IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

CASE NO: 06385/2017

IN THE MATTER OF AN APPEAL FROM THE MAGISTRATES' COURT IN CAUSE #06385 of 2017

BETWEEN:

IAIN NIGEL MACKELLAR

Appellant

and

THE UNITED STATES OF AMERICA

1st Respondent

and

H.E. THE GOVERNOR OF THE CAYMAN ISLANDS

2nd Respondent

Appearances:	**Mr. Edward Fitzgerald Q.C. instructed by Mr. James Austin-Smith of Campbells for the Appellant**
	Ms. Toyin Salako of the ODPP for the 1st Respondent
	Ms. Clare Allen, Deputy Solicitor General/The Attorney General's Chambers for the 2nd Respondent
Before:	**Dame Linda Dobbs**
Heard:	**29th July 2020**
Further Note from Appellant:	**5th August 2020**

HEADNOTE

Criminal Law - Extradition *– Appellant's Application for Costs following successful appeal of Order for Extradition -* s.*134 of the* ***Extradition Act 2003 (Overseas Territories) Order*** *2016 – Whether Appellant should recover full actual costs – Whether the Court has the power to award the Governor Costs.*

JUDGMENT ON COSTS

INTRODUCTION

1. On 9th March 2020, following an appeal from the Summary Court, the Grand Court discharged the extradition order made against the Appellant on the basis that it would be oppressive to extradite him to the United States of America on the grounds of his serious and life-threatening illness.

2. The parties were to agree costs of the case between them. Regrettably, they have been unable to do so, and, consequently, have approached the Court for a ruling. The court received written submissions on costs from all three parties.

3. As time was limited for the hearing, the court directed the parties to distil the live issues into a single document. This has been done in a series of questions and will form the approach of this judgment. There will be little reference to the facts and legal arguments in the appeal, all of which can be found in the original judgment[1].

THE SUBMISSIONS: THE FIRST APPEAL

4. **Question #1:** "Whether there is a discretionary power to order the Appellant's costs out of public funds pursuant to s.134 of the ***Extradition Act 2003 (Overseas Territories) Order*** 2016?"

5. Section 134 of the ***Extradition Act 2003 (Overseas Territories) Order*** 2016 reads as follows:

> ***"Costs where discharge ordered***
> ***134.*** *(1) This section applies if any of the following occurs in relation to a person whose extradition to an extradition territory is requested under this Part-*
> *(a) an order for the person's discharge is made under this Part;*
> *(b) ...*
> *(ba) ...*

[1] Dated the 9th March 2020

(c) ...
(d) ....
(e) ...

(2) *In a case falling within subsection (1)(a), an order in favour of the person may be made by-*

(a) ...

(b) *the Supreme Court, if the order for the person's discharge is made by it;*

(c) ...

...

and such an order in favour of the person is to be such as the judge, the Supreme Court or the Judicial Committee considers just and reasonable to compensate the person for any expenses properly incurred by the person in the proceedings under this Part.

(3) ....

(4) ...."

6. There is no dispute between the parties that such a discretionary power exists.

7. The First Respondent has taken a point that there are no "Central Funds" in the Cayman Islands as in the UK, and thus it is not possible to make an order out of public funds. However, it was conceded that, as a matter of fact, if an order is made against either of the Respondents, it will effectively be coming from the public purse, whatever the appellation of the particular fund.

8. **Question #2:** "Whether the Appellant should be awarded his costs as the successful party who won the appeal?"

9. The two parties agree that the Appellant was the successful party and in principle is entitled to costs. The issue between the parties arises in the following question.

10. **Question #3**: "Whether the Appellant should recover his full actual costs for the hearing both in this Court and below? Whether the conduct of the prosecution is relevant to this issue? Whether, regardless, these costs should be capped at legal aid rates".

11. Relying on the phrase "Just and reasonable" the First Respondent submits that the Appellant should not recover all his costs. This will be developed when dealing with Question 4.

12. Ms Salako went through the various areas where complaint had been made about the conduct of the First Respondent. She pointed out that once the extradition process was started, the DPP had no choice but to continue. Decisions about bail were made by the Court. Bail was denied both in the Summary Court and on appeal in the Grand Court, being granted subsequently following a deterioration in the Appellant's health. The First Respondent, as obliged to do, presented the case for Extradition and the Magistrate came to her decision giving proper reasons, save for where there was criticism by the appeal court on the one issue regarding the Appellant's medical condition.

