REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
PORT OF SPAIN

BETWEEN

In the Matter of the Bail Act, Chap. 4:60
of the Laws of the Republic of Trinidad and Tobago

AND

In the Matter of an Application under section 5 of the Bail Act, Chap. 4:60
of the Laws of the Republic of Trinidad and Tobago

AND

In the Matter of the Extradition (Commonwealth and Foreign Territories) Act, 1985
as amended by Act No. 12 of 2004

BEWTEEN

STEVE FERGUSON
ISHWAR GALBARABNSINGH

Applicants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

RULING

BEFORE: The Hon. Mr. Justice André A. Mon Désir

APPEARANCES:

Mr. F. Hosein, SC and Mr. R. Dass, for the Applicant- Steve Ferguson

Mr. A. Mitchell, QC and Mr. R. Persad, for the Applicant- Ishwar Galberansingh

Mr. A. Sinanan, SC and Mr. K Ramkisoon, for the Attorney General

DATED: December 22, 2010

I

BACKGROUND

Relevant Chronology of Events

1. This is the renewal of an application for bail by the applicants Steve Ferguson and Ishwar Galbaransingh, both of whom are businessmen and citizens of Trinidad and Tobago residing in this country. The two are wanted in the United States of America (USA) where they both face a total of 95 counts of Conspiracy to Defraud, Fraud and Money Laundering charges arising out of the Piarco International Airport development project.

2. The history of this matter has been quite protracted and I dare say, undulating at times. The various twists and turns are well known to all parties concerned and I do not propose to recount or chronicle them at this stage, save, for purely expository convenience, to say that- the applicants' bail was revoked on June 14, 2010, after the Privy Council, on June 7, 2010, refused their application to stay their extradition. Thereafter, the applicants made two successive applications for bail, each before a different judge of the High Court. Both applications were refused. The first of those applications was dismissed by Kokaram J. on 16th June 2010. Shortly thereafter, in July 2010 the applicants attempted to renew an application for bail before Holdip J. who, for the reasons outlined in his ruling of July 14, 2010, declined to resolve the application on the merits.

3. Thereafter, on October 9, 2010 it transpired that the Attorney General (AG) signed warrants of extradition in respect of both men and the applicants subsequently sought and were refused leave from Madam Justice Charles to judicially review the AG's decision to sign the said warrants. The applicants then appealed the decision of Charles J, to refuse them leave and on Friday December 17, 2010 the Court of Appeal, *inter alia*, allowed the appeal and granted leave to the applicants to apply for judicial review of the AG's decision to order their return to the USA under section 16 of the Extradition (Commonwealth and Foreign Territories) Act, 1985 Act. The Court of Appeal also granted a stay of the AG's decision to return the applicants to

the USA, pending the hearing and determination of their application for judicial review.

4. Immediately following the decision of the Court of Appeal, the applicants made this renewed application for bail which was heard before this Court on December 20, 2010 when my ruling was reserved until December 22, 2010.

5. This is my ruling on the said application and my reasons in that regard.

II

THE ISSUES

The Issues

6. The issues which fall for my determination at this stage are quite narrow and I have distilled them as follows:

   (a) The first is whether there has been any "change in circumstances" since the applicants last engaged this Court on the question of bail; or whether there are any "new considerations" which were not before the Court when the applicants' were last remanded in custody?

   (b) If so, whether such change in circumstances or new conditions are relevant to the issue of the applicants' entitlement to bail?

   (c) The third issue- which will only arise for this Court's consideration if the threshold of the first two issues is crossed- is the ultimate question of whether, in the circumstances, the applicants should now be admitted to bail?

III

SUBMISSIONS BY THE PARTIES

The Applicants' Arguments

7. The substance of the applicants' joint submissions at this stage of the application is that since their last remand in custody, a number of developments have taken place and these they identified as the following: (1) the passage of some six (6) months since their detention; (2) the fact that leave has now been granted by the Court of Appeal to judicially review the AG's decision to make the extradition order; and (3) the fact that the State has given oral notice of its intention to appeal the recent decision of the Court of Appeal. In my view, the last two (2) of these submissions relate to essentially the same issue and I propose to deal with them together in due course.

8. In short, therefore, they say that these amount to "changes in circumstances" sufficient to invoke and clothe this Court with jurisdiction to entertain a renewal of their applications for bail.

Submissions by Counsel for the State

9. Mr. Sinanan SC, learned Senior Counsel who represented the Honourable AG, declared that the role of the AG in this renewed application for bail was a merely *neutral one*. I fail to see however, just how the Honourable AG could possibly be neutral in matters of this nature- particularly, having regard to the fact that it is *his* warrants for the applicants' extradition to the USA that have been the subject of the most recent proceedings before the Court of Appeal- the outcome of which has now precipitated the instant application; and having regard also to the role that the AG clearly has in extradition proceedings in general; and his role as one of the primary guardians of the public interest as a whole. In my view, a posture of neutrality is entirely inconsistent with the role of the AG on applications for bail by persons whom *he* would, in any event, have extradited to another country, pursuant to this country's reciprocal international obligations.

