

# THE ROLE OF THE MAGISTRATE IN EXTRADITION PROCEEDINGS IN SOUTH AFRICA: MEANING OF “FAIR TRIAL” AND “COMPETENT COURT” IN A REQUESTING STATE

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## SUMMARY

The Extradition Act provides for two general modes of extradition: extradition to foreign states and extradition to associated states. In both cases, a magistrate has to issue a warrant of arrest for the person-to-be-extradited to be brought before him or her to conduct an enquiry to determine whether the person should be extradited. In the case of extradition to foreign states, the Minister responsible for justice has the final say on whether a person should be extradited. The magistrate's role stops at authorising the detention of the person for the purposes of extradition. However, in the case of extradition to associated states, the magistrate has the final say on whether the person should be surrendered for extradition. In both cases, the magistrate plays a role – he or she has to issue a warrant for the arrest of the person in question. He or she also has to conduct an enquiry. The Constitutional Court held that before issuing a warrant of arrest, the magistrate must be satisfied that the person sought to be extradited has been convicted by a competent court. However, the Constitutional Court does not define or describe a “competent court”. The Constitutional Court also held that a person may not be extradited if his or her trial was unfair. However, it does not stipulate the yardstick that should be used to measure the fairness of the trial in a foreign or associated state. In this article, the author relies on international human rights law and on jurisprudence from South African courts to explain the meaning of “competent court”. The author also relies on international human rights law and jurisprudence from different countries to suggest the criteria that could be adopted by the Constitutional Court to determine whether a trial in a foreign or associated state was fair.

## 1 INTRODUCTION

In South Africa, extradition is governed by the Extradition Act<sup>1</sup> and the bilateral and multilateral treaties that South Africa has signed or ratified. The multilateral treaties are the European Convention on Extradition<sup>2</sup> and the

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<sup>1</sup> 67 of 1962.

<sup>2</sup> European Treaty Series No 24 (1957).

SADC Protocol on Extradition.<sup>3</sup> These treaties have been invoked in numerous extradition cases in South Africa.<sup>4</sup> As is illustrated below, the Extradition Act provides for two general modes of extradition: extradition to foreign states and extradition to associated states.<sup>5</sup> In both cases, a magistrate has to issue a warrant of arrest for the person-to-be-extradited to be brought before him or her to conduct an enquiry and determine whether the person should be extradited. In the case of extradition to foreign states, the Minister responsible for justice (the Minister) has the final say on whether a person should be extradited. The magistrate's role stops at authorising the detention of the person for the purposes of extradition. However, in the case of extradition to associated states, the magistrate has the final say on whether the person should be surrendered for extradition. In both cases, the magistrate plays a role – he or she has to issue a warrant for the arrest of the person in question. He or she also has to conduct an enquiry. As will be discussed below, over the years, courts (especially the Constitutional Court) have explained the role of the magistrate in extradition proceedings.<sup>6</sup> The Constitutional Court has clarified the factors that a magistrate has to consider before deciding whether to issue a warrant for the arrest of the person to be extradited, and before ordering the detention of such a person for the purpose of extradition. These factors are not provided for in the Extradition Act. With regard to the first issue, the court has held that a magistrate should only be concerned with whether the warrant of arrest was issued by a competent court. With regard to the second issue, the court has held, *inter alia*, that in cases of extradition to foreign states, the magistrate does not have to be concerned with the fairness of the trial in a requesting state. However, the fairness of the trial is an issue that the Minister (in cases of extradition to foreign states) and the magistrate (in cases of extradition to associated states) have to consider before authorising an extradition. With regard to the first issue (whether a competent court issued the warrant of arrest), the Constitutional Court does not explain what amounts to a “competent court”. The author relies on South African law and international human rights law to explain this concept. Likewise, the Constitutional Court does not explain what amounts to a fair trial for the purpose of allowing or

<sup>3</sup> SADC Protocol on Extradition (2002).

<sup>4</sup> For some of the cases in which these treaties have been invoked, see Mujuzi “Extradition Between European and African Countries: Overcoming the Challenges” 2021 11(3) *European Criminal Law Review* 288–319. See also *Republic of Mozambique v Forum De Monitoria Do Orcamento* [2022] ZAGPJHC 495 (dealing with concurrent extradition requests).

<sup>5</sup> According to s 6 of the Extradition Act, an associated state is any state in Africa with which South Africa has an extradition agreement that “provides for the endorsement for execution of warrants of arrest on a reciprocal basis”. The opposite is true with a foreign state. The drafting history of the Act does not clearly explain the differences between a foreign state and an associated state. It is stated: “It is interesting to note that there is still retained a distinction between those states which have judicial systems very similar to our own and others who do not fall into that category, designated in this Bill as foreign states and associated states.” See submission by Mr Cadman, Debates of the House of Assembly (Hansard) (First Session: Second Parliament) (14 May 1962) 5558. For a discussion of the distinction between a “foreign state” and an “associated state”, see *S v Khanyisile* [2012] ZANWHC 35; *Director of Public Prosecutions, Western Cape v Kouwenhoven*; *Kouwenhoven v Director of Public Prosecutions, Western Cape* [2021] 1 All SA 843 (WCC); 2021 (1) SACR 579 (WCC).

<sup>6</sup> See discussion below on “the role of magistrates in extradition proceedings”.

denying the extradition of a person. The author relies on international human rights law (article 14 of the International Covenant on Civil and Political Rights (ICCPR)) and jurisprudence from the European Court of Human Rights and different countries to suggest what fairness of a trial means for the purpose of deciding whether a person should be extradited. It is hoped this jurisprudence will be relied on by South African courts in clarifying what a fair trial is for the purposes of extradition. The author first highlights the role of a magistrate in extradition proceedings as explained by the Constitutional Court.

## 2 THE ROLE OF THE MAGISTRATE IN EXTRADITION PROCEEDINGS: ISSUING A WARRANT OF ARREST

A warrant of arrest has to be issued for a person who is subject to extradition. Thus, section 5(1) of the Extradition Act provides:

“Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person – (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or (b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.”

For many years, magistrates relied on section 5(1)(a) to issue warrants of arrest and courts, including the Constitutional Court, held that those warrants had been issued validly.<sup>7</sup> However, in *Smit v Minister of Justice and Correctional Services*,<sup>8</sup> the Constitutional Court held, by majority, that section 5(1)(a) was inconsistent with the Constitution because it deprived the magistrate of the discretion to determine whether or not a warrant of arrest should be issued. In effect, the magistrate was required to issue a warrant once he or she received a notification from the Minister. According to the majority judgment, this meant that the provision violated the principle of the separation of powers. Secondly, the provision required the magistrate to issue a warrant of arrest whether or not there were reasonable grounds to believe that the person to be arrested had committed an offence. In holding that section 5(1)(b) was consistent with the Constitution, the court made the following observation:

“Section 5(1)(b) of the Extradition Act imports the section 43(1)(c) of the CPA [Criminal Procedure Act] requirement. The result is that under section 5(1)(b) the Magistrate must bring her or his own independent mind to bear on

<sup>7</sup> See, for example, *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC); *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478; *Marsland v Additional District Court Magistrate, Kempton Park* [2019] ZAGPJHC 545; *Saliu v S* [2015] ZAGPJHC 179. Apart from issuing warrants of arrest, the magistrate may also release on bail a person facing extradition, see generally *Osagiede v S* [2022] ZAWCHC 166; *Otubu v Director of Public Prosecutions, Western Cape* [2022] ZAWCHC 79.

