IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CIVIL APPEAL NO. 11 of 2002

BETWEEN:

RHETT FULLER **Appellant**

AND

THE ATTORNEY GENERAL OF BELIZE **Respondent**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Just ice Morrison	**-**	**Justice of Appeal**

Mr. Eamon Courtenay, SC for the appellant.
Ms. Priscilla Banner for the respondent.

Heard on 9, 10 October, 2008, 23, 24, 25 March & 19 June 2009

MOTTLEY P

[1] On 22 March 1990, Larry Miller was shot and killed in Miami/Dade Florida in the United States of America. The killing occurred during the course of an attempted armed robbery. Miller had agreed to go to the apartment of an individual by the name of Alex Napolitan where he would purchase marijuana. It is alleged that the appellant, Napolitan and another individual by the name of Carlos Cuello however agreed among themselves that, when Miller came to the apartment, they would rob him of the money which he was bringing to purchase the drugs. It was decided that a revolver would be used to commit the robbery. It is further alleged that at the apartment, the appellant was armed with a shot gun. During the course of the robbery Miller was shot and subsequently died.

[2] On 23 March 1990 a Circuit Court Judge of the Eleventh Judicial Circuit in and for Dade County, Florida issued a warrant of arrest for the appellant on a number of charges including first degree murder in violation of Florida Statute 782.01(1)(a). In the affidavit which was sworn in support of the request for the extradition of the appellant, Dawn Marie Cortese, an Assistant State Attorney for Dade County, Florida, deposed that, following the commission of the offence, the law enforcement officers from Dale County were unable to locate the appellant. However, in October 1997 law enforcement officials from Dade County discovered that the appellant was residing in Belize. Following the discovery of the whereabouts of the appellant, Dade State Attorney's office moved to indict the appellant. On 28 January 1998, a Grand Jury indicted him for the first degree felony murder of Miller. On 29 January the Clerk of the Eleventh Judicial Circuit in and for Dade County Florida issued a Capias for the appellant. On 17 August 1998, the Embassy of the United States of America in Belize formally requested the Government of Belize to effect the provisional arrest and extradition of the appellant to the United States of America. On 8 October 1998, the Minister of Foreign Affairs issued an order to the Chief Magistrate to issue a warrant for the arrest of the appellant. On 21 October 1998 the warrant of arrest was issued and the appellant was taken into custody.

[3] Following a hearing before the Chief Magistrate, the appellant was, on 26 February 1999, committed to prison. At the time the order was made, the Chief Magistrate informed the appellant that he had the right to apply to the Supreme Court for a writ of habeas corpus. Subsequent to the grant of leave, the application for the writ of habeas corpus was heard by the Chief Justice who, on 29 April 2002, determined that the committal of the appellant by the Chief Magistrate for extradition was regular. It is from this refusal by Chief Justice to issue a writ of habeas corpus that the appellant now appeals to this Court.

[4] In the appeal it was argued that the Chief Justice erred in law in that he failed to appreciate that, in seeking a writ of habeas corpus, the appellant

invoked the unlimited jurisdiction of the Supreme Court under the provision of section 95 of the Constitution. In such circumstances, the appellant contended that the Supreme Court therefore had jurisdiction to consider issues such as inordinate delay in making the request for extradition, whether there was bad faith by the government of the United States of America in making the request and that the request, in any event, amounted to an abuse of process. It was forcefully argued that the case of **Atkinson v United States of America Government** 1969 3 W.L.R. 1074 and cases which followed that case are inapplicable to Belize. It was urged upon the Court that, by applying **Atkinson**'s case, the Chief Justice misconstrued the breadth of the jurisdiction of the Supreme Court when hearing an application for a writ of habeas corpus. Consequently, counsel for the appellant invited this Court to set aside the decision of the Chief Justice and to hold that, having regard to the inordinate delay by the Government of the United States of America in requesting the extradition of the appellant and the passage of time since the date of the offence, the extradition of the appellant is barred by the lapse of time and, in such circumstances, amounted to an abuse of process of the Court.

[5] In so far as the evidence in support of the extradition request was concerned, the appellant alleged that the Chief Justice fell into error in finding that the sections of the Indictable Procedure Act Cap 96 which deal with procedure also authorized the admission of hearsay evidence under the laws of Belize. It was pointed out that the Chief Justice ought to have found that the Chief Magistrate was not entitled to act on inadmissible evidence of a co-accused and unreliable hearsay evidence which was the essential evidence of the appellant's part in the murder and consequently, therefore, the evidence upon which the request was based was insufficient to warrant the committal of the appellant and his consequent surrender to the United States of America.

[6] Before embarking on the grounds of appeal, I consider that it is necessary to appreciate the role of extradition in the justice system. In order to do this, I

can do no better than adopt what was said by McLachlin J in **Kindler v Canada (Minister of Justice) [1991] 2 S.C.R. 779**. Writing on behalf of herself, L'Heureux-Dube, Gonthier JJ, McLachlin J, explaining the place of extradition in the Canadian System of justice stated:

> "Extradition occupies a unique and important position in the structure of law enforcement. As the majority noted in *United States of America v Cotroni,* [1989] 1 S.C.R. 1469, at p. 1485, "the investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of the goal cannot realistically be confined within national boundaries. 'That has long been the case, but it is increasingly evident today …
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> While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.
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> This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations.
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> Most importantly, our extradition process, while premised on our conceptions of what is fundamentally just, must accommodate differences between our system of criminal justice and the systems in place in reciprocating states. The simple fact is that if we were to insist on strict conformity with our own system, there would be virtually no state in the world with which we could reciprocate. Canada, unable to obtain extradition of persons who commit crimes

> here and flee elsewhere, would be the loser. For this reason, we require a limited but not absolute degree of similarity between our laws and those of the reciprocating state. We will not extradite for acts which are not offences in this country. We sign treaties only with states which can assure us that their systems of criminal justice are fair and offer sufficient procedural protections to accused persons. We permit our Minister to demand assurances relating to penalties where the Minister considers such a demand appropriate. But beyond these basic conditions precedent of reciprocity, much diversity is, of necessity, tolerated.
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> Thus this Court, per La Forest J., recognized in *Canada v Schmidt*, [1987] 1 S.C.R. 500, at pp. 522-23, that our extradition process does not require conformity with Canadian norms and standards. The foreign judicial system will not necessarily be considered fundamentally unjust because it operates without, for example, the presumption of innocence and other legal safeguards we demand in our own system of criminal justice.
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> For the same reasons, this Court has emphasized that we must avoid extraterritorial application of the guarantees in our *Charter* under the guise of ruling extradition procedures unconstitutional. As La Forest J put it in *Schmidt*, at p. 518, "the *Charter* cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted."
>
> These considerations affect the applicability of the *Charter* in these cases and the determination of whether our extradition law offends the fundamental principles of justice which the *Charter* enshrines."

[7] Counsel for the appellant, with the leave of the Court, argued grounds 1, 2 and 4 together. In ground 1 it is stated that the Chief Justice erred in law in finding that the Supreme Court has no jurisdiction to consider issues of delay and abuse of process on an application for a writ of habeas corpus by an appellant

who had been ordered to be extradited. Having rejected the appellant's submission in respect of delay and abuse of process, the Chief Justice held that it was the Minister responsible for extradition who had the power to consider issues of delay and abuse and that it was from him that the appellant should seek redress. This, the appellant contended is wrong and it formed the basis of the second ground of appeal. In Ground 4, the appellant stated that the Chief Justice ought to have found that the inordinate delay commencing the extradition proceedings "gave the court the power, indeed the obligation, to refuse extradition on the ground that the prosecution of the offence had become barred by lapse of time".

[8] Counsel for the appellant submitted that the Chief Justice erred in law in concluding that the Supreme Court had no power or discretion to order the discharge of the appellant on the ground of inordinate delay even where that delay amounted to an abuse of the process of the Court He further submitted that the Chief Justice was also wrong to hold that such power was vested in the Minister responsible for extradition and he could therefore lawfully determine whether or not the appellant could be legally surrendered in accordance with the provisions of the Extradition Act.

[9] In his judgment, the Chief Justice concluded:

> "60 In fine therefore, I find that the Applicant's committal by the Chief Magistrate was regular, that on the present applicable authorities, this Court does not have the power or discretion to find that, despite the inordinate delay in seeking his rendition by the requesting state, his return would, in the circumstances, be an abuse of the process of the court. This discretion whether on a regular committal to return him or not lies not here but somewhere else. For now, in my humble view, by section 11 of the Extradition Act 1870, it is the Minister of Belize on whose order Extradition proceedings against the Applicant were commenced, who is clothed with the discretion in the light of the

circumstances highlighted in this part of the application to order his discharge. The applicant is, of course, at liberty to make whatever representations he can in that direction.

This position I must add, is not inconsistent with the bounden duty of this Court to proffer protection to everyone within the bounds of the law. In this branch of the law, extradition which is quintessentially treaty based and part of the foreign policy or relations of the state, the current state of the law in Belize, as I understand it, gives a latitude of discretion to the administration not allowed the Courts. In other countries and in other instances, as I hope, I have tried to show for example section 8(3) of the Fugitives Offenders Act 1967 and now section 11(3) of the Extradition Act 1989 in the United Kingdom, the law expressly allows the Courts an equal measure of discretion as is allowed the Foreign Minister to grant a discharge such as the applicant seeks."

[10] In reaching this conclusion, the Chief Justice relied on **Atkinson v United States Government** (supra) and the line of cases flowing from that decision. Counsel for the appellant contended that, in Atkinson's case, the Law Lords reached their conclusion on the basis that the 1870 Act did not give the committing magistrate any express power to stop committal proceedings for abuse of process caused by delay. Their Lordships, it is said, relied heavily on section 10 of the 1870 Act which required the Magistrate to "forthwith send a report to a Secretary of State a certificate of the committal and such report upon the case as he may think fit." The Secretary of the State has residual power to decide whether a fugitive prisoner should be surrendered after the magistrate had ordered his committal. (section 11 of the Act). Counsel relied on the statement of Lord Reid that the Secretary of the State always has power to refuse to surrender a man committed to prison by the magistrate if to do so would be wrong, unjust or oppressive. In particular, counsel laid great emphasis on the observation by Lord Reid that if he had thought that Parliament had not intended

the Secretary of the State to have regard to whether it would be wrong, unjust or oppressive to surrender a prisoner, then he would have thought it necessary to infer that the magistrate had powers to refuse to commit a prisoner if he found that it was contrary to natural justice to surrender him. Counsel sought to distinguish the power of a committing magistrate as in **Atkinson**'s case and the power of the judge hearing a habeas corpus application.

[11] Counsel was critical of the Chief Justice for relying primarily on cases which interpreted the Extradition Act of 1870 and the treaty. He contended that this approach led the Chief Justice into error in concluding that a committing magistrate had no power to deal with issues such as delay and abuse of process. The approach adopted by the Chief Justice also led him to hold, erroneously, that the issues of abuse of process, natural justice fell to be considered by the Minister in the exercise of power under section 11 of the Extradition Act. The Chief Justice held that the habeas corpus application was not appellate in nature and that the Supreme Court was merely to decide whether the evidence was sufficient to warrant his committal. This error, counsel argued, was due to the Chief Justice accepting and adopting the approach found in Atkinson's case, **Regina v Governor of Pentonville Prison ex parte Alves (1993) A.C. 284, R v Governor of Pentonville Prison ex parte Tarling (1980) 70 Cr.App.Rep. 77, Government of Federal Republic Germany v Sotiriadis [1995] AC 1**. Counsel forcibly urged upon this Court that, had the Chief Justice recognized the proper constitutional position of a habeas corpus application, he would have rejected Atkinson's case and the cases which followed Atkinson.

[12] Counsel for the respondent submitted that the Chief Justice adopted the correct approach and having reviewed that relevant statutes and cases, reached the correct decision in law.

The Extradition Act 1870

[13] Counsel for the appellant, in the course of one of his later submissions, doubted whether the Extradition Act 1870 of England was extended to Belize. In my view, for the reasons set out later, it does. This Act provides for a scheme of extradition of a person whose presence is required in a foreign country to stand trial in respect of a criminal offence for which he is charged. Once the request is made and the warrant is issued, the person is brought before the magistrate. The magistrate is required to hear the case "in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence "committed in Belize (section 9). Evidence must be produced which would, according to the Law of Belize, justify the committal of the person for trial of an indictable offence. If there is no such evidence, the magistrate is required to discharge the prisoner. The powers under the Extradition Act are to be exercised in Belize by the Chief Magistrate. In committing the person, the Chief Magistrate is required to inform him that he will not be surrendered until after the expiration of fifteen days. In addition, the Chief Magistrate must inform the prisoner that he has the right to apply to the Supreme Court for a writ of habeas corpus. The Act does not give the appellant any right of appeal. It requires the Chief Magistrate to inform him of his right to apply for habeas corpus. The Act does not create the right to apply for habeas corpus. The Act merely recognizes that the right exist. Such right, in my view would have existed as part of the common law of England and as such became part of the common law of Belize. It is noted that the right to apply for habeas corpus is enshrined in the Constitution of Belize. I shall return to that aspect of the case later. No complaint has been made of this aspect of the procedure.

Delay

[14] The first issue to be determined is whether the Supreme Court has jurisdiction to discharge the appellant on the ground that the inordinate delay in

commencing extradition proceedings amounted to an abuse of the process of the Court. In my view, the Chief Justice was correct in rejecting the submission that the Supreme Court had such jurisdiction. For the reasons set out below, I also reject those submissions.

[15] In **Atkinson's case** supra, Lord Reid identified the question as being "whether, if there is evidence sufficient to justify committal, the magistrate can refuse to commit on any other oppressive or contrary to natural justice". Lord Reid in delivering judgment said:

> "Whatever may be the proper interpretation of the speeches in Connelly's case [1964] A.C. 1254 with regard to the extent of the power of a trial judge to stop a case, I cannot regard this case as any authority for the proposition that magistrates have power to refuse to commit an accused for trial on the ground that it would be unjust or oppressive to require him to be tried and that proposition has no support in practice or in principle. In my view once a magistrate decides that there is sufficient evidence to justify committal he must commit the accused for trial. and there is no provision in the 1870 Act giving a magistrate any wider power in extradition proceedings than he has when he is committing for trial in England.
>
> But that is not the end of the matter. It is now well recognized that the court has power to expand procedure laid down by statute if that is necessary to prevent infringement of natural justice and is not plainly contrary to the intention of Parliament. There can be cases where it would clearly be contrary to natural justice to surrender a man although there is sufficient evidence to justify committal. Extradition may be either because the man is accused of an extradition crime or because he has been convicted in the foreign country of an extradition crime. It is not unknown for

convictions to be obtained in a few foreign countries by improper means, and it would be intolerable if a man so convicted had to be surrendered. Parliament can never have so intended when the 1870 Act was passed.

But the Act does provide a safeguard. The Secretary of State always has power to refuse to surrender a man committed to prison by the magistrate. It appears to me that Parliament must have intended the Secretary of State to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man. Section 10 of the 1870 Act provides that when a magistrate commits a man to prison "he shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit." So the magistrate will report to the Secretary of State anything which has come to light in the course of proceedings before him showing or alleged to show that it would be in any way improper to surrender the man. Then the Secretary of State is answerable to Parliament, but not to the courts, for any decision he may make.

If I had thought that Parliament did not intend this safeguard to be used in this way, then I would think it necessary to infer that the magistrate has power to refuse to commit if he finds that it would be contrary to natural justice to surrender the man. But in my judgment Parliament by providing this safeguard has excluded the jurisdiction of the courts. Some reference was made to the Fugitive offenders Act, 1881, where the provisions are very different from those of the Extradition Act, 1870. But it would not be right to use the later Act as an aid to the construction of the earlier Act. I would therefore dismiss the appeal as regards habeas corpus."

[16] Lord Morris of Borth-y-Gest observed at p. 23

> "Though the situation is unusual and has perplexing features, I consider that pursuant to section 10 of the Extradition Act, 1870, the learned magistrate was correct in deciding to commit the appellant once he had decided in the manner directed by the section that the evidence in regard to the charges was sufficient to warrant committal. In regard to the existence of or the exercise of a judicial discretion in this country I do not wish to add to what I said in **Connelly v. Director of Public Prosecutions [1964] A.C. 1254**. There is, however, a complete discretion in extradition cases in the Secretary of State and it will be for him to decide whether in all the circumstances the appellant should or should not be surrendered."

[17] Lord Guest in reaching a similar conclusion stated:

> "The foundation of Mr. Hazan's argument is contained in certain passages from **Connelly v. Director of Public Prosecutions [1964] A.C. 1254** which state that a residual discretion rests in the High Court to stay proceedings where the preferring of certain charges would be oppressive and contrary to the principles of natural justice. But there is no case in which this discretion has been stated to exist in magistrates at committal proceedings. If such a plea is available it can be raised at the subsequent stages when the case reaches the High Court. It has never been suggested that examining magistrates at committal proceedings have a discretion to refuse to commit on the ground that although a prima facie case has been made out, to do so would be contrary to natural justice. I therefore consider that the magistrate under the Extradition Act, 1870, has no discretion to refuse to commit on the ground that the principles of natural justice have not been complied with.

> There is a further reason why the discretion to dismiss the charges in extradition proceedings on the ground of oppression or breach of the principles of natural justice should not be exercised by the magistrate. Under section 11 of the Act, after the magistrate has under section 10 committed the prisoner to prison the Secretary of State is given a complete discretion after a certain time limit to order the fugitive criminal to be surrendered to the foreign state. He can, if necessary, at that stage decide questions of oppression or breach of the principles of natural justice. I respectfully adopt the observations of my noble and learned friend, Lord Reid, on this point. In my view, it is clear in regard to extradition proceedings at any rate that no discretion resides in the magistrate to refuse to commit on the grounds Mr. Hazan suggests.
>
> In the whole circumstances my view is that the appellant's appeal must fail upon this point also."

[18] Lord Reid was not rejecting any argument that natural justice applied to extradition proceedings. His Lordship recognized that such principles did in fact apply. However, his Lordship was satisfied that Parliament intended the Secretary of the State to exercise the powers vested in him under the Act to ensure that a person is not surrendered if he formed the view that it would be wrong, unjust or oppressive. Indeed this is a topic to which I shall return when dealing with the appellant's ground of appeal relating to the separation of powers.

