COMMONWEALTH OF THE BAHAMAS 2017/CRI/con/59

IN THE SUPREME COURT

Constitutional Side

IN THE MATTER OF THE EXTRADITION ACT, 1994

BETWEEN

AND

SAMUEL KNOWLES JR.

Applicant

AND

THE MINISTER OF FOREIGN AFFAIRS OF THE COMMONWEALTH OF THE BAHAMAS

First Respondent

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Second Respondent

Before:	The Honourable Mr. Justice Andrew Forbes
Date:	8th February 2018, 28th May 2018 & 21st June 2018
Appearances:	Mr. Edward Fitzgerald KC & Mr. Roger Minnis on behalf of the Applicant Mr. Samuel Knowles
	Ms. Stephanie Pintard & Ms. Kristen Stubbs on behalf of the 1st & 2nd Respondents

FORBES, J

BACKGROUND

1. It should be acknowledged that it has taken far longer than it should have for a decision to be rendered in this matter and that this is wholly the fault of the Court and unacceptable. And given the current decisions of the Court of Appeal In **Polymers International Limited v Phillip Hepburn SCCivApp. No.8 of 2021** specifically at paragraph 42 Sir Michael Barnett cited the CCJ case of Reid v. Reid (2008) CCJ 8 (AJ) *"42. As far back as 2008 in Reid v Reid [2008] CCJ 8 (AJ), Justice Adrian Saunders, the now President of the Caribbean Court of Justice, said: "as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most."* The Court also noted that no explanation was offered for the delay. This Court without seeking to offer any excuses, will note that the current Court was sitting in an acting capacity at the time the matter was transferred from then Acting Chief Justice Isaacs (deceased). That after hearing the matter the decision was reserved, however, in the process the Court was reassigned to Magistrate Court and unfortunately the Court forgot the commitment to render a finding. It was only recently brought to the attention of the Court that the matter was outstanding. It is extremely regrettable given the significance of the issues raised by this case.

2. The Applicant was arrested pursuant to provisions of the Extradition Act and after proceedings were conducted before the Magistrate Court, he was ordered committed for extradition. As was his right he challenged the legality of his committal by an application for a writ of habeas corpus. He was unsuccessful and appealed to the Court of Appeal. It should be noted that for completeness of the factual matrix, there were two (2) separate extradition proceedings. In the first proceeding, the Applicant was able to challenge the order for extradition. However, on Appeal that order was set aside and later confirmed by the Privy Council in February 2004. It was during the period between Appeals the Government of the United States filed a second request for extradition. That while the second request was being heard by the Magistrate the Privy Council affirmed the decision of the Court of Appeal which had reversed the Judge of first instance finding granting the habeas corpus. The Applicant had

also applied for habeas corpus in reference to the second request, which was heard by Justice Lyons (retired) in which he refused the Applicant's application. The Applicant appealed Justice Lyons's decision to the Court of Appeal. The Court of Appeal dismissed his appeal; he then appealed to the Privy Council which also dismissed the Appeal.

3. However, while addressing the first request the Privy Council noted at paragraph 36 the following: *"There is, however, an outstanding application for habeas corpus by the appellant, referable to the second request, based on section 7 (1) (c) of the 1994 Act and the kingpin grounds referred to above. This was to have been heard by Small J on 12 – 13 May, 2005, but in deference to a strong indication by the Court of Appeal when allowing the Government's appeal in relation to the first extradition request on 11 May, 2005, he adjourned the hearing to await the Board's judgment on the appellant's appeal against that decision. That application has not therefore been the subject of argument or decision. The Board forbears to make any observation about it."*

4. That the initial habeas corpus was to be heard by Mr. Justice Small, however, he was unable to hear the matter as he demitted office. The matter was then assigned to Mr. Justice Lyons, he would have set the matter down for hearing and proceeded to case management and set a hearing date. It was discovered that the Minister of Foreign Affairs had executed a warrant surrendering the Applicant to the Government of the United States. As a consequence, the Applicant was removed from the Bahamas. Justice Lyons proceeded to hear the Application, notwithstanding that the Applicant himself was already out of the Jurisdiction. The Applicant's Counsel did not alert the Court nor was an amendment made to the Originating Summons to reflect the change of circumstances. Justice Lyons made his findings and ruled against the Applicants. That ruling was subsequently appealed to the Court of Appeal, which then dismissed the Appeal. However, the Court of Appeal comprising Rt. Honourable Dame Joan Sawyer (President). Justices of Appeal Ganpatsingh & Osadebay in **Samuel Knowles Jr. v The Government of the United States of America v The Superintendent of Her Majesty's Prison Civil Appeal No. 64 of 2006** commented very directly on the actions of the Executive in removing the Applicant before his Application before Justice Lyons had been determined stating at paragraph 39 the following: *"In our view the appellant had a right to be present at the hearing before Lyons J on 28 September, 2006 if not under Article 20 (2) of the Constitution then on the basis of the rules of natural justice.*

