IN THE SUPREME COURT OF FIJI AT SUVA
ON APPEAL FROM THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. CBV 0004/94
(Fiji Court of Appeal No. 42/92)

BETWEEN : TAM SUK-CHONG, TAMMIE

Appellant

A N D : THE MINISTER OF FOREIGN AFFAIRS

First Respondent

A N D : THE GOVERNMENT OF HONG KONG

Second Respondent

Coram: The Hon. Sir Timoci Tuivaga, President
The Rt. Hon. Sir Robin Cooke
The Hon. Sir Anthony Mason

Hearing: 16 November 1995

Counsel: G.J.X. McCoy, R.P.G. Haines and Vasantika Patel for Appellant
N. Nand for First Respondent
A.S. Bruce and N.S. Arjun for Second Respondent

Judgment: 17 MARCH 1996

JUDGMENT OF THE COURT

The Proceedings

By a judgment in a judicial review proceeding, delivered in the High Court on 2 September 1992, Byrne J. ordered that *certiorari* go to quash an authority to proceed ('the second authority') issued by the Minister for Foreign

Affairs on 18 May 1990 to enable the Nausori Magistrate's Court to continue with the extradition proceedings (Criminal Case No. 160 of 1988) then said to be pending before that Court to extradite the applicant from Fiji to Hong Kong. Byrne J. also ordered that the extradition proceedings be stayed forever. The second authority related to eight charges of conspiracy to account falsely and five charges of conspiracy to furnish false information. The conspiracies were alleged to have occurred in Hong Kong at various times between 30 December 1983 and 23 May 1985. In each charge it was alleged that the applicant conspired with three other named persons and other persons unknown.

The applicant's judicial review proceeding was based on many grounds. On the view taken by Byrne J., he did not need to consider most of them. His decision was based on the following grounds. He held that the eight charges were not of extradition offences within the meaning of the relevant statute of Fiji, the Extradition Act 1977, s.5, because there was no corresponding offence in the Fiji Penal Code: that is to say, in the language of s.5(1)(c), the act constituting the offence would not constitute an offence against the law of Fiji if it took place within Fiji. He thought that the five charges probably did have a corresponding Fiji offence and so passed muster under para. (c), but that they were not shown to satisfy para. (b) of the same subsection, in that on the material before the court it could not be said that the alleged offences were punishable in Hong Kong with imprisonment for 12 months or any greater punishment. As we understand the judgment, this was also a further ground on which Byrne J. held that the eight charges did not fall within s.5.

Moreover, as to all 13 charges he either held or at least leant to the view that the Minister was bound but had failed to give the applicant an opportunity to be heard (sc. in writing) before issuing the second authority. This proposition was

based on the doctrine of legitimate expectations, the Judge holding that the Minister had created such an expectation by, as the Judge understood, inviting the applicant to make representations concerning a prior request for extradition on ten charges, and by considering a petition to him from the applicant concerning that request. The Minister had granted an authority to proceed ('the first authority') after considering the petition. The 13 charges were intended to replace the previous ten, a matter to which we will return.

The Minister and the Government of Hong Kong appealed to the Court of Appeal from the judgment of Byrne J. For her part the applicant sought to sustain the judgment both on the grounds given by the Judge and on further grounds, including all the additional grounds on which the judicial review proceeding was based. In a judgment delivered on 26 April 1994 the Court of Appeal allowed the appeals, dismissed the cross-appeal by way of respondent's notice, and set aside the High Court orders.

The reasoning of the Court of Appeal was that the Minister was justified in regarding the offences charged as *prima facie* extradition offences and that the Minister's generally-worded affidavit was, in the circumstances, sufficient evidence that he had turned his mind to all relevant matters. The scheme of the Extradition Act was such that no more was required at that stage. It was for the Magistrate in the committal proceedings to determine whether the offences charged were extradition offences. If he decided that they were, his decision might well be the subject of an application to the High Court and an appeal to the Court of Appeal; but it would be inappropriate for the Court of Appeal to express an opinion on the extradition offences point before the Magistrate had decided it. In that connection the Court of Appeal expressly raised a doubt as to whether the decision of the majority of the House of Lords in *Government of Canada* v. *Aronson* [1990] 1 A.C.