[19] In **R v Governor of Pentonville Prison ex parte Sinclair 1991 2A.C. 64**, Lord Ackner identified one of the questions which had to be answered as whether the magistrate in extradition proceedings, has an inherent jurisdiction to consider whether such proceedings amount to an abuse of process of the Court. His Lordship answered the question in the negative. The other Law Lords all agreed with his judgment and the reasons given. Lord Ackner recognized that in Atkinson's case the House of Lords "had to decide, inter alia, whether the Chief

Metropolitan Magistrate had jurisdiction to consider whether the extradition proceedings there brought were an abuse of the process of the Court, in that they were unjust or oppressive or contrary to the principles of natural justice". Lord Ackner recognized that the statement of Lord Reid in **Atkinson** relating as to whether a magistrate in domestic litigation had power to refuse to commit on the ground there was an abuse of process of the Court was obiter. His Lordship distinguished the issue in **Sinclair'**s case on the ground that **Sinclair**'s appeal "is concerned only with whether the magistrate has an inherent jurisdiction to prevent an abuse of process of the court in respect of proceedings under the Extradition Act 1870".

[20] In reaching his conclusion, Lord Ackner referred to the fact that since **Atkinson**'s case the Extradition Act of 1989 had been enacted. His Lordship referred to section 11 of the Act which gave power to the High Court to order the discharge of the prisoner in the circumstances set out in section 11(3) of that Act if the Court considers that it would be unjust or oppressive to extradite him. His Lordship concluded at p. 80:

> "By this section a radical alteration has been made by giving to the High Court, in part at least, the same kind of discretion, as to whether or not to discharge an applicant, as the Secretary of State has in deciding whether or not to order a fugitive criminal to be returned to a requesting state. It is the clearest possible recognition by the legislature that hitherto no such discretion existed in the courts and in particular in the magistrate's court. I therefore conclude that in extradition proceedings the magistrate has no jurisdiction to consider whether such proceedings may be an abuse of the process of the court."

[21] Lord Ackner reasoned that the provisions in section 11(3) of the Extradition Act 1989 expressly giving the High Court in England jurisdiction to

discharge the order of committal by the magistrate on the ground that it would be unjust or oppressive to extradite the prisoner was a clear indication that the court did not possess that power prior to the Act of 1989.

[22] This issue again engaged the attention of the House of Lords in **R v Governor of Pentonville ex parte Alves [1993] A.C. 284**. Lord Goff of Chieveley, a member of the Court in **Sinclair**'s case gave the judgment affirming the judgment in **Sinclair**'s case. Lord Templeman, Lord Roskill and Lord Jauncey of Tullichettle all agreed with the reasoning of Lord Goff. At p. 294 Lord Goff said:

> "Mr. Newman also sought to invoke section 11(3) of the Act of 1989, which confers upon the High Court jurisdiction to order a person's discharge if, having regard to certain matters specified in the subsection, it would be unjust or oppressive to return him to a foreign state. It was Mr. Newman's submission that the matters to which regard should be had in the present case were (1) the lapse of time between the commission of the alleged offences and the request for extradition, and (2) the fact that the accusation against the applicant was contrary to the interests of justice, in that it would lead to the trial of the applicant in Sweden on the basis of the record of Price's evidence, despite the fact that Price had subsequently retracted that evidence in this country in so far as it implicated the applicant. However it is plain from the Act of 1989 that section 11(3) applies only to the new procedure for extradition, set out in Part III of the Act, and has no application to the old procedure, set out in Schedule 1, which is applicable in the present case. Mr. Newman also submitted that in the above circumstances the order for committal of the applicant was an abuse of the process of the court, and for that reason the court should exercise its discretion to refuse to make such an order. But it is well

established by authority of this House (see **Atkinson v. United States of America Government [1971] A.C. 197**, and **Reg. v. Governor of Brixton Prison, Ex parte Kotronis [1971] A.C. 250**) that, until the enactment of section 11(3) of the Act of 1989, no such discretion was vested in the English courts in extradition matters, the relevant discretion being vested in the Secretary of State: see **Ex parte Sinclair [1991] 2 A.C. 64, 80-81**, *per* Lord Ackner. It is of course open to the applicant to make such representations as he thinks fit in this regard to the Secretary of State."

[23] Counsel for the respondent pointed out that in **Alves**' case counsel for the applicant had submitted that the High Court in England ought to have had regard to the length of time that had elapsed between the commission of the alleged offences and the request for extradition.

[24] Based on these authorities, it is my opinion that the Magistrates Court, under the law as it stood when the request for extradition was made, had no jurisdiction to refuse an order for the committal of the appellant on the ground that the inordinate delay in making the request for extradition amounted to an abuse of the process of the court. Equally in my view, the Supreme Court did not have jurisdiction to grant habeas corpus to release the appellant on such a ground. Any such delay ought to be the subject of representation by the appellant to the Minister responsible for extradition that, in the circumstances of this particular case, such delay is an abuse of process and that it would be unjust and oppressive to hand him over to the United States of America.

Jurisdiction of the Supreme Court on Habeas Corpus

[25] This leads me to the complaint that the Chief Justice erred when he regarded the jurisdiction of the Supreme Court on the habeas corpus application as

arising purely from the Act together with the treaty. Counsel submitted that the Supreme Court had an unfettered jurisdiction to determine, under section 5(2)(d) of the Constitution, the lawfulness of the detention of the appellant. Such consideration, he contended should not be restricted by the provisions of the Act or the Treaty. Section 5(1) of the Constitution of Belize provides as follows:

> "5(1) A person shall not be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:-
>
> a. – h.
>
> i. for the purpose of preventing his unlawful entry into Belize, or for the purpose of effecting his expulsion, extradition or other lawful removal from Belize or for the purpose of restraining him while he is being conveyed through Belize in the course of his extradition or removal as a convicted prisoner from one country to another,

[26] Section 5(2) (d) of the Constitution states:

> "5(2) Any person who is arrested or detained shall be entitled-
>
> a. – c.
>
> d. to the remedy by way of habeas corpus for determining the validity of his detention.

[27] In making an application to the Supreme Court for the issue of a writ of habeas corpus, counsel for the appellant contended that the appellant was invoking a fundamental right guaranteed under the Fundamental Rights Provisions of the Constitution. In these circumstances, he argued, the Chief Justice ought to have appreciated that the Court was obliged to determine whether or not the appellant's detention was valid according to law. Put this way, counsel asserted that the question which fell to be determined by the Chief Justice was whether there was anything which rendered his detention invalid. He

submitted that the lawfulness of the appellant's detention was not restricted by the 1870 Act or the provisions of the treaty.

[28] By exercising his right under section 5(2) (d) of the Constitution to apply for the writ of habeas corpus the appellant, counsel submitted, had invoked the unlimited jurisdiction of the Supreme Court to determine whether his detention was valid. Counsel referred to section 95(1) of the Constitution which provides:

> "95(1) The Supreme Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law:
>
> Provided that the Supreme Court shall not have jurisdiction to hear and determine any application made by a person sentenced to death under any law after the expiration of one year from the passing of the sentence."

[29] Counsel further submitted that the jurisdiction of the Supreme Court on an application for a writ of habeas corpus is unlimited and therefore the court has jurisdiction to entertain challenges based on abuse of process including delay. It was contended that the **Atkinson**'s case and subsequent cases created "a species of habeas corpus that is very limited in nature and a woefully inadequate remedy". This species, it was said, cannot stand in face of section 5(2) (d) and 95(1) of the Constitution. In these circumstances, counsel stated that the Chief Justice was wrong in deciding that the jurisdiction of the Supreme Court was limited by the **Atkinson**'s case.

[30] On behalf of the respondent, it was submitted that the Chief Justice gave due and proper regard to the right of the appellant to the remedy of habeas corpus as set out in the Constitution. Counsel submitted that there could be no doubt that the Chief Justice was fully aware of the constitutional status of the habeas corpus application and the appropriate question of whether his detention

was valid. Counsel pointed to the fact that, at the outset of his judgment dealing with the issue of habeas corpus, the Chief Justice stated:

> "It is the law that in an application for habeas corpus consequent on a committal by a Magistrate Court for extradition…..the application is not an appeal against the magistrate committal order. The application is to determine whether the detention of the applicant is lawful, that is to say, whether the committal order was valid or not…"

[31] Section 30 of the Supreme Court of Judicature Act Cap 91 provides:

> "The common law right to the writ of habeas corpus, as confirmed and regulated by the Habeas Corpus Act 1679 and extended by the Habeas Corpus Act 1816 should be part of the law and procedure of Belize and subject to any rule of court shall be granted and issued as nearly as possible in accordance with the practice and procedure for the time being in force in regard to that writ in the High Court of Justice in England."

[32] Section 5(2)(d) of the Constitution enshrines in the Constitution the right of a person to the remedy by way of habeas corpus for the purposes of determining the validity of his detention. The Constitution does not, in my view, extend the scope of the writ of habeas corpus. The scope of the writ at common law was to determine the validity of the detention of any person. In the case of a person who is detained under criminal process the writ was intended to see whether that detention was in accordance with the law. The writ of habeas corpus was to ensure that the appellant has been validity detained.

[33] The appellant had been detained pursuant to the committal order of the Magistrate. Under section 10 of the 1870 Act, the magistrate was required to ensure that the foreign warrant which authorized the arrest of the appellant was

duly authenticated. The magistrate also had to be satisfied that the evidence produced at the extradition proceedings was such that it would have entitled him to commit the appellant for trial if he had been charged in Belize with a crime committed in Belize. If these conditions are satisfied the magistrate has no discretion under the Act. He is required to commit the appellant to prison. One aspect of the magistrate's duty when committing the appellant to prison is to inform him of his right to apply to the High Court for a writ of habeas corpus. This shows the limited role of the magistrate in committing the appellant. The application for a writ of habeas corpus is to ascertain whether the magistrate acted within the narrow confines of the 1870 Act. Without express statutory authority, the magistrate does not, in my view, have any jurisdiction to go outside the scope of his limited functions as set out in the 1870 Act.

[34] Support for this view of the limited role of the magistrate in extradition proceedings may be found in the observation of La Forest J in **Argentina v Mellino** [1987] 1 S.C.R. 539 where he spoke of the role of the extradition judge in Canada who performs a role similar to that of the Chief Magistrate in Belize. At paragraph 29 the judge said:

> "29. ……the modest function of an extradition hearing which (barring minimal statutory and treaty exceptions) is merely to determine whether the relevant crime falls within the appropriate treaty and whether the evidence presented is sufficient to justify the executive surrendering the fugitive to the requesting country for trial there. … I repeat: the role of the extradition judge is a modest one; absent express statutory or treaty authorization, the sole purpose of an extradition hearing is to ensure that the evidence establishes a *prima facie* case that the extradition crime has been committed."

[35] In **McVey v States of America** [1992] 3 S.L.R 475 La Forest J had occasion to again comment on the role of the extradition judge in Canada. There, under the subheading "Purpose of the Hearing", La Forest J observed:

> "The function of the extradition hearing, then, as observed in **Argentina v. Mellino**, [1987] 1 S.C.R. 536, is a modest one. That function is to determine whether there is sufficient evidence that a fugitive accused has committed an act in the requesting state that would, if committed in Canada, constitute a Canadian crime listed or described in the treaty. In short, and I shall have more to say about this later, what the extradition judge must determine is whether the conduct of the accused would constitute a crime if it had been committed in this country. This function, if modest in scope, is critical to the liberty of the individual. This Court thus put the matter in **Canada v. Schmidt**, [1987] 1 S.C.R. 500, at p. 515:
>
> The hearing thus protects the individual in this country from being surrendered for trial for a crime in a foreign country unless *prima facie* evidence is produced that he or she has done something there that would constitute a crime mentioned in the treaty if committed here.
>
> Lord Ackner's statement in **Sinclair**, at p. 82, that the extradition judge "has important but very limited functions to perform", aptly describes the situation."

Abuse of Process

[36] It was also submitted that the magistrate also had jurisdiction to entertain a challenge to extradition proceedings based on the ground of abuse of process. Counsel for the appellant contended that a magistrate, whether sitting as a trial court or in committal proceedings, has power and jurisdiction to deal with issues of abuse of process. In support of these submissions, counsel relied on **Regina v Horseferry Road Magistrates' Court Ex parte Bennett [1993] 3 WLR 90**. In that case the defendant, who was a citizen of New Zealand, was alleged to have committed criminal offences in England. He left England and was later found in South Africa. No extradition treaty existed between South Africa and England. He was returned to England. He alleged that he had been kidnapped as a result

of collusion between the South African and British Police. When brought before the magistrates' court, he sought an adjournment to enable him to challenge the jurisdiction of the court. The application was refused and he was committed for trial. He sought judicial review of the magistrate's decision. The Divisional Court of the Queen's Bench refused the application and held that the court had no jurisdiction to inquire into the circumstances surrounding how the defendant had been brought into the jurisdiction.

[37} On appeal to the House of Lords, Lord Griffiths, in giving judgment, said at p. 106:

> "I would accordingly affirm the power of the magistrate, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matter directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in **Reg. v Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108** that this wider responsibility for upholding the rule of law must be that of the High Court and that if serious question arises as to the deliberate abuse of extradition procedures a magistrate should an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken."

[38] In response, counsel for the respondent submitted that **Regina v Horseferry Road Magistrate Court ex parte Bennett (supra)** did not support the interpretation which counsel for the appellant sought to place on that case. She submitted that the correct position in relation to the magistrates' court, when considering whether it had jurisdiction to entertain a submission that in extradition proceeding delay on the part of the requesting court amounted to an abuse of process is to be found in the speech of Lord Jauncey of Tullichettle in **Schmidt v Federal Government of Germany and another [1994] 3 LRC 548**.

[39] In that case the appellant Schmidt, a German national, was thought to have committed drug smuggling offence in Holland and Germany. He subsequently moved to Ireland where he established a business. As a result of a trick, Schmidt came to the United Kingdom where he was arrested on a provisional warrant at the request of the German Government. He was remanded in custody. The German Government made a request to the Home Office to extradite him. The request was made pursuant to the Extradition Act 1989. Section 11(3) of the 1989 Act which gave the High Court power to discharge an individual if the Court was satisfied that (a) by reasons of the trivial nature of the offence, (b) by the reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large or (c) because the accusation against him is not made in good faith in the interest of justice it would be unjust or oppressive to return him. Schmidt applied for inter alia, a writ of habeas corpus contending that the events which led up to his arrest and the deception practiced by the police amounted to an abuse of power and/or process and in the circumstances that he should be released.

[40] Lord Templeman, Lord Ackner, Lord Slynn of Hadley and Lord Lloyd of Berwick all agreed with the judgment and the reasons given by Lord Jauncey who delivered the judgment. At p. 556, Lord Jauncey pointed our that Mr. Newman QC, counsel for the appellant "took the bull by the horns and submitted that **Atkinson v US Government** was out of date and should not be followed."

(It may be said Mr. Courtenay adopted a similar approach in this matter.) Mr. Newman argued that Schmidt's appearance before the English Court was in breach of the law of Ireland and consequently the High Court had power to intervene as the process was tainted. In support of this submission, Mr. Newman relied on **Regina v Horseferry Road Magistrates' Court ex parte Bennett** which he said also applied to extradition proceedings "where an individual was brought before English courts in circumstances involving a breach of the rule of law resulting from violation of international, foreign or domestic law".

[41] In rejecting this submission, Lord Jauncey said at p. 559:

> "My Lords, I am satisfied that **Bennett v Horseferry Road Magistrates' Court** has no such general application as the appellant contends. The issue in that case was whether the English courts should decline to try the accused by staying the prosecution. That the power to intervene, which was held to exist in the High Court, was related only to a trial is abundantly clear from the passages in the speeches to which I have referred. Indeed, there was no reason in that case to consider the power in any other context. However, the matter went further because Lord Griffiths said ([1993] 3 LRC 94 at 109, [1994] 1 AC 42 at 62-63):
>
> > 'The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondents that examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House in **Sinclair v DPP [1991] 2 All ER 366, [1991] 2 AC 64** and **Atkinson v US Government [1969] 3 All ER 1317, [1971] AC 197**, which established that in extradition proceedings a magistrate has no power to refuse to commit an accused on the grounds of abuse of process. But the reason underlying those decisions is that

the Secretary of State has the power to refuse to surrender the accused if it would be unjust or oppressive to do so; and now under the Extradition Act 1989 an expressed power to this effect has been conferred upon the High Court.'

In this passage Lord Griffiths far from doubting or detracting from those decisions is recognizing their application to the different procedures which apply in extradition from England."

[42] Lord Jauncey went on to summarize his conclusion at p. 560 in this way:

"My Lords, I summarize my conclusions on this branch of the case thus: **Atkinson v US Government** decided that Parliament had excluded the jurisdiction of the courts to refuse to surrender a person under the 1870 Act when to do so would be unjust or oppressive. **Sinclair v DPP** pointed out that the re-enactment of s 8(3) in s 11(3) of the 1989 Act demonstrated that in relation to foreign countries no discretion to refuse the return of a foreign fugitive had previously existed. The dicta in **Government of Australia v Harrod** and **Re Osman** were obiter. **Bennett v Horseferry Magistrates' Court** related to the very different situation of the power to stay an English prosecution. Accordingly, the position now is that in extradition proceedings under the 1989 Act the High Court has power to intervene only in the circumstances predicated by the Act and has no inherent common law supervisory power as contended for by the appellant. The principal safeguard for the subject of extradition proceedings therefore remains in the general discretion conferred upon the Secretary of State by Parliament in s 12. It follows that the Divisional Court were correct in concluding that the decisions in **Atkinson v US Government** and **Sinclair v DPP** had not been affected by **Bennett v Horseferry Road Magistrates' Court** and should be followed."