13. So far as capping at Legal Aid rates is concerned: The First Respondent submits that it is important to consider the public purse and the fact that it is the Cayman Islands' public purse and not that of the United States of America. There is a limited budget in the Cayman Islands. The costs should be capped to legal aid rates therefore. It was suggested that, if the fees were not capped, a two tier system would be created where the issue of whether the potential extraditee was legally aided or privately represented might affect the Governor's decision as to whether he should direct that the extradition process start at all given the potential costs.

14. The Appellant submits that he is entitled to his full costs both in the Grand Court and in the court below irrespective of the fact that he did not succeed in the court below.

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15. There are few extradition authorities on costs, no doubt because the majority of individuals subject to extradition requests are legally aided and, it is submitted, because the law is uncontroversial. The Appellant relies on the case of ***Government of United States of America v. Tollman***[2] where Mr and Mrs Tollman, following a successful appeal, recovered all their costs. Both successfully resisted extradition on the basis that it would be oppressive to extradite them.

16. The Appellant submits that he has been put to additional expense due to the conduct of the First Respondent. A number of examples were set out, including, the First Respondent initially challenging the state of health of the Appellant, resisting the applications for bail and offering an undertaking to support bail for the Appellant in the US at the last minute at the start of the appeal hearing. Robust observations made by this court in the original judgment are also relied on to make good the point and to submit that costs should be ordered on the indemnity basis.

17. Regarding the question of capping at legal aid rates, the Appellant submits that (a) there is no power to do so under the Order and (b) it would be unfair to do so. This was a complex case and the Appellant, on the basis of equality of arms, was entitled to have specialist counsel to represent him.

18. **Question #4:** "Whether there should be any reduction in the costs ordered to the successful Appellant because he did not succeed on all of the grounds of appeal? If so, should this be done by what percentage or by reference to actual numbers?"

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[2] [2008] 3 All ER 150

19. The First Respondent submits that there should be a significant reduction in the costs awarded because the Appellant won on one point only and lost all the legal arguments. It should be done on a proportionate basis and not issue by issue, although bearing in mind that the Appellant won on one issue alone.

20. The Appellant, quoting from Lord Justice May's judgment in the case of ***Lipkin Gorman v Kapnale Ltd***[3], submits that the principle to be gleaned from the judgment is that "the winner, is in general entitled to be paid his costs." In written submissions the point was made, quoting from a number of cases, that a successful party does not have to succeed in every aspect of their defence to give rise to a presumption that they are entitled to their costs. There is no automatic rule requiring a reduction of a successful party's costs where they have lost on one or more issues. Weight should be given to the overall success of the winning party. Here, the Appellant was resisting extradition. He was successful.

THE SUBMISSIONS: THE SECOND APPEAL

21. The Appellant does not seek costs against the Second Respondent. Nevertheless, the Second Respondent, relying on s.133 and s.134 of the Order and also on O.62 of the ***Grand Court Rules (GCR)*** seeks an order of costs against the Appellant for the costs incurred by the Second Appellant. The basis for the submission is that, although the second appeal fell away by virtue of the decision in the first appeal, the court had indicated at the end of the original judgment that the Appeal against the Second Appellant would have failed, should the court have needed to give a judgment in that appeal.

[3] [1989] 1 WLR 1340 @ 1389-1390

22. The following questions were agreed by counsel.

23. **Question #5:** "Whether the Court has power to award the Governor his costs? If so, should it exercise that power and what should these costs be?"

24. Miss Allen for the Governor, submitted that s.133 of the Order provides that where the Supreme Court dismisses an application for leave to appeal, the court may make an order for costs to be paid by that applicant which the court considers just and reasonable. Relying on ***Bennion on Statutory Interpretation***, the argument is that the Court can look at the heading of the relevant section and give it a generous interpretation to find that the Applicant effectively lost the second appeal, even though the court did not deliver a judgment on the issue. The word "dismissed" in the legislation can be read to mean "Not granted." The costs sought are the costs of engaging Leading Counsel.

25. The Appellant submits that s.134 of the Order makes no provision for a costs order in favour of the Governor. Section 133 applies to an unsuccessful applicant. In this case, the second appeal was not determined. The GCR provide for the conduct of civil proceedings and are not applicable to extradition hearings.

