[2017]JMSC Civ 52

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017 HCV 0484

IN THE MATTER OF an Application for leave for Judicial review for Declaration/Certiorari to quash the decision of Minister DELROY CHUCK 1st respondent signing a Warrant of Extradition of the Applicant to Canada dated November 30, 2016 & February 7, 2017

AND

IN THE MATTER OF a request for the extradition of **GEORGE FLOWERS** made by the **GOVERNMENT OF CANADA**

AND

IN THE MATTER OF the **EXTRADITION ACT**

BETWEEN	**GEORGE FLOWERS**	**APPLICANT**
AND	**THE MINISTER OF JUSTICE (DELROY CHUCK)**	**1st RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS FOR AND ON BEHALF OF THE GOVERNMENT OF CANADA**	**2nd RESPONDENT**
AND	**THE COMMISSIONER OF CORRECTIONAL SERVICES**	**3rd RESPONDENT**

AND **THE ATTORNEY GENERAL OF JAMAICA** **4th RESPONDENT**

IN CHAMBERS

Mr. Don Foote and Mr. John Thompson for the applicant

Miss Althea Jarrett instructed by the Director of State Proceedings for the 1st, 3rd& 4th respondents

Mr. Jeremy Taylor for the 2nd respondent

Heard: 15 February and 6 April 2017

Application for leave to apply for Judicial Review–res judicata- Extradition Act – section 13(1) (b)

SIMMONS J

[1] By way of an ex parte application the applicant seeks leave to apply for an order of certiorari/ a declaration to quash the warrant of extradition dated the 7thFebruary 2017(the February warrant). Additionally or in the alternative Mr. Flowers also seeks leave to apply for an order of certiorari/a declaration to quash the warrant of extradition dated the 30th November 2016 (the November warrant). He has also sought an order that he be discharged from custody.

[2] The grounds on which the application is based are stated to be as follows:-

(i) The applicant's right to invoke the provisions of section 13 (1) (b) of the ***Extradition Act*** (***the Act***)to quash the November warrant which was signed and issued over one month ago is being prejudiced by the issuing and signing of the February warrant;

(ii) That the issue of the November warrant and the February warrant is unfair, oppressive, an abuse of Ministerial power and a breach of the applicant's Constitutional right to be discharged pursuant to section13 (1) (b) of ***the Act***;

(iii) The offence for which his extradition is being sought is not an extraditable offence under ***the Act***, as there is no corresponding offence in Jamaican law;

(iv) That the issue of the February warrant has either prevented or prejudiced his efforts to have his case for discharge being heard on its merits;

(v) That in light of the fact that the applicant has spent four years in custody it would be unjust and oppressive to extradite him; and

(vi) The applicant's appeal has a real likelihood of success.

[3] On the day appointed for hearing there were two claims before the court in respect of Mr. Flowers; Claim No. 2017 HCV 00346 and the present claim. The former claim was centred around the issue of the November warrant. The respondents indicated that they had no difficulty dealing with both matters as their submissions would be the same.

Background

[4] On the 23rd March 2013 the Dominion of Canada made a request for the provisional arrest and extradition of Mr. Flowers in order for him to stand trial for the offence of aggravated assault. The particulars of the offence are that he engaged in sexual activities with five complainants while HIV positive, having not disclosed his medical status.

[5] On the 3rd June 2013 the then Minister of Justice, Senator the Honourable Mark Golding issued the authority to proceed. A warrant of arrest was subsequently issued and was executed on the applicant on the 4th June 2013.

[6] A further request was made for the applicant's extradition on the 30thAugust 2013 and the authority to proceed issued on the 9th September 2013. A warrant of arrest was issued and executed on the 19thSeptember 2013.

[7] On the 22nd August 2014 the applicant was committed for extradition. The applicant applied for a Writ of Habeas Corpus. The application was heard by the Full Court and was refused on the 30th June 2016. The court also made an order that the applicant be extradited to Canada. The applicant through his Attorney-at-law Mr. Don Foote gave verbal notice of appeal.

[8] On the 16th November 2016 Mr. Flowers's Notice of Appeal was struck out for failure to comply with the ***Court of Appeal Rules, 2002***.