[43] I am satisfied that based on these authorities the magistrate did not possess any jurisdiction to entertain any submission that any perceived delay between the commission of the offence and the request for extradition amounted to an abuse of the process of the court. Further, I am satisfied that on an application for habeas corpus, the Supreme Court is required to follow **Atkinson v US Government (supra)** and does not have jurisdiction to entertain submissions relating to abuse of process due to delay. Indeed, Lord Jauncey pointed out the jurisdiction of the High Court in England to intervene in extradition proceedings is limited to that granted to Court by the Extradition Act 1989. The High Court, his Lordship stated, "has no inherent common law supervisory power such as that for which Mr. Newman was contending." None of the Extradition Acts gives the Supreme Court of Belize the jurisdiction which Mr. Courtenay contended it should exercise.

[44] Reliance was also placed by the appellant on **Knowles v United States of America & Another [2006] UK PC 38** in which their Lordships held that based on the language of the Constitution of the Commonwealth of The Bahamas and the Bahamas Extradition Act, the High Court of The Bahamas has jurisdiction to entertain a challenge to extradition proceedings on the ground that the proceedings amounted to an abuse of process. I do not consider that this aspect of the decision in **Knowles Jr. v The Government of the United States of America (supra)** is of any assistance to the appellant as the jurisdiction of the Supreme Court of The Bahamas on an application for habeas corpus by a person who is committed to custody pending his extradition is set out in the Extradition Act 1994. Section 11(3) of that Act provided as follows:

> "(3) On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that-
>
> (a) by reason of the trivial nature of the offence of which he is accused or was convicted; or

(b) by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at law, as the case may be; or

(c) because the accusation against him is not made in good faith in the interest of justice,

it would, having regard to all the circumstances, be unjust or oppressive to extradite him.

[45] The Privy Council also dealt with a submission that the magistrate had jurisdiction to stay or dismiss extradition proceedings on the ground of abuse which did not fall within 7(1) of the Extradition Act, 1994. Their Lordships had indicated that:

> "13 Section 7 of the Extradition Act 1994….provides five grounds on which those in the Bahamas may not be extradited by the Minister, committed to custody of the Court of committal or kept in custody by the Supreme Court on an application for habeas corpus."

Section 10 (2) of the 1994 Act provides:

> "For the purposes of proceedings under this section, a Court of committal shall have, as nearly as maybe, the like jurisdiction and powers (including powers to remand in custody or to release on bail) as it would have had if it were conducting a preliminary inquiry and the person arrested were charged with an indictable offence committed within its jurisdiction."

[46] In **Knowles** case, the appellant had submitted that the committing court had power to decline to inquire into the offence on the ground of abuse. For this the appellant in that case relied on **R v Telford Justices Ex parte Bahdan [1991] 2 QB 78**. He also relied on **R (Kashamu) v Governor of Brixton Prisons [2001] EWHC Admin 980 [2002] QB 887** in which the Divisional Court in England declined to follow the **Atkinson** line of cases on the grounds that it

was prevented from so doing by reason of the Human Rights Act 1998 and Article 5 of European Convention on Human Rights. The Divisional Court pointed out that under that article, a person who had been arrested or detained for the purposes of being extradited had the right to take proceedings to challenge the lawfulness of his detention. The Divisional Court went on to hold that the magistrate had jurisdiction to deal with the issue of abuse of process. The appellant had also argued that it was the court and not the executive which was charged with the responsibility of protecting the individual against proceedings which amount to an abuse of the court's process.

[47] Counsel for the respondent in **Knowles**' case, on the other hand, relied on the cases of **Atkinson**, **Sinclair** and **Schmidt**, all of which held that the magistrate did not have any such jurisdiction. As regards Article 5 of the European Convention on Human Rights, counsel relied on Article 19(1)(g) of the Constitution of The Bahamas which provided that no person shall be deprived of his personal liberty except as authorized by law. The law provides for the detention of a person for the purpose of effecting extradition or other lawful removal from The Bahamas. Counsel further contended that, if a person alleges that he is being detained pursuant to proceedings which amount to an abuse of process, his remedy lies in recourse to the Supreme Court, not the magistrate's court to complain that his rights under Article 19(1)(g) of the Constitution have been infringed.

[48] Article 19(1)(g) of the Constitution of the Bahamas provides inter alia:

> "(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases-
>
> > (g)…..for the purposes of effecting the…….extradition or other lawful removal from the Bahamas of that person or taking of proceedings relating there to."

[49] In paragraph 28 of the judgment the Board admitted that it did not

> "...find this an altogether easy question to resolve but on balance it prefers the Government's argument as did the court's below. In enacting section 10(2) of the 1994 Act, the Bahamian Legislature may be taken to have assumed the general correctness of the Atkinson line of authority. The Constitution does not include, in article 19(1) or elsewhere, the specific provision which obliged the Divisional Court to distinguish the Atkinson line of authority in Kashamu. The Constitution allocates to the Supreme Court not to the magistrates, the jurisdiction to redress constitutional grievances…."

[50] Their Lordships, in declining to follow **R (Kashamu) v Governor of Brixton Prison (supra)** indicated that the provision of Article 19(1)(g) of the Constitution of The Bahamas or elsewhere did not contain the specific provisions of Article 5 of the European Conventions on Human Rights. Lord Bingham pointed out that:

> "Article 5(1) (of the European Convention on Human Rights) recognizes that a person against whom action is being taken with a view to extradition may be lawfully arrested or detained, but this provision is qualified by article 5(4) which provides:
>
> > "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a Court and his release ordered if the detention is not lawful."

[51] In **Regina (Kashamu) v Governor of Brixton Prison et al** [2002] 2 WLR 907 it was recognized that based on the Atkinson lines of cases the Courts had "no discretion to refuse extradition on the grounds that the proceeding were a abuse of the Court's process". The issue that arose in Kashamu's case is whether, since the coming into force of the Human Rights Act 1998, Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms

as set out in the Schedule to the Act, required the Court to depart from the Atkinson jurisprudence.

[52] Article 5(1) provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law …
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation."

[53] Article 5(4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceeding by which the lawfulness of his decision shall be decided speedily by a Court and his release ordered if the detention is not lawful."

[54] In his judgment Rose LJ stated in para. 32:

> "What is in issue in the present case is whether, when lawful extradition procedures are used a resultant detention may be unlawful by virtue of abuse of the Court process. The Magistrates' Court rather than the High Court, is, in my judgment, the appropriate tribunal for hearing evidence and submissions, finding facts relevant to abuse and doing so speedily. Furthermore, as it seems to me, the district judge's obligation under section 6(1) of the Human Rights Act 1998 to act compatibility with Convention rights require him to make a determination under Article 5(a)

Later the Lord Justice identified the pertinent issue under section 5(4) proceedings as being

> "… solely whether the detention was unlawful by English domestic law and/or arbitrary, because of bad faith or deliberate abuse of the English Courts' procedure."

[55] As stated earlier this line of argument was rejected by the Privy Council in **Knowles v United States of America**. As pointed out those submissions were rejected on the basis that the Constitution of The Bahamas did not include in Article 19(1) or elsewhere specific provisions such as those which obliged the Divisional Court to distinguish the Atkinson line of authority in Kashamu. The Board went on to point out that under the Constitution of The Bahamas it was the Supreme Court and not the magistrates who had jurisdiction to redress breaches of the fundamental rights provision of the Constitution.

[56] In departing from the Atkinson line of case, the Divisional Court in Kashamu also rejected the rationale on which Lord Reid and Lord Guest based their decision – that it was for the Secretary of State to consider the issue whether it would be unjust or oppressive to return the prisoner. Rose LJ did not consider that the Secretary of State possessed the qualities of independence and impartiality required of the Court-like body required by the Strasbourg jurisprudence.

[57] In Belize there is no equivalent provision in the Constitution of Belize to the provision of section 5(4) of the Convention for the Protection of Human Rights and Fundamental Freedoms. There is no provision in the Constitution which requires that the lawfulness of the appellant's detention "shall be decided **speedily** by a Court." (emphasis mine). Based on the reasoning of Kashamu, nothing in the Constitution gives the Chief Magistrate the right to determine the lawfulness of his detention. The Chief Magistrate is limited to acting within his jurisdiction as given by the Act. For the reasons set out earlier, I am of the

opinion that the Chief Magistrate had no jurisdiction to determine issue of abuse of process.

[58] In Belize, the issue of contravention of the fundamental rights provisions are to be heard by the Supreme Court (see section 206). The right to apply for a writ of habeas corpus does not, as stated earlier, widen the scope of habeas corpus. On application for a writ of habeas corpus the court is to determine whether the appellant's detention is lawful. This means that the committal was in keeping with the provisions of the 1870 Act.

[59] Section 9 of the 1970 Act 1870 provides:

> "9 When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and power as near as may be, as if the provision were brought before him charged with an indictable offence committed in England…."

[60] Under this section, the magistrate has the same jurisdiction and powers as he would have had if he were conducting a preliminary inquiry. The cases of **Atkinson**, **Sinclair** and **Schmidt** all held that the magistrate has no jurisdiction when dealing with extradition proceedings to entertain a submission that the proceedings are an abuse of process. Such responsibility, as Lord Griffiths pointed out in **Regina v Horseferry Road Magistrates' Court ex parte Bennett**, was for the Divisional Court which his Lordship regarded "as the proper forum in which such a decision should be taken". In the circumstance, I do not consider that Knowles' case is of any assistance to the appellant.

[61] In my opinion, the magistrate had no jurisdiction to entertain any application for the release of the appellant based on a submission that the extradition proceedings amounted to an abuse of process of the court. Under section 10 of the Extradition Act 1870 if the foreign warrant authorizing the arrest

of an individual is duly authorized and the evidence produced would justify the committal for trial if the crime had been committed in Belize, the magistrate is required to commit him to prison. The magistrate has no discretion. In committing him to prison, the magistrate shall inform the prisoner that he will not be surrendered until after the expiration of fifteen days. The magistrate must also inform him of his right to apply to the Supreme Court for a writ of habeas corpus. In my view, the application for habeas corpus and thus the validity of the appellant's detention is to be considered in the light of the jurisdiction and limited powers of the magistrate in extradition proceedings.

[62] It is also alleged that the Chief Justice ought to have found that the inordinate delay in commencing the extradition proceedings empowered the court to refuse extradition on the ground that the prosecution of the offence in the United States had become barred by lapse of time. The appellant also submitted that, to return him to the United States after the lapse of eighteen years since the offence was alleged to have been committed, would be unjust and oppressive. For this submission, counsel relied on **Kakis v Government of the Republic of Cyprus [1978] 1WLR 779** and **Holmes v Government of Portugal [2004] EWHC 2875 (Admin)**.

[63] In **Kakis** case, the issue before the House of Lords was whether, because of the passage of time, it would be unjust or oppressive to return Kakis to Cyprus where a warrant of arrest for murder. Kakis had applied to the High Court in England for habeas corpus based on the provision of section 8 (3)(b) of the Fugitive Offenders Act 1967. This subsection provides:

> "…..the High Court….may, without prejudice to any other jurisdiction of the court, order the person committed to be discharged from custody if it appears to the court that – (a) by reason of the trivial nature of the offence of which he is accused or was convicted; or (b) by reason of the passage of time since he is alleged to have committed it or to become unlawfully at large, as

the case may be; or (c) because the accusation against him is not made in good faith in the interest of justice, it would, having regard to all the circumstances, be unjust or oppressive to return him."

It should be noted that the jurisdiction to discharge an applicant on these grounds was expressly given by the Act to the High Court and not the magistrate.

[64] Kakis' case may be distinguished on the ground that the jurisdiction granted to the High Court was statutory. To that extent, the House of Lords would not have been required to consider the **Atkinson** line of cases which were not in fact considered either in the argument or in the judgment. For this reason I do not consider that Kakis' case is of any assistance to the appellant.

[65] Equally, I do not consider **Holmes v Government of Portugal** (supra) to be of any assistance. While the judgment of Thomas LJ may indeed provide some assistance on matters of delay and oppression, the Divisional Court in England was in fact exercising a statutory jurisdiction under the provisions of section 11(3) of the Extradition Act 1989 which empowers the court to discharge an applicant if it appears to the Court, in relation to the offence for which his return is sought, that it is a trivial offence or that by reason of the passage of time since he was alleged to have committed the offence it would , having regard to all the circumstances, be unjust or oppressive to return the applicant for the reasons stated above. I do not consider that the case of Holmes is of any assistance to the appellant as the 1870 Act does not give either the Supreme Court or the Magistrate's Court any such jurisdiction as I have previously stated.

[66] In **Bishop v Attorney General 3 Bel. LR 230** this Court had to interpret Article V(i)(b) of the Treaty between Belize and the United States of America. The Article provides inter alia:

"Extradition shall not be granted if:

(a)…..

(b) The prosecution for the offence for which extradition is requested has become barred by lapse of time according to the law of the requesting or requested Party."

The Court recognized that:

"A bar by lapse of time may occur in at least one of two ways. A specific period may be fixed by law after which no prosecution can be instituted or criteria may be prescribed the applications of which will justify a court in ruling that a prosecution should be barred."

This Court concluded:

"…that the law of Belize does contain a provision which may cause the prosecution for an offence to become barred by lapse of time. This conclusion is arrived [at] quite independent of the status of section 6(2) of the Belize Constitution as one of the fundamental rights and freedom."

It was submitted that, in the circumstances of this matter, the lapse between the commission of the offence and the request for extradition is in fact a legitimate issue for the consideration of the magistrate and, on the habeas corpus application, by the Supreme Court. Counsel for the appellant invited this Court to revisit its decision in **Hislop v Attorney General; Civil Appeal No. 12 of 2002**.

[67] In **Hislop v Attorney General t**he issue was whether the inordinate delay caused essentially by the prosecuting authorities in the United States in instituting extradition proceedings infringed the appellant's right under section 6(2) of the Constitution of Belize to a fair hearing within a reasonable time. Section 6(2) of the Constitution provides:

"….6(2) If any person is charged with a criminal offence then unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law…."

The Court relied inter alia on a number of Canadian authorities under section 11(b) of the Canadian Charter of Rights and Freedoms which provide that any person who was charged with an offence had the right to be tried within a reasonable time. For my part, I accept that the decision, based on those authorities under the Charter, was correct and I see no need to revisit that case. These cases were **The Republic of Argentina v Mellino [1987] 1 S.C.R 536** and the **United States of America v Allard [1987] 1 S.C.R. 564**.

[68] In **Mellino's** case one of the issues raised concerned alleged breaches of section 11(b) of the Canadian Charter of Rights and Freedoms. This section provides:

> "11 Any person charged with an offence has the right
>
> (b) to be tried within a reasonable time."

La Forest J, who delivered the judgment on behalf of the majority, stated that the extradition judge had treated the proceedings as if Mellino had been charged before him with a criminal offence and held that section 11(b) of the Charter had been violated. La Forest J however pointed out that Mellino was never charged by the Canadian Government to which the Charter applies but rather with an offence in Argentina by the Government of Argentina for an offence that took place in Argentina. The judge stated at paragraph 16 of the judgment:

> "16. As I indicated in **(Canada) v Schmidt [1987] 1 S.C.R. 500**, s 11 of the Charter has no application to extradition hearings. It is interesting that the courts of the United States have interpreted the Sixth Amendment of their Constitution guaranteeing speedy trial as not applying to extradition proceedings. See **Jhird v Ferrandina 536 F 2d 478 (2d Cir. 1976); Sabatier v Dabrowski, 586 F. 2d 866 (1st Cir. 1978); Matter of Burt, 737 F 2d 1477 (7th Cir. 1984).**
>
> 17. Counsel for Mellino, however, argues that s 11(b) of the Charter applied to Mellino by virtue of article V of the treaty which provides that extradition shall not take place if "exemption from

> prosecution or punishment has been acquired by lapse of time, according to the laws of the state applying or applied to". This provision was obviously intended to bring into operation statutes of limitation that exist in some counties prohibiting prosecution for certain crimes after a lapse of time …
>
> Section 11(b), on the other hand is not an exemption in that sense. It gives a Charter remedy for delay when a prosecution has been initiated; no fixed time is involved. One must take into account such matters as whether the delay is unreasonable having regard to the particular procedures ordinarily taken. In extradition matters this would surely require an inquiry into how proceedings are conducted in the foreign country and involve comparing with ours. As well, a thorough examination of the facts surrounding the delay would have to be made, a function, as I explained in Schmidt, supra, wholly out of keeping with extradition proceedings. It would require much stronger words than these to persuade me that a treaty provision of this kind was intended to expand the application of our constitutional standards for expeditious prosecutions to the international arena…."

[69] In the **United States of America v Alain Allard** (supra), a judgment delivered the same day as the judgment in **Argentina v Mellino** (supra), La Forest J, who delivered the judgment on behalf of the majority, indicated that that appeal raised four questions, the last two of which were:

> "Does the Charter have extra territorial applications so as to deprive a foreign country of a right conferred upon it by a treaty with Canada?"
>
> and
>
> "Does s 7 of the Charter apply in the present case"

Section 7 of the Charter provides:

"7 Every one has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[70] In answer to these two questions La Forest J stated:

"12. The answer to the last two questions may also be found by referring to my reasons for judgment in *Mellino* as well as those in **Canada v. Schmidt, 1987 CanLII 48 (S.C.C.), [1987] 1 S.C.R. 500**, a judgment also delivered today. As to these two questions, it seems obvious in the first place that the *Charter* can only apply to the activities of the governments mentioned in s. 32. It therefore does not apply to the activities of a foreign government, especially when these take place in the foreign country. The delays referred to in this case are those of the United States prosecutorial authorities in that country. Accordingly s. 11(*b*) of the *Charter*, which deals specifically with delay, has no application in this case.

13. As I indicated in the cases already cited, a judge acting as an extradition judge does not have jurisdiction to try the case. The various defences to the charge are for the consideration of the judge at the trial in the United States. It should not be presumed that the foreign court to which the task of conducting the trial will be assigned will fail to take account of the kinds of questions the respondents raise. Rather, it must be presumed that the respondents will get a fair trial. The general provision in article 8 of the treaty, which provides that the determination of whether extradition should be granted or refused shall be made in accordance with the law of the requested state and that a fugitive has all the rights to all remedies and recourses provided by law, was not intended to displace the entire structure of the system of extradition. One

should not, therefore, interpret it as importing into an extradition hearing all the defences that could be raised at a trial of an accused in Canada. The provision simply provides for the application of the law of the requested state to the determination of whether extradition will be granted, including remedies relevant to that procedure.

