In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: 27

PAUL DOUGLAS MARTIN

Applicant/
Appellant

-v-

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent

RULING
(Leave to Appeal to Privy Council)

Application for leave to Appeal to the Judicial Committee of the Privy Council from an Appeal upholding an Order of Extradition in the Magistrates' Court- Section 114 of the Extradition Act 2003 (Overseas Territories) Order 2016 – "Most exceptional circumstances" where there is culpable delay under s.82 Passage of Time provision - (whether extradition would be unjust or oppressive)

Date of Hearing: 09 October 2020
Date of Judgment: 19 October 2020

Appellant Ms. Susan Mulligan, Christopher's
Respondent Mr. Alan Richardson for the Director of Public Prosecutions

RULING delivered by S. Subair Williams J

Introduction

1. This is an application for leave to appeal to the Judicial Committee of the Privy Council against my 27 February 2020 judgment on appeal confirming the order of extradition against Mr. Paul Martin made by Magistrate Craig Attridge on 15 August 2019 sitting in a Court of first instance.
2. The background facts, which need not be rehearsed in any great detail, are more fully stated in my judgment of 27 February 2020.

3. Mr. Martin's application for leave to appeal is made under section 114 of the Extradition Act 2003 (Overseas Territories) Order 2016 ("the 2003 Act") which provides:

"*Appeal to Judicial Committee*

114. – (1) An appeal lies to the Judicial Committee from a decision of the Supreme Court on an appeal under section 103, 105, 108 or 110.

(2) An appeal under this section lies at the instance of –

(a) the person whose extradition is requested;

(b) a person acting on behalf of the extradition territory.

(3) An appeal under this section lies only with the leave of the Supreme Court or the Judicial Committee.

(4) Leave to appeal under this section must not be granted unless-

(a) the Supreme Court has certified that there is a point of law of general public importance involved in the decision, and

(b) it appears to the court granting leave that the point is one which ought to be considered by the Judicial Committee.

(5) An application to the Supreme Court for leave to appeal under this section must be made before the end of the permitted period, which is 14 days starting with the day on which the court makes its decision on appeal to it.

(6) An application to the Judicial Committee for leave to appeal under this section must be made before the end of the permitted period, which is 14 days starting with the day on which the court makes its decision on the appeal to it.

(7) If leave to appeal under this section is granted…."

The Notice of Application for Leave to Appeal

4. On 11 March 2020 a Notice of Application for Leave to Appeal was filed on behalf of Mr. Martin. Therein the Applicant seeks a certification from this Court that the following two questions state points of law of general importance which ought to be considered by the Judicial Committee:

   "***Question 1***:

   Does Gomes v Government of Trinidad and Tobago; Goodyer v Government of Trinidad and Tobago [2009] 3 ALL ER 549 prevent, in all cases where the person sought is unlawfully at large, the hearing Court from considering whether his extradition would be unjust or oppressive by reason, in whole or in part, of the requesting State failing to take appropriate steps to seek his extradition.

   Question 2:

   In the alternative, should Gomes v Government of Trinidad and Tobago; Goodyer v Government of Trinidad and Tobago [2009] 3 ALL ER 549 be reconsidered now that it is apparent that the effect of its strict application by the Courts below effectively amends the Act to prevent persons who are unlawfully at large from relying on the passage of time as a potential bar to extradition, save and except in one special circumstance – where the State has expressly led them to believe they were no longer wanted (in effect, in cases where the individual is no longer "unlawfully at large" because he would be able to rely on officially induced error to explain his absence from the requesting jurisdiction)."

5. The following passages are lifted from the Notice of Application for Leave [pages 3-5]:

   "*ISSUES BEFORE THE COURTS BELOW*

   Whilst several points were argued before the Magistrate's Court and subsequently raised as grounds of appeal in the Supreme Court, the central issue revolved around the delay by the Requesting State (Respondent) to seek the Applicant's extradition from Bermuda.

