IN THE COURT OF APPEAL OF BELIZE AD 2013
CIVIL APPEAL NO 45 of 2011

RHETT ALLEN FULLER Appellant

v

THE MINISTER OF FOREIGN AFFAIRS Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Douglas Mendes	Justice of Appeal

E Courtenay SC for the appellant.
M Perdomo and H Panton for the respondent.

19 and 22 October 2012 and 28 March 2013.

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SOSA P

[1] I agree with Mendes JA, whose judgment I have read, in draft, that this appeal should be allowed; and I concur in the reasons for judgment given, and the orders proposed, in that judgment

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SOSA P

MORRISON JA

[2] I am in full agreement with the careful reasoning and conclusions of Mendes JA. I concur and have nothing to add.

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MORRISON JA

MENDES JA

[3] The factual background to this, the appellant's latest effort to avoid extradition to the United States, has been recounted in detail in the judgment of the Privy Council dismissing his habeas corpus challenge to the decision of the Chief Magistrate committing him to prison to await an order for extradition by the Minister of Foreign Affairs - see ***Rhett Allen Fuller v The Attorney General of Belize*** [2011] UPKC 23, paras 1 & 60-70. It is therefore necessary only to refer to such of the facts as would help to elucidate the issues which call for determination on this appeal.

[4] On 28 January 1998, a US Grand Jury issued an indictment charging the appellant with the murder of Larry Miller. The murder is alleged to have been committed on 22 March 1990, some eight years earlier. On 17 August 1998, the US Government formally requested the appellant's extradition. He was arrested by Belizean authorities on 21 October 1998 and on 26 February 1998, after a hearing before the Chief Magistrate, was remanded into custody to await his extradition. On 16 June 2000, he was admitted to bail pending the hearing of his application for habeas corpus. He had been granted leave to pursue that application on 5 May 1999.

[5] The habeas corpus application was heard by Chief Justice Conteh. The appellant argued that the Chief Magistrate had acted on the inadmissible and unreliable hearsay evidence of a co-accused and that accordingly there was insufficient evidence to support the Chief Magistrate's finding that the evidence adduced would have justified his committal for trial, if the crime of which he was accused had been committed in Belize. The appellant argued further that, having regard to the inordinate delay by the US Government in requesting his extradition and the overall passage of time since the offence was allegedly committed, his extradition amounted to an abuse of the process of the Court.

[6] The Chief Justice rejected these arguments and denied the writ of habeas corpus. He held that the evidence relied on by the US Government was admissible. He held further that the Supreme Court of Belize did not have jurisdiction to discharge a fugitive on the ground that his extradition would amount to an abuse of the process of the court. Relying on the decision of the House of Lords in ***Atkinson v United States Government*** [1969] 3 WLR 1074, he held that it was the Minister of Foreign Affairs, not the Belize judiciary, who was empowered to refuse to surrender a fugitive on the ground that, by reason of delay or otherwise, it would be wrong, unjust and oppressive to extradite him.

[7] The Chief Justice's judgment was delivered on 29 April 2002 and the appellant promptly appealed on 21 May 2002. The appeal then lay dormant for the next almost six years until, on 14th March 2008, the Registrar summoned the parties to settle the record of appeal. The appeal was heard by this Court in October 2008 and March 2009 and was dismissed on 27 March 2009. The appellant largely rehearsed the arguments he deployed before the Chief Justice and they were all rejected for the same reasons.

[8] The appellant then appealed to the Privy Council where his argument that the Supreme Court of Belize was empowered to discharge a fugitive on the ground that his extradition abused the process of the court fell on more fertile ground. On 9 August 2011, their Lordships held, reversing the courts below, that since under a state which

has a Westminster model Constitution the lawfulness of an extradition is a matter for the courts and not the executive, the Supreme Court of Belize was empowered to grant an application for habeas corpus discharging a fugitive where the extradition proceedings constituted an abuse of the process of the court – ***Rhett Allen Fuller v The Attorney General of Belize*** [2011] UPKC 23, paras 50 & 58. However, on the facts, their Lordships were not persuaded that the abuse of process complaint had been established. They held as well that there was no basis for attacking the conclusion of the courts below that there was sufficient evidence to found a case against the appellant. It therefore fell to the Minister of Foreign Affairs to decide whether he would surrender the appellant to the US authorities.

[9] On 6 September 2011, the appellant tendered written representations to the Minister in anticipation of an oral hearing which began on 7 September 2011 and continued on 12 September 2011. He sought to persuade the Minister that the Government of the United States was guilty of bad faith in the presentation of its request for extradition arising from false statements made in the Diplomatic Note accompanying the request and from the inordinate delay in making the request. He contended further that it would be unjust and oppressive to order his extradition because of the use of extra-legal methods to extract prejudicial information from him, because of the passage of time (then 21 years) since the date the offence was alleged to have been committed, because of the real risk that a fair trial was no longer possible and because of the hardship he would suffer having regard to the change in his circumstances over this extended period of time. He asked to be provided with a copy of the report which the Chief Magistrate is required by section 10 of the Extradition Act 1870 to prepare and submit to the Minister, but after he was informed that the report was not available, he submitted (through his attorney Mr Denys Barrow SC) that, as a result, the Minister had no jurisdiction to take any further step.

[10] In written reasons dated 20 September 2011, the details of which will be set out later, the Minister communicated his decision to surrender the appellant to the US authorities to stand trial. He took the view that the furnishing of a report by the Chief

Magistrate was not a mandatory requirement and that its absence did not deprive him of jurisdiction. With regard to the complaints founded on delay, the evidence presented did not satisfy him that it would be unjust or oppressive to surrender the appellant. As to the allegations of bad faith, he was not persuaded that the US authorities had intended deliberately to mislead their Belizean counterparts.

[11] The appellant promptly applied for judicial review of the Minister's decision. He sought an order of certiorari quashing the decision and an order of prohibition restraining the Minister from resuming or restarting any further hearing pursuant to section 11 of the Extradition Act and from issuing any warrant authorising his surrender to the US authorities. He relied on a number of grounds, all of which are still live on this appeal and accordingly must be set out in detail. They are, in summary: i) In the absence of receiving and considering the Chief Magistrate's report, the Minister had no jurisdiction to exercise his power of surrender; ii) The Minister's conclusions that it would not be unjust to surrender the appellant, that the American officials had not acted in bad faith and that there was no undue delay on the part of the United States were Wednesbury unreasonable or arbitrary; iii) The Minister misdirected himself in law in finding that it would only be unjust and oppressive to return the appellant if it were established that a fair trial in the United States was not possible and failed to consider what effect the passage of time was likely to have on a fair trial in the United States; iv) The Minister misdirected himself in law when he found that it would not be oppressive to surrender the appellant because there was no evidence that the appellant was suffering from physical or mental infirmity; v) The Minister failed to have regard to uncontroverted evidence, failed to give any or any sufficient weight to the evidence which was put before him and came to conclusions which were not supported by evidence; vi) The Minister failed to give any reasons why he was not persuaded by the uncontroverted evidence on bad faith and failed to systematically and logically explain his decisions and accordingly his reasons were inadequate.