14. It is not the Canadian government that is prosecuting the respondents. Therefore, it is not that government that has a responsibility to see that the prosecution is conducted in accordance with procedures applicable in Canada. Accordingly, we need not enquire into whether the prosecution will conform to our procedures or if there are defences that could be raised if the trial took place in Canada. This would amount to exercising a jurisdiction that belongs to the country where the crime was committed.

17. As I indicated in *Schmidt* and *Mellino*, *supra*, the courts in the United States, which has a Constitution similar to ours, have proceeded in a similar manner. For example, in *Matter of Burt*, 737 F.2d 1477 (7th Cir. 1984), at p. 1487, where there was a delay of twenty years between the commission of the crime and the request for extradition, the Federal Court of Appeal of the United States expressed itself as follows:

> We hold that no standards of fair play and decency sufficient to trigger due process concerns are automatically implicated when, in undertaking its foreign policy mission, a governmental extradition decision subjects a citizen accused of committing crimes in a foreign jurisdiction to prosecution in the foreign state after a substantial time has elapsed since the commission of the crime.... To constrain the government by placing on it the duty to undertake its

> extradition decisions with an eye not only toward the legitimate international interests of the United States as determined by the branch charged with that responsibility, but also toward the prejudice that might result to an individual accused because of the amount of time that has elapsed, would be to distort the aims of the diplomatic effort. After all, the actions of the United States in extraditing someone, do not result primarily from a desire to try the accused; it is the foreign state that is the instigator of the prosecutorial action."

[71] In **Kirkwood v United Kingdom (1984) 6 EHRR 373**, the European Commission of Human Rights was required to decide when the allegation that the applicant had been afforded the opportunity to cross-examine the witnesses for the prosecution at the committal stage of extradition proceedings. He alleged that such failure amounted to a breach of article 6(3)(d) of article 6 of the European Convention on Human Rights. The Commission stated:

> "The applicant invokes Article 6 in relation to the proceedings concerning his extradition from the United Kingdom and contends that he has not been afforded the guarantees of article 6(3)(d) and specifically the opportunity to cross-examine the prosecution witness against him at the committal stage of the extradition proceedings … The present case also concerns extradition, but the Commission notes that the tasks of the Magistrates' Court included the assessment of whether or not there was, on the basis of the evidence, the outline of a case to answer against the applicant. This necessarily involved a certain limited examination of the issues which would be decisive in the applicant's ultimate trial. Nevertheless, the Commission concludes that these proceedings did not in themselves form part of the determination of the applicant's guilt or innocence,

> which will be the subject of separate proceedings in the United States which may be expected to conform to standards of fairness equivalent to the requirements of Art. 6, including the presumption of innocence, notwithstanding the committal proceedings. In these circumstances, the Commission concludes that the committal proceedings did not form part of or constitute the determination of a criminal charge within the meaning of Art. 6 of the Convention."

[72] These cases all show that proceedings for extradition in the requested country are not criminal proceedings, as the person to be extradited has not been charged with any offence in the requested country. Consequently, as stated earlier I do consider that there is any need to revisit the court's decision in **Hislop v Attorney General**. The appellant was not a person charged in Belize with a criminal offence against the law of Belize. The provisions of section 6(2) of the Constitution of Belize must be taken to mean a person charged within Belize as, in my view, the Constitution does not create extraterritorial jurisdiction to include in the term "a person charged" a person who is charged in the United States of America. What is being guaranteed by section 6(2)is that a person who is charged with a criminal offence against the law of Belize shall be entitled to a trial within a reasonable time. La Forest J in **Schmidt** [1987] 1 S.C.R. 500, at paragraph 36 of the judgment, pointed out that:

> "An extradition hearing is not a trial. It is simply a hearing to determine whether there is sufficient evidence of an alleged extradition crime to warrant the Government under its treaty obligations to surrender a fugitive to a foreign country for trial by the authorities there for an offence committed within its jurisdiction."

Applying this statement to the instant matter, the appellant has not been charged with any criminal offence against the Laws of Belize. He had been arrested on a warrant at the request of the United States Government which is seeking his extradition. The function of the magistrate is to determine whether there is

sufficient evidence of an alleged offence in the United States for a trial for first degree murder in that country.

[73] I accept and adopt the observation by La Forest J at paragraph 29 of the judgment in Mellino's case when he spoke of:

> "29……the modest function of an extradition hearing which (barring minimal statutory and treaty exceptions) is merely to determine whether the relevant crime falls within the appropriate treaty and whether the evidence presented is sufficient to justify the executive surrendering the fugitive to the requesting country for trial there. I repeat: the role of the extradition judge is a modest one: absent express statutory or treaty authorization, the sole purpose of an extradition hearing is to ensure that the evidence establishes a *prima facie* case that the extradition crime has been committed. The procedure bears a considerable affinity to a preliminary hearing…"

[74] For the reasons stated above I do not consider that either the magistrate or the Supreme Court had any jurisdiction to entertain submissions that, based on the delay in instituting the extradition proceedings, such delay amounted to an abuse of the court's process. The application to the Supreme Court was not an appeal but an application for a writ of habeas corpus. On such an application the court, in my view, was required to determine the validity of the order committing the appellant to prison. In other words, to ensure that the magistrate in committing the appellant acted within the powers conferred on him by the Act – whether the warrant requesting the extradition of the appellant had been properly authenticated and whether the evidence produced establish a prima facie case against the appellant that he had committed the alleged offence in Florida.

Separation of Powers

[75] In ground 2, it is alleged that the Chief Justice erred in holding that the Minister responsible for extradition has power to consider issues of delay and abuse of process, and that it is from the Minister that the appellant should seek redress. In Ground 3, it is stated that section 10 of the Extradition Act 1870 violates the Separation of Powers Doctrine and section 6(7) and (8) of the Belize Constitution and is pro tanto void.

[76] By Section 10 of the 1870 Act the Minister is given this power to decide whether a fugitive criminal is to be surrender pursuant to a request for his extradition. As pointed out earlier, in **Atkinson**'s case, Lord Reid recognized the importance of the safeguard provided in section 11 of the 1870 Act which gives to the Secretary of the State power to refuse to surrender a prisoner who had been committed to prison, if it was considered wrong unjust or oppressive.

[77] On the **Atkinson** line of cases, the safeguard resides in the Minister responsible for extradition who has to make the final decision on whether to surrender the appellant. Counsel for the appellant submitted that, in exercising this power, the Minister is ultimately deciding on the liberty of the appellant and is required to consider weighing legal matters including important fundamental rights issues such as breach of natural justice, oppression abuse of process and injustice. Counsel also contended that, in weighing all these matter to determine whether a prisoner should be freed, the Minister was in fact performing an essentially judicial function which under the Constitution falls exclusively within the province of the judiciary. Counsel argued that, by conferring such a function on the Minister, section 10 violated the doctrine of separation of powers.

[78] In support of the submissions counsel for the appellant relied on **The State v Khoyratty [2006] UKPC 13**. In that case, the Privy Council was required to consider whether amendments made to the Constitution of Mauritius and the

Dangerous Drugs Act which denied bail that person charged with offences under certain specified sections of the Dangerous Drugs Act were unconstitutional in so far as they conflicted with other sections of the Constitution. The Privy Council held that the amendments removed from the judiciary what was essentially a judicial function of determining the issue of deprivation of a person's liberty. In so determining, their Lordships held that the amendments amounted to a violation of the doctrine of separation of powers.

[79] In giving his judgment, Lord Steyn considered that it was necessary to understand the constitutional background to the Constitution of Mauritius. For this, his Lordship referred to the judgment of the Board in **Ahnee v Director of Public Prosecution [1999] 2 AC 294, 302 – 303** where the Board determined:

> "From these provisions the following propositions can be deduced. First, Mauritius is a democratic state constitutionally based on the rule of law. Secondly, subject to its specific provisions, the Constitution entrenches the principle of the separation of powers between the legislature, the executive, and the judiciary. Under the Constitution one branch of government may not trespass upon the province of any other. Thirdly, the Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary.

His Lordship continued at paragraph 11 of his judgment that:

> "While the judgment in Ahnee does not afford the answer to the question under consideration it is relevant in emphasizing (a) that Mauritius is a democratic state based on the rule of law; (b) that the principle of separation of powers is entrenched; and (c) that one branch of government may not trespass on the province of any other in conflict with the principle of separation of power."

[80] Lord Steyn accepted that Mauritius was a democratic state based on the rule of law with a Constitution in which the principle of separation of powers is entrenched requiring that one branch of the government is not entitled to trespass on the province of any other which would create a conflict with the principle of separation of powers.

[81] Counsel for the appellant also relied on the judgment of Lord Mance who said at paragraph 35:

> "35. These are basic principles themselves not expressly spelled out elsewhere in the Constitution, for reasons explained by Lord Diplock in **Hinds v The Queen [1977] AC 195** (a decision followed in Director of Public Prosecutions of **Jamaica v. Mollison [2003] 1 AC 41** to which Lord Steyn has referred). Lord Diplock giving the majority judgment said that new constitutions on the Westminister model were, particularly in the case of unitary states, evolutionary not revolutionary and that:
>
> > "Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature.
>
> Nonetheless, it is well established as a rule of construction applicable to constitutional instruments

under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively."

36. These basic principles were in my opinion infringed, even though only in a limited sphere, by the purported constitutional amendment in 1994 of section 5 to insert subsection (3A)(a). The effect of the amendment was to remove from the judiciary any responsibility for and power in respect of the liberty of any individual, prior to any trial for a prescribed drug offence upon reasonable suspicion of which the prosecuting authorities might arrest and detain him. The scheme of section 5 prior to such amendment permitted a person to be arrested upon reasonable suspicion, and then required him or her to be brought without delay before a court, for remand in custody or on bail pending trial as the court determined. To remove the court's role – and in the process to prescribe automatic detention in custody pending trial whenever prosecuting authorities have reasonable grounds to arrest for a prescribed drug offence – is not merely to amend section 5, it would be to introduce an entirely different scheme. The new scheme would contradict the basic democratic principles of the rule of law and the separation of judicial and executive powers which serve as a primary protection of individual liberty and are entrenched by the combination of sections 1 and 47(3)."

[82] Counsel for the appellant also relied on **Director of Public Prosecution v Mollison [2003] 2 AC. 411**. In that case, the Privy Council held that it was unconstitutional for juveniles convicted of crimes to be sentenced to be detained

during the Queen's pleasure. Such a sentence, the Board said, violated the separation of powers doctrine.

[83] In response counsel for the respondent submitted that in exercising his powers under the 1870 Act whether a person should be surrendered the Minister responsible was not exercising any judicial function but rather exercising an executive function. Consequently the provision of Section 10 of the Act does not violate sections 6(7) and (8) of the Constitution.

[84] In resolving these submissions, it is in my view necessary to have regard to the respective roles of the Courts and the Minister in relation to extradition and proceedings flowing from such request. In **Canada v Schmidt** (supra) La Forest J in explaining extradition said at para 26:

> "Extradition is the surrender by one state to another on request of persons accused or convicted of committing crime in the state seeking the surrender. This is ordinarily done pursuant to a treaty or other arrangement between states acting in their sovereign capacity and obviously engages their honour and good faith. A surrender under these treaties is primarily an executive act. Charter considerations and international implications apart, it is under domestic law in the discretion of the executive to surrender or not to surrender a fugitive requested by another state."

[85] In **Argentina v Mellino (supra)** La Forest J pointed to the limited role of the court in extradition proceedings in the absence of express statutory or treaty authorization and at para. 29 of his judgment reminded that in Canada:

> "Responsibility for the conduct of our foreign relations, including the performance of Canada obligations under extradition treaties is, of course, vested in the Executive."

[86] In **United States of America v McVey [1992]** 475 La Forest J again had occasion to comment insofar as Canada was concerned, on the nature of extradition. The justice in explaining the basic consideration relating to extraditions said:

> "To begin with, it is important to remember that under customary international law states have no obligation to surrender fugitives from justice to other states; see **United States v. Allard** 1 S.C.R. 861, at p. 865. To create such obligation, it is necessary to enter into treaties. So far as the international obligations of Canada (and for that matter other states) are concerned, therefore, they must be found within the confines of the treaties. Of course, some assistance may be found in the practices followed by other states and there is considerable similarity in the practices of different states ...
>
> Equally these principles and rules do not exist at common law. At common law, the executive had no power to extradite criminals. Nor would a treaty obligation undertaken by Canada alone authorize the executive to do so. A treaty does not alter the law of the land. A statute is required to implement it. From the standpoint of domestic law, therefore, extradition is a creature of statute. The domestic law of this country is to be found in the Extradition Act; see also **Allard, supra**, at p. 865.
>
> Canada's international obligations, then, are to be found in the treaty. The purpose of the Act is to ensure that the law of the land conforms to the treaty. It is to the former instrument that the courts must turn to find their authority in extradition matters. The genesis of the present Act may be traced to the first British statute of general application on the subject, The Extradition Act, 1870 (U.K.)."

[87] Later in his judgment, La Forest J, reflecting on the nature of the extradition treaty of Canada, said:

> "Some perspective may be gained through reflection on what an extradition treaty is. It is an agreement between two sovereign states whereby each agrees to surrender on request persons alleged to have committed crimes in the state requesting the surrender. To this general obligation, states frequently attach terms and conditions. When a request is made, the political authorities in the requested state will examine the material to see that the request complies with these terms and conditions. The treaties also make provision for the requesting state to supply certain material whereby the requested state can determine the validity of the request and its compliance with the terms and conditions of the treaty (see Art. 9 of the treaty here (Can. T.S. 1976 No. 3)), and it is reasonable that these are the materials to be looked at in determining the issue. In essence, the treaty obligations are of a political character to be dealt with in the absence of statute by the political authorities. Barring statutory provision, the task of dealing with international treaty obligations is for the political authorities, and is performed by the Ministers and departments in the course of fulfilling their appropriate mandates. The Extradition Act, of course, gives the Minister of Justice authority respecting the surrender of a fugitive; see ss. 20 - 22 and 25. The treaty terms are aimed at the obligations of the parties and not the internal procedures by which these are to be carried into effect.

[88] The Supreme Court of the Philippines sitting en banc in **Government of the United States of America v Guillermo et al G.R. No. 148571**, Panganivan J, in giving the judgment of the majority, spoke of the need to understand "certain postulates of extradition".

In respect to the third of those postulates which relates to the sui generis nature of extradition proceedings, the judge said:

3. The Proceedings Are Sui Generis

Third, as pointed out in Secretary of Justice v. Lantion, extradition proceedings are not criminal in nature. In criminal proceedings, the constitutional rights of the accused are at fore; in extradition which is sui generis -- in a class by itself -- they are not.

An extradition [proceeding] is sui generis. It is not a criminal proceeding which will call into operation all the rights of an accused as guaranteed by the Bill of Rights. To begin with, the process of extradition does not involve the determination of the guilt or innocence of an accused. His guilt or innocence will be adjudged in the court of the state where he will be extradited. Hence, as a rule, constitutional rights that are only relevant to determine the guilt or innocence of an accused cannot be invoked by an extraditee.

There are other differences between an extradition proceeding and a criminal proceeding. An extradition proceeding is summary in nature while criminal proceedings involve a full-blown trial. In contradistinction to a criminal proceeding, the rules of evidence in an extradition proceeding allow admission of evidence under less stringent standards. In terms of the quantum of evidence to be satisfied, a criminal case requires proof beyond reasonable doubt for conviction while a fugitive may be ordered extradited upon showing of the existence of a prima facie case. Finally, unlike in a criminal case where judgment becomes executory upon being rendered final, in an extradition proceeding, our courts may adjudge an individual extraditable but the President has the final discretion to extradite him. The United States adheres to a similar practice whereby the Secretary of State exercises wide discretion in balancing the equities of the case and the demands of the nations foreign relations before making the ultimate decision to extradite.

Given the foregoing, it is evident that the extradition court is not called upon to ascertain the guilt or the innocence of the person

sought to be extradited. Such determination during the extradition proceedings will only result in needless duplication and delay. Extradition is merely a measure of international judicial assistance through which a person charged with or convicted of a crime is restored to a jurisdiction with the best claim to try that person. It is not part of the function of the assisting authorities to enter into questions that are the prerogative of that jurisdiction. The ultimate purpose of extradition proceedings in court is only to determine whether the extradition request complies with the Extradition Treaty, and whether the person sought is extraditable."

[89] Extradition proceedings are sui juris. The common law did not recognize extradition. The Executive did not possess any authority to extradite its citizens to a foreign country. However recognizing that it was important that criminals should not be able to commit crimes with impunity – committing crime in a foreign country and then returning home, the Executive entered into treaty arrangements with foreign countries to extradite persons found within the country to the foreign country to stand trial. In order to give effect to these treaties domestic legislation had to be enacted. As will be seen later the 1870 Extradition Act of England was extended to Belize.

[90] The role of the Executive is clearly set out under that enactment. The request from the United States of America for the Extradition of the appellant was made pursuant to the treaty governing extradition between the United Kingdom and the United States which was extended to Belize pursuant to an Order in Council. The role assigned to the Executive is clearly defined under the 1870 Act. In keeping with the **Atkinson** line of cases, the Courts, both at the Supreme Court and Magistrate Court, have a limited role to play as is set out above. It is because the process of Extradition was executed by a political determination that the Courts were granted the role. It is of significance that the magistrate does not make an order extraditing the prisoner. The magistrate is limited to

committing the appellant in custody. The final determination if he is to be extradited is to be made by the Minister responsible for Extradition. He is required to take into consideration whether having regard to all the circumstances, it would be wrong, unjust or oppressive to surrender the appellant.

