

[2003–04 Gib LR 434]**SONEJI v. GOVERNMENT OF THE UNITED KINGDOM**

COURT OF APPEAL (Glidewell, P., Stuart-Smith and Otton, JJ.A.):
September 14th, 2004

Extradition and Fugitive Offenders—request for extradition—Governor’s authority to proceed—Governor may issue second authority to proceed under Fugitive Offenders Ordinance 2002 even if first (under Fugitive Offenders Act 1967) still valid and lawful

Constitutional Law—Gibraltar House of Assembly—limitations on legislative powers—nothing to prevent enactment of local legislation providing parallel procedures to those under imperial Order in Council

The UK Government sought the extradition of the appellant from Gibraltar to the United Kingdom in respect of charges related to laundering the proceeds of drug trafficking.

In 2000, the Governor issued an authority to proceed with the extradition of the appellant pursuant to s.5 of the Fugitive Offenders Act 1967 (as extended to Gibraltar by the Fugitive Offenders (Gibraltar) Order 1967), and the Stipendiary Magistrate issued a warrant for the appellant’s arrest pursuant to s.6(1)(a) of the Act. During subsequent delays in the proceedings, the Extradition (Overseas Territories) Order 2002 was passed, revoking the 1967 Order, and having the overall effect that all extradition arrangements between Gibraltar and the United Kingdom were removed. However, by virtue of s.3(2) of the 2002 Order, the revocation of the 1967 Order would “not have any effect in relation to any case in which a warrant of arrest . . . [had] been issued before 16th August 2002,” as was the situation in the present case; the revocation of the 1967 Order therefore did not affect the proceedings. In December 2002, the Fugitive Offenders Ordinance 2002 was passed by the Gibraltar legislature in identical terms to the 1967 Act, and s.19 provided that it applied “to offences committed before as well as after its coming into force.”

Following this, the Governor issued a new authority to proceed in identical terms to the previous authority to proceed, except that it was based on the 2002 Ordinance rather than the 1967 Order/Act. The Stipendiary Magistrate discharged the appellant on the original warrant and he was re-arrested on the back of the authority issued under the 2002 Ordinance. The appellant claimed that the issue of the second authority to proceed was unlawful but the Supreme Court (Schofield, C.J.) upheld it.

On appeal, the appellant submitted, *inter alia*, that (a) the original extradition proceedings remained valid and it was therefore unlawful to issue a second authority to proceed, on the principle that the courts should strive to avoid pronouncing in favour of duplication in the law; (b) the intention of the legislature, in enacting s.19 of the 2002 Ordinance, had been to cover the situation where an offence had been committed before the Ordinance came into force, but no authority to proceed had yet been issued; and (c) s.19 was not therefore applicable to the present case.

The UK Government submitted in reply that, even though s.3(2) of Extradition (Overseas Territories) Order 2002 had the effect that the original extradition proceedings remained valid and lawful, the Governor was empowered, if he chose to do so, to issue a second authority to proceed, and this was evidenced by the inclusion of s.19 in the 2002 Ordinance.

Held, dismissing the appeal:

The authority to proceed issued under the Fugitive Offenders Ordinance 2002 was valid and lawful because the Governor was empowered to issue a second authority to proceed even though the first authority was still valid. It was the intention of the legislature that the 2002 Ordinance should apply to every case where an appropriate request of extradition was made, whether the request was made before or after the commencement of the Ordinance, as evidenced by the inclusion of s.19, and there was no authority to suggest that it was not possible for the Gibraltar legislature to enact legislation which provided parallel procedures to an Order in Council (paras. 19–20).

Cases cited:

- (1) *Eng Sui-hang, In re*, [1991] 2 H.K.L.R. 502, followed.
- (2) *Farinha, Re*, [1992] Imm. A.R. 174; [1992] C.O.D. 202, distinguished.
- (3) *R. (Guisto) v. Governor of Brixton Prison*, [2004] 1 A.C. 101; (2003), 100(23) L.S.G. 36; *sub nom. Guisto, Re*, [2003] 2 All E.R. 647, distinguished.
- (4) *Rees, In re*, [1986] A.C. 937; (1986), 130 Sol. Jo. 408; *sub nom. Rees v. Home Secy.*, [1986] 2 All E.R. 321; (1986), 83 Cr. App. R. 128, followed.

