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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 42 OF 1992
(Judicial Review No. 24 of 1990)

BETWEEN:

THE MINISTER FOR FOREIGN AFFAIRS

FIRST APPELLANT
(Original First Respondent)

GOVERNMENT OF HONG KONG

SECOND APPELLANT
(Original Second Respondent)

and

TAM SUK-CHONG TAMMIE

RESPONDENT
(Original Applicant)

Mr Nainendra Nand with Mr J. Udit for the 1st Appellant
Mr Andrew A. Bruce with Mr R. Gopal for the 2nd Appellant
Dr M.S. Sahu Khan and Mr R.P.G. Haines for the Respondent

Dates of Hearing : 22nd and 23rd February, 1994
Delivery of Judgment : 26th April, 1994

JUDGMENT OF THE COURT

Order appealed from

This is an appeal from the decision of the Suva High Court whereby Byrne J. on 2nd September, 1992 made the following orders -

" *I order that Certiorari go to quash the decision made by the First Respondent on the 18th of May 1990 to issue an Authority to Proceed to enable the Nausori Magistrate's Court to continue with the Extradition Proceedings (Criminal Case No. 760 of 1988) now pending before the Nausori Magistrate's Court to extradite the Applicant from Fiji to Hong Kong and the Authority to Proceed aforesaid.*

I further order that the said extradition proceedings be forever stayed.

I further order that the Applicant's Passport be returned to her forthwith." (Note: Altered by consent to "immediately after 21 days".)

The Appellants are the Minister for Foreign Affairs hereinafter referred to as the 1st Appellant and the Government of Hong Kong hereinafter referred to as the 2nd Appellant. The original Applicant is the Respondent and will be referred to as such in this judgment.

1st Appellant's grounds of appeal

The 1st Appellant's grounds of appeal (as amended) are as follows:

"*1. THAT the Learned Judge erred in law in making a finding that the Respondent had a legitimate expectation to be heard prior to the issuing of the Second Authority to Proceed.*

2. THAT the Learned Judge erred in law in failing to evaluate the decision making process and instead proceeded to analyse and adjudicate into the merits of the application.

3. THAT the Learned Judge erred in law in finding that the eight offences of conspiracy to falsely account and five offences of conspiracy to furnish false information do not fall within the definition of extraditable offences under the Extradition Act, Cap.23.

4. *THAT the Learned Judge erred in law and in fact in finding that there was no evidence that the offences in Hong Kong for which extradition was sought were punishable by twelve months imprisonment or more."* (See Supplementary Notice of Appeal filed on 1/11/93 by the State Solicitor as counsel for the 1st Appellant.)

The 1st Appellant is also asking for costs in this Court and the Court below.

2nd Appellant's grounds of appeal

The 2nd Appellant has lodged 6 grounds of appeal and these read as follows:

"1. THAT the learned Judge erred in law in finding that there was no evidence that the offences in Hong Kong for which extradition was sought, were punishable by twelve months imprisonment or more.

2. THAT the learned Judge erred in law in finding that the matters particularised in the Hong Kong warrant if proved would not constitute an offence in Fiji.

3. THAT the learned judge erred in law in finding that the failure of the Minister for Foreign Affairs to specify the corresponding Fijian offences made his decision to issue the authority insupportable in law.

4. THAT the learned Judge erred in law in finding that the (8) eight offence (sic) of Conspiracy to Falsely Account and (5) five offences of conspiracy to furnish false information do not fall within the meaning of extraditable offences under the Extradition Act Cap. 23.

5. THAT the learned Judge erred in law in finding that the Minister erred in failing to give the Respondent the opportunity to show cause as to why he should not issue the authority to proceed.

6. THAT the learned Judge erred in law in finding that it was for the appellants to prove the offences for which the respondent was charged were extraditable offences."

Respondent's Notice

The Respondent's Notice filed on 24th September, 1993 reads as follows:

"The Respondent says that the Judgment of the Honourable High Court be affirmed on the grounds appearing in the Judgment of Byrne J and in any event upon the further grounds.

1. *That the relief sought by the Respondent and as ordered by the Honourable the High Court be sustained upon all the grounds appearing in the Respondent's Statement filed in the High Court pursuant to Order 53 Rule 3(2)of the High Court Rules and which appear on pages 236 to 246 of the Record in as much as the Learned trial Judge only dealt with grounds (d), (e) and (m) of all the grounds for reliefs presented to the High Court by the Respondent.*

2. *That in any event the purported offences for which the Respondent has been charged in Hong Kong and in respect of which the purported warrants for arrest have been issued in Hong Kong and which charges formed the basis of the Extradition Proceedings the subject of this appeal are not such as are offences which fall within any description set out in the schedule to the Extradition Act and are punishable under that law with imprisonment for a term of twelve months or more.*

3. *That there is no valid appeal before this Honourable Court in as much as the Notice of Appeal was not presented by the First Appellant in accordance with the Court of Appeal Act and the Rules thereunder.*

4. *That the Appellants have no locus standi in presenting this Appeal to this Honourable Court and/or this Honourable Court has no jurisdiction in the matter.*

5. *That in any event the purported affidavits filed by the Appellants were defective null and void and accordingly, the learned Judge erred in law and in fact in placing any reliance on the same in as much as the Affidavits did not comply with the requirements of Order 40 of the High Court Rules and the Laws relating thereto particularly relating to the affidavits of Ratu Sir Kamisese Kapaiwai Tuimcilai Mara and Apaitia Vute Matanatoto Seru which were not sworn before a Commissioner for Oaths before whom such affidavits could be taken."*

Background

A brief factual background to this appeal is set out in the 2nd Appellant's written submissions and it can be usefully repeated here. It reads as follows:

> " *On November 12, 1988, a Resident Magistrate in Fiji issued a provisional warrant of arrest for the Respondent Tam Suk-Chong pursuant to his jurisdiction under S.8 of the Extradition Act. The Respondent was arrested and granted bail on November 13th(sic), 1988. On November 24, 1988, the Governor of Hong Kong made a request to the Honourable Minister for Foreign Affairs for Fiji (hereinafter referred to as "the Minister") for the extradition of the Respondent. Furnished with the request was a certified true copy of a warrant for the arrest of Tam issued by a Hong Kong Magistrate on November 4, 1988, with information and charges attached thereto. The charges referred to were 5 offences of false accounting and 5 offences of furnishing false information, all offences contrary to the Theft Ordinance of Hong Kong.*
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> *On March 30, 1989, the Minister issued an Authority to Proceed ordering a Magistrate to proceed with the case against the Respondent in accordance with the provisions of the Section 7 of the Extradition Act Cap. 23. The Respondent applied for judicial review to quash the decision of the Minister for Foreign Affairs to issue the authority to proceed.*
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> *On December 30, 1988, a further warrant of arrest was issued in Hong Kong by a Hong Kong Magistrate in respect of 8 charges of conspiracy to falsely account, contrary to the Theft Ordinance of Hong Kong, and 5 charges of conspiracy to furnish false information, contrary to the Theft Ordinance of Hong Kong. As a result, a second request for the Respondent's extradition was made by the Governor of Hong Kong, dated April 19, 1990. After receiving the second request, the Minister issued a second authority to proceed, dated May 15th(sic) 1990.*
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> *On or about July 15, 1990, the Judicial Review proceedings in respect of the first Authority to Proceed were ordered discontinued after an undertaking was given by a Hong Kong prosecutor that the Respondent would not be indicted in respect of the 10 charges which were the subject of the first warrant. The extradition proceedings which had been directed in the initial authority to proceed issued by the Minister were then stayed by the High Court.*
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> *On August 13, 1990, the Respondent was given leave to apply for an order for Certiorari to quash the second authority to proceed (Judicial Review No. 24 of 1990).*

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The Certiorari application was heard on various dates between September 9, 1991 and April 8, 1992. Judgment was given on September 2, 1992 by Byrne, J. quashing the Authority to Proceed issued by the Minister."

