

**R. v STIPENDIARY MAGISTRATE, ex p. NEWALL**

SUPREME COURT (Kneller, C.J.): October 7th, 1993

*Extradition and Fugitive Offenders—detention pending extradition—judicial review—no order for prerogative relief before committal proceedings completed unless clear lack of jurisdiction shown—no power to stay proceedings or release offender for abuse of process in original arrest*

*Extradition and Fugitive Offenders—detention pending extradition—abuse of process—compliance with Fugitive Offenders (Gibraltar) Order 1967 is only criterion for Magistrate hearing extradition proceedings—fairness of means by which offender brought to Gibraltar irrelevant to jurisdiction*

The States of Jersey sought the extradition of the appellant to Jersey on a charge of murder.

The appellant was intercepted in international waters by a ship of the Royal Navy. Once on board, he was arrested on a warrant by the Jersey police and when the ship docked in Gibraltar the next day he was arrested by Gibraltar police on a provisional warrant from the Stipendiary Magistrate. He argued before the Magistrate that both warrants were invalid and that his arrest at sea had been illegal. The Magistrate rejected these contentions. The Governor then issued an authority to proceed with the appellant's extradition to Jersey.

The Supreme Court rejected an application for habeas corpus on the ground that it was premature, in that the committal proceedings had not been completed, and the Court of Appeal upheld the Supreme Court's decision. The proceedings are reported at 1993–94 Gib LR 143.

The applicant applied for leave to seek an order of prohibition to halt the extradition proceedings on the ground that he was in custody as a result of an abuse of process by the requesting state, Jersey, and the Gibraltar authorities.

He submitted that (a) both states had abused their powers and the process of the court since (i) the warrant for his arrest had been issued almost five years after the alleged offences, and could not be executed outside Jersey, (ii) he had not absconded from Jersey and therefore was not a fugitive offender, (iii) the Stipendiary Magistrate had issued the Gibraltar warrant on the basis of the false information that he was “on his way to Gibraltar,” whereas he had effectively been kidnapped, (iv) he had been subject to the jurisdiction of the English courts rather than those of Jersey when on board the Royal Navy ship, and (v) he had been ill-treated whilst on board; (b) since the courts of the requesting country had power

to stay the prosecution of an offender brought into the jurisdiction in breach of extradition procedures, the courts of the requested state also had a duty to examine any abuse of process alleged by the offender, and to order his release if appropriate; and (c) the requesting state had no *locus standi* to oppose his application for judicial review, since leave had not yet been granted.

The requesting state submitted in reply that (a) the applicant should be refused leave to apply for judicial review, since he was bound to fail; (b) the court's powers in extradition matters were governed by the Fugitive Offenders (Gibraltar) Order 1967, which did not allow for judicial review unless the applicant could show that the Stipendiary Magistrate lacked jurisdiction to hear the proceedings; (c) provided that the applicant was present in Gibraltar, it was irrelevant to the Magistrate's jurisdiction how he came to be here; (d) since the power lay with the Governor under s.9(3) to refuse to surrender the offender if it would be unjust or oppressive to do so, neither the Magistrate nor the Supreme Court could refuse to commit him or stay the proceedings on the ground of abuse of process; (e) the applicant should not be permitted to attack collaterally the existing decision of the Supreme Court, affirmed on appeal, that the Stipendiary Magistrate had jurisdiction and should proceed with the committal; (f) in any event, under O.53, r.4(1) of the Rules of the Supreme Court, an application for judicial review must be made within three months from the date when grounds for the application arose, and almost a year had passed between the Magistrate's ruling and the present application; and (g) the requesting state had *locus standi* in this matter as a putative respondent invited to attend to make representations on the question of leave.

**Held**, dismissing the application:

(1) The requesting state of Jersey had *locus standi* to be heard on the application for leave to apply for judicial review. The court had decided that the application should be heard on an *inter partes* basis rather than on the papers, since the applicant would have had the right to return to the same court following a refusal of leave, and the parties had agreed to the application being heard in this way. However, the application had been made outside the time-limit set by O.53, r.4(1) of the Rules of the Supreme Court, and there was no reason to justify granting an extension of time (page 174, lines 26–38; page 175, lines 18–32).

