

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2008-00639

BETWEEN

In the matter of the Constitution of Trinidad and Tobago

And

**In the matter of an application for redress pursuant to section 14 of the Constitution
alleging that the provisions of sections 4 and 5 thereof have and are being and are likely
to be abrogated abridged or infringed**

And

**In the matter of the Extradition (Commonwealth and Foreign Territories Act) 1985 as
amended by Act No 12 of 2004**

BETWEEN

STEVE FERGUSON

ISHWAR GALBARANSINGH

Claimants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

HIS WORSHIP SHERMAN MC NICHOLLS

CHIEF MAGISTRATE

Defendants

Before the Honorable Mr. Justice V. Kokaram

Appearances:

Mr. Fyard Hosein, S.C. and Mr. R. Dass instructed by Ms. N. Alphonso for the Claimants

Mr. K. Ramkissoon and Mr. M. Quamina for the Defendants

ORAL JUDGMENT

1. On 14th July 2008, the Claimants were committed by the Chief Magistrate further to an Extradition request made under the Extradition Act Chapter 12:04 (“the Act”). The extradition request relates to indictments in the United States of America (“U.S.A.”) related to corrupt practices in relation to the construction of the Piarco International Airport. The Claimants filed an application for habeas corpus to challenge the said committal on 24th July 2008. Their applications were dismissed on 6th May 2009 and the Claimant’s filed their appeal against that decision. The appellate proceedings eventually came to an end on 7th June 2010 with the decision of the Judicial Committee of the Privy Council refusing leave to the Claimants to appeal against the majority decision of the Court of Appeal which had dismissed their appeals.

2. During the course of the hearing of the application for habeas corpus and the attendant appellate proceedings, the Claimants were released on bail pursuant to an order made by the Court in July 2008, after the Claimants were committed by the Chief Magistrate to await the decision of the Attorney General as to their surrender to the U.S.A. On 15th June 2010, at the end of those appellate proceedings I mentioned previously, the Claimants were arrested and now remain incarcerated.

3. About the same time the Claimants filed their application for habeas corpus, they also launched a constitutional motion by Fixed Date Claim form issued on February 19th

2008.¹ This constitutional motion challenges the validity of the Extradition Act on the basis that it infringes the Claimants constitutional rights under sections 4 (a) (e) (h) and 5 (2) (a) (e) (h) of the Constitution. This motion is scheduled to be heard on 27th July 2010.

4. Prior to the said decision of the Judicial Committee of the Privy Council, the Attorney General indicated to the Claimants his intention to carry out his statutory duty under section 16 of the Act should their appeal be dismissed. If I can summarise an effect of section 16, it gives the Attorney General the discretion to order the return of the Claimants unless such a return is “unjust or oppressive”.² The Attorney General explained in his letter dated 9th June 2010:

“Your application for leave to appeal against the decision of the Court of Appeal to the Judicial Committee of the Privy Council is extant. We intend to allow the proceedings before the Judicial Committee to take their course. If your appeal is dismissed, the Honourable Attorney General will then proceed to carry out his statutory duty under section 16 of the extradition Act as amended.

In this regard the Honourable Attorney General will maintain the position adopted by his predecessor and allow you a reasonable time to consider and take any appropriate measures in respect of a decision under section 16, if it were adverse to your clients. We would also provide an opportunity to your clients to make the necessary representation, in keeping with the prior legal position adopted by the former Attorney General.

Rest assured that the Honourable Attorney General is committed to observing the principles of natural justice and fairness in the exercise of his functions.”

¹ An amended Fixed Date Claim form was filed on 11th March 2008

² Section 16 (1) Where a person is committed to await his return and is not discharged by order of the High Court or of the Court of Appeal, The Attorney General may by warrant in the form set out in Form 11 in the Second Schedule order him to be returned to the territory by which the request for his return was made unless the return of that person is prohibited or prohibited for the time being by section 8 or by this section or the Attorney General decides under this section to make no such order in this case.

(2)..

(3)The Attorney General shall not make an order under this section in the case of a person if it appears to the Attorney General on the grounds mentioned in section 13(3) that it would be unjust or oppressive to return that person.”

5. The Claimants attorney at law and the Attorney General have exchanged correspondence with a view to making those representations. By letter dated 15th June 2010 the Attorney General has given the Claimants until 21st June 2010 to make the relevant representations to him before he exercises his powers under section 16 of the Act, which I will conveniently refer to as “the section 16 decision.” Senior Counsel has submitted that the issue of what is “unjust and oppressive” under section 16 (3) of the Act is rooted in fact. I agree, as ultimately a resolution of what is “unjust and oppressive” although may involve mixed questions of law and fact, is essentially fact driven. The Claimants incarceration according to Senior Counsel is therefore making it difficult for him to obtain proper instructions to make submissions on this issue of “injustice and oppression” from his client. He submits that it constitutes an unjust fetter to his access to his client and unfair restriction on the ability to make representations as per the invitation of the Attorney General.

