18-3-97

18.3.97

1 IN CHAMBERS
2
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS
4
5 CAUSE NO. 146 OF 1997
6
7
8
9
10
11 **BETWEEN:** PETER KRUGER
12 **APPLICANT**
13
14
15 **AND:** HIS EXCELLENCY THE GOVERNOR
16
17 **RESPONDENT**
18
19
20
21
22
23 **APPEARANCES:**
24 Mr. Alan Jones Q.C. instructed by Mr. Ross McDonough of Bruce
25 Campbell & Co. for the applicant.
26 Mr. Ivor Archie, Solicitor-General and Miss Sherryl Richards of the Legal
27 Department for the respondent.
28
29
30
31
32 **REASONS**
33
34 The applicant seeks leave to apply for judicial review of the Governor's
35 authority to proceed issued to the Magistrate pursuant to section 7(4) of the
36 Extradition Act 1989 ("the 1989 Act") and pursuant to a second request
37 from the Government of Switzerland, for the applicant's extradition.

Arguments were taken on the 5th and the application was refused by a ruling delivered on 6th March. These are the reasons.

Background

The applicant is a Swiss national and is the subject of charges in that country which involve allegations of bankruptcy fraud, false accounting, theft and the dishonest obtaining of property. In essence the allegations are that he stripped away the assets of his several companies in order to defraud the creditors of the companies.

The applicant and his wife had been the subjects of an earlier request for extradition from the Swiss Government which involved largely but not exclusively, the same charges and allegations.

Proceedings instituted pursuant to that earlier request were concluded upon their discharge pursuant to writs of habeas corpus issued by this Court on 5 August 1996 which set aside the Summary Court's earlier order for their committal to await extradition.

The applicant, who had resided in Grand Cayman for some years prior, then remained at liberty until his rearrest on a provisional warrant issued by the magistrate on 19 February 1997. That provisional warrant responded to the further request for extradition. Evidence in that regard was given to the magistrate.

On the 3 March 1997 the Governor decided to issue his authority to proceed - the subject of this application.

A warrant pursuant to that authority to proceed was issued and the applicant formally "rearrested" on it. The authority to proceed thus became the legal basis for his arrest and current detention pending the proceedings for his extradition.

Grounds for leave for Judicial Review

Two main grounds were advanced as the basis for leave.

The first was that the Governor's authority to proceed was illegal because it relied upon the European Convention on Extradition (Dependent

1 Territories) Order 1996 (S.I. 1996 No. 2875) ("the 1996 Order") which was
2 said to be ultra vires.
3
4 That ground is, properly, no longer being pursued for reasons which are set
5 out below.
6
7 The second ground is "irrationality" and it is premised upon a number of
8 points or sub-grounds which challenge the Governor's decision upon which
9 he issued the authority to proceed. Those points or sub-grounds will be
10 considered below.
11
12 **Judicial Review**
13 I needed to be satisfied of the Court's power to review the Governor's
14 decision.
15
16 Assuming the legality or "vires" of the 1996 Order all sides agreed that the
17 Governor had the power to issue the authority to proceed notwithstanding
18 that there had been an earlier request for extradition which failed.
19
20 It was nonetheless implicitly conceded by the Solicitor-General that the
21 Governor's decision is amenable to judicial review. I perceived that
22 concession to have been made having regard to the settled English case law
23 which deems the Secretary of State's decisions in the same context, to be
24 reviewable.
25
26 The two issues, that of the Governor's power and the Court's jurisdiction,
27 were dealt with by Lord MacKay in In Re Rees [1986] A.C. 937 at page 963
28 letters B-F in the following terms:-
29
30 "---- in my opinion the Secretary of State
31 can lawfully issue an order under section 7
32 of the Act of 1870 once a requisition has
33 been made to him by a person recognised by
34 him as a diplomatic representative of the
35 foreign State and he is not precluded from
36 making an order following on a requisition
37 merely because he has made an earlier order
38 following on the same requisition, and that

