BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Appeal Nos.18, 20 and 21 of 2007

BETWEEN:

JOHN SCANTLEBURY

SEAN GASKIN ***Appellants***

CHRISTOPHER HAWKESWORTH

AND

THE ATTORNEY-GENERAL ***Respondents***

CLYDE NICHOLLS

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice, the Hon. Peter Williams, Justice of Appeal, and the Hon. Elneth Kentish, Justice of Appeal (Acting)

2008: 28, 29 and 30 July; 24 and 25 September; 7 and 10 November

2009: 8 June

Mr. Hal Gollop and Mr. Steve Gollop for appellant, Scantlebury

Mr. Ralph Thorne Q.C. for appellants, Hawkesworth and Gaskin

Mr. Leslie Haynes Q.C. and Mr. Philip McWatt for the Attorney-General

Mr. Roger Barker for the respondent, Clyde Nicholls

JUDGMENT

Introduction

SIMMONS CJ: These appeals are against a judgment of ***Reifer J*** in judicial review proceedings commenced under the provisions of the ***Administrative Justice Act, Cap. 109B***. In those proceedings, the appellants sought judicial review of decisions of the Chief Magistrate, Mr. Clyde Nicholls, made in relation to a request by the Government of

the United States of America (the USG) for the extradition of the appellants. These appeals raise issues specific to the law of extradition and highlight the special character of extradition proceedings. Although such proceedings are grounded in the criminal law, they are very much *sui generis*.

Background

[2] On 16 June 2004, warrants for the arrest of the appellants were signed in Washington, D.C. Next day, a Federal Grand Jury in the District of Columbia returned an indictment against the appellants charging them with drug offences contrary to the laws of the U.S.A. All three appellants were charged with conspiracy to distribute five kilograms or more of cocaine intending and knowing that it would be unlawfully imported into the U.S.A. In addition, the appellant Hawkesworth was charged with distributing 500 grams or more of cocaine intending and knowing that it would be unlawfully imported into the U.S.A. It was for these offences that the USG sought the extradition of the appellants from Barbados.

[3] On 26 May 2004 Assistant Superintendent Grafton Phillips of the Royal Barbados Police Force, on behalf of the Commissioner of Police, sought the issuance of a warrant under s.10(1) of the ***Extradition Act, Cap.189*** (the Act), "for the apprehension" of the appellants. Chief Magistrate Nicholls issued provisional warrants for their arrest. They were arrested on 27 May 2004, brought before Mr. Nicholls and remanded in custody. They were subsequently released on bail.

[4] On 19 July 2004, Stephen May, a senior trial attorney in the narcotics and dangerous drugs section of the U.S. Department of Justice, swore an affidavit before Deborah Robinson, a U.S. Magistrate Judge for the District of Columbia. This affidavit and authenticated documentation had been prepared in support of a request for the appellants' extradition by the USG. May's affidavit was certified on the same day by Lystra Blake, Associate Director of the office of International Affairs, Criminal Division, of the U.S. Department of Justice.

[5] The then U.S. Secretary of State, Colin Powell, affixed the Seal of his Office to a bundle of documents certified by Ms. Blake on 20 July 2004. Among the bundle of documents and attached to May's affidavit was a document purporting to be an affidavit. It purported to be sworn before Ms. Robinson on 16 July 2004. However, the name of the deponent was not disclosed on the affidavit nor was a signature of the deponent subscribed in the jurat. These omissions bore the word "redacted" to indicate that the identity of the deponent was being withheld. In short, this affidavit purported to have been made by an anonymous deponent. Mr. May referred to this deponent as "a Confidential Source" (C/S). So too, did Gordon Patten Jr. whose affidavit was attached to May's. Patten was a special agent of the U.S. Drug Enforcement Administration (DEA) then assigned to Barbados.

[6] Patten said in his affidavit that the C/S had assisted the DEA in its investigations into the matters involving the appellants. Patten's affidavit provided detailed evidence of the appellants' acts over a period of approximately 4 years. We do not think it appropriate to set out *in extenso* those acts and we are content to use the summary provided in paras.17 to 19 of the affidavit to encapsulate the nature of the case against the appellants.

> "17. Hawkesworth was the head of this drug distribution organisation. He oversaw the entire operation of the organisation in Barbados, directing the transportation and distribution of cocaine, and arranging for the drugs to be shipped out of Barbados or Guyana to the United States and other countries. He was involved in several attempts to deliver "test loads" of 1-3 kilograms of cocaine to the Confidential Source through JFK Airport in New York. He admitted to confidential sources that he wanted to ship 50

kilogram loads of cocaine to the United States once the test loads successfully cleared the airport in New York. He sold one kilogram of cocaine to the confidential source on 30 March 2004 and fronted him an additional kilogram. After that, he negotiated to sell an additional 5 kilograms of cocaine.

18. Scantlebury was the main associate or "lieutenant" for Hawkesworth during the time that he worked with him. Scantlebury would seek buyers of cocaine and introduce them to Hawkesworth. He would meet with the buyers on behalf of Hawkesworth to negotiate the delivery of cocaine. Scantlebury was supposed to travel to the United States after the "test loads" of cocaine had been successfully delivered to New York. He was then going to be in charge of overseeing the receipt of the shipments of cocaine from Hawkesworth and Douglas.

19. Gaskin primarily assisted Scantlebury in meeting with prospective purchasers of cocaine from Hawkesworth. He was also supposed to travel to New York and help oversee the shipments of cocaine sent from Hawkesworth and Douglas to the United States."

[7] The affidavit of the C/S contained considerable evidence detailing his contact with the appellants and the arrangements or agreements made between himself and the appellants for the supply, purchase and distribution of cocaine in the U.S.A. The C/S was clearly an undercover operative working in tandem with the DEA.

The Committal Proceedings for Extradition

[8] On 4 August 2004 the extradition proceedings for committal of the appellants began before Mr. Nicholls. The evidence led in support of the request of the USG consisted of the oral evidence of four witnesses brought to prove the authenticity and chain of custody of the bundle of documents submitted by the USG together with the affidavits and various exhibits.

[9] More particularly, the bundle of documents contained: Colin Powell's Seal of Office; Lystra Blake's certificate; a certificate of Robert Fretz authenticating the Seal of the U.S. Department of State; a certificate of Donna Forde, a Barbadian foreign service officer based in Washington, D.C.; a certificate of the then U.S. Attorney-General, John Ashcroft; the affidavits of Stephen May, Gordon Patten and the C/S; the U.S. warrants of arrest; and photographs of the appellants.

Submissions before the Chief Magistrate

[10] Before the conclusion of the committal proceedings before the Chief Magistrate, counsel for the appellants made a number of submissions causing the proceedings to be halted. For example, counsel made specific requests to cross-examine those witnesses whose affidavit evidence formed the basis of the extradition request; in particular, Stephen May, Gordon Patten and the C/S. Counsel sought the presence in Barbados of these deponents for cross-examination. They argued that a denial of the right to cross-examine the deponents rendered the procedure unfair and was a violation of s.18 of the Constitution of Barbados. They challenged the validity of the affidavit of the C/S and argued that it did not qualify as an affidavit in a number of ways. They also challenged the validity of a provisional warrant of arrest and its constitutionality under s.13(2) of the Constitution. They contended that the bundle of documents did "not measure up to the requirements of U.S. law".

[11] Other submissions urged upon the Chief Magistrate questioned the parties to the extradition proceedings and the legal appearances. For example, it was submitted that neither the USG nor the Attorney-General of

Barbados had "*locus standi* to prosecute" the extradition proceedings. Mr. Nicholls overruled all of the submissions except that he ruled that the Director of Public Prosecutions should not continue to appear and he allowed conduct of the proceedings in the name of the Attorney-General. The Chief Magistrate gave a written decision in response to the submissions and concluded that *prima facie* cases had been made out against the appellants.