<sup>8</sup> 2021 (3) BCLR 219 (CC).

whether, in the case where the person concerned is accused of an extraditable offence, there are reasonable grounds to suspect that the person has committed the offence. In the case where the information before the Magistrate is that the person concerned is convicted of an offence, all that the Magistrate is required to do is to satisfy her- or himself that the person has indeed been convicted. For it to be a conviction, it must be by a competent court. The Magistrate must be satisfied that this is so. She or he is not expected to play the role of a review or appellate arbiter on the legal correctness of the conviction; not even at the level whether there are reasonable grounds to believe that the conviction is legally correct. To use an Americanism, the Magistrate must not second-guess the conviction by the foreign court. To do so, would be to undermine the judicial system of the requesting State. That, in turn, would be inconsonant with the idea of comity between South Africa and those nations it owes extradition obligations.”<sup>9</sup>

Here, the court raises two important issues. First, before a magistrate issues a warrant of arrest under section 5(1)(b), he or she must be satisfied that that person was convicted, and that the conviction was by a competent court. Secondly, the magistrate is not required to question the validity of the conviction. In other words, his or her assessment should focus on the court that convicted the person and not the conviction itself. This would mean that in effect the magistrate is permitted to order the detention of a person for extradition even if there is evidence that the trial was not fair. However, the Constitutional Court does not explain what amounts to a “competent court”. If a court is considered to be competent in the laws of the requesting state for the purposes of convicting the person who is being sought for extradition, how can its competency be questioned by a South African court? In other words, what amounts to a competent court? This is a question that the Constitutional Court does not explain in its judgment. However, this is an issue that requires further clarification because South African courts will grapple with it soon or later. This takes us to the question of how the concept of a competent court is understood or defined by South African courts and in international human rights law and in particular under article 14 of the ICCPR. Based on jurisprudence, it is argued that a competent court means one that has jurisdiction over the offender and the offence.

## **2 1 A competent court as understood in South African law**

The Constitution of South Africa refers to the role of a “competent court” in two instances.<sup>10</sup> However, the Constitution does not provide expressly that an accused has a right to be tried before a competent court. It could be

<sup>9</sup> *Smit v Minister of Justice and Correctional Services supra* par 111.

<sup>10</sup> Section 38(1) of the Constitution provides: “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are– (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.” Likewise, section 37(3) of the Constitution provides: “Any competent court may decide on the validity of– (a) a declaration of a state of emergency; (b) any extension of a declaration of a state of emergency; or (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.”

argued that the drafters of the Constitution deliberately decided not to include this right in the Constitution.<sup>11</sup> Apart from the Constitution, there are other pieces of legislation that provide for a “competent court” to try a matter.<sup>12</sup> However, neither the Constitution nor many of these pieces of legislation define or describe what amounts to a “competent court”. Some pieces of legislation hold “competent court” to mean one with jurisdiction over the matter.<sup>13</sup>

There are many cases in which the Constitutional Court,<sup>14</sup> the Supreme Court of Appeal and the High Court<sup>15</sup> have referred to the relevant constitutional or legislative provisions requiring a competent court. However, most of these decisions concern section 38 of the Constitution and none of these courts has expressly defined or described this concept. However, this jurisprudence shows that courts have understood the concept of a competent court, in both civil and criminal cases, to be one that has jurisdiction over the subject matter and the person. For example, in *S v F*,<sup>16</sup> the High Court explained the meaning of “competent court” within the context of section 18(5) of the Children’s Act:

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<sup>11</sup> In *Bernstein v Bester NO* 1996 (4) BCLR 449; 1996 (2) SA 751 par 106, the Constitutional Court held: “A provision cannot ordinarily be implied if all the surrounding circumstances point to the fact that it was deliberately omitted. That the framers of the Constitution were alert to issues of constitutionalising rules of procedural law and justice is evident from the detailed criminal fair trial provisions in section 25(3) [of the interim Constitution]. The internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights instruments. Section [sic] 6 of the European Convention on Human Rights explicitly confers the right to a fair and public hearing, not only in a criminal trial, but also in regard to the determination of civil rights and obligations. Nearer home, article 12(1)(a) of the Namibian Constitution expressly provides that “[i]n the determination of their civil rights and obligations ... all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ...”. In these circumstances an argument could be made out that the framers deliberately elected not to constitutionalise the right to a fair civil trial.”

<sup>12</sup> See, for example, ss 41 and 43 of the Postal Services Act 124 of 1998; ss 12(3) and 103(2) of the Securities Services Act 36 of 2004; s 26B of the Unemployment Insurance Act 2001.

<sup>13</sup> See, for example, s 47 of the Magistrates’ Courts Act 32 of 1944 which provides: “(1) When in answer to a claim within the jurisdiction the defendant sets up a counterclaim exceeding the jurisdiction, the claim shall not on that account be dismissed; but the court may, if satisfied that the defendant has *prima facie* a reasonable prospect on his counterclaim of obtaining a judgment in excess of its jurisdiction, stay the action for a reasonable period in order to enable him to institute an action in a competent court. The plaintiff in the magistrate’s court may (notwithstanding his action therein) counterclaim in such competent court and in that event all questions as to costs incurred in the magistrate’s court shall be decided by that competent court.”

<sup>14</sup> See, for example, *Fose v Minister of Safety and Security* 1997 (7) BCLR 851; 1997 (3) SA 786 (on the provision in the Constitution); *Centre for Child Law v Media 24 Limited* 2020 (3) BCLR 24 (5) (CC); 2020 (1) SACR 469 (CC); 2020 (4) SA 319 (CC) (on s 154(3) of the Criminal Procedure Act).

<sup>15</sup> *Octagon Chartered Accounts v Additional Magistrate, Johannesburg* [2015] ZAGPJHC 89 (s 47 of the Magistrates’ Courts Act 32 of 1944); *Bestuursliggaam van Gene Louw Laerskool v J D Roodtman* [2000] ZAWCHC 2 (on s 102A(1) of the Education Affairs Act (House of Assembly) 70 of 1988); *Rathabeng Properties (Pty) Ltd v Mohlaoli* [2021] ZAGPJHC 8 (dealing with COVID-19 regulations issued in terms of s 27(2) of the Disaster Management Act 57 of 2002).

