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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY **CR 63 OF 2016**

IN THE MATTER OF: **The Extradition Act**

AND:

IN THE MATTER OF: **A request of the United States of America for extradition of Antone Thomas Pedras, aka Chris Pedras, aka Christopher A.T Pedras to the United States of America for trial.**

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: **Mr. L. Niu SC for the applicant**
Mr. 'A. Kefu SC for the Crown

Hearing: **26 May 2016**
Ruling: **7 June 2016**

RULING

recd 07/06/16

IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY **CR 63 OF 2016**

The application

1. The United States of America considers that Mr. Antone Thomas Pedras defrauded investors of more than USD$5million. Mr. Pedras is presently living in Tonga. The United States has sought his extradition from Tonga under the Extradition Act (Cap 7.24) (the Act) so that he can face trial on 11 counts of wire fraud, which is an offence against Title 18, United States Code, section 1343.

2. On 19 April 2016 the Magistrates' Court made an order that Mr. Pedras be committed to await his return to the United States of America to stand trial on those counts.

3. Mr. Pedras seeks to review the Magistrates' Court's decision by application for *habeus corpus* under section 10 of the Act. He applies to have the order of the Magistrates' Court quashed and that he be discharged.

The facts

4. It is unnecessary to provide anything other than a very brief summary of what is alleged against Mr. Pedras.

5. The evidence before the Court is that Mr. Pedras devised a fraudulent scheme by which through false representations made to investors he caused them to invest in what was known as the Maxum Gold Trade Program and the FMP Renal Program.

6. The false representations made in respect of the Maxum Gold Trade Program included that Maxum had been in existence for over 23 years and had over 6,000 client's, that returns to investors ranged from 4 to 8 per cent per month, that each investor's investment would be placed in the investor's own escrow account at the ANZ Bank where only the investor could access the money, that the Maxum Gold Trade Program was audited annually and that Maxum traded over USD$100million per month. It is also alleged that investor's account statements on the Maxum website showed investment balances that were false. In respect of the FMP Renal Program it is said that it was falsely represented that for every USD$100,000 invested the investor would gain USD$28,000 immediately and earn between 2 and 5 per cent quarterly.

7. It is said that Mr. Pedras intended and did use the investors' money to pay other investors, to pay sales commissions and for his own personal use and that in pursuance of his fraudulent scheme Mr. Pedras raised USD$5.6million from investors of which more than

USD$2.4million was paid as investor returns, more than USD$1.2million was paid to sales agents and Mr. Pedras misappropriated at least USD$1.99million for his personal use.

8. The eleven counts of wire fraud relate specifically to wire transfers of money into or from Maxum's bank account on various dates between December 2011 and December 2012 which it is said were for the purpose of executing the fraudulent scheme to defraud investors of their money.

The arguments advanced by Mr. Pedras

9. Mr. Pedras advances the same arguments in this Court as were before the Magistrates' Court. His principal and, in my view, only substantial argument is that the offence of wire fraud is not a 'relevant offence' for which his extradition can be sought.

10. More technically he takes objection to the form of the indictment charging him in the United States District Court with the eleven counts of wire fraud. He also argues that there is insufficient evidence that he has violated section 1343 or that he was involved in a fraudulent Ponzi scheme as was alleged in the record of the case.

The Extradition Act

11. It has been held that the Act is a full code as to the matters of extradition both from and to Tonga (*Lavulo v Fifita & Kingdom of Tonga* [1995] Tonga LR 201, 204.).

12. It is not my intention to set out the scheme and provisions of the Extradition Act in full detail. The Act has previously been the subject of analysis by Hampton C.J in *Lavulo*. I intend to set out the passages in the Act which are relevant to the arguments presented to this Court and which are the following.

13. The long title to the Act states that the Act is:

> An act to make provision for the return from the Kingdom of Tonga to other countries of persons accused or convicted of offences in these countries; to regulate the treatment of persons accused or convicted of offences in the Kingdom of Tonga who are returned from such countries; and for purposes connected with the matters aforesaid.

