IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G 365 OF 2013

BETWEEN

JERRY KORBLA KPESUNU

PETITIONER

AND

THE CHIEF IMMIGRATION OFFICER

FIRST RESPONDENT

AND

THE ATTORNEY GENERAL

SECOND RESPONDENT

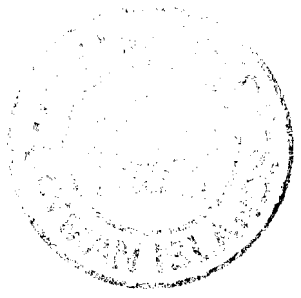
Appearances:	**Mr. Dennis Brady for the Petitioner** **Ms. Reshma Sharma and Ms. Jenny Catran for the Respondents**
Before:	**Hon. Justice Timothy Owen Q.C. (Acting)**
Date of Hearing:	**19th August 2014**
Judgment Delivered:	**25th August 2014**
Judgment Circulated:	**26th August 2014**

JUDGMENT

Introduction

1. This case was listed before me as a Directions Hearing in the context of a Petition filed on behalf of the Petitioner, Mr. Kpesunu, on 24th October 2013 and seeking various forms of relief pursuant to section 26 of the

Cayman Islands Constitution Order 2009. However in light of the conclusion I have reached as to the fundamentally misconceived basis for the Petition, it is neither necessary nor appropriate to give directions for its further progress. Accordingly, for reasons set out below, it is dismissed. I should add at the outset of this Judgment that, having read the written submissions lodged by the parties and heard brief oral submissions from Mr. Brady on behalf of the Petitioner, both parties agreed to my giving this final Judgment on the merits of the Petition despite the fact that the case had been listed merely for directions. I also add that it appears that at no stage was the Petition served on the Director of Public Prosecutions who was not represented before me. I was initially concerned about the appropriateness of continuing with the hearing in these circumstances given that, as it seems to me, the DPP was plainly an interested party in light of the fact that a criminal trial has been adjourned for some 11 months pending the resolution of these proceedings. But in light of the fact that the Attorney General *is* a party to the proceedings - and in view of the very clear view I have formed as to the abusive nature of this Petition - I have concluded that no useful purpose would have been served by adjourning the proceedings. Rather the most appropriate course is forthwith to deliver this Judgment so that the criminal trial can resume as soon as reasonably practicable.



The facts

2. The Petitioner is a citizen of Ghana who at all relevant times was married to a Caymanian, Darlene Manzanares-Kpesunu, and was accordingly the beneficiary of a Residency and Employment Rights Certificate ("RERC") issued on 4th October 2012. He later took up employment as a security guard at the Owen Roberts airport. It appears that after their marriage in June 2012 serious difficulties quickly developed, culminating in Mrs. Manzanares-Kpesunu writing a letter dated 15th November 2012 to the Chief Immigration Officer announcing that "my husband has proven that this is a 'marriage of convenience'...and I am desperately asking all privileges be revoked as this marriage has no hope of reconciliation."

3. By letter dated 18th December 2012 the Caymanian Status and Permanent Residency Board ("the Board") wrote to the Petitioner informing him that they were minded to revoke his RERC. On 2nd January 2013, the Petitioner replied outlining his version of events but in the event the Board wrote a further letter to the Petitioner dated 15th February 2013 revoking his RERC as from 31st January 2013. On 26th February 2013 the Petitioner lodged an appeal against the revocation decision to the Immigration Appeal Tribunal and on the same day his lawyer wrote to the Chief Immigration Officer seeking an extension of his right to work. The letter asserted that the Petitioner was entitled as of right to an extension of

his permission to work by operation of law pursuant to the provisions of s.31 (8) (b) of the Immigration Law 2012.

4. It is the Petitioner's case that at some stage before he was eventually arrested he visited the Department of Immigration where he met Ms. Roseta Moore, an official within the Department. He claims that he explained to Ms. Moore that he had lodged an appeal against the revocation of his RERC and that he had applied to the Chief Immigration Officer for the right to continue working in the Cayman Islands. He says he was given a Working by Operation of Law application form to complete but that when he later attempted to submit the form, Ms. Moore refused to accept it, told him that he had no right to remain on the island and that he should depart immediately. It is unclear to me the extent to which the Petitioner's version of events on this aspect of the case is rejected by the Chief Immigration Officer but it is not necessary to resolve any potential factual disputes within the instant proceedings in light of my conclusion as to the abusive nature of the Petition itself.

