RE: HELMUT KASPER PAUL RUTTEN

[HIGH COURT, 1992 (Fatiaki J.), 24 August]

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Civil Jurisdiction

Extradition - whether there is in existence a valid extradition treaty between the U.S.A. and Fiji - whether extradition proceedings must comply with the Criminal Procedure Code (Cap 21) - whether test of dual criminality satisfied- whether alleged offence of a political character.

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On application being made for a writ of habeas corpus the High Court reviewed the Magistrates order for committal. Rejecting the application, the Court HELD: (1) that there is a valid extradition treaty between the U.S.A. and Fiji (2) that the Criminal Procedure Code does not govern extradition proceedings (3) that the offences in respect of which extradition was sought satisfied the dual criminality test and where not of a political character.

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Cases cited:

Atkinson v USA Government [1971] AC 197
Blackburn v Attorney-General [1971] 1 WLR 1037
DPP v Doot & ors [1973] 1 All ER 940
R v Governor of Pentonville ex. P. Cheng [1973] AC 931
Republic of France v Moghadam 617 F. Supp. 777
Schtraks v. Government of Israel [1964] AC 55
Re Tota Ram Civ. 750 of 1986

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Application for Habeas Corpus in the High Court.

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M. Raza for the Applicant
Ms. N. Shameem for the Respondent

Fatiaki J. :

On the 8th of July an Order was made against the applicant in the Magistrates Court, Suva committing him into custody to await his extradition to face criminal charges filed against him in the District Court of the Northern District of California in the United States of America.

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The order was made in the exercise of powers conferred on the Magistrate Court pursuant to Section 9 of the Extradition Act (Cap. 23) (hereafter referred to as "the Act"). From that order Section 10 of the Act provides 2 avenues for challenging a committal order by way of:

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> (a) "an action instituted in the Supreme Court (now High Court) for redress of a contravention of his right to personal liberty"; or

(b) "... for review of the order of committal".

A In this latter regard the applicant has sought by way of a Writ of Habeas Corpus to challenge the lawfulness of his committal by the Magistrates Court and although such a Writ might be considered technically to be a challenge based on a person's "right to personal liberty", it almost invariably involves the Court in a review of the committal order. Certainly learned counsel for the applicant urged this Court to consider afresh the evidence before the Magistrates Court.

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I am content to adopt as the correct position on this application, the dictum of Viscount Radcliffe in Schtraks v Government of Israel [1964] A.C. 55 where he said at p.585 :

> C "I think it clear that in habeas corpus proceedings which arise out of a committal order under the Extradition Act, 1870, the Court does not rehear the case that was before the magistrate, nor does it hear an appeal from his order. Its function, apart from considering any issue raised as to the offence charged being a political one, is to see that the prisoner is lawfully detained by his gaoler."

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In his affidavit in support of this applicant raises 5 grounds of complaint against the Committal Order as follows :

> "(a) That the learned Magistrate failed to direct his mind to Section 5(1)(c) of the Extradition Act which particularly requires that the offence must be 'in
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> E corresponding circumstances outside Fiji' i.e. on the Dual Criminality Principle;
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> (b) That the learned Magistrate failed to comply with Section 155 of the Criminal Procedure Code for not giving reasons for his deliberations on Section 5(1)(c)
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> F of the Extradition Act other than saying in reaching this conclusion: "I uphold the submissions of Miss Shameem and reject the submissions on behalf of Rutter";
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> (c) That the learned Magistrate failed to realise that in a
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> G matter such as Extradition pertaining to the liberty of the subject careful scrutiny must be given to any matter raised;
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> (d) That the learned Magistrate failed to realise that there was a contradiction in the affidavits of the complainant and also failed to direct his mind, on the issue of oral evidence be taken as per Section 256 of the Criminal

Procedure Code; and

(e) That apart from paying lip service in deciding whether the offence is of a "political character the learned Magistrate failed to adequately direct his mind as per Section 155 of the Criminal Procedure Code." A

Before dealing however with the various grounds of complaint and learned counsel's submissions it necessary to clear up a misunderstanding that appears to have arisen as to the nature of 'proceedings for extradition' which is set out in Part III of the Extradition Act (Cap. 23) and which was extensively canvassed in the judgment of Sheehan J in Civil Action No. 750 of 1986 In the Matter of Tota Ram *(cyclostyled copy)* at pp. 6, 7 and 8. B

In his judgment Sheehan J. after a review of the relevant provisions of the Act correctly concluded with respect that : C

> "In essence the Court of Committal had to decide that evidence put before it related to extraditable offences and that the evidence was such as would be sufficient to warrant committing the applicant for trial in this country had the offences occurred here." D

