EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV297 of 2012

BETWEEN:

EARL HODGE

Applicant

And

THE GOVERNOR OF THE TERRITORY OF THE VIRGIN ISLANDS

Respondent

CLAIM NO. BVIHCV298 of 2012

BETWEEN:

CHAD SKELTON

Applicant

And

THE GOVERNOR OF THE TERRITORY OF THE VIRGIN ISLANDS

Respondent

CLAIM NO. BVIHCV303 of 2012

BETWEEN:

ROBERTO HARRIGAN

Applicant

And

THE GOVERNOR OF THE TERRITORY OF THE VIRGIN ISLANDS
THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

CLAIM NO. BVIHCV327 of 2012

BETWEEN:

CARLSTON BEAZER

Applicant

And

THE GOVERNOR OF THE TERRITORY OF THE VIRGIN ISLANDS

Respondent

Appearances:

Mr. Julian Knowles QC, Richard Rowe and Jennifer Jarvis for Earl Hodge
Lord McDonald QC and Menelick Miller for Chad Skelton
Patrick Thompson and Sonjah Smith for Roberto Harrigan
Richard Rowe and Jennifer Jarvis for Carlston Beazer
Honourable Attorney General Dr. Christopher Malcolm and Natalie Sandiford for the Respondents

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2013: July 5th

JUDGMENT

[1] ELLIS J. On 29th August 2011, Earl Hodge was arrested by the Royal Virgin Islands Police (RVIP) and was charged with the offences of conspiracy to import cocaine; possession of a prohibited firearm; acquisition of possession or use of proceeds of criminal conduct; possession of cocaine with intent to supply; unlawful importation of cocaine.

[2] On 29th September 2010, Chad Skelton was arrested by the RVIP and charged with the offences of importation of a controlled drug into the Territory; conspiracy, money laundering and offences under the Drugs (Prevention of Misuse) Act.

[3] Roberto Harrigan was arrested by the RVIP on 24th August 2011 and charged with the offences of money laundering; conspiracy to import a controlled drug (cocaine) into the Territory; importation of cocaine and possession with intent to supply; acquisition possession or use of the proceeds of criminal conduct; abuse of authority and bribery of a public official.

[4] Carlston Beazer was arrested on the RVIP on 29th September 2010 and charged several offences. He was bailed and later rearrested on 24th September 2011 and charged with the conspiracy to

import cocaine; acquisition, possession or use of proceeds of criminal conduct; possession of cocaine with intent to supply and unlawful importation of a controlled drug.

[5] Following the arrest of Earl Hodge, Chad Skelton, Roberto Harrigan and Carlston Beazer (the Applicants) the Government of the United States also requested the extradition of the Applicants in relation to criminal proceedings which had been commenced in the state of Florida and in the case of Earl Hodge, also in the state of North Carolina. These criminal proceedings allege inter alia that the Applicants knowingly and intentionally conspired with other persons to (a) distribute cocaine intending that such cocaine be unlawfully imported into the United States or into waters within 12 nautical miles of the coast of the United States and (b) possess with intent to distribute cocaine while on board an aircraft registered in the United States and with a United States citizen on board.

[6] Consequent upon the Extradition Request from the United States Government, the Governor of the Virgin Islands issued to the Senior Magistrate an Authority to Proceed dated 26th October 2011. Committal proceedings commenced before the Magistrate's Court and on March 13th, 2012 the Magistrate found that a prima facie case had been made out for the Applicant's extradition and committed the Applicants to Her Majesty's Prison at Balsam Ghut, Tortola to await the Governor's decision as to whether they should be extradited to the United States of America.

[7] The learned Magistrate rendered an oral decision on 13th February 2012 by which she purported to make an order of committal under section 9 (8) (a) of the Extradition Act[1]. She later issued a written Ruling on 13th March 2012 in which she committed the Applicants under and by virtue section 7 (1) of the Extradition Act. In her written ruling, she found that the acts alleged by the United States Government were sufficient to establish territorial jurisdiction and that the evidence against the Applicants was sufficient to warrant a trial in this jurisdiction had the VBVI been in the same position as the United States. She concluded that she was satisfied that a prima facie case had been made out against the Applicants.

[8] The Applicants applied to a judge of this Honorable Court for a writ of habeas corpus to be directed to the Superintendent of Prisons to show cause as to whether their continued detention at Her Majesty's Prison at Balsam Ghut, Tortola was lawful. The Applicants primary contentions in support of the application for the grant of a writ of habeas corpus included the following:

[1] The Applicants extradition is sought pursuant to the UK-USA Extradition Treaty dated June 8th 1972 as amended by the Supplementary Treaty of 1985. The application of the 1972 and 1985 Treaties are informed by the Extradition Act and Statutory Instrument No. 1823 of 2002. The UK Extradition Act of 1870 as well as the Extradition Act of 1989 are also a part of the statutory framework that informs these proceedings.

i. That the Governor wrongly purported to exercise a power which he did not have, namely an Authority to Proceed and consequently the learned Magistrate committed the Applicants under and pursuant to the wrong legislative provisions.

ii. That the learned Magistrate erred in finding that the Applicant was a party to a conspiracy to import cocaine into the United States in the absence of any evidence as to the destination of the alleged cocaine, the subject of the conspiracy.

iii. That the learned Magistrate either erred or failed to properly carry out the transposition exercise which required her to suppose that (i) the criminal conduct alleged against the Applicants in the Requesting State happened in the BVI with all other conduct remaining where it happened and (ii) suppose that any conduct alleged to have happened in the Territory, happened abroad.

iv. That the learned Magistrate erred in finding that the Requesting State could exercise jurisdiction over the Applicants on the basis of alleged overt acts which took place in the United States and the purchase and registration of an aircraft and the transporting of drugs on a US registered aircraft.

v. That the learned Magistrate erred in finding that the acts alleged by the Requesting State suffice to establish territorial jurisdiction by the Requesting State.

vi. That the learned Magistrate erred in law in finding that there was a prima facie case for the Applicants' extradition to the United States of America.

vii. That the learned Magistrate erred in failing to address or otherwise deal with the issue of whether the Applicants' extradition was disproportionate and likely to infringe their rights and freedoms as protected by the British Virgin Islands Constitution.

[9] On 17th September 2012, the Honorable Mr Justice Redhead delivered a written judgment granting the writ of habeas corpus. He ordered that the decision of the learned Magistrate be quashed on the basis that it was null and void as it was based on an invalid authority. He also declared that the appropriate forum for the trial of the Applicants alleged criminality is the British Virgin Islands.

[10] Following the discharge by the learned Judge, a new Request for Extradition was received on 11th October 2012 in respect of the same Florida proceedings. The second request was supported by an affidavit of Denise Del Carmen Sosa Ventura dated 8th October 2012 which the Respondent contends demonstrates that the Applicants were engaged in a conspiracy to import cocaine into the United States. The Governor issued an Order to Proceed to the Magistrate on 11th October 2012, (the same day that the Request was received) ordering her to proceed in accordance with the provisions of Schedule 1 of the Extradition Act.

[11] On 12th October 2012, the Director of Public Prosecutions discontinued the local criminal proceedings against the Applicants and entered a *nolle prosequi* in respect of each charge. Upon being advised that the Governor had issued a new order to Proceed based on a fresh request for the Applicants extradition, the Magistrate ordered that the Applicants be remanded into custody.

[12] On 17th October 2012 the Superintendent of Prisons and the Attorney General filed an appeal against the decision of Redhead J regarding the North Carolina extradition request. No fresh extradition request was made in relation to those North Carolina proceedings.

[13] On or around 1st November 2012, the Applicants filed applications for leave to apply for judicial review in which they collectively seek to have the Court review-

i. the decision of the Governor to issue the Order to Proceed dated 11th October 2012, conferring upon the Magistrate, authority to commence extradition hearing in the wake of a second request by the Government of the United States, for their extradition to that country; and
ii. the decision of the Magistrate to detain them in custody on account of the second request for their extradition; and
iii. the decision to commence, or otherwise embark upon any extradition hearing pursuant to the Order to Proceed of 11th October 2012.

[14] In the case of the Applicant, Roberto Harrigan, he also seeks to have the Court review the decision of the Director of Public Prosecutions (DPP) to enter a *nolle prosequi* on 12th October 2012 which discontinued the domestic charges laid against him.

[15] At the start of the hearing, Counsel for the Applicants indicated for the record that they intended to proceed only with the application for leave to review the decision of the Governor to issue the Order to Proceed dated 11th October 2012, conferring upon the Magistrate, authority to commence extradition proceedings in the wake of a second request by the Government of the United States. Counsel for Earl Hodge indicated that this position was premised on the basis that a Magistrate could only act pursuant to a lawful and valid Order to Proceed. So that if the Order to Proceed is quashed, then the actions or decision of the Magistrate would consequently fall away.