5. On 10th April 2013, the Petitioner was notified by an Inspector Scott that he should report to the Enforcement Section of the Department of Immigration the following day at 09.00. Mr. Kpesunu duly attended accompanied by his lawyer, Mr. Dennis Brady, and later that morning the Petitioner was placed under arrest for the offence of overstaying. He was

fingerprinted, photographed and later bailed after some two hours in custody. I do not have a copy of the original charge sheet amongst my papers but it appears that prior to his release on bail the Petitioner was formally charged with the offence of remaining in the Cayman Islands without authorization contrary to s.78 (1) (c) of the Immigration Law (2012 Revision), the particulars being that "on the 26th March and 11th April 2013 you were found to be overstaying your authorization to remain in the Cayman Islands".

6. The Petitioner's criminal trial for overstaying commenced in September 2013 before His Honour Magistrate Foldats. No formal record of the proceedings has been produced but it is common ground that in the course of the cross-examination of Ms. Moore on 26th September 2013, the learned Magistrate became concerned that the line of questioning being pursued by Mr. Brady engaged issues under the Cayman Islands Constitution Order 2009 and that it was the Magistrate himself who took the initiative to adjourn the trial so that Mr. Brady might "consider his options". Significantly in my view, when adjourning the criminal trial the learned Magistrate did not make a reference to the Grand Court under s.26 (2) of the Constitution pursuant to Order 77A, r.5 of the Grand Court (Amendment No. 2 Rules) 2012 and of course at the time he had adjourned he had made no findings of fact capable of being incorporated into any such reference nor had the Summary Court identified any issue

as to the interpretation of the Bill of Rights on which the opinion of the Grand Court was sought. In the course of the oral hearing before me, I asked Mr. Brady whether either party to the criminal trial raised any concern as to the appropriateness of adjourning the criminal proceedings or sought to clarify with the Magistrate what it was that was concerning him in light of Mr. Brady's cross-examination. I was told that not only did neither party seek clarification but that at no stage did the learned Magistrate hear any submissions on whether there existed a jurisdictional bar to him considering any Bill of Rights issues that might be relevant to the questions for disposal within the criminal trial itself. Mr. Brady explained to me that he, in effect, deferred to the Court's concern that there might be issues arising under the Constitution Order 2009 and that the decision to pursue this Petition was taken without any debate before the Magistrate as to the appropriateness of adjourning the criminal trial pending resolution of this Petition. For reasons which will become clear, I regard this as unfortunate.

7. The criminal trial having been adjourned, the instant Petition was lodged by Mr. Kpesunu with the Grand Court on 24th October 2013 and supported by an Affidavit which summarized the key facts and proceeded to make a number of allegations of breaches of various provisions of the Bill of Rights contained in Part I of the Cayman Islands Constitution Order 2009. These breaches were said to arise in connection with the acts and

omissions of Ms. Moore and the Chief Immigration Officer in refusing to accept his application to work by operation of law pending the outcome of his appeal to the Immigration Appeals Tribunal and the decisions of the immigration enforcement department in arresting, questioning and charging the Petitioner with the criminal offence of overstaying. Specifically, the Petition alleges that Mr. Kpesunu, as a person still married to a Caymanian, had a right to reside with his spouse pursuant to Section 9(1) of the Bill of Rights and that the acts of the various officials in demanding that he leave the Cayman Islands and then prosecuting him for overstaying constituted disproportionate, unlawful, oppressive and discriminatory conduct in breach of Sections 7,8, 13 and 16 of the Bill of Rights.