10. Learned Senior Counsel for the Honourable AG sought nevertheless, to place before this Court certain matters which he felt would be of assistance to the Court in placing the instant application into what he described as "its proper context".

11. In that regard, the Court wishes to express its thanks not only to learned counsel for the AG but to all counsel for the assistance they have provided to the Court in this matter.

IV

THE LAW

Renewed Bail Applications

12. In considering this application and the arguments advanced by counsel, I have directed myself as to all of the relevant principles as have emerged from the authorities that have been drawn to the Court's attention as well from those which I have been able to unearth from my own research. I have therefore, endeavoured in what shall ensue in my ruling to give full effect to what is contained in those authorities.

13. I begin with the observation that it is not only good practice but in my judgment strictly required that on the making of a renewed application to the High Court for bail pursuant to section 5 of the Bail Act, Chap. 4:60, the applicant must inform the court of any earlier applications to either the High Court or the Magistrates Court relating to the issue of his bail in the course of the *same proceedings*. This is important, not only because the interest of justice demands it but also because it would allow the Court hearing the renewed bail application to have before it all of the circumstances relevant to the refusal of bail on the previous occasions. The duty in my view, is not merely that of the State or prosecutorial entity but also that of the applicant himself and is consistent with his obligation to approach these Courts with clean hands and in good faith.

Change in Circumstances and New Considerations

14. The instant application requires this Court to consider the meaning of the much used term "change of circumstances" and to determine its applicability, if any, to the peculiar circumstances of this case.

15. What therefore, does this term mean? In short, the term change in circumstances is essentially a short hand way of summarising the law set out by the Divisional Court of the UK as to when renewed bail applications should be entertained.[1] In the UK, the Divisional Court considered the question of the extent of the obligation of Courts of first instance to entertain renewed applications for bail in a number of cases prior to the amendments to their 1976 Act, effected by the Criminal Justice Act 1988. The general effect of those decisions was that a Court was not bound to entertain an application for bail, after it had previously been refused, unless it was satisfied that there had been a "change in circumstances". The learned authors of Archbold 2010 edition[2], in discussing this issue used the term "a material change of circumstances" and I shall presently demonstrate, from whence that term originated.

16. A decision to refuse bail therefore, presupposed that the previous Court had found *as a fact* that there were substantial grounds for believing that one of the events described in paragraph 2(a), (b) or (c) of Schedule 1 to the Act would occur[3]. The provisions of paragraph 2(a), (b) or (c) of Schedule 1 to the Act are in all material respects identical to the provisions outlined in section 6(2)(a)(i),(ii) and (iii) of the Bail Act, of Trinidad and Tobago. I have therefore, found the dicta in the pre-1988 UK authorities on this point quite instructive.

17. A later Court was therefore, *bound to accept that finding of fact*, otherwise it would be acting as an appellate court unless there was a material change of circumstances.

[1] R. (on the application of Morgan) v. Isleworth Crown Court, [2007] EWHC 1087 per Collins J
[2] Archbold 2010 para 3-17 to 3-19
[3] Archbold 2010 para 3-17 to 3-19

18. In R. v. Nottingham JJ., *ex p. Davies*[4], the approach to be adopted by the Court on renewed applications for bail was enunciated by Donaldson LJ. Although he was there outlining the relevant principles in respect of bail applications before a magistrates' court, the principles are in my view equally applicable to applications before the High Court and I direct myself in accordance with those principles. At pages 43 and 44 he stated as follows:

> "I fully accept the submission that, in accordance with section 4 of the Bail Act 1976, every accused person who appears or is brought before a magistrates' court in the course of or in connection with proceedings for the offence or who applies to a court for bail in connection with the proceedings is entitled to be granted bail except as provided by Schedule 1 to the Act. I also fully accept that on each occasion, the exceptions specified in paragraph 2 [and 3[5]]… only apply if the justices then sitting are satisfied in terms of those paragraphs. Finally, I accept that the fact that a bench of the same or different constitution has decided on a previous occasion or occasions that one or more of the Schedule 1 exceptions applies and has accordingly remanded the accused in custody does not absolve the Bench on each subsequent occasion from considering whether the accused is entitled to bail, whether or not an application is made. However, it does not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. Far from it. On those previous occasions, the Court will have been under an obligation to grant bail unless it was satisfied that a Schedule 1 exception was made out. If it was so satisfied, it would have recorded the exceptions which in its judgment were applicable. The 'satisfaction' is not a personal intellectual conclusion by each justice. It is a finding by the court that Schedule 1 circumstances then existed and is to be treated like every other finding. It is *res judicata* or analogous thereto. It stands as a finding unless and until it is overturned on appeal. And appeal is not to the same Court, whether or not of the same constitution, on a later occasion. It is to the judge in Chambers. It follows that on the next occasion when bail is considered that the Court should treat, as an essential fact, that at the time when the matter of bail was last considered, Schedule 1 circumstances did indeed exist. Strictly speaking, they can and should only investigate whether that situation has changed since then. There will always be the possibility that there has been a change,

