HOUSE OF LORDS

Gomes

Vs.

Government of Trinidad and Tobago

(Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry, Lord Brown of Eaton-under-Heywood, Lord Mance and Lord Neuberger of Abbotsbury)

29.04.2009

ORDERED

LORD BROWN OF EATON-UNDER-HEYWOOD.

1. This is the considered opinion of the committee.

2. Each of the two appellants, Benjamin Goodyer, a UK national, and Rick Anthony Gomes, a citizen of Trinidad and Tobago, is wanted by the Government of Trinidad and Tobago (hereafter Trinidad) for trial there on charges of possession of cocaine for the purposes of trafficking (7.5 kg in Goodyer's case, two or three times that amount in Gomes's case). Their alleged offences were committed at different times and in different circumstances. What, however, they have in common is that each was arrested in the UK following an extradition request by Trinidad and each unsuccessfully argued before the District Judge at their respective extradition hearings, first, pursuant to sections 79(1)(c) and 82 of the Extradition Act 2003 (the Act), that it would be unjust or oppressive to extradite him by reason of the passage of time since his alleged offence (five and a quarter years in Goodyer's case, eight and a half years in Gomes's case), and, secondly, pursuant to section 87 of the Act, that his extradition would not be compatible with his Convention rights under article 3 given Trinidad's appalling prison conditions.

3. Each having appealed to the Divisional Court under section 103 of the Act against the respective District Judge's decisions under section 87(3) to send their cases to the Secretary of State for her decision whether to extradite them, it was ordered that their appeals be heard together because they raised similar issues.

4. On 22 August 2007 the Divisional Court (Sedley LJ and Nelson J) allowed their appeals and, pursuant to section 104(1)(b) of the Act, remitted the case to the district Judge to decide again two questions, namely (A) whether it would be unjust or oppressive by reason of the passage of time to return either defendant to Trinidad for trial and, if not, (B) whether, were either defendant to be returned, his prison conditions in the maximum security facility (MSF) in Trinidad would be such as to breach article 3's prohibition against inhuman and degrading treatment. Question (B) referred to the MSF because, on the eve of the Divisional Court hearing, Trinidad had given a diplomatic assurance that the men, if returned, would be held there (both on remand and, if convicted, as prisoners) and not in their original prisons. In the event, the District Judge, having heard very extensive evidence about conditions at the MSF, including from Lord Ramsbottom, a former HM's

Chief Inspector of Prisons, who had visited Trinidad for the purpose, decided that detention there would involve no real risk of an article 3 breach, and we need say no more about that particular question.

5. As to the re-determination of question (A), the Divisional Court thought it relevant not only that both appellants were alleged to have fled Trinidad in breach of their bail conditions but also that Trinidad itself was thereafter guilty of culpable delay in seeking their extradition (at any rate in Goodyer's case where Trinidad admitted to having lost the prosecution case file for perhaps as long as three years). Having cited the opinions of the House in Kakis v Government of the Republic of Cyprus [1978] 1 WLR 779 (to which we shall return), the Divisional Court's judgment included the following:

"It seems to us that, whether the concurrent fault of the requesting state is regarded as keeping the chain of causation intact, albeit attenuated, or is regarded as an exceptional circumstance, it is wrong for the reasons given by Lord Edmund-Davies to leave it out of account. (para 17)

There would also be an asymmetry, if we may respectfully say so, between taking cause of delay into account to the accused person's detriment when it is his fault, but leaving it out of account when it is the requesting state's fault. It seems to us more appropriate to regard the respective faults of the offender and the state as merging at the point where it is no longer reasonable for the requesting state not to have located the offender. From that point it becomes increasingly likely that the sense of security engendered by state inaction will render extradition oppressive. (para 19)

For all these reasons, difficult though it will be for the decision-maker, section 82 in our judgment requires him or her to give as much weight to the effects of the passage of time as he or she judges right given that both sides have been to blame for it." (para 21)

6. Section 82 of the Act provides:

"82. Passage of time

A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—

(a) committed the extradition offence (where he is accused of its commission), or

(b) become lawfully at large (where he is alleged to have been convicted of it)."