[9] The Minister of Justice subsequently signed the surrender warrant on the 22nd November 2016. That warrant was withdrawn as it did not contain the particulars of the offences for which the applicant was being extradited. Another warrant was sent to the Minister who signed it on the 30th November 2016.

[10] On the 25thNovember 2016 the applicant who was then represented by Mr. John Thompson filed an application for an extension of time to file his Notice and Grounds of Appeal. The ground on which he relied was dual criminality. On the 30th January 2017 the application was refused. At the time, the court also considered the merits of the appeal.

[11] The November warrant was not executed due to Mr. Flowers' pending application.

[12] On the 1stFebruary 2017 Mr. Taylor wrote to the Minister indicating that in his opinion the November warrant had been spent. Mr. Taylor also enclosed a draft surrender warrant for his signature.

[13] On the 3rdFebruary 2017 Mr. Flowers filed a Fixed Date Claim Form in which he seeks an order of certiorari to quash the November warrant. He also seeks an order for his release and damages. An ex parte Notice of Application for leave to apply for judicial review was also filed on that date. I will refer to those proceedings as the first claim.

[14] A new warrant was issued on the 7th February 2017. It is this warrant that has led to the filing of this claim.

Applicant's submissions

[15] Mr. Foote submitted that the November warrant is invalid as it was signed whilst the applicant's application was still pending in the Court of Appeal. He also submitted that the February warrant is also invalid as it was issued whilst the applicant's application for extension of time was still pending. He stated that the issue of that warrant is an abuse of the Minister's power and a breach of Mr. Flowers' Constitutional rights.

[16] He also stated that the issue of the February warrant has prejudiced the applicant's application in the first claim to quash the November warrant. He said that the issue of the February warrant amounts to unlawful Ministerial interference in those court proceedings and is a breach of the applicant's Constitutional right under section 13 (1) (b) of ***the Act*** to be discharged from custody. He stated that the applicant only became aware of the existence of the February warrant when he came to court. Counsel also submitted that section 13(1) (b) proceedings are required to be done by way of an application for judicial review to quash the warrant. He also stated that the provisions of section 11(3) are linked to applications under section 13.

[17] He also raised the issue of dual criminality and submitted that where there is any doubt as to whether the offence for which the applicant is charged is an extraditable one that doubt ought to be resolved in the applicant's favour.

[18] Where the amount of time that Mr. Flowers has been in custody is concerned, Mr. Foote directed the court's attention to the Affidavit of Urgency in which it is asserted that the maximum penalty for the offence for which the applicant's extradition is sought is three years and his client has spent four years in custody. He stated that it would be oppressive and unjust in such circumstances to extradite him. He emphasized that his client is still at risk of being extradited.

[19] He stated that Mr. Flowers's case has a realistic prospect of success and as such leave should be granted for him to apply for judicial review.

First, third and fourth respondent's submissions

[20] Miss Jarrett submitted that the grounds on which Mr. Flowers relies have no realistic prospect of success and as such his application ought to be refused. Reference was made to the case of ***Regina v Industrial Disputes Tribunal (ex parte J. Wray and Nephew Limited*** (unreported), Supreme Court, Jamaica, Claim No. 2009 HCV 04798, judgment delivered 23 October 2009 in support of that submission. Reference was made to the case of ***Tyndall & others v Carey & others*** (unreported),Supreme Court, Jamaica, Claim No. 2010 HCV 00474, judgment delivered 12 February 2010 and the case of ***Sharma v Brown – Antoine*** (2006) 69 WIR 379. Counsel also made the point that only the application for certiorari required the leave of the court and that his claims for declaration could be made without the court's permission.

[21] With respect to section 13 (1) (b) of ***the Act*** Counsel submitted that the section does not anticipate an application for judicial review. She stated that it applies to an application for discharge where the criteria are met. She indicated that she understood Mr. Flowers to be saying that the issue of the second warrant would thwart his ability to discharge the invalid warrant.

