THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 314 of 2017

Claim No. CV2015-04091

BETWEEN

JACK AUSTIN WARNER

APPELLANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENT

PANEL:

G. Smith J.A.

P. Moosai J.A.

A. des Vignes J.A.

DATE OF DELIVERY: June 11, 2019

APPEARANCES:

F. Hosein S.C., R. Dass, S. Bridgemohansingh and A. Maraj instructed by N. Alphonso for the Appellant

D. Mendes S.C. and M. Quamina instructed by S. Julien for the Respondent

I have read the judgment of Smith J.A. I agree with it and have nothing to add.

……..……

P. Moosai

Justice of Appeal

I too, agree.

……..

A. des Vignes

Justice of Appeal

JUDGMENT

Delivered by G. Smith J.A.

INTRODUCTION

1. Jack Austin Warner, the Appellant, has been charged with certain criminal offences in the United States of America. The United States of America seeks to extradite the Appellant from Trinidad and Tobago to face prosecution in the United States of America for the offences for which he is charged. The United States of America has commenced extradition proceedings in Trinidad and Tobago.

2. The Appellant brought judicial review proceedings to challenge the validity of the extradition proceedings. He also alleges that the proceedings should be discontinued because of breaches of his right to natural justice.

3. A brief summary of the challenge to the validity of the extradition proceedings is as follows:

   Extradition proceedings are governed by the Extradition (Commonwealth and Foreign Territories) Act, Chapter 12:04 (the Act).

   With respect to foreign territories (*viz.* non-Commonwealth territories) like the United States of America, section 4 of the Act stipulates that where a treaty has been concluded between Trinidad and Tobago and any foreign territory for the return of fugitive offenders (like the Appellant), "**the Attorney General may, by Order subject to the negative resolution of Parliament, declare that territory to be a foreign territory (hereafter referred to as a declared foreign territory) in relation to which the Act applies…**"

   A new extradition treaty had been concluded between the United States of America and Trinidad and Tobago in 1996 (the U.S. Treaty) and pursuant to section 4 of the Act, an order had been made declaring the United States of America to be a declared foreign territory. This order was made by Legal Notice 58 of 2000 dated 15 March, 2000 and is cited as the Extradition (United States of America) Order, 2000 (the U.S. Order).

   However, section 4 (2) of the Act also stipulates that an order with respect to a declared foreign territory shall not be made unless the treaty which had been concluded between Trinidad and Tobago and that foreign declared territory "**is in conformity with the provisions of this Act, and in particular with the restrictions on the return of fugitive offenders contained in this Act.**"

   The Appellant contends that the U.S. Treaty between the United States of America and Trinidad and Tobago was not in conformity with the Act as required by section 4(2). Therefore, the Attorney General could not validly make the U.S. Order which declared the United States of America to be a foreign declared territory. As a result, there is no jurisdiction for Trinidad and Tobago to extradite the Appellant to the United States of America.

4. With respect to the issue of natural justice:-

   Part of the procedure for extradition from Trinidad and Tobago to the United States of America mandates the Attorney General to issue what is known as an Authority To Proceed (ATP) to the Chief Magistrate. Based on this ATP, the alleged fugitive offender (like the Appellant) is brought before a Magistrate to determine whether the fugitive offender can be extradited.

   The Appellant alleged that he had a right to be heard before the Attorney General issued an ATP to the Chief Magistrate and he was denied such a hearing.

5. The trial judge, Aboud J., found that (i) the U.S Treaty was in conformity with the Act; and (ii) there was no breach of natural justice since the Appellant had no right to be heard before the Attorney General issued an ATP; in any event, the Appellant was given a reasonable opportunity to be heard and did not accept the same.

   The trial judge dismissed the Appellant's application for judicial review.

6. For the reasons that will appear in this judgment, I would uphold the trial judge's decision and dismiss this appeal.

PRELIMINARY ISSUES

7. Before embarking on the substantive discussion concerning the validity of the U.S. Order and the issue of natural justice, I must deal with certain preliminary issues which affect that discussion. They are:-

   (a) The effect of the provisions in section 4(3) of the Act which purport to prevent any query of the U.S. Order.

   (b) What is the extent of conformity between the U.S Treaty and the Act as required by section 4(2) of the Act.

   (c) Whether it is (i) the original 1985 Act; (ii) the 2004 Amended Act; or (iii) both, which must be used to test conformity between the U.S. Treaty and the Act.

(a) The limitations on challenging the U.S. Order under section 4(3) of the Act

8. Section 4(3) of the Act purports to place 2 limitations on any query concerning the validity of an Order declaring a state to be a declared foreign territory.

   They are firstly, a conclusive evidence provision; namely, as stated in section 4(3), "**the Order shall be conclusive evidence that the treaty complies with the requisitions of this Act and that this Act applies in relation to the foreign territory mentioned in the Order…**"

   Secondly, an ouster provision; namely, as section 4(3) goes on to state "**…and the validity of the Order shall not be questioned in any legal proceedings whatever**."

9. The Respondent argues with some conviction that these 2 statutory limitations are fatal to this judicial review application since they prevent the court from examining: (i) the question of conformity between the U.S. Treaty and the Act because of the conclusive evidence provision; and (ii) any issue as to the validity of the U.S. Order (the very issue being posed in this judicial review application) because of the ouster provision.

10. The Respondent accepts that "ordinarily, a provision such as section 4(3)…will be construed as applying only to orders made in accordance with the law as determined by a court of law…".[1] In such cases, the court itself would assume the jurisdiction to ascertain compliance with the law and, in pursuit of that exercise, would disregard the limitations of both the conclusive evidence and the ouster provisions.

    However, the Respondent contends that this general principle is not applicable here for what I summarise (with all due respect to Counsel) as the following two reasons.

    First, there is authority that in the case of conclusive evidence clauses, a court would allow the official tasked with making decisions the protection of the clause, especially where some specialised knowledge is to be attributed to the decision-maker. This has been

[1] See the Respondent's written submissions at the High Court dated 7 March, 2017 at paragraph 11.

applied to Registrars who make decisions within their purview.[2] In the present case, the executive is uniquely the body that concludes international treaties and considers matters such as international comity and diplomacy. They are therefore to be treated as the specialists in the area and ought to be given the benefit of the conclusive evidence clause in section 4(3).

Second, it is a well-recognised and accepted principle that the courts have no jurisdiction to entertain any challenge to the treaty-making power of the executive or to interpret a treaty if it is not incorporated into the domestic law of this country (see **J.H. Rayner (Mining Lane Ltd v Department of Trade and Industry and others [1990] 2 A.C. 418**). Therefore, there is every reason to give effect to the ouster provision in section 4(3).

11. The Appellant and the trial judge disagreed with the Respondent's submissions and preferred to adopt the traditional, narrow and limited construction of the conclusive evidence and the ouster provisions. This approach favours the court assuming jurisdiction to entertain these challenges in spite of the limiting provisions in section 4(3) of the Act. I support this approach.

