

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

**ANTIGUA AND BARBUDA
CLAIM NO. ANUHCV 2012/0220**

**IN THE MATTER of sections 3, 5, 14, 15 and 18 of the
Constitution of Antigua and Barbuda**

IN THE MATTER of sections 12 - 15 of the Extradition Act 1993

**IN THE MATTER of the decision of the 2nd Respondent to order the Applicant's return to the
United States of America as contained in a letter dated the 23rd March 2012 and further
embodied in a warrant dated 30th March 2012**

**IN THE MATTER of an Application for an Administrative Order and leave to apply for judicial
review**

IN THE MATTER of CPR 26.1(2)(w), 26.1(6), 26.9(3) and 56.8

BETWEEN

LEROY KING

Claimant

-and-

[1] THE ATTORNEY GENERAL

**[2] MINISTER OF FOREIGN AFFAIRS
Defendants**

Before:

The Hon. Mr. Darshan Ramdhani
High Court Judge (Ag.)

Appearances:

Dr. David Dorsett and Mr. Fitzmore Harris for the Claimant/Applicant
Ms. Bridget Nelson, Senior Crown Counsel for the Attorney General and the Minister of Foreign Affairs
Mr. Anthony Armstrong, Director of Public Prosecutions for the United States Government

2016: September 23, 28, October 3 November 11, 24
2017: April 19

Constitutional Law – Originating Motion – Failed application for Writ of Habeas Corpus and failed appeal – Consequential Order of Extradition – Challenges to Extradition Order coupled with challenges to extradition process - Whether proceedings duplicitous to original Application for Habeas Corpus.

Constitutional Law – Allegations of breach of fundamental rights – Sections 3, 5, 14 and 15 of the Constitution – No right of Appeal from High Court's refusal to grant Writ of Habeas Corpus – Whether right of appeal to Court of Appeal to requesting states – Whether failure to provide right of appeal from refusal to grant Writ of Habeas Corpus breach of right of access – Whether breach of right to protection of the law – Whether any right of appeal to requesting state discriminatory

Judicial Review – application for leave to apply for judicial review – application made a part of originating motion – application not supported by grounds – whether application properly brought – Subsequent written application with grounds filed within same proceedings near date of hearing more than four years after decision – whether application should be barred on discretionary grounds.

Judicial Review – Whether arguable grounds that Minister making extradition order failed to have proper regard to statutory considerations – Whether arguable case that Minister should have reconsidered the quality of the evidence before the committing courts to satisfy himself that accusations grounding extradition request are justified and made in good faith – Whether arguable case that extradition request tainted by acts of bad faith – Whether arguable case that Minister failed to properly consider representations made by Claimant prior to the making of extradition order – Whether arguable case of an abuse of power and abuse of process

Judicial Review – Order of Extradition – Late application made after hearing for additional matters to be considered to show arguable case that Minister's decision bad in law – Whether application providing court with sufficient basis to find that additional matters not discoverable with reasonable due diligence – whether an abuse of the process of the court.

Judicial Review – Order of Extradition – Original US Indictment one of the main basis for Extradition Order – Superseding Indictments against co-defendants in the USA – No disclosure of superseding indictments – Whether superseding indictments nullifying the original indictment thereby nullifying original indictment and erasing accusations against claimant – whether superseding indictment relevant to the Minister's decision to make extradition order.

In 2010, the Government of the United States made a request to the Government of Antigua and Barbuda to extradite Mr. Leroy King, the claimant in these proceedings. The documents which were sent showed that the request was grounded in a twenty-one-count indictment returned in 2009 by a Grand Jury in the State of Texas. That indictment also charged the now infamous Allen Stanford as well as a number of other persons.

In 2011, the claimant was committed under the Extradition Act 1993. Following his committal he applied pursuant to section 13 of the Act for Habeas Corpus and also sought an order of certiorari to quash the committal. On the 6th February 2012, the High Court upheld in part his challenge and nullified the committal insofar as it related to ten of the charges but affirmed the committal in

relation to the other eleven charges. Immediately after this, by a letter of the 10th February 2012, the Minister of Foreign Affairs (the second defendant) exercising powers under the Extradition Act, gave notice to the claimant that he should show reasons why an order of return should not be made against him pursuant to section 14 of the Act. On the 16th February 2012, the claimant appealed the decision of the high court to the Court of Appeal. On the 21st March 2012, the Court of Appeal dismissed the appeal on the basis that it had no jurisdiction pursuant to section 31 to hear an appeal which arose from a 'criminal cause of matter'. On the 23rd March 2012, the second defendant ordered the return of the claimant to the USA in relation to the charges for which he was committed. On the 30th March 2012, the second defendant signed a warrant for the extradition of the claimant. This was served on him on the 1st April 2012.

Prior to the issue of the warrant, on the 26th March 2012, the claimant filed this constitutional motion seeking a number of declarations and orders. On the receipt of the warrant the claimant amended his claim on the 4th April 2012. Essentially, the claimant contended on the motion that his fundamental rights had been breached during the extradition process and he ought not to be returned. He asked for declarations to the effect that (a) he had a fundamental right to the protection of the law as guaranteed by section 3 of the Antigua and Barbuda Constitution and this right had been breached by the Extradition Act failing to provide him with a right of appeal beyond the High Court; (b) to grant a right of appeal beyond the High Court to the requesting states when no such access was given to the person who was the subject of the request, was discriminatory and in breach of section 14 of the Constitution. On the basis of these and other grounds he sought an order to prohibit his return.

That motion also included an application for leave to apply for judicial review of the second defendant's decision to order the return of the claimant to the USA. That application did not contain any grounds and did not otherwise comply with CPR 56.3.

These proceedings eventually came before this Court in September 2016 for case management with a view of hearing the matter before the end of November 2016. The proceedings were case managed several times and finally listed for hearing on the 28th November 2016. Before it came on for hearing, the claimant, through his attorneys filed a 'second application' for leave to apply for judicial in which he set out grounds upon which leave was being sought. He contended that the decision was bad in law for (a) being in breach of section 3 of the Constitution and in breach of the claimant's right to procedural fairness and the right to access to the court; (b) being illegal and breach of second defendant's duty to sufficiently acquaint himself with relevant information, fairly presented and properly addressed, and to have regard to all relevant consideration; and for being unreasonable and irrational in that the second defendant failed to have regard to all legal considerations.

After the matters was heard, the claimant without the leave or permission from the court, caused to be filed a number of affidavits and documents and even submissions, on matters which he contended were new and were not before available to him. He presented this Court with evidence of two 'superseding indictments' which had been filed in 2011 in the USA but which he had not known about before. He also submitted for the first time, the original indictment. He contended that the Government of the USA and the Director of Public Prosecutions who held a watching brief in court, had failed in their duty of continuing candour by failing to disclose the 'superseding indictments' which had named Allen Stanford and others and excluded this claimant. It was

contended that the new 'superseding indictments' meant that there was no subsisting accusation against the claimant and that the request for extradition could not be lawfully carried out under the Act. This affidavit and its documents caused the defendants to put in two affidavits. These were from Mr. Anthony Armstrong, the DPP and Mr. Baldwin Spencer, the former Minister of Foreign Affairs at the relevant time. A declaration from a Mr. John P. Pearson, Deputy Criminal Chief of the Major Fraud Section of the US Department of Justice was attached to the affidavit of the Director. The affidavit of the Director and the declaration essentially stated that the original indictment was still pending and that the 'superseding indictment was irrelevant to the extradition of the claimant, as it did not affect the validity of the first indictment which had been laid against him.

Submissions were also filed by the Mr. Harris for the claimant and he argued among other things that the decision of the second defendant to return the claimant was bad in law as the second defendant had failed to consider whether the US Government had acted in bad faith. He pointed to a number of matters which he contended shows this bad faith. First he said that Mr. Pearson's declaration was executed by the trial Judge who dealt with Allen Stanford. This, he asserts, shows that the trial judge had 'either initiated, permitted, and in fact engaged in ex parte communication' with the prosecution, and this shows bad faith on the part of the US Government. Second, bad faith is also found in the manner in which charges of conspiracy related to the FSRC against the claimant covered a period of 1999 to 2009 when the claimant only joined the FRSC in 2002. It was also contended that the second defendant had failed to follow the requirements of section 14(2)(a)(iii) of the Act when he failed to consider whether bad faith existed and whether the superseding indictment showed that some of the charges had been effectively withdrawn against the claimant. He finally contended that the second defendant failed to give due regard to the representations made and further failed to follow the judgment of Michel J in setting out the charges for which the claimant had been committed. These failures meant that the order of return was bad in law.

Finally, on the 28th March 2017, the claimant filed an application praying for orders that all of the documents filed by him after the hearing were properly before the court.

Held: Dismissing the claim for constitutional relief and the application for leave to apply for judicial review, and making no order as to costs, that:

1. A Constitutional Court has the jurisdiction to bar the extradition of any person against whom the extradition process has commenced if it is shown that the process has caused the breach of one or more of his fundamental rights. Breaches of the Constitution may or may not amount to breaches of a subject's fundamental right for the purposes of the exercise of this jurisdiction.
2. Extradition proceedings are not to be equated with the actual trial of the underlying charges on which the extradition is sought. Laws which govern the extradition process must in any event meet constitution muster and must be consistent with rights of access to justice and the protection of the law as required by sections 3, 5 and 15 of the Constitution of Antigua and Barbuda. At the minimum this will mean that the extradition process must be subjected to judicial scrutiny, where the process is truly adversarial, and there must be equality of arms.

3. The Extradition Act 1993 provides to a person who has been committed for extradition by a magistrate a right to apply for habeas corpus to the High Court. No order for return may be made by a Minister when such an application is pending. If habeas corpus is refused, there is no right of appeal given by the Act and the general provisions of section 31(2)(a) of the Eastern Caribbean Supreme Court Act which bars appeals to the Court of Appeal in civil matters which arises from a criminal cause or matter dispenses with any notions that an appeal lies to the Court from a refusal to grant a Writ of Habeas Corpus. Section 8 of the Act, however, gives to person who has been committed for extradition to make an application to the Court of Appeal to have a committal *reviewed*. Section 8 also designates the Court of Appeal as an 'appropriate authority' and is given power and discretion to bar the return on matters set out in section 8 of the Act. This right to apply for a review is properly to be exercised after the High Court has confirmed a committal on a Habeas Corpus application. The Minister's power under section 14 of the Act to order a return is not stayed by an application for a review to the Court of Appeal.
4. Section 12 of the Extradition provides to a requesting state where the court of committal refuses to make an order of committal, a right to question those proceedings on the ground that it is wrong in law by applying to the court refusing to make the committal to state a case for the opinion of the High Court on the question of law involved. By the express provisions of section 12 of the Act, overriding section 32(1)(a) of the Eastern Caribbean Supreme Court Act, where the High Court dismisses such an appeal, the requesting state has a right to appeal to the Court of Appeal. By virtue of the express provisions of section 122 of the Antigua and Barbuda Constitution there is the possibility of an appeal to the Privy Council from a decision of the Court of Appeal. Once any of these appeals rights have been engaged on behalf of the requesting state, the person may continue to be detained or released on bail as the case may be.
5. The differences as there are in access to justice rights given to a person whose return is sought and to the requesting state do not offend the protection of the law rights and the access of justice rights as are found in sections 3, 5 and 15 of the Antigua and Barbuda Constitution. These implied and express constitutional safeguards require that in extradition matters certain minimum standards of fairness be attendant to the proceedings, but do not require that a right of **appeal** from a refusal to grant a Writ of Habeas Corpus be given the person whose return is sought. In the context of the equality of arms principle, having regards to the rights of appeal given to requesting states, it is sufficient that the person has a right to make an application to the Court of Appeal to review the committal, and then possibly file an appeal to the Privy Council from the decision on that review. For these reasons, the differences as there are in access to justice rights are justifiable, and further they do not amount to a breach of section 14 of the Constitution as being discriminatory against a person whose return may be sought as no 'different treatment' has been afforded the requesting state on the basis of its 'place of origin'.
6. The application for leave to apply for judicial review which was contained in the originating motion was bad in law as it failed to set out grounds on which it rested. In an exceptional case and for good reason, the statutory period for the filing of an application for leave to apply for judicial review may be extended. As a discretionary matter, having regards to the draconian consequences of dismissal involving questions of liberty for the claimant, and

the fact that the defendants were prepared not to oppose the application for leave, the second written application for leave to apply for judicial review will not be barred on any discretionary grounds but will be considered on its merits.

7. A minister exercising powers of return under section 14(2)(a) of the Extradition Act is not required in all cases to examine the quality of the evidence on which committal for extradition was based; such an examination should only be in rare case for good cause. In the normal case, the Minister would act properly if he chooses to rely on court's analysis of the evidence to justify finding that the underlying accusation is justified. In this case, the offences for which the claimant was committed for extradition was examined not only by the magistrate but also by a High Court Judge. Having regards to those courts' conclusions and this Court's findings on the superseding indictments, there is accordingly no basis to argue the Minister ought to have personally examined the quality of the evidence.
8. There was no arguable case that the extradition request was tainted by any bad faith there being no merit to contentions that (a) the US Government had engaged in improper ex parte communication with the trial judge in the USA who is expected to try this claimant should he be returned; (b) the superseding indictments against persons originally co-defendant with the claimant on the original indictment, had caused the dismissal of, or nullified the original indictment and thus the underlying accusations against this claimant, and further that the US government had acted improperly by failing to disclose these superseding indictments; (c) a comparison between the superseding indictments and the original indictment was relevant for any reason. There was also no arguable case, that (a) the fact that certain charges of conspiracy being omitted from the superseding indictment would mean that the charge for conspiracy against the claimant had lost its basis, as it is no defense to a charge of conspiracy in Texas to contend that one or another of the co-conspirators have not been prosecuted; (b) that the Minister had failed to consider relevant matters by failing to consider whether his decision to return the claimant was constitutionally sound as well as whether the claimant had further rights of appeal. The Minister's decision to order the return was therefore not bad in law as being an abuse of power or an abuse of process.
9. It is an abuse of the process of the courts for any party to an action to continue to file affidavits, exhibits, and submissions after a full oral hearing of that matter where those additional matters could have been discovered with reasonable due diligence before the hearing. It is even more of an abuse to seek to argue after a full hearing matters which are contained in the documents before the court at the hearing. In this case, there has been no evidence to inform this court why the superseding indictment could not have been obtained before and be dealt with at the hearing. There is no duty on the defendants or the American government to disclose matters which are not relevant to the extradition of this claimant. There is no arguable case that the superseding indictments against Allen Stanford and others nullified the original indictment against the claimant or was in any other way relevant. If the claimant had considered this to be relevant he ought to have

presented it before the hearing or show good reason why he was previously unaware of it. He failed to provide any reasons why reasonable efforts on his part would not have revealed those superseding indictments on which he relied so heavily to make further submissions after the hearing; it would have been a highly public matter that the USA had proceeded against Allen Stanford and others who had been charged together with this claimant on the original indictment. There was accordingly an abuse of the process of the court by the claimant. Nonetheless all the matters raised were considered on their merits.