1 where a person has been set at liberty
2 following upon proceedings under any
3 earlier order he may be apprehended under a
4 later order and the effect of article xii [(of
5 the UK - US Treaty)] is to require that if
6 sufficient evidence for the extradition is not
7 produced within two months from the date
8 of that apprehension he shall again be set at
9 liberty.
10 Questions 4) and (5) [(posed to the House
11 by the Court of Appeal by agreement of
12 counsel for the parties)] deal with power to
13 review the making of an order by the
14 Secretary of State under section 7 and are in
15 these terms:
16 "(4) whether the police
17 magistrate has power to review
18 the exercise of the Secretary of
19 State's discretion to make an
20 order under section 7 of [the
21 [Act of 1870].
22 (5) whether the High Court has
23 power to review the exercise of
24 the Secretary of State's
25 discretion to make an order
26 under section 7 of the said
27 Act".
28 Both parties were agreed that question (4)
29 should be answered in the negative and
30 question(5) in the affirmative, although the
31 respondent (the Secretary of State) did so
32 with the explanation that a successful
33 challenge to such exercise could only very
34 rarely arise. I agree that question (4) should
35 be answered in the negative and question (5)
36 in the affirmative".
37

1 Those statements of principles, insofar as they relate to the power in the
2 Governor to issue a second or further order to proceed have been adopted
3 and applied by this Court: see In Re Bodden [1988-89] CILR 259.
4
5 There was however, no case cited directly on point, showing that there
6 exists the power in this Court to review the Governor's decision.
7
8 The question arises at all because the Court's power to review is an inherent
9 power derived from the prerogative writs which are peremptory commands
10 of the Crown directed to the subject and may not without absurdity be
11 directed towards the Crown itself.
12
13 I having considered the matter, concluded that the concession in that regard,
14 in the present context, is correct.
15
16 The power to issue authorities to proceed is not a power exercised by the
17 Governor as derived from the Royal Prerogative but is derived instead
18 entirely from statute within the strictures of which he is obliged to decide.
19
20 Any question of jurisdiction to be posed by virtue of the fact that this
21 Court's power to review is non-statutory, and remains entirely as a
22 manifestation of the Royal Prerogative of the Crown, would therefore be
23 out of context in the present case. By this I have specifically in mind the
24 earlier decision of this court in: In Re Fedele [1988-89] CILR 155. In that
25 case it was held that there is no power in the Court to issue prerogative writs
26 against the Governor in respect of decisions or actions taken while
27 exercising the delegated power of administering the Government on Her
28 Majesty's behalf.
29
30 **Illegality**
31 I have already made reference to the fact that the validity of the 1996 Order
32 is no longer being challenged. This concession was made by Mr. Jones
33 when it was brought to the court's attention that arrangements had been
34 finalised as between the Government of the United Kingdom and
35 Switzerland by which the operation of the European Convention on
36 Extradition ("the Convention"), previously in force as between those two
37 States, was to be extended to dependent territories for whose international

1 relations the United Kingdom had responsibility. This includes the Cayman
2 Islands.
3
4 It appears from Article 27.4 of the Convention - as ratified and enforced in
5 the United Kingdom by the European Convention on Extradition Order
6 1990 (S.I. 1990 No. 1507) - that such an arrangement is a necessary
7 prerequisite to the extension of the Convention to the dependent territories.
8
9 During the submissions and regrettably only after Mr. Jones had invested
10 considerable time and energy in pursuing the point, it was brought to the
11 attention of the court that this necessary arrangement had been properly
12 concluded.
13
14 This appears from correspondence described "an exchange of notes", from
15 the British Embassy to the Swiss Federal Counsellor, at the Swiss Federal
16 Department of Foreign Affairs and the letters in reply, respectively dated 9
17 February 1996 and 26 February 1996. Those exchanges together, as final
18 step in the process, speak of the arrangement constituted in them as
19 "entering into force on the date on which each of our two Governments has
20 notified the other of the completion of their internal procedures necessary to
21 give affect to it".
22
23 As evidence of those last steps having been taken, Mr. Nichols submitted a
24 copy of a letter addressed to him from the Foreign and Commonwealth
25 Office of Her Majesty's Government, London; dated 3 March 1997 in the
26 following terms:
27
28
29 "Dear Mr. Nichols:
30 I enclose as requested a copy of the
31 exchange of notes with the states parties to
32 the European Convention on Extradition to
33 which the European Convention on
34 Extradition (Dependent Territories) Order
35 1996 applies.
36 In pursuance of Article 1(1) of the Order,
37 notices were inserted in the London,
38 Edinburgh and Belfast Gazettes for Friday

> 20 December 1996 that the order would come into operation on 15 January 1997, on which date the Government of the United Kingdom informed the Embassies of the parties concerned that the United Kingdom has completed its internal procedures (that is, the making of the Order) each of the parties already having confirmed that their own internal procedures had been completed." (Emphasis supplied).