[16] In addition, Roberto Harrigan also seeks leave to have the decision of the DPP reviewed on a number of grounds which are detailed below.

JUDICIAL REVIEW – GENERAL

[17] It is settled law that judicial review proceedings are the proceedings by which the Court exercises supervisory jurisdiction over tribunals and public bodies. This jurisdiction enables superior courts

to review decisions, acts or omissions of public authorities in order to ensure that these bodies act within the parameters of their given powers.

[18] Given the nature of this jurisdiction, it is not surprising that judicial review is not an automatic entitlement of a litigant. A person seeking to invoke the court's supervisory jurisdiction must first obtain the leave of the court. The purpose of the requirement for leave is to facilitate a judicial filtering of hopeless cases.

[19] Within the Territory of the Virgin Islands the relevant procedural requirements are set out in CPR Part 56.3 which expressly hints at several hurdles which a potential applicant must successfully traverse if he is to obtain the leave of the court.

[20] Firstly, a person or entity wishing to move the court to review a decision of a public body must satisfy the Court that he has sufficient interest and standing in the subject matter of the application to justify the Court intervening on his behalf. In the case at bar the Respondents quite rightly do not dispute the Applicant's interest in the matter so that this not a matter upon which the Court need say anything further save that all of the Applicants have satisfied the Court that they fall within CPR Part 56.2 (2) (a) and therefore have sufficient standing to make this application.

[21] Where (as in this case) a applicant is able to satisfy a Court that he has the requisite *locus standi*, to make the application, he must then satisfy the Court that he can traverse the next threshold requirement for the grant of leave - he must demonstrate that there is an arguable case that a ground of judicial review exists which merits a detailed examination at a substantive hearing.

IS THERE AN ARGUABLE GROUND FOR JUDICIAL REVIEW?

[22] Ultimately, the principle purpose of the requirement of leave for judicial review is to facilitate the filtering out of applications which are either groundless or hopeless. It is intended to avert a waste of judicial time and unnecessary legal costs. An applicant must demonstrate that there is an arguable case that a ground for seeking judicial review exists. The court must therefore be satisfied that there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review.

[23] It is now settled law that the proper test for the grant of leave to apply for judicial review is that established by Lord Bingham and Lord Walker in Sharma v Browne –Antoine.[2] The test is expressed as follows:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is* ***an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an***

[2] [2007] 1 WLR 780 at page 787 D-H recently applied in Michelle Andrews v DPP et al. High Court Civil Claim 41 of 2008 (St. Vincent & the Grenadines)

alternative remedy: see R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham, Judicial Review Handbook 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:

"the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733"

[24] It follows that at this stage in the proceedings, the role of the court is to determine whether a prima facie case has been made out on the merits. In arriving at this determination, the nature and gravity of the issues, the cogency of the evidence before the court and the prospect of success are integral factors which would have to be considered by the court.

[25] The Court must therefore now examine the grounds upon which Applicants seek to invoke the Court's supervisory jurisdiction, in order to determine whether they meet the required threshold for the grant of leave.

Governor's Decision to issue the Order to Proceed of 11th October 2012

[26] At the commencement of the hearing Counsel for the Applicants agreed that despite what may have been set out in their Notice of Applications; there is one main decision under challenge. That is - the decision of His Excellency the Governor to issue the Order to proceed dated 11thOctober 2012 for the commencement of extradition proceedings to secure the extradition of the Applicants to the United States.

[27] The Parties do not dispute that such a decision is in principle amenable to judicial review. It also common ground between the Parties that the Governor has the power to issue an Order to Proceed notwithstanding that there had been an earlier request for extradition which was

unsuccessful.[3] The Applicants however contend that in this case, the Order to Proceed should be reviewed and quashed and they largely rely on the same grounds for judicial review. They contend that the Governor's decision should be quashed on the following grounds: (1) irrationality (Wednesbury unreasonableness), (2) abuse of process. (3) procedural impropriety (failure to give reasons).

Irrationality

[28] The common thread of the Applicants' case is that the Governor's decision is irrational because no reasonable Governor could have issued an order to proceed given the history of the case. This ground is primarily advanced on a basis of the Judgment of the Redhead J which the Applicants say followed an extended habeas corpus hearing in which all relevant evidential material was presented and extensive written and oral submissions were presented on the legality of the Applicants detention, the lawfulness of the extradition proceedings and appropriate forum.

[29] The Applicants contend that Redhead J made definitive rulings on the evidence before him which the Governor was obliged to taken into account to take into account when considering the second request for extradition. The Applicants contend that there is no direct evidence that they had agreed to any of the features of the conspiracy alleged that are essential elements if the United States is lawfully to claim jurisdiction over them. Lord McDonald noted in respect of his client that the sufficiency of the case against him depends wholly upon an inference that he agreed to participate in a conspiracy that had the essential element of an intention to import drugs into the United Sates. He contended that there is no legitimate inference which can be drawn from the facts other than an agreement to import drugs into the Virgin Islands.

[30] Counsel referred the Court to paragraphs 94 -98 of Redhead J's judgment in which he contends that the learned Judge carefully considered the sufficiency of the evidence before the Court and concluded that *"… 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*". And later, "*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 US. 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 of suspected that the plane was a registered US plane bearing in mind that they were not involved in its purchase*."

[3] Rees v SOS for the Home Department [1986] 2 All ER 321; R v Chief Metropolitan Magistrate ex parte Government of Denmark (9183) 79 Cr. App. R. 1 ; United States v Bowe [1989] 3 All ER 315

[31] According to the Applicants, these excerpts demonstrate that learned Judge determined that the evidence against the Applicants was insufficient to warrant their extradition to the United States.

[32] They further argued that the substantive evidence advanced in support the Request has largely remained the same and has not materially changed. They submit that the additional evidence recently obtained from Denise Del Carmen Sosa Ventura and Eduardo Diaz and Alvaro Nino- Bonilla would not have altered the decision of Redhead J had it been before him at the hearing of habeas corpus application and otherwise does little to advance the case for extradition.

[33] Lord McDonald QC posited that while the evidence may demonstrate that some of the drugs in question were destined for the United States, it does not expressly mention his client Mr. Skelton. Variations of this theme were submitted in respect of Mr. Beazer, Mr. Hodge and Mr. Harrigan with Counsel in each case contending that this additional evidence does not address or cure the evidential lacuna identified in the Judgment of Redhead J.

[34] The Applicants submit that there is still no evidence that they knew that any of the drugs were destined for the United States or that they were aware of the nationality of the US participator or that they were aware of the country of registration of the aircraft. In these circumstances they contend that it was irrational for the Governor to sign an Order to Proceed on 11th October 2012 which would have precipitated another futile extradition proceeding.

[35] Further, the Applicants contend that the judgment of Redhead J contains an unequivocal determination that the BVI is the proper forum for the trial of Applicants alleged criminality. Counsel in the matter referred the Court extensively to the text of the judgment of Redhead J. in particular to paragraph 118 where the learned Judge made this pronouncement:

> *"It is hereby declared that the appropriate forum to try the Applicants for the alleged drug offences is the British Virgin Islands."*

[36] Mr. Thompson submitted that the learned Judge would have had the benefit of full and comprehensive submissions on the issue or forum and referred the Court to the extensive legal submissions and authorities advanced by Mr. Edward Fitzgerald QC on this issue. Accordingly, he submitted that the issue of forum was properly before the Judge, fully argued and that the Judge made clear, specific and definite rulings on this issue.

[37] The Applicants also contended that the ruling on forum was not akin to a mere "irregularity" but rather went to the very heart of the matter before the court. Mr Thompson went further to submit that the Ruling must operate as either res judicata or issue estoppel on this issue of forum as the Judge had determined a primary and not collateral issue in controversy between the parties.

[38] The Applicants therefore concluded that the Judgment constituted a definite pronouncement on the question forum which the Governor was obliged to take into account when deciding whether to issue the Order to Proceed. They further submit that the Governor's decision to issue an Order to Proceed in circumstances where there is a clear and explicit ruling of the High Court that the BVI is the proper forum is irrational and unreasonable in the *Wednesbury* sense.

[39] The Applicants further contended that the learned Judge recognized that he was obliged to also consider the constitutionality of the extradition and that he did in fact consider, discuss and rule on oppression and impact of the extradition on the Applicants' fundamental human rights.The Court was referred to paragraphs 99 to 112 of the Judgment, which culminated in the learned Judge concluding that the Applicants were entitled to a jury trial: a trial by their peers under section 166 (1) (g) of the British Virgin Islands Constitution and that extradition would deprive them of that right.