14. Section 3 of the Act relevantly states:

> Subject to the provisions of this Act, a person found in Tonga who is accused of a relevant offence in any other country being a country designated in terms

> of section 4 of this Act .... may be arrested and returned to that country as provided by this Act.

15. There is no dispute that the United States of America is a designated country in terms of section 4.

16. The term 'relevant offence' (refer section 3 of the Act and paragraph 14 above) is defined in section 5 as follows:

> (1) For the purpose of this Act an offence of which a person is accused or has been convicted in a designated country is a relevant offence if the offence however described is punishable both in Tonga and in the designated country concerned by imprisonment for a term of 2 years or more.
>
> (2) An offence that is a relevant offence under subsection (1) shall not cease to be such by reason only that it is purely fiscal in character.

17. Section 6 of the Act imposes general restrictions on the extradition and return of any person under the Act.

18. Section 7 of the Act deals with a request from a designated country to the Prime Minister for extradition and the documents that must accompany such a request, which in this case included a record of the

case under the proviso to section 7(2) of the Act. I set out the content of a record of the case below.

19. Section 7(5) provides that upon receipt of a request the Prime Minister may issue an authority to proceed. This must be done if the extradition request is to proceed further. The Prime Minister may issue an authority to proceed unless it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of the Act. In this case the authority to proceed was issued by the Hon Acting Prime Minister on 21 September 2015 and in this regard I note that the definition of Prime Minister in the Act includes any person who is from time to time performing his function.

20. Sections 7(2), (3) and (4) set out what must be contained in a record of the case. They are detailed provisions as follows:

> (2) There shall be furnished with any request made for the purposes of this section on behalf of any country —
>
> (a) in the case of a person accused of an offence, a warrant for his arrest issued in that country;
>
> (b) in the case of a person unlawfully at large after conviction of an offence, a certificate of the conviction and sentence in that country, and a statement of the amount if any of that sentence

which has been served, together (in each case) with particulars of the person whose return is requested and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant for his arrest under section 8 of this Act:

Provided that if the Order declaring the country concerned to be a designated country in terms of section 4 so provides, the request may be accompanied by a record of the case in respect of the offence concerned containing the particulars and documents referred to in subsection (3), and accompanied by —

(i) an affidavit, sworn statement or affirmation of an officer of the investigating authority of the designated country stating that the record was prepared by him or under his direction and that the evidence referred to therein has been preserved for use in court; and

(ii) a certificate of the Attorney General or the Principal Legal Officer of the Government of the designated country stating that, in his opinion, the record discloses the existence of evidence under the law of the designated country sufficient to justify a prosecution.

(3) A record of the case referred to in the proviso to subsection (2) of this section shall contain —

(a) particulars of the description, identity, nationality and, to the extent available, the whereabouts of the person sought; and

(b) particulars of each offence and conduct in respect of which extradition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the designated country; including a certified copy of any such definition in the written law of that country; and

(c) the original or a certified copy of any warrant or process issued in the designated country against the person whom it seeks to have extradited; and

(d) a recital or summary of the evidence acquired to support the request for extradition of the person sought; and

(e) a certified copy, reproduction or photograph of exhibits or documentary evidence.

(4) Any certification required by subsection (2) may be done by any person in the designated country concerned who is or holds office as the Attorney General or a legal practitioner, notary public, commissioner of oaths or commissioned police officer.

21. Section 8 deals with the arrest of a person for the purposes of committal. A person who is arrested pursuant to a warrant issued under section 8 must be brought before the Magistrates' Court which is a court of committal.

22. The making of a committal order is authorized by section 9(4) as follows:

(4) Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the return of that person or on behalf of that person, that the offence to which the authority relates is a relevant offence and is further satisfied...

(a) where the person is accused of the offence —

(i) that the evidence would be sufficient to warrant that person's trial for that offence if it had been committed within the jurisdiction of the court; or

(ii) that a record of the case has been submitted in terms of the proviso to subsection (2) of section 7; ....

the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his return thereunder; but if the court is not so satisfied or if the committal of that person is so prohibited, the court shall discharge him from custody.