Furthermore, in rejecting an argument that extradition proceedings did not permit oral evidence Sheehan J. said (at p. 7) :

> "The object of any preliminary enquiry is the examination of any admissible evidence oral, documentary or otherwise to determine whether a prima facie case is made out sufficient to warrant committal ... to custody pending an order of extradition by the Minister." E

And later at p.10, of the function of the Court in reviewing an order of committal, he said :

> "But any review of the evidence by this Court cannot be wholly concerned with (the) truth of it nor to a large extent (with) the quality of it any more than such was the concern of the magistrate. He and this Court can only be concerned to see if in fact the admissible evidence establishes a case to answer." F

I accept at once that Section 2 of the Extradition Act (Cap. 23) states : G

> "(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, ... as a magistrate conducting a preliminary inquiry."

but with all due regard to the views expressed by learned counsel for the applicant as to the effect of the section, it does not in my view mean that in holding proceedings under Section 9 of the Extradition Act the Magistrate Court is conducting a 'preliminary inquiry' in terms of Parts VII or VIII of the Criminal Procedure Code (Cap. 21) and must accordingly comply with all the provisions in that regard.

In particular, I cannot accept the proposition that by this sidewind the admissibility of a duly authenticated document under Section 13 of the Extradition Act (Cap.23) is made subject to compliance with the provisions of Section 256 of the Criminal Procedure Code (Cap. 21) relating to the requirements for the admissibility of written statements in paper committals under Part VIII of the Criminal Procedure Code.

As was said by Lord Morris of Borth-y-Gest in Atkinson v. U.S.A. Government [1971] A.C. 197 at p.241 :

> "Extradition procedure is something special and it is not precisely comparable with and cannot be equated with purely domestic procedure. It is a procedure relating to 'fugitive criminals' ... The procedure is designed to assist foreign states. When a fugitive criminal is brought before the police magistrate the magistrate must hear the case in the same manner (and he has the same jurisdiction and powers as near as may be) as if the prisoner were brought before him charged with an indictable offence committed in England. But though the magistrate has those powers he is certainly not acting as a committing magistrate in England."

I turn next to deal with the specific grounds of complaint and the submissions of learned counsel for the applicant which primarily canvassed the various arguments raised in the applicant's affidavit of the 14th of January 1989 filed in the Magistrates Court.

In particular counsel raised the following submissions with reference to the relevant paragraphs in the applicant's affidavit and which may be conveniently summarised as follows :

(a) No valid Extradition Treaty in existence between Fiji and the U.S.A. (paras 9 and 10);

(b) Failure of the Court of Committal to comply with the procedure set out in the C.P.C. relating to preliminary inquiries (paras 11 to 15);

(c) Incorrect decision on the meaning of Section 5(1)(c) of the Act which incorporates into our laws the principle of Dual Criminality (paras 16 to 19); and; A

(d) Incorrect decision on the meaning of "an offence of a political character" in Section 6(1) (a) of the Act and in failing to consider the requirements of Section 6(3) of the Act (paras 20 to 23).

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As for (a) learned counsel for the applicant submitted that although the decision of Sheehan J in Tota Ram's case *(op.cit)* correctly represented the law in 1986, since then the 1970 Constitution has been abrogated and somehow (not fully explained) the Extradition Treaty that existed between the U.S.A. and Fiji was rendered invalid.

Needless to say the fact of this present request for extradition by the Government of the United States of America undertaken in 1989 speaks volumes as to the attitude of that government as to the validity and/or continued existence of an Extradition Treaty with this country. C

Similarly the issuance of an authority to proceed in terms of Section 7 of the Extradition Act by the Minister responsible for the Act confirms the attitude of the Government of this country towards the validity of such a Treaty and its continuance despite the abrogation of the 1970 Constitution. D

Furthermore the submission blithely ignores the provisions of the Fiji Existing Laws Decree 1987 which was published on the same day as the Fiji Constitution Revocation Decree (which abrogated the 1970 Constitution) and which continued in existence all existing laws in force immediately before the 25th day of September 1987. To the similar effect are the provisions of Section 8(1) of the 1990 Constitution of Fiji (Promulgation) Decree and Section 168 of the Constitution itself. E

It is also noteworthy that in the 1990 Constitution the Transitional Provisions in Chapter XV contains the following relevant section : F

> "167(1) All rights, liabilities and obligations of Her Majesty in right of the Government of Fiji ... shall after the commencement of this Constitution be rights, liabilities and obligations of the State.
>
> (2) In this Section, rights, liabilities and obligations include prerogative rights and rights, liabilities and obligations arising from contract or otherwise . . ." G

In my considered opinion the above provision manifests an intention on the part of the Republic of Fiji to continue to be bound by and to honour its pre-1990 Constitution treaty obligations. I am fortified in my view by the doctrine

of international law contained in para 1802 and footnote 3 thereto, of Halsburys Laws of England (Vol. 18) which states :

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> "A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty and which was not foreseen by the parties may not be invoked as a ground for terminating or withdrawing from the treaty unless (1) the existence of those circumstances constituted an essential basis of the consent of parties to be bound by the treaty ..."