<sup>16</sup> [2020] ZAGPPHC 350.

“[T]he Court within whose area of jurisdiction the minor children was [sic] ordinarily resident at the time when the application was instituted, as well as the Court within whose area of jurisdiction the respondent resided, had the necessary jurisdiction to entertain the relocation application, and were ‘competent courts’.”<sup>17</sup>

There are other civil cases in which the High Court has understood a competent court to be one having jurisdiction over the matter.<sup>18</sup> In the context of criminal proceedings, the High Court also understands a competent court to be one with jurisdiction over the offender and the offence.<sup>19</sup> Likewise, the Constitutional Court has, in many of its judgments (dealing with civil issues),<sup>20</sup> explained that a competent court means a court with jurisdiction over the matter. It has taken the same approach in criminal cases.<sup>21</sup> This explains why in some instances the Constitutional Court has used the words “competent court” and “court of competent jurisdiction” interchangeably.<sup>22</sup> The Supreme Court of Appeal has also followed a similar approach.<sup>23</sup> The competence of a court is not limited to jurisdiction over the offender and the offence. It also extends to jurisdiction as to sentence. A court can only impose a sentence that the law allows it to impose.<sup>24</sup> However, the mere fact that the accused has been wrongly convicted does not mean that the court that convicted him was not competent. For example, in *S v Sema*,<sup>25</sup> the accused was convicted of rape when he should have been convicted of the offence of having unlawful carnal intercourse with an under-aged girl. The High Court held:

“The learned regional magistrate erred when she convicted the appellant of rape. Nevertheless the appellant was convicted by a competent court and the convictions were to stand until set aside by a competent higher court. Thus, when the appellant was, albeit wrongly, convicted by the regional court on the

<sup>17</sup> *S v F supra* par 40.

<sup>18</sup> *Rahube v Rahube* 2018 (1) SA 638 (GP) par 91; *Sizani Primary School v MEC for Education, Mpumalanga* [2015] ZAGPPHC 851 par 9; *N v N*; *In re: N* [2017] ZAECPEHC 61 par 29.

<sup>19</sup> *S v Tshotshoza* 2010 (2) SACR 274 (GNP) par 9; *S v Viljoen* [2006] ZANHC 117 par 13; *Seoe v Deputy Director of Public Prosecutions of Free State* [2015] ZAFSHC 131 par 19.

<sup>20</sup> *Association of Mineworkers and Construction v Royal Bafokeng Platinum Limited* 2020 (4) BCLR 373 (CC); [2020] 5 BLLR 441 (CC); 2020 (3) SA 1 (CC) par 206–209; *Thint (Pty) Ltd v National Director of Public Prosecutions*, *Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC) par 242; *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) par 1; *Social Justice Coalition v Minister of Police* [2022] ZACC 27 par 139.

<sup>21</sup> *Van der Walt v S* 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) par 18; *Molaudzi v S* 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC) par 15.

<sup>22</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6; 1998 (12) BCLR 1517.

<sup>23</sup> *Laden v MV “Dimitris”* [1989] 2 All SA 436 (A); *Polokwane Local and Long Distance Taxi Association v Limpopo Permissions Board* [2017] ZASCA 44 par 23; *KLVC v SDI* [2015] 1 All SA 532 (SCA) par 37; *Ndou v S* 2019 (2) SACR 243 (SCA) par 17; *Director of Public Prosecutions, Limpopo v Mokgotho* [2017] ZASCA 159 par 26; *Director of Public Prosecutions, Gauteng v Pistorius* [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) par 22.

<sup>24</sup> *Seedat v S* 2017 (1) SACR 141 (SCA); *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC); *S v Nxumalo* [2015] ZAGPPHC 660 par 2; *Mangisi v S* [2015] ZAGPPHC 554 par 15.

<sup>25</sup> *S v Sema* [2008] ZAGPPHC 223.

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rape of a girl under the age of 16, the regional court was obliged to commit the appellant to the High Court for sentence.<sup>26</sup>

The High Court held that, in extradition cases, the person is surrendered to the requesting state to stand trial before a competent court.<sup>27</sup> The above jurisprudence from the High Court, the Supreme Court of Appeal and the Constitutional Court shows that South African courts understand a competent court to be one with jurisdiction over the offender and the offence, and also with jurisdiction to impose the sentence in question. In the extradition context, before a magistrate issues a warrant of arrest under section 5(1) of the Extradition Act, he or she is required to be satisfied that the following three things were in place in the court that convicted the person-to-be-extradited (if his extradition is sought to enforce a sentence): (1) the court that convicted the offender had jurisdiction over him or her – for example, that he or she committed the offence within its area of jurisdiction; (2) the court had jurisdiction over the offence<sup>28</sup> – for example, if it was a military court and the person in question is a civilian, it has to be shown that the court had jurisdiction over him or her; (3) the court had the jurisdiction to impose the sentence on the offender – for example, if the offender is being sought to serve a sentence of life imprisonment, it has to be shown that the court had jurisdiction to impose this sentence. Answering all these questions clearly requires the magistrate to get as much information as possible before issuing a warrant of arrest. If any of the above questions is not answered to the satisfaction of the magistrate, he or she will not issue a warrant of arrest. This is likely to delay the process, something that was not contemplated by the drafters of section 5(1) of the Extradition Act. The above discussion shows the courts’ understanding of what a competent court is in South African law. However, South African law is not of universal application. In other words, the court’s understanding is applicable to South Africa. This raises the question of the international yardstick that a court may have to rely on to determine whether a court in question is competent. This question takes us to discussion of the concept of a competent court in international human rights law.

## **2 2 A competent court in international human rights law**

The right to be tried before a competent court is one of the elements of the right to a fair trial in international human rights law. Article 14(1) of the ICCPR provides:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

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<sup>26</sup> *S v Sema supra* 4.

<sup>27</sup> *Makwaka v S* [2011] ZAFSHC 27 par 23.

<sup>28</sup> For a discussion of what amounts to “jurisdiction” for the purpose of extradition in the Extradition Act, see *Kouwenhoven v DPP (Western Cape)* [2021] 4 All SA 619 (SCA).

The ICCPR does not define or describe a competent court. In its General Comment on article 14,<sup>29</sup> the Human Rights Committee explained that “[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.”<sup>30</sup> The Committee explains the meaning of an independent and impartial tribunal within the meaning of article 14(1).<sup>31</sup> However, it does not explain the meaning of “competent tribunal”. It would appear that it understands a competent tribunal or court to mean one that is independent and impartial. The Human Rights Committee’s jurisprudence does not define or describe a competent court. This means that one has to resort to the drafting history of article 14 to know why the word “competent” was included in this provision.