[12] The application was heard in quick time by Awich J (as he then was) on the 7, 10 and 11 October 2011. In his judgment delivered on 22 November 2011, he found that,

on the evidence, it was to be inferred that the Chief Magistrate did not see it fit to send a report and accordingly no report was sent. He therefore rejected the complaint that the Minister failed to consider the report. He found further that on a proper interpretation of section 10, the Chief Magistrate was not obliged to send a report. Accordingly, the fact that one was not sent did not deprive the Minister of jurisdiction to surrender the appellant. The trial judge was satisfied that the Minister had considered the questions of bad faith, injustice and oppression and reached the same conclusions as did the Privy Council. He continued:

> "The fact that the Minister reached the same conclusion on those points of law as the Privy Council, or adopted the decision of the Privy Council renders the argument by (the appellant's attorney) that the Minister would have acted unlawfully a good argument, but without consequence, because by following the decision of the Privy Council on exactly the same facts, the Minister did not apply the wrong law in his consideration."

He was satisfied further that a careful examination of the Minister's reasons disclosed no "instances of unfair procedure or any stark irrationality." In his view, "the answers to the difficult questions of law posed in this case have been provided by the Privy Council … The Law Lords decided that on (the facts as stated by the appellant) the detention of the (appellant) to await surrender for extradition was lawful …. The Minister did not add anything unlawful in the process of the extradition."

[13] By his notice of appeal dated 19 December 2011, the appellant challenged the learned trial judge's finding that the Chief Magistrate did not prepare and send a report and that in any event the Chief Magistrate was not obliged to do so. He contends that the trial judge ought to have found that it was contrary to natural justice for the Minister to proceed to surrender the appellant without considering the report. He complains further that, having found that the Minister "adopted the decision of the Privy Council," the trial judge ought to have found that the Minister failed to independently exercise his power under section 11.

[14] Mr. Courtenay SC, who appeared for the appellant, fleshed out the appellant's challenge in his written and oral submissions. He first criticised the trial judge's finding that it had not been established that the Chief Magistrate had sent a report to the Minister. The undisputed evidence, he argued, was that a report was sent but it got lost. He next challenged the trial judge's finding that the Chief Magistrate was not bound to submit a report to the Minister. Not only was he obliged to do so, but any failure to prepare a report and, as he submitted was the case here, any failure to place a report before the Minister, once prepared, deprives the Minister of jurisdiction to surrender a fugitive. Alternatively, he submitted that the Minister ought to have asked the Chief Magistrate, now a judge of the Supreme Court, to re-submit his report. His failure to do so, knowing that the Chief Magistrate's report might have contained material weighing against extradition, deprived the appellant of the protection afforded by section 10 and rendered the Minister's decision's procedurally unfair.

[15] With regard to the Minister's findings that it would not be unjust to surrender the appellant, Mr. Courtenay submitted that the Minister failed to consider the evidence put before him which tended to establish that it was not possible for the appellant to receive a fair trial in the United States, that the Minister's finding that the delay did not impair the appellant's physical and mental capacity to stand trial and did not render his proposed trial unfair was Wednesbury unreasonable, and that the Minister failed to set out clearly in his reasons why he rejected the evidence which tended to establish prejudice to the appellant's prospects of a fair trial. On the question of bad faith, he submitted that there was no evidence based on which the Minister could find that the US authorities did not intentionally include false information in the request for extradition and the Minister offered no reason why he did not accept the appellant's evidence of bad faith. In any event, the Minister applied the wrong test in determining whether it would be unjust to extradite the appellant. The correct test was whether there was a risk of prejudice to the accused in the conduct of the trial. The test applied by the Minister, on the other hand, was whether a fair trial would not be possible in the United States. Furthermore, the Minister simply adopted the decision of the Privy Council and failed to exercise his own independent judgment in deciding whether to surrender the appellant. In so doing, he

failed to appreciate that the discretion vested in him was different in nature to the function performed by the courts in determining the legitimacy of an extradition. He submitted, finally, that in determining whether it would be oppressive to extradite the appellant the Minister failed to take any account of the evidence pertaining to the impact which extradition after such a long period of delay would have on the appellant and his family.

[16] Ms Perdomo, who appeared for the respondent, submitted, on the other hand, that the Minister's power to decide whether to surrender a fugitive is not founded in the Magistrate's report and accordingly he is not deprived of his jurisdiction to decide whether to extradite a fugitive in the absence of such a report. The magistrate is entitled to see it fit to send no report at all. Moreover, given that the purpose of the report is to draw the Minister's attention to any matter which would render an extradition unjust or oppressive, the absence of a report in this case is of no moment since the Privy Council had already determined that there was no such material. With regard to the challenge to the Minister's decision that it is not unjust or oppressive to surrender the appellant, Ms Perdomo submitted, *in limine* as it were, that in light of the Privy Council's decision that it is for the courts and not the executive to pronounce upon the legitimacy of an extradition, the Minister no longer had any jurisdiction to refuse to extradite a fugitive on the ground of injustice or oppression. Questions whether it is improper, wrong, unjust or oppressive to surrender a fugitive all go the legitimacy of an extradition and are accordingly excluded from consideration by the Minister. It is implicit in the decision of the Privy Council that "after issues of delay, bad faith and abuse had been considered by the Courts, the Minister may have little role to play under section 11 of the 1870 Extradition Act." As to the complaint that the Minister failed to give adequate reasons for his decision, Ms Perdomo submitted that the Minister was not required to give a detailed judgment rebutting each and every allegation made by the appellant. As to the allegation that there was no evidence to support the Minister's findings, she submitted, the Minister was entitled to take account of the Privy Council's judgment on the question of bad faith and the impact of delay. The representations made to the Minister's on delay and bad faith were fully argued before the Privy Council and it would be

inconceivable that the Minister could come to a different conclusion. At the very least, it would be untenable to argue that it was irrational for the Minister to come to the same conclusion as the Privy Council.

