

1983 April 2

[STYLIANIDES, J.]

IN THE MATTER OF JEAN GABRIEL HANNAH HAYEK,

and

IN THE MATTER OF AN APPLICATION BY THE ABOVE
APPLICANT FOR A WRIT OF HABEAS CORPUS.

(Application No. 7/83).

Fugitive offenders—Extradition—Extradition proceedings—Character of—Proper procedure—Accused entitled to be heard in Court as regulated by the Criminal Procedure Law, Cap. 155 sections 74 and 93—Fugitive Offenders Law, 1970 (Law 97/70) and European Convention on the Extradition of Offenders (Ratification) Law, 1970 (Law 95/70). 5

Habeas Corpus—Extradition proceedings—Principles applicable.

The applicant a Lebanese national was arrested under a provisional warrant issued by the President of the District Court of Larnaca under s.8(1)(b) of the Extradition of Fugitive Offenders Law 1970 (Law 97/70) and was remanded in custody for 8 days. The remand was renewed by the same judicial officer on 7.2.1983 for a further period of 8 days. On 12.2.1983 the Minister of Justice issued, under s.7(2) of the above Law, pursuant to a request made by the Swedish Government, authority for the commencement of extradition proceedings by the District Court of Larnaca of the applicant to Sweden. 15

On 25.2.1983, after a submission by the representative of the Police, the Court below ruled that the provisions of Article 12 of the European Convention on the Extradition of Offenders (Ratification) Law, 1970 (Law 95/70) prevail over those of s.9(5) of Law 97/70 and, therefore, the production of the material envisaged in Article 12(2) of the European Convention on Extradition of Offenders, ratified by Law 95/70, was sufficient for the making of an extradition order. 20 25

On 1.3.1983 the Court dealing with these extradition proceed-

ings, after stating that the law applicable is the European Convention on the Extradition of Offenders (Ratification) Law, 1970 (Law 95/70), decided that the material adduced in support of the application fulfilled to his satisfaction all the requirements set out in Article 12 of the Convention in so far as the matter pertains to grave narcotic drug offences and gross smuggling of goods, and ordered that the applicant be committed to custody pending his extradition to Sweden. Then the applicant was addressed in terms of s.10 of the Extradition of Fugitive Offenders Law 97/70.

Upon an application for the issue of a writ of habeas corpus counsel for the applicant mainly contended that the extradition Court disregarded the rights of the applicant enshrined and safeguarded by Article 30.3(a)(b) and (c) of the Constitution and the provisions of the Criminal Procedure Law, Cap. 155 relating to the holding of a preliminary inquiry.

Held, (1) extradition proceedings are a very important matter. It deals with a branch of the criminal law. It affects the liberty of the individual and the conditions of the law should be clearly fulfilled. The accused is entitled to his right to be heard in Court as regulated by the Criminal Procedure Law, sections 74 and 93. The committal Judge has to consider the evidence admissible, oral or documentary admissible under s.13 of Law 97/70. He then has to consider whether such evidence sufficiently raises a probable presumption of guilt of that person.

(2) In the present case the proper procedure was not followed. The committal Court erred in Law; he misdirected himself. The applicant was deprived of his right of audience in the sense of making a statement or giving evidence and calling witnesses, if he so decided. It is immaterial whether he would call witnesses or not. The fact remains that from the record of the committal Court it is abundantly clear that the Court did not afford such a right to the applicant. The Court did not consider any evidence before it. Due to a misconception of law he did not advert at all to exhibit No. 3, authenticated documents containing some evidence obtained in Sweden and adduced apparently under the provisions of s.13 of Law 97/70. The Court satisfied itself only with the production of the documents, exhibit No. 2, i.e. those envisaged in Article 12(2) of

the Convention. The proceedings before the committal Judge are not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him but rather of the character of a Preliminary Inquiry which takes place in this country before a committing Court for the purpose of determining whether a case is made out which will justify the committal of the accused to trial on information in which he shall be finally tried. The essence of the test is that the evidence against him is such as, if uncontradicted, would raise a probable presumption of his guilt. The Court used a wrong test. It did not consider whether the evidence was sufficient to commit the accused to trial if the offence had been committed in this country.

(3) This Court is not a committal Court. It has no power in habeas corpus proceedings to examine retrial before the committal Court and step into its shoes. The order for custody and extradition of the applicant is not valid in law and therefore habeas corpus will be granted and applicant will be discharged from custody.

Application granted.