[4] [1981] Q.B. 38,71 Cr.App.R. 178, DC
[5] *My note.*

because more time has elapsed… But the starting point must always be the finding of the position when the matter was last considered by the court. I would inject only one qualification to the general rule that justices can and should only investigate whether the situation has changed since the last remand in custody. The finding on that occasion Schedule 1 circumstances existed will have been based upon matters known to the court at that time. The court considering afresh the question of bail is both entitled and bound to take account not only of **a change in circumstances** which has occurred since that last occasion, but also of circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider than "Has there been a change?" It is "Are there any **new considerations** which were not before the court when the accused was last remanded in custody?[6]

19. Further, in the case of *R. v. Reading Crown Court, ex p. Malik*[7], a case which concerned the renewal of an application for bail after the applicants had been committed for trial, it was held on an application for judicial review and for the remedy of an order of mandamus directing the Crown Court to hear and adjudicate on the application for bail- that the jurisdiction of the High Court and the Crown Court to grant bail were separate and distinct, but both in the High Court and the Crown Court the jurisdiction was that of the court and not of the individual judge. It was further observed by Davidson LJ at page 454 of that judgment that- as a general rule the moment of committal for trial must be an occasion upon which an accused person is entitled to have his right to bail fully reviewed by the justices. In any particular case, the eligibility of the accused for bail may or may not have improved, but it is almost inevitable that there will be some change in circumstances.[8]

20. Both of these cases, *ex p Malik* and *ex p Davies* were considered and explained in great detail in the later case of *R. v. Slough JJ., ex p. Duncan*[9] and remain good law and

[6] [1981] Q.B. 38,71 Cr. App. R. 178, DC;

[7] [1981] Q.B. 451,72 Cr.App.R. 146, DC
[8] [1981] Q.B. 451,72 Cr.App.R. 146, DC;
[9] 75 Cr.App.R. 384, DC.

part of the applicable practice in this jurisdiction today. I therefore, direct myself in accordance with the principles laid down in those cases. In that regard, I further direct myself that the change in circumstances required to justify this Court entertaining a renewed application for bail need not in all cases be the occurrence a major event.[10]

Change of Circumstances Must Impact Entitlement to Bail

21. It would seem however, that the expressions "change of circumstances" and "new considerations" are not simply terms of art to refer to merely "any changes" or 'new considerations" that have arisen since the last application for bail, or merely any circumstances which were not previously brought to the attention of the Court. In my view, such changes or new considerations must of necessity have some relationship to or bearing or impact on the issue of bail and upon the applicants' entitlement to it.

22. It is not therefore, every new event, new circumstance or new consideration that would trigger this Court's jurisdiction to revisit and treat again with the question of an applicant's entitlement to bail. Since it is obvious that many such changes would have absolutely nothing to do with the issue of bail or the applicant's entitlement to it. A somewhat extreme example may be drawn by reference to a situation where for instance, an applicant whilst on remand has learned that his wife has given birth to their son or where an applicant seeks to rely on the fact that he has just attained the age of sixty-five (65) as a basis for the Court revisiting his entitlement to bail. Neither of these matters without more, being purely personal circumstances, have anything to do with the issue of bail or with the applicant's entitlement to it.

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[10] R v Blyth Juvenile Court xe p G [1991] Crim. LR 693

23. The point was well made by Collins J in the 2007 case of *R. (on the application of Morgan) v. Isleworth Crown Court*[11], who cited with approval the dictum of Ormrod LJ in *ex p Davies* where he stated that-

> "It is obvious that the new considerations referred to by Donaldson LJ must be new considerations which impact upon the decision whether to grant bail. The mere fact that something new emerges would not by itself justify the receipt of a renewed application for bail."

Material Change In Relevant Circumstances

24. Therefore, in analysing these principles and what they mean in the context of the laws of Trinidad and Tobago, the question which arises is what exactly is contemplated by "change of circumstances or new considerations which impact upon the decision to grant bail"? In my judgment the expressions "change in circumstances" and "new considerations" must be taken to mean some "material change in relevant circumstances". In this regard I also direct myself in accordance with and I adopt the views and reasoning expressed by the court in the 2002 Hong Kong case of *HKSAR v Siu Yat Leung*[12] where McCoy J took the time to discuss the principles at common law relevant to successive bail applications. At paragraph 14 to 19 of the judgment the learned judge stated as follows:

> "Principles at common law: successive bail application:
>
> 14. Until 1994, s. 12B of the Criminal Procedure Ordinance provided:
>
> If an accused person is refused or denied bail by the court or a judge, he shall not thereafter be entitled to make a fresh application for bail:
>
> (a) Before the commencement of his trial, except to the court or a judge and only if he satisfies the court or judge that since the refusal or denial, there has been a material change in relevant circumstances;

[11] [2007] EWHC 1087 per Collins J

[12] [2002] 2HKLRD 147

(b) During the trial, except to the court conducting his trial.

