IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110531
Docket: 25413
Registry: Vancouver

In the matter of the Extradition Act, S.C. 1999, c. 18 as amended

and

In the matter of
The Attorney General of Canada on behalf of
The United States of America

and

Adeyemi Peter Alfred-Adekeye

Before: The Honourable Mr. Justice McKinnon

Oral Reasons for Judgment

In Chambers
May 31, 2011

Counsel for the Attorney General of Canada on behalf of the Requesting State (Respondent):	D.B. Majzub
Counsel for the Person Sought (Applicant):	M.E. Sandford
Place and Date of Hearing:	Vancouver, B.C. April 18, 19, 20, 2011
Place and Date of Judgment:	Vancouver, B.C. May 31, 2011

[1] **THE COURT:** The applicant seeks a stay of proceedings pursuant to ss. 7 and 24(1) of the *Charter of Rights and Freedoms* and/or pursuant to the common-law powers of the court in respect to an extradition request made by the United States of America, hereinafter referred to as the requesting state.

[2] The applicant alleges serious misconduct on the part of the requesting state, such that is disentitled to the relief it seeks; namely, the applicant's extradition to the United States. The respondent denies misconduct and submits that the requesting state disclosed all pertinent information to the Minister of Justice and to the judge who issued the provisional arrest warrant.

Background

[3] There is no dispute in respect to much of the factual background, and thus I have replicated some of the applicant's and respondent's written submissions in respect to this background. Regrettably, it is quite lengthy, but in my view necessary in order to appreciate the position of the parties and the basis for my ultimate conclusions.

[4] The applicant was born in Nigeria, but became a British citizen in 2004. In 2000, he commenced employment with Cisco Systems Inc. in London, England, in the field of advanced engineering and technical services. In 2003, he was transferred to California. The United States immigration authorities granted him an L-1 visa, which is available to persons who will be employed in the United States in a managerial, executive, or specialized knowledge capacity.

[5] In 2005, Mr. Adekeye left Cisco and founded his own company known as Multiven Inc. Given his change in status, he was obliged to seek a different kind of visa, namely an E-2, which is available to nations with whom the United States has entered a treaty. The United States has such a treaty with Britain, but not Nigeria, thus Mr. Adekeye relied on his British citizenship in making this application, which was granted on or about June 3, 2005, expiring May 21, 2007.

[6] Between June 3, 2005, and May 20, 2007, the applicant remained in the United States. In December of 2007, he travelled to Europe and, in accordance with United States requirements, attended at the United States embassy in London to obtain a visa stamp authorizing his return to the United States. A visa stamp was refused. In the result, the applicant was not able to reside and work in the United States. Accordingly, he moved his family to London. The absence of an E-2 treaty visa did not preclude him from making short-term trips to the United States for personal or business purposes, provided the United States granted him travel visas for such entries or he was given a "waiver".

[7] On December 23, 2007, he went to San Francisco where he was granted entry to the United States as a temporary visitor under the visa waiver program. His stay in the United States was limited to 90 days. Given his need to be in the United States to ensure his business succeeded, he employed immigration counsel to seek a work visa known as a H-1B for "persons in specialized occupations".

[8] In March of 2008, he left the United States for Vancouver, British Columbia, but returned to the United States less than a week later, obtaining entry once again as a visitor under the visa waiver program. He was entitled to remain for another 90 days. Also in March 2008, Multiven Inc. filed an application seeking an H-1B visa for the applicant, filing his British passport in support.

[9] In June of 2008, he returned to London. While there, he supplied further information in support of his application as requested by U.S. authorities. In August he returned to the United States once again as a visitor under the visa waiver program and was admitted for another 90 days.

[10] In September 2008, he was advised that his application for an H-1B work visa had been approved, valid from October 1, 2008, to September 10, 2011. In October of 2008, he went to Vancouver to attend the United States consulate where he intended to complete the formalities for his visa, but was told there were no appointments available for six weeks. He decided he would try to obtain an earlier appointment in Europe, and drove back to the United States border, intending to

return to California. This seems to be the start of a series of misadventures that could only be the subject of a Joseph Heller novel.

[11] When he presented himself at the United States border and advised border officials of events, he was told that he was not admissible as a temporary visitor under the visa waiver program, because he had been approved for an H-1B visa. However, since that had not yet been entered in his passport, he was not eligible for entry under that visa. Exercising his only option, he returned to Vancouver.