12. With respect to the ouster provision in section 4(3), the traditional approach of courts to such ouster clauses is aptly stated in a quote from **Wade and Forsyth on Administrative Law** 10th edition (2009) at page 610:

> "*There is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy since otherwise administrative*

[2] See **National Provincial and Union Bank of England v Charnley [1924] 1 KB 431** and **R v Registrar of Companies ex Parte Central Bank of India [1988] 1 QB 1114** and see paragraphs 13, 14 and 15 of the Respondent's submissions.
And see paragraphs 13, 14 and 15 of the Respondent's written submissions at the High Court dated 7 March, 2017.

authorities and tribunals would be given uncontrollable power and violate the law at will."[3]

If the narrowest possible construction of this ouster provision is adopted, the present enquiry as to whether the U.S. Treaty conforms with the Act is one which involves the ascertainment of compliance with the law "as determined by a court of law" and as stated above at paragraph 10, the courts, in pursuit of that ascertainment exercise would disregard the ouster provision.

13. Further, while I accept the correctness of the general principle that courts do not entertain a challenge to the treaty-making power of the state nor do they interpret a treaty, this principle is not absolute. There are some limited exceptions, one of which is applicable here.

This exception which was referred to by the trial judge is well stated in the dicta of Lord Griffiths at pages 500 to 501 of the very same **JH Rayner[4]** case that was cited by Counsel for the Respondent; namely:

> "**Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation...But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are questions of fact."**

[3] And see recently the observations of Lord Carnwath (for the majority) in **R v Investigatory Powers Tribunal [2019] UKSC 22 at paragraph 144**.

[4] Cited at paragraph 10 above.

14. As the trial judge found, in the present matter, the nature of the enquiry into the conformity between the U.S. Treaty and the Act is an evidential, fact-based enquiry to determine whether, as a matter of fact, the U.S. Treaty conforms to the Act. It is not an enquiry to determine rights arising under the U.S. Treaty. Further, as will also be expanded upon in the discussion which follows, the enquiry is also a very limited enquiry to determine the level of conformity between the U.S. Treaty and the Act as a question of fact.

    I therefore have little hesitation in adopting the traditional, narrow and limited approach to the ouster provision in this case and I will assume the jurisdiction to examine the Appellant's arguments with respect to the validity of the U.S. Order.

15. With respect to the conclusive evidence provision in section 4(3):-

    While the U.S. Treaty does not give rights that are enforceable in domestic legislation, the Act itself can and does affect the fundamental rights of persons to whom it applies. This will be detailed later on in this judgment.[5] Therefore an examination of conformity of the U.S. Treaty to the Act may well involve an examination of questions touching upon the rights of individuals and raise issues of constitutional significance and the very rule of law. This exercise should be given oversight by the courts, otherwise an Attorney General who is not subject to such oversight by the courts could effectively become an administrative authority who "would be given uncontrollable power and (can) violate the law at will."[6]

16. Further, the probable impact of the extradition process on fundamental rights and the rule of law is a feature which distinguishes this case from the exercise of administrative powers by Registrars in the cases cited by the Respondent where the conclusive evidence clause was upheld.

17. I therefore have little hesitation to disapply the conclusive evidence provision in this case and to examine the issue of the U.S. Treaty's conformity to the Act.

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[5] See paragraphs 20, 21 and 57 below.

[6] See citation from Wade and Forsyth on Administration Law 10th Edn., (2009), pg 610 supra at paragraph 12.

18. In conclusion therefore, I find that the provisions of section 4(3) of the Act do not in this case oust the jurisdiction of the court to enquire into the question of the conformity between the U.S. Treaty and the Act and hence, the validity of the U.S. Order.

(b) The extent of conformity between the U.S. extradition treaty and the Act

19. Section 4(2) of the Act states that no declared foreign territory Order, such as the U.S. Order, shall be made unless the treaty which has been concluded between Trinidad and Tobago and that foreign territory "**is in conformity with the provisions of this Act and in particular with the restrictions on the return of fugitive offenders contained in this Act;**".

20. The Appellant contends that there must be strict conformity between the treaty and the Act. He says this because "the end result of extradition is the deprivation of a person's liberty and subjection to a foreign jurisdiction." This has "irreversible" effects on an individual's life and health since:

> "Once extradited, a requested person is separated from friends, family and their emotional support network, considered a fugitive from justice and a flight-risk so generally imprisoned on arrival and potentially held in custody for the full pre-trial period."[7]

21. The Respondent contends that no fundamental right is breached by an extradition in accordance with the Act;[8] much less is there any need to consider fundamental rights when examining the question of whether a treaty conforms to the Act. Further, the insidious expansion of international crime and the comity between nations mandate that conformity between countries with different legal systems as reflected in a treaty, must

[7] See **Written Evidence to the House of Lords Select Committee on Extradition Law (2014)** at paragraph 2; cited at paragraph 29 of the Appellant's written submissions filed 25 September, 2018.
[8] See paragraph 81 of **Ferguson and anor v The Attorney General of Trinidad and Tobago Civ. App. No. 185 of 2010.**

be only a broad conformity; otherwise extradition will become an impossibility since no two states have the same systems. This, Counsel says is also reflected in the case law on the issue.

22. The trial judge accepted the Respondent's propositions. I uphold this decision.

23. Extradition often involves a tension of opposites between the liberty of an individual and the prerogative of the executive to send individuals abroad to face prosecution for their crimes.

24. In the world of today, our courts have recognised that there is indeed an imperative transnational interest in prosecuting serious international or cross-border crimes. As Lord Griffith aptly expressed in **Liangsiriprasert (Somchai) v Government of the United States of America [1991] 1 AC 225,251:**

> "**Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality.**"

This reality mandates a broad and liberal approach to the construction of extradition legislation to make extradition work. As Lord Steyn aptly stated in ***In re* Ismail [1999] 1 AC 320, 327**:

> **"There is a transnational interest in the achievement of this aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits** (*sic*) **it in order to facilitate extradition…"**

See too Lord Bridge of Harwich in **R v Governor of Ashford Remand Centre, Ex Postlethwaite [1988] AC 924, 947**:

> "**I also take the judgment in that case [*In re Arton (No 2)* [1896] 1 QB 509, 517] as good authority for the proposition that in the application**

of the principle the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would 'hinder the working and narrow the operation of most salutary international arrangements.' The second principle is that an extradition treaty is a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute: *R v Governor of Ashford Remand Centre, Ex p Beese* [1973] 1 WLR 969, 973, per Lord Widgery CJ. In applying this second principle, closely related as it is to the first, it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."

25. I accept the correctness of the dicta cited above and I am of the view that the conformity required by section 4(2) of the Act is a broad and liberal conformity which facilitates extradition as far as is possible.

(c) Which Act/s is/are to be used to test conformity with the U.S. Treaty?

26. The original Act was passed in 1985. It has been amended several times since then. Specifically, an amendment in 2004 introduced some changes to the definition of what is an extraditable offence.

27. The Appellant contends that the question of conformity must be tested against the 2004 amended Act. The Respondent contends that the conformity is with the original 1985 Act. The trial judge held that it is the 1985 Act to apply. The trial judge went on to examine conformity between the U.S. Treaty and the 1985 Act; however, for the sake of

completeness, he also examined, in the alternative, conformity between the U.S. Treaty and the 2004 Act. I uphold this decision.