To the above background we add that before the 1st Appellant issued his first Authority to Proceed, the Respondent lodged a petition with the 1st Appellant on 20th February, 1989 requesting him not to issue the Authority to Proceed. However, on 3rd March, 1989 the 1st Appellant advised the Respondent that he had considered her petition but was declining it.

Relief sought

The relief sought by the Respondent by way of judicial review was stated in her Statement made on 9th August, 1990 under Order 53 rule 3(2)(a) of the High Court Rules 1988 as follows:

"(a) For an Order of Certiorari to quash the decision made by the Minister of Foreign Affairs under Section 7 of the Extradition Act Cap. 23 (hereinafter called "the Act") on the 18th May 1990 purporting to be made under Section 7 thereof to issue an Authority To Proceed ("the Second Authority To Proceed") to continue with the Extradition Proceedings (Criminal case No. 760 of 1988) now pending before the Nausori Magistrate's Court so as to extradite the Applicant from Fiji to Hong Kong and to quash the Second Authority To Proceed aforesaid.

(b) For an Order that the Respondent do pay the Applicant's costs on the basis of common fund and/or Solicitor/client relationship."

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Subsequently on 27th August, 1991 by an amended Statement made under Order 53 rule 3(2)(a) the Respondent sought the following relief:

"(a) *For an Order of Certiorari to quash the decision made by the First Respondent purporting to be made under Section 7 of the Extradition Act Cap. 23 on the 18th May 1990 to issue the Second Authority To Proceed to enable the Nausori Magistrate's Court to continue with the Extradition Proceedings (Criminal Case No. 760 of 1988) (now pending before the Nausori Magistrate's Court) to extradite the Applicant from Fiji to Hong Kong and the Second Authority To Proceed aforesaid.*

(b) *For an Order that the Extradition Proceedings (Criminal Case No. 760 of 1988) insituted (sic) by the Director of Public Prosecutions for and on behalf of the Government of Hong Kong against the Applicant and now pending in the Magistrate's Court at Nausori as aforesaid be stayed pending the completion of this proceeding or until further Order on such terms as His Lordship thinks just and proper.*

(c) *For an Order that the Respondents do pay the Applicant's costs on the basis of common fund and/or Solicitor/client relationship."*

Respondent's grounds for relief

The grounds upon which, in her amended Statement, the Respondent sought that relief were:-

"(a) *That the First Respondent erred and misdirected himself in law in not coming to the decision that the Government of Hong Kong's request for the Applicant's extradition was made for the purpose of prosecuting her in Hong Kong on account of her race or political opinions and in so doing he misconstrued and or did not consider the full implications of Sections 6 and 7 of the Act;*

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(b) *That the First Respondent erred in law and misdirected himself in not coming to the conclusion that the Applicant might be prejudiced at the trial or punished or detained or restricted in her personal liberty by reason of her race or political opinions and in doing so he misconstrued and/or did not consider the full implications of Section 1 (1) (c) (sic) of the Act;*

(c) *That the First Respondent erred in law and misdirected himself in not coming to the decision that there is a strong probability that the Applicant will be prosecuted in Hong Kong after her return to Hong Kong for other and additional offences (for the same reasons as aforesaid) apart from the thirteen (13) Charges referred to in the Second Authority To Proceed and in so doing he misconstrued and/or did not consider the full implications of Section 3 (sic) of the Act;*

(d) *That the First Respondent erred in law and misdirected himself in not coming to the decision that the eight (8) Offences of Conspiracy to Falsely Account contrary to Common Law and Section 19 (1) (a) of the Theft Ordinance Cap. 210 do not fall within the description of extraditable offences set out in the Schedule of the Act and referred to in Section 5 thereof;*

(e) *That the First Respondent erred in law and misdirected himself in not coming to the conclusion that the five (5) Offences of Conspiracy to Furnish False information contrary to Common Law and Section 19 (1) (b) of the Theft Ordinance Cap. 210 do not fall within the description of extraditable offences as set forth in the Schedule of the Act and referred to in Section 5 thereof;*

(f) *That the First Respondent erred in law and misdirected himself in not coming to the decision that Hong Kong was merely a dependency of the United Kingdom and as such it did not have the conduct of external relations and that the United Kingdom Government alone had the right to issue the Letter of Request to the First Respondent to extradite the Applicant and that therefore the Second Letter of Request issued by the Governor of Hong Kong was null and void;*

(g) *That the First Respondent erred in law in not coming to the decision that Fiji cannot at the present time extradite any person from Fiji to a Commonwealth Country under the Act by reason of the fact that on the 7th October 1987 Fiji was declared a "Republic"; that subsequently Fiji was expelled form the Commonwealth and that her present status has not been changed;*

(h) *That the First Respondent erred in law and misdirected himself in not coming to the conclusion that it would be unjust and/or oppressive to extradite the Applicant for the reasons inter alia :-*

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(i) *Because of passage of time since the alleged offences were committed.*

(ii) *Because of the fact that the Hong Kong Government FAILED TO DISCLOSE to the Authorities in Fiji and the Courts that all moneys due and owing by the borrowing Companies referred to in Counts 1 to 13 inclusive and referred in the Second Warrant of Arrest dated the 30th December 1988 issued by the Hong Kong Government HAVE BEEN PAID IN FULL and that they were paid within twelve (12) months of the relevant borrowings.*

(iii) *Because of the fact that the Hong Kong Government failed to disclose to the Authority and the Court in Fiji that in relation to the same subject matters the Applicant has already been named in (13) Charges for Conspiracy as a Co-Conspirator as hereinafter mentioned.*

(i) *That the First Respondent erred in law in not analyzing objectively the evidence presented to him by the Government of Hong Kong before issuing the Second Authority To Proceed dated the 18th May 1990.*