[22] She made the point that the draft surrender warrant with which the applicant has taken issue was requested and issued after the Court of Appeal had made its decision. Reference was made to paragraph 21 of the affidavit of Jeremy Taylor sworn to on the 9th February 2017 which states that he wrote to the Minister of Justice on the 16th November 2016 enclosing a draft surrender warrant for his signature and the decision of the Court of Appeal. The said warrant was signed on the 22nd November 2016.

[23] Miss Jarrett queried how the issue of the November warrant prevented the applicant's case being heard on its merits. She stated that Mr. Taylor's affidavit

also states that although he received the said warrant on the 30th November 2016 no action was taken to enforce it as Mr. Flowers had filed an application for extension of time to file Notice and Grounds of Appeal. She submitted that it is a falsehood for the applicant to suggest that the issue of the warrant stymied his effort to have his appeal heard.

[24] Reference was also made to paragraph 31 of Mr. Taylor's affidavit in which he states that he wrote to the Minister of Justice explaining why the November warrant was no longer valid. Counsel stated that in the circumstances the issue of the February warrant cannot prejudice Mr. Flowers' right to challenge the validity of the November warrant.

[25] Counsel also stated that it is clear that the November warrant is no longer valid and has been superseded by the February warrant. She submitted that in the circumstances there is no reason for the court to make any finding in respect of it. Miss Jarrett submitted that at this stage it would be an entirely academic exercise for the court to determine its validity and the court should not act in vain.

[26] Ground two is concerned with the issue of both warrants. Counsel submitted that there was no abuse of ministerial power. That ground challenges the decision of the Minister to issue the November and February warrants. This is not an issue to be raised in new proceedings. He should take his challenge to the Court of Appeal. She noted that the Notice and Grounds of Appeal that were filed are the same as the grounds listed in this application. Miss Jarrett also submitted that the November warrant is no longer valid.

[27] Where ground three is concerned, Miss Jarrett submitted that the applicant is attempting to argue the very issue that was dealt with by the Full Court. She stated that when the Court of Appeal heard the application for leave to appeal it considered the merits of the case.

[28] Counsel stated that in ground three Mr. Flowers is seeking to challenge the Full Court's decision. Miss Jarrett made the point that the judicial review court is not

an appellate one. Reference was made to ***Kemper Reinsurance Co v Minster of Finance & Ors.***[1998] 3 LRC 633. Particular reference was made to page 9 of the judgment of Lord Hoffman which states:-

> *'In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct".*

[29] She therefore submitted that these grounds have no realistic prospect of success.

[30] Counsel also stated that the remedy that the applicant seeks is a discretionary one. She indicated that although the ***Sharma*** case speaks to the issue of delay and the availability of alternative remedies there are authorities that indicate that the applicant must also display candour. She submitted that when an applicant fails to disclose relevant evidence the court may refuse the application. She stated that Mr. Flowers has demonstrated a lack of candour by his failure to make full and frank disclosure. She indicated that he has not seen it fit to bring to the court's attention all of the relevant facts since the Full Court's decision. She stated that there is clear authority that when one is approaching the judicial review court they are required to be forthright. Reference was made to ***R v Secretary of State for the Home Department*** [2007] EWHC 3103 (Admin) where Collins J, said :-

> *"However, I do not want to leave this case without commenting on one important matter. When the claim was lodged, the decision of the adjudicator was not included in the papers to be seen by the judge. Indeed, it was not until the acknowledgement of service that the full history was disclosed. It is essential that those who bring judicial review proceedings appreciate that there is a duty of candour. That means that they must put before the judge all relevant material, and in particular any material which may be adverse, or appear to be adverse. They must not leave the situation*

> *that the judge does not have the full picture in order to make the relevant decision".*[1]

[31] She stated that in neither application has Mr. Flowers directed the court's attention to the decision of the Court of Appeal. Reference was made to ***R(on the application of Mahmood) v Secretary of States for the Home Department IJR*** [2014] UKUT 439 (IAC) where McCloskey P, stated:-

> *"In the contemporary era, which is characterised by voluminous judicial workloads, the overriding objective and the constant battle against the unholy trinity of avoidable delay, excessive cost and unnecessary complexity, a hallowed principle is sometimes overlooked. This principle takes the form of a requirement of long standing that in every application for judicial review there is a duty of candour on the Applicant. While this applies throughout the proceedings, it is of particular importance at the permission stage. Formerly, permission applications were made* ex parte*. As a result of modern reforms, they now proceed on an* inter-partes *basis, according to a procedure which should normally ensure that the Court is alerted to the substance of the Respondent's case and the most important documentary evidence...However, I take this opportunity to emphasise that this duty continues to apply with full vigour at all stages of judicial review proceedings..."*

[32] Counsel submitted that the clear chronology in this matter does not support Mr. Flowers' contention that the warrant has prevented him from approaching the Court of Appeal.