8. By letter dated 28th November 2013, the Attorney General's Chambers wrote to Mr. Brady acknowledging receipt of the Petition, pointing out that much of the factual basis for the Petition remained in dispute and asserting that s.26 (5) of the Bill of Rights preserves the jurisdiction of the Summary Court to deal with procedural matters and that the Summary Court also has jurisdiction to assess the consistency of any legislative provision with the Bill of Rights and to interpret any legislative provision "so far as it is possible to do so" in a manner that is compatible with the rights set out in the Bill of Rights (see s.25 of The Constitution Order). Finally, and importantly, it was asserted that "it is inappropriate to bring a

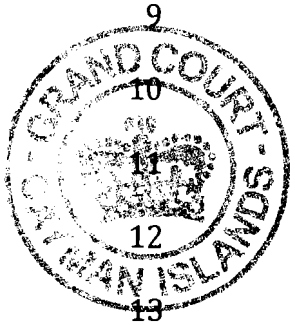
collateral challenge to the decision to charge Mr. Kpesunu under s.7 (1) of the Bill of Rights, while the trial itself is on foot. The current Summary Court trial is "the *forum conveniens* for any questions of procedural fairness to be aired." Against this background, the Respondent's Note for the Directions Hearing rightly identifies the central issue to be determined as follows:

> "How should the Grand Court treat a petition under ss23 and 26 of the Bill of Rights which arises from a *sub judice* criminal trial in the Summary Court for overstaying under s.78 (1) (c) of the Immigration Law (2012 Revision)?"

Relevant legal principles

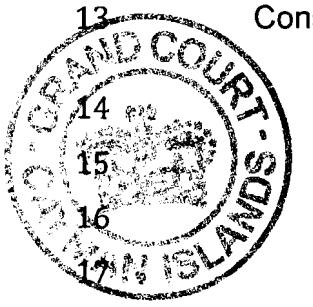
9. As has been frequently observed over the years by Judges far wiser than me, in law context is everything. The relevant context here is that a criminal trial involving the Petitioner has now been adjourned in mid flow for almost a year while this Petition has been pending before the Grand Court. No facts have been found by the Summary Court and although he expressed concern as to the issues which were being raised before him on behalf of Mr. Kpesunu by way of his Defence to the charge of overstaying, the learned Magistrate at no stage formulated any questions of law for determination by the Grand Court nor did he refer the case to the Grand Court himself pursuant to s.26 (2) of the Constitution. Instead what has happened is that Mr. Kpesunu has initiated satellite litigation designed to raise the very issues that now stand adjourned before the

criminal court. In effect, the Petition is no more than a collateral challenge to the legality of the charge and the events surrounding the decision to pursue it. Of course, if it were truly the case that the issues raised in the Petition were incapable in law of being adjudicated upon within the Summary Court process, it might be said that the administration of justice was well served by bringing an early judicial review of the legality of the prosecution rather than requiring Mr. Kpesunu to wait to be convicted and then to pursue an appeal against his conviction. For this reason, it has long been acknowledged in England and Wales that the High Court may entertain, in exceptional circumstances, an application for judicial review of a decision to prosecute rather than require an individual defendant to pursue his remedy within the conventional criminal trial process. But are the circumstances in this case such that this exceptional course of action is to be permitted notwithstanding the fact that the criminal trial has commenced without any prior challenge to the legality of the decision to prosecute?



10. The issues which Mr. Kpesunu wishes to pursue in his Petition are a mixture of attacks on the prosecuting authority for the circumstances in which the criminal prosecution of him for overstaying was commenced and an assertion of a legal right to remain and work in the Cayman Islands by operation of law pursuant to s.31 (8) (b) of the Immigration Law (2012 Revision). The former may, if accepted by the learned Magistrate, result

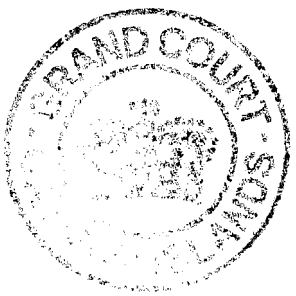
in the Summary Court granting a stay of the proceedings on the basis that they amount to an abuse of the process of the Court whereas the latter assertion of law would logically, if accepted by the Court, result in a finding of not guilty. Either way, I see no basis whatsoever for a concern that the Summary Court is not competent to adjudicate upon any of the issues raised in Mr. Kpesunu's Petition. Indeed Mr. Brady makes no submission that the Summary Court is incapable of resolving any of the arguments contained in the Petition within the trial process. As the Respondents have submitted, the Summary Court may address Bill of Rights issues which arise within its statutory jurisdiction under the Summary Jurisdiction Law and Rules, the Penal Code and the Criminal Procedure Code. It is of course the case that section 26 (1) of the Bill of Rights (Part I of the Constitution) states that:



> "Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time."

