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Mr. Ian Ramsay Q.C. for applicant
Mr. R. Ground for respondent

This is an application for a writ of habeas corpus ad subjiciendum to secure the liberty of the applicant who was apprehended by warrant and held in custody purportedly under section 8 of the Extradition Act 1870 pursuant to the United States of America (Extradition) Order 1976.

The applicant came to these Islands on 15th February 1983 and was arrested on the 23rd March 1983 on controlled drug related charges alleged to have been committed in these Islands. On 6th April 1983 he was granted bail on terms he was unable to meet and remained in custody. On 8th April 1983 the United States Justice Department, through the Legal Department of the Cayman Islands, obtained a warrant under section 8 (2) of the Extradition Act. The basis for the issue of the warrant was that the appellant was accused of controlled drug related offences (being extraditable offences) in the state of Florida in the United States of America. The regularity of the issue of that warrant is not challenged in any way.

On 4th May 1983 the controlled drug related charges in

relation to this jurisdiction were dropped. The applicant was thereupon arrested under the warrant of 8th April 1983 and detained. The following day, 5th May, he was brought before the learned Magistrate, Mr. Kipling Douglas, for remand and to fix a time pursuant to the last paragraph of section 8 of the Extradition Act which reads:

"A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that requisition has been made for the surrender of such criminal."

It is alleged in the applicant's affidavit, and not challenged, that at this hearing the Magistrate expressed the view that, having regard to the length of time since the warrant was issued, during which the United States Justice Department had knowledge of the required papers and had time to prepare them, 14 days was a reasonable time to allow pursuant to the last paragraph of section 8 and, accordingly, set the date 20th May 1983 as the date by which he should receive an order signifying that a requisition had been made.

On the 20th May the applicant appeared before the learned acting Magistrate, Mrs. Allen. Mr. Douglas was at the time acting as Chief Justice. The acting Magistrate heard Crown Counsel, who was acting for the United States Justice Department and applying for an extension of the time fixed, and counsel for the applicant opposing the application. She thereupon extended the time until 25 May 1983. Apparently she expressed the view that as the applicant had been in custody for a period prior to the execution of the warrant that that time should count against the time to be allowed to the United States Justice Department to make a formal request.

On the 23rd May Crown Counsel received a further diplomatic note from the Embassy of the United States in Kingston via the British High Commissioner in Kingston. It is dated 19th May 1983 and is exhibited to the applicant's affidavit. In brief it asserts

that the United States authorities were pursuing the request for extradition and were making every effort to provide the requisite documents as far in advance of what it termed the "deadline (June 17)" as possible. The deadline was a period of 45 days after the execution of the warrant and the diplomatic note assumed that the United States authorities were entitled to that period for that purpose. That assumption was no doubt based on Article VIII of the Treaty with the United Kingdom concluded 8th June 1972 and embodied in the United States of America (Extradition) Order 1976. That was a false assumption as will appear later. That Article reads as follows:

"ARTICLE VIII

(1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party. The application shall contain an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a conviction against that person, and, if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offence been committed, or the person sought been convicted, in the territory of the requested Party.

(2) A person arrested upon such an application shall be set at liberty upon the expiration of forty-five days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of the person sought if a request is subsequently received."

On the 25th May the applicant again appeared before the acting Magistrate. No order had been received as signifying that requisition had been made. At this meeting the diplomatic note was tendered. There was no doubt an application for an extension of time and argument on both sides although the affidavits are silent on this.

One can digress here and remark that in proceedings of this nature, as in routine applications for bail and remands, the Magistrate determining the question can require evidence before making a determination and will do so where there is a dispute on important questions of fact. More often than not, however, the matter is determined on representation made from the Bar, there being no dispute as to the facts, the issue being e.g. whether it is reasonable or lawful to make the order.

That would appear to have been the position here.

At the hearing on 25th May it would appear that the learned acting Magistrate said that she took the note as an indication that the United States authorities had not let the matter go to sleep. She also said that they were entitled to rely on 45 days from the date of arrest. She thereupon extended the period for the receipt of the formal request to a period of 45 days, ending on 17th June 1983. The learned acting Magistrate simply made the order. It was not a reasoned judgment.

Since then there have been remands at 8 day intervals.

There is authority for the extension of the period in the House of Lords case *Government of the Federal Republic of Germany v. Sotiriadis and Anor.* 1975 AC 1. At page 25 Lord Diplock said:

"Secondly, when a person apprehended on a provisional warrant is brought before a metropolitan magistrate, the magistrate is required by the last paragraph of section 8 to discharge the prisoner unless "... within such reasonable time as, with reference to the circumstances of the case, he may fix, ..." he receives from the Secretary of State an order signifying that a requisition has been made for the surrender of the prisoner. Under this paragraph the magistrate is bound to fix a date by which the order must be received although, no doubt, he has power also to extend it from time to time if he considers that the circumstances justify his doing so."