[40] In response, the Attorney General and counsel for the Governor submitted that it is trite law that the Governor has the power to issue an Order to Proceed notwithstanding that there has been an earlier request for extradition which had failed. So that consequently where the Governor acting in good faith, determines that extradition is warranted he is not barred from pursing multiple extradition requests.

[41] The Attorney General submitted that once the Governor receives a request for extradition, he is obliged to act upon it.[4] Having received what he deemed to be a proper request for extradition on 11th October 2012, the Governor rightly acceded to it thus initiating the appropriate proceedings. The Attorney General also contended that the Applicants have failed to establish that in so doing the Governor has exceeded his obligations and powers under the relevant treaty. He argued that the Applicant have also failed to establish that the Governor has acted improperly in his decision to accede to the second Request for extradition by signing the Order to Proceed or that his decision was unreasonable in the *Wednesbury* sense. When measured against the true scope and policy of the legislative framework, the Attorney General submitted that it is not possible to conclude that the Governor's decision was "*so absurd that no reasonable authority could have come to that conclusion*."

[42] In launching his argument, the Attorney General first submitted that the Applicants' success on the habeas corpus application was based on mere irregularities in the first extradition proceedings and could not possibly operate as res judicata or issue estoppel. He submitted that following a finding that the Governor had acted pursuant to an invalid authority, it would not have been necessary for the learned Judge to go further and make any other substantial findings. In that regard, the conclusions drawn by the learned Judge with regard to sufficiency of evidence, the constitutional objections raised by the Applicants and the question of forum were in his view wholly

[4] Rees v Secretary of State for the Home Department [1986] 1 All ER 321

academic, unreasoned, non-specific *obiter dicta* which could not operate to preclude the Governor from carrying out his treaty obligations.

[43] Secondly, the Attorney General argued that the ratio of High Court decision rendered by Redhead J dealt specifically with the first Request (and the proceedings which followed as a result) which is at law distinct from this second Request. The second Request would therefore have to be considered on its own merits and in doing so the Governor would have been obliged take into account the information provided in support of that Request in determining whether it was a proper Request in accordance with the terms of the legislative framework.

[44] While he conceded that he could not definitively say what factors the Governor had taken into account in arriving at his decision to issue the Order to Proceed, he submitted that it would have been improper for the Governor to have considered himself bound by the terms of the Judgment. In his view, the Governor was under no obligation to even consider the ratio and conclusions drawn by the High Court Judge since they could not and should not have affected how he would have dealt with the Request received on the 11th October 2012.

[45] Further, the Attorney General submitted that it would be "dangerous" for the Court to embark on a review of the first Request and proceedings which were attendant thereto. He based this contention primarily on the fact that they would not be relevant to the second Request.

[46] Thirdly, the Attorney General submitted that the second Request contained further and new evidence which was not available on the first extradition request, including the affidavit of Denise del Carmen Sosa Ventura. It is the Respondent's case that this affidavit, properly executed on 8th October 2012, will show that the conspiracy was to import the cocaine into the territory of the United States. While the Respondent's evidence did not go so far as to aver that the contents of this Affidavit were actually weighed and considered by the Governor, it does contend that the Governor was entitled to take the view that the fresh evidence showing that the intended destination of the drugs was the United States justified him taking a "different approach".

[47] In any event, the Attorney General contended that the appropriate persons to examine the evidence and weigh the sufficiency thereof, is a Magistrate and not the Governor. He pointed the Court to what he termed "the separation of powers" prescribed by the Extradition Act which delineates distinct roles for both the Governor and the Magistrate. He also relied on the case of R v Secretary of State ex parte Norgren[5] which demonstrates that it is the role of the examining magistrate to review questions relating to forum, sufficiency of evidence and abuse of process. He submitted therefore that the Governor would have acted appropriately in referring the matter to the magistrate for her consideration. This is particularly so because the case for extradition is by no means closed. He submitted further evidence has been and may

[5] [2000] QB 817

continue to be forthcoming which may bolster the case for extradition by the time that the matter comes before the magistrate.

[48] In those circumstances he argued that the result of the extradition proceedings would not be hopeless or inevitable as was suggested by Counsel for the Applicants. So that it could not be irrational for the Governor to have issued the Order to Proceed. He concluded that the Applicants have presented nothing which demonstrates that the Governor abused his discretion or acted unreasonably. He argued the Governor actions were entirely permissible in all the circumstances and that the fact that another decision maker would have exercised his discretion differently is not a sufficient basis challenge a decision on the ground of irrationality.[6]

Conclusion

[49] Lord Greene MR's judgment in Associated Provincial Picture Houses Ltd v Wednesbury Corporation is frequently cited as the classic explanation of unreasonableness. In that case the standard of unreasonableness was pitched very high: "so absurd that no sensible person could ever dream that it lay within the powers of the authority."

[50] There can be no doubt however that "unreasonableness" now covers a multitude of sins including absurdity, irrelevant considerations, misdirection, fettering discretion, and improper or illegitimate motives. In the exercise of their supervisory jurisdiction, courts have increasingly found legally unreasonable decisions and actions at all levels.

[51] To the extent that the Applicant's *irrationality* challenge is grounded in the factors which Governor took into account (or ignored) in the exercise of its discretion, and the weight accorded to factors, the Court is satisfied that an arguable case has been made out. The factors which are in issue are those which would have been referenced in the habeas corpus judgment. Whether the Governor was obliged to consider that judgment and to weigh its import is in the Court's opinion a matter which requires a full hearing on the merits.

[52] This opinion follows a review of the relevant judicial authorities referenced by the Parties as well as the " on point" decision of Kruger v Governor of the Cayman Islands[7] in respect of which the Court solicited further written submissions from the Parties.

[53] In that case, Swiss Government sought the Applicant's extradition in respect of bankruptcy related offences. The first request failed and the Applicant was discharged on a habeas corpus application because the evidence filed in support of the extradition was not translated or properly authenticated and was therefore inadmissible. The Applicant was thereafter released from custody

[6] Attorney General v Independent Broadcasting Authority; Redman v Gaskin
[7] [1997] CILR 73

and remained at liberty until he was later retaken into custody pending the receipt of a second request for extradition. The Swiss Government in fact made a second Request for the surrender of the Applicant and included in its request additional evidence which had been seized from the fugitive's home by the Cayman Police pursuant to a request for assistance. The Governor issued an Authority to Proceed and the fugitive sought leave to obtain judicial review of the Governor's decision. The grounds of the application were that the Swiss Government was not entitled to make the second request having failed in the first because the Governor had not taken the improper conduct of Switzerland in delaying its second application. Counsel for the Applicant also argued that the Governor ought not to have issued the authority to proceed because to surrender the Applicant would have been unjust and oppressive.

[54] Smellie J dismissed the application for leave on the basis that the Governor's decision to issue the Authority to Proceed was not so irrational that no reasonable person applying his mind to the question could have arrived at the same decision. The learned Judge made following important observations:

> *"The basic premise of the argument that a requesting state when once shown to be at fault, may not be afforded a second chance at extraditing a fugitive, is therefore not one which is supported by authority…Surely it must lie within the discretion of the Governor to consider what went wrong on the previous occasion or occasions and the reasons for it, before he might feel obliged to refuse a request, even if some fault can be ascribed to the requesting state."*
>
> *"No court in this jurisdiction has expressed a finding that the former case was weak. On the contrary, the Summary Court did find proof of a prima facie case to justify the committal of the applicant and the remand of Mrs. Kruger on bail to await extradition. In so far as this court has set aside that decision, it did so for reasons expressed in the Chief Justice's written judgment in Kruger V Northward Prison Director that the requirements of due authentication and certified translation of the evidence documentation had not been met. It is plain from those written reasons themselves that no pronouncement was made one way or the other on the probative merits of the case. There would therefore have been no objective basis available to the Governor for arriving at such a decision on that issue. Moreover the assessment of the particular merits of the case is par excellence a matter for the courts." (Emphasis mine)*

[55] In distinguishing the Kruger judgment, the Applicants submitted that this is not a case where the High Court merely ruled on the technical objections. Rather, they contend that Governor of the BVI had available to him a considered judgment rendered by a seasoned judicial luminary which should have provide guidance as to the law and the merits of the case for extradition. This submission is somewhat consistent with the reasoning in the cases of M v Secretary of State for the Home Department and R v DPP ex parte Treadway and R v DPP ex parte Manning.