[17] As practically all aspects of Ms Perdomo's submissions revolve around her conception of the limited role which the Minister now plays in the extradition of a fugitive and the view that the Privy Council has effectively resolved all the issues which were raised as bars to the appellant's extradition, it is best that the full extent of the Minister's power and the effect of the Privy Council's decision on the appellant's habeas corpus application be examined first.

The Minister's discretion

[18] In order to determine whether the Minister's discretion to refuse extradition when he considers it wrong, unjust or oppressive to do so, has now been taken away by the recognition of the existence of a comparable abuse of process jurisdiction in the Supreme Court of Belize, it is first necessary to examine in more detail the ambit of the Minister's discretion. The question is not merely whether the Minister is permitted to refuse to order the extradition of a fugitive on the ground that he is satisfied that it would be unjust or oppressive to so order, but also whether he would be obliged to refuse surrender if he were so satisfied. The respondent answers both questions in the negative. The place to begin is with the Extradition Act 1870 itself.

[19] Where a magistrate determines that there is sufficient evidence which would justify committing the fugitive for trial, if the offence had been committed in Belize, he or she is required to order that the accused be taken into custody pending the Minister's decision whether or not to order extradition and to submit to the Minister such report as he thinks fit (s.10). Section 11 governs the Minister's power to order extradition. It provides that:

> "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus. Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, ***it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered*** to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly..." (Emphasis added)

In Belize, the section must be read as if the Minister of Foreign Affairs is substituted for the Secretary of State.

[20] Section 3 of the Act prohibits extradition: i) where the offence in respect of which the fugitive's surrender is demanded is one of a political character; ii) where there is no provision in the law of the requesting state or no arrangement prohibiting prosecution in the requesting state for an offence committed before surrender (other than for a crime on which the fugitive's surrender is founded); iii) where the fugitive is serving a sentence in the requested state for an offence other than the one for which his extradition is requested; and iv) where fifteen days have not yet elapsed since the fugitive was committed to prison by the magistrate to await surrender. Other than in these specific instances, there is no provision in the Act expressly limiting the discretion vested in the Minister. Accordingly, the power he exercises has been described as a "complete discretion" - per Lord Morris and Lord Guest in ***Atkinson v United States of America Government*** [1971] AC 197*, at pp 239 and 247*. Even so, in ***Atkinson*** the House of Lords unanimously accepted that in enacting the Extradition Act 1870, Parliament "must have intended the (Minister of Foreign Affairs) to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man." It was in this context that the magistrate's obligation to send to the Minister "such report upon the case as he may think fit" loomed large since it was expected that the magistrate would bring to the Minister's attention "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" (pp. 232-233). The Minister's power to refuse to surrender the fugitive was seen as a safeguard protecting the fugitive against injustice and oppression and indeed it was precisely because Parliament had provided this safeguard that Lord Reid concluded that any jurisdiction in the courts to discharge an accused on these grounds had been impliedly excluded.

[21] As with all statutory discretions, one would have expected that the Minister's power to order the surrender of a fugitive would be susceptible to challenge in judicial review proceedings on the usual grounds of illegality, irrationality and procedural irregularity. It was therefore somewhat surprising that in ***Atkinson*** Lord Reid expressed the view, from which none of the other Law Lords dissented, that in the exercise of his discretion to refuse an extradition because of perceived injustice or oppression the Minister was "answerable to Parliament, but not to the courts, for any decision he may make" (p. 233). However, probably because it was expressed *obiter*, this view never appeared to gain any traction and in ***R v Governor of Pentonville Prison ex parte Sinclair*** [1991] 2 AC 64, 82, Lord Ackner, with the unanimous agreement of the other Law Lords, reverted to the traditional position. Before making his decision, he said, the Minister is duty bound to consider any report submitted to him by the magistrate and any representations made to him by the fugitive. "If he acts outside his jurisdiction", he continued (at p. 82), "his decision can of course be effectively challenged by writ of habeas corpus or, where appropriate, by judicial review."

[22] Any view to the contrary is now foreclosed by the decision of this court in ***Rhett Fuller v Attorney General of Belize*** (Civil Appeal No. 11 of 2002, 19 June 2009) where Mottley P said (at para 97):

> "When the Minister surrenders a person he is performing an executive act under the provisions 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."

[23] There does not appear to be any decided case bearing upon the precise contours of the Minister's discretion to refuse extradition where it would be wrong, unjust or oppressive, in his view, to surrender the fugitive. At least no authority has been cited to us. However, in many Commonwealth countries the courts are empowered by statute to discharge a fugitive where, because of certain stipulated reasons, it would be unjust or oppressive to surrender him, and it is probably inevitable that some guidance would be taken from the way in which this comparable statutory power is exercised. The concepts of injustice and oppression are not defined in the legislation and it has been left to the judiciary to give flesh to them. It would therefore be surprising if the way in which the courts have implemented the expressed statutory duty did not influence the approach to the duty implied from the provisions of the 1870 Extradition Act in identical terms. Indeed, in ***R v Secretary of State for the Home Department ex parte Patel*** (The Times, 10 February 1994), the English Divisional Court thought it was right that, in the exercise of his discretion, the Minister should be guided by the statutory duty which happened not to be applicable on the facts of that case. And in ***R v Governor of Pentonville Prison ex part Sinclair*** [1991] 2 AC 64, 80-81, Lord Ackner thought that the statutory power gave 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."

[24] At the same time, however, because it is largely uncontrolled, the Minister's implicit discretion to refuse to surrender a fugitive because it would be wrong, unjust or oppressive to do so, is broader than the comparable statutory power and indeed is susceptible to the influence of political and policy considerations which may limit the scope for judicial review. Simon Brown L.J. made this point in ***R v Secretary of State for the Home Department ex parte the Kingdom of Belgium*** (unreported, 15 February 2000) in a case where the question was whether the Secretary of State should refuse extradition because of the ill health of the fugitive. He said (at p. 9):

> Were the Secretary of State to take the view that Senator Pinochet's medical condition brought him within s.12(2)(a)(ii) (relating to delay) and that in those circumstances it would be "unjust or oppressive to return him", then he would have no discretion in the matter: Senator Pinochet would have to be discharged. If, however, s.12(2)(a) does not apply - and the case law suggests a narrow application of these provisions - the Secretary of State would nevertheless have a general discretion in the matter and would then need to have regard to a whole range of other considerations - including his policy in extradition cases, various political considerations (one notes amongst the consultees the Government of Chile, the Foreign and Commonwealth Office and the Ministry of Defence), and where best the decision on fitness for trial should be taken - the relevance and weight of which would be entirely for him.