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In this latter regard it might be that the Government of the U.S.A. could have withdrawn from the Treaty after the democratically elected government of Fiji was overthrown by the coup d'etat in 1987 but as it has chosen not to, it is not for this Court to question or challenge the existence of the Treaty which was brought about by the exercise of prerogative powers. (per Lord Denning M.R. in Blackburn v. Attorney General [1971] 1 W.L.R. 1037 at 1040).

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This ground of complaint accordingly fails as being without merit.

Similarly in the light of my earlier observations regarding the meaning and effect of Section 9(2) of the Act the applicant's second ground of Complaint must also fail.

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In dealing with the question of dual criminality the committing magistrate referred to the nature of the charges preferred in the U.S. indictment against the applicant and the quantity of marijuana involved and said:

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> "I am satisfied that the offences with which Rutter stands indicted for are extradition offences in terms of the treaty between Fiji and the U.S. and in terms of Section 5 of the Act."

Then in the very next sentence (to which learned counsel objects) the committing magistrate states:

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> "In reaching this conclusion I uphold the submissions of Ms. Shameem and reject the submissions on behalf of Rutter."

It may be noted that the relevant submissions were contained in 5 pages of a 9 page written submission placed before the learned committing magistrate. It specifically identified the relevant treaty offence for which extradition was being sought and discusses in same detail the evidence, statutory provisions and case law applicable to a proper consideration of Section 5(1) of the Extradition Act in the context of the present case.

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So far as relevant for present purposes Section 5(1) of the Extradition Act comprises 2 limbs, the first of which provides :

> "(1) For the purposes of this Act; an offence of which a person is accused ... is an extradition offence if -
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> (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."

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In this case the offences with which the applicant has been charged in the U.S. indictment may be described as follows: <u>Conspiracy to import marijuana into the U.S.A.; Causing to Import marijuana into the U.S.A.; Conspiracy to Distribute marijuana;</u> and <u>Knowingly Possessing marijuana with Intent to distribute</u>.

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These are offences which are expressly "provided for by the extradition treaty" between the U.S.A. and Fiji in Article 3(24) which, reads :

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> "Extradition shall be reciprocally granted for the following crimes or offences:
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> (24) Crimes or offences ... in connection with the traffic in dangerous drugs.
>
> "Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties."

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Although no precise offences are separately or distinctly enumerated in the Article, there can be no doubting that the particular offences with which the applicant is charged are within the general category of offences "... in connection with the traffic in dangerous drugs." Certainly no challenge was mounted on this score either in the Magistrate Court or in this Court nor in my view could it have been.

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This would appear to be the short answer to the applicant's third ground of complaint. In deference however to the submissions of learned counsel for the applicant I shall endeavour to deal with the argument relating to Section 5(c) of the Act which raises what is called the double criminality principle.

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It will be noted that the Section begins with the words "in any case ...", following upon two paragraphs that separately deal with 'extradition offences' that are provided for in (a) a treaty; and (b) in the Schedule to the Act in so far as the requesting state is 'a designated Commonwealth country'.

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In my view such lists of extradition offences must be considered exhaustive for the purpose of committal proceedings under the Extradition Act. Accordingly the words 'in any case' must be read *ejusdem generis* so as to bear a meaning restricted to the categories of offences enumerated in either the Treaty (if one exists) or the Schedule to the Act.

In other words Section 5(c) cannot and does not create a separate category of 'extradition offence' additional to and beyond those expressly provided in a Treaty or the Schedule to the Act nor in my view is it necessary to invoke the provisions of Section 5(c) if the offence charged by the requesting State is one provided for in the Treaty or Schedule whether specifically or in broad generic terms using popular language.

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Without necessarily accepting that the principle applies, I turn next to the dual criminality principle which is claimed to be incorporated into the law of this country through the second limb of Section 5(l)(c) which so far as relevant reads :

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> "5(1) For the purposes of this Act, an offence of which a person is accused ... in a treaty State ... is an extradition offence if
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> (c) in any case, the act ... constituting the offence, or the equivalent act, 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."