Cases referred to:

- Re Manfred Mutke* (1982) 1 C.L.R. 922 at p. 926;
Republic v. Demetriades (1977) 3 C.L.R. 213;
Miliangos v. George Frank (Textiles) Ltd. [1975] 1 All E.R. 1076
 at pp. 1084-1085;
Schtraks v. Government of Israel (1962) 3 C.L.R. 529 at p. 533;
Re Galwey [1896] 1 Q.B. 230 at p. 236;
R. v. Maurer [1883] 10 Q.B.D. 513 at p. 516;
Re Arton (No. 1) [1896] 1 Q.B. 108 at p. 113;
Re Arton (No. 2) [1896] 1 Q.B. 509 at p. 518;
Armah v. Government of Ghana [1966] 3 All E.R. 177;
West German Government v. Sotiriadis [1974] 1 All E.R. 692;
R. v. Governor of Brixton Prison—Ex Parte Sirugo, 4th December
 1967;
Re Miller, The Times, 25th October, 1978;
Argento v. Horn, 241 F. 2d 258 at p. 263;
*R. v. Governor of Pentonville Prison, Ex Parte Budlong and
 Another* [1980] 1 All E.R. 701;

R v Brixton Prison (Governor) Ex parte Perival [1907,
1 K B. 696 at p 706

Application.

Application for an order of habeas corpus by Jean Gabrie
5 Hannah Hayek following his committal to custody awaiting
extradition, by a Judge of the District Court of Larnaca

E. Efstathiou with *N. Kleanthous*, for the applicant

A Evangelou, Senior Counsel of the Republic with *L*
Loizidou (Mrs.), for the respondent

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Cur adv. vult

STYLIANIDES J. read the following judgment. This is an
application for the issue of a writ of habeas corpus arising out
of extradition proceedings brought against the applicant, Jean
Gabriel Hannah Hayek.

15 The applicant is a Lebanese national. He was arrested under
a provisional warrant issued by the President of the District
Court of Larnaca under s 8(1)(b) of the Extradition of Fugitive
Offenders Law, 1970 (Law 97/70) and was remanded in custody
for 8 days. The remand was renewed by the same judicial
20 officer on 7.2.83 for a further period of 8 days. On 12.2.1983
the Minister of Justice issued, under s.7(2) of the Extradition
of Fugitive Offenders Law, pursuant to a request made by the
Swedish Government, authority for the commencement of
extradition proceedings by the District Court of Larnaca of
25 the applicant to Sweden.

On 15.2.1983 the proceedings commenced. The inquiry
was adjourned to 17.2.1983. Police Sergeant Papageorghiou
appearing for the Police, applied for adjournment as he was
not in a position "to adduce, on that day, all the necessary
30 evidential material required by s.9(5)(a) of Law 97/70", and he
based his such application on the power of the Court under
s.9(3) of the Law, the evidential material consisting of documents
made admissible under s.13.

On 25.2.1983, after a submission by the representative of
35 Police, the Court ruled that the provisions of Article 12 of Law
95/70 prevail over those of s.9(5) of Law 97/70 and, therefore,
the production of the material envisaged in Article 12(2) of

the European Convention on Extradition of Offenders, ratified by Law 95/70, was sufficient for the making of an extradition order.

On 1.3.1983 the District Judge dealing with these extradition proceedings, after stating that the law applicable is the European Convention on the Extradition of Offenders (Ratification) Law, 1970 (Law 95/70), decided that the material adduced in support of the application fulfilled to his satisfaction all the requirements set out in Article 12 of the Convention in so far as the matter pertains to grave narcotic drug offences and gross smuggling of goods, and ordered that the applicant be committed to custody pending his extradition to Sweden. Then the applicant was addressed in terms of s.10 of the Extradition of Fugitive Offenders Law 97/70. 5
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The grounds on which this application rests are that the committal Court erred in law; it misdirected itself as to the law applicable; it failed to apply the provisions of ss.9(5) and 13 of the Extradition of Fugitive Offenders Law; it failed to apply the proper criteria and did not exercise the power or jurisdiction vested in it in virtue of Law 97/70, as Law 95/70 only ratified the European Convention but did not provide for any power, jurisdiction or procedure for the making of an extradition order; it did not address its mind whether the evidence was sufficient under the law to commit the applicant to trial for that offence, if it had been committed within the jurisdiction of the Court; the extradition Court disregarded the rights of the applicant enshrined and safeguarded by Art. 30.3(a), (b) and (c) of the Constitution and the provisions of the Criminal Procedure Law for the holding of a Preliminary Inquiry. 15
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Counsel appearing for the respondent in this application contended that ss. 9 and 13 of Law 97/70 are not applicable, as they conflict with the provisions of Art. 12(2) of the Convention and as the evaluation of the "evidence" required for the extradition order is not a procedural but a substantive matter; that Article 22 of the Convention is applicable; that the proceedings in Court are a continuation of the request by the requesting country; that the material required for the making of an extradition order is only the one specifically set out in Article 12(2) of the Convention, and, as the material adduced satisfied 30
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the Judge that it conformed with Article 12(2) of the Convention, the proceedings were valid and the applicant is not entitled to the issue of a habeas corpus.