26. **Question #6:** "If not, is it permissible for the court to reduce the costs awarded in respect of the Appellant's successful appeal to reflect the Governor's costs?"

27. It is suggested by the Second Respondent that in order to save the court making multiple orders, the costs incurred by the Second Respondent should be deducted from any amount awarded to the Appellant in relation to the first appeal. This could

be achieved as an accounting exercise because, although they are different budgets, it is ultimately the same public purse. No authority is provided for such a proposition.

28. The alternative submission by the Second Respondent is that under s.134 when considering what is "just and reasonable" the fact of the failed second appeal can be taken into account when considering the costs to be awarded to the Appellant by taking into account the expenditure on an appeal which would not have succeeded.

29. The Appellant contends that there is no power under either section to engage in such a procedure.

30. **Question #7:** "Do the Learned Judge's *obiter* observations justify an award of costs to the Governor or a reduction in the costs to the Appellant in the first appeal?"

31. The Second Respondent submits in the affirmative. The Appellant in the negative.

THE PRINCIPLES

32. The Court, in reaching its decision has been guided by, *inter alia*, the following principles.

a. The starting point is s.134 of the Order which gives the court a discretion consistent with the approach to costs generally.

b. The court has a broad discretion.

c. The general rule is that the successful party is entitled to costs from the unsuccessful party, but the court has a wide discretion to order otherwise.

d. The normal rule should only be departed from where the needs of justice and the circumstances of the particular case require it. However, caution should be exercised before departing from the normal rule.

e. The court can take into account the conduct of the parties and also whether a party has succeeded in whole or in part of its case.

f. There is no automatic rule requiring the reduction of a party's costs if it loses on one or more issue but the court can make a reduction to reflect that fact that the party did not get all that was claimed.

g. Where the raising of issues has added significant time and costd to the proceedings the party may be deprived of some or all of the costs whether or not they have acted unreasonably.

h. Costs on an indemnity bass are for unreasonable behaviour. There must be a firm finding of unreasonable conduct by the court to make such an order.

DECISION: THE FIRST APPEAL

33. The Court, it is agreed, clearly has the power to make an order for costs in the Appellant's favour. Those costs will come from the public purse.

34. It is also agreed that the Appellant is the successful party and therefore entitled to his costs.

35. There are guidelines in existence in relation to the taxation of costs in the Cayman Islands, but they do not relate to criminal cases[4]. No authority or Practice Direction has been drawn to my attention to demonstrate that the court has the power to order that the costs be capped to Legal Aid rates. Whilst a taxing master might disallow certain costs, that is not the same as a blanket cap on the rates allowable. The knowledge that there was an additional financial risk in relation to costs when engaging lawyers privately – risk over and above the usual risks of litigation and what is contained in the guidelines – is something which, as a matter of fairness, would need to be explicit and clear in my judgment. A client needs to know what the risks are, in order to be able to make an informed choice.

36. In the absence of any guidance on this issue, the court is not prepared to order that the costs be capped to Legal Aid rates. The First Respondent's argument about the creation of a two-tier system and the possible effect on the Governor's decision to initiate proceedings is not tenable.

37. I have considered the issue of whether costs should be awarded on the indemnity principle. I have reached the conclusion that they should not. This is because, although the court indulged in some robust criticism in the course of the original judgment, Ms Salako, during the hearing, gave further and better particulars, which put some of the conduct in perspective and mitigated part of the criticism. A combination of bureaucracy, lack of coordination between different departments in the USA, and, other factors, make the task of the DPP in the Cayman Islands difficult. Costs will be on the standard basis.

[4] (Practice Direction 1/2011)

38. The real issue is whether the Appellant should recover all his costs. The parties are agreed that the court should approach this not on an issue by issue basis, but on a proportioned basis.

39. The Appellant submits that the general rule should be followed and that losing on some points does not automatically mean that the Appellant should be penalised. It is apparent from reading the cases cited in the ***White Book*** that full costs have been awarded even though the successful party has not won all the arguments. Each case will depend on its own individual facts, so there is little assistance to be gained from reading the detail of the cases.

40. As noted above, the Appellant submitted that had the First Respondent accepted from the outset that it would be oppressive to extradite the Appellant then the proceedings would not have been necessary. In other words, this was the real issue in the case. That being the case, the Appellant could have made it the only issue in the case when advancing submissions. Instead, a substantial number of legal issues were raised, at the court below, all of which were unsuccessful. On the papers, the USA government has a good case against the Appellant and the request for extradition was properly made at the time.