That was conceded by Mr. Jones to be a complete answer to the first limb of this application.

Mr. Nichols did, however, also argue that the answer, as a matter of statutory interpretation, was apparent from the face of the 1996 Order itself, in Schedule 2.

The title to that Schedule reads as follows:

> "RESERVATIONS AND DECLARATIONS MADE BY THE UNITED KINGDOM AND THE STATES PARTIES LISTED IN PART I OF SCHEDULE I ABOVE IN CONNECTION WITH THE EXTENSION OF THE CONVENTION AS BETWEEN THOSE STATES AND THE DEPENDENT TERRITORIES LISTED IN PART II OF THAT SCHEDULE."

The provisions of the Schedule do speak in terms of such reservations and declarations and from which I agree it must be inferred that arrangements have been made for the extension of the Convention to be effective as between the member states listed and the dependent territories listed. This is because the Schedule may not be read as if divorced from the rest of the Order.

The Schedule however omits any reference to the further requirement mentioned in the Exchange of Notes - that of notification of the finalisation of internal procedures. But as we gleaned from the F.C.O. letter it could not, as that process was not complete until upon the publication of the 1996 Order itself. It therefore proved essential for the purposes of these proceedings that the letter from the F.C.O. had been procured and tendered, even if not timously so.

Irrationality

This, the remaining limb of the application, was argued on a number of sub-grounds each of which I will consider. Nonetheless, the overarching theme of the argument remained that the Governor's authority to proceed is irrational because "no reasonable Governor could have issued an order to proceed against the history of the case as set out in the affidavit of the applicant". This argument was advanced notwithstanding the concession by Mr. Jones that a second or further authority to proceed may lawfully be issued. The premise is that it was wrong in principle to do so in this case and there exists no known example of a further authority or order to proceed (as it is described in the Extradition Act of 1870) ("the 1870 Act")) where once the requesting state is shown to have been at fault in the disposition of an earlier request.

Mr. Jones cited the case of In Re Rees (supra) as an example of a second order to proceed being justified because the requesting state had encountered difficulties in obtaining evidence from a third state, difficulties which were thus beyond its control. Another example he cited as justified was in U.S. Government v Bowe [1989] 3 ALL E.R.. 315 - where the first two orders to proceed had been illegally issued by a minister instead of by the Governor-General as required by Bahamian law. The matter was rectified by subsequent orders to proceed issued by the Governor-General. This latter submission of Mr. Jones was made notwithstanding that in neither of those two leading cases (nor for that matter in the local case of In Re Bodden (supra)), did the judgments seek to delimit the categories of circumstances in which second or subsequent orders to proceed might properly be issued.

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. As a basic premise, I am of the view that it must be wrong - 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" may be ascribed to the requesting state.

I therefore found that argument to be misconceived and one which, standing by itself, could have had no hope of success as a ground for showing the irrationality alleged.

There remained nonetheless the factual grounds of complaint that there could, in fact, be shown to be delictual conduct on the part of the Swiss Government which, when taken against the general history of the case, must render the Governor's decision arguably irrational.

I was mindful that as this is a case involving the liberty of the subject and as the application was, as yet, only for leave to apply for judicial review, I could refuse leave only if I am satisfied that the substantive application was bound to fail: See R.S.C. Order 53 R 53/1 - 14/2 the Notes, 1995 Edition at page 848.

For the reasons which follow and having considered separately and together each of the points raised, I came firmly to the view that this application should be refused.

I turn now to consider the specific points or sub-grounds. The first is subground :-

> "7(A) (that) the requesting State, through counsel, has repeatedly mislead the courts of the Cayman Islands, recklessly or incompetently, as to the strength of the case, so that the defendant was remanded in prison for over 6 months, and his wife for nearly three months."

This is a serious allegation of misconduct on the part of counsel who had earlier appeared on behalf of the Swiss Government.