Trinidad is a category 2 territory under the Act.

7. The remitted case was heard by District Judge Purdy (who had originally heard Gomes's case but not Goodyer's) on 24 April 2008. Before he did so, however, another constitution of the Divisional Court (Longmore LJ and Mitting J) on 23 November 2007 in *Krzyzowski* v *The Circuit Court in Gliwice, Poland* [2007] EWHC 2754 (Admin), decided that the views expressed by the Divisional Court in the present case were inconsistent with Kakis and wrong and that the district judge in Krzyzowski had been right to hold that once the suspect had been found guilty of deliberate flight he could not rely on the passage of time save in the most exceptional circumstances.

8. District Judge Purdy, despite Sedley LJ's ruling that question A was to be decided "in the light of

this judgment", noted the later decision in *Krzyzowski* and held that Longmore LJ's judgment in that case "correctly states the law founded on long established and frequently applied principles set out in Kakis." Having heard a number of witnesses and considered a good deal of material ("contained in several large files") on the various issues before him, the judge rejected the respective appellants' accounts of having been free to leave Trinidad and instead expressed himself sure to the criminal standard of proof that each appellant was "a classic fugitive". "On one view", he said, "that leads to answering question A without more in the negative". He nevertheless went on to consider, in Goodyer's case, whether Trinidad's admitted loss of the file for several years, and, in Gomes's case, whether the death in 2005 of a prospective defence witness, Monica Buns, gave rise to a bar to extradition under section 82, in each case holding not.

9. By virtue of section 104(7) of the Act, the appellants' appeals were therefore to be taken as having been dismissed by the High Court (i.e. the Divisional Court). It may be doubted whether in fact the judge's conclusion on question A would have been any different had he adopted Sedley LJ's rather than Longmore LJ's approach to the law. Be that as it may, however, the Divisional Court on 22 July 2008, pursuant to section 114(4) of the Act, certified that a point of law of general public importance was involved in the decision, namely:

"Whether the law on the passage of time bar to extradition as set out in sections 14 and 82 of the Extradition Act 2003 is correctly stated in Goodyer and Gomes v Government of Trinidad and Tobago or whether *Krzyzowski v The Circuit Court of Gliwice, Poland* which considers Goodyer and disapproves of its approach to the passage of time bar should be followed."

(Section 14 makes identical provision to sec 82 with regard to category 1 territories.)

Leave to appeal was given by the House on 11 December 2008.

10. Before addressing the certified question it is convenient next to indicate a little more about the facts of the appellants' cases. Goodyer

11. Goodyer, then aged 23, was arrested on 21 November 2002 at an airport in Trinidad en route to Heathrow: the cocaine had been found in a samsonite handbag in his luggage; he denied all knowledge of it. After two months on remand, he was bailed on 31 January 2003 to appear on 28 February 2003 with a condition of thrice weekly reporting. Following his failure to surrender to bail, a domestic arrest warrant was issued on 24 April 2003. It was at some point after this that the prosecution file (containing Goodyer's address in the UK) went missing and it was not until 22 June 2006 (a month or two after it was re-located) that Trinidad requested Goodyer's extradition. He had in the meantime been living at his home address (his mother's house) in Essex (save for serving a sentence of nine months' imprisonment imposed at Isleworth Crown Court on 3 October 2003 for smuggling cocaine to the UK on return from holidaying in Venezuela on a newly issued British passport). On 30 June 2006 a 2003 Act warrant was issued for his arrest and by arrangement he was arrested on 3 October 2006.

12. On 12 February 2007 District Judge Wickham sent his case to the Secretary of State and on 26 March 2007 the Secretary of State ordered his extradition. We have already recounted the subsequent history of these proceedings. On 1 August 2008, following the Divisional Court's certification of a point of law with a view to further appeal, Goodyer was bailed.