   Both the Learned Magistrate and the Learned Justice of the Supreme Court concluded, based on the authority of Gomes v Government of Trinidad and Tobago; Goodyer v Government of Trinidad and Tobago [2009] 3 ALL ER 549, citing with approval the decision of Lord Diplock in Kakis v Government of Republic of Cyprus [1978] 2 ALL ER 634. Although Lord-Edmund Davies [Lord Edmund-Davies] and Lord Keith of Kinkel dissenting in Kakis, were both unable to concur with Lord Dipock's opinion that the question of responsibility for the delay in seeking extradition of an individual form [from] another jurisdiction was never relevant to the question of whether an order of extradition

may be unjust or oppressive, it was Lord Diplock's reasoning in Kakis that the House of Lords preferred in Gomes.

The decision of the House of Lords, in Gomes, supra, was held by both the Learned Magistrate and Learned Justice of the Supreme Court of Bermuda to be binding authority that no one who deliberately flees the jurisdiction of the Requesting State, save in the most exceptional circumstances such as where the Requesting State has expressly led the individual to believe he was no longer wanted, can rely on the conduct of Requesting State, in whole or in part, to argue that the passage of time would result in his extradition being unjust or oppressive.

In the Applicant's case, as Mrs. Justice Subair Williams set out in her careful reasons, the Requesting State knew he had returned to Bermuda in January 2007, and the unchallenged evidence before the Court was that the Applicant had lived under his own name and made no attempts to evade authorities or hide himself after entering Bermuda. The request to extradite the Applicant to serve the sentence of 1-3 years imprisonment imposed in his absence was nevertheless not made until 25 May 2018, resulting in a delay of over 11 years. Even if due to extreme inefficiency, Mrs. Justice Subair Williams held, relying on Gomes, that the Requesting State's conduct could have no bearing on issues of delay, fairness and oppression, notwithstanding the unique facts of this case.

Mrs. Justice Subair Williams wrote, at page 20 of her Judgment denying the Applicant's appeal:

"However, applying the approach stated by the House of Lords in the Gomes and Goodyer case in favour of Lord Diplock's ratio in the Kakis case: As a starting point it matters not whether the US authorities were slow-paced in their investigation, even if it was to the point of extreme inefficiency. In circumstances such as the present case, a fugitive offender who deliberately fled the jurisdiction of the requesting state is in no position to later shield his culpability by pointing to the inadequacies of the extradition process.

Mr. Martin, undeniably on the evidence before the magistrate, absconded from the US to avoid his pending sentence. So, it is hardly open to him to now suggest that the US authorities should share in his responsibility for the ensuing delay, notwithstanding any fair criticism that they delayed in locating the Appellant since January 2007 when it was confirmed that he entered Bermuda. The chain of causation, in my judgment, is unbroken. It was he, Mr. Martin, that authored the 13 year delay which has lapsed since he first fled the US in breach of his bail conditions."

PROPOSED GROUNDS OF APPEAL

We respectfully submit that the decision in ***Gomes****, if read and applied as it has been by* [the] *Learned Magistrate and* [the] *Supreme Court Justice in* [the] *Applicant's case, effectively amends section 82 of the* ***Extradition Act 2003****, [The Act"] and that is a function reserved only for Parliament.*

Section 82 of The Act reads:

> *A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have-committed the extradition offence or since he is alleged to have become* ***unlawfully at large*** *(as the case may be). [****Emphasis added****]*

*Section 82 of the Act presupposes that the passage of time may in fact bar extradition of persons who hav become "unlawfully at large." In order for an individual to be at large "****unlawfully****" he must, at minimum, have knowledge that he is lawfully bound to be in another jurisdiction whether it be to answer bail, stand trial, be sentenced, or serve a lawfully imposed sentence.*

We, therefore, submit that the House of Lords in ***Gomes*** *must not have intended, despite the strong language used in that decision, to preclude Courts from examining and considering all facts relevant to the passage of time to determine whether an extradition would be unjust or oppressive, notwithstanding that the individual may have purposely absented himself from the Requesting State. If the passage of time, which may have been contributed to by actions of the Requesting State entirely outside of the individual's control, are irrelevant not only are the lower Courts prevented from considering all issues contemplated by the Act, but also the words "unlawfully at large" will have been effectively Judicially deleted from this Section of the Act.*

It is respectfully submitted that the House of Lords could not have intended Gomes to be read and applied in this way. It is true that, in some cases, the actions of the individual sought may rightfully precluded him from relying on Section 82 as a bar to his extradition. Such circumstances may arise where the individual has fled to a country where he has no ties, lives thereafter under an assumed name and perhaps even alters his appearance. These types of actions would clearly, we submit, prevent an individual from claiming his extradition would be unjust or oppressive due to the inability, entirely of his own making, of the Requesting State to locate him and request his extradition earlier.

