THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. 2013-01303

Between

DOREEN ALEXANDER-DURITY

Applicant/Intended Claimant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent/Intended Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. David West and Ms. K. Berkley for the Applicant/Intended Claimant
2. Mr. Avory Sinanan S.C., Mr. Kelvin Ramkissoon and Ms. Zelica Haynes for the Respondent/Intended Defendant.

Date of Judgment: 26th July, 2013

Decision

1. Before the Court for determination is the Applicant/Intended Claimant's application for leave to apply for Judicial Review filed on the 28th March 2013.

2. The intended relief claimedt included *inter alia:*

   i. An order of Certiorari to remove into this Honourable Court and quash the decision of the Honourable Attorney General to issue the warrant of surrender dated 21st March, 2012 directing that the Applicant be extradited to the United States of America.

   ii. A declaration that the decision of the Honourable Attorney General to issue the warrant of surrender was illegal, unreasonable, irrational, unfair and procedurally irregular.

   iii. An order of Certiorari to remove into this Honourable Court and quash the decision of the Honourable Attorney General to order the surrender of the Applicant.

   iv. A declaration that the decision of the Honourable Attorney General not to enquire into the reasoning of the Director of Public Prosecutions to discontinue local charges against the Applicant and the Honourable Attorney General issuing the warrant of surrender has deprived the Applicant of a legitimate expectation of being tried in Trinidad and Tobago.

   v. Alternatively, a declaration that the failure of the Honourable Attorney General to enquire into the evidence that the Requesting State has against the Applicant was illegal, unreasonable, irrational, unfair and procedurally irregular.

vi. A declaration that the decision of the Honourable Attorney General not to allow the Applicant to respond in full to the affidavit of Matthew Singer dated 2nd May, 2012 was illegal, unreasonable, irrational, unfair and procedurally irregular.

vii. A declaration that the decision of the Honourable Attorney General not to receive an undertaking in the form of a Diplomatic Note that the death penalty would not be carried out if the Applicant is found guilty was illegal, unreasonable, irrational, unfair and procedurally irregular.

viii. A declaration that the Constitutional rights of the Applicant/Intended Claimant have been infringed and therefore it is unjust, oppressive and unlawful to order the extradition of the Applicant/Intended Claimant by virtue of section 16(3) of the Extradition Act.

ix. An order of Mandamus directing the Honourable Attorney General to stay any further proceedings in relation to the extradition of the Applicant until the determination of these proceedings.

3. The Application was on the 28th March, 2013 served on N. Nabie of the Chief State Solicitor's Department and there is also confirmation from the Court Registry that around 2:25 p.m. on the said date Ms. Zelica Haynes from the Attorney General's Department communicated with the Assistant Registrar and was told of the application and that the matter was to be docketed and listed for a hearing.

4. The High Court Easter vacation commenced on the 29th March, 2013 for a period of one week and re-opened on the 8th April, 2013. During the vacation period the instant application was not directed to the attention of the vacation judge and the Applicant/Intended Claimant's Attorney-at-Law did not communicate to the Court Registry that the application was urgent nor were any follow up calls made after the application was filed.

5. On the 31st March, 2013, the Applicant/Intended Claimant was surrendered to the United States.

6. The issue that the Court is required to determine at this stage is:

    i. Whether or not the Applicant/ Intended Claimant has an arguable case so as to justify a review of the Attorney General's decision to issue a warrant of surrender dated 21st March, 2013.

