HCAL000118B/1999

HCAL118/99

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO.118 OF 1999

IN THE MATTER OF Applications for Leave to Apply for Judicial Review under Order 53, rule 3, Rules of High Court

AND

IN THE MATTER of a decision of the Chief Executive of the HKSAR

AND

IN THE MATTER OF ROBERT HENRY COSBY (Applicant)

BETWEEN

ROBERT HENRY COSBY	Applicant
AND	
THE CHIEF EXECUTIVE OF THE HKSAR	Respondent

Coram : Stock J in Court

Dates of hearing : 3 and 4 November 1999

Date of delivery of judgment : 12 November 1999

J U D G M E N T

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1. The applicant is a national of the United States of America. A request has been made for his extradition to the USA. The Chief Executive has issued to the magistrate an authority to proceed, and committal proceedings before the magistrate are scheduled for later this month. The applicant issued proceedings seeking leave to apply for judicial review of the decision to issue the authority to proceed, for an order of *certiorari* to quash that decision, and *mandamus* requiring the Chief Executive to order the applicant's release. There were also applications for leave to apply for a number of declarations.

2. On 13 October 1999, at an *inter partes* hearing, I granted leave to the applicant to apply for judicial review for orders of *certiorari* and *mandamus* but not for declarations. I had raised the question whether judicial review rather than *habeas corpus* was the appropriate method of seeking relief in this case, but being pressed by all parties that it was, I did not pursue the point. I have given permission for the United States Government to make representations in this case, as a party with a sufficient interest.

Background

3. On 2 December 1998, a Grand Jury in the District of Nevada handed down an indictment. It contains three counts. The first count alleges as follows :

COUNT ONE

TITLE 18, UNITED STATES CODE, SECTION 1956(a)(1)(B)(i)-

Money Laundering

On or about the 6th day of December, 1993, in the District of Nevada, ROBERT H. COSBY, defendant herein, did knowingly conduct and attempt to conduct a financial transaction affecting interstate commerce, to wit, a wire transfer of funds in the amount of $400,000.00, from the Bank of America, Reno, Nevada, to Lippobank, San Francisco, California, which involved the proceeds of a specified unlawful activity, that is, Fraud in the Sale of Securities, in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5, and Wire Fraud, in violation of Title 18, United States Code, Section 1343, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction, that is, funds in the amount of $400,000.00, represented the proceeds of some form of unlawful activity;

All in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).

4. The second count was in the same terms save that the unlawful transfer of funds is said to have taken place on or about 24 November 1994 and was in the sum of $150,000.

5. The third count is in a form unfamiliar to this jurisdiction, in that it states the applicant's liability, upon conviction, of the money laundering offences, to forfeit property involved in the offences up to the sum of $550,000.

6. Following the filing of this indictment, a warrant was issued in Nevada for the applicant's arrest.

7. The applicant was not then in the USA. He was detained in Canada on 16 January 1999 by immigration authorities, and he was carrying a large amount of cash. He was denied entry, and was given the opportunity to return to the USA, or to Hong Kong from whence he had just travelled by air. He chose to go to Hong Kong.

8. I do not know where the applicant was between that date and July 1999. At any rate, he arrived in Hong Kong on 7 July 1999, and on 15 July, a provisional warrant was issued for his arrest and he was arrested at Hong Kong Airport on 16 July. A request was then made by the US authorities for his surrender.

9. In making its request for the surrender of the applicant - and we do not have the terms of that request - the authorities of the USA sent to the Chief Executive a number of documents. They were the USA indictment, to which I have referred; the warrant issued by the District Court in Nevada for the arrest of the applicant; as well as a number of affidavits. This included an affidavit from an assistant US Attorney employed by the US Department of Justice, Mr Sullivan, as well as an affidavit from one Ronald Stoecklein who confesses to participation with the applicant in certain alleged fraudulent conduct. Mr Sullivan provides a summary of the facts of the case. Together with the evidence of the accomplice, the following allegations emerge.

The allegations

10. The applicant was, between September 1989 and March 1994, president and chairman of the board of directors of a public company in the USA called SoftPoint Inc. SoftPoint marketed a computerised cash register. Its headquarters were in Nevada. The fraud which he is said to have perpetrated was first to create fictitious sales of SoftPoint software to six foreign companies. The companies were in fact companies under his control and very little software was ever distributed to them. The fictitious sales were recorded as accounts receivable and constituted a very substantial proportion of the company's sales. It is said that the applicant caused SoftPoint to issue shares to four of the companies. The companies then, at the applicant's behest, sold most of their shares to an unsuspecting public; unsuspecting in the sense that the public did not know that the sales of software were bogus, or that the foreign companies were controlled by the applicant, or that the proceeds of the sales of the shares were applied against the fictitious accounts receivable. The bogus sales boosted sale of SoftPoint's stock. As in the case of other public companies, SoftPoint was required to file quarterly and annual reports with the United States Securities and Exchange Commission ("the SEC"), reports which are relied upon by the investing public. The fictitious sales were included in these reports, and no mention was made of the fact that these were not arms length transactions. A bank account was opened with Bank of America, Reno, Nevada. That account was established by the applicant without the approval of the board of directors, and was called "SoftPoint Overseas Operations account". Into that account was remitted a significant part of the proceeds of sale of the shares; and it was from that account that the two transfers were made in December 1993 and February 1994 to an account in San Francisco controlled by the applicant, and which two transfers are the subject of the first two counts of the US indictment.