(j) *That the First Respondent erred in law in not taking into account that there has been an inordinate delay on the part of the Government of Hong Kong in completing its case against the Applicant and that its present efforts to extradite the Applicant are not to prosecute her but to assist its case against her alleged Co-Consipirators (sic) in Criminal Case No. C25234 of 1988 now pending before the Magistrate's Court Central at Hong Kong. The alleged Co-Consipirators are Deacon Chiu, Dick Chiu and David Chiu. It is now pending before the Magistrate's Court at Hong Kong. They have been charged with eight (8) Offences of Conspiracy To Falsely Account, contrary to Common Law and Section 19 (1) (a) of the Theft Ordinance Cap. 210 and with five (5) Offences of Conspiracy To Furnish Information contrary to Common Law and Section 19 (1) (b) of the Theft Ordinance Cap. 210.*

(k) *That the First Respondent erred in law and misdirected himself in issuing the Second Authority To Proceed upon the grounds that an Order for extradition cannot lawfully be made by the Nausori Magistrate's Court; or it would not in fact be made in accordance with the provisions of the Act. (See Section 7 (3) of the Act).*

(l) *That the First Respondent erred in law in not exercising his discretion rationally and lawfully having regard to the fact that the First Respondent knew or ought to have known :-*

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(i) That initially the Applicant was charged with the ten (10) offences namely Five (5) offences of "False Accounting" contrary to to Section 19 (1) (a) of the Theft Ordinance Cap. 210 and Five (5) offences of "Furnishing False Information" contrary to Section 19 (1) (b) of the Theft Ordinance Cap. 210 Hong Kong.

(ii) That before the issuance of his First Authority To Proceed on the 31st March 1989 relating to the ten (10) offences as aforesaid, the First Respondent knew or ought to have known that the Hong Kong Government had laid additional or substituted Charges before the Magistrate's Court in Hong Kong whereby it charged the Applicant with (13) offences. Particulars whereof are now set forth in the Second Warrant of Arrest issued by the Magistrate's Court in (Central Magistracy) (sic) in Hong Kong on 30th December 1988.

(iii) That he knew or ought to have known the pendency of the said 13 Charges of Conspiracy in Hong Kong either before or at the time when the Affidavit of Mr. K.T. Kripas was filed in the Judicial Review Proceeding No. 17 of 1989 instituted by the Applicant in this Honourable Court.

(iv) He knew or ought to have known that the Applicant was named in the (13) substituted or additional Charges of conspiracy as a Co-Conspirator in Hong Kong as aforesaid when Mr. Nainendra Nand of Solicitor-General's Chambers (from whom he has obtained legal advise(sic)) had written to the Applicant's Solicitors by letter dated 19th March 1990 and forwarded a proposed Affidavit of Mr. K.T. Kripas.

(v) He knew or ought to have known that the issuance of Second Authority To Proceed in the light of all the circumstances existing as at 18th May 1990 were such that it was unfair, oppressive and an abuse of process to issue the same.

(m) That the First Respondent erred in law in issuing the Second Authority To Proceed :-

(i) because he did not accord any opportunity to the Applicant to show cause as to why the Second Authority To Proceed should not proceed.

(ii) because the First Authority was still in existence.

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(iii) *because the Extradition Proceeding against the Applicant instituted by the Hong Kong Government (No. 760 of 1988) was then and (sic) still pending before the Nausori Magistrate's Court.*

(iv) *because the First Respondent did not at any time revoke his First Authority To Proceed.*

(v) *because having regard to all the circumstances he acted in breach of the rules of the natural justice including the rule relating to the doctrine of legitimate expectation.*

(vi) *because it purports to confer jurisdiction or authority to enable the Nausori Magistrate's Court to continue with the said pending Extradition Proceeding.*

(n) *That he erred in law in issuing the Second Authority To Proceed well knowing that the First Authority To Proceed and the Second Authority To Proceed were inconsistent with the other (sic) and that the issuance of the Second Authority To Proceed did not and could not lawfully confer any jurisdiction to the Resident Magistrate at Nausori to Continue to hear the said Extradition Proceeding.*

(o) *That the First Respondent erred in law in holding that the surrender of the Applicant was not requested by the Hong Kong Government to prosecute or punish her on account of her race, religion, nationality or political opinions, nor that she would be prejudiced at her trial or punished or restricted in her personal liberty in any manner. In so doing he prejudged the relevant matters for consideration if and when he was called upon to exercise his discretion to issue or not to issue the final warrant to extradite the Applicant in accordance with the provisions of Section 11 of the Extradition Act and particularly having regard to the provisions of Sections (6) (sic) and Section (10) (sic) (3) of the Extradition Act.*

(p) *That the First Respondent erred in law in issuing the Second Authority To Proceed in that at the material time Extradition Proceeding No. 760 was (and still(sic)) pending before the Magistrate's Court at Nausori and it was concerned with the charges relating to substantive offences allegedly committed by the Applicant of False Accounting contrary to Section 19 (1) (a) of the Theft Ordinance (Hong Kong) and 5 offences of "Furnishing False Information" contrary to Section 19 (1) (b) of the Theft Ordinance (Hong Kong) and that the said charges were not at any time concerned with any offence or offences of conspiracy to commit any offence in Hong Kong.*

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(q) *That the First Respondent erred in law in issuing the Second Authority To Proceed in a form which does not confirm (sic) with the forms prescribed under the Extradition (Forms) Regulations and or it is not in a prescribed form as required by Section 15 of the Extradition Act.*

(r) *The Respondent erred in law and or exercised his discretion irrationally in issuing the Second Authority To Proceed when it was well known to him that the Applicant was already named as a Co-Conspirator in Criminal Case No. C25234 instituted by the Attorney General of Hong Kong in the Hong Kong Magistrates Court wheren (sic) DEACON Chiu, Dick Chiu and David Chiu are named the Accused for the eight (8) offences of Conspiracy To Falsely Account contrary to Common Law and Section 19 (1) (a) of the Theft Ordinance Cap. 210 and with five (5) offences of Conspiracy To Furnish Information contrary to Common Law and Section 19 (1) (b) of the Theft Ordinance Cap. 210. (The 14th Count in the said proceeding is not relevant to this Judicial Review Proceeding.)*

THE impugned decision in respect of which relief is sought herein is :-

The decision of the First Respondent made by him on the 18th May 1990 purporting to be made under Section 7 of the Extradition Act Cap. 23 to issue the Second Authority To Proceed to enable the Nausori Magistrate's Court to continue with the Extradition Proceedings already instituted by the Director of Public Prosecutions and now pending in the Nausori Magistrate's Court (Criminal Case No. 760 of 1988) to extradite the Applicant from Fiji to Hong Kong." (See pages 236-237 of the Record.)

Basis of Order

The broad conclusion on which His Lordship based his order of Certiorari was:

"For the reasons which I have stated, in my judgment he should not have issued the second Authority to Proceed and by doing so has misdirected himself as to the correct legal principles to be applied. The result is that the application for Judicial Review is granted."(See page 23 of the judgment appearing at p.465 of the Record.)