579 should be followed in Fiji. That majority decision was to the effect that, to determine whether there was a corresponding offence in the country from which return was sought, all that could be looked at were the particulars of the offence in the charge: the requesting Commonwealth country could not embark, in the court of the country from which extradition was sought, on a review of the evidence for the purpose of seeking to identify conduct which would found charges in the latter country. *Aronson* arose under the Fugitive Offenders Act 1967 of the United Kingdom, and the Court of Appeal suggested that the Fiji Act of 1977 might be materially different.

On the natural justice point the Court of Appeal held that there was no foundation for applying the legitimate expectation doctrine. The scheme of the Act did not envisage a hearing by the Minister before the issue of an authority to proceed. There was no evidence of any long-standing practice, nor of any representation on behalf of the Minister to the applicant that she would be heard, nor of any invitation to the applicant on the prior occasion.

The Court of Appeal did not find merit in any of the further grounds on which the applicant sought to sustain the result reached by Byrne J. We will have to deal with the more important of these later in this judgment. At this point we merely note that on the question of injustice, oppression and the lapse of time, the Court of Appeal said that at the date of the second authority 'only five years' had elapsed since the alleged commission of the last offence; that, if the monies alleged to have been fraudulently borrowed had all been repaid, this would be relevant only to mitigation of sentence in the event of a conviction of the applicant in Hong Kong; and that certain mistakes or misunderstandings by the authorities in Hong Kong and Fiji, to which we will have to refer, had resulted in an error in the second authority but it was 'mere surplusage'.

The applicant petitioned the Supreme Court for special leave to appeal from the decision of the Court of Appeal. It is a decision in what has been called a civil proceeding in a criminal cause or matter: *R.* v. *Governor of Belmarsh Prison, ex parte Francis* [1995] 3 All E.R. 634, 638. Since *Amand* v. *Secretary of State for Home Affairs* [1943] A.C. 147 it has been generally accepted that, for the purpose of statutory provisions concerning rights of appeal or leave to appeal, such decisions are treated as having been given in criminal matters. See further *R.* v. *Chief Metropolitan Magistrate, ex parte Osman* [1988] 3 All E.R. 173. The Supreme Court has implied jurisdiction to grant special leave to appeal under s.117(3) of the Constitution; provision on the matter is also to be found in s.13 of the Supreme Court Decree 1991. The first respondent, the Minister, did not pursue before us an argument that the appellant should have obtained leave from the Court of Appeal, but it was contended on his behalf that we should not grant special leave in this case. That question is bound up with the merits of the case, on which we have heard and received full arguments and to which we now turn.

The Issues in the Supreme Court

Counsel for the appellant nominally put forward four specific grounds of appeal, but in substance the argument was wider. Two of the specific grounds can be disposed of briefly. We do not doubt that the Governor of the Crown Colony of Hong Kong is a proper officer of the Crown to request extradition to Hong Kong: compare *Governor of Pitcairn* v. *Sutton* [1995] 1 N.Z.L.R. 426. And we are in full agreement with both the conclusion and the reasoning of the Court of Appeal on the natural justice point. No more need be said on these subjects.

Counsel for the appellant also presented arguments relying in part on the unsatisfactory history of the case and defects in the second authority. These arguments were accompanied, and in truth to some extent obscured, by a certain amount of rhetoric. When the latter was stripped away it appeared to this Court that in substance the appellant was contending that continuation of the extradition proceedings would be either an abuse of process, which has been said to be a ground available in extreme cases to defeat extradition proceedings (see *In re Rees* [1986] 1 A.C. 937, 962, per Lord Mackay of Clashfern; *Wiest* v. *Director of Public Prosecutions* (1988) 86 A.L.R. 464, 469, per Burchett J.), or within s.10(3) of the Extradition Act. The statutory provision just mentioned provides sufficient support for our conclusion, as stated hereinafter, without invoking abuse of process; but we add that *In re Schmidt* [1995] 1 A.C. 339 was not concerned with any issue of delay.

So far as material s.10(3) provides that in a post-committal action the court may order the person committed to be discharged from custody if it appears to the court that by reason of the passage of time since he is alleged to have committed the offence it would, having regard to all the circumstances, be unjust or oppressive to extradite him. Another relevant provision is contained in s.11(3), whereby, again after a committal, the Minister is prohibited from making an order for extradition if it appears to him, on the ground mentioned in s.10(3), that it would be unjust or oppressive to return the person.