23. Under section 10, where a person is committed to custody to await his return under section 9 of the Act his means of reviewing the order is only by application for *habeus corpus* (*Lavulo* (supra) at page 212). The person committed to custody is not to be returned under the Act until the expiration of the period of 15 days from the day on which the order for his committal was made or, if an application for *habeus*

corpus is made, until proceedings on that application (including any appeal) are disposed of (section 10(2) of the Act).

Dual criminality and the approach to interpretation

24. As will be apparent, no person may be arrested and returned to any country under the Act except where they are accused of, or are unlawfully at large after conviction of, a 'relevant offence'.

25. The definition of relevant offence in section 5 gives effect to a principle of international law known as dual or double criminality, which in broad terms means extradition will not occur except where the conduct in issue is a crime in both the state which is asked to extradite as well as the state which requires extradition (Oppenheim's International Law, 8th Ed (1955), vol 1 p. 701 referred to in *Riley v The Commonwealth of Australia* [1985] 159 C.L.R. 1, 12 per Gibbs C.J, Wilson and Dawson JJ).

26. The rationale for the requirement of dual criminality has been stated in various ways. In E P Aughterson, *Extradition: Australian law and procedure,* Law Book Co, Sydney 1995, 59-60 the learned authors state:

> Broadly, the principle requires that the conduct constituting the extradition offence, either in total or in part, be criminal also by the law of the requested state. Its rationale is that a state should not be required to surrender a person to a foreign state, and allow its criminal process to be used for conduct which it does not itself consider criminal. Shearer also views double criminality as resting in part on the principle of reciprocity, so that "the rule ensures that a state is not required to extradite categories of offenders for which it, in return, would never have occasion to make demand. Bassiouni notes that reciprocity is upheld because it reflects the continued preservation of co-equal sovereignty among nation-states and ensures that the process of a given state will not be used for trivial offences which do not exist in the legal system of the requested state.

27. In *R (Al-Fawwaz) v Governor of Brixton Prison* [2002] 1 AC 556 at [95] Lord Millet said that the principle has dual aims of precluding extradition if the country requesting extradition could not try the defendant or if its jurisdiction is 'exhorbitant' in that it goes beyond the jurisdiction the requested country claims for itself (see also *New Zealand Police v Radhi* [2014] NZCA 327 at [11]).

28. In *Riley* (supra) at page 17 Deane J noted that whilst the precise content of the principle of double criminality remained unsettled:

> Its essential utility is to provide an available safety mechanism whereby a state is not required to surrender up a person, possibly one of its own

> nationals, to be tried and punished for conduct which, according to the standards accepted by those within its boundaries is not deserving of punishment at all.

29. Dual criminality is not a mandatory rule of international law. Different approaches to its application are open and its existence and scope in any case will be governed by the terms of the relevant treaty or domestic legislation under consideration. (Aughterson (supra) at page 60).

30. Decisions of the Courts in other countries in this area inform this Court's inquiry but care must be taken to recognise that invariably they have been concerned to interpret treaties or legislation that is worded differently from the Act.

31. It has been noted that differences in approach are apparent when questions of extradition arise in the context of treaty or statutory interpretation. Domestic legislation on the subject of extradition is part of the penal law and also has a protective function. Penal laws should as a general rule be interpreted in favour of the person whose liberty is threatened. The laws protective function is apparent when one considers the long title of the Act and the restrictions on extradition, particularly under sections 6, 10 and 11.

32. The point is made by Williams, Sharon A, *The Double Criminality Rule and Extradition: A Comparative Analysis* Nova Law Review 15.2 (1991) 581-624 at 588 as follows:

> In conclusion, on this issue of interpretation, it appears that the courts in Canada, the United Kingdom and the United States have in recent times emphasized the cooperative intent of the parties to extradition treaties when called upon to interpret their provisions. It is only where the domestic statute is in question that the courts have a more protective function. When the courts have been required to interpret the extradition legislation.....then the penal aspects have been stressed and where ambiguities have been found they have been construed in favour of the fugitive. In *Regina v Governor of Pentonville ex parte Cheng*, [[1973] App. Cas 931] in the House of Lords, Lord Simon of Glaisdale argued that "the positive powers under the Act [i.e. to extradite] should be given a restrictive construction and the exceptions from those positive powers a liberal construction. Moreover, '[s]ince the common law, as so often, favours the freedom of the individual, the rules enjoining strict construction of a penal statute or of a provision in derogation of liberty....merely reinforce the presumption against change in the common law.