As the result of representations made to him at the trial, Byrne J. concentrated his attention on grounds (d) and (e) of the

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Respondent's grounds for relief; in his judgment only those two grounds and ground (m)(i) were discussed. The appeals by the Appellants concern those grounds; the Respondent's notice brings into issue in this Court the remaining grounds, as well as the new matters referred to in paragraphs 3, 4 and 5 of the notice.

Before addressing any of the grounds of relief, the grounds of appeal and the matters raised by the Respondent's notice, we consider it necessary to set out the relevant provisions of the Extradition Act and to discuss in general terms the scheme for which it provides for dealing with extradition requests from other countries.

Section 5 of the Act states what is meant by the expression "extradition offence". For the purposes of these appeals it must be read together with the definition of "designated Commonwealth country" in section 2 and the "Description of Extradition Offences in Designated Commonwealth Countries" contained in the Schedule to the Act, in particular item 18 in the list of offences.

Section 5 is as follows:-

" 5.-(1) For the purposes of this Act, an offence of which a person is accused or has been convicted in a treaty State or in a designated Commonwealth country is an extradition offence if-

(a) in the case of an offence against the law of a treaty State, it is an offence which is provided for by the extradition treaty;

(b) in the case of an offence against the law of a designated Commonwealth country, it is an offence which, however described in that law, falls within any description set out in the Schedule and is punishable under that law with imprisonment for a term of twelve months or any greater punishment; and

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(c) in any case, the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Fiji if it took place within Fiji or, in the case of an extra-territorial offence, in corresponding circumstances outside Fiji.

(2) In determining for the purposes of this section whether an offence against the law of a designated Commonwealth country falls within the description set out in the Schedule, any special intent or state of mind or special circumstances of aggravation which may be necessary to constitute that offence under the law shall be disregarded.

(3) The descriptions set out in the Schedule include in each case offences of attempting or conspiring to commit, of assisting, counselling or procuring, the commission of or being accessory before or after the fact to the offences therein described, and of impeding the apprehension or prosecution of persons guilty of those offences.

(4) References in this Act to the law of any State or country include references to the law of any part of that country."

The definition of "designated Commonwealth country" in section 2 reads:-

`"designated Commonwealth country" means a Commonwealth country designated under section 3 and includes the dependencies of any such country;' (emphasis added)

Item 18 in the list of extradition offences in the Schedule is:-

"Stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false pretences, receiving stolen property or any other offence in respect of property involving fraud."

Section 7 provides what action is to be taken by the Minister for Foreign Affairs on receipt of a request, made by a treaty State or a designated Commonwealth country, for the extradition of a person in Fiji to that State or country. It reads as follows:-

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" 7.-(1) Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with thereunder except in pursuance of an order of the Minister (in this Act referred to as an authority to proceed) issued in pursuance of a request made to him by or on behalf of the treaty State or the designated Commonwealth country in which the person to be extradited is accused or was convicted.

(2) There shall be furnished with any request made for the purposes of this section on behalf of any treaty State or designated Commonwealth country-

(a) in the case of a person accused of an offence, a warrant for his arrest issued in that State or country;

(b) in the case of a person unlawfully at large after conviction of an offence, a certificate of the conviction and sentence in that State or country, and a statement of the amount if any of that sentence which has been served,

together, in each case, with particulars of the person whose extradition is requested and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to satisfy the issue of a warrant for his arrest under section 8.

(3) On receipt of such a request the Minister may issue an authority to proceed unless it appears to him that an order for extradition of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act."

Section 8 relates to the arrest in Fiji of a person accused of an extradition offence or already convicted of such an offence. The person may be arrested before an authority to proceed is issued under section 7(3) but must be released from custody if the Minister decides not to issue an authority to proceed.

Section 9(4) provides for the action to be taken where the Minister has issued an authority to proceed. However, that subsection needs to be read together with subsections (1) and (2). The three subsections are as follows:-

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" 9.-(1) A person arrested in pursuance of a warrant under section 8 shall (unless previously discharged under subsection (3) of that section) be brought as soon as practicable before a court presided over by a magistrate (in this Act referred to as the court of committal).

(2) For the purpose of proceedings under this section, a court of committal shall have the like jurisdiction and powers, as nearly as may be, including power to remand in custody or on bail, as a magistrate conducting a preliminary inquiry.

(3).....

(4) Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the extradition of that person or on behalf of that person, that the offence to which the authority relates is an extradition offence and is further satisfied-

(a) where that person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the court;

(b) where that person is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large,

the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his extradition thereunder; but if the court is not so satisfied or if the committal of that person is so prohibited, the court shall discharge him from custody."

If the person is committed to custody under section 9, the provisions of section 10 come into play. They are:-

" 10.-(1) Where a person is committed to custody under section 9, the court shall inform him in ordinary language of his right of action in the High Court for redress of a contravention of his right to personal liberty or for review of the order of committal, and shall forthwith give notice of the committal to the Minister.

(2) A person committed to custody under section 9 shall not be extradited under this Act-

(a) in any case, until the expiration of the period of fifteen days beginning with the day on which the order for his committal is made;

(b) if an action has been instituted in the High Court for redress of a contravention of his right to personal liberty or for review of the order of committal so long as proceedings on that action are pending.

(3) In any such action, the High Court may, without prejudice to any other jurisdiction 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 it or to have become unlawfully at large, as the case may be; or

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(c) because the accusation against him is not made in good faith in the interests of justice, it would, having regard to all the circumstances, be unjust or oppressive to extradite him.

(4) On any such application the High Court may receive additional evidence relevant to the exercise of their jurisdiction under section 6 or under subsection (3).

(5) For the purposes of this section proceedings in an action for redress of a contravention of a person's right to personal liberty or for review of an order shall be treated as pending until any appeal in those proceedings is disposed of; and an appeal shall be treated as disposed of at the expiration of the time within which the appeal may be brought or, where leave to appeal is required, within which the application for leave may be made, if the appeal is not brought or the application made within that time."

Only where a person has been committed by the Magistrate to await extradition and has not been discharged by order of the High Court pursuant to section 10(3) may the Minister order that he or she be extradited. The power to order the extradition is conferred on the Minister by section 11(1). However, the exercise of that power is subject to the provisions of section 11(3), (4) and (5). Subsections (3) and (4) provide:-

"11.-(3) The Minister shall not make an order under this section in the case of any person if it appears to the Minister, on the ground mentioned in subsection (3) of section 10, that it would be unjust or oppressive to return that person.

(4) The Minister may decide to make no order under this section in the case of a person accused or convicted of a relevant offence not punishable with death in Fiji if that person could be or has been sentenced to death for that offence in the country by which the request for his return is made."

We make the following observations about the scheme for dealing with extradition requests for which sections 7 to 11 of the Act provide. First the effect of section 7(3) is that, even though in respect of an extradition request it does not appear to the Minister that an order for extradition cannot lawfully be made, the Minister nevertheless has a discretion whether or not

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to issue an authority to proceed. However, that discretion must, like all such discretions, be exercised reasonably.