However, it was the appellant's application and even though there is no mention of him having given his consent to the application being heard in his absence, the fact that his counsel did not seek either an adjournment of the application or inform the court that he could not proceed in the absence of the appellant but proceeded instead to 14 argue the case on its merits, gave the learned judge no choice but to deal with the matter as it had been presented before him...." And again *at paragraphs 70 thru 73 which are repeated in full here: "We cannot leave this judgment without recording this court's serious concern about the manner and timing of the order for the removal of the appellant from The Bahamas at a time when the Executive well knew that Lyons J had fixed a date a little over a month away to hear the appellant's application. Further, the Executive must be taken to know the law and to have understood that by then the statute conferred a right on both sides to appeal to this 24 court from the grant or refusal of habeas corpus on the kingpin ground and that both sides would have had a further right to appeal to the Privy Council from this court's decision. In those circumstances, to have ordered the surrender of the appellant ten days after the learned judge had fixed a date for hearing the application,* ***is clearly an egregious breach of the statute and is without precedent in this country.*** *71. The Members of the Executive Branch of government are subject to the law and when any of them deliberately acts in breach of the law, then the rule of law is itself imperiled. We respectfully adopt what Lord Bridge of Harwich said in the case of Regina v Horseferry Road Magistrates' Court ex parte Bennett [1994] 1 AC 42 at page 67- "There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself." 72. We also respectfully adopt what the New Zealand Court of Appeal said in relation to the actions of the New Zealand Police in the earlier case of Regina v Hartley [1978] 2 N.Z.L.R. 199 at page 216 which was quoted with approval by the House of Lords in Bennett's case cited above. - ". . .For the protection of the public the statute rightly demands the sanction of recognized court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. . . The issues raised by this affair are basic to the whole 25 concept of freedom in society." (Emphasis added) In Bennett's case cited above, the House of Lords reviewed decisions from a number of common law jurisdictions, including Australia, New Zealand, Canada and the United States. From that review it appears that while there may not be universal acceptance of the principle espoused by their Lordships in Bennett's case in the United States, the courts of the United Kingdom and other common law*

jurisdictions as well as the courts of The Bahamas, are bound by their statutes themselves and in the case of The Bahamas, its Constitution, to ensure that due process is allowed to be effected before anyone thought to be a fugitive offender is surrendered from the country where he is to another. ***73. As indicated at the hearing of this appeal, if The Bahamas is to be seen as a law abiding country, what happened to the appellant in this case should never happen again."***

5. That the Applicant once surrendered to the United States of America was convicted of drug trafficking offences and was sentenced to a very lengthy prison sentence. All appeal processes were sought and rejected. The Applicant remains incarcerated. In addition, in a separate action, the United States Government sought to have the assets of Mr. Knowles seized as like the extradition proceedings, this was an equally lengthy litigation, where the United Government had sought to register a forfeiture order of the assets of Mr. Knowles pursuant to the Proceeds of Crime Act. The Order was accepted and registered by then Senior Justice Longley dated 9th August 2011. That decision was appealed to the Court of Appeal which set aside the Ruling of Justice Longley in its Ruling in action **SCCivApp. No. 210 of 2012**. This decision was itself appealed to the Privy Council who at paragraph 26 of their ruling ordered the forfeiture of the assets.

6. That as a result of these comments the Applicant filed on the 24th October 2017 an Originating Summons titled **Samuel Knowles Jr. v The Minister of Foreign Affairs & the Attorney General of the Commonwealth of the Bahamas.** The summons sought declaratory relief from the Supreme Court that the constitutional rights of the Applicant were violated when he was removed from the Commonwealth of the Bahamas before his second outstanding extradition had been heard and determined. A further declaration that the said removal constituted a violation of his rights to the protection of the law, his right to remain in the Bahamas unless lawfully extradited, and his right to access the courts for determination of his civil rights. This Summons was supported by an Affidavit filed on the 12th June, 2018. It should be noted for completeness that there was an Affidavit filed on the 24th October, 2017 and sworn by Counsel for the Applicant. There was an objection taken by Counsel for the Respondent that it violated a Practice Direction of the Court No. 1 of 1995. As a consequence, the Affidavit was sworn by Ntieado Knowles who states that he is the son of the Applicant and was authorized to make this affidavit on behalf of the Applicant and also exhibited the Affidavit of Counsel which had been previously filed. Also

exhibited were several correspondences between Samuel Knowles Jr and various Government Officials pointing out the injustice of his extradition as he saw it and requesting intervention. The Affidavit of Mr. Minnis indicated that he was the Attorney of the Applicant and that he is advised by the Applicant that a declaration from the Supreme Court with regard to the illegality of his extradition would assist him in reducing his incarceration time with the United States of America. The Affidavit of the Attorney also exhibited multiple correspondence sent by the Applicant to various Government Officials seeking their intervention.