[91] The appellant also complained that it is the Minister who has the responsibility for making the final decision under the Act with regards him being handed over to the United States. It is contended that in making this decision the Minister is determining the personal liberty and this is a civil right within the meaning of section 6(7) of the Constitution. Section 6(7) provided:

> "(7) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

[92] It is said that the Minister is not independent nor is he impartial. Counsel for the appellant submitted that the primary responsibility of the Minister is to promote the foreign policy of Belize and to maintain good relations with friendly countries. The Minister is obligated to facilitate and promote the objective of the Treaty. This creates a clash between broad foreign policy considerations and the rights of the appellant. In support of these submissions we were referred to **Aerts v Belgium – 25357/94 [1998] ECHR 64 Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening) [2003] 2WLR 388; Alconbury [2001] 2All E.R. 929 and R (Kashamu v Governor of Brixton Prison [2002] QB 887**.

[93] Reliance was also placed on **Aerts v Belgium – 25357/94 1998 ECHR 64**. In that case the applicant was seeking a judicial declaration that the Court had jurisdiction to award him compensation for unlawful imprisonment. The Belgian law required that in civil cases a person must be represented by counsel before the Court of Cessation. The Legal Aid Board denied Aerts representation before the Court of Cassation on the grounds that the appeal did not appear to be well founded. It was held that the Legal Aid Board did not have authority to assess the applicant's prospect of success. It was for the Court to make that assessment. It was held that by refusing the applicant's request on the ground that it was not well founded, the Legal Aid Board affected the applicant's right of access to the tribunal.

[94] In Kashamu's case supra, Rose LJ said at para. 27:

> "It is, in my judgment, plain that Article 5 expressly requires the lawfulness of the detention of a person detained with view to extradition under paragraph (1)(f) to be decided speedily by a Court. It is equally plain to my mind that, in the extradition context, the Secretary of State lacks the qualities of independence and impartiality required of the Court-like body by the Strasbourg jurisprudence in particular Weeks v United Kingdom.

[95] Rose LJ went on to point out that insofar as the Strasbourg jurisprudence was concerned that it was for a Court and not the Secretary of State, as the appropriate forum, to decide on the issue of the lawfulness of a person's detention and, subject to the provision of the Extradition Act 1989, the magistrate was to be preferred to the High Court. It may be that Rose LJ reached this decision as he had earlier recognized that abuse of process allegations usually required resolution of factual issues which was unsuited for the High Court on application for habeas corpus or judicial review.

[96] When the Minister responsible for Extradition exercises his power under section 7 of the 1870 Act he does not determine the guilt or innocence of the person whose extradition is being sought. That person, like the appellant, has not been charged with any offence under the Laws of Belize. The Minister, in exercising his discretion is performing his responsibility for Extradition which has been assigned to him as Minister of Foreign Affairs. The Minister acts under the provisions of the treaty made between the Government of the United Kingdom and the Government of the United States and extended to Belize by Order-n-Council. As La Forest J reminded in McVey's case that:

> "Barring statutory provisions, the task of dealing with international treaty obligation is for the political authorities, and is performed by Ministers and departments in the course of fulfilling their appropriate mandates."

[97] In my view, when the Minister orders the surrender of the appellant he is not acting as a Court or other authority proscribed by law for the determination of the existence or extent of any civil right. When the Minister surrenders a person he is performing an executive act under the provision of the treaty. He is not acting as a court. He is not an authority entrusted with determining any civil right. This does not mean that the Minister is entitled to act in an arbitrary fashion or make any decision which is irrational given all the circumstances of the case. In such circumstances the decision of the Minister would be open to review by the Courts.

Grounds 5 & 6

[98] In ground 5, the appellant stated that the Chief Justice was wrong when he concluded that hearsay evidence was admissible in the proceedings before the Magistrate. In ground 6, it was alleged that the Chief Justice was also wrong

to hold that there was sufficient admissible evidence before the Magistrate for him to commit the appellant under the provisions of section 10 of the 1870 Act.

[99] Counsel for the appellant acknowledged that section 14 of the 1870 Act creates an exception to the hearsay rule by allowing evidence to be tendered before the magistrate by means of depositions and statement on oath other than from the persons who actually made the depositions and statements. However, notwithstanding this exception, counsel submitted that section 14 does not permit hearsay evidence which is contained in the depositions to be admitted into evidence. In support of this submission, he relied on **R v Governor of Pentonville ex parte Kirby** [1979] 1WLR 541. Counsel argued that the Chief Justice fell into error when he found that sections of the Indictable Procedure Act - Cap 96 which dealt with procedures also authorised the admission of hearsay evidence which is contained in the statements. He argued that the essential evidence of the offence of first degree murder against the appellant came from the evidence of a co-accused and such evidence was inadmissible being hearsay evidence and therefore unreliable. Such evidence taken at its highest, it was said, is inadmissible under the Laws of Belize and is insufficient for the magistrate to warrant the committal of the appellant.

[100] On the other hand, counsel for the respondent submitted that the Chief Justice did not rule that the affidavits referred to by counsel for the appellant contained hearsay statements which were admissible. Counsel pointed out that the Chief Justice, having reviewed the affidavit evidence, found that the evidence was admissible. Counsel pointed out that the Chief Justice did not rule that the affidavit contained hearsay evidence. Counsel however indicated that if the Chief Justice ruled that the evidence contained in the affidavit included hearsay was admissible, the Chief Justice was nonetheless right. Counsel submitted that, as a general rule, hearsay evidence is admissible in extradition proceedings and the court is entitled to act on such evidence. She however insisted that there was no hearsay evidence in the affidavits. Counsel pointed out that even though the Chief

Justice ruled that hearsay evidence was admissible he did not in fact hold that the affidavits contained hearsay evidence.

[101] Section 14 of the 1870 Act provides:

> "14. Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under the Act."

This is authority for admission into evidence of the deposition if the conditions set out in the section are satisfied.

[102] Section 10 of the 1870 Act so far as material provides:

> "10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused has been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged…."

[103] This issue engaged the attention of the Court in **R v Zossenheim (1903)** 20 T.L.R 121, where Lord Alverston, Chief Justice said at p. 122:

> "Foreign depositions ought to be most strictly scrutinized. The magistrate ought to say what the substance of them was, as establishing the facts of the case, but to say that if the statements in the deposition did establish the facts, the magistrate should then inquire whether certain formalities according to English Law has been taken, was in his Lordship's opinion, contrary to section 11 of the Extradition Act 1870. It was suggested….that many of these facts

> might have been altered by cross-examination. Though the magistrate ought to scrutinize the depositions and see that they afforded substantial evidence of facts going to prove an offence, his Lordship knew of no authority that, because they might be criticized subsequently and cross-examined to subsequently, or because possible they had not been taken according to English rules of evidence, they ought not to be acted upon. On the first point, that the depositions did not show substantial ground of possible guilt and that the depositions might have been taken in a way in which they could not have been taken in the English Courts, there was no ground to interfere."

[104] The issue of whether the evidence produced in committal proceedings had to accord with the Laws of England in order to justify committal of the prisoner also attracted the attention of the Divisional Court in **R v Governor of Pentonville Prisoner ex parte Voets [1986] 1 All E.R. 630**. Lloyd L.J. delivering the judgment of the Court said at p.632:

> "The first submission raises an important point, which I do not find altogether easy. By section 10 of the Act of 1870 and article VII of the Anglo-French Treaty of 14 August 1876, the subject of an Order in Council of 16 May 1878, the evidence to be produced was such evidence as would, according to the law of England, justify the applicant's committal for trial. The law of England in section 10 of the Act means not only English substantive law but also English rules of evidence. Thus, it appears to be well established that hearsay evidence is inadmissible to establish a prima facie case under the Extradition Acts. The only exception is that provided by section 14 of the Act itself, under which depositions taken in a foreign state may be received in evidence, even though otherwise inadmissible in English law, and even though the formalities

required by English law in the taking of the deposition are not complied with: see **Rex v. Zossenheim (1903) 20 T.L.R. 121**."

[105] These cases show that the Chief Magistrate must determine whether the evidence contained in the depositions is such that would according to the Laws of Belize, justify the appellant's committal for trial. As Lloyd L.J. indicated in Voets case "it appears to be well established that hearsay evidence is inadmissible to establish a prima facie case under the Extradition Act." However, the Chief Magistrate was required to determine whether the depositions taken in the United States should be received into evidence under and in accordance with the provisions of Section 14 of the 1870 Act. In so doing the Chief Magistrate was not required to determine whether the depositions otherwise complied with the requirements of the Laws of Belize in so far as the taking of depositions was concerned.

[106] In my view the Chief Justice was correct in holding that depositions (affidavit) properly fell within the statutory exception to section 14 of the 1870 Act. I do not agree with the appellant that the evidence taken together and at its highest is inadmissible according to the Laws of Belize. There was in my view sufficient evidence in which to commit the appellant.

Ground 7

[107] The appellant alleged that the extradition proceedings which were initiated by the Order of Minister of Foreign Affairs dated 8 October 1998 which required the Chief Magistrate to issue a warrant for the apprehension of the appellant is unlawful and has no legal effect. The Minister of Foreign Affairs is not empowered by any law in Belize to issue such an Order. The appellant submitted that there is no specific legislative provision in Belize which authorized the Minister to issue the Orders.

[108] Counsel for the appellant premised his submissions on the basis that the 1870 Act is not part of the Laws of Belize as it was never extended to Belize and was not therefore an existing law at the time of Independence. The locally enacted Extradition Act which he said is applicable is silent on who should exercise the power contained in section 7 of the 1870 Act.

[109] Section 7 of the 1870 Act provides:

> "7. A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal."

Under this section, the request from a foreign state is made to the Secretary of State who may then require a police magistrate to issue a warrant for the arrest of the fugitive criminal. This section provides the statutory authority for the Secretary of State to initiate the proceeding consequent upon the request the relevant treaty between the United Kingdom and a foreign state. The Extradition Act of Belize Cap 112, it is said, does not refer to section 7 of the 1870 Act. Consequently, the Extradition Act does not contain any provision which vests authority in any person to issue the Order to the Chief Magistrate for the arrest of the appellant.

[110] It is argued that not surprisingly the Extradition Treaty contains no provision as to which office or authority in the United Kingdom (Belize) is empowered to order the Magistrate to issue the warrant for arrest of the fugitive criminal.

[111] Counsel for the appellant contended that there is no provision in law in Belize which identifies and authorizes the Minister of Foreign Affairs to issue a warrant for the arrest of a fugitive criminal. Counsel indicated that where the 1870 Act was extended to a colony by Order in Council the request in the colony was made to the Governor as the person who had responsibility for the Extradition of criminal fugitives (section 17(1)).

[112] On attaining independence, it was said that under the new Constitution of Belize a constitutional monarchy was established with the executive authority vested on the Queen. This executive authority is exercised in Belize on behalf of the Queen by the Governor-General. Counsel argued that the office of Governor-General was a new office created under section 30 of the Constitution. He submitted that the powers which had been specifically reserved to the Governor by Letters Patent and the 1964 Constitution had not been vested in the Governor-General. The Governor-General was empowered to assign responsibilities for foreign affairs including treaties and extradition to a specific minister on the advice of the Governor-General.

[113] It is the appellant's position that the 1870 Act was never extended to or formed part of the laws of Belize. The effect of this, counsel argues, is that the 1870 Act was not an existing law at the time of Independence. In these circumstances it is said that the locally enacted Extradition Act is applicable. Consequently the locally enacted Act is silent on who should exercise the power similar to that contained in the 1870 Act.

[114] In support of his submission, counsel relied on **US Government v Bowe [1990] 1 A.C. 50**. Pursuant to a requisition made by the Government of the United States of America to the Ministry of Foreign Affairs of the Bahamas for the surrender of a criminal fugitive, the Minister of Foreign Affairs made an order under section 7 of the Extradition Act 1870. Another order under section 7 was issued by the Governor-General. At page 1267 Lord Lowry held:

> "Section 4(3) of The Bahamas Independence Order 1973 conferred power on the Governor-General by order to make such amendments to any existing law as might appear to him to be necessary or expedient and in exercise of that power the Governor-General made the Existing Laws Amendment Order 1974, effective from 9 July 1974, which provided that a reference in an existing law to the colony should be construed as a reference to the Commonwealth of the Bahamas and that a reference in an existing law to the Governor should be construed as a reference to the Governor-General. Paragraph 9(3) provided:
>
> > 'where it is provided in any existing law that any matter or thing….is required to be or may be done by a Secretary of State, such provision shall have effect as if that matter or thing were required to be or might be done by the Governor-General'."

[115] Counsel submitted that the Governor-General in the Commonwealth of the Bahamas used his powers under the Constitution to designate the Governor-General as the proper person in place of the Governor when it is found in Bahamian legislation. The Governor-General of Belize had been given similar powers under section 134(3). The power had to be exercised with 12 month period after independence. This was not done and the power no longer existed.

[116] Counsel also referred to **Noel Health et al v The Government of the United States of America** [2002] UKPC 33. The Minister of Foreign Affairs in St. Christopher and Nevis was requested by the Government of the United States of America to extradite Noel Heath and the other appellants. One of the issues that the Privy Council had to decide was the validity of the requisitions issued by the Minister of Foreign Affairs. It was submitted that the Minister had no power to issue the requisition to the Magistrate in the exercise of his power

under section 7 of the Extradition Act 1870. The appellants had submitted that only the Governor-General had power to issue a requisition under section 7.

[117] Lord Hutton delivering the judgment of the Board said:

> "24. The submission advanced on behalf of the appellants was that prior to 19 September 1983 the executive authority of St Christopher and Nevis was exercised on behalf of Her Majesty by the Governor and that the power to issue the requisition to the magistrate under sections 7 and 17 of the 1870 Act had to be exercised by him and that, as from 19 September 1983 under section 51(2) of the Constitution the executive authority was to be exercised on behalf of her Majesty by the Governor-General, it therefore followed that the requisition to the magistrate under section 7 must be issued by him and not by the Minister of Foreign Affairs.
>
> 25. The submission advanced on behalf of the respondent was that under the 1983 Constitution St Christopher and Nevis became an independent sovereign state and that the functions of government and the exercise of executive authority, including executive decisions in relation to requests for extradition, were to be carried out by a government minister and not by the Governor-General. Accordingly the necessary adaptation and modification of section 17 of the 1870 Act were that a requisition by the United States of America for the surrender of a fugitive criminal was to be made to the Minister of Foreign Affairs and that the requisition to the magistrate was also to be issued by the Minister of Foreign Affairs.
>
> 26. Their Lordships are of opinion that the submission advanced on behalf of the respondent is correct. Before St Christopher and Nevis became an independent state the executive authority of that territory was vested in Her Majesty and was exercised on her

behalf by the Governor. It was therefore appropriate that in matters relating to extradition the functions carried out in the United Kingdom by a Secretary of State under section 7 of the 1870 Act should be carried out in St Christopher and Nevis by the Governor. But after St Christopher and Nevis had become an independent sovereign State and after 6 July 1995 when the Governor General assigned to Mr Denzil Llewellyn Douglas the responsibility for foreign affairs, it became constitutionally proper that the function under section 7 should be carried out by the Minister to whom responsibility for foreign affairs had been assigned. Under the assignment the subjects assigned to Mr Denzil Llewellyn Douglas included "Conventions and Agreements". The Treaty concluded between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the reciprocal extradition of offenders and set out in Schedule 1 to the United States of America (Extradition) Order 1976 is an "Agreement" within the meaning of that term in the assignment by the Governor General and the Treaty commences with the words:

"The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America;

Desiring to make provision for the reciprocal extradition of offenders;

Have agreed as follows … "

27. In the opinion of their Lordships the Minister of Foreign Affairs is a more appropriate person to exercise the function under section 7 of the 1870 Act than the Governor-General. If the function of issuing a requisition to a magistrate under section 7 of the 1870 Act is vested in the Governor-General, section 56(1) of the Constitution would require him to act in accordance with the

advice of the Cabinet or a minister acting under the general authority of the Cabinet, and it would be a strange result if the 1983 Constitution Order granting independence to St Christopher and Nevis resulted in the decision whether to issue a requisition to a magistrate under section 7 being taken by the Governor- General on the advice of the Cabinet rather than by the decision being taken, as it is in England, by a government minister.

28. Section 7 of the 1870 Act clearly contemplates that the Secretary of State in England who receives the request for extradition will issue the requisition to the magistrate. The appellants accept that the request for extradition of the appellants was properly made to the Minister of Foreign Affairs (see *Government of the United States of America v Bowe* [1990] 1 AC 500, 527A), and in the absence of an express statutory provision pointing to a different conclusion it would appear more logical that, the request from the United States of America having been made to the Minister of Foreign Affairs, the requisition to the magistrate should also be issued by that minister."

[118] His Lordship at para. 31 said:

"31. Therefore their Lordships consider that in order to bring the 1870 Act into conformity with the Constitution pursuant to paragraph 2(1) of Schedule 2 to the St Christopher and Nevis Constitution Order 1983 it is necessary to adapt the Act by substituting "St Christopher and Nevis" for "British possession" and "the Minister of Foreign Affairs" for "the governor" in section 17 of that Act. Accordingly their Lordships hold that the requisitions issued by the Minister of Foreign Affairs in this case were valid and lawful."

[119] Counsel submitted that Heath's case is distinguishable because the Extradition Act 1870 was not part of the Laws of Belize.

[120] For the respondent, it was submitted that, in as much that the appellant had based his argument that the 1870 Act is not part of the Laws of Belize and was not therefore an existing law at the time of independence, once it is shown that the Act was in fact extended to Belize his argument would fail.

[121] Section 2 of the 1870 Act provided inter alia:

> "2. Where an argument has been made with any foreign state with respect to the surrender to such state of any fugitive criminal, Hey Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state."

This section is applicable where it is shown that an arrangement has been made with a foreign government for the surrender of fugitive criminals.

[122] On 8 June 1972 a Treaty with Protocol of Signature was concluded between the United Kingdom of Great Britain and Northern Ireland and the United States of America for the reciprocal extradition of offenders. In the Preamble to an Order-in-Council, The United States of America (Extradition) Order 1976 (Statutory Instrument No. 2144 of 1976), it is stated that:

> "…Her Majesty, in exercise of the powers conferred on Her by section 2, 17 and 21 of the Extradition Act, 1870 or otherwise in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered as follows:"

[123] In paragraphs 3 and 4 it is stated:

> "3. The Extradition Act 1870 and 1935, as amended or extended by any subsequent enactment shall apply in case of the United States of America in accordance with the said Treaty of 8th June 1972.
>
> 4. The operations of this Order is limited to the United Kingdom of Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and the other territories (including dependencies) specified in schedule 2 to this Order."

