Trinity Term
[2021] UKPC 19
Privy Council Appeal No 0095 of 2017

JUDGMENT

Knowles and others (Appellants) *v* The Superintendent of Her Majesty's Fox Hill Prison (The Commissioner, Bahamas Department of Correctional Services) and others (Respondents) (The Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Lloyd-Jones
Lord Briggs
Lord Hamblen
Lord Leggatt
Lord Stephens

JUDGMENT GIVEN ON

19 July 2021

Heard on 13 May 2021

Appellants	*Respondents*
Edward Fitzgerald QC Damian A L Gomez QC Joseph Middleton (Instructed by Simons Muirhead & Burton LLP)	James Lewis QC (Instructed by Charles Russell Speechlys LLP)

LORD HAMBLEN:

1. The appellants seek to challenge their extradition from The Bahamas to the United States of America to stand trial for conspiracy to commit drug trafficking offences.

2. This appeal concerns two grounds of challenge. The first is that the evidence adduced in support of the extradition was not "duly authenticated" in accordance with section 14(3)(a) of the Extradition Act 1994 ("the Act") ("the authentication issue"). The second is that the appellants have been deprived of their constitutional right to have habeas corpus proceedings determined within a reasonable time, in violation of article 20(8) of the Constitution of The Bahamas and that they are entitled to a remedy by way of discharge from the proceedings ("the delay issue").

The factual background

3. The alleged conspiracy to traffic drugs concerns shipments of cocaine from The Bahamas to Florida between June and November 2002 involving over 1,000 kg of cocaine.

4. On 12 December 2002, the appellants and others were charged by a grand jury sitting in the US District Court for the Southern District of Florida. On 15 December 2002, the US authorities sent a request for the appellants' provisional arrest with a view to their extradition. A full extradition request was sent on about 6 February 2003. The acting Minister of Foreign Affairs, Dr Marcus Bethel, issued an Authority to Proceed to the magistrate on 13 February 2003.

5. The committal proceedings began on 24 March 2003 before Stipendiary and Circuit Magistrate Carolita Bethell. The principal evidence relied on at committal consisted of a number of affidavits of the prosecution witnesses, namely Drug Enforcement Authority ("DEA") agents, scientists, and co-conspirators who had been arrested when the importing vessels were seized and who inculpated other conspirators. These affidavits were exhibited to an affidavit of Karen Atkinson, an Assistant US Attorney. It is Karen Atkinson's affidavit which is said not to have been "duly authenticated".

6. As summarised by the Court of Appeal, Karen Atkinson's affidavit "sets out her familiarity with the charges and her opinion as to the relevant law. It exhibits the affidavits of witnesses containing evidence given on oath before the grand jury which resulted in the Indictment, and on which the US relies for its Request for extradition. It certifies that the charges are felonies punishable by more than a year's imprisonment;

sets out that warrants of arrest were issued and the dates on which they were issued; and attests that the evidence indicates that each of the appellants is guilty of the offences in the Indictment."

7. At the committal hearing no challenge was made to the admission of Karen Atkinson's affidavit. The only objection raised by leading counsel then representing the appellants, Keir Starmer QC, was that parts of the evidence exhibited by her were hearsay. The magistrate expressly found that all the evidence had been duly authenticated.

8. On 12 November 2003, the magistrate committed the appellants to HM Prison Fox Hill to await extradition.

9. On 25 November 2003, the appellants applied to the Supreme Court for writs of habeas corpus. They made separate applications for judicial review of the instrument appointing Dr Bethel as acting Minister of Foreign Affairs. Both sets of proceedings were subsequently dealt with together in the Supreme Court.

10. In May 2004, the appellants applied for discovery relating to the appointment of Dr Bethel and for bail. Thompson J granted both applications, but in June 2004 the Court of Appeal allowed the State's appeal against both orders. The appellants appealed to the Judicial Committee, which in March 2005 dismissed the appeal on disclosure but allowed the appeal on bail: *Knowles v Superintendent of Her Majesty's Prison Fox Hill* [2005] 1 WLR 2546. On 25 March 2005, the appellants were admitted to bail and have remained on bail since then.

