15.8.96 CJ

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE #'S 306 & 310 of 1996

In the Matter of an application of a Habeas Corpus ad Subjiciendum and in the Matter of an Application by the Government of Switzerland for the extradition of Peter Kruger and Barbara Kruger

BETWEEN:	PETER KRUGER	APPLICANT
	BARBARA KRUGER	APPLICANT
AND:	THE DIRECTOR OF NORTHWARD PRISON	FIRST RESPONDENT
AND:	THE GOVERNMENT OF SWITZERLAND	SECOND RESPONDENT
AND:	THE ATTORNEY GENERAL FOR THE CAYMAN ISLANDS	THIRD RESPONDENT

Mr. Alun Jones, QC instructed by Mr. Shaun McCann for Peter Kruger
Mr. Alun Jones, QC instructed by Mr. Charles Quin for Barbara Kruger
Mr. James Turner of Counsel and Ms. Lisa Agard for the First, Second & Third Respondents

G.E. HARRE CJ

JUDGMENT

Part 1, delivered on 12th August 1996

On 29th May, 1996 Peter Kruger was committed to prison to await extradition to Switzerland. His wife Barbara, was remanded on bail for the same purpose. Both were, informed that they would not be surrendered until after the expiration of fifteen days and that they had a right to apply for a writ of habeas corpus. The requirement that this information should be given is to be found in paragraph 8 (1) of the first schedule of the English Extradition Act 1989 which applies to the Cayman Islands. The jurisdiction in this matter is not now in dispute between the parties. I have read the written submissions in that regard which were before the magistrate and concur

with that approach. However, the respondents have questioned whether the issue of a writ of habeas corpus ad subjiciendum is the correct remedy to be sought now, or whether the matter should proceed instead by way of an application by Judicial Review. The basis for this approach was that it is questionable what effect the issue of a writ of habeas corpus has on the decision of the magistrate that there is a prima facie case in respect of the relevant offences. At best it can secure release from custody of the persons detained and they cannot be said to be wrongfully detained because the warrant of the Magistrate provides a justification for the detention unless and until it is quashed. Any order of the Court is binding until it is set aside.

In R.v. Oldham Justices and Another ex-parte Cawley (1996) 1 All ER 464 the English Queen's Bench Divisional Court considered the habeas corpus procedure in relation to young offenders who had been imprisoned for non-payment of fines. It was held that habeas corpus was not an appropriate remedy in cases where such offenders challenged their detention as unlawful on the basis of defective warrants. Detention on that ground could only properly be challenged by Judicial Review. Reference was made in the judgment of Simon Brown LJ to the argument that in situations such as extradition matters no one suggests that any fault lies with the Prison Governor to whom necessarily the application is directed, or that he could properly free the detainee without a Court Order. Later in the same judgment he refers to the distinction between the cases with which he was dealing and extradition cases concerning which habeas corpus has become the accepted remedy. It has indeed been the accepted remedy in

over 120 years of extradition history and whatever the virtues of the respondent's theoretical proposition, the effect of such applications has been to quash the whole committal on all or some of the charges on which an applicant was committed. The Grand Court is not a Court of Appeal from the Magistrate. Its position is analogous to the English Divisional Court hearing an application for habeas corpus. The following was said in relation to that court by Lord Wilberforce in the House of Lords when Tarling and others v. Government of Singapore and others (1977) C App Rep 77 came before their Lordships -

> "It cannot retry or rehear a case. Its powers are limited to deciding whether the Chief Magistrate was right or wrong in finding on the evidence before him that there was sufficient evidence to warrant a committal and to ascertaining whether he has erred in law".

It is the duty of the magistrate to decide whether the evidence supports a prima facie case. Only if he does not so find, or if a superior court finds that no reasonable magistrate could have so found, is the person detained released. There is thus, as Lord Wilberforce said in the same speech, a "usual predisposition to uphold the magistrates' decision."

No case has been cited to me where in extradition proceedings it has been doubted whether habeas corpus was an appropriate procedure to be used in a challenge to the decision of a magistrate where that challenge is to the legality of his acts or it is argued that there was insufficient evidence to entitle him to commit. The applicants have availed themselves of the old and well established remedy of

which they were advised, as they had to be, and they are entitled to have the matter proceed on that basis.