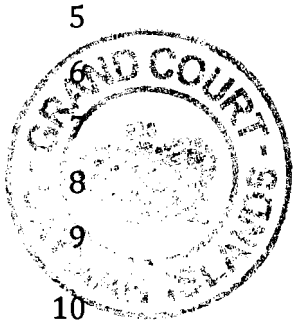
However this provision does not mean that a Summary Court is incapable of addressing and resolving Bill of Rights issues which arise within its ordinary criminal jurisdiction and indeed it is routine for first instance courts to consider human rights/constitutional law issues both here and in England and Wales under the Human Rights Act 1998. As pointed out by

the Respondent, s.26 (5) of the Bill of Rights preserves the jurisdiction of all courts to manage their own procedure "to ensure that cases are dealt with justly, fairly and expeditiously, including their ability to dismiss applications that are vexatious or unreasonable". It is this jurisdiction that is exercised whenever the Summary Court determines issues of admissibility of evidence allegedly obtained in circumstances which violate Constitutional guarantees such as the right to private and family life or the right to a fair trial (see for example R v. Minzett (2011) 2 CILR 236 and R v. Stewart (2000) CILR 213). Moreover, it is well established that a defendant to a criminal charge may raise as defence thereto the contention that subordinate legislation under which he is being prosecuted or an administrative decision made thereunder is *ultra vires* and unlawful (see Boddington v. British Transport Police [1999] 2 AC 143). Thus, Mr. Kpesunu's argument that Ms. Moore acted unlawfully in refusing to receive his application to continue working pending his appeal is one that is, in my view, at least potentially capable of being advanced either by way of defence to the overstaying charge before the Summary Court or possibly as an aspect of an abuse of process submission on the basis that it is unfair to try Mr. Kpesunu (although I express no view whatsoever as to its legal or factual merits having heard no argument on these issues).



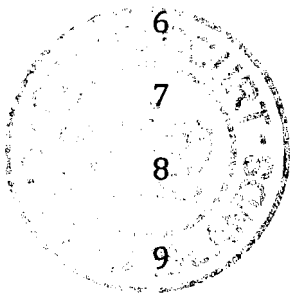
11. The single restriction upon the jurisdiction of the Summary Court to adjudicate upon issues arising under the Constitution is to be found in s.26 (2) of the Bill of Rights which states that:

> "If, in any proceedings in any court established in the Cayman Islands other than the Grand Court or the Court of Appeal, any issue arises as to the interpretation of the Bill of Rights, the court in which the question has arisen shall refer the question to the Grand Court if it is in its opinion necessary for the issue to be determined."



It follows from this limitation that the Summary Court is not competent to adjudicate on the interpretation of the Bill of Rights itself. But as I have already made clear, before the criminal trial was adjourned no issue of interpretation had been identified in this case either by the learned Magistrate or by Mr. Kpesunu. The Petition alleges breaches of Mr. Kpesunu's rights under the Constitution in relation to his arrest and subsequent prosecution but nowhere does the Petition even begin to formulate an issue of interpretation of the Bill of Rights relevant to the resolution of the criminal trial process. Were such an issue to arise during any trial before the Summary Court, the proper course would be for the Court to identify the issue the determination of which is necessary for the purposes of the trial process and to make a reference to the Grand Court pursuant to s.26 (2) of the Bill of Rights. It should be noted that the threshold requirement in s.26 (2) is one of necessity not desirability. Any reference pursuant s.26 (2) of the Bill of Rights should only be made in a

summary criminal trial if, in the view of the Court, it is truly necessary for the resolution of the criminal proceedings. Any such reference would have to comply with the detailed requirements of O.77A, r 5 and thus must concisely set out, in any criminal cause or matter, the charge, summons, information or complaint in respect of which the proceedings arose, the facts found by the Lower Court to have been proved or admitted and/or the facts to be presumed and, crucially, the issue as to the interpretation of the Bill of Rights on which the opinion of the Grand Court is sought.