Judicial Review Application before Reifer J

[12] The appellants Hawkesworth and Gaskin filed applications for judicial review of the decisions of the Chief Magistrate on 7 October 2005. On 10 October 2005, Scantlebury also filed an application for judicial review of the decisions of the Chief Magistrate. Broadly, the applications sought a declaration that the Chief Magistrate's decision to continue the extradition proceedings was contrary to law and/or *ultra vires*. Consequently, they sought an order of *certiorari* to quash the decision; an order of prohibition or an injunction to restrain further proceedings. And Hawkesworth and Gaskin also claimed damages. The applications were heard by ***Reifer J*** who gave a written decision on 31 July 2007.

[13] ***Reifer J*** summarised the arguments addressed to her at para.[13] of her judgment as follows:

> "[13] I have condensed the arguments raised by both counsel and have found that they have addressed the following points:-
>
> (1) The validity of the Provisional Arrest Warrant has been brought into issue and it has generally been argued that it is unconstitutional (contrary to section 13(2) of the Constitution) and *ultra vires*;
>
> (2) Who is the proper party to these proceedings, it being argued by the Applicants that neither the United States Government nor the Attorney General had *locus standi* to prosecute these proceedings and that the Second Respondent erred in allowing conduct of these proceedings in the name of the Attorney General in contradiction of the Constitution and of the law;
>
> (3) There were several issues raised relating to the admissibility of evidence by the magistrate, namely the chain of custody of documents admitted in evidence; the validity of the redacted affidavit of the confidential source; the alleged failure of the indictment to meet the requirements of United States law;
>
> (4) The refusal of the magistrate to allow the cross-examination of certain witnesses was deemed to be an error of law;
>
> (5) The finding of the Second Respondent that there was a *'prima facie'* case made out as earlier stated was an error of law and in breach of the fair hearing provisions of the Constitution and raised the issue of the bias of the magistrate in the future conduct of this matter."

[14] The trial judge relied to a great extent on the observations of the Privy Council (per ***Lord Lowry***) in ***Government***

of the United States of America v. Bowe [1990] 1 AC 500 and ***Storer v. Murphy 104 FLR 303***. She was of opinion that the applications for judicial review were premature. At paras.[14], [17] and [18] she said:

> "[14] Counsel for the Respondents raised the issue of the prematurity of this claim for judicial review and referred the Court to the cases of ***United States of America v. Gaynor (1908) AC 128*** referred to in Jones on Extradition 14-003 (2001ed) and the ***United States Government v. Bowe [1990] 1 AC 500***.
>
> [17] To my mind, a further issue with respect to the prematurity of this application also arises.
>
> [18] There is a basic principle of Judicial Review that it should not be invoked unless the Applicant has exhausted the adequate alternative remedies. Thus there is a significant series of cases where the High Court has exercised its discretion to turn away judicial review applications where the applicant has failed to pursue another remedy."

[15] In support of those propositions, the trial judge cited ***R. v. Epping and Harlow General Commissioner ex parte Goldstraw [1983] 3 All ER 257*** and the local decisions – ***Mount Six Mens Company Limited v. The Chief Town Planner, The Chief Surveyor and The Attorney-General (unreported decision of Kentish J in H.C. Suit No.274 of 1994)***, and ***Victor Clifford v. Emmerson Graham and The Attorney-General (unreported decision of Moore J in H.C. Suit No.377 of 1999).***

[16] ***Reifer J*** found no exceptional circumstances justifying judicial review – see para.[22]. She made other specific findings at paras. [24] and [25]: *(i)* that the "provisional arrest warrant" was valid, having regard to the language of the Act and an Extradition Treaty made between Barbados and the U.S.A; *(ii)* that the Attorney-General is a proper party to the extradition proceedings and had delegated his authority to the Director of Public Prosecutions; *(iii)* that the Chief Magistrate was entitled to and properly carried out an analysis of the evidence to determine whether there was a *prima facie* case. Such a finding did not amount to bias. The trial judge remitted the matter to the Chief Magistrate with a direction to complete it in accordance with the Act.

The Extradition Regime in Barbados

[17] Extradition involves the surrender of a person (the fugitive) by a State (the requested State) in whose territory the fugitive is located to another State which has requested the surrender of the fugitive (the requesting State) for the purpose of prosecuting and/or sentencing the fugitive in criminal proceedings. The regime for extradition in Barbados is statute-based. When Barbados was a colony of Great Britain and, indeed subsequent to Independence on 30 November 1966, the applicable law in respect of extradition was the ***Extradition Act 1870*** of the United Kingdom. By virtue of s.2 of that Act, it applied to Barbados through the operation of an Order-in-Council. By the ***United States of America (Extradition) Order-in-Council 1935***, dated 6 June 1935 and reciting the terms of a treaty made between the United Kingdom and the United States of America, it was ordered, *inter alia*, that –

> "(1) From and after 24 June 1935 the Extradition Acts 1870-1932 shall apply in respect of the United Kingdom of Great Britain….and all British Colonies in the case of the United States of America under and in accordance with the said treaty of 22 December 1931."

[18] Thus, the Act of 1870 was applied to extradition as between the U.S.A. and Britain and its Colonies, of which Barbados was one. Section 17 of the Act provided that, when applied by Order-in-Council, it "shall extend to every British possession in the same manner as if……the British possession were substituted for the United Kingdom or England."

[19] After Independence, by virtue of the existing law provisions of the Constitution of Barbados the existing legislation which included the Act of 1870 was saved and continued to apply to Barbados in the same manner as prior to Independence – see s.26 of the Constitution. However, in 1979 the Parliament of Barbados passed the ***Extradition Act***. It came into force on 2 June 1980 and is now Chapter 189 of the Laws of Barbados. This Act repealed and replaced the laws then existing in respect of extradition, in particular, the ***Fugitive Offenders Act, 1881 (UK)*** and the ***Extradition Acts, 1870 to 1935 (UK)***. The Act sought to make proceedings for extradition "as uniform as circumstances permit irrespective of whether a fugitive is from a Commonwealth country or a foreign state"; and it sought to adopt "the principles relating to fugitives within the Commonwealth as formulated by the Commonwealth Law Ministers at their conference in London in 1966 and, generally to accord with current international practice in respect of extradition" – s.3(1).

[20] It was expressly provided in s.3(2) that –

> "(2) This Act is remedial and shall be given such fair, large and liberal construction as best ensures the attainment of its purposes."

Extradition in Barbados is therefore now governed by the Act although Treaties made subsequent to the Act between Barbados and other States are also of great significance. In the local case, ***Government of Canada v. Browne (1985) 20 Barb.L.R. 295*** at 298-299, the then Divisional Court sketched some of the main provisions of the Act. We do not propose to traverse that ground again.

The Treaty

[21] An Extradition Treaty was made between Barbados and the United States of America on 28 February 1996. It was transmitted to the Senate of the United States of America by President William J. Clinton on 31 July 1997. In his letter of Transmittal, President Clinton said:

> "This Treaty will, upon entry into force, enhance co-operation between the law enforcement communities of both countries, and thereby make a significant contribution to international law enforcement efforts. It will supersede the Extradition Treaty between the United States and Great Britain that was signed at London on December 22, 1931, which was made applicable to Barbados upon its entry into force on June 24, 1931, and which the United States and Barbados have continued to apply following Barbados becoming independent. However, that Treaty has become outmoded and the new Treaty will provide significant improvements."

[22] An extradition treaty is a contract between two sovereign states and must be construed as such a contract. ***Lord Widgery CJ*** said in ***R. v. Governor of Ashford Remand Centre, ex parte Beese [1973] 1 WLR 969*** at 973 –

> "It would be a mistake to think that it (a treaty) had to be construed as though it were a domestic statute."

[23] And ***Lord Bridge of Harwick*** said in the leading case of ***R. v. Governor of Ashford Remand Centre ex parte Postlethwaite [1988] AC 924*** at 947:

> "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."