[12] Mr. Adekeye arranged for an interview at the United States consulate in Paris for October 20, 2008. At that meeting, he provided his British passport as part of the application process. Five weeks passed without any decision, so he asked for and received his British passport back.

[13] On March 26, 2009, a notice to revoke (I am referring to the visa) was issued. Also effective January 2009, United States visa waiver rules changed such that British citizens could no longer present themselves to U.S. border authorities and seek entry to the country; they now had to either obtain a visa from a United States embassy abroad in advance or obtain a visa waiver in advance through an online application.

[14] On December 1, 2008, Multiven filed an antitrust lawsuit against Cisco in United States Federal Court. The claim related to Cisco's refusal to make "fixes" available to its customers who experience "bugs" in their operating systems unless those customers purchased maintenance contracts from Cisco. This, said Multiven, limited competition against Cisco and wrongly aided Cisco in its monopoly of the market for maintenance of Cisco infrastructure equipment. According to the applicant, the claim had potential for a considerable award of damages.

[15] Cisco filed a countersuit on November 20, 2009, naming Multiven, another company known as Pingsta, and the applicant personally. This claim alleged that the defendant by counterclaim had improperly accessed Cisco's secure computer

network on more than 90 occasions. The value of this claim was stated by Cisco to be "over $14,000".

[16] In the summer of 2009, Cisco made a complaint to authorities in California that the alleged intercepts amounted to "theft" of trade secrets. This was investigated by the United States Secret Service, an organization created for the purpose. *inter alia*, of "preventing, detecting, investigating, and mitigating the effects of electronic and financial crimes".

[17] The investigation was completed between mid-April and mid-May 2010 when the Secret Service concluded that the complaint had merit and they intended to bring criminal charges through the United States Attorney's office. On May 19, 2010, a criminal complaint was filed charging Mr. Adekeye with 97 counts of intentionally accessing a protected computer system without authorization, contrary to U.S. law. That same day, a United States District Court issued an arrest warrant for Mr. Adekeye.

[18] There does not seem to be any dispute that this criminal complaint "mirrors" the counterclaim brought by Cisco in the antitrust suit. The applicant submits that this was an improper use of the criminal process such that in the Canadian context it would be dismissed as an abuse of the criminal process.

[19] The parties in the antitrust action arranged for mediation in the United States, which was scheduled for April 23, 2009. Mr. Adekeye was then living in London. He applied online pursuant to the new regulations for a visa waiver, but this was denied. In the result, mediation occurred through video conferencing. Nothing came of the mediation.

[20] The applicant's request for a visa continued its tortured path. In April of 2009, his immigration counsel sent U.S. authorities a nine-page letter answering queries they had posed. In June of 2009, immigration authorities attended Multiven's California offices which they toured and where they spoke with an executive, Mr. Matt Goldberg. Based upon that attendance, in July of 2009, they revoked

Mr. Adekeye's H-1B work visa. In August, Mr. Adekeye's immigration counsel sought a review of that revocation, but to date no decision has been rendered. In the result, Mr. Adekeye has not entered the United States since his refused entry in October 2008.

[21] In November of 2009, Multiven established an office in Zurich, Switzerland, where the applicant relocated his family from London and where the family continues to reside.

[22] In December 2009, Cisco sought to depose both Mr. Adekeye and his wife in San Francisco. Mr. Adekeye applied at the United States embassy in Bern, Switzerland, for permission to enter the United States for that purpose, but entry was denied. Cisco's counsel was informed of this and informed by the applicant's counsel that any attempt by Mr. Adekeye to enter the United States without proper authorization could prejudice his ongoing pursuit of a visa. Notwithstanding this entirely reasonable explanation for his inability to attend a U.S. deposition, Cisco had the unmitigated gall to commence contempt proceedings for the applicant's "failure" to attend a U.S. deposition. It was, of course, unsuccessful, but it speaks volumes for Cisco's duplicity.

[23] The frustration level suffered by the applicant over his inability to obtain a visa was so great that he wrote to United States President Barack Obama requesting his intervention. Nothing appears to have come from that request.

[24] Considerable efforts were made by all parties to schedule a location for the depositions, and eventually it was agreed that Vancouver was the best option. An order to that effect was made by U.S. Magistrate Lloyd. On April 13, 2010, U.S. District Judge James Ware directed that a Mr. George C. Fisher, a California attorney, I believe, be appointed as special master for the Vancouver deposition, which he directed be held between May 18 and 21. Arrangements were made to hold the deposition at the Wedgewood Hotel in Vancouver on May 18, 19, and 20.