In view of the time limits applying to oral arguments in the Supreme Court and the scope of the arguments presented, the court by minute gave counsel the opportunity of making any additional submissions, if they so wished, on the following question:

> Whether in all the circumstances of this case, which were discussed in argument, the Supreme Court of Fiji should now both give special leave to appeal and allow the appeal on the ground that further continuance of the extradition proceedings would be an abuse of process and/or oppressive.

Written submissions were lodged in response, and the respective memoranda of counsel for the Minister and the Hong Kong Government go far towards confirming that the extradition proceedings should not be permitted to continue. In particular counsel for the Hong Kong Government speaks rightly of the 'utterly astonishing' delay and says -

> Never in the wildest imagination of those concerned with the extradition could it have been foreseen that in November 1995 there still has not been a committal hearing.

It is material to consider the reasons for the delay: see *R.* v. *Governor of Brixton prison, ex parte Osman* (No. 4) [1992] 1 All E.R. 545, 585-6, where Woolf L.J. analyses the previous leading English authorities and concludes -

> In this passage from his speech in *Kakis*'s case it could, at first sight, appear that Lord Diplock did not regard culpability on the part of the requesting state as being relevant. However I would draw attention to the fact that the remarks of Lord Diplock are preceded by the word 'generally' at one stage and, at another, by the word 'normally'. If Lord Diplock had intended to indicate that the culpability of the requesting state was not a material matter then this, as I understand it, would be inconsistent with the approach which the House of Lords adopted in *Narang*'s case [*cit. infra*].
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> However, I do not regard Lord Diplock as intending to adopt a different approach. He was indicating that if the applicant has brought the delay upon himself by his own acts then that delay was not generally relevant; but if, on the other hand, it was a situation where, as a result of the passage of time (not brought about by the applicant), injustice or oppression resulted then irrespective of whether the requesting state was or was not blameworthy the applicant would be entitled to be discharged, the fact that the requesting state had been guilty of

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culpable delay was not a matter which the court was entitled to take into consideration.

Here the chronology must be examined. On 4 November 1988 the appellant was charged in Hong Kong with and arrested on ten charges alleging in all five offences of false accounting and five of furnishing false information. These were not charges of conspiracy and the appellant was the only person named in the charges. On 12 November 1988 the appellant was consequently arrested in Fiji on a provisional warrant; she was released on bail on 15 November 1988. On 24 November 1988 the Governor of Hong Kong signed a request for her extradition from Fiji on the ten charges. But on 30 December 1988, apparently as a result of further investigation or consideration of the evidence in Hong Kong, a second warrant to arrest the appellant was issued there. It specified the 13 conspiracy charges with which the case is concerned. Ten of these charges related at least in part to the same conduct as was the subject of the previous ten charges; the other three apparently related to different conduct. Affidavit evidence filed on behalf of the Hong Kong Government explains that the thirteen conspiracy charges were intended to be in complete substitution for the initial charges. But this was not made clear to and was not understood by the Fiji authorities. The affidavit also speaks of the ten charges as amended by the first ten replacement charges; but likewise this is incorrect. A memorandum to the Chief Magistrate from the Fiji Director of Public Prosecutions, dated 22 May 1990, shows that the position was misunderstood in Fiji. The first extradition request was received in Fiji on 5 January 1989. Confusingly the supporting documents included the warrant and evidence relating to the conspiracy charges, but the request itself was limited to the ten original charges. These were mistakes made in Hong Kong.

On 20 February 1989 the appellant's petition requesting the Minister not to issue an authority to proceed on the ten charges was lodged. On 3 March 1989

the Minister advised her that he declined the petition, and on 30 March 1989 he signed the first authority, i.e. an authority relating to the ten charges on which, unknown to him, the Hong Kong prosecutor was not intending to proceed. On 5 June 1989 the appellant was granted leave to issue a judicial review proceeding challenging the first authority. She commenced the proceeding on 30 June 1989. On 6 July 1989 the Fiji High Court made an interim order that the extradition proceedings be stayed. Some nine months later, on 19 April 1990, the Governor of Hong Kong signed a request for extradition on the 13 conspiracy charges. On 18 May 1990 the Minister for Foreign Affairs issued the authority which is at the centre of this case. It reads in full:

ORDER OF AUTHORITY TO PROCEED

(EXTRADITION ACT, CAP 23, SECTION 7)

The Chief Magistrate

A request having been made to the Fiji Government by the Government of Hong Kong for the return to that country of TAM Suk-chong who is accused of eight offences of conspiracy to falsely account contrary to Common Law and Section 19(1)(a) of the Theft Ordinance, Cap. 210 and five offences of conspiracy to furnish false information contrary to Common Law and Section 19(1)(b) of the Theft Ordinance, Cap. 210. (Please see attached schedule)

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.