(2) In any event, the application was bound to fail, as the court endorsed and was bound by the order of the Court of Appeal that the Stipendiary Magistrate had jurisdiction to proceed with the extradition proceedings. The court could not entertain any application for prerogative relief during committal proceedings unless a clear lack of jurisdiction was shown. The role of the Stipendiary Magistrate was to examine the evidence before him and comply with the provisions of the Fugitive Offenders (Gibraltar) Order. The fairness of the means by which the

offender appeared before him and the consequences of extradition were not relevant. The powers of the courts of the requesting state (Jersey) to deal with an alleged abuse of process in the extradition procedure were exercisable as part of the trial process following the offender's return to that state, and had no bearing on the process of extradition in the requested state (Gibraltar). Extradition proceedings were not a part of the trial process (page 175, line 33 – page 176, line 27).

**Cases cited:**

- (1) *Atkinson v. US Govt.*, [1971] A.C. 197; [1969] 3 All E.R. 1317.
- (2) *R. v. Carden* (1878), 5 Q.B.D. 1; 49 L.J.M.C. 1.
- (3) *R. v. Home Secy., ex p. Begum*, [1990] C.O.D. 107; [1990] Imm. A.R. 1.
- (4) *R. v. Horseferry Rd. Magistrates' Ct., ex p. Bennett*, [1994] 1 A.C. 42; *sub nom. Bennett v. Horseferry Rd. Magistrates' Ct.*, [1993] 3 All E.R. 138, distinguished.
- (5) *R. v. Knightsbridge Crown Ct., ex p. Quinlan*, [1988–89] C.O.D. 287.
- (6) *R. v. Pentonville Prison (Governor), ex p. Lee*, [1993] 1 W.L.R. 1294; [1993] 3 All E.R. 504; *sub nom. R. v. Metropolitan Stipendiary Magistrate, ex p. Lee*, [1993] C.O.D. 310, followed.
- (7) *R. v. Pentonville Prison (Governor), ex p. Sinclair*, [1991] 2 A.C. 64; *sub nom. Sinclair v. D.P.P.*, [1991] 2 All E.R. 366.
- (8) *R. v. Wells St. Stipendiary Magistrate, ex p. Seillon*, [1978] 1 W.L.R. 1002; [1978] 3 All E.R. 257; (1978), 69 Cr. App. R. 77.
- (9) *US v. Gaynor*, [1905] A.C. 128; (1905), 9 C.C.C. 205.
- (10) *US Govt. v. Bowe*, [1990] 1 A.C. 500; [1989] 3 All E.R. 315.

**Legislation construed:**

Fugitive Offenders (Gibraltar) Order 1967 (S.I. 1967/1909), Schedule, s.6(1):

“A warrant for the arrest of a person accused of a relevant offence ... may be issued—

...  
 (b) without ... an authority [to proceed], by the Stipendiary Magistrate in Gibraltar, upon information that the said person is or is believed to be in or on his way to Gibraltar ...”

s.8(3): The relevant terms of this sub-section are set out at page 172, line 41 – page 173, line 7.

s.9(3): “The Governor shall not make an order under this section in the case of any person if it appears to the Governor, on the grounds mentioned in section 8(3) of this Act, that it would be unjust or oppressive to return that person, and may decide to make no order under this section in the case of a person accused or convicted of an offence in the United Kingdom or a United Kingdom dependency if he considers ... that an order ought not to be made.”

Rules of the Supreme Court, O.53, r.4(1): The relevant terms of this paragraph are set out at page 174, lines 28–32.

*C. Finch* for the applicant;  
*G.D.L. de Silva, Q.C., B.P. Jubb* and *I. Christmas* for the States of Jersey.