On the other hand, an individual who fled over a decade ago out of fear or perhaps a misunderstanding of the process but was in a location known to the requesting state [Requesting State], *using his own name, and not attempting to hide himself may be the type of case where the Court, we submit ought to at least be able to consider the passage of time and the culpability of the Requesting State in causing any delay.*

We say this is particularly so, in the Applicant's case, because the unchallenged evidence is that he always intended to try to address his legal matter in New York but for a very long time did not have the means to instruct counsel. As time went on, having lived and worked under his own name in Bermuda for over a decade, he reasonably believed the authorities in New York were not interested in him any longer. Whilst the injuries suffered by the complainant, arising from this traffic accident were significant it is, we submit, somewhat unusual for a request for extradition to be made in this type of case, let alone a request after 11 years have passed. The need for justice to be served by having the Applicant spend 1-3 years in prison at this point in time, we submit must be weighed or balanced against the failure of the Requesting State to take any reasonable steps to seek his extradition in over 10 years.

We respectfully submit that the Courts below, considering the Applicant's extradition, ought to have been entitled, notwithstanding ***Gomes****, to consider whether due to the passage of time and the failure to* [of the] *Requesting State to act with reasonable diligence in the circumstances of his case, it would be unjust or oppressive to extradite the Applicant. All factors including the failure of the Requesting authorities to act with reasonable diligence may have a bearing on whether it would be unjust and oppressive to forcibly remove the Applicant from his own country, transport him in custody to another jurisdiction at this later stage in his life, bearing in mind he has no effective routes of appeal in the other jurisdiction, to serve a 1-3 year prison sentence imposed in his absence now over 13 years ago.*

We therefore seek leave to appeal to the Judicial Committee of the Privy Council."

The Respondent's Objections to the Application for Leave to Appeal

6. In opposing the application for leave to appeal, the Respondent argued, *inter alia*, on the written submissions of Mr. Richards [paras 5-11]:

*"**Point of Law of General Public Importance***

5. It will be noted from the Report of the (unanimous) Appellate Committee of the House of Lords in Gomes and Goodyear v Trinidad and Tobago [2009] UKHL 21, that the point

of law that arose for decision in that case arose from a divergence in the approach of different constitutions of the intermediate appellate court (i.e. Divisional Courts of the Queen's Bench Division of the High Court) in the interpretation and application of the House of Lords' earlier decision holding in Kakis [1978] 1 WLR 779.

6. The Divisional Court which hear Gomes "thought it relevant not only that both appellants were alleged to have fled Trinidad in breach of their bail conditions but also that Trinidad itself was thereafter guilty of culpable delay in seeking their extradition" (see para. 5). It therefore remitted the matter for further consideration by the District Judge.

7. While Gomes was being reheard, another Divisional Court, in Krzyzowski v Poland [2007] EWHC 2754 (Admin) "decided that the views expressed by the Divisional Court in [Gomes] were inconsistent with Kakis and wrong and that the district judge in Krzyzowski had been right to hold that once the suspect had been found guilty of deliberate flight he could not rely on the passage of time save in the most exceptional circumstances."

8. Thus the certified point of law of general public importance in Gomes was as set out in paragraph 9. Essentially it asked which Division Court judgment (Gomes or Krzyzowski) was correct? The House of Lords clearly and unequivocally answered that question (para 29):

> *"We are accordingly in no doubt that it is Krzyzowski, rather than the Divisional Court's judgment in the present case, which correctly states the law on the passage of time bar to extradition. The rule contained in Diplock para 1 should be strictly adhered to. As the rule itself recognises, of course, there may be "most exceptional circumstances" in which, despite the accused's responsibility for the delay, the court will nevertheless find the section 82 bar established….In the great majority of cases where the accused has sought to escape justice, however, he will be unable to rely upon the risk of prejudice to his trial or a change in his circumstances, brought about by the passing years, to defeat his extradition."*

9. It is accept [accepted] that a point of law of general public importance cannot only arise when there has been judicial disagreement similar to that which the House of Lords had to resolve in Gomes, but this situation demonstrates the kind of significant and purely legal controversy that the requirement for certification is surely designed to ensure may reach the ultimate appellate forum.

