THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-04267

IN THE MATTER OF KIM MAHARAJ IN AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

BETWEEN

KIM MAHARAJ

Applicant

AND

THE COMMISSIONER OF PRISONS

Respondent

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: **20 February 2020**

Appearances:

Mr. Mario Merritt instructed by Ms. Karunaa Bisramsingh for the Applicant

Mr. Ravi Rajcoomar and Mr. Graeme McClean instructed by Ms. Varuna Chattoo

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DECISION ON THE APPLICANT'S APPLICATION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM

I. Introduction

[1] Before the Court for decision is the Applicant's application for a Writ of *Habeas Corpus ad Subjiciendum* (hereinafter "the Writ of *Habeas Corpus*") seeking to challenge the committal order made against him by Chief Magistrate Her Worship Maria Busby Earle-Caddle on 31 October 2018, extraditing him to the United States of America. The Applicant

is presently incarcerated at the State Prisons. The Applicant alleged that it would be unjust and oppressive to order his extradition because of the passage of time since he has become unlawfully at large and accordingly, sought relief from this Court.

II. Background

[2] The Applicant was charged, tried and convicted by a jury in the State of New York for the following two offences: (1) Assault in the second degree in violation of New York Penal Law Section 120.05-1; and (2) Gang Assault in the second degree in violation of New York Penal Law Section 120.06-1 against the laws of the United States of America ("the USA").

[3] In the **"Record of the Case for the Extradition of Kim Maharaj"** appended to the affidavit of Varuna Chattoo exhibited as part of the bundle of **"VC2"** filed on behalf of the respondent on 22 November 2018, the **"Summary of the Case"** against the Applicant states as follows:

> *"This prosecution arose from a New York City Police Department investigation, which revealed that, on September 7, 1998, the fugitive, Kim Maharaj, acting in concert with two others, and in the course of shoplifting beer, assaulted a store owner, Amar Jeet Multrani, by punching him in the face while the other two individuals held Multrani down, causing him to suffer fractures and permanent visual impairment to the left eye. On September 12, 2000, a jury trial for Maharaj and his two co-defendants began in the Supreme Court of the State of New York, County of Queens. Maharaj, who was represented by counsel throughout the proceedings, fled during jury deliberations on September 28, 2000, after all the evidence had been presented and closing arguments had been made. On September 28, 2000, the jury convicted Maharaj of assault in the second degree and gang assault in the second degree. Maharaj's counsel was present when the jury delivered its verdict. On January 12, 2001, after determining that Maharaj had absented himself voluntarily, the court sentenced Maharaj to a total of twelve (12) years' incarceration with five (5) years of mandatory post-release supervision. Maharaj's counsel was present for the sentencing proceeding. Maharaj's failure to appear persists to the present, and his sentence remains unenforced."*

[4] Based on the "summary of the case", it is clear that the Applicant was present and represented by counsel for the entirety of the trial, including presentation of all evidence, closing arguments and jury deliberations, but failed to appear for the verdict. Nevertheless, the Supreme Court of the State of New York accepted the verdict and issued a warrant for his arrest. This warrant remains valid and executable.

[5] On 12 January 2001, in accordance with the USA law, after determining that the Applicant had voluntarily absented himself, the Court sentenced the Applicant *in absentia*. In relation to the first offence of assault in the second degree, the Applicant was sentenced to 12 years' incarceration with 5 years of mandatory post-release supervision. In relation to the second offence of Gang Assault in the second degree, he was sentenced to 7 years' incarceration to run concurrently with the former sentence. The Applicant has the entirety of the sentence left to serve.

[6] The Applicant left the State of New York, USA in or around February 2001 and returned to Trinidad and Tobago. He resided at LP 53 East Sooknanan Street, Aranguez with his extended family from the time he returned to the time of the filing of this application.

[7] On or about 15 February 2016, the Applicant was arrested and charged in this jurisdiction for the offence of Driving under the Influence (DUI). Consequently, on 15 March 2016, the Interpol Bureau of the Police Service, Trinidad & Tobago received a request for a foreign criminal record trace in relation to the Applicant. The United States National Central Bureau (USNCB) Interpol Washington was contacted for a criminal record check based on the name and date of birth of the Applicant. On 16 March 2016, the USNCB Interpol Washington responded; the Interpol Bureau was advised that there was a subject with a similar name and date of birth wanted in the USA for assault. The USNCB Interpol Washington requested fingerprints and photographs of the Applicant to be forwarded for comparison; Interpol Bureau Port of Spain complied with the request on the 16 March 2016.