7. The Court would note that was not an Affidavit in response filed by the Respondents. In fact only Submissions were laid over by the Respondent and similarly by the Applicant and the Court is grateful to Counsels for their submissions and authorities provided.

SUBMISSIONS

Applicant's Submissions

8. Counsel for the Applicant argued that the matter was one fit for constitutional motion. That by the executive extraditing the Defendant before the habeas corpus hearing was concluded, it was directly in breach of **section 7 (1) c** of the **Extradition Act** and by extension there was a 'self-evident breach' of a constitutional right. In the pleadings before the Court, counsels for the defendant sought the following relief:
    1. A declaration that there was a violation of the Applicant's constitutional right not to be removed from the Commonwealth of The Bahamas before his (second) outstanding extradition application had been heard and determined when he was surrendered to the US authorities without lawful authority on the 28th August 2006.

    2. A further declaration that the said removal constituted a violation of his right to the 'protection of the law', his right to remain in The Bahamas unless lawfully extradited, and his right of access to courts for the determination of his civil rights.
9. The Applicant laid over several cases for the courts consideration notably **Regina v. Horseferry Road Magistrates' Court Ex. Parte Bennett [1994] AC 41, Darrin Roger Thomas and Another v. Cipriani Baptiste and Others [2000] 2 AC**

1, Neville Lewis et al v. Attorney General of Jamaica [2001] 2AC 50, George Herbert v. The Attorney General Supreme Court of Belize Action No. 398 of 2003, Secretary of State for Home Affairs v. Obrien [1923] AC 603, Attorney General of Trinidad and Tobago v. Ramanoop [2005] UKPC 15, Bowe and another v. The Queen [2006] UKPC 10 & Angela Inniss v. Attorney General of Saint Christopher and Nevis Privy Council Appeal No. 29 of 2007. Aside for the reliance upon Ramanoop and Horseferry, the Applicant did not rely on any of the principles articulated in any of the other cases. Further, a review of the cases do not appear to support the material arguments being advanced by the Applicant and did not assist the Court in any material way.

Respondent's Submission

10. Counsel for the Respondent argued that the application before this Court did not provide any grounds for a breach of a constitutional right. That the Counsels for the Applicant ought to have amended the claim and leaned heavily on the decision of Dame Sawyer in the Court of Appeal Case of Samuel Knowles *supra* at para 29 where she stated:

> At the hearing of the appeal, we asked **Mr. Minnis questions as to whether or not there had been any attempt to amend the originating notice of motion to seek, e.g., a declaration that the appellant's extradition was unlawful**, or **that the appellant's constitutional right to not be removed from The Bahamas before his second application on the section 7 (1) (c) ground had been heard and determined; and whether this or any court in The Bahamas had the jurisdiction to require the requesting state to return the appellant to The Bahamas until that application is finally disposed of by the courts of this country, including the Privy Council.** Mr. Minnis' answer to those questions was in the **negative although he did try, without much enthusiasm, to raise the issue of the infringement of the appellant's constitutional rights without having made any formal application to do so.**

11. Further, the Respondent argued that the decision of Lyons J, though scrutinized was not overturned on appeal and was not appealed to the Privy Council and therefore remains the stance at law.

12. That the Appellant's choice to bring this application some ten years later constituted an abuse of process, see: ***McEwan v Bahamas* [2002] BHS J. No. 24.**

Finally, that the appropriate remedy would be that of Judicial Review with reliance on the case of ***Jaroo v Attorney General of Trinidad and Tobago* [2002] UKPC 5**.

13. Counsels for the Applicant replied to the submission of the Respondent stated that, in regard to delay, the matter is an exceptional one as it pertains to a constitutional breach. That Court of Appeal recognized the injustice to the Applicant but granted no relief. That the Applicant never acquiesced to the injustice and appealed both in the Bahamian and American courts. That personal factors such as detention abroad, lack of resources and the difficulty of pursuing exceptional remedies are all good reason to excuse the delay (with reliance on the case of *R v Hamilton* [2012] UKPC 31 at para 17). That there is no time bar to a constitutional relief (*reliance on the case of Bancolt v Secretary of State* [2001] QB 10 1067. Finally, that the Respondent could not demonstrate any prejudice by bringing the application when the Applicant chose to do so.

14. In relation to the point of Justice Lyons' judgment, the Applicant replied that the breach arose from the executive and that the Court of Appeal rejected Justice Lyons' views on the merits of the "King Pin Point".