In his arguments in support of it, Mr. Jones cited earlier assurances given to this Court - (see ruling of the 3rd May 1996 given on an earlier application for Judicial Review) - and to the Summary Court at the early stages of the proceedings on the first request before that court. Then, the assurances given were that the core of the case against the Krugers remained strong, even while the Swiss Government was then seeking an adjournment to allow it to garner further evidence.

The inference Mr. Jones says is to be drawn from that, when taken with the further circumstance that the Swiss Government chose to await the introduction of the new legislative extradition scheme before renewing their request, - (by which means the strength of their case is not to be tested) - must be that the case is weak.

Related to this sub-ground are sub-grounds 7(B) (C) (D) and (E) which I set out now:

> "(B) It is apparently now accepted by the Government of Switzerland that there was no case at all against Barbara Kruger.
>
> (C) The requesting state has not sought to appeal, and has thus conceded that its previous assurances of the strength of the case were wrong.
>
> (D) Instead of seeking to present its evidence again in proper form so that sufficiency of evidence might be assessed, the requesting state deliberately waited until the extension of the provision of the European Convention on Extradition before presenting what it concedes is simply a "rehash" of its case, but with the addition of material apparently illegally obtained.

> (E) The evidence presented by the requesting state on the first occasion manifestly failed to prove a case to answer, and it appears that the Government of Switzerland has done little to correct or improve it".

It will be immediately apparent that these sub-grounds contain surmise and conjecture. They also depend upon opinion about matters such as the strength or weakness of the former case.

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 (that was the legal evidential test at the time) to justify the committal of the applicant and the remand of Mrs. Kruger on bail, to await extradition.

Insofar as this court has set aside that decision, it did so for the reasons expressed in the Chief Justice's written judgment (delivered on 15 August 1996) - 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 a case is par excellence a matter for the courts.

Nonetheless, the applicant's argument on this point is that the Governor ought to have embarked upon such an assessment and ought to have heard his elaborated views on the matter.

In my view, the good sense of such an approach to deciding whether to issue an authority to proceed would have itself been questionable.

1 The extension of the Convention to the Cayman Islands has brought with it
2 a fundamental change to the law of extradition as it relates to arrangements
3 with the party States listed in the first Schedule to the 1996 Order. It is
4 correct that by Article 12 of the Convention (given statutory force by
5 section 9(4) of the 1989 Act) the requesting state no longer must show the
6 existence of a prima facie case: Re Evans [199] 1 W.L.R. 1006 H.L. and
7 see Jones on Extradition Sweet and Maxwell London 1995 at pages 118-
8 119.
9
10 The policy of the new scheme is that proof of the facts, the possibility of
11 other relevant facts or of any defence and the question whether the conduct
12 of the accused amounted to an offence alleged, are to be matters for the
13 requesting state to determine at trial in that state. And it does not fall to the
14 magistrate in the requested State to determine whether or not the request for
15 extradition was made in good faith in the interest of justice. The very
16 existence of the arrangements for those purposes must be taken to be
17 conclusive of any issue before the magistrate whether a fugitive defendant
18 will be assured a fair trial and whether the requesting state will accord full
19 faith and credit to any conditions of his return for those purposes: Atkinson
20 v United States of America Government [1971] A.C. 197.
21
22 In that case it was however established by the House of Lords that the
23 Secretary of State (here the Governor) has the power to refuse to extradite
24 after committal by the magistrate if there are circumstances to show that it
25 would be unjust or oppressive to surrender the fugitive: at pages 232c -
26 233b.
27
28 That case was decided under the 1870 Act.
29
30 In the arguments before me, it was acknowledged on all sides that the
31 Governor has, in this case, a similar power by virtue of Section 12(2)(a)(iii)
32 of the 1989 Act. Those provisions are expressed in terms which suggest
33 that there were intended by the draftsman to reflect the principles laid down
34 in Atkinson's case.
35
36 So, if committal is ordered, the applicant will then have the opportunity to
37 bring factors to the attention of the Governor which point to lack of good

faith on the part of the Swiss Government or as to why it may otherwise be unjust or oppressive to return him.

From section 11(3)(c) of the 1989 Act it is also plain that the Superior Court now has similar powers upon an application for habeas corpus.