28. The arguments on this issue were somewhat involved. However, since in this opinion, I propose to examine both compliance with the 1985 Act and, in the alternative, the 2004 Act, I will deal with this issue in a less expansive way than Counsel.

29. The Appellant contends, in summary, that the court is being called upon to determine the validity of the U.S. Order as it relates to the extradition proceedings against him. Therefore, it is the validity of the U.S. Order at present that is relevant. Further, certain provisions of the Interpretation Act Chap. 3:01 favour this interpretation; they are sections 29(3) and 30.

    According to Counsel's interpretation, section 29(3) of the Interpretation Act mandates that when an Act (or a part of it) is repealed or revoked and is substituted by a new provision, all statutory sub legislation (like the U.S. Order) is to be read, as far as possible, in conformity with the new provisions.

    Section 30 of the Interpretation Act also provides that amendments to laws change the law as from its date; therefore the law would now be, as far as possible, what is stated in the amending provisions.

30. The Respondent contends, in summary, that the trial judge was correct in deciding that the issue of conformity, by the Act, is time-specific, namely, that it is only relevant to the time of the making of the U.S. Order. Hence, it must be the Act in existence at the time of the U.S. Order which is relevant to the conformity exercise. That is the 1985 Act.

    Counsel for the Respondent also challenges the application of both sections 29(3) and 30 of the Interpretation Act to this case.

    With respect to section 29(3) above, Counsel states that the relevant provision being tested is section 4(2) of the Act. This has not been altered, or amended or substituted. Therefore, section 29(3) which applies to amendments to an Act cannot apply. Neither

for that matter was the U.S. Order nor the U.S. Treaty amended or changed; therefore again, there is no need to apply section 29(3) to this situation.

With respect to section 30, Counsel for the Respondent states that this is merely a provision prohibiting statutory provisions "to apply with retrospective effect to events which have already occurred so as to impact upon the legality of acts which were otherwise lawful when made." As such, section 30 is of no relevance to this exercise as no one contends that any version of the Act, the U.S. Order or the U.S. Treaty is to have retrospective effect.

31. The Appellant repeatedly asserts that this judicial review challenge is based on the doctrine of "ultra vires", namely the Attorney General acted outside of his powers when he made the U.S. Order. It is a challenge to the jurisdiction of the Attorney General to make the U.S. Order pursuant to the provisions of section 4(2) of the Act. It therefore follows that what has to be examined is the state of the law at the time of making the Order, namely the 1985 Act. As the trial judge stated, "**it is a time-specific enquiry as to jurisdiction only**."[9]

A fortiori, the Act, and more specifically, section 4(2) contained no provision with respect to the making of any further Orders in respect of a declared foreign territory. As drafted, the Act provided only a time-specific enquiry limited to the making of one prescribed Order. The Act did not deal with treaty compliance in the future nor did it seek to address the jurisdiction of the Attorney General to make any future Orders.

32. Further, assuming that after a declared foreign territory Order is made, the Act is amended and no longer complies with the treaty, the issue that arises does not relate to the concluded declared foreign territory Order that was made but it becomes either:

    (i) one of international relations and comity between the contracting states which may necessitate a new or revised treaty arrangement. This a matter for the executive and not for the courts; or

[9] See paragraph 26 of the judgment of Aboud J.

(ii) (ii) it may affect the extradition proceedings on an ATP, so for example, if an amendment to the Extradition Act reduced the category or the type of offence for which extradition were available, it may mean that some extradition requests which were permitted by the treaty may now fail; in that case, the point at which treaty and Act non-conformity may be affected by future changes in the Act may be in the actual extradition proceedings. This does not affect the status of the U.S. Treaty or the past, executed declared foreign territory Order.

33. Also, if section 4(2) is interpreted as having effect on future treaty/Act conformity, a declared foreign territory Order would amount to a virtual guarantee by an Attorney General that the U.S Treaty and the Act will always be in conformity. This would be an unacceptable fetter on the power of Parliament to change the law. More specifically, it would also be a fetter on the Parliament not to change the law in a way that would affect any declared foreign territory Order made with every declared foreign territory; a virtual impossibility.

34. For these reasons, I am of the view that the conformity required is conformity between the U.S. Treaty and the 1985 Act.

While it is not necessary to consider the effect of the Interpretation Act, I state briefly that neither section 29(3) nor section 30 affect the reasoning above. In any event, I accept the correctness of the submissions of the Respondent on this issue as I have stated in paragraph 30 above and I am of the view that these provisions in the Interpretation Act are not relevant to the issue of which is the proper version of the Act to test against U.S. treaty conformity.

SECTION A

THE U.S. TREATY AND CONFORMITY WITH THE ACT

35. The Appellant contends that the U.S. Treaty is not in conformity with the Act in the following 4 areas:

    1. The constitution of an "extraditable offence"
    2. Double/dual criminality and extraterritoriality
    3. Minimum gravity/penalty
    4. Speciality

    These 4 areas represent principles of extradition law which are followed by most countries.

(1) The Constitution of an "Extraditable Offence"

36. To appreciate this argument, I have to refer to the difference in the way offences are categorised under the headings of: (i) an enumerative listing, as contrasted to (ii) an eliminative listing.

    Enumerative listing of offences is, as the title implies, a specific listing of offences being described.

    Eliminative listing on the contrary does not list offences but generally provides a description of related offences which by that definition eliminates other offences. So for example, a description "indictable offence" eliminates non-indictable offences.

37. The Appellant contends that the 1985 Act provides an enumerative listing of extraditable offences in section 7 of the Act. The relevant part of section 7 defines an extraditable offence as being "**one of the offences described in the First Schedule**" of the 1985 Act. That First Schedule contains an almost exhaustive and generic list of indictable offences.

    However, the Appellant contends that the U.S. Treaty provides for an eliminative method of describing an extraditable offence. Article 2(1) of the U.S. Treaty defines an extraditable office as one which is an indictable offence in Trinidad and Tobago and one

punishable in the United States of America by deprivation of liberty for more than one year.

The Appellant contends that this conflict between the enumerative and eliminative methods may mean that there may be some offences which are catered for in the U.S. Treaty that are not catered for in the Act, therefore the U.S. Treaty does not conform to the Act.

38. The Respondent contends:

(i) that the list of extraditable offences in the First Schedule of the Act is so exhaustive that it is hard to imagine any offences that do not also comprise offences under Article 2(1) of the Treaty. Therefore the U.S. Treaty broadly conforms to the Act.

In fact, the list of offences in the First Schedule are all indictable offences which are punishable by imprisonment for more than one year. This effectively is the same as the eliminative classification of offences in Article 2(1) of the U.S. Treaty; namely, indictable offences in Trinidad and Tobago and deprivation of liberty in the U.S. for more than one year. Therefore, both the enumerative and the eliminative definitions broadly cover the same offences. Thus, the U.S. Treaty broadly conforms to the Act.

(ii) If there is non-conformity, the enumerative list in the First Schedule of the Act would be narrower than the eliminative listing in the Treaty. Therefore, extradition from Trinidad and Tobago would be more restrictive and more protective of individual rights. Therefore, on a purposive construction, the working of the Act and U.S. Treaty would achieve the dual goals of protecting rights and enabling extradition and so the U.S. Treaty and the Act would broadly conform to each other.