LAW

15. When examining the relevant law pertaining to a Constitutional motion, The Court will rely on Article 28 (1) of the Constitution of The Bahamas to establish its jurisdiction to hear the motion which states:

> 28. (1) **If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.**

16. Moreover, it is noted that where there is other appropriate remedies other than seeking a Constitutional Motion the Court *shall not* exercise its power. Namely, Article 28 (2) states:

> (2) The Supreme Court shall have original jurisdiction-

(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its power under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law. (Emphasis added)

17. Further, in the case of ***The Attorney General v Siewchand Ramanoop* [2005] UKPC 15** at para 24 Lord Nicholls of Birkenhead, when discussing whether to invoke "the section 14" procedure (the equivalent to our Article 28) stated:

24. In ***Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant.*** *Speaking in the context of judicial review as a parallel remedy, Lord Diplock* ***warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action.*** *Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have.* ***Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268*** *(emphasis added).*

Therefore, it is settled law that where there is an adequate "parallel remedy" the Court is not permitted to exercise its power permitted by section 28 (1).

18. Moreover, as the basis of this claim stems from the extradition proceeding, section 7 (1) c which lays out the general restrictions on extradition was relied upon on numerous occasions by the Applicant's counsel and states:

7. (1) A person shall not be extradited under this Act to an approved State or committed to or kept in custody for the purposes of such extradition if it appears to the Minister, to the court of committal or to the Supreme Court on an application for habeas corpus —

(a) that the offence of which that person is accused or was convicted is an offence of a political character or that it is an offence under military law which is not also an offence under the general criminal law; or

(b) that the request for extradition, though purporting to be on account of an extraditable offence, is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or

(c) that he might, if extradited, be denied a fair trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions; or

(d) if the offence of which that person is accused is statute-barred in the approved State that has requested his extradition; or

(e) if his extradition is prohibited by any law in forced in The Bahamas.
(Emphasis added)

19. However, as the Applicant was extradited without his *habeas corpus* application being heard the Court must acknowledge section 11 (1) of the Extradition Act which affords a person who is committed to custody the right to make an application to the Supreme Court for *habeas corpus*. Further, section 11 (2) b states:

(2) A person committed to custody under section 10(5) shall not be extradited under this Act —

(a) in any case, until the expiration of the period of fifteen days commencing on the day on which the order for his committal is made; and

(b) if an application for habeas corpus is made in his case, so long as proceedings on the application are pending. (Emphasis added)

20. Nevertheless, this action having begun in 2017 is governed by the previous Rules of the Supreme Court. Thus, the action is brought by way of Summons in compliance with Order 5 Rule 3 which states:

> *"3. Proceedings by which an application is to be made to the Supreme Court or a judge thereof under any Act must begin by the originating summons except where by these Rules or under any Act the application in question is expressly required or authorized to be made by some other means. This rule does not apply to an application made in pending proceedings..."*

21. Further, the Rules of the Supreme Court at Order 7 Rule 3 (1) give explicit instructions as to what must be in every originating summons for which the plaintiff seeks the determination or direction of the Supreme Court, inclusive of a concise statement of the relief or remedy claimed. Specifically, Order 7 Rule 3 (1) states:

> *"3. (1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the Supreme Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy...."*

22. The Court notes the case of *Ramanoop supra* when discussing "redress" in the form of damages at para. 19 Lord Nicholls held:

> 19. **An award of compensation will go some distance towards vindicating the infringed constitutional right.** How far it goes will depend on the circumstances, but in principle it may well not suffice. **The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right, the gravity of the breach and deter further breaches.** All these elements have a place in this additional award. **"Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object.** Accordingly, the

expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award. (Emphasis added)

23. Thus, where a party seeks "redress" the Court may award, based on the circumstances, an additional award to reflect the gravity of the constitutional breach. However, where pleadings are defective in that they lack a particular ground or remedy sought the pleadings must be amended for the Court to either make a consideration or grant such remedy.

24. This principle is reflected in the case of ***Dennis Graham (Appellant) v Police Service Commission and the Attorney General of Trinidad & Tobago (Respondents)*** **[2011] UKPC 46.** To properly distinguish the judgment of this case a retelling of the facts is necessary. The appeal concerned a constitutional breach of the appellant's right to equality of treatment per section 4(d) of the Constitution of Trinidad and Tobago. When the claim was originally formulated, it did not raise any complaint of a constitutional violation; further, he did not claim damages. He sought leave to amend his claim and by the amendment, he asserted that the refusal to backdate his appointment as Superintendent to 23 December, 1996 violated the aforementioned section 4(d) of the Constitution and sought damages. It is this amendment that allowed the Courts in that matter to determine 1) what ground a potential breach was made and 2) what damages should be awarded, if any.

25. Therefore, it is obligatory for the plaintiff to insert all relevant grounds to be determined or relief sought in the originating summons. Simply put, the Court cannot make out that which is not pleaded.

26. Finally, in the case of ***Antonio Webster (Appellant) v The Attorney General of Trinidad & Tobago (Respondent)*** **[2011] UKPC 22.** The case concerned the wrongful arrest, detainment and abuse of the appellant at the hands of officers. The main concern was whether procedurally the claim was brought correctly. The appellant in this case sought:

> "2. A Declaration that the arrest and detention of the said Claimant was unconstitutional and illegal.
>
> 3. A Declaration that the Claimant was deprived of his right to be informed promptly and with sufficient particulars of the reason for his arrest.