11. Between 2003 and 2015 there was correspondence between the parties and the courts as to the transmission of the certified transcripts and exhibits from the committal proceedings and the listing of the habeas corpus matter in the Supreme Court. The matter was also reassigned during that period from Thompson J to Allen J and then to Stephen Isaacs SJ.

12. Following several status hearings before Isaacs SJ, the substantive hearing of the habeas corpus applications took place between 29 February and 3 May 2016. The judge refused both the habeas corpus and judicial review applications.

13. On 23 October 2017, the appellants' appeals against the rejection of their habeas corpus applications were dismissed by the Court of Appeal (Dame Anita Allen P; Isaacs and Crane-Scott JJA). On the same day, the appellants filed a joint notice of motion in the Court of Appeal for leave to appeal to the Judicial Committee, but leave was refused on 28 November 2017.

14. On 12 December 2017, all five of the appellants in the court below applied to the Judicial Committee for permission to appeal. Two of the appellants, Austin Knowles and Sean Bruey, subsequently withdrew their applications. The Judicial Committee granted leave to appeal to the remaining three appellants on 10 April 2019.

The legal framework

15. The appellants' extradition request was submitted pursuant to the Extradition Treaty concluded between The Bahamas and The United States in 1990 ("the Treaty"). The legal requirements for extradition from The Bahamas are set out in the Act.

16. Under section 10 of the Act the magistrate has to be satisfied (i) that the offence to which the Authority to Proceed relates "is an extradition offence" and (ii) that the evidence against the requested person "would be sufficient to warrant trial for that offence if the offence had been committed in The Bahamas". Evidence must therefore be adduced to establish a prima facie case. If these requirements are satisfied, then the person is to be committed to custody to await extradition "unless his committal is prohibited by any other provision of this Act" - see section 10(5).

17. An "extradition offence" is as defined in section 5 of the Act, which materially provides as follows:

> "5(1) Without prejudice to subsection (2) for the purposes of this Act, any offence of which a person is accused or has been convicted in an approved State is an extradition offence, if -
>
> …
>
> (b) in the case of an offence against the law of a treaty State -
>
> (i) it is an offence which is provided for by the extradition treaty with that State; and
>
> (ii) the act or omission constituting the offence, or the equivalent act of omission, would constitute an offence against the law of The Bahamas if it took place within The Bahamas or, in the case of an extraterritorial offence, in corresponding circumstances outside The Bahamas.

…

(3) Any offence which the Minister under his hand certifies is the subject matter of a request received from an approved State for the purposes of section 8 and that he is satisfied is constituted by acts in furtherance of the possession, distribution, importation or manufacture of dangerous drugs is an extradition offence for the purposes of this Act and of the extradition treaty with that approved State."

18. The admissibility requirements in relation to evidence in extradition proceedings are set out in section 14 of the Act, which materially provides as follows:

"14(1) In any proceedings under this Act, including proceedings on an application for habeas corpus in respect of a person in custody under this Act -

(a) a document, duly authenticated, which purports to set out testimony given on oath in an approved State shall be admissible as evidence of the matters stated therein;

(b) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received in any proceedings in an approved State shall be admissible in evidence;

…

(3) A document shall be deemed to be duly authenticated for the purposes of this section -

(a) in the case of a document which purports to set out testimony given as referred to in subsection (1)(a), if the document purports to be certified by a judge, magistrate or officer of the Court in or of the approved State in question or an officer of the diplomatic or consular service of that State to be the original document containing or recording that testimony or a true copy of that original document;

(b) in the case of a document which purports to have been received in evidence as referred to in subsection (1)(b)

or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of a document which has been so received;

…

(5) A document purporting to be issued under the hand of the Minister for the purposes of section 5(3) shall be admissible in evidence in any proceedings under this Act and shall be prima facie evidence of the facts stated in that document.

(6) Nothing in this section shall prevent the proof of any matter, or the admission in evidence of any document, in accordance with any other law of The Bahamas."