I do not think that the following propositions of law are in dispute, although their application to the present case, as will soon be seen, certainly is -

By virtue of paragraph 6 of Schedule 1 to the Extradition Act 1989 ("the 1989 Act) the magistrate is to conduct the case as near as may be as if he was an examining or committing magistrate in his normal jurisdiction. There are two relevant exceptions to the usual domestic committal procedure. These are that the foreign warrant must be "duly authenticated" by virtue of paragraph 7 (1) of the Schedule and that depositions and statements on oath taken in a foreign state and copies of such original depositions or statements may, if "duly authenticated" be received in evidence in proceedings under Schedule 1. That proposition is based on paragraph 12 to Schedule 1 and section 26 of the 1989 Act, to both at which I shall refer in more detail later. Contrary to what was submitted on the basis of Rees v. Secretary of State (1986) 1 All ER 321 Paragraph 12 applies to all foreign documents, although, in respect of Switzerland, subject, as provided in subsection 1 (3) of the 1989 Act, to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the Order in Council dated 18th May 1881 ("the 1881 Order").

The charges which the magistrate must consider are charges framed

according to domestic law. Authority for that is to be found in the following passage from the judgment of Woolf L J in R V Governor of Pentonville Prison, Ex-Parte Naghdi (1990) 1 All ER 257 at 265 -

> "Counsel for the applicant, in my view rightly, submits that so far as this issue of jurisdiction is concerned the Magistrate will require to ask himself, assuming the facts established by the evidence as having occurred in the United States of America occurred in this country ..... whether they would show a sufficiently strong case to justify the applicant's committal for trial in this country."

Woolf L J goes on to observe that "jurisdiction" should not be interpreted in the sense in which the term would be used in the foreign state since then the foreign state could be entitled to claim what we would regard as an exorbitant jurisdiction and the magistrate would inevitably be drawn into disputes as to the extent of the foreign jurisdiction. This accords with the analysis of the proper application of the statutory provisions under the Extradition Act 1870 ("the 1870 Act") contained in Lord Diplock's speech in Government of Denmark ex parte Nielsen (1984) AC 606.

I have expressed some possibly trite propositions of extradition law as a preliminary to the consideration of the more demanding matters of what the admissible evidence was.

The state of Switzerland ("the requesting state") sought to put evidence before the Magistrate in the following forms -

1. Statements and exhibits from Switzerland in purported accordance with Article VII of the 1881 Order which was made pursuant to the 1870

Act and which would not otherwise be admissible in domestic committal proceedings.

2. Oral evidence which would be admissible in domestic committal proceedings.

3. Documentary evidence which, it was claimed, would be admissible in domestic committal proceedings by reason of sections 10 and 23 of the Evidence Law of the Cayman Islands. It was, however, conceded that section 10 simply sets out the procedure, rather than the substantive law, under which the contents of such documents may be admitted in evidence. The Common Law relating to documents made by a public officer for the purpose of the public making use of them and being able to refer to them does not assist the requesting state.

Article VII of the 1881 Order reads as follows -

> "Article VII
>
> In the examinations which they have to make in accordance with the foregoing stipulations, the authorities of the State applied to shall admit as entirely valid evidence the depositions or statements of witnesses, either sworn or solemnly declared to be true, taken in the State, or copies thereof, and likewise the warrants and sentences issued therein, or copies thereof, provided such documents purport to be signed or certified by a Judge, Magistrate or officer of such State, and are authenticated by the official seal of a British Secretary of State, or of the Chancellor of the Swiss Confederation, being affixed thereto.
>
> The personal attendance of witnesses can be

> required only to establish the identity of the person who is being proceeded against with that of the person arrested."

The Magistrate interpreted the final paragraph of the Article as meaning that no oral evidence other than identification evidence could be admitted. In that he fell into error. Evidence that would be admissible under domestic rules of evidence will be admissible in extradition proceedings for committal independently of the special provision for authentication of foreign documents under extradition legislation unless, of course, that legislation specifically excludes it. There is ample authority for this. In Government of Belgium v. Postlethwaite and others (1988) AC 924 it was submitted at the committal proceedings that evidence obtained in England had not been "presented" within the time limit prescribed by Article V of the Anglo-Belgian Extradition Treaty. That aside, the status of evidence outside the confines of the extradition legislation in England is clear from the following extracts from the speech of Lord Bridge of Harwich -

> "The evidence on which the magistrate based [his] findings and conclusions fell into three categories. The Belgian evidence comprised the depositions and statements on oath taken in Belgium which, being duly authenticated as required by section 15 of the Act of 1870, were admissible in evidence pursuant to section 14. The English evidence comprised those section 102 statements tendered and duly received in evidence as admissible under that section in the absence of objection on behalf of any of the respondents under subsection (2)(d) and the oral evidence of the makers of other section 102 statements to which objection was taken under subsection (2)(d) before the statements were tendered in

evidence....