4. A Declaration that the Claimant was deprived of the constitutional right to be informed of his right to communicate with, instruct and retain an Attorney at Law of his choice contrary to Section 5 of the Trinidad and Tobago Constitution."

27. The Court in this matter noted that the three declarations sought were reflective of the appellant's rights under the Constitution of Trinidad and Tobago 1976. However, Lord Wilson at para 20 stated:

> *"In the present case – and irrespective of the erroneous procedure which he adopted – the appellant, by his attorney, made two decisions about how to formulate his claim: one of them was right and the other was wrong.* ***The right decision was primarily to formulate his claim, unlike the claim in Ramanoop, as being for damages in tort. The wrong decision was to include subsidiary claims for the three declarations: for they were redundant.*** *Upon the filing of the Defence then, even on the assumption, in the appellant's favour, that he had hitherto been unaware of its likely content,* ***it should have become even more obvious to him that the declarations had been wrongly included and that he should apply for permission to amend his claim form and his statement of case so as to delete them."*** (Emphasis Added)

28. Should the pleadings have been made to reflect the grounds which were breached specifically or by way in which the claim was laid out, it still would be argued that the only available adequate remedy is available in common law (damages), and he ought to have taken that route in common law for damages due to breach of section 11 of the Extradition Act 2011 as it is evident that the breach happened as is not denied by the Crown.

29. Moreover, when considering *habeas corpus* it is well established in the Privy Council case of **Rhett Allen Fuller (Appellant) v The Attorney General of Belize (Respondent) [2011] UKPC 23 at para 32** stated that:

> ***"The English authorities had drawn a clear distinction between the jurisdiction of the courts exercising domestic criminal jurisdiction and the courts sitting in extradition proceedings*****.....** *But in the case of* ***extradition proceedings the matters into which the magistrate could inquire were restricted to those in respect of which the relevant legislation made express provision.*** *The function of the Divisional Court in* ***habeas corpus proceedings was to review the decision reached by the magistrate****. There was no wider*

abuse jurisdiction. Questions of abuse were for the Secretary of State, whose decision would be ***subject to judicial review.....***"

Therefore, as it relates to a habeas corpus hearing, it is merely a matter of inquiry separate and apart from that of a criminal proceeding.

DECISION & ANALYSIS

Whether the Affidavit of Ntieado Knowles meet the requirements at law?

30. When seeking to move the court for constitutional motions, one must do so by an originating summons supported by an affidavit as directed by Order 5 Rule 3 of the Rules of the Supreme Court. In this instance Counsel for the Applicant first filed a "statement" then put the statement in proper form to be an Affidavit. This Affidavit was contrary to the directions given in Practice Note No. 1 of 1995 as it was sworn by counsel on the record. Therefore, to rid themselves of this roadblock Counsels for the Applicant chose to have the son of the Applicant swear an affidavit, in which the contents reflected the affidavit of Counsel made earlier. It was illustrative in the Court of Appeal case of **The Honourable Attorney General of the Commonwealth of the Bahamas etal. v Rony Jean Charles SCCivApp. No. 26 of 2018** where the Court made the observations at paragraphs 30 to 34:

"30.
It is clear that the affidavit of Clotilde Charles did not satisfy the requirements of the Rule. It does not state that Jean-Rony Jean-Charles is "unable to make the affidavit himself" and does not state "for what reason" he is unable to make the affidavit. The mere fact that the applicant was being restrained does not mean that he is unable to make the affidavit himself. All applicants who make the application are by definition restrained.

31.
The Clotilde affidavit raises the specter whether or not he was unable to make the affidavit because he was no longer restrained and was no longer in the country. It is surprising therefore that the trial judge would have acted on that affidavit given its glaring defect and given the fact that it failed to state what the rules required.

32.
Further, in paragraph 4 of the Clotilde affidavit she stated that the affidavit contains statements of facts which are not of her own knowledge. This is impermissible. Order 41 rule 5 states,

- ***"5. (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove."***

An application for a writ of habeas corpus is not an interlocutory application.

33.
In paragraph 17 she states categorically that her brother is still "unlawfully in prison" this was not a matter of which she had any knowledge at the time she made her affidavit. Her affidavit does not state that she ever saw her brother at the detention camp nor did it state the basis upon which she knew at the time the affidavit was sworn that he was still being detained at the detention camp.

34.
These defects illustrate why it was important and why the rules require that an affidavit be made by the applicant himself."

31. The Court cannot believe that on the face of it, authority was given to the son to execute the Affidavit on behalf of the Applicant. Therefore, this affidavit being relied upon does not meet the requirements to consider the evidence put forth and the Court cannot rely on the contents of the affidavit made in support of this case and can only look to the pleadings made in the summons."