[56] The Applicants also referenced that following observation made by Smellie J after he considered section 7 (4) of the 1989 UK Extradition Act[8];

> *"The words emphasized do admit of a discretion in the Governor to anticipate issues which may arise for his consideration at the final stage, after committal and so as to preclude extradition… Indeed, there appears to be no reason why concerns about lack of good faith on the part of a requesting state, oppression or injustice could not be taken into account at the earliest stage by the Governor. The sooner such a flawed request is disposed of, the better it will be for the interest of justice."*

[57] In circumstances where it is alleged that the judgment of the BVI High Court considered factors which would arise for consideration by the Governor at the final stage of the extradition process (following committal by the magistrate), the Court also accepts that it is arguable that he would have been obliged to take this into account.

[58] In order to succeed on an irrationality challenge a litigant will have to demonstrate that the Governor's decision "*is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*."[9] There can be no doubt that the Applicants face a very high threshold. However having reviewed the Parties' evidence and the relevant judicial authorities, the Court is persuaded that the Applicants' submissions are arguable.

[59] The Parties widely differ on import and impact of the judgment of Redhead J and the later evidence filed in support of the second request for Extradition. It is clear from the evidence filed on behalf of the Governor in response to this Application, that there is significant ambivalence about the Judgment. This is reflected in paragraphs 20 – 25 of the affidavit of Isis Potter filed on 5th December 2012 which sets out an equivocal analysis of the ratio of that judgment that was later confirmed in Counsels' submissions. Clearly, much will depend on a careful examination of the relevant case law and thorough construing analysis of that Judgment.

[60] However at this stage, the Court cannot say that the Applicants have no reasonable prospect of success. Both sides have raised compelling legal arguments which require a full hearing on their merits. The Court is also mindful that this case raises issues of general public importance which will potentially have significant implications for the international obligations of the Territory. Therefore, in the Court's view, the Applicants have raised an arguable case for the grant of leave to seek judicial review on the ground of irrationality.

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[8] Section 7 of the 1989 Extradition Act has been extended to the British Virgin islands by virtue of Extradition (Overseas Territories) order 2002

[9] Council of Civil Service Unions v Minister of Civil Service (1985) AC at 410

[61] Having said this, the Court is not persuaded that it would (*without more)* be proper to draw any adverse inference from the chronology of events or the relevant timeline. To do this would involve the Court making a judgment that the Governor needs to take a particular period of time before arriving at a decision, in order for that decision to be lawful. The Court does not accept that this would be any basis upon which the Applicants could seek to rebut the presumption of regularity.

Abuse of Process

[62] Not only have the Applicants submitted that the decision of the Governor's is irrational, they also contend that having regard to all of the circumstances, it also amounted to a clear abuse of process.

[63] In grounding this submission, the Applicant's contend that in light of High Court Judgment on the habeas corpus application, the Governor was bound to satisfy himself (prior to issuing the Order to proceed on the second request) that there had been a material change of circumstances or sufficiently cogent fresh evidence.

[64] The Applicants' case is that no further evidence has been presented which could support a finding of complicity in the alleged conspiracy beyond that which was already before the High Court during the habeas corpus application. Counsel referred to the additional affidavit evidence submitted in support of the second Request for extradition and submitted that it does little to fill the gaping lacuna in the evidence which was at the heart of the judgment of Redhead J. The Applicants therefore concluded that in issuing the Order of 11th October 2012, the Governor acted on the basis of precisely the same legal and factual matrix that led the learned Judge to unequivocally order their release from custody.

[65] Where a decision maker pursues a legal process in circumstances where he knows he cannot succeed or not thinking about the likelihood of its success, the Applicants contend that this is an abuse of process which must be disallowed by the court. In light of the fact that there has been no discernible change of circumstances since the High Court Judgment they contend that any Court would once again be obliged to grant a further application for habeas corpus. In those circumstances, Lord MacDonald QC submitted that it must be an abuse of process for the Governor to start proceedings which are bound to fail. In his view the extradition proceedings are just as hopeless now as they were under the invalid Authority to Proceed and would amount to a complete waste of the Court's time. This contention was wholeheartedly adopted by all of the Applicants.

[66] They also contended that the decision of the Governor amounted to an abuse of process because it purports to undermine the express ruling by Redhead J. that the appropriate forum for the trial of the Applicants' criminality is in the Virgin Islands. After pointing out that there has been no appeal

by the Crown against the judgment in respect to the Florida proceedings, Mr. Thompson contended that the only logical conclusion which can be drawn is that the Order to Proceed was intended to circumvent the terms of Judgment without going through the process of appeal.

[67] Mr. Knowles pointed out that as at the date of signing the Order to Proceed, there were still local charges pending against the Applicants which made it imperative for the Governor to take cognizance of the Judge's ratio and or the declaratory relief which had been granted.[10] Counsel submitted that there is no evidence the Governor took these matters into account.

[68] In response the Attorney General submitted that Court should not engage in a review of the first request and the proceedings which followed as a consequence. He submitted the current application only concerns the rightness of the decision of the Governor to issue the current Order to Proceed. In that regard, he submitted that once the Governor receives a request for extradition, he is obliged to act upon it. He referred the Court to the case of Rees v Secretary of State for the Home Department where the court held that "Once *a requisition is made the Secretary of State is entitled to make an order or orders following upon and based on it*." He contended that the Governor is under a treaty obligation to consider request for extradition made to him and to refer by Order to Proceed, matters to a magistrate for her to then consider the merits.

[69] He submitted under the fresh request for extradition, the Governor was under no obligation to consider what would have taken place under the previous request and he was not constrained by any conclusions which would have been drawn by the Court in respect of the previous, invalid Authority to Proceed. Further, he submitted that in carrying out his treaty obligations, the Governor cannot be precluded or barred by a non-specific decision of the High Court. In support of this contention he referenced the case of Collins v Loisel[11] and submitted that a discharge in habeas corpus proceedings which is based on mere irregularities in extradition proceedings does not operate as res judicata against a proceeding for the same offence. As a result, where the Governor in good faith determined that extradition was warranted, he would not be barred from commencing a fresh extradition process.

[70] The Attorney General relied on the case of R (Kashamu) v Governor of Brixton Prison and Anor where at paragraph 34 the Court made the following observation;[12]

> "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

[10] DPP entered the *nolle prosequi* on 12 November 2012 discontinuing the local charges against all Applicants
[11] 259 U.S. 309, (1922)
[12] [2001] EWHC 980 (Admin)

> 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.
>
> 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.
>
> What is pertinent here in the present cases is solely whether the detention is unlawful by English domestic law and/or arbitrary, because of bad faith or deliberate abuse of the English courts' procedure. The scope of the inquiry is, therefore, narrow. In that connection, it by no means follows, merely because second proceedings have been instituted against Kashamu, following failure of the first proceedings in the circumstances earlier set out, that there has been an abuse. I add that it will only be in a very rare extradition case, provided the statutory procedures have been followed, that it will be possible to argue that abuse of process has rendered the detention unlawful under article 5(4)." (Emphasis mine)

[71] The Attorney General submitted that the Applicants have failed to raise any arguable case that the Governor has wrongly exercised his discretion or that he exercised it in a manner and for a purpose for which it was not intended. He argued that where there is a lack of evidential or legal basis to support the view that the Governor acted in bad faith, then it must be accepted that he acted in good faith. The Attorney General positively argued that in fact the Governor acted reasonably and in accordance with the law. In those circumstances it follows that his decision to accede to the second Request for extradition cannot constitute an abuse of process simply because there was a previous Request in regards to which the Applicants had successfully been discharged.

[72] In circumstances where the Governor has merely sought to honor the Territory's treaty obligations, the Attorney General submitted that it cannot be properly argued that his actions have in fact or law, subverted the earlier High Court decision. In issuing the Order to Proceed, the Governor has done no more than refer the matter to the proper legal authority who is obliged to consider the sufficiency of the evidence advanced by the requesting state and to make consequential findings. He reiterated that sufficiency of evidence and allegations of abuse of process are matters which properly fall within the remit of the enquiring Magistrate who has the requisite legal training to properly make that analysis.[13]

[13] R (Kashamu) v Governor of Brixton Prison and Another at paragraphs 29, 30 and 32

Conclusion

[73] The doctrine of abuse of process is aimed is preventing the judicial system being used in a way that is inconsistent with its fundamental values, purposes and principles. It has been said that preventing misuse is necessary to defend the very existence of the courts, because their existence depends on the maintenance of public confidence. One of the clearest statements of the applicable principles is set out by Lord Backburn in **Metropolitan Bank v Pooley**[14]

> "From early time (I rather think, though I have not looked enough to say from the earliest times) the Court had inherently in its power the right to see that its process was not abused by any proceeding without reasonable grounds so as to be vexations and harassing the Court had the right to protect itself against such abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstance as to be an abuse of the process of the
> Court; and in a proper case they did stay the action."