Cases considered:

1. *A and others v United Kingdom* (App no 3455/05) - [2009]
2. *Amand v Home Secretary and Minister of Defence or Royal Netherlands Government* [1943] AC 147 *Government of United States v Bowe* [1990]
3. *Arorangi Timberland Ltd v Minister of the Cook Islands national Superannuation Fund* [2016] UKPC 32
4. *Atanasova v Holloway & Amor* [2009] EWHC 2740 (Admin)
5. *Attorney General v Issac* ANU HCVAP 2015/0014
6. *Attorney General of Barbados v Joseph and Boyce* [2006] CCJ 3 (AJ), 87 WIR 178
7. *Bahamas Hotel Maintenance & Allied Workers v Bahamas Hotel Catering & Allied Workers*. [2011] UKPC 4 at [23]
8. *Belize Alliance of Conservation Non-Governmental Organisations v. Department of the Environment* [2004] UKPC 6 at [86]-[87]
9. *Bentley v The Government of the USA* [2005] EWHC 1078 Admin
10. *Boddington v British Transport Police* [1999] 2 AC 143
11. *Bushell v. Secretary of State for the Environment* [1981] AC 75
12. *Central Broadcasting Services Ltd v Attorney General of Trinidad and Tobago* [2006] UKPC 35, [2006] 1 WLR 2891
13. *f CanadaDH and others v Czech Republic* - (2007) 23 BHRC 526
14. *Fuller v A.G.* 79 W.I.R 173
15. *Garcia Alva v Germany* [2001] ECHR 23541/94
16. *Government of United States v Bowe* [1990] 1 AC 42
17. *Hamza and others v Secretary of State for the Home Department* 455/11
18. *Ismail v Secretary of State for Home Department* [2013] EWHC 663 (Admin). [2013] WLR (D) 133
19. *Knowles Jr v. United States of America & Anor (The Bahamas)* [2006] UKPC 38 (24 July 2006)
20. *Lucas v Chief Education Officer* [2015] CCJ 15 (AJ), 87 WIR 178
21. *Matthews v Ministry of Defence* [20003] UKHL 4, [2003] 1 AC 1163
22. *Maya Leaders Alliance v The Attorney General of Belize* [2015] CCJ 15 (AJ), 87 WIR 178
23. *Mooren v Germany* (App no 11364/03) - [2009]
24. *Opara v. N.E.O.C.C. Warden* Case NO. 4:14 CV 0827 (N.D.) Ohio, 2014
25. *Omar v. France* judgment of 29th July, 1998(43/1997/827/1033
26. *Peerless Ltd v Gambling Regulatory Authority* [2015] UKPC 29 at [21]
27. *R (Birmingham) v Director of SFO* [2007] QB727

28. *Rahmatullah v Secretary of State for Foreign and commonwealth Affairs* [2011] EWCA Civ 11155540, [2012] 1 WLR 1462 at [43]
29. *R (Lumba) v Secretary of State for Home Department* [2012] AC 245; [1998] AC 539
30. *R (Guisto) v Governor of Brixton Prison* [2004] 1 AC 101
31. *R (on the application of Allison) v Secretary of State for the Home Department -* [2001] EWHC Admin 506, [1998] AC 539
32. *R (Rotterdam Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] PTSR 322 at [61]
33. *R (Saifi) v Governor of Brixton Prison* [2001] 1 WLR 34
34. *R v Chief Constable of the Merseyside Police ex parte Calveley and Others* [1986] Q.B.
35. *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42
36. *Reinprecht v Austria* (App no 67175/01) - [2005] ECHR 67175/01
37. *Secretary of State for Education and Science and Tameside Metropolitan Borough Council* [1997] AC 1014
38. *Sharma v Brown-Antoine and others* [2006] UKPC 57, [2007] 1 WLR 780
39. *Solomon v Shuster* MNI HCVAP2014/0004
40. *St. Kitts Development Ltd v Golfview Department Ltd* SKN HCVAP2003/024 at [18]
41. *Sutej v The Governor of HMP Holloway and Another*; [2003] EWHC 1940 (Admin)
42. *Svipsta v Latvia* [2006] ECHR 66820/01
43. *Texan Management Ltd. Pacific Electric Wire & Cable Co. Ltd.* [2009] UKPC 46;
44. *The Extradition Act 1993 of Antigua and Barbuda*
45. *The State v Brad Boyce* 65 WIR 65.
46. *Thomas v Gonsalves* Civil Appeal. No. 9 of 2014 SVG HCVAP 2014/0009 at [15]
47. *Toussaint v Attorney general of Saint Vincent and the Grenadines* [2007] UKPC 48, [2007] 1 WLR 2825
48. *Umirov v Russia* (App. No. 17455/11) -
49. *United States v Ray L. Corona and Rafael Corona* 804 F.2d. 1568
50. *United States v. Broecker* CR NO. 112-97-C (W.D. Ky., 2012)
51. *U.S. v. Hickey*, 580 F.3d 922 (9th Cir., 2009)
52. *United States v. Miner* No. 3:11-cr-25 (E.D. Tenn'2012)
53. *United States v. Goff*, 187 Fed. App'x 486, 491 (6th Cir. 2006)
54. *United States v. Stricklin* 591 F.2d 1112
55. *Warren v Attorney General for Jersey* [2011] UKPC 10.
56. *Watson v Fernandes* [2007] CCJ 1(AJ) at [39]-[40]

JUDGMENT

- [1] **RAMDHANI J. (Ag.)** This is a constitutional claim brought by way of an originating motion (once amended) for remedies under section 18 of the Antigua and Barbuda Constitution. Primarily, it was being contended that a decision made by the second defendant to order the return of Mr. Leroy King, the claimant to the United States of America under the Extradition Act 1993, is in breach of the claimant's right to the protection of law as guaranteed by sections 3, 5, and 15 of the Constitution. It also being contended that

Extradition Act in failing to provide the claimant with a right of appeal from a refusal to grant a Writ of Habeas Corpus is discriminatory and in breach of section 14 of the Constitution. On the Constitutional motion, there was an application for leave to apply for judicial review of the decision made by the second defendant to extradite the claimant. Nearer to the hearing of this matter a second written application for leave to apply for judicial review was filed.

- [2] The court refuses to grant any of the relief being sought. The applications for leave to apply for judicial review are dismissed. There will be no order as to costs. The reasons are set out below.
- [3] It is important that the court expresses its regret for the delay in this decision. The primary reasons for this was the fact that after the hearing which took place at the end of November 2016, the claimant, through his attorney sent to this court on several occasions, affidavits with exhibits and submissions - in excess of hundreds of pages. This began in January 2017 and continued well into March 2017. The claimant's attorney contended in these late filings, that events had just been discovered which demonstrated that the request for extradition was without basis; this had to be brought to the court's attention. The Director of Public Prosecutions also filed an affidavit in response to the several filings of the claimant. These additional documents did nothing to vary the conclusions of the court and will also be addressed below.

Brief Background re: the Originating Motion

- [4] The claimant/applicant (the 'claimant') is one Leroy King. Since 2010, he had been the subject of a request for extradition from the United States of America. Committal proceedings ended with his committed for extradition. An application for a Writ of Habeas Corpus filed on his behalf was heard by Justice Michel who held that his committal on extradition on most of the charges were proper. The court refused to grant habeas corpus and an appeal to the court of appeal from this refusal was dismissed, the court holding that

it lacked jurisdiction to entertain an appeal on any matter arising from a criminal cause of matter.

- [5] The first defendant in the Attorney General who is joined in his capacity as representing the State having regards to the various declarations being sought.
- [6] The second defendant is the Minister of Foreign Affairs who is given power under the Extradition Act 1993 and who has made an order of return for the claimant to be extradited to the United States. At that time that Minister was Mr. Baldwin Spencer.
- [7] The learned Director of Public Prosecutions, Mr. Anthony Armstrong was allowed to fully participate in the proceedings in the interests of the Government of the United States of America.

The Amended Originating Motion

- [8] The Originating Motion was filed on the 26th March 2012, and amended on the 4th April 2012. It sought a number of substantive relief, inclusive of:
 - 1. A declaration that the Committal Order of the Chief Magistrate made on the 26th day of April 2010 in whole or in part is invalid and unlawful and of no effect so far as it violates the Claimant's right's to protection of law guaranteed by Section 3, 5, 14 and 15 of the Antigua and Barbuda Constitution Order 1981.
 - 2. A declaration that any warrant issued in consequence of the aforesaid committal order by the Minister of Foreign Affairs constitutes an infringement of the Claimant's right of protection of law under the said section 3, 5, 14 and 15 of the aforesaid Constitutional Order.
 - 3. A declaration that in so far as Parliament enacted Section 12 and 13 of the Extradition Act 1993 the same is discriminatory in its application against the

Claimant in that it deprives him of the right to appeal to the Court of Appeal in circumstances where a committal magistrate and a Judge on a habeas corpus application (as provided for in Section 13) acted in excess of jurisdiction conferred by the aforesaid Extradition Act to the Claimant's detriment and accords to the foreign requesting state in circumstances where a committal order has been denied, a right of appeal ultimately to the court of appeal and beyond contrary to Section 3(a) and 14(1) and (2) of the aforesaid Antigua and Barbuda Constitution Order 1981.

4. A declaration that the claimant is entitled to equal protection of the law and equal treatment under the law.
5. That Leave be granted pursuant to Part 56.8(1) of CPR to the Claimant to apply for Judicial Review of the second defendant's decision to return him to the United States for trial for offences for which he was committed by warrant under the hand of the Minister of Foreign Affairs dated March 30th 2012 and served on him on Sunday 1st April 2012.

[9] An order was sought that if leave was granted to apply for judicial review, that that application be heard together with the substantive claim for constitutional redress.

Affidavits filed in support of the Originating Motion

[10] In his evidence supporting his motion, the claimant deposed that in 2010, the Minister of foreign Affairs issued a warrant for his return on extradition to answer charges filed against him on a 21-counts Indictment returned by a Grand Jury in the State of Texas, the United States of America.

[11] On the 26th April 2010, the Chief Magistrate presiding at District A Magistrate Court, St. John's made an order of Committal for his return to the United States for trial in respect of the Texas Indictment containing 21 counts which charged inter alia, conspiracy to commit

mail wire and securities fraud – eight counts of wire fraud, ten counts of mail fraud, conspiracy to obstruct SEC investigation, obstruction of SEC investigation and conspiracy to commit money laundering.

- [12] On the 5th May 2010, the claimant applied pursuant to section 13 of the Extradition Act 1993, to the High Court for a grant of a Writ of Habeas Corpus. He also sought an order of certiorari to quash the committal order of the magistrate.
- [13] Those matters were heard on the 15th and 21st of December 2012 before the Hon. Mr. Justice Mario Michel and by a decision delivered on the 6th February 2013, the claimant's committal was set aside on the ten counts of mail fraud. The court however, upheld the committal order in respect of the other eleven counts on the indictment.
- [14] An appeal was filed on the 16th February 2012, on the High Court's refusal to grant certiorari quashing the remaining eleven counts on the basis that the Court has acted in excess of jurisdiction granted by the Extradition Act 1993, that the court was not lawfully authorized to order the claimant's extradition. A stay of execution was sought of the committal order pending the determination of the Court of Appeal.
- [15] The application for a stay was heard by the Court of Appeal on the 19th and 21st March 2012. At that hearing the Director of Public Prosecutions argued against the grant of a stay on the basis that there was no valid appeal as the instant appeal was caught by section 31(2)(a) of the Eastern Caribbean Supreme Court Act. The Court of Appeal agreed.
- [16] On the 10th February 2012, the claimant was served with a 'Notice' by the second defendant in which the latter stated that he was considering issuing a warrant ordering the claimant's return to the United States for trial pursuant to the committal order made by the magistrate. In that Notice, the claimant was advised that he had 15 days to make representations as to why he should not be returned. On the 24th February 2012, the claimant, through his attorney, made those representations as to why he should not be returned.

- [17] By a letter dated the 24th March 2012, sent to the claimant, the second defendant determined that he would be making the order for the return to the United States for trial of those offences on which the committal was found to be valid by the High Court. On the 30th March 2012, the second defendant executed a warrant of extradition against the claimant. It was served on him on the 1st April 2012.
- [18] On this motion, the claimant contended that the High Court's decision is bad in law. It is contended that the High court was wrong in law to rule that the 'decision that the offences of wire fraud are covered by the Minister's Authority to Proceed' under the generic designation therein as 'obtaining money by false pretences' and as such would satisfy the double criminality rule in extradition matters, in that it is conduct which of committed in Antigua and Barbuda will constitute the offence of obtaining by false pretences in the Larceny Act of Antigua and Barbuda.'
- [19] The claimant has further contended that the 'decision in so far as it concerns the counts of obstructing the SEC investigation and conspiracy to obstruct the SEC investigation is also wrong in law in so far as it rests on the premise that the Antigua and Barbuda common law offence of perverting the court of justice and/or conspiracy to do so thereof are conduct constituting like offences and equally have extra territorial effect.'
- [20] The motion contends that these findings of both the magistrate and the High Court Judge have been made in excess of jurisdiction 'as extradition is not authorized by the Extradition Act for an offence which fails to satisfy the provisions of section 4 of the said Act. That the same constitutes an error of law for which ordinarily the remedy of certiorari would have been available as the challenge is to want of jurisdiction. That the same is a nullity, nothing can arise therefrom and in consequence [the claimant] is not lawfully liable to be extradited'. Any such extradition would be in 'breach of section 3, 5, and 15 of the Antigua and Barbuda Constitution.

- [21] The motion further contends that if the claimant is unable to appeal that 'manifestly wrong' decision of the High Court, the risk of injustice and the deprivation of his liberty will result in his right to the protection of law being infringed. It is contended that section 12 and 13 of the Extradition Act 1993, by not providing a right of appeal to person who are the subject of extradition proceedings, is 'discriminatory in its application and deprives the claimant of equal treatment and protection under the law. It is contended that section 12 of the Act gives a right to a foreign requesting state the right to appeal any adverse decision made by the committal magistrate to the court of appeal and possibly to the Privy Council whilst it denies persons such as the claimant, through section 13, the right of appeal and to have reviewed any wrong decision on the law made by the committing magistrate and the Judge. The claimant contends that these are in breach of section 3(a) and 14(1) and (2) of the Antigua and Barbuda Constitution Order 1981.
- [22] As regards the 'application for leave to apply for judicial review', the claimant in 2012 did not provide any grounds for the challenge to the second defendant's decision to order his return based on the committal order. In his supplemental affidavit filed on the 4th April 2012, he simply stated the fact that 'on Sunday the 1st of April 2012, [he had been] served with the warrant under the hand of the Minister of Foreign Affairs which was dated March 30th 2012 which authorizes [his] return to the United States for eleven offences which [he has] been committed by the High Court'.
- [23] Additional evidence was filed after the hearing on behalf of the claimant. These were also considered. The relevant portions are discussed below.

The Case Management Conferences in September and October 2016

- [24] The matter was not heard until it came before this court in September 2016.¹ The first hearing was essentially to case manage the matter to determine whether the matter was trial ready or whether there was need to hear any other applications.
- [25] At that hearing the defendants, through their attorney, indicated that they were ready to proceed as they saw no need make any applications or to present the court with any evidence; the expressed intent was to rely on legal arguments.
- [26] Mr. Hamilton Q.C. counsel for the claimant appeared at the case management conference. Counsel advised that he had real challenges to any of the suggested hearing dates. At first, he opposed every suggested date stating that he was otherwise engaged. The court then advised that the matter was going to be heard in November 2016 and that if Mr. Hamilton Q.C. was not able to attend, perhaps other counsel would have to be retained and adequate and reasonable time given for preparation. Eventually, Queen's Counsel suggested that a date near the end of November 2016 was suitable.
- [27] On the 3rd October 2016, the matter was again brought on for further case management. At this hearing, Dr. Dorsett appeared for the claimant. At this stage, an issue was raised as to whether the application for leave to apply for judicial review was proper having been made as part of the motion, and without setting out grounds for this application. Dr. Dorsett sought a ruling from the court to deem that the application for leave made on the originating motion was properly before the court. Having not heard substantive arguments on the point, the court declined to rule at that stage, indicating that it would be dealt with at the hearing.
- [28] On the 17th October 2016, the claimant filed a written application for leave to apply for judicial review for an order to quash the decision of the second defendant dated the 23rd March 2012, to return him to the United States.

¹ It was suggested by the Director that this was because, the claimant had indicated that he was having discussions with the American and that the government of Antigua and Barbuda had stayed their hand. This statement was not denied. Notwithstanding, this reason was given no weight at all in the considerations of this Court.

[29] On this application, the claimant recited the background the motion and contended that it was arguable that the decision was bad in law on the following grounds, namely that it was:

- i. Unconstitutional and in breach of section 3 of the Constitution and in breach of the claimant's right to procedural fairness and the right to access to the court;
- ii. Illegal and breach of his duty to sufficiently acquaint himself with relevant information, fairly presented and properly addressed, and to have regard to all relevant consideration, and
- iii. Unreasonable and irrational in that he failed to have regard to all legally considerations.