Whether a constitutional claim was made out?

32. When examining the constitutional claim brought forth the Court restates Order 7 Rule 3 which said:

> *"3. (1)* ***Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the Supreme Court*** *or, as the case may be,* ***a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with***

sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy...." (Emphasis added)

33. The Court recognizes the two remedies being sought by counsel in this application, namely:

    3. A declaration that there was a violation of the Applicant's constitutional right not to be removed from the Commonwealth of The Bahamas before his (second) outstanding extradition application had been heard and determined when he was surrendered to the US authorities without lawful authority on the 28th August 2006.

    4. A further declaration that the said removal constituted a violation of his right to the 'protection of the law', his right to remain in The Bahamas unless lawfully extradited, and his right of access to courts for the determination of his civil rights.

34. However, Order 7 Rule 3 requires *sufficient* particulars and in this instance the Counsel for the applicants neglected to set out any particular ground in the pleadings listed above. Particularly, it is noted that counsel refers to the breach as a 'self-evident' breach due to section 7 (1) c of the Extradition Act not being adhered to. However, the Court would like to note that section 11 (2) b more appropriately fits or as the Court of Appeal noted section 11 (3) of the Extradition Act (see para 19-20 of **The Government of the United States of America, The Superintendent of Prisons of the Commonwealth of the Bahamas v Samuel Knowles SCCivApp No. 48 of 2004**) . Nonetheless, Counsel for the Applicant has leaned on the stated belief that "we don't need an affidavit to prove" that a constitutional breach had occurred. However, there is much need for discussion on this point. Specifically, when looking at the discussion in the Court of Appeal which made certain findings in relation to a constitutional breach, specifically where the Court stated:

    "39. In our view the appellant had a right to be present at the hearing before Lyons J on 28 September, 2006 if not under Article 20 (2) of the Constitution then on the basis of the rules of natural justice.....

    40. In addition, Article 19 (1) (g) of the Constitution, read with subsection 11 (1) and (3) (d) of the Extradition Act, in our judgment, put it beyond any peradventure that the appellant was entitled to be present at the hearing on 28 September and also put it beyond any peradventure that the appellant

had not exhausted his local rights before he was removed from The Bahamas."

The relevant section of Article 28 of the Constitution of the Bahamas states that:

> 28. (1) **If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being of is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.**
>
> **Provided that the Supreme Court shall not exercise its power under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law**. (Emphasis added)

Therefore, it is necessary for the rights afforded to Mr. Knowles that relate to this matter to be discussed.

35. Firstly, Article 20 of the Constitution of The Bahamas reads:

> "20. (2) Every person who is charged with a criminal offence –
>
> . . .and except with his own consent the trial shall not take place in his absence unless he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence." (Emphasis added)

However, this Court notes the case of **Rhett Allen Fuller (Appellant) v The Attorney General of Belize (Respondent) [2011] UKPC 23 at para 32** which stated that:

> ***"The English authorities had drawn a clear distinction between the jurisdiction of the courts exercising domestic criminal jurisdiction and the courts sitting in extradition proceedings....."***

36. This point was further reinforced in the Court of Appeal decision of **Nyahuma Bastian v Magistrate Guillemina Archer and The Attorney General SCCrApp. No. 72 of 2011**, where at paragraph 14 the Court said: *"14. It cannot be disputed that extradition proceedings are unusual in nature. Guilt or innocence is not being determined. The procedure does not have the same technicalities as criminal proceedings. Finality is not the function of such proceedings.*

Extradition proceedings are a creature of treaties entered into between the sovereign states to provide machinery for the surrender of fugitive criminals who may have committed offences abroad. Whilst governed by legislative provisions the strict rules of evidence are not always adhered to, nevertheless, the fugitive is entitled to a fair hearing."

37. And to further make the point the Court of Appeal in **Roscoe Thompson v. The Attorney General SCCrApp. No. 232 of 2016,** where the Court cited with approval at paragraph 31 the following: *"31. John, JA went on at paragraph 26 to refer to the Canadian case of Wisconsin (State) v Armstrong [1973] F.C. 437, 10 C.C.C. (2d) 217, where the Federal Court of Appeal Canada rejected the argument that admitting affidavits into evidence without cross—examination deprived a person of his right under section 2(e) of the Canadian Bill of Rights; and the judgment of Thurlow, J. with whom Cameron, J. concurred. Thurlow, J. said: "... the hearing is a mere inquiry and what the extradition judge has to determine is not the guilt or innocence of the fugitive but the question whether the evidence produced would justify his committal for trial. The fugitive is entitled to be made aware, by the reading of the affidavits presented, of the case against him, upon which his extradition for trial may be ordered, but he is not required to answer that case and even if he elects to do so, by evidence or otherwise, the judge's function remains the same. He is not empowered to decide the merits of guilt or innocence, or to pass upon the credibility of witnesses but simply to determine whether there is sufficient case against the fugitive to justify his committal. The trial and determination of the fugitive's rights with respect to the charge are left to the trial Court."*

38. There is a clear distinction between criminal matters and that of extradition which is more akin to that of an inquiry than a criminal trial. However, the Court does concede that in applying the rules of natural justice and section 11 (2) b or 11 (3) the Applicant ought to have been present for the hearing of his application. Moreover, the basis of one of the Applicant's arguments for breach of this ground was that by removing the Applicant the court would have breached the rule of fairness by not hearing both sides. However, it was Counsels for the Applicant that decided to proceed with the hearing in the absence of their client without informing the judge.