> It is not now disputed that the magistrate could properly conclude that a sufficient prima facie case of manslaughter was made out to justify committal for trial of all the respondents on the basis of the Belgian evidence and the English evidence considered together, nor are any of the magistrate's findings or conclusions reached on that basis now sought to be impugned. Conversely, it is not contended on behalf of the Government of Belgium that the magistrate's orders can be supported on the basis that the Belgian evidence alone justified committal. The magistrate was never asked to consider that question."

The reference to section 102 is to the section so numbered in the Magistrates Courts Act 1980. I shall need to relate it in due course to the relevant Cayman provisions. The impracticality of any other approach was demonstrated in this later passage in the speech of Lord Bridge -

> "We know that duly authenticated depositions or statements taken on oath or upon solemn affirmation before the Belgian judge or magistrate are admissible in the English proceedings without the necessity for Belgian witnesses to travel to England. We may safely infer that duly authenticated depositions or statements taken on oath or upon solemn affirmation before the British judge or magistrate are admissible in evidence in the Belgian proceedings without the necessity for British witnesses to travel to Belgium. Finding thus that the Treaty makes reciprocal provision to avoid the necessity for witnesses present in the state where the extradition crime was committed to travel to the state where the fugitive criminal is found and where the extradition proceedings will take place, it would surely stand the scheme of the Treaty on its head to interpret article V as imposing an obligation with which the requesting state could only safely ensure compliance by procuring that witnesses present in the state where the extradition proceedings will take

> place and available to give evidence in those proceedings, should travel to the requesting state to give evidence there for the purpose of having it formally authenticated. Moreover, such an interpretation can manifestly do nothing to enhance the substantial justice of the extradition procedure."

See also R. v. Governor and Pentonville Prison, ex-parte Herbage (No. 3) 84 C. App R 149 and R. v. Governor of Pentonville Prison, ex-parte Kirby (1979) 2 All ER 1094 where Croom-Johnson J said that "the procedure laid down .. and the standard of proof implied ... clearly contemplate that it is [domestic] rules of evidence which have to be applied in the course of committal proceedings."

Paragraphs 2 and 12 of Schedule 1 of the 1989 Act ("Schedule 1") read as follows -

> "2. An Order in Council under section 2 of the Extradition Act 1870 shall be conclusive evidence that the arrangement referred to in it complies with this Schedule and that this Schedule applies in the case of the foreign state mentioned in the Order.
>
> 12. Depositions and statements on oath taken in a foreign state, and copies of such original depositions or statements and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Schedule."

What then, against that background, is the meaning of "duly authenticated" in paragraph 12? It is submitted on behalf of the applicants that the

answer to that question is to be found not in Article VII of the 1881 Order but in section 26 of the 1989 Act, which reads as follows -

> "26. (1) In extradition proceedings in relation to a person whose return has been requested by a foreign state foreign documents may be authenticated by the oath of a witness, but shall in any case by deemed duly authenticated -
>
> (a) if they purport to be signed by a judge, magistrate or officer of the foreign state where they were issued; and
> (b) if they purport to be certified by being sealed with the official seal of the Minister of Justice, or some other Minister of State, of the foreign state.
>
> (2) Judicial notice shall be taken of such certification as is mentioned in subsection (1)(b) above, and documents authenticated by such certification shall be received in evidence without further proof."

Some clarity has been sacrificed to brevity in this section when it is compared with the repealed section 15 of the 1870 Act which sets out in separate paragraphs the requirements for signature or certification on warrants, depositions or statements on oath and copies thereof and certificates of or judicial documents stating the fact of conviction.

Nevertheless, the substance of the requirement is the same as that which is to be found in section 26 of the 1989 Act - signature by a judge, magistrate or officer of the foreign state and authentication either by oath of a witness or by being sealed with the official seal of the Minister of Justice or some other Minister of State.