The initial draft of article 14(1) did not include the word “competent”. It provided:

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing, by an independent and impartial tribunal established by law.”<sup>32</sup>

It was the Yugoslav delegate who suggested that the word “competent” should be inserted before the word “independent” for the draft provision to read as follows: “[b]y a competent, independent and impartial tribunal established by law.”<sup>33</sup> This amendment was adopted by ten votes to two, with five abstentions.<sup>34</sup> The word “competent” is therefore not redundant. As the Secretary-General’s report on the draft ICCPR shows in the context of article 6:

“There was agreement that the death penalty should be imposed by a ‘competent court’. A suggestion that the court should also be ‘independent’ was opposed on the ground that the ‘independence’ of tribunals was already provided for in another article of the covenant.”<sup>35</sup>

More specifically, the Secretary-General’s Report explains the drafting history of article 14(1):

“The use of the word ‘competent’ before ‘independent and impartial tribunal’ in paragraph 1 was intended to ensure that all persons were tried in courts whose jurisdiction had been previously established by law, and arbitrary action so avoided.”<sup>36</sup>

The drafting history of article 14 of ICCPR makes it clear a competent court means a court with jurisdiction over the person who has appeared before it.

<sup>29</sup> UN Human Rights Committee *General Comment No 32 – Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial* (23 August 2007) CCPR/C/GC/32.

<sup>30</sup> Par 19 of General Comment No 32.

<sup>31</sup> Par 19–21 of General Comment No 32.

<sup>32</sup> UN Commission on Human Rights *Report to the Economic and Social Council on the Seventh Session of the Commission, Held at the Palais des Nations, Geneva, From 16 April to 19 May 1951* (24 May 1951) E-1992, E-CN\_4-640 21.

<sup>33</sup> *Report on the Seventh Session of the Commission* 31.

<sup>34</sup> UN Commission on Human Rights *Commission on Human Rights: Report of the 8th Session, 14 April to 14 June 1952* (1952) E/2556/ E/CN.4/669 31.

<sup>35</sup> UN Secretary-General *Annotations on the Text of the Draft International Covenants on Human Rights* (1 July 1955) A/2929 84.

<sup>36</sup> *Annotations on the Text of the Draft International Covenants on Human Rights* 120.

This jurisdiction should also cover the offence in question. Therefore, in deciding whether or not the court that sentenced the person to be extradited was competent, the magistrate has to ask only one question: did the court have jurisdiction over the offender and the offence? Whether or not the court was independent or impartial are not questions with which the magistrate should be concerned according to the Constitutional Court.

This then requires us to deal with the place of a fair trial in extradition proceedings. The next section deals with the role of the magistrate in the extradition enquiry and how he or she is expected to deal with the issue of whether, in the case of an extradition to serve a sentence, the trial of the person (who is the subject of the enquiry) was fair, or, in the case of an extradition to stand trial, whether it is likely to be fair.

### 3 THE ROLE OF THE MAGISTRATE AT AN ENQUIRY

Once a warrant of arrest has been issued, the magistrate must conduct an enquiry to determine whether a person should be extradited. Thus, section 9(1) of the Extradition Act provides:

“Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned.”

Section 9(2) provides that the enquiry in question “shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic”.<sup>37</sup> According to section 9(3) of the Act, at the enquiry, the magistrate is empowered to receive any evidence from a foreign state that would help determine whether the person should be surrendered for extradition. On the basis of that evidence, the magistrate may order the detention of the person for the Minister to decide whether he or she should be extradited (s 10) or issue an order for surrender of the detainee to any person authorised by an associated state to receive him or her for the purpose of extradition (s 12). In the case of extradition to associated states, the magistrate may decline to order the surrender of a person for extradition on several grounds. Thus, section 12(2) of the Act provides that the magistrate may order that the person brought before him or her shall not be surrendered—

“(a) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served; (b) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed; (c) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that (i) by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that

<sup>37</sup> In *Kouwenhoven v DPP (Western Cape)* [2021] 4 All SA 619 (SCA) par 6, the court held that in terms of the Criminal Procedure Act 51 of 1977, “preparatory examinations have now largely, if not entirely, fallen into disuse”.

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for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or (ii) the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated State by reason of his or her gender, race, religion, nationality or political opinion.”

Likewise, section 11(b) of the Act provides for similar circumstances (to those under section 12(b)) in which the Minister may decline to order the extradition of a person to a foreign state.

On the basis of section 12(2)(c)(i), the magistrate may not order the surrender of a person if he or she thinks that it would not be “in the interests of justice” for the person to be extradited. Of great importance to this discussion is section 12(2)(c)(ii). Its effect is that the magistrate may decline to order the surrender of the person for extradition if one of three grounds exists: first, if the person will be prosecuted in the associated state by reason of his or her gender, race, religion, nationality or political opinion; secondly, if the person will be punished in the associated state by reason of his or her gender, race, religion, nationality or political opinion; and thirdly, if the person will be prejudiced at his or her trial in the associated state by reason of his or her gender, race, religion, nationality or political opinion. The first ground above relates to the manner in which the prosecution will be conducted, and in particular the offences for which the person will be prosecuted. If it is clear that the prosecution will be based on any of the listed grounds, the magistrate must not order the extradition of the person. This is irrespective of whether the court that will preside over the case will be competent. The second ground relates to the sentence that will be imposed on the person in the event of a conviction.<sup>38</sup> In this case, the enquiry does not focus on the prosecution or on the fairness of the trial process before conviction. The focus is on the sentence that will be imposed on the person upon conviction. And finally, the third ground focuses on the trial process itself. How will the trial be conducted? In simple terms, will the extradited person get a fair trial? However, in all cases, the word “may” is used. This implies that the magistrate has a discretion whether or not to order the extradition of the person in question. However, a person against whom an order has been made has a right of appeal.<sup>39</sup> The purpose of section 12(2)(c)(ii) is to protect the person in question against persecution in the requesting state.<sup>40</sup>

There are several decisions in which courts, including the Constitutional Court, have explained the role of a magistrate in extradition proceedings. For example, in *Director of Public Prosecutions: Cape of Good Hope v Robinson*,<sup>41</sup> the Constitutional Court held that in cases of extradition to a foreign state, the magistrate is obliged to commit the person in question for extradition if the evidence at the enquiry shows that “(a) he has been

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<sup>38</sup> The Constitution of South Africa, 1996 draws a distinction between sentence and punishment. See generally, *Phaahla v Minister of Justice and Correctional Services (Tlhakanye Intervening)* 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC).

<sup>39</sup> S 13 of the Extradition Act.

<sup>40</sup> *Mail and Guardian Media Ltd v Chipu NO* 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) par 84 (the court was dealing with s 11(b)(iv) of the Extradition Act, which is the same as s 12(2)(c)(ii)).