5 “Extradition” is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, a crime, by the State on whose territory the alleged criminal happens for the time to be.

10 The first point that falls for determination is the law applicable for extradition proceedings in Court.

15 The European Convention on Extradition that came into force on 18.4.1960 was ratified by Sweden and by the Republic of Cyprus. (See the European Convention on Extradition (Ratification) Law, 1970 (Law No. 95/70) and the Chart showing signatures and ratifications of Council of Europe Conventions and Agreements, Council of Europe, Legal Affairs, ISSN 0252-9122-15.11.1982).

20 Treaties, conventions and agreements concluded under a decision of the Council of Ministers and approved by a law made by the House of Representatives, as from their publication in the official Gazette of the Republic have superior force to a municipal law, on condition that such treaties, conventions and agreements are applied by the other party thereto—(Article 169 of the Constitution of the Republic). The European Convention is a multilateral one.

25 The request by the Government of Sweden was made through the diplomatic channel to the Government of Cyprus, in accordance with the European Convention on Extradition.

30 Under Article 2 of the Convention “extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty”. Thus the offence must be punishable under the laws both of the requesting Party and the requested Party. Political, military and fiscal offences are excluded from the application of the Convention.

35 Article 12 provides for the request and supporting documents. It reads:—

"1. The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties.

2. The request shall be supported by: 5

- (a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party; 10
- (b) a statement of the offences for which extradition is requested. The time and place of their commission, their legal description and a reference to the relevant legal provisions shall be set out as accurately as possible; and 15
- (c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality". 20

Article 13 reads:-

"Supplementary information

If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Convention, the latter Party shall request the necessary supplementary information and may fix a time-limit for the receipt thereof". 25

In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought, stating that one of the documents mentioned in Article 12, paragraph 2(a), exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its Law. (See Article 16 of the Convention). 30 35

Article 22 reads:-

“Procedure

5 Except where this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party”.

10 There is no provision whatsoever in the Convention about the procedure to be followed in the country of the requested Party leading to the extradition order. The law providing for the procedure in Cyprus is the Extradition of Fugitive Offenders Law, 1970 (Law No. 97/70).

15 Law 97/70 was modelled on the English Fugitive Offenders Act, 1967. Section 7 provides that the Minister of Justice issues, in pursuance of a request by a State party to a Convention with the Republic or a designated country of the Commonwealth, made to the Minister of Foreign Affairs through the diplomatic representative of the said State, an order which is the authority for the commencement of extradition proceedings.

20 The extradition proceedings are governed by section 9. The material part for this application is subsection (5) which reads as follows:-

25 “(5) Έφ’ ὅσον ἡ ἐξουσιοδότησις διὰ τὴν ἐναρξιν τῆς διαδικασίας τῆς ἐκδόσεως ἤθελε παρασχεθῆ τὸ δὲ ἐπιληφθέν τῆς ἐκδόσεως Δικαστήριον ἤθελεν ἱκανοποιηθῆ, δυνάμει τῶν προσαχθέντων πρὸς ὑποστήριξιν τῆς αἰτήσεως ἐκδόσεως ἀποδεικτικῶν στοιχείων, ἢ τῶν κατ’ αὐτῆς προσαχθέντων τοιούτων, ὅτι τὸ ἀδίκημα εἰς ὃ ἀφορᾷ ἡ τοιαύτη ἐξουσιοδότησις εἶναι ἀδίκημα δι’ ὃ δύναται κατὰ νόμον νὰ χωρίσῃ ἔκδοσις, πρὸς τούτοις δὲ ἱκανοποιηθῆ—