33. In *Government of Canada v Aronson* [1990] 1 A.C. 579, 590 Lord Bridge said in relation to the approach to be taken to the interpretation of the Fugitive Offenders Act 1967:

> But if the language is ambiguous, the narrow construction is to be preferred in a criminal statute as the construction more favourable to the liberty of the subject.

Is section 1343 a relevant offence?

34. The principal question for this Court is whether section 1343 is a relevant offence and this turns upon the meaning of the following words in section 5 of the Act:

> ..an offence of which a person is accused or has been convicted in a designated country is a relevant offence if the offence however described is punishable both in Tonga and in the designated country concerned

35. I was not referred to any relevant case law from overseas and am not aware of any prior decisions of the Courts of the Kingdom that shed any light on this issue.

36. In principle a number of approaches are open. One approach is to require strict correspondence between the elements of an offence under the law of the requesting state, and the elements of an offence under the law of the requested state. A less narrow approach would be to inquire whether the proscribed activity in the requesting state, either in total or in part, amounts to criminal conduct in the

requested state. Another approach, and the one that I perceive the Crown ultimately contended for in this case, would be that double criminality is satisfied if the relevant crimes in both jurisdictions are broadly similar and the totality of the evidence relied upon by the requesting state would, if accepted, prove guilt of a crime according to the laws of the requested state.

37. The relevant part of section 1343 for present purposes reads as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, picture, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years or both...

38. The evidence in the affidavit of Ivy Wang, an Assistant United States Attorney in the United States Attorney's Office for the Central District of California is that in order to convict Mr. Pedras of wire fraud under section 1343 the United States must prove the following elements:

38.1. That Mr. Pedras knowingly participated in, devised or intended to devise, a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations or promises; and

38.2. The statements made or facts omitted as part of the scheme were material – that is that they had a natural tendency to influence, or were capable of influencing, a person to part with money or property; and

38.3. That Mr. Pedras acted with intent to defraud – that is the intent to deceive or cheat; and

38.4. That Mr. Pedras used, or caused to be used wire, radio, or television communication in interstate or foreign commerce to carry out or attempt to carry out an essential part of the scheme.

39. The case for the Crown presented by Mr. Kefu SC was somewhat less elaborate. He submitted that the elements of the offence of wire fraud were as follows:

39.1. That an accused person (in this case Mr. Pedras);

39.2. Devised or is intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises;

39.3. Transmits or causes to be transmitted;

39.4. By means of wire, radio or television communication in interstate or foreign commerce;

39.5. Any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice.

40. The Magistrate held that the offence of wire fraud was a relevant offence because it was 'compatible' with either or both of the offences under sections 162 and 164 of the Criminal Offences Act and that he was "satisfied that the wire fraud counts, charged against the accused, under US law, would stand in Tonga if brought under section 162 or 164."

41. Mr. Kefu expressly disclaimed any reliance upon section 162 Criminal Offences Act. He does rely on section 164 of the Criminal Offences Act which reads as follows:

> Every person who by any false pretence obtains for himself or for any other person any money, valuable security or other thing whatever shall be liable to the same punishment as if he had committed theft.

42. The elements of the offence under section 164 are said by Mr. Kefu to be

42.1. A accused person (Mr. Pedras);

42.2. By making a false pretense;

42.3. Obtains for himself or any other person;

42.4. Any money, valuable security or other thing whatsoever.

43. Mr. Kefu's submitted that wire fraud is a relevant offence because it is "the same or similar to the offence of obtaining by false pretences under section 164 of the Criminal Offences Act." I do not accept this submission.

44. It is immediately apparent that the constituent elements of the two offences are not the same. It is the case that the offences share a common aspect in that both involve the making of a false pretence but I do not regard them as similar (or as the Magistrate said 'compatible') for that reason alone.

