Michaelmas Term
[2022] UKPC 43
Privy Council Appeal No 0026 of 2020

JUDGMENT

Jack Austin Warner (Appellant) v Attorney General of Trinidad and Tobago (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

LORD HODGE
LORD BRIGGS
LORD HAMBLEN
LORD BURROWS
SIR DECLAN MORGAN

JUDGMENT GIVEN ON
17 November 2022

Heard on 27 and 28 April 2022

Appellant
Clare Montgomery KC
Fyard Hosein SC
Anil V Maraj
Rishi P. A. Dass
Sasha Bridgemohansingh
(Instructed by Simons Muirhead & Burton (Newman Street))

Respondent
James Lewis KC
Douglas L Mendes SC
Rachel Scott
(Instructed by Charles Russell Speechlys LLP (London))

SIR DECLAN MORGAN (with whom Lord Hodge, Lord Briggs, Lord Hamblen and Lord Burrows agree):

Introduction

1. The appellant is Jack Austin Warner, a politician, businessman and former Vice President of Fédération Internationale de Football Association ("FIFA"). He is charged by the prosecuting authorities in the United States of America ("USA") with various crimes covering a period of more than three decades.

2. This is an appeal from the decision of the Court of Appeal of Trinidad and Tobago dismissing an appeal against the dismissal by the High Court of judicial review proceedings brought by the appellant. In those proceedings he challenged:

> (1) whether the Extradition (United States of America) Order, 2000 ("the USA Order"), purportedly issued by the Attorney General pursuant to section 4 of the Extradition (Commonwealth and Territories) Act 1985 ("the Act") was intra vires the Act or the Act as amended by the Extradition (Commonwealth and Foreign Territories) (Amendment) Act, 2004 ("the 2004 Act");
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> (2) whether the decision of the Attorney General to issue, pursuant to section 9 of the Act, an authority to proceed ("ATP") in respect of the USA's request for the extradition of the appellant was in breach of the appellant's right to procedural fairness;
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> (3) whether the Attorney General was entitled to rely on a certificate issued pursuant to section 8(5) of the Act dealing with specialty without disclosing the specialty arrangement with the USA; and
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> (4) whether the Attorney General acted in conformity with the Constitution of Trinidad and Tobago.

As will be explained below (see para 34), there are four main specific issues for the Board to decide which arise from those four grounds of challenge.

Factual background

3. On 27 May 2015 a provisional warrant was issued pursuant to section 10 of the Act by a Magistrate for the arrest of the appellant. He voluntarily surrendered himself to police and was taken to the Port-of-Spain Magistrates' Court where he was granted bail in the sum of $2.5 million upon condition that he surrender his passport and report twice per week to police. On 24 July 2015 a request for the extradition of the appellant was made by the USA on foot of the USA Order.

4. On 27 May 2015 the appellant made a request for the disclosure of all material relevant to the issue of an ATP so that he could make representations. This request was repeated by letters of 12 June, 3 July and 18 August 2015. The Attorney General by letter of 2 July 2015 refused disclosure of any such material and declined to afford the appellant the opportunity of making any representations prior to any decision in respect of an ATP. The position was reiterated in a further letter of 12 August 2015 in which the Attorney General invited the appellant's lawyers to agree that the timeframe for an ATP should be extended until the middle of September in light of imminent parliamentary elections in which the appellant was a candidate.

5. The Magistrate presiding over the extradition proceedings ruled that any ATP should be issued by 15 September 2015. On 9 September, following a change of government as a result of the general election, a new Attorney General was appointed. On 14 September 2015, the newly appointed Attorney General indicated that he had taken the decision to allow the appellant's attorneys to make representations as to whether or not he should issue an ATP. His letter asked the appellant's attorneys to confirm by 4:00 pm on the same day that they intended to make representations to the Attorney General and that they would agree that the date set by the Chief Magistrate for receipt of the ATP be vacated and reconsidered in the Magistrates' Court on 21 September 2015. A copy of the extradition request was provided to the appellant's lawyers at 3.45 pm that day.

6. The appellant's lawyers declined to make representations and did not agree to the proposed extension of time. The Magistrate made an Order extending time to 21 September 2015 and the ATP in respect of 29 offences of fraud, corruption and money laundering over a 30 year period was delivered to the Magistrate on that date.

Statutory background

7. The Act provides for extradition arrangements between Trinidad and Tobago and Commonwealth and foreign territories. It was amended by the 2004 Act. The statutory background will describe the relevant provisions of the Act and then deal with the amendments introduced by the 2004 Act.

The Act prior to amendment

8. Section 3 of the Act enables the Attorney General, by Order subject to negative resolution in Parliament, to declare a Commonwealth territory to be one to which the Act applies subject to any exceptions, adaptations, modifications or other provisions specified in the Order.

9. Section 4 deals with foreign territories outside the Commonwealth:

> "(1) Where a treaty has been concluded, whether before or after the commencement of this Act, between Trinidad and Tobago and any foreign territory in relation to the return of fugitive offenders, the Attorney General may, by Order subject to negative resolution of Parliament, declare that territory to be a foreign territory (hereafter referred to as a declared foreign territory) in relation to which this Act applies, and where any such Order so declares, this Act applies in relation to that territory; and any such Order may provide that this Act applies in relation to that territory subject to such exceptions, adaptations, modifications or other provisions as may be specified in the Order and, where any such Order so provides, this Act applies in relation to that territory subject to such exceptions, adaptations, modifications or other provisions.
>
> (2) An Order shall not be made under subsection (1) unless the treaty—
>
> (a) 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; and

(b) provides for the determination of the treaty by either party to it after the expiration of a notice not exceeding one year.