The submission made on behalf of the respondents that Article VII of the 1881 Order in Council bears an entirely different meaning from both the 1870 and the 1989 Acts in that it requires signature by a judge, magistrate or officer, and authentication by seal, only in respect of warrants and sentences, or copies thereof, issued in the foreign state is, in my judgment, quite wrong, and in any event a less natural construction of the text of Article VII. Article VII is relevant to the present case in two respects. It specifies the official seal of the Chancellor of the Swiss Confederation as being that which is to be used for purposes of authentication and it indicates the meaning to be ascribed to the expression "foreign documents" in relation to Switzerland.

These findings are important, as a large part of the applicants' argument is directed to the effect of the requirement for due authentication, and other evidential points, in respect of various documents most importantly the certified translations.

It is common ground that by virtue of paragraph 7 (1) to Schedule 1 of the 1989 Act the foreign warrant authorizing the arrest of a fugitive criminal accused of an extradition crime must be duly authenticated. I will deal with that matter first, as the case of the applicants is that the failure to provide even a bare certificate of a translation of the warrant is itself a sufficient reason for the application for habeas corpus to succeed.

The requesting state has provided a bundle of documents ("the first

sealed bundle") bound together by a cord looped through each page, the ends of which are sealed. The first document in the bundle is in German. It is headed "Verhaftungsbeschluss" and consists of two pages, both of which bear a red stamp purporting to be that of a "Besondere Untersuchungsrichter fur den Kanton Bern." I do not need to resort to translation to take note of the fact that the same expression precedes the signatures of the two individuals who signed the document. Also on the document is another stamp purporting to emanate from "Staatskanzlei Kanton Bern" and two signatures of one Ursula Liechti. On the back of the document is an Apostille under the Hague Convention of 1961 which is in English. The seal upon it is inscribed "Swiss Federal Chancellery" and the document reads as follows -

Apostille
(Convention de la Haye du 5 Octobre 1961)

1. Country: SWISS CONFEDERATION

This public document

2. has been signed by Mrs. Ursula LIECHTI

3. acting in the capacity of functionary

4. bears the seal/stamp of the CHANCELLERY OF STATE OF THE CANTON OF BERNE

Certified

5. at Berne 6. the 27. Okt. 1995

7. by Stefanie HADORN, functionary of the Swiss Federal Chancellery

8. No. 6542

9. Seal/stamp: 10. Signature:

SWISS FEDERAL CHANCELLERY .....
S. Hadorn

The document is undoubtedly duly authenticated. But it is in German. It is immediately followed by a purported translation which bears only, on each page, an original red stamp of the "Besondere Untersuchungsrichter" in the form which also appears in the German text. There is no indication of the identity or competence in the German or English language of the translator, or even that the document is a translation of the German text which immediately precedes it in the bundle.

The requesting state argues as follows in respect of this -

1. That if it is correct that the only oral evidence which could have been put in before the magistrate was evidence of identity how could evidence of the translation be put before the court? As I have already found that the premise on which that argument is based is wrong, I shall not linger over that.

2. The warrant does not need to be translated because it is not evidence, it does not contain evidence. All that needs to be shown in this jurisdiction is that the warrant exists. I shall address that point in a moment.

3. The translation has the stamp of the "Untersuchungsrichter" upon it, apart from the seal which is attached to the cord which runs through the whole bundle but no signature at all. That would not in my view be a sufficient authorisation, if such authorisation were needed, nor could it suffice as a

translation if translation were needed.

4. It is admissible as a business record. I will have to deal with that later, as it is a proposition which is advanced in relation to all the translations. I say no more now than that I reject it.

I have gone outside the cases which were cited to me to do a little research of my own. This was because I was left in some doubt as to the evidential requirements as to translations in general. I confess that I was surprised to find that what I had regarded as a fundamental principle - that the court does not take notice of a foreign document in a foreign language - is by no means universally followed in the reports.

As long ago as 1891, the extradition of a French subject to France was sought. The case is Re Bellecontre (1891) 2 QB 122. A warrant of arrest and depositions are set out at length and in English in the report. From the nature of the case it is obvious that the original documents were in French, but how the translations were introduced in evidence is of no present relevance, and is not clear from the report (1891) 2QB 143-4. The only point of interest is that Wills J did not feel compelled to ignore the French language when a point of translation arose. He said this -

> "A good deal of stress was laid upon an expression in which it was said that he had made himself answerable for the investment. I have already pointed out that I do not think

> that is at all the meaning of the French term and that "J'en reponds" in my opinion means "I will answer for it."