Second, the Minister's discretion to issue an authority to proceed arises when he receives the extradition request. He is empowered to exercise it unless it appears to him that an extradition order could not lawfully be made. That is to say, the only condition precedent upon which the power to exercise the discretion depends is the receipt of the extradition request. The Minister then continues to have that power unless it appears to him that the extradition order cannot lawfully be made.

Third, the Magistrate's function under section 9(4) is to hear evidence and to reach several conclusions in respect of it. The first is whether he is or is not satisfied that the offence or offences in respect of which the authority to proceed has been issued is or are an extradition offence or extradition offences. If he is not satisfied of that, he must discharge the person.

Fourth, section 10 contains provisions designed to prevent the extradition of a person whom it would be unjust to extradite. Upon committal by the Magistrate, the person must be informed of his right of action in the High Court in that regard.

Fifth, the provisions of section 11(3) are mandatory and forbid the Minister to extradite a person where it would be unjust or oppressive to do so. Further, section 11(4) expressly states a matter which the Minister must take into account in exercising his discretion whether or not to make an extradition

order. It is relevant to the question whether the extradition of that person would be unfair or unreasonable.

Having set out and discussed the scheme which the Act provides for dealing with extradition requests, we now turn to the grounds of the appeals.

Essentially, the arguments presented by both Mr Nand and Mr Bruce were that the information in the Minister's possession was not such as could have caused it to appear to him that an extradition order could not lawfully be made. However, as His Lordship made findings that the offences of which the Respondent was accused were not extradition offences, arguments were also presented going to that question. Counsel for the Respondent also presented lengthy argument on that question. It was the Respondent's case that the Minister had no power to issue an authority to proceed if the offences were not extradition offences, and that, as a corollary to that, he had a duty to satisfy himself that they were extradition offences.

We are unable to accept as correct that basic premise of the Respondent's case. To do so would be to ignore the scheme which the Act has provided for dealing with extradition requests and the roles assigned by it to the Minister and the Magistrate at the various stages of the process set out in sections 7, 9 and 11. In the High Court an affidavit sworn by the Minister was received in evidence; it described the information furnished by the Governor of Hong Kong with the extradition request. That information was stated to have included "a statement defining the

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offences upon which [the Respondent] is accused and prescribing the maximum punishment thereof". The Minister also stated in his affidavit that he "perused the relevant sections and the Schedule to the Extradition Act Cap. 23 and satisfied [himself] that the thirteen (13) charges did fall into the description of extraditable offences under the Act". He exhibited to his affidavit a copy of the authority to proceed which he had issued, together with the schedule to that authority in which the offences as charged in Hong Kong were set out in full. Eight of the offences were of conspiracy to falsely account and five were of conspiracy to furnish false information. The particulars of the offences showed that the conspiracies alleged related to fraudulent false accounting and to fraudulenty giving false information with the intention of gain for the offenders or of causing loss to others.

In view of the content of item 18 in the list of extradition offences in the Schedule to the Act and the provisions of section 5(3), the Minister was, we are satisfied, justified in regarding the offences prima facie as extradition offences. He did not specify in his affidavit on what basis he became satisfied that the offences were extradition offences, in particular how the requirements of section 5(1)(c) were met. However, counsel for the Respondent at the trial did not seek to cross-examine the Minister; nor did he ask for a further affidavit dealing expressly with that matter. In the circumstances the affidavit was sufficient evidence of the Minister having turned his mind to all relevant matters.

The effect of section 5(1)(c) was the subject of considerable argument before us. It is in substantially the same terms as section 3(1)(c) of the Fugitive Offenders Act 1967 (England) was when the House of Lords decided the appeal to it in *Government of Canada v. Aronson* [1990] 1 A.C. 579. However, paragraphs (a) and (b) of section 5(1) of the Fiji Act differ in one very important respect from those of paragraphs (a) and (b) of section 3(1) of the English Act. As a consequence of that, it is by no means certain that the reasoning underlying the judgments of the majority in Aronson is applicable to section 5(1)(c). It is possible that the reasoning of the minority in Aronson and of Deane J. in *Rigby v. Commonwealth of Australia* (1985) 159 C.L.R. 1 at pp.15ff. should be preferred. However, that is not a matter which we have to decide in these proceedings and it is inappropriate that we should express an opinion on it; it will need to be considered when the Magistrate undertakes the committal proceedings under section 9 and, if he comes to the conclusion that the offences with which the Respondent is charged in Hong Kong are extradition offences, may well be the subject of an application to the High Court and an appeal to this Court. The point we have to stress now is that it was no part of the Minister's function under section 7 to resolve the question. It was sufficient that he had information adequate to establish prima facie that the offences were extradition offences. In his affidavit he swore that he did have such information. The trial judge erred in implicitly requiring that the Minister should have been satisfied, after full inquiry, that the offences were extradition offences. In so far as his judgment related to grounds (d) and (e) of the Respondent's grounds for relief, he made the wrong decision.

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His Lordship discussed also whether the Minister failed to accord the Respondent natural justice by not giving her an opportunity to make submissions to him before he issued the authority to proceed. That reflected the matter raised by the Respondent in ground (m)(i) of the grounds on which she sought relief. Before us counsel for the Respondent submitted that there were two bases on which it could properly be held that the Minister failed to accord her natural justice. The first basis was that the consequences of the issuing of an authority to proceed were so serious for the person to whom it related that the principles of natural justice required that he or she be heard before it was issued. The second basis was that, even if there was no general requirement that the person be heard, the Respondent personally had a legitimate expectation that she would be heard. That, it was submitted, arose because, when the Minister had dealt with the earlier request for her extradition, he had received a written submission from her solicitor and had given consideration to it before deciding to issue the authority to proceed.

We shall consider first the question whether the principles of natural justice require the Minister generally to hear a person in respect of whom an extradition request has been made before issuing an authority to proceed. Natural justice is now often described as a requirement of procedural fairness (see e.g. *Kioa v. West* (1985) 159 C.L.R. 550 at p.663). What is required in any particular decision-making process depends on the nature of the decision which is to be made. The procedure must be "what

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is fair in all the circumstances" (*Wiseman v. Borneman* [1971] A.C. 297). In Kioa the decision was to deport the Appellant from Australia; the decision was made as the result of the exercise of a discretion. For that discretion to be exercised reasonably and in accordance with the applicable legislation, the decision-maker had to take into account all the relevant facts. Information about relevant facts had come to him from sources other than the Appellant. Procedural fairness required that the Appellant be given an opportunity to challenge that information and to inform the Minister of other relevant facts. Because of the failure to accord that fairness the decision-making process was vitiated.