[24] We shall summarise or reproduce only those Articles of the Treaty which have been alluded to during the argument. Article 2(1) defines an "extraditable offence" as one punishable under the laws of both Contracting States by deprivation of liberty for a period of more than one year, or by a more severe penalty. Article 2, para.2 provides that an attempt or a conspiracy to commit, aid or abet, counsel, cause or procure the commission of, or being an accessory before or after the fact to an extraditable offence within the meaning of Article 2, para.1 is an extraditable offence.

[25] Then Article 2, para.3 provides:

> "3. For the purposes of this Article, an offence shall be an extraditable offence:
>
> (a) whether or not the laws in the Contracting States place the offence within the same category of offences or describe the offence by the same terminology; or
>
> (b) whether or not the offence is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court."

Article 2, therefore, incorporates the principle of dual criminality which we discuss later.

[26] Article 6 is also of importance in this case. It establishes the procedures and describes the documents that are required to support a request for extradition. So far as is material, Article 6 provides:

> "1. All requests for extradition shall be submitted through the diplomatic channel.
>
> 2. All requests shall be supported by:
>
> (a) documents, statements, or other types of information which describe the identity, and probable location of the person sought;
>
> (b) information describing the facts of the offence and the procedural history of the case;
>
> (c) information as to:

(i) the provisions of the law describing the essential elements of the offence for which extradition is requested;

(ii) the provisions of the law describing the punishment for the offense; and

(iii) the provisions of law describing any time limit on the prosecution; and

(d) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable.

3. A request for extradition of a person who is sought for prosecution shall also be supported by:

(a) a copy of the warrant or order of arrest, if any, issued by a judge or other competent authority of the Requesting State;

(b) a document setting forth the charges; and

(c) such information as would provide probable cause, according to the law of the Requested State, for the arrest and committal for trial of the person if the offence had been committed in the Requesting State.

[27] Article 9 which was also the subject of much argument deals with "Provisional Arrest". It is in these terms:

"1. In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel or directly between the United States Department of Justice and the Attorney General in Barbados. Such a request may also be transmitted through the facilities of the International Criminal Police Organisation (INTERPOL), or through such other means as may be settled by arrangement between the Contracting States.

2. The application for provisional arrest shall contain:

(a) a description of the person sought;

(b) the location of the person sought, if known;

(c) a brief statement of the facts of the case, including, if possible, the time and location of the offence;

(d) a description of the laws violated;

(e) a statement of the existence of a warrant of arrest or a finding of guilt or judgment of conviction against the person sought; and

(f) a statement that a request for extradition for the person sought will follow.

3. The Requesting State shall be notified without delay of the disposition of its application and the reasons for any denial.

4. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required in Article 6.

5. The fact that the person sought has been discharged from custody pursuant to paragraph 4 of this Article shall not prejudice the subsequent re-arrest and extradition of that person if the extradition request and supporting documents are delivered at a later date."

[28] Article 17 contains provisions on representation and expenses that are similar to those found in other contemporary extradition treaties.

The Dual Criminality Principle

[29] By s.4 of the Act an "extraditable crime" means, in relation to any Commonwealth country or foreign state to which [Part I] applies, an offence however described that, if committed in Barbados,

"(a) would be a crime described in the *Schedule*, or

(b) would be a crime that would be so described were the description to contain a reference to any intent or state of mind on the part of the person committing the offence or to any circumstances of aggravation, necessary to constitute the offence,

and for which the maximum penalty in that other country or state is death or imprisonment for a term of 12 months or more."

[30] The Schedule to the Act describes 36 types of offence among which are *(a)* "an offence against the law relating to dangerous drugs, narcotics or psychotropic substances" and *(b)* "aiding and abetting, or counseling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit any of the offences listed in any of the paragraphs preceding this paragraph."

[31] In ***Norris v. Government of the United States of America and Others [2008] 2 All ER 1103, Lord Bingham*** of Cornhill explained at para.[65] the double criminality rule:

> "It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. That is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here, or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test….If, however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is found."

[32] In England an extradition crime is defined in language similar to that of s.4 of the Act. Part 2 of the ***Extradition Act 2003*** of England deals with extradition to certain territories, including the U.S.A. For the purposes of Part 2 of the English Act the term 'extradition offence' is defined by s.137 which, so far as material, provides:

> "(2) The conduct constitutes an extradition offence in relation to the category 2 territory if these conditions are satisfied – (a) the conduct occurs in the category 2 territory; (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom; (c) the conduct is so punishable under the law of the category 2 territory (however it is described in that law)."

[33] Whereas the English legislation expressly specifies conduct as the determinative criterion for an extraditable crime, our legislation requires an interpretation of s.4 of the Act. In our opinion, the language of that section requires that a magistrate, in the words of ***Lord Hope of Craighead***, in ***Office of the King's Prosecutor, Brussels v. Cando Armas [2006] 2 AC 1*** at para.30, need not –

> "concern himself with the criminal law of the requesting state when he is addressing the question whether the offence…is an extradition offence. *But he does have to consider whether the conduct which is alleged to constitute the offence took place.*" (Emphasis supplied).

[34] Similarly, in ***Dabas v. High Court of Justice, Madrid [2007] 2 All ER 641, Lord Hope*** said at paras.[47] and [48]:

> "[47] It is not obvious from the narrative of the circumstances set out in the arrest warrant…that the date when the relevant conspiracy is alleged to have begun was as early as 'before the year 2000". The essence of the allegation is that the appellant was involved in a conspiracy which led up to the train bombings in Madrid on 11 March 2004. Mention is made of the appellant's activities during an earlier period, but this part of the narrative appears to have been included simply as background.
>
> [48] In the light of this narrative I would have been willing to hold, had it been necessary to do so [it was in fact unnecessary since four members of the Committee concluded that the appellant's conduct also constituted an extradition offence under the Framework List provision], that throughout the period of the conduct which is said to constitute the offence in this case the requirement of double criminality was satisfied. A narrative of events prior in date to the conduct relied on will not be objectionable if it is included merely in order to set the scene. [I]t is the conduct for which extradition is sought, not any narrative that may be included in the Pt 1 warrant simply by way of background, that must satisfy the test of double criminality."

[35] In the determination of an extraditable crime, it is important that the magistrate should make a mental distinction

between mere narrative background and the real conduct for which extradition is sought. The conduct test obviates the need for the magistrate to investigate the legal elements of the offence under the law of the requesting State. This approach would delay the extradition process interminably and assume a complexity not congruent with the objectives of extradition.

[36] ***La Forest J*** wrote with sensitivity and understanding in ***United States of America v. McVey [1992] 3 SCR 475*** at 528:

> "[T]o require evidence of foreign law beyond the documents now supplied with the requisition could cripple the operation of the extradition proceedings…Flying witnesses in to engage in abstruse debates about legal issues arising in a legal system with which the judge is unfamiliar is a certain recipe for delay and confusion to no useful purpose, particularly if one contemplates the joys of translation and the entirely different structure of foreign systems of law."

[37] What the approach to contemporary extradition statutes requires is a broad, liberal construction of an "extraditable crime". A broad and generous construction should be given to extradition statutes "intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim." – per ***Lord Steyn*** in ***Re: Ismail [1998] 3 All ER 1007*** at 1011.

[38] In ***Norris*** *(supra)* at para.[90] ***Lord Bingham*** canvassed the appropriateness of the conduct approach:

> "[T]he wider construction would place the United Kingdom's extradition law on the same footing as the law in most of the rest of the common law world. The broad conduct approach – the examination of all the conduct on which the requesting state relies – is that almost universally followed."

[39] At para.[91] he summarised the approach of the English courts in these terms:

> "In short, the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Pt 2 of the Act being that described in the documents constituting the request (the equivalent of the arrest warrant under Pt 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence."

[40] In ***Norris, Lord Bingham*** cited with approval a *dictum* of ***Duff J*** in the old Canadian case, ***Re: Collins (No.3) (1905) 10 CCC 80*** at pp.100-101. In that case ***Duff J*** was giving prominence to the place of an extradition treaty. He said:

> "In the first place, the treaty itself, which, after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of "criminality", and it seems to me that the fair and natural way to apply that is this – you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts, in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with."