[30] The matter was again case managed, at which time, the attorney for the defendants suggested having regards to the application for leave which had been filed, that the court grant leave to apply for judicial review and adjourn the matter so that the claimant could file his fixed date claim for judicial review so that that claim could then be consolidated with the motion and be heard together. The Learned Director of Public Prosecutions who was allowed to participate in the proceedings in the interests of the US Government took a different view and objected to the application for leave being granted. this objection was made the subject of written submissions² by Dr. Dorsett who argued that it was rather strange that the Director could take such a view in light of the concession of the defendants' own concession, and that since he had only a 'watching brief', his views ought to be disregarded.

[31] In the circumstances of this case, the court found Ms. Harris' stance rather startling, as it involved a concession that not only the application was properly made, but that it had met the threshold for the grant of leave, and a matter which was really crucial for this court's determination. For this reasons, in this case, Dr. Dorsett's arguments too went beyond the pale. No doubt, defendants to an application for leave can always concede that there are arguable grounds for full inquiry, they may only do so on serious considerations that are indeed such grounds; concession must not simply be made for expediency. In those circumstances, the court declined to make the orders suggested by counsel for the

² Submissions filed 3rd January 2017

defendants and ordered that the motion and the application would be heard on the 28th November 2016 when all of the issues would be dealt with. (It is noted that this concession did influence the court's discretion is not dismissing the second application on the basis of delay.)

[32] At that stage, Dr. Dorsett had made it quite clear that the court was not being asked to consider whether there was valid grounds to justify committal on the counts found valid by the High Court. He had accepted that there was no evidence of the committal bundles before the court. He also accepted that in the absence those bundles and related evidence, even if the court were minded to, it was not in a position to consider whether the magistrate's committal and the Judge's confirmation that there was sufficient evidence to justify the committal on those counts were properly made. (I have considered the reasons given by Michel J related to whether the double criminality rule was satisfied. Sitting as a constitutional court, I reconsidered this matter and I am of the view that the findings of the High Court on the habeas corpus application cannot be faulted.)

[33] In any event, at this stage, Dr. Dorsett had essentially narrowed his own statement of the issues for the court, contending that these were (a) whether there was a breach of the claimant's fundamental rights there being no right of appeal provided for by the Act; and (b) Whether there were arguable grounds for the grant of leave for judicial review.

[34] Having regard to Dr. Dorsett's own formulation, and the court's own understanding of the issues, the court considered that the hearing could proceed on all matters there being no real need to separate the hearing of the motion from the hearing of the application. These matters have been delayed long enough. It was also considered that if Dr. Dorsett succeeded on the motion, in his quest for a declaration that the Act had interfered with the claimant's right of access to justice and this was in breach of the Constitution, this could well stand separate and apart from the issues raised on the application for leave, which essentially (in the absence of any consideration as to whether the underlying committal was valid for evidential sufficiency) was whether there was an arguable case that the second defendant had acted reasonably and taken all relevant matters into consideration

and had not taken any irrelevant matters into consideration. Even if the grant of any declarations would affect the application for leave, it would have simply meant that leave might then be granted and the subsequent application for judicial review be heard on its merits.

The Submissions in Brief – Framing the Issues.

- [35] The Claimant focused his arguments on the ‘failure’ of the Extradition Act 1993 to provide for a right of appeal which he contends is unconstitutional and in denial of his right of protection of the law as guaranteed by section 3(a) of the Antigua and Barbuda Constitution Order 1981. In written submissions, Dr. Dorsett states: “The central complaint is that the Extradition Act 1993, which governs the whole regime of extradition, does not grant the [claimant] the right of appeal against a judge’s denial of a habeas corpus application, whilst on the other hand the Extradition Act 1993 grants to a foreign requesting state a right of appeal against a judge’s order denying the requesting state’s application for extradition. In simple terms where an extradition requests fails before a judge the aggrieved party (i.e. the requesting state has a right of appeal to the Court of Appeal (and possibly beyond)). On the other hand, when the extradition request is upheld the aggrieved party (i.e., the wanted person) has no right of appeal to the Court of Appeal.”
- [36] Learned counsel relies on a number of cases including **Attorney General of Barbados v Joseph and Boyce** 69 WIR 104; **Lucas v Chief Education Officer** 86 WIR 100; **Maya Leaders Alliance v The Attorney General of Belize** 87 WIR 178 to argue that: “The Extradition Act affords one party with a grievance in an extradition matter greater access and opportunity to legal redress than another party. This is wholly contrary to ‘universally accepted standards of justice observed by civilized nations which observe the rule of law.’
- [37] As regards the Application for leave to apply for judicial review, it is submitted on behalf of the claimant that the court should treat his original application which was incorporated on the original originating motion as properly before the court. As the court understands the arguments, the claimant’s is contending that his written application filed in October of 2016

is simply done out of an abundance caution, but that effectively he still relies on his earlier application; they should be taken together. He contends that his application should not falter because of a lack of form or for being included on the originating motion.

[38] As his application for leave stands before the court, the claimant is contending that the second defendant's decision is bad in law *inter alia* for the being unreasonable and failing to take relevant matters into consideration.

[39] As far as the relief sought on the Constitution motion, Ms. Bridget Nelson, Senior Crown Counsel for the respondents, argued that the right to the protection of the law provided for by the Constitution was not an absolute right but had to give way to lawful limitations. Learned counsel's essential argument was that the extradition laws were consistent with the Constitutional provisions related to the access to justice and the protection of the law. Learned counsel also argued that there was no basis to argue that the extradition laws were discriminatory against the claimant. Finally, learned counsel contended that the claimant was seeking to re-litigate matters already dealt with by the High Court by filing this new constitutional motion.

[40] In relation to the application for leave to apply for judicial review, Senior Crown Counsel for the defendants, moving on from an earlier non-objection to the second application for leave, essentially argued that under the Extradition Act, the two preconditions to the exercise of the second defendant's decision to order return are firstly, that the person has not been discharged by the High Court on his application for habeas corpus, and secondly that his return is not prohibited by the Act. Learned counsel contended that there are no arguable grounds to say that there has been a breach of the Act.

[41] The Learned Director essentially contended that the first application was bad in law and that the second application should not be entertained having regards to the fact that it was filed more than four years after the decision it seeks to challenge.

[42] After the hearing in this matter, the claimant caused to be filed a new affidavit attaching what purports to be a new indictment along with supporting documents from the United States. He asserts that this shows that he is no longer required in the United States as he is not named in that 'superseding indictment'. New submissions were filed along with these documents. The Director of Public Prosecution also filed an affidavit and contended that this new indictment had nothing to do with the claimant, as the United States simply wanted to move along with the case against others.

The Issues for the Court

[43] All of these contentions have assisted the court in framing the issues. The issues are as follows:

1. The first issue is whether the omission of the Extradition Act 1993 in providing the claimant to a right of appeal from the judge's refusal to grant Habeas Corpus deprives him of the protection of the law as guaranteed by the Constitution of Antigua and Barbuda? An important question is whether section 13 of the Act provides for a right of appeal to a requesting state to appeal to the court of appeal and beyond, and if so whether this is breach of the protection of the law as contained in section 3 of the Constitution. It is important that the court address whether it indeed has jurisdiction to grant the orders being sought.
2. The second and third issues relate to the application. The second issue is whether the application for leave to apply for judicial review is properly before the court.
3. The third issue arises if the second is answered in the affirmative. It is whether the claimant has satisfied the court that the application has met the threshold for the grant of leave.

4. The fourth issue is whether the new 'superseding indictment' shows clearly that the United States no longer requires the return of the claimant, and whether this means that these proceedings have been overtaken.

A. THE CONSTITUTIONAL MOTION

Issue No. 1 - Whether the omission of the Extradition Act 1993 in providing the claimant to a right of appeal from the judge' refusal to grant Habeas Corpus deprives him of the protection of the law as guaranteed by the Constitution of Antigua and Barbuda? Is an extended right of appeal discriminatory within the meaning of section 14 of the Constitution? Does the Court have jurisdiction to bar the return of the claimant?

[44] The claimant's made his case by calling in aid a number of provisions of the Constitution. First, he claims that the failure of the Act to provide him with a right of appeal interferes with his right of access to the courts. He also effectively contends that this failure does not pursue any legitimate aim and even if it does, the failure is not reasonably proportional to the aim it seeks to achieve.

[45] Second, he claims that this denial is discriminatory and also offends against the Constitution. He asserts that section 14(1) of the Constitution mandates that no law shall make any provision that is discriminatory either of itself or in its effect. He states that the Extradition Act 1993 by failing to provide him with a right of appeal and giving one to a 'requesting state' is discriminatory in itself and its effect by giving preferential treatment to that state because of its 'place of origin'.

[46] The defendants on this arguments contends there has been no preferential treatment given to the requesting state, any right of appeal merely seeks to restore balance to the proceedings. It therefore is not in breach of any of the provisions of the Constitution.

Analysis and Findings

- [47] This is a challenge brought under the fundamental rights provisions of the Constitution of Antigua and Barbuda. It has followed contested committal proceedings for extradition, resort to the habeas corpus procedure available for challenge of the magistrate's committal coupled with an application for certiorari, as well as a failed appeal before the court of appeal.
- [48] As a preliminary point, I did consider the arguments that the Court should not entertain this matter as this was simply another way to re-litigate the earlier challenge on the application for Habeas Corpus. Having regard to Dr. Dorsett's own narrowing of the issues at the hearing, I have declined to follow this argument. What was left before me at the hearing on the Constitutional motion were serious constitutional arguments as to whether the extradition law were consistent with the Constitution including the express and implied rights of access to justice and the protection of the law found in the Constitution.
- [49] A Constitutional Court has the jurisdiction under section 18 of the Antigua and Barbuda Constitution to bar the extradition of any person against whom the extradition process has commenced if it is shown that the process has caused the breach of one or more of his fundamental rights. Breaches of the Constitution may or may not amount to breaches of a subject's fundamental right for the purposes of the exercise of this jurisdiction.
- [50] Additionally, this motion followed the order of extradition which was made by the second defendant and which arose after the proceedings in the High Court. It is then that questions related to rights of appeal would have arisen. Significantly, all of these matters have been pending in the court now for over four years. For all these reasons, this court cannot find that the proceedings, as originally framed are an abuse of the process of the court.
- [51] In its present form, the challenge to the committal for extradition seeks to assert breaches of the protection of law as guaranteed by several provisions of the Constitution. Primarily it is argued the claimant has a 'right of access' to justice and the Extradition Act 1993 has

breached this right by failing to provide to the claimant a right of appeal when one was provided to the requesting state. It is important that I set out the rights of access to justice which are given by the Extradition Act 1993.

The Subject Person's Right to access the Court of Appeal and beyond

- [52] The Extradition Act 1993 of Antigua and Barbuda provides for redress to both the person whose return is being sought and the requesting state on the decision of a magistrate on committal proceedings. As far as the subject of the proceedings is concerned section 13 of the Act is applicable. It provides as follows:

"(1) Where a person is committed under section 11, the court shall inform him in ordinary language of his right to make an application for habeas corpus and shall forthwith give notice of the committal to the Minister.

(2) A person committed shall not be returned –

(a) in any case until the expiration of the period of 15 days beginning with the day on which the order of committal was made;

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

(3) Without any prejudice to the jurisdiction of the high court apart from this section, the court shall order the applicant's discharge if it appears to the court in relation to the offence, or each of the offences, in respect of which each of the applicant's return is sought, that –

(a) by reason of the trivial nature of the offence; or

(b) by reasons of the passages of time since he is alleged to have committed it or to become unlawfully at large, as the case may be; or

(c) because the accusation against him is not made in good faith in the interest of justice,

it would, having regard to all the circumstances, be unjust or oppressive to return him.

(4) On any such application the court may receive additional evidence relevant to the exercise of its jurisdiction under section 8 or subsection (3) of this section.

(5) Proceedings on an application for habeas corpus shall be treated for the purposes of this section as pending (unless they are discontinued) until

(disregarding any power of the court to grant leave to appeal out of time) there is no further possibility of an appeal.

[53] At first blush it might appear that subsection (5) allows an appeal from the high court decision. A careful reading, however, shows that the section does not go as far as providing for a right of appeal – only that proceedings are taken as pending ‘until there is no possibility of an appeal’. Further, section 31(2) (a) of the Eastern Caribbean Supreme Court Act puts the matter to rest. In dealing with civil appeals from the High Court it states – “No appeal shall lie under this section (a) from any order made in any criminal cause of matter”. This section has been examined by the Court of Appeal from this jurisdiction in an earlier attempt by the claimant to appeal the high court’s decision not to grant habeas corpus and not to refuse certiorari. It was effectively held that as far as the extradition process is concerned, the laws of Antigua and Barbuda do not allow an appeal from a refusal to grant a Writ of Habeas Corpus.³

[54] This, however, is not the end of access rights. Section 8 of the Act is to be noted. It speaks to the Court of Appeal and certain powers given to it. This section states in full:

- (1) A person shall not be returned under Part IV, or committed or kept in custody for the purposes of return, if it appears to an appropriate authority*
 - (a) That the offence of which the person is accused or was convicted is one of political nature;*
 - (b) that it is an offence under military law which is not also an offence under the general criminal law;*
 - (c) that the request for his return (though purporting to be made on account of an extradition crime) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or*
 - (d) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.*
- (2) A person who is alleged to be unlawfully at large after conviction of an extradition crime shall not be returned to a foreign state, or committed or kept in custody for the purposes of return to a foreign state, if it appears to an appropriate authority—*

³ See the Transcripts of the Court of Appeal of the 21st March 2012 of the oral judgment of the Court delivered by Chief Justice Rawlins. The court comprised of Her Ladyship Madame Janice Pereira and His Lordship Justice Paul Webster.

- (a) *that the conviction was obtained in his absence; and*
 - (b) *that it would not be in the interests of justice to return him on the ground of that conviction.*
- (3) *A person accused of an offence shall not be returned, or committed or kept in custody for the purposes of return, if it appears to an appropriate authority that is charged with that offence in Antigua and Barbuda he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.*
- (4) *A person shall not be returned, or committed or kept in custody for the purposes of such return, unless provision is made by relevant law, or by an arrangement made with relevant foreign state, or Commonwealth country, for securing that he will not unless he has first had an opportunity to leave it, be dealt with there for or in respect of any offence committed before his return to it other than –*
 - (a) *The offence is respect of which his return is ordered;*
 - (b) *an offence, other than an offence excluded by subsection (5), which is disclosed by the facts in respect of which his return was ordered; or subject to subsection (6), any other offence being an extradition crime in respect of which the Minister may consent to his being dealt with.*
- (5) *The offences excluded froth subsection (4) (b) are offences in relation to which an order for the return of the person concerned could not lawfully be made.*
- (6) *The Minister may not give consent under subsection (4)(c) in respect of an offence in relation to which it appears to him that an order for return of the person concerned could not lawfully be made, or would not in fact be made.*
- (7) *Any such arrangement as is mentioned is subsection (4) which is made with a designated Commonwealth country may be an arrangement made for the particular case or an arrangement of a more general nature; and for purposes of that subsection a certificate issued by or under the authority of the Minister confirming the existence of an arrangement with a Commonwealth country and stating its terms shall be conclusive evidence of the matter contained in the certificate.*
- (8) *In relation to Common wealth country the reference in subsection (1) to an offence of political character does not include an offence of against the life or person of the Head of the Commonwealth or attempting or conspiring to commit, or assisting, counseling or procuring the commission of or being accessory before or after the fact to such an offence, or impeding the apprehension of prosecution of persons guilty of such offence.*
- (9) *In this Act “appropriate authority” means—*
 - (a) *the Minister;*
 - (b) *the court of committal;*

- (c) *the High Court on an application for habeas corpus;*
- (d) *the court of Appeal on an application for review of the order of the order of committal.*

[55] This section provides for the range of matters in which 'an appropriate authority' may refuse to order the return of the person whose return is sought. The language at subsection (9) makes it clear that the Court of Appeal has been designated one of those 'appropriate authorities' under the Act which is given powers under section 8 of the Act to refuse return when it has before it **'an application for review of an order of committal'**.