45. The requirements in section 1343 that the accused devised or is intending to devise any scheme or artifice to defraud and makes a transmission by wire (which I shall use as shorthand for wire, radio or television communication) are absent from section 164. Furthermore, the requirement in section 164 that the accused obtains for himself or another any money, valuable security or other thing is not present in section 1343, where the offence is completed upon the making of the transmission by wire regardless of whether the fraudulent scheme or artifice profits the accused.

46. However, as noted above I understood Mr. Kefu also to be arguing for the Crown that it is enough if the totality of the evidence relied upon by the United States Government in the record of the case would if accepted prove guilt of a corresponding offence here in Tonga. He submitted that the conduct of Mr. Pedras as set out in the record of the case would, if such conduct had occurred within Tonga, prove his guilt of an offence under section 164.

47. For Mr. Pedras Mr. Niu SC argued that wire fraud is not a relevant offence for two reasons. First he submitted that the essential feature of the offence of wire fraud is the transmission or causing to be transmitted by wire of some writing, sign, signals, picture or sounds for the purpose of executing such scheme or artifice. He said that there is no such requirement in section 164 of the Criminal Offences Act or in any other offence in Tonga. Secondly, he pointed out that the necessary requirement in section 164, that it be proved that the accused obtains for himself or any other person some money, valuable security or other thing, is not a requirement of the offence of wire fraud.

48. There is in my view some justification for adopting a narrow interpretation of section 5 of the Act so as to require a strict correspondence between the elements of the offences in the requesting and requested countries. As I have noted the Act is part of the penal law of the Kingdom and in the event of ambiguity should be interpreted in a manner favourable to the liberty of an accused person. The approach most beneficial to an accused person would place primary emphasis upon the legal elements of the offence he is alleged to have committed in the requesting state and an offence recognised by the law of the requested state.

49. Looking at section 5 itself, the words 'the offence' mean and refer to the offence charged in the requesting state. To be a relevant offence it is necessary that that offence (however it may be described) is punishable in Tonga. This too suggests that a narrow interpretation is appropriate. In other countries, for instance under section 5 of the Extradition Act (NZ), the law requires the Court to have regard to the totality of the acts alleged to have been committed by the person whom it is sought to extradite which is suggestive of a broader approach to interpretation, but there is nothing of that sort in the Act.

50. *Regina v Brixton Prison ex parte Gardner* [1968] 2 Q.B. 2 was a case where New Zealand sought to extradite Gardner on charges of false pretences involving false pretenses as to future events. The Court was concerned with interpreting section 3(1) of the Fugitive Offenders Act 1967 which provided that an offence was a relevant offence if, *inter alia*, the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom. Although obtaining property by false pretences was an offence in the United Kingdom it was not an offence to make a false pretence as to a future event and accordingly Gardner was not returned to New Zealand. Edmund Davies L.J said at page 416:

> "The offence" [*in section 3 (1) of the Fugitive Offenders Act 1967*] there referred to must mean the offence charged in New Zealand, and "the act or omission" refers to the manner or means whereby the offence so charged in New Zealand was committed. This involves examination of the particulars of the offence charged in New Zealand, and in the present case that examination necessitates consideration of the New Zealand warrants.

51. However, in Commonwealth jurisdictions the Courts have tended not to focus on the technical elements of an offence but on the conduct necessary to constitute the offence in the requesting state and its correspondence with some offence recognised by the law of the requested state. In *Riley* (supra) Deane J said at page 17-18:

> The preferable view – and that which commands general acceptance – rejects the need for precise correspondence between labels or between the constituent elements of identified legal offences under the criminal law of the requesting and requested states and defines the principle of double criminality in terms of substance rather than technical form. On this view the requirement of double criminality is satisfied if the acts in respect of which extradition is sought are criminal under both systems even if the relevant offences have different names and elements....This view places primary emphasis upon the acts constituting the offence alleged against the accused in the warrant rather than upon general theoretical correspondence between the legal elements of the offence which he is alleged to have committed against the law of the requesting state and some offence recognized by the law of the requested state.