That section was simultaneously repealed by the enactment of the new Pt.IA of the Criminal Procedure Ordinance."

25. According to McCoy J-

"15. By the former s.12B, a further application for bail could not be made without 'a material change in relevant circumstances'. In my judgment, that repealed statutory test was and is declaratory of the true common law position for the determination of a repeated bail application before the Court of First Instance. It would continue to apply to an application for bail to the Court of First Instance brought under the inherent jurisdiction, where there had been a previous decision refusing bail by this Court, under the inherent jurisdiction."

26. McCoy J, further stated that-

"16. Section 9G(11)[13] is essentially an epexegesis of the common law test. This test ensures that access to the Court is not a revolving door. A serious issue of judicial resources arises. Deserving cases may be needlessly postponed by repeated and legally frivolous applications by others for bail. The test is 'a sensible' and necessary adjunct to a coherent legal system, which would otherwise be prey to a proliferation of speculative bail applications on issues already decided: R v Ng Yiu Fai [1992] 2 HKCLR 122 at p. 125".

27. Further, at paragraphs 21 the learned judge in addressing his mind to the issue of how the applicant in that case suggested that he qualified for bail- reasoned as follows:

"21. How does the present applicant suggest he now qualifies for bail? Under a s.9D(1)(b) application the decision-maker is plainly entitled and required to consider all the circumstances, including the previous bail application

[13] Which relates to the statutory restrictions against multiple bail applications.

> history. The only different circumstance is that he has now been in custody longer since the hearing before Jackson J and he is much closer to his trial in this Court than he was before. This is a wholly inadequate basis and cannot possible qualify. Being committed by a magistrate for trial in the Court of First Instance is not a development in favour of the applicant's position; indeed, as it now presupposes the existence of a prima facie case against him of an indictable offence, it may very well be an adverse change of material circumstances. True, a 'radical' change in the trial fixture date may qualify: per Bokhary J (as he then was), in R v Chu Kwok Wah (unrep, MP No 2006 of 1989, [1990] HKLY 190), but the allocation of a trial date 'after a bail refusal will materially change the circumstances only if the delay to trial is excessive in itself or, if not excessive, then beyond the likely contemplation of the judge refusing bail: R v Ng Yiu Fai [1992] 2 HKCLR 122 at pp. 124-125".

28. It is clear therefore, that having regard to the "true common law test"- what is required to be shown is that there has been 'a material change in relevant circumstances'. What is or is not relevant will of course vary from case to case, but the question of relevance is and must be in relation to the issue of bail and the applicants' entitlement to same. The duty is on the applicant to not only state but demonstrate to the satisfaction of the Court, on the balance of probabilities, that since the previous refusal or denial of bail, there has been a material change in relevant circumstances. It must be *material,* in the sense that it is not a mere trifling change, so that these Courts would not be inundated by, or constrained to entertain, repeated and legally frivolous applications based on speculation and conjecture or on matters that have already been decided at the previous hearing. It must also be *relevant*, in the sense that it must have some relation to, bearing or impact upon the issue of bail and the applicant's entitlement to same. I therefore, direct myself accordingly.

New Considerations

29. What then of this question of "new considerations" which may have arisen since the last bail hearing? I have also been very helpfully referred by learned QC Mr. Mitchell

to the learning in *Corre and Wolchover: Bail in Criminal Proceedings* [14] where the learned authors articulate a useful summary of the law on this matter:

> "The practice of making weekly bail applications provoked the extra-curial declaration by Ackner J (as he then was) that it would be proper, in the interests of both 'comity and common sense', for a bench to honour the bail decision originally made unless circumstances had changed (*see The Magistrate,* March 1980). Inspired by this comment, the justices of Nottingham agreed in March 1980 that they would apply a new policy to repeated bail applications. They decided that, on and after the third successive application, if previous applications had been refused, they would refuse to consider bail unless the defendant could show 'new circumstances'. The policy of allowing two bites at the cherry was devised to deal with the fact that bail applications made on the first appearance of a defendant in custody are usually based on instructions taken at short notice at the police station or at court, with little or no opportunity for the defence legal representative to make full inquiries (for further consideration see para. 5.5.4 below).
>
> "A challenge to the policy was mounted in *R v Nottingham Justices, ex parte Davies* [1980] 2 All ER 775. Charged with rape, Davies had made two applications for bail in successive weeks and was refused leave to make a third application because there had been no change of circumstances. He applied for judicial review by way of an order of *mandamus* directing the justices to hear the full facts supporting the application and to determine the application. Although Davies was the nominal applicant, the case was in effect brought by a group of Nottingham solicitors seeking guidance on renewed applications for bail."
>
> "The Divisional Court accepted that the fact that a bench of the same or a different constitution had refused to grant bail on one or more previous remand hearings did not absolve the bench on a subsequent occasion from considering whether the accused was entitled to bail, whether or not an application were made. However, the court held, this did not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. On those previous occasions, the court would have been under an obligation to grant bail unless satisfied that such exception had been made out. ..."

