

IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 199 OF 2014S

BETWEEN

STATE

APPLICANT

VS

AND

KINHO LO

RESPONDENT

Counsels : Ms. J. Prasad for Applicant
Mr. G. O'Driscoll for Respondent

Hearing : 3 February, 2015

Judgment : 16 March, 2015

JUDGMENT

1. On 24 July, 2014, the State made an application under section 10 and 15 of the Extradition Act 2003, before the Suva Magistrate Court, for the arrest of the Respondent, and that extradition proceedings commenced against him.
2. The State relied on Police Detective Sergeant 2572 Satish Chand's affidavit in support, of the application which read as follows:

"...1. **THAT** I am based at the CID Headquarters of the Fiji Police Force in Suva Street.

2. **THAT** I am familiar with matters pertaining to these proceedings and dispose this, my affidavit, from my personal knowledge and as a result of information obtained in my official capacity unless otherwise stated, and the contents of which are true to the best of my knowledge, information and belief.

3. THAT the United States of America (USA) has requested the extradition of the respondent. Annexed hereto and marked "SC 1" is a copy of the application. ["the Application"].
4. THAT on 15th July 2014, the Fijian Minister for Foreign Affairs and International Cooperation issued an Authority to Proceed on the Application. Annexed hereto and marked "SC2" is a copy of the authority to proceed.
5. THAT United States of America is a treaty country. Annexed hereto and marked "SC3" is a copy of the Extradition Treaty.
6. THAT a warrant of arrest was issued by the United States District Court, Northern District of Illinois, Eastern Division against Kinho Lo, the Respondent on 21st June, 2013. [Annexure labeled Government exhibit A in extradition application of USA].
7. THAT as part of the supporting documents provided to Fiji by the United States of America has provided the photograph and the description of the Respondent. The description as per the affidavit of Matthew F Madden is:

Name	:	Kinho Lo
Date of Birth	:	March 13. 1967
Passport	:	674328 [Fiji]
Last known address	:	78 Lees Road, Suva, Fiji.
8. THAT I have looked at the picture annexed to the Application and confirm that the Respondent is the same person I have investigated earlier.
9. THAT the offences that the Respondent is charged with are specified in Government Exhibit B of the Application. These offences are violations of Title 18, United States Code section 371,1544, 1028(a) (1) and 1543.
10. THAT the text of the relevant section IS annexed to the Application and marked as Government Exhibit C.
11. THAT I believe that the offences contained in the complaint [Government Exhibit B] are extradition offences as they attract a sentence of not less than 12 months imprisonment under the laws of the United States of America.
12. THAT I am informed that, the offences if committed in Fiji would attract a term of imprisonment of more than 12 months imprisonment as these offence relate to making, providing or possessing fraudulent passports contrary to section 127 of the Crimes Decree which attracts a term of imprisonment for 10 years.
13. THAT the Application is duly authenticated and sealed by the United States of America Secretary of State Mr John F Kerry and is certified by the Attorney General, Mr Eric Holder. Furthermore, the warrant of arrest

is certified by the Deputy Clerk of the United States District Court, Northern District Illinois, Eastern Division.

14. THAT I reasonably believe that in light of the charges that the Respondent faces and through my own investigations, it highly likely that the Respondent would have in his possession the means to travel out of Fiji under a false identity.
15. THAT it is my belief that the Respondent is a flight risk and that if bail is granted pending final determination of this Application the Respondent will attempt to leave jurisdiction.

Order Sought

16. THAT orders sought are as follows:
 - a) That an arrest warrant be issued against the Respondent.
 - b) That extradition proceedings be conducted in relation to the Respondent..."