52. Importantly in the present context Deane J rejected the notion that the requirement of double criminality would be satisfied simply because the acts alleged in the extradition request would involve the commission of a criminal offence in both the requesting and the requested states. He said at page 18:

> The suggestion would, however unduly discount the content of the requirement of double criminality if it would permit extradition in a case where conviction under the law of the requesting state was possible upon proof of some only of the acts alleged in the warrant. The principle of double criminality is satisfied, where, and only where, any alleged offence against the law of the requesting state in respect of which extradition is sought would necessarily involve a criminal offence against the law of the requested state if the acts constituting it had been done in that state.

53. The learned Judge concluded at page 20:

> The result is that extradition pursuant to the relevant provisions of the Act is precluded except in a case where the acts or omissions alleged to constitute each extradition crime necessarily involve a criminal offence against the law of this country.

54. Consistent with this approach in *State (Furlong) v Kelly* [1971] IR 132, 141 O'Dalaigh C.J in the Irish Supreme Court stated:

> The basic inquiry is to discover whether the several ingredients which constitute the offence specified in the warrant, or one or more of such ingredients, constitute an offence under the law of the [requested state]...[if that] offence consists of, say, four essential elements a + b + c + d, then a corresponding Irish offence exists only if it contains either precisely these same four elements or a lesser number thereof. If the only Irish offence that can be pointed to has an additional essential ingredient (that is to say, if the Irish offence may be defined as a + b + c + d + e) then there is no corresponding Irish offence ... for the simple reason that, *ex hypothesi*, conduct a + b + c + d falls short of being an offence under Irish law or, in plainer words, is not an offence, It is fundamental to extradition that no one shall be extradited for acts or omissions (the offence alleged in the warrant) which, if repeated within the state, would offend against our law.

55. To similar effect in *Hanlon v Fleming* [1981] IR 489, 499 the Supreme Court of Ireland followed *Furlong* stating that if "the ingredients enumerated in the warrant were necessarily less [*sic*] in number than those required for an offence under the law of this state, there would be an absence of the correspondence of offences envisaged". (see also *Wyatt v McLoughlin* [1974] IR 378).

56. In *Government of Canada v Aronson* (supra) the Canadian Government requested extradition in respect of dishonesty offences said to have been committed in Canada. The appeal turned on the construction to be placed on section 3(1)(c) of the Fugitive Offenders

Act 1967, to which I referred earlier in relation to the case of *Gardner*. The accused had been committed by a Magistrate but that decision had been overturned in the Divisional Court of the Queen's Bench Division which held that in deciding whether an offence was a relevant offence the Magistrate was not entitled to review the evidence adduced by the requesting state in order to decide whether the accused's conduct would found criminal charges in the United Kingdom. As the definitions of the Canadian offences in question lacked ingredients that the law of the United Kingdom required to be proved the Magistrate's decision was quashed. By a majority that decision was upheld in the House of Lords.

57. Lord Bridge explained the issue in this way (at page 589):

> The issue arises when the Commonwealth offence may be established by particularising and proving ingredients A, B and C, but the nearest corresponding United Kingdom offence requires that the prosecution prove ingredients A, B, C and D. It is submitted for the Government of Canada and the Governor of Her Majesty's Prison of Pentonville ('the appellants') that if, in a particular case, the evidence relied on to prove the Commonwealth offence would be sufficient, if accepted, to establish ingredient D in addition to ingredients A, B and C, this is sufficient to satisfy the requirements of section 3(1)(c).

58. Lord Bridge rejected the appellants submission which he considered would lead to startling results. He said (at page 590):

> I do not think the language of the statute fairly admits of the wide construction. The short answer is that neither the additional ingredient nor the evidence which is said to establish that ingredient forms any part of the material 'constituting' the Commonwealth offence.

