHC 2021 (Admin)**
[31] **(2010) UK SC 9**
[32] [**2009] EWHC 1395 (Admin)**

criminal proceedings in existence in all of those cases. The defendants in those cases were unable to complain that they were being prosecuted simultaneously by UK and US authorities for the same matter. He contends that in the UK, one cannot be extradited or proceeded against in extradition proceedings, if there is a domestic prosecution, ongoing against that one. (See UK Extraditon Act[33]).

[107] In the case at bar the defendants argue that local prosecutions were initiated here and are ongoing before the US request was received. They argue that this is closely analogous to the facts of the case of Steve Ferguson, Ishwar Galbaransingh v Attorney General of Trinidad and Tobago[34]. After considering the Coltroni factors, Boodoosing J. at paragraph 105 opines:

> "States do not have international treaty obligations to do all they can to ensure that persons who breach the laws of their state and other states are prosecuted and thus called to account. In the several cases cited, the alternative would likely have been impunity that was a most relevant consideration here which Attorney General either considered under a misapprehension having regard to the DPP's representation or did not consider at all…Here, the domestic ongoing prosecutions ought to have had significant impact in the Attorney General's decision. It is significant that in the several cases cited by the defendant including Birmingham v United States (supra), Norris v United States (supra), Wright v Scottish Ministers and Mckinnon[35], there were no criminal proceedings in the requested state. That is significantly different from this case. The primary impact or loss of the conduct was also not in the requested state."

[108] Mr. Fitzgerald Q.C. submits that Ferguson (supra) emphasizes that the extradition of a citizen to a foreign state engages their fundamental constitutional rights. He also submits that the decision of the English Supreme Court in the case of Harrigan and others establishes that the extradition of a citizen engages the fair trial rights of such

[33] **Section 88**
[34] **High Court Civil 2010**
[35] **[2004] LT 823**

a citizen under Article 6 of the European Convention because extradition decisions involve a determination of the civil rights and obligations of a citizen facing extradition.

[109] In my opinion, Section 6 of the BVI constitution finds expression in Article 6 of the European Convention. Section 6 (1) of the BVI Constitution mandates as follows:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[110] Mr. Fitzgerald Q.C. refers to the case Rhett Fuller v The Attorney General of Belize[36] and argues that the Privy Council held that this abuse jurisdiction existed in the High Court hearing a habeas corpus application in extradition proceedings under the 1870 Extradition Act. He contends that by parity of reasoning, such an abuse jurisdiction necessarily exists and applies to these proceedings under Schedule 1 of the 1989 Act (which substantially re-enacts the 1870 Extradition Act). The matter is put beyond doubt by the fact that the constitution guarantees protection from arbitrary detention and guarantees the protection of the law. It is from these fundamental rights that the abuse jurisdiction is derived. It is the courts, and not the executive, that must exercise the abuse jurisdiction in a constitutional regime founded on the rule of law and the separation of powers.

[111] I agree entirely with this submission of Mr. Fitzgerald Q.C.

[112] In addition in my view, the defendants would be entitled to jury trial (see Section 16 (1) (g) of the BVI Constitution), trial by their peers. In my opinion, one is entitled to

[36] **[2011] UK P.C. 23**

that right whenever that is possible. To extradite the defendants to stand trial in a foreign jurisdiction will deprive them of that right.

[113] Finally, in Birmingham (supra) the English High Court establishes that a person's Article 8 rights to family life are engaged by potential extradition, insofar as extradition constitutes a breach of the defendants' right to private and family life. Mr. Fitzgerald Q.C. contends that Article 8 of the European Convention has a direct parallel to section 19 of the BVI Constitution, which says in part:

> "Every person has a right to respect for his or her private and family life, his or her home and his or her correspondence including business and professional communications."

[114] The Applicant Harrigan in his affidavit swore that he has four young children. Mr. Fitzgerald argues that the rights of innocent children must be considered when determining the proportionality of extradition to a foreign country. He contends that in the FK Case (F-K v Polish Judicial Authority and others supra) they said it is very important if they are very young, and some of them are very young, and obviously they depend therefore on their father's presence, is highly relevant. He says that is another telling reason why extradition would be inappropriate and why BVI is the appropriate forum.

[115] Mr. Jones Q.C., Learned Counsel for the Respondents referred to Norris v Government of the United Sates (No2)[37] in which Lord Phillips warned that extradition proceedings should not become the occasion for a debate about the most convenient for criminal proceedings. Lord Phillips' concern in this exercise was expressed as follows:

[37] **[2012] UK SC 25**

> "rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with a country's treaty obligations."
>
> However on this issue, Lord Phillips concludes that:
>
> "Unless the judge reaches the conclusion that the scales are finely balanced, he should not enter into an inquiry as to the possibility of prosecution in this country."

[116] Mr. Jones Q.C. argues even if it were for the court to determine questions of appropriate forum, the existence of local charges does not make the Virgin Islands the preferred forum for trial. There are various factors to be considered in determining forum. The majority of the witnesses against the applicants are in the USA. Crucial evidence, for example the tracking of the aircraft and photographic evidence, is also in the possession of the USA. Mr. Jones Q.C. argues that these factors point heavily to extradition to the requesting state.

[117] In conclusion, I hold, among other things, that the order by the Learned Magistrate to extradite the applicants was null and void as it was based on an invalid authority. And in addition to the reasons given above. The order of the Learned Magistrate to extradite the Applicants to the United States of America is quashed.

[118] It is hereby declared that the appropriate forum to try the Applicants for the alleged drug offences is the British Virgin Islands.

[119] I must confess that it is not with any pleasure or gratitude that I have arrived at these conclusions but that is the law as I see it.

[120] Finally, I expressed my thanks to Counsel on both sides for their very helpful arguments and submissions which were of great assistance to me in producing this judgment.

[121] Costs to each applicant on a prescribed cost basis, if not agreed.

Albert Redhead
High Court Judge