Nonetheless, on this point Mr. Jones' argument goes further. He submitted that the Governor, at the stage of deciding whether to issue the authority to proceed, is empowered and is indeed obliged to consider the issues of lack of good faith and oppression raised with him by the applicant . To that end he cited section 7(4) of the 1989 Act which provides:

> (4) On receipt of any such request the Secretary of State may issue an authority to proceed unless it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act." (Emphasis added).

The words emphasised 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. I can therefore see nothing objectionable in itself about that argument. Indeed there appears no reason why concerns about lack of good faith on the part of a requesting state, oppression or injustice, could not be taken account of at the earliest stage by the Governor. The sooner such a flawed request be disposed of, the better in the interests of justice.

But that construction of the powers does not enhance the case of the applicant here. Those very issues of lack of good faith, weakness of the case and oppression were canvassed in advance with the Governor in written submissions prepared by Mr. Jones - who has represented Mr. Kruger throughout - and submitted on the 21 November 1996 and on 27 February 1997. In them the purpose of the submissions was made clear by Mr. Jones in these terms - I quote from paragraph 3 of that of the 21 November 1996:

1 "The Governor would have a discretion as
2 to whether to issue another order to proceed,
3 or orders to proceed. The House of Lords
4 decided in Re Rees [1986] A.C. 937 that it
5 is not necessarily unlawful or irrational to
6 do so after the failure of an earlier case.
7 The purpose of this memorandum is to
8 argue that in the circumstances of this case
9 the commencement of fresh proceedings
10 would be irrational and oppressive".
11
12 The memorandum then runs a further eight full paragraphs setting out the
13 arguments. It was expanded upon by that of the 27 January 1997 which
14 raised the further point that the provisional warrant for the rearrest of Mr.
15 Kruger - which had by then been issued by the Magistrate and executed -
16 was unlawful because there was no case of "urgency" as required by Article
17 16 of the Convention. It also invited the Governor to defer issuing any
18 authority to proceed until after habeas corpus application to quash that
19 warrant. Although that memorandum also sought further time for
20 representations to be made to the Governor, it is clear that substantially the
21 same arguments presented to be raised on judicial review, had been
22 presented to the Governor.
23
24 The Governor's order to proceed was, notwithstanding, issued on the 3
25 March 1997.
26
27 Thus, it is against all that background in the very nature of the applicant's
28 case that the decision of the Governor to issue the order must be irrational in
29 the sense that the only rational decision would have been not to do so.
30
31 That is not an argument that could have any hope of success. To give effect
32 to it, the court would be required to arrogate the discretion of the Governor
33 to itself. That is precisely the approach which the case law advises against:
34 "It is important to remember in every case that the purpose of [the remedy
35 of judicial review] is to ensure that the individual is given fair treatment by
36 the authority to which he has been subjected and that it is not part of that
37 purpose to substitute the opinion of the judiciary or of individual judges for
38 that of the authority constituted by law to decide the matters in question" -

1 per Lord Hailsham L.C. in Chief Constable of North Wales Police v Evans
2 [1982] 1 W.L.R. 1155 at p. 1160.
3
4 Thus the courts will not on judicial review, act as a "court of appeal" from
5 the body concerned, nor will it interfere in any way with the exercise of any
6 power or discretion which has been conferred on that body unless it has
7 been exercised in a way which is not within that body's jurisdiction, or the
8 decision is "Wednesbury" unreasonable. See the Notes to R.S.C. Order
9 53/1 - 14/6 in the 1995 Edition at pages 851 - 852 and The Wednesbury
10 Justices case (infra).
11
12 I have already touched upon the issue of whether the first request was weak.
13 I will not attempt to traverse every aspect of the grounds which seek to
14 suggest that it was. I think that objectively they must all be subsumed
15 within the consideration that no court had definitively so pronounced and
16 that it must have been therefore open to the Governor rationally to conclude
17 that such concerns should be no bar to a further request.
18
19 As to sub-ground (F): this also regrettably raised allegations of serious
20 misconduct on the part of those representing the Swiss Government. It
21 alleges that they omitted among other things, to inform the magistrate when
22 applying for the provisional rearrest warrant, that it should be issued only in
23 a case of urgency.
24
25 However, the very records of the notes taken by the Magistrate when she
26 issued the provisional warrant pointed to the inaccuracy of those
27 allegations. And Mr. Nichols, in his submissions, explained that Mr. Lewis,
28 his junior and the counsel who had then appeared, had produced a copy of
29 the "highly relevant material", the Convention itself, and had read Article
30 16 to the Magistrate. Article 16 provides for provisional warrants only in
31 "cases of urgency".
32
33 Thus, the main basis for complaint that the provisional warrant had been
34 "improperly" obtained fell away. The fact that it had been presented as a
35 ground of complaint to the Governor (and presumably considered by him
36 before he issued the authority to proceed) can, therefore, be no basis for an
37 argument that his decision, to the contrary, was irrational.
38