Dated at Suva this 18th day of May 1990

(signed) K.K.T. Mara
Prime Minister
Minister for Foreign Affairs

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It is to be observed (i) that the second authority is not in accordance with the form prescribed by the Extradition (Forms) Regulations, Form 1, which is a simple form reciting the request for return of a person accused of specified offences and ordering a Resident Magistrate to proceed with the case in accordance with the provisions of the Extradition Act; (ii) that this second authority speaks of a Resident Magistrate being seized with an extradition request pursuant to the order of 30 March 1989, although proceedings under that request had been stayed in the interim by the High Court and the Hong Kong Government did not intend to proceed thereunder; (iii) that the second authority gives no indication that those proceedings are not to continue; (iv) that the second authority purports to specify that a particular Resident Magistrate is to proceed with the case. Although in a case of amended or additional charges that would be a convenient course, it is a course properly to be decided upon as a matter of judicial administration. There is nothing in the Extradition Act empowering the Minister to select the Magistrate who is to conduct a committal hearing.

We need not list the various interlocutory hearings in the High Court or Court of Appeal. Suffice it that on 16 July 1990 an order was made in the High Court that the first judicial review proceeding be forever discontinued, an undertaking having been given by a Hong Kong prosecutor that the appellant would not be indicted on the ten charges. On 10 August 1990, by leave, the appellant issued the judicial review proceeding challenging the second authority. The hearing took place over 12 days in September 1991, one in March 1992 and two in April 1992. On 8 April 1992 judgment was reserved; it was delivered in favour of the appellant some five months later.

Before the hearing of the appeals from that judgment, there were some relevant developments in Hong Kong. At the times of the alleged conspiracies the

appellant, who was then in her twenties, was employed as executive secretary to a director of the Far East Bank. Her named alleged fellow conspirators were the chairman of the Bank and two sons of his. On 20 April 1993 Leonard J. in the High Court of Hong Kong permanently stayed the trial of the chairman by reason of latter's alleged dementia and illness to which delay in the prosecution may have contributed. The Judge criticised those responsible for the Hong Kong prosecution for delay, for deferring the prosecution of the chairman while the extradition of the present appellant was being sought, and for the mistakes made in the extradition procedure: *R.* v. *Chiu Te Ken, Deacon and another* [1993] 2 H.K.C.L.R. 21. Thereupon, on 3 May 1993, the Crown offered no evidence against the son who was a director, and he was acquitted. The other son alleged to have been a conspirator is said never to have been located. We add that it is common ground that all the monies alleged to have been obtained by the fraudulent conspiracies have been repaid. Evidently the appellant had no part in the repayment; it is a reasonable inference that, if there were such conspiracies, her part in them was secondary or relatively minor. She may well have been the instrument of other persons.

To return to the Fiji proceedings, the appeals were heard by the Court of Appeal on 22 and 23 February 1994, judgment being delivered on 26 April 1994. The appellant gave due notice of application for special leave to appeal to the Supreme Court. The case was heard at the inaugural sittings of this Court, on 16 November 1995.

Notwithstanding the time that has already elapsed, it has been a prominent ingredient of the submissions for the Minister and the Hong Kong Government, as it was of the reasoning of the Court of Appeal, that the appellant's second judicial review proceeding is premature. The argument goes *inter alia* that

if there is any real issue of abuse of process or oppression (which is denied) the scheme of the Act indicates that it should not be determined unless and until the Magistrate orders committal, in which event it could be determined by the courts in a s.10 action and any appeal or appeals therein, or as a last resort by the Minister under s.11. A further argument invokes the provision of the Hong Kong Bill of Rights, Article 11(2)(c), that everyone facing a criminal charge is entitled to be tried without undue delay. Therein, it is suggested, lies the appellant's protection and remedy against delay.

Unfairness

We are unable to accept these arguments for the respondents. Ultimately the question is one of fairness. In *Kakis* v. *Government of the Republic of Cyprus* [1978] 2 All E.R. 634, 638-9, Lord Diplock said of statutory provisions corresponding to s.10(3) of the Fiji Extradition Act -

> 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair.