Belize is listed in Schedule 2.

[124] Counsel for the respondent has drawn the attention of the Court to the fact that in this Order in Council, St. Christopher and Nevis is listed in Schedule 2. For this reason counsel submitted that this Court should be following the decision of the Privy Council in Heath's case.

[125] For my part, I am of the view that paragraphs 3 and 4 of the United States of America (Extradition) Order in 1976 extended the 1870 Act to Belize. Consequently I have no hesitation in accepting the decision and reasoning of the Board in Heath's case. I therefore hold that in Belize the correct person to whom an application under section 7 of the 1870 Act for the rendition of a prisoner is the Minister of Foreign Affairs being the person to whom the Governor-General, acting on the advice of the Prime Minister, had assigned the responsibility for extradition and treaties. Consequently, in my view, the Minister of Foreign Affairs was in fact the person to give the order to the Magistrate for the arrest of the appellant.

[126] In Part XI of the Constitution, section 134 deals with the existing laws of Belize. Section 134(1) provides as follows:

> "134(1). Subject to the provision of this Part, the existing laws shall notwithstanding the revocation of the Letters Patent and the Constitution Ordinance continue in force on and after Independence and shall then have effect as if they had been made in pursuance of this Constitution but they shall be construed with such modifications, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution."

[127] Section 136(6) provides a definition of "existing law." It is stated:

> "(16) In this section, the expression "existing law" means any Act of the Parliament of the United Kingdom, Order of Her Majesty in Council, Ordinance rule, regulation, order or other instrument having effect as part of the law of Belize immediately before Independence Day (including any such law made before that day and coming into operation on or after that day)."

[128] The 1870 Act was an existing law at Independence and is still applicable in Belize. By virtue of the provision of section 17 of the 1870 Act, the Secretary of State would have been replaced by the Governor for the purposes of section 17 of the 1870 Act.

[129] Adopting the approach laid down in **Heath**'s case "the question which arises is what modifications and adaptations to section 17 of the 1870 are necessary to bring it into conformity with the Constitution (para. 21)." The relevant sections of the Constitution are 30, 34, 36, 37, 40, 41.

[130] Section 30 of the Constitution which deals with the establishment of the Office of Governor-General provides:

> "30. There shall be a Governor-General of Belize who shall be a citizen of Belize appointed by Her Majesty and shall hold office during Her Majesty's pleasure and who shall be Her Majesty's representative in Belize."

[131] The manner in which the Governor-General is required to exercise his functions is set out in section 34. That section provides:

> "34-(1) In the exercise of his functions the Governor-General shall act in accordance with the advice of the cabinet or a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution or any other law to act in accordance with the advice of, or after consultation with, any person or authority other than the Cabinet or in his own deliberate judgment.
>
> (2) Any reference in this Constitution to the functions of the Governor-General shall be construed as a reference to his powers and duties in the exercise of the executive authority of Belize and to any other powers and duties conferred or imposed on him as Governor-General by or under this Constitution or any other law.
>
> (3) Where by this Constitution the Governor-General is required to perform any function after consultation with any person or authority he shall not be obliged to exercise that function in accordance with the advice of that person or authority.
>
> (4) Where by this Constitution the Governor-General is required to perform any function in accordance with the advice of, or after consultation with, any person or authority, the question whether the Governor-General has so exercised that function shall not be enquired into by any court of law."

[132] Section 36 establishes the executive authority in Belize. In that section it is provided:

> "36.-(1) The executive authority of Belize is vested in Her Majesty.
>
> (2) Subject to the provision of this Constitution, the executive authority of Belize may be exercised on behalf of Her Majesty by the Governor-general either directly or through officers subordinate to him.
>
> (3) Nothing in this section shall prevent the National Assembly from conferring functions on persons or authorities other than the Governor-General."

[133] Section 37(1) deals with the appointment of the Prime Minister by the Governor-General. Section 40(1) makes provisions for Ministers of Government. Section 40(2) relates to the appointment of Ministers by the Governor-General acting in accordance with the advice of the Prime Minister.

[134] Section 41(1) which deals with the allocation of portfolios to minister provides:

> "41.-(1) The Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for any business of the government, including the administration of any department of Government …"

This subsection is subject to a proviso which is not relevant. Pursuant to this section, the Governor-General by instrument dated 3 September 1998, assigned to the Prime Minister responsibility for Foreign Affairs including Extradition.

[135] Applying the necessary modifications and adaptations to the 1870 Act, I am of the view that "when the Governor-General assigned the responsibility for foreign affairs, it became constitutionally proper that the function under section 7 should be carried out by the Minister to whom responsibility for foreign affairs had been assigned." (see para. 26 of **Heath**'s case.)

[136] It was for these reasons that I agreed that this appeal should be dismissed, with no order as to costs.

MOTTLEY P

CAREY JA

[137] As far back as 26 February 1999, the appellant was committed to detention by the Chief Magistrate to await extradition to the United States of America, there to stand trial for first degree murder of one Larry Miller. *Habeas Corpus* proceedings were commenced before Rivero J, but he died before he could give a decision. The matter was started de novo before the Chief Justice who determined that the appellant who had been granted bail in the interim, should surrender himself to the Superintendent of Hattieville Prison. He was subsequently granted leave to appeal. He filed a notice of appeal on 21 May 2002. Thereafter the matter went to sleep for reasons which have not been vouchsafed to us. The record was not settled until 7 August 2008. These proceedings qualify as civil where the carriage of the appeal is in the hands of the appellant. That said, it is not obvious that the Attorney General's Ministry as representing the requesting state took any action. It all makes for a very

unsatisfactory state of affairs. The sword of Damocles has, so to speak, been hanging over the appellant's head, but he, perhaps not unnaturally, was content to allow things to remain as they were. I think it right to make these comments in the hope that a situation such as has been revealed, will not recur.

[138] Mr. Eamon Courtenay, S.C. who has appeared before us on behalf of the appellant filed amended grounds of appeal which he sought and obtained leave to argue. These are as follows:

> "1. that the Learned Chief Justice erred in law in finding that the Supreme Court has no jurisdiction to consider issues of delay and abuse of process on the habeas corpus application before him;
>
> 2. The Learned Chief Justice erred in holding that the Minister has power to consider issues of delay and abuse of process, and that it is from the Minister that the appellant should seek redress;
>
> 3. Section 10 of the Extradition Act 1870 violates the Separation of Powers Doctrine and sections 6(7) & (8) of the Belize Constitution and is pro tanto void;
>
> 4. That the Learned Chief Justice erred in law by not finding that the inordinate delay in commencing the extradition proceedings gave the Court the power, indeed the obligation, to refuse extradition on the ground that the prosecution of the offense had become barred by lapse of time.
>
> 5. The Learned Chief Justice erred in law in concluding that hearsay evidence was admissible in the proceedings before the Magistrate; and
>
> 6. The Learned Chief Justice erred in law in finding that there existed sufficient admissible evidence for the Magistrate to order the committal of the Appellant.
>
> 7. The extradition proceedings relating to the Appellant initiated by the Order of the Minister of Foreign Affairs dated the 8th October 1998 (pages 397 of the record) is unlawful and of no legal effect for

the reason that the Minister of Foreign Affairs is not empowered by any law in Belize to issue such an Order".

GROUND 7

[139] Mr. Courtenay, S.C. began by arguing ground 7 which, if successful, has the most serious consequences and would cast many a past Attorney General in a sad light indeed. But success on this ground, puts a high premium and a deal of confidence in research facilities at counsel's disposal. He therefore embarked on a review of the history of the Belizean legislation which touched and concerned extradition from colonial times to the time of the attainment of independence from Great Britain in 1981. It was his submission from which he never for one moment resiled that the 1870 Extradition Act, which was an Imperial Statute, is not and was never a part of the laws of Belize because it was never extended to British Honduras, the former colony, and was not therefore "existing law" at the time of Independence. The applicable Extradition law is a locally enacted statute – the Extradition Act, Cap 112, he argued. It is to be noted that this Act is an amalgam of legislation enacted in 1887 (Part III), in 1919 (Part II) and 2000 (Part IV). By no means does it provide or establish a comprehensive legislative scheme for extradition. Mr. Courtenay, S.C. accepts however, that the Extradition Act 1870 (U.K.) is relevant because extradition "being mainly an executive act, primary responsibility for dealing with requests remained with colonial authorities". He called attention to section 18 which provides:

> "18. If by any law or ordinance, made before of after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may by the Order in Council applying this

> Act in the case of any foreign state, or by any subsequent order, either
>
> suspend the operation within such British possession of this Act, or of any part thereof, so far as it relates to such foreign state and so long as such law or ordinance continues in force there, and no longer; or
>
> direct such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act.

Counsel made no significant comment as to the effect of this provision but went on to say that there were two local ordinances passed in 1877 and 1919, the latter repealing and replacing the former. I would very much doubt that the 1919 ordinance did what is asserted by counsel, seeing that both statutes form part of Cap. 112 the extant legislation on extradition. Howsoever that may be, counsel produced an Order in Council (S.I. 1919 No 1893) which states (so far as is material) as follows:

> 'Now, therefore, … The Extradition Ordinance, 1919 shall have effect in the Colony of British Honduras without modification or alteration **as if it were part of the Extradition Act, 1870**" (emphasis supplied)

Counsel submitted that the effect of this Order in Council was to make the 1919 Extradition Ordinance effective in Belize as if it were part of the U.K. 1870 Act. The 1870 Act itself he urged, was not made The Extradition Ordinance for the Colony.

[140] This conclusion is remarkable given the fact that section 18 of the U.K. Extradition Act 1870 to which counsel drew our attention, states explicitly that the order in council may direct that the local enactment is to have effect without modifications as if it were part of this Act, viz., the U.K. Extradition Act 1870. It is as plain as plain can be that it is the local legislation which becomes incorporated into the imperial statute. This is consonant with the constitutional position viz. that the United Kingdom retained responsibility for extradition. Belize, then British Honduras, was not a self governing state. That submission, I fear, is misconceived as due to a misreading of the provision.

[141] Counsel for the respondent, Ms. Banner, did not share the pessimistic misgivings of Mr. Courtenay, S.C. She alluded to section 2 of the 1870 Act which provides (so far as material):

> "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".

and said that an arrangement as contemplated by the provision was made between the United Kingdom and the United States of America by a treaty of 8 June 1972. Mr. Courtenay accepts that position. The treaty came into force on 21 January 1977. Pursuant to an Order in Council intituled the United States of America (Extradition) Order 1976, the Extradition Acts (UK) 1870 – 1935 was made applicable to Belize. The explanatory note at the end of the Order states no more than that the Order applies the UK Extradition Act to "Overseas Territories", previously termed "possessions", among which Belize was listed. It is a profound error to suppose that the Ordinance of 1919 rendered the 1870 UK Act ineffective, as I do not think it was being suggested that the local Act repealed the "imperial" statute. The conclusion is irresistible that the 1870 Act remains a part of the laws

of Belize because, as has been demonstrated, it was extended to this country.

[142] But Mr. Courtenay, S.C. is at least right when he asserts that neither the 1870 Act nor the local legislation have expressly specified on whom is conferred the power to initiate extradition proceedings on behalf of a foreign state, and specifically that power does not reside in the Minister of Foreign Affairs who issued such an order in the instant case dated 8 October 1998. In the circumstances, section 17 of the 1870 Act is a useful starting point. It is in these terms:-

> "17. This Act, when applied by Order in Council, shall unless it is otherwise provided by such Order, extended to every British possession in the same manner as if throughout this Act, the British possession were substituted for the United Kingdom or England , as the case may require, but with the following modifications, namely,
>
> (1)The requisition for the surrender of a fugitive criminal may be made to the governor of that British possession by any person recognized by that governor as a consul-general, consul, or vice-consul, of (if the fugitive criminal has escaped from a colony or a dependency of the foreign state on behalf of which the requisition is made) as the governor of such colony or dependency;
>
> (2) No warrant of a secretary of state shall be required, and all powers vested in or acts authorized or required to be done under this Act by the police magistrate and the secretary of state or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone:

(3)…
(4)…

In this connection section 7 is also relevant. It states so far as is material:-

> "A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom [for which substitute Belize as required by [section 17] shall be made to a Secretary of State {for which substitute Governor as required by section 17(1)} by some person recognized by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State [Governor] may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal"

[143] Ms. Banner correctly encapsulate the legal position when she stated that section 17 legally identified and authorized the Governor in the colony as the designated person for the purpose of executing the functions of the 1870 Act. That regime continued until Belize gained internal self-government in 1964. As a matter of historical fact, as Ms. Banner points out, correctly as I think, powers reserved to the Governor included extradition. Section 2(4) of the Constitution ordinance provided as follows:

> '(4) Unless the context otherwise required, references in this ordinance to the special responsibilities of the Governor are references to the matters for which the Governor is responsible by virtue of Article 15 of the Letters Patent, that is to say:-
>
> (a) external affairs:
> (b) defence (including the armed forces);

(c) internal security;

(d) the terms and conditions of service (including leave and passages) of public officers".

Then sections 15 and 16 must be noted. They provide:-

> "15. The Governor, acting with the advice of the Premier, may, by directions in writing, assign to the Premier or any other Minister responsibility for any business of the Government of Belize, including the administration of any department of government:
>
> Provided that:-
>
> (a) except for the purpose of conducting business in either house of the National Assembly, a Minister shall not be given responsibility for any matter for which under Article 16 of these our letters the Governor, acting in discretion, is responsible and has not delegated to a Minister, and …
>
> 16(1) The Governor, acting in his discretion, shall be responsible for the following matters:-
>
> (a)external affairs;
>
> (b) defence (including the armed forces)
>
> (c) internal security; and
>
> (d) the terms and conditions of service (including leave and passages) of public officers
>
> (2) The Governor, acting in his discretion, may, by direction in writing delegate, with the prior approval of the Secretary of State, to a Minister designated by him after consultation with the Premier, such responsibility for matters relating to external affairs, or (with respect to the armed forces) The Belize Defence Forces, as the Governor may think fit upon such conditions as he may impose".

Mr. Courtenay acknowledges that the Governor did not at any time during the self-government period, assign responsibility for treaties and/or extradition to any Minister. On the attainment of Independence, the Constitution Ordinance was repealed and Letters Patent were revoked, and in their place, the Belize Constitution 1981 became the supreme law.

[144] The new Constitution included Transitional Provisions (part X1) provided for the continuing in force of "existing laws". Section 134 provides as follows:

> "(1) Subject to the provisions of this part, the existing laws shall notwithstanding the revocation the revocation of The Letters Patent and the Constitution Ordinance continue in force on and after Independence Day and shall then have effect as if they have been made in pursuance of this Constitution but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.
>
> (2) Where any matter that falls to be prescribed or otherwise provided for under this Constitution by the National Assembly or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) that prescription or provision shall as from Independence Day have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution) as if it had been made under this Constitution by the Nation Assembly or as the case may require by the other authority or person.
>
> …
>
> (6) In this section, the expression "existing law" means any Act of the Parliament of the United Kingdom, Order of Her Majesty in Council, Ordinance, rule, regulation, order or other instrument

having effect as part of the law of Belize immediately before Independence Day (including any such law made before that day and coming into operation on or after that day".

The significance of these enactments is that the 1870 Act was an existing law at Independence. Accordingly, I agree with Ms. Banner that it is clear as well that since the 1870 Act was extended and applied to Belize by Order in Council, section 17 of the 1870 Act is applicable, so that "Secretary of State" is to be replaced by Governor in construing section 17 of the Act with respect to Belize. The transitional provisions enacted in the Belize Constitution, ensured that the 1870 Act remained the legal regime for extradition matters in Belize and continued in full force and effect. However, it has effect with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution (Section 134(2)).

[145] The absence of legislation providing specifically what person or authority is empowered to direct the magistrate to issue a warrant for the apprehension of a fugitive offender, is not new in the Caribbean region. Decisions of the Privy Council from The Bahamas*, Government of the United States of America v. Bowe [1989] WLR 1256* and from St. Christopher and Nevis, *Heath v. Government of the United States of America [2002] UKPC 33 (19 June 2002)* and also a decision of the High Court of Trinidad and Tobago dated 24 November 1993, in the matter of *Itmo Saroop* (an application for *habeas corpus)* before Razack J, attest to this fact. Mr. Courtenay correctly noted that in the *Bowe case*, the Privy Council held that the Governor General had used powers granted him under the Constitution, The Bahamas Independence Order 1973 to make orders amending existing legislation and pursuant to such an Order, he designated the Governor General as the proper person. The Order which he made provided:

"Where it is provided in any existing law that any matter or thing … is required to be or may be done by a Secretary of

State, such provision shall have effect as if that matter or thing were required to be or might be done by the Governor General".

Counsel stated that Belize had a similar provision in the Belize Constitution, 1981 but that it was of limited effect as such Orders had a twelve month life span after Independence. At all events, he did not seem to think that an Order similar to that made in The Bahamas was made in Belize. That case, it can be said, is not helpful, nor was the case from Trinidad and Tobago in which it was held that the President of The Republic was to exercise that power. That decision was arrived at by an examination of the relevant legislation during Trinidad's transition from colony to the equivalent of dominion status and subsequently to republican status.

[146] Counsel for the requesting state places great reliance on *Heath v. Government of The United States of America [supra]*. Mr. Courtenay, S.C. however, argued that the case is distinguishable on the basis that the 1870 Act is not part of the laws of Belize, but that proposition, as has been shown, is wholly misconceived. In that case, the Privy Council accepted that the Extradition Act 1870 was an "existing law and as such it qualified to be construed "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring that existing law in conformity with the Constitution. Their Lordships' advice then continued (para 21):-

"Therefore the question which arises is what modifications and adaptations to section 17 of the 1870 Act are necessary to bring it into conformity with the Constitution".