And at page 29 he said:

"(1) When the prisoner is first brought before him, the metropolitan magistrate should fix a date on which the prisoner is to be discharged unless the magistrate has by that date received an order of the Secretary of State signifying that a requisition for the surrender of the prisoner has been made. He may extend this date at a subsequent hearing if he considers that the circumstances justify this course."

On first principles that power must exist subject to any express or implied provision to the contrary.

The position is, therefore, that a Magistrate must fix a period pursuant to the last paragraph of section 8. That period must be a reasonable one "with reference to the circumstances of the case". Until that period (having been extended if the circumstances justify extension) expires it is lawful, by warrant, to detain the person initially apprehended under section 8(2). The

authority to detain stems from the warrant issued under section 8 (2) (which has not been challenged here) and, once it has been executed, continues during the period fixed by the Magistrate provided that period is a reasonable one in the circumstances. The intervening remands are formalities to comply with the law requiring the prisoner to be brought up at intervals not exceeding 8 days.

So the real issue in this matter is whether the period fixed, as extended, was reasonable "with reference to the circumstances of the case". It is the decision or order (or orders) extending that period that should be attacked. It was clearly within the jurisdiction of the acting Magistrate to make the order. This is important because an application for a writ of habeas corpus is not the proper vehicle for reviewing decisions of inferior courts acting within the scope of their jurisdiction. The writ will not be granted where the effect of it would be to question the decision of an inferior court or tribunal on a matter within its jurisdiction - Halsbury's Laws of England 4th Ed. Vol. 11 para. 1473; R. v. Commanding Officer of Morn Hill Camp, ex Parte Ferguson 1917 1 KB 176. The facts of that case are very different from this one but the principle is clear. It was held that a writ of habeas corpus would not lie to question the decision of the Magistrate. At p. 179 Lord Reading C.J. said:

"In this case the magistrate has held that the prosecutor was "for the time being ordinarily resident in Great Britain" within the meaning of s. 1 of the Military Service Act, 1916 (Session 2). The prosecutor has sought to question that decision by means of a writ of habeas corpus. If the jurisdiction exercised by the magistrate is a jurisdiction which has been conferred upon him by the statute, then, notwithstanding that he may have come to a wrong decision on the facts or upon the law, it is clear that his decision cannot be questioned by this procedure."

And at p. 180 he observed that the principles applicable in cases of certiorari apply in the case of habeas corpus.

The exception to this general principle is to be found in cases where there has been a committal by a magistrate under the Extradition Act. In such cases it is well established that on an

application for a writ of habeas corpus a court is entitled to review the decision of the Magistrate where it is contended that there was not sufficient evidence upon which he could make a committal order or if it appeared that he applied the wrong test in coming to his decision - R. v. Director of Prisons and Director of Public Prosecutions ex parte Morally 1975 24 W.I.R. 355. That stage has not been reached in this matter.

That should be sufficient to dispose of this case but it might be helpful if other aspects were dealt with.

The main thrust of the argument by learned counsel for the applicant centred on the observation by the acting Magistrate at the hearing on 25th May that the United States authorities were entitled to rely upon 45 days from the date of arrest. Let it be said straight away that that is a wrong view of the law.

It was contended that that went to the root of the case; that the learned acting Magistrate acted on an entirely false premise and therefore acted in excess of her powers. It was contended that she was, therefore, acting ultra vires because she had no power to make the order on that basis. It was submitted that her powers were governed by the Extradition Act, in particular section 8, which enjoined her to set a reasonable period and that she should have had no regard whatever to the treaty or article VIII thereof. Ordinarily, of course, an enactment cannot be affected by a treaty - In the matter of Elsie Counhaye 1873 8 Q.B. 410. However, different considerations apply here.

Section 2 of the Extradition Act provides, in part, as follows:

"2. Where Arrangement for surrender of criminals made,
Order in Council to apply Act.

Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

Her Majesty may, by the same or any subsequent order,

limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in part of Her Majesty's dominions specified in the order and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement."

It is clear therefore that the arrangement or treaty is recited or embodied in the Order in Council. That is the position in the United States of America (Extradition) Order 1976. The treaty constitutes part of the Order and cannot be ignored. It is clear from section 2 that the Order may limit its operation and render its operation "subject to such conditions, exceptions and qualifications as may be deemed expedient". This is reflected in the case of Government of the Federal Republic of Germany v. Sotiriadis and Anor (ibid) at p.21 where Lord Diplock said:

"My Lords, the Extradition Act 1870, though it states what constitutes sufficient evidence to justify committing a fugitive criminal to prison await surrender to the government of the foreign state within whose jurisdiction he is accused of having committed an extradition crime, does not itself fix any time limit within which such evidence must be produced. Section 2, however, provides that an Order in Council directing that the Act shall apply in the case of a foreign state with which an extradition treaty has been made may render the operation of the Act subject to such conditions, exceptions and qualifications as may be deemed expedient. Conditions, exceptions and qualifications introduced by Order in Council may add to the restrictions on the surrender of fugitive criminals in the Act itself, but section 8 prohibits any subtraction from them.