11. Ronald Stoecklein states that he is co-operating with US law enforcement officials in the "stock fraud/money laundering investigation of Robert H. Cosby" and that he, Stoecklein, has "agreed to plea guilty to felony income tax violation which relate to my involvement in the above-mentioned stock fraud/money laundering scheme". He attests to his co-operation with the applicant in the compilation of false reports to the SEC. As a consultant to SoftPoint from November 1991 through March 1994, he was also responsible for dealing with shareholders and for writing press releases and the preparation of these SEC reports. Misleading annual reports were filed for the years ending 31 August 1992, 1993 and 1994. It was Stoecklein who helped the applicant sell the shares that had been issued to the foreign companies and who, through Stocklein's brother, Donald, as a conduit, arranged for the proceeds of sale to find their way to the Overseas Operations account. The applicant told Stocklein, according to this evidence, that the funds in the account were to be used "to assist certain individuals regarding the SEC investigation." None of this was reported to the SEC, or to the investing public. Funds from the account were also transferred into bank accounts in Hong Kong. Stocklein speaks also of a transaction in late 1993 with someone named Lane to whom were issued 550,000 SoftPoint shares purportedly as compensation for services, whereas in fact the shares were sold, and the proceeds went back to the SoftPoint Overseas Operations account, which the applicant then fed out of the USA to an account or accounts under his control. Some of these shares were sold by Lane in early 1994 and, on the instructions of the applicant, Stoecklein caused Lane to remit the proceeds of sale to himself, to the applicant and to SoftPoint.

The Authority to Proceed

12. On 10 September 1999, the Chief Executive issued an authority to proceed. It reads as follows :

" Authority to Proceed

> A Request for Surrender having been received from the Government of the United States of America for the surrender of Robert Henry COSBY, who is wanted in the said place for prosecution in respect of the offence of conspiracy to defraud.
>
> I hereby order that the said person be dealt with under Part II of the Fugitive Offenders Ordinance, Cap.503, Laws of Hong Kong.

Dated this 10th day of September 1999."

Grounds of Complaint

13. There are a number of facts upon which are founded the applicant's case for judicial review :

(1) The first two offences with which the applicant is charged in the US indictment have been referred to by counsel, and indeed in the evidence filed by the US authorities in support of the requisition, as money laundering. Section 25 of the *Organised and Serious Crimes Ordinance* makes it an offence in Hong Kong to deal with property known or believed to represent the proceeds of crime. However, at the time the applicant is said to have committed the US offences of money laundering, that *Ordinance* was not yet in effect in Hong Kong.

(2) It is common ground that under US law "no person shall be prosecuted, tried or punished for any offence ... unless the indictment is found or the information is instituted within five years next after such offence shall have been committed."

Title 18, United States Code, section 328(2).

14. I have had some difficulty in following the grounds of the application for leave as drafted. They were not drafted by Mr Bell, and I am content to distill the grounds from the thrust of Mr Bell's skeleton argument and oral submissions. Mr Bell puts the matter this way :

(1) That the Chief Executive has issued an authority to proceed against the applicant for the offence of conspiracy to defraud.

(2) That the applicant cannot however now be tried in the USA for conspiracy to defraud because the last of the offences alleged against the applicant took place in February 1994 and he cannot now be tried for a conspiracy to defraud, such conspiracy not being the offence alleged in the Nevada indictment filed in November 1998.

(3) That even if, or even granted that, under the *Fugitive Offenders Ordinance, Cap.503,* the requested jurisdiction, namely Hong Kong, examines conduct rather than the description of the foreign offence to decide for what offence the request is made, the conduct for which the applicant is wanted is the wiring of funds from Nevada to California. That is the *actus reus;* all else is background and it is to the actus reus that one looks to find the conduct for which a fugitive is wanted. In this case the *actus reus* is the wiring of funds - beyond that it is necessary only to show that he, the applicant, knew that the funds represented the proceeds of illegal activity, and it is not necessary to prove that he was himself party to that activity. Therefore, his alleged involvement in the alleged conspiracy which the laundering was intended to hide is surplus to the request for surrender.

(4) That money laundering is not a relevant offence in this case, as relevant offence is defined by the *Fugitive Offenders Ordinance* since that is the conduct for which the request has been made, and such conduct was not at the time of its alleged commission an offence in Hong Kong.

(5) That accordingly the decision to issue an authority to proceed in respect of an offence (conspiracy to defraud) which is at once entirely different from that for which the request for surrender has been made (money laundering), and which is not one for which the applicant may now be prosecuted in the USA, is an unlawful decision.

15. In particular,

(a) section 6 of the *Fugitive Offenders Ordinance* provides that :

> "... a person shall not be dealt with under [Part II of the Ordinance] except pursuant to an authority to proceed issued pursuant to a request for surrender - made by ... a diplomatic or consular representative.";

yet the authority to proceed, it is argued, cannot be said to have been issued pursuant to the request for surrender, for the request was in respect of one offence and the authority to proceed was in respect of another;

(b) the authority to proceed misrepresents the position "by stating that the applicant is wanted for one offence when he is wanted for entirely different ones";

(c) in so far as it might be suggested that the conduct relied upon is the transmission of funds between bank accounts, that conduct does not, in any event, disclose a conspiracy; it discloses substantive conduct by the applicant alone; and

(d) by reason of these various considerations, and by reason of the specialty provision of the Hong Kong-US agreement which, as far as is relevant to the case, precludes prosecution in the USA for an offence other than the offence for which he is surrendered, which in this case it is envisaged will be conspiracy to defraud, the decision to issue an authority to proceed was in the circumstances oppressive, an abuse of process and irrational.