[25] Accepting therefore that the statutory jurisdiction to discharge a fugitive where it would be unjust and oppressive to extradite him provides some guidance to the exercise of the Minister's discretion under the 1870 Extradition Act, I turn therefore to the current conception of the statutory duty. Given that in this case the focus has been on the effect which delay may have on the exercise of the Minister's discretion, I will limit my examination to the authorities in this area.

"Unjust and Oppressive"

[26] The place to start is with Lord Diplock's now classic peroration on the meaning of the concepts of injustice and oppression as used in extradition legislation. In ***Kakis v Government of the Republic of Cyprus*** [1978] 1 WLR 779, 782-783, he said:

> "'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."

He went on to point out (at p. 784) that "the gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return to stand his trial oppressive ..." In ***Gomes v***

Government of Trinidad and Tobago [2009] 1 WLR 1038, para 31, the House of Lords was careful to emphasise, however, that the test of oppression would not likely be easy to satisfy and that hardship, which is a comparatively commonplace consequence of an order for extradition, is not enough.

[27] On the question of injustice the Privy Council in ***Knowles v Government of the United States of America*** [2007] 1 WLR 47, distilled the following propositions (at para 31):

> "First, the question is not whether it would be unjust or oppressive to try the accused but whether ... it would be unjust or oppressive to extradite him... Secondly, if the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust or oppressive for the requested state to return him... But, thirdly, the court of the requested state must have regard to the safeguards which exist under the domestic law of the requesting state to protect a defendant against a trial rendered unjust or oppressive by the passage of time... Fourthly, no rule of thumb can be applied to determine whether the passage of time has rendered a fair trial no longer possible: much will turn on the particular case... Fifthly, 'there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive'..."

It would be noted that the Privy Council's formulation of the question in ***Knowles*** differs from Lord Diplock's in ***Kakis***. Lord Diplock was concerned with the risk of prejudice in the conduct of the trial, whereas in ***Knowles*** the question was whether a fair trial is impossible. In ***Gomes***, the House of Lords confirmed that the impossibility of a fair trial is indeed the test and that it accorded with the test applied domestically in determining whether a stay of a criminal trial ought to be granted on the ground of delay (see para 33).

[28] If the domestic courts of the request*ed* state are to determine whether the courts of the request*ing* state are bound to conclude that a fair trial is impossible, evidence of the safeguards protecting the fairness of a trial which exist in the request*ing* state would no doubt be required. But a resolution of this question would put the courts of the request*ed* state in the invidious position of endeavouring to determine the way in which

the courts of the reques*ting* state would apply their own laws to the facts of the particular case. Clearly, the domestic courts of the request*ing* state are better placed to determine any such question and it should follow logically that, as a general rule, it should be sufficient if there are in fact in place in the request*ing* state the safeguards necessary to ensure that a fair trial is still possible despite delay, and to stay the proceedings, if not. If so, there should be no basis for refusing to surrender a fugitive despite evidence of prejudice. Much better to leave it to the domestic courts of the request*ing* state to resolve the issue. As noted in ***Knowles***, the question is not whether it would be unjust or oppressive to *try* the accused, but whether it is unjust and oppressive to *extradite* him.

[29] This point was made clearly by the House of Lords in ***Gomes*** where Lord Brown grappled with the approach which the courts should take where it was not clear whether the laws of the requesting state had the necessary safeguards in place. He said (at para 36):

> "We conclude ... that even with regard to these countries the presumption should be that justice will be done despite the passage of time and the burden should be on the accused to establish the contrary. If there is such a likelihood of injustice, almost certainly this will be apparent from widely available international reports. Whilst we cannot agree with Mr Perry QC's submission on behalf of Trinidad that the test to be satisfied is that of a risk of a flagrant denial of justice such as would give rise to an article 6 bar under section 87, we would nevertheless stress that the test of establishing the likelihood of injustice will not be easily satisfied. The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international co-operation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad."

[30] On the question what delay should be taken into account in deciding whether it would be unjust or oppressive to extradite an accused, Lord Diplock had this to say in ***Kakis*** (at pp. 783):

> "Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8(3) is based upon the 'passage of time' under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case."

[31] A difference of opinion appears to have arisen at the level of the English Divisional Court as to whether delay by the requesting state in seeking extradition after the accused has fled the jurisdiction should be taken into account in assessing whether injustice or oppression has occurred. The court composed of Sedley LJ and Nelson J (in ***Gomes v Government of Trinidad and Tobago*** [2007] EWHC 2012 (Admin)) took the view that it was wrong to leave out of account culpable delay on the part of the requesting state in requesting extradition, while the court differently constituted (Longmore LJ and Mitting J in ***Krzyzowski v Circuit Court in Gliwice, Poland*** [2007] EWHC 2754 (Admin)) decided that once the fugitive had been found guilty of deliberate flight he could not rely on the passage of time save in the most exceptional circumstances.

[32] On the appeal from the Divisional Court in ***Gomes***, the House of Lords preferred the latter view. Lord Brown said (***Gomes v Government of Trinidad and Tobago*** [2009] 1 WLR 1038, at para 26):

> "If an accused ... deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part, whether this be, as in his case, losing the file, or dilatoriness, or, as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused's own conduct. Only a deliberate decision by the requesting state communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from justice, could allow him properly to assert that the effects of further delay were not "of his own choice and making."

[33] This then is the way the courts have approached the exercise of their statutory jurisdiction to discharge a fugitive if, by reason of delay, it would be unjust and oppressive to extradite him, and this too is the way in which it is expected a Minister would exercise his comparable discretion to refuse to surrender a fugitive. Is this the same jurisdiction which the Privy Council in ***Rhett Fuller*** held to be vested in the Supreme Court of Belize as part of its abuse of process jurisdiction? And if so, does this mean that the Minister now no longer is permitted to refuse an extradition on the ground of injustice and oppression? The answers to these questions require a closer look at the Privy Council's decision.