[25] On May 19, the United States criminal complaint was filed and a warrant issued for Mr. Adekeye's arrest. Authorities in the United States were made aware of Mr. Adekeye's presence at the Vancouver deposition and that he would in all likelihood leave for Switzerland at the conclusion of that deposition. Accordingly, and pursuant to the Treaty on Extradition between the Government of Canada and the Government of the United States of America, the United States made a "provisional request" for Mr. Adekeye's arrest in Canada. There is no issue before me about the formality of this process.

[26] A Corporal Deanna Draffin of the RCMP provided an affidavit setting out information respecting the applicant, the basis for the criminal complaint, and her belief that he would be leaving Canada imminently. Based upon that material, Mr. Justice Leask issued a "provisional warrant".

[27] Shortly after 5:00 p.m. on May 20, Mr. Adekeye was arrested during the course of his deposition at the Wedgewood Hotel. I viewed a video clip of the arrest, which I am bound to say was shocking. The most charitable characterization I can place on it was that Corporal Draffin was not aware that she was interrupting a legal proceeding. I heard her announce to all present at the deposition that she was going to have to "interrupt this meeting". Her actions could be compared to entering a courtroom and arresting a person during the course of his or her testimony. It is simply not done in a civilized jurisdiction that is bound by the rule of law.

[28] Some issue is taken as to whether the deposition authorized in the United States could be conducted in Canada without Canadian permission. I do not know the answer to that query, nor is it essential to my conclusions.

[29] The applicant was taken through the hotel lobby and placed in a police van, then taken to police cells. Clearly it was a humiliating experience and one that has caused him much anxiety. His counsel contends that this outrageous procedure forms part of her submissions in respect to the abuse of process argument.

[30] Several delays occurred, mostly at the request of the applicant's counsel who sought additional information and, of course, time to consult and determine strategy, but eventually on June 15, a bail hearing was held before Silverman J. The Attorney General for Canada initially opposed Mr. Adekeye's release on bail. Documentation was filed in support of its claim that he was a serious flight risk. However, during the bail hearing, the Attorney General altered this position to one requiring strict conditions.

[31] Silverman J. granted bail with considerable restrictions on the applicant's liberty. Apart from one court-sanctioned trip to Toronto, Mr. Adekeye has been unable to leave the Vancouver area since May of 2010.

[32] Two aspects have some bearing upon the applicant's position:

(1) On July 21, 2010, settlement was reached in the antitrust claim. Although it does not appear that Multiven received any monies from this settlement, it is not disputed that the terms of the settlement permitted it to compete with Cisco (and no doubt others) in resolving "bug fixes" in Cisco software. The requesting state does not dispute the applicant's claim that this was a "win" for his company.

(2) The tortured historical record of the applicant's attempts to ensure that he was always in compliance with United States immigration laws and the many court proceedings in respect of the antitrust suit were readily available via Internet searches or through government channels, such that the requesting state should have had a complete and accurate picture of events. It either chose to ignore these sources or, at worst, had the information but decided to put a sinister spin on those events to cast the applicant in the worst possible light.

[33] Mr. Adekeye has no criminal record. He has a degree in civil engineering and appears to be highly successful in his chosen field. He has repeatedly tried to ensure his lawful entry to the United States and has declined to utilize any process that might jeopardize this objective.

[34] Insofar as the criminal complaint is concerned, it seems curious that authorities would allege 97 separate counts with a possibility of a five-year prison term for each, when one count alleging the date commenced and the date ended seems more logical and reasonable. Thus, instead of facing a possible 485 years in prison, the applicant would be facing a possible five years. That strikes me as a more proportional approach, assuming a conviction could be obtained. The applicant vigorously denies the charges.

[35] I am also somewhat concerned over the loss claimed by Cisco. They allege a loss of "over $14,000". I do not know what magic there is in a $14,000 figure. Does this mean a loss of $15,000 or one million dollars? Clearly Cisco now accepts it is owed nothing, given the settlement. Thus, it would not seem to matter what figure Cisco gave U.S. authorities, other than to demonstrate the trivial monetary loss claimed. Cisco is on record as agreeing it is now owed nothing. How then can the criminal complaint be proven if the "victim" says it lost nothing? I appreciate that at the time of the issuance of criminal proceedings, the civil proceedings had not been resolved, but resolution did occur within a few months, which suggests that the parties to the civil proceedings must have been in active negotiations to resolve matters.