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The essential feature of the double criminality principle highlighted by learned counsel for the applicant was that the offence with which the applicant was charged must have a corresponding or equivalent offence in the law of Fiji and as an offence on the high seas was unknown in Fiji therefore it is argued the applicant had not been charged with an extradition offence.

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Reference was made to the opinion of Patel J. in Republic of France v. Moghadam 617 F.Supp 777 in which the principle is described at p.784 in the following terms:

> "Under the doctrine of dual criminality the particular act charged must be criminal in both the requesting and the extraditing jurisdiction in order to justify extradition."

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Furthermore:

> "... the principle does not require that the charges be identical, but only that the acts be punishable in each country."

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and at p.785 :

> "... the proper inquiry is if the individual had committed the same acts in the United States would a crime have been committed ?"

Learned counsel submitted that the facts in this case would not support any criminal offence in Fiji because the offences charged occurred on the high seas

and concerned a German national on a German registered vessel.

With all due respect I cannot agree. Even accepting that the criminal jurisdiction of our courts is territorial in so far as it relates to the trial of offenders, Section 6 of the Penal Code (Cap. 17) clearly recognises the jurisdiction of our courts to try offences that are "... done partly within and partly beyond the jurisdiction..." A

In this case the charges laid against the applicant arise out of his alleged participation in a conspiracy to import twelve tons of marijuana into the U.S. A. More particularly it is alleged that the applicant was a crew member on a vessel which sailed from P.N.G. and picked up a cargo of marijuana and then kept a pre planned rendezvous with a U.S. fishing vessel the Pyrgos on the high seas off the coast of the Hawaiian Islands in the Northern Pacific Ocean. At the meeting the applicant is alleged to have assisted in the transfer of the cargo of marijuana from his vessel to the Pyrgos after which the Pyrgos sailed to the West Coast of the U.S.A. where the cargo of marijuana was off-loaded from the Pyrgos onto a beach north of Santa Cruz in the State of California. B C

It is an offence contrary to the provisions of Section 4(2) of our Dangerous Drugs Act (Cap. 114) to bring or cause to be brought into Fiji by land air or water any dangerous drug which term includes Indian Hemp and Section 8(b) makes it an offence to possess, sell or give to any person any Indian Hemp. D

Furthermore Section 41(1)(d) of the Dangerous Drugs Act makes it an offence for :

> "Any person in Fiji (to) aid, abet, counsel or procure the commission in any place outside Fiji of any offence punishable under the provisions of any corresponding law in force in that place or (to) do any act preparatory to or in furtherance of any act which, if committed in Fiji, would constitute an offence against this Act." E

There can be no doubt that if what the applicant is alleged to have done occurred in Fiji Waters he would have committed offences against our Dangerous Drugs Act irrespective of his nationality or the nationality of the vessel from which he operated. F

The question posed however is :

> 'Whether a conspiracy hatched on the high seas to do the same thing is exempt from our laws if acts in furtherance of it occur on our shore?' G

In my considered view such a conspiracy and all persons involved in it whether in its planning and/or execution are amenable to our criminal law and triable in our Courts.

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In reaching this conclusion I have considered the provisions of Section 385 of our Penal Code (Cap. 17) which makes it a felony offence in Fiji for "... any person to conspire with another ... to do any act in any part of the world which if done in Fiji would be a felony and which is an offence under the laws in force in the place where it is proposed to be done."

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In this latter regard the affidavit of Maria Jensen Allmand the Assistant U.S. Attorney assigned to the applicant's case contains the following undisputed statement of the relevant law of the U.S.A. :

> "Under the laws of the U.S., if two or more persons conspire to import to the U.S., distribute or possess with intent to distribute, a controlled substance, and one or more of those persons do any act to effect the object of the conspiracy, then all are guilty of the crime of conspiracy."

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I am also fortified by the House of Lord's decision in D.P.P.v. Doot and Others [1973] 1 All E.R. 940 which:

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> "Held: that an agreement made outside the jurisdiction of the English Courts to commit an unlawful act within the jurisdiction was a conspiracy which could be tried in English if the agreement was subsequently performed wholly or in part in England. Although the crime of conspiracy was complete once the agreement had been made, nevertheless, the conspiratorial agreement remained in being until terminated by completion of its performance or by abandonment; accordingly where acts were committed in England in performance of the Agreement that would suffice to show the existence of a conspiracy within the jurisdiction triable by the English Courts."