30 (α) ἐν μὲν τῇ περιπτώσει προσώπου διωκομένου διὰ τὴν διάπραξιν τοῦ ἐν λόγῳ ἀδικήματος, ὅτι τὰ προσαχθέντα ἐνώπιον αὐτοῦ ἀποδεικτικὰ στοιχεῖα εἶναι ἐπαρκῆ ὥστε νὰ δικαιολογῶσι τὴν παραπομπὴν αὐτοῦ εἰς δίκην διὰ τὸ ἐν λόγῳ ἀδίκημα, ἐφ’ ὅσον τοῦτο διεπράττετο ἐντὸς τῆς δικαιοδοσίας τοῦ Δικαστηρίου·

35 (β) ἐν δὲ τῇ περιπτώσει προσώπου καταζητουμένου διὰ τὴν ἔκτισιν ποινῆς ἐπιβληθείσης αὐτῷ διὰ τὴν διάπραξιν

τοῦ τοιοῦτου ἀδικήματος, ὅτι τῷ ὄντι κατεδικάσθη
καὶ ὅτι παρανόμως παραμένει ἐλεύθερον,

τὸ Δικαστήριον θέλει διατάξει τὴν προφυλάκισιν αὐτοῦ
μέχρις οὗ χωρήσῃ ἡ ἐκδοσις, ἐκτὸς ἐὰν ἡ ἐκδοσις ἀπαγορεύεται
δυνάμει ἐτέρας τινὸς προνοίας τοῦ παρόντος Νόμου· ἐν ἐνα- 5
ντίᾳ περιπτώσει θέλει διατάξει ὅπως τὸ εἰς ὃ ἀφορᾷ ἡ αἴτησις
ἐκδόσεως πρόσωπον ἀφεθῇ ἐλεύθερον”.

“(5) 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 10
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 15
that offence if it had been committed within the juris-
diction 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, 20

the Court shall, unless his committal is prohibited by any
other provision of this Law, 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 pro-
hibited, the Court shall discharge him from custody”). 25

With regard to the “evidence” referred to in this subsection,
the provisions of s.13, which corresponds to s.11 of the Fugitive
Offenders Act, 1967, should be borne in mind. It reads:—

“13.—(1) Εἰς πᾶσαν διαδικασίαν διεξαγομένην δυνάμει τοῦ
παρόντος Νόμου, περιλαμβανομένης καὶ τῆς διαδικασίας 30
τῆς ἀφορώσης εἰς τὴν αἴτησιν ἐκδόσεως habeas corpus,
ἀναφορικῶς πρὸς κρατούμενον, δυνάμει τοῦ παρόντος Νόμου,
πρόσωπον—

(α) πᾶν, δεόντως κεκρωμένον, ἔγγραφον, φερόμενον ὡς
περιέχον ἔνορκον μαρτυρικὴν κατάθεσιν παρασχεθεῖσαν 35
εἰς Κράτος συνάψαν συνθήκην ἐκδόσεως μετὰ τῆς Δημο-

κρατίας ἢ εἰς καθωρισμένην χώραν τῆς Κοινοπολιτείας, γίνεται ἀποδεκτὸν ὡς ἀποδεικτικὸν στοιχείου τῶν ἐν αὐτῷ ἐκτιθεμένων γεγονότων·