The situation for which section 7(3) of the Act provides is very different. The decision to be made is whether to issue an authority to proceed. If it is decided not to issue it, the process of dealing with the extradition request comes immediately to an end; the liberty of the person in respect of whom the request was made is restored, if he or she has been arrested. But, if the decision is made to issue the authority, the person will not be committed to await extradition unless the Magistrate is satisfied that the offence charged is an extradition offence and the evidence is sufficient to warrant his or her trial for it. He or she may then apply to the High Court pursuant to section 10(3) and, if unsuccessful in that, will still not be extradited if it appears to the Minister that extradition would be unjust or oppressive. We have come to the conclusion that, in those circumstances, natural justice does not require that generally the Minister, before issuing an authority to proceed

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under section 7(3), should give the person concerned a chance to be heard.

The Privy Council and the English courts have held that a legitimate expectation as to the procedures to be followed before making a decision may arise where a representation has been made to a particular person or to a group of people that the procedure will be followed in relation to that person or to the people in that group (*Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] A.C. 629), where there is a long-standing practice of following that procedure in relation to such persons (*Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374) or where the persons concerned have in the past enjoyed a privilege or benefit which they could legitimately expect not to be withdrawn without prior consultation (*R. v. Secretary of State for the Home Department: Ex parte Ruddock* [1987] 1 W.L.R. 1482. In *R.V. Secretary of State for the Home Department: Ex parte Khan* [1984] 1 WLR 1337 it was suggested that a representation that a particular substantive policy would be followed in relation to a particular class of person was capable of giving rise to a legitimate expectation that the policy would not be changed in relation to persons to whom it had been communicated unless the public interest demanded it. However, in Re Findlay [1985] AC 318 the House of Lords held that a change in parole policy did not infringe the legitimate expectations of certain prisoners; they could expect only that their cases would be individually considered under whatever policy the Minister chose to adopt.

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No evidence was presented in the High Court to show that there had been a long-standing practice of the Minister hearing persons in respect of whom extradition requests had been made before deciding whether to issue an authority to proceed. Nor was there evidence of any representation having been made by, or on behalf of, the Minister to the Respondent that he would hear her before making his decision. The evidence was that her solicitor had sent a written submission to the Minister but not that the Minister had invited the Respondent or her solicitor to do so. The fact that the Minister read the submission and took it into account before he issued the first authority to proceed falls, in our view, far short of a benefit enjoyed in the past that is sufficient to give rise to a legitimate expectation that it will be accorded again. It is not clear from His Lordship's judgment whether he actually decided that the Respondent had been denied natural justice. If he did so, he was in error and, to the extent that the orders he made depended on his having made that decision, they lacked a proper foundation.

Accordingly we have come to the conclusion that, as the Respondent was not entitled to succeed in the High Court on grounds (d), (e) and (m)(i) of the grounds on which she sought relief, the appeals of the 1st Appellant and the 2nd Appellant must succeed and the orders made by His Lordship must be set aside unless they should have been made on the basis of any of the Respondent's other grounds for relief or unless, as suggested in the notice of the Respondent in these proceedings, this Court lacks the power to hear and determine the appeal. We turn, therefore, to those matters.

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At the commencement of the hearing we invited Dr Sahu Khan to address us on grounds 3 and 4 of the notice; he did so and we ruled orally that the Court had jurisdiction. We undertook to state in this judgment our reasons for so ruling.

In support of ground 3 Dr Sahu Khan pointed out that the 1st Appellant's Notice of Appeal was signed on his behalf by the Director of Public Prosecutions "as counsel for the Appellant". He referred to the requirement of rule 15(1) of the Court of Appeal Rules that appeals to this Court must be commenced by notice of motion which, he contended, must be signed either by the Appellant or by a barrister and solicitor representing him. He drew to our attention also the provisions of section 96 of the 1990 Constitution of Fiji. He submitted that, because of his office, the Director of Public Prosecutions could not represent any party as a barrister and solicitor.

Dr Sahu Khan did not suggest that the person who signed the 1st Appellant's notice of appeal was not qualified under the Legal Practitioners Act (Cap 254) to practise as a barrister and solicitor. However, he submitted that, because he held the office of Director of Public Prosecutions, he could not do so. Section 96 of the Constitution contains no express provision removing the right of the holder of that office to practise as a barrister and solicitor. We invited Dr Sahu Khan to point out any provision that had that effect; he was unable to do so. Undoubtedly any person holding the office of Director of Public Prosecutions cannot properly act as a barrister and

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solicitor representing a person whose interests are such that pursuit of them would be inconsistent with the duties and functions of the office of Director. But this is not such a case; on the contrary, the interests of the Minister are such that their pursuit in these proceedings is extremely consistent with the Director's statutory functions and duties. In any case, if it was not appropriate for Mr Mataitoga to sign the notice of appeal, then it was, in our view, only an irregularity and this was rectified when the State Counsel lodged the supplementary notice on 1st November, 1993 as counsel for the 1st Appellant.

We need say little about ground 4. The 1st Appellant undoubtedly has locus standi as the person whose decision was impugned in the High Court proceedings. Whether or not the 2nd Appellant was entitled to appeal, the Court undoubtedly has jurisdiction in these proceedings because the 1st Appellant has locus standi and his appeal was properly commenced. The 2nd Appellant was permitted by the trial judge to take part in the proceedings in the High Court; costs were ordered against it. Whether it was formally made a party to the proceedings is not entirely clear. If it was, as the order for costs appears to indicate, it was entitled to appeal to this Court. However, in case it had not formally been made a party in the High Court and consequently had no right to appeal to this Court, we granted it leave to be heard in these proceedings.

Grounds (a) and (b) of the Respondent's grounds of relief were not proceeded with by her counsel before us; there is, therefore, no need for us to deal with them.

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Ground (c) concerns the provisions of section 6(3) of the Act. That subsection reads:-

> *" 6.-(3) A person shall not be extradited under this Act to any State or country, or committed or kept in custody for the purposes of such extradition, unless provision is made by the law of that State or country or by an arrangement made with the State or country, for securing that he will not, unless he has first been restored or had an opportunity of returning to Fiji, be dealt with in that State or country, for or in respect of any offence committed before his extradition under this Act other than-*
>
> *(a) the offence in respect of which the extradition under this Act is requested;*
>
> *(b) any lesser offence proved by the facts proved before the court of committal; or*
>
> *(c) any other offence being an extradition offence in respect of which the Minister may consent to his being so dealt with. "*

Its effect is to require satisfaction that the State or country to which a person is extradited will apply what is known in international law as the speciality principle.

Counsel for the Respondent submitted that the Minister's decision to issue the authority to proceed was vitiated by the fact that he never addressed his mind to the question whether the laws of Hong Kong made provision of the type referred to in section 6(3). Certainly the law in force in Hong Kong relating to the extradition of persons to Hong Kong <u>from Commonwealth countries</u>, a copy of which was tendered in evidence in the High Court, contains provisions of that nature; but, as counsel for the Respondent pointed out, Fiji is no longer a Commonwealth country. There was no evidence before the High Court of any other law of Hong Kong, or of any arrangement between Fiji and Hong Kong, which would provide to persons extradited there from Fiji the type of protection which section 6(3) requires. Such

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evidence will be needed before the Magistrate can commit the Respondent to await extradition. But it was not a matter which the Minister was required to consider at the stage of deciding whether or not to issue an authority to proceed. The provisions of the subsection are quite clear; a person shall not be extradited, committed or kept in custody for the purpose of extradition if the law of the country to which he or she is to be extradited does not contain the required safeguard. The first stage of dealing with an extradition request at which the question has to be addressed is the committal proceedings conducted by the Magistrate. The Minister made no error of law in not addressing it and did not misdirect himself.