[33] She asked the court to refuse his application on the basis that none of the grounds are arguable and it has no merit.

Second respondent's submissions

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[1]Paragraph 8

[34] Mr. Taylor adopted Miss Jarrett's submissions. In addition he argued that it is an abuse of process for the applicant to continue to rely on the dual criminality ground. He stated that the matter is now *res judicata*.

[35] He said that the applicant should not be permitted to raise the issue of the constitutionality of the extradition of a Jamaican citizen which is raised at paragraph 6 (4) (b) (iii) of this application as it could have been raised before the Full Court. Reference was made to the case of ***Clarence Ricketts v Tropigas*** (unreported), Court of Appeal, Jamaica SCCA 109/99, judgment delivered 31 July 2000 in which it was stated that in order to avoid a multiplicity of proceedings, where it is possible, all claims arising out of the same circumstances should be heard together. Mr. Taylor stated that there were no special circumstances that have emerged since the last proceedings to justify the raising of that issue in the present claim.

[36] Counsel also referred to the case of ***Belize Port Authorityv Eurocaribe Shipping Services Limited dba Michael Colin Gallery Duty Free Shop*** (unreported) Belize Court of Appeal, Civil Appeal 13 of 2011, judgment delivered 29 November 2012, in which Morrison JA said:-

> *"On the basis of these authorities, I would therefore conclude that the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i) cause of action estoppel, which, where applicable, is an absolute bar to relitigation between the same parties or their privies; (ii) issue estoppel, which, where applicable, also prevents the reopening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances; and (iii) Henderson v Henderson abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests involved, "a party is misusing or*

> *abusing the process of the court by seeking to raise before it the issue which could have been raised before" (per Lord Bingham, in Johnson v Gore Wood & Co (a firm), at page 499)."*[2]

[37] He stated that the court has the inherent jurisdiction to protect its process from abuse and the principles of *res judicata* and issue estoppel are designed to bar litigants from re-litigating matters that have already been decided.

[38] Where the issue of the time spent by the applicant in custody is concerned, Mr. Taylor stated that the applicant should not be allowed to raise this issue again as it was abandoned when the previous claim was being dealt with by the Full Court (Claim No. 2014 HCV 04232).

[39] Where the application for discharge is concerned, Mr. Taylor indicated that in order to make an application under section 13 of ***the Act*** the warrant must be spent. He stated that in the present case, the February warrant has not been spent. In the circumstances it was submitted that that aspect of the case has no realistic prospect of success.

[40] Mr. Taylor stated that the applicant has failed to satisfy the threshold test as the claim has no realistic prospect of success. He also urged the court to find that the raising of the issue of dual criminality in the second claim is an abuse of the court's process.

Discussion

[41] Rule 56.2 (1) of the ***Civil Procedure Rules (2002)***(***CPR***)states:-

> *"An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application".*

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[2]Paragraph 43

Such persons include “any person who has been adversely affected by the decision which is the subject of the application”. In this matter, there is no dispute that Mr. Flowers has the *locus standi* to make the application.

[42] Rule 56.3 of the ***CPR*** also requires an applicant to state among other things, the grounds on which the relief is being sought, whether there is any alternative form of redress available and whether he is personally or directly affected by the decision which is the subject of the application. The applicant has complied with these requirements.