The Test for granting Leave

7. The test is whether or not there is an arguable case. Lord Diplock in IRC v National Federation of Self Employed and Small Businesses [1982] AC 617 at page 642-644 stated as follows:

> *"The need for leave to start proceedings for remedies in public law is not new. It applied previously to application for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities could be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."*
>
> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the Court were to go into the matter in any depth at that stage. If in a quick perusal of the material then available, the Court thinks that it discloses what might turn out to be an arguable case in favour of granting the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief."*

8. In Steve Ferguson & Ishwar Galbaransingh v The Attorney General of Trinidad and Tobago Civil Appeal No. 207/2010 Kangaloo JA at paragraph 4 and 5 stated:

> 4. *"The purpose of judicial review is to keep the executive in check and to prevent the citizen from arbitrary, unwarranted and unlawful executive action. Such protections are part of the wider concept of the rule of law which lies at the foundation of any democratic society. In this regard the observations of Lord Phillips of Worth Matravers are worthy of note:*
>
> > *The rule of law is the bedrock of a democratic society. It is the only basis upon which individuals, private corporations, public bodies and the executive can order their lives and activities…..The rule of law will not fully prevail unless the domestic law of a country permits judges to review the legitimacy of executive action. This is increasingly becoming the single most important function of the judge in the field of civil law, at least in my jurisdiction."*
>
> 5. "*The main purpose of the permission stage in judicial review proceedings is still to eliminate unmeritorious applications brought by an applicant who is "no more than a meddlesome busybody", an aim which is particularly beneficial in current times given the explosion in civil litigation which our justice system has witnessed. However in fulfilling its mandate as the guardians of democracy and the rule of law; concepts which can easily be seen as two side of the same coin, the Court must not lightly refuse a litigant permission to apply for judicial review. It must be only in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the courts should exercise its discretion in refusing to grant leave."*

9. In Sharma v Brown Antoine [2006] UKPC 57 the court stated that permission to proceed with a judicial review claim would not be granted unless the court is satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not

subject to a discretionary bar such as delay or an alternative remedy. This test must be scrupulously adopted by the Court.

10. The decision that the Applicant/Intended Claimant seeks to challenge is the decision of the Intended Respondent dated 21st March, 2013 to issue the warrant to surrender directing that the Applicant/Intended Claimant be handed over to the United States of America.

11. In the instant matter, the application of the relevant test of whether there are arguable grounds for judicial review has to be undertaken with regard to the purport and effect of the Extradition Act (Commonwealth and Foreign Territories) Act. Chapter. 12.04.

12. In the Applicant/Intended Claimant's application filed on the 28th March 2013, the ground upon which the relief is sought was outlined at paragraphs 3.1 to 3.6. The matters referred to at paragraphs 3.1 to 3.6 outline a narrative of events and the only clear and discernible ground upon which the application is premised appears to be the ground stated at 3.6. This position notwithstanding the affidavit of Doreen Alexander-Durity filed in support of the application raises issues which were not specifically identified as "grounds" in the application.

13. The ground stated at paragraph 3.6 of the Application is:

> *"The decision of the Attorney General not to review the Director of Public Prosecution's decision, allow the Applicant an opportunity to respond to Mr. Singer's affidavit and to not seek greater assurances from the US authorities was illegal, unreasonable, irrational, unfair and procedurally irregular contravention of the Applicant/Intended Claimant legitimate expectation to be tried in Trinidad and Tobago."*

The first issue raised in this ground is the decision of the Attorney General not to review the DPP's decision.

14. The decision referred to must be the decision of the DPP to discontinue the local proceedings against the Applicant/Intended Claimant. On the 12th March, 2013 the DPP issued a Notice of Discontinuance and the proceedings against the Applicant/ Intended Claimant relative to information No. 1134/06 was discontinued pursuant to the exercise of the powers of the office of the DPP under section 90 of the Constitution of Trinidad and Tobago. Section 90 (1) 3 provides that the Director of Public Prosecutions should have power in any case in which he considers it proper to do so "*to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority*."

15. In Dhanraj Singh v. Attorney General and Director of Public Prosecutions HCA 395/2001, Bereaux J (as he then was) at page 68 said:

> *"The intention, by the re-introduction of the office of Director of Public Prosecution into the 1976 Constitution, was to make public prosecutions the responsibility of the holder of an independent office free from political control, by removing the power to initiate, undertake or discontinue public prosecutions from the control of the Attorney General, who is a political appointee."*

16. The Attorney General has no authority to review or challenge the decision of the DPP to discontinue any criminal proceedings in Trinidad and Tobago. The Attorney General is/was required, however, to give consideration to the fact that the DPP had discontinued the local proceedings against the Applicant/Intended Claimant.