16. The decision is said to be *Wednesbury* unreasonable, not only because it was an irrational decision, but also because the Chief Executive did not, it is argued, take into account the relevant circumstance that the applicant was wanted for money laundering offences, not conspiracy, and that the applicant cannot now be tried in the USA for conspiracy to defraud.

The emphasis on conduct

17. An analysis of the *Fugitive Offenders Ordinance* reveals certain key features with which it is both convenient and important to begin examination of the merits of the applicant's case. They are :

(1) that the statutory regime directs the Chief Executive in the exercise of his duties under this *Ordinance* to the *conduct* of the fugitive in respect of which a surrender is sought by the requesting jurisdiction;

(2) that the same statutory regime directs the magistrate to the *conduct* of the fugitive revealed by the evidence placed before the magistrate at a committal hearing; and

(3) that neither the Chief Executive nor the magistrate are required to, nor should they, engage upon a study of the constituent elements of the foreign offence with which a wanted person has been charged, nor is either required to match the foreign offence with a local offence.

There is an important difference for the purpose of the *Ordinance* between the law of the requesting jurisdiction ("the law of the prescribed place"), and a relevant offence against that law. To this I shall return, but it suffices to say at this stage that in my judgment, the courts and the Chief Executive are concerned with the law of the requesting jurisdiction to the extent only that it is necessary to see whether the offence described by that law carries a term of 12 months' imprisonment or more, and (sometimes) to see whether the law of the requesting place embraces that which is known in extradition law as the specialty requirement.

The starting point

18. The starting point is section 4 of the *Ordinance*. It is the starting point because it alone determines who is liable to surrender and in what circumstances :

"4. Persons liable to be surrendered

A person in Hong Kong who is wanted in a prescribed place for prosecution, or for the imposition or enforcement of a sentence, in respect of a relevant offence against the law of that place may be arrested and surrendered to that place in accordance with the provisions of this Ordinance."

19. The USA is a "prescribed place", as that is defined by section 2 of the *Ordinance*, for it is a place outside Hong Kong to or from which a person may be surrendered pursuant to an arrangement in respect of which the Chief Executive by order has directed that the procedure of the *Ordinance* shall apply. The arrangement is an agreement between the Governments of the USA and Hong Kong recited in a schedule to that order; an agreement to which I shall have occasion to refer in due course.

The relevant offence and the foreign offence

20. We see from section 4 that the only person who may be surrendered is one "who is wanted ... for prosecution ..., in respect of a relevant offence against the law of [the prescribed] place ...." There is a refrain in the applicant's case which takes us with some regularity to the offence in the United States with which the applicant has been charged and to the actus reus disclosed by the particulars in the indictment, for it is said that the actus reus determines the conduct for which a fugitive's return is sought and that the conduct for which the magistrate's proceedings are now in train, as a result of the authority to proceed issued by the Chief Executive, is quite different conduct. This, in my judgment, is to import the foreign offence in a way that is not permissible. It is an argument which contravenes the provisions of the *Ordinance*, and the dictate of case law.

21. Section 2(2) of the *Ordinance* tells us what is meant by "relevant offence against the law of that place" :

> "(2) For the purposes of this Ordinance, an offence by a person against the law of a prescribed place is a relevant offence against that law if-
>
> (a) the offence is punishable under that law with imprisonment for more than 12 months, or any greater punishment; and
>
> (b) the acts or omissions constituting the conduct in respect of which the person's surrender to that place is sought amount to conduct which, if the conduct had occurred in Hong Kong, would constitute an offence
>
> (i) coming within any of the descriptions specified in Schedule 1; and
>
> (ii) punishable in Hong Kong with imprisonment for more than 12 months, or any greater punishment."

22. Now, that sub-section establishes that there is a difference between an offence against the law of a prescribed place, and a relevant offence against that law. An offence against the law of the prescribed place means, in the present case, an offence against the law of the USA. But a relevant offence against that law is much wider, and it imports the law of the USA to a very limited extent, namely, to the extent only that it must be shown that the offence charged in the prescribed place carries with it liability to imprisonment for at least 12 months. Subject only to the specialty provision in section 5(2) which I shall in due course address, and to the limitation points which Mr Bell has raised, that is the only relevance of US law in this case. There is no requirement in the *Ordinance* to examine the particulars in the indictment, even if such an indictment is forwarded (and note that there is no requirement in the US-Hong Kong agreement for the US authorities to forward, or for the Chief Executive, or for the courts in Hong Kong to examine, the indictment).

23. The second significant feature, for present purposes, of section 2(2) are the words "... if ... the acts constituting the conduct ... amount to conduct which ... would constitute an offence ... punishable in Hong Kong." The words are significant because Mr Bell's insistence on examination of the conduct constituting the *actus reus* of the foreign offence presupposes a different definition of relevant offence; one which, instead, spoke of "acts constituting the offence". I use the phrase "acts constituting the offence" not merely to highlight that for which the legislature might have provided had it intended the exercise which the applicant's case postulates, but because it is the very phrase used in the definition of relevant offence in section 3 of the *Fugitive Offenders Act 1967.* There, an offence was a relevant offence only, if :

> "the act or omission constituting the offence ... would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom ... ."

The difference is self-evident, and in my judgment deliberate. Whereas the *1967 Act* did demand an examination of the actus reus stipulated by the statutory definition of the foreign offence, or an isolation of core conduct by reference to the foreign indictment, perhaps, the Hong Kong Ordinance eschews that approach.