59. The approach in *Aronson* was applied in *R v Governor of Pentonville Prison, ex parte Osman* (No 3) [1990] 1 ALL ER 999, which again concerned the Fugitive Offenders Act. At page 1015 of the judgment of the Court Parker LJ said:

> ...if the charge as formulated by the requesting state would constitute, if proved, an offence here the offence is a relevant offence subject only to this: that, if and to the extent that the charge so formulated includes elements which are not essential to conviction of the offence in the requesting state but are necessary requirements to show the existence of a corresponding offence here, then they must be excluded from consideration and the offence will not be a relevant offence.

60. In my view, having regard to the scheme and purpose of the Act, the rationale underlying the requirement of double criminality and the relevant case law it is not necessary for the purposes of section 5 that there be a direct correlation or correspondence between the

elements of an entire offence under the law of the requesting state and an entire offence under the law of a requested state. However, nor do I consider that it is sufficient if the relevant offence in both jurisdictions is only similar or that the conduct of the accused person viewed in its totality amounted to the commission of an offence according to the law of the requested state. I can find nothing in principle or in the words of the Act that support that approach.

61. In my view the appropriate focus is upon the relevant conduct of an accused which is said to constitute the offence in the requesting state, however that offence is described, and not the generality of his conduct as disclosed by the evidence submitted to the Court by the requesting state. The Court must ask itself whether that conduct, in total or in part, constitutes an offence under the law of Tonga. It follows from this that an accused person will not be subject to extradition in a case where the conduct that is the offence for which extradition is sought does not amount to an offence here in Tonga because of the absence of some essential ingredient required for an offence under the law of this country.

62. When applied to the facts of this case the result is clear. The offence of obtaining by false pretences under section 164 requires that it be proved that the accused has by making the false pretence obtained

some money, valuable security or other thing. This is not a requirement of the offence of wire fraud under section 1343. The evidence that is in the record of the case that Mr. Pedras did, as a result of his fraudulent activities, obtain for himself and others over USD$5million forms no part of the material that the Court my consider when determining whether section 1343 is a relevant offence for the purposes of the Act.

63. It follows from this that section 1343 is not a relevant offence for the purposes of the Act.

The other matters raised by Mr. Pedras

64. My finding above is enough to dispose of this application but I will deal very briefly with the other matters raised by Mr. Pedras which I find have no substance.

65. It is submitted for Mr. Pedras that the superseding indictment charging him with wire fraud is bad for want of form because it contains the words 'aiding and abetting' or 'aided and abetted' when there is no law of the United States referred to justifying the inclusion of these words and because the indictment is not signed by the foreman of the grand jury. I agree with the submissions of Mr.

Kefu. The record of the case complies with the requirements of section 7(3) of the Act. There is before the Court evidence of Ms Ivy Wang who confirms the procedural history of the proceedings and the requirements of the United States law and she attaches the indictment and swears to the fact that the grand jury voted in favour of the superseding indictment in accordance with the relevant laws of the United States. The indictment itself is supported by an arrest warrant and there is before the Court what have been certified as true and accurate copies of the first superseding indictment and arrest warrant. In the absence of some cogent evidence to the contrary, of which there is none, the Court must presume that the superseding indictment is valid in my view.

66. The next matter raised is that in the case of nine of the eleven bank transfers Mr. Pedras did not make those transfers and did not cause them to be made. This is a trial issue. There is sufficient evidence for the purposes of this Court that Mr. Pedras caused all eleven of those money transfers to be made.

67. It is argued that there is no documentary evidence that any of the money transfers were made and no evidence of a Ponzi scheme. The reference to a Ponzi scheme comes from the evidence of Special Agent Mason who deposed that Mr. Pedras ran a Ponzi scheme.

There is satisfactory evidence of the money transfers and of the existence of a Ponzi scheme particularly in the affidavit of Special Agent Mason. In any event there is no requirement under section 1343 that it be proved that Mr. Pedras ran a Ponzi scheme.

The result

68. I have found that section 1343 is not a relevant offence for the purposes of the Act.

69. I set aside the order committing Mr. Pedras to custody for return to the United States of America to stand trial and he is released forthwith from detention.

70. The parties should attempt to reach agreement on costs but if they cannot do so leave is reserved to apply within 21 days.

O.G. Paulsen
LORD CHIEF JUSTICE

NUKU'ALOFA: 7 June 2016