[56] This is an express jurisdiction given to the Court of Appeal and relates specifically to a review of an order of committal. This does not at all conflict with the Court of Appeal decision that no appeal will lie from a criminal cause or matter. This, it would seem, is a concurrent jurisdiction given to the subject person to seek a review of the committal. The subsection does not expressly state when such an application is to be made, whether after the magistrate has committed the person or after High Court has confirmed the committal. However, based on the expressed provisions which stipulate that the Magistrate should inform the person of his right to habeas corpus, it would seem that the Act intends that the application for review to the Court of Appeal follow from the Habeas Corpus hearing. It is noted that the Act allows additional evidence to be heard at the Habeas Corpus application. In the absence of any such provisions, the review at the Court of Appeal will simply be on the basis of examining the legality of the committal and not be a re-hearing of the committal.⁴

[57] Further, there is no language in the Act which stipulates that an application for a review of any committal to the Court of Appeal under section 8 operates as a stay of the Minister's exercise of his powers of return under section 14 of the Act. Any possible stay would therefore have to be granted by the Court of Appeal.

⁴ See generally for differences between appeal and review - *R v Chief Constable of the Merseyside Police ex parte Calveley and Others* [1986] Q.B. 424

- [58] Further, the review jurisdiction given to the Court of Appeal though a specialty jurisdiction appears to be caught by section 122 of the Antigua and Barbuda Constitution to the effect that appeals may lie from this decision with the leave of the Court of Appeal or The Privy council. It is noted in this case, that no application was made for a review of the committal by the Court of Appeal.

The Requesting State's right to access to the Court of Appeal and beyond

- [59] This is dealt with by section 12 of the Extradition Act 1993. It provides as follows:

"12.(1) If the court of committal refuses to make an order in relation to a person under section 11 in respect of the offence or, as the case may be, any of the offences to which the authority to proceed relates, the foreign state or the Commonwealth country seeking the surrender of that person to it may question the proceeding on the grounds that it is wrong in law by apply to the court to state a case for the opinion of the High Court on the question of law involved.

(2) If the foreign state or Commonwealth country seeking the return immediately informs the court of committal that it intends to make such an application, the court shall make an order providing for the detention of the person to whom the authority to proceed relates, or directing that he shall not be released except on bail.

(3) Rules of court may specify –

- (a) a period within which such an application must be made unless the court grants a longer period; and*
- (b) a period within which the court of committal must comply with such an application.*

(4) Where the court of committal fails to comply with an application under subsection (1) within the period specified by Rules of Court, the High Court may, on the application by the foreign state or Commonwealth country that applied for the case to be stated, make an order requiring the court to state a case.

(5) The High court shall have power –

- (a) to remit the case to the court of committal to decide it according to the opinion of the High Court on the question of law; or*
- (b) to dismiss the appeal.*

(6) where the High Court dismisses an appeal relating to an offence, it shall by order declare that that offence is not an offence in respect of which the Minister

has power to make an order for return in respect of the person whose return as requested.

(7) An order made by the Magistrate under subsection (2) shall cease to have effect if -

(a) the High Court dismisses the appeal in respect of the offence or all of the offence to which it relates; and

(b) the foreign state or Commonwealth country does not immediately inform the High Court that it intends to appeal to the court of appeal.

(8) The Court of Appeal may exercise any powers of the High Court under subsection (3) and subsection (6) shall apply to the Court of Appeal as it applies to the High Court.

(9) An order under subsection (2) shall have effect as long as the case is pending.

(10) For the purpose of this section a case is pending (unless proceedings are discontinued) until (disregarding any power of a court to grant leave to take any step out of time) there is no step that a foreign state or Commonwealth country can take."

[60] Again, these provisions speak to the proceedings in the Court of Appeal. These provisions are a bit more specific than those contained in section 13. They actually speak to what powers may be exercised by the Court of Appeal in the event of an appeal, and they also speak to the status of the person once proceedings are 'pending'.

[61] It seems to me that these provisions actually confer a right of appeal on the requesting states in relation to points of law. It appears that on such a construction, the specific provisions of section 13 of the Act would therefore override the general provisions of 31(2) (a) of the Eastern Caribbean Supreme Court Act in relation to extradition matters.

[62] Dr. Dorsett's arguments that the Act has given the requesting states greater rights of appeal must therefore be understood in the context of the above analysis of the provisions. The subject person is given no 'right of appeal' to the court of appeal, but the requesting state is. Does this by itself breach the Constitution and if it does, should extradition be barred?

The Protection of the Law – Its Scope in the context of Extradition Proceedings

[63] Dr. Dorsett has focused his arguments on the protection of law guarantee by reference to section 3 of the Constitution. Learned counsel submits: “The central complaint is that the Extradition Act 1993, which governs the whole regime of extradition, does not grant the [claimant] the right of appeal against a judge’s denial of a habeas corpus application, whilst on the [other] hand the Extradition Act 1993 grants to a foreign requesting state a right of appeal against a judge’s order denying the requesting state’s application for extradition. In simple terms where an extradition request fails before a judge the aggrieved party, (i.e. the requesting state) has a right of appeal to the Court of Appeal (and possibly beyond). On the other hand, when the extradition request is upheld the aggrieved party (i.e. the wanted person) has no right of appeal to the Court of Appeal. The claimant contends that this regime is unconstitutional and in denial of his right to the protection of the law as guaranteed by section 3(a) of the Constitution.

Learned Counsel also relied on the following authorities: **Arorangi Timberland Ltd. V Minister of the Cook Islands National Superannuation Fund** [2016] UKPC 32; **Attorney General of Barbados v Joseph and Boyce** [2006] 69 WIR 104; **Lucas v Chief Education Officer** 86 WIR 100; **Maya Leaders Alliance v The Attorney General of Belize** 87 WIR 178; **Omar v France** judgment of 29th July 1998; **R (Lumba) v Secretary of State for Home Department** [2012] AC 245; **Rahamatullah v Secretary of State for Foreign and Commonwealth Affairs** [2012] 1 WLR 1462.

[64] Chapter II of the Antigua and Barbuda Constitution provides for the protection of fundamental rights and freedoms of the individual. Section 3 in particular provides that every person regardless of race, place of origin, political opinions or affiliations, colour creed or sex but subject to respect for the rights and freedoms of others and for the public interest is entitled *inter alia* to the ‘protection of law’. Section 3 goes on to provide that the provisions of chapter II ‘shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of

the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[65] The full scope of the protection given by the general provisions of section 3 are also to be understood in the context of those specific provisions of Chapter II. Having regard to the nature of the extradition process there are essentially two other substantive provisions of the Constitution which have been engaged. These are sections 5 and 14 which treat with the right to liberty and the right to a fair trial.

[66] The relevant portion of section 5 reads:

"No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say-

a....

b....

...

j. for the purpose of preventing the unlawful entry of that person into Antigua and Barbuda, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Antigua and Barbuda or for the purpose of restricting that person while he is being conveyed through Antigua and Barbuda in the course of his extradition or removal as a convicted prisoner from one country to another; or

[67] The provisions to secure the 'protection of the law' to a person charged with a criminal offence are found in section 15. The relevant portion reads:

"If any person is charged with a criminal offence then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

[68] I adopt Boyce' and agree that protection of law in the fair trial sense must be meaningful. Wit J.'s statement in Boyce is applicable when he stated:

"The right to protection of the law requires therefore not only of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power, but it also requires the availability of effective remedies."

[69] The recognition that the protection of law must be adequate and meaningful is equally consistent the acceptance that the protection may legitimately vary in its form dependent on what fundamental right is being affected. In this regard, it has been accepted that the

protection of the law which is standard in relation to the fair trial provisions is not quite the same as is required for extradition proceedings.

Extradition Proceedings vis-à-vis the Trial Process

[70] Extradition proceedings and the trial of the underlying offences are two separate matters. Section 15 relates to the actual trial into the charges against the claimant. It is not to be read as transforming the extradition process into the actual trial process having identical protection mechanisms and rights of appeal.

[71] The two processes are uniquely different in some material respects. As far as the right to a fair trial is concerned it is expected that the person will be afforded a fair trial in the requesting state. As the court of Appeal stated in *Scantlebury* at paragraph 70:

"Extradition law proceeds upon the assumption that the requesting state (in this case the USA) is acting in good faith and the fugitive will receive a fair trial in the courts of the requesting state."

[72] Even on matters of procedural safeguards, the two differ in significant way. In *Kindler v Canada (Minister of Justice)* [1993] 4 LRC 85 at 124 McLachlin J (as she then was) said:

"While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions."

[73] The authors of *The Law of Extradition and Mutual Assistance* (2nd edn, 2007), p 132, Clive Nicholls QC, Clare Montgomery QC and Julian Knowles on their discussion of Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, assert:

"Article 6 does not apply to extradition proceedings. In other words, the domestic extradition process does not have to offer all the guarantees in Article 6(3), for example, the right to cross-examine witnesses. This is because Article 6 only applies to the full process of the examination of an individual's guilt or innocence"

*of an offence and not the mere process of determining whether a person can be extradited to another country.*⁵

- [74] The European Court of Human Rights have also underscored that domestic extradition proceedings do not have to provide all the guarantees of the fair trial provision but have made it clear where such proceedings fall to be considered in the context of Article 5(4) of the European Convention judicial scrutiny is required:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

- [75] **This theme is further elaborated on in A and others v United Kingdom (App no 3455/05) - [2009] ECHR 3455/05** the European Court of Human Rights held that:

Although it was not always necessary that an art 5(4) procedure be attended by the same guarantees as those required under art 6 of the Convention for criminal or civil litigation, it should have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. Accordingly, the proceedings had to be adversarial and should always ensure 'equality of arms' between the parties.

See also **Mooren v Germany** (App no 11364/03) - [2009] ECHR 11364/0 **Umirov v Russia** (App. No. 17455/11) - [2012] ECHR 17455/11

- [76] Extradition involves an interference with the liberty of the subject whether or not the person has been detained and has been on bail. Therefore, sections 3, 5 and 15 of the Antigua and Barbuda Constitution ought to be construed in this light as the safeguards and principles set out by the Human Rights Court in the context of Article 5(4) of the European Convention reflect modern standards of fairness and constitutional soundness.⁶

- [77] The one safeguard being complained of relates to rights of appeal. But there is nothing in the Constitution or the Act, or in the learning which requires that there should always be a **right of appeal** in these types of proceedings; proceedings may well be judicial in character without there being any **right of appeal**. It is to be noted that judicial review as a remedy was always available – the right to apply for habeas corpus fits squarely within that

⁵ Quoted with approval in Scantelbury

⁶ **Reinprecht v Austria** (App no 67175/01) - [2005] ECHR 67175/01 at para. 37; *Imbrioscia v Switzerland* [1993] ECHR 13972/88 at para 36, and *John Murray v UK* [1996] ECHR 18731/91 at para 62)

scheme. The Act provides that once habeas corpus application is still pending the second defendant may not order the return of the subject person.

- [78] It is important that the mechanisms facilitating extradition are not overly burdened. Rights of appeal may often have that effect. See **Hamza and others v Secretary of State for the Home Department** where the European Court of Human Rights stated:

“[21] Second, there is an overwhelming public interest in the proper functioning of the extradition arrangements and the honouring of extradition treaties. It is also in the interests of justice that those accused of very serious crimes, as each of these Claimants is in these proceedings, are tried as quickly as possible as is consistent with the interests of justice. It is unacceptable that extradition proceedings should take more than a relatively short time, to be measured in months not years. It is not just to anyone that proceedings such as these should last between 14 and eight years.

[22] Thirdly, it is necessary to emphasise the importance of finality in litigation and the particular importance of that principle in extradition cases because of the public interest in an efficient process, the need to adhere to international obligations and to avoid a recurrence of the delays which have so disfigured the extradition process in the past and to which successive appeals over time can subject it.”

- [79] The right to apply for a review of the committal to the Court of Appeal, thought adding another level of access to the subject person addresses the concerns expressed in Hamza. The legislation do not provide for any stay of the Minister's hand where this right is being exercised. Such a right being only to examine the legality of the committal, it will be up to the Court of Appeal to decide whether a stay of the power of return should be ordered. It would be sensible for any person who has been committed to inform the Minister that he intends to exercise this right and to request that the Minister stay his hand in this regard, but there would be no obligation on a Minister to refuse to make a stay on this basis.

- [80] So while, there is no right of appeal, access if provided to the court of Appeal to review the committal – this must be taken from the High Court's confirmation of the committal. In my view, it is likely that an appeal from a decision of the Court of Appeal to the Privy Council is possible under section 122 of the Constitution.

- [81] A right of appeal from a refusal of habeas corpus would have meant that habeas corpus proceedings would have continued to be 'pending', providing for an automatic statutory stay of the power of return. Apart from this effect, the fact that the claimant has no right of appeal, means little and is hardly an interference with access to justice and the protection of the law having regards to his right to apply for a review to the Court of Appeal and then having the possibility of an appeal to the Privy Council. Access to justice is surely provided for. The question then is whether conferring a right of appeal on requesting states as distinct from a right to apply is for a review is still consistent and grounded in fundamental notions of justice and the rule of law⁷ or whether it interferes with the equality of arms principle.

Equality of Arms

- [82] The equality of arms principle requires that no party before the court should be at a substantial disadvantage as against his opponent. As is stated in Halsbury Laws of England:

"The principle of equality of arms, which entails that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent, has frequently been endorsed¹ in relation to both civil and criminal proceedings². To this end, fairness under Article 6 requires that proceedings are truly adversarial, such that parties are entitled to make known evidence needed for their claims to succeed and to have knowledge of, and comment effectively on, all evidence adduced before or submissions filed with the court.

- [83] The principle does not require that each side must have an 'equal opportunity'. What is required is that each side must have a reasonable opportunity to present his case, and that in providing for that opportunity neither side must be placed at a substantial disadvantage vis-à-vis his opponent.

- [84] I am satisfied and there is no complaint, that both sides do not have an equal opportunity to present each side's respective case whenever the court is engaged.

⁷ Maya Leaders Alliance and Others v The AG of Belize 87 WIR 178 at para. 47.

- [85] I have no doubt that in the absence of any right of appeal given to requesting states, they would always be at some disadvantage in extradition proceedings. From their standpoint, it is their lawful duty to prosecute crimes falling within their jurisdiction and it is expected in keeping with international obligations and international comity that they would receive legal assistance from requested states to fulfil their obligations. In the usual way, if a committal is obtained, the extradited person will have all rights to a fair trial at the trial in the requesting state, including all right to access to an appeal process. Where, however, committal is denied, the requesting state in the absence of any right of appeal finds itself without any remedy. Everything will end there.
- [86] The learned Director of Public Prosecutions has argued that there is no inequality in the Constitutional sense in allowing the requesting states to be able to appeal a refusal to commit on points of law even *though no right of appeal has been* given to the claimant beyond the high court. The Director submits that the right of appeal given to the requesting states is effectively to restore balance and to address the inequality which would have arisen in the absence of such a right.
- [87] These arguments as I understand them, had assumed in this case, that the Court of Appeal had no jurisdiction in the event of a committal. I have shown that this is not so.
- [88] It is not a question of restoring balance. It is question of whether those access rights as there are do not offend the equality of arms principle having regards to the differences inherent in each sides' rights of access. What then are these differences?
- [89] On one hand, the requesting state has a right to state a case on a point of law to the court of appeal, and by virtue of section 122 of the Constitution, may have a right of appeal on any decisions on those points of law. Construing the provisions purposively, the right given the requesting state to request the court to state a case, may be exercised if the magistrate refuses to commit or of the high court nullifies the committal.

[90] On the other hand, the subject person has a right to apply for habeas corpus if he is committed for extradition by the Magistrate. This right is as broad as an appeal as there is a right to present additional evidence and it amounts to a re-hearing. Once it is being exercised, no power of returned may be exercised. Then there is a right to apply to the Court of Appeal for a review of the committal as has been confirmed by the Judge on the Habeas Corpus application. There is no automatic stay here. Any stay would have to be given on the Court of Appeal's exercise of discretion.