**KNELLER, C.J.:** Roderick Innes Nelson Newall, through his counsel, Mr. Finch, gave notice on October 4th that he wished to have leave to apply for judicial review of the proceedings before the Stipendiary Magistrate which were started under the Fugitive Offenders (Gibraltar) Order 1967 (“the Order”). They are extradition proceedings. The requesting state is the Island of Jersey where Mr. Newall is alleged to have murdered his parents on or about October 10th, 1987, which he maintains is untrue. 5 10

The extradition proceedings are said to be nearly complete but Mr. Newall applies for an order of prohibition from this court to halt them and discharge him from custody in H.M. Prison in the Moorish Castle, where he has been since August 6th, 1992. The principal ground on which he seeks relief is that he is in Gibraltar, before the Stipendiary Magistrate and in the prison as a result of an abuse of process by the executives of the requesting state and the requested state, which is Gibraltar, and their police forces. The term “abuse of process” was either replaced or expanded upon by Mr. Finch in his submissions by the phrase “abuse of power.” 15 20

Mr. Finch for Mr. Newall sets out in brief the facts he submits constitute the abuse thus:

1. The warrant for the arrest of Mr. Newall was not issued until July 17th, 1992, which was nearly five years after the alleged offence in Jersey. 25

2. It declared that he had absconded from Jersey. He had not absconded. He was not a wanted man nor a fugitive from justice but a man free to come and go as he pleased. He had left Jersey in 1987 lawfully, having been interviewed by a member of its police force, and it was known to some of them that he would be leaving Jersey thereafter to return, eventually, to the Falkland Islands, where he is ordinarily resident for tax purposes. 30

3. The warrant was not “backed.” It could not be executed outside Jersey. 35

4. He was sailing with a friend, Mr. Stephen Beldham, on August 5th, 1992 on a yacht, the *Austral Soma*, in international waters off the coast of North Africa towards the Canary Islands when they were intercepted by *HMS Argonaut* and *HMS Ranger*. Mr. Newall was summoned aboard *HMS Argonaut* to have his papers checked because there was a naval exercise in the area, but the real purpose was to have him arrested by the Jersey police. 40

5. Members of the Royal Gibraltar Police Force, carrying assault rifles and wearing paramilitary uniforms, surrounded him. They threw him to the burning hot deck. Detective Sgt. McDowall of the Jersey police 45

arrested him pursuant to the Jersey warrant. Mr. Newall was subject to the exclusive jurisdiction of the courts of England and Wales because he was on board a British warship.

5 6. Mr. Newall was manacled in a sitting position and kept without refreshment for 14 hours, which was inhumane treatment.

7. He was taken against his will and without due process to Gibraltar on board *HMS Argonaut*. He was “hijacked” or “kidnapped” by the armed services and the two police forces.

10 8. The Attorney-General for Gibraltar applied to the Stipendiary Magistrate here for a provisional warrant of arrest under s.6(1)(b) of the Order. *HMS Argonaut* signalled to Gibraltar that Mr. Newall was in custody and that she was sailing to Gibraltar.

15 9. Detective Sgt. Yome of the Royal Gibraltar Police Force provided information on oath supporting the Attorney-General’s application, stating that Mr. Newall “is, or is believed to be, in or on his way to Gibraltar...” The Stipendiary Magistrate issued the provisional warrant. Mr. Newall was not in or on his way to Gibraltar. He had been illegally arrested by Det. Sgt. McDowall and was being fetched to Gibraltar against his will, which amounted to his illegal detention and transportation. None of this was put before the Stipendiary Magistrate, who could not have exercised his discretion as to whether or not to issue the warrant. This was an abuse of the process of the magistrates’ court of Gibraltar.

20 10. Mr. Newall was therefore not a fugitive offender.

25 11. Detective Insp. Wink of the Royal Gibraltar Police Force executed the provisional warrant on board *HMS Argonaut* and took Mr. Newall into custody against his will and forcibly. Mr. Newall was subject to the law of England and Wales on board *HMS Argonaut*.