[8] On 18 March 2016, the USNCB Interpol Washington confirmed that the fingerprints matched those of the Kim Maharaj wanted in the USA and that extradition was to be pursued. On 19 March 2016, the Interpol Bureau responded and confirmed that the Applicant was not in custody and that the matter before the Court was adjourned to 12 June 2016.

[9] On 27 June 2018, the Attorney General issued an Authority to Proceed pursuant to the Requesting State's (USA) request for the extradition of the Applicant. The Authority to Proceed listed the offences against the Applicant and stated the particulars. On 28 June 2018, the Applicant was arrested pursuant to a Warrant of Arrest dated 28 June 2016, wherein he was alleged to be unlawfully at large after being convicted of two offences stated in paragraph [2] above. Extradition proceedings were conducted, following which, on 31 October 2018, the Applicant was committed by the Chief Magistrate to be extradited to the USA.

[10] On 14 November 2018, the Applicant applied for leave to issue a Writ of *Habeas Corpus* so as to secure his release and avert the consequences of the extradition order. The Application was supported by the affidavits of (i) the Applicant; (ii) his father, Tatepal Maharaj; and (iii) his wife, Tricia Maharaj, all filed on 14 November 2018. Tatepal Maharaj filed a supplemental affidavit on 15 November 2018.

[11] Permission was granted on the 15 November 2018 to issue the Writ of *Habeas Corpus* which was made returnable on 22 November 2018. On the return date, the Respondent filed response affidavits of (i) Herman Narace; and (ii) Varuna Chattoo. These affidavits set out, inter alia, the Record of Case, Criminal Record of the Applicant and the witness statements of the witnesses at the Magistrates' Court, Port of Spain who gave evidence on behalf of the Requesting State. No reply affidavit was filed by the Applicant.

[12] Both the Respondent and the Applicant filed their written submissions on 5 December 2018 and 18 December 2018 respectively. Further oral submissions were made by both counsel on the 19 December 2018.

III. Application

[13] The sole ground of the Application is that it would be oppressive to extradite the Applicant owing to the passage of time since he became unlawfully at large. The Applicant also asked the Court to consider other circumstances, which, in his estimation, will justify a bar to the extradition. These circumstances are:

(i) the right of the individual to respect for his private and family life;

(ii) the rights of Applicant's child and the effect the extradition will have on him;

(iii) the seriousness of the offences for which the Applicant has been convicted; and

(iv) the health of the Applicant.

[14] Counsel for the Applicant relied on **section 13(3) of the Extradition (Commonwealth and Foreign Territories) Act, Chap 12:04**, which provides as follows:

> *"13.(3) On any such application made under this section the High Court may, without prejudice to any other jurisdiction of the High Court, order the person committed to be discharged from custody if it appears to the High Court that by reason of— ...*
>
> *(b) in the case of a declared Commonwealth or foreign territory—*
>
> *(i) the passage of time since he is alleged to have committed the extraditable offence or to have become unlawfully at large, as the case may be;*
>
> *(ii) the accusation against him not having been made in good faith in the interests of justice; or*
>
> *(iii) any other sufficient cause,*
>
> *it would, having regard to all the circumstances, be unjust or oppressive to return the person."*

Affidavits in support of the Application

[15] The Applicant deposed that he was a Green Card holder of the USA and was in fact charged for the offences of assault in the second degree and gang assault in the second degree together with two other persons. He admitted that he panicked at the thought of the verdict and decided not to attend the rest of the trial to face the outcome. He was

convicted of those offences on 28 September 2000. He further admitted that he did not attend the sentencing hearing on 12 January 2001.

[16] He deposed that although he did not appear in Court for his verdict and sentencing, he continued to live at his USA address – 9718 103rd Street, Ozone Park, Queens, New York with his parents. The Applicant also continued to work at Jani King, a janitorial company. The Applicant stated that he was not in hiding in the USA or elsewhere unwilling to face his sentence. He simply stated that "*I just pretended like it never happened*."

