NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF ADDRESS REFERRED TO AT [7] OF THE COURT OF APPEAL JUDGMENT (SMITH v R [2020] NZCA 499) REMAINS IN FORCE.

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS REFERRED TO AT [6] OF THE COURT OF APPEAL JUDGMENT (SMITH v R [2020] NZCA 499) PROHIBITED BY SS 139(1) AND 139A OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 88/2023
[2023] NZSC 134

BETWEEN	PHILLIP JOHN SMITH Applicant
AND	THE KING Respondent

Court:	Glazebrook, Ellen France and Williams JJ
Counsel:	Applicant in person F R J Sinclair for Respondent
Judgment:	17 October 2023

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

Introduction

[1] This application for leave to appeal arises out of the deportation of the applicant, Phillip Smith, following his escape from custody in New Zealand while on

short-term release. The order for his deportation was made by the 3rd Federal Criminal Court in Rio de Janeiro.

[2] Mr Smith challenged the two convictions arising out of his escape on the basis that the deportation was unlawful. He says he could not have been lawfully deported from Brazil and, as the Court of Appeal summarised his argument, the deportation was "knowingly connived in by the New Zealand Police, and that in consequence the prosecution was an abuse of process".[1] Essentially, he argued that the deportation was a disguised extradition in circumstances where extradition would not have been available.[2] The Court of Appeal dismissed his case and he now seeks leave to appeal that decision.

[3] Mr Smith also says that if he succeeds in this argument then arguably the Court should consider whether the life sentence imposed in 1996 by Greig J for murder, aggravated burglary and other charges should be quashed and substituted for a finite sentence with a maximum term of 30 years.[3] That would put him in the same position he would have been in if extradited. This reflects the fact that it appears that extradition would have been conditional on Mr Smith's sentence of life imprisonment being reduced to a finite term of 30 years as that is the maximum permitted in Brazil.

Background

[4] As the respondent notes, on the day the applicant was arrested in Rio de Janeiro, the local police officer sought an order detaining him for the purpose of deportation. An administrative arrest order was made at that point "for the purpose of deportation, for a period of 60 days".[4] The Court of Appeal observed that there was no evidence the New Zealand authorities exercised any influence over these

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1 *Smith v R* [2020] NZCA 499, [2021] 3 NZLR 324 (Kós P, French and Collins JJ) [CA judgment].

2 That is because the extradition would not meet the dual criminality requirement where Brazil has no equivalent offence to escaping from lawful custody.

3 *R v Smith* HC Wellington T23/96, 16 August 1996. Mr Smith, in reliance on sch 5 cl 3(2) of the Senior Courts Act 2016, consented to his application for leave to appeal being determined by this Court. The Crown consented to him filing his application in this Court rather than the Privy Council.

4 CA judgment, above n 1, at [12].

immediate steps.[5] Matters advanced when the Federal Prosecutor's Office sought an order for deportation in the 3rd Federal Criminal Court. There was then some debate between the Federal Police and Interpol about the next steps. The Court of Appeal made the point that:

> [80] When uncertainty developed over the propriety of deportation (at the instance of Interpol Brasilia), the New Zealand police appear on the record to have quite properly stood back and allowed the argument (which was between different branches of the Brazilian Federal government) to be resolved by that government.
>
> (footnote omitted)

[5] The applicant was removed from Brazil on 27 November 2014.

[6] After a tortuous procedural history, Mr Smith's abuse of process argument was effectively dealt with at first instance by the Court of Appeal. In rejecting the case for Mr Smith the Court, amongst other matters, considered the affidavit evidence. That evidence included an affidavit from Mr Smith which appended a legal opinion from a Professor from a São Paulo University and an affidavit from the key police officer. Mr Smith declined to cross-examine the latter on the grounds the Court could draw the necessary inferences from the documents. The Court of Appeal did not agree with that submission. The Court said that s 92 of the Evidence Act 2006 applied, meaning that if witnesses were to be dis-believed, cross-examination was necessary.

[7] On the evidence, the Court of Appeal dismissed the argument that the New Zealand authorities had procured the deportation order. The Court also rejected the argument that the New Zealand authorities were aware of any underlying illegality of the deportation order and similarly dismissed any suggestions of bad faith on the part of the New Zealand authorities.

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5 As the respondent also notes, shortly afterwards, the first step towards initiating extradition was also taken so that there were dual tracks of extradition and deportation although no extradition request was ever made.

The proposed appeal

[8] Against this background, the applicant wishes to raise a number of points which he says give rise to questions of general or public importance.[6] He also submits that there is a risk of a miscarriage of justice.[7] The main points Mr Smith wishes to argue can be summarised as follows.

[9] First, Mr Smith says that there is a question of general and public importance as to the legal principles applicable in the context of this category of abuse of process. That is where the abuse of process involves State conduct that will undermine public confidence in the integrity of the judicial process. Under this heading the applicant says that, in the context of a disguised extradition, this category of abuse of process is generally established if there is "a causal connection between … State impropriety and the presence of an accused within the jurisdiction" where deportation has been procured by the requesting state "with the ulterior motive of avoiding an extradition procedure … with knowledge that the deportation was unlawful under the law of the requested State". He relies here on the factual finding made by the Court of Appeal that the offer of the New Zealand police to send its police officers to escort the applicant was "material" to the Brazilian authorities' decision to seek deportation.[8]

[10] He also argues that this aspect gives rise to a miscarriage of justice because the outcome of the appeal may have been different if causation had been considered in light of the factual finding the Court of Appeal made.[9]

[11] The latter point leads Mr Smith to argue that the Court of Appeal's reliance on s 92 of the Evidence Act was wrong. If granted leave, he would seek leave to cross-examine the Crown's deponents in this Court.