39. The trial judge accepted the Respondent's submissions. I too uphold this decision and find that for the reasons advanced in paragraph 38 above, the U.S. Treaty conforms to the 1985 Act in the "constitution of an extraditable offence."

40. The Appellant also sought to argue that the U.S. Treaty was wider than the Act since Article 2(2) of the U.S. Treaty allowed for inchoate conspiracies to be extraditable whereas the 1985 Act did not. However, the Appellant apparently abandoned this argument when section 66(1) of the Interpretation Act was cited. Under section 66(1) of the Interpretation Act, a reference in any Act to an offence includes a reference to a conspiracy to commit that offence.

41. In the alternative, even if the 2004 Act is the relevant Act, the U.S. Treaty more readily conforms to the 2004 Act.

    The 2004 Act also uses an eliminative description of an extraditable offence that is the equivalent to, or at least very similar to the eliminative description in the U.S. Treaty.

    Section 6(1)(a) of the 2004 Act defines an extraditable offence as one that is punishable in the law of the declared foreign territory with death or imprisonment for a term of not less than twelve months. This equates to Article 2(1) of the U.S. Treaty which defines an extraditable offence as an indictable offence in Trinidad and Tobago and one punishable in the U.S. "**by deprivation of liberty for a period of more than one year or by a more severe penalty**."

    Even if the definitions in the Act and the U.S. Treaty are not identical, they cover the same or virtually the same offences which are punishable by one year imprisonment or more and the U.S. Treaty broadly conforms to the Act.

42. The Appellant also sought to argue that section 6(1)(c) of the 2004 Act created an unascertainable category of extraditable offences that was enumerative and different to the eliminative character of the definition in Article 2(1).

43. The Appellant contends that section 6(1)(c) provides that "**in the case of a declared foreign territory, extradition for <u>that offence</u> is provided for by a treaty between Trinidad and Tobago and that territory**." (my emphasis). The reference to "**that offence"**

is allegedly a reference to an unascertained offence that now had to be identified or listed somewhere else.

This argument is not sustainable. The reference to "**that offence**" in section 6(1)(c) is a reference back to an extraditable offence as mentioned in sections 6(1)(a) and (b) of the Act. Section 6(1)(b) is not relevant to this decision and as stated before, section 6(1)(a) is in conformity with the U.S. Treaty definition of an extraditable offence. No new category of unascertainable offences was created by section 6(1)(c) of the 2004 Act. Section 6(1)(c) merely provided that there must be an extradition treaty in the case of a declared foreign territory to permit extradition for offences covered by sections 6(1)(a) and (b).

There is no issue of non-conformity between section 6(1)(c) of the 2004 Act and the U.S. Treaty.

(2) Double Criminality and Extraterritoriality

44. As a matter of principle, unless a local statute permits it, a person can only be extradited for offences that are crimes both in the Requesting State (like the United States of America in this case) and the Requested State (Trinidad and Tobago in this case). This is the principle of double criminality. An extension of the principle of double criminality is the principle of extraterritoriality; namely that a person can only be extradited for conduct that is "punishable" both in the Requesting State and the Requested Stated. So for instance if a United States citizen is murdered in Grenada, this may be punishable in the United States of America but not in Trinidad and Tobago; therefore a person who murders a United States citizen in Grenada and is now in Trinidad and Tobago ought not to be extradited out Trinidad and Tobago to the United States of America unless statute permits it.

45. The Appellant argues that Article 2(4) of the U.S. Treaty makes allowance for extradition to the United States of America from Trinidad and Tobago for extraterritorial offences, while section 7(1) of the 1985 Act makes no allowance for it. Thus he alleges that the U.S. Treaty is not in conformity with the 1985 Act.

46. The Respondent originally conceded both before the High Court and in original submissions before me that there was such an anomaly, but contended that the full text of Article 2(4) was in conformity with the 1985 Act. However, on invitation from the Court, the parties reconsidered these arguments and made further written submissions on the meaning of section 7(1) of the 1985 Act. The Respondent now submits that section 7(1) of the 1985 Act permits extradition for extraterritorial offences. This does not in any event affect the Respondent's further argument with respect to the broad conformity between Article 2(4) of the U.S. Treaty and the 1985 Act.

47. Under the heading Article 2 Extraditable Offences, the U.S. Treaty contains provisions dealing with extraterritoriality in Article 2(4). Article 2(4) is in 2 parts.

    The first part deals with extradition where the law of the Requested State (Trinidad and Tobago) makes provision for extraterritoriality; it states:

    > "**If the offence was committed outside the territory of the Requesting State, extradition shall be granted if the laws in the Requested State provide for the punishment of an offence committed outside its territory in similar circumstances.**"

    The second part permits for extradition in special circumstances even when the law of the Requested State does not make provisions for extraterritoriality; it states:

    > "**If the laws in the Requested State do not so provide, the executive authority of the Requested State may, in its discretion, grant extradition, provided the requirements of this treaty are met**."

48. The first issue is whether the laws of Trinidad and Tobago (the Requested State) make provision for extraterritoriality and so are in conformity with the first part of Article 2(4) of the U.S. Treaty.

49. Section 7(1) of the 1985 Act deals with this, it provides:

> "**For the purposes of this Act, an offence in respect of which a person is accused or has been convicted in a declared foreign territory is an extraditable offence if it is an offence which is punishable under the law of that territory with death or imprisonment for a term of not less than twelve months and <u>which, if committed in Trinidad and Tobago or within the jurisdiction of Trinidad and Tobago</u>, would be one of the offences described in the First Schedule**." (my emphasis)

Do the words emphasised "**which, if committed in Trinidad and Tobago or within the jurisdiction of Trinidad and Tobago**" provide for extraterritoriality in respect of extraditable offences?

50. There has been a very helpful discussion of the meaning of the very same words in a United Kingdom statute. In **Re Al-Fawwaz and others [2001] UKHL 69**, the House of Lords decided (in summary) that those words permit extradition from a Requested State for extraterritorial offences.

51. In **Al-Fawwaz**, the applicant who was in England was alleged to be a member of an Islamic terrorist organisation and to have conspired to murder American citizens, officials, diplomats and others, both in the United States of America and elsewhere. The Appellant had never been to the United States of America and it was disputed whether any of the acts in pursuit of the conspiracy occurred there. The treaty provided for the extraterritorial jurisdiction of the United States. Based on an interpretation of the same wording in the U.K. statute as in Trinidad and Tobago, it was also decided that the principle of double criminality in England was satisfied once an equivalent offence would be triable in England; namely, that if the facts were transposed to England, the offence would be triable there.

Lord Slynn in a very useful exposé on the point examined the history and case law with respect to extraterritoriality and concluded that the words, ""**a crime which if committed**

in England or within English jurisdiction" would be one of the crimes described in Schedule 1 to the U.K Act, and so the U.K. Act did provide for extradition from England for extraterritorial offences.