Legislation construed:

Fugitive Offenders Ordinance 2002 (Ord. No. 2002–15), s.19: The relevant terms of this section are set out at para. 4.

Extradition (Overseas Territories) Order 2002 (S.I. 2002/1823), s.3(2): The relevant terms of this sub-section are set out at para. 2.

C. Gomez for the appellant;
R.R. Rhoda, Q.C., Attorney-General, *Ms. K. Khubchand*, Crown Counsel,
and *E. Phillips* for the Government of the United Kingdom.

1 **GLIDEWELL, P.:** In 2002, the statutory provisions which had until then governed the extradition from Gibraltar of a person to the United Kingdom, or to another Commonwealth country, were repealed, and were subsequently replaced by new Gibraltar legislation. The question which arises in this appeal is whether, when proceedings were already in train in Gibraltar for the extradition to the United Kingdom of a person accused of committing offences there before 2002, it was lawful for the Governor to issue a new authority to proceed, under the later legislation, and for the proceedings thereafter to continue by virtue of that new authority.

2 The facts and the relevant legislation are accurately and succinctly summarized in the judgment of Schofield, C.J. given on June 16th, 2004, and I cannot do better than to adopt his summary and incorporate it into this judgment:

“On March 14th, 2000, a request was received from H.M. Customs and Excise in the United Kingdom for the extradition of Raju Kumar Soneji (‘the applicant’) on 18 separate charges. For the purposes of this application, I need not recite or even consider the charges and it is sufficient to record that the applicant is alleged to have been involved in laundering the proceeds of drug trafficking. The request was issued under the Fugitive Offenders Act 1967 (‘the 1967 Act’), as extended to Gibraltar by the Fugitive Offenders (Gibraltar) Order 1967 (‘the 1967 Order’). On March 31st, 2000, the Governor issued an authority to proceed pursuant to s.5 of the 1967 Act. On June 1st, 2000, the Stipendiary Magistrate issued a warrant for the arrest of the applicant pursuant to s.6(1)(a) of the 1967 Act.

The applicant was arrested on the warrant and eventually the Magistrate fixed the hearing for June 27th, 2003. Clearly there were delays and adjournments from the date the warrant was executed to the date fixed for hearing, but these are not relevant to this application. However, during these delays an event occurred which changed the course of the proceedings, and which has led to the arguments in this application.

On August 16th, 2002, the Extradition (Overseas Territories) Order 2002 (‘the 2002 Order’) was passed. By Schedule 5 of the 2002 Order, the 1967 Order was revoked. The 2002 Order extended parts of the English Extradition Act 1989 to certain overseas territories, but Gibraltar was excluded from the list. The effect of the 2002 Order was to remove all extradition arrangements between Gibraltar and the United Kingdom. However, by s.3(2) of the 2002 Order, the revocation of the 1967 Order—

‘ . . . shall not have effect in relation to any case in which a warrant of arrest, whether issued on receipt of an authority to

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proceed or a provisional warrant, has been issued before 16th August 2002.’

In this case, the warrant of arrest, issued on receipt of an authority to proceed, was issued on June 1st, 2000, and so the revocation of the 1967 Order did not affect the proceedings against the applicant.

On December 16th, 2002, the Governor assented to the Fugitive Offenders Ordinance (‘the 2002 Ordinance’), passed by the Gibraltar legislature. The 2002 Ordinance is in identical terms to the 1967 Act.

On May 14th, 2003, the Governor issued a new authority to proceed against the applicant. There had been no new request from the Government of the United Kingdom and the new authority to proceed was in identical terms to the authority to proceed issued on March 31st, 2000, save that it was issued under the 2002 Ordinance rather than the 1967 Order and Act. When the matter came for hearing before the Stipendiary Magistrate on June 27th, 2003, the Attorney-General applied to discontinue proceedings under the Order and Act of 1967 and produced the authority to proceed, issued by the Governor under the 2002 Ordinance. The Stipendiary Magistrate discharged the applicant on the original warrant and the applicant was re-arrested on the back of the authority issued under the 2002 Ordinance. Committal proceedings were conducted and the applicant was, on July 15th, 2003, committed on 9 of the 18 charges and discharged on the remaining 9 charges.”