[14] Corre and Wolchover Bail in Criminal Proceedings 3rd Edition

30. They then quote the passage in *Davies* to which I have already referred and continued as follows:

> "That 'satisfaction' was not a personal intellectual conclusion by each justice. It was a finding by the court that such circumstances then existed and was to be treated like every other finding of the court. It was *res judicata* or analogous thereto and stood as a finding unless and until overturned on appeal. ..."
>
> "It followed that on the next occasion when bail was considered the court should treat, as an essential fact, that at the time when the matter of bail was last considered, such circumstances did indeed exist. ..."
>
> "Strictly speaking, the court held, the justices were bound to investigate only whether that situation had changed since the last remand in custody. ..."
>
> "However, in the view of the court there was one qualification to the general rule that there must be a change of circumstances. The question which the justices ought to ask was slightly wider than whether there had been a change. The question which had to be asked was whether there were any *new considerations* which were not before the court when the accused was last remanded in custody."
>
> "In the first edition of the present work Corre argued that 'new consideration' was a less stringent and more easily identifiable test. It meant that the court might consider matters which, although they existed, were not before the court on the previous occasions. A strictly observed change in circumstances rule would have meant that the court would not consider material which previously existed even though it was not known to the applicant and therefore not put before the court."
>
> "The decision was amplified in *Re Moles* [1981] Crim LR 170, in which it was held that magistrates were bound to investigate all alleged circumstances and where they refused to do so a court with appropriate jurisdiction could set aside the subsequent decision."

31. I direct myself therefore, as to the requirement for this Court to investigate "all alleged circumstances" and I propose to do so in the instant case. However, here

again it is clear that what is required to be shown is that there are some "**new-** (and I would add), *material and relevant* **considerations**". Although, this means that the court might consider matters which, though they existed, were not before the court on the previous occasions- such new considerations must of necessity in my view, also be *"material* **and** *relevant"* in the sense that I have described in paragraph 28 above. I therefore, direct myself accordingly.

The Passage of Time and Change of Circumstances

32. I now turn to the question of the passage of time as a "change of circumstances". The applicants have argued that six (6) months have now passed since there incarceration and that in itself required a revisiting of the question of their entitlement to bail. Additionally, they contend that with the recent decision of the Court of Appeal to grant them leave to judicially review the decision of the Attorney General to sign their warrants of extradition- the Court's timetable for determining substantive proceedings has now been adjusted.

33. I am bound to say however, that time and the mere effluxion of it is not, without more, a change in circumstances. Time is a medium, a definite and measurable portion of that continuum in which we who exist in this realm, live. It is not and cannot, even in the most philosophical assessment of it, be considered a 'circumstance' without more. Rather, it is *the events* that have transpired relative to us in the context of the passage of time that may properly be described as our "circumstances". So that, the suggestion that the mere passage of some six (6) months since the applicants were incarcerated is somehow in itself grounds for revisiting the issue of their entitlement to bail or that it, by some curious formulae, is sufficient to invoke this Court's jurisdiction to entertain a renewed bail application- is in my judgment ill-founded.

34. The impact however, that the passage of time is likely to have on the Court's timetable for hearing the applicant's judicial review matter and the collateral impact that that may have on the applicants' entitlement to bail, is an entirely different

matter. In that regard, the decision in the Hong Kong case of *The Queen v Ng Yiu-Fai*[15] is quite instructive. In that case the applicant was awaiting trial in the District Court and had, in April 1992, had an application for bail rejected. According to s.12B of the Criminal Procedure Ordinance (Cap. 221) a fresh application for bail could only be made if, since the initial refusal, there had been a material change in relevant circumstances. Counsel for the applicant advanced two major contentions. First, that since the initial refusal of bail there had been a change in the court's timetable which entitled the applicant to make a fresh application pursuant to s.12B of (Cap. 221). Secondly, in any event, s.12B of (Cap. 221) had been repealed by Article 5(3) of the Bill of Rights.

35. It was held that the fact that there had been some change in the court's timetable since the first bail application, did not of itself permit a fresh application. There had to be a material change of circumstances. Allocation of a trial date after the refusal of bail would materially change the relevant circumstances only if the delay to trail was excessive in itself or was beyond the likely contemplation of the judge refusing bail initially. Such a material change of circumstances was not established on the facts[16].

36. As McCoy J put it in *Siu Yat Leung* (supra):

> "True, a 'radical' change in the trial fixture date may qualify: … but the allocation of a trial date 'after a bail refusal will materially change the circumstances only if the delay to trial is excessive in itself or, if not excessive, then beyond the likely contemplation of the judge refusing bail."