39. Further, when giving oral submissions, Counsel for the Applicant made out an argument that the Applicant's right to liberty was breached. It is noted that this ground was not made out in submissions but nonetheless, the Court will discuss it. The material part of Article 19 reads as follows:

> *"19. (1) Every person in The Bahamas is entitled to the right not to be deprived of his personal liberty save as may be authorized by law in any of the following cases –*
>
> *. . .(g) for the purpose of effecting the ...**extradition or other lawful** removal from The Bahamas of that person..." (Emphasis added)*

40. Therefore, if the extradition was deemed lawful, then the deprivation of liberty was not breached. Though the Court of Appeal admonished Lyons J for how he came to the decision, ultimately they upheld his finding. Further, the Applicant has never made an appeal to the Privy Council on that ruling. Therefore, the extradition itself is deemed lawful; however, the procedure was breached. Thus, this ground would too fail. The Court is of the view that should the right to natural justice have been breached, Counsels for the Applicant ought to have either more appropriately laid the framework for the ground they are relying on or, in the alternative, amended the proceedings to reflect that of judicial review. Judicial review is not concerned with the rightness or wrongness of a decision but rather it is concerned with the procedural correctness behind a decision made by a public body. Further, in the case of ***The Attorney General v Siewchand Ramanoop* [2005] UKPC 15** at para 24 Lord Nicholls of Birkenhead, when discussing whether to invoke "the section 14" procedure (the equivalent to our Article 28) stated:

> *"24. In **Harrikissoon the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant.** Speaking in the context of judicial review as a parallel remedy, Lord Diplock **warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action.** Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. **Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of applying in the***

normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268" *(Emphasis added).*

41. Therefore, it is settled law that where there is an adequate "parallel remedy" the Court is not permitted to exercise its power permitted by Article 28 (1). When seeking Judicial Review the remedies available are declarations, *certiorari, mandamus,* prohibition and where appropriate compensatory damages. In this matter, Counsel for the Applicant has made it abundantly clear that at this point they are choosing to not focus on the damages, rather they are focusing on the declarations with the hopes that it would get the Applicant repatriated to The Bahamas and at some later stage, should they choose to then they will apply for Judicial Review. The Court notes page 6 of the transcript dated the 21st June 2018, where Counsel for the Applicant said ***"And the further question of damage is that, and we are not asking your Lordship to accept damages now. That is what is slated in the principle. If this remains remedied the effects on damages will be accepted at a later stage."*** (Emphasis added). However, in applying Ramanoop, it is abundantly clear that the Counsel for Applicants ought to have amended their summons and affidavit to reflect that which is required for a Judicial Review proceeding as this is an adequate means of redress that is afforded to the Applicant. Further, by seeking declarations it is unlikely that the Government of the United States of America would deliver up the Applicant. Therefore, the only appropriate remedy is for damages, but this cannot be awarded as Counsel had not pleaded for it.

42. The Applicant appears to be arguing perhaps implicitly that the decision of this Court may somehow be used for the purposes of having the Applicant returned to this jurisdiction. That view is flawed on a simple bases. And in fact the Court of Appeal has already rejected that idea as not plausible and citing paragraphs 31 to 33 of **Samuel Knowles case (supra)** where the Court said the following: *"31. Ground 1 of the notice of appeal reads: "1. The Learned Judge was wrong not to require the Respondents to produce the Appellant for his hearing." 32. The first ground of appeal assumes, without any evidence or citing any statutory or common law authority for that assumption, that the Supreme Court has the power to require the respondents to produce the appellant after he had been physically removed from The Bahamas. 33. In the absence of any statutory or common law authority, we were of opinion that the learned judge was right to reject that application.* ***In addition, neither the Supreme Court nor this court***

will make any order which cannot be enforced. Clearly counsel for the appellant was not considering whether such a request should or should not be made to the Executive Branch of government which has authority to make treaty arrangements with other countries and whose responsibility it would be to seek the return to The Bahamas of the appellant if they were so minded. *Of course, it must be borne in mind that it was a member of the Executive Branch of Government who authorized the appellant's removal from The Bahamas while his second application for habeas corpus on the kingpin ground was still pending. 34. In our judgment, so far as the appellant's appeal depended on ground one, it failed."(Emphasis added)*

Whether the Court's delay injured the Applicant?