[41] ***Lord Bingham***, however, pointed out that the reasoning of ***Duff J*** has been adopted in subsequent cases in relation to Canadian extradition legislation. In short, the double criminality rule comes down to this. No one is to be extradited from Barbados unless the offence which he is alleged to have committed would, if it had been

committed in Barbados, have been an offence for which he could be tried under the laws of Barbados. In our opinion, the conduct test must be applied in Barbados.

The Grounds of Appeal

[42] Counsel for the appellants formulated a variety of grounds of appeal. Fortunately, where there was overlap in the grounds, Mr. Thorne Q.C. and Mr. Hal Gollop adopted each other's arguments *mutatis mutandis*. For the purposes of this judgment, we think it convenient to re-formulate the several grounds of appeal in the nature of issues or questions raised for our determination. In essence, the issues raised in the grounds of appeal are the selfsame issues argued before the Chief Magistrate and ***Reifer J.*** The judge adverted to some of them in her judgment (see paras.[14] and [16] *supra*) but found it unnecessary to decide each of the issues for the purposes of her decision. However, in so far as the grounds of appeal complain of the trial judge's failure to determine many of the issues and, in so far as this Court heard full argument on all of the issues canvassed in the courts below, we think it appropriate to discuss them in this part of the judgment. We consider first in issue #1, the basis upon which ***Reifer J*** dismissed the applications for judicial review.

Issue #1 Was the application for judicial review premature? Was an alternative remedy available?

[43] As we have indicated above, the judge concluded at para.26 of her judgment that the application for judicial review of the Chief Magistrate's decision was premature. She held that the appellants "should allow the proceeding before the Magistrate to be completed and should exhaust the alternative remedies available to them under the ***Magistrate's Court Act*** and the ***Extradition Act***". She found no 'exceptional circumstances' justifying judicial review and relied upon the cases previously mentioned at para.[15] *supra.*

[44] Mr. Hal Gollop submitted that the basis for the application for judicial review was that the Chief Magistrate had violated the appellant's right to cross-examination of the deponents whose depositions formed part of the bundle of documents in support of the request for extradition. He argued that the alleged breach of the appellant's constitutional rights to cross-examine constituted an exceptional circumstance.

[45] Mr. Haynes Q.C., on the other hand, submitted that the judge was right to hold that, save where exceptional circumstances exist, judicial review applications should not be brought in respect of decisions in extradition proceedings until after the decision on the application for extradition. In our opinion, the question of prematurity requires a discussion of the relevant constitutional provision and the decided cases.

[46] Section 24 of the Constitution, so far as is relevant, provides:

> "24.(1) Subject to the provisions of subsection (b), if any person alleges that any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened in relation to him……..then, without prejudice to any other action with respect to the same matter which is lawfully available, that person…..may apply to the High court for redress.
>
> (2) The High Court shall have original jurisdiction -
>
> (a) to hear and determine any application made by a person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 12 to 23:

Provided that the High Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

(3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of sections 12 to 23, the person presiding in that court shall refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

[47] Section 24 therefore confers jurisdiction on the High Court to review decisions of magistrates or tribunals where there is an allegation that a person's fundamental rights guaranteed under ss.12 to 23 of the Constitution have been violated. In the words of ***Sir Vincent Floissac CJ*** in ***Permanent Secretary v. de Freitas (1995) 49 WIR 70*** at 74 and 75:

> "[T]he jurisdiction conferred by section 18(2) is derived from or based on an allegation of actual or prospective contravention of a fundamental right or freedom. *The mere allegation of such contravention is sufficient to engender constitutional jurisdiction in the High Court to hear and determine the application in which the allegation is made*." (Emphasis supplied).

Floissac CJ was interpreting s.18(2) of the Constitution of Antigua and Barbuda which is in similar terms to s.24(1) of the Constitution of Barbados.

[48] The *proviso* to subsection (2), however, empowers the High Court to refuse to exercise its powers if the High Court is satisfied "that adequate means of redress are or have been available" to an applicant for review under any other law. And by virtue of subsection (3), says Mr. Gollop, since the appellants were raising a question as to the denial of their right to cross-examine under s.18(2)(e) of the Constitution, the Chief Magistrate was obliged to refer the question to the High Court unless he was satisfied that it was frivolous or vexatious.

[49] In ***Kemrajh Harrikissoon v. Attorney-General (1979) 31 WIR 348*** at 349, ***Lord Diplock*** explained the restrictions upon the use of s.24 as a constitutional review procedure -

> "The right to apply to the High Court under s.6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administration

which involves no contravention of any human right or fundamental freedom."

[50] In ***Harrikissoon*** the Privy Council was considering a claim by a teacher that his transfer from one school to another constituted a breach of his fundamental rights under the Constitution of Trinidad and Tobago. The Board held that it was manifest that such a right was not included among the fundamental rights and freedoms specified in Chapter I of the Constitution.

[51] On the other hand, in ***Attorney-General of Antigua and Barbuda v. Lake [1998] 4 LRC 348,*** the applicant claimed that there was a breach of a specific provision in Chapter VII of the Constitution of Antigua and Barbuda designed to protect appointees to public office. In addition, he alleged that he had been discriminated against for political reasons contrary to s.14(2) of the Constitution which provided:

> "(2) Subject to the provisions of subsection (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or public authority."

Having regard to the facts adduced by the applicant, the Board was satisfied that a case of discrimination in violation of s.14(2) had been made out and the claim for constitutional relief was neither frivolous nor vexatious.

[52] On the issue of prematurity, the rather complicated case of ***Bowe*** *(supra)* is helpful. This was an appeal from the Court of Appeal of the Bahamas by the Government of the United States of America (USG). A magistrate ruled that Bowe had a case to answer in respect of a request by the USG for his extradition for drug offences. He applied to the Supreme Court for orders of *certiorari* and prohibition. His application was dismissed on the ground that it was premature since the proceedings before the magistrate had not been concluded. The Court of Appeal reversed the decision of the Supreme Court, ordered that the government pay Bowe's costs of the appeal and remitted the matter to the Supreme Court. The Supreme Court then quashed the proceedings in the Magistrates Court because the requisite order was not made by the Governor-General.

[53] The Governor-General thereafter made the relevant order and Bowe was subsequently arrested on a warrant alleging conspiracy to import *cocaine* into the U.S.A. The Governor-General then issued a supplemental order stating that Bowe was accused of conspiracy to import *dangerous drugs*.

[54] A second warrant was issued and Bowe was again arrested. Applications were then made to the Supreme Court for orders of *certiorari* and prohibition to quash both warrants. The applications were refused by the Supreme Court. However, the Court of Appeal allowed Bowe's appeal and ordered *certiorari* to issue to quash the first warrant with costs to Bowe. The Court of Appeal were of opinion that the Supreme Court was exercising original jurisdiction under Art.28 of the Constitution and, as such, Bowe had a right of appeal under Art.104 (1) of the Constitution.

[55] The USG appealed to the Judicial Committee of the Privy Council against the orders for costs and the order of *certiorari*. The Board allowed the appeal. It was held that, when hearing the applications for *certiorari* and prohibition, the Supreme Court was exercising a "revisional jurisdiction" not its jurisdiction in relation to fundamental rights and freedoms under Art.28 of the Constitution and Bowe had no right of appeal under Art.104(1). In the course of delivering the leading speech on behalf of the Board, ***Lord Lowry*** observed at p.526:

> "The way in which the proceedings before the Magistrate were interrupted in order that the fugitive might apply to the Supreme Court for orders of *certiorari* and prohibition has meant that their Lordships' decision in the extradition appeal does not achieve finality, *since the evidence against him remains to be heard and considered*. Their Lordships here take the opportunity of saying that, *generally speaking*, *the entire case, including all the evidence which the parties wish to adduce, should be presented before either side applies for a prerogative remedy*. Only when it is clear that the extradition proceedings must fail (as where the order to proceed is issued by the wrong person) should this practice be varied." (Emphasis supplied).