Because of the depth of the argument on this issue, I cite liberally Lord Slynn's opinion at paragraphs 30, 31 and 32:

> "**30. It seems to me that the words in the 1870 Act "within English jurisdiction" must have been intended to add something to "committed in England". There is nothing to indicate that those words are limited to specific statutory provisions deeming or declaring the offence to have been committed in England for the purposes of extradition.**
>
> **31. Accordingly unless there are other compelling reasons I would interpret "within jurisdiction" as including but being wider than "in the territory" of the foreign state. The question is thus whether the conduct complained of will be triable in the United States and if that conduct were transposed to England, would be triable in England. The question is not whether the acts done in the United States (if any) regardless of other acts necessary to found jurisdiction committed elsewhere, would if transposed to England be triable in England. It is still necessary to decide whether all acts relied on or only those acts done in the United States are transposed to England**."
>
> **32. In most cases which approach is adopted may not matter. If only the events occurring in the United States are transferred to England and the other events occurring outside the USA are regarded as still occurring outside England, in asking whether the crime would be triable in England, it seems likely that the English courts would have extraterritorial jurisdiction. I tend to the view that this is the right approach but I recognise the force of the argument that all events are transposed to England.**"

Lord Slynn preferred the liberal approach because of the real threat of transnational crimes and the need to deal with them and stated at paragraphs 37, 38, 40 and 41:

> **"37. When the 1870 Act was passed crimes were no doubt largely committed in the territory of the state trying the alleged criminal but that fact does not, and should not, mean that the reference to the jurisdiction is to be so limited. It does not as a matter of the ordinary meaning of the words used. It should not because in present conditions it would make it impossible to extradite for some of the most serious crimes now committed globally or at any rate across frontiers. Drug smuggling, money laundering, the abduction of children, acts of terrorism, would to a considerable extent be excluded from the extradition process. It is essential that that process should be available to them. To ignore modern methods of communication and travel as aids to criminal activities is unreal. It is no less unreal to ignore the fact that there are now many crimes where states assert extraterritorial jurisdiction, often as a result of international conventions. Buxton LJ recognised the difficulties of the approach he felt bound to adopt when he commented [2001] 1 WLR 1234, 1243, para 32 "[w]hether this is a sensible rule in a world of major international crime and of the regular passage of persons involved in such crime between different jurisdictions is no doubt not for us to say".**
>
> **38. There is, moreover, one express provision of the 1870 Act which as was emphasised during the argument indicates that the jurisdiction of the requesting state is not limited to territorial jurisdiction. Even though most of the crimes listed in the first Schedule can be committed in England or on English vessels which are to be treated as English territory it is clear that "Piracy by law of nations" not only may but has to be**

committed on the high seas, ie. although within the jurisdiction it is not committed in the territory of the state.[10]

40. The second is that of Lord Griffiths in *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, [1990] 2 All ER 866 at 251 of the former report:

"Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong. This then is a sufficient reason to justify the magistrate's order…"

41. Finally I agree with what is said in *Jones on Extradition* (1995), p 88, para 3-023:

> **'Although the point was not argued, *Liangsiriprasert* is to be taken as clear authority for the proposition that the word 'jurisdiction' in the definition of the words 'extradition crime' in section 26 of the 1870 Act and paragraph 20 of Schedule 1 to the 1989 Act is not limited to 'territory'. Neither the Secretary of State in issuing his order to proceed, nor the magistrate exercising his duties under section 10 (paragraph 7 (1)), is required to consider whether there is evidence of criminal**

[10] Note that in Trinidad and Tobago, "piracy" is listed as a First Schedule Extraditable offence in the 1985 Act.

conduct committed within the territory of the requesting state. It is sufficient if, were the crime charged in England, he would be entitled to commit.'"

52. I accept the correctness of this decision and reasoning and apply it to section 7(1) of the 1985 Act. I find that since the laws of Trinidad and Tobago (the Requested State) provide for punishment for an offence committed outside its territory in similar circumstances (see section 7(1) of the 1985 Act), the U.S. Treaty and more specifically, the first part of Article 2(4) of the U.S. Treaty, is in conformity with the Act in respect of the principle of extraterritoriality.

53. Further, even if this were not the case, then the second part of Article 2(4) would apply and there would still be conformity with the Act, more specifically with section 8(3) of the Act.

Section 8(3)(c) of the Act allows for extradition for any extraditable offence once the Attorney General consents to this; it states:

"**A person shall not be returned under this Act to a declared Commonwealth or foreign territory, or committed to or kept in custody for the purposes of the return, unless provision is made by the law of that territory, or by an arrangement made with that territory, that he will not, until he has left or has been free to leave that territory, be dealt with in that territory for or in respect of any offence committed before his return under this Act other than-**

…

(c) any other offence being an extraditable offence in respect of which the Attorney General may consent to his being so dealt with."

54. As the trial judge decided, this section permits the Attorney General to consent to extradition for any other First Schedule offence even if it is extraterritorial in nature. This

is the equivalent provision to the second part Article 2(4) of the U.S. Treaty where, if the laws of the Requested State do not provide for extraterritoriality "**the executive authority of the Requested State, may, in its discretion grant extradition**."

Therefore, assuming section 7(1) did not provide for extraterritoriality in extradition, such extradition could only be achieved under the provisions of section 8(3)(c) of the Act which is the equivalent of the second part of Article 2(4) of the U.S Treaty.

Thus on condition that the Attorney General so consented, the U.S Treaty would still conform to the 1985 Act in respect of extraterritoriality.

55. Assuming that the 2004 Act applies, there is no issue of extraterritoriality since section 6(1)(b) of the 2004 Act provides for extraterritoriality. It states that:

> "**For the purpose of this Act, an offence in respect of which a person is accused or has been convicted in a declared Commonwealth territory, or a declared foreign territory, is an extraditable offence if—**
>
> **…**
>
> **(b) the conduct of the person would constitute an offence against the law of Trinidad and Tobago if it took place in Trinidad and Tobago, or in the case of an extra-territorial offence, <u>if it took place in corresponding circumstances outside Trinidad and Tobago</u>, and would be punishable under the law of Trinidad and Tobago with death or imprisonment for a term of not less than twelve months**;" (my emphasis)

It is clear that like in the **Al Fawwaz** case, section 6(1)(b) of the 2004 Act covers <u>conduct</u> which if transposed to Trinidad and Tobago would be punishable in Trinidad and Tobago by imprisonment for more than one year. Therefore, on the issue of extraterritoriality, the U.S. Treaty and the 2004 Act are in conformity.

56. Similarly, like in the case of the 1985 Act, even if section 6(1)(b) did not cover extradition to the Requested State, section 8(3)(c) of the Act would apply to the 2004 Act, and as before, on the condition that the Attorney General consented to extradition for

extraterritorial offences, the second part of Article 2(4) of the U.S. Treaty would be in conformity with section 8(3)(c) of the Act.

(3) Minimum Gravity

57. The requirement of minimum gravity is an expression of the principle that an offence must be of some level of gravity before a fugitive offender is extradited. Again, a balance has to be struck between the prosecution of international cross-border crime and the rights of an individual, especially so, "having regard to the level of interference that extradition can pose to the life and livelihood of an individual, there must be an assurance against an unjustifiable and disproportionate removal for comparatively trivial wrongs."[11]

58. Article 2(5) of the U.S. Treaty allows the U.S. to "tack on" less serious offences to an extraditable offence for the purposes of extradition.