For the purposes of the present judgment we see no need to draw sharp lines between injustice, oppression and abuse of process. It is enough to treat these expressions as different ways of referring to unfairness or as representing different aspects of unfairness. There is Privy Council recognition that, despite the statutory scheme, where it is clear that the extradition proceedings must fail a prerogative remedy may be granted to put an end to the proceedings: *United States Government*

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v. *Bowe* [1990] 1 A.C. 500, 526. In the context of an extradition statute Lord Diplock in *Kakis* at 638 identified the passage of time to be considered as that between the date of the hearing of a Divisional Court post-committal application, corresponding to a s.10 hearing in Fiji. In *R.* v. *Governor of Pentonville Prison, ex parte Kirby* [1979] 2 All E.R. 1094, 1101, Croom-Johnston J. said that there may be cases where the offences are simply so stale and so old that anybody would say that it was unjust or oppressive to return. The *Kirby* case was decided in 1976, before the more elaborate discussions in the House of Lords cases of *Kakis* and *Union of India* v. *Narang* [1978] A.C. 247, but the speeches in those cases contain nothing to qualify the common sense of the observation in *Kirby* just quoted.

In the supplementary submissions for the Hong Kong Government, counsel responsibly drew attention to a recent (perhaps unreported) decision of a Queen's Bench Divisional Court in England *R.* v. *Secretary of State for the Home Department, ex parte Patel*, 9 February 1994, in which it was held that the irresistible inference from the particular facts was that it would be unjust and oppressive to surrender the applicant, and that the Minister could not properly have reached any other conclusion. In the course of his judgment Henry L.J., speaking of delays between the alleged offences and the Minister's extradition order of nine to nearly 12 years, referred to the 'enormity' of the periods and described the suggestion that the delays should simply be left to be considered by the American court of trial as 'quite startling'.

Considering the facts of the instant case in the light of the cases that we have cited, we note that unless the Supreme Court now intervenes it would be unrealistic to expect the appellant to have an opportunity of invoking delay, by action in the High Court, until well into 1996 at the earliest. That would be nearly 13 years since the earliest date in the conspiracy charges and more than eleven years

since the last date. We do not consider that the delay can be laid at the appellant's door. Mistakes contributed to in both Hong Kong and Fiji led to a second authority to proceed of questionable validity. Even assuming that the Court of Appeal were right to dismiss the defects in the authority as mere surplusage, it was reasonable of the appellant to contest that point at least and to pursue it as far as the Supreme Court. Personal liberty was at stake. Bearing that in mind, we are not satisfied that the Court of Appeal were right about surplusage, but we need not express a final opinion on that point. What we regard as decisive is the reasonableness of the challenge raised and persisted in by the appellant.

Our conclusion, having regard to all the circumstances, is that this is plainly a stale case in which it would be unfair, in the comprehensive sense explained above, to permit the extradition procedure to continue. Whether or not it is constitutionally necessary to do so, we hold that the question of the ability of the courts to put a stop to an extradition process, on grounds of unfairness, before a committal hearing is of general legal importance warranting special leave to appeal. Accordingly we grant leave, allow the appeal and restore the order of the High Court staying the extradition proceedings permanently.

Observations should be added on three matters.

First we are conscious of the problems caused in Hong Kong by commercial corruption and resulting in the creation of the office of Independent Commissioner against Corruption. Only the exceptional facts of the present case have outweighed that consideration.

Secondly, and similarly, we reject suggestions by the respondents that the present decision will cast doubt on Fiji's reliability in fulfilling international

extradition obligations. The facts of the case are too special to justify any such doubt. On the contrary, while it is no part of our function to seek to predict how the Hong Kong courts would decide the case, we think that our decision gives effect to the spirit of Article 11(2)(c) of the Hong Kong Bill of Rights.

Thirdly, we refer to the view of the Court of Appeal that the authority or application of the majority decision of the House of Lords in the *Aronson* case is questionable in Fiji. Although there are some differences in the statutes, the words directly relevant are the same and were obviously copied in Fiji from the United Kingdom legislation. In the interests of international comity, it is a tenable view that *Aronson* should be followed in this jurisdiction. We express no final opinion on this point, however, in the absence of both full argument and any need to do so.

Although we allow the appeal, there will be no order for costs in any of the three Courts. The appellant has succeeded on a ground not at first clearly articulated in support of her appeal to this Court, and many of the grounds put forward for her throughout the proceedings have been both without substance and time-consuming. Justice will be done if costs lie where they fall.

Sir Timoci Tuivaga

Sir Robin Cooke

Sir Anthony Mason

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