In Rouyer Guillet et Cie v. Rouyer Guillet & Co Ltd and anor (1949) 1 AER 244 the question which arose was the interpretation of French law, with the assistance of expert witnesses. The evidence of the experts was conflicting and accordingly the Court construed the text itself. Lord Green M R said this -

> "...evidence on the construction of a private document, such as articles of association, is admissible so far as it deals with French rules of construction or French rules of law or the explanation of French technical terms, but evidence as to its meaning after those aids have been taken into account is not admissible. It is for the court to construe the document, having fortified itself with the permissible evidence. I would ad that when you come to the statute law itself, although it is right that prima facie what must be considered is the evidence of the experts and not the text of the law, when the experts differ as to its meaning an English court is entitled and, if it is to perform its function properly, is, indeed, bound, to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks ought to be given to it, to the text itself and to examine it in order to make up its mind on the question of interpretation as between the two sets of witnesses.

The brief report, in the form of a note, is silent as to whether an English translation was available and, if so, how it was admitted. I refer to it only as another instance when the Court was clearly not regarding itself as precluded from referring to the French language at all.

There are other instances when judges have freely referred to the foreign language and English texts of International Conventions, but that is a situation easily distinguishable from what I have today.

The question I have to ask - and I stress here that I am considering at this stage only the question of the existence of a duly authenticated warrant of arrest - is should I, in the absence of a sworn or otherwise duly authenticated translation use a modicum of knowledge of the German language to look at the German text for that very limited purpose? In addressing that question, there is an analogy to be drawn from what was said by Lord Bridge of Harwich in R v. Governor of Ashford Prison, ex-parte Postlethwaite -

> "In approaching the main issue two important principles are to be borne in mind. The first is expressed in the well know dictum of Lord Russell of Killowen C.J. In Re Arton (no. 2) [1896] 1 QB 509, 517 where he said:
>
> > "In my judgment these treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent."
>
> I also take the judgment in that case as good authority for the proposition that in the application of the principle the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would "hinder the working and narrow the operation of most salutary international arrangements." The second principle is that an extradition treaty is "a contract

> between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute:" Reg v. Governor of Ashford Remand Centre, Ex parte Beese [1973] 1 W.L.R. 969,973, per Lord Widgery C.J. In applying this second principle, closely related as it is to the first, it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."

Of course I am not commenting on the treaty. Nevertheless, I think that that philosophy must colour to some extent the international arrangements based on such a treaty. While I acknowledge that even the most technical rules are there for a reason, I believe that, as was said in another context in an extradition matter, I would "put a new gloss on the word technicality" if I did not go to the length of recognizing that the document headed by the word "Verhaftungsbeschluss", which is the first of the documents which I look at in the first bundle purports to be a Warrant to arrest both Peter and Barbara Kruger, duly authenticated in the way which I have described.

Now for the translation issue in relation to the other documents.

The Requesting State acknowledges that without translated documents it has nothing of any worth before these courts, not because a document in a foreign language is for that reason inadmissible but because the Court, without understanding what is in the evidence cannot say that it is satisfied that there is a prima facie case on that evidence. While I have permitted myself, on the basis of a modicum of knowledge of the German language, and the assistance of a dictionary, to deal with the warrant of arrest, that knowledge is quite inadequate to go further. Even if it were not, I would have been unwilling to do so on the basis of a purely subjective test. It would be absurd if important matters of this kind were decided by chance on the basis of the linguistic skills of a judge.

There are many cases where translations are referred to without any reference to any formality relating to them, that is only to be expected when the matter is not in issue. There are, on the other hand, cases where translations are shown on the record to have been sworn. One of these is Re Rodriguez (unreported QB 15th November 1994). The relevant passage from the judgment of Robert Goff LJ is this -

> "A number of these documents are either in German or in Portuguese. Available with them, supplied as I understand it by the Portuguese Government, are translations of those documents. The relevant statement sworn under the Magistrates Courts Act, attesting the translations and made by the translators,

