

As time goes by

The House of Lords has confirmed 'fugitives' could not rely on the requesting state's shortfalls to avoid extradition, but will this not open the door to unfair delays, asks Ben Newton

A CRUCIAL DISTINCTION exists in extradition cases between requested persons who have voluntarily absented themselves and those blameless for any delay in the commencement of proceedings. The case of *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21 saw the House of Lords come down firmly at the first sign of a softening of that distinction.

The two appellants, Goodyer, a UK national, and Gomes, a citizen of Trinidad and Tobago, were both wanted in relation to unrelated charges of possession of cocaine for the purposes of trafficking. Having initially had their extradition ordered by different district judges in early 2007, their appeals to the Divisional Court were joined as they both argued that it would be unjust or oppressive to extradite them because of the passage of time (s.82 Extradition Act 2003), and that their extradition would be incompatible with Art.3 ECHR because of Trinidad's appalling prison conditions. Their appeals were allowed on 22 August 2007 by Sedley LJ and Nelson J, and the cases were remitted for a district judge to decide the two issues again in light of the ruling made.

The Art.3 argument was eventually resolved through a combination of a diplomatic assurance that the appellants would only be held in the maximum security facility in Trinidad and evidence from Lord Ramsbottom, a former HM's Chief Inspector of Prisons, who had visited that institution.

The s.82 arguments proved far more contentious. The arguments were founded on delays by the requesting state in seeking the extradition of the appellants. In Goodyer's case, the prosecution file had been lost for three years. In the case of Gomes a defence witness had died. Both were, however, 'classic fugitives'.

The Divisional Court held that: "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."

Before the remitted case could be heard, however, a differently constituted Divisional Court held on 23 November 2007 in *Kryzowski v Poland* [2007] EWHC 2754 (Admin) that these views were inconsistent with the longstanding House of Lords authority of *Kakis v Cyprus* [1978] 1 WLR 779. In *Kryzowski* the district judge was held to have been right 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. The district judge noted this decision with approval when hearing the remitted case, although he nevertheless considered whether the loss of the Goodyer file or the death of Gomes' witness gave rise to a bar under s.82, finding that they did not.

The Divisional Court subsequently certified the question of which authority was correct as a point of general public importance. The law lords (Lord Brown of Eaton-under-Heywood preparing the report on behalf of the committee) subsequently noted that "the decision of the House in *Kakis* lies at the very heart of this appeal". In *Kakis* Lord Diplock had stated that "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", save, that is, in the most exceptional circumstances.

The lords observed that the Divisional Court's decision would allow Goodyer to rely on part of the delay because of the requesting state's blameworthy conduct in losing the file. This approach was rejected outright: "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..." It was held that only something akin to a deliberate decision by the requesting state, communicated to the accused, not to pursue the case against him would suffice. This was justified on the basis of the need to minimise the incentive to flee and on the invidious, expensive, and time-consuming nature of exploration of the fault of the requesting state.

The House of Lords therefore held that *Kryzowski* was to be preferred, and that the rule in *Kakis* was to be strictly adhered to. An example of what might amount to exceptional circumstances would be the situation in *Re: Davies* CA 443/96 (unreported, 30 July 1997) where the defendant was responsible for the lapse of time but had become unfit to plead.

Having decided the certified point, the lords proceeded to give *obiter dicta* guidance as to the application of five rules extracted from *Woodcock v New Zealand* [2004] 1 WLR 1979 in *Knowles v US Government* [2007] 1 WLR 47. They held that the test should be whether it was *impossible* to obtain a fair trial. Furthermore, that countries subject to Art.6, or where the Privy Council was the highest court of appeal, should be assumed to have the necessary safeguards against an unjust trial. Indeed, this assumption was expanded almost limitlessly with a burden on the accused to establish the contrary. "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."

No quarter for 'fugitives' then, as the House of Lords comes down firmly on the side of public policy considerations. The consequence, of course, is that requesting states can now take their time in seeking extradition where someone is unlawfully at large. Whoever said that 'justice delayed is justice denied'?

Benjamin Newton is a barrister practising at Doughty Street Chambers