Realistic Prospect of Success

[43] In order to succeed in his application, the applicant must satisfy the court that the claim is one with a realistic prospect of success. The test which is to be applied was set out in the judgment of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe in ***Sharma v Brown-Antoine*** (supra). The court stated:-

> *“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:*
>
> > *'… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must*

> *be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'*
>
> *It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'; Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733."*[3]

[44] This test was applied by Sykes J in ***Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited*** (supra). The learned Judge said:-

> *"There must be in the words of Lord Bingham and Lord Walker, 'arguable ground for judicial review having a realistic prospect of success'….*
>
> ***The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away.*** *The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in light of the now stated approach.'* ***An applicant cannot cast about expressions such as ultra vires, null and void, erroneous in law, wrong in law, unreasonable without adducing in the required affidavit evidence making***

[3]Page 387

> ***these conclusions arguable with a realistic prospect of success. These expressions are really conclusions".***[4]

[Emphasis mine]

[45] In ***R v Secretary of State for the Home Department, ex p Begum*** (1990) COD 107, CA**,** Lord Donaldson MR described the rule in simple terms. He said that in order for an application to succeed the court must be satisfied *"that there is a point fit for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law"*.[5]

[46] The role of the court at this application stage has been described as that of a *"gatekeeper"* who decides whether an applicant ought to be given *"the green light to bring a claim for judicial review."*[6]

[47] As Sykes J said in ***Regina v Industrial Disputes Tribunal (ex parte J. Wray and Nephew Limited***(supra)"...leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away".

[48] It must also be noted that when considering whether or not leave should be granted, the court is not required go into the matter in as much depth as it would in a trial where all of the evidence would have been presented for its consideration. In ***Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Limited*** [1981] 2 All E.R. 93 Lord Diplock stated:-

> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the*

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[4]Paragraphs 57 & 58
[5] R v Secretary of State for the Home Department, ex p Begum (1990) COD 107, CA, Lord Donaldson MR.
[6] Tyndall & others v. Carey & others, Claim no. 2010HCV00474 paragraph 4

court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application".[7]

[49] The remedies are discretionary and at the permission stage, the court is required to consider whether the claim has a realistic prospect of success. Other factors such as delay by the applicant, the existence of an alternative remedy and the likely effect that the remedy may have on the respondent or third parties are also relevant.

[50] In order to determine whether there is an arguable ground for judicial review having a realistic prospect of success the following issues must be considered-

(i) Whether the November warrant is still valid;

(ii) Whether the February warrant was issued whilst the applicant's appeal in the first claim was pending;

(iii) Whether the issue of the February warrant prevents the applicant from having the case for his discharge being heard on its merits;

(iv) Whether the applicant's Constitutional rights were breached by the issue of the February warrant;

(v) Time spent in custody; and

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[7]Page 106

(vi) Whether the issue of dual criminality is *res judicata*.

The November warrant

[51] The above warrant was signed on the 30th November 2016 but was not enforced. Mr. Taylor in his affidavit indicates that this was due to the fact that Mr. Flowers had filed an application for extension of time to file Notice and Grounds of Appeal. On the 30th January 2017 the application was refused. Section 13 (1) (b) of ***the Act*** states:-

> *"If any person committed to await his extradition is in custody in Jamaica under this Act after the expiration of the following period, that is to say –*
>
> *(a) ...*
>
> *(b) Where a warrant for his extradition has been issued under section 12, a period of one month commencing with the day on which that warrant was issued,*
>
> *he may apply to the Supreme Court for his discharge".*

Mr. Taylor and Miss Jarrett have submitted that the November warrant is no longer valid as one month had elapsed without it having been executed. They also submitted that it has been superseded by the February warrant.

[52] I agree with their submissions.

Was the February warrant issued whilst the applicant's appeal was pending?

[53] The above captioned warrant is dated the 7th February 2017. The matter before the Court of Appeal was determined on the 30th January 2017. That warrant was therefore issued after the matter was completed. This ground in my view has no realistic prospect of success.

Did the issue of the February warrant prevent the applicant from having the case for his discharge being heard on its merits?