24. So, too, in this case, does the arrangement to which the *Ordinance*, by reason of the order made under section 3, applies. Article 2 of the US-Hong Kong agreement stipulates that surrender shall be granted for :

> "an offence coming within any of the following descriptions of offences in so far as it is according to the law of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty:
>
> ...
>
> (viii) offences relating to possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement;
>
> ...
>
> (x) Obtaining property or pecuniary advantage by deception ... false accounting ... any other offence in respect of property involving fraud;
>
> ...
>
> (xxxv) ...conspiring to commit any offence for which surrender may be granted under this Agreement;
>
> ...
>
> (3) For the purpose of this Article, in determining whether an offence is an offence against the law of the requested Party, the conduct of the person shall be examined by reference to the totality of the acts or omissions alleged against the person without reference to the elements of the offence prescribed by the law of the requesting Party,"

And it is to be noted that Article 8 of the Agreement which itemizes the documents which are required to accompany a request does not mention the indictment. What must be provided is a description of the fugitive; information describing the facts of the offence; and "a statement of the provisions of the law describing the offence for which surrender is requested and a statement of the punishment which can be imposed therefor and a specification of any time limit which is imposed on the institution of proceedings."

25. The *1967 Act* embodied a further indication of its emphasis on the foreign offence which contrasts with the emphasis of the *Ordinance*, and the contrast is to be seen in the respective specialty sections, for whereas section 4(3) of the *1967 Act* referred to a person being dealt with upon return for the offence in respect of which his return under the Act was *requested*, the *Ordinance* in section 5(2), refers to the fugitive being dealt with in the prescribed place for "the offence in respect of which a surrender is *ordered*." The differences are, as I say, deliberate. The wording of the *1967 Act* resulted in a narrow construction (see **Government of Canada v. Aronson** [1990] 1 AC 579) which required an analysis of the ingredients of the Commonwealth offence, and made it inappropriate to review the conduct disclosed by the information and evidence forwarded by the requesting jurisdiction. The *Fugitive Offenders Act 1967* was an enactment which provided for the return of offenders to Commonwealth countries, and the limitations in that *Act*, to which I have referred, may have been acceptable in the context of an arrangement between regimes with similar legal systems. The *Fugitive Offenders Ordinance* on the other hand has to cater for co-operation with territories which embrace disparate legal concepts, and crimes framed quite differently from ours. Hong Kong's extradition legislation, as well as its extradition agreements, therefore strive to minimize the circumstances in which either the executive or the courts are required to examine the law of the requesting jurisdiction, and to maximize the emphasis upon conduct which in Hong Kong would constitute a scheduled crime.

26. That it is the function of the magistrate in committal proceedings to restrict himself to the question of whether the *evidence* produced to him would, according to the law of the requested jurisdiction, amount to a (scheduled) offence in that jurisdiction, and to abjure considerations of the substantive law of the requesting state, was decided by the House of Lords in **In re Nielsen** [1984] 1 AC 606; a case which turned on an interpretation of provisions of the *Extradition Act 1870*, the definition in which of "extradition crime" was not as clear in its emphasis upon conduct as is the definition of "relevant offence" in the *Fugitive Offenders Ordinance.* Counsel for the fugitive pressed for a narrow offence-based interpretation as the crucial safeguard "against the possibility of being extradited ... for a crime of a different nature to that of which the fugitive is accused." The House of Lords noted that the Danish offence with which the applicant in that case had been charged involved a narrower concept than was involved in any specified English offence, but nonetheless held that there was no need for the magistrate to confine himself to the description of the Danish offence. Lord Diplock said that where section 10 of the *1870 Act* spoke of the powers of the magistrate to commit to prison if such evidence was produced as would justify trial "if the crime of which he is accused had been committed in England," the "crime of which he is accused" there meant the crime specified in the Secretary of State's order to proceed; and that save to the extent that it was necessary by virtue of the terms of a treaty to ensure that the foreign offence constituted a crime of a particular kind (for example, one that attracts a specified minimum penalty), the magistrate was "not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state." (see p.624). The decision as to committal was to be based on evidence adduced at the committal hearing, and the decision whether that evidence justified committal was one to which English law alone was relevant. Articles in the *Danish Penal Code* were irrelevant. This decision, that the magistrate's task was to examine conduct, and not the constituent elements of the foreign offence, was followed in **Hong Kong in Levy v. the Attorney General** [1987] HKLR 777, in which the Court of Appeal added that it was

also conduct, and not the foreign offence, "which the Governor considers when he decides whether to make an order requiring the magistrate to issue his warrant for the apprehension of the accused person." (*per* Roberts CJ at page 780).

27. There is every reason to conclude that the requirement of the *Fugitive Offenders Ordinance* are the same in this regard as those under the *Extradition Act 1870.* Indeed the requirement is enforced by language more specific, and which allows of no other interpretation. I have earlier set down the terms of section 2(2) with its frequent reference to conduct and to "acts and omissions constituting the conduct in respect of which ... surrender is sought." Turning to other provisions, one notes that there is little that is needed to justify the issue of a provisional warrant of arrest. This case was a provisional arrest case. All that section 7(1)(b) of the *Ordinance* requires in such cases, from information on oath, is that the person in respect of whom the warrant is sought is or is believed to be in or on his way to Hong Kong and that he is wanted in a prescribed place for prosecution "in respect of" a relevant offence.