[17] The Applicant stayed in New York for approximately one month after his sentencing hearing. He returned to Trinidad and Tobago in or around February 2001 and lived at LP 53 East Sooknanan Street, Aranguez. This was the address he used in his application for a green card for the USA. The Applicant stated that from the time of his sentencing to the time that he left New York, the police never came to his house looking for him nor to any of the job sites that he worked.

[18] The Applicant deposed that since the years had passed by and the USA did not make any attempts to have him serve the sentence, he took the opportunity to build his life. He got married on 27 April 2007 and began working in his registered family business, "Suspension Kings". He now has a son who was born on 11 December 2007.

[19] The Applicant was arrested and charged in 2016 for driving under the influence (DUI). It was only upon this arrest that a criminal search via Interpol was done. It is the Applicant's belief that had the local authorities in Trinidad and Tobago not made a request for Interpol tracing, the US authorities were not going to make any attempts to find him. Nonetheless, two years had elapsed since the USA confirmed that the Applicant was wanted in the USA to when they requested the extradition of the Applicant.

[20] At the time of the filing of the Application, it had been 18 years that the Applicant defaulted on his appearance and to his knowledge, the USA had made no attempts to locate him.

[21] Consequently, during that time, the Applicant has become a man with a family and business; he is the sole breadwinner in his family since his wife is a housewife. He stated that he is like a best friend to his son; they do everything together. His son has a reading problem so he spends every night ensuring that his son reads for him. His wife, Tricia, is often very sick. He, therefore, is the one charged with the responsibility of caring for her. He ensures that she gets her medication and is always comfortable. However, it must be noted that the Applicant has not provided the Court with any documentary evidence in support of these claims.

[22] The Applicant also stated that he plays a major role in the lives of his brother's children since he lives in a family house with his extended family. He also assists members of his community by servicing motor vehicles free of charge or training young men interested in the field of auto mechanics.

[23] The Applicant deposed that he is diagnosed with transverse myelitis which is an auto-immune disease. His spinal cord is affected: he is sometimes in severe pain and has problems walking. As a result, he currently walks with a limp and has problems with his bladder and bowel movements. The Applicant stated that there are days when he is depressed and his pain is so severe that the pain medication does not work. As a consequence, he turns to alcohol to help ease his pain. Again, the Applicant has not exhibited any medical reports or documentary evidence in support of this diagnosis.

[24] The Applicant's father, Tatepal Maharaj, deposed that the Applicant was convicted of the two offences in the USA and that he failed to show up at the Court for the delivery of the verdict and his sentencing hearing. **In fact, the father stated that he received a call from the Applicant that he was in Trinidad after he failed to attend his sentencing hearing**. However, the father, clarified this statement in his supplemental affidavit stating that **he received the call about a month after the son failed to attend same**.

[25] The Applicant's father stated that from the time of his sentencing to the time that he left, the police never came to their address in the USA searching for the Applicant. During that time, the father deposed that he continued working at Jani King (where he was self-employed and the Applicant was a taxable employee for several years) yet the police also never showed up at Jani King looking for the Applicant.

[26] The father left for Trinidad and Tobago in 2002. When he returned, he resided at LP #53 East Sooknanan Street, Aranguez, the same address in Trinidad that the USA had on their record since their visas were issued and their residency granted. The father further stated that the Applicant, from 2001 to 2018, lived in plain sight at LP #53 East Sooknanan Street, Aranguez.

[27] The Applicant's wife, Tricia Maharaj, gave evidence on her relationship and time spent with the Applicant from the date that they were married on 27 April 2007. She stated that they live together in a family house with the Applicant's parents, his brother, sister-in-law, nieces and nephews. She deposed that the Applicant is the sole breadwinner of her family; he provides financially for her and their child.

[28] In 2016, the wife found out she had an ovarian cyst which needed immediate attention and resulted in surgery. The surgery was a success, however, she found herself suffering from high blood pressure and migraines. The wife stated that since her husband has been in custody, her health and family life have deteriorated; she has had to increase her tablet dosage and now suffers from migraines every day. Again, it is to be noted that no medical reports or documentary evidence was exhibited in support of these claims.