> was not actually made until after the expiry of the two month period. So, said [counsel], in that case, the evidence of the translations was not available within the two-month period. But he did not refer to the fact that there were present, in the bundle of documents produced to the Secretary of State, affidavits sworn by the translators in which they stated on oath that they had duly translated the relevant documents into the English language. Says [Counsel] that may be evidence, but it is not evidence in the proper form. This has to be produced before the stipendiary magistrate and the proper form is the form of a statement under the Magistrates' Courts Act.
>
> In my judgment, that is not a good point. I am quite satisfied that having regard to the intent of this particular treaty, evidence can be produced to the Secretary of State in, for example, the form of an affidavit which satisfies the words of the treaty even if thereafter it may be considered that, in point of form for the purposes of the hearing before the magistrate, it is necessary to put in a statement under the Magistrates' Courts Act rather than the affidavit. I am satisfied that, so far as the treaty was concerned, there was complete compliance by the Portuguese Government in this case."

There we have a distinction drawn between the requisites for compliance with the terms of an Extradition Treaty and for the reception of evidence before a Magistrate, though in neither case are the minimum requirements identified in unconditional terms. That was not the issue.

The Magistrate is not concerned with compliance with the terms of such a treaty. I will deal with that briefly because I do not think it arises in this case at all.

Section 1 (3) of the 1989 Act provides that where an Order in Council under section 2 of the 1870 Act is in force, Schedule 1 of the 1989 Act shall have effect "subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the Order." All that is domestic legislation. It has nothing to do with monitoring the treaty and any court must be under a duty to consider the Order in Council dated 18th May 1881 when interpreting Schedule 1 in relation to Switzerland.

From there I return to the English case law.

In Postlethwaite, to which I have referred, the following passages appear in the speech of Lord Bridge (1988) 1 AC at p. 953 -

> "My Lords, I accept that the House in Sotiriadis proceeded on the implicit assumption that the "evidence" required to be produced by the relevant provision of the German extradition treaty, in a case where the only evidence relied on by the requesting state consisted of depositions and statements on oath taken in the requesting state, meant such evidence as duly authenticated. For my part, I am not disposed, nor have we been invited, to question this assumption. But I do not accept that it inexorably follows from this that "evidence," to be presented within the time limit imposed by article V of the Treaty which we have to consider, must then be in legally admissible form. The primary factor which governed the decision of the majority and which emerges from the views expressed in Sotiriadis was that compliance with the time limit should be a matter within the control of the requesting state. If this leads to the

> conclusion that "evidence" may mean different things according to the category of evidence relied on by the requesting state, so be it. Logically it may be attractive to say that "evidence" must always mean the same thing, viz. legally admissible evidence. But if pragmatically it is necessary to interpret the word more flexibly in order to avoid frustrating the object and intent of the Treaty, I prefer the pragmatic solution."

Lord Bridge then took as a typical example of recently concluded treaties the 1975 Treaty with Finland. Of that he said this -

> "Here, if the word "evidence" means, in relation to Finnish witnesses, duly authenticated depositions or statements on oath taken in Finland in accordance with the assumption implicit in Sotiriadis, it nevertheless cannot possibly mean, in the context, admissible oral evidence where the evidence of English witnesses is to be relied on.
>
> I see no insuperable difficulty in interpreting the word "evidence" in all such treaty provisions as referring to written statements which set forth the relevant evidence which witnesses are able to give of their own knowledge and which are, for the purpose of establishing their authenticity, using that word in an entirely non-technical sense, attested in the form most appropriate to the category of the statements in question. This will mean as a general rule: in the case of statements taken in the requesting state, duly authenticated depositions or statements on oath; in the case of English evidence before 1967, sworn affidavits; in the case of English evidence since 1967, statements made under section 2 of the Criminal Justice Act 1967, now section 102 of the Magistrates' Courts Act 1980. "Evidence"

> as in the first of these examples, is my view of the meaning of that word as it appears in the expression "entirely valid evidence" in Article VII of the 1881 Order. Any stricter interpretation would indeed, in the language of Lord Russell of Killowen C.J., "hinder the working and narrow the operation of most salutary international arrangements" and should, on that account, be rejected."

What I now have to consider is whether the Magistrate was right in adopting translations in the form in which they were presented from Switzerland. If I do so I would be going further than in any previous case of which I know. I am satisfied that the cases cited do not support the submission that such a practice has grown up to such an extent that it has achieved the status of law. Beyond that I will not go today. I shall continue this judgment on Thursday at 10:00 A.M. as I am still in doubt as to the course which I should adopt in that regard. Translations do appear to me to be sui generis in relation to evidential law and practice. It is this which leaves me still in doubt.

