

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-008316

UNDER the Habeas Corpus Act 2001
IN THE MATTER OF an application for a Writ of Habeas Corpus
BETWEEN MARTIN JAMES MAILLEY
Applicant
AND THE GENERAL MANAGER,
AUCKLAND CENTRAL REMAND
PRISON
Defendant

Hearing: 17 December 2008

Appearances: T Ellis, A Shaw and E Frykberg for Applicant
N Walker for Defendant

Judgment: 17 December 2008

ORAL JUDGMENT OF JOHN HANSEN J

Solicitors/Counsel:

Marshall Bird and Curtis, PO Box 105 045, Auckland
Crown Solicitor, PO Box 2213, Auckland

T Ellis, PO Box 24347, Wellington

[1] The applicant for this writ of habeas corpus, presently known as Martin James Mailley, faces a number of offences of a fraudulent nature in Queensland. On 5 February 2007 a Detective Godfrey swore an affidavit seeking his extradition. Some considerable time later following a further affidavit of Detective Godfrey, an *ex parte* application for endorsement of warrant was filed on 10 March 2008 in the North Shore District Court. It was supported by a memorandum of the applicant. Ultimately, the applicant was brought before the Court and has been detained in custody since July of this year.

[2] There have been applications for bail and appeals and certainly in relation to those appeals, they have been adjourned at the request of Mr Mailley's counsel who, I stress, is not counsel now appearing.

[3] Ultimately, however, this application for a writ was filed on 12 December. It has been heard over the greater portion of today. In the course of submissions, Mr Ellis, in his careful way, has mounted a thorough and sustained attack on the extradition process. There are certainly matters that give strong grounds to think that this was an extremely flawed process. However, I do not consider I need to go into those in detail today for reasons that will become apparent.

[4] On behalf of the defendant, who should be properly named as the Manager of the Auckland Central Remand Prison, it has been argued that a great number of those matters are not capable of proper summary and fair disposition and in terms of the Court of Appeal decision in *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 should await disposal on the normal way by judicial review or at the substantive extradition proceeding.

[5] Of more moment, however, in my view, for present purposes is the warrant for detention that has been issued on a continuing basis since July. The final one with which we are concerned today is dated 10 December 2008 and was signed by his Honour Judge Wilson QC. Counsel for the defendant responsibly accepts that there are errors on the face of this document. However, she mounts the substantive

argument that they are errors of an administrative or minor kind that in no way attack the validity of the order to detain Mr Mailley in custody.

[6] It is perhaps appropriate at this juncture to detail those continuing defects. It is apparent from the affidavit of the Deputy Registrar of the North Shore Court that when the first of these orders was made she was unaware of the appropriate form to use. She sought precedent documents from other registries and used those to create a document which she says she believed reflected the Judge's order. The errors can be found in the intituling where there are references to ss 26, 28 and 46 of the Extradition Act which it is accepted are irrelevant for present purposes. The body of the document then records that Australia, as opposed to the Commonwealth of Australia, made a request under the Extradition Act on the 1 February 2007. That date is incorrect. It is explained that the Deputy Registrar must have picked it up from the affidavit of Detective Mark Palma. However, the Australian affidavit is in fact dated 5 February 2007, not 1 February.

[7] The document then purports to state that the request was made under s 18 of the Extradition Act 1999. That is incorrect; it was not. It then records that on 14 March 2008 a provisional warrant was issued by Judge Morris. Again a mistake.

[8] Ms Walker has argued that the first part of the warrant may be ignored and the operative part in the second part of the document is correct. She also submits that any errors are minor and that by application of the provisions of the Summary Proceedings Act, the Extradition Act, the Summary Proceeding Rules and the Extradition Regulations, there is no basis to hold the warrant invalid. In particular, she refers to s 204 of the Summary Proceedings Act which applies to extradition cases pursuant to s 43 of the Extradition Act. She refers to authorities of *Difarn v The Superintendent of Mount Eden Prison* HC AK M1062/92 8 July 1992, Robertson J, and *Inglin v General Manager of the Auckland Central Remand Prison* HC AK 9 June 2001, Nicholson J, as authority for the proposition that a warrant will not be held invalid where any defect, irregularity or omission or want of form does not create a miscarriage of justice. She further relies on a decision of Blanchard J in *R v Fisher* T236/95 4 October 1995 and to the same effect the decision of the Court of Appeal in *Henderson v The Superintendent of Manawatu Prison* CA27/05 19 May

2005. She submitted what is important is the Judges' order and they are the basis for the lawfulness of the order made.

[9] The following passage relied on comes from Blanchard J's decision in *Fisher*. He stated:

It appears to me that it cannot be correct that after an oral order for remand in custody has been made any detention is unlawful if a warrant of commitment is not subsequently signed. A warrant is needed for administrative purposes and, if an issue is raised, for proof of the existence of the Court order. But, because a period of time will always elapse between the making of the order and the drawing up and signing of the warrant, it cannot have been intended that s.47(1) should make the warrant a prerequisite to the lawful holding of the defendant in custody as ordered by the Court.

[10] The difficulty in this case is that there is absolutely no evidence of the orders that were made in Court by these various District Court Judges and it appears that at least one was made in Chambers back-dating the order, although I accept the proper submission that we are concerned with the 10 December one. There is no way of knowing what order Judge Wilson made in Court. We can only act on the face of the warrant. The face of the warrant, in my view, is seriously flawed. This man has been held in custody since 2 July pursuant to such a flawed order and that in itself, in my view, creates a significant miscarriage of justice.

[11] I would also add that some serious consideration needs to be given to the flaws that are apartment to date in the extradition proceedings because they may be so fatal the process needs to start again, but that is for others to determine. However, I am quite satisfied on the basis of the order which is flawed, in the absence of any evidence of what orders were made in Court, that this applicant is entitled to the writ he seeks.

[12] Accordingly, there will be a writ of habeas corpus addressed to the defendant as The Manager, Auckland Central Remand Prison, Auckland, to release Mr Martin James Mailley from prison.

[13] It is the responsibility of judges to ensure that the warrant signed properly reflects the orders they make in Court and the lawful basis for such orders.

[14] Memorandum as to costs to be filed by the Crown by **4:00 pm on 18 December 2008.**

.....
John Hansen J

ADDENDUM

[15] I would just expand briefly on paras [10] and [13] above. In the absence of any other material, other than the warrant, it is impossible to ascertain under what statutory provisions the District Court Judges purported to detain the applicant.