[74] The Court is also guided by the dicta of Woodhouse J in Moevao v. Department of Labour[15] where after citing the relevant passage from his own judgment in Reg. v. Hartley [1978] 2 N.Z.L.R. 19 he added;

> "… In the Connelly case Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the courts accepting what he described as their 'inescapable duty to secure fair treatment for those who come or are brought before them.' He said that 'the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused' ([1964] A.C. 1254, 1354 . . .). Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is 'the process of law,' to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the court system. It is the function and purpose of the courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in general."

[75] Generally, abuse of process has been established where the proceedings are oppressive or vexatious and where they violate the fundamental principles of justice underlying the community's sense of fair play and decency. Concepts of oppressiveness and vexatiousness as well as the pubic interest in the proper administration of justice underlie the application of the doctrine.

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[14] Metropolitan Bank v Pooley [1885] L R 10 App. Cas 210, at 220 -221; and see Connelly v DPP [1964] AC 1254 at 1293; mills v Cooper [1967] 2 QB 459 at 467

[15] [1980] 1 N.Z.L.R. 464 , 475-476

[76] Thus far the doctrine has been allowed to develop incrementally with the courts repeatedly refusing to narrow or close the categories which may constitute an abuse of process. Instead, they have adopted an approach in which the question of whether an abuse of process has occurred is determined by reference to the underlying values, principles and purposes of the law which the courts exist to uphold. The circumstances that may constitute an abuse of process are therefore varied and the discretionary factors that are relevant in dealing with such allegations have not been rigidly confined or applied.

[77] The case law demonstrates that the courts are prepared to find that an abuse of process exists where the court's process has been put to a use which is fundamentally alien to its purposes. It has also been found where there is an attempt to re-litigate in subsequent proceedings, issues which have already been finally decided in earlier proceedings. In the context of criminal proceedings, it has been used to allay any attempt to undermine or controvert previous rulings or acquittals in favor of the accused which would effectively deprive them of full benefit of their judgment. Additionally, it is also clear that proceedings will constitute an abuse of process where regardless of the propriety of the purpose of the person responsible for their institution and maintenance, they can be clearly seen to be "foredoomed to fail".[16] Utterly hopeless proceedings, be they criminal or civil can amount to an abuse of process where a court is satisfied that it is doomed to fail rather than merely weak. What is clear in any event, is that if the exercise of a discretion in a particular way will occasion an abuse of process then that discretion must be exercised so as to avoid the abuse of process.

[78] All of these grounds have to some degree been advanced by the Applicants all of whom seek to challenge the Governor's exercise of discretion on the basis that it will amount to an abuse of process. This ground of challenge will need to be approached by any court with the greatest of care: the normal course, is that proceedings should be permitted to run their full course and it is only in the most exceptional circumstances, that the court should exercise its undoubted discretion to prevent such a course on the basis that the proceedings amount to an abuse.[17] There can therefore be no doubt that the onus or burden on the Applicants will be a heavy one.

[79] The Court unreservedly accepts that as a matter of legal principle, the Governor was empowered to issue the Order to Proceed notwithstanding that there had been an earlier request for extradition which had failed. He would however have been obliged to exercise his discretion in a rational and reasonable manner, taking care to avoid a possible abuse of process. No doubt the application of the doctrine will depend on the particular factual context in which it is alleged to have arisen.

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[16] Metropolitan Bank v. Pooley (1885) 10 App Cas 210, at pp 220-221; General Steel Industries Inc. v Commissioner for Railways (N.S.W.) [1964] HCA 69; (1964) 112 CLR 125, at pp 128-130.)

[17] CPS v Tweddell [2001] EWHC Admin 188

[80] Again, much will depend of the import of the earlier High Court decision and the many developments which followed its wake including the additional evidence filed in support of the second Request. At this stage, the Court is satisfied that an arguable case has been made out which warrants a full hearing on the merits. While the Court is also cognizant of the objection raised by the Attorney General that these are matters which should properly be ventilated before the relevant magistrate, the Court is satisfied that the grounds raised by the Applicants are arguable and having reviewed the House of Lords' opinions 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,[18] the Court is satisfied this issue should be explored in a substantive hearing.

Procedural Impropriety (failure to give reasons)

[81] Mr. Knowles QC for Earl Hodge submitted that in circumstances where the Governor was prepared to facilitate extradition proceedings which had comprehensively failed just one month prior, and where the judge of the High Court had made definitive pronouncements not only in regard to the sufficiency of evidence but also the appropriate forum, the Governor was obliged to provide reasons for his decision. He submitted that the Governor has failed to do so and in the absence of such reasons, invited the Court to conclude there are in fact no proper reasons.

[82] He asked the Court to pay special regard to the relevant timeline and noted that the request for extradition and the decision to issue the Order to Proceed were clearly taken on the same day. He argued that it is doubtful that any real consideration could have been undertaken in the space of one working day and that the absence of reasons should lead the Court to draw the inference that the Governor did not bring is mind to bear on the relevant matters which he ought to have taken into account.

[83] Counsel referred the Court to the case of R (Birmingham City Council) v Birmingham Crown Court[19] where at paragraph 46-48 Beatson J made the following observation;

> "Although English law may be inching towards a general duty to give reasons, as was recognised in Ex p Institute of Dental Surgery [1994] 1 WLR 242 , 275, it has not yet got to the stage where there is such a duty. Sedley J, giving the judgment of the Divisional Court, stated that at that time, 1993, the court "cannot go beyond the proposition that, there being no general obligation to give reasons, there will be decisions for which fairness does not demand reasons". His analysis of the decision in R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531 concluded, that reasons are not called for wherever it is desired to know whether grounds for challenge exist, because this would be to create a general duty that Lord Mustill in Ex p Doody was

[18] In which their Lordships held that a magistrate has no power to refuse to commit in extradition proceedings because of abuse. The rationale of each of those authorities is that it is open to the Secretary of State to respond to abuse by refusing to return the fugitive.

[19] [2010] 1 WLR 1287 (QBD)

careful to exclude: see Ex p Institute of Dental Surgery [1994] 1 WLR 242 , 257. Sedley J stated, at p 258, that: "The absence of reasons always makes it difficult to know whether there has been an error of approach. The question of justification for withholding reasons logically comes after the establishment of a prima facie duty to give them."

In R v Secretary of State for Trade and Industry, Ex p Lonrho plc [1989] 1 WLR 525 , 540 Lord Keith of Kinkel stated:

"The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reasons for his decision."

The implication of that statement is that in such circumstances an explanation is called for. R v Civil Service Appeal Board, Ex p Cunningham [1992] ICR 816recognised that one of the categories of case in which there is a duty to give reasons is a decision that appears aberrant without reasons. In that case the court considered there was a duty to give reasons for the award of abnormally low compensation to an unfairly dismissed prison officer.

[84] Mr. Knowles QC submitted that the circumstances of this case demanded that the Governor explain why he was content to issue the Order to Proceed which clearly had implications for the liberty of these Applicants. He submitted that where decisions touch and concern the liberty of a subject the courts have determined that a decision maker is obliged to provide reasons for his decision.

[85] Counsel referred the Court to the case of M v Secretary of State for the Home Department. [20] In that case M, a Bangladeshi citizen, appealed against a ruling of the Immigration Appeal Tribunal dismissing his appeal against a decision of the Secretary of State to deport him. The Secretary of State's decision had been made pursuant to the Immigration Act 1971 s.3(5)(a) on the basis that M's deportation would be conducive to the public good, he having been convicted for indecent assault of two minor girls. A recommendation for deportation had been made by the sentencing judge. M appealed against sentence and although his sentence was left undisturbed, the Court of Appeal (Criminal Division) set aside the recommendation for deportation on the basis that it was disproportionate to the objective of preventing crime in the UK. Subsequently, the Secretary of State decided to deport M. M contended that in the absence of any fresh evidence, relevant change of circumstances or the availability of other material not previously considered, there was a presumption that the Secretary of State should follow the recommendation of the Court of Appeal or give reasons for his failure to do so.