12. Mr. Newall is not alleged to have committed a criminal offence here. He did not intend to visit Gibraltar.

30 13. All in all, Mr. Newall maintains that the Supreme Court should exercise its general supervisory jurisdiction over the extradition proceedings and prevent the abuse of its process.

35 Mr. Finch added briefly and not fully to those grounds: The judges of the Court of Appeal for Gibraltar, during the course of his submissions to them on appeal from this court in Mr. Newall’s application for habeas corpus, said that abuse of process should be raised by way of judicial review and not in habeas corpus proceedings. Mr. Newall raised it as early as possible.

40 The speeches in the House of Lords in *R. v. Horseferry Rd. Magistrates’ Ct., ex p. Bennett* (4) were delivered on June 24th, 1993 but the report was not available in Gibraltar until August this year. It was their opinion (Lord Oliver of Aylmerton dissenting) that where a defendant had been brought back to the United Kingdom in disregard of available extradition process, in breach of international law and the laws of the state where he had been found, the courts in the United Kingdom

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would take note of those matters and refuse to try the defendant. Accordingly, the High Court, in the exercise of its supervisory jurisdiction, had power to look into the circumstances by which the defendant had been fetched into the jurisdiction and, if it were found that extradition procedures had been flouted, the High Court might stay the prosecution and order the release of the defendant because there had been this abuse of process. 5

This was part of the High Court’s supervisory jurisdiction to uphold the law. The magistrates did not have that jurisdiction. If a question arose as to whether extradition procedures had been abused deliberately, they should adjourn their proceedings so that an application could be made to the Divisional Court, because that was the proper forum to deal with the matter. The jurisdiction of the magistrates as committing magistrates in domestic matters or in summary trials was limited to protecting the process of their court from abuse, *i.e.* it was confined to matters directly affecting the fairness of the trial of the defendant before them. 10 15

Mr. Finch described *Ex p. Bennett* as a noble and courageous decision from which this court should not “back-slide.” *Ex p. Bennett* turned earlier authorities upside down. It was not confined in its application to the place where the trial would take place. Mr. Newall was entitled to pray it in aid, since when he was first arrested he was on board *HMS Argonaut* and subject to the laws of England and Wales. This court also had jurisdiction to deal with this issue now before extradition proceedings were finished. Otherwise this court would be abdicating its responsibility to check how Mr. Newall came to be here. 20 25

He further submitted that this court must not be confined to what Lord Griffiths ([1994] 1 A.C. at 59) called “its forensic process.” Mr. Newall was entitled to have a very important point relating to his freedom dealt with by this court right now and not later. It was not an application that was doomed to failure, so Mr. Newall could not be refused leave to apply for judicial review in the form of an order of prohibition. 30

Mr. de Silva, Q.C., for the requesting state, the Island of Jersey, urged this court to refuse leave because it was just that—doomed to failure. *Ex p. Bennett* set out the discretionary powers of the magistrates’ court and the Divisional Court for the court of trial but not their powers in extradition proceedings. Here in Gibraltar, extradition proceedings were controlled by the Order which set out in statutory form the relevant conditions. 35

It was only in an application by Mr. Newall for habeas corpus that under s.8(3)— 40

“the Supreme 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 45

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

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

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

10 There was no provision in the Order by which Mr. Newall could apply for judicial review unless he could show that the Stipendiary Magistrate had no jurisdiction to hear the extradition proceedings because, e.g. the authority to proceed had not been given by the Governor or the alleged fugitive was the ruler of a sovereign territory whose immunity protected him here.

15 There was no question, he submitted, that Paul James Bennett, a citizen of New Zealand alleged to have committed criminal offences in England, was lawfully arrested, despite the fact that the South African police and British police had colluded in forcibly returning him to England, although special arrangements could have been made for his extradition under s.15 of the Extradition Act 1989.