3 As a preliminary issue in *habeas corpus* proceedings, Mr. Gomez, for the appellant, Mr. Soneji, raised the argument that the issue of the Governor’s authority of May 14th, 2003 was unlawful and a nullity. In his judgment, the Chief Justice ruled against him, and the appellant now appeals against that ruling.

4 Before referring to the arguments advanced by counsel to us, it is necessary to refer to one further provision of the legislation. Section 19 of the 2002 Ordinance provides: “This Ordinance applies to offences committed before as well as after its coming into force.” In this case, a warrant for the arrest of the appellant had been issued on June 1st, 2000. The Chief Justice held, and the Attorney-General, for the Government of the United Kingdom, accepts, that the proviso in s.3(2) of the Extradition (Overseas Territories) Order 2002 had the effect that the extradition proceedings under the 1967 Order remained valid and lawful. Nevertheless, the Attorney-General argues that, when the 2002 Ordinance came into force, the Governor was empowered, if he chose to do so, to issue a second authority to proceed.

5 This must follow, the Attorney-General submits and the Chief Justice

has concluded, from s.19 of the 2002 Ordinance, which entitles the Governor to issue an authority to proceed in relation to offences alleged to have been committed before the Ordinance came into force.

6 Mr. Gomez submits that the purpose and intention of s.19 of the Ordinance was to cover a situation in which it is alleged that an offence was committed before December 16th, 2002, when the Ordinance came into force, but no authority to proceed had yet been issued. I understand him to accept that the section would enable extradition proceedings to be commenced not only in respect of an offence committed during the period between August 16th and December 16th, 2002, when there was no relevant legislation in force in Gibraltar, but also in respect of an offence committed before August 16th, 2002, provided that no warrant of arrest had been issued by that date. His submission is, however, that where, as in this case, an authority to proceed, and indeed an arrest warrant, have been issued before August 16th, 2002, the legislature cannot have intended s.19 of the Ordinance to apply, and we should so construe it.

7 Mr. Gomez cannot cite any direct authority in support of this submission but bases it on the following principles, set out in Bennion, *Statutory Interpretation*, 4th ed., s.316, at 858–861 (2002):

(i) Parliament does nothing in vain.

(ii) The court is always averse to requiring litigants to embark on futile or unnecessary legal proceedings.

(iii) The court strives to avoid pronouncing in favour of duplication in the law.

8 Mr. Gomez also relies on the undoubted principle that legislation must be interpreted strictly where the freedom of the individual is in issue, and that the courts must be vigilant to ensure that extradition procedures are strictly observed: *Re Farinha* (2) ([1992] Imm. A.R. at 178, *per* Mann, L.J.) quoted with approval in *R. (Guisto) v. Governor of Brixton Prison* (3) ([2004] 1 A.C. 101, at para. 41). However, we are not here concerned with whether the correct procedure has been followed. The issue is whether the 2002 Ordinance applies: if it does, it is not suggested that the correct procedure under that Ordinance has not been followed.

9 In my view, it is the third general principle relied on by Mr. Gomez, *i.e.* that the court should strive to avoid pronouncing in favour of duplication, which is most relevant in the present case. On this, we have been referred to some authorities, of which I need only refer to two.

10 The first is the decision of the House of Lords in *In re Rees* (4). In that case, the appellant was alleged to have taken part in the kidnapping

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and detention of a German national in Bolivia. The German Government made a request for his extradition from the United Kingdom to Germany to be tried for the kidnapping offence. The Secretary of State for the Home Department made an order under s.7 of the Extradition Act 1870, requiring a magistrate to proceed with an extradition hearing, the appellant having already been remanded in custody. The hearing commenced on July 6th, 1984, on the evidence which was then available. On that day, further statements of evidence were received at court from Bolivia. There was argument about the validity of the earlier evidence, which the magistrate held might properly be received in evidence. As the statements received that day had not been translated, the magistrate then adjourned the hearing to July 26th, 1984, to enable translation to be made.