They then considered provisions in the St. Christopher and Nevis Constitution which are no different from provisions in the Belize Constitution, and said, accepting the submissions advanced on behalf of

the respondent that under their 1983 Constitution St. Christopher and Nevis became an independent sovereign state and that the functions of government and the exercise of executive authority, including executive decisions in relations to requests for extradition, were to be carried out by a government minister and not by the Governor-General. Accordingly, the argument ran, the necessary adaptation and modification of section 17 of the 1870 Act were that a requisition by The United States of America for the surrender of a fugitive criminal was to be made to the Minister of Foreign Affairs and that the requisition to the magistrate was also to be issued by the Minister of Foreign Affairs. Ms. Banner therefore asks that we adopt and apply the approach of the Board in Heath (supra) in which event, the only question is, which Minister was assigned the Extradition portfolio.

[147] Before dealing with her submission, I must refer to an argument of Mr. Courtenay that the assignment of portfolio responsibility for extradition to the Minister of Foreign Affairs in 1998 was nothing more than that – an assignment of responsibility. It did not, he asserted, give the Minister any power which did not exist at law. That argument is founded in my opinion, on a misunderstanding of executive authority which means the power to carry out the business of government section 36(1) of the Constitution provides:-

> "(1) The executive authority of Belize is vested in Her Majesty.
> (2) Subject to the provisions of this Constitution, the executive authority of Belize may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.

Then, section 41(1) states:

> "(1) The Governor General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for any business of the Government including the administration of any department of government;
>
> This analysis of the exercise of the plenitude of power of the state shows that the summary dismissal of the assignment of responsibility is of, presumably, no consequence is unsound. The authority for such assignment, I venture to think, is the Constitution itself, the supreme law of the democratic state of Belize. I am not in the least doubt that the submissions deployed by Ms. Banner are eminently right and are to be preferred to those of Mr. Courtenay for the reasons stated.

[148] In the result, the assignment of extradition business to the Minister of Foreign Affairs by the Governor-General was a valid exercise of his powers under section 41 of the Constitution and the Minister so charged was legally empowered to deal with matters of extraditions, including receiving the requisition from a foreign state and directing the issue of a warrant, by a magistrate, to apprehend the fugitive offender. Accordingly ground 7 fails.

GROUNDS 1, 2 AND 4

[149] In his arguments advanced on this ground, counsel submitted that because the remedy of habeas corpus was a constitutional right, by reason of section 5(2) of the Constitution:-

> "(2) Any person who is arrested or detained shall be entitled:-
>
> …
>
> (d) to the remedy by way of habeas corpus for determining the validity of his detention".

the Chief Justice was not restricted by the Act or the Treaty to follow the "Atkinson jurisprudence". To the extent that this "Atkinson jurisprudence' appears to restrict the right afforded by section 5(2)(d) of the Constitution to seek redress by way of habeas corpus, it is inconsistent with that provision and must yield. The appellant exercised his right under section 5(2)(d) of the Constitution and invoked the unlimited jurisdiction of the Supreme Court to determine the lawfulness of his detention. Counsel cited section 95(1) which recites, so far as material as follows:-

> "95(1) The Supreme Court shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law…"

From this he concluded that the jurisdiction of the Supreme Court on a *habeas corpus* application is unlimited thereby enabling it to properly entertain challenges based on abuse of process including delay. His argument continues thus, as appears in his skeleton arguments:-

> "The Atkinson jurisprudence creates a species of habeas corpus that is very limited in nature and a woefully inadequate remedy. The species cannot stand in the face of sections 5(2)(d) and 95(1) of the Belize Constitution"

[150] The writ of *habeas corpus* is a common law remedy dating back to Magna Carta. It was created to ensure the liberty of the subject. By this writ, any person detained or incarcerated without just cause could question his right to be free. Section 5(2) of the Constitution entitles such a person to question his arrest or detention by "the remedy by way of *habeas corpus* to determine the validity of his arrest or detention. That language is not in my opinion apt to suggest that a new means of redress was being created to determine the validity of an arrest or

detention. The remedy predates the Constitution: it was not created by the Constitution. The purpose of the remedy has undergone no change because it is specified in the Constitution as the remedy to subserve the guarantee of personal liberty. The relevance of section 95(1) in this connection is far to seek. This provision confers on the Supreme Court unlimited jurisdiction to try criminal or civil cases pursuant to powers conferred by the Constitution or under some law. I cannot therefore agree with the assertion that the jurisdiction of the Supreme Court is unlimited in the sense contended for by Mr. Courtenay. The Constitution has ordained that its function remains the same, that is, to determine the validity of the detention of the person claiming to be detained. The question for the court would be whether the detention is justified by the Constitution or other law. I entirely agree that section 5(1) of the Constitution is relevant. It states:-

> "5(1) A person shall not be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:
>
> (e) – (l)
>
> (i) for the purpose of preventing his unlawful entry into Belize, or for the purpose of effecting his expulsion, extradition or other lawful removal from Belize or for the purpose of restraining him while he is being conveyed through Belize in the course of his extradition or removal as a convicted prisoner from one country to another".

The effect of this provision in relation to the instant case, is that detention for extradition purposes is prima facie lawful, but nothing in that provision denies a person so detained, access to the Supreme Court. Indeed the Constitution provides the specific remedy. The validity of such detention will thus depend on whether it is in accordance with the law, which means in reality, the relevant Extradition Act and the relevant treaty.

[151] It is therefore correct that there is no tension between section 5(1) and section 5(2)(d) of the Constitution as Mr. Courtenay states in his skeleton argument but then no one was putting forward a contrary view. I am led then to examine this "Atkinsonian" jurisprudence which counsel contends has emasculated the pristine remedy of habeas corpus created by the Belize Constitution. The case *Atkinson v. United States of America Government [1971] A.C. 197* was a decision of the House of Lords and was based on the Extradition Act 1870. The matter at issue was whether a magistrate or The Divisional Court on *habeas corpus* proceedings could refuse to commit on the ground that it would be wrong, unjust or oppressive to surrender a fugitive offender. It was held:-

> "(1) that once a magistrate decided that there was sufficient evidence to justify committal for trial the accused must be so committed:-
> (2) that by virtue of section 10 of The Extradition Act, 1870, the question whether it would be wrong, unjust or oppressive to surrender the fugitive was not one for the courts but for the Secretary of State who was answerable to Parliament, but not to the courts, for any decision he might make. (See headnote p.199)

There is no case in which their Lordships' House stated that this decision should no longer be followed or doubted its validity. As late as 1994, in *Schmidt v. Federal Government of Germany & Anor. [1994] 3 LRC 548*, a case brought to our attention by Ms. Banner, the House applied the principles articulated in *Atkinson v. US Government (supra)*. Lord Jauncey of Tullichettle with whose speech the other Law Lords agreed, said (p.560):

> "My Lords, I summarise my conclusions on this branch of the case thus: *Atkinson v. US Government* decided that Parliament had excluded the jurisdiction of the Courts to refuse to surrender a

person under the 1870 Act when to do so would be unjust or oppressive. *Sinclair v. DPP* pointed out that the re-enactment of s.8(3) in S.11(3) of the 1989 Act demonstrated that in relation to foreign countries no discretion to refuse the return of a foreign fugitive had previously existed".

By section 11(3) of 1989 Extradition Act (U.K.) such power was conferred on the High Court. That is the position in the United Kingdom. It is the position in The Bahamas where a similar provision exists. See *Knowles Jr. v. Government of the United States and Ors. [2006] UKPC 38* which Mr. Courtenay cited but that case does not assist him, given the fact that The Bahamas has included a section 11(3) provision in its own Extradition legislation. Belize, on the other hand, has so far not enacted a modern statute in this important area of law. I do not propose to deal with such cases as *R. Horseferry Road magistrates' Court, Ex parte Bennett [1993] 3 WLR 90; R v. Telford Justices, Ex parte Badhan [1991] I WLR 866* which are of little help in this discussion as the power of magistrates is not a live issue in this appeal.

[152] I would conclude from what has been said above that the Supreme Court in Belize has no power to consider an abuse of process or delay in habeas corpus proceedings. The Atkinson line of cases (I use the phrase in deference to Mr. Courtenay's submissions) has not rendered habeas corpus an inadequate remedy to determine the validity of the arrest of a fugitive. The Constitution has not created a "*super-habeas corpus"* remedy which widens the scope of the common law remedy. I adhere to the opinion of this court in *Hislop v. Attorney General (unreported) 27 March 2003* that the 1870 Act did not provide for the law's delays. The court in that case undertook a review of cases not only of *Bishop v. Attorney General 3 Bel. LR 230* but to the approach of the Canadian and US Supreme Courts in order to arrive at its decision. I am content to say

that Bishop (supra) is of limited value. It did not presume to lay down any definitive principle.

[153] It is of importance to note that the delay of which complaint is made is the delay in commencing the extradition proceedings (ground 4), but in developing his arguments in this regard, he submitted that "it is the nineteen years that has to be borne in mind." A recurring theme during those submissions was that the appellant was not responsible for this inordinate delay between requisition for extradition by the US government and the hearing of this appeal. I doubt whether that evaluation is entirely accurate. In the first place, after the commission of the offence, allegedly on or about 22 March 1990, the appellant fled the USA and was not heard of again until he was arrested on a warrant issued by the Chief Magistrate pursuant to a requisition made to the Minister of Foreign Affairs in October 1998. The appellant has no where stated where he resided during those intervening years. It is not easy to appreciate how he can escape responsibility in those circumstances. The hearing before the Chief Magistrate concluded on 26 February 1999 when he was committed to await surrender. The appellant challenged his committal by way of habeas corpus proceedings before Rivero J who passed away before giving a ruling. Fresh proceedings were taken before the Chief Justice who gave his decision 29 April 2002. An appeal was lodged on 21 May 2002. It is noted that the appeal is listed as a criminal appeal although the respondent is not stated to be the Queen. The Record was not settled until 7 August 2008. During this period, blame may have to be allocated. The appellant, as is common knowledge, has carriage of a civil appeal. He seemed to have shuffled off his responsibility in that regard. The respondent took no steps to have the appeal dismissed for want of prosecution. The Registrar of the Court at the relevant time (May 2002) did not convene a meeting to settle the record until August 2008. Mr. Courtenay's disclaimer of responsibility must therefore be seen against this background.

[154] There is reason for holding therefore, that the Chief Justice did not err in not finding that the inordinate delay in commencing the extradition proceedings gave the power to refuse extradition on the ground that the prosecution had become barred by lapse of time. See *Hislop v. Attorney General (supra)*.

GROUND 3

[155] This ground seeks to question the constitutionality of section 10 of the Extradition Act 1870, because, as the agreement goes, it violates section 6(7) and (8) of the Constitution, and accordingly is *pro tanto void*. This point of separation of powers was not raised before the Chief Justice for the very good reason that the Chief Justice was engaged in a habeas corpus hearing, not in a constitutional hearing. I would have thought that if the appellant did in the future make representations to the Minister of Foreign Affairs, who, in the event, ordered his surrender, the appellant would be at liberty to apply for judicial review. Any appeal against that ruling by the Minister, would allow for this ground to be properly raised and argued. However, in the event that it is hereafter held that I was in error, I propose to express an opinion on the matter.

[156] Mr. Courtenay, in his skeleton arguments, set out what he categorised as the "schema" of the extradition process, and noted as part of the process -

> "h) the Minister decides whether or not it is lawful to surrender the fugitive."

From this premise, he invoked the constitutional provisions (section 6(7) and (8)) which provide as follows:

> "(7) Any court or other authority prescribed by law for the determination of the existence of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other

authority, the case shall be given a fair hearing within a reasonable time.

(8) Except with the agreement of all parties thereto, and proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the commencement of the decision of the court or other authority, shall be held in public."

The Minister, the argument went, was determining the civil rights of the fugitive but he was a member of the executive, who was neither independent nor impartial. Put another way, "it is the Minister as a functionary of the executive, not the Judiciary, who determines whether or not a fugitive criminal is actually surrendered to the United States of America."

[157] With respect, this argument rests on a false premise. The Minister is not determining any civil right or obligation of the fugitive, nor is he determining whether it is lawful to surrender the fugitive. The Minister does not sit in review of the court's decision that the requirements of the Extradition Act and the conditions stipulated under the treaty have been satisfied. The Extradition process as Ms. Banner argued and Mr. Courtenay appears to acknowledge has an executive and a judicial component. The Minister starts and ends the process: he is not part of the judicial process. The decision which the Minister makes to surrender or not is entirely political. He is obliged by treaty obligations to surrender a fugitive after the judicial process has been exhausted. I would add that the Minister in the interest of fairness, is obliged to consider representations made on behalf of the fugitive as to delay, abuse of process and the like, as to which the court would not have ruled. I would conclude therefore, in agreement with Ms. Banner, that the provisions of the Constitution invoked by Mr. Courtenay, are not applicable to the Minister of Foreign Affairs who is a member

of the Executive. I would accordingly reject this ground, and observe that section 10 of the Extradition Act remains the safeguard as indicated by Lord Reid in the Atkinson case (supra).

GROUNDS 5 AND 6

[158] These grounds were not developed before us. Counsel seemed content to rely on his skeleton arguments, the burden of which was that "hearsay evidence was admitted and inadmissible evidence of co-accused and unreliable evidence" constituted the essential evidence against the appellant. Counsel did not attempt to bring to our attention, "the hearsay evidence or the other unreliable evidence". An examination of the evidence submitted by the requesting country does not bear out the assertion of counsel. It is enough to say that I see no reason to disagree with the Chief Justice that there was evidence before the magistrate on which he could properly commit the appellant to await surrender.

[159] Before parting with this appeal I think it is right to commend counsel for the appellant for his courage and persistence in developing every point he could find or fashion on behalf of his client. Ms. Banner must be complimented on her careful research and her meticulously reasoned arguments. Both counsel were of great help to the court.

[160] In all the circumstances, for the reasons stated above, I would dismiss the appeal and confirm the order made by the Chief Justice.

CAREY JA

MORRISON JA

Introduction

[161] On 27 March 2009, this appeal was dismissed and the order of the Chief Justice refusing the appellant's application for habeas corpus was affirmed. There was no order as to costs. The court promised reasons for its decision and this is my contribution.

[162] I have now had the distinct advantage of reading in draft the judgments prepared by Mottley P and Carey JA, with both of which I am in full agreement. I therefore propose to confine my attention in this judgment to a consideration of ground of appeal 7, which raised an interesting and important question relating to the history of extradition arrangements in Belize.

[163] The appeal arises out of extradition proceedings initiated by an order of the Minister of Foreign Affairs made on 8 October 1998 ("the Minister's Order") in the following terms:

> "WHEREAS, in pursuance of the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America dated the 8 June, 1972, continuing in force between Belize and the United States, a requisition has been made to me, SAID W. MUSA, Minister of Foreign Affairs of Belize, by the Embassy of the United States of America in Belize for the surrender of RHETT ALLEN FULLER, born October 9, 1970, lately of 17031 Northeast 23rd Ave., Apt. No. 7, North Miami Beach, Dade County, Florida, and now believed to be residing at Mile 2 ½ Northern highway, Belize City, Belize, accused of the commission of the crime of FIRST DEGREE MURDER on March 22, 1990 within the jurisdiction of the

Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida, as set forth in the attached Warrant of Arrest issued on March 23, 1990 by the said Court.

NOW, THEREFORE, I hereby by this my Order under my hand and seal, signify to you that such requisition has been made, and require you to issue your warrant for the apprehension of the said RHETT ALLEN FULLER, provided that the conditions of the said Treaty (a copy of which is attached) relating to the issue of the warrant, are in your judgment complied with.

GIVEN under the hand and seal of the undersigned, Minister of Foreign Affairs of Belize, this 8th day of October, 1998.

(SAID W. MUSA)
MINISTER OF FOREIGN AFFAIRS "

[164] Ground 7, which played no part in the appellant's application for habeas corpus in the Supreme Court, seeks to challenge the Minister's Order at its very foundation:

"The extradition proceedings relating to the Appellant initiated by the Order of the Minister of Foreign Affairs dated the 8th October 1998 is [sic] unlawful and of no legal effect for the reason that the Minister of Foreign Affairs is not empowered by any law in Belize to issue such an Oder".

[165] Mr Courtenay SC, in a far-reaching submission on behalf of the appellant, contended that the United Kingdom ("the UK") Extradition Act, 1870 ("the 1870 Act") is not a part of the laws of Belize, it never having been extended to the colony of British Honduras and was therefore not an existing law at the date of

independence in 1981. Instead, the local legislature had passed its own extradition ordinance which made no provision for the initiation of extradition proceedings. As a consequence of this, Mr Courtenay contended that there is a lacuna in the laws of Belize in that there is no law which provides for the commencement of any domestic procedure upon receipt of an extradition request from the United States of America ("the USA"). The Minister's Order, pursuant to which the appellant had been detained, was as a result null and void.

[166] Miss Banner for the respondent disagreed, challenging Mr Courtenay's basic premise, which was that the 1870 Act is not (and never was) a part of the laws of Belize. She submitted that the Act, an imperial statute, had been duly extended to Belize by Order in Council and that, as a result, it was an existing law at the date of independence. As a result, section 134(1) of the Belize Constitution ("the Constitution") and the decision of the Privy Council in **Heath & Others v Government of the United States of America** [2002] UKPC 33, (2002) 61 WIR 189 are applicable, enabling the court to construe the relevant provisions of the 1870 Act in accordance with the Constitution.

The 1870 Act

[167] The starting point is the 1870 Act itself ("An Act for amending the Law relating to the Extradition of Criminals"), which was enacted by the UK Parliament on 9 August 1870. I will summarise briefly only those sections of the Act which are relevant for present purposes.

[168] Section 2 provides that where an arrangement has been made (by the government of the United Kingdom) with a foreign state with respect to the surrender to such state of "fugitive criminals", "Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state". Every such order is required "to recite or embody the terms of the arrangement".

[169] Section 7 sets out how extradition proceedings are initiated:

> "A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognized by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal".

[170] Section 8 authorises the issue of a warrant for the apprehension of a fugitive criminal suspected of being in the UK by a police magistrate on the receipt of the Secretary of State's order, or such evidence as would in his opinion justify the issue of the warrant in respect of a crime committed or a criminal conviction in England. Provision is also made for the issue of a warrant by a police magistrate or a justice of the peace in certain circumstances without an order from the Secretary of State, who in such a case may subsequently if he thinks fit order the cancellation of the warrant and the discharge of any person apprehended on it.