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I would also respectfully adopt as a sound basis for the decision the statement of principle enunciated by Lord Pearson in his judgment where he said:

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> "On principle ... I think that a conspiracy to commit in England an offence against English law ought to be triable in England if it has been wholly or partly performed in England. In such a case the conspiracy has been carried on in England with the consent and authority of all the conspirators. It is not necessary that they should all be present in England. One of them, acting on his own behalf and as agent for the others, has been performing their Agreement, with their consent and authority in England. In such a case the conspiracy has been committed by all of them in England."

Accordingly this Court finds that the applicant is charged with an 'extradition offence' for which a committal order may be made.

There only remains the applicants final complaint that he is charged with offences "... of a political character".

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Of such an offence Lord Diplock said in R. v. Governor of Pentonville Ex.p Cheng [1973] A.C.: 931 at p.945 :

> "... I would hold that prima facie an act committed in a foreign state was not "an offence of a political character "unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce it to change its policy..." (my underlining)

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On the face of the offences charged in the U.S. indictment in this case it is difficult to understand how they could be considered to be "offences of a political character". The applicant's argument however is that the U.S. court's in asserting jurisdiction over a conspiracy which took place on the high seas is asserting a "worldwide jurisdiction" which is ... "political in nature" and accordingly the offences with which the applicant is charged are "... of a political character".

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I cannot agree. In the first place it is nowhere suggested in the submissions or affidavit of the applicant that in doing what he is alleged to have done he had a political motive or intention in mind such as to induce a change of U.S. government policy in claiming jurisdiction over offences committed on the high seas.

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Secondly, as already demonstrated in my earlier discussions of Section 5(1)(c) of the Extradition Act the U.S. claim to jurisdiction arises not, merely because of the fact of the existence of a conspiracy *per se* that involves a contravention of U.S. domestic law relating to controlled substances but rather and principally because in furtherance of the conspiracy a criminal act has in fact been committed on U.S. shores within the territorial limits of the ordinary jurisdiction of its Courts. Such a conspiracy I suggest would be triable in England and in my considered view in Fiji too.

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Thirdly, the motivation of the requesting, state in laying charges whilst it may be relevant to a consideration of Section 10(3)(c) does not *ipso facto* render the offence charged one "of a political character" in terms of Section 5(1)(c) of the Act if the offender himself had no political motive or purpose in committing the offence.

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Nor is it likely that the Courts of a country would accept as "political" the commission of an offence only remotely or indirectly connected with the offender's political purpose or motive and especially where there was a more immediate readily identifiable "non-political" purpose or benefit obtained by the offender in the commission of the offence.

For instance, if the accused person had robbed a bank to obtain funds for a political party, the object would, in my view, clearly be too remote and indirect to constitute a "political" offence but if the accused had killed a dictator in the hope of changing the government of the country his object would have a sufficiently direct and immediate impact on the government of the country as to justify the term "political".

This ground of complaint is also without merit and is accordingly rejected.

Finally there is the provision of Section 6(3) of the Extradition Act which prohibits the extradition of a person "... unless provision is made by the law (of the requesting State) ... or by an arrangement made with the (requesting) State or country ..." for the return of the fugitive offender to this country before he may be proceeded against for any offence(s) other than the offence(s) in respect of which his extradition was sought.

In this regard it is noteworthy that Article 7 of the Fiji/U.S.A. Extradition Treaty specifically provides:

> "A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence or on account of any other matters than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning to the territories of the High Contracting Party by whom he has been surrendered."

In the light of the clear terms of the above Article which is an 'arrangement' that complies with Section 6(3) of our Act, this Court is not prepared to countenance an argument premised on an unsubstantiated claim that the U.S.A. will not honour its obligations under the Extradition Treaty existing between it and this country.

In rejecting a similar and more substantiated argument in Atkinson v. U.S.A. Government *(op. cit)* Parker C.J. said at p.204 :

> "Undoubtedly if that were to be done it would be a breach of the treaty between this country and the United States. For my part I am by no means satisfied that the United States has any such intention ... I proceed on the basis that a friendly State with whom we are under treaty obligations the one with other will observe the conditions of the treaty."

I note also that in Atkinson's case the House of Lords accepted the opinion of a U.S. attorney that under Article VI of the Constitution of the United States the judges of every state are bound to act in accordance with the treaties made under the authority of the United States of America (per Lord Guest at p.245).

Needless to say the applicant's complaint is not based upon a charge of bad faith on the part of the American prosecuting authorities nor is it disclosed that the applicant has or may have other charges (if any) pending against him in the U.S.A.

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This final ground accordingly fails. Having thus disposed of all the applicant's grounds of complaint against the order made by the Court of Committal, the application for a Writ of Habeas Corpus is dismissed.

(Application dismissed.)

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