[56] Mr. Leslie Haynes places great reliance on the words emphasised above in the speech of ***Lord Lowry***. He submitted that, as a matter of policy, it must be preferable, save in exceptional circumstances, that the proceedings in the court below be completed before the High Court is invited to judicially review those proceedings. There is much virtue in achieving finality of proceedings. ***Lord Lowry*** made it clear that, "generally speaking", the entire case should be presented before either side applies for a prerogative order.

[57] There is a body of authority in Australia to the effect that exceptional circumstances will generally be required before a superior court will consider interfering with committal proceedings particularly at an interlocutory stage. In ***Yates v. Wilson (1989) 168 CLR 338***, an application for special leave to appeal from the Federal Court to the High Court of Australia was refused where an attempt was made to obtain judicial review of a decision to commit to trial. Delivering the judgment of the High Court, ***Sir Anthony Mason CJ*** said at p.339:

> "It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us."

[58] See also ***Castles v. Briot and Others (1989) 19 ALD 153; Australian Broalastinc Tribunal v. Bond [1990] HCA 33*** and ***Storer v. Special Magistrate (1991) 104 FLR 303***. None of these cases involved a constitutional issue.

[59] But Mr. Gollop argued that his application was made pursuant to s.24 of the Constitution. It is plain that the language of s.24(1) of the Constitution permits an application to be made where it is alleged that a person's fundamental rights have been breached retrospectively, are currently being breached, or are likely, prospectively, to be breached.

[60] Here, the appellants were indeed invoking the procedure provided for in s.24(1) of the Constitution. We hold, distinguishing ***Bowe***, that since the appellants were challenging the denial of a right under Chapter III of the Constitution, prima facie, they could proceed by way of the s.24(1) procedure. Whether such a procedure would avail them on the facts of this case is another matter. We accept that counsel did not raise the issue of the denial of cross-examination before the Chief Magistrate in a frivolous or vexatious manner. The argument was genuinely put forward even if it were misconceived as we explain later.

[61] In any event, a further question must still be answered. Was there an alternative efficacious remedy available to the appellants outside the remedy of constitutional judicial review under s.24(1) of the Constitution? Mr. Haynes submitted that the appellants should have appealed under s.20 of the ***Extradition Act*** which provided an alternative and efficacious remedy to the s.24 procedure.

[62] Section 20 of the ***Extradition Act*** provides:

"20.(1) With leave of the Divisional Court, an appeal lies to that court, on a question of law only, from

(a) the committal to prison of a fugitive under section 17, or

(b) the discharge of a fugitive under section 18.

(2) Leave to appeal to the Divisional Court may not be granted unless,

(a) in the case of a committal, application for leave to appeal is made within the time limited therefor by paragraph (a) of section 19, or

(b) in the case of the discharge of a fugitive, application for leave to appeal is made within fifteen days from the making of the order for discharge."

[63] We interject the observation that the reference to "the Divisional Court" in s.20 must now be understood to mean the Court of Appeal.

[64] In our judgment, the appellants could have and should have appealed in accordance with s.20 of the Act after conclusion of the committal proceedings. All that was necessary was that after the application to cross-examine the deponents on their affidavits was refused, the appellants should have awaited the Chief Magistrate's decision in respect of committal.

[65] Instead, they chose the route of judicial review under the Constitution and under the ***Administrative Justice Act, Cap.109B***. In our judgment, s.20 of the Act provided an adequate and efficacious alternative remedy. In ***Jaroo v. Attorney-General of Trinidad and Tobago [2002] 1 AC 871***, the Judicial Committee of the Privy Council said that if another procedure is available, resort to a procedure such as is provided in s.24 of the Constitution, will be inappropriate. Resort to it will be an abuse of process. We agree with ***Reifer's J*** dismissal of the applications for judicial review. First, the appellants ought to have allowed the committal proceedings to be completed before seeking to challenge them. Secondly, an adequate remedy was available to the appellants under s.20 of the Act.

[66] Finally, having examined the circumstances of this matter in great depth and detail, we can find no exceptional circumstances which merited applications being made for judicial review under s.24 of the Constitution or under the ***Administrative Justice Act***. There was nothing, so egregious in the decisions of the Chief Magistrate, that warranted the use of judicial review. We repeat that an appeal was provided for in the extradition legislation. The appellate procedure ought to have been used if it was thought that the Chief Magistrate had erred in law. The constitutional right which both counsel for the appellants assumed had been violated was, in law, a right which is inapplicable to extradition proceedings as we show later when we discuss issue #2. However, if the appellants were convinced that the decision of the Chief Magistrate was a breach of their constitutional rights, such a decision would, *ipso facto*, have been an error of law. The ordinary process of appeal would have offered them an adequate

opportunity to seek to challenge the decision of the Chief Magistrate on the ground that he had erred in law. We turn next in paras.[67] to [163] to a discussion of the issues raised on the grounds of appeal in which both counsel complain that the trial judge erred in law because she failed to decide properly or at all, a number of legal questions notwithstanding full argument in the High Court.

Issue #2 Was there a right to cross-examine and was there a breach of the Constitution?

[67] It was submitted on behalf of Scantlebury by Mr. Hal Gollop that ***Reifer J*** erred in law in failing to determine whether Scantlebury's right to a fair hearing under s.18 of the Constitution had been violated because the Chief Magistrate had refused to allow cross-examination of witnesses. During the committal proceedings, Mr. Gollop made application to cross-examine those witnesses whose affidavit evidence formed the basis of the extradition application viz. Stephen May, Gordon Patten and the C/S. In his skeleton argument counsel wrote that "it was absolutely crucial for the proper presentation of the client's case that the deponents to these affidavits be made available for cross-examination." He criticised the trial judge for not addressing this issue.

[68] Section 18(1) of the Constitution states:

> "18.(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

This subsection has at its core the right to a fair hearing. This right is absolute. It applies to *criminal trials* properly so called. The application of s.18(1) is confined to proceedings which determine a criminal charge and the issues of guilt or innocence.

[69] Section 18(2) of the Constitution provides:

> "(2) Every person who is charged with a criminal offence –
>
> (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
>
> (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
>
> (c) shall be given adequate time and facilities for the preparation of his defence;
>
> (d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;
>
> (e) *shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution*;

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,

and, except with his consent, the trial shall not take place in his absence unless he so conducts himself as to render the proceedings in his presence impracticable and the court has ordered the trial to proceed in his absence." (Emphasis supplied).

The paragraphs of s.18(2) are specific aspects of the general right to a fair hearing or, as it is sometimes said, the right to a fair trial.

[70] Counsel's point is that s.18 is contained in Chapter III of the Constitution and the right to cross-examination is a fundamental right of a person charged with a criminal offence. He argues that s.18 has to be read together with s.13 of the ***Extradition Act*** and, upon a proper interpretation of the respective sections, the Magistrate fell into error in disallowing cross-examination of the witnesses.

[71] Section 13 of the ***Extradition Act*** is in these terms:

"13.(1) A fugitive who is apprehended on a warrant issued under section 10 shall be brought before a magistrate as soon as practicable after the fugitive is apprehended.

(2) The magistrate before whom the fugitive is brought shall determine, subject to this Act, whether he should be committed for surrender or be discharged.

(3) In making a determination under subsection (2), the magistrate shall deal with the fugitive *and hear the case in the same manner, as nearly as may be, as if the fugitive had been brought before him and charged with an offence committed in Barbados that is triable on indictment*." (Emphasis supplied).