10. The decision in this case involves and has resulted from the application of the now settled principles of law expounded in Kakis and reaffirmed in Gomes to the particular facts of this case. Both the learned Magistrate and this Court have found that, for reasons

which they have explained, the circumstances of this case do not fall into the small minority of "most exceptional circumstances" that would justify a departure from the general rule articulated in what Lord Brown of Eaton-under-Heywood calls 'Diplock para. 1' (see para. 19 of Gomes). None of this amounts, in effect, to an amendment of the legislation, as the Applicant contends. The case law merely elucidates the statutory "unjust or oppressive" standard and guides its application.

11. The decision in this case does not, therefore, involve a point of law of general public importance. The relevant law is settled and the application of it to the facts of this case, though important to the Applicant, is not of general public importance. The questions proposed by the Applicant should accordingly not be certified. If the Court agrees with the Respondent in that regard, it need not go no further; leave to appeal to the JPC must be refused."

7. Mr. Richards further submitted on both his written and oral arguments that the Court should consider the general public importance aspect of the law separately from the question as to whether the matter ought to be considered by the Judicial Committee. Thus, he contended, I could very well find that the Applicant established the former without satisfying this Court on the latter part of the test.

Analysis and Decision

8. This Court was not concerned with an Appellant who departed from the US due to his misunderstanding of the process. The evidence in this case was clear and unchallenged. Mr. Martin fled the US, having been convicted upon his guilty plea for offences arising out of a road traffic collision where he seriously injured Mr. Christine Dobson who was then 18 years of age. He absconded from the US, thereby abruptly terminating his employment in October 2006, to escape the penalty of his sentence in criminal proceedings.

9. Ms. Mulligan in bringing an application under section 82 argued throughout these proceedings that Mr. Martin should not be held culpable for the US Authorities' delay in pursuing extradition proceedings because it was known as far back as 8 January 2007 that Mr. Martin had entered Bermuda. Mr. Martin deposed that the subsequent inaction on the part of the Respondent caused him to believe that the criminal proceedings had come to an end and that no further steps would be taken against him. In other words, Mr. Martin felt that he had successfully bypassed the burden and responsibility of those criminal proceedings because a significant period of time had lapsed since his escape.

10. Mr. Martin also sought to persuade this Court that it would be unjust and/or oppressive for him to face his criminal liability in the US by pointing to the increase in his age and his un-particularised mobility challenges. His added that he is a Bermudian national and resident

who has no ties to persons living in the US, notwithstanding his previous period of US residency. Further, and with much emphasis, the Applicant's Counsel reminded this Court that although Mr. Martin deliberately fled the US, he has been living in plain sight in Bermuda since his return in 2006.

11. This is a broad summary of the circumstances relied on in support of the Applicant's submission that it would be unfair and/or oppressive to extradite him.

12. The House of Lords judgment delivered by Lord Brown of Eaton-under-Heywood in the conjoined appeal cases of *Gomes v Government of Trinidad and Tobago* and *Goodyer v Government of Trinidad and Tobago* [2009] 3 ALL ER 549 was unanimously decided. This settled the law to be applied under section 82 of the 2003 Act. Thus, this Court was not burdened with the need to resolve any earlier conflicts on the law arising between the Divisional Courts where Sedley LJ delivered the High Court decision in *Gomes and Goodyear v Trinidad and Tobago* [2007] EWHC 2012 Admin [17] and where Moses LJ handed down the decision in *Government of the United States of America v Tollman and another* [2008] EWHC 184 (Admin).