[91] These differences as there are in my view not substantial. There is no real inequality or arms between the subject persons and the requesting state. In this case, from the evidence presented, it appeared that the claimant and his attorney labored under the view that when he failed at habeas corpus his only recourse was to file an appeal to the Court of Appeal. The Court of Appeal was faced with an appeal and proceeded quite correctly to dismiss it for want of jurisdiction; there was never an application made for review of the committal. Even after the second respondent sent out his Notice under section 15 of the Act informing the claimant that he was considering making an order for return, the claimant did not file an application for a review.

The Requesting State's Right of Appeal and Discriminatory Treatment

[92] The arguments that the provisions of the Extradition Act 1993 are discriminatory in itself and its effects are without merit having regards to the construction this court has given to sections 12 and 13 of the Act. Notwithstanding, having regards to the arguments raised, it is appropriate that this Court go on to consider whether it is discriminatory in the Constitutional sense where seemingly different access rights have been given to the subject person as against the requesting state.

[93] The relevant portion of section 14 of the Antigua and Barbuda Constitution states:

1. *Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.*

2. *Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority.*
3. *In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions or affiliations, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.*

[94] Dr. Dorsett arguments on this point must be understood as relating to different access rights and that a requesting state has been favoured because of its 'place of origin'. Having regards to my findings above, these arguments can be quickly disposed of. No doubt a 'requesting state' can be considered a person for the purposes of section 14 of the Constitution. That said however, learned counsel arguments goes no further. The different treatment which is contemplated by section 14 must be treatment which is different with any objective and reasonable justification and not simply different treatment to cater for obvious inequalities between parties, i.e. factual difference between relevant persons.⁸ Further, such different treatment as there is must be 'wholly or mainly' based on one of the factors as set out in section 14 of the Constitution and in this case, on the subject person or requesting state 'place of origin'.⁹

⁸ In *DH and others v Czech Republic* - (2007) 23 BHRC 526, the European Court underscored the practical approach which ought to be taken in considering whether any different treatment could be regarded as discriminatory. The court affirmed the following principles: "The court has established in its case law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (*Willis v UK* [2002] ECHR 36042/97 at para 48; and *Okpisz v Germany* [2005] ECHR 59140/00 at para 33). However, art 14 does not prohibit a member state from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article (*Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* [1968] ECHR 1474/62 at para 10; *Thlimmenos v Greece* (2000) 9 BHRC 12 at para 44; and *Stec v UK* (2006) 20 BHRC 348 at para 51). The court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (2007) 23 BHRC 526 at 581 (*Jordan v UK* (2001) 11 BHRC 1 at para 154; and *Hoogendijk v Netherlands* (App no 58461/00) (admissibility decision, 6 January 2005)), and that discrimination potentially contrary to the convention may result from a de facto situation (*Zarb Adami v Malta* (2006) 20 BHRC 703 at para 76).

⁹ It has been accepted that the difference of treatment or that 'favouritism' will only be unconstitutional when it is based on one of the other of the constitutional prohibitions. As Massiah JA, speaking of the equivalent provision in the Guyana Constitution stated in *Nielsen v Barker* (1982) 32 WIR 254 at 280: "What I am endeavouring to develop is the notion that it is a misconception to think that the Constitution is panacean in character, capacitated for the eventual solution of all legal problems. This process of magnification has led to attempts being made to fit a variety of rights into the framework of fundamental rights and freedoms, although the former often lacked the attributes essential for such categorisation ... The word "discriminatory" in article 149 does not bear the wide meaning assigned to it in a dictionary.

[95] I am satisfied that there was a real justification for not allowing a 'right of appeal' from the refusal of habeas corpus. The Act recognized that the extradition process must proceed with some haste and for this reason chose instead to provide only for a right of review of a committal to the Court of Appeal. Such a right does not carry with it an automatic stay of the power of return, and so unless the Court of Appeal sees fit or the Minister on being informed that such a right is being exercised, chooses to stay the exercise of this power, extradition will expedited. The Act therefore assumes that two tiers of protection (where return must await the outcome) is a sufficient burden on the treaty obligations. This in my view is good reason why the requesting state has a right of appeal on points of law from a refusal to commit but the subject person does not have a right of appeal from refusal of habeas corpus.

[96] Further, even with the most generous construction, I am unable to conclude that any 'different treatment' is because either the claimant is from Antigua or Barbuda or the requesting state's place of origin is outside of Antigua and Barbuda. It has nothing to do with the place of origin of the requesting state – it makes no difference that 'requesting states' will always be 'out of this jurisdiction; the different treatment is not grounded on that fact. In my view, the right of appeal in Antigua and Barbuda which is given to requesting states arises from the fact that the criminal trial is not expected to take place in Antigua and Barbuda, but that it is to take place in another jurisdiction where the plenitude of fair trial protection will inure. Its primary purpose is to secure access to justice for requesting states where committal has been denied by the committing court. It is to ensure that there is some balance to extradition proceedings. Thus, for example, even an American citizen in Antigua and Barbuda whose extradition is being sought would still be subjected to

It has a precise and limited connotation. Although it contains the elemental constituent of favouritism, or differentiation in treatment, its application is confined only to favouritism or differentiation based on "race, place of origin, political opinions, colour or creed". No other kind of favouritism or differentiation is "discriminatory" within the narrow constitutional definition of that word in article 149(2). It is to be profoundly in error to think that there has been a contravention of a person's fundamental rights under article 149 where the alleged discrimination is based on some ground other than those referred to above, no matter how reprehensible such grounds may appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee, although there may well be other means for its investigation and for securing redress.'

'different treatment', but that different treatment would have nothing to do with his or the requesting state's place of origin. It also has nothing to do with the fact the claimant is from Antigua and Barbuda; he may well have been from the USA, in other words his place of origin has nothing to do with any different treatment. See **The State v Brad Boyce** 65 WIR 65.

[97] In my view, the claimant has failed to show that the Extradition Act 1993 is in contravention with the Constitution and more importantly that any of his fundamental rights have been breached. I will express the view that even if he were able to show that the requesting states possessed more rights of access which were in contravention of the Constitution that would not have assisted him at all on this motion in relation to any of the orders he sought.

[98] In these proceedings the right of access to the Court of Appeal given to requesting states was never engaged; the committal or the order of return of this claimant has not been as a result of any event arising from the requesting state employing an unconstitutional right of appeal. As far as this claimant is concerned, the rights of appeal which are found in section 13 of the Act do not all impact on the present proceedings before the court. For these reasons, Dr. Dorsett's argument fails.¹⁰

[99] For all of the reasons given above, this court will decline to grant any of the declarations which are sought on the Constitutional Motion. I now turn to consider the application for leave to apply for judicial review.

B. THE DECISION AND THE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

[100] On the 10th February 2012, the second respondents caused to be sent to the claimant, a "Notice" under the Extradition Act 1993, informing the claimant that he was considering the

¹⁰ Dr. Dorsett had also argued that no-one should be extradited if his fundamental rights have been breached relying on *Fuller v A.G.* 79 W.I.R 173.

issue of a warrant to order his return to the United States of America for trial pursuant to the pursuant to the committal order made by the Chief Magistrate. That 'Notice' advised the claimant that he had 15 days to make representations as to why he should not be returned. The 'Notice' sent to the claimant is as follows:

Dear Sir,

Re: Extradition Request for the Government of the United States

On April 26, 2010, the former Chief Magistrate Mr. Ivan Walters committed you to custody to await the Minister of Foreign Affairs decision as to your return to the United States of America for trial on twenty-one (21) counts alleging violations of various sections of Title 18 of the United States Code. The committal was made following extradition proceedings at the St. John's Magistrate Court pursuant to Section 9(4) of the Extradition Act, 1993 (No. 12 of 1993) which were held following an extradition request by the United States Government and the issue of my authority to commence the said proceedings.

Your challenge of the committal by way of habeas corpus and certiorari has been denied by the High Court on February 6, 2012 by way of the Judgment of Michel, J. Accordingly, as Minister of Foreign Affairs and pursuant to section 15 (1) of The Extradition Act, 1993, I am now considering issuing a warrant ordering you to be returned to the United States of trial.

You now have fifteen (15) days from the date of your receipt of this letter to make written representation as to why you should not be returned to the United States for trial. It is my duty to consider any representation made by you or on your behalf unless you waive the right to make any such representation.

Kindly be guided accordingly.

Very truly yours,

*Hon. Dr W. Baldwin Spencer
Prime Minister and Minister of Foreign Affairs*

[101] The claimant made representations to the second respondent through his attorney on the 24th February 2012. Those representation are now set out in full:

Dear Sir,

Re: Extradition Request Leroy King Government of the United States

Mr. Leroy King has passed your letter to him dated February 10th 2012 and delivered to him on Saturday 11th February, 2012. He has instructed me to convey to you the several representations on his behalf. You will of course appreciate that the stipulated time limit expired on Sunday 26th February and both that day and the preceding as well as the date of delivery and the day following are and were public holidays and the office of the Prime Minister is closed to the public. Nevertheless, I am instructed to urge the following in respect of my client:

- 1. As you may be aware my client appealed the decision of Mr. Justice Mario Michel on the 16th February, 2012 on the issue of certiorari to the Eastern Caribbean Court of Appeal.*
- 2. Secondly, my client is of the view that he has not committed any of the offences (11 counts of the U.S Indictment) for which he is liable to be extradited to the United States. The bases for which is a blood pact made by himself, one Trevor Bailey and Allan Stanford that he would assist Mr. A. Stanford in his allegedly fraudulent enterprise to defraud investors of their moneys. Neither are eight of the eleven counts extra-territorial offences under the Laws of Antigua and Barbuda.*
- 3. My client was employed by the FSRC as Administrator for several years both during your Government's Administration and the previous Labour Party's Administration. My client feels that he has been singled out unfairly on grounds of mere suspicion as being a primary collaborator in Mr. Stanford fraudulent ventures. In particular, because he was given Super Bowl tickets by Mr. Stanford he had received a benefit intending to be a bribe. It is a well known public fact both here and in the United States that Mr. Stanford largesse extended to members of Congress, Political Parties in Antigua and Barbuda, Members of Parliament and Ministers of Government. Indeed, he once threatened to extend the now alleged 'benefits' of his ill-gotten gains to the constituency from which you were returned as a Member of Parliament.*
- 4. Thirdly, whilst in the short term it may be perceived by some in the society to 'scapegoat' him and surrender him to the United States to appease US hegemonic ambitions, it is pellucid that the intent of the S.E.C and the Government organs of the United States is to have him as high official of the Government of Antigua and Barbuda convicted in a U.S Court, so that US capitalist interest could press their claim to large tracts of the people's patrimony in Antigua. Further, such a conviction could be and would be used against Antigua and Barbuda not only to bend us to their will but also to claim recompense for money extended in Antigua and Barbuda on the possible basis of accessories to Stanford fraudulent enterprises. All presumed beneficiaries will be unsafe from US Court processes.*
- 5. Fourthly, there is no evidence that the paltry sum Mr. King placed in US accounts have their origins in Stanford's enterprises. An investigation into accounts he shared with his wife was conducted by the US authorities and at*

its end discontinued on the basis of no proof that these were moneys originating in Stanford's banks.

- 6. Fifthly, one of the chief complaint against Mr. King is that he failed to give assistance to the S.E.C. It is his contention that such assistance was impossible under the laws which governed the FSRC. It was prohibited under the law to disclose information to a foreign entity, and secondly, he did not audit the books of Stanford Banks nor supervised such banks. In hindsight, there is always 20/20 vision, but the clear policy of governments was always to collaborate with Allan Stanford because he provided investment to the economy and employment of the large segment of the working population.*
- 7. Sixthly, Leroy King is sixty-five years of age. He was diagnosed with highly differential squamous cell carcinoma of the distal esophagus and underwent Ivor Lewis esophagectomy treatment in the United States in November, 2005. This has occasioned him significant distress and stress and on account thereof his health has deteriorated under the strain of court proceedings.*
- 8. Seventhly, he recognizes that this exercise is for your Government one of procedural form mostly as during the last two years, he has been excoriated in Parliament and on radio by high officials all of whom presumed him guilty and so expressed themselves.*

The appeal here is made to your better judgment not individually but in the personage of your office of Prime Minister and he urges you not to return him to the United States.

Very truly yours,

DANE HAMILTON Q.C

[102] After the Court of appeal dismissed the claimants appeal from the refusal to grant the Writ of Habeas Corpus, the second respondent made a decision to return the claimant in the following terms:

Dear Sir,

Re: Extradition request from the Government of the United States

Out of deference and respect to the Court and a sense of fairness to you, I decided to await the outcome of your appeal to the Court of Appeal before replying to Queen Counsel, Dane Hamilton's letter dated February 24, 2012, and written on your behalf in response to mine of February, 10, 2012. I am now informed that your appeal was dismissed on March 21, 2012 following oral submissions by

Hamilton QC, and the learned Director of Public Prosecutions. I have given long and careful consideration to each and every representation that you have (through your Counsel) urged on me, and I advise as follows seriatim:

- 1. I note your view that you have not committed any of the offences for which you have been indicted in the United States and that eight of these counts are not extra-territorial offences. Both the Magistrates Court and the High Court have considered your claims and defence guided by the Extradition Act and the law and have determined the issue of your extradition according to law: additionally, the Court of Appeal has ruled that you have no legal right to an appeal to that body by way of certiorari given the criminal nature of the charges. I am accordingly guided by the courts on legal process.*
- 2. Please be assured that no one in my Administration has singled you out in the matter of Allen Stanford's fraudulent ventures. As you have correctly pointed out, you were employed as the Administrator of FSRC under both Government administrations, which translates into you enjoying the confidence and support of my administration during your tenure. I have not formed any opinion on Mr. Stanford's largesse to any political, party members, or US Congressional members. The fact is that the courts have ruled that they had sufficient evidence before them to come to the conclusion that they did, and that alone has informed my decision.*
- 3. I cannot speak to the hegemonic ambition and capitalistic ambition of the United States. I can assure you that I regards Antigua and Barbuda as an independent sovereign nation within the community of nations and while bound by the various treaties which it has ratified and adopted as part of its domestic law, I would not surrender any of this nation's nationals to simply appease the ambition of any nation.*
- 4. The question of the sufficiency of evidence for a conviction is a matter for a jury, and the issue whether the "paltry sums" had their origins from Stanford's enterprises is not a determination that I can make. Suffice to say that the courts have determined that there is sufficient evidence to warrant your committal.*
- 5. I refute your suggestion that it was the clear policy of my government always to collaborate with Allen Stanford "because he provided investment to the economy and employment of a large segment of the working population". We have always been a nation of laws and give due respect to the laws of nations where they do not conflict with ours.*
- 6. I am aware that you are a United States citizen, and that your decision to seek medical attention in the United States in 2005 was in due recognition of its better if not the best medical treatment and care available anywhere, and your entitlements as citizen.*

7. *I have formed no opinion of your guilt, and the law both in Antigua and Barbuda and the United States does presume anyone who is charged with any offence innocent until proven guilty. I do not recall you being excoriated in Parliament or on the radio by high officials within my administration, and if they did this not has not been a factor in my decision. My decision has been made objectively and independently of any one.*

Having given due consideration to the matters that were urged on me on your behalf, the decisions of the court, and this country's international obligations as agreed to under The Extradition Treaty (Government of Antigua and Barbuda and the Government of the United States of America) Ratification Act, 2000, my Order is that you be returned to the United States in accordance with the procedures prescribed in the Extradition Act, 1993 and be committed to trial on the offences determined by the High Court on its review of the Magistrate's decision.

*Please be guided accordingly.
Respectfully,
Hon. Dr. W. Baldwin Spencer
Prime Minister and Minister of Foreign Affairs*

[103] The warrant of extradition was made on the 30th March 2012. Even on the 26th March 2012, the claimant had included on his Constitutional claim an application for leave to apply for judicial review of the second defendant's decision to make an order for the return of the claimant to the USA.

[104] At the date when this application was first made, there were no grounds set out in the application.

[105] On the 17th October 2016, the claimant filed under these Constitutional proceedings, a second application for leave to apply for judicial review of the decision to return him. It appeared that this application was made to out of counsel's own prudence to regularize the first application which had been filed without complying with CPR 56.3. He grounded this second application on several matters.