12. There are compelling reasons of policy which explain why Courts in common law jurisdictions have sought to place very firm restrictions on the pursuit of satellite litigation – whether in the form of applications for judicial review or, as here, a constitutional petition – whose effect is to delay or otherwise interfere with the prosecution of criminal charges before a court of criminal jurisdiction. These reasons were set out in clear terms in the Judgment of Lord Bingham and Lord Walker in the Privy Council appeal of Sharma v. Brown-Antoine & others [2006] UKPC 57 which arose from an attempt to pursue an application for judicial review by the Chief Justice of Trinidad & Tobago of the decision to prosecute him on a charge of attempting to pervert the course of justice. To avert such prosecution, the Chief Justice had been granted leave to apply for judicial review of the Director of Public Prosecution's decision to prosecute him and an order staying all action consequential on that decision. The central issue before

the Board was whether the decision to prosecute the Chief Justice should be examined by way of judicial review or whether the criminal process should be allowed to take its course. The Chief Justice's case was that there had been improper, politically motivated interference in the prosecution process by the Prime Minister and Attorney General, politically inspired dishonesty by the Chief Magistrate and improper politically inspired decision making and conduct by the Deputy Director, the Assistant Commissioner and the Commissioner, respectively an attorney discharging the important functions of the DPP and two of the most senior officers in the state.

13. In explaining why the appeal was dismissed on the basis that the Court of Appeal had been right to set aside the grant of leave to seek judicial review of the Deputy Director's decision, Lord Bingham and Lord Walker identified the following principles of law in paragraph 14 (5) of their Judgment:

> "14.....(5) It is well-established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review: *Matalulu*, above, pp 735-736; *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, paras 17, 21. It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional

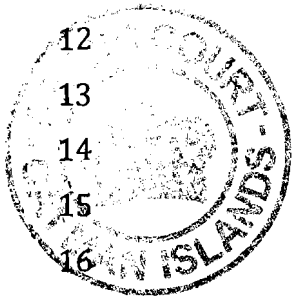
remedy. The language of the cases shows a uniform approach: "rare in the extreme" (*R v Inland Revenue Commissioners, Ex p Mead* [1993] 1 All ER 772, 782); "sparingly exercised" (*R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 140); "very hesitant" (*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449); "very rare indeed" (*R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49); "very rarely" (*R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 371, Lord Steyn said:

> "My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review."

With that ruling, other members of the House expressly or generally agreed: pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute (see *Mohit*, para 18): in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy: *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61,[2002] 1 AC 800, para 67; *Matalulu*, above, p 736. In *Wayte v United States* (1985) 470 US 598, 607, Powell J. described the decision to prosecute as "particularly ill-suited to judicial review."

The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:

(i) "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" (*Matalulu*, above, p 735, cited in *Mohit*, above, para 17);



(ii) "the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account" (counsel's argument in *Mohit*, above, para 18, accepting that the threshold of a successful challenge is "a high one");

(iii) the delay inevitably caused to the criminal trial if it proceeds (*Kebilene*, above, p 371; *Pretty*, above, para 77);

(iv) "the desirability of all challenges taking place in the criminal trial or on appeal" (*Kebilene*, above, p 371; and see *Pepushi*, above, para 49). In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself (*R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42). But, as Lord Lane C.J. pointed out with reference to abuse

applications in *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, 642:

> "We should like to add to that statement of principle by stressing a point which is somewhat overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay."

(v) the blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts: *Director of Public Prosecutions v Humphrys* [1977] AC 1, 24, 26, 46, 53; *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718, 733, 742; *R v Power* [1994] 1 SCR 601, 621-623; *Kostuch v Attorney General of Alberta*, above, pp 449-450; *Pretty*, above, para 121."