    The text of Article 2(5) is that "**If extradition has been granted for an extraditable offence, it shall also be granted for any other offence specified in the request <u>even if the latter offence is punishable by one year's deprivation of liberty or less, provided that all other requirements for extradition are met</u>**." (emphasis mine)

59. The Appellant argues that Article 2(5) is not in conformity with the Act. Section 7(1) of the 1985 Act and section 6(1)(a) and (b) of the 2004 Act mandate (inter alia) that the offence for which extradition is sought must be one that is punishable by imprisonment for one year or more, whereas Article 2(5) allows extradition (even if only as a "tack on") for offences which are punishable by imprisonment for less than one year.

    This argument is not sustainable.

60. Even though there is some dissonance between Article 2(5) and section 7(1) of the 1985 Act (as the trial judge and Counsel for the Respondent accept) this is not the extent of conformity required by the Act.

[11] See paragraph 68 of the Appellant's written submissions filed 25th September, 2018.

The Act requires conformity between the treaty and the Act as a whole. It is not conformity with a sole provision of the Act alone (like section 7(1)). There is another provision of the Act that allows the tack on of less serious offences (like an offence punishable by imprisonment for the less than one year) to extradition for an extraditable offence. This is section 8(3)(b) of the Act.

61. Section 8(3)(b) of the Act forbids the return or extradition of a fugitive offender unless (inter alia) a treaty or a special arrangement is in place which provides that the fugitive offender would only be tried for the extraditable offence(s) for which he is returned (section 8(3)(a)) or a "tack on" lesser offence (like an offence punishable by imprisonment for less than one year) proved in the course of extradition proceedings before a Magistrate (section 8(3)(b)).

    The text of section 8(3)(b)is:

    "**A person shall not be returned under this Act to a declared Commonwealth or foreign territory, or committed to or kept in custody for the purposes of the return, unless provision is made by the law of that territory, or by an arrangement made with that territory, that he will not, until he has left or has been free to leave that territory, be dealt with in that territory for or in respect of any offence committed before his return under this Act other than-**

    (b) any lesser offence proved by the facts proved before the Magistrate on proceedings under section 12;" (my emphasis)

62. As stated above, section 8(3)(b) allows extradition for a lesser offence as a tack on to an extraditable offence once the facts of that lesser offence are proved in the extradition proceedings before the Magistrate.

    This is in conformity with the U.S. Treaty which allows lesser offences (offences punishable by less than one year imprisonment) to be tacked on to an extraditable offence "**provided that all other requirements for extradition are met**." That

requirement under the Act in the case of such a lesser offence, is that the facts of the lesser offence are proved in the extradition proceedings before the Magistrate.

63. Even if it could be argued that the provisions of Article 2(5) of the U.S. Treaty were still not strictly in conformity with the Act, there is provision in section 8(3) for a "special arrangement" to have been made to allow a lesser offence to be tacked on to an indictable offence. Section 8(3) allows for "**an arrangement**" to be made with a declared foreign territory for extradition for lesser offences proved before a Magistrate under section 8(3)(b) of the Act. This will be more fully explored under the discussion of speciality below.

    Thus, the U.S. Treaty, would have been in conformity with the Act on the issue of requirement of minimum gravity when the extra requirement of a special arrangement would have been put in place. In these circumstances, the U.S. Treaty would still be in broad conformity with the Act in respect of minimum gravity. As stated before, such broad conformity between the U.S. Treaty and the Act is acceptable.

64. In fact as will be discussed below[12], there was a special arrangement put in place for the Appellant's extradition that would have satisfied the test of conformity with this "extra requirement" of minimum gravity even if Article 2(5) did not.

(4) Speciality

65. The rule of speciality is an expression of the principle that except as is provided for by statute in the Requested State, a fugitive offender should not be prosecuted in the Requesting State for any offence other than that for which he was extradited.

66. In Trinidad and Tobago the rule of speciality is provided for in section 8(3) of the Act.

    Section 8(3) of the Act encapsulates the speciality rule and provides for 2 exceptions. These are: (i) lesser offences tacked on to an extraditable offence and proved before a

[12] See paragraphs 88, 89 and 90 below, particularly paragraph 90.

Magistrate in extradition proceedings; and (ii) any other extraditable offence where the Attorney General of Trinidad and Tobago consents to this.

While I already cited parts of section 8(3) in the prior discussion on minimum gravity, I cite the entire provision here to refocus the argument on speciality.

Section 8(3) provides:

> "**A person shall not be returned under this Act to a declared Commonwealth or foreign territory, or committed to or kept in custody for the purposes of the return, unless provision is made by the law of that territory, or by an arrangement made with that territory, that he will not, until he has left or has been free to leave that territory, be dealt with in that territory for or in respect of any offence committed before his return under this Act other than-**
>
> **(a) the offence in respect of which he is returned;**
>
> **(b) any lesser offence proved by the facts proved before the Magistrate on proceedings under section 12; or**
>
> **(c) any other offence being an extraditable offence in respect of which the Attorney General may consent to his being so dealt with**."

67. The Appellant alleges that Articles 2(5) and 14(1) of the U.S. Treaty are not in conformity with the speciality provisions of section 8(3) of the Act.

Article 2(5) and the speciality rule

68. With respect to Article 2(5) of the U.S. Treaty there is no merit in the argument that there is non-conformity between the U.S. Treaty and the Act. As I had indicated in the prior discussion on minimum gravity, Article 2(5) is in conformity with section 8(3)(b) of the Act. In summary, both Article 2(5) of the U.S. Treaty and section 8(3)(b) of the Act cater for the return of fugitive offenders for extraditable offences and permit a tack on for lesser offences proved before a Magistrate in extradition proceedings.

Since the statute in the Requested State (section 8(3)(b)) permits the tack on of lesser offences in similar terms to the U.S. Treaty (Article 2(5)), they together illustrate a recognition of the speciality rule.

Article 14(1) and the speciality rule

69. Article 14 of the U.S. Treaty comes under a heading "Rule of Speciality".

Article 14(1) provides that:

> "**A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for—**
>
> **(a) the offence for which extradition has been granted or a differently denominated offence based on the same facts on which extradition was granted, provided such offence is extraditable, or is a lesser included offence;"… or**
>
> **(c) an offence for which the executive authority of the Requested State consents to the person's detention, trial, or punishment…"**

70. With respect to the words "**or is a lesser included offence**" in Article 14(1)(a), the Appellant firstly repeats the arguments that have already been dealt with above with respect to the minimum gravity rule to say that there is non-conformity between the U.S. Treaty and the Act.

As stated before, these arguments are without merit.

71. The Appellant goes on to contend that the words in Article 14(1)(a) of the U.S. Treaty which allow for prosecution in the Requesting State for "a differently denominated offence" or "a lesser included offence" are so vague and unspecified that there is the very real probability that a fugitive offender may be prosecuted in the Requesting State for an entirely different offence than that for which he was extradited. In that way the rule of speciality would be broken.

72. As attractive as it may seem, this argument does not detract from the conformity between the U.S. Treaty and the Act.