1 Part of sub-ground (D) is the further complaint that the new request is being
2 supplemented by evidential material which has "apparently (been) illegally
3 obtained".
4
5 The word "apparently" is significant in this context also in that it betrays the
6 conjecture on which this point is premised and which is developed in
7 paragraph 16 of the applicant's affidavit in support of this application. But
8 conjecture aside, there were more fundamental reasons why criticism of the
9 Governor's decision based on this sub-ground would be bound to fail.
10
11 The criticism is premised on a judgment of this Court in which Murphy J.
12 refused a letter of request from a Swiss Court for the production of
13 evidential material which had been seized by the local police from the home
14 of the applicant later on the day he was arrested pursuant to the first request
15 for extradition.
16
17 Although not basing his decision on it, an important finding of that judge
18 was that the material had been illegally obtained by the local police who
19 had had no lawful authority to enter and search the applicant's home.
20
21 That being the background, there can now, in my view, be no basis for an
22 argument that the Governor was obliged, having considered the matter, to
23 ascribe responsibility for the illegal entry to the Swiss Government.
24
25 Nor, for that matter, can it properly be argued that the Governor was
26 irrational to have allowed the second request to proceed because of the
27 likelihood that material which had been then illegally obtained would now
28 be used to bolster the case against the applicant.
29
30 The law of the Cayman Islands admits of no such mandatory exclusionary
31 rule in criminal proceedings: Sang [1980] A.C. 402. Rather, if evidence is
32 to be excluded, the matter might properly be raised in the criminal
33 proceedings to follow, if that be the case, in Switzerland.
34
35 Those are factors which the Governor could properly have been advised to
36 consider after they were all raised with him in Mr Jones' memoranda. And
37 that is all to be placed in the context in which the Governor was required to
38 decide. There can in my view, be no basis for an argument that he was

obliged to regard the Request as flawed for those reasons. Certainly not, with all the attendant consequences of overriding the public interest in ensuring the due prosecution of serious crime, and, perhaps, even of the denial of the international obligations in that regard which the Convention embodies.

The last two grounds of the application, 8 and 9, I now set out and address in turn:

> "8. No reasonable Governor would have issued an Authority to Proceed in these circumstances without taking advice from a lawyer other than the Attorney-General. The Attorney-General is advising and representing the Government of Switzerland. It is submitted that the Governor cannot have taken such independent advice because he issued an Authority to Proceed one working day after receiving the emergency representations - [Mr. Jones' memorandum of the 27 January 1997] - submitted on behalf of the applicant".

There is and could be no evidence propounded by the applicant to show that the Governor did not take advice from a lawyer other than the Attorney-General. This is therefore further speculation and it is relied upon notwithstanding the suggestion in Mr. Jones' prior submissions to the Governor that he should seek independent advice.

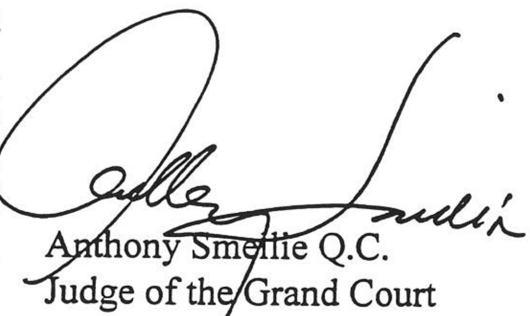
Contrary to the speculation that the Governor had failed to do so, the Solicitor-General informed the Court that he had, in fact, taken such independent advice. Faced with that information, Mr. Jones submitted that the Governor should be strictly required to prove it by evidence.