<sup>41</sup> 2005 (4) SA 1 (CC); 2005 (2) BCLR 103 (CC).

convicted of an extraditable offence that is mentioned in the extradition agreement; and (b) there is nothing in the Act or in the extradition agreement read subject to the Act that warrants a finding that the ... [person in question] is not liable for extradition.”<sup>42</sup> The court added:

“The magistrate is therefore required to determine these two matters only. Issue (a) does not entail a consideration of whether the respondent will be subject to an unfair trial if extradited. It remains necessary to consider whether issue (b) requires the magistrate to consider this aspect. In other words, is there anything in the Act or the extradition agreement which requires the magistrate to ensure that the respondent will not be subject to an unfair trial before concluding that the respondent is liable to be surrendered?”<sup>43</sup>

The court added that in extraditions to foreign states,

“we must remind ourselves that a decision by an extradition magistrate in terms of section 10(1) of the Act that the person sought is liable to be surrendered does not result in the extradition of that person. We must not forget that the decision to extradite is made by the Minister in terms of section 11 of the Act.”<sup>44</sup>

The court explained the role of the magistrate in both modes of extradition (to a foreign state and to an associated state). It stated:

“[T]he magistrate conducting a section 10 enquiry, as distinct from the magistrate conducting an enquiry mandated by section 12 of the Act makes no order to surrender. Section 11 of the Act does not oblige the Minister to order extradition. She may order extradition if she chooses and is expressly permitted not to order extradition in certain defined circumstances. A finding that the person is liable to be surrendered in terms of section 10(1) obliges nobody to do anything; the decision places no obligation whatsoever whether directly or indirectly upon the Minister or any other organ of state for that matter.”<sup>45</sup>

The court added that in extradition to foreign states, “it is the Minister who is empowered to consider whether it will be unjust or unreasonable, having regard to all the circumstances of the case to surrender the person concerned”.<sup>46</sup> In other words, “the magistrate is not authorised to make that decision under section 10(1)”.<sup>47</sup> However, the court emphasised that the Minister’s decision to order the surrender of the person for extradition is “subject to judicial control” although on the facts of the case it was “not appropriate to determine ... the principles that would govern a challenge to a decision by the Minister to extradite”.<sup>48</sup> The court added:

“[T]he magistrate conducting the section 12 enquiry is expressly empowered not to make an order of surrender if this is not in the interests of justice or if it would be unjust or unreasonable in all the circumstances of the case. The scheme of the Act makes it quite clear that the question whether a person sought to be extradited will become the victim of an unfair trial as a result of

<sup>42</sup> *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 49.

<sup>43</sup> *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 49.

<sup>44</sup> *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 50.

<sup>45</sup> *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 51.

<sup>46</sup> *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 52.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 55.

the extradition must be weighed in the equation at the time when consideration is being given to whether there should be a surrender.”<sup>49</sup>

In *Mochebelele v Director of Public Prosecutions, Gauteng*,<sup>50</sup> the appellant was convicted of bribery in Lesotho and sentenced to five years’ imprisonment.<sup>51</sup> However, “[b]y the time he was sentenced, the appellant had fled to South Africa, and he was sentenced in his absence”.<sup>52</sup> He applied for refugee status on the ground that “his trial and conviction in Lesotho amounted to political persecution”.<sup>53</sup> Although the magistrate found that he was liable for extradition, he discharged him on the ground that he had applied for refugee status. However, his application was unsuccessful. The Supreme Court of Appeal held that the provisions of section 35(3) of the Constitution (on the right to a fair trial) “bear no relevance to an extradition enquiry in terms of s 10”.<sup>54</sup> The court added that it is

“not within the magistrate’s remit to determine whether it would be unjust or unreasonable to extradite the appellant. The magistrate’s power to discharge the person is limited to only two instances in terms of s 10(3): if he or she finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time.”<sup>55</sup>

The court concluded that it is the Minister, under section 11 of the Act, who has the powers to determine whether or not it would be unjust to extradite the applicant.<sup>56</sup> Even if there is a real risk that the applicant’s rights will be violated upon extradition, the magistrate would have to commit the applicant to prison to wait the Minister’s decision on whether he or she should be extradited. As the High Court held in *Tucker v S*:<sup>57</sup>

“Even if it was found that the applicant faced infringement of his right to equality, more specifically his right not to be discriminated against on the basis of his sexual orientation, and there was a real risk that he could face punishment which is inconsistent with the provisions of the Constitution if he was to be extradited, this right is not absolute. The Minister might still request the UK to provide the necessary assurances. The real risk of infringement, even if it was found to exist, was no bar for the magistrate to order his committal to prison to await the Minister’s decision with regard to his surrender.”<sup>58</sup>

The Supreme Court of Appeal held:

“[I]t is clearly appropriate that the person whose surrender to the foreign state making the request is sought should be entitled to place material before the magistrate holding the enquiry in the hope of persuading the magistrate to include material in a report to be submitted to the Minister which may induce

<sup>49</sup> *Director of Public Prosecutions: Cape of Good Hope v Robinson supra* par 52.

<sup>50</sup> *Mochebelele v Director of Public Prosecutions, Gauteng* 2019 (2) SACR 231 (SCA).

<sup>51</sup> *Mochebelele v Director of Public Prosecutions, Gauteng* par 2.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Mochebelele v Director of Public Prosecutions, Gauteng* par 6.

<sup>54</sup> *Mochebelele v Director of Public Prosecutions, Gauteng* par 19.

<sup>55</sup> *Mochebelele v Director of Public Prosecutions, Gauteng* par 23.

<sup>56</sup> *Mochebelele v Director of Public Prosecutions, Gauteng* par 24.

<sup>57</sup> *Tucker v S* [2018] 2 All SA 566 (WCC).

<sup>58</sup> *Tucker v S supra* par 29.