    One must remember that the conformity required is a broad conformity which facilitates extradition; not exact or strict conformity. The use of general descriptions for the type of offence to which the speciality rule would apply is not itself a violation of the speciality rule. In fact, as the trial judge stated, it would be unreal to expect any strict or exact conformity between the denomination of offences between the United States of America and Trinidad and Tobago because of the many differences between the United States law and Trinidad and Tobago law.[13]

73. Further, as the trial judge also noted, "**extradition is conduct-based**: **Norris v Government of the United States of America [2008] 1 A.C. 920, para 73"**[14]. The wording of Article 14(1) of the U.S. Treaty gives effect to this by:

    a) Not simply providing that prosecution may be for a differently denominated offence but also, for such an offence that is "**based on the <u>same facts</u> on which extradition was granted**." (my emphasis) This reference to the "**same facts on which extradition was granted**", indicates that it is the same conduct that matters for the purpose of extradition and not the denomination of the offence.

       Again, there is the proper broad conformity between Article 14(1)(a) and section 8(3) of the Act.

    b) The use of the term "**lesser <u>included</u> offence**" (my emphasis) in Article 14(1)(a) must be interpreted as a reference back to such lesser offences as are proved by the facts before a Magistrate for which extradition was granted. This is the interpretation that is most in keeping with both a purposive interpretation of the U.S. Treaty and an

[13] See paragraph 93 of the judgment of Aboud J.
[14] *Supra*

interpretation that facilitates extradition, since it is the interpretation which proves conformity with section 8(3)(b) of the Act.

The words "**a differently denominated offence**" and "**a lesser included offence**", although seemingly general, when taken in context, are broadly in conformity with the requirements of the Act and do not prove a breach of the speciality rule.

74. The Appellant also contends that the same words in the U.S. Treaty can and indeed have been interpreted by United States prosecutors in such a subjective manner so as to frustrate the speciality rule.

75. Both on appeal and before the trial judge, the Appellant made heavy weather of 2 cases and other authorities which purportedly show this tendency of the United States prosecuting authorities to flout the speciality rule by prosecuting for different offences than those for which extradition was granted.

These 2 United States cases were the cases of **United States v Paroutian 319 F.2d 661 (2d Cir. 1963)** and **Fiocconi v Attorney General 39 F. Supp. 1242 (S.D.N.Y. 1972)**.

76. The trial judge delved into these cases and other authorities on the issue, especially so the decision of Ouseley J in **Welsh and another v Secretary of State for the Home Department [2007] 1 WLR 1281**. In that case Ouseley J did an extensive review of the authorities which allegedly showed that the United States prosecutors tends to flout the speciality rule. Ouseley J. concluded (like the trial judge) that an examination of the authorities did not reveal any attempt by the United States prosecutors to breach the speciality rule. On the contrary, they showed that the United States authorities do try to ascertain the position of the sending (Requested) state on the issue of speciality and give effect to the same.

77. I do not propose to conduct any such extensive review of the United States cases and related authorities on the issue in this judgment. I accept the analysis of the trial judge

and Ouseley J. on this issue and I find that the allegation that there is a very real threat that United States prosecutors would attempt to flout the speciality rule is without merit.

78. In summary, there is no merit in the Appellant's case that the wording of Article 14(1)(a) of the U.S. Treaty on the issue of speciality is not in conformity with the Act; or that any alleged non-conformity would result in a violation of the speciality rule.

79. In any event, even if Article 14(1)(a) of the U.S. Treaty was not in conformity with the Act on the issue of speciality, this would not be an end of the issue.

80. Article 14(1)(c) permits extradition for "**an offence for which the executive authority of the Requested State** (the Attorney General in Trinidad and Tobago) **consents to the person's detention, trial, or punishment**."

Article 14(1)(c) mirrors section 8(3)(c) of the Act which permits the return and prosecution of a fugitive offender for "**any other extraditable offence in respect of which the Attorney General may consent to his being so dealt with**."

Even if Article 14(1)(a) of the U.S. Treaty were not in conformity with the Act, the U.S. Treaty would therefore, and in any event, conform to the Act in respect of speciality on the condition that the Attorney General consents to a fugitive offender being dealt with for an extraditable offence. Such consent may be signified for example, upon the hearing pursuant to an ATP or by special arrangement under section 8(5) of the Act (which will be further explored below).

The special extradition arrangement

81. After the grant of leave to apply for judicial review, it came to the Appellant's attention that the Attorney General and the Government of the United States of America came to a special arrangement over the possible extradition of the Appellant. The Appellant was granted leave to challenge this special arrangement.

82. The legal basis of the arrangement is found in sections 8(3) and 8(5) of the Act.

Section 8(3) specifically provides for the return of a fugitive offender where "**provision is made…by an arrangement made with that territory…"**.

Section 8(5) provides that "**Any such arrangement as is mentioned in subsection (3) may be an arrangement made for the particular case or an arrangement of a more general nature;…"**

83. The arrangement itself is as follows:

> "In pursuance of the powers conferred by section 8(5) of [the Act], I hereby certify under the authority of the Attorney General that an arrangement has been made with the Government of the United States of America in the case of JACK WARNER that, *if he is returned to the United States of America, Jack Warner will not, until he has left or been free to leave the United States of America, be dealt with in the United States of America for or in respect of any offence committed before his return other than (a) the offence in respect of which he is returned; (b) any lesser offence(s) proved by the facts proved before the magistrate on the extradition proceedings leading to his return; or (c) any other offence(s) being an offence in respect of which the Attorney General may consent to his so being dealt with*."

A point to note is that this special arrangement, especially so the parts cited in italics above, replicates the provisions of section 8(3) of the Act.

84. The trial judge decided that this special arrangement between the United States of America and Trinidad and Tobago (the arrangement) was a valid undertaking that inter alia, "…**fully neutralizes the fears about breaches of the rule of speciality."**[15]

[15] See paragraph 98 of the judgment of Aboud J.

85. The Appellant contends that:

(i) the arrangement in no way affects the issue with respect to the validity or invalidity of the U.S. Order; and

(ii) in any event, the arrangement itself is invalid.

86. With respect to issue (i) above, I agree with the Appellant that the arrangement does not affect the issue of conformity between the U.S. Treaty and the Act and hence the validity of the U.S. Order. As I stated before, the enquiry about treaty/Act conformity is time specific to the time of the making of the U.S. Order. The arrangement which was made much later than the U.S. Order does not affect the issue of treaty/Act conformity.

87. With respect to issue (ii), the validity of the special arrangement, the Appellant advanced several reasons why he felt it was invalid. Even though the validity of the special arrangement is not strictly relevant to the case based on treaty/Act conformity, I will deal with this issue in a more summary manner.

The Appellant essentially alleges that there may be some conflict between the U.S. Treaty and the arrangement, especially with regard to the speciality rule; in that case there is doubt as to which should take precedence. In such a case the U.S. Treaty, which is validated by the U.S. Order ought to take precedence and the arrangement ignored or set aside.

These arguments are not sustainable for the following reasons.

88. First, as I have already mentioned, the speciality rule is recognised in sections 8(3) of the Act, and the provision for special arrangements pursuant to section 8(3) of the Act is provided for in section 8(5) of the Act. The special arrangement made in respect of this Appellant replicates the speciality provisions of section 8(3) of the Act. In that case, there can be no question of its validity. Further, as I have already decided, the U.S. Treaty and the Act conform on the issue of speciality (as provided for in section 8(3) of the Act).