Ground (f) concerns the validity of the extradition request. Counsel for the Respondent submitted that, as Hong Kong is not an independent Commonwealth country but rather a dependency of the United Kingdom, it does not have the control of its external affairs; they are controlled by the government of the United Kingdom. There is no doubt that Hong Kong comes within the definition in section 2 of the Act of "designated Commonwealth country", which expressly includes the dependencies of the countries designated under section 3 of the Act, the United Kingdom being one of the countries designated. By the Fugitive Offences (Hong Kong) Order 1967, an Order-in-Council, the United Kingdom applied its Fugitive Offenders Act 1967, with modifications, to Hong Kong; that Act, as so applied, deals with the extradition of persons from Hong Kong and the safeguarding of the interests of persons extradited to Hong Kong but it does not

contain any provision for the making of requests to other countries for the extradition of persons to Hong Kong.

Section 7(1) of the Extradition Act relates to requests made to the Minister "by or on behalf of...the designated Commonwealth country in which the person to be extradited is accused"; the Commonwealth country in which the Respondent is accused is Hong Kong. By international law a country is responsible for the external affairs of its dependent territories. However, it may, if it chooses, permit those exercising executive authority in a dependency to conduct some of its external affairs business themselves. So far as the United Kingdom is concerned, Sir Kenneth Roberts-Wray wrote in 1966 in his book "Commonwealth and Colonial Law" at page 380 that "subject to special arrangements, external relations are excluded from the executive and legislative authority of every dependent territory" (emphasis added). However, at page 381 he noted that "local laws [i.e. those of a dependency] may make provision for external affairs and frequently do so for the purpose of giving effect to international conventions". At page 338 he stated the powers of the Governor of a colony as being those of the Sovereign that are delegated to him and observed that in a few early instances Governors had been authorised to exercise all the Sovereign's powers.

Clearly the United Kingdom could have made the extradition request on behalf of Hong Kong, as it was responsible for Hong Kong's external affairs. But it was also free, if it wished, to

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delegate to the Governor of Hong Kong the management of that part of the colony's external affairs business which relates to the making of extradition requests in respect of offences alleged to have been committed in Hong Kong. There was no evidence before the High Court on which the trial judge could have found that the Governor of Hong Kong had no power to make the request and that the request was, therefore, invalid; nor was any such evidence before this Court. In Halsbury's Laws of England (4th edition) Vol. 18, at paragraph 240 of the section dealing with Extradition, it is stated that, where an extradition treaty between a foreign state and the United Kingdom is extended to dependencies of the United Kingdom, an extradition request may be made directly to the Governor of the dependency through the foreign state's consular representative there; a warrant of the Secretary of State is not required. It would be a reasonable corollary that the Governor of the dependency should be authorised to make extradition requests. There is, therefore, in our view adequate support for the application in this case of the *omnia praesumuntur* principle, that is to say for this Court to presume that the Governor had authority to do as he did when he made the request.

Ground (g) relates to the effect that Fiji's having ceased to be a Commonwealth country may have had on the operation of the Act. The Act was passed by Parliament in 1972. Six years earlier the Chief Justices and Law Officers of Commonwealth countries had devised the scheme for the extradition of offenders from one Commonwealth country to another to which, in part, the Act was intended to give effect. In the United Kingdom effect was given to it by the enactment of the Fugitive Offenders Act

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1967. That Act related only to the extradition of a person from one Commonwealth country to another. The extradition of persons to other countries remained governed by the Extradition Act 1870; treaties were required between the United Kingdom and individual countries. In Fiji, however, provision for extradition both to countries with which Fiji had extradition treaties and to Commonwealth countries was contained in the single Act which is now Cap. 23.

The fact that Fiji is no longer a member of the Commonwealth can have had no effect on the provisions of the Act which relate to the extradition of persons to non-Commonwealth countries. We can see no reason why it should have had any automatic effect on the provisions of the Act which relate to extradition to Commonwealth countries. Certainly Commonwealth countries no longer afford Fiji the reciprocal advantages of their legislation giving effect to the 1966 scheme. But that of itself does not deprive of their validity and effectiveness of those parts of the Act which relate to extradition from Fiji to Commonwealth countries. In international law there is no need for reciprocity (Re Zahabian I.L.R. Vol 32 p.290); if a footnote to paragraph 201 of the section on Extradition in Vol. 18 of Halbury's Laws of England (4th edition) is correct, the laws of the United Kingdom provide for extradition to Tonga without a reciprocal provision in the laws of Tonga. Legislative amendment would be needed for the provisions of the Act providing for extradition to Commonwealth countries to cease to have effect. The provisions of the extradition laws of many, if not all, Commonwealth countries restricting the trial of extradited persons to the extradition offences probably apply, as those of the United Kingdom do, only where those persons have been extradited from

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Commonwealth countries or treaty States. It may, therefore, no longer be lawful to extradite anyone from Fiji to a Commonwealth country unless, as envisaged by section 6(3), an arrangement has specifically been made with that country for securing such a restriction. However, that was not a matter with which the Minister had to concern himself at the stage of deciding whether or not to issue the authority to proceed.

Ground (h) was not pursued strongly in either the written or the oral submissions of the Respondent's counsel in these proceedings. We find that it lacks merit. At the time when the Minister issued the authority to proceed only five years had elapsed since the alleged commission of the last offence. The fact, if true, that the moneys due and owing by the borrowing companies had already been repaid would be a matter for the Hong Kong court to take into account in mitigation of sentence, if it convicted the Respondent. It was not a matter for the Minister to consider when deciding whether to issue the authority to proceed. The significance of the fact referred to in paragraph (iii) of ground (h) is not apparent to us. In any event, the stage at which the Minister is required to consider whether it would be "unjust and/or oppressive" for any reason to extradite the Respondent will be after the Magistrate has committed her to await extradition, if he does commit her.

Grounds (i) and (j) were also not pursued strongly. There was no evidence before the High Court or this Court that the Minister did not analyse objectively the evidence presented to him by the Governor of Hong Kong. On the contrary the evidence contained in his affidavit was that he did so. Our attention was

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not directed to any evidence presented to the High Court that might have established the allegations made in ground (j) that the Government of Hong Kong was actuated by improper motives in requesting the Respondent's extradition. We find no merit in either of the two grounds.