14. In a judgment that concurred in dismissing the appeal, Baroness Hale of Richmond, Lord Carswell and Lord Mance expanded on the relevant principles that governed the jurisdiction of a criminal court to stay proceedings on grounds of abuse of process as follows:

> "30. We have had the benefit of reading in draft the opinion prepared in this matter by Lord Bingham of Cornhill and Lord Walker of Gestingthorpe. We shall in its light confine ourselves to what we perceive as the main areas where there may be a difference of view or emphasis. We start however by expressing our full agreement with the proposition that judicial review of a decision to prosecute is an exceptional remedy of

last resort, for all the reasons which Lord Bingham and Lord Walker identify in paragraph 14.

31. The possibility of a challenge to the prosecutorial decision, and the apparent inevitability of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. They could properly be raised in the criminal proceedings, either in the course of an application to stay those proceedings on the ground of abuse of process or in any substantive trial. Like Lord Bingham and Lord Walker, we are not persuaded that the Chief Justice's complaint could not properly be resolved within the criminal process. It is clear that the criminal courts would have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of the process of the court: cf *R v. Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42, where Lord Griffiths (with whose speech Lord Bridge of Harwich, Lord Lowry and Lord Slynn of Hadley agreed) explained the rationale in the following passage (at pp.61H-62A):

> "If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law."

32. In our opinion, the same responsibility extends to the oversight of executive action in the form of a police or other prosecutorial decision to prosecute. The power to stay for abuse of process can and should be understood widely enough to embrace an application challenging a decision to prosecute on the ground that it was arrived at under political pressure or influence or was motivated politically rather than by an objective review of proper prosecutorial considerations (such as, in England, those set out in the Code for Crown Prosecutors issued under the Prosecution of Offences Act 1985).

33. Among the authorities which give support to these propositions we would point to *R v. Grays Justices, Ex p. Low* [1990] 1 QB 54, *Hui-Ching v. The Queen* [1992] 1 AC 34, 57, *Attorney-General of Trinidad and Tobago v. Phillip* [1995] 1 AC 396, 417C-D and *R v. Director of Public Prosecutions, Ex p. Kebilene* [2000] 2 AC 326. In so holding, however, we must emphasise that we are expressing only an opinion on the existence of a legal basis for such an application and none whatever on the prospects of its success or failure.

34. Viewing the matter generally, the present is clearly a case where all issues should if possible be resolved in one set of proceedings. There are potential disadvantages for all concerned, including the public, in a scenario of which one outcome might be long and quite probably public judicial review proceedings followed by criminal proceedings. We add that, in our view, it will in a single set of criminal proceedings be easier to identify and address in the appropriate way the different issues likely to arise. The suggestion of improper political interference in or influence over the prosecuting decision is distinct in principle from the question whether the proposed charge has any basis – the decision to charge may have been

entirely proper, without the charge being in any way sustainable. But there is in this case some potential overlap in some of the evidence relevant to each of these matters, and a risk that they would not be easily severable in the evidence or judgment given on any judicial review hearing. A criminal judge would we think be better placed to manage the different potential issues, such as whether the decision to charge was politically influenced, whether there is evidence fit to be left to the jury (both matters for him at separate stages of any trial) and, if the case gets that far, how the evidence should be left to the jury. The court is entitled to weigh all such disadvantages in the balance along with any possible advantage that the Chief Justice might hope to gain by judicial review proceedings. That was, as we see it, the approach taken by Lord Steyn in *Ex p. Kebilene*.

35. Viewing the matter as a whole, and in the light of what we have said in paragraphs 31 to 34 above, this is not a case where judicial review proceedings ought to be permitted. We rest our decision on these grounds, and not upon any conclusion about the substantive strength or weakness of any challenge to the decision to prosecute..."