- 5 (β) πᾶν, δεόντως κεκρωμένον ἔγγραφον, φερόμενον ὡς ἔγγραφον ἀποδεικτικὸν στοιχείου ἢ ὡς ἀντίγραφον τοιοῦτου ἔγγράφου κατατεθέντος εἰς οἰανδήποτε δικαστικὴν διαδικασίαν διεξαχθεῖσαν εἰς τὸ τοιοῦτον Κράτος ἢ χώραν, γίνεται ἀποδεκτὸν ὡς ἀποδεικτικὸν στοιχείου·
- 10 (γ) πᾶν, δεόντως κεκρωμένον ἔγγραφον, πιστοποιοῦν ὅτι πρόσωπόν τι κατεδικάσθη κατὰ τὴν καθωρισμένην ἐν τῷ ἔγγράφῳ ἡμερομηνίαν, δι' ἀδίκημα κατὰ τὸ δίκαιον οἰουδήποτε τοιοῦτου Κράτους ἢ χώρας ἢ τμήματος αὐτῶν, γίνεται δεκτὸν ὡς ἀποδεικτικὸν στοιχείου τοῦ γεγονότος καὶ τῆς ἡμερομηνίας τῆς τοιαύτης καταδίκης
- 15 (2) Διὰ τοὺς σκοποὺς τοῦ παρόντος ἄρθρου ἔγγραφόν τι λογίζεται ὡς δεόντως κεκρωμένον τοιοῦτο—
- 20 (α) ἐν τῇ περιπτώσει ἔγγράφου περιέχοντος μαρτυρικὴν κατάθεσιν παρασχεθεῖσαν ὡς ἐν τοῖς ἀνωτέρω, ἐφ' ὅσον ἤθελε πιστοποιηθῆ ὑπὸ δικαστοῦ ἢ λειτουργοῦ τοῦ ὡς εἴρηται Κράτους ἢ χώρας ὅτι τοῦτο εἶναι τὸ πρωτότυπον ἔγγραφον, τὸ περιέχον ἢ ἀναγράφον τὴν τοιαύτην μαρτυρικὴν κατάθεσιν ἢ πιστὸν ἀντίγραφον αὐτοῦ·
- 25 (β) ἐν τῇ περιπτώσει ἔγγράφου ἀποδεικτικοῦ στοιχείου, ἐφ' ὅσον ἤθελε πιστοποιηθῆ ὡς ἐν τοῖς ἀνωτέρω ὅτι εἶναι πρωτότυπον τοῦ οὕτω κατατεθέντος ἔγγράφου ἢ πιστὸν ἀντίγραφόν αὐτοῦ·
- 30 (γ) ἐν τῇ περιπτώσει ἔγγράφου βεβαιούντος τὴν καταδίκην προσώπου, ἐφ' ὅσον τοῦτο ἤθελε πιστοποιηθῆ ὡς ἐν τοῖς ἀνωτέρω,
- 35 καὶ ἐν πάσῃ τοιαύτῃ περιπτώσει τὸ ἔγγραφον κυροῦται εἴτε δι' ἐνόρκου τινὸς μαρτυρίας εἴτε διὰ τῆς ἐπισήμου σφραγίδος Ἐπιουργοῦ τοῦ Κράτους μεθ' οὗ συνήφθη συληθήκη ἐκδόσεως μετὰ τῆς Δημοκρατίας, ἢ, ἀναλόγως τῆς περιπτώσεως, καθωρισμένης χώρας τῆς Κοινοπολιτείας.

(3) Ἐν τῷ παρόντι ἄρθρῳ ὁ ὄρος ἐνόρκος περιλαμβάνει

καὶ ἐπίσημον βεβαίωσιν ἢ δῆλωσιν· οὐδὲν τῶν ἐν τῷ παρόντι
 ἄρθρῳ διαλαμβανόμενων ἀποκλείει τὴν παραδοχὴν οἰουδήποτε
 ἐγγράφου ὡς ἀποδεικτικῶν στοιχείου, ἐφ' ὅσον τὸ τοιοῦτον
 ἐγγραφὸν εἶναι παραδεκτὸν ὡς ἀποδεικτικὸν στοιχείου
 ἀνεξαρτήτως τῶν προνοιῶν τοῦ παρόντος ἄρθρου". 5

("13.—(1) In any proceedings under this Law, including
 proceedings on an application for habeas corpus in respect
 of a person in custody thereunder—

- (a) a document, duly authenticated, which purports to
 set out evidence given on oath in a treaty State or
 designated commonwealth country shall be admissible 10
 as evidence of the matters stated therein;
- (b) a document, duly authenticated, which purports
 to have been received in evidence, or to be a copy
 of a document so received, in any proceedings in any 15
 such State or country shall be admissible in evidence;
- (c) a document, duly authenticated, which certifies that
 a person was convicted on a date specified in the docu-
 ment of an offence against the law of, or of a part
 of, any such State or country shall be admissible as 20
 evidence of the fact and date of the conviction.

(2) A document shall be deemed to be duly authenticated
 for the purposes of this section—

- (a) in the case of a document purporting to set out evidence
 given as aforesaid, if the document purports to be 25
 certified by a judge, or magistrate or officer in or
 of the State or country in question to be the original
 document containing or recording that evidence or
 a true copy of such a document;
- (b) in the case of a document which purports to have 30
 been received in evidence as aforesaid or to be a copy
 of a document so received, if the document purports
 to be certified as aforesaid to have been, or to be a
 true copy of a document which has been, so received;
- (c) in the case of a document which certifies that a person 35

was collected as aforesaid, if the document purports to be certified as aforesaid,

5 and in any such case the document is authenticated either by the oath of a witness or by the official seal of a Minister of the Treaty State or the designated Commonwealth country, as the case may be.