37. I direct myself in accordance with the principles enunciated in these authorities and hold that I do not therefore, find that the mere passage of six (6) months since the applicants' remand in custody is either a material change in relevant circumstances or a new, material and relevant consideration that would, in the circumstances of this case, be sufficient to entitle the applicants to invoke the jurisdiction of the court to

[15] [1992] 2HKCLR 122
[16] See p124, lines 45-46 and p.125, lines 1-4.

hear a renewal of an application for bail. Nor do I find that the delay to the hearing of the applicants' judicial review application is excessive in itself or beyond the likely contemplation of this Court. The applicants' arguments on this point may have carried more weight if the delay in question was occasioned by the slothfulness of the State, but it is not insignificant that the various meanderings, which have now come to characterise this protracted matter, are in large measure due to the fact that the applicants themselves have, from the very inception, been actively engaging the judicial and legal process at every level. This is a fact which was not lost on the learned judges of Appeal who heard the applicants' most recent appeal against the decisions of Kokaram J and Charles J. At page 2, paragraph 3 of the judgment of the Mendonca JA, on December 17, 2010, the learned judge noted that-

> "Since the request for the extradition of the Appellants they have mounted a number of legal challenges to the extradition process which serve to explain the apparent delay from the date of the issue of the authority to proceed to the decision of the AG for their return to the U.S. under section 16 of the Act.

38. In any event I understand that a judge has already been appointed to hear the applicants judicial review application and it will now in large measure lie with the applicants themselves to determine at what pace they proceed with that matter.

What is the Impact of the Decision of the CA on the Applications' entitlement to bail?

39. I turn now to the matters of the recent decision of the Court of Appeal and AG's oral notification of his intention to appeal that decision. This in my view is the stronger of the two broad points raised by the applicants and I have therefore, striven in the ensuing paragraph, to treat it with the degree of care and microscopic scrutiny that it deserves. In that regard, the question which arises for my consideration at this stage is what impact do these matters have on the question of bail and on the applicants' entitlement to same.

40. On December 17, 2010 the Court of Appeal ruled that-

> "the appellants have demonstrated arguable grounds for judicial review with a realistic prospect of success and are entitled to be granted leave to apply for judicial review of the Attorney General's decision to order their surrender to the United States to face criminal prosecution and a stay of the Attorney General's decision."

41. Again, I say, the question which therefore, arises for my consideration at this stage is what impact if any, does this ruling by the Court of Appeal have on the applicants' entitlement to bail? In my view it does nothing to it. It amounts in my judgment to simply and only a declaration at this stage by the learned judges of appeal that the applicants now have leave to judicially review the AG's decision to sign their warrants of extradition and that such leave ought not to have been 'lightly refused" given the arguable grounds for judicial review that have been advanced by the applicants. It says nothing of the actual merits or demerits of such a judicial review application itself- in respect of which there is likely, in any event, to be heated contest by the AG.

42. The arguability of the applicants grounds do not, to my mind, cast any new light on the salient question of the applicants' entitlement to bail. Nor, in my respectful view does the finding by the learned judges of appeal that the said grounds have a "realistic prospect of success" materially or at all alter the applicants' entitlement to bail. As, suggested by learned Senior Counsel for the State, a realistic prospect of success is not, as he put it, a "guarantee of success".

43. In my judgment the applicants have merely crossed the threshold at the leave stage of the judicial review proceedings. According to Mr. Sinanan for the State, it should not be forgotten that what the applicants seek to impugn in the judicial review proceedings is merely the decision of the AG to issue the extradition warrants. Learned Senior Counsel contends that, at best what the applicants could hope for is that the decision of the AG may be quashed and that he be ordered by the Court go "think again and direct his mind to the relevant considerations". Both learned Senior Counsel for the applicants on the other hand argued that the Court hearing the

judicial review application may also decide, on the basis of the material that is placed before it, to quash the Attorney General's decision "for all time", to use the words of learned Senior Counsel Mr. Hosein.

44. However, in my judgment, neither of these possibilities are certain and between them is an entire range of other possible outcomes which any such judicial review application may have and it is not for this Court to speculate as to what those might be, or the possible effect that they may have on the extradition proceedings as a whole. Those are clearly matters for the trial judge who is seized of all the relevant facts and matters to determine.

The Main Purpose of the Leave Stage in Judicial Review

45. One has only to properly analyse what was actually said by the Court of Appeal regarding this question of leave- to make the point. At page 4, paragraph 8 of the said judgment, Kangaloo JA, in his consideration of the rule laid down by the Privy Council in *Sharma v Brown-Antoine*[17] regarding the granting of leave in judicial review proceedings, stated that-

> "The main purpose of the permission stage in judicial review proceedings is still to eliminate unmeritorious applications brought by an applicant who is 'no more than a meddlesome busybody, an aim which is particularly beneficial in current times given the explosion of civil litigation which our justice system has witnessed. However, in fulfilling its mandate as the guardians of democracy and the rule of law; concepts which can easily be seen as two sides of the same coin, the court must not lightly refuse a litigant permission to apply for judicial review. It must only be in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the courts should exercise its discretion in refusing to grant leave. For all the reasons set out by my brother this case clearly does not fall within such a category and as such the appellants should be granted leave to challenge the decision of the Attorney General."