15. Observations to similar effect were made by the Privy Council in the later decision in Panday v. Virgil [2008] UKPC 24 where the Board (in a unanimous decision) made clear that a magistrates' court enjoys a very broad jurisdiction to stay criminal proceedings by reference to the well-known principles set out in R v. Horsferry Road Magistrates' Court ex parte Bennett [1994] 1 AC 42. Having referred to Bennett together with

the other well-known abuse of process decisions in R v. Latif [1996] 1 WLR 104 and R v. Looseley [2001] 1 WLR 2060, Lord Brown said as follows:

> "28. It will readily be seen that the factor common to all these cases, indeed the central consideration underlying the entire principle, is that the various situations in question all involved the defendant standing trial when, but for an abuse of executive power, he would never have been before the Court at all. In the wrongful extradition cases the defendant ought properly not to have been within the jurisdiction; only a violation of the rule of law had brought him here. Similarly, in the entrapment cases, the defendant only committed the offence because the enforcement officer wrongly incited him to do so. True, in both situations, a fair trial could take place. But, given that there should have been no trial at all, the imperative consideration became the vindication of the rule of law. As Lord Hoffmann put it in *Looseley* at para 40:
>
> > "The stay is sometimes said to be on the ground that the proceedings are an abuse of process, but Lord Griffiths [in *Bennett*] described the jurisdiction more broadly and, I respectfully think, more accurately, as the jurisdiction to prevent abuse of executive power."
>
> That principle simply has no application here. This appellant has, quite rightly, had his conviction quashed. *A fortiori* that would have been the appropriate result had he established not merely apparent bias but, consequent on government pressure to convict, actual bias. But the quashing of his conviction restores the appellant to the position he was in before the unfair trial. Why should his success gain him

immunity from what is conceded to be the position he now faces under the Court of Appeal's order: a fair trial upon charges properly brought?

29. Their Lordships having decided that the *Bennett* principle cannot in any event be invoked here, it is strictly unnecessary to address Mr. Clayton's third submission—his contention that, if *Bennett* applied, the magistrate would be unable to exercise the relevant jurisdiction so that the Court of Appeal ought themselves to have dealt with the issue and not remitted it. Since, however, the matter was fully argued and since the Board has reached a clear view upon it, a brief judgment on the point may assist in future cases.

30. Mr. Clayton founds this submission on a single passage from Lord Griffiths' speech in *Bennett* (at p64):

> "I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures...[T]his wider responsibility for upholding the rule of law must be that of the High Court and . . . if a serious question arises as to the

deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken."

31. No other member of the Committee addressed the particular question as to when exactly it is open to magistrates to exercise this wider supervisory jurisdiction themselves rather than adjourn the proceedings for a judicial review application to be made in the Divisional Court. Although in the passage cited Lord Griffiths initially draws the distinction between on the one hand "matters directly affecting the fairness of the trial . . . such as delay or unfair manipulation of court procedures" and on the other hand "the wider supervisory jurisdiction" (the latter being described as "a horse of a very different colour from the narrower issues which arise when considering domestic criminal trial procedures"), the only illustration he gives of "this wider responsibility for upholding the rule of law" is when "a serious question arises as to the deliberate abuse of extradition procedures", the very question raised in *Bennett* itself.

32. Lord Griffiths had earlier in his speech noted with approval a number of authorities recognising the magistrate's power, albeit to be "most sparingly exercised", to decline to allow a criminal prosecution to proceed on the ground that it was oppressive or otherwise an abuse of the court's process. And Lord Oliver, although dissenting on the main issue as to whether any court could properly restrain a prosecution just because it followed on from an unlawful extradition, accepted (at p70) "that the court has power to

prevent the abuse of its own process". This would "include the power to investigate the bona fides of the charge which it is called upon to try and to decline to entertain a charge instituted in bad faith or oppressively—for instance, if the accused's co-operation in the investigation of a crime has been secured by an executive undertaking that no prosecution will take place" (another clear illustration of circumstances in which the defendant ought never to have been before the court at all).

33. Their Lordships have already mentioned the entrapment cases as an example of the *Bennett* principle in action. On one reading of Lord Griffiths' speech those cases too, like the unlawful extradition cases, could be said to involve "the wider supervisory jurisdiction" rather than "matters directly affecting the fairness of the trial". It is the Board's clear view, however, that if the defence of entrapment is raised before magistrates, rather than adjourn the proceedings for a judicial review application to be made, they should themselves decide on which side of the *Loosely* line the case falls: i.e. whether the defendant was incited to commit the offence or merely given the opportunity to do so. So too it would be for the trial court (whether magistrates or a judge) to decide whether a charge had been instituted in bad faith or oppressively, for example in breach of an executive undertaking or indemnity.