13. In asserting that it would be oppressive to extradite him, Goodyer had placed particular reliance

on a new relationship he had formed with a Ms Tibbles by whom he had a son. Very properly, however, Mr Alun Jones QC told the House that since being bailed Goodyer and Ms Tibbles have become estranged—to the extent, indeed, that she obtained a non-molestation order against him and he is now remanded in custody charged with attempting to pervert the course of justice after an incident at court involving Ms Tibbles' new partner.

Gomes

14. Gomes, then aged 35, was arrested with a man named Luis Blanco Gomez on 15 May 1998. Both were charged with possessing cocaine for trafficking and Gomes was charged additionally with a further similar count and with possession of a firearm and ammunition. At the start of their joint trial on 4 November 1999, the judge (Volney J) severed the firearm and ammunition charges and at the close of the prosecution case on 14 December 1999 he upheld a defence submission of no case to answer and discharged both defendants. He appears to have been concerned above all with a discrepancy in the evidence as to the weight of cocaine found in the defendants' possession—originally said by the police to weigh 25.5kg, later weighed by the forensic science centre analyst at 18.7kg.

15. Despite being bailed for the firearm and ammunition offences and knowing also that the state was appealing Volney J's decision to discharge him, Gomes left Trinidad on 16 December 1999 and notwithstanding efforts both locally and abroad could not be located. On 11 February 2000 the Trinidad Court of Appeal (de la Bastide CJ, Sharma and Ibrahim JJA) in Gomes's absence (despite newspaper notices of the hearing date) allowed the state's appeal and ordered a retrial. A domestic arrest warrant was then issued. It was not, however, until 5 May 2006 that Gomes came to be arrested, pursuant to the activation of an Interpol red notice, as he left an Air France aircraft at Heathrow. On 5 June 2006 Trinidad requested his extradition. On 11 January 2007 District Judge Purdy sent his case to the Secretary of State and on 9 March 2007 the Secretary of State ordered his extradition.

16. Prior to his leaving Trinidad on 16 December 1999 Gomes had been held on remand for 19 months at Frederick Street prison, a prison which Lord Ramsbottom had unequivocally condemned in 2001 as not ECHR compliant. It was not, however, on this account that Gomes explained his decision to flee the country in breach of his bail conditions. Rather he claimed to have been threatened with death, the police being so upset at his acquittal, an explanation roundly rejected by the judge. We have already mentioned Monica Buns, many years ago a police inspector in Kenya, a prospective defence witness who is thought to have died in 2005. On 28 July 1998 she had given detailed evidence at the committal proceedings, evidence which the defendant suggests contradicts certain police evidence as to what they could see at the time of his arrest. District Judge Purdy was unimpressed by this, pointing out that "she was missing at the first trial" (i.e. she had not been there to give evidence had the no case submission failed) and that "a sworn deposition existed and exists".

17. So much for the facts. Against that background we now turn to the certified question and certain other issues to which it has given rise.

18. The decision of the House in *Kakis* lies at the very heart of this appeal and must be referred to at this stage. Kakis's extradition was sought by Cyprus in relation to an EOKA killing in April 1973. Although a warrant for Kakis's arrest had been issued that very night, he had escaped into the mountains and remained hidden for 15 months. Subsequently, in circumstances we need not recount, he settled in England with the apparent approval of the Cyprus Government and so too did a Mr

Alexandrou, Kakis's only alibi witness, who swore that he would not return to give evidence in Cyprus. It was these two circumstances, the first going to oppression, the second to injustice, that ultimately led the House to allow Kakis's appeal against the Divisional Court's refusal to discharge him under section 8(3) of the Fugitive Offenders Act 1967 (a provision materially indistinguishable from section 82):

". . . the High Court . . . may . . . order the person committed to be discharged from custody if it appears to the court that . . . (b) by reason of the passage of time since he is alleged to have committed [the offence] . . . it would, having regard to all the circumstances, be unjust or oppressive to return him."