3. Section 13 of the Extradition Act 2003 reads as follows:

Extradition proceedings

"...13. If –

- (a) the Minister has issued an authority to proceed for an extradition offence in relation to a person;
- (b) the person has not consented to surrender for the offence;
- (c) an application is made to a magistrate by or on behalf of the person or the requesting country for extradition proceedings to be conducted in relation to the person; and
- (d) the magistrate considers that the person and the requesting country have had reasonable time since the person received a copy of the extradition request in which to prepare for the proceedings, the magistrate must conduct proceedings to determine whether the person should be surrendered for the extradition offence for which the surrender of the person is sought..."

4. From 3, 10 and 19 November 2014, the Suva Magistrate Court conducted an extradition proceeding against the respondent. On 19 November, 2014, it delivered its "Surrender Determination" as follows:

"...For the above mentioned reasons this Court finds that State has satisfied all the requirements and that in addition to there being no extradition objection made by and on behalf of the Respondent, this Court finds the following:

- (a) that the requesting country is an extradition country;
- (b) that the offence for which surrender is sought is an extradition offence;

- (c) as to the identity of the person;
 - (d) that the supporting documents have been produced to the court;
 - (e) that the supporting documents satisfy the requirements of section 16; and
- Orders

For the reasons given herein following a surrender determination this Court orders as follows:

- (a) the Respondent, Kin ho Lo be held in custody until a Judge's decision on surrender;
- (b) the Respondent may within 15 days after the day on which this Order is made seek a review of the Order under Section 17 of the Extradition Act;
- (c) Copies of this determination be made available to the Respondent, his counsel, The Director of Public Prosecutions and the Minister responsible..."

5. Section 18(1) of the Extradition Act 2003, reads as follows:

"...18. [1] If –

- (a) a magistrate has reported to a Judge that a person should be held for surrender; and
- (b) the period during which an appeal may be lodged has ended and no appeal was lodged or, on appeal, the court ordered that the person be held for surrender or 21 days have expired after the date of the order for determination for surrender by the magistrate,

the Judge must make a final decision whether the person should be surrendered..."

6. In this case Resident Magistrate Chaitanya Lakshman, on 19 November 2014 had reported to myself that, the respondent should be held for surrender. The period during which an appeal may be lodged has ended, and no appeal was lodged. The standard appeal period is 28 days, and that expired on 17 December 2014. In any event, 21 days had expired from the date the learned Resident Magistrate ordered the respondent to be surrendered. Given the dictates of section 18(1) above mentioned, I must make a final decision on whether or not the respondent should be surrendered.

7. At this point, the court needs to pause, and consider the effect of section 18(2) of the Extradition Act 2003, which reads as follows:

"...(2) A Judge may refuse to order that the person be surrendered if –

- (a) The requesting country has not given a specialty undertaking and –
 - (i) the requesting country is not a country with which the Fiji Islands has a bilateral treaty containing a specialty undertaking;
 - or

- (ii) the law of the requesting country does not contain a provision prohibiting prosecution for an offence other than the one for which the person is surrendered; or
- (b) the person is a citizen of the Fiji Islands;
- (c) the offence for which surrender has been ordered is punishable by death in the requesting country but not in the Fiji Islands and the requesting country has not given sufficient undertaking that the penalty either will not be imposed or, if imposed, will not be carried out;
- (d) a prosecution for the offence for which surrender has been ordered is pending against the person in the Fiji Islands;
- (e) the offence for which surrender has been ordered was committed outside the territory of the requesting country and the law of the Fiji Islands does not provide for jurisdiction over an offence of that kind committed in similar circumstances outside its territory;
- (f) the offence for which surrender has been ordered is regarded by the Fiji Islands as having been committed wholly or partly within the Fiji Islands;
- (g) the person has been sentenced or would be liable to be tried or sentenced in the requesting country by an extraordinary or ad hoc court or tribunal;
- (h) the person has been subjected in the requesting country to torture or cruel, inhuman or degrading treatment or punishment; or
- (i) having regard to –
 - (i) the national interest of the Fiji Islands, including its interests in effective international cooperation to combat crime, and
 - (ii) the severity of the offence,

the Judge is of the view that the person should not be surrendered...”