[17] 69 WIR 379

46. It was also noted at page 3 paragraph 5 of the judgment of Mendonca JA that it was indicated to the Court that should the appeal have succeeded and the applicants obtain leave as they have now done, the AG would wish to put evidence before the Court. So that the full extent of the evidence and the representations by and on behalf of the Attorney General have not even been considered as yet.

The Hurdle To Overcome the Permission Stage is not very High

47. What is even more noteworthy in this regard is what Mendonca JA stated in his said judgment regarding the standard that the applicants must attain in order to cross the leave threshold. At page 3 paragraph 7 he noted that:

> "Before discussing these grounds it is important to emphasize that this is an appeal from the refusal of leave to apply for judicial review. It is not an appeal from the final determination of the matter after a full hearing. The hurdle that the Appellants must overcome is not a very high one. What the Appellants need to show in order to obtain leave is an arguable ground for judicial review having a realistic prospect of success and there is no discretionary bar such as delay or an alternative remedy (see Privy Council Appeal No. 75 of 2006 **Sharma v Antoine** to his appeal no arguments have been advanced that there is any discretionary bar that is fatal to the grant of leave so that the question is whether the Appellants have established an arguable ground of appeal for judicial review having a realistic prospect of success. If so, then leave should have been granted. If not, the judge was correct to refuse leave."

48. It follows therefore, that despite the urging of learned counsel, the standard that the applicants had to attain to persuade the appellate court of their entitlement for leave was not a very high one and I certainly do not interpret the other comments by the learned judges of appeal to be any sort pronouncement by them as to whether the applicants would ultimately succeed at the substantive matter.

49. The question therefore, which was posed by Donaldson LJ in *ex parte Davies* as to whether there are any new considerations which were not before the court when the applicants were last remanded in custody, must be viewed in light of what relevance

or relationships, if any, do such new considerations have to the applicants' entitlement to bail? It is not in my view, sufficient to invoke the jurisdiction of the court to hear a renewal of a bail application for an applicant to simply say that there are "new considerations" or "changes in circumstances" which have arisen. Such considerations or circumstances must have some direct bearing on the question of bail and on the applicants' entitlement to it. That is, they must be ***material*** and they must be ***relevant.***

50. It is only if such new considerations or changes in circumstances as may have arisen are demonstrated to have an impact on the applicants' right or entitlement to bail that is to say, that they are *both material* ***and*** *relevant*; or they are matters which touch and concern what is provided for in one or more of the relevant provisions Bail Act- that an occasion would then arise upon which an accused person would be entitled to have his right to bail fully reviewed by this Court. In many instances, the eligibility of the applicant for bail may or may not have improved, and in most cases where some time has elapsed there would almost inevitably be some change in circumstances. However, such changes in circumstances or new considerations are only grounds for disturbing an earlier Court's finding that section 6(2)(a) conditions existed where it is shown to the satisfaction of the Court that the changes in circumstances or new considerations touch, concern or impact upon the issue of bail and upon the applicants' eligibility for bail in a way that improves it.

51. I say so because the issue of the applicants' entitlement to bail in extradition proceedings is governed primarily by the provisions of the Bail Act, in particular sections 5 and 6 thereof and by whether on a full, proper and mature assessment of the peculiar facts of each case, the applicants are so entitled. While the JR proceedings on the other hand, relate to a challenge to the decision of some State functionary, and as the Court of Appeal has noted, the standard of proof at the leave or permission stage is not a very high one.

52. I say so also because essentially what is complained of on this point by the applicants is that the length of time they are now likely to remain in custody, awaiting the

resolution of these judicial review proceedings is now likely to be considerably longer. However, in light of the fact that this matter may well be listed as a priority hearing and the fact that a trial judge has already been appointed in that regard- there has not in my judgment been any radical change in the trial's fixture date[18]. Nor can it be said that there is anything in the nature of an "excessive delay to trial" or that the date for trial was "beyond the likely contemplation of the judge refusing bail". In my view, the applicants are nowhere near to either of these at this stage.

53. I therefore, hold that although the most recent decision of the Court of Appeal is a "development" in the overall context of the extradition proceedings, yet on an objective assessment, it is not such a change in circumstances that is either material or relevant to the question of bail which, in my view, is an entirely separate matter altogether. I see it for what it is, which is simply and merely the granting of leave to the applicants to judicially review the decision of the AG and I attach no more weight than that to it in *the context of the instant renewed application for bail.*

The Other Factors in Kokaram J's Judgment

54. It should be noted also that the decision of the Court of Appeal merely relates, in an almost innocuous way I might add, to *only on*e of the matters to which Kokaram J addressed his mind during the previous application for bail. The other factors upon which Kokaram J relied to based his decision to refuse bail, have not at all been affected or otherwise altered by the decision of the learned Judges of Appeal, nor has there been any complaint about that by the applicants.