[106] First, it was contended that there was an arguable case that the second defendant's actions were unconstitutional and in breach of section 3 of the Constitution and in breach of the claimant's right to procedural fairness and the right of access to the court.

[107] Second, he contended that it was arguable that the second defendant's actions were illegal and in breach of his duty to sufficiently acquaint himself with relevant information, fairly presented, and to have regard to all relevant information, and

[108] Third, he also contended that it was arguable that the same decision was unreasonable and irrational in that he failed to have regard to all relevant information.

Issue No. 2 – Whether the Application for Leave to apply for Judicial Review is properly before the Court?

[109] The original application for leave to apply for judicial review failed to set out the matters which were required by CPR 56.3. In particular, the application did not set out any grounds upon which the application was based. For this reason, this application was bad in law and is accordingly dismissed.

[110] The second written application for leave was made more than four years after the decision which is being challenged. The respondents after initially posing no objection to this application later argued that this application was bad in law as it had been brought outside the seven days statutory period¹¹ within which it was to be made.

[111] These matters may have affected the viability of this second application as infringing the statutory time period, and on the basis of discretionary bars. It cannot be ignored, however, that these matters did not come on for a substantive hearing for some four years. Had there been a hearing on this matter at the earliest opportunity, the claimant may have been able to save his original application and seek to re-file a new application nearer to the date of the decision. This may have been one of the reasons why the respondents had initially agreed that court should consider the application on its merits.

¹¹ Section 15(6) of the Extradition Act 1993

[112] The respondents are awaiting the outcome of this matter. The claimant has not yet been returned. His return was automatically stayed having regard to the 'bad' application for leave contained on the motion. As a discretionary matter, having regards to the draconian consequences of dismissal involving questions of liberty for the claimant, and the fact that the respondents were prepared not to oppose the application for leave, the second written application for leave to apply for judicial review will not be barred on any discretionary grounds but will be considered on its merits. This court is of the view that in an exceptional case, a court may for good reason extend the statutory time period given within which to file an application for judicial review of the second defendant's decision to order return. I now turn to consider the merits of this application.

[113] In taking this view, I have had regard to the authorities submitted by Dr. Dorsett including: **Thomas v Gonsalves** Civil Appeal. No. 9 of 2014 SVG; **Watson v Fernandes** [2007] CCJ 1; **Attorney General v Isaac** Civil Appeal No. 14 of 2015 Antigua and Barbuda; **Texan Management Ltd. Pacific Electric Wire & Cable Co. Ltd.** [2009] UKPC 46; **R (Rotterdam Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills** [2015] UKSC 6; **St. Kitts Development Ltd v Goldview Development Ltd.** Civil Appeal No. 24 of 2003 SKN; **Solomon v Shuster** Civil Appeal No. 4 of 2014 Monts.; **Sharma v Browne-Antoine** [2006] 1 WLR 780

Issue No. 3 – Whether there is an arguable case on the merits that the decision of the second defendant is bad in law?

Should a decision maker consider whether the laws grounding his decision are valid?

[114] Dr. Dorsett's has contended that it is arguable that in this case the second defendant's actions were unconstitutional and in breach of section 3 of the Constitution and in breach of the claimant's right to procedural fairness and the right of access to the court.

[115] In the context of my earlier findings on the constitutional points, I understand learned counsel to be saying among other things that the second defendant must consider whether the laws grounding his decision are valid and constitutional. If this is what learned counsel is suggesting, I do not agree. To my mind it would be alarming for any decision-maker to question underlying laws and then to examine them against the provisions of the Constitution before he performs any statutory duty. This is a recipe for confusion and administrative mayhem. Decision makers have no role to embark on such examinations. The Extradition Act in this regard is very clear. It effectively states that where Habeas Corpus is refused, the second defendant's may consider whether to make an order for return. This is what he did in this case.

The Minister's Duty to act fairly and to Conduct Sufficient Inquiry re a Right of Appeal – whether an abuse of power or process

[116] Dr. Dorsett has argued that the second defendant had a duty to act fairly and he failed this duty when he effectively stopped the claimant from taking his case to the Privy Council and thereby denying him the protection of the law and right of access to the court. He submitted that the second defendant did this by deciding on the 23rd March 2012 to have the claimant extradited to the USA and then issuing the warrant dated 30th March 2012 and having it served on the claimant on the 1st April 2012. Learned counsel states: "Once this decision was made this brought into operation section 15 of the Extradition Act 1993 which provides that a person has seven days to apply for judicial review against an order extraditing him."

[117] Learned Counsel submitted: "The choice facing the [claimant was] whether to (1) challenge the decision of a judge or a court on his extradition matter by way of an appeal or further appeal (ultimately up to the Privy Council) or (2) to challenge the decision of the [second defendant] who has exercised his power to make an order for him to be extradited by way of judicial review. The [claimant] was unfairly placed between a rock and a hard place. He chose to exercise his right to go for judicial review reasoning that whilst an application for judicial review operates as a stay of the order of extradition, an appeal does

not. Moreover it would be unseemly to be pursuing both an appeal and a judicial review action at the same time and be condemned as one abusing the process of the court – running both with the fixes and the hound.”

[118] Learned Counsel also argued that the second respondent had a duty to conduct sufficient inquiry in that he had to take reasonable steps to acquaint himself with the relevant information on whether the claimant had a right of appeal from the Court of Appeal. Learned counsel relied on the UK Court of Appeal's decision in **Secretary of State for Education and Science v Tameside Metropolitan Borough Council** [1977] AC 1014. Learned Counsel argued that whether or not the claimant had a right of appeal from the court of appeal was at the heart of what the second respondent had to decide, and the letter of the 23rd March 2012, contained no indication that the second respondent had directed his mind to this matter.

[119] Learned Counsel goes on to argue that if the second respondent had made sufficient inquiries, he would have ‘known that the Court of Appeal has jurisdiction to entertain extradition appeals (i.e., to say the Court of Appeal has jurisdiction to deal with an appeal arising from a criminal cause or matter) and that furthermore, extradition appeals are routinely heard by both the Court of Appeal and the Privy Council.’

[120] Learned Counsel also argued that the actions of the second respondent in deciding to order the extradition of the claimant was an abuse of power and an abuse of process. He submitted: “It was an abuse of power for the second respondent to have ordered the [claimant's] return prior to him having exhausted his right of appeal to the Privy Council. It would be an abuse of process to permit the [second respondent] to continue to use the process of extradition in the face of executive misconduct.” In making these arguments he relied on **R v Horseferry Road Magistrates' Court, ex p Bennet** [1994] 1 AC 42; **Amand v Home Secretary and Minister of Defence or Royal Netherlands Government** [1943] AC 147; **Government of United States v Bowe** [1990] 1 AC 500; **Warren v Attorney General for Jersey** [2011] UKPC 10.

[121] The respondents argued that ‘there was no obligation on the second respondent to await the expiration of time for the filing an appeal to the Privy Council. The [claimant] had no right of appeal to the Court of Appeal from the order of the High Court on his habeas corpus application. That notwithstanding, the second respondent as an act of good faith awaited the determination of the [claimant’s] appeal and pursuant to the Act considered the representations made in the [claimant’s] behalf before issuing the order. The second respondent was careful to observe all the procedures set out in the Extradition Act.”

[122] Learned Counsel for the respondents further agued: “The allegations made by the [claimant] in his application are baseless phantoms conjured up in a useless attempt to support the fiction that the second respondent acted unfairly. The [claimant] imposed a restriction on himself by not pursuing an appeal to the Privy Council and is seeking unfairly and unjustly to cast blame on the second respondent his or his legal counsel’s deliberate decision not to pursue an appeal to the Privy Council. The act of the second respondent in issuing the order was not unfair or perverse; he did not commit any error of law in the exercise of his authority, nor did his act amount of an abuse of power or an abuse of process.”

[123] I do not agree with counsel for the claimant. I find that there is no arguable case that the second defendant has failed in any of the instances complained of.

[124] There was nothing stopping the claimant from taking any steps to exercise any of the rights he believes he had. It seems an almost tongue-in-cheek statement that he was barred from appealing to the Privy Council by the second respondent’s decision to return him when he also saying at the same time he has no right of appeal. The Act is also very clear here. The Act effectively provides that once Habeas Corpus is refused, and no possibility of an appeal exists, the second respondent may proceed to act. It would therefore be necessary to consider whether the claimant had any pending right of appeal. In this case, the Court of Appeal actually ruled that there was no right of appeal. The second respondent letter of the 23rd March 2012 shows that he knew this. Was the second respondent to sit and wait for something else to happen? Even in his representations

made by Queen's Counsel on his behalf, there was no indication that the claimant was considering an appeal or any other process.

[125] The right given to the claimant to make an application to the Court of Appeal to review his committal has never been done to date. Even if had been done, it would not have had the effect of staying the second respondent's hand. It was surely up to the claimant to inform the second respondent that he had intended to seek a review. He did not do so.

[126] I am unable to understand what Dr. Dorsett means when he says that extradition appeals are routinely heard by both the Court of Appeal and the Privy Council. Each territory has its own statutory scheme. No relevant authority from Antigua and Barbuda has been presented to this Court. He himself has not yet sought to file any appeal to any other court from the refusal of Habeas Corpus. For this reason, it is difficult to see what he means about being placed between a 'rock and hard place' as if he believed that he had a choice, he could employed both courses. (See **R (Bermingham and Others) v Director Serious Fraud Office** [2007] QB 727).

[127] In my view there is no arguable case that the second respondent acted unreasonably or unlawfully by failing to have regard to any relevant matters. In fact he acted quite properly by waiting until the 'appeal' filed by the claimant had been disposed of by the Court of Appeal before making the order of return.

[128] For these very reasons, the abuse of power and the abuse of process arguments fail.

Whether the Second Defendant considered all the relevant matters under section 14(2)(a)

[129] In submissions filed after the hearing Dr. Dorsett argued that the second respondent failed to consider all the matters required of him under section 144(2) of the Act. That section states:

“14(2) Without prejudice to his general discretion as to the making of an order for the return of a person to a foreign state or commonwealth country –

(a) A Minister shall not make an order in the case of any person if it appears to the Minister in relation to the offence, or each of the offences, in respect of which his return is sought, that –

(i) by the reason of its trivial nature; or

(ii) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or

(iii) because the accusation against him is not made in good faith it would, having regard to all the circumstances, be unjust or oppressive to return him.”

[130] Dr. Dorsett has focused on the ‘accusation’ as contained in Section 14(2)(a)(iii). He states this section repeats essentially what is contained in section 13(3)(c) and that when the magistrate or for that matter the judge on the habeas corpus application, is required to consider the ‘accusation’ under that section 13(3)(c) he must examine the offences itself and the underlying evidence. He relies on **R (Saifi) v Governor of Brixton Prison** [2001] 1 ELR 1134. He also points to and relies on section 9(2)(a) of the Act which states that particulars of any offence and the underlying evidence must be provided with every request for extradition.

[131] Learned Counsel states: “The obligation of the [second defendant] under section 14(2)(a) is no less intense or demanding than that imposed on the High Court under section 13(3). It is very clear from the judgment of Michel J that he examined the accusatory instruments (and in particular the indictment) with great detail. There is absolutely no evidence in the [second defendant’s] letter of the 23rd March 2012, the letter ordering the extradition of the [claimant], that the [second defendant] was attentive to section 14(2)(a) of the Extradition Act 1993...”

[132] Learned Counsel continued: “The [second defendant] ordered that the [claimant] be returned ‘in accordance with the procedures prescribed in the Extradition Act 1993’ but there is no evidence that the [second defendant] complied with the procedure stipulated by section 14(2)(a) of the Extradition Act 1993 which required him to consider whether or not ‘the accusation’ against the [claimant] is not made in good faith in the interests of justice’.

Such a consideration is not possible without a full and detailed forensic analysis of the accusatory instruments, including the indictment.

[133] Learned Counsel stated: "The [second defendant] cannot rely on the High Court's assessment of the accusation. The [second defendant] is duty bound to perform his own independent assessment.... There is no positive law permitting the [second defendant] to rely on the assessment performed by a High Court judge under section 13(3) of the Extradition Act 1993 to serve as the [second defendant's] assessment that is required under section 14(2)(a).

[134] The Learned Director of Public Prosecutions in his written submissions argued that the second defendant is not required to look into the accusation made in the indictment against the claimant. The Director submitted: "It can be reasonably assumed given the extradition arrangement under the Extradition Act that the [second defendant] would have so satisfied by the accusations made much earlier when he issued the authority to proceed to the then Chief Magistrate.... the would have entrusted that process [and acting in accordance with the provisions of the Extradition Act] to the several courts in which the [claimant] mounted his challenges – the Magistrate's Court, the High Court and the Court of Appeal. Certainly there is nothing wrong in law or irrational for the [second defendant] to take cognizance of the decision of those three Courts."

[135] In my view, there is no merit to any contention that the second defendant must as a matter of law be required to exercise his independent judgment to assess the underlying accusation in all cases when he is exercising his powers under section 14(2)(a) of the Act. In the UK, under section 12 of the 1989 Extradition Act, the powers of return given to the Secretary of State who exercises power to order the return of a person whose return is sought, was framed in almost identical language as Antigua and Barbuda section 14(2)(a) of the Act. This section came under scrutiny in a number of cases where the question was whether the Secretary of State was required to 'afresh in all cases the very evidence upon which the Magistrate had found a prima facie case'. In **R v Secretary of State for the**

Home Department ex p. Susan Hagan and Sally Anne Croft (unreported 15 December 1993), (Pages 11-12E). Russell LJ (with whom Blofeld J agreed) explained that:

"[The Secretary of State] is not a rubber stamp for the Magistrate. He should take into account matters such as delay and compassionate considerations and any additional evidence that emerges after the Magistrate has considered the case...But, and Miss Montgomery [Counsel for the Respondent in that case] emphasises this, there is no obligation on the part of the Home Secretary to reconsider the facts presented to the Magistrate and it is no part of his function to review the decision of the Magistrate, or for that matter in this case the Divisional Court. On the contrary, the Secretary of State is entitled to have regard to the fact that the Magistrate and the Divisional Court have found a prima facie case to exist. They are relevant factors in his decision making process. If, on the other hand, the existence of a prima facie case is outweighed by other considerations the Secretary of State may refuse his warrant, but in doing so he is in no sense reviewing the Magistrate's decision. He is taking his own decision bearing in mind the findings of the Magistrate..."

... I add that perhaps only in an extreme case the Home Secretary will look at the quality of the evidence but I am satisfied that whether he does so remains a matter for his discretion as opposed to an obligation."

[136] This passage was quoted with approval in **R (on the application of Allison) v Secretary of State for the Home Department - [2001] EWHC Admin 506** where SILBER J of the Queens Bench Division (Divisional Court) stated

"[16] Blofeld J said that he accepted that the Secretary of State, "in his discretion should decide in each case what he should consider in the light of representations made by the applicant and where appropriate the fresh evidence admitted on that applicant's behalf. I do not accept that it is as a matter of law or requirement upon him to consider the evidence afresh in every case.

[17] Thus, the Secretary of State has a wide and unstructured discretion to take into account such matters as he regards as suitable in deciding how to react to representations on defences to charges in respect of which the Magistrate has found a prima facie case. The width of this discretion means that the Secretary of State is entitled to consider the representations of an applicant on the basis that the Magistrate has satisfied himself that, as a matter of law, there is a prima facie case made out against the person, whose case he is considering. In this case, the Secretary of State decided that his starting point should be the decision of the Divisional Court that the offences in charges 2 and 3 were extradition offences on which the Magistrate had been entitled to find a prima facie case established in respect of each of them. He regarded that decision as being something, which enabled him to conclude that the representation, made by the applicant was "Not a reason not to order to surrender". In the light of his broad discretion, we do not think that he can be criticised for this as he obviously appreciated and was entitled

to appreciate that the decision of the Divisional Court had been made after thorough legal argument, including a submission as to the effect of s23A of the 1986 Act (see 851G – 852A).