Rhett Allen Fuller v The Attorney General of Belize

[34] In ***Rhett Fuller v Attorney General of Belize***, the appellant alleged that by reason of the delay in making the extradition request, the delay in the progress of the extradition proceedings, the deliberate and false assertion made by the US authorities in the request for extradition that they did not know of the appellant's whereabouts until October 1997, and the fact that the appellant was induced to disclose facts to the US authorities which he might not otherwise have disclosed, the application for extradition was an abuse of the process of the court. Reversing the courts below, the Privy Council held that the Supreme Court of Belize has jurisdiction to entertain a challenge to an

extradition based on abuse of process. Both the lawfulness of a person's detention pending extradition and the lawfulness of the extradition itself, their Lordship held, are matters for the courts and not the executive to determine in a country such as Belize where its written constitution is based upon the doctrine of the separation of powers (para. 50-51). "The abuse of process argument", Lord Phillips said (at para 53) "goes to the legality of the extradition proceedings. Abuse of process is a paradigm example of a matter that is for the court not the executive." The court's abuse of process jurisdiction, he said (at para 5), would include

> "(i) making use of the process of the court in a manner which is improper, such as adducing false evidence or indulging in inordinate delay, or (ii) using the process of the court in circumstances where it is improper to do so, as for instance where a defendant has been brought before the court in circumstances which are an affront to the rule of law, or (iii) using the process of the court for an improper motive or purpose, such as to extradite a defendant for a political motive."

[35] The all-important question was "in what circumstances the Supreme Court can, or should, accede to a habeas corpus application on the ground that extradition would be so unjust or oppressive as to be unlawful, with the consequence that detention of the person whose extradition is sought cannot be justified" (para 58). However, Lord Phillips did not think it necessary to give a general answer to that question but was prepared to say that "the circumstances might extend further than those that can naturally be described as amounting to an abuse of process." He concluded (at para 58):

> "Where, however there has been an abuse of process in the narrow sense of the kind that the Board has described in para 5 above, the Supreme Court can properly grant the application for habeas corpus on the ground that it is contrary to justice that the court's process should be used in such circumstances."

[36] Even though Lord Phillips was not prepared to spell out the circumstances in which an extradition might be so unjust and oppressive as to be unlawful, he did accept that it would be unjust and oppressive, and therefore an abuse of process, to return a person if it was plain that a fair trial in the requesting state would not be possible (para

75). He also held that "(i)nordinate delay in pursuing extradition proceedings is capable of amounting to an abuse of process justifying the discharge of the person whose extradition is sought" (para 76). It is instructive that he then referred to ***Kakis*** and ***Gomes*** for guidance on the circumstances in which delay will justify discharging a fugitive.

[37] It is quite apparent that, given the Privy Council's expressed unwillingness to spell out the circumstances under which an unjust and oppressive extradition might be considered unlawful, it is yet too early to determine whether the jurisdiction which the Supreme Court of Belize may exercise in relation to extradition proceedings is co-extensive with, or encompasses but exceeds, the jurisdiction which the Minister hitherto was permitted to exercise under section 11 of the 1870 Act. Clearly there is substantial overlap. But it may very well be that the Minister's discretion is broader, influenced as it might be by political or policy considerations. For example, a Minister might refuse extradition because in his view the hardship caused to the fugitive by the inordinate delay in requesting extradition renders it oppressive to surrender him for trial. Would the courts consider that such oppression renders the extradition an abuse of process and therefore unlawful, even though a fair trial is still possible?

[38] In any event, it is clear that the Supreme Court of Belize is engaged in an exercise which is different in nature to the exercise which the Minister hitherto carried out. The Supreme Court is required to determine whether an extradition is unlawful. That is a question which the Minister, as a member of the executive, is constitutionally incapable of determining. Of course, he may not extradite a person who the court has said cannot be lawfully extradited. But the discretion to surrender or not comes after it has been determined that there are no lawful impediments to extradition. Necessarily, therefore, it is permissible for him to refuse to surrender a fugitive who has failed in all his legal challenges to his extradition. In such a case, subject to the possibility of a judicial review challenge by the requesting state (about which I express no opinion), he is answerable to the requesting state in the international arena and to Parliament.

[39] In my judgment, therefore, the effect of the Privy Council decision in ***Rhett Fuller v Attorney General of Belize*** is not to deprive the Minister of his discretion under section 11 to refuse to surrender a fugitive where he considers it wrong, unjust or oppressive to do so. Likewise, the Privy Council's rejection of the appellant's claim that it would be unjust and oppressive and therefore an abuse of process to return him did not deprive the Minister of the jurisdiction to answer what on the face of it was a similar question. Having said that, to the extent that the Privy Council did pronounce upon an identical question which the Minister was called upon to determine, it would be extremely difficult, if not impossible, to successfully contend that he acted irrationally.

[40] I turn therefore to consider the appellant's substantive challenges to the Minister's decision to surrender him to face trial in the United States.

Bad Faith

[41] In the diplomatic note accompanying its request for extradition, the US Government stated as follows: "Following the offence in 1990, law enforcement officers were unable to locate Rhett Allen Fuller because he had fled the United States. In October 1997, law enforcement officials discovered he was in Belize. They notified the Dade County State Attorney's Office, which led to the charges and capias issued on January 29, 1998." This is in fact false since, as Mr. Fuller was able to demonstrate to the Minister, US law enforcement officials had been in touch with him in Belize since 1990 and they therefore knew of his whereabouts for some time.

[42] Against this backdrop, the appellant submitted to the Minister that the request for extradition had been made in bad faith. He argued that since the requesting state had provided no explanation for its erroneous representation, no explanation existed and accordingly a decision had been taken by the requesting state "to deliberately misrepresent the true position."

[43] While accepting that the diplomatic note was inaccurate, the Minister was not persuaded that false information was presented intentionally "with a view to deceiving

the Belizean Authorities and therefore constituted bad faith." To his thinking, there was "no rational basis why the requesting state would have thought it necessary to resort to such subterfuge in making its application for extradition. The alleged offence was a very serious one which was properly the subject of extradition."

[44] Mr Courtenay submitted that there was no evidence on which the Minister could base his finding that there was no intention to deceive. The fact is that the requesting state did not provide any evidence as to its state of mind. On this basis alone, the Minister's decision is to be set aside.

[45] I must note, first of all, that it is quite unacceptable that having included in its diplomatic note what, on reflection, they must have appreciated was as a flagrant falsehood, the US Government apparently did not think it fit to explain its actions and to assure the Minister of its continued respect for the integrity of the extradition process. Instead, it left the evaluation of its motives to the uncertainties of implication.