17. The Notice of Discontinuance was attached as exhibit **"DAD 3"** to the affidavit of Applicant/Intended Claimant. The statement contained in the said Notice was clear and unambiguous. The Attorney General caused a letter dated 27th March, 2013 to be issued to the Applicant/Intended Claimant and in the said letter it was clearly stated, *inter alia*,

that the Attorney General did consider the effect of the Notice of Discontinuance and the impact of same on the issue of any conflict of jurisdiction. This ground, therefore, is not an arguable ground for judicial review that has a realistic prospect of success.

The second ground articulated at paragraph 3.6 of the application is that the Applicant/Intended Claimant was denied an opportunity to respond to Mr. Singer's Affidavit.

18. The affidavit of Matthew Singer was filed in the habeas corpus proceedings that were determined by this Court in CV2012-01742 ("the habeas matter"). The Applicant/Intended Claimant, therefore, had notification of the contents of same since May, 2012 and the Attorney General did consider this issue as reflected at paragraph 3 page 2 of the letter dated 27th March, 2013.

19. The Applicant/Intend Claimant had every opportunity to address her concerns in relation to the said affidavit in the habeas matter. After the judgment was delivered in July 2012, the Applicant/Intended Claimant made written representations to the Attorney General and the Applicant/Intended Claimant had ample opportunity to address any concerns in relation to the Singer affidavit. In the circumstances therefore the Court is of the view that this is not an arguable ground for judicial review that has a realistic prospect of success.

The third ground outlined at paragraph 3.6 of the application is that the decision of the Attorney General not to see greater assurances from the US authorities was illegal, unreasonable, irrational, unfair and procedurally irregular in contravention of the Applicant/Intended Claimant's legitimate expectation to be tried in Trinidad and Tobago.

20. The affidavit of Matthew Singer was attached as exhibit **"DAD 21"** to the affidavit of the Applicant/Intended Claimant filed in support of her application, on the 28th March, 2013. Mr. Singer at paragraph 14 stated *"Alexander is incorrect in asserting that she faces death in the United States. The United States has given an assurance to the Trinidad and*

Tobago Government that it will not seek the death penalty. Therefore, the maximum penalty in the United States is life imprisonment." Mr. Singer is a senior trial attorney attached to the United States Department of Justice and his affidavit was sworn before a US Magistrate in the District of Columbia.

21. In the Habeas Corpus proceedings CV 2012-01742 this Court determined that the applicant could be extradited even if she may face a greater penalty in the US than she would face in this jurisdiction and that the possibility of a greater penalty does not breach section (4) of the Constitution.

22. Section 16 (4) in the Extradition Act provides:

> *"The Attorney General may decide to make no order under this section in the case of a person accused or convicted of an extraditable offence not punishable with death in Trinidad and Tobago if that person could be or has been sentenced to death for that offence in the territory by which the request for his return is made unless that territory gives to the Attorney General an undertaking that the sentence of death will not be carried into effect."*

23. The section uses the word 'may' and not the word 'shall'. The provision, in the view of this Court, vests the Attorney General with a discretion as to whether or not to make an Order under section 16 of the Extradition Act. He may decide not to make an Order unless the territory gives to the Attorney General an undertaking that a sentence of death will not be carried into effect, or conversely he may still decide to make an Order even though no such undertaking is given.

24. The discretion under section 16 of the Extradition Act is purely an Executive one. In Ferguson and Galbaransingh v. John Jeremie and Others CV 60/2007, at page 11, Warner JA quoted with approval the dicta of Gleeson C.J. in Vasiljkovic v. Commonwealth (80 ALJR) as follows:

"In accordance with international practice, the Parliament has given the executive authority, subject to the requirements of the Act, the ultimate discretion, even if all other conditions are satisfied, to decide whether, and upon what conditions, a person will be surrendered to a requesting state……."