[171] Sections 9, 10 and 11 provide for the hearing of the evidence against the fugitive criminal by the police magistrate, his committal to prison ("the Middlesex House of Detention, or some other prison in Middlesex" – section 10) if the magistrate is satisfied on the evidence to the requisite standard, the fugitive criminal's right within 15 days of the date of committal to apply for a writ of habeas corpus and (in the absence of such application or upon the conclusion of the habeas corpus proceedings against the fugitive criminal) his surrender to the foreign state.

[172] Sections 17 and 18 deal with the position of fugitive criminals in British possessions and are, for present purposes, the all important provisions of the 1870 Act. I therefore set them out in full:

> "17. This Act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the British possession were substituted for the United Kingdom or England, as the case may require, but with the following modifications; namely,
>
> (1) The requisition for the surrender of a fugitive criminal who is or suspected of being in a British possession may be made to the governor of that British possession by any person recognized by that governor as a consul general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign state on behalf of which the recognition is made) as the governor of such colony or dependency:
>
> (2) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorised or required to be done under this Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone:
>
> (3) Any prison in the British possession may be substituted for a prison in Middlesex:

(4) A judge of any court exercising in the British possession the like powers as the Court of Queen's Bench exercises in England may exercise the power of discharging a criminal when not conveyed within two months out of such British possession.

18. If by any law or ordinance, made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act in the case of any foreign state, or by any subsequent order, either

suspend the operation within any such British possession of this Act, or of any part thereof, so far as it relates to such foreign state, and so long as such law or ordinance continues in force there, and no longer;

or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act".

[173] The effect of section 17 was that, upon the application of the 1870 Act by order in council (pursuant to section 2) to any foreign state with which an extradition arrangement had been concluded, the Act would (unless otherwise provided in that order) extend to every British possession, subject only to the modifications specifically referred to. It is therefore by virtue of this section that the 1870 Act was to be extended to such possessions, subject to any contrary indication.

[174] Section 18, on the other hand, is of more limited import and provides for the suspension or saving of such local laws covering the subject of extradition as may have been or might be passed by the legislature of such possessions either before or after the passing of the 1870 Act. Where any such law existed or came into being, provision was accordingly made either for the suspension within that possession of the 1870 Act (in which case the local law would continue to govern extradition proceedings for the time being), or for the local law, or any part of it, to continue to have effect in that possession "as if it were part of this Act". In this latter situation, it would therefore be necessary to read the local law and the 1870 Act together in order to have a complete picture of what the extradition regime was in the particular possession.

[175] Section 21 of the 1870 Act provided for revocation or alteration by Her Majesty of any Order in Council and section 26 defined the term "British possession" to mean "'any colony, plantation, island, territory, or settlement within Her Majesty's dominions …".

The Orders in Council

[176] The first Order in Council making the 1870 Act applicable to the USA that counsel's researches were able to produce for our actual inspection is The United States of America (Extradition) Order in Council, 1935 (1935 No. 574) ("the 1935 Order"). The preamble to that Order recited three previous Orders in Council, dated 21 March 1890, 26 June 1901 and 11 February 1907, which had applied the 1870 Act in respect of the USA under and in accordance with conventions concluded between the UK and the USA on 12 July 1889, 13 December 1900 and 12 April 1905 respectively.

[177] The 1935 Order then went on to revoke the previous Orders and, a new extradition treaty having been signed between the governments of the UK and the USA on 22 December 1931 (to replace an earlier treaty made on 9 August

1842), to order that "From and after the 25th day of June, 1935, the Extradition Acts, 1870 – 1932, shall apply in respect of the United Kingdom of Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and all British Colonies in the case of the United States of America under and in accordance with the said Treaty of the 22nd December 1931" (emphasis added).

[178] The 1935 Order continued in effect until 21 January 1977, when The United States of America (Extradition) Order 1976 (1976 No. 2144) (the 1976 Order") came into effect. The preamble to the 1976 Order recited that a new extradition treaty between the governments of the UK and the USA had been concluded on 8 June 1972 and ratified on 21 October 1976. It also recited that "in accordance with Article 11(1)(a) of the said Treaty, it has been agreed by Notes exchanged on 21st October 1976 that the Treaty shall apply to those territories for the international relations of which the United Kingdom is responsible and which are specified in Schedule 2 to this Order".

[179] The 1976 Order then went on to provide that the 1870 Act (as amended or extended by any subsequent amendment) "shall apply in the case of the United States of America in accordance with the said Treaty of the 8th June 1972" (paragraph 3), and, further, that its operation "is limited to the United Kingdom of Great Britain and Northern Ireland, the Isle of Man, and the other territories (including their dependencies) specified in Schedule 2 to this Order" (paragraph 4). Belize (the name of the colony having been changed with effect from 1 June 1973 by section 3 of the Belize Act) is specifically listed in Schedule 2.

[180] The 1976 Order was on the face of it made under sections 2, 17 and 21 of the 1870 Act. And so, it seems clear from its language and structure (although it was not explicitly stated to be so), was the 1935 Order. The relevance of this is that, under section 17(1) of the 1870 Act, which had been expressly extended by Order in Council to British Honduras, the requisition by a foreign state for the surrender of a fugitive criminal in the colony fell to be made to the Governor and

any acts authorised to be done by a Secretary of State could be done by the Governor alone. It was therefore the Governor who had the authority to order that a warrant be issued for the apprehension of the fugitive criminal, pursuant to section 7 of the 1870 Act.

Legislative activity at home

[181] On 25 June 1877, the Legislative Council of British Honduras passed "An Ordinance to provide for the convenient administration of 'The Extradition Acts, 1870 and 1878'" (Ordinance No. 7 of 1877). This Ordinance, The Extradition Ordinance (British Honduras) 1877 ("the 1877 Ordinance"), was assented to by the Governor on 26 June 1877 and brought into operation by Order in Council dated 22 February 1878.

[182] Subsequently, on 4 September 1919, the Legislative Council passed The Extradition Ordinance, 1919 (No. 9 of 1919) ("the 1919 Ordinance"), which was assented to by the Governor on 9 September 1919 and repealed the 1877 Ordinance. It restated, with some slight differences in detail, the provisions of the 1877 Ordinance (sections 4, 5 and 6). It provided that all powers vested in a police magistrate or a justice of the peace under the 1870 Act should be exercised in the colony by the Police Magistrate or Acting Police Magistrate (section 2); that the committal and detention of any fugitive criminal under the 1870 Act in the colony should be to and in "the Common Gaol at Belize" (section 3); and that the powers vested in any judge of one of Her Majesty's Superior Courts at Westminster under the 1870 Act should be exercised by the Chief Justice or Acting Chief Justice for the time being of the colony (section 4).

[183] The 1919 Ordinance was brought into force by Order in Council 1919 No. 1892, which revoked the 1878 Order and directed that the 1919 Ordinance "shall have effect in the Colony of British Honduras without modification or alteration as if it were part of the Extradition Act 1870."

[184] The Orders in Council made in 1878 and 1919 were both made under section 18 of the 1870 Act. Both the 1877 and the 1919 Ordinances were plainly premised on the applicability to British Honduras of the 1870 Act and, although we have not actually seen the Orders made under section 17 prior to the 1935 Order, it appears clear that, as early as 1877, both the legislature of British Honduras and the Colonial Office operated on the basis that the 1870 Act applied in the colony.

[185] The current version of the Extradition Act (Cap. 112 of the Laws of Belize, revised edition 2000), restates in Part II (again with some modifications in detail) the provisions of the 1919 Ordinance. For completeness, it should be noted, however, that extradition arrangements with the USA are now governed by the Extradition Treaty between the governments of Belize and the USA dated 30 March 2000 (see section 9 of the Extradition Act). Nothing turns on the new arrangements for the purposes of this appeal.

The constitutional dimension

1964 to 1981

[186] On 1 January 1964, British Honduras became a self-governing colony, under and by virtue of the British Honduras Constitution Ordinance 1963 ("the 1963 Constitution"). The 1963 Constitution provided for the establishment of a Legislature consisting of Her Majesty and a National Assembly (section 3(1)), which comprised a House of Representatives and a Senate (section 3(2)). However, the executive authority of the colony remained in Her Majesty and was exercisable by the Governor pursuant to the British Honduras Letters Patent, 1964 ("the Letters Patent") issued to him by the Queen.

[187] Despite the fact that the Letters Patent provided for the appointment of a Premier and Ministers of Government and established a cabinet consisting of the

Premier and other Ministers, Article 16(1) reserved certain special responsibilities to the Governor, viz -

(a) external affairs;

(b) defence (including armed forces);

(c) internal security; and

(d) the terms and conditions of service (including leave and passages) of public officers.

[188] While Article 16(2) of the Letters Patent did permit the governor in his discretion to delegate responsibility, to a minister designated by him with the prior approval of the Secretary of State, for matters relating to external affairs or the Belize Defence Forces, it does not appear that the governor exercised this power at any time during this period in relation to treaties and/or extradition.

[189] Section 73(1) of the 1963 Constitution provided that existing laws should continue in force, subject to them being construed "with such modifications, adaptations and exceptions as may be necessary to bring them into conformity with this Ordinance." Mr Courtenay and Miss Banner were therefore in agreement that the position during this period was that responsibility for treaty matters (including extradition) fell exclusively to the Governor within his reserved powers under the Letters Patent.

Independence

[190] Belize obtained fully independent status from the UK on Independence Day, 21 September 1981. As of that day the British government ceased to have any responsibility for the government of Belize and no Act of the UK Parliament

passed on or after that day could extend or be deemed to extend to Belize (see the UK Belize Act 1981 c. 52, section 1). The Letters Patent and the 1963 Constitution were revoked and the Constitution came into effect on that day by virtue (unusually in Commonwealth Caribbean constitutional experience) of an Act (14 of 1981) of the Legislature of Belize.

[191] Section 30 of the Constitution provides for the office of Governor-General ("who shall be her Majesty's representative in Belize") and section 34(1) provides that, in the exercise of his functions, the Governor-General shall act in accordance with the advice of the cabinet or a minister acting under the general authority of the cabinet, save where he is required by the Constitution or any other law to act in accordance with the advice of or after consultation with, some other power or authority, or "in his own deliberate judgment."

[192] Importantly, section 41 provides for the allocation of portfolios to ministers as follows:

> "41.-(1) The Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for any business of the Government, including the administration of any department of Government:
>
> Provided that responsibility for finance shall be assigned to a Minister who is a member of the House of Representatives.
>
> (2) Where a Minister has been charged with responsibility for any department of government, he shall exercise general direction and control over that department of government".

[193] On 3 September 1998, acting pursuant to section 41 and in accordance with the advice of the Prime Minister, the Governor-General assigned responsibility for, among other things, extradition and treaties to the Honourable Said Wilbert Musa, the then Prime Minister, Minister of Finance and Foreign Affairs (see Belize Gazette, 4 September 1998). I shall have to return to the significance of this assignment of responsibility.

[194] Finally, before leaving the constitutional provisions, I should also refer to section 134, sub-sections (1) and (6) of which are of critical importance for present purposes:

> "134.-(1) Subject to the provisions of this Part, the existing laws shall notwithstanding the revocation of the Letters Patent and the Constitution Ordinance continue in force on or after Independence Day and shall then have effect as if they had been made in pursuance of this Constitution but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution...
>
> (2)…
>
> (3)… .
>
> (4)…
>
> (5)…
>
> (6) In this section, the expression "existing law" means any Act of the Parliament of the United Kingdom, Order of Her Majesty in Council, Ordinance, rule, regulation, order or other instrument having effect as part of the law of Belize immediately

before Independence Day (including any such law made before that day and coming into operation on or after that day)".

Was the 1870 Act an "existing law"?

[195] Miss Banner submitted that the 1870 Act was an existing law within the meaning of section 134(6) and that it was therefore open to this court to give effect to it in these proceedings, in the manner provided for by section 134(1). Mr Courtenay on the other hand maintained his position that, as the 1870 Act had never been extended (or, I suppose he might also say, properly extended) to Belize before independence, it was not an existing law and therefore could not be dealt with in that manner.

[196] In my view, Miss Banner was plainly correct. As the history that I have attempted to rehearse (at, I fear, far too great length) demonstrates, the 1870 Act was extended to British Honduras by Orders in Council pursuant to section 17 from at latest 1935 (and probably significantly before that). The relevant Order in Council for the purposes of these proceedings is that made in 1976. The 1919 Ordinance was also directed by Order in Council to have effect in British Honduras as if it were part of the 1870 Act. As a result, the 1870 Act fell to be read subject only to the provisions of the 1919 Ordinance relating to the title of the appropriate judicial officer to hear an extradition request, the place at or to which fugitive criminals were to be detained or committed and the judge with jurisdiction to consider an application for habeas corpus.

[197] By this process, the 1870 Act was part of the existing laws of British Honduras before the 1963 Constitution and so remained until immediately before Independence Day and the coming into force of the Constitution on 21 September 1981. There was therefore an unbroken continuity of authority in the Governor to initiate extradition proceedings by making an Order under section 7 of the 1870 Act.

[198] This conclusion, it may be of interest to note, is very similar to that reached by the Privy Council after a consideration of the relevant history of comparable extradition arrangements in The Bahamas in **Government of the United States of America v Bowe** [1989] 3 WLR 1256, 1266:

> "The Extradition Act 1870 by virtue of section 17 applied to The Bahamas and the powers vested by the Act of 1870 in the police magistrate were by the Bahamas Extradition Act 1926 vested in any magistrate in the colony. The Act of 1926 was directed to have effect, in accordance with section 18 of the Act, by S.R. & O. 1926 No. 974, as if it were part of the Act. When the Act of 1870 was applied to the treaty by Order in Council, article 2 of the treaty extended it to The Bahamas in accordance with section 17 of the Act. Therefore, on 9 July 1973, the eve of independence, the Act of 1870, as applied to the United States of America, and the Order in Council 1935 were in full force and effect in The Bahamas".

[199] Delivering the advice of the Board, Lord Lowry went on to observe (at page 1267) that "Their Lordships have deemed it best to trace the course of this legislation in order to refute the fugitive's contention, which they will presently advert to, that at the material time no extradition arrangements existed between the United States and the Commonwealth of the Bahamas." In the result, it was held that the order for the warrant to issue under section 7 of the 1870 Act had been properly made by the Governor-General since, under the applicable transitional arrangements (the Existing Laws Amendment Order 1974), a reference in an existing law to the Governor fell to be construed as a reference to the Governor-General.

The Minister's Order

[200] Which leads me then to the only remaining point on this ground, which is whether the Minister of Foreign Affairs had the authority to make the Order of 8 October 1998.

[201] In **Heath & Others v Government of the United States of America** (supra), the Board was concerned with the effect of paragraph 2(1) of Schedule 2 to the St Christopher and Nevis Constitution Order, 1983, which is *in pari materia* with section 134(1) of the Constitution. In that case, the Governor-General had assigned to the Prime Minister responsibility for the business of the Ministry of Foreign Affairs, which included "Conventions and Agreements." The requisition to the magistrate in purported exercise of the power under section 7 of the 1870 Act was issued by the Minister. It was submitted that he had no power to do so, on the basis that the executive authority of Her Majesty, which had been exercised by the Governor before independence, was now to be exercised under the Constitution by the Governor-General, and that the requisition under section 7 ought therefore to have been issued by the Governor-General and not by the Minister of Foreign Affairs.

[202] The Board considered that this was an appropriate case in which, in order to bring the 1870 Act into conformity with the Constitution of St Christopher and Nevis,, to adapt it (in accordance with paragraph 2(1) of Schedule 2) by substituting "the Minister of Foreign Affairs" for "the Governor" in section 17 of that Act. The advice of the Board was delivered by Lord Hutton, who said this:

> "In the opinion of their Lordships the Minister of Foreign Affairs is a more appropriate person to exercise the function under section 7 of the 1870 Act than the Governor-General. If the function of issuing a requisition to a magistrate under section 7 of the 1870 Act is vested in the Governor-General, section 56(1) of the Constitution

> would require him to act in accordance with the advice of the Cabinet or a minister acting under the general authority of the Cabinet, and it would be a strange result if the 1983 Constitution Order granting independence to St Christopher and Nevis resulted in the decision whether to issue a requisition to a magistrate under section 7 being taken by the Governor-general on the advice of the Cabinet rather than by the decision being taken, as it is in England, by a government minister."

[203] Section 56(1) of the Constitution of St. Christopher and Nevis is also in terms almost identical to section 34(1) of the Belize Constitution, thus making Lord Hutton's rationale equally applicable, it seems to me, to the instant case, as Miss Banner submitted. Indeed, given that the Governor-General's assignment of portfolio responsibility to the Minister of Foreign Affairs on 3 September 1998 specifically included extradition, the instant case may well be, as Miss Banner also pointed out, an even stronger case in which to apply section 134(1) by adapting the 1870 Act to bring it into conformity with the Constitution by substituting "the Minister of Foreign Affairs" for "the Governor" in section 17. By this means, it also becomes unnecessary to enter into a discussion, which Mr Courtenay's submissions invited, as to whether the office of Governor-General, established by the Constitution, is the successor to the Governor under the 1963 Constitution.

[204] Mr Courtenay sought to distinguish **Bowe** and **Heath** on the basis that in both cases the 1870 Act was part of the existing laws of The Bahamas and St Christopher and Nevis respectively and as such fell to be construed in the light of the new constitutional arrangements upon independence. In the light of the conclusion to which I have come that the 1870 Act was also an existing law for the purposes of the Belize Constitution, Mr Courtenay's point on both cases must accordingly fall away completely. In my view, therefore, the Minister's Order was properly made.

Conclusion

[205] As a result, ground 7 cannot succeed and it is for these reasons, in addition to those given by Mottley P and Carey JA, that I agreed that this appeal should be dismissed and the order of the Chief Justice affirmed. However, I cannot leave the appeal without acknowledging, with gratitude, the tremendous assistance received from both counsel in the matter.

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MORRISON JA