28. Nor does the section which prescribes the circumstances in which the Chief Executive may issue his authority to proceed require him to examine the foreign indictment or the elements of the offence. Section 6, in so far as is relevant to this case, provides as follows :

> *6. Request for surrender and authority to proceed*
>
> (1) Subject to the provisions of this Ordinance relating to provisional warrants, a person shall not be dealt with under this Part except pursuant to an authority to proceed issued pursuant to a request for surrender-
>
> (a) made by-
>
> (i) a person recognized by the Secretary of State as a diplomatic or consular representative of the prescribed place which made the request; or

(ii) any other person approved by the Secretary of State as a person who may make such a request in respect of that place; and

(b) transmitted through

(i) the diplomatic channel; or

(ii) any other channel approved by the Secretary of State as a channel through which such a request may be transmitted.

(2) On receipt of a request for surrender, the Governor may issue an authority to proceed unless it appears to him that an order for surrender in relation to the person concerned could not lawfully be made under the provisions of this Ordinance, or would not in fact be made.

..."

29. Section 22 of the *Ordinance* requires that an authority to proceed "shall be in the prescribed form", and it is important to appreciate that the prescribed form requires the Chief Executive to specify that the person whose surrender has been requested "is wanted in the said place for prosecution ... in respect of the offence of ...," and to insert at this stage the offence, not by reference to the foreign offence, but by reference to Hong Kong offences specified in the schedule to the *Ordinance* (see Form 1, and also the terms of section 2(2) of the *Ordinance*). This is an illustration of the point which I shall later make, that where the *Ordinance* uses phrases such as "is wanted in the prescribed place in respect of the offence", it means wanted in the prescribed place in respect of conduct which is a Hong Kong offence specified in the schedule. As was said in **In re Nielsen** :

" It is for the Secretary of State to make up his mind what crime those acts would have amounted to according to the English law in force at the time they were committed if they had been committed in England. In the instant case, this meant identifying the offences which those acts would have amounted to under the relevant criminal statute in force in England at the relevant date ..." (per Lord Diplock at p.619)

30. Section 10(6)(b) of the *Ordinance* stipulates thus :

> "10(6) Where-
>
> .....
>
> (b) an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied -
>
> (i) that the offence to which the authority relates is a relevant offence;
>
> (ii) that the supporting documents in relation to the offence -
>
> (A) have been produced; and
>
> (B) are duly authenticated; [and]
>
> (iii) where the person is wanted for prosecution in respect of the offence, that the evidence in relation to the offence would be sufficient to warrant the person's committal for trial according to the law of Hong Kong if the offence had been committed within the jurisdiction of that court or any other court;
>
> .....
>
> the court shall (unless the person's committal is prohibited by any other provision of this Ordinance) by order commit him to custody -
>
> (i) to await the Governor's decision as to his surrender to the prescribed place by which the request for surrender concerned was made; and
>
> (ii) if the Governor decides that he shall be surrendered to that place, to await such surrender."

31. Since the authority to proceed is required to relate to the scheduled Hong Kong offence, the issue posed by section 10(6)(b)(i) does not entail any examination of the foreign offence or indictment; and where section 10(6)(b)(iii) refers to the offence in respect of which the person is wanted for prosecution, that, too, must refer to the offence described in the authority to proceed, and not to the foreign offence.

32. There arises thus far in the scrutiny of these legislative provisions no room for the argument that the Chief Executive in issuing his authority to proceed, or the magistrate in making his determination as to committal to await a decision on the question of surrender, must find and examine the *actus reus* of the foreign offence to determine whether the authority to proceed or the committal order can lawfully be made.

The specialty considerations

33. But I have yet to mention section 5(2) of the *Ordinance* :

> " 5(2) A person shall not be surrendered to a prescribed place, or committed to or kept in custody for the purposes of such surrender, unless provision is made by the law of the place, or by the prescribed arrangements concerned, for securing that he will not, unless he has first had an opportunity to leave that place, be dealt with in that place for or in respect of any offence committed before his surrender to it other than -
>
> (a) the offence in respect of which his surrender is ordered;
>
> (b) any equivalent or lesser relevant offence which is disclosed by the particulars contained in the supporting documents in relation to the offence referred to in paragraph (a); or
>
> (c) subject to subsections (3) and (4), any other offence being a relevant offence in respect of which the Governor may consent to his being dealt with."

This section is mirrored in Article 16 of the USA-Hong Kong agreement :

> "(1) A fugitive offender who has been surrendered shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence for any offence committed prior to his surrender other than:
>
> (a) the offence in respect of which his return is ordered;
>
> (b) any lesser offence, however described, disclosed by the facts in respect of which his return was ordered, provided such an offence is an offence for which he can be returned under this Agreement;
>
> (c) any other offence for which surrender may be granted under this Agreement in respect of which the requested Party consents to his so being proceeded against, sentenced or detained. For the purpose of this sub-paragraph:
>
> (i) the requested Party may require the submission of the documents called for in Article 8; and
>
> (ii) the person surrendered may be detained by the requesting Party for up to ninety days while the request is being processed.
>
> (2) A person surrendered under this Agreement may not be surrendered or transferred beyond the jurisdiction of the requesting Party for the offence for which his surrender was granted, or for an offence committed prior to his original surrender, unless the requested Party consents.
>
> (3) Paragraphs (1) and (2) of this Article shall not prevent a person being proceeded against, sentenced or detained, or surrendered to another jurisdiction, if he has had an opportunity to leave the jurisdiction of the Party to which he has been surrendered and has not done so within thirty days or has voluntarily returned to that jurisdiction having left it. "

34. Section 5(2) is important, and the applicant relies on it in this application because he says that when under section 6(2) the Chief Executive asks himself, as clearly he must, whether it "appears to him that an order could not lawfully be made under the provisions of this Ordinance or would not in fact be made," he is bound in this case to conclude that section 5(2) (and Article 16) prevent surrender, for the applicant is to be prosecuted, it is said, for an offence other than the offence in respect of which surrender is ordered.