19. Section 7(1) of the Act sets out circumstances in which extradition and committal to or retention in custody is prohibited:

"7(1) A person shall not be extradited under this Act to an approved State or committed to or kept in custody for the purposes of such extradition if it appears to the Minister, to the court of committal or to the Supreme Court on an application for habeas corpus -

(a) that the offence of which that person is accused or was convicted is an offence of a political character or that it is an offence under military law which is not also an offence under the general criminal law; or

(b) that the request for extradition, though purporting to be on account of an extraditable offence, is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or

(c) that he might, if extradited, be denied a fair trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions; or

> (d) if the offence of which that person is accused is statute-barred in the approved State that has requested his extradition; or
>
> (e) if his extradition is prohibited by any law in force in The Bahamas."

20. Under section 11(3)(b) of the Act the Supreme Court may order a person committed to be discharged from custody if it appears to the Court that "by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large … it would, having regard to all the circumstances, be unjust or oppressive to extradite him".

21. Article 20(8) of the Constitution of provides that:

> "(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

22. Under article 28(2) of the Constitution the Supreme Court shall not exercise its powers to hear and determine constitutional applications "if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

The authentication issue

23. Karen Atkinson's affidavit is a document which "purports to set out testimony given on oath". To be admissible under section 14(1)(a) of the Act it was accordingly required to be "duly authenticated". Under section 14(3)(a) it would be "duly authenticated" if it "purports to be certified by a judge, magistrate or officer of the Court in or of the approved State in question or an officer of the diplomatic or consular service of that State" to be an original document or a true copy of that original document.

24. Her affidavit was authenticated by Lystra Blake, who was stated to be "Associate Director, Office of International Affairs, Criminal Division, US Department of Justice".

25. The appellants' case is that Lystra Blake does not "purport" to be any of the qualifying individuals identified in section 14(3)(a) of the Act. She is not stated to be a judge, or a magistrate, or an officer of the Court, or an officer in the US diplomatic or consular service. She is simply stated to be an Associate Director of the Office of International Affairs. It follows that Karen Atkinson's affidavit does not "purport to be certified" by any of qualifying individuals and is accordingly not "duly authenticated". The appellants submit that in consequence neither her affidavit nor its exhibits are admissible under the Act.

26. The Court of Appeal accepted that the authentication requirement under the Act is mandatory and the respondents do not contend otherwise - see, in relation to the analogous provision in the Extradition Act in Jamaica, *Ramcharan v Commissioner of Correctional Services* (2007) 73 WIR 312, 322. The Court of Appeal nevertheless rejected the appellants' case on the authentication issue, observing that Parliament cannot have intended that "a bare technical point such as not stating in the certificate in what capacity you are doing so, should be allowed to defeat the extradition process …".

27. Of the various reasons given by the Court of Appeal for rejecting the appellants' "technical point", only one has sought to be supported in oral argument by the respondents. That is that the US Attorney General confirmed that Lystra Blake was "duly commissioned and qualified". The Court of Appeal held that the Attorney General was thereby declaring that she was "assigned to the function of certification of such documents, and was qualified to do so in that she had complied with the specific requirements or conditions precedent to legally perform that function".

28. The appellants submit that the Attorney General was confirming no more than the fact that Lystra Blake was duly commissioned and qualified as the "Associate Director of the Office of International Affairs". He was not asserting or implying that Lystra Blake was also a judge, magistrate, officer of the Court or officer of the diplomatic or consular service. It does not follow from the fact that Lystra Blake may have been assigned to the function of certifying documents for extradition requests that she was qualified to do so for the purposes of Bahamian extradition law.

29. There is force in the appellants' argument. It is not necessary, however, to determine whether the Court of Appeal's decision was wrong on this issue as the Board is satisfied that the requisite evidence is admissible on other grounds.

30. The evidence necessary to establish a prima facie case was set out in the affidavits exhibited to Karen Atkinson's affidavit. Each of those affidavits was certified by Karen Atkinson as an "officer of the Court". She stated that "As an officer of the Court, I certify that attached hereto are the following exhibits in support of the extradition". Each of the affidavits exhibited was then certified as being "original".

Those affidavits were accordingly "duly authenticated" under section 14(3)(a) of the Act as they purport to be certified by an "officer of the Court" as an "original document".