[12] The second error of law advanced is as to the description given by the Court of Appeal of the difference between extradition and deportation. The Court of Appeal summarised the position in this way. First, the Court said extradition

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6 Senior Courts Act, s 74(2)(a).
7 Section 74(2)(b).
8 CA judgment, above n 1, at [19].
9 Senior Courts Act, s 74(2)(b).

involves the making of a formal request by one State for the remission of an individual by another State. Extradition is on this basis a matter for domestic law. Second, by contrast, the Court described the decision to pursue deportation as one for the Brazilian authorities.[10]

[13] This aspect leads into Mr Smith's argument that the Court was wrong to say that because the deportation order was made by a court of competent jurisdiction any potential underlying invalidity of that order on its merits was "beside the point".[11] Mr Smith said the Court of Appeal should have considered the exceptions to this principle where, for example, the proceedings in which the judgment was obtained were contrary to natural justice. He says that the natural justice exception is relevant because the deportation order was granted summarily.

[14] The third question of law said to arise is whether the applicant was arbitrarily detained in terms of s 22 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) by the New Zealand authorities after he left Brazil and arrived in the transit area of Santiago Airport in Chile. It is submitted that questions arise about whether the police powers of extra-territorial arrest and detention apply to a deportation procedure in international transit areas; as well as the extra-territorial implications of that detention on rights under the Bill of Rights, such as s 22.

[15] In terms of this point, the Court of Appeal said that whether the Bill of Rights applies to acts of the New Zealand State undertaken abroad has yet to be authoritatively explored. The Court proceeded on the basis nonetheless that the Bill of Rights may have extra-territorial application. The Court went on to say it had found Mr Smith was plainly in the custody of the New Zealand police from the point he boarded the aircraft. The Court relied on the decision in *Teddy v New Zealand Police* for the proposition that the powers of arrest under the Crimes Act 1961 may be exercised outside the territorial limits of New Zealand in relation to arrest for offences triable in New Zealand courts.[12] The officers undeniably had the requisite good cause.

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10 CA judgment, above n 1, at [56]–[60].

11 At [71].

12 *Teddy v New Zealand Police* [2014] NZCA 422, [2015] NZAR 80 at [76]–[77]. This Court refused leave to appeal: *Teddy v New Zealand Police* [2015] NZSC 6.

[16] In relation to Mr Smith's argument based on s 22 of the Bill of Rights, the Court saw the real issue as being whether there was lawful authority for that detention from handover until arrival in New Zealand. The question of any breach of s 22 turned on the success or failure of the abuse of process argument. What the Court was addressing was the argument that arbitrary detention as part of a disguised extradition breached the applicant's rights under s 22 and is an abuse of process. The Court said:[13]

> The reasoning is circular: the detention may be arbitrary in these circumstances if an abuse of process (disguised extradition) has occurred. The better course here is to examine the premise, the abuse of process, on which the further alleged consequence depends. There is no need to go beyond that.

[17] Finally, the applicant makes an argument that s 25(g) of the Bill of Rights and s 6(1) of the Sentencing Act 2002 would enable this Court to quash the life sentence imposed by Greig J and substitute a finite sentence of no more than 30 years as a remedial measure.

[18] The application for leave to appeal is out of time. The Court of Appeal's judgment was delivered in October 2020. The delay is explained in Mr Smith's affidavit. We grant an extension of time.

Our assessment

[19] We do not consider the proposed appeal raises a question of general or public importance. The deportation was made pursuant to a Court order, the validity of which has not been challenged before the Brazilian courts and so no error or misconduct established.[14] This factor distinguishes this case from others where the claim of disguised extradition has been successful.

[20] Further, the abuse of process principles for this category, that is, where the actions call into question the integrity of the process, are settled.[15] We accept the

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13 CA judgment, above n 1, at [95].

14 By contrast, for example, the Court of Appeal of England and Wales in *R v Burns* [2002] EWCA 1324, referred to by the Court of Appeal in the present case, noted that the trial Judge had heard unchallenged expert evidence that the local (Venezuelan) authorities had acted contrary to the local law. The outcome in *Burns*, reflecting the outcome in the present case, was that the deportation by the order of the Venezuelan court involved no improper conduct by British authorities and there had been no abuse of process.

15 See, for example, *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.

submission for the respondent that the factual findings made by the Court of Appeal mean the case is not a suitable one to pursue questions about the disguised extradition aspect of abuse of process. Further, the Court's decision is, as the Court of Appeal of England and Wales said in *R v Burns*, "very largely a question of fact and the inference which one draws from the available facts on affidavits and on documentary evidence which are before us".[16] Nothing raised by the applicant calls into question the Court of Appeal's assessment of the evidence.

[21] Nor do we see any error in the Court of Appeal's assessment of the claim relating to s 22 of the Bill of Rights. The primary question was whether this was in fact an abuse of process.

Result

[22] The application for an extension of time to apply for leave to appeal is granted. The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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16 *R v Burns*, above n 14, at [27] citing Lord Lane CJ in *R v Bow Street Magistrates*, *ex parte Mackeson* (1981) 75 Cr App R 24.