35. There are a number of preliminary points to note. First is that there was in this case no need for the Chief Executive to look at the law of the prescribed place to ascertain whether it contained a specialty protection. That is because the protection is contained in the relevant prescribed arrangement (Article 16), and section 5(2) requires the Chief Executive then to go no further. Second, the phrase "the offence in respect of which a surrender is ordered" is again a reference not to the foreign offence, nor to the constituent elements of the foreign offence, but to the relevant offence, that is, the Hong Kong offence. So much is clear from the entire statutory scheme and from the consequences of section 13 of the *Ordinance*. Section 13 empowers the Chief Executive to order surrender of a person committed by a magistrate under section 10(6), and the order of surrender prescribed by Form 7 of the *Fugitive Offenders (Forms) Regulations* requires the Chief Executive to identify the offence by "reciting the relevant wording in the order of committal concerned"; and Form 6 of the same *Regulations* requires the magistrate, if he makes a committal order, to "identify the offences by reference to the Hong Kong offences falling within the description of offences specified in Schedule 1 to the ... *Ordinance*."

36. Mr Bell, for the applicant, would say that there must however be some cognizance of the core conduct for which surrender has been requested, for it cannot be that one has regard at large to any conduct disclosed in the papers accompanying the request, and then institutes proceedings and orders surrender of the wanted person for whatever offences are uncovered in the nooks and crannies of the factual maze which might be presented. That, he says, would enable surrender for an offence of a sort disclosed in passing, as mere background information in papers forwarded with the request; an assault, for example, where the conduct complained of in the foreign indictment was fraud, and that, says Mr Bell, can never have been intended. Furthermore, he says, what must be excluded from the conduct on which the authority to proceed is based and for which surrender is ordered, is conduct prosecution for which will be time-barred in the requesting jurisdiction.

37. There is in my opinion no warrant for an exercise which requires isolation, from the information submitted by the requesting jurisdiction, of core conduct by reference to the foreign indictment or warrant. That is a course fraught with practical difficulties, a course which will lead in many instances to an analysis of the elements of the foreign offence, and is one which does not accord with the scheme or requirements of the *Ordinance*. It presupposes in every, or many, cases a complex exercise, even at the authority to proceed stage, when time is short, an exercise in which evidence - perhaps copious evidence - is sifted for core conduct, for underlying conduct, for extraneous conduct, for background conduct, for *actus reus,* for *mens rea,* for time-barred conduct, for non-time barred conduct, for conduct for which the person can clearly be said to be wanted, for conduct for which it might be said he is wanted, and so on. The scenario is merely to be postulated to illustrate that it can never have been intended.

38. I note in passing that in **R. v. Secretary of State for the Home Department ex p Hill** [1997] 2 AER 638, there was raised in the context of the *Extradition Act 1989* the argument that the Secretary of State in preparing his authority to proceed was limited to conduct alleged in the foreign charges on which the fugitive was accused, but the argument was rejected and it was said in the judgment (see page 656) that the Secretary of State was "entitled to include in the authority to proceed any offences under the laws of [the United Kingdom], which are disclosed by the documents accompanying the request."

39. Where information and evidence is forwarded with a request, the requesting jurisdiction is, in my judgment, entitled to proceed on the basis that it is in relation to the conduct disclosed by the totality of that information that the surrender is requested. There may arise cases where it is obvious, by reference to the request and to the information and evidence accompanying it, that the totality of the information includes reference to isolated conduct which is neither core conduct, nor underlying conduct, but rather wholly extraneous or superfluous conduct which is clearly not conduct "in respect of which" surrender is sought, and therefore that there is no intention that the fugitive will be "dealt with ... in respect of" such conduct. But this is not such a case. It is quite artificial in my judgment to conclude in this case that the conduct which constitutes the 1992 to 1994 conspiracy is not conduct "in respect of which" the applicant's surrender is sought and that therefore he is not going to be "dealt with", if surrendered, in respect of that conduct. That it *is* conduct in respect of which he is to be dealt with is apparent from a number of factors :

> (1) it is conduct referred to and described extensively in the information or evidence thus far supplied by the US authorities;

(2) although I have not the terms of the requisition, and although the matter is not to be determined by reference to the foreign indictment, assuming however that the requisition refers to, or encapsulates the foreign charge, the conduct disclosed by the information and evidence forwarded is the very conduct which underlies the actual offence with which the applicant is charged and for which it is intended to prosecute him; and the conduct which constitutes the conspiracy alleged by the authority to proceed is the "specified unlawful activity" referred to in the charge and which specified activity it is intended to prove against the applicant, and which is the sine qua non of a successful prosecution in this case.

40. That a fugitive may be returned for such underlying conduct even though the underlying conduct does not constitute an offence which will, or can, be charged in the requesting country, is demonstrated by Government of the **USA v. McCaffery** [1984] 1 WLR 867.