6. It is against this backdrop that the Claimants make this oral application³ for-
- (a) bail for the Claimants under the same conditions that existed previously pending the determination of the section 16 question or the constitutional proceedings whichever is later; and
 - (b) a conservatory order preventing the Attorney General whether acting on his own or through his servants and/or agents or otherwise howsoever from removing the Claimants from the jurisdiction pending the hearing and determination of this section 16 question and/or the constitutional motion.

³ The application was made in the form of an unfiled application without an affidavit based on the undertaking that an affidavit will be filed on 17th June 2010. Evidence was led from the bar table through the form of correspondence and certain facts. There was no objection to hearing this application in this form by the Defendants and having regard to the urgent nature of the application and the largely uncontroversial facts there could be none.

Conservatory orders

7. The principles that guide the Court in granting a conservatory order are well known. It is accepted that the constitutional court does have the power to preserve the status quo ante pending the hearing of a constitutional motion. The guidance issued by Braithwaite JA in *AG v Sumair Bansraj*⁴ deserves repeating:

“Now to the formula. Both remedies of an interim injunction and an interim declaration order are excluded by the State Liability and Proceedings Act, as applied by section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the “conservatory order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective rights will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction...but on the other hand it would be well within the competence and the jurisdiction of the High Court to “give such directions as it may consider appropriate for the purpose of securing the enforcement of ...the provisions” of the Constitution.

In the exercise of its discretion given under section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application inter partes and not ex parte and to set down the substantive motion for hearing within a week at most of the interim conservatory order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal.

I have suggested this formula because in my opinion the interpretation of the words in section 14(2) “subject to subsection (3) and the enactment of section 14(3) in the 1976 Constitution must have ...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under

⁴ (1985) 38 WIR 286

the 1962 Constitution. On the other hand, however, the State has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and the State.”

8. The constitutional court must hold the scales of justice evenly between the Claimants and the State. There are competing and powerful interests at stake in this case. The right of the Claimants to their liberty and freedom of movement on the one hand and on the other the public interest in the prosecution of crime, the comity of nations the attendant obligations under international treaties with foreign nations. In considering the question of bail in extradition cases the Court of Appeal in *R v Phillips* (1922) recognized the importance of the international obligations in extradition cases. The “scrupulousness of conduct” with which the obligation is to be fulfilled is not measured by any tenderness shown to the foreign country but is really a matter of duty. “It becomes a point of honour when a treaty of that kind has been made that special care should be taken to fulfill it.”⁵ This Court must therefore be astute to balance these competing interests in the interim while it deals with the substantial complaint of the Claimants.

Bail

9. The State accepts that the Court has the power to grant bail. The power of the Court to grant bail is further entrenched in the Bail Act Chapter 4:20. It is clear in its terms. Importantly the Act applies to extraditable offences. See section 4 of the Bail Act. Senior Counsel submits in the main that the Claimants are entitled to bail for the following reasons:

- (a) The record reveals that bail was previously granted to the Claimants.
- (b) The Claimants were subjected to several conditions which they dutifully observed.
- (c) The Claimants have at all times consistently and diligently attended the multiplicity of proceedings in which they are before the courts in compliance with the various conditions of their bail.

⁵ (1922) 27 CLR 345

(d) They are not a flight risk.

(e) Senior Counsel needs access to them if meaningful representations are to be made under section 16 of the Act.

10. Mr. Ramkissoon and Mr. Quamina submitted that the question of bail is in the Court's discretion. I agree and I hasten to add that it is a discretion that must be exercised judiciously and not capriciously. The Defendants submit that some compelling factors to consider in exercising this discretion are:

(a) The stage at which the Claimants are in the extradition proceedings. They are at the last stage where ultimately standing between them and the American criminal court is a decision to be made under section 16 of the Act.

(b) A second factor to consider is that in extradited cases a Court should exercise greater circumspection in granting bail in deference to the public interest in honoring its treaty obligations.

(c) The fact that they are not a flight risk is of no moment. It can well be said that sensing that the end is near it may make the Claimants reconsider their previously compliant dispositions.

(d) Matters of personal convenience and personal factors care of little weight in exercising the discretion.

(e) The Claimants have not yet filed any application for judicial review of a decision made by the Attorney General under section 16 of the Act.

11. The upshot of Senior Counsel's submissions in my view, is that the grant of bail is almost automatic to any person who is accused of an extraditable offence and is awaiting a "section 16" decision by the Attorney General, so long as there is nothing to trigger section 6 of the Bail Act. I do not think such a general view can be accepted. The Court still reserves a discretion and I adopt the approach of acting cautiously in the exercise of

that discretion before granting bail to accused persons awaiting a section 16 decision. In exercising that discretion I give due deference to the public interest in the reciprocity of international obligations, the serious nature of the crimes for which the Claimants have been charged, the serious penalties of those crimes and the principles enunciated in the authorities referred to the Court.