20 Mr. de Silva continued that the learned Stipendiary Magistrate had jurisdiction to begin and continue the extradition proceedings because, among other things, Mr. Newall was here in Gibraltar, no matter how he was brought here. When the Magistrate has no jurisdiction he cannot exercise a discretion, and on that basis the requesting state came to this court for judicial review of his decision to exclude what was said to be

25 Mr. Newall’s incriminating statement to his uncle and aunt. When he did that the Magistrate, it was submitted, had exercised a jurisdiction he did not have and this was upheld by this court and the Court of Appeal for Gibraltar last year.

30 The magistrates in extradition proceedings in England and Wales have no power to stay proceedings or refuse to commit on the ground of abuse of process (see *R. v. Governor of Pentonville Prison, ex p. Sinclair* (7) and *Atkinson v. US Govt.* (1)), because the Secretary of State may refuse to surrender the defendant if it would be unjust or oppressive to do so.

35 The Governor has the same discretionary power under s.9(3) of the Order. The High Court in England and Wales has it too under s.11(3) of the Extradition Act 1989 but it has not been conferred on the Supreme Court of Gibraltar.

40 The Stipendiary Magistrate issued a provisional warrant of arrest for Mr. Newall under s.6(1)(b) of the Order because he was informed that Mr. Newall was believed to be on his way to Gibraltar. There was no justification for claiming that Mr. Newall had to be on his way “voluntarily” before a provisional warrant could be issued. Such a warrant could be issued if he was believed to be on his way to Gibraltar

45 because a gale or strong tide was bearing the *Austral Soma* here.

Over and above all that, Mr. de Silva continued, this court, the Supreme Court, has in Mr. Newall’s case no jurisdiction to entertain his application for leave to apply for judicial review. It decided in his habeas corpus application that the Stipendiary Magistrate had jurisdiction and should proceed to hear and determine the extradition proceedings. Mr. Newall appealed from that decision and the Court of Appeal upheld the Supreme Court. The judges of the Court of Appeal unanimously dismissed the appeal with costs and ordered the Stipendiary Magistrate to continue the extradition proceedings with all dispatch. The order binds this court, the Stipendiary Magistrate, the requesting state and Mr. Newall. It was a final decision of a court of competent jurisdiction which could not be attacked collaterally: see *R. v. Knightsbridge Crown Ct., ex p. Quinlan* (5) ([1988–89] C.O.D. at 288, *per Roch, J.*)

Then, Mr. de Silva submitted, because the Stipendiary Magistrate has jurisdiction to conduct the extradition proceedings, Mr. Newall cannot seek prerogative relief before he is committed to custody to await his return to the requesting state, when he may apply for his premature application for habeas corpus to be heard in full: see s.7(4) of the Order, *R. v. Wells St. Stipendiary Magistrate, ex p. Seillon* (8), *R. v. Carden* (2), *US v. Gaynor* (9) and *US Govt. v. Bowe* (10). Lord Griffiths and Lord Lowry, who sat in *Bowe*, it will be recalled, were also members of the House of Lords in *Ex p. Bennett*.

The Divisional Court in *R. v. Governor of Pentonville Prison, ex p. Lee* (6) held that committal for extradition is not part of the court’s trial process.

Finally, Mr. de Silva drew this court’s attention to the provision of the Rules of the Supreme Court, O.53, r.4(1), which reads:

“An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.”

The learned Stipendiary Magistrate ruled on September 3rd, 1992 that he had jurisdiction to continue the extradition position despite Mr. Finch’s submission for Mr. Newall that his arrest and detention in Gibraltar were illegal. This application for leave to apply for judicial review was made on October 4th, 1993, which is 13 months later and so was 10 months out of time. The fact that *Ex p. Bennett* was decided in June 1993 and reached Gibraltar in August 1993 was not a good reason to extend the time for allowing Mr. Newall’s application to be brought, because *Ex p. Bennett* was not relevant in committal proceedings.

Mr. de Silva for the requesting state, Jersey, took as a preliminary issue this court’s jurisdiction and that of the learned Stipendiary Magistrate to hear and determine an application for judicial review. Mr. Finch condemned this as yet another “hijacking” manoeuvre on the part of the



requesting state. Mr. Finch declared the requesting state had no *locus standi* when Mr. Newall applied for leave to apply for judicial review. It had it if this court gave leave to apply and directed that Mr. Newall's papers should be served on the requesting state.