43. In the introduction to this matter, the Court admitted its inexcusable delay in giving this judgment. The Court notes that the position of **Polymers International Limited v Phillip Hepburn (supra),** was not in the position at the time; however, it ought to be considered. However, the Court in taking on the responsibility of delay, must also note that there has been limited follow up by Counsel of the Applicant and the Respondent in the form of phone calls, or emails to inquire into the decision of this matter and the reasons why there has been such a delay from this Court. That being said the Court is fully responsible for the obvious delay. The Court notes that the avenues that were available to Applicant i.e. judicial review, would've been spent from February of 2007 (six months after the decision to extradite him). Therefore, the delay would not have injured or brought further harm to the Applicant.

Whether there are any available remedies?

44. There is one final issue which ought to be considered and that is the question of what if any remedies are available to the Applicant if any? It should be noted that the Applicant's Counsel during oral arguments did not advance any possible remedies nor was any remedy pleaded. The Court does note that in proceedings before Lyons J the Applicant's Counsel sought to have the Minister responsible for the execution of the warrant that removed the Applicant held in contempt. In fact, at paragraph 62, the Court of Appeal made the following observation: *"In our judgment, it is the statute itself which forbade the removal of the appellant from The Bahamas so long as an application for habeas corpus was pending but as noted earlier, it appears that no reference was even made to section 11 (3) (d) of the Extradition Act in the arguments before the learned*

judge....." and at Paragraph 65 continued, *"As to the actual application for the committal of the then Attorney General and Minister of Foreign Affairs to prison for criminal contempt of court, the learned judge was in fact correct in law, and in view of the lack of any proper application having been made for the committal of the Attorney General and the Minister of Foreign Affairs there was no process before the court for such a decision and the judge was therefore right to refuse to make the order for their committal in the circumstances."*

45. There is the question of damages, the Court notes the decision of the Court of Appeal in **Douglas Ngumi v. The Honourable Carl Bethel (In his capacity as Attorney General of the Bahamas) etal SCCivApp. No. 6 of 2021** and broad discussion on the question of damages for perceived Constitutional breaches and the multiple discussions about the formula to be applied. The facts of the above case centered on a foreign national who had been detained and held subject to deportation and upon his release sued for unlawful detention and was successful at first instance however, the Court of Appeal was critical of the Judge at first instance's failure to apply guidelines both itself and the Privy Council had established and consequently modified the award of damages. The distinction this Court would draw between the **Ngumi case** and the present case is that in the **Ngumi** case damages were pleaded noting the final sentence of paragraph 2 of the Court of Appeal's finding which is indicative: *"The appellant claimed aggravated, punitive, exemplary and vindicatory damages for wrongful arrest and subsequent false imprisonment occasioned by the oppressive, arbitrary, and unconstitutional conduct of the respondents and its agents...."* It should be noted that many of the cases cited involved persons who were unlawfully detained the determination as to damages would clearly be applicable. Again it should be noted in those cases applied by the Court of Appeal there was pleadings asserting damages, however, in this case there was no such pleading and as a consequence the Court cannot out of whole cloth devise what would be reasonable compensation for what clearly were procedural and statutory breaches. Whether the Court ought to apply nominal damages for the Courts delay again the Court would be consider itself out over its skis for use of a euphemism by making such a determination without any arguments or leading authorities to guide it. Although it is aware of legislation being advanced in other Caribbean jurisdictions to address these very concerns.

46. The Court would note that the Applicant's Counsel attached with supplement submissions in response to the Respondents submissions a single sheet of paper titled relief sought. The Court would note that no leave was sought to amend the Originating summons and nor was this single sheet of paper filed. It appears to be the Applicant's Counsels attempt layover possible remedies. The Court notes this document and makes no further comment on it.The delay, however, didn't impact the Court's ability to render a decision in this matter as it had the material filed as well as the transcripts and in light of there being no direct evidence required.

47. The Court notes that cost generally follows the event, had the Applicant's Counsel perceived the defects in his pleadings and sought to amend them the outcome might have been considerably different noting that this current action was entirely predicated on the undisputed fact that the Executive had removed the Applicant in direct violation of the Statute and as the Court of Appeal noted in **Samuel Knowles case** at paragraph 66 the following: *"That is not to say that any member of the Executive Branch of government is above the law but just as for the lowliest person in The Bahamas the rule of law requires transparency of process, so for members of the other two branches of government who may be accused of wrongdoing in office. Ground 5 of the appellant's appeal therefore failed...."* In this Court's view, it would negate the Crown recovering cost.

DISPOSITION

48. Therefore, the Court dismisses the application of the Applicant and makes no order as to cost.
49. Parties aggrieved by this decision may Appeal.

Dated the 15th November, 2023

Andrew Forbes
Justice of the Supreme Court