That was, to say the least, a remarkable submission having regard to where the onus lies.

1 In my view there could be no reliance placed on this ground for leave for
2 judicial review. Apart from its merely speculative nature, and the Solicitor-
3 General's information aside, even had the advice not been taken, that could
4 have availed the applicant not at all as there was no merit to be found in the
5 rest of his grounds. The failure in them to show irrationality in the decision
6 criticised could not be made good simply because the decision itself might
7 have been taken without independent legal advice.
8
9 Ground 9 reads:
10 "No reasonable Governor would have failed
11 to give the applicant a longer opportunity to
12 present reasons why an Authority to
13 Proceed should not be issued and an
14 opportunity to seek to quash the issue of the
15 provisional warrant of arrest on the ground
16 that the case was not urgent".
17
18 This sub-ground, whilst wrapped up in the general complaint of irrationality
19 was really a complaint of procedural impropriety. But when viewed as a
20 complaint of procedural impropriety the ground faired no better.
21
22 The Governor had been in receipt of detailed written submissions from
23 November 1996. The evidence disclosed that those submissions were under
24 consideration as currently as the 27 February 1997 when Mr. Jones' further
25 submissions were sent in response to the Governor's invitation in that
26 regard issued seven days earlier.
27
28 Given that background and the nature of the extradition process, it is hardly
29 surprising that this complaint was not framed in terms of an alleged breach
30 of the *audi alterem partem rules.*
31
32 By their very nature extradition proceedings, and the Governor's authority
33 to proceed which initiates them, would not admit of extensive prior
34 consultations with the fugitive - subject of the request.
35
36 Nonetheless, Mr. Jones submitted in these proceedings that there were other
37 issues or aspects which the applicant would have wished to raise with the

1 Governor in support of his submissions against the issuance of the
2 authority to proceed, had he been given the opportunity.
3
4 Those are all issues which can still be raised together with any other which
5 would go to the matters contemplated by section 12(1)(iii) of the 1989 Act,
6 in the event the applicant is to be committed for return.
7
8 And as already noted, concerns about lack of good faith, oppression or
9 injustice might also then be raised with this court upon an application for
10 habeas corpus pursuant to section 11(3) of the 1989 Act.
11
12 Those are all factors which clearly, in my view, point instead to the
13 reasonableness of the limits placed by the Governor on the consultation
14 process before the issuance of his authority to proceed.
15
16 For all the foregoing reasons there was, in my view, no hope of the
17 applicant showing that the Governor's decision was irrational or
18 unreasonable in the sense required by the law - ie: that as established in the
19 Wednesbury Justices case [1948] 1 K.B. 223 and as explained by Lord
20 Diplock in C.C.S.U. v Minister for the Civil Service [1985] 1 A.C. 374 at
21 410G: that "the decision is so outrageous in its defiance of logic or of
22 accepted moral standards that no sensible person who had applied his mind
23 to the question to be decided could have arrived at it".
24 And as that is a very strict test for an applicant relying on the ground of
25 irrationality to meet, I should also state my views that the circumstances of
26 this case, when objectively considered, would give no basis for the view
27 that the decision in question could properly be regarded as "unreasonable"
28 even in the widest and most general meaning of that word.
29
30 The application for leave was for all the foregoing reasons, refused.
31
32 **Procedural Point**
33 This is a point of procedure which latterly occurred to me and which I
34 should mention. Although designed by the rules of court (G.C.R. Order 53)
35 to be taken ex parte, this application for leave was taken inter partes at the
36 initiative of the applicant who had invited the other parties in and consented
37 to the taking of submissions from them. A general disapproval of inter
38 partes arguments on an ex parte application for leave was expressed by the

1 Court of Appeal in Smith v Comm. Of Police 1980-83 CILR 126. As this
2 case involved the liberty of the subject who consented, I took the view that
3 the applicant could not ultimately be prejudiced by the Court having the
4 benefit of the submissions of all counsel, at this early stage. In the end I
5 was assured that the procedure adopted is likely ultimately to result in the
6 saving of considerable time and expense.
7
8
9
10
11
12
13
14



15 Anthony Smellie Q.C.
16 Judge of the Grand Court
17
18
19 Dated this 18 day of March 1997
20