10 (3) In this section 'oath' includes affirmation or declaration; and nothing in this section shall prejudice the admission in evidence of any document which is admissible in evidence apart from this section").

In *Re Manfred Mutke*, (1982) 1 C.L.R. 922, Triantafyllides, P., said at p. 926:-

15 "Law 97/70 has been preceded by the European Convention on Extradition (Ratification) Law, 1970 (Law No. 95/70), but I do not think that there arises, at any rate for the purposes of this case, the issue of whether Law 95/70 and the Convention which was ratified by means of it, are, in any way, in conflict with the relevant provisions of Law 97/70, because in the said Convention it is expressly provided, by means of its Article 22, that 'Except where 20 this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party'.

25 In deciding on the fate of this application for an order of habeas corpus I have to examine, inter alia, whether the procedure prescribed by Law 97/70 has been duly complied with".

30 In that case the Government of the Federal Republic of Germany requested the extradition of the applicant and forwarded to the Government of Cyprus an International Warrant for Arrest issued by the Local Court at Osterode am Harz and setting out, in detail, the offences in respect of which the extradition of the applicant was being requested, and, also, a certificate issued by the aforesaid Local Court regarding the

relevant provisions of the German Criminal Code. As Triantafyllides, P., found that such evidence could not be regarded sufficient to warrant the applicant's trial for the offences concerned, if they "had been committed within the jurisdiction" of the Court of committal, in exercise of the powers of the Court under s. 10 of Law 97/70 as well as under Article 155.4 of the Constitution, he discharged the applicant from custody. 5

I was invited by counsel for the respondents not to follow or apply this decision on two grounds: It is a decision of another Judge of this Court, and, therefore, not binding on me, and it was given *incuriam*. 10

It appears that the doctrine of precedent in its various manifestations operates so as to bind Courts in the lower line of the ladder of hierarchy of Courts. One Judge of the Supreme Court sitting alone is not to be regarded in any way at all as an inferior Court to another Judge, and the judgments of one Judge have only persuasive authority on another Judge of this Court. It is binding on all inferior Courts. (*Republic (Minister of Finance and Another) v. Demetrios Demetriades*, (1977) 3 C.L.R. 213). 15 20

It is not clear from the judgment in the *Mutke* case whether any side advanced any argument on the subject but a decision is not given *per incuriam* because the argument was not fully or carefully formulated or because it is argued on one side only. The Court does its own researches and consults authorities and this may never be mentioned in the judgment. (*Miliangos v. George Frank (Textiles) Ltd.*, [1975] 1 All E.R. 1076, at pp. 1084-1085, where Lord Denning, M.R., dealt with decisions *per incuriam*). 25

In determining the question posed—law applicable—I take into consideration that every treaty in force must be performed by the parties thereto in good faith. (*Pacta sunt servanda*). 30

I have carefully considered the provisions of s.9, and particularly subsection (5) thereof, and the provisions of the Convention, particularly Articles 12 and 22, and I am of the view 35

that there is no conflict whatsoever between the provisions of Law 97/70 and the Convention. The procedure envisaged in Article 12 of the Convention is for the request from one country to another whereas s.9 provides for the proceedings in Court, in Cyprus as the requested country. It is this section which gives jurisdiction and power to the Court to hold these proceedings. Had it not been for the provisions of s.9, the committal Court would have had no jurisdiction at all on the matter. Under s.9(2) the extradition Court has the same jurisdiction and power, as nearly as may be, as a Judge holding a Preliminary Enquiry. The word "δικαίωσις" ("proceedings") in subsection (2) should read "δικαιοδοσία" ("jurisdiction"), otherwise it creates an absurdity.

Section 9(3) provides that the trial is held in the same way, if possible, as if it were a summary trial of an offence. See in this respect the provisions of s.74 of the Criminal Procedure Law, Cap. 155. I need not repeat subsection (5), which is the most vital one for this case, as I had cited it verbatim earlier on in this judgment.