19. Critically for present purposes, however, Lord Diplock in giving the leading speech said this:

"'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from change in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them.

As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8(3) is based upon the "passage of time" under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case." (pp782-783).

For convenience I shall hereafter refer to these paragraphs respectively as Diplock para 1 and Diplock para 2. Lord Diplock continued:

"the failure of the prosecuting authorities to begin criminal proceedings against Mr Kakis during the first fifteen months until the coup in July 1974 was due to his own action in going into hiding in the mountains. So the starting point for the period of time that requires to be considered is July 1974."

20. All the other members of the Committee agreed with Diplock para 1; indeed, Lord Russell of Killowen and Lord Scarman agreed with the whole of Lord Diplock's speech. Lord Edmund-Davies, however, was "unable to concur" in Diplock para 2:

"In my respectful judgement, on the contrary, the answer to the question of where responsibility lies for the delay may well have a direct bearing on the issues of injustice and oppression. Thus, the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an

order for his return, whereas the issue might be left in some doubt if the only known fact related to the extent of the passage of time, and it has been customary in practice to advert to that factor: see, for example, *Reg v Governor of Pentonville Prison, ex parte Teja* [1971] 2 QB 274, 290, per Lord Parker CJ and the speeches in this House in *Reg v Governor of Pentonville Prison*, *ex parte Narang* [1978] AC 247." (p.785)

Lord Keith of Kinkel (dissenting in the result) also appears to have disagreed with Diplock para 2: "the case of *Narang* 1978 AC 247 also indicates that it may be relevant to consider the extent to which the passage of time has been due to dilatoriness on the part of the requesting authority." (p787), *Narang* had been decided by the House just a year earlier, the speeches there being entirely consistent with Diplock para 1 but two or three of them indeed lending some support to Lord Edmund- Davies's and Lord Keith's disagreement with Diplock para 2.

21. The certified question principally concerns Diplock para 1, notably that part of it which states that, "[s]ave in the most exceptional circumstances", "[d]elay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot . . . be relied upon as a ground for holding it to be either unjust or oppressive to return him". In other words, the accused cannot pray in aid what would not have happened but for the additional passage of time for which he is responsible. (In speaking of "[d]elay in the commencement or conduct of extradition proceedings" Lord Diplock was clearly referring to delay in the overall process of bringing the suspect to justice, including delay before any question of extradition arose. That, after all, was the position in Kakis itself: the fifteen months to be disregarded was the period the suspect was hiding out in Cyprus before ever he left for the UK.)

22. Diplock para 2, raising as it does the question whether dilatoriness on the part of the requesting state can ever be of relevance (the question which divided the House), expressly postulates that the delay "is not brought about by the acts of the accused himself". If it is, then the question of blameworthiness on the state's part simply does not rise.

23. As may be seen from the passages in the judgment below (set out at para 4 above) the Divisional Court made no such distinction between the two paragraphs. Rather, in para 17, they invoked Lord Edmund-Davies's reasoning in respect of Diplock para 2 to dilute the effect of Diplock para 1 and in all three of the quoted paragraphs they considered the position arising when both the accused and the state are to be regarded as at fault: para 17 refers to "concurrent fault", para 19 to having regard to "the respective faults" of both and para 21 to "both sides [being] to blame".

24. It would necessarily follow from the Divisional Court's judgment that in a case like Goodyer's—where plainly he delayed the commencement of extradition proceedings (or rather created the need for them and thereby delayed the overall process of justice) by fleeing Trinidad but where Trinidad too may be regarded as blameworthy for having lost the file—the accused could rely on part at least of the period following his flight in seeking to make good his case for a section 82 bar to extradition.