[36] I accept that it is a reasonable inference, given the conduct of Cisco representatives, that it prevailed upon the United States Justice Department to launch criminal proceedings in an effort to derail the applicant's antitrust suit against Cisco. The criminal complaint "mirrors" the civil counterclaim by Cisco.

[37] What is the conduct or misconduct alleged? Fundamental to respect for the criminal law is the notion that issuance of criminal proceedings to effect resolution of civil matters ought not to be countenanced. Such a process encourages unseemly partnerships which, when viewed by a well-informed public, would bring the administration of justice into disrepute. At bar, it would appear Cisco representatives were very much complicit with U.S. justice authorities to utilize the criminal process to put as much pressure on Mr. Adekeye as they possibly could.

[38] United States lawyers for Cisco would have known at the time of the Vancouver deposition that an arrest warrant had been issued for Mr. Adekeye and that extradition proceedings were in process. Thus, it would come as no surprise to them when the RCMP entered the deposition hearing room to effect the arrest of Mr. Adekeye. Indeed, lawyers for Cisco were heard and observed on a video shown me to insist on recording that shocking event.

[39] Thus, we have a man who has no criminal record, who has made every possible effort to comply with United States immigration laws and procedures, but who dared to take on a multinational giant, rewarded with criminal charges that have been so grotesquely inflated as to make the average, well-informed member of the public blanche at the audacity of it all.

[40] What is even more astounding is that United States immigration authorities refused the applicant's entry to the United States, and while they are perfectly entitled to make that decision, assuming they have reasonable grounds for doing so, it is very odd that they would not permit his entry for the sole purpose of effecting his arrest. One has to ask why would United States authorities go to the time, expense, and trouble of relying upon extradition between states to effect the return of someone who has tried his best to enter the country? There was no need at all to rely upon the extradition treaties. The applicant could simply have been given permission to enter the United States and he would have done so.

[41] The respondent contends that this could be viewed as luring Mr. Adekeye to the United States merely to effect his arrest. I do not view the act of permitting someone who wants to enter the United States as "luring". It is simply an effective way to bring the person within United States jurisdiction. The person wants to enter the United States and the United States wants to arrest him. It seems to me that resorting to the extradition process to bring the applicant before United States courts, and which involved innuendo, half truths, and complete falsehoods, is the more deplorable course.

[42] I turn now to the basis upon which the provisional arrest warrant was issued. An ex parte application for a provisional arrest warrant is governed by s. 13 of the *Extradition Act*, S.C. 1999, c. 18. It reads:

> (1) A judge may, on ex parte application of the Attorney General, issue a warrant for the provisional arrest of a person, if satisfied that there are reasonable grounds to believe that
>
> > (a) it is necessary in the public interest to arrest the person, including to prevent the person from escaping or committing an offence . . .

[43] The applicant concedes that the provisions of 13(b) and (c) would have been established to the satisfaction of the issuing judge.

[44] There was one affidavit before the issuing judge. Corporal Draffin of the RCMP supplied this affidavit, which simply incorporated the information given her by the United States authorities. The affidavit made no mention of the fact that United States immigration authorities had refused the applicant entry to the United States. No mention was made that the applicant had no criminal record. No mention was made that the United States Federal Court had ordered a deposition in Vancouver, presided over by a "special master" at which six or more United States lawyers would be present. No mention was made that the criminal complaint "mirrored" a counterclaim brought by Cisco in the main action in which the applicant was seeking large damages in an antitrust suit.

[45] Sinister inferences were suggested, leading to an inference that the applicant would be a flight risk. The affidavit stated that the applicant "is a Nigerian citizen who claims to also have citizenship from the United Kingdom", and that he possibly had British citizenship, and that he was in Canada on a Nigerian passport. The latter reference invited an inference that he might flee to Nigeria, a country from which extradition was highly unlikely. In fact, U.S. authorities well knew and had a duty to disclose to the issuing judge that the applicant was a citizen of the United Kingdom and possessed a British passport, on which passport he had entered Canada. They also knew and had a duty to disclose that he had been a resident of England, but

was currently residing with his wife and child in Switzerland, and that he had travelled from Switzerland to Canada for purposes of the deposition.

[46] I agree with the applicant that had the issuing judge known all of these facts, he would not have concluded that "it was necessary in the public interest to arrest the person, including to prevent the person from escaping or committing an offence."

