1984 August 29

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF AN APPLICATION BY
AHMED YOUSEF WEHBE,
FOR AN ORDER OF HABEAS CORPUS.

(Civil Application No. 63/83).

Fugitive Offenders—Extradition proceedings—Committal order—Evidence therefor—Admissibility—Whether it would be "unjust" or "oppressive" in the sense of section 10(3) of the Extradition of Fugitive Offenders Law, 1970 (Law 97/70) to extradite an offender—Principles applicable—Application for habeas corpus refused.

The applicant applied for an order of habeas corpus, under section 10 of the Extradition of Fugitive Offenders Law, 1970 (Law 97/70), challenging a committal order, for the purpose of extraditing him to Denmark, which was made by the District Court of Nicosia on the 17th December, 1983.

The proceedings for the extradition were commenced in April 1983 and the first committal order which was made in this connection on the 3rd May 1983 was quashed by this Court by an order of habeas corpus on the 9th November 1983. Then proceedings for the extradition of the applicant were set in motion again and the committal order which is the subject-matter of the present application was made on the 17th December, 1983.

The offences in respect of which the extradition to Denmark of the applicant was ordered were allegedly committed in 1981 and 1982.

The evidence on which the Court of committal mainly relied was that which was given before the Court in Denmark by three other persons who were the accused in criminal proceedings.

Counsel for the applicant mainly contented that having regard to all the circumstances of the present case it

would be "unjust or oppressive" in the sense of section 10(3) of Law 97/70, to return the applicant to Denmark.

Held, that though the evidence of the said 3 other persons before the Court in Denmark was not given on oath it was given in circumstances of such gravity and solemnity in the course of criminal trials so as to render it possible and proper to treat it, for purposes of extradition proceedings, as evidence given on affirmation or declaration in the sense of sub-sections (1) and (3) of section 13 of Law 97/70; and that, therefore, the Court of committal rightly treated such evidence as being legally admissible under section 13(1)(a) of Law 97/70 and that this evidence was sufficient to warrant the committal of the applicant to custody under section 9(5) of Law 97/70.

(2) *After dealing with the principles governing the question whether it is "unjust" or "oppressive" to extradite an offender—vide pp. 60-65 post:* That whether in a particular case it would be unjust or oppressive to extradite the person concerned is a matter depending on all the circumstances of that case; that in the light of the principles governing the question whether it is "unjust" or "oppressive" to extradite the person concerned and of the time which has elapsed and of the proceedings which have taken place ever since the extradition of the applicant, for offences allegedly committed by him in 1981 and 1982, was first sought in early 1983, as well as of all other relevant considerations, including all the arguments advanced in this respect by counsel for the applicant, it would not be unjust or oppressive to extradite the applicant to Denmark; and that, accordingly, the application must fail.

Application dismissed.

Cases referred to:

In re Hayek (1983) 1 C.L.R. 266;

R. v. *Governor of Pentonville Prison, Ex parte Singh* [1981] 3 All E.R. 23;

R. v. *Governor of Pentonville Prison, Ex parte Passingham* [1982] 3 All E.R. 1012;

Dowse v. *Government of Sweden* [1983] 2 All E.R. 123;

Union of India v. *Manohar Lal Narang* [1977] 2 All E.R. 348 at p. 370;

Kakis v. *Government of the Republic of Cyprus* [1978] 2 All E.R. 634;

Re Tarling [1979] 1 All E.R. 981 at pp. 989, 990.

Application.

Application for an order of habeas corpus by Ahmed Yousef Wehbe following his committal to custody awaiting extradition by the District Court of Nicosia.

E. Efstathiou with *P. Demetriades* and *N. Stylianidou (Miss)*, for the applicant.

M. Kyprianou, Senior Counsel of the Republic with *E. Loizidou (Mrs.)*, for the Republic.

Cur. adv. vult.

TRIANTAFFYLLIDES P. read the following judgment. By means of this application for an order of habeas corbus, which was filed under section 10 of the Extradition of Fugitive Offenders Law, 1970 (Law 97/70), the applicant challenges an order of the District Court of Nicosia, made on the 17th December 1983, by which he was committed to custody under section 9(5) of Law 97/70, for the purpose of being extradited to Denmark.

The matter of the powers of this Court in dealing with an application of this nature has been considered at length in, inter alia, *In re Hayek*, (1983) 1 C.L.R. 266, and need not be dealt with once again in the present instance.

The District Court of Nicosia — which will be referred to hereinafter as the "Court of committal" — found, under section 9(5) of Law 97/70, that there existed evidence sufficient to warrant the trial of the applicant for the offences in respect of which his extradition is being sought, had such offences been committed within the jurisdiction of the Court of committal.

The said offences related to the illegal import in Denmark of narcotics and to conspiracy to effect such import.