25. In its submissions the Defendant referred to a Diplomatic Note dated 27th March, 2013 and on the 25th June, 2013 the Defendant filed an affidavit of Renee Charles of the Central Authority Unit. The Affidavit annexed the Diplomatic Note dated 27th March, 2013 and the note outlines the requisite assurance that the death penalty would not be sought by the United States against the Applicant/Intended Claimant.

26. The said Diplomatic Note came after the decision of the Attorney General to issue the warrant of surrender was made, however, the power under Section 16 of the Extradition Act is discretionary and is not contingent upon the receipt of an assurance that a sentence of death would not be perused.

27. Further in his letter dated the 27th March, 2013, the Attorney General caused to be stated that (para. 4 pg. 2) "*The Attorney General is satisfied with the adequacy of the written assurance provided by the US Department of Justice contained in the affidavit of US Server Trial Attorney Matthew Singer to the effect that the United States will not seek the death penalty*". The issue was also considered at para. 1 and 2 at pg. 9 of the letter dated 21st March, 2013. In Gervasoni v. Canada (Justice), 1996 CanLII 8361, the Court of Appeal of British Columbia was of the view that informal assurances given by competent authorities in the Requesting State would suffice to assist the decision-maker in the exercise of his Executive function whether to surrender the fugitive and the absence of a formal Diplomatic assurance does not vitiate the decision to surrender. The Attorney General fully considered this issue and in accordance with his Executive authority and in the exercise of his discretion under Section 16 of the Act was satisfied with the representations that were made and he decided to issue the warrant of surrender. The

Court therefore finds that this is not an arguable ground for judicial review that has a realistic prospect of success.

Further Grounds

28. At paragraph 28 of her affidavit the Applicant/Intended Claimant stated that:

> *"By the Attorney General not asking questions of the Prosecuting Authorities he has acted on an unreasonable, irrational, unfair and procedurally irregular manner. The Attorney General did not request information about the witnesses that gave evidence against me. The Attorney General did not enquire if the witnesses are available to give evidence in Trinidad. The Attorney General did not enquire when the witnesses gave a first statement implicating me. The Attorney General did not ask if the witnesses been (sic.) given any promises of a lesser sentence."*

29. At paragraph 3.6 of the application, the assertions of unreasonableness and irrationality are stated in relation to the failure to seek greater assurances from the US authorities, the decision not to review the DPP's decision and the failure to allow the applicant an opportunity to respond to Mr. Singer's affidavit. Paragraph 28 of the affidavit however raises issues of unreasonableness and irrationality with respect to the failure to request information about the witnesses who are to testify against the Applicant/Intended Claimant and the failure to enquire as to when the said witnesses first gave statements against the Applicant/Intended Claimant or whether they were given reduced sentences.

30. The Extradition Act does not stipulate that the Attorney General is required to request information about witnesses. The Applicant/Intended Claimant has therefore not raised an arguable ground with respect to 'unreasonableness' or 'irrationality' in relation to the exercise of the Attorney General's discretion under section 16 of the Act that has a real prospect of success.

31. The Attorney General's letters of the 21st March, 2013 and the 27th March, 2013 outlined the factors and considerations to which he addressed his mind in determining the manner in which he was to exercise his discretion under section 16 of Act.

32. The Attorney General addressed his mind, inter alia, as to whether it would be wrong, unjust or oppressive to order the return of the Applicant/Intended Claimant, he considered whether there where matters or circumstances which could trigger any of the restrictions on return set out in section 8 or 8A of the Extradition Act, he considered the passage of time since the offence was allegedly committed, the issue as to whether the accusation was made in good faith in the interest of justice and he also addressed his mind as to whether there was any other sufficient cause which when considered in the context of all the circumstances would indicate that it would have been unjust or oppressive to return the Applicant/Intended Claimant.