41. **McCaffery** was a 1984 case under the *Extradition Act 1870.* The request from the USA was for his extradition for offences of using wire, radio or television to transmit communications for fraudulent purposes in interstate or foreign commerce, and of transporting in interstate or foreign commerce a valuable security knowing it to have been converted or taken by fraud. Neither was an extradition crime, wherefore the order to proceed could not, and did not, refer to them. Instead, it described the offences of which he was accused in the USA as theft and obtaining property by deception and securing the execution of a valuable security by deception; all extradition crimes. They related not to the interstate transmission of funds which was the conduct with which McCaffery had been charged, but with the underlying intra-state acts of McCaffery and his confederates pursuant to which the interstates acts were committed. The Divisional Court had held "that Nielsen's case ... was wrongly decided, that what both the magistrate and the Secretary of State were concerned with was not whether the conduct of the accused (or in the instant case his confederates in the underlying fraud) would have amounted to an extradition crime if that conduct had taken place in England, but was whether the double criminality test was satisfied." Lord Diplock, at page 873 said that :

> "The reasons why both judges were wrong in so holding were dealt with so fully and recently in the decision of this House dismissing the appeal in the Nielsen case that there is no need to repeat them here."

42. The report does not summarise the arguments of counsel, and Mr Bell seeks to distinguish **McCaffery** from the present case on the suggested footing that the transmission of funds must also have constituted the offences of theft and obtaining property by deception; that there is in **McCaffery**, in other words, no such separation of facts as there is in this case. I doubt that that was the distinction. Had that been the case, the reference to the underlying fraud would have been unnecessary. There was no suggestion in the speech of Lord Diplock that the magistrate was required to isolate the core conduct to which the American charge itself was restricted, and then to ask whether that conduct constituted an offence under English law. The conduct of the fugitive's confederates in committing the underlying fraud pursuant to which the charged offences were allegedly committed was underlying conduct which was a part of the case against the fugitive to be led at trial, even though not the charge itself. The essence of the House of Lord's decision was that since the conduct of the respondent's confederates in committing the underlying fraud would have amounted to a crime in England, the committal order had lawfully been made; and that is a decision reached notwithstanding the fact that the core conduct, as I have called it, did not constitute an extradition crime, and notwithstanding the fact that there could be no federal charge restricted to the underlying conduct for such conduct did not constitute a federal offence.

43. Whilst the courts must be alert to attempts to circumvent statutory provisions by artifice, especially where such devices touch upon the liberty of the individual, the court should not, in striving against artifice, be driven artificially in the construction and application of the statutory scheme. This is an ordinance "intended to serve the purpose of bringing to justice those accused of serious crime. ...There is a transnational interest in the achievement of this aim. Extradition treaties and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the text permits it in order to facilitate extradition." (See **In re Ismail** [1999] 1 AC 320, at 327, a case concerned with the *1989 Extradition Act.*)

So, too, a court ".... should not, unless constrained by the language used, interpret any extradition treaty in a way which would 'hinder the working and narrow the operation of the most salutary international arrangements' " (*per* Lord Bridge in**R v. Government of Belgium v. Postlethwaite and Others** [1988] 1 AC 924, 947).

44. Neither the scheme of this *Ordinance*, nor the terms of the arrangement to which the *Ordinance* applies in this case, intend the restrictive approach invited by Mr Bell, and I rather think that such an approach would render operation of the agreement difficult, if not well nigh impossible. I have earlier noted that section 2(2) of the *Ordinance* refers to "acts and omissions constituting *conduct*" rather than to "acts or omissions constituting the *offence*". But more than that, it does not say that a relevant offence is one represented by acts *charged* against the accused for which his surrender is sought. It talks in terms that are deliberately broader than that - of conduct "in respect of which" surrender is sought, where the phrase "in respect of which" is itself one which invites latitude. The same breadth is implicit in section 5(2) where "*dealt with* ... for or *in respect of* any offence ... other than the offence *in respect of which* his surrender is *ordered*;" is different from some such phrase as "*charged* in that place for or *with* the offence for which his surrender was *requested*"; and in section 17 as well which, in restricting proceedings against those surrendered to Hong Kong, refers to offences "disclosed by the particulars furnished to that place on which his surrender *is grounded*."

The limitation point

45. As for the question of the limitation period for prosecution in the requesting jurisdiction, there is nothing in the *Ordinance* which requires the Chief Executive or the magistrate to ask whether the Hong Kong offence or the conduct which constitutes the Hong Kong offence is time barred in the requesting jurisdiction. What the Chief Executive must address is whether it appears to him that an order for surrender could not lawfully be made. By reason of Article 8(2) of the Agreement, the attention of the Chief Executive will be directed to such time limit as may exist for the institution of proceedings for the *actual offence* for which surrender is requested, and section 2(2)(a) of the *Ordinance* obviously contemplates prosecution in the requesting jurisdiction for a specific offence against the law of that jurisdiction. If, therefore, it is apparent that the foreign offence for which prosecution will take place is time barred, that may be evidence upon which the Chief Executive might conclude that the request is bogus or misrepresented and that the fugitive might be prosecuted for conduct quite different from that upon which the extradition proceedings are grounded. But so long as prosecution of the foreign offence is not time barred, and so long as that prosecution is grounded on acts or omissions in respect of which it may realistically be said surrender has been ordered, there is no need to dissect the information and the evidence transmitted by the requesting jurisdiction to see whether this piece of evidence or that piece of evidence might, if encapsulated as a foreign offence, be time barred.