[86] At paragraph 18 – 19 of the judgment the Laws LJ noted

"I consider that there is no basis whatever for applying a presumption in favour of the criminal court's decision not to recommend deportation. Such a presumption would bind the Secretary of

[20] [2003] 1 WLR 1980

> State unless he has reasons or material not before the criminal court to take a different view. But I consider also that Mr. Tam's submission that the Secretary of State should take account of the criminal court's decision, but is under no particular duty to state what it thinks of it, lacks principle. Indeed, with respect to Mr. Tam, who could not have put the case better than he did, the position taken is actually incoherent. A duty owed by one decision-maker-A-to take account of the views or decision of another decision-maker-B-upon the same or an overlapping issue means nothing whatever unless A has to engage with what B has said: to explain, however shortly, why he differs from it if he does.
>
> In my judgment, therefore, when he comes to his own jurisdiction under section 3(5)(a) in a case such the Secretary of State has to consider the prior reasoning of the criminal court and explain, however shortly, what he makes of it. He may simply state that he agrees with it. In that case he would as this, of course make no decision to deport under section 3(5) (a). If he disagrees with it, he must explain, however shortly, why he disagrees with it. This seems to me to be no more than an elementary application of the Secretary of State's duties of fairness and good administration imposed upon him by the common law. The immigrant/defendant ex hypothesi has persuaded the criminal court distinctly to decide, on reasoned grounds, that there should be no section 6(1) recommendation. Whether the matter is put in terms of a legitimate expectation, ordinary fairness, or the obligation to take a rational approach to the duties of good administration, it seems to be clear that in this specific situation the law imposes upon the Secretary of State a duty to explain-as I have said however shortly-why he is taking a different view from that of the criminal court."(Emphasis mine)

[87] All of the Applicants contended that the Governor was obliged to taken into account the ratio and findings in the Judgment of Redhead J. Indeed Lord McDonald QC went further to submit that it would have been perverse for the Governor to have ignored the learned Judge's ruling. Linking this head of challenge with that which was raised earlier he submitted no rational decision maker would have in these circumstances issued the Order to Proceed without giving reasons for the decision.

[88] For these reasons, Counsel submitted that the decision was procedurally unfair and should on that basis be quashed. Having earned a hard fought victory on the habeas corpus application, the Applicants submit that they were entitled to know why the Governor held a contrary view to that of Redhead J.

[89] In response, the Attorney General contended that the facts of this case do not give rise to a duty to give reasons. In distinguishing the case of M v Secretary of State for the Home Department he asked the Court to note that the relevant statute in that case i.e. the Immigration legislation (SI 658 of 2003) imposed a statutory obligation on the secretary of state to provide reasons for his decisions. As such he noted that the operating factual and legislative context is decidedly different to the case at bar. He also noted that M v Secretary of State for the Home Department did not concern an extradition treaty and there was nothing akin to the international treaty rights of third party states which operates here. Further in that case the Court ordered that the matter be reheard.

In those circumstances he submitted that the court should have recourse to the common law position which to this day imposes no general obligation or duty to provide reasons for a decision.

[90] While he readily conceded that he could not definitively say what matters the Governor actually took into account in arriving at his decision, the Attorney General submitted that the Applicants had no hope of proving that the Governor acted improperly or that he otherwise abused his discretion. He further submitted that when a request for extradition comes under consideration, the Governor has a right to determine how, when and in what manner to exercise his discretion. He concluded that in these circumstances his decision cannot be the subject of a quashing order and the Applicants should therefore be denied leave.

Conclusion

[91] Having read the relevant authorities and having heard the submissions of both sides, the Court is satisfied that this is ground of challenge is also arguable. While the common law position is as expressed in R v Secretary of State of Home Department ex parte Doody[21] recent case law have emphasized that this is only a general principle. Where fairness requires it in any particular case, the courts have increasingly begun to insist that decision makers provide reasons for their decisions. While this may not have evolved in any structured way, emerging from the case law is an inclination to more often than not, infer a duty to give reasons where the decision is likely to affect an individual's fundamental rights and liberty.[22]

[92] Further, the general principle emanating from the case of M v Secretary of State for the Home Department to the effect that where a decision maker purports to make a decision which overlaps with a prior judicial pronouncement, then reasons ought to be given to reflect how that decision was taken into account and weighed, was not decisively routed by the Respondent and in the courts view warrants a thorough hearing on the merits. When the context and circumstances of this case are examined, the Court is satisfied that an arguable case has been established on this ground.

DPP decision to issue a *nolle prosequi* in respect of the local charges

[93] The Applicant, Roberto Harrigan also seeks to review the decision of the Director of Public Prosecutions (DPP) to enter a *nolle prosequi* filed on 12th October 2012 discontinuing the complaints lodged against him. Counsel for Mr. Harrigan indicated to the Court that his client intends to seek certiorari quashing the *nolle prosequi* and an order that the matter be reconsidered by the DPP. He submitted that the DPP's decision was an unreasonable, irrational exercise of his powers and thus subject to review on the following bases.

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[21] [1994] 1 AC 531

[22] R v Director of Public Prosecutions ex parte Manning and Another [2001] QB 320

[94] Firstly, Counsel for Mr. Harrrigan contended that the rule of law demands that an order or ruling of the High Court be obeyed. He submitted that by discontinuing the local charges, the DPP would have effectively removed one of the key factors which informed the learned judge's decision on the question of forum, thus depriving his client of the benefit of that Judgment. For that reason he contended that the DPP's decision to discontinue the local charges is contrary to the rule of law in that it subverts the express and unchallenged High Court ruling that the BVI is the appropriate forum for the trial of the Applicants' alleged criminality.

[95] Counsel relied on the case of R v DPP ex parte Treadaway[23]. This case involved an application for judicial review of the DPP's decision not to prosecute five police officers for an assault on the applicant, in respect of which he had been awarded damages by the High Court. In allowing the application the Court held that whilst the civil court's determination was not binding on the DPP, the High Court judge had set out detailed findings and firm conclusions which required very careful analysis if the DPP was not to institute a criminal prosecution. Since the High Court decision in the civil case had not received the analysis it deserved, the Divisional Court directed the CPS to review its decision not to prosecute.

[96] Counsel concluded that having satisfied himself that there was sufficient evidence to support the laying of local charges in 2011, the DPP's decision to discontinue the charges in the wake of the definitive conclusions drawn in the High Court judgment gives rise to an arguable case for review.

[97] Secondly, Mr. Thompson posited that the DPP's own utterances at the hearing before the Magistrate's Court on 4th October 2012 reveal that he was influenced by irrelevant considerations which included the fate of the earlier extradition proceedings as well as the possibility of an appeal of the habeas corpus judgment. The affidavit evidence filed in support of this contention[24] alleges that the DPP initially indicated to the learned Magistrate that any proceedings regarding the local charges should be adjourned until the end of the 42 day period for appealing the High Court judgment. It also alleges that the DPP intimated that he had not taken any decision in regard to the local charges and invited the magistrate to await the Attorney General's decision in regard to a possible appeal of the High Court judgment. According to Mr. Thompson, this demonstrates that there was a nexus between the extradition proceedings and the local prosecution with the extradition taking precedence over a domestic or local prosecution.

[98] He further submitted that the fact that the local charges were only discontinued after the Order to proceed was issued on 11th October 2012 leads to the inference that the DPP was influenced by extraneous considerations.

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23 The Times, October 31 1997

24 Affidavit of Roberto Harrigan filed on7 November 2012 at paragraph 12

[99] Thirdly, he contended that there is no evidence that the DPP took into account or accorded sufficient weight to the fact that the nature of the charges specifically the charges dealing with abuse of authority and bribery of a public official warrants a trial by a court within the Territory.

[100] Finally, although conceding that the DPP is under no obligation in the normal course to provide reasons for a decision not to prosecute, Mr. Thompson argued that the facts and circumstances of this case demanded that the DPP provide reasons for his decision. He further submitted that the DPP's failure to do so infers that he had no good reason for discontinuing the prosecution. He relied on the judgment in R v DPP ex parte Manning [25] in which that Court determined that reasons were necessary in order "*to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given*."

[101] In advancing this challenge, Mr. Thompson submitted that there is a crucial point of distinction when a court considers an application to judicially review a decision not to prosecute as opposed to a decision to prosecute. He submitted that in the case of the former, the considerations are slightly different and the threshold for review is significantly lower.[26]

[102] In responding, the Attorney submitted that the Applicant's evidence demonstrates no clear nexus between what is alleged to have been said by the DPP before the Magistrate and whether he was in fact motivated by these considerations. He submitted that in the absence of this evidential nexus, the Applicant cannot seek to vitiate the decision of the DPP through mere speculation and conjecture.