[46] Yet still, I am unable to agree that the Minister made any reviewable error in finding that the inclusion of false information in the diplomatic note was not deliberate, for the simple reason that it is incredible that an assertion which could be so easily disproved would be intentionally put forward. Nor can it be said that the inference which the Minister drew was irrational. In response to an almost identical submission, the Privy Council was satisfied that the error "was almost certainly the consequence of a breakdown in communications rather than an attempt to deceive the Belize Court" (para 74).

Injustice and delay

[47] Before the Minister, the appellant argued that because of the passage of some 21 years since the alleged murder was committed there was a "real risk that a fair trial is no longer possible." Indeed, such a long period of delay made it presumptively so. He emphasised the fact that, since the date of the commission of the offence, the US

authorities were aware that he was in Belize and were in regular contact with him and had not endeavoured to explain why it took them some eight years to request his extradition. He referred to the additional delay of 6 years in the hearing of his appeal, the responsibility for which he placed squarely at the judiciary's doorstep. It was submitted that as a result of the delay it would be near impossible to have any clear or reliable recollection of events which took place so long ago and it was indisputable that the appellant's memory of the events surrounding the offence had faded. This would necessarily impact on the appellant's ability to get a fair trial in the United States, if he was returned. His faded memory, it was submitted, would affect his ability to properly instruct defence counsel, whereas the prosecuting authorities in the United States would have retained their statements and evidence, which could be used to refresh the memories of its witnesses. Further, any witnesses the appellant might wish to rely on would also be suffering from impaired recollection of the events and it was uncertain whether he would be able to locate any of them. It would also be impossible for him to have experts to investigate the case. All of this resulted in the "scales of justice (being titled) in favour of the State to the prejudice of Mr. Fuller."

[48] The Minister was not persuaded that it would be unjust to surrender the appellant. He was of the view that the appellant was not without blame for some of the delay, that there was no indication that the delay had impaired in any way the appellant's "physical and mental capacity to stand trial" and there was nothing to suggest that the trial would in any way be unfairly impacted by the delay. He saw "no manifest negative consequence that Mr. Fuller has suffered in consequence of delay." He took the view that it was "only if it were made plain to me that a fair trial will not be possible in the requesting state that it would be unjust and oppressive for me to return Mr. Fuller to the United States of America." However, he was satisfied that there was no evidence before him that this was the case. Finally, although there had been "some passage of time", he was not persuaded that there had been "undue delay" by the requesting state.

[49] The appellant has challenged both the test applied by the Minister and evidential basis for his findings. He contends that the correct test of injustice is that stated in

Kakis, namely, whether there was a risk of prejudice to the accused in the conduct of the trial. But, as noted above, ***Knowles*** and ***Gomes*** have made clear that the correct approach is to determine whether there is evidence that a fair trial in the requesting state has become impossible because of the delay. Indeed, this was the test which the appellant advocated in his written submissions to the Minister. The Minister pointed out correctly that extradition proceeds on the basis that the person whose extradition is sought will receive a fair trial in the requesting state and that there will exist procedures to determine whether a fair trial can be held despite long delay. It is for the trial judge in the requesting state to determine such questions, not the courts of the requested state and not the Minister. He will only act if there was evidence presented to him that a fair trial has in fact become impossible, that there are in fact no mechanisms in place in the requesting state which will accommodate or evaluate the effect of delay on the fairness of the trial. There was no such evidence put before the Minister and in the absence of such evidence he was quite right to say that he was not in a position to evaluate the appellant's contention that he could no longer get a fair trial in the United States. In so stating, he did not abdicate his statutory duty. Rather, he recognised the limitations which he faced in making any such determination. It is pertinent that the Privy Council had expressed similar sentiments and had obviously influenced the Minister on this question. Lord Phillips said (at para 75):

> "Mr Fitzgerald has put at the forefront of his case on abuse of process the delay that has occurred in this case. He has submitted that this would render impossible a fair trial in the United States. The Board is in no position to evaluate this submission, nor was the Supreme Court in Belize. It was not, however, a matter for investigation by that court. Extradition proceeds on the basis that the person whose extradition is sought will receive a fair trial in the requesting State. If it is plain that a fair trial will not be possible, it will obviously be unjust and oppressive to return the person, but that is not this case. If it is alleged that the delay that has occurred, or any other matter, has rendered a fair trial in Dade County impossible, the appropriate remedy is to apply to the court there for relief."

[50] It is in this light, I think, that the Minister's findings must be viewed. What the appellant was required to present to the Minister was evidence that the difficulties which he claimed to be experiencing as a result of delay would not be considered by the trial

judge in the United States. If there was a mechanism in place in the requesting state to evaluate his concerns, there would be no cause for complaint. If the trial judge in the United States was persuaded that a fair trial was no longer possible, it is to be presumed that the charges would be dismissed. If, on the other hand, the trial judge determined that the prejudice the appellant claimed to have suffered would not affect the fairness of the trial, there would be no cause for complaint. The point is that it was not for the Minister to make such determinations. His concern was only with any evidence which would demonstrate that a fair trial was impossible, which could include some evidence of how a case like this would be dealt with in the United States. No such evidence was presented to the Minister and accordingly he cannot be faulted for finding that there was no evidence of any manifest negative consequence or that the trial would be negatively impacted.

[51] In any event, it seems to me that the evidence that the appellant did present left much to be desired. He claimed not to have a clear recollection of the events that took place in 1990 and that he had difficulty in clearly recollecting “his exact whereabouts, acts and omissions around that time.” He does not claim, in other words, to have no recollection at all and a consequence inability to mount a defence. Similarly, he claims that it is unlikely that he would be able to locate a witness who would be prepared to testify on his behalf and to give exculpatory evidence. He says further that any witness he might find may not be able to accurately or reliably recollect events that occurred in 1990 or his whereabouts at that time. What he does not say is that there is some particular witness who is either no longer available to him or who has said that they cannot remember the relevant events. In other words, there may in fact have been no such witness ever in existence. The appellant appears to rely on bald speculation. In order to mount a case that a fair trial is impossible, it was incumbent on the appellant to demonstrate, for example, that evidence which once existed was no longer available because of the delay, or that he simply had no recollection of the events surrounding the commission of the offence.