25. In support of this approach the Divisional Court sought to rely on two cases in particular: *Osman (No.4)* [1992] 1 AER 579 and *La Torre v Italy* [2007] EWHC 137 (Admin). As explained in *Krzyzowski*, however, it is clear that neither authority in fact seeks to qualify in any way the clear ruling contained in Diplock para 1 (nor, of course, could they properly have done so). Rather they are directed at Diplock para 2 and conclude, in cases where the extraditee himself has not been

responsible for the delay: “Culpable delay on the part of the state may certainly colour that judgment [as to whether it would be unjust or oppressive to extradite him by reason of the passage of time] and may sometimes be decisive, not least in what is otherwise a marginal case (as Lord Woolf [then Woolf LJ] said in *Osman (No 4)*).”—Laws LJ in *La Torre* at para 37, in effect adopting the minority view expressed by the House in Kakis.

26. True it is that Laws LJ then added: “An overall judgment on the merits is required, unshackled by rules with too sharp edges.” If, however, this was intended to dilute the clear effect of Diplock para 1, we cannot agree with it. This is an area of the law where a substantial measure of clarity and certainty is required. If an accused like Goodyer deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting state should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part, whether this be, as in his case, losing the file, or dilatoriness, or, as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused’s own conduct. Only a deliberate decision by the requesting state communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own flight from justice, could allow him properly to assert that the effects of further delay were not “of his own choice and making".

27. There are sound reasons for such an approach. Foremost amongst them is to minimise the incentive on the accused to flee. There is always the possibility, often a strong possibility, that the requesting state, for want of resources or whatever other reason, may be dilatory in seeking a fugitive’s return. If it were then open to the fugitive to pray in aid such events as occurred during the ensuing years—for example the disappearance of witnesses or the establishment of close-knit relationships—it would tend rather to encourage flight than, as must be the policy of the law, discourage it. Secondly, as was pointed out in Diplock para 2, deciding whether “mere inaction” on the part of the requesting state “was blameworthy or otherwise” could be “an invidious task". And undoubtedly it creates practical problems. Generally it will be clear one way or the other whether the accused has deliberately fled the country and in any event, as was held in *Krzyzowski*, given that flight will in all save the most exceptional circumstances operate as an almost automatic bar to reliance on delay, it will have to be proved beyond reasonable doubt (just as the issue whether a defendant has deliberately absented himself from trial in an inquiry under section 85(3) of the Act). But it will often be by no means clear whether the passage of time in requesting the accused’s extradition has involved fault on the part of the requesting state and certainly the exploration of such a question may not only be invidious (involving an exploration of the state’s resources, practices and so forth) but also expensive and time consuming. It is one thing to say—as Lord Edmund-Davies said in Kakis and later Woolf LJ said in *Osman (No. 4)* and Laws LJ in *La Torre*—that in borderline cases, where the accused himself is not to blame, culpable delay by the requesting state can tip the balance; quite another to say that it can be relevant to and needs to be explored even in cases where the accused is to blame.

28. The Divisional Court’s suggestion that there would be “an asymmetry” in a “concurrent fault” case in taking account of the accused’s fault but leaving out of account the requesting state’s fault seems to us, with respect, misconceived. In the ordinary way the accused gets the benefit of the passage of time (unless he has caused it) irrespective of any blameworthiness on the part of the requesting state. Why then, save perhaps in a rare borderline case, consider whether the requesting state itself should in addition be found at fault?

29. We are accordingly in no doubt that it is *Krzyzowski*, rather than the Divisional Court's judgment in the present case, which correctly states the law on the passage of time bar to extradition. The rule contained in Diplock para 1 should be strictly adhered to. As the rule itself recognises, of course, there may be "most exceptional circumstances" in which, despite the accused's responsibility for the delay, the court will nevertheless find the section 82 bar established. The decision of the Divisional Court (Hobhouse LJ and Moses J) in *Re: Davies* CA 443/96, (unreported, 30 July 1997), discharging a defendant who had become unfit to plead notwithstanding his responsibility for the relevant lapse of time, may well be one such case. In the great majority of cases where the accused has sought to escape justice, however, he will be unable to rely upon the risk of prejudice to his trial or a change in his circumstances, brought about by the passing years, to defeat his extradition.