[72] Mr. Gollop's argument appears to us to be misconceived. Extradition proceedings, as we said in the introductory paragraph of this judgment, are *sui generis*. It is critically important to appreciate that a distinction must be drawn between the character of a court hearing proceedings for extradition and the character and functions of a court conducting a preliminary inquiry into an indictable offence. In the vast majority of extradition cases the court considers the evidence on paper. The attention of the court hearing the committal proceedings is focused on the contents of the committal bundle. In ***Kindler v. Canada (Minister of Justice)(1991) 84 DLR (4th) 438, McLachlin J*** (as she then was) said at p.488:

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

[73] Extradition law proceeds upon the assumption that the requesting state (in this case the U.S.A.) is acting in good faith *and the fugitive will receive a fair trial in the courts of the requesting state*. Committal under the ***Extradition***

Act is not part of the *trial process* of our courts.

[74] The phrase "as nearly as may be" in s.13(3) of the Act was construed by the English Court of Appeal in ***R. v. Governor of Pentonville Prison and Another ex parte Lee [1993] 3 All ER 504***. At p.508 ***Ognall J***, with whom ***Watkins LJ*** agreed, said in relation to s.9(2) of the ***English Extradition Act 1989*** where the phrase appears:

> "*The words must be consistent with the terms and purpose of the extradition legislation. Proper regard must also be had to the limited function of the magistrate in extradition proceedings*. That function is defined in s.9(8)(a) of the [1989] Act. That requires the magistrate to be satisfied 'that the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the court'." (Emphasis supplied).

[75] Reverting to s.18, we bear in mind that, in so far as that section is included in Chapter III of the Constitution, it must be construed purposively and liberally. The European Convention for the Protection of Human Rights and Fundamental Freedoms is the *fons et origo* of Chapter III of the Constitution. Thus, decisions of the European Court of Human Rights (ECHR) on the Convention are of especial relevance in an interpretation of Chapter III. In our opinion, the section as a whole, deals with situations where persons are charged with criminal offences in Barbados in which the issue of guilt or innocence is to be decided by a court of trial in Barbados. *One of the essential characteristics of committal proceedings for extradition is that they do not determine guilt or innocence. Those issues are for determination at the trial.*

[76] In ***Soering v. United Kingdom (1989) 11 EHRR 439***, the Strasbourg Court considered Art.6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. There it is provided that every one charged with a criminal offence has certain "minimum rights" including the right –

> "(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

The fact that legal aid was not available in Virginia was held not to be a breach of Art.6(3)(c). At para.113, the ECHR, although rejecting on its merits the argument that the absence of legal aid in Virginia breached Art.6(3)(c), went on to advert to the possibility that, in some countries or situations, fair trial rights may be denied in a requesting state. The Court said:

> "The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances *where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country*. However, the facts of the present case do not disclose such a risk." (Emphasis supplied).

[77] In ***Kirkwood v. United Kingdom 6 EHRR 373***, the European Commission on Human Rights made it clear that Art.6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (dealing with the right to examine and cross-examine witnesses) does not apply to a committal hearing on an application for extradition. It had been argued on behalf of the applicant that the denial to him of any opportunity to cross-examine a witness against him at the committal stage of the extradition proceedings constituted a violation of his rights under Art.6(3)(d) of the Convention. At p.386 the Commission said:

"Nevertheless, the Commission concludes that these proceedings did not in themselves form part of the determination of the applicant's guilt or innocence, which will be the subject of separate proceedings in the United States which may be expected to conform to standards of fairness equivalent to the requirements of article 6, including the presumption of innocence, notwithstanding the committal proceedings. In these circumstances the Commission concludes that the committal proceedings did not form part of or constitute the determination of a criminal charge within the meaning of article 6 of the Convention."

[78] The issue of the right to cross-examine in extradition committal proceedings was faced squarely by the Court of Appeal of Trinidad and Tobago in ***Saroop v. Maharaj (1995) 50 WIR 414***. Delivering the leading judgment, ***Hamel-Smith JA*** summarised the appellant's contention on this issue at p.423:

"Attorney submitted that the evidence of the foreign witnesses, de Port and Baltimore, was wrongly admitted before the magistrate. He contended that the evidence of these two witnesses could not be admitted by way of depositions, as was done, but that the witnesses had to attend court personally, so to speak, and give *viva voce* evidence from the witness stand. The evidence of these witnesses was the only evidence capable of proving the commission of the alleged crime and as such the appellant had a constitutional right under due process of law to cross-examine them. By admitting the evidence by way of depositions, the magistrate had effectively deprived the appellant of this right to cross-examine.

This submission, in my view, bears little examination. The nature of the inquiry before the magistrate, the rules under which he is to act and the subject matter to be dealt with by him are all matters prescribed by the 1870 Act. It requires the magistrate to hear the case in the same manner, as near as may be, as if the prisoner brought before him was charged with an indictable offence. It follows that, as long as the magistrate conducts the case before him in accordance with the prescribed procedure, there can be little or no reason for complaint. If that procedure allows evidence to be admitted by way of depositions, properly authenticated, it also follows that the qualification "as near as may be", is satisfied and the right to cross-examine is limited to witnesses who give *viva voce* evidence. The right to admit evidence by way of depositions is expressly given by the Act itself and that very Act can and does circumscribe the right in certain instances.

To suggest that it is a constitutional right to be given an opportunity to cross-examine a witness in such circumstances and, therefore evidence by way of depositions is inadmissible is tenuous."

[79] ***Hamel-Smith JA*** found support for his opinion in a dictum of ***Thurlow J*** in ***Re: State of Wisconsin and Armstrong, 32 DLR (3d) 265***. In that case, the statutory provisions for extradition were identical with the Trinidad and Tobago statute of 1870 and an argument similar to that in ***Saroop*** was advanced before ***Thurlow J***. His Lordship said at p.270 in respect of the right to cross-examine:

"[T]here is no reason to doubt that in this procedure the right of the fugitive to cross-examine arises as it does under….the Criminal Code. Such right of cross-examination, however, has its origin not in the requirements of natural justice but in the statute, just as the whole procedure for preliminary inquiries is statutory, and the right to cross-examine arises only in so far as the statue provides for it…If the proceedings were in the nature of a trial on the subject of guilt or innocence the absence of a right or opportunity to test the evidence of the applicants by cross-examination might well be a serious objection to the fairness and justice of such a rule but,…that is not the situation. *The hearing is a mere inquiry and what the extradition judge has to determine is not the guilt or innocence of the fugitive but the question whether the evidence produced would justify his committal for trial*. The fugitive is entitled to be made aware, by the reading of the affidavits presented, of the case against him, upon which his extradition for trial may be ordered, but he is not required to answer that case and even if he elects to do so, by evidence or otherwise, the judge's function remains the same. *He is not empowered to*

decide the merits of guilt or innocence, or to pass upon the credibility of witnesses but simply to determine whether there is a sufficient case against the fugitive to justify his committal. The trial and determination of the fugitive's rights with respect to the charge are left to the trial court." (Emphasis supplied).

[80] The Human Rights Act 1998 incorporated the European Convention on Human Rights into English law. See s.1(3) and Schedule I to the Act. Notwithstanding Art.6(3)(d), ***Lord Bingham*** was still able to assert in ***R. v. Davis [2008] AC 1128*** **a**t para.18:

> "*[E]xtradition proceedings are not a criminal trial and cannot culminate in a conviction; there is in any event no right of cross-examination where duly authenticated evidence is presented in extradition proceedings*….". (Emphasis supplied).