41. The multiple issues were raised again on appeal and additional arguments thrown in, all of which were unsuccessful and for most, leave to appeal was not even granted. It was clear on a reading of the papers, that the real issue in the case was the Appellant's state of health which had deteriorated significantly at a later stage. The First Respondent lost its case, not by lack of merit of the substance of the case.

42. During the appeal hearing, when addressing the court with regard to the proposed undertaking from the First Respondent, Mr Fitzgerald informed the court that the Appellant had approached the First Respondent in the court below seeking an undertaking. The request was denied at that time. Implicit in that approach was a recognition that the case for extradition was made out. Despite this apparent recognition, as noted above, multiple issues were raised and argued both in the Summary Court and on appeal.

43. Mr Fitzgerald has conceded that the Appellant lost on most of the grounds and whilst not encouraging the court to make any reduction in costs, accepted that the court could do so, but submitted that if the court were to do so, it should be a modest reduction not falling below 80%. This is because a significant proportion of the Appellant's costs related to the medical issue on which the Appellant won.

44. It is to be noted that the legal arguments on the five grounds, not including the successful one, occupied a considerable amount of court time and went well into the second day of the three-day hearing of the First Appeal. Considerable material, both evidence and authorities were relied on during the submissions.

45. In my judgment, it is appropriate to reflect the fact that this was not treated as a single issue case when it should have been, and that, as the court found, the grounds, apart from the successful one, were grounds which were unlikely to succeed. I make a reduction of 35% therefore. The court was minded to make a greater reduction, but took into account that additional costs were incurred as a result of the First Respondent's late change of tack in relation to the undertaking and all that flowed thereafter.

46. The First Respondent is ordered to pay 65% of the Appellant's costs here and in the court below.

DECISION: THE SECOND APPEAL

47. The bold and novel arguments of Miss Allen do not find favour with the court for the simple reason that the Second Appeal was not determined. The post-script in the judgment, referred to as the court's *obiter* observations, do not change the position. The Appeal was neither allowed nor dismissed. There is no power to order costs in the Governor's favour.

ASSESSMENT OF COSTS

48. The final question posed by the parties was directions by the court on the assessment of costs.

49. Mr Austin-Smith for the Appellant prepared a helpful note on a suggested approach to the assessment of costs. The two Respondents were given the opportunity to comment on the note. The Second Respondent replied with nothing to add. The First Respondent has not replied to date.

50. Having set out the procedure under the GCR, which is the system used in civil proceedings in the Cayman Islands, two possible routes were identified, to avoid the risk of double discounting in the event that the court made an order for a proportion of the Appellant's costs. The court could order the taxing master to disallow costs which are obviously unrelated to the proceedings or which are manifestly unreasonable. The alternative is to order that costs be taxed on the indemnity basis which is the basis the Appellant had advocated in the submissions. Should the court make an order on the standard basis, it is submitted that it was appropriate to certify

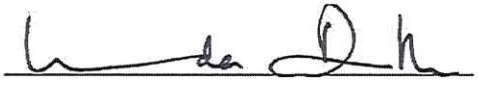
that the proceedings were unusually complex and important and that the maximum hourly rates allowable in the Financial Services Division are to apply.

51. The court has already indicated that the Appellant is to receive 65% of his costs for the Summary court and appeal proceedings which includes the costs hearings. The court does not intend to go into a hearing by hearing investigation as to what happened in bail applications and other ancillary hearings. There is not enough information before the court. Moreover, it is not a proportionate use of court time. With regards to the costs of taxation hearings: Whatever the usual rule is regarding such hearings should apply.

52. The costs will be assessed on the standard basis. The Taxing Master should avoid double discounting and only disallow costs which are quite clearly unrelated to the proceedings or manifestly unreasonable. No further discounting should be engaged in.

53. The court certifies that the case was unusually important. It concerned the life-threatening illness of the Appellant and right to life and related issues. It was also complex, although not perhaps unusually complex, but certainly on a par with a Financial Services Division case. Accordingly, those rates should apply and the lawyers' fees should be assessed by reference to the actual rates charged.

Dated this the 28th day of August 2020



Dame Linda Dobbs
Acting Judge of the Grand Court