30. We recognise, of course, that in a section 82(b) case the defendant will by definition have been "unlawfully at large" and will generally, therefore, be subject to the rule in Diplock para 1. Given, however, that in these cases he will by flight have brought upon himself such difficulties as may then ensue from the passage of time, we see no reason why he should not be required to accept them—again, save in the most exceptional circumstances. He, after all, will not merely be accused of the crime but will actually have been convicted of it.

31. The other main question discussed at some length during the argument is what approach should be adopted to the concepts of injustice and oppression within the meaning of s.82. This is, of course, touched on in the first sentence of Diplock para 1. And, so far as concerns oppression, it is worth noting too Lord Diplock's statement (at p284) that: "the gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return to stand his trial oppressive". That said, the test of oppression will not easily be satisfied: hardship, a comparatively commonplace consequence of an order for extradition, is not enough.

32. With regard to the concept of injustice, the law has moved on since *Kakis*, in part because of the developing abuse of process jurisdiction over the past 30 years. It is unnecessary to rehearse this at length. Rather it is sufficient to refer to the judgment of the Privy Council delivered by Lord Bingham of Cornhill in *Knowles v US Government* [2007] 1 WLR 47, in particular para 31 where the Board approved the Divisional Court's judgment in *Woodcock v Government of New Zealand* [2004] 1 WLR 1979 from which it extracted and endorsed the following propositions:

"First, the question is not whether it would be unjust or oppressive to try the accused but whether . . . it would be unjust or oppressive to extradite him (para 20). Secondly, if the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust or oppressive for the requested state to return him (para 21). But, thirdly, the court of the requested state must have regard to the safeguards which exist under the domestic law of the requesting state to protect the defendant against a trial rendered unjust or oppressive by the passage of time (paras 21-22). Fourthly, no rule of thumb can be applied to determine whether the passage of time has rendered a fair trial no longer possible: much will turn on the particular case (paras 14-16, 23-25). Fifthly, 'there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive' (para 29)."

33. The second of those propositions, it will be noted, invites consideration of whether, in any particular case, "a fair trial is impossible", and that indeed we regard as the essential question underlying any application for a s.82 bar on the ground that the passage of time has made it unjust

to extradite the accused. As was pointed out in *Woodcock* (para 17), a stay on the ground of delay in our domestic courts is only properly granted when "there really is evidence of prejudice to the extent that a fair trial could not be held". We acknowledge that in *Kakis*, Diplock para 1 speaks of "the risk of prejudice to the accused in the conduct of the trial itself". But Viscount Dilhorne's leading speech in *Narang* the previous year had used the language of impossibility:

"I see nothing in the material before this House to lead to the conclusion that as a result of the passage of time it would be impossible for [the two accused] to obtain justice, and, that being so, I am unable to conclude that by reason of the passage of time their return would be unjust or oppressive." (p.276)

34. The third of the *Knowles's* propositions requires a requested state to have regard to the domestic law safeguards in the requesting state. As *Woodcock* observed (para 21), the domestic court of the requested state has obvious advantages in deciding whether or not a fair trial is now possible: "That court will have an altogether clearer picture than we have of precisely what evidence is available and the issues likely to arise". The Divisional Court added, however, that "We would have no alternative but to reach our own conclusion on whether a fair trial would now be possible in the requesting state if we were not persuaded that the courts of that state have what we regard as satisfactory procedures of their own akin to our (and the New Zealand courts') abuse of process jurisdiction".