8. In his verbal submissions on 3 February 2015, Mr G. O'Driscoll for the Respondent, submitted that they were only relying on section 18(2)(b), 18(2)(e), 18(2)(f) and 18(2)(i) of the Extradition Act 2003. They submitted they are not relying on the other subsections of section 18 of the Extradition Act 2003. They submitted, they hope to persuade the court, not to surrender the Respondent, on the above grounds.
9. As for section 18(2)(b) of the Extradition Act 2003, Mr. O'Driscoll submitted that, because the respondent was a Fiji Citizen, Fiji as a Sovereign State, should have “afforded the respondent some protection”. While on its face Mr. O'Driscoll's argument appear valid, Fiji's obligation to protect its citizens against foreign governments only arises, if the citizen had not violated the foreign government's domestic and other laws. In other words, Fiji citizens who violate other foreign government's laws, must seek remedies available under that foreign government laws, while simultaneously seeking assistance from the Republic of Fiji. The Republic of Fiji is only obliged to assist its citizens within that foreign governments domestic laws, Fiji's domestic laws

and international laws. In this case, the applicant is doing exactly the above. Within its treaty obligation, the State of Fiji is surrendering its citizen to the United States of America, to face due process of law. Any relief sought by the respondent, must be obtained within the domestic laws of the United States of America. For the above reasons, I dismiss Mr. O'Driscoll's arguments on section 2(b) of the Extradition Act 2003.

10. Mr. O'Driscoll then relied on section 18(2)(e) of the Extradition Act 2003. He argued that, if a foreign national commits a similar crime against Fiji, Fijian law does not provide jurisdiction to charge that foreign national. This argument does not hold water in Fiji. If a foreign national commits a similar type of crime against Fiji, Fiji has the jurisdiction to charge the foreign national for the same. Fiji's jurisdiction to charge people for committing offences against Fiji overseas is now codified in section 7 and 8 of the Crimes Decree 2009. Mr. O'Driscoll's argument is therefore not tenable, and I dismiss it.
11. Mr. O'Driscoll then relied on section 18(2)(f) of the Extradition Act 2003. The arguments relied on against section 18(2)(e) of the Extradition Act 2003 also applied here. Mr. O'Driscoll agreed with the same, and verbally withdrew his objection on this ground.
12. Finally, Mr. O'Driscoll call in aid section 18(2)(i) of the Extradition Act 2003. After discussing this section with Mr. O'Driscoll, he finally agreed that this section may work against the respondent. Identity theft and the abuse of passports to enter other countries is an international problem. In fact, it is in Fiji's national interest that those who abuse its passports to fraudulently enter other countries, ought to be taken to those countries, to be tried accordingly to their laws. In this case, it is in Fiji's national interest to co-operate with the United States of America, to prosecute those who abuse their passports. If the respondent is innocent, then he has nothing to fear when tried in the United States of America. I therefore dismiss Mr. O'Driscoll reliance of section 18(2)(i) of the Extradition Act 2003.
13. A Judge may also refuse to order the surrender of a person, if that person succeeds on an objection under any of the grounds, laid out in section 4(a) to (h) of the Extradition Act 2003. The respondent had not raised an objection on any of the above grounds, therefore it is would not be appropriate to consider the same in this case.

14. As required by section 18(1)(a) and (b) of the Extradition Act 2003, I order that the respondent be surrendered to the United States of America, as soon as practicable, and the Office of the Director of Public Prosecution, to prepare the necessary surrender warrant, in accordance with section 19 of the Extradition Act 2003, for the extradition of the respondent to the United States of America. The Respondent is remanded in custody until he is extradited to the United States of America.



Salesi Temo
JUDGE

Solicitor for the State
Solicitor for Accused

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Office of the Director of Public Prosecution, Suva.
O'Driscoll and Co., Barrister and Solicitor, Suva.