The evidence on which the Court of committal mainly relied was that which was given by three other persons who were the accused in criminal proceedings in Denmark, namely Johnny Jensen who was the accused in criminal case No. 35/1982 before the Frederiksberg Court, Mohamed Issa who was the accused in criminal case No. 515/1983 behore the Copenhagen City Court, and Kjeld Guldbrandtsen who was the accused in criminal case No. 634/1983 before, also the Copenhagen City Court.

Their evidence was not given on oath but in circumstances of such gravity and solemnity in the course of criminal trials so as to render it possible and proper to treat it, for purposes of extradition proceedings, as evidence given on affirmation or declaration in the sense of subsections (1) and (3) of section 13 of Law 97/70 (see, too, in this respect, inter alia, *R* v. *Governor of Pentonville Prison, ex parte Singh*, [1981] 3 All E.R. 23, *R.* v. *Governor of Pentonville Prison ex parte Passingham*, [1982] 3 All E.R. 1012 and *Dowse* v. *Government of Sweden*, [1983] 2 All E.R. 123).

In my opinion, therefore, the Court of committal rightly treated such evidence as being legally admissible under section 13(1)(a) of Law 97/70; and I am in agreement with the Court of committal that this evidence was sufficient to warrant the committal of the applicant to custody under section 9(5) of Law 97/70.

I am, moreover, satisfied that the copies of the documents in which there was set out, not only in English translation but also in Danish, the evidence in question and which were produced before the Court of committal and, also, before me, were duly authenticated by the Ministry of Justice in Denmark, in a manner compatible with the aforesaid section 13(1)(a) of Law 97/70.

I agree, too, with the Court of committal that the offences under Danish Law, in respect of which the extradition of the applicant is being sought, constitute offences under our own legislation. It is, indeed, useful

to draw particular attention in this connection to the Joint effect of the relevant provisions of the Narcotic Drugs and Psychotropic Substances Law, 1977 (Law 29/77) and of section 40 of the Customs and Excise Law, 1967 (Law 82/67).

It has been argued by counsel for the applicant that his client has not been properly identified as the person against whom criminal proceedings (case No. 490/1983 before the Copenhagen City Court) were instituted in Denmark and whose extradition is, consequently, being sought. I am, however, of the view, on the totality of the material before me, that this is not a case of mistaken identification and that, indeed, the applicant is the accused in the said criminal proceedings in Denmark.

It has been further sumbitted by counsel for the applicant that having regard to all the circumstances of the present case it would be "unjust or oppressive", in the sense of section 10(3) of Law 97/70, to return the applicant to Denmark:

The proceedings for the extradition of the applicant from Cyprus to Denmark were commenced in April 1983 and the first committal order which was made in this connection on the 3rd May 1983 was quashed by this Court by an order of habeas corpus on the 9th November 1983 (see *In re Wehbe,* (1983) 1 C.L.R. 978).

Then proceedings for the extradition of the applicant were set in motion again and a committal order was made on the 17th December 1983, which is the subject-matter of the present application.

The offences in respect of which the extradition to Denmark of the applicant was ordered on the 17th December 1983 by the Court of committal were allegedly committed in 1981 and 1982.

Whether in a particular case it would be unjust or oppressive to extradite the person concerned is a matter depending on all the circumstances of that case.

In this respect it is useful to point out that the relevant provisions of section 10(3) of Law 97/70 correspond

closely to the provisions of section 8(3) of the Fugitive Offenders Act, 1967, in England.

In relation to the proper application of the said section 8(3) Lord Edmund—Davies said the following in *Union of India* v. *Manohar Lal Narang*, [1977] 2 All E.R. 348 (at p. 370):

> "What, then, is a Divisional Court called on to do when considering an application for the release of a fugitive offender under as 8(3)? In the light of all the circumstances, they have to ask themselves whether it 'appears' to them that (a) the offence is of a trivial nature, or (b) there has been a passage of time since the fugitive is alleged to have committed the offence charged or to have become unlawfully at large, as the case may be, or (c) that the accusation against him is not made in good faith or in the interests of justice. If it does appear to them that the case falls within one or more of the three categories, the Divisional Court have then to decide whether 'by reason' or 'because' (the two are surely synonymous) of the foregoing facts it would be 'unjust or appressive' to return the fugitive. One begins, as Lord Radcliffe said in *Zacharia* v. *Republic of Cyprus* * with a question of law, but what is finally called for is a conclusion of fact. Although it may be said correctly that at the end of their deliberations the Divisional Court have to form an opinion on the matter of injustice or oppression, that is as much a conclusion of fact as is, for example, an opinion or inference, based on primary facts, that in all the relevant circumstances the conduct of a party has been 'reasonable' or 'unreasonable' as the case may be.
>
> Then what course is open if, at the end of their deliberations, a Divisional Court conclude that it would be unjust or oppressive to return the fugitive? Section 8(3) provides that they 'may.... order the person committed to be discharged from custody'. Does that word 'may' leave it open to the court to

* [1962] 2 All E.R. 438 at 446

take any other course? Having concluded that to order the return of the fugitive would be unjust or oppressive, can it really be said that the Divisional Court nevertheless have a discretion to do that very thing? In my judgment, no such discretion exists. Conversely, if no injustice or oppression has been made to appear, the court have no alternative but to make the order sought by the requesting government. Not for the first time in statutory construction, the word 'may' in s 8(3), relating as it does to a man's liberty, has to be treated as equivalent to 'shall': see *Re Shuter* * a case on s 7 of the Fugitive Offenders Act 1881, and the decisions collected in Maxwell on the Interpretation of Statutes". **

Also, in his judgment in the same case Lord Keith said (at p. 378):

"My Lords, the terms of s 10 of the 1881 Act were significantly different from those of s 8(3) of the 1967 Act. They were:

'Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.'