46. This conclusion as to the appropriate approach does not dishonour the protection which the specialty provision confers upon those fugitives who are alleged to be offenders. Behind the specialty protection are a number of considerations - in particular that one jurisdiction should not be expected, and would not wish, to surrender someone within its current protection in respect of conduct which was not considered by its law to be criminal; that it should not be induced to do so by some pretence that the person will, when surrendered, be dealt with in respect of such conduct when in reality he is to be dealt with for a quite differently grounded matter; and that the person whose surrender is requested knows at what acts or omissions his requested surrender is directed so that, on that sure footing, he can contest, if he wishes, the legality of the consequential proceedings both locally and, if unsuccessful locally, then at his subsequent trial in the requesting jurisdiction.

The decision to issue the authority to proceed

47. It is as well to bear in mind the stage at which this judicial review is brought. It is not an attack on a decision that there is a *prima facie* case. It is not an attack on a committal order. It is not an attack upon an order for surrender. It is an attack on the decision to issue the authority to proceed. The success of such an attack must be predicated on a basis which is likely in a particular case to be difficult to bring home, namely, that it ought at this stage to have appeared to the Chief Executive that an order for surrender could in due course not lawfully be made, and as was said in **In re Cuoghi** [1999] 1 All ER 466, 474, *per* Kennedy LJ : "... it is worth noting that it is his perception that matters."

48. A conclusion in any particular case that it ought to appear at the outset that a surrender order could not lawfully, or would not in fact, be made is likely to be a rare conclusion. There is much that can (and does) happen, as a matter of law and in practice, between the issue of an authority to proceed and the time at which an order for surrender is made. In particular, further information and evidence can be presented, and further authorities to proceed may be issued, or the current authority to proceed amended. So, for example, in this case, there are suggestions in the information presented to the Chief Executive that the conduct constituted by, and immediately surrounding, the movement of funds were not simply acts by the applicant alone, but were themselves part of a conspiracy, and if that is so, then the case of the applicant does not get off the ground in this judicial review for it is a case which contends that in respect of the conduct for which the surrender is requested - that is, the movement of funds - there is no evidence of conspiracy.

49. Whether there is sufficient there for a *prima facie* case is not at this stage to the point. The Chief Executive is not required to decide whether or not there is a *prima facie* case. He asks - often when time is pressing - whether there is sufficient to warrant asking the magistrate to see if there is a *prima facie* case. In this case - and nothing I say should be taken as pre-empting the magistrate's task - there is clearly enough to suggest a conspiracy to defraud in respect of that to which I have referred as the underlying conduct; and to show that it is conduct in respect of which surrender is sought; enough from which to say that it is intended that he will be dealt with in respect of that conduct; and to conclude that the offences for which proceedings have been instituted in the USA are not time barred. Following the principles to which I have drawn attention and the scheme of the *Ordinance*, this is sufficient to render lawful the decision to issue the authority to proceed. But, in any event, there is, in my judgment, at this stage, sufficient to warrant the issue of an authority to proceed based upon that which I have referred as core conduct, for there are several suggestions that the money laundering itself was part of a conspiracy between the applicant and Stoecklein, and perhaps also Stoecklein's brother, or between the applicant and others concerned with the SEC investigation.

50. There is a final point. It is Mr Bell's point that whereas section 6 requires that the authority to proceed be issued "pursuant to a request for surrender," this authority to proceed cannot be said to have been so issued because, as the skeleton argument puts it, "the request was in respect of certain offences [on certain dates] whereas the authority to proceed was in respect of [an] entirely different [offence]."

51. The point, with respect, is not a good one. The authority to proceed was not issued in a vacuum, nor in response to some informal request. Section 6, from which Mr Bell seeks to draw comfort, is designed to ensure that authorities to proceed are not issued other than pursuant to formal request made through appropriate channels.

52. Mr Bell goes on to say that a proper construction of section 10(6)(b)(iii) of the *Ordinance* is that the authority to proceed must refer to the offence in respect of which the fugitive is wanted for prosecution. The applicant is not wanted, he says, for conspiracy to defraud, and therefore, he suggests, the authority to proceed is defective. The answer is that the offence to which section 10(6)(b)(iii) refers is the offence to which the authority to proceed relates; and the offence to which the authority to proceed relates is the relevant offence. This authority to proceed does relate to a relevant offence as that is defined, and for reasons which I have, at some length, expounded, one can, in my judgment, safely say that the applicant is wanted for prosecution in respect of a relevant offence, as that is defined.

Conclusion

53. In my judgment, and for the reasons I have given, it is not shown that the decision of the Chief Executive to issue the authority to proceed was unlawful. I perceive no error of law, no abuse, and no irrationality, and there is no basis upon which to conclude that in deciding to issue that authority to proceed, the Chief Executive failed to take into account relevant considerations, or took into account irrelevant considerations. It follows that this application for judicial review fails. The applications to quash that decision, and for an order of *mandamus* are according dismissed.

[Submissions on costs]

54. I have heard counsel as to costs. The application by the Government of the United States is not, in the event, really pressed in the light of the provisions of Article 12 of the US-Hong Kong agreement. Accordingly, there will be no order for costs in favour of the US Government.

55. As far as the respondent's costs are concerned, the respondent had, of course, to be represented and was present by counsel, and entitled to take whatever approach it thought most efficient and convenient. There will be an order that the applicant shall pay to the respondent his costs of and occasioned by this motion, such costs to be taxed if not agreed.

(F. Stock)
Judge of the Court of First Instance,
High Court

Representation:

Mr Adrian Bell, inst'd by Erving Brettell, for the Applicant

Mr Nicholas Cooney, Department of Justice, for Chief Executive

Mr Michael Blanchflower, Department of Justice, for the Government of the USA