The committal of a person for trial for an indictable offence triable in Cyprus is governed by the relevant provisions of the Criminal Procedure Law, Cap. 155. The Judge holding a Preliminary Inquiry takes the evidence of the witnesses for the prosecution in the presence of the accused, or summary of their evidence; thereafter he affords an opportunity to the accused to make a statement or give evidence; he asks him whether he desires to call witnesses on his own behalf; then the accused or his advocate address the Court, and, after hearing the evidence in defence, the Judge considers whether there are sufficient grounds for committing the accused for trial. The Judge considers the evidence to be sufficient to commit the accused for trial if the evidence against him is such as, if uncontradicted, would raise a probable presumption of his guilt. He has to exercise his discretion under s.94 of the Criminal Procedure Law, Cap. 155.

Law 97/70 contains procedural matters and not substantive law; it regulates the proceedings in Court for the extradition

of a fugitive offender. Its enactment was necessary for the enforcement and performance of international obligations of this country, including the European Convention on Extradition. Article 12 provides for the procedure for a request by one contracting party to another whereas Law 97/70 provides procedure for the performance, inter alia, of this Convention by the local Courts of the country. Therefore, Law 97/70 is the law applicable. 5

Habeas Corpus:

Section 10 preserves any other jurisdiction of the Supreme Court with regard to habeas corpus—under Art. 155.4 of the Constitution and the Common Law—and empowers this Court further to order discharge from custody of the person committed on the further grounds set out therein. 10

The Supreme Court does not hear the case by way of appeal so as to reverse the decision on fact or alter a discretion properly exercised; the function of this Court is not confined to an inquiry whether the committing Judge had jurisdiction to hear and determine the case. 15

In *Schtraks v. Government of Israel*, [1962] 3 All E.R. 529, at p. 533. Lord Reid said:— 20

“The court (the Divisional Court), and on appeal this House, can and must consider whether on the material before the magistrate a reasonable magistrate would have been entitled to commit the accused, but neither a court nor this House can re-try the case so as to substitute its discretion for that of the magistrate. In the first place the court must see what is the offence charged. Next it is necessary to determine whether the material before the magistrate was adequate to justify committal”. 25 30

Re Galwey, [1896] 1 Q.B. 230, at p. 236, is an example of an application for habeas corpus under the Extradition Act. There Lord Russell of Killowen, C.J., said:—

“_____we should, after the order of committal, be entitled to review the magistrate’s decision, not in the sense of enter- 35

5 taining an appeal from it, but in the sense of determining whether there was evidence enough to give him jurisdiction to make the order of committal: I mean evidence of the offence and of other necessary conditions for the application of the Act when the chief magistrate made the order of committal under which the prisoner is now in custody. It seems to me that the only ground on which this habeas corpus can be successfully maintained is that the committal order was made without jurisdiction and was illegal”.

10 In *R. v. Maurer*, [1883] 10 Q.B.D. 513, Mathew, J., said at p. 516:—

15 “There must be such evidence as according to the law of England would justify the magistrate in committing the prisoner for trial if the alleged crime had been committed in England”.

In *Re Arton (No. 1)*, [1896] 1 Q.B. 108, at p. 113, Lord Russell of Killowen, C.J., said:—

20 “..... learned counsel is quite right in saying that the court is entitled, and is indeed bound, to see whether there has been made out such a prima facie case of guilt as would entitle a magistrate to commit in the ordinary case of an offence against the municipal law of this country”.

And in *Re Arton (No. 2)*, [1896] 1 Q.B. 509, at p. 518, he said:—

25 “We are not a Court of Appeal on questions of fact from him. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit”.

30 In *Armah v. Government of Ghana*, [1966] 3 All E.R. 177, three of Their Lordships held that in examining, on an application for a writ of habeas corpus, whether a person is being properly detained, the Court inquires whether the order of the magistrate was one which he had jurisdiction to make. This includes inquiry whether there was any evidence to warrant a decision and, if he acted without any such evidence, the order will be regarded as an order which there was no jurisdiction to

make. The Court inquires whether the magistrate applied the right test and whether there was sufficient evidence.

In *West German Government v. Sotiriadis*, [1974] 1 All E.R. 692, Lord Diplock said:-

“Habeas corpus does not provide a remedy by way of appeal 5
from judicial decisions made within jurisdiction. So, as a general rule, on an application for a writ of habeas corpus to secure the release of a prisoner detained pursuant to an order made by a judicial authority as a result of a 10
judicial hearing, the only question for the High Court, and for this House on appeal from the High Court, is whether or not the judicial authority had jurisdiction to make the order for his detention”.