Part 2, delivered on 15th August 1996

When I concluded the first part of my judgment on Monday I referred to translations as being sui generis in relation to evidential law and practice. I will now develop that, in relation to both oral and written translations. Counsel for the respondents referred me to S. 25 of the Summary Jurisdiction Law. It reads as follows -

> "In any proceedings before a court in which the language spoken by any witness or party requires to be interpreted into English, the presiding magistrate may appoint a suitable person as interpreter, and shall record the name of such person in the record of the proceedings."

I was asked to regard the acceptance of the Swiss translations as deemed appointments of an interpreter under this section. Even if I were to do so, S 25 in itself says nothing about how the "evidence" of the interpreter is to be received. Invariably, in oral proceedings an interpreter should take an oath. The form of that oath is to be found at paragraph 4-31 of Archbold, 1995 Edition. It is that which is used in the Cayman Islands. It is in different form, for obvious reasons, to that sworn by a witness, but it is no less solemn and it is the translated material which is before the court. The strictness of this requirement is illustrated by R v. Attard 1958 G App R at p. 90.

> "The prosecution proposed to call evidence by a police officer of an interview which he had conducted with the prisoner through an interpreter. Since neither the police officer or the prisoner could understand what the interpreter said to the other, the evidence of the police officer was held to be inadmissible as being hearsay. Only the interpreter could give evidence of the questions which he put to the prisoner on behalf of the police officer and of the answers given to him by the prisoner in the prisoner's own language."

The interpreter is not a mere cypher. It is interesting to note from the report of Attard that as a result of the case,

a Home Office circular was sent out, advising that it would be necessary in future to ensure that the interpreter is available to give evidence as to oral statements as was already done (and I emphasize this) in the case of written statements. I was asked to regard these matters as matters of practice, not of law. In that connection, I now refer to R v. Governor of Gloucester Prison ex parte Miller (1979) 2 All ER 1103. I need not recite the facts because the conclusion of the Queens Bench Divisional Court is succinctly set out in the following short passage from the judgment of Wien J -

> "I consider that the "rule" regarding the allowing of evidence to be given by refreshing ones memory as a result of contemporaneous notes is a matter of practice and not a rule of evidence."

That is far removed from the task before me which is to interpret specific statutory provisions of the Extradition Act 1989 and the Evidence Law. The admissibility of evidence under these enactments is not simply a matter of practice. There was, in the end, nothing in any case which was cited to me to indicate that a practice has grown up in England in Extraditon cases of admitting translations on the basis of there being a deposition in the original language before the Court.

There are two provisions of our Evidence Law with which I must deal. The first is S. 23, the relevant part of which

reads as follows -

> "23. (1) In criminal proceedings where direct oral evidence of a fact would be admissible, a statement contained in a document tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if -
>
> (a) the document is, or forms part of, a record relating to any trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have. personal knowledge of the matters dealt with in the information they supply; and
>
> (b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matter dealt with in the information he supplied."

The Magistrate was quite right to reject the submission that the translations which on the face of it were prepared in the course of its business by a firm called Scott Translations were, for that reason, admissible as a 'business record' under s. 23 of the Evidence Law. The purpose of that provision is to provide an exception to the hearsay rule in relation to the contents of a record on the ground that it is more likely to be true than other forms of hearsay. The basis of that is put most clearly in the

judgment of Lloyd LJ in R v. Governor of Pentonville Prison ex parte Osman (1990) 90 G App R L 281 at pp 305-6. First he refers to the short ruling of the Magistrate that "any document which recites the business of a company is a record ...." The only observation of Lloyd LJ on that is that it "may state the test somewhat too broadly." The following passage from the judgment of Bingham J in H v. Schering Chemicals Ltd and anor (1983) 1WLR 143, 146 was adopted as the true test -

> "The intention ... was, I believe, to admit in evidence records which a historian would regard as original or primary sources, that is, documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts."

A translation of a document which may itself be hearsay upon hearsay and not contemporaneous with the events it describes cannot possibly pass that test in relation to any issue in this case.