31. Mr Edward Fitzgerald QC for the appellants sought to resist this conclusion by contending that the exhibits are an integral part of Karen Atkinson's affidavit and that if her affidavit was not "duly authenticated" it must follow that her exhibits were equally not "duly authenticated". No particular form of authentication is required, however, in relation to the certifier of the document which purports to set out testimony given on oath under section 14(1)(a). All that section 14(3)(a) requires is that the document be certified as an original or true copy document by a person purporting to be one of the qualifying individuals. Each of the affidavits was so certified in this case.

32. Mr Fitzgerald further contended that Karen Atkinson's affidavit was necessary to establish that the crimes were extradition offences. Under article 2 of the Treaty the offence was required to carry a sentence of more than one year's imprisonment.

33. Under section 8 of the Act extradition proceedings require the Minister of Foreign Affairs to issue an Authority to Proceed "in pursuance of a request made to the Minister by or on behalf of an approved State".

34. The Acting Minister of Foreign Affairs issued an Authority to Proceed dated 13 February 2003 "under his hand and seal". That document stated that a request had been made for extradition by the Government of the United States. It also stated that he was "satisfied" that the "acts and omissions constituting" the offences would constitute offences under the Dangerous Drugs Act 2000, namely conspiracy to import dangerous drugs, attempt to import dangerous drugs and possession of dangerous drugs with intent to supply.

35. We agree with the respondents that the statements made in the Authority to Proceed satisfy the requirements of section 5(3) of the Act with the consequence that the offences are deemed to be "an extradition offence for the purposes of this Act".

36. The Authority to Proceed was made by the Minister "under his hand". It stated that it was "the subject matter of a request received from an approved State". It stated that the Minister was "satisfied" that the acts constituting the offences were in furtherance of the "importation" and "possession" of "dangerous drugs". Mr Fitzgerald submitted that the Authority to Proceed did not "certify" these matters, as required under section 5(3) of the Act. No particular form or style of certification is, however, required and in the Board's view official statements made by the Minister under his hand and seal in a formal document such as the Authority to Proceed suffice.

37. Mr Fitzgerald next contended that Karen Atkinson's affidavit was necessary for there to be admissible evidence that the offences were not statute-barred. It is correct that this is a matter addressed by Karen Atkinson and no doubt that it is good practice. The Board does not, however, consider that it is a mandatory requirement of a valid extradition request. Section 7 of the Act sets out various restrictions on extradition, including if the offence is time-barred. In the Board's view these are matters to be raised by the requested person. It is not for the requesting State to rebut them in advance and to seek to disprove the applicability of the restrictions before any of them have been raised. It would make little sense, for example, to require the requesting state to establish at the initial requesting stage that there was no prospect that the requested person "might" be denied a fair trial (section 7(1)(c)).

38. Finally, Mr Fitzgerald contended that Karen Atkinson's affidavit was necessary to comply with the "required documents" provision in article 8 of the Treaty. In particular, it was said that her affidavit was necessary to provide "a statement of the facts of the case"; "a statement of the provisions of the law describing the essential elements of the offense"; "a statement of the provisions of law describing the punishment for the offense", and "a statement of the provisions of law describing any time limit on the prosecution". As an unincorporated treaty these are not, however, requirements of Bahamian law. Those requirements are as set out in the Act.

39. For all these reasons the Board rejects the appellants' case on the authentication issue. These reasons differ from those given by the Court of Appeal but the Board has had the benefit of more wide-ranging arguments presented by Mr James Lewis QC on behalf of the respondents.

40. For completeness, it should be noted that Mr Lewis submitted that the authentication requirements were met in a number of further ways such as: (i) each affidavit (including the affidavit of Karen Atkinson) was certified by United States Magistrate Judge Ann E Vitunac; (ii) the affidavits were certified as a whole by Colin Powell, Secretary of State and head of the US diplomatic and consular service; and (iii) the proper interpretation of section 14(3)(a) is that it allows for certification by a person purporting to be an officer "of the approved State", as is provided for in the Extradition Act 1870 and every other United Kingdom Extradition Act upon which the Bahamian Act is founded. It is not necessary to rule on these further arguments, save to observe that point (iii) was rightly acknowledged by Mr Lewis to be a "long stop" argument. It is difficult to see that there can be any warrant for recasting the provisions of the Act in the manner suggested.