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the Minister to order that the person concerned not be surrendered on one or other of the grounds set forth in s 11(b).<sup>59</sup>

In *Director of Public Prosecutions, Western Cape v Tucker*,<sup>60</sup> the Constitutional Court held:

“Allowing a sought person to lead evidence relating to surrender promotes their right to a fair hearing. It affords them the liberty to raise pertinent evidence that they feel might be relevant to the Minister’s decision from the start of their extradition proceedings and have that evidence recorded in open court. It does so without prejudicing or disadvantaging the prosecuting authorities or the requesting State, and ensures that the sought person’s concerns relating to surrender are recorded in the transcript of proceedings and the possible report forwarded to the Minister in terms of section 10(4).”<sup>61</sup>

The court added that the “magistrate is obliged to admit evidence that is relevant to the Minister’s surrender during committal proceedings, notwithstanding the fact that the enquiry is solely concerned with the committal of the sought person”.<sup>62</sup> The High Court held that in deciding whether a person should be detained awaiting the Minister’s decision to determine whether or not he or she should be extradited to a foreign state, it is “not concerned” with the question of the fairness or otherwise of his trial in the foreign state.<sup>63</sup> The above jurisprudence shows that in an enquiry for the purpose of extradition to a foreign state, the magistrate does not have the power to determine whether the trial of the person to be extradited was fair (if extradition is sought to serve a sentence) or will be fair (if extradition is sought for the purpose of standing a trial). However, the evidence relating to the fairness or otherwise of the trial has to be included in a report that the magistrate submits to the Minister.<sup>64</sup> It is for the Minister to consider that question and his or her decision is not beyond scrutiny.<sup>65</sup> However, in the case of extradition to associated states, the magistrate is empowered to enquire into the fairness of the trial. If he or she is of the view that the trial will not be fair or was not fair, he or she may decline to make the extradition order. The question that has to be answered is: what yardstick should be used to measure the fairness of the trial in question? Should the magistrate or Minister rely on the meaning of the fairness of a trial in the South African Constitution? Because the South African Constitution does not apply extraterritorially,<sup>66</sup> it is argued that the question of whether the trial was fair in

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<sup>59</sup> *Garrido v Director of Public Prosecutions, Witwatersrand Local Division* [2007] 4 All SA 1100 (SCA) par 25.

<sup>60</sup> *Director of Public Prosecutions, Western Cape v Tucker* 2021 (12) BCLR 1345 (CC).

<sup>61</sup> *Director of Public Prosecutions, Western Cape v Tucker supra* par 105.

<sup>62</sup> *Director of Public Prosecutions, Western Cape v Tucker supra* par 117.

<sup>63</sup> *Director of Public Prosecutions, Western Cape v Kouwenhoven; Kouwenhoven v Director of Public Prosecutions, Western Cape* [2021] 1 All SA 843 (WCC) par 4.

<sup>64</sup> The legislators emphasised the significance of this report during the making of the Extradition Act. See *Debates of the House of Assembly (Hansard)* (First Session: Second Parliament) (14 May 1962) 5558–5561.

<sup>65</sup> For example, in *Forum De Monitoria Do Orcamento v Chang* [2021] ZAGPJHC 808, the High Court held that the Minister’s decision to extradite the respondent to Mozambique where he enjoyed immunity from prosecution was irrational. The court held that if extradited to the USA, the respondent would be prosecuted for the alleged corruption.

<sup>66</sup> See generally, *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC).

a foreign state has to be assessed against minimum standards set by international law. This requires one to refer to article 14 of the ICCPR.

Article 14 also provides for other elements of the right to a fair trial. It is to the effect that:

- “(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
- (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
- (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.
- (4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
- (5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
- (6) ...
- (7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

The fact that the accused was convicted by a competent court – that is, a court with jurisdiction over the offence and the accused – does not mean that his or her trial was fair. There are innumerable examples from South Africa where appeal courts, including the Constitutional Court and the Supreme Court of Appeal, have acquitted appellants on the basis that their trials were unfair.<sup>67</sup> However, the mere fact that the person who is subject to the extradition enquiry alleges that his or her trial was not fair or is likely to

<sup>67</sup> See for example, *Ofarah v S* [2013] ZAGPJHC 216; *Magwaza v S* [2015] 2 All SA 280 (SCA); 2016 (1) SACR 53 (SCA); *Makwaka v S* [2014] ZAGPJHC 185; *Van der Walt v S supra*.

be unfair does not mean that he or she should not be extradited. For the court to rule against extradition, evidence should show that the trial did not comply with the minimum international standards of a fair trial. In other words, the fairness or otherwise of the trial should be assessed against international standards and not against the standards of a fair trial in the South African Constitution. The ICCPR has been ratified by most countries.<sup>68</sup> The Constitutional Court has explained the importance of the ICCPR. For example, it held that by acceding to the ICCPR, the Republic of South Africa has an international obligation to give effect to its provisions.<sup>69</sup> The court has also held that South Africa’s accession to the ICCPR and other human rights treaties shows its “commitment to the advancement and protection of fundamental human rights”.<sup>70</sup> However, like any other treaty, the ICCPR does “not create rights and obligations automatically enforceable within the domestic legal system” of South Africa.<sup>71</sup> For it to be “directly applicable on the domestic front”, it has first to be domesticated.<sup>72</sup> Otherwise its provisions “cannot form the basis of a justiciable claim” in any South African court.<sup>73</sup>

Much as the ICCPR provides for a right to a fair trial, not every violation of one or more of the elements of this right under article 14 nullifies the trial; and the fact that the trial was unfair does not mean that the person in question should not be extradited. Relying on the jurisprudence of the European Court of Human Rights and from other countries, it is argued that there are two approaches from which the Constitutional Court may choose in deciding whether the trial in the country to which the person is to be extradited was so unfair or likely to be so unfair as to be the basis to block the extradition of the person in question. The first approach has been adopted by the European Court of Human Rights and many other countries. It is to the effect that a court or Minister should not authorise the extradition of a person if the evidence before it shows that there was or there is likely to be a flagrant denial of justice. The second approach, which has been adopted by the New Zealand High Court, rejects the concept of flagrant denial of justice. It is to the effect that extradition should not take place if there is a real risk that the trial will not comply with the minimum standards under article 14 of the ICCPR. This then raises the issue of what amounts to a flagrant denial of justice.

The jurisprudence of the European Court of Human Rights shows there is a flagrant denial of justice where there is an “impairment of the essence of the right to a fair trial”.<sup>74</sup> In other words, as Judges Pinto De Albuquerque

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<sup>68</sup> See UN Treaty Collection *Depositary: Status of Treaties* Ch IV “4. International Covenant on Civil and Political Rights” [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-4&chapter=4&clang=en).

<sup>69</sup> *Zealand v Minister for Justice and Constitutional Development* 2008 (4) SA 458 (CC) par 30.

<sup>70</sup> *Kaunda v President of the Republic of South Africa supra* par 158.

<sup>71</sup> *Zuma v Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) par 108.

<sup>72</sup> *Zuma v Secretary of the Judicial Commission of Inquiry supra* par 108.

<sup>73</sup> *Zuma v Secretary of the Judicial Commission of Inquiry supra* par 113.