And further down:-

“The second respect in which the court exercises a wider 15
power in habeas corpus applications brought in extradition cases is not the subject of any express provision in the Act, but is the result of long-established practice which was approved by this House in *Schtraks v. Government of 20
Israel*, [1962] 3 All E.R. 529, and in *Armah v. Government of Ghana*, [1966] 3 All E.R. 177, a case under the Fugitive Offenders Act, 1881. Under this practice, the Court will entertain the question whether there was any evidence before the magistrate to justify the committal and, if it 25
finds that there was none, will order the prisoner to be discharged. Strictly speaking, to commit a person for trial for an offence, when there is no evidence that he committed it, is not to act in excess of jurisdiction, but to err in law, since it must involve a misunderstanding of the legal nature of the offence. Nevertheless, in extradition 30
cases, the courts have assimilated such an error of law to acting in excess of jurisdiction”.

The Court will interfere if it is satisfied that there was no evidence upon which a magistrate, properly directing himself as to the law, could have committed. The evidence, however, 35
must be admissible evidence. (*R. v. Governor of Brixton*

Prison—Ex parte Sirugo, (1967), 4th December, D.C., (unreported), where hearsay evidence was held to be inadmissible for the purposes of testing the sufficiency of evidence). In *Re Miller*, (1978) Q.B.D., (The Times, 25th October, 1978) it was held that rules connected with the refreshing of the memories of witnesses such as the requirement of contemporaneity were merely rules of practice which did not have to be followed in extradition proceedings. They should be distinguished from evidentiary rules of law which magistrates were obliged to apply in all cases. (See *Halsbury's Laws of England*, 4th edition, Annual Abridgment, (1978), paragraph 1312). Cf. *Argento v. Horn*, 241 F.2d 258, 263 (6th Cir. 1957).

In assessing whether there were sufficient facts established to constitute an offence against the law of the requested country, the Court is required to look at the evidence and not to the formal documents required for the request.

An “extradition crime” refers to an act or omission which would have amounted to the commission of an extraditable crime, if it had been committed in Cyprus. (*Re v. Governor of Pentonville Prison, Ex parte Badlong and Another*, [1980] 1 All E.R. 701).

In *R. v. Brixton Prison (Governor), Ex p. Percival*, [1907] 1 K.B. 696, Lord Alverstone, C.J., said at p. 706:—

“... having regard to the fact that we are dealing with the criminal law, we must apply the general principles of the criminal law, and the prosecutor must make out his case. We are also dealing with a branch of the criminal law which affects the liberty of the subject, and that condition should under ordinary circumstances be clearly fulfilled”.

By analogy this extract applies in this case. Extradition proceedings are a very important matter. It deals with a branch of the criminal law. It affects the liberty of the individual and the conditions of the law should be clearly fulfilled. The accused is entitled to his right to be heard in Court as regulated

by the Criminal Procedure Law, sections 74 and 93. The committal Judge has to consider the evidence admissible, oral or documentary admissible under s.13 of Law 97/70. He then has to consider whether such evidence sufficiently raises a probable presumption of guilt of that person. 5

In the present case the proper procedure was not followed. The committal Court erred in law; he misdirected himself. The applicant was deprived of his right of audience in the sense of making a statement or giving evidence and calling witnesses, if he so decided. It is immaterial whether he would call witnesses or not. The fact remains that from the record of the committal Court it is abundantly clear that the Court did not afford such a right to the applicant. The Court did not consider any evidence before it. Due to a misconception of law he did not advert at all to exhibit No. 3, authenticated documents containing some evidence obtained in Sweden and adduced apparently under the provisions of s.13 of Law 97/70. The Court satisfied itself only with the production of the documents, exhibit No. 2, i.e. those envisaged in Article 12(2) of the Convention. The proceedings before the committal Judge are not to be regarded as in the nature of the final trial by which the prisoner could be convicted or acquitted of the crime charged against him but rather of the character of a Preliminary Inquiry which takes place in this country before a committing Court for the purpose of determining whether a case is made out which will justify the committal of the accused to trial on information in which he shall be finally tried. The essence of the test is that the evidence against him is such as, if uncontradicted, would raise a probable presumption of his guilt. The Court used a a wrong test. It did not consider whether the evidence was sufficient to commit the accused to trial if the offence had been committed in this country. 10
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This Court is not a committal Court. It has no power in habeas corpus proceedings to examine exhibit No. 3 and step into the shoes of the committal Court. 35

The order for custody and extradition of the applicant is not valid in law.

Habeas corpus granted. Applicant to be discharged from custody. In the circumstances I make no order for costs.

Habeas corpus granted. No order as to costs.