[52] In addition, on the appellant's own account, in the eight years after the alleged murder was committed, he was repeatedly contacted by the US authorities about the killing and asked to return to the United States to give evidence against his alleged accomplices, in exchange for which he would be treated with lenience. He says on one occasion he even provided them with information, the details of which he does not provide. The facts recounted to the Privy Council indicate that this was in response to questions he was asked in relation to witness statements collected in the investigation which he was shown in October 1997 (see para 68 of the Privy Council's judgment). Then, the request for extradition was made in 1998 and the appellant would have been made aware at that time of the case against him. Thus, this is not a case where 21 years after the event, the appellant was being called upon for the first time to recall events in the distant past. The fact that his participation in the murder was still a live issue was always known to him. He therefore had no cause to put it out of his mind. Despite the long passage of time, therefore, this is not a case where a fair trial was presumptively impossible.

[53] I also find no basis for complaint about the Minister's finding that there was no evidence indicating that the appellant's physical or mental capacity to stand trial had been impaired by the passage of time. There was in fact no such evidence. The only evidence presented was that the appellant was having difficulty remembering the events clearly, not that he was mentally, far less physically, incapable of standing trial.

[54] Likewise, the Minister's finding that the appellant was responsible for some of the delay cannot be faulted. Although the evidence was that it was the registry's responsibility to settle the appellants record of appeal and that it did not do so, there is also no evidence that the appellant took any steps to bring the appeal on. He was apparently content to let it lie dormant. To the extent that the Privy Council came to a similar conclusion (at para 79), it certainly cannot be said that the Minister acted irrationally in this regard.

[55] The appellant also complained to the Minister that he had been persuaded by the US authorities to share with them information relevant to the offence. Before the Privy Council, he had argued that he only opened up to the US law enforcement officials because he was led to legitimately expect that he would not be prosecuted for the murder of Larry Miller. The Privy Council found that there was no evidence to support that claim. Before the Minister and before us, the appellant shifted gear slightly arguing instead that he was not given a Miranda caution before he answered the questions posed to him. Because the interview took place in Belize, the Miranda protection did not apply. The information he imparted was accordingly available to the US authorities to use against him, with the result that a fair trial was not possible.

[56] The Minister rejected this strand of alleged injustice for the same reasons he gave for saying that delay did not make the appellant's extradition unfair. In short, he did not think this was a matter he could evaluate and pronounce upon. I can find no valid basis for questioning the Minister's determination in this regard. Apart from the fact that there was no expert evidence on Miranda obligations outside of United States territory, it is for the US courts to determine whether the fairness of the trial has been affected by the conduct of the US police officers complained of. In any event, it would have been difficult for the Minister, as it is for this court, to evaluate the impact of the disclosure made by the appellant since he gave no particulars whatsoever of what information he did disclose and whether the same amounted to a material admission or otherwise which would severely prejudice his defence. And even if he did, the Minister was right to adopt a hands off approach in the absence of evidence that the US courts would be bound to find that, for this reason, a fair trial was impossible.

Oppression

[57] In support of his submission on oppression, the appellant referred the Minister to the changes in his circumstances which occurred, he claimed, because of the passage of time. He referred to the fact that he now owns and operates a small business and that he got married and had three children, one of whom is autistic and requires special

care. If he were surrendered to the United States, he submitted, his familial and community ties and bonds would be undone, the roots which he has been permitted "to burrow in Belizean soil by the inordinate delay … in requesting his extradition" would be dug up, his family would be torn apart and his business destroyed. Extradition, after such long delay, would be oppressive.

[58] The Minister rejected these submissions in two short sentences: "(N)othing adduced by Mr. Barrow or Mr. Fuller indicates that by reason of physical or mental infirmity Mr. Fuller is unfit to stand trial. I therefore do not agree that under the circumstances it would be oppressive to extradite him to stand trial for the offence with which he is charged." In other words, he appears to have taken the position that it would only be oppressive to surrender the appellant if it could be shown that by reason of physical or mental infirmity he was unfit to stand trial.

[59] It is clear that the comparable statutory duty to discharge a fugitive where by reason of delay it would be oppressive to extradite him, is interpreted quite differently. In ***Kakis***, Lord Diplock said that the 'oppression' jurisdiction is directed to "the hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration." Exercising its 'oppression' jurisdiction, courts have considered the effect which surrender would have on the fugitive's life and that of his family. For example, in ***Cookeson v Government of Australia*** [2001] EWHC Admin 149, the Court ordered the release of a fugitive because it was satisfied that there was a real risk that his son, who suffered from schizophrenia, would be significantly prejudiced if his father was not available to care for him. Of course, the oppression which is alleged would occur if the fugitive is surrendered must be the result of the passage of time – ***R v Governor of Pentonville Prison, ex parte Narang*** [1978] AC 247 - and any delay caused by the fugitive fleeing the country where the offence was alleged to be committed is not to be taken into account.

[60] The Minister made it clear in his reasons that in determining whether it would be unjust or oppressive or wrong to surrender the appellant he would be guided by

legislation enacted in other commonwealth countries which required the relevant Minister to discharge a fugitive if by reason of the passage of time it would be unjust or oppressive to extradite him. The statutory duty has not been restricted to circumstances where because of the passage of time the fugitive would be unfit to stand trial by reason of physical or mental infirmity. By restricting his discretion in this way, the Minister abdicated his ample jurisdiction and asked himself the wrong question. He failed to give the appellant the fullest consideration to which he was entitled under the law. The Minister's decision to surrender the appellant must accordingly be set aside and the case returned to him so that he could exercise his discretion in accordance with the findings in this judgment.

Reasons

[61] Mr. Courtney also submitted that the Minister did not provide sufficient reasons for his decisions and in particular did not say why he rejected the appellant's uncontradicted evidence. This point can be dealt with shortly. It would by now be apparent that the Minister did give reasons, and with the exception of his determination on oppression, I have found his reasons not only adequate but unassailable. Furthermore, I do not think that it is accurate or fair to say that the Minister rejected the appellant's evidence and failed to give reasons for so doing. The Minister was careful to emphasise that he had read and taken into account all the material put before him. It is just that he did not think that the evidence presented to him established injustice or oppression of such quality as would justify a refusal to order the appellant's extradition.