Ground (k) as expressed implies that the Minister authorised the Nausori Magistrate's Court to make an order for the Respondent's extradition. Certainly, if he had done so, it would have exceeded his powers, as the Magistrate who conducts the committal proceedings can only commit to await extradition and cannot order extradition. However, the authority to proceed was in the following terms:-

> *"I hereby order that the Resident Magistrate seized with this extradition request pursuant to my Order dated 30 March 1989 proceed in accordance with the Provisions of the Extradition Act, Cap. 23"* (underlining in original)

The Minister did not, as implied in ground (k), authorise the Magistrate or a Magistrate's Court to order the Respondent's extradition. The ground is without merit.

Ground (l) alleges that the Minister did not exercise his discretion rationally or lawfully. Ground (m)(ii)-(vi) and ground (n) are concerned with the same matter. Mr Haines conceded that the Minister may in appropriate circumstances issue more than one authority to proceed in respect of the same person. But, he submitted, the circumstances in the Respondent's case were such that he ought not to have done so. The terms in which

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the authority to proceed was couched appear to show that he believed that the charges which were the subject of the second extradition request were additional to those which had been the subject of the first request and the first authority to proceed. The earlier charges all related to the alleged commission of substantive offences against provisions of the Penal Code of Hong Kong. The later ones alleged conspiracies to commit those offences and three more similar offences. There is no law which prevents the charging of a person with both substantive offences and conspiracy to commit them, although the Courts have set their face against the practice of combining them in the same indictment or information. In principle, therefore, in our view, there would have been nothing making it unlawful, or an improper exercise of his discretion, for the Minister to issue the second authority to proceed additionally to the first authority, if the Governor of Hong Kong had informed him that the conspiracy charges were additional to the charges for the substantive offences. However, that was not what the Governor did. He informed the Minister that the conspiracy charges had been substituted for the substantive offences; clearly the Minister misunderstood the situation.

That, however, in our view does not vitiate his exercise of the discretion. In his affidavit he stated that he considered the information which he had in respect of the later charges and

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was satisfied that they fell within the description of extradition offences in the Act. There was nothing wrong with the reasoning which led him to the conclusion that he should issue a second authority to proceed in respect of them. His misunderstanding of the situation in respect of the earlier offences, however, led to his making an error in the formulation of the authority. Even then, in so far as it authorised the Magistrate to proceed in respect of the later charges, it was essentially in proper form. The error lay only in the departure from the form of the order of authority to proceed, which is prescribed in the Schedule to the Act; that departure was intended to ensure that the same Magistrate dealt with both sets of charges. The departure, by way of addition to the prescribed form, was unauthorised and, both for that reason and because it was founded on the Minister's apparent misunderstanding with regard to the earlier charges, ineffective. However, we are satisfied that it was mere surplusage and that the authority to proceed in respect of the later charges was not invalidated by its inclusion. It is to be read as though it were couched simply in the terms set out in the Schedule.

If, as asserted in ground (o), the Minister has prejudged matters which he will need to consider if the Magistrate commits the Respondent to await extradition, and if the Minister has to exercise his discretion under section 11 whether to order her extradition, that is a matter to be dealt with at that stage. It does not affect the propriety of the exercise of the discretion to issue the authority to proceed. This ground, therefore, lacks any merit.

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In dealing with grounds (l), (m)(ii)-(vi) and (n) above, we have disposed of the matters raised by grounds (p) and (r). Similarly, in dealing with ground (o), we have disposed of the matter raised in ground (q). As we have found that the Respondent was not entitled to succeed in the High Court on any of the grounds on which she sought relief, we have come to the conclusion that ground 1 of the Respondent's notice has not been made out.

We have dealt above with grounds 2, 3 and 4 of that notice. There remains only ground 5 with which we have still to deal. It goes to the admissibility of the affidavit evidence of the Minister and the Chief Magistrate which was presented by the Minister's counsel in the High Court. Both affidavits were sworn before Mr Mataitoga, who was at that time the Director of Public Prosecutions. In committal proceedings following the issue of an authority to proceed the Director apparently undertakes the presentation of the evidence for the prosecution to the Magistrate. Counsel for the Respondent submitted that, because of that, the Director was "an interested party in the proceedings" and that his taking the affidavits "clearly breached the provision of Order 41 of the High Court Rules".

By virtue of section 31(3) of the Legal Practitioners Act (Cap 254) every person entitled to practise as a barrister and solicitor is to be deemed to be a Commissioner for Oaths. There was no evidence that the fact of Mr Mataitoga's appointment as Director of Public Prosecutions in some way caused that provision not to apply to him. The issue raised by counsel for the Respondent is based on the alleged breach of Order 41.

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Rule 8 of Order 41 provides:-

"8. No affidavit shall be sufficient if sworn before the barrister and solicitor of the party on whose behalf the affidavit is used or before any agent, partner or clerk of that barrister and solicitor".

The Minister's affidavit was sworn on 21st March, 1991 and the Chief Magistrate's on 16th September, 1991. A perusal of the appeal book discloses that the only barrister and solicitor who represented the Minister in the proceedings in the High Court, which were commenced in August 1990, was Mr Nand, who represented him also before us. He was a State Solicitor in the office of the Solicitor-General. Mr Mataitoga did not represent the Minister (or, for that matter, the Government of Hong Kong) at any stage of the proceedings. In those circumstances his taking the affidavits of the Minister and the Chief Magistrate was not a breach of Order 41. Ground 5 of the Notice of the Respondent is without merit.

This is not a case in which it is possible for the appeal of one of the Appellants to succeed and that of the other to fail. Either the orders made by Byrne J. must be set aside or they must be allowed to stand. We have stated above the reasons why they must be set aside. In terms of the grounds on which the Appellants presented their respective appeals, the 1st Appellant succeeded on his first and fourth grounds and the 2nd Appellant succeeded on his first, third and fifth grounds. We have explained why the matters referred to in the 1st Appellant's third ground and in the 2nd Appellant's second, fourth and sixth grounds did not require determination by the High Court; they

will, however, become of importance in the committal proceedings and, if the Magistrate commits the Respondent, in any application for review of that decision. We have not found it necessary to decide whether the appeal would have succeeded on the 1st Appellant's second ground.

The learned trial judge erred in making the order of certiorari to quash the Minister's decision to issue the authority to proceed and the order staying the extradition proceedings forever. Those orders are set aside. As the orders for return of the Respondent's passport and for payment of the Respondent's costs by the Appellants were made in consequence of those orders, they also ought not to have been made and are also set aside.

The Appellants have been wholly successful; we order, therefore, that the Respondent is to pay their costs of this appeal and of the proceedings in the High Court on a party and party basis, the costs to be taxed if not agreed.

Decision and Orders

Both appeals allowed.

Cross-appeal by way of Respondent's Notice dismissed.

Orders in the High Court set aside.

Respondent to pay the Appellants' costs of the appeals and of the proceedings in the High Court.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Sir Edward Williams
Judge of Appeal

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Justice Ian Thompson
Judge of Appeal