Conclusion

[103] Under Section 59 of the British Virgin Islands Constitution the Director of Public Prosecutions is empowered to discontinue any criminal proceedings at any stage before judgment. Section 64 provides as follows;

> (1) "There shall be a Director of Public Prosecutions, whose office shall be a public office and who shall be appointed in accordance with section 95.
>
> (2) The Director of Public Prosecutions shall have power, in any case in which he or she considers it desirable to do so—
> (a) to institute and undertake criminal proceedings against any person before any civil court in respect of any offence against any law in force in the Virgin Islands;

[25] [2001] QB 330 at paragraphs 23, 31-33

[26] DaSilva v DPP [2006] EWHC 3204; Leonie Marshall v DPP [2007] UKPC 4.

(b) to take over and continue any such criminal proceedings that have been instituted by any other person or authority; and
(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or herself or any other person or authority.

(3) The powers of the Director of Public Prosecutions under subsection (2) may be exercised by him or her in person or by officers subordinate to him or her acting under and in accordance with his or her general or special instructions.

(4) The powers conferred on the Director of Public Prosecutions by subsection (2)(b) and (c) shall be vested in him or her to the exclusion of any other person or authority; but where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.

(5) –

(6) In the exercise of the powers conferred on him or her by this section and section 88(2) the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

[104] The Court can find no clearer or more definitive statement of the standard which must be applied by a DPP in exercising his constitutional powers than that set out by Edwards J in Steadroy Benjamin v Commissioner of Police et al.[27] where she stated:

> "The Director's primary job is to consider the weight of the evidence against potential defendants, give directions concerning the charge to be brought against suspects, and prosecute persons charged where there is sufficient evidence to prove a criminal offence provided it is in the public interest to do so. That consideration must be conducted without bias whoever the potential defendant may be. The fairness of a prosecution necessarily demands that the prosecution will be instituted only in those cases where there is sufficient evidence and the proceedings are in the public interest. The general presumption is that the Director of Public Prosecutions in the exercise of his constitutional powers will with competence, impartiality and integrity; assess the information submitted to him by the police. It must be assumed that the Director will not allow cases meeting the standard of reasonable prospect of conviction to escape prosecution, nor the innocent to be prosecuted where no charge has been laid. Criminal prosecutions should not be motivated by corruption, or political, class, social or economic interests. The Director of Public Prosecutions may be regarded therefore as gatekeeper of the criminal prosecutions process...."

[27] HCVAP 2009/23 Antigua and Barbuda Civil Appeal

[105] Given the nature of this remit, it is not surprising that the courts have been conspicuously reluctant to review prosecutorial decisions taken by a DPP. In Leonie Marshall v Director of Public Prosecutions, Lord Carswell in delivering the decision of the Privy Council stated at paragraph 17:

> "The position and functions of the DPP are such that judicial review of his decisions, though available in principle is a highly exceptional remedy (Sharma v Brown – Antoine [2006] UK PC 57, paragraph 14). Where policy considerations come into the decision it is particularly difficult for a court to review it, since it may depend on a range of factors on which the responsible prosecutor is best equipped to reach a sound conclusion. These factors were well expressed in the judgment of the Supreme Court of Fiji in Matalulu v DPP [2003] 4 LRC 712, 735-6 which was cited with approval by the Board in Mohit v The Director of Public Prosecutions of Mauritius [2006] UK PC 20:
>
> "It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. The approach subsumes concerns about separation of powers.""

[106] However, while judicial review of prosecutorial decisions may be a highly exceptional remedy, decisions not to prosecute have been successfully challenged in a number of cases.[28] In Leonie Marshall v DPP, the Court observed the following

> "In relation to decisions not to prosecute the considerations are slightly different and the threshold for review may be to some extent lower. The reasons are set out in para 23 of the judgment of Lord Bingham CJ in Ex parte Manning, *supra*:
>
> Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example, *R v Director of Public Prosecutions, ex p. C* [1995] 1 Cr. App. R. 135. But as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will

[28] Mohit v Director of Public Prosecutions of Mauritius [2006] UK PC 20, R v Director of Public Prosecutions exp. C [1995] 1 Cr. App. R 36, and R v Director of Public Prosecutions, Ex parte Manning and another [2001] QB p. 330

> be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatize a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

[107] While judges appear to be more willing to review a DPP's decision not to prosecute, they have reiterated that this is a jurisdiction that should be sparingly exercised on an exceptional basis. There can therefore be no doubt that any applicant seeking to quash a DPP's decision not to prosecute assumes a considerable burden. Given the high threshold of an irrationality challenge and coupled with the distinct reluctance of the courts to interfere with the constitutional remit of the DPP, an applicant must mount a cogent case for leave to review and at the substantive application, he would need to establish on primary facts that there is a sufficient basis for granting the relief sought.

[108] Following a careful review of the Notice of Application and the affidavit filed by Mr. Harrigan, the Court finds that there no arguable case has been made out to support the contention that DPP's decision was intended to subvert the express and unchallenged High Court ruling on the question of forum.

[109] In the Court's view, the facts of this case do not echo those of ex parte Treadaway. The learned Judge's ruling on the question of forum would clearly have been decided within the context of the habeas corpus application and the extradition proceedings. In determining the legality of the Applicant's detention, the learned Judge was asked to consider whether the appropriate forum for the trial of the Applicant's alleged criminality would have been the BVI. Such a determination would have been premised on a confluence of factors which would not have warranted a finding on the probative merit of the domestic prosecution. A determination of the appropriate forum in the context of the extradition proceedings could therefore could not properly provide any binding direction to the DPP which could compel him to proceed with the prosecution of the domestic charges.

[110] In any event, this submission is at complete variance with the constitutional mandate afforded to the DPP by section 59 (6) of the BVI Constitution.

[111] Further, the nexus between the *nolle prosequi* and the allegation that he would have been deprived of benefit of that the judgment could only be drawn if the Applicant is able to allege and

demonstrate that there was some collusion between the DPP and the Governor which effectively resulted in his re-arrest pursuant to the Order to Proceed issued by the Governor. It is after all by virtue of the second Request the Governor's to Order to Proceed of 11thOctober 2012 the Applicant would have been the subject of further extradition proceedings. There is no evidence (and certainly no express allegation by Mr. Harrrigan) that there was any collusion between the Governor and the DPP in regard to the issuance of the Order to Proceed and the discontinuance of the local prosecution. In any event, all Parties appear to agree that the Judge's decision on forum would clearly have been decided on a basis of a number of factors besides the extant domestic charges. In these circumstances it is difficult to say how an arguable case could be made out that the rule of law has been undermined by the DPP's decision.

[112] No actual reasons have been proffered by the DPP for the discontinuance of the local charges and he has chosen not to put in any evidence in response to this Application setting out the factors which informed his decision. There is therefore no material to show what considerations did in fact influence the DPP. This is acknowledged by Counsel for the Applicant who contends that the Court may infer from the surrounding circumstances that the DPP had no legitimate reasons or was influenced by extraneous considerations.[29]These relevant circumstances include the DPP's comments to the effect that the local charges were inextricably linked to the extradition matters as well as the relevant timeline. Counsel submitted that this is more than sufficient evidence to sustain a prima facie case for challenging the Director's decision on the basis of irrationality.

[113] Having reviewed all of the authorities the Court is satisfied that in order to make out an arguable case for irrationality, the Applicant would need to demonstrate that the DPP's decision to enter the *nolle prosequi* was not based on the sound application of the relevant tests prescribed in Steadroy Benjamin v The Commission of Police, R v DPP ex parte Peter Dennis 2006 EWHC 321 and R v DPP ex parte C. In applying those tests the DPP would have been obliged to assess the evidence and likelihood of a successful prosecution. He would then have had to consider the public interest in pursuing the prosecution. Surprisingly, the Applicant's grounds for review do not positively allege that the DPP failed to apply the relevant tests or internal policies or procedures. What is contended is that the DPP would have taken into account irrelevant considerations or conversely ignored relevant considerations.

[114] In that regard the Court adopts the guidance provided in the *Matalulu case.* In that case the court considered Section 114(4) of the Constitution of Fiji (which is similar to section 59 of the British Virgin islands Constitution) as well as the grounds of review and concluded:

> "There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without

[29] C.O.Williams Ltd. v Blackman (1994) 45 WIR 94

> regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the Director of Public Prosecutions may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

[115] Even if the Applicant's evidence regarding the statements made by the DPP at the hearing before the Magistrate is accepted, this would not in the Court's opinion be a sufficient basis to underpin a challenge on the ground of irrationality and unreasonableness. At their best the DPP's alleged statements appear have been advanced to explain or justify the delay in progressing the domestic prosecution. It may well be that the DPP thought that the outcome of the first extradition request and the possible appeal would have been relevant factors in that regard, however Counsel asks this Court to transpose this reasoning to the later decision to discontinue the charges. *Without more*, the Court could find no basis upon which to do so. The Court also accepts the Attorney General's contention that no clear nexus has been established between what is alleged to have been said by the DPP and whether he was in fact motivated by these considerations.