[29] Additionally, she is unable to help their son with his homework since the Applicant was the one charged with this responsibility. She stated that she has received calls from her son's teacher who indicated that their son is distracted in class and that his marks have dropped drastically. The wife also experiences sleepless nights because the son cries at night for his father.

[30] The wife deposed that she is very much dependent on the Applicant since he was the one who did everything around the house; he dropped and picked up their son to and from school, paid the bills and made the groceries. Her life has changed drastically since the Applicant has been in custody. She and her son need the Applicant more than ever in their lives.

IV. Issue

[31] The sole issue which falls for determination in this Application before the Court is ***whether, in the circumstances, it would be oppressive to extradite the Applicant to the USA***.

V. Law and Analysis

[32] Lord Bingham in the case of **Knowles v The Government of the United States of America**[1] stated as follows:

> *"Laws governing extradition seek to reconcile two objectives, both of concern to states recognizing the rule of law. One objective is to give effect to the principle that, in the ordinary way, persons in one state who are credibly accused of committing serious crimes triable in another should be surrendered to that other to answer for their alleged misdeeds. This is a principle which national authorities, including courts, will seek to honour. The second objective is to protect those whose surrender is sought against such surrender in circumstances where they would, putting it very generally, suffer injustice or oppression. States ordinarily seek to provide some safeguards against the surrender of those within their borders in such circumstances".*

[33] Pursuant to **section 13(3) of the Extradition (Commonwealth and Foreign Territories) Act**, the High Court may discharge a committed person if, by reason of: (a) the passage

[1] [2006] UKPC 38

of time between the commission of the offence and the extradition proceedings; or (b) the accusation not having been made in good faith or in the interests of justice; or (c) "or any other sufficient cause", it would, having regard to all the circumstances, be unjust or oppressive to return the person.

[34] In **Kakis v Government of the Republic of Cyprus**[2], Lord Diplock defined "unjust" and "oppressive" as follows:

> *"'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."*

[35] Based on the meaning postulated by Lord Diplock in ***Kakis***, Counsel for the Applicant, Mr. Merritt, submitted that the Applicant's submissions are not based on the Applicant's extradition being unjust, but rather, oppressive.

[36] The Court agrees with Counsel on this submission. The Applicant has already faced his trial for the two offences and was convicted of same by a jury. He was represented by Counsel throughout the trial, the verdict and sentence. Therefore, the issue of the Applicant receiving an unfair trial is moot. The Applicant only has to serve the sentence imposed upon him by the Supreme Court of the State of New York.

[37] In that regard, the Court has only to consider whether it will be ***oppressive*** to extradite the Applicant to the USA.

[2] [1978] 1 WLR 779

[38] Counsel for the Applicant asked the Court to consider the following factors in deciding whether it will be oppressive to extradite the Applicant to the USA:

(i) the passage of time since he became unlawfully at large (delay);

(ii) the right of the individual to respect of his private and family life;

(iii) the rights of the Applicant's child and the effect the extradition will have on him;

(iv) the seriousness of the offences for which the Applicant has been convicted; and

(v) the health of the Applicant.

The Court will now examine each factor separately below.

Passage of Time (Delay)

[39] Mr. Rajcoomar, Counsel for the Respondent, contended that there is no dispute that the Applicant voluntarily absented himself from the American jurisdiction while on bail after the trial and while awaiting the verdict of the jury. It was, therefore, submitted that the delay caused by the Applicant himself either 'by fleeing the country, concealing his whereabouts or evading his arrest' cannot be used a ground to evade extradition. Counsel relied on the authorities of **Kakis v Government of the Republic of Cyprus**[3] and **Gomes v Government of Trinidad and Tobago**[4] in support of his proposition.

[40] Counsel for the Applicant also referred the Court to ***Kakis*** and submitted that the Applicant will need to establish that there are exceptional circumstances that exist in this case which make his extradition oppressive. Counsel contended that if there exist exceptional circumstances, the Applicant will be able to rely on the passage of time as a bar to extradition even though the Applicant was responsible for the delay. Counsel relied on the following authorities in support of his proposition: **Obert v Public Prosecutor's Office of Appeal of Ioannina, Greece**[5], **Lord Advocate v Merica**[6] and **Commonwealth of Australia v O'Neill**[7].