33. He considered, *inter alia,* the provisions of the Extradition Act and the cases of Kakis v. Government of Republic of Cyprus [1978] 2AER634, Alkinson v. USA [1971] AC 197 and Knowles v. The US Government [2007] 1 WLR47and he also addressed his mind to this country's obligation to honour its treaty obligations and the relevant political ramifications.

34. The Attorney General also considered the representations that were made on behalf of the Applicant/Intended Claimant by her letters, the representation by the DPP and the Notice of Discontinuance as well as the affidavit of Singer. Consideration was given as to the effect of the Notice of Discontinuance and the impact of same on the issue of any conflict of jurisdiction, he considered the issue as to where the impact of the alleged offence was felt and he considered the observations stated in the 'Cotroni' case as to the objectives of extradition.

35. Regard was given to the fact that the Authority to Proceed contained an additional count that was not contained in the US indictment. The Attorney General considered the operation of section 8 (3) in the context of the entire case and he also considered the issue

as to whether an assurance was given that the sentence of death would not be carried out by the US.

36. Having reviewed the said letters in detail, the court is of the view that the Attorney General addressed his mind to all the material considerations and factors that ought to have been considered prior to and so as to enable the exercise of his discretion under section 16 of the Act and the Court finds that the Applicant/Intended Claimant has no realistic prospect of successfully advancing the ground that the Attorney General failed to properly consider whether it would be unjust or oppressive to order her surrender.

37. Another ground which the Applicant/Intended Claimant outlined, was that she had a legitimate expectation to be tried in Trinidad and Tobago. The application, however, is devoid of any particulars in this regard and there is no evidence contained in the affidavit or in the factual matrix of this case that can legitimately give rise to any such expectation. Consequently the Court is of the view that there is no arguable ground that has a realistic prospect of success in relation to a legitimate expectation argument.

38. The Applicant/Intended Claimant outlined in the submissions filed on the 3rd May, 2013 that no reasonable opportunity was given to the Applicant/Intended Claimant to respond to the Attorney General's decision dated 21st March, 2013 and that the said letter contained new information regarding the discontinuance filed by the DPP on 12th March, 2013. The Applicant/Intended Claimant did in fact respond to the said letter by letter dated 25th March, 2013and a response was also issued by the Central Authority Unit on the 27th March, 2013. The Court is therefore of the view that this is not an arguable ground that has a realistic prospect of success.

39. The Applicant/Intended Claimant complained that she was in fact extradited while the instant application for leave was pending and that this breached her Constitutional rights. While this Court is of the view, that regard should have been given by the Defendant to the fact that the Claimant had filed the instant application thereby invoking the

jurisdiction of the Court, it is not open to this Court at this stage to adjudicate upon this issue.

40. This Court is charged with the sole mandate in accordance with the application that was filed by the Applicant/Intended Claimant of determining whether or not leave ought to be granted so as to enable the decision of the Attorney General to issue the warrant of surrender, to be judicially reviewed. The unfortunate events of the 31st March, 2013 and the effect, if any, of the decision made on that date to extradite the Applicant/Intended Claimant, may give rise to a distinct and separate claim. In the application before this Court no relief for constitutional redress was claimed nor has any application been filed to amend the application filed on the 28th March 2013 so as to include any other relief. Accordingly, all the submissions made on this issue are therefore irrelevant and of no assistance to this Court in the instant matter.

41. In the circumstances, the Court is of the view that the Applicant/Intended Claimant has raised no arguable grounds for judicial review that have a realistic prospect of success.

42. Accordingly the Applicant/Intended Claimant's application filed on the 28th March, 2013 is hereby dismissed and the Applicant/Intended Claimant is to pay to the Respondent/Intended Defendant's cost which is to be assessed in default of agreement.

……..

FRANK SEEPERSAD

JUDGE