13. In settling the question of how section 82 is to be interpreted, Lord Brown of Eaton-under-Heywood approvingly referred to an earlier decision of the House in *Kakis v Government of Republic of Cyprus* [1978] 2 ALL ER 634. In *Kakis* Lord Diplock clarified the meaning of the terms 'unjust' and 'oppression'. While the decision of the House in *Kakis* was not unanimous, the subsequent decision of the House of Lords in *Gomes* was indeed unanimous. It is on this basis that this Court accepted that the House of Lords unanimously approved Lord Diplock's holdings on the statutory terms 'unjust' and 'oppression'. This is because in *Gomes* the House of Lords unanimously and more recently approved Lord Diplock's judgment in *Kakis*. For this reason, this Court was not disconcerted by the dissenting judgments of Lord-Edmund Davies or Lord Keith of Kinkel.

14. In *Kakis* Lord Diplock held [pages 638-639]:

"*"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 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 the most exceptional circumstances it would be neither unjust nor oppressive 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 promptitude. So where the application for discharge under s8(3) is based upon 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. Your Lordships have no occasion to do so in the instant case."

15. There is no merit to any suggestion that culpable delay was held by Lord Diplock in *Kakis* or by the House of Lords in *Gomes* to present an absolute prohibition from relief under section 82. The correct position, as stated in the earlier judgment of this Court and in the first instance judgment of Magistrate Attridge is that the most exceptional of circumstances would be required to permit an offender to avail him or herself of section 82 in circumstances where he or she has culpably absconded the jurisdiction of the Requesting State. As helpfully pointed out by Mr. Richards, Lord Brown's judgment in Gomes clearly contemplates factors which might qualify as '*most exceptional circumstances*' [para 29]:

"We are accordingly in no doubt that it is Krzyzowski's case, rather than the Divisional Court's judgment in the present case, which correctly states the law on the passage of time bar to extradition. The rule contained in Diplock para 1 should be strictly adhered to. As the rule itself recognises, of course, there may be 'most exceptional circumstances' in which, despite the accused's responsibility for the delay, the court will nevertheless find the s. 82 bar established. The decision of the Divisional Court (Hobhouse LJ and Moses J) in Re Davies (30 July 1997, unreported), discharging a defendant who had become unfit to plead notwithstanding his responsibility for the relevant lapse of time, may well be one such case. In the great majority of cases where the accused has sought to escape justice, however, he will be unable to rely upon the risk of prejudice to his trial or a change of circumstances, brought about by passing years, to defeat his extradition.

We recognise, of course, that in a s. 82(b) case the defendant will by definition have been 'unlawfully at large' and will generally, therefore, be subject to the rule in Diplock para 1. Given, however, that in these cases he will by flight have brought upon himself such difficulties as may then ensue from the passage of time, we see no reason why he should not be required to accept them- again, save in the most exceptional circumstances. He,

after all, will not merely be accused of the crime but will actually have been convicted of it."

16. I see no good cause for remitting a question of law to the Judicial Committee which was previously settled by what was then the ultimate forum of appeal in the *Gomes* and *Goodyer* appeals. It is plain to see from the unanimously agreed judgment of Lord Brown of Eaton-under-Heywood that the specific question on Lord Diplock's '*most exceptional circumstances'* test was certified for the House [paras 21-22]:

    "*The certified question principally concerns Diplock para 1, notably that part of it which states that, '[s]ave in the most exceptional circumstances, [d]elay 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… be relied upon as a ground for holding it to be either unjust or oppressive to return him'…"*

17. As for the application of the law under section 82 to the present case, applying the law as settled by the House of Lords in the *Gomes and Goodyer* appeals, I see no reasonable or meritorious basis for an argument that an extradition would be unfair and/or oppressive to Mr. Martin. There was no evidence before this Court which would suggest that Mr. Martin's circumstances were so exceptional so to mitigate his culpability for having absconded the US authorities.

18. For these reasons, which may be further expounded by reference to my judgment of 27 February 2020, I find there is no cause for the settled law under section 82 of the 2003 Act to be considered by the Judicial Committee, notwithstanding that this question of law was once upon a time of general public importance.

Conclusion

19. The application for leave to appeal to the Judicial Committee of the Privy Council is accordingly refused.

Dated this 19th day of October 2020

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE