

**WEDNESDAY – 15<sup>TH</sup> OCTOBER, 2003**

**IN COURT**

**ACTION NO. 398 OF 2003**

**GEORGE E. HERBERT**

**Applicant**

**v.**

**ATTORNEY GENERAL**

**Respondent**

Constitutional Motion pursuant to section 20(1) for a Declaration of contravention of constitutional rights under sections 5(1), 6(1) and 10(1) of the Constitution.

**APPEARANCES:**

Dean Barrow S.C. for Applicant.

Solicitor General for Respondent.

**BARROW:**

**SOLICITOR GENERAL:**

Preliminary application – Respondent would like to cross-examine several affiants who filed affidavits on behalf of Applicant. Notice to this effect has been served in respect of Applicant himself; Brian Brown, Ellis Arnold and B. Q. Pitts S.C., pursuant to Order 39, Rules 9 and 29.

Reason for application is differences in the affidavits of both sides that can only be resolved by cross-examination, especially that of Applicant's affidavit which raises several questions of facts that can't be resolved without recourse to cross-examination.

**BARROW S.C.:**

Objects to application – Not made on proper form.

Order cited is not right – no direction for affidavit evidence.

Applicable Order is Order 39, Rule 1. Respondent has not made proper application.

**COURT:** Can application be made orally?

**BARROW:** Yes, but there is a discretion in the Court.

**La Trinidad v Brown's (1902) 36 W.R. 138.**

**Fordham's Judicial Review Handbook 3<sup>rd</sup> Ed.** at p. 303 – sparing allowance of cross-examination.

**Submit:**

This is a case in which cross-examination is not normally the rule.

The application for cross-examination is also rather late.

Would ask Court to take this into account.

Also the request for cross-examination also relates to Applicant himself who has been spirited out of jurisdiction by Respondent hence the Motion: How can Applicant produce himself?

It is impossible for Respondent to produce the Applicant.

**COURT:** The application on the substantive motion will proceed. The application to cross-examine will be dealt with if necessary at the proper time, if necessary for the resolution of conflict in the affidavits on authority of **La Trinidad**.

**BARROW:**

The application is by notice of motion dated 1<sup>st</sup> August 2003. It contains statement and grounds of application and affidavits in support filed by Applicant dated 21<sup>st</sup> July 2003; Affidavit of Brian Brown sworn to on 11<sup>th</sup> August 2003; Ellis Arnold of 11<sup>th</sup> August 2003 and B. Q. Pitts of 8<sup>th</sup> September 2003.

The Application for a Declaration that constitutional rights of Applicant under sections 5(1), 61) and 10(1) have been contravened by Minister of Home Affairs and Commissioner of Police.

**Submit** that none of exceptions to guarantee of personal liberty in section 5(1) is applicable.

Section 6(1) – Applicant also says that equal protection of law was denied him.

Also section 10(1) – the applicant says the right to move freely within Belize, the right to reside in Belize and the immunity from expulsion from Belize also violated.

**Submit** Applicant is not affected by limitations contained in these sections of the Constitution.

Applicant says section 10(3)(g) is inapplicable as he was not taken out of Belize under any law.

Abandons ground 1(a) of Application.

Applicant was arrested and detained – concedes the Respondent could do so.

Concedes ground 1(b) as well – nothing is made of keeping Applicant in detention. But Respondent forcibly delivered Applicant to U.S. Law Enforcement officials at Airport, who took Applicant away to U.S. on a non-commercial airplane.

In ground 1(c) the Respondent thereby expelled Applicant, a citizen of Belize, on 26<sup>th</sup> April 2003 without ever first releasing him from custody on due process in Court or benefit of legal court order, statute or authority.

The Applicant therefore seeks exemplary aggravated damages as well.

And some other or consequential reliefs that may be just, including an order that Respondent procure the return of Applicant to Belize; and costs.

The Application is supported by affidavit of Applicant – paras. 1 – 10, paras. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, 27.

Also Brian Brown's affidavit.

The Solicitor General again asks when Applicant will be available for cross-examination.

**Court Ruled** In view of the nature of the application and the claim of the Applicant that he was taken out of the jurisdiction as a result of the Respondent's agents' activities and it is not physically practicable to have Applicant within the jurisdiction, any conflict in the affidavit of the Applicant will be resolved as matter of fact on the balance of probability by the Court.

**BARROW cont.**

On Brown's affidavit this confirms presence in police station and custody of Applicant.

Paras. 6, 7, 8, 9, 10, 18, 19.

**Solicitor General** applies to cross-examine Brian Brown.

**COURT:** As the Solicitor General has indicated a wish to cross-examine Brown on the grounds that cross-examination of Brown is helpful to Respondent's case, it is ordered that in the circumstances it would be fair to have Brown available for cross-examination. It is so ordered.

**Court** also ordered that Messrs. Arnold and Pitts, the two other affiants for Applicant, be subpoenaed to testify under cross-examination tomorrow.

**The further hearing adjourned to 2:30 p.m.**

**2:40 p.m. - HEARING continues.**

**BRIAN BROWN called for cross-examination by Solicitor General for Respondent.**

**In chief by Barrow.**

**BRIAN BROWN s/s:**

Of 7476 Jimmy Dyer Avenue, Belize City.

Recall swearing an affidavit in these proceedings on 11<sup>th</sup> August 2003.

**CROSS-EXAMINATION BY SOLICITOR GENERAL:**

Yes, I recall Applicant and McCord being called by Sgt. Williams to go to C.I.B. Office.

I don't know what happened in C.I.B. Office.

They did not reach C.I.B. Office – they went into grey pick-up vehicle.

There was a handcuff on Applicant's hand above his chest. The handcuff was put on him in the holding cell.

The vehicle containing Applicant went in a back road towards Magistrates' Court.

I don't know if Applicant later met with any D.E.A. officer.

McCord was not handcuffed.

I did not hear Applicant or McCord ask where they were being taken.

The officers had "fire power" whilst escorting Applicant and McCord.

There was no fight.

Yes, I know Applicant and McCord were forcibly abducted out of Belize.

Q: How do you know?

A: We were in holding cell the night before and we got information from Government worker who visited us and told us that things looked really funny and fishy. He then told us a D.E.A. plane was here in Belize and they will use Belize Police Force to help them with snatching Applicant and McCord out of country to U.S.A.

Q: Who are "they"?

A: The D.E.A. and agents.

The Applicant had consulted his attorneys and was assured nothing would happen without Court intervention.

Because there was no Court hearing, I say they were abducted. Applicant left money, wedding ring, belt for jeans pants and lace for his tennis shoes. That's why I say they were abducted.

I don't know what happened between police compound and Airport.

**NO RE-EXAMINATION.**

**SOLICITOR GENERAL:**

Foregoes the right to cross-examine Ellis Arnold and B.Q. Pitts S.C. as from their Affidavits I do not think it would advance case that Applicant was forcibly taken out of Belize or not.

**Court** points out that this is for its determination.

**BARROW cont.**

On Arnold's affidavit of 11<sup>th</sup> August 2003 – Refers to paras. 5, 6, 7, 8 and 9.

On Affidavit of B.Q. Pitts of 8<sup>th</sup> September 2003 – Refers to paras. 2, 4, 5, 6, 11 and 12.

On Applicant's affidavit, he deposes to having been expelled from this country by virtue of Belize Police handing him over in Belize to custody of US D.E.A. – paras. 14, 15 and 16, 17 and 18.

This was corroborated by Affidavit of Brown.

Applicant was removed on Saturday morning, Brown also corroborates Applicant's fears on information of his pending removal, he sent for attorney.

On the evidence Applicant was on Friday night apprehensive about being sent abroad.

The evidence supports assertion of Applicant. He had not agreed to go to U.S. voluntarily – no passport, no change of clothes, no lace for his sneakers.

**Submit** – circumstances support Applicant's contention that he was taken away involuntarily. He did not even see his wife and children before departure.

And this was at a time when Applicant was not even in custody pursuant to an extradition warrant.

**Submit** that the Belize Police had no authority to surrender Applicant to D.E.A. agents – he was not in custody for extradition purposes.

**Submit** Article 15 of Schedule to Extradition Act requires a formal process – a warrant for extradition and formal waiver by fugitive before there can be a waiver of extradition.

Also on the facts there was no agreement by Applicant to go with D.E.A.

Para. 6 of Commissioner of Police's affidavit – this is also hearsay - Commissioner of Police did not hear Applicant say that he wished to go to U.S.A.

voluntarily and he does not say he knew Applicant wanted to go to U.S. voluntarily.

Para. 7 of Commissioner of Police's affidavit - Even after Police had resolved to release Applicant, but instead handed him over to D.E.A.

**Submits:** Applicant's case is made out on his supporting affidavits and admission of Respondent on Commissioner of Police's Affidavit.

On Ms. Hafiz's affidavit – paras. 1, 2 and 3.

No proceedings were commenced before Chief Magistrate regarding extradition of Applicant – The warrant for Applicant's apprehension was not even signed – MH 1.

**Submits** that the Applicant's constitutional rights were therefore violated by the way he was proceeded against, he was deprived of personal liberty when Police handed him over to foreign agents and this deprivation does not come within exceptions in section 5(1)(i).

The Applicant's rights to equal protection of the law as provided in section 6, that is, deprived due process – Applicant was not charged with any offence nor told of any request for his extradition according to the law.

Also, Applicant's right under section 10, that is, immunity from expulsion from Belize was violated and para. (g) of subsection (3) is not applicable.

**Submit** that on the facts Applicant's case is made out and therefore prays for order of Declaration and damages sought.

On Damages for breach of Constitutional right

Peter v Markness (2001) 1 LRC 1.

They are awardable.

Dunlea v Attorney General (2000) 5 LRC.

A serious view is taken by the Courts of breaches of fundamental rights.

In Dunlea it was conceded that exemplary damages would lie for breach of constitutional rights – right-centered approach. This approach is finding support in the region instead of loss-centered approach.

Submitted that given the rights violated, damages should be awarded to vindicate them by being substantial.

**CASE FOR APPLICANT.**

**THURSDAY – 16<sup>TH</sup> OCTOBER, 2003**

**IN COURT**

**ACTION NO. 398 continues.**

**SOLICITOR GENERAL FOR RESPONDENT:**

Will no longer need to cross-examine Pitts S.C. and Arnold on their affidavits.

Court requests the two witnesses to withdraw who had come in answer to subpoena.

**SOLICITOR GENERAL FOR RESPONDENT:**

Evidence of Respondent comprises affidavit of Commissioner of Police of 14<sup>th</sup> October 2003 and M. Hafiz of 14<sup>th</sup> October 2003.

Refers to Commissioner of Police's Affidavit – paras. 1, 2 etc.

**Barrow indicates that he would like to cross-examine Commissioner of Police.**

**Commissioner of Police led in chief by Solicitor General.**

**JOSE ZETINA (Commissioner of Police) s/s:**

I am Commissioner of Police.

Made an affidavit in this case.



**Shown copy of affidavit and identifies it was made on 14<sup>th</sup> October 2003.**

**CROSS-EXAMINATION OF COMMISSIONER OF POLICE BY BARROW FOR APPLICANT:**

“Same day” in para. 6 is 25<sup>th</sup> April 2003.

It was around 2:00 in the afternoon that agent Vince Williams spoke to me by phone.

I have been Commissioner of Police for over a year and six months. Before that I was Assistant Commissioner from 1993.

I have read of extraditions in Belize from the papers.

Yes, I know that extradition proceedings take place in a court of law.

When Agent Williams told me extradition proceedings had been filed with Attorney General’s Ministry, I expected Court proceedings to follow as he told me this.

Agent Williams did not tell me why he told me this. It came as a surprise to me.

I was informed by people from D.E.A. about proceedings for extradition against one Michael Webster.

I was surprised to hear of extradition proceedings from Williams against Applicant and McCord because we had them in custody that very day.

I did not consider it necessary for D.E.A to inform me.

Agent Williams gave me no reason for informing me.

Shortly after I spoke with Williams I asked Attorney General’s office to confirm.

I spoke to one of the Crown Counsel in Attorney General’s office. I don’t remember the name. I assumed it was a Crown Counsel. A secretary said she would put me through to a Crown Counsel.

I can’t say for sure it was a Crown Counsel I spoke to.

The person said yes, the papers had been filed for processing.

Yes, I expected these proceedings would take place before the Courts of this country.

I did nothing else with information Williams had given me.

Yes, it was Williams that I told D.E.A. could speak to Applicant and McCord in police custody.

I said this in the context of law enforcement officers – we usually work with our counterparts closely in Belize and border areas.

If the detainees did not want to see D.E.A. officer then they could not see them. I did not specify this to Williams.

I knew the detainees were in Queen Street Police Station.

I did not instruct any of my officers to arrange for D.E.A. to talk to detainees.

It was sometime around 5:00 to 6:00 p.m. that D.E.A. told me that they had spoken to Applicant and McCord.

Williams of D.E.A. told me this and that Applicant and McCord had agreed to travel voluntarily to U.S.A. for proceedings there.

I did not call my officers at Queen Street to ascertain that Williams had in fact interviewed Applicant and McCord.

I never made any attempt personally to contact Applicant and McCord.

I never instructed any of my senior officers to confirm that Applicant and McCord wanted to go to U.S.A. voluntarily.

I had no knowledge of the charges Applicant was facing in U.S.A.

I did not know specifically that they were drug trafficking charges.

I got in touch with Asst. Supt. Blackett after this, after being told by Vince Williams that he had spoken to Applicant and McCord.

I did not call Williams back. He spoke to me by telephone.

Williams told me they would take Applicant and McCord as soon as possible, by the next day.

I instructed Asst. Supt. that he should facilitate the process of escorting the two prisoners to the Airport. I knew that extradition proceedings before the courts had not taken place.

The Applicant was released into D.E.A. custody the next day, that is, 26<sup>th</sup> April.

When Applicant was handed over to D.E.A., he was no longer needed by Belize Police.

Based on what Williams told me that Applicant wanted to go to the U.S.A., this was the authority for releasing him into D.E.A. custody.

I agree that I have no authority to release anyone to U.S. law enforcement agents without an order of Courts in Belize. I know this then and now.

Yes, Applicant could have been released to make his own arrangements if he wanted to go to U.S.A.

I did not release Applicant to make his own arrangements to travel to U.S.A. because Williams told me he was willing to go with them.

I would never have released Applicant to make his own travel arrangements even if he had indicated this to me.

I don't know the circumstances in which police officers accompanied Applicant to Airport that day nor how many officers went.

I expected my officers to be openly armed on that day as they were on special operation that weekend.

I don't know Applicant was handcuffed nor the time he was taken to Airport.

I did know it was the Saturday morning, and that Applicant had been in custody since early Friday.

Detained people are not allowed to take along change of clothes.

I did not go into it to find out if Applicant had agreed to go to U.S.A. without change of clothes or seeing his family.

As Commissioner of Police I don't think I have to go down that road.

I did not consult with my Minister before instructing police to accompany Applicant to Airport.

I did not consult with Mr. Gian Ghandi.

I don't think I ought to have taken legal advise for this.

I did not instruct any of my men to inform Applicant's family that he had agreed to go to U.S.A.

I did not know that while Applicant was in detention his lawyers had visited him nor that police did not say what happened to him when his lawyer visited that Saturday morning; nor that other family members visited that Saturday morning.

I learnt form media later that Applicant was saying that he was kidnapping by Police. I did not know of media interviews by his family to this effect.

I don't know if D.E.A. went to Police Station before Applicant was taken to Airport.

I instructed police to accompany Applicant to Airport.

I can't say where Applicant was delivered to D.E.A. custody, whether at police station or at Airport.

I did not instruct my men to be armed or to handcuff Applicant for escorting to Airport.

It did not occur to me to get in writing what Williams had told me that Applicant had agreed to, nor to get confirmation from Applicant that he wished to go to U.S.A.

I didn't come to find out what Williams told me was true – because I had more important things to do.

I knew Applicant was a Belizean citizen and citizens of this country have rights. I am sworn to uphold law from which these rights stem.

I upheld the law in this case.

**RE-EXAMINATION OF COMMISSIONER OF POLICE BY SOLICITOR GENERAL:**

I had no reasons to doubt Vince Williams when he told me that Applicant had agreed to go to U.S.A. voluntarily.

The police usually escort extradited people to Airport.

“Custody” meant take Applicant to Airport and hand him over to D.E.A. people.

To my knowledge, I don’t know if Applicant was forced by police to go to Airport.

**SOLICITOR GENERAL cont.**

Based on affidavit of Commissioner of Police, it is clear that Applicant’s arrest was lawful in law.

Under Article 15 of Schedule to Chapter 112 on Extradition – Waiver of extradition.

**Submits** that this provision is at heart of this case.

Applicant was “person sought” as provided for in Article 15 and there was some discussion between him and D.E.A. concerning subject-matter of formal request for extradition lodged with Attorney General’s Ministry.

**Submit** on facts of case Applicant went voluntarily to U.S.A. within provision of Article 15 and section 10(3)(d) of Constitution.

Submit therefore that the removal of Applicant was lawful.

**SOLICITOR GENERAL ON DAMAGES**

**Submit** that a Declaration would be sufficient if Court were to find for Applicant.

The issue of lost earnings does not arise as Applicant has not given proof of this.

Damages are properly awardable in public law cases on the principle of Maharaj.

But damages should be compensatory and not gratuitously enrich Applicant.

Peters (2001)

The Court must bear in mind that Respondent was not high-handed though mistaken in law if it were to award damages. There was a genuine mistaken belief as to law in overzealously cooperating with a foreign power (D.E.A.).

Fuller v Attorney General of Jamaica

Respondent is not trivializing breach of Applicant's right but there was an unfortunate misinterpretation of law by police.

Exemplary damages are exceptional and this case does not warrant such an award. There was no mala fides or high-handedness.

There should be a balance between right-centered approach and damages/tort-centered approach.

Reynolds v Attorney General of St. Kitts should be followed.

**THE CASE FOR RESPONDENT.**

**Mr. Barrow dispenses with cross-examination of Ms. Hafiz on her affidavit.**

**BARROW IN REPLY:**

On Article 15 of Schedule to Article "the person sought" was Applicant. But a person sought can only be surrendered as the result of committal by Magistrate or he consents to surrender.

The person sought must consent to the authorities of the requested State.

The person sought must know of the extradition request before he can consent to surrender.

There must be informed consent. There was none here because there was no evidence that Applicant knew of any formal extradition request.

In any event, the person sought would have to consent to authorities of the requested State.

The consent, if there was one in this case, was to officers of the requesting State.

There is no evidence of consent at all; it is only through hearsay by Commissioner of Police,

**Submit** therefore removal of Applicant was unlawful.

### **ON DAMAGES**

This is a case for exemplary award. Commissioner of Police did not evince any remorse on handing over Applicant. Commissioner of Police said he knew he had no authority but did not care.

This case calls for exemplary damages.

**COURT:** Will an order to return Applicant be helpful?

**SOLICITOR GENERAL:** I doubt the efficacy of such an order.

**BARROW:** Such an order would be appropriate. It would underline sacrosanctity of fundamental rights and Respondent will endeavour to comply with Order.

**CUR. ADV. VULT**

A. O. CONTEH  
Chief Justice