[3] [1978] 2 All ER 634
[4] [2009] UKHL 21
[5] [2017] EWHC 303 (Admin)
[6] (2015) Scot (D) 8/6
[7] 2010 Scot (D) 4/7

[41] The locus classicus on the issue of passage of time (delay) in extradition proceedings is ***Kakis***. Lord Diplock stated as follows:

> *"Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.*
>
> *As respects delay, which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8(3) is based upon the "passage of time" under paragraph (*b*) and not on absence of good faith under paragraph (*c*), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case."*

[42] The House of Lords in **Gomes v Government of the Republic of Trinidad and Tobago; Goodyear v Same**[8] held as follows:

[8] [2009] 1 WLR 1038; [2009] UKHL 21

> *"An accused who deliberately fled the jurisdiction in which he had been bailed to appear was not entitled, save in the most exceptional circumstances, to claim that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some fault on its part such as losing his file, dilatoriness or mere inaction through pressure of work or limited resources. Only a deliberate decision by the requesting state, communicated to the accused, not to pursue the case against him or some other circumstance, which would justify a sense of security on his part, should allow him to assert that the effects of further delay were not of his own choice and making."*

[43] **Krzyzowski v Circuit Court in Gliwice, Poland**[9] in applying ***Kakis*** and considering ***Gomes***, the Court found that save in the most exceptional circumstances, delay in the commencement or conduct of any extradition proceedings brought about by the accused fleeing the country, concealing his whereabouts or evading arrest, could not be relied upon by him as a ground for holding it to be unjust or oppressive to return him – whatever other concurrent cause of delay there may have been.

The Court further found that the concept of the "chain of causation" may be attenuated in a case in which the extraditee flees justice and goes into hiding, but his whereabouts subsequently become known to the requesting state. Culpable delay, thereafter, on the part of the requesting state can be taken into account. However, where the whereabouts of the extraditee remain unknown to the requesting state, delay on its part cannot properly be taken into account, save in an exceptional case.

[44] Lord Phillip in **Fuller v Attorney General**[10] stated as follows:

[9] [2007] EWHC 2754
[10] (2012) 2 LRC 110 per Lord Phillip

> *"The relevant delay so far as an allegation of abuse of process is concerned is not the delay in commencing the extradition proceedings, but the delay in pursuing them. Inordinate delay in pursuing extradition proceedings is capable of amounting to an abuse of process justifying the discharge of the person whose extradition is sought. There is authority at the highest level on the circumstances in which delay will justify discharging such a person, albeit in the context of express statutory provisions as to this."*

[45] The Court is of the view that the Applicant cannot invoke the passage of time, though lengthy it is, since he is guilty of deliberate flight from the USA and there are no exceptional circumstances existing to justify a different course. Moreover, there was no deliberate decision by the USA communicated to the Applicant that they will not pursue him to serve his sentence nor was there any other circumstance to justify a sense of security on the Applicant's part.

[46] Furthermore, after fleeing the USA, the US authorities were not aware of the Applicant's whereabouts until USNCB Interpol Washington was contacted by the Interpol Bureau of Trinidad and Tobago to run a criminal record check of the Applicant in March 2016. Thereafter, in June 2018, the US authorities requested that the Applicant be extradited to serve his pending sentence.

[47] The Court is, therefore, of the opinion that the length of time from the Requesting State becoming aware of the Applicant's whereabouts to the time the Requesting State made a request for extradition (March 2016 to June 2018), taking into account that the Applicant was responsible for 16 years' delay, cannot be considered inordinate. The fugitive cannot pray in aid what would not have happened but for the additional passage of time for which he himself is culpable. Can 2 years be considered inordinate delay, taking all of the circumstances into account? This is not a case where the fugitive is being sought to face a trial, where the longer the delay the more likely it will affect the fairness of the trial in terms of witnesses no longer being available, loss of witnesses' memory or loss of

evidence as a whole. This is a case where the fugitive has been tried, convicted and sentenced but has not yet served any part of the sentence. There was no culpable delay on the part of the Requesting State in pursuing extradition proceedings, thus, it cannot be said to be oppressive to have the Applicant returned to the USA.

Right of the individual to respect for his private and family life

[48] Mr. Rajcoomar submitted that the principles governing the effect of constitutional fundamental protections with regard to extradition are now well-settled in that the Court needs to carry out a balancing exercise of the factors before determining whether extradition is proportional to fundamental protections. It is important to keep in mind that the fugitive has been tried, convicted and sentenced and that no issue has been raised of the unfairness of the trial, conviction and sentence. These are not in dispute.

[49] It was further submitted that in all criminal proceedings and extradition matters, there will always be an interference with private and family life; sentencing will always have an adverse effect on private and family life. Counsel advanced that sentencing is provided for by the rule of law as being a proportionate response to that which is defined as criminal conduct.

It was submitted that any submission that the criminal sentencing powers are subservient to constitutional provisions would be absurd and an affront to the rule of law including the drafting of criminal law statutes. Mr. Rajcoomar, however, submitted that in all instances of extradition, the common consequences will be oppressive but proportional and justified – such justification can only be usurped by extreme facts and circumstances. He relied on the authority of **R (Warren) v Secretary of State for the Home Department**[11] in support of his proposition.

[50] Mr. Rajcoomar contended that the primary factors to be considered would always be the public interest in the suppression of crime and international obligations, including treaty obligations and mutual assistance. Counsel noted that the punishment for which the

[11] (2003) EWHC 1117 at paragraph 40

Applicant is sought exceeds one year and the offence is an indicatable offence which is serious and ought to be considered.

[51] Counsel advanced that none of the factors in the affidavit evidence amount to striking and unusual facts to permit the Court to declare that extradition would be disproportionate to the Applicant's constitutional rights. Counsel relied on the authorities of **Ruiz v Central Criminal Court Proceedings No. 5 of the National Courts Madrid**[12], **Tajik v United States of America**[13], **R (Wellington) v Secretary of the State for the Home Department**[14] which were all considered in **Norris v Government of the United States of America (No 2)**[15]. Counsel also referred to the authority of **Polish Judicial Authorities v Celinski and others; Slovakian Judicial Authority v Cambal; R (on the application of Inglot) v Secretary of State for the Home Department and another**[16] where the English Court of Appeal set out guidelines where an issue of human rights is raised as a bar to extradition.

[52] Lady Justice Hale in **R (Warren) v Secretary of State for the Home Department (supra)** stated as follows:

> *"The object of extradition is to return a person who is properly accused or has been convicted of an extradition crime in a foreign country to face trial or to serve his sentence there… The extradition process is only available for return to friendly foreign states with whom this country has entered into either a multi or a bilateral treaty obligation involving mutually agreed and reciprocal commitments. Mr Perry, on behalf of the claimant, accepts that there is a strong public interest in our respecting such treaty obligations. Such international cooperation is all the more important in modern times, when cross-border problems are*

[12] [2008] 1 WIR 2798 per Dyson CJ at paragraph 57
[13] (2008) EWHC 660 per Richard J at paragraph 156
[14] (2009) AV 335
[15] [2010] 2 AC 487
[16] [2015] EWHC 1274 (Admin)

becoming ever more common, and the need to provide international solutions for them is ever clearer."

[53] Lord Phillip in **Norris v Government of the United States of America (No 2) (supra)** stated as follows:

> *"[51] I agree that there can be no absolute rule that any interference with article 8 rights [article 8 of the European Convention on Human Rights provides for the right to respect for one's private and family life] as a consequence of extradition will be proportionate. The public interest in extradition nonetheless weighs very heavily indeed. In Wellington [2009] AC 335, the majority of the House of Lords held that the public interest in extradition carries special weight where article 3 is engaged in a foreign case. I am in no doubt that the same is true when considering the interference that extradition will cause in a domestic case to article 8 rights enjoyed within the jurisdiction of the requested state.*
>
> It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on a basis of international reciprocity… Such detention will necessarily interfere drastically with family and private life. In theory, a question of proportionality could arise under article 8(2). In practice it is only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment: see *R (P) v Secretary of State of the Home Department* [2001] 1 WLR 2002, para 79, for discussion of such circumstances. **Normally, it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate**. [Emphasis mine]"

[54] It would not be correct to say that a person's extradition can never be incompatible with his right to respect for his private and family life guaranteed under **section 4 of the Constitution**. However, to bar extradition on this ground is not an easy feat. From the authorities above, it is settled law that it is only in *exceptional circumstances* that extradition would be an unjustified or disproportionate interference with the right to respect for private and family life. Nonetheless, the Court is of the view that it is self-evident that interference to family life that normally follows extradition as a matter of course is proportionate.