There is therefore no live issue with respect to the validity of either the treaty or the special arrangement on the issue of speciality.

89. Second, the U.S. Treaty and any special arrangement made under section 8(5) can operate independently of each other.

Section 8(5) of the Act specifically allows for a special arrangement "**for the particular case or an arrangement of a more general nature…**" and there is no issue with the existence of both a treaty and a special arrangement for a particular case as was done here. In fact, the trial judge, relying on the **Welsh**[16] decision cited above, so found. I uphold that decision.

90. Third, if there is any dissonance between a treaty and a specific arrangement, on an application of the normal rules of statutory interpretation, it is the terms of a specific arrangement which should take precedence over the more general provisions in a treaty. As the trial judge stated, "**…the Arrangement will have equal or more weight than the Treaty.**"

I uphold this decision. As stated before, in construing the Act, the approach to be adopted is to give a broad and purposive construction to the Act which facilitates extradition and allows Trinidad and Tobago to fulfil its international obligations. Any special arrangement for a specific case which statute permits, must be given precedence over the more general arrangements of a treaty. A fortiori if the effect of the special arrangement is, as here, an attempt to clarify or neutralise any perceived or actual shortcomings in a treaty.

In fact, Ouseley J. in the **Welsh** case cites the very real and practical prospect that in England, many arrangements will have to be made on an ad hoc basis to cater for extradition to states which impose the death penalty, a penalty which is frowned upon in England. [17]

[16] See paragraph 98 of the judgment of Aboud J. and see the **Welsh** (*supra* paragraph 76) at page 1315, paragraphs 149 and 150.
[17] at paragraph 150, page 1315.

Similarly, in Trinidad and Tobago, the special arrangement is a useful statutory provision that could validly be used to neutralise or allay fears of possible treaty/Act non-conformity. As the trial judge stated, the special arrangement that was used for the Appellant, neutralised fears about possible breaches of the speciality rule.

The special arrangement for the Appellant's extradition is expressed in terms that reproduce section 8(3) of the Act. It is most likely that there is now no issue with regards to matters like speciality, minimum gravity and probably, even, extraterritoriality in the extradition of the Appellant. By the United States government's undertaking only to prosecute for offences in accordance with the terms of section 8(3) of the Act, the Appellant's rights under the Act will be protected; also, any perceived arbitrariness on the part of the United States prosecutors in respect of speciality would now be avoided.

SECTION B

THERE WAS NO DENIAL OF NATURAL JUSTICE IN THIS CASE

91. The Appellant advanced 2 arguments on this issue, namely:

(i) He had a right to make representations to the Attorney General before the Attorney General issued the ATP before the Magistrate; and

(ii) He was denied this hearing.

92. With respect to argument (i), there is no right to be heard before the issuance of an ATP. See **R v Home Secretary *Ex parte* Norgren [2000] QB 817**. The processes leading up to and initiating the issuance of an ATP are likened to investigations by the police leading up to an arrest. Lord Bingham CJ (as he then was) aptly stated in the ***Ex parte* Norgren** case:

> "**The statutory scheme makes no provision for representations to be made by the object of an extradition request before an order to proceed is issued.** ***Reg. v. Secretary of State for the Home Department, Ex parte McQuire*** **(1995) 10 Admin.L.R. 534, 537**

> **highlights the general undesirability of prolonged representations and counter-representations at this stage…It is not standard practice in an ordinary domestic context to warn a person of his impending arrest. Where the extradition of the party in question is sought on the grounds that he is a fugitive criminal there are obvious practical reasons for not giving such notice. The Home Secretary never led the applicant or his solicitors to think that an opportunity to make further representations would be granted. They were entitled to hope that such an opportunity would be granted, but not to expect it. In our view the Home Secretary was not guilty of procedural unfairness in acting as he did.**"

The Appellant had no right to be heard before the issuance of the ATP.

93. However, even if there were no such right to be heard, if a promise is made to entertain representations, a fair opportunity must be given to make such representations. In this case, on the facts as found by the trial judge, the Appellant was given the opportunity to be heard, but he unjustifiably refused the request (see issue ii). I uphold that decision.

94. The relevant facts as found by the trial judge are that:

> "**(4) Between July and September the claimant's** (Appellant's) **attorney corresponded with the Attorney General demanding a right to be heard before the issuance of an ATP. There was a general election on 7 September 2015 and a new Attorney General, Mr. Faris Al-Rawi, was sworn in on 9 September 2015. The previous Attorney General** (had) **declined his requests. The new Attorney General gave him an opportunity to be heard on the basis of certain conditions, which the claimant rejected.**

> **(5) On 21 September 2015 the Attorney General issued the ATP requiring the Magistrate to proceed with the case in accordance with the provisions of the Act."[18]**

95. In analysing the facts, the trial judge made special reference to a letter dated 14 September, 2015.[19] This letter was sent by the new Attorney General to the Appellant. In that letter, the Appellant was given the opportunity to be heard before he issued the ATP but on the condition that the Appellant agreed to consent to an extension of the timeframe which the Magistrate had set for the issue of the ATP (16 September, 2015). The Appellant unreasonably refused this request.

96. The trial judge stated that:

> "**I find it difficult to understand why the claimant's** (Appellant's) **attorneys refused the opportunity to be heard for the reasons given. The claimant** (Appellant) **was on bail and the allegation that the extension of time would have compromised his liberty exists only on the esoteric plane of legal theory…An unlimited extension of time was not being sought, and, in any event, since the extension was being fixed by the Magistrate, the claimant** (Appellant) **would obviously have a say on the question of its duration. The right to be heard, if it exists in a case like this, was not withheld, and the conditionality for its grant, in practical terms, was not severe or injurious."[20]**

Having regard to these findings, the trial judge concluded:

> "**The claimant** (the Appellant) **was not entitled in law to be heard but nonetheless declined the invitation that was extended to him. I am not satisfied that he was justified in refusing the invitation**

[18] See paragraph 4(4) and (5) of the judgment of Aboud J.
[19] See paragraph 103 of the judgment of Aboud J.
[20] See paragraph 104 of the judgment of Aboud J.

that was extended to him. The offer that was made was voluntary and not unconditional. If he wished to be heard, he could easily have accepted the condition."[21]

97. I see no reason to overturn these findings and I also find that the Appellant unjustifiably declined the invitation to make representations to the Attorney General before the issuance of the ATP. No natural justice rights were infringed in this case.

CONCLUSION

98. I find that :

i. The U.S. Treaty has not been shown to lack conformity with the Act hence there is no merit in the Appellant's case that the U.S. Order which declared the United States of America as a declared foreign territory is not valid. Therefore, the pending extradition proceedings in respect of the Appellant before the Magistrate are valid.

ii. There was no denial of natural justice in the issuance of the ATP by the Attorney General.

For these reasons, this appeal is dismissed. We will hear the parties on the issue of costs.

……

G. Smith

Justice of Appeal

[21] See paragraph 107 of the judgment of Aboud J.