The Magistrate's Report

[62] By section 10 of the Act, the Magistrate, upon committing the fugitive to prison to await the Minister's order for his surrender must "forthwith send to (the Minister) a certificate of the committal and such report upon the case as he may think fit." It was not in dispute that the Minister did not have in his possession a report from the Chief Magistrate when he decided to surrender the appellant. In the circumstances, the

appellant argued in the court below and repeated his argument here that in the absence of the report the Minister had no jurisdiction to surrender the appellant. Mr. Courtenay pointed out that the word "shall" is used and this creates an obligation on the Magistrate to prepare and send a report. The report is not a trifling thing, he continued. The Magistrate is expected to include in his report "anything which may have come to light during the course of the proceedings before him showing or alleged to show that it would be in any way improper to surrender the man" – per Lord Reid in ***Atkinson***, pp 232-233. The rendering of a report is accordingly one of safeguards provided by the legislature against an improper extradition. There must be strict compliance with the statutory procedure, Mr. Courtenay submitted. Failure to produce a report would deprive the Minister of his jurisdiction.

[63] The trial judge rejected these submissions. In his view, section 10 meant that the Magistrate must forthwith send a certificate of committal to the Minister and had the option to accompany it with a report on the case. That, he said, was the effect of the comma after the words "a certificate of committal" in the section.

[64] The Attorney General would have us uphold the trial judge's finding, but for different reasons. Ms. Perdomo submitted that the Magistrate is to produce such report as he thinks fit, which means that he can see it fit to submit no report at all. She relies on ***R v Secretary of State for the Home Department, ex parte Hagan*** (25 May 1994) for this proposition.

[65] I do not agree. On its natural and ordinary meaning, the concluding words of section 10 require the Magistrate to send two things to the Minister 'forthwith', a certificate of committal and "such report upon the case as he may think fit." The word "shall" covers both items. Furthermore, I do not accept that the words "as he may think fit" governs or qualifies the magistrate's obligation to produce a report. Rather, it qualifies the type of report that he is to produce. The words are adjectival, not adverbial. On its natural and ordinary meaning, section 10 requires the Magistrate to send a report, the contents of which are within his discretion. As Mr. Courtney points out, section 10

does not say that the Magistrate must send a report "if" he thinks fit. He must send "such" report, as he may think fit.

[66] In my judgment this interpretation is preferable and advances the object of the section 10. As noted, the requirement that the Magistrate send a report to the Minister acts as a safeguard against an unjust or oppressive extradition to the extent that the Magistrate is expected to include in the report any matter which would bear upon the question of injustice or oppression. Imposing an obligation on the Magistrate to send a report forces the Magistrate to focus his attention on whether any such matter has been revealed in the course of the proceedings before him. If the sending of a report was optional, there is the risk that matters which might otherwise have been brought to the Minister's attention would slip through the cracks.

[67] The question, however, is whether the failure of the Magistrate to send a report deprives the Minister of jurisdiction to surrender the fugitive and renders invalid any decision to order his surrender in the absence of a report. That depends entirely on what the legislature intended. Lord Hailsham described the challenge which the court faces in such circumstances. In ***London & Clydeside Estates Ltd. v Aberdeen District Council*** [1980] 1 WLR 182, he said (at pp. 189-190):

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault,

> the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like "mandatory," "directory," "void," "voidable," "nullity" and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

[68] In ***Howard v Bodington*** [1877] 2 PD 203 Lord Penzance gave some guidance on the factors which should be considered in determining what Parliament's intention was. He said (at p. 211):

> "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

[69] The Extradition Act is to be interpreted against the back-drop of treaty obligations to surrender persons against whom a prime facie case of criminal activity has been established. I find it difficult in this context to believe, in the absence of express words to the contrary, that the legislature would have intended that the entire extradition process would come to a screeching halt because of the failure of the magistrate to produce a report. A number of reasons may account for this failure. The magistrate

may have died before preparing the report. He may have had nothing significant to report and so simply forgot to prepare one. I do not mean to diminish the importance of the magistrate's duty in this regard. But the fact is that the fugitive himself would have the opportunity to bring to the Minister's attention any matter which bears upon the decision to surrender and the Minister is bound to take these matters into account. It is not insignificant that the sending of the report is not expressed as a pre-condition to the exercise of the Minister's jurisdiction. In my judgment, therefore, the failure to produce a report would not deprive the Minister of his jurisdiction to order the surrender of a fugitive.

[70] The trial judge found that, on the evidence, the Chief Magistrate did not deem it fit to prepare a report and accordingly no report was in fact sent with the certificate of committal. On his interpretation of section 10, this did not affect the Minister's jurisdiction and there was no report for the Minister to consider. As Mr. Courtenay pointed out, however, the appellant had deposed in these proceedings that at the hearing held on 12th September 2011, the Minister said that the Chief Magistrate had prepared and submitted a report but it could not be found at the Ministry. He stated further that the papers relating to the extradition proceedings before the Chief Magistrate were no longer available as they were destroyed by fire when the Paslow Building, which housed the magistracy, was burnt down. In his affidavit in response, the Minister did not refute this and it must therefore be taken to have been established that a report was sent, but got lost. The question is whether this vitiates the Minister's decision.

[71] No doubt, if the Chief Magistrate had included in his report a reference to some matter which bore upon the question whether it would be improper to surrender the appellant, the Minister would have been obliged to consider it. If he failed to do so, his decision would have been susceptible to an order of certiorari. However, the fact is that the report was not available and the Minister could not be accused of not having taken it into consideration. Nevertheless, as Mr. Courtenay was astute to point out, the report may have contained matters relevant to the exercise of the Minister's discretion and, given that the Chief Magistrate is now a sitting Supreme Court Judge, he could have

been asked to reconstruct his report. By failing to take this simple step, the Minister in my judgment adopted an unfair procedure and denied the appellant the protection which the Act provided.

[72] It may very well be that if the former Chief Magistrate is asked to reconstruct his report he would not be able to do so given the passage of time and the destruction of the relevant files. If this was the only reviewable error, I may have been open to persuasion not to grant relief given that the appellant has had ample opportunity to put before the courts and the Minister such matters as he may have thought would justify refusing his surrender. The appellant has also had ample time himself to ask the former Chief Magistrate if he was in a position to produce a report even at this late stage. But we have had no indication that he did so. However, given that I am satisfied that the Minister's decision should be quashed on other grounds, I would order as well that he make efforts to have the former Chief Magistrate reconstruct the report which has become lost.

[73] I would therefore allow the appeal and order that the Minister's decision to surrender the appellant be quashed and he be required to reconsider the question of surrendering the appellant in accordance with the findings in this judgment. The appellant shall have his costs here and in the court below, certified fit for Senior Counsel, to be taxed, if not sooner agreed. This order as to costs shall stand unless application be made for a contrary order within 7 days of the date of delivery of this judgment, in which event the matter shall be decided by the Court on written submissions to be filed within 15 days from the said date.

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MENDES JA