[47] The duty to make full and frank disclosure in an ex parte application is well known: see *R. v. Araujo*, [2000] 2 S.C.R. 992. Had the issuing judge been informed of all the facts and particularly that the plan was to arrest the applicant in the midst of "court proceedings", clearly he would not have authorized its issuance.

[48] Consequent upon his arrest, the applicant sought bail which was initially opposed. Various documents were filed at the bail hearing, including a letter from Richard C. Cheng, Assistant United States Attorney, dated May 21, 2010. The sum of the material presented to the judge in respect of bail was as misleading as the previous material on which the arrest warrant was issued. Mr. Cheng made the following allegations:

(1)

> Adekeye is a citizen of Nigeria. He has no legal status in the United States or in Canada. He purports to have traveled internationally with a British passport and supposedly makes his home in Zurich, Switzerland.

In fact, Mr. Cheng knew or ought to have known that Mr. Adekeye had British citizenship, did make his home in Zurich, and had tried his level best to obtain legal status to enter the United States but had been refused.

(2)

> Using his Nigerian passport, Adekeye received an "E visa" to enter the United States.

In fact, he applied for a visa, but not an E visa, and applied using his British passport.

(3)

> The United States denied each and every one of Adekeye's applications for visas since 2007, because he failed to substantiate that he or his business produced any trade at all, much less any trade between the United States and his native Nigeria.

This allegation is simply not true.

(4) Mr. Cheng makes repeated reference to Mr. Adekeye's "purporting himself" to be a citizen of the United Kingdom, when he knew full well that he was a citizen. He had actually lodged his British passport with the United States embassy in Paris for five weeks while they investigated his request for a visa.

(5) Mr. Cheng alleges Adekeye repeatedly entered the United States unlawfully, citing United States immigration law and the applicant's immigration history, both of which were factually wrong.

(6)

> Adekeye previously insisted that the deposition be taken in Vancouver because he refused to return to the United States for reasons supposedly related to the expiration of his visa.

Again, this is simply not true. Adekeye desperately wanted to enter the United States. It was the United States that denied him entry.

(7) Mr. Cheng went on at some length to suggest that the United States did not know where he lived in Switzerland and he was likely to flee to Nigeria. The United States had his Swiss address, and there was absolutely no evidence to suggest he intended to return to Nigeria. He had an ex-wife and child living in England, and his current wife and child in Switzerland. Considerable discussions had taken place earlier about holding the deposition in Switzerland, and his address there was well known to Cisco.

(8)

> . . . Adekeye has every incentive to flee again as he has done in the past.

The applicant has never fled from any jurisdiction. This statement was completely untrue.

[49] Mr. Cheng's letter is totally misleading, and had the judge involved in the bail application been made aware of the true facts, he would probably have released Mr. Adekeye on very lenient terms. However, the point of assessing the material on the bail application is to demonstrate the continued half truths, untruths, false innuendo, and generally misleading information that commenced with the application for his arrest.

[50] I accept, as well, that not only was the issuing judge and the bail judge misled, but Canada as well. I accept the applicant's assertion that "the misconduct of the requesting state was grossly offensive to notions of fair play, principles of fundamental justice, and notions of comity that underlie the extradition process."

[51] Had Canada been informed of the true facts, it is, in my respectful view, unlikely that it would have acceded to the emergency provisional warrant request. It seems to me that had Canada known of the applicant's repeated request to enter the United States and its repeated refusal to grant same, Canada would have asked why it should be involved in an expensive, lengthy procedure that was entirely of the requesting state's making.

[52] Also, the very minor nature of the complaint, e.g., the loss of $14,000 (it is variously described as a $14,000 loss or over $14,000, but seems to be accepted by all that the claim is for $14,000) may have left Canada wondering why it should involve itself in such a minor matter, particularly when there was a considerable body of evidence to suggest it was a ploy to effect resolution of a civil matter.

[53] This conclusion is not intended to operate as a review of the Minister's decision, but per *Froom v. Ministry of Justice*, 2004 FCA 352, to assess the reasonableness/truthfulness of the material upon which the authorization was issued, and to provide relief to an applicant if that material is wanting.

[54] Counsel for the applicant made the following statement, which I adopt:

> The principle of comity upon which our extradition laws are based has, as its heart, the notion of courtesy that a nation that extends courtesy to another nation will, in the spirit of reciprocity, be similarly treated in a courteous manner by that nation. An essential aspect of the principle of comity is that one nation not act in a manner that demeans the jurisdiction, laws or courts of another.