[18] By the same token, he was quite entitled to take the view that it was not open to him to come to a different conclusion from that of the Divisional Court because, as, Russell LJ said “it is no part of his function to review... the decision of the Divisional Court”. In other words, it was reasonable for him to proceed, in the exercise of his discretion, on the findings in the Divisional Court that the matters complained of were extradition grounds. (See R v Bow Street Metropolitan Stipendiary Magistrates, ex parte Government of the United States of America and another; R v Governor of Brixton Prison and another ex parte Allison [1998] QB 847, [1998] 3 WLR 1156 at 859 -861 of the former report per Kennedy LJ). The thrust of the judgment of the Divisional Court was that the applicant's submissions had been rejected. So far as it is suggested that the Divisional Court failed to deal with relevant questions in their judgment, the proper course for the applicant to have adopted would have been to have sought clarification from that Court or permission to appeal to the House of Lords. Neither of those steps was pursued here and the Secretary of State was entitled to consider that the Divisional Court had determined all matters relating to the existence of a prima facie case in respect of the extraditable offences.

[137] I can hardly say it better than Silber J and I will adopt his statement of principle in setting out the scope of the powers of the second defendant under section 14(2)(a) of the Act. In the exercise of his powers to order a return a second defendant has a ‘wide and unstructured discretion to take into account such matters as he regards as suitable in deciding how to react to representations on defences to charges in respect of which the Magistrate has found a prima facie case. The width of this discretion means that the [second defendant] is entitled to consider the representations of an [claimant] on the basis that the Magistrate has satisfied himself that, as a matter of law, there is a prima facie case made out against the person, whose case he is considering.’

[138] In this case, not only had the charges been vetted by the Magistrate's court, but it had also been vetted by a judge of the high court; a comprehensive written decision was available and it is clear from his letter he had examined this decision. Nothing was raised at all by the claimant in his response to the second defendant that the underlying charges had not been made out on a prima facie basis. On this basis the second defendant was surely

entitled to proceed on the basis that the charges upon which Michel J had grounded the committal was made out on a prima facie basis.

[139] I see no reason nor do I see any basis in law contained in section 14 of the Act which requires that the second defendant must himself consider the underlying **evidence in all cases and in this case**. In considering whether a request was made in good faith, a second defendant does not superimpose himself into the judicial process which leads to a committal. He has no business reviewing the decision of the committing court.¹² This was not such a rare case in which required that he look at the quality of evidence. It was entirely reasonable for him to proceed on the basis of the committal by the High Court.

[140] Further, this court does not find that there is an arguable case that had this superseding indictment been presented to him it would have made any difference to his decision making as it has not been shown to be relevant.

Whether the Second Defendant failed to have proper regard to Health Concerns

[141] This was a point raised in the submissions filed on the 3rd January 2017. Dr. Dorsett and Mr. Harris argued that the health concerns were not given adequate consideration by the second respondent. They argued: The sixth matter raised for consideration and as stated in a letter addressed to the second defendant dated 24th February 2012 is in the following term:

"Sixthly, Leroy King is sixty five years of age. He was diagnosed with highly differential squamous cell carcinoma of the distal esophagus and underwent Ivor Lewis esophagectomy treatment in the United State in November 2005. This has occasioned him significant distress and on account thereof his health has deteriorated under the strain of court proceedings.

[142] Learned counsel went on: "The obvious point being advanced on behalf of the [claimant] is that [claimant] has faced tremendous medical challenges which challenges have caused him significant distress and stress and this distress and stress had adversely affected his

¹² See R v Secretary of State for the Home Department ex p. Susan Hagan and Sally Anne Croft (unreported 15 December 1993) cited by the claimant in his last set of submissions.

health and the deterioration in his health has exacerbated under the strain of court proceedings. The message is clear: having had regard to these circumstances it would be unjust or oppressive to return the [claimant] to the United States.”

[143] Learned counsel points to the response of second respondent: “The consideration of the second defendant as stated in his letter in response is in the following terms: ‘6. I am aware that you are a United States citizen, and that your decision to seek medical attention in the United States in 2005 was in due recognition of its better if not the best medical treatment and care available anywhere, and your entitlement as a citizen.’”

[144] They then argue that response shows that the second respondent failed to give any regard or any proper regard to whether it would have been unjust or oppressive to return the claimant in these circumstances.

[145] In my view, the response of the second respondent makes it very clear that he gave consideration to the medical condition of the claimant. There is no arguable case that the second respondent did not have the full extent of the matters under section 14(2) within his contemplation. This being the case, it is difficult to see how the question of how it would have been unjust or oppressive to return him would not have been considered in this context. The statement made in the letter of response leaves one with the clear impression that the second respondent saw no reason why the medical condition of the claimant should mean that he should not be tried on the allegations. There is no arguable case that the second respondent failed to properly consider the representations in the context of his statutory duties under the Act.

[146] Before leaving these matters it is appropriate that the following comment be made. These last two points were only made by the attorneys by the claimant after the hearing in one of their many submissions. In my view, there was nothing preventing the claimant from taking these arguments earlier. To take it after the hearing was an abuse of the process of this court. The claimant was however not prejudiced by the Court’s view that there has been an

abuse of process of the court and it was nonetheless considered as important matters related to the claimant's liberty was concerned.

C. OTHER MATTERS FOLLOWING THE HEARING OF THE MOTION AND THE APPLICATION FOR LEAVE

Issue No. 4 – Instances of Bad Faith? - Whether the new ‘superseding indictment’ shows clearly that the United States no longer requires the return of the claimant, and whether this means that these proceedings have been overtaken.

Whether Superseding Indictments have nullified the second defendant's Order

[147] The claimant has filed new evidence following the hearing. He has presented this court with an affidavit sworn to by him on the 3rd January 2017, to which is attached an ‘indictment’ dated the 4th May 2011 from the United States. In late January 2017, affidavits were also filed in response to this affidavit and the supporting documents. Again in March 2017, more documents including submissions came from the claimant. On the 28th March 2017, an application was filed by the claimant. It was supported by an affidavit. It sought an order deeming all of the affidavits and documents properly filed.

[148] The claimant had deposed that it was not until the last week of December 2016 that he was informed by his counsel in the USA, Mr. Harris, that ‘the 21 count indictment which had grounded the request for extradition had been superseded by a new indictment.’

[149] He states at paragraph 19 to 23:

“19. I am not aware that I am the subject of any criminal indictment in any court including any court in the United States. I was always laboring under the impression that I was the subject of a 2009 indictment. As it turns out, the 2009 indictment has been superseded by a 2011 indictment that does not name me as a defendant.”

20. When the 2011 indictment was filed, my extradition matter was before Justice Michel. He delivered his judgment in April 2012. Whilst the proceedings were

ongoing before Justice Michel I was never informed of the superseding 2011 indictment.

21. My observation of the extradition court proceedings in Antigua are that Mr. Anthony Armstrong has appeared in court as representing the interests of the United States Government. He holds a 'watching brief' for the United States Government as an interested party in the instant matter. I would have thought that there is a duty in the interested party and counsel representing the interested party to disclosure to the court all relevant facts in my extradition matter. The fact that there is a superseding indictment filed in 2011 is a relevant matter.

22. I find it hard to fathom how I can be the subject of an order extraditing me to stand trial on an indictment that as a matter of fact and law no longer exists. The Minister was wrong to have me committed. There was no lawful basis for my extradition. The United States government requested that I be extradited to stand trial on an indictment in which I was named. That indictment has been superseded by a new indictment that does not name me as a defendant. There is no accusation against me. In the circumstances I would ask that the decision of the Minister to order my extradition be quashed."

[150] Dr. Dorsett has contended that this indictment shows that the USA is not pursuing the claimant again. On this understanding of the effect of the new indictment Dr. Dorsett has also argued in written submission filed in January 2017 that the Director has failed in his duty of candour.

[151] He also submitted that: "Section 14(2)(a)(iii) of the Extradition Act 1993 provides that the '[second defendant] shall not make an order in the case of any person if it appears to the [second defendant] in relation to the offence, or each of the offences, in respect of which his return is sought, that ... the accusation against him is not made in good faith in the interests of justice'. In the instant case the superseding indictment does not name the [claimant] as a defendant. There is no subsisting accusation against the [claimant]. The [second defendant] only has jurisdiction to make an order for the extradition of the [claimant] if there is an accusation against him. In the absence of a subsisting accusation the order of the [second defendant] is an order made totally without jurisdiction.'

[152] After these documents were filed and submissions made, Dr. Dorsett filed an application dated the 28th March 2017 supported by an affidavit of even date for an order that all

additional documents be deemed properly before the court. He continues to pray that on the basis of the 'superseding indictment' the order of the second defendant be quashed. On the 27th March 2017, additional submissions in writing were filed by Mr. Harris. These will be addressed in due course.

[153] The Director himself has presented an affidavit once amended on the 14th February 2017. He denied that any superseding indictment had replaced the indictment against the claimant. He states: "...it is denied that the 2011 superseding indictment against Allen Stanford had any effect on the 21 count indictment against the [claimant]."

[154] He states as follows:

"8. The [claimant] was indicted by a Grand Jury sitting in the Criminal Court in the Southern District of Texas, Houston Division. I am advised by John P. Pearson, Deputy Criminal Chief, Major Fraud Section (United States Department of Justice (United States Attorney's Office) Southern District of Texas and I verily believe that at no time did the [claimant] make an application to the United States District Judge for the Southern District of Texas, Houston Division, for the 21 count indictment against him to be dismissed."

9. I am further advised by Mr. Pearson and I verily believe that the United States Government Department of Justice did not withdraw the 21 count indictment against the [claimant].

10. ...it is denied that the 21 count 2009 indictment in which he was named as a defendant was superseded by a new indictment filed on the 4th May 2011. I am informed by Mr. Pearson who has provided me with an affidavit dated the 24th January 2017 that the superseding indictment filed against Allen Stanford has no bearing on the 21 count indictment against the [claimant].

11. ...I state that there was no need for the United States Attorney Office that has conduct of the case against the [claimant] to inform the [claimant] of the 2011 superseding indictment against Allen Stanford since it was irrelevant and still is irrelevant to the charges against the [claimant]. The charges against the [claimant] still subsist

12. Further I state that there was no reason for any official to apprise Mr. Justice Michel of the 2011 superseding indictment against Allen Stanford since Allen Stanford did not invoke the jurisdiction of the Eastern Caribbean Supreme [Court] sitting in Antigua and Barbuda in respect of the charges brought against him by the Government of the United States of America.

13. ...I strenuously deny the aspersions cast upon me in my capacity as counsel representing the interests of the United States Government in the extradition proceedings against the [claimant]. The 2011 superseding indictment against Allen Stanford was and still is irrelevant to the 21 count indictment against the [claimant]. Therefore there was no duty on the United States Department of Justice (United States Attorney's Office) to disclose to the court the existence of the superseding indictment against Allen Stanford and there is no duty placed on me to make disclosure of this irrelevant fact."

[155] A declaration by Mr. John P. Pearson dated the 24th January 2017 was attached to the Director's affidavit. Mr. Pearson is the Deputy Criminal Chief of the Major Fraud Section of the United States Department of Justice (United States Attorney's Office) Southern District of Texas. He states that the original indictment against this claimant has never been withdrawn or discontinued and remains valid.

[156] To put the application of March 2017 in context, it seems to me that the claimant is asking this court to use these matters to support either his motion for constitutional redress or his application for leave to quash the decision of the second defendant to return him or both. When I look at the various matters now presented to the court, it seems to me that these were all things which would have been available to the claimant with reasonable due diligence. In his application there is nothing given to this court which explains why reasonable due diligence would not have discovered the superseding indictment. The superseding indictments were filed in the USA since 2011. The trial and conviction of Allen Stanford and his accomplices were highly public matter. (For the avoidance of doubt, if the superseding was relevant, then I agree that the Americans ought to have disclosed it; the duty of candour would have required it. I have found that it is not.)

[157] Quite apart from the superseding indictments, the claimant now seeks to raise points related to the first indictment which he ought to have raised before whether on the habeas corpus application or even in these proceedings at an earlier stage. This included matters such as his argument that it was obvious that he could have been ever involved in a conspiracy during the period of 1999 to 2009 when he only became part of the FSRC in 2002. To have waited until this last minute had the effect of effectively delaying this court in delivering its judgment in this matter. To my mind, to throw all these matters at the court at

this point in time when they all could have been addressed earlier amounts to an abuse of the process of the court.

- [158] I am of the view that in any event, these do not provide me with any basis to find that there is an arguable case that the second defendant's decision is bad in law to allow judicial review of the same or to quash the decision for any other reason. I will briefly address each of the points raised.

Bad Faith – The USA Government in ex parte communication with Trial Judge?

- [159] First, as seemingly a preliminary matter, learned counsel Mr. Harris pointed that the affidavit of Mr. Pearson was sworn to before United States District Judge David Hittner who was the judge who tried the case against Allen Stanford and other related defendants and who is expected to try the case against the claimant should he be returned. He states that 'clearly there were ex parte communications between the Judge and the Government of the United States. He states that such communications are prohibited by the Code of Conduct for US Judges and is another example of bad faith by the requesting state. It seemed that this was tagged to the abuse of process arguments made by Dr. Dorsett.

- [160] I am startled by this submission. I can hardly see how the swearing of an affidavit shows that there has been some ex parte communication in relation to this matter which is pending in the United States. The swearing of a document may well be done without there being any discussion regarding the contents of the document. For this reason, I can hardly see how this United States Government has acted in bad faith in this regard. In my view this is an unfounded attack on the integrity of the Judge sitting in the USA. It does not advance this matter in any way.

Bad Faith – Breaches of the Treaty of Mutual Legal Assistance

[161] The claimant's attorneys also argued that bad faith was also to be found in obvious breaches of the Treaty of Mutual Legal Assistance between the USA and Antigua and Barbuda. They contend that the USA breached the Treaty when official of that government personally requested the claimant to provide information to them during the court of the investigation and before any indictment had been filed. They recite various provisions of the Treaty to say that all requests from the USA must be made in a specific manner and from the 'Central Authority' of the requesting state to the 'Central Authority' of the Government in the requested State. To my mind this is a curious submission. This Treaty does not prevent officials of the Government of the USA from communicating with individuals or even officials of the Government of Antigua and Barbuda. What the treaty seeks to do is to regularize all such requests and imposes obligations on each to assist the other in legal matters. It surely does not prevent officials from various investigative agencies of each country to make contact with oversight bodies and investigative agencies in the other country. Law enforcement officials from different co-operating countries usually have a working relationship with each other and it is not unknown that 'groundwork investigations' are carried out in ways outside the normal channels. When the need arises for more formalized assistance, and agencies the 'Central Authorities' will take steps on behalf of their respective agencies.

[162] Of more significance, there is nothing in the Treaty which states that any party would act 'illegally' if they were to request information in any manner other than the prescribed manner under the Treaty. Treaties are civil arrangements between governments and unless domestic legislation incorporates the terms of those treaties and in turn criminalizes certain matters contained in the treaties, breach of the treaty provisions would not amount to illegal acts in the domestic law sense. I cannot for these reasons see how there is an arguable case that there has been bad faith if government agencies in the USA made contact personally with the claimant and requested his assistance.

[163] The other point made in this submission was that the bad faith was obvious when the US Government used the claimant's refusal (which was lawful) to ground charges against him. Again, apart from this being a matter which should have been argued long ago, it is difficult

to see how there is an arguable case that bad faith arises because officials from a foreign country in the course of their investigations come across conduct, which they reasonably believe amounts to a crime. There is no arguable case here.

Bad Faith – that Original Indictment pending against claimant whilst others co-defendants have ben proceeded against

[164] These are arguments contained in paragraphs 14 and 15 of the '[claimant] Second Reply Submissions'. Learned counsel states: "...the fact that the original indictment is still pending only underscores the bad faith of the government since all of the other defendants were tried the respective superseding indictments and only Laura Pendergest-Holt pleaded guilty on June 21st, 2012 to Count Twenty of the original indictment; and the government subsequently moved to dismiss the remaining counts of the indictment against Pendergest-Holt on September 13th, 2012."

[165] Counsel continues: "What Mr. Pearson failed to mention is that as part of her plea agreement Pendergest-Holt waived her right to trial and rights to appeal then agreed to be prosecuted on the original indictment. Mr. King has not waived any such rights."