[55] It is also settled law that the public interest in ensuring that extradition arrangements are honoured are very high as well as the public interest in discouraging persons from seeing Trinidad and Tobago as a country willing to accept and safeguard fugitives from justice.

[56] In that regard, the Court considered the affidavit evidence of the Applicant, his father and his wife and found that there is nothing out of the ordinary or exceptional in the consequences that extradition would have for the family life of the Applicant. The Court is of the view that the consequences of interference with the right to respect for private and family life is not exceptionally serious to outweigh the importance of extradition.

[57] The Applicant's allegation that his family (his wife and child) will undergo hardship should he be extradited is unsupported by any evidence. Save and except for his assertion that he is the sole breadwinner of the family, the Applicant has not provided any evidence to support his claim.

[58] In any event, this consequence is not exceptional and does not undo the justification that exists for such interference with family life. There are no grave effects of interference with the Applicant's family life, which are capable of rendering extradition disproportionate to the public interest that it serves. Furthermore, the Applicant in his affidavit evidence stated that he lived in a family house with his extended family. Therefore, it is likely that the Applicant's wife and child will be taken care of by the extended family.

Rights of the Child

[59] Mr. Merritt submitted that the Applicant's son has rights since Trinidad and Tobago has signed and ratified many international conventions promoting the rights of children, including the **United Nations Convention on the Rights of the Child 1989** (commonly abbreviated as **CRC** or **UNCRC**). He further submitted that the effect of the Applicant's extradition on his child is an important factor to be taken into account and is likely to be a factor, which may render extradition disproportionate. Counsel relied on the authority of **HH and another v Deputy Prosecutor of the Italian Republic, Genoa; F-K (FC) v Polish Judicial Authority**[17].

[60] The right of an individual to respect for his private and family life is also applicable here. However, it would be the right of a child and not that of an adult. If the child's interests are to be appropriately taken into account, the Court will need to have reliable and cogent evidence about that child, preferably expert evidence. In the cases relied on by Counsel for the Applicant - **HH and another v Deputy Prosecutor of the Italian Republic, Genoa; F-K (FC) v Polish Judicial Authority (supra) -** expert evidence was led to show the serious harm that would be suffered by the children if the parents were extradited. The Applicant, however, failed to adduce any documentary evidence or otherwise, including expert evidence, supporting his statement that his extradition would have an alleged severe effect on his child's welfare.

[61] The question must therefore be asked: Does the evidence before the Court reveal the character of a man who seeks to portray genuine care for his son's well-being? The Applicant has admitted to turning to alcohol to deal with his alleged medical issues, so much so that he has been in breach of the law by driving under the influence of alcohol. His criminal record in this jurisdiction, exhibited as **"HN8"** (hard copy of "Known Offender" Criminal Record KO# 91655 from the Criminal Records Office of the Trinidad & Tobago Police Service) attached to the affidavit of Herman Narace, Acting Inspector of Police Regimental No. 12674, shows that he has been charged by the police on 10

[17] [2012] 4 All ER 539

occasions for a variety of offences, at least 3 of those charges being for Driving Under the Influence of Drink or Drug, 3 charges for possession of marijuana, and 1 charge each for possession of an offensive weapon, resisting arrest, using obscene language and playing noisy instruments in a street/public place. The dates of these charges range from May 2003 to March 2016. So it is clear that after the Applicant absconded from the USA, seeking sanctuary in this jurisdiction, he continued to demonstrate his propensity towards criminal conduct.

[62] The Applicant's conduct, in the mind of any right-thinking person in society, cannot be of any positive influence in the child's upbringing. In fact, it is widely acknowledged that, in most instances, young children follow the footsteps and behaviour of their parents, more particularly, their father. The averments by the Applicant, his father and his wife of his good and changed behaviour are not supported by evidence. In fact, his admission in paragraph 23 of his affidavit that *"what he did in the United States was wrong"* coupled with his criminal record accumulated after fleeing the USA (which he has admitted), tells a different story: there is simply no evidence to substantiate any charitable and community commitments including any ties to church or religion. There is no recommendation for pardon from any religious leader or community group averring to any work done to lift the community. Piety has not become a feature of his life. Instead, his breaches of the law continued unabated.