<sup>74</sup> *Muhammad and Muhammad v Romania* [GC] no. 80982/12 § 27 ECHR 2020.

and Elósegui put in their concurring opinion in the Grand Chamber case of *Muhammad and Muhammad v Romania*:<sup>75</sup>

“a flagrant denial of justice, in other words, a violation of the essence of the fair trial right, goes beyond mere irregularities in the pre-trial and trial procedures, it warrants a breach so fundamental as to amount to a nullification (or destruction) of the right guaranteed by article 6 [of the European Convention on Human Rights].”<sup>76</sup>

As the High Court of the Republic of Ireland held, “[t]he term ‘flagrant denial of justice’ is synonymous with a trial which is manifestly contrary to the provisions of article 6 or the principles embodied therein”.<sup>77</sup> It is a very high threshold which will be “met only in the most exceptional and clear circumstances”.<sup>78</sup>

Relying on the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union has summarised examples that the European Court of Human Rights has given and which amount to a flagrant denial of justice. In *Minister for Justice and Equality v LM (Defaillances du système judiciaire)*,<sup>79</sup> the Advocate General observed that the

“European Court of Human Rights considers that, in order for a Contracting State to be required not to expel or extradite a person, he must risk suffering in the requesting Member State not just a breach of Article 6 of the ECHR, but a ‘flagrant denial’ of justice or of a fair trial.”<sup>80</sup>

He added:

“According to the European Court of Human Rights, the following may thus constitute a flagrant denial of justice preventing the person concerned from being extradited or expelled: a conviction in absentia without the possibility of obtaining a re-examination of the merits of the charge; a trial that is summary in nature and conducted in total disregard of the rights of the defence; detention whose lawfulness is not open to examination by an independent and impartial tribunal; and a deliberate and systematic refusal to allow an individual, in particular an individual detained in a foreign country, to communicate with a lawyer. The European Court of Human Rights also attaches importance to the fact that a civilian has to appear before a court composed, even if only in part, of members of the armed forces who take orders from the executive.”<sup>81</sup>

This test has been followed by courts in some European countries. For example, the Irish High Court will not order the extradition of a person to a country where there is evidence led by the person challenging the extradition that his or her trial would amount to a flagrant denial of justice.<sup>82</sup> It has also been followed in jurisdictions outside Europe. For example, in *Ibrahim v Simon Russell, Esq.*,<sup>83</sup> the applicant contested his extradition from Hong

<sup>75</sup> *Muhammad and Muhammad v Romania supra*.

<sup>76</sup> *Muhammad and Muhammad v Romania supra* par 28.

<sup>77</sup> *Attorney General v Damache* [2015] IEHC 339 par 6.4.4.

<sup>78</sup> *The Attorney General v Marques* [2016] IECA 374 (12 December 2016) par 52.

<sup>79</sup> *Minister for Justice and Equality v LM (Defaillances du système judiciaire)* [2018] EUECJ C-216/18PPU\_O (28 June 2018).

<sup>80</sup> *Minister for Justice and Equality v LM supra* par 79.

<sup>81</sup> *Minister for Justice and Equality v LM supra* par 82 (references omitted).

<sup>82</sup> *Attorney General v Damache supra* par 10.4–10.5.

<sup>83</sup> [2020] HKCA 514.

Kong to serve his sentence in Bangladesh on the ground that the trial leading to his conviction had taken place in his absence and was therefore a flagrant denial of justice. The Hong Kong Court of Appeal held that “to make good a case on flagrant denial of justice, he should also provide some evidence on Bangladeshi law” under which he was convicted to show that his trial was a nullity.<sup>84</sup> The test has been followed in extradition proceedings in other countries outside Europe such as Australia,<sup>85</sup> Barbados,<sup>86</sup> and Belize.<sup>87</sup> It has also been included in the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism<sup>88</sup> and has been adopted by the Privy Council.<sup>89</sup> It is also an approach that the South African High Court is prepared to follow. For example, in *Tucker v Additional Magistrate, Cape Town; Tucker v S*,<sup>90</sup> the court held that South African courts should not impose “our constitutionally compliant fair trial standards on another country”.<sup>91</sup> The court added:

“[W]hereas it might offend the standards by which we measure fairness in our criminal trials, for an accused to be convicted and sentenced in his absence, this does not mean that it is necessarily unfair if this is the case in another legal system, especially where the accused is a fugitive from justice, who has absconded instead of making use of the opportunity to exercise his rights to take part in the proceedings and to challenge the evidence which is admitted during them. Just because we have a particular ‘fair trial’ constitutional provision in our Bill of Rights which is not mirrored in the constitutional dispensation of a foreign state which requests the extradition of a person does not mean that if he/she were to be extradited to that state the trial or punishment they would have to face would be in breach of their constitutional rights, at least not insofar as that system is concerned. And it is before that system that they are required to account for their criminal offences, which have usually been committed in that state, and not ours. In this regard both the European Court of Human Rights as well as the UK Supreme Court have cautioned Courts dealing with extradition matters not to seek to impose their constitutional standards or international treaty or convention standards on states that are not party thereto, and which may have different requirements or standards pertaining to fair trial issues in criminal matters. Obviously, where the extradition of an offender might only offend a fair trial right in the requesting, as opposed to the requested, state we are not talking about imposing the standards of the latter on the former. But in keeping with the principle of comity in this regard international jurisprudence seems to suggest that the alleged denial or breach of a fair trial right, in the event of extradition

<sup>84</sup> *Ibrahim v Simon Russell, Esq supra* par 12.

<sup>85</sup> *FUD18 v Minister for Home Affairs* [2020] FCA 48 par 30.

<sup>86</sup> *John Scantlebury et al v AG* [2009] BCCA 7 (8 June 2009) par 73–83. At par 83, the Court of Appeal allowed the extradition of the applicant to the USA because it had “no doubt that, at the trial, the appellants will be accorded the plenitude of rights including the right to cross-examine witnesses and the deponents to the affidavits, to ensure that they have a fair trial in the U.S.A.”.

<sup>87</sup> *Rhett Allen Fuller and the Minister of Foreign Affairs* [2013] BZCA 5 par 29.

<sup>88</sup> Adopted by the Committee of Ministers of the Council of Europe, on 15 July 2002, at its 804th meeting. Guideline XIII (4) provides that “[w]hen the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition”.

<sup>89</sup> *Heath v United States of America (St. Christopher and Nevis)* [2005] UKPC 45 par 26.

<sup>90</sup> *Tucker v Additional Magistrate, Cape Town; Tucker v S* [2019] 2 All SA 852 (WCC); 2019 (2) SACR 166 (WCC).

<sup>91</sup> *Tucker v Additional Magistrate, Cape Town; Tucker v S supra* par 45.

in such a case, is only to be entertained exceptionally, where there is a risk of a 'flagrant denial' of fairness."<sup>92</sup>

At the core of this principle is the view that courts in the requested state should not second-guess the competence of the courts in the requesting state to ensure that the extradited person's right to a fair trial is guaranteed.