5 Mr. de Silva had an answer to this. A judge confronted with an application for leave to apply for judicial review should grant it if it is clear that there is a point for investigation on an *inter partes* basis or, if not, he can mark it "leave refused." If he is in doubt he can invite a putative respondent to attend and to make representations as to whether leave should or should not be granted. This, Mr. de Silva suggested, was what had happened in this matter: see *R. v. Home Secy., ex p. Begum* (3).

10 I have tried to set out Mr. Newall's application, his grounds for the relief he seeks and Mr. Finch's submissions in support of them at this preliminary stage. And I hope the requesting state accepts that in the short time available I have done the same for Mr. de Silva's arguments. I am again much indebted to Mr. de Silva and Mr. Finch for their help.

15 I looked at Mr. Newall's papers between Monday, October 4th and Wednesday, October 6th and wondered whether I should refuse leave because his application was hopeless. I asked Mr. Finch and Mr. de Silva if I should hear them because in Gibraltar we have no Divisional Court, which would mean that if I dismissed Mr. Newall's application for leave on the papers because it was hopeless, then he would have to come back to me and though I could and would exercise the different jurisdiction as best I could, it would be difficult and Mr. Newall would find it unsatisfactory. Mr. Finch said that the application should be heard *inter partes* and Mr. de Silva agreed. That is what has been done.

20 Having heard Mr. Finch and Mr. de Silva, I find:

- 25 1. The requesting state had *locus standi* in this matter.
- 30 2. Mr. Newall was out of time with his application.
3. This court considers that good reason for extending the period within which the application could be made was not shown.
4. This court and the Stipendiary Magistrate are bound by the Court of Appeal's order to proceed with the extradition proceedings with all dispatch.
- 35 5. This court cannot entertain an application for prerogative relief during committal proceedings unless the Stipendiary Magistrate is shown to have no jurisdiction.
- 40 6. The Stipendiary Magistrate had jurisdiction to continue and determine the extradition proceedings.
7. Extradition proceedings are not part of the court's trial process.
8. Preliminary objections that succeed necessarily exclude full arguments and a ruling on such applications.
- 45 9. *Ex p. Bennett* (4) does not apply to extradition proceedings in a requested state.

10. Mr. Newall's application for leave to apply for judicial review fails.

At this point let me add some observations set out in *Ex p. Lee* (3) ([1993] 3 All E.R. at 508–509): (a) extradition is the creature of statute; (b) it requires the Stipendiary Magistrate to examine the evidence put before him; (c) this in all but the rarest cases would be the evidence on the papers put before him; (d) extradition procedure is founded on reciprocity, comity and respect for differences in other jurisdictions; it is unlike concepts appropriate to local criminal procedure; and (e) compliance with the Order is the only criterion; fairness is not a criterion.

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Wai-Kit Lee applied for a writ of habeas corpus and judicial review when the Metropolitan Stipendiary Magistrate committed him to await the decision of the Secretary of State. He was committed in respect of three charges of kidnapping, false imprisonment and blackmail said to have been committed by him in Hong Kong. The kidnap victim would be presumed to be dead by April 1997 since he had not been seen since his abduction in 1990. That was the law in Hong Kong. If Wai-Kit Lee were tried under the Chinese jurisdiction and convicted of murder he would be sentenced to death. Nevertheless, Watkins, L.J. and Ognall, J. said that this deserved the attention of the Secretary of State but the Metropolitan Stipendiary Magistrate was correct to treat it as irrelevant to his decision to commit or not to commit for extradition.

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In this case the Court of Appeal for Gibraltar ordered that the committal proceedings should proceed with all dispatch. Given the hierarchy of the courts in and for Gibraltar it would be impertinent for this court to endorse or repeat that direction. So without further ado, I reject Mr. Newall's application for judicial review because in law it is hopeless.

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The application for leave to apply for judicial review is refused.

*Application dismissed.*