[166] This Court struggles to understand these arguments. How is bad faith shown if the original indictment is still pending? The US government was duty bound to proceed with the charges against the others who were present in the USA. They clearly saw the need to seek superseding indictments against Stanford and others. They also saw the need to proceed against Pendergest-Holt on the original indictment. None of those convictions has been overturned. As I have concluded, none of those proceedings really affect the pending charges against this remaining defendant who has effectively always remained at large. I am unable to fathom how there is an arguable case that this shows bad faith.

Whether the Minister's order has failed to follow the directives of Michel J. and so bad in law?

- [167] Learned Counsel has argued that the second respondent failed to follow the directives of the High Court Judge by failing to specifically setting out the offences on which the clamant had been committed. Counsel points to paragraph 66 of the judgment where the court stated:

"This then concludes the challenges by the Applicant to the judgment of the Chief Magistrate. The judicial destination having been reached, the Order of Certiorari applied for by the Applicant to quash the Committal Order of the Chief Magistrate is denied; the leave sought by the applicant to apply for the Writ of Habeas Corpus as subjiciendum is denied; the Committal Order made on the 26th April 2010 by the then Chief Magistrate, Mr. Ivan Walters, is upheld with respect to eleven of the twenty one count on which the Applicant was indicted; and Mr. Leroy King the Director of Financial Services Regulatory Commission of Antigua and Barbuda from 2003 to 2009 – remains committed to Her Majesty's to await the decision of the Minister responsibility for External Affairs to return him to the United States of America to stand trial for one of conspiracy to commit mail, wire and securities fraud, seven counts of wire fraud, one count of conspiracy to obstruct SEC investigation, one count of conspiracy to commit money laundering."

- [168] Mr. Harris points to the extradition order signed by second respondents on the 30th March 2012. The relevant part reads as follows:

"THEREFORE I, Winston Baldwin Spencer, do hereby order that the said Leroy King be extradited to the United States of America in respect of the offences of: Conspiracy to commit mail, wire and securities fraud, wire fraud, conspiracy to obstruct SEC investigation, obstruction of SEC investigation and conspiracy to commit money laundering for which he was committed by the court of committal and on a review by the High Court of Antigua and Barbuda."

- [169] Learned counsel submits: "It is clear that [the second respondent's] extradition is fatally flawed in that it omitted the specific enumeration as to the counts for which Michel J found that Mr. King should have been returned to the United States of America to stand trial. Given the fact that the first superseding indictment abandoned the conspiracy to commit securities fraud with respect to Allen Stanford, it would follow then that those charges could no longer be valid as against Mr. King as he was charged as a c-conspirator and not with any individual criminal liability. It is plain that the order of extradition should be

quashed because under the order, if Mr. King is returned to the United States, he would be tried on charges for which Michel J did not find him extraditable.”

[170] I do not agree with Mr. Harris on either of his points. First, the extradition order expressly states that the claimant is to be returned on those offences “*for which he was committed by the court of committal and on a review by the High Court of Antigua and Barbuda.*” If the claimant is returned Treaty obligations would require that the US government have regard to the judgment of Michel J when they proceed to the trial against him. There is no such flaw in the extradition order as is contended for.

[171] Second, the abandonment of the conspiracy to commit securities fraud against Allen Stanford on the supervening indictment does not ipso facto mean that the charge would be equally abandoned against this claimant. Section 15.02 of the Texas Criminal Code provides *inter alia* that it is no defence to a charge of criminal conspiracy that ‘one or more of the conspirators has not been prosecuted or convicted’. In any event if return is not abandoned, the claimant would hardly be prejudiced if this charge is also abandoned against him, as there is no real complaint or merit against the other charges for which he has been found to have been properly committed.

The Superseding Indictments – Their Relevance to the Second Defendant’s Decision

[172] This point comprises a number of facets but they all relate to the superseding indictments. Mr. Harris states that the section 14(2)(a) power which the second defendant has exercised requires that there be an underlying ‘accusation’. On this basis learned counsel argues that the superseding indictment replaced the original indictment thereby nullifying it. What this means is that there is no underlying accusation and therefore no basis upon which the second respondent could have proceeded to make an order for return.

[173] Learned counsel presented this court with a number of authorities from the USA. One of these is **United States v. Stricklin** 591 F.2d 1112, 1116 n. 1 (5th Cir.1979) where it was stated: ‘It is well established that two indictments may be outstanding at the same time for

the same offence if jeopardy has not attached to the first indictment. The government may then select the indictment under which to proceed.’ Counsel contended: “Of course because two separate indictments may be pending so as to preserve the statute of limitations until one is dismissed does not mean that a supervening does not supplant an original indictment. Moreover, there is no question that jeopardy has attached in the instant action since Stanford has been tried on the superseding indictment and convicted by a jury.”

[174] Wrapped in these arguments Mr. Harris has also contended that the second respondent failed to examine the superseding indictments against Stanford and two other persons who had all been named on the original indictment. It is contended that an examination of the superseding indictment would have revealed that a number of allegations contained in the original indictment had been abandoned (a detailed comparison was set out for this court in a schedule attached to the last set of submissions).

[175] The question then for this Court was whether there was an arguable case that the superseding indictments was relevant to show that the underlying accusations did not exist and whether there is an arguable case that the second respondent’s decision was so flawed on the basis that he did not consider these documents.

[176] I have examined the several cases cited and relied on by the Mr. Harris. These contained general discussions of the law related to superseding indictments. In each of these cases, the question related to the effect of a superseding indictment on an original indictment against the same defendant against whom the superseding indictment was laid.

[177] In **Opara v. N.E.O.C.C. Warden** Case No. 4:14 CV 0827 (N.D. Ohio, 2014), the defendant was found guilty and sentenced on a supervening indictment. When he was about to be sentenced, the prosecution applied to the court to have the original indictment dismissed. It was dismissed. Fourteen years later, the defendant applied to have his sentence set aside as null and void, contending that since the original indictment had been dismissed – the superseding indictment simply being an amendment of that original indictment – all

steps taken on the superseding indictment was bad in law. The court gave a general outline of the law related to superseding indictments. The US District Court of Ohio accepted that:

*"A 'superseding indictment' refers to an indictment issued in the absence of a dismissal of the first. An indictment is only 'classified as 'superseding' when it supplants a valid, pending indictment." United States v. Garcia, 268 F.3d 407, 410 n. 1(6th Cir. 2001) (overruled on other grounds by, United States v. Leachman, 309 F.3d 377 (6th Cir. 2002)). By definition, the term supplant means "to take the place of (someone or something that is old or no longer used or accepted; to supersede." <http://www.merriam-webster.com/dictionary/supplants> The underlying premise is that the superseding indictment is considered a separate and distinct charging instrument. See United States v. Cordova, Nos. CR-3-97-96(2), CR-3-97-96(3), 1998 WL 1572760, at *4 n. 8 (S.D. Ohio Apr. 28, 2000). There is an expectation that the original indictment will be or is effectively dismissed when the superseding indictment is filed. See United States v. McKay, 30 F.3d*

- [178] In **United States v. Miner** No. 3:11-cr-25 (E.D. Tenn., 2012) several indictments had been filed against the defendant. The original indictment was returned by a grand jury. Four varying versions of the original indictment were then issued. Then the Grand Jury returned a superseding indictment against him. The US District Court of Tennessee stated:

"Though Defendant argues that the Superseding Indictment creates further confusion and merely puts a fifth document into "play" in this case, the Court finds it well established that, "just as an amended complaint supplants the original complaint and becomes the only live complaint in a civil case, a superseding indictment supplants the earlier indictment and becomes the only indictment in force." United States v. Goff, 187 Fed. App'x 486, 491 (6th Cir. 2006) (citing Parks v. Fed. Express Corp., 1 Fed. App' 273, 277 (6th Cir. 2001)). The Superseding Indictment is the only indictment currently "in play" and has remedied any prior discrepancies in this case."

- [179] In **United States v. Broecker** Cr. No. 11-97-C (W.D. Ky., 2012), the US District Court of the Western District of Kentucky, Louisville Division reaffirmed that:

"A superseding indictment supplants a preceding indictment to become the only indictment in force. See United States v. Goff, 187 Fed. App'x 486, 491 (6th Cir. 2006). While a district court may dismiss a superseding indictment where sufficient grounds exist to do so and thereby reinstate a preceding indictment, see United States v. Garcia, 268 F.3d 407, 410 (6th Cir. 2001), overruled on other grounds by United States v. Leachman, 309 F.3d 377 (6th Cir. 2002), it does not have the discretion to choose to proceed on an indictment that is superseded, just as it may not proceed on a civil complaint that is amended by a subsequent complaint. See Parks v. Federal Express Corp., 1 Fed. App'x 273, 277 (6th Cir. 2001).

[180] In **United States v. Stricklin** 591 F.2d 1112, 1116 n. 1 (5th Cir.1979) there were four indictments against the defendant. One was filed in Tennessee in 1973. One was filed in New Mexico in 1974. Then there the third indictment filed against the defendant and other persons in Texas in August 1974 – and a fourth indictment which was a superseding indictment to the third, naming only the defendant, filed in Sept 1974. The fate of the several indictments were set out by the court in the following excerpt: “The Tennessee indictment was dismissed with prejudice on March 18, 1975, because of the government’s failure to grant Stricklin a speedy trial in accord with his constitutional right under the Sixth Amendment. The New Mexico indictment resulted in a conviction on both counts on March 14, 1975, and Stricklin received a five year prison sentence. The Texas indictment was returned on June 16, 1977. On August 17, and 26, 1977, Stricklin moved before the District Court to dismiss the Texas indictment on the grounds that the Tennessee indictment, which was dismissed with prejudice, and the New Mexico indictment, which resulted in his conviction, had placed him in former jeopardy. A pretrial double jeopardy hearing took place on August 31, 1977; the government filed the superceding indictment on September 15, 1977; and the District Court issued an order denying Stricklin’s motion on September 27, 1977. The District Court found that the four substantive counts pertaining to unlawful importation and possession with intent to distribute marijuana within the Western District of Texas presented no possible double jeopardy problem. With regard to the two conspiracy counts, the District Court found that a comparison of the Tennessee and New Mexico indictments with the superceding indictment in Texas, in light of the evidence obtained at the hearing, reflects that each alleges different transactions and overt acts and that, in any event, jeopardy had never attached in the Tennessee case. Concerning the continuing criminal enterprise count, the District Court found that the government did not have sufficient proof in either the Tennessee or New Mexico conspiracy case to sustain a conviction for a violation of 21 U.S.C. § 848, so that there was no double jeopardy bar to this subsequent prosecution for the greater offense.

[181] On appeal from the United States District Court for the Western District of Texas several points were made by the United States Court of Appeal. First, it stated that “a superceding indictment may be returned at any time before a trial on the merits” Second that “two

indictments may be outstanding at the same time for the same offense if jeopardy has not attached to the first indictment.”

[182] The US Court of Appeal also stated:

“Since the original indictment apparently was never dismissed, there are technically two pending indictments against Stricklin, and it appears that the government may select one of them with which to proceed to trial. United States v. Cerilli, 558 F.2d at 700 n. 3. The superseding indictment was not filed until after the pretrial double jeopardy hearing, so that Stricklin's argument at the hearing was concerned with the original indictment. The District Court, however, referred only to the superseding indictment's conspiracy charges in its order denying Stricklin's motion. At oral argument, the government indicated that it may attempt to proceed on a combination of the two indictments because the superseding indictment deals only with a portion of the original indictment's charges. Hence, we will consider both indictments for purposes of this review.”

[183] The reasoning in **Stricklin** was later applied by the US Court of Appeal in **United States v L. Bowen** 946 F. 2d. 734. In this case, a superseding indictment had been returned against the defendant. On the first day of trial, a second superseding indictment was returned against him charging essentially the same offences but changing some dates and amounts of money involved in some counts. The defence was successful in contending that the trial should proceed on the first superseding indictment because of the untimeliness of the second superseding indictment. He was convicted and on appeal it was argued on his behalf that the second superseding indictment had nullified the first superseding indictment the result being that the trial judge should have dismissed the first superseding indictment and discharged the defendant. The US Court of Appeal recognizing that there was no double jeopardy issue stated:

“We have found no authority which supports the proposition that a superseding indictment zaps an earlier indictment to the end that the earlier indictment somehow vanishes into thin air. In the instant case, we are concerned with at least two outstanding indictments against Bowen. As indicated, counsel agree that we are not concerned with a double jeopardy problem. The district court did not err in holding that because of untimeliness Bowen would not be forced to trial on the Second Superseding Indictment which was only returned on the morning the First Superseding Indictment was set for trial, and that the trial on the First Superseding Indictment, which was set for that date, would proceed as scheduled.”

[184] Another instructive case decided by the US Court of Appeal is the **United States v Ray L. Corona and Rafael Corona** 804 F 2d. 1568. In this case, the two defendants had been charged together with three other persons on the same indictment. Two of the others were convicted and one of acquitted. The jury failed to return a verdict against these defendants and a mistrial was declared in relation to them. Three months after the trial a grand jury returned a superseding indictment naming only the two defendants and relating to essentially the same allegations as set forth in the original indictment. 'However, several specific charges were altered, some new charges were added, and other charges were deleted. The most significant of these changes were as follows: an expansion of the dates of the alleged conspiracy, adding six months at the beginning of the eight-year conspiracy and twelve months at the end (reflecting the time between the indictments, during which time the enterprise allegedly continued operations); the addition of new overt acts in furtherance of the conspiracy; and additional counts of mail fraud and Travel Act violations.'¹³ The two defendants sought a dismissal of the superseding indictment. These arguments reached as far as the Court of Appeal. Arguments related to double jeopardy were viewed as misconceived and rejected. It was held that nothing prevented the Grand Jury from returning the superseding indictment. The stay was refused.

[185] In my view, the analysis in these three last cases decided by the United States Court of Appeal make it clear that if there is an original indictment against a named defendant and a superseding indictment against that same defendant, there would be in existence, two pending indictments against that defendant and the government may choose one of them to proceed to trial.

[186] Therefore, the fact that a superseding indictment was filed against Stanford and others is of no relevance to the validity of the indictment against this claimant. The indictment against him continues to remain valid (See Stricklin). There is absolutely no merit to any contention and it is absurd to suggest that because Stanford and others have been tried on other superseding indictments, jeopardy has been attached against this claimant. Stricklin itself states very clearly that jeopardy will only attach when a jury is sworn and empanelled.

¹³ As recited by the Court of Appeal in the judgment.

This must be taken to mean in a case against that same defendant. It does not at all comport with common sense to contend that if two persons are named in a single indictment and a superseding indictment against one proceeds to trial, then double jeopardy applies to the person who was named in the first indictment and in relation to whom no jury was ever empanelled. It does not.

[187] As far as the relevant American case law is concerned, the indictment against this claimant remains valid. It may be that an amendment will have to be made to remove the names of the other defendants, as they have been tried or have pleaded.¹⁴ The Americans may also chose to file new superseding indictment, but whatever they do, they will have to bear in mind the charges upon which the claimant has been committed.¹⁵ For me and for now, it is sufficient to say that the claimant has failed to make out any arguable case that the second respondent's decision is bad because the underlying accusation has disappeared - it has not - or because he should have at the very least considered the superseding indictment. As I have found, the superseding indictments are irrelevant to his decision to return the claimant.

Conclusions and Orders

[188] Having regard to all of the above, this Court sees no reason, why either the claim or the application for leave should be allowed. I have further seen no reason why the second respondent's order of return should be stayed or quashed. The claim for constitutional relief is therefore dismissed. The application for leave to apply for judicial review is also dismissed. There shall be no order as to costs.

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Darshan Ramdhani
High Court Judge (Ag.)

¹⁴ <https://www.justice.gov/usam/criminal-resource-manual-236-amendment-indictments>

¹⁵ It is accepted that 'a superseding indictment assists the defendant by avoiding initial unwarranted overcharging and at the same time allowing the Government to clarify facts underlying the charge, thus performing the dual function of informing the defendant and preventing later re-indictment on the same charge.' See *United States v. Sepulveda*, 15 F.3d 1161, 1192 (1st Cir. 1993).