11 On July 25th, 1984, the Secretary of State issued a further order to the magistrate to proceed. On July 26th, 1984, at the request of counsel for the German Government, the part-heard proceedings were terminated, and the appellant was discharged but immediately re-arrested on a second warrant, issued by the magistrate in compliance with the second order of the Secretary of State.

12 The appellant sought judicial review of the second proceedings before the magistrate, on the ground that they were oppressive, vexatious and an abuse of process. The Divisional Court dismissed the application. On appeal to the House of Lord, three issues were argued, of which the third was ([1986] A.C. at 960):

“I turn now to matters raised by the appellant questioning the lawfulness of the Secretary of State’s order dated 25 July 1984 and the certified question (3) which is

‘whether or to what extent the Secretary of State can lawfully issue an order under section 7 of the [Act of 1870] during the currency of an existing order and without any further requisition by the requesting state.’”

Section 7 of the Act of 1870 was to the same effect as s.6 of the Ordinance of 2002, under which the Governor issued his authority in the present case on May 14th, 2003.

13 On this issue, Lord Mackay of Clashfern, with whose speech all the other members of the House of Lords agreed, said (*ibid.*, at 961):

“The certified question asks whether the Secretary of State can lawfully issue an order during the currency of an existing order. Strictly speaking an order having been made the magistrate is informed of it and required to act upon it and the concept of ‘the currency’ of an order is not perhaps particularly appropriate. In

argument the appellant submitted that it was not lawful for the Secretary of State to issue a further order while the appellant was in custody during proceedings consequent upon an earlier order. There is nothing in the section expressly supporting this submission, and counsel was not able to point to any provisions in the Act of 1870 or other basis from which such a restriction is to be inferred. It is plain that an order may be made while a person is already in custody and accordingly I can see no reason to accept this submission from the appellant. The appellant further submitted, although with hesitation, that a further requisition is required before the second order can be made, but again, there is nothing in the section which expressly supports this and nothing, in my opinion, from which such a restriction is to be inferred. Once a requisition is made the Secretary of State is entitled to make an order or orders following upon and based on it.”

14 The second authority, which is not binding upon this court but is highly persuasive, is the decision of the Court of Appeal of Hong Kong in *In re Eng Sui-hang* (1). That applicant had been arrested and detained, pending committal proceedings for his extradition to the United States of America, to answer charges of drug offences. He challenged his arrest and detention by applying for a writ of *habeas corpus*.

15 The extradition proceedings were expressed to be under the Extradition Act 1870. However, at the date when the Governor issued his order to proceed, that Act had been repealed and replaced by the Extradition Act 1989. The applicant argued that this error rendered the extradition proceedings invalid and a nullity.

16 Before the hearing of the applicant’s *habeas corpus* challenge commenced, on May 25th, 1990, the Governor issued a fresh order to proceed. On June 22nd, 1990, Jones, J. ruled in favour of the applicant on the first set of committal proceedings and ordered his release, but he was promptly re-arrested under a warrant issued in compliance with the Governor’s second order to proceed.

17 The applicant argued that the second order to proceed was a nullity, since at the time it was made the Governor was still arguing that the first set of committal proceedings were valid. The Court of Appeal rejected this argument, relying on the authority of *Rees* (4).

18 The present case differs from *Eng Sui-hang* (1) only in that here the extradition proceedings under the 1967 Act were valid and could properly have been pursued to a conclusion. But this is not a difference which affects the principle enunciated in *Rees*.

19 At the conclusion of his judgment in the present case, the Chief Justice said:

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“In my judgment, it was the intention of the Gibraltar legislature that the 2002 Ordinance should apply to every case where an appropriate request is made, whether the request was made before or has been made after the commencement date of the Ordinance.

I have been referred to no authority which suggests that it is not possible for the Gibraltar legislature to enact legislation which overlaps, and provides contemporaneous procedures to, an Order in Council.”

20 For my part, I entirely agree with that and for those reasons I would dismiss this appeal. I add, however, that, for reasons which have not concerned us and about which we have not been informed, there was very considerable delay in this case in the earlier part of proceedings before 2002, and, following this judgment, I earnestly hope that there will be as little delay as possible in continuing with the proceedings.

21 **STUART-SMITH** and **OTTON, J.J.A** concurred.

Appeal dismissed.