12. *Re Hertular, Knowles* and *R v Sezak* suggest that in extradition cases the Court must exercise a great degree of care in granting bail which may defeat the international obligations underpinning the arrest. In *Re Hertular No 2* (Belize Law Report pg 38) Barrow J examined the issue of whether bail should be granted in light of the personal circumstances of the petitioner:

“In this case the personal factors to which the petitioner referred, the wish to care for his child and the convenience of being better able to instruct his lawyers, are of little weight on an objective assessment. That would be so even if he were a prisoner arrested on suspicion of crime and detained pending trial in Belize and so had full constitutional right to bail. It is even more so since he is an extradition prisoner.”

The mere personal inconvenience of the Claimants in this case is not enough to trump the public interest in honoring its obligations. The Claimants can still access their attorneys. Their submissions really amounted to an issue of the convenience of the lawyers in taking their instructions which carries little weight in the objective assessment of the exercise of the Court’s discretion.

13. Barrow J in *Hertular* also correctly observed that the mere fact that the petitioner did not jump bail when he was at risk of conviction in Belize for drug trafficking is no basis to conclude that he would not jump bail now that he is at risk of extradition to the USA and conviction in that jurisdiction for drug trafficking. The Court also considered the severity of the penalty associated with the offence and considered it a relevant factor in the exercise of the Court’s discretion whether to grant bail.

14. In *Knowles v Superintendent of Fox Hill Prison* (PC)⁶ Lord Slynn also examined this issue of “personal factors” as a basis for granting bail to persons awaiting extradition. He observed that “mere residence and having family in the country do not necessarily lead to the conclusion that there will be no attempt to flee the jurisdiction, particularly in a case where it is possible that substantial sums of money may be available from drug smuggling.” The Board in that case also considered the nature of the crimes alleged and the advantage or the risk of the flight of the accused as relevant considerations. Importantly Lord Slynn also observed: “It is important that in this particular type of case these considerations should be taken fully into account and it should only be in exceptional cases that bail as a matter of discretion is granted.”

15. Finally in the *R v Sezek* [2001] EWCA Civ. 795, the Court of Appeal also commended a cautious approach in the grant of bail in “deportation cases.” In that case Ouseley J dismissed the appellant’s application for judicial review filed against the decision of the Secretary of State refusing to revoke a deportation order. The Court of Appeal dismissed a renewed application for bail pending the hearing of an appeal by the applicant against the decision of Ouseley J. The Court of Appeal also considered the advanced stage of the proceedings in refusing the grant of bail.

16. I do not view the grounds advanced for the grant of bail as sufficient to warrant an exercise of my discretion in favor of the Claimants over the public’s interest in these extradition proceedings. The fact that they did not previously “jump bail” is of no moment in light of the fact that the Claimants are at the “end game” in this extradition proceedings.

The section 16 decision:

17. No real complaint has been made by the Claimants with regard to the making of the section 16 decision. In any event I am of the view that the main thrust of the Claimants case is the constitutionality of the process. Any complaint with regard to the exercise of the section 16 decision is premature in the face of the serious challenge raised

⁶ [2005] 1 WLR 2546

by the Claimants in the constitutional motion. If the Act is unconstitutional a section 16 decision is made redundant.

18. I have considered the principles of *East Coast Drilling v Petroleum Company of Trinidad and Tobago Ltd* [2000] 58 WIR 351 and I adopt the reasoning of *Bansraj* and consider it appropriate in this case to grant a conservatory order against the extradition of the Claimants pending the determination of this motion. The constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with our supreme law. It would be wrong in my view to extradite the Claimants while this issue is pending in effect and which will render the matter of the constitutionality of the legislation academic.

19. However pursuant to the guidance of Braithwaite JA in granting this conservatory order I must proceed swiftly to deal with the substantive motion. This I propose to do.

Order

20. My order therefore is as follows:

- (a) The application for bail is dismissed.
- (b) It is hereby ordered that the Attorney General whether acting on his own or through his servants and/or agents or otherwise howsoever be restrained and a conservatory order is hereby granted restraining them or each of them from removing the Claimants from the jurisdiction pending the hearing and determination of the constitutional motion or until further order.
- (c) The hearing of the Claimants constitutional motion is brought forward for hearing to 24th June 2010 at 10.00 a.m. POS 20.

21. Upon the application made by the Claimants, leave to appeal against the order refusing the grant of bail is hereby granted. No party addressed me on the issue of costs and I reserve this issue until the hearing of the motion.

Dated this 16th June 2010.

Vasheist Kokaram
Judge