55. Consistent therefore, with the principle laid down by Donaldson LJ in *ex p Davies*, that- *"the starting point must always be the finding of the position when the matter was last considered by the court"*- it is convenient at this stage to set out *verbatim* precisely what was held by my learned brother Mr. Justice Kokaram, relative to the applicants'

[18] The concept referred to by Bokhary J in *R v Chu Kwok Wah*

entitlement to bail, in his judgment[19] on June 16, 2010. At pages 6 to 9 of his well reasoned and erudite judgment, the learned judge stated that:

> "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 Chap. 4:20. It is clear in its terms. Importantly it 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.
>
> (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. Ramkisoon 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 extradition cases a Court should exercise greater circumspection in granting bail in deference to the public interest in honouring 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 are of little weight in exercising the discretion.

[19] Claim No. CV 2008-00639

(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 view can be accepted. The Court still reserved 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.

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 issues 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 a 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 inconvenience of the Claimants in this case is not enough to trump the public interest in honouring 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 carry 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 has 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)* Lord Slynn also examined this issue of "personal factors" as a basis for granting bail to a person 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 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 fully taken into account and it should only be in exceptional cases that bail as a matter of discretion is granted."

15. Finally, in *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 Ousely 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 Ousley J. The Court of Appeal also considered the 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 favour of the Claimants over the public's interest in these extradition proceedings."

Analysis of Kokaram J's Decision

56. It is abundantly clear from the judgment of Kokaram J, that at the time of the application for bail before him, he had before him and addressed his mind to *all the relevant considerations*. It is clear from his detailed discussion of the relevant principles that, on the occasion when he dismissed the applicants' application for bail, he bore in mind the fact that he would have been under an obligation to grant bail unless he

was satisfied that at least one condition relevant to the exercise of his discretion to refuse bail was made out. He addressed his mind to the question of the country's international obligations, as well as the serious nature of the crimes for which the applicants have been charged and the serious penalties of those crimes and he was clearly of the view that those factors were to be given, to use his words, "due deference".

57. It is clear that he accepted the arguments advanced by the State against granting bail and rejected the arguments advanced by the applicants. He also addressed his mind to the question of whether the applicants were a flight risk and it is clear that he was not persuaded that they were not. He addressed his mind to the question of whether the applicants had sufficient ties to the community and it is clear from his reasoning and consideration of the relevant authorities that he was not persuaded that such ties as the applicants did have, necessarily lead to the conclusion that there will be no attempt to flee the jurisdiction.

58. The learned judge also recorded in his judgment, with commendable lucidity, the conditions relevant to his refusal to grant bail and his satisfaction that such conditions existed. In my view, the learned judge having recorded his findings, such findings are *res judicata* and they stand as proper findings unless and until they are overturned on appeal. Additionally, and for the avoidance of doubt, the appeal of such findings, regardless of how it is couched or in what form it takes, can never be to the same Court or to a Court of equal status or jurisdiction, whether or not of the same constitution, on a later occasion. It is to the Court of Appeal and nothing which has been advanced by any of the parties to this matter has persuaded me otherwise.

59. It therefore, follows that on this occasion where the issue of the applicant's bail is to be reconsidered, this Court commences its deliberation process by treating, as an essential fact, the fact that at the time when the matter of the applicants' bail was last considered, <u>factors relevant to the Kokaram J's entitlement to refuse to grant bail did</u>

indeed exist. In the circumstances, I take the view that, this Court can and should only investigate whether **that situation** has changed since then. In other words, whether there are any changes, either in the form of new considerations or changes of circumstances- which alter the circumstances upon which Kokaram J based his decision, and in such a way as to improve the applicants' entitlement to or eligibility for bail. In my view, there are none.

60. Indeed, apart from the issue of the applicants not having filed any application for judicial review of the AG's decision under section 16 of the Extradition (Commonwealth and Foreign Territories) Act, 1985, which they obviously could not have done at the time when Kokaram J refused them bail- there not yet having been any decision by the AG to review- nothing in the recent decision of their lordships of appeal even remotely touches, concerns or affects the matters to which Kokaram J, addressed his mind during the applicants' bail application before him- nor has it been so argued by learned counsel for the applicants.

61. Indeed, the applicants are still accused persons awaiting a section 16 decision- albeit they are now awaiting the outcome of their judicial review application. The public interest in the reciprocity of international obligations is still of paramount importance. So too are the serious nature of the crimes with which the applicants have been charged and the serious penalties for those crimes.

62. It is clear therefore, that the applicants remain in custody not by dint of some capricious exercise of judicial discretion or by the tyranny of circumstances. They remain in custody because at the time of the last hearing of their application for bail, the learned judge, quite rightly in my view, found that there existed several factors relevant to and in favour of exercising his discretion to refuse the applicants' bail, and, with respect to the applicants, none of these things have changed nor do the matters urged upon the Court, alter that position in any way.

Order and Disposition

63. In all of the circumstances, I find therefore, that there are no new considerations or change of circumstances relevant to the question of bail. In that regard, as there was no new considerations or changes of circumstances before this Court that are relevant to the question of bail,

(a) the application is therefore dismissed;

(b) bail is refused; and

(c) the status quo of the Applicants remains as is.

André A. Mon Désir
Judge

DATED: December 22, 2010