[116] The Court notes that the standard of proof which attaches to the test of leave to seek judicial review is the balance of probabilities and that it varies according to the circumstances of the case. Where an Applicant seeks to challenge a decision of a public authority with the constitutional remit of DPP, the Court accepts that he must advance strong evidence before such a challenge can be proved to the requisite standard.[30] In the Court's view the Applicant in this case has not met the relevant standard of proof.

[117] Decisions to initiate or not to initiate or to discontinue prosecutions are presumed to be based on judgments about the prospects of success on questions of law and fact and it is clear that the factors which may properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. Having considered this Application, the Court is not satisfied that the evidence filed in support of this ground when considered objectively, could form a sufficient basis for the view that the decision was "*so outrageous in its defiance of logic".*

[118] Ultimately the Applicant's case is largely premised on surmise and conjecture because the simple fact is that the DPP has provided no reasons for his decision and has declined to file any evidence in response to this Application. Counsel for the Applicant readily conceded that the DPP is under no general or absolute duty to provide reasons for his prosecutorial decisions. However, he argued that the nature of the proceedings and good administrative practice required that the DPP provide reasons for his decision to discontinue the criminal proceedings against his client.

[30] Sharma v Brown Antoine

[119] Firstly, he contended that the Applicant's fundamental right to liberty as protected by the BVI Constitution would have obliged the DPP to provide reasons for his decision. In support of this contention he again relied on the case of R v DPP ex parte Manning. That case involved the death of an individual while in the custody of the state where the death was alleged to have resulted from violence inflicted by agents of that state. There followed a public coroner inquest which culminated in a verdict of unlawful killing implicating a clearly identified person. The Divisional Court held that whilst the DPP was not under a general duty to give reasons for a decision not to prosecute, it was reasonable to do so where no compelling grounds suggested otherwise. In circumstances where an individual had died whilst in the custody of the State and a properly directed inquest had reached a verdict of unlawful killing, the Court concluded that reasons should be given for a decision not to prosecute.

[120] The court in that case noted that the right to life is the most fundamental of all human rights and that the power to derogate from it is very limited. In those circumstances the Court concluded that the ordinary expectation would naturally be that a prosecution would follow. So that in the absence of compelling grounds for not giving reasons, the Director would be expected to provide reasons to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting demonstrating that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision.

[121] Counsel for the Applicant also argued that in the wake of the High Court judgment, the DPP was obliged to give reasons for his decisions. Although the habeas corpus application would not have required an extensive analysis of the probative merits of the domestic prosecution the learned Judge made the following observation at paragraph 94 of the Judgment.

> "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."

[122] When combined with Court's findings on the Applicant's constitutional right to a fair trial by a jury of his peers, the Court is satisfied that an arguable case has been made out that reasons would have been necessary in order "*to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting demonstrating that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision*." For the reasons which have already been detailed above, the Court is satisfied that this is an arguable ground for review.

[123] In considering Mr. Harrigan's challenge it has not escaped the Court's notice that the decision to discontinue the criminal proceedings is ostensibly favorable to him. In what can only be described as a remarkable twist, the Applicant in the case at bar, is a former accused person who has been

fortunate enough to have criminal proceedings discontinued against him. While it is in principle permissible for an accused person to challenge a decision not to prosecute him, the Court does find this particular application to be perplexing.

[124] It seems to the Court that the true concern for the Applicant and that which would most likely impact on his right to liberty is the Governor's decision to issue the Order to Proceed on 11th October 2012. In circumstances where Applicant does not allege any collusion on the part of the DPP and the Governor and where he does not specifically allege bad faith or improper motive on the part of the DPP, the Court has some difficulty in discerning the utility of the substantive relief which is claimed.

[125] Notwithstanding this, the Court is satisfied that Mr. Harrigan has demonstrated an arguable case that the DPP was obliged to provide reasons for the discontinuance of the domestic criminal proceedings.

ALTERNATIVE REMEDY

[126] Where an applicant has alternative remedies and cannot establish the existence of exceptional circumstances that would justify the court in ignoring the same and acquiescing to judicial review proceedings, a court may also refuse leave or to grant relief.

[127] In the English Court of Appeal case of R (Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 475, Lord Phillips reviewed the case law on alternative remedies including the decisions of Harley Development Inc. v Commissioner of Inland Revenue [1996] 1 WLR 727 and R v Inland Revenue Commissioners ex part Preston [1985] AC 835 and at paragraph 47 of the judgment stated;

> *"What these authorities show is that judicial review is customarily refused as an exercise of judicial discretion where alternative remedy is available. Where Parliament has provided a statutory appeal procedure it will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory than the procedure of judicial review. Usually however, the alternative procedure is more convenient and judicial review is refused."*

[128] The Court also finds assistance in the case of Ex Parte Waldron [1986] 1 QB 824 where Lord Glidewell at page 852 reiterated the dicta in Ex Parte Royco Homes Ltd. [1974] QB 720, 728

> *"…it has always been the principle that certiorari will go only where there is no other equally affective and convenient remedy. Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower that the procedure or technical knowledge which is more readily available to the alternative appellate body; these are amongst the matters which a court*

should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available."

[129] The Court is satisfied that the nature of the issues to be resolved and the appropriateness or effectiveness of the remedies available are also relevant factors which must be considered in determining whether there are exceptional circumstances which would justify a claimant leapfrogging an alternative avenue of redress.

[130] The Attorney General submitted that the objections raised by the Applicants in regard to forum, abuse of process and the sufficiency of evidence are all matters which should properly be ventilated before the magistrate in the context of the existing extradition proceedings. In the premises, he argued that the application for judicial review is premature and seeks to prevent the magistrate from carrying out the lawful exercise of her functions under the Act.

[131] On the other hand the Applicants contend that there should in fact be no extant extradition proceedings and they seek to challenge the very Order to Proceed which precipitated the commencement of these proceedings. They quite rightly argue that there is no avenue to appeal the decision of the Governor to issue an Order to Proceed under the relevant statutory regime so that this is the only means by which the Order can be challenged. It is clear that if successful, all of the consequential proceedings including the pending proceedings before the Magistrate would also fall away.

[132] In any event, the Applicants also contend that the issues of forum and abuse of process which are intended to be advanced cannot be properly or conveniently ventilated before the inquiring Magistrate without significant prejudice to the Applicants. All of the Attorneys in the matter have submitted that compelling the Applicants to pursue this avenue would inevitably expose them to the possibility of committal and further detention.

[133] The Court is also satisfied (and notes that no submissions have been made to the contrary) that there is no alternative means of challenging the decision of the DPP not to prosecute.

[134] Having examined the relevant legislative regime as well as the applications and the evidence in support and having heard the submissions of both sides, the Court is persuaded by the arguments of Counsel for the Applicants, and is satisfied that there is no alternative form of redress available to the Applicants which would be as convenient, beneficial or effectual. The Court therefore finds that that this is not a ground for refusing the instant application.

[135] For the reasons given, the Court will exercise its discretion so as to grant leave to Applicants to file an application for judicial review in respect the Governor's decision on the grounds of irrationality, abuse of process and want of procedural fairness. The Court will also grant leave to Mr. Harrigan

to file an application for judicial review in respect of the DPP's decision to discontinue the domestic criminal proceedings on the ground of a procedural impropriety (failure to give reasons).

[136] In an effort to expedite the matter the following directions are made:

1. Leave is granted to the Applicants to file and serve Fixed Date Claim Forms and Affidavits in support seeking judicial review within 14 days or on or before 19th July, 2013.

2. The Defendants will file their Affidavits in Answer within 28 days of the service of the Fixed Date Claim Forms and Affidavits or on or before 16th August 2013.

3. The Applicants will (if necessary), file their Affidavits in Reply within 14 days thereafter or on or before 30th August 2013.

4. The Parties are to file and serve and agreed Statement of Facts, Issue and Law on or before 13th September 2013

5. To the extent that the Parties intend to rely upon the same evidence which has already been served in support of the applications for leave to apply for judicial review, or in opposition to it, any requirement at CPR 56.7(3) and CPR 56.10 to re-serve that evidence is dispensed with.

6. First Hearing is to be held in Chambers at 9.00am on 30th September, 2013

7. Directions will be given for the final determination of the Claims at the first hearing of the fixed date claim forms. In addition the Court will consider all pending interlocutory applications filed by the Parties.

8. There is no order as to costs.

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Justice Vicki Ann Ellis
High Court Judge