34. The Divisional Court case of *R v Belmarsh Magistrates Court Ex p Watts* [1999] 2 Crim App Rep 188 provides another useful illustration of where it is appropriate for the magistrate himself, even though the fairness of the trial is not itself threatened, to entertain what might broadly be regarded as a *Bennett* type defence, there a contention

that the complainant's summons constituted a collateral attack upon his own conviction. If the Board have any criticism to make of Buxton LJ's analysis (at p195) of the limited circumstances in which, pursuant to *Bennett*, magistrates must themselves decline jurisdiction, it is that it does not go far enough in narrowing down that class of case. Indeed their Lordships find it difficult to think of any situation save where, as in *Bennett* itself, the accused has been unlawfully brought within the jurisdiction, in which the magistrates would have to adjourn the proceedings in favour of a judicial review challenge. The rationale for that particular exception must be that unlawful extradition introduces into the case cross-border considerations which may be of a sensitive character and which certainly range far outside the prosecution process itself.

35. It is to be noted in this connection that in *Sharma v Brown-Antoine* all five members of the Judicial Committee took the view that the Chief Justice's complaints—involving not least an attack on the decision to prosecute him as being politically motivated or influenced, could and should properly be resolved within the criminal process itself rather than by way of a judicial review challenge. Mr. Clayton seeks to distinguish that case on the basis that the Chief Justice was to be tried not summarily but on indictment. Their Lordships, however, cannot see this as a relevant distinction."

16. In my view, the principles identified in these two Privy Council decisions are directly relevant to the issues before me and compel a clear and straightforward response to the instant Petition. All of the arguments which Mr. Brady seeks to advance on Mr. Kpesunu's behalf in the Petition before

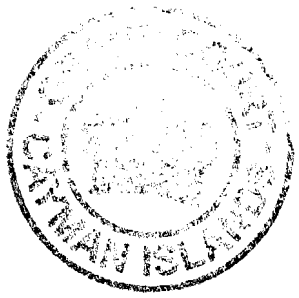
me can and should have been determined within the criminal proceedings that commenced before the Summary Court in September 2013. Quite apart from the fact that the Court below never formulated an issue of interpretation for the Grand Court to consider in a manner that complied with Order 77A, r 5 of the Grand Court (Amendment No 2) Rules 2012, there are overwhelming reasons of policy which dictate that a Petition instituted in the present circumstances is itself an abuse of the process of the court because *all* the issues which it seeks to advance can and must be resolved before the criminal court that is properly seized of the relevant issues and which is constitutionally required to try the charge of overstaying preferred against Mr. Kpesunu. The result of the decision to adjourn the criminal trial in mid flow is that justice has been delayed to no effect by a collateral challenge to the validity of the criminal trial process and associated decisions made in the lead up to the decision to charge Mr. Kpesunu. As stated above, I regard it as very unfortunate that before deciding to adjourn the criminal trial neither of the parties thought it appropriate to address detailed argument to the learned Magistrate on the concerns he had raised as to his ability to resolve the constitutional issues raised by Mr. Brady's cross-examination of Ms. Moore. Had such argument taken place, it is clear in my view that the learned Magistrate could have come to only one conclusion, namely to continue with the trial and resolve the abuse of process arguments and substantive Defence submissions that Mr. Brady wished to advance on Mr. Kpesunu's behalf.

No doubt in future cases, and with the benefit of this Judgment, a similar sequence of events will not occur and the smooth course of criminal justice can be maintained.

Conclusion

17. In all the circumstances, I dismiss Mr. Kpesunu's Petition.

Dated this 25th day of August 2014.



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THE HON. MR. JUSTICE TIMOTHY OWEN, Q.C. (ACTING)
JUDGE OF THE GRAND COURT

The judgment was delivered in private, but the Judge hereby gives leave for it to be published.

The judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.