[63] In **HH and another v Deputy Prosecutor of the Italian Republic, Genoa; F-K (FC) v Polish Judicial Authority (supra)**, the UK Supreme Court heard two appeals under Part 1 of the Extradition Act 2003 involving the parents of young children. The Court ruled that under ***Norris*** **(supra)**, the question was whether the interference with the private and family lives of the extraditee and other members of his family was outweighed by the public interests in extradition. Lady Hale who delivered the lead judgment in ***HH*** drew the following conclusions from ***Norris***:

> ***(i)*** *There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but*

the court still has to examine carefully the way in which it will interfere with family life.

(ii) *There is no test of exceptionality in either context.*

(iii) *The question is always whether the interference with private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.*

(iv) *There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.*

(v) *That the public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.*

(vi) *The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.*

(vii) *Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe.*

[64] **ZH (Tanzania) v Secretary of State for the Home Department**[18] emphasized the importance of any relevant child's interests as a primary consideration. However, those authorities ***HH***, ***Norris*** and ***ZH*** did not state that the interests of the child were the only consideration. It could be outweighed by the cumulative effect of other considerations.

[65] In this regard, the Court is of the view that the public interest in extraditing the Applicant is not outweighed by the effect of the extradition on the child. The child will still receive the love, support and care of his mother with whom he also lives. The Applicant has given evidence that he lives with his extended family, which includes his parents and his brother and his family. There is a support system in place for the wife and child. There are also

[18] [2011] 2 All ER 783

several governmental social welfare programmes in place to provide financial and psychological support which the wife can seek to access for herself and the child. The Court is of the opinion that the child will be taken care of by his family until the return of his father.

Seriousness of the offence

[66] The two offences for which the Applicant was convicted are offences relating to assault of a person. These offences can be labelled as serious offences. The gravity of the offences, as Lord Diplock observed in ***Kakis*** **(supra)**, is relevant to the question of oppressiveness. One only has to look at the facts in the "Summary of Case" recited in paragraph [3] of this judgment, to appreciate the serious nature of the offence and the grievous injuries caused to the victim in the USA.

[67] When the gravity of these offences is compared to the Applicant's alleged change in circumstances over the period, any associated hardship as a result of the extradition will not render oppressive his return to the USA to serve his sentence: **Woodcock v Government of New Zealand**[19].

Health of the Applicant

[68] The Applicant gave evidence that he was diagnosed with transverse myelitis, which has affected his spinal cord. As a result, he is sometimes in severe pain and has difficulty walking and problems with his bladder and bowel movements.

[69] Nonetheless, the Applicant has failed to produce any documentary or medical evidence in support of this assertion. In this regard, in absence of proof of his health condition, the Court is unable to attribute significant weight to this consideration as being a bar to extradition. Even though I have given due consideration to this reliance on the health and physical condition of the Applicant, it must be made clear that our **Extradition (Commonwealth and Foreign Territories) Act Chap. 12:04**, unlike its counterpart, the

[19] [2004] 1 WLR 1979

UK Extradition Act 2003 section 91, does not provide for the physical or mental condition of the fugitive being a bar to extradition.

VI. Disposition

[70] Having analysed the full weight of the evidence in support of the writ of *habeas corpus* together with written submissions and authorities advanced by Counsel for the Applicant and the Respondent, there is no other conclusion for the Court to draw but that the writ of *habeas corpus* must fail in its attempt to bar the extradition of the Applicant/Fugitive. Every factor considered in light of the leading and applicable authorities has tipped the balance in favour of extradition. Consequently, the Order of the Court is as follows:

Order:

1. **The Writ of *Habeas Corpus ad Subjiciendum* issued on 14 November 2018 be and is hereby dismissed.**

2. **The Applicant shall pay to the Respondent costs of this Application to be assessed in accordance with Part 67.11 of the CPR 1998, in default of agreement.**

3. **Leave is granted to the Applicant to appeal this Order.**

4. **Stay of this Order is for 14 days.**

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Robin N Mohammed
Judge