[54] Section 13 (1) (b) of ***the Act*** gives the applicant the right to apply for his discharge where one month has passed since the issue of the warrant for his extradition and it has not been executed. Subsection (2), however goes on to state:-

> *"If upon any such application the Supreme Court is satisfied that reasonable notice of the proposed application has been given to the Minister, the Supreme Court may, unless sufficient cause is shown to the contrary, by order direct the applicant to be discharged from custody and, if a warrant for his extradition has been issued under section 12, quash that warrant."*

The section gives the court the discretion to discharge the applicant from custody. It also stipulates that the Minister be given reasonable notice. In addition, the applicant's discharge is contingent on their being no sound basis to keep him in custody. Once the court is satisfied that the applicant should be discharged it is also empowered to quash the warrant.

[55] The applicant has alleged that the issue of the February warrant amounts to an abuse of Ministerial power, unlawful Ministerial interference in the court proceedings, a breach of his Constitutional right to be discharged and was calculated to undermine his application for discharge.

[56] The only evidence that has been presented in support of these allegations is the fact that the February warrant was issued after the commencement of the present claim. I have however noted that Mr. Taylor's letter that accompanied the draft of the February warrant predates the filing of this claim. There is also no provision in ***the Act*** which precludes the Minister from reissuing a surrender warrant if necessary.

[57] The applicant seems to be suggesting that the November warrant having been spent by the time his case was concluded before the Court of Appeal, the

authorities should have done nothing. That position in my view is unreasonable. Taken to its logical conclusion, a person for whom a surrender warrant has been issued could circumvent the system by filing multiple applications and appeals.

[58] The applicant's case in respect of this issue is in my view fanciful and has no realistic prospect of success.

[59] I also wish to make the point that an application under section 13 (1) (b) of ***the Act*** is not contingent on an application being made for judicial review.

Time spent in custody

[60] Counsel argued that having regard to all the grounds raised in the applicant's affidavit and given the fact that the applicant has spent four years in custody it would be unjust and oppressive to extradite him and this would contravene section 11 (3) of ***the Act.*** Section 11 states:-

> *"(1) Where a person is committed to custody under section 10 (5), the court of committal shall inform him in ordinary language of his right to make an application for habeas corpus and shall forthwith give notice of the committal to the Minister.*
>
> *(2) A person committed to custody under section 10 (5) shall not be extradited under this Act-*
>
> > *(a) in any case, until the expiration of the period of fifteen days commencing on the day on which the order for his committal is made; and*
> >
> > *(b) if an application for habeas corpus is made in his case, so long as proceedings on the application are pending.*
>
> *(3) On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that-*
>
> > *(a) by reason of the trivial nature of the offence of which he is accused or was convicted; or*

(b) by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large, as the case may be; or

(c) because the accusation against him is not made in good faith in the interest of justice,

it would, having regard to all the circumstances, be unjust and oppressive to extradite him."

[61] The application contemplated by section 11(3) of ***the Act*** is clearly one for a Writ of Habeas Corpus. The factors listed in section 11(3) are therefore matters that could properly have been raised and considered by the Full Court which could have ordered Mr. Flowers's discharge. The application was supported by the affidavit of Mr. Flowers which was sworn to on the 5th September 2014. In that affidavit, the applicant stated that he should be discharged from custody for three reasons. They are:-

(i) There is no corresponding offence in Jamaica to the one for which his extradition was being sought;

(ii) The accusation made against him was not in good faith and contrary to the interests of justice;

(iii) By reason of the length of time since he is alleged to have committed the offences.

Only the issue of dual criminality was pursued before the Full Court.

[62] I agree with Mr. Taylor's submission that litigants are to be discouraged from bringing a multiplicity of actions. This point was dealt with in ***Yat Tung Co v Dao Heng Bank Ltd & Anor*** [1975] AC 581. In that case, a building that was being constructed was sold to the plaintiffs by the first defendant when the borrower defaulted in making its mortgage payments. The plaintiffs also fell into arrears and the bank resold the property to the second defendants. The plaintiffs brought an action alleging that the sale was a sham and the mortgage back a nullity. The

first defendant denied these allegations and counterclaimed for the loss they had incurred on the resale. The counterclaim contained a statement of account relating to both transactions. Judgment was awarded in the first defendant's favour. The plaintiffs filed an action, in which they abandoned their claim that the sale to them was a sham. Instead, they asked that the resale to the second defendants be set aside on the basis of collusion and fraud. Their action was struck out as an abuse of the process of the court. On appeal, the decision of the Judge to strike out the second action was upheld. The court stated that the issue of the correctness of their accounting had been raised in the first defendant's counterclaim in the first action and it had been open to the plaintiffs to plead by way of defence to the counterclaim that the bank's accounting was erroneous on the basis of the alleged fraud. They were therefore estopped from bringing a second action. Lord Kilbrandon stated:-