[55] The respondent contends that the conduct to which I have referred cannot collectively be considered an abusive pattern of misconduct, nor can it be deemed coercive, bad faith, collusion, illegal conduct or gross negligence. The respondent concedes that mistakes were made in documentation provided to the court, but these "errors" could not affect the ultimate issue of bad faith. The respondent also contends that the arrest of the applicant was conducted in a reasonable manner.

[56] For the reasons given, I am unable to agree with this submission.

[57] It remains to consider whether the conduct of the responding state entitles the applicant to the relief which he seeks.

[58] In *R. v. O'Connor*, [1995] 4 S.C.R. 411, L'Heureux-Dubé J., at paragraph 68, stated:

> I also recognize that, despite these strong parallels, the common law and *Charter* analyses have often been kept separate because of the differing onus of proof upon the accused under the two regimes. In *R. v. Keyowski* (1986), 28 C.C.C. (3d) 553 (Sask. C.A.), at pp. 561-62, for instance, it was noted that while the burden of proof under the *Charter* was the balance of probabilities, the burden under the common law was the "clearest of cases". It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the "clearest of cases".

At paragraph 73, she stated:

> As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of

> the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged. For instance, where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b) of the *Charter*, to which the jurisprudence of this Court has now established fairly clear guidelines ([see] *Morin*). Alternatively, the circumstances may indicate an infringement of the accused's right to a fair trial, embodied in ss. 7 and 11(d) of the *Charter*. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[59] Thus, the remedy sought can only be granted in "the clearest of cases" where the actions and activities of the prosecution collectively amount to "unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."

[60] In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, a unanimous court stated at paragraph 90:

> If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>
> > (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
> >
> > (2) no other remedy is reasonably capable of removing that prejudice.

[61] In *R. v. Zarinchang*, 2010 ONCA 286, the Ontario Court of Appeal referred to the above criteria and added a third when it stated:

> In cases in either of the above categories where there remains some uncertainty as to whether the abuse is sufficiently serious to create the prejudice to warrant a stay, there is a third criterion that the court may

> consider – the balancing of the interests in granting a stay against society's interest in having a trial on the merits.
>
> Where the residual category is engaged, a court will generally find it necessary to perform the balancing exercise referred to in the third criterion. When a stay is sought for a case on the basis of the residual category, there will not be a concern about continuing prejudice to the applicant by proceeding with the prosecution. Rather, the concern is for the integrity of the justice system.

At paragraph 60 in *Zarinchang*, the court went on to say:

> However, the "residual category" is not an opened-ended means for courts to address ongoing systemic problems. In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. It seems to us that a court will be required to look at the particulars of the case, the circumstances of the accused, the nature of the charges he or she faces, the interest of the victim and the broader interest of the community in having the particular charges disposed of on the merits.

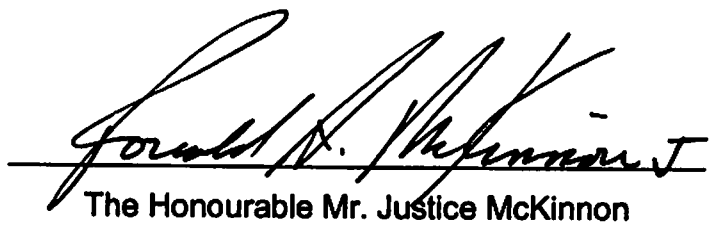
[62] In *Tobiass*, the court stated that it must appear that the carrying forward of the prosecution will offend society's sense of justice. The court then cited L'Heureux-Dubé in *R. v. Conway*, [1989] 1 S.C.R. 1659:

> . . . where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[63] At bar, the criminal complaint mirrors the civil complaint, and the only reasonable inference I can draw from the facts is that the criminal process was used to pressure (unsuccessfully) the applicant into abandoning his antitrust suit against Cisco. The requesting state could have easily granted the applicant a visa to enter the United States and authorities could have arrested him there. Invocation of extradition proceedings was unnecessary. In invoking the extradition process, the requesting state painted a sinister picture of the applicant which was completely unjustified. Any well-informed person acquainted with the truth would conclude that the collective result of the mistreatment of Mr. Adekeye offended fundamental

notions of justice damaging to the integrity of the administration of justice: see paragraph 60, *R. v. Zarinchang*, above.

[64] In my respectful view, the prejudice caused by the abuse will be perpetuated if the extradition process continues. No other remedy but a stay of proceedings is capable of removing the prejudice. The applicant is entitled to the relief sought; namely a stay of proceedings.



The Honourable Mr. Justice McKinnon