[81] The submissions and arguments of counsel fail properly to appreciate the special nature of extradition proceedings. Although the trial judge made certain specific findings to which we have adverted at para.[16], it is clear to us that, at the forefront of her reasons for dismissing the application for judicial review was her opinion that the application was premature and disclosed no exceptional circumstances for allowing it. She held, without identifying it, that there was another means of redress available to the applicants. – see para.18 of her judgment at para.[14] hereof. According to the trial judge's reasoning, it was unnecessary to examine and discuss many of the issues raised by the applicants. The short point was that they should have allowed completion of the committal proceedings and, if necessary, sought another and appropriate remedy of redress. Mr. Gollop's contention for a right to cross-examine the deponents mentioned is not supported by the legal authorities. *The specific right granted in s.18(2)(e) of the Constitution does not apply to committal proceedings for extradition.*

[82] We leave the last words on the right to cross-examine in extradition proceedings to internationally acclaimed and respected practitioners and authors. In their discussion of Art.6 of the European Convention on Human Rights, which guarantees the right to a fair trial, the authors of The Law of Extradition and Mutual Assistance (Second Edition), Clive Nicholls Q.C., Clare Montgomery Q.C. and Julian Knowles assert at p.132:

> "Article 6 does not apply to extradition proceedings. In other words, *the domestic extradition process does not have to offer all the guarantees in Article 6(3), for example, the right to cross-examine witnesses.* This is because Article 6 only applies to the full process of the examination of an individual's guilt or innocence of an offence and not the mere process of determining whether a person can be extradited to another country." (Emphasis supplied).

[83] We have no doubt that, at the trial, the appellants will be accorded the plenitude of rights including the right to cross-examine witnesses and the deponents to the affidavits, to ensure that they have a fair trial in the U.S.A. This ground of appeal fails.

Issue #3 Was the Affidavit of C/S inadmissible?

[84] Counsel submitted that the affidavit of the C/S was inadmissible in evidence. He submitted that the Chief Magistrate erred in receiving it among the authenticated bundle of documents in support of the extradition request and ***Reifer J*** erred in failing to rule that any "evidence" contained in the affidavit was admissible before the Chief

Magistrate. This issue here requires a consideration of the legal principles applicable broadly, to what may be called "anonymous witnesses".

[85] The extradition request was supported by the deposition of Stephen May to which was annexed as an exhibit, an affidavit from the C/S. The affidavit of Stephen May and that of the C/S are at the heart of these extradition proceedings. Apart from contending that the affidavit of the C/S did not conform to the requirements of O.41 of the Rules of the Supreme Court (RSC), Mr. Gollop contended that the affidavit of the C/S should not have been admissible because it did not disclose the identity of its maker on its face; nor was it signed by the deponent.

[86] Section 15 of the ***Extradition Act*** provides –

> "15.(1) In order to show the truth of a charge of an extradition crime or the fact of a conviction for an extradition crime, any or all of the following are admissible in evidence, if duly authenticated, namely,
>
> (a) evidence on oath or affirmation; and
>
> (b) warrants, depositions taken outside Barbados, certificates of conviction in a Commonwealth country or foreign state, or copies thereof.
>
> (2) A document or paper is duly authenticated for the purposes of subsection (1) if it is authenticated in the manner provided for the time being the law of Barbados.
>
> (3) Other documents or papers not within the purview of subsection (2) are duly authenticated for the purpose of subsection (1) if,
>
> (a) …..
>
> (b) in the case of a deposition or copy thereof, it purports to be the original deposition signed, or a true copy thereof certified, by an appropriate judicial officer in the prescribed manner…"

[87] "Appropriate judicial officer" means a judge, magistrate or officer of the Commonwealth country or the foreign state, as the case may be, that is seeking the surrender of the fugitive concerned. – s.15(4)(a). "In the prescribed manner" means that the document or paper is authenticated by the oath or affirmation of some witness or by being sealed with the official seal of the Attorney-General, Minister of Justice, or some other Minister of Government of the Commonwealth country or foreign state, as the case may be, that is seeking the surrender of the fugitive concerned. – s.15(4)(b). We hold, having carefully scrutinised the documents, that they were properly authenticated in accordance with the Act and the Treaty. But the further question remains whether they were admissible in evidence since the identity of the C/S was not disclosed.

[88] The House of Lords in 2008 gave exhaustive consideration to the use of anonymous witnesses in ***Davis*** *(supra).*

[89] At common law and from the days of "ancient Rome" (per ***Lord Bingham*** at para.5 in ***Davis***), the principle has been well-established that, subject to certain exceptions such as dying declarations and statements forming part of the *res gestae*, an accused should be confronted by his accusers in order to challenge their evidence if he so desired. In the U.S.A. this right is included in the Constitution and has been described as "one of the fundamental guarantees of life and liberty" – ***Kirby v. United States 174 US 47, 55 (1899)***. See also, ***Smith v. Illinois 390 US 129, 131*** where the Supreme Court pointed out that –

> "[W]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives."

[90] In New Zealand, ***Richardson J*** said in ***R v. Hughes [1986] 2 NZLR 129*** at 149:

> "The right to confront an adverse witness is basic to any civilised notion of a fair trial. That must include the right for the defence to ascertain the true identity of an accuser where questions of credibility are in issue."

[91] The common law, by a series of small steps, has allowed departures from the general principle. In ***R. v. Taylor and Crabb (unreported Court of Appeal decision of 22 July 1994)*** the English Court of Appeal accepted that an accused has a fundamental right to see and know his accusers and that right should be denied only in rare and exceptional cases. It is important, however, to make a distinction between the use of anonymous witnesses in a *trial* and the use of such witnesses for committal proceedings in extradition cases.

[92] In ***R. v. X (1989) 91 Cr.App.R.36***, a case dealing with the anonymity of child witnesses by the use of a screen, ***Lord Lane CJ*** said at p.40:

> "The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is we have got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes we have to make decisions as to where the balance of fairness lies. He came to the conclusion that in these circumstances the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen."

[93] ***Lord Hutton*** summarised the balancing exercise that a court must undertake at para.85 of ***R. v. (Al-Fawwaz) Governor of Brixton Prison [2002] 1 AC 566:***

> "85. Therefore the authorities emphasise that the decision whether to admit evidence from an anonymous witness is a matter of deciding where the balance of fairness lies between the prosecution and the accused and that it is pre-eminently a matter for the discretion of the magistrate or judge conducting the hearing."

[94] The recent decision in ***Davis*** *(supra)* concerned the use of anonymous witnesses *in a trial*. The defendant was charged with murder. The only witnesses who had identified him were permitted to give evidence with the benefit of a number of protective measures. For example, their evidence was given pseudonymously; information from which they might be identified was withheld from the defence; the defence were not allowed to ask questions

which might lead to their identification; their evidence was given from behind a screen and only the judge and jury were able to hear their natural voices. These protective measures were allowed because the witnesses genuinely feared for their lives.

[95] The House of Lords allowed the appeal against conviction. ***Lord Bingham*** looked at the impact of the protective measures on the conduct of the defence in order to determine whether they operated unfairly to the appellant. In overruling the Court of Appeal, ***Lord Bingham*** observed at para.[34]:

> "At no point in its judgment does the Court of Appeal acknowledge that the right to be confronted by one's accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the defendant."

His Lordship concluded "that the protective measures imposed by the court in this case hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair." – para.[35].

[96] In ***R. v. Liverpool City Magistrates' Court,, ex parte Director of Public Prosecutions (1996) 161 JP 43***, undercover police officers were involved in operations to bring to justice a number of persons who were part of an extensive drug cartel. The police officers carried out their operations at great personal danger. At the committal stage, the Magistrate made an order that the police officers should disclose their true names and identities but could give evidence by shielding their faces from the public. The Director applied for judicial review of the Magistrate's order. ***Beldam LJ*** in the Queen's Bench Divisional Court, relied on his earlier decision in ***R. v. Watford Magistrates' Court, ex parte Lenman [1993] Crim.LR 388***. His Lordship held, following ***R. v. X*** *(supra)* that it is –

> "well established that there may be occasions upon which the interests of justice require that the identity of witnesses should be withheld." – p.389

[97] In the ***Liverpool City Magistrates*** case, a group of youths had been charged with violent disorder leading to attacks on several persons. Certain witnesses, fearing for their safety if identified, made statements to the police under pseudonyms. At the committal proceedings, the court ruled that the witnesses should retain their anonymity but counsel should be able to see the witnesses. It was this ruling that was the subject of the judicial review application. ***Beldam LJ*** said:

> 'If a magistrate is satisfied that there is a real risk to the administration of justice, because a witness or witnesses on reasonable grounds fears for his or their safety if their identity is disclosed, it is entirely within the power of the magistrate to take reasonable steps to protect and reassure the witness or witnesses otherwise they will be deterred from coming forward to give evidence. The purpose is, of course, to secure justice."