The words 'or otherwise', which do not appear in s 8(3) of the 1967 Act, have been interpreted widely as giving the court an unlimited field for finding grounds on which it would be unjust or oppressive or too severe a punishment to return the fugitive: see *Re*

* [1959] 2 All E.R. 782.

** 12th Edn (1969), p. 281

Naranjan Sign *. In these circumstances the view that the function of the court under s 10 was a discretionary one is understandable, but it is unnecessary to decide whether or not it was correct, for the altered wording of s 8(3) of the 1967 Act, and in particular the omission of the words 'or otherwise', has created a new situation. Three grounds only are specified on one or more of which the court may conclude that it would be unjust or oppressive to return the fugitive. The words 'if it appears to the court that' have the meaning, in my view, that the court must survey the facts and draw an inference, or form an opinion, whether or not it would be unjust or oppressive to return the fugitive. It should approach this task, I think, in the same way as it deals, for example, with questions whether something is reasonable or whether there has been negligence. Once the court has concluded that it would be unjust or oppressive to return the fugitive, I cannot regard the word 'may' as leaving it with any residual discretion. Lord Radcliffe in *Zacharia* v. *Republic of Cyprus*** was clearly right about this. The court must then order the person to be discharged from custody".

In *Kakis* v. *Government of the Republic of Cyprus*, [1978] 2 All E.R. 634, the *Union of India* v. *Narang* case, supra, was applied and referred to with approval. Lord Diplock stated the following (at pp. 638, 639):

> "My Lords, the passage of time to be considered is the time that passed between the date of the offence on 5th April 1973 and the date of the hearing in the Divisional Court on 15th December 1977, for that is the first occasion on which this ground for resisting extradition can be raised by the accused. So one must look at the complete chronology of events that I have summarised above and consider whether the happening of such of those events as would not have happened before the trial of the accused in Cyprus if it had taken place with ordinary

* [1961] 2 All E.R. 565.

** [1962] 2 All E.R. 438 at 446.

promptitude has made it unjust or oppressive that he should be sent back to Cyprus to stand his trial now.

'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. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied on as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of delay due to such causes are of his own choice and making. Save in most exceptional circumstances it would be neither unjust nor oppresive that he should be required to accept them.

As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promtitude. So where the application for discharge under s 8(3) is based on the 'passage of time' under para (b) and not on absence of good faith under para (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise".

Also, in the same case Lord Russell of Killowen said (at p. 641):

"I would only add this comment on s. 8(3) (b) of

the 1967 Act. It is not merely a question whether the length of the time passed would make it unjust or oppressive to return the fugitive. Regard must be had to all the circumstances. Those circumstances are not restricted to circumstances from which the passage of time resulted. They include circumstances taking place during the passage of time which may (as I think here) give to the particular passage of time a quality or significance leading to a conclusion that return would be unjust or oppressive".

Lastly, in that same case Lord Scarman said (at p. 645):

It is not permissible, in my judgment, to consider the passage of time divorced from the course of events which it allows to develop. For the purposes of this jurisdiction, time is not an abstraction but the necessary cradle of events, the impact of which on the applicant has to be assessed".

The *Kakis* case, supra, was followed later in the case of *Re Tarling*, [1979] 1 All E.R. 981, 989, 990.

In the light of the foregoing dicta and of the time which has elapsed and of the proceedings which have taken place ever since the extradition of the applicant, for offences allegedly committed by him in 1981 and 1982, was first sought in early 1983, as well as of all other relevant considerations, including all the arguments advanced in this respect by counsel for the applicant, I am not prepared to hold that it would be unjust or oppressive to extradite the applicant to Denmark.

Before concluding this judgment I should point out that the fact that the applicant, after having been rearrested on the 9th November 1983, was taken on the 10th November 1983 before another Judge of the District Court of Nicosia who, on the 12th November 1983, ordered his release from custody, did not prevent the making of the committal order which is challenged in the present proceedings, because the said order was made under section 9(5) of Law 97/70, whereas the earlier proceedings before another Judge of the District Court of Nicosia

were obviously conducted under section 9(4) of Law 97/70.

In the light of all the foregoing the present application has to be dismissed.

There will not be made any order as to the costs of these proceedings.

Application dismissed with no order as to costs.