35. *Woodcock* was concerned with extradition to New Zealand and evidence was adduced there of an approach in New Zealand very similar to our own. *Knowles* concerned the extradition of a Bahamian to the United States. What, however, of extradition to countries of whose judicial systems we know less and in which, it is submitted, we should have less confidence? Council of Europe countries in our view present no problem. All are subject to article 6 of the Convention and should readily be assumed capable of protecting an accused against an unjust trial—whether by an abuse of process jurisdiction like ours or in some other way. Insofar as Keene LJ's judgment in *Lisowski v Regional Court of Bialystok (Poland)* [2006] EWHC 3227 (Admin) suggests the contrary, it should not be followed. Trinidad itself should similarly be assumed to have the necessary safeguards against an unjust trial; the Privy Council is, after all, its final Court of Appeal.

36. More difficult, no doubt, are certain other category 2 territories or indeed, a country like Rwanda with whom, we are told, ad hoc extradition arrangements have recently been made pursuant to s.94 of the Act. We conclude, however, that even with regard to these countries the presumption should be that justice will be done despite the passage of time and the burden should be on the accused to establish the contrary. If there is such a likelihood of injustice, almost certainly this will be apparent from widely available international reports. Whilst we cannot agree with Mr Perry QC's submission on behalf of Trinidad that the test to be satisfied is that of a risk of a flagrant denial of justice such as would give rise to an article 6 bar under s.87, we would nevertheless stress that the test of establishing the likelihood of injustice will not be easily satisfied. The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multi-lateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international cooperation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad. We were told that the sec. 82 (or sec. 14) 'defence' is invoked in no fewer than 40 per cent of extradition cases. This seems to us an extraordinarily high proportion and we would be unsurprised were it to

fall following the committee's judgment in the present case.

37. Mr Fitzgerald submitted that the House should adopt the approach taken by the Privy Council in *State of Trinidad and Tobago v* Boyce [2006] 2 AC 76 where, despite ruling that the trial judge had wrongly directed the accused's acquittal, the Board refused to order a retrial and accordingly dismissed the appeal. Delivering the opinion of the Board, Lord Hoffmann (at para 27) noted that nine years had elapsed since the incident (of alleged manslaughter) and said:

"Their Lordships consider that in ordering a new trial after an acquittal, an appellate court should be satisfied that it will be fair in the sense that there is not (by reason, for example, of fading memory or missing witnesses) a materially greater risk of an inaccurate verdict than there would have been if the case had been properly left to the jury at the first trial."

Insofar as the approach formulated there is less exacting than that of the impossibility of a fair trial, that is appropriate when the question is whether to retry an accused after he has already been tried once and acquitted; not so, when the question is whether to extradite the accused to stand trial for the first time.

38. The final question discussed before the House was the period of time for consideration under s.82. It starts, of course, with the date of the alleged offence (s.82(a)) or when the fugitive became unlawfully at large (s.82(b)) (a fugitive tried in his absence without having deliberately absented himself from his trial falling for this purpose under s.82(a)). Mr Perry submits that the period ends with the extradition hearing—and certainly the period considered by Lord Diplock in *Kakis* (p.783) ended on 16 December 1977, the date of the Divisional Court's decision. Given, however, s.104(4) of the Act (making provision for evidence on appeal "that was not available at the extradition hearing") and recognising that any appeal court would be bound to have regard to the further passage of time and any factual developments when considering a human rights challenge under s.87, we would not regard the date of the initial extradition hearing as a final cut-off point. If, however, the accused were to be regarded as having deliberately spun out the proceedings for his own purposes, he could hardly expect to take much advantage from the additional passage of time.

39. In the context of the present appeal, these further issues cannot be seen as determinative. It follows from what we said earlier in response to the certified question that neither appellant, as a "classic fugitive", can invoke the passage of time, lengthy though it is, since their respective alleged offences. In any event there could be no question here of regarding their extradition as either unjust or oppressive, still less as falling within "the most exceptional circumstances" saving to Diplock para 1. Their appeals must be dismissed.

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