[98] In ***ex parte Lenman***, which concerned committal proceedings and not a trial, ***Beldam LJ*** expressly left open the question whether the witnesses should be allowed to withhold their identities and give their evidence anonymously.

[99] Turning now to the use of anonymous witnesses *in committal proceedings for extradition*, the Strasbourg Court has stated that the use of anonymous evidence is not necessarily incompatible with the ***European Convention*** –

see ***Doorson v. The Netherlands (1996) 22 EHRR 330; Van Mechelen v. The Netherlands (1997) 25 EHRR 647***. In ***Doorson***, the ECHR held that arrangements to preserve the anonymity of a witness could, in principle, be justified where there was a real threat to the life and safety of a witness.

[100] In ***R. (Al-Fawwaz) v. Governor of Brixton Prison*** *(supra)*, the House of Lords was concerned with an application for *habeas corpus* arising from a request to extradite to the U.S.A. In that case, the magistrate had relied on anonymous affidavit evidence. This was challenged on appeal. The House held that the magistrate had not erred or acted irrationally in deciding, after careful consideration, that the balance of fairness required that the anonymity of two witnesses be preserved and their evidence be admitted.

[101] ***Lord Slynn*** said at para.[44]:

> "It seems to me that the magistrate and the Divisional Court considered this matter carefully and were satisfied that the protection of the witness CS/I made it necessary in all the circumstances to preserve his anonymity and that the interests of society in prosecuting required that the evidence be taken into account on the application for extradition. It would be a matter for the trial judge as to whether the statement should be admitted. The parties in ***Al-Fawwaz*** agree that if the evidence of CS/I is admitted there is sufficient to satisfy the requirement of paragraph 7 of the Schedule. That seems to me to be right. I consider that the decision of the Divisional Court in this case, that the magistrate's admission of the evidence, even if anonymous, was fully justified in all the circumstances to which the Divisional Court refer, was correct."

[102] On the question whether the admission of the evidence of the anonymous witness CS/I was in breach of Article 6(3)(d) of the European Convention, ***Lord Hutton*** said at para.87:

> "The applicants recognised that they faced the difficulty *that there is no provision for cross-examination in committal proceedings on an application for extradition*, but they submitted that their inability to cross-examine made it important that the defence should not be deprived of information as to the identity of a witness when knowledge of his identity might enable them to demonstrate that his evidence was unreliable because he was actuated by malice or hostility. In my opinion the *two Administrative Courts were right to reject this argument as it is clear from the decision of the European Commission of Human Rights in Kirkwood v. United Kingdom (1984) 37 DR 158 that the provisions of article 6 do not apply to a committal hearing on an application for extradition*…." (Emphasis supplied).

[103] Against that background of legal principles, we now address the circumstances applicable to these appeals. The affidavit of the C/S was properly sworn but the name of the deponent was not disclosed. It was stated to have been "redacted". Paragraph 20(ii) of Stephen May's deposition contains the following:

> "The name and signature of the Confidential Source were redacted, for his protection and safety, after the affidavit was sworn before the US magistrate. The original affidavit has been filed, under seal, with the District Court for the District of Columbia. The Magistrate Judge has signed an order allowing certified copies of affidavits, with the Confidential Source's name and signature redacted, to be disclosed for legitimate law enforcement purposes including the arrest and extradition of the defendants."

[104] At p.11 of his reasons, the Chief Magistrate wrote:

> "In my view the affidavit of CS is of such importance in establishing a case for committal of these fugitives. I find that the affidavit of CS was sworn and duly authenticated under s.15 of the Extradition Act, but the name of the CS was redacted for his protection and safety. I accept that the seriousness of

> modern crime gives rise to situations where the witnesses are most unwilling to give crucial evidence if they are to accept that their identity will be revealed to the fugitives…"

[105] We accept that ignorance of the identity of a witness may deprive a defendant of particular information which could show the unreliability, prejudice or hostility of a witness. But a balance must be struck between the need for open justice, the interests of the defendant and the public interest. This Court is not ignorant of instances in the Commonwealth Caribbean where trials for serious criminal offences have collapsed because key witnesses for the prosecution have been killed. Indeed this court is also aware that such events have led to the preparation of legislation to preserve the identity of witnesses and protect them from harm pending trials. We are satisfied that, in the contemporary global environment which is polluted by the transnational traffic in illegal drugs, notwithstanding the overarching principle of open justice, there is a public interest in the pursuit of justice, in an appropriate case, not to disclose the identities of undercover law enforcement operatives *in committal proceedings for extradition.*

[106] For the reasons set out by the Chief Magistrate and, having regard to that part of May's deposition quoted at para.[103] and the weight of legal authority, we are of opinion that the affidavit of C/S was admissible. It will be an entirely different matter if, *at the trial of the appellants*, an attempt is made to rely on the evidence of the C/S without disclosing his identity. The trial judge will then be called upon to balance the various interests to which we have adverted to ensure that the trial is fair. But, for the purposes of the committal proceedings before the Chief Magistrate, no legal or constitutional principle is offended by withholding the identity of the C/S *at this stage*. There is not yet a trial. Accordingly, the ground of appeal raising the issue here is rejected.

Issue #4 Does the Constitution provide for extradition?

[107] Mr. Haynes submitted, and we agree, that at the centre of the appellants' case on appeal is an allegation that the extradition proceedings were conducted in a manner which breached their constitutional rights under Chapter III of the Constitution. Counsel for the appellants suggested that, somehow, extradition was inconsistent with the Constitution. The preamble to Chapter III of the Constitution is to be found in s.11 of the Constitution.

> "Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –
>
> (a) life, liberty and security of the person;
>
> (b) protection for the privacy of his home and other property and from deprivation of property without compensation;
>
> (c) the protection of the law; and
>
> (d) freedom of conscience, of expression and of assembly and association,

> the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

[108] It will be observed that the rights and freedoms therein contained are "subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest." Extradition is mentioned in s.13(1) and s.22(3)(g) of the Constitution.

[109] Thus, s.13 provides for the protection of the right to personal liberty but derogation from this right is permitted under s.13(1)(**i**). No person shall be deprived of his personal liberty save as may be authorised by law –

> "(**i**) for the purpose of preventing the unlawful entry of that person into Barbados, or for the purpose of effecting the expulsion, *extradition* or other lawful removal of that person from Barbados…."

[110] Likewise, s.22 protects the right to freedom of movement but s.22(3) provides:

> "(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> (g) for the removal of persons from Barbados -
>
> (i) *to be tried or punished in some other country for a criminal offence under the law of that country;*"

We think that the effect of s.13(1)(i) and s.22(3)(g) is that a person may be deprived of his liberty for the purpose, *inter alia*, of effecting his extradition from Barbados – see ***Roberts and Others v. Minister of Foreign Affairs and Others (2007) 71 WIR 1***.

[111] In ***Forbes v. DPP [2007] UKPC 61,*** in an appeal from Jamaica, ***Lord Hoffmann*** said of the equivalent paragraph in the Constitution of Jamaica in respect of the Extradition Act of Jamaica –

> "It appears to the Board that the Extradition Act 1991 is a law which makes provision for the removal of a person from Jamaica to be tried outside of Jamaica for a criminal offence and therefore falls within the terms of section 16(3)(e). Consequently it is not inconsistent with section 16….."

[112] Thus, for the same reasons as expressed by ***Lord Hoffmann***, the ***Extradition Act*** of Barbados is not inconsistent with ss.13 and 22 of the Constitution. The derogation provisions contained in those sections recognise extradition as an exception to the specific fundamental rights provided for in the sections.

Issue #5 Was the issuance of a provisional warrant valid?

[113]