However, the test has been questioned in some jurisdictions. For example, in New Zealand, a court will set aside the Minister's order to extradite a person if the requesting state does not assure the Minister (through diplomatic assurances) that the person in question will get a fair trial as provided for under article 14 of the ICCPR. Courts will not use the test of flagrant denial of justice. For example, in *Kim v Minister of Justice of New Zealand*,<sup>93</sup> the Minister authorised the extradition of the appellant to China to be prosecuted for murder. The appellant argued, *inter alia*, that there was a real risk that he would not get a fair trial as stipulated in article 14 of the ICCPR. The Minister argued that he "was obliged to consider whether Mr Kim was at a real risk of a trial that would constitute a 'flagrant denial of justice' [as defined by the European Court of Human Rights]".<sup>94</sup> The court held:

"[T]he word 'flagrant' may also tend to confuse, because 'flagrant' is a word usually denoting high-handed, brazen or scandalous conduct. Its use may suggest the applicant must show high-handed, brazen o[r] scandalous conduct to make out a case that surrender should be refused on fair trial grounds."<sup>95</sup>

The court also took issue with the European Court of Human Rights' definition of flagrant denial of justice. It held:

"We also have reservations as to the explanation of the test offered [by the European Court of Human Rights] in *Othman*, that a 'flagrant denial of justice' involves such a departure from standards so as to amount to a nullification or destruction of the right guaranteed by art 14 (in this case). It is true that ... the threshold permits some degree of difference between countries' legal systems, appropriate in light of the public interest in extradition. But the language of nullification or destruction expresses the matter in such absolute terms that it errs on the side of setting the threshold too high. We consider that the appropriate threshold is whether there is a real risk of a departure from the standard such as to deprive the defendant of a key benefit of the right in question."<sup>96</sup>

The court added:

"'Real risk' does not mean proof on the balance of probabilities. It means a risk which is real and not merely fanciful; so that it may be established by something less than a 51 per cent probability. The prospect of unfairness may arise in respect of an individual or categories of individual – for example, political dissidents or those charged with certain offences, or if the unfairness is systemic can arise for every individual. Once the person can show that

<sup>92</sup> *Tucker v Additional Magistrate, Cape Town; Tucker v S supra* par 45 (footnotes omitted).

<sup>93</sup> *Kim v Minister of Justice of New Zealand* [2019] NZCA 209.

<sup>94</sup> *Kim v Minister of Justice of New Zealand supra* par 168.

<sup>95</sup> *Kim v Minister of Justice of New Zealand supra* par 178.

<sup>96</sup> *Kim v Minister of Justice of New Zealand supra* par 179.

there is a real risk of a trial that might be unfair in this sense, it is for the requesting state to “dispel any doubts” about that risk.”<sup>97</sup>

The Court of Appeal concluded:

“When addressing the issue of the risk that Mr Kim will not receive a fair trial in the PRC [China] should he be surrendered, the Minister should: (i) seek further information in connection with the extent to which the judiciary is subject to political control, and the extent to which tribunals that did not hear persons, or groups, or tribunals that did not hear the case, control or influence decisions of guilt or innocence; (ii) seek further information as to the position of the defence bar in the PRC, the right the defence has to disclosure of the case to be met, and the right to examine witnesses; and (iii) seek further assurances that Mr Kim will be entitled to disclosure of the case against him (detailed as to timing and content), that he will have the right, through counsel, to question all witnesses, and the right to the presence of effective defence counsel during all interrogation.”<sup>98</sup>

In other words, the diplomatic assurances must stipulate that the accused’s right under article 14 of the ICCPR as interpreted by the Human Rights Committee will be guaranteed and also put in place a mechanism to monitor the requesting state’s compliance with the commitments it made in the diplomatic assurances.<sup>99</sup> This is irrespective of whether the requesting state has ratified the ICCPR. This is so because the ICCPR imposes duties on the extraditing state.<sup>100</sup> The Working Group on Arbitrary Detention has held that

“the non-observance of the international norms relating to the right to a fair trial established in articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant [ICCPR] is of such gravity as to amount to a flagrant denial of justice.”<sup>101</sup>

Verifying whether the person’s trial was fair before allowing extradition to serve a sentence would not be the only instance in which a South African magistrate would be assessing the correctness of the law and procedure that was followed in the requesting state. Before a magistrate endorses a foreign warrant for the arrest of the person to be extradited, the Extradition Act empowers the magistrate first to verify that the warrant in question was indeed issued in accordance with the law of the foreign state. Thus section 6 of the Act provides:

“Whenever an extradition agreement with any foreign State in Africa provides for the endorsement for execution of warrants of arrest on a reciprocal basis,

<sup>97</sup> *Kim v Minister of Justice of New Zealand supra* par 180.

<sup>98</sup> *Kim v Minister of Justice of New Zealand supra* par 278.

<sup>99</sup> The Human Rights Committee interprets the relevant provisions of the ICCPR through, *inter alia*, its case law (communications) and General Comments. For the work of the Human Rights Committee, see <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (accessed 2022-01-06).

<sup>100</sup> *Kim v Minister of Justice of New Zealand supra* par 169–172. South African courts also require requesting states to issue diplomatic assurances in cases where there is a possibility that the person to be extradited will be sentenced to death. The requesting state has to make it clear that the extradited person will not be sentenced to death, or if sentenced to death, will not be executed. See, for example, *Minister of Home Affairs v Tsebe, Minister of Justice and Constitutional Development v Tsebe* 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

<sup>101</sup> UN Human Rights Council (Working Group on Arbitrary Detention) *Opinion No. 91/2017 concerning Imran Abdullah (Maldives) A/HRC/WGAD/2017/91* (22 January 2018) par 95.

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any magistrate to whom is produced a warrant issued in such State for the arrest of any person alleged to be a person liable to be surrendered to such State, may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, endorse such warrant for execution in the Republic, if he is satisfied that it was lawfully issued, whereupon it shall be executed in the same manner as a warrant issued under section five.”

In other words, the magistrate can only endorse such a warrant if he or she “is satisfied that it was lawfully issued”. For the court to verify that such a warrant was lawfully issued, it may have first to examine the law of the requesting state relating to the validity of a warrant of arrest. If the magistrate concludes that the warrant was issued contrary to the laws of the requesting state, he or she will not endorse it. In the author’s opinion, the approach adopted by the New Zealand High Court is preferable. This is so because it ensures that the accused’s right to a fair trial is protected by not requiring the accused to meet the very high threshold of proving a flagrant denial of justice.

#### **4 CONCLUSION**

In this article, the author has highlighted the decisions in which the Constitutional Court and other courts have clarified the role of magistrates in extradition proceedings. It has been argued that the Constitutional Court will have to clarify the meaning of “competent court” for the purpose of issuing a warrant of arrest under section 5 of the Extradition Act. The author has relied on South African case law and legislation and international human rights law to argue that a competent court is one that has jurisdiction over the offender and the offence. It has also been argued that in deciding whether to extradite a person on the basis that his or her trial was unfair (or is likely to be unfair), courts should use the minimum guarantees under article 14 of the ICCPR as the yardstick.