> *"The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMullin J. that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to,* ***so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.*** *The locus classicus of that aspect of res judicata is the judgment of Wigram V.-C. in Henderson v. Henderson (1843) 3 Hare 100, 115, where the judge says:*
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> > *"… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but*

> *which was not brought forward, only because they have, from negligence, inadvertence,or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

The shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in no. 969 came to be answered Mr. Lai was unaware, and could not reasonably have been expected to be aware, of the circumstances attending the sale to Choi Kee, it may be that the present plea against him would not have been maintainable. But no such averment has been made.

The Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in Greenhalgh v. Mallard *[1947] 2 All E.R. 255, 257, by Somervell L.J.:*

> *"… res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."*[8]

[8]Pages 589-590

(see also ***Stewart and others v Independent Radio Company and another*** (unreported), Court of Appeal, Jamaica Civil Appeal no, 9/2011,judgment delivered 17 February 2012)

[63] In light of the above, it is my view that this ground has no realistic prospect of success.

The issue of dual criminality

[64] The applicant has once again advanced the dual criminality ground in his application for leave. This issue was however dealt with by the Full Court in the case of ***George Flowers v The Director of Public Prosecutions for and on behalf of the Government of Canada and the Commissioner of Correctional Services and the Attorney General*** [2016] JMFC Full 3, judgment delivered 30 June 2016.

[65] In fact, that was the only issue that was before the court for its consideration. Thompson-James J said:-

> *"The only issue to be decided by the Court at this time is whether there is a corresponding offence in Jamaica to the offence of aggravated sexual assault for which the Applicant's extradition is being sought."*

In dismissing the application for a Writ of Habeas Corpus the court found that the offence of Aggravated Sexual Assault for which the applicant was charged is an extraditable offence under ***the Act***. The learned Judge expressed the finding of the court in the following terms:-

> *"From the foregoing, I find that Aggravated Sexual Assault contrary to section 273 of the Canadian Criminal code is an extraditable offence pursuant to the Extradition Act of Jamaica in circumstances where the conduct of the accused results in the infliction of grievous bodily harm to the complainant. Therefore the Applicant may be*

> *extradited to answer to charges only in respect of the three (3) complainants who contracted the HIV Virus."*[9]

Laing J was also of the view that the offence is extraditable. He stated:-

> *"[121] Based on my conclusion expressed earlier in this judgment that the conduct test is applicable in our jurisdiction, I take into account the fact that in the documents constituting the request, the requesting state of Canada has produced evidence which is capable of supporting the conclusion that the Applicant has caused the HIV infection of three of the four complainants. This evidence is not necessary to sustain a charge in Canada of aggravated sexual assault contrary to section 273 of the Criminal Code (it may for convenience be viewed as the additional "ingredient D" using Lord Bridge's example referred to earlier) but the infection would be a necessary ingredient were the Accused to be charged in Jamaica for the offence of section 22 of our Offences Against the Person Act. Accordingly, I have considered this evidence in my assessment of whether the Applicant is extraditable.*
>
> *[122] For the reasons herein it is my conclusion that the acts or omissions of the Applicant constituting the offence for which his extradition is being sought (including the additional ingredient of causing HIV infection in respect of three of the complainants) would constitute an offence against the law of Jamaica if it took place within Jamaica since he would have "inflicted" grievous bodily harm in respect of these three complaints. Consequently the Applicant is being accused of having committed three counts of an "extradition offence". The position of the fourth complainant who was not infected with the HIV virus is clearly distinguishable."*

[66] Mr. Taylor pointed out that the same ground was also raised before the Court of Appeal when the application for an extension of time was heard. Counsel also stated that Brooks JA who dealt with the application also considered the merits of the appeal.