The next provision of the Evidence Law which falls for consideration is s. 26 (1). It reads thus -

> "26 (1) In criminal proceedings, a written statement by any person is admissible as evidence to the like extent as oral evidence to the like effect by that person if -
> (a) the statement purports to be signed by the person who made it;
> (b) the statement contains a declaration by that person to the effect that it

is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(c) not less than seven days before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

(d) none of the other parties or their advocates, within four days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section:

Provided that paragraphs (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be tendered."

That, except in respects which are not relevant now, repeats the substance of s. 102 of the Magistrates Courts Act 1980 in England. What is important is that paragraphs (a) and (b) are identical in the two provisions.

I mentioned in the first part of this judgment, which I delivered on Monday, the judgment of Croom-Johnson J in R v. Governor of Pentonville Prison ex parte Kirby (1979) 2 All ER 1094. The references to statute in the extract which I am about to read from that are to the Fugitive Offenders Act 1967 but they are apposite now -

"What s 11 is dealing with is the way of presenting evidence to the committing

> court. Since witnesses in proceedings of this type cannot be expected to travel all the way from a foreign country to the place of committal and documentary evidence of what they would say and exhibit is therefore to be allowed, safeguards have to be imposed to make sure that only authenticated evidence as provided for by s 11 is to be allowed in and not documents or exhibits in any form. This section is dealing with procedure and method but not with admissibility.
> The right view of the expression at the end, for example, of s 11(1)(a) that the documents shall be admissible as evidence of the matters stated therein is that this is an enabling provision allowing documents with due authentication to be put before the magistrate so that he may receive them knowing that they are vouched for by the country from which they purport to come, and he may therefore have regard to them for the purposes of the committal proceedings. But it does not mean that anything which is in that document, regardless of whether or not it complies with the ordinary rules of evidence which would be applied in the committing court, shall be considered by the magistrate."

The magistrate thought that it did mean that, and that is wrong.

While on the matter of authentication, I will mention one more case. It is Oskar v. Government of Australia (1988) 1 All ER 183. It concerns certification of documents by a magistrate in Australia. It was held that a certificate by the magistrate in relation to the depositions of eight named persons, which were tried together, was sufficient. Lord Ackner agreed with the Divisional Court that in those circumstances it was not necessary that each statement

should have a certificate on its face -

> "Such a request would be highly artificial. The section is complied with if there is a separate certificate, which sufficiently identifies all the statements which it certifies, as in the instant case, when they are all tied together."

However, the only aspect of this case to which that could relate is the binding of the bundle under the Seal of the Swiss Federal Ministry.

The Magistrate was right to find that that seal and binding is a sufficient certification by seal under section 26 (1)(b) of the 1989 Act. The problem is with 26 (1)(a). There is no conflict between S 26 (1)(b) and Article VII of the 1881 Order, for the reasons which I expressed on Monday. Article VII can only restrict, and not enlarge the provisions of s. 26 as was formerly the case with the 1870 Act.

I was prepared, on Monday, to recognize the existence of the Swiss warrant of arrest, for the reasons which I also explained then.

The Magistrate was invited to look at inadmissible translations of documents concerning Swiss matters of business law, and the interest of the present applicants in that connection. It is the kind of matter where the

principles expressed by Lord Esher MR in Chatenay v. the Brazilian Submarine Telegraph Company Ltd (1890) 1QB 79 are to be strictly followed, in spite of what Lord Wilberforce described in his speech in Tarling v. the Government of Singapore as being, in such cases as this, as "a usual predisposition to uphold the Magistrates' decision." I acknowledge that predisposition, and that I came to express the decision which I have reached with some regret.

However, the meaning of the documents in German must be ascertained by the evidence - and there is noting figurative in my use here of that word - of translators and if necessary experts. No such evidence was presented to the Magistrate in admissible form, except, as I have ruled, in relation to the warrant of arrest. Without such evidence the Magistrate could not have found that there was sufficient grounds to warrant a committal and he erred in law in the respects which I have indicated.

The Court has had to deal with some highly technical pints. But they are of great importance. The extradition procedures have the effect of depriving defendants of the right to cross examine on material in properly admitted foreign documents. I adopt the observation of counsel that in return for that advantage a requesting state must comply strictly with the law.

In this case for the reasons which I have given habeas corpus must issue and I order that these applicants be released from custody or bail conditions as the case may be. Costs of the habeas corpus proceedings will be in their favour.

G.E. Harre
Chief Justice

15th August 1996

GRAND COURT
CAYMAN ISLANDS