The Federal Republic of Germany (Extradition) Order 1960 provides [article 2] that the Extradition Act 1870 shall apply "under and in accordance with" the extradition treaty set out in Schedule 2. So it is ^{to} the treaty that one must look in the first instance to discover what, upon its true construction, is the additional restriction upon the surrender of the respondent that article XII provides."

Section 3 of United States of America (Extradition) Order 1976 provides:

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"The Extradition Acts 1870¹, as amended or extended by any subsequent enactment, shall apply in the case of the United States of America in accordance with the said Treaty of the 8th June 1972." Emphasis added.

It follows that the Extradition Act must be construed subject to any conditions, exceptions and qualifications in the treaty. The treaty cannot enlarge the scope of section 8 of the Extradition Act but it can restrict its scope. Article VIII (2) is such a restriction. It restricts the maximum time which can be fixed under section 8 of the Extradition Act to 45 days from the date of arrest.

The Magistrate can and, indeed, must look at the treaty for any conditions, exceptions and qualifications in this treaty to see if they restrict the scope of section 8 or any other provision of the Extradition Act. But the Magistrate is obliged to fix a reasonable time. If a reasonable time is, say, 30 days then that is the time that should be fixed. The United States Authorities are not entitled to any more by reason of the treaty. If a reasonable time happens to be, say, 60 days then that is curtailed by the treaty to 45 days and any period fixed in excess of 45 days would be ultra vires.

was correct

And so the learned acting Magistrate in having regard to the limit of 45 days. Where she was wrong, with respect, was in observing that the United States authorities were entitled to that period in any event. They were only entitled to that period if a period of 45 days (or a longer period) was a reasonable time in the circumstances.

As observed earlier, that observation was not part of a reasoned judgment. Judges and magistrates often make observations in the course of a hearing which are inaccurate. It is apparent from her observations at the hearing on 20 May that she did not feel obliged to give the full 45 day period. In the absence of reasons for decision, or an affidavit from her, it is impossible for this court to interpret accurately the basis for her decision. This court cannot merely seize on an observation embodied in an affidavit to impugn its basis. There is nothing to suggest that she lost sight of her prime duty, namely, to fix a reasonable time. And, if she did, an application for a writ of habeas corpus is not the appropriate vehicle for attacking her decision on that aspect, namely, whether 45 days in the circumstances of this case

was reasonable. While that decision had effect, i. e. during the 45 day period, the detention of the applicant on a warrant was lawful.

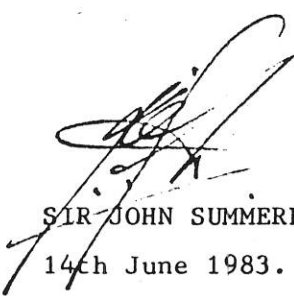
At my request counsel made submissions on the question of whether an appeal lay from the decision of the learned acting Magistrate's fixing the 45 day period, thus ousting an application for a writ of habeas corpus. The question was whether an appeal lay under section 156 of the Criminal Procedure Code, if this is a criminal cause or matter, or otherwise, including by way of an application for a writ of certiorari to quash the order extending the period to 45 days. If the order were quashed then release would be automatic under the last paragraph of section 8 of the Extradition Act.

As it turns out I do not have to decide this question and it would seem to me to be inappropriate to make any pronouncement by way of obiter dicta. I need only remark that if an alternative process is the proper way to move this court then the record would have been different and the approach of this court would have been governed by the process adopted. For example, had the applicant moved for an order of certiorari to bring up and quash the May 25th order of the acting Magistrate one would have been concerned primarily with whether an error appears on the face of the proceedings. Other grounds on which an application for an order of certiorari would appear to have no application to this case. It is difficult to see how jurisdiction could be impugned and there is no suggestion of a breach of the rules of natural justice. None of the other grounds could be applicable. It is not a case of excess of jurisdiction. There was jurisdiction to fix a period up to 45 days. Whether there was an incorrect application of the law must appear from the record. Where certiorari is sought on the ground of error of law on the face of the record the court will not admit any extraneous evidence: the error must appear from the record itself - Halsbury (ibid) paragraph 1559. The application to this court would, therefore, have taken an altogether form.

Had there been an appeal under section 156 of the Criminal

Procedure Code, assuming one lay, then again the form would have been different whether the appeal was by way of motion or case stated. In that event, it may be significant that in none of the grounds of complaint set out in the applicant's affidavit is it averred that the period fixed by the acting Magistrate was unreasonable.

As it is, for the reasons given earlier, the application is dismissed.



SIR JOHN SUMMERFIELD

14th June 1983.