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[9]Paragraph 68

[67] That approach is in keeping with the views expressed by Harris JA In ***Pan Caribbean Financial Services Ltd. v Sebol Limited et al***. [2010] JMCA App 19 judgment delivered 8 October 2010, who stated:-

> *"It will be readily observed from the foregoing that the court, in determining whether to grant or refuse an application for an extension of time, must pay due regard to the length of the delay, the explanation for the delay,* ***the merits of the appeal*** *and the prejudice caused to the other party by the delay. All of this must be considered within the framework of the administration of justice."*

[Emphasis mine]

[68] The dismissal of the application is in my view indicative of the fact that the Court of Appeal found no merit in the appeal.

[69] It is clear from the above, that the matter was fully dealt with by the Full Court. Any issue that the applicant has with that judgment ought to be dealt with by the Court of Appeal. The judicial review court is not an appellate court. The applicant having failed to proceed with his case before the Court of Appeal with expedition cannot hope to resurrect the matter by way of judicial review.

[70] I agree with Mr. Taylor that the issue is now *res judicata*. The applicant is therefore based on the case ***Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd, Ulster Marine Insurance Co Ltd v Oceanus Mutual Underwriting Association (Bermuda) Ltd*** [1982] 2 Lloyd's Rep 132 precluded from raising it again. In that case Kerr LJ stated:-

> *"...it is clear that an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same. It would be wrong to attempt to categorise the situations in which such a conclusion would be appropriate. However, it is significant that in the cases to which we were referred, where this conclusion was reached, the attempted relitigation had no other purpose than what Lord Diplock described*

> *as "**mounting a collateral attack upon a final decision… which has been made by another court of competent jurisdiction in previous proceedings in which… (the party concerned) had a full opportunity of contesting the decision of the court by which it was made**".*[10]

[Emphasis mine]

[71] This rule, was expressed by Sir Thomas Bingham MR in ***Barrow v Bankside Members Agency Ltd*** (1996] 1 All ER 981 in the following terms:-

> *"The rule in* Henderson v Henderson *(1843) 3 Hare 100, [1843–60] All ER Rep 378 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise.* ***The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."***

[72] This issue has been the subject of litigation since 2014. The applicant in my view is attempting to mount a "*collateral attack"* upon the Full Court's decision. As Lord Griffiths said in ***The Administrator General for Jamaica v. Rudyard Stephens, Federal Investors Limited, Krias Limited and Exley Ho***, Privy Council Appeal No. 4 of 1992 (delivered on the 22nd July 1992) *"There must be an end to litigation".*

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[10]Page 137

[73] In the circumstances, it is my view that this ground also has no realistic prospect of success.

The duty of candour

[74] This issue was raised by Miss Jarrett who pointed out that Mr. Flowers in breach of that duty has not directed the court's attention to the decision of the Full Court in ***George Flowers v The Director of Public Prosecutions for and on behalf of the Government of Canada and the Commissioner of Correctional Services and the Attorney General*** (supra).

[75] The importance of this duty cannot be over emphasized. In order to do justice in each case the court should be fully appraised of the history of the matter and the relevant facts. In ***R (on the application of Mahmood) v Secretary of State for the Home Department IJR*** (supra) McCloskey P, stated:-

> *"The exalted importance of every litigant's duty of candour to the Court or Tribunal concerned is properly appreciated when the duty is juxtaposed with the concept of abuse of the process of the Court or Tribunal. I consider that, properly analysed, a breach of this duty will normally be tantamount to a misuse of the Tribunal's process. It is appropriate to add that the duty is not, of course, unilateral. It is, rather, bilateral in nature, applying fully to all parties to the proceedings. As regards Respondents, this has been long recognised. In* R v Lancashire County Court, ex parte Huddelston *[1986] 2 All ER 941, Sir John Donaldson MR observed, at p 4:*
>
> > '*Certainly it is for the applicant to satisfy the Court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards*

> *face upwards on the table and the vast majority of the cards will start in the authority's hands'."*[11]

I will say no more on this issue.

Conclusion

[76] Having found that the claim that has no realistic prospect of success, the application for leave to apply for judicial review is refused. No order as to costs. Leave to appeal is refused.

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[11]Paragraph 17