41. Finally, it should be noted that all of these difficulties would have been avoided if Lystra Blake had stated that she was an officer of the Court, as the Court of Appeal said she was well known to be. For the avoidance of doubt, States requesting extradition from The Bahamas, and other countries with like extradition legislation, should ensure

that the certifier of all affidavits sworn in support of their application does expressly state that he or she is one of the individuals qualified so to certify.

The delay point

42. The Act specifically provides in section 11(3) a means of redress where extradition would be unjust due to the passage of time. The appellants' application under section 11 was dismissed on the facts by both the Supreme Court and the Court of Appeal. There is no appeal against that finding.

43. Instead, the appellants seek to rely on delay to mount a constitutional challenge on the grounds that they were not given a hearing of their habeas corpus application "within a reasonable time", contrary to article 20(2) of the Constitution.

44. We are prepared to assume without deciding that the appellants are entitled to rely on article 20(8) on the basis that the determination of their habeas corpus applications involved the determination of their civil rights, as Bahamian nationals. We are also prepared to assume without deciding that they can rely on article 20(8) even though it may be said, as Isaacs SJ held, that constitutional relief is not available by reason of article 28(2) of the Constitution as section 11 provides an "adequate means of redress". The fundamental difficulty facing the appellants is factual.

45. Both the judge and the Court of Appeal considered and made findings in relation to the delay and its effect.

46. In the light of his more detailed findings, the judge found that:

> "Apart from the applications relative to discovery, for bail and a challenge to the Authority to Proceed, all of which were disposed of at the Privy Council, nothing was done by the Applicants to bring this application on for hearing after the Privy Council delivered its judgment on 23 March 2005, save for agreeing dates between June and September 2010 at the instance the Respondents."

47. The Court of Appeal observed that:

> "Undoubtedly, it is ultimately the duty of the requesting state with the assistance of the requested state, to pursue the extradition, nevertheless, the appellants also have an obligation to assert their rights, particularly as they had already been committed to await extradition."

In the light of its more detailed findings, the Court of Appeal found that:

> "In the premises, I agree with the learned judge's finding that the delay was not attributable to the failings of the Supreme Court Registry, but due to the appellants' contentment with the delay as evidenced by their failure to pursue timeously, their applications for habeas corpus."

48. It has therefore been found as a fact that the delay was attributable to the appellants' failure to pursue their applications for habeas corpus and that they were content for their applications to be delayed.

49. Despite criticisms made by Mr Fitzgerald, there is no basis for going behind these findings. The Board does not consider that the appellants can complain about not obtaining a hearing in "a reasonable time" in circumstances where they did not seek a hearing and were content for the matter to be delayed.

50. Further, even if the appellants could establish a breach of article 20(8) there is no basis for seeking the remedy of discharge from extradition. As Lord Bingham stated in *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72 at para 24 in relation to a failure to determine a criminal charge within a reasonable time in breach of article 6(1) of the European Convention on Human Rights:

> "The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances."

51. In *Fuller v Attorney General of Belize* [2011] UKPC 23 at para 79, in relation to a complaint of delay in the hearing of an appeal from a refusal of a habeas corpus application in extradition proceedings in Belize, Lord Phillips stated:

> "Had the appellant wished to progress this appeal he could and should have made representations to the Registry. The fact that he did not do so indicates that, perhaps not surprisingly, he was only too happy that the

> hearing of his appeal should be delayed. In these circumstances the Board does not consider it arguable that justice demands that the extradition proceedings should be abandoned because of the delay that has occurred."

Similarly, in the present case, on the findings made, the appellants were "only too happy" that there should be delay. The Court of Appeal also found that the appellants had not established that they would suffer any prejudice as a result of the delay and that a fair trial in the United States was still possible. Consequently, the Court of Appeal determined that "it would not be unjust to extradite them due to the time that has passed." Although made in relation to section 11(3) of the Act, that finding disposes equally of the appellants' argument that they should be discharged from extradition because their habeas corpus applications were not heard "within a reasonable time", contrary to article 20(2) of the Constitution. In such circumstances discharge from extradition would not be an appropriate remedy.

Conclusion

52. The Board will humbly advise Her Majesty that the appeal should be dismissed.