(3) Any Order made under subsection (1) shall recite or embody the terms of the treaty and shall not remain in force for any longer period than the treaty; and 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, and the validity of the Order shall not be questioned in any legal proceedings whatever."

Neither section 3 nor section 4 was amended by the 2004 Act.

10. On 15 March 2000 the Attorney General exercised the power under section 4(1) to make the USA Order based on the Treaty between Trinidad and Tobago and the USA set out in the Order ("the Treaty"). The conditions imposed by section 4(2) of the Act have a long legislative history and can be traced back to section 4 of the Extradition Act 1870 ("the 1870 Act") dealing with extradition to foreign states. The conclusive evidence and validity provisions in section 4(3) of the Act were originally set out in section 5 of the 1870 Act. The absence of a conformity obligation in section 3 of the Act in cases concerning Commonwealth territories reflects the general shared legislative history and comity between those territories.

11. Section 5 of the Act provides that those accused of an extraditable offence or alleged to be unlawfully at large after conviction of an indictable offence in a declared Commonwealth or foreign territory may be arrested and returned to that territory in accordance with the provisions of the Act. The 2004 Act added a point of clarification on extraterritorial offences but made no other amendment to this section.

12. Section 6 (which, as is explained in para 21 below, has been amended) defined extraditable offences in declared Commonwealth territories. There was a requirement for double criminality with the offences set out in the First Schedule to the Act however the offence was described in the requesting territory. The First Schedule set out a list of specific offences and legislative provisions giving rise to a range of offences. This approach is described as the enumerative approach as it involves specifying in the legislation the precise offences in respect of which extradition can be ordered. All of the offences specified in the First Schedule were indictable in Trinidad and Tobago but a range of indictable offences including sexual offences, firearms

offences and certain common law offences were not included in the schedule. Provision was made for minimum gravity of not less than 12 months' imprisonment and there was inclusion of extraterritorial offences if in corresponding circumstances they would be contrary to law in Trinidad and Tobago. Inchoate offences associated with the offences in the First Schedule were also included.

13. Section 7 (which has also been amended) followed a similar structure for declared foreign territories with the same double criminality provision on the basis of the offences set out in the First Schedule to the Act. Article 2(1) of the Treaty, however, provides a wider definition of an indictable offence asserting that an extraditable offence is one which is indictable under the laws of Trinidad and Tobago.

14. Section 7(1) of the Act stated:

> "an offence ...is an extraditable offence if it is an offence… which if committed in Trinidad or Tobago or within the jurisdiction of Trinidad and Tobago would be one of the offences described in the First Schedule."

There is an issue between the parties as to whether this included extraterritorial offences. The appellant also points out that the inchoate offence of conspiracy to commit the offences in the First Schedule was not included in section 7 but section 66 (1)(b)(iii) of the Interpretation Act 1962 provides that any reference to an offence in a Trinidad and Tobago statute also includes reference to conspiracy to commit the offence. There was a provision in section 7 for minimum gravity of not less than 12 months' imprisonment, recorded in the Treaty at Article 2(1) as a period of more than one year.

15. The issue of extraterritoriality is provided for at Article 2(4) of the Treaty:

> "4. 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. 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."

That will require consideration of the discretionary powers available to the Attorney General under the Act.

16. Section 8 of the Act was the subject of a minor amendment by the 2004 Act which is not relevant to these proceedings. It deals with restrictions on return:

> "8. (1) A person shall not be returned under this Act ... to a declared Commonwealth territory or a declared foreign territory, or committed to or kept in custody for the purposes of the return, if it appears to the Attorney General, … the Magistrate, … the High Court … or … the Court of Appeal ….
>
> (a) that the offence in respect of which that person is accused or was convicted is an offence of a political character;
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> (b) that the request for his return (though purporting to be made on account of an extraditable offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, gender, sexual preference, nationality or political opinions; or
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> (c) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, gender, sexual preference, nationality or political opinions.
>
> (2) A person accused of an offence 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, if it appears as aforesaid that if charged with that offence in Trinidad and Tobago he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.
>
> (3) 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.
>
> (4) The Attorney General shall not give his consent under subsection (3)(c) if he has reasonable grounds for believing that the offence to which the request for consent relates could have been charged prior to return if due diligence had been exercised.
>
> (5) 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; and for the purposes of that subsection a certificate issued by or under the authority of the Attorney General confirming the existence of an arrangement with any territory and stating its terms is conclusive evidence of the matters contained in the certificate."

It is not contended in this appeal that the Attorney General failed to consider the matters set out in sections 8(1) and (2).

17. On the same day that he issued the ATP the Attorney General signed a certificate pursuant to section 8(5) in the following terms:

> "In pursuance of the powers conferred by section 8(5) of the Extradition (Commonwealth and Foreign Territories) Act 1985 as amended, I hereby certify under the authority of the Attorney General that an arrangement has been made in

> pursuance of section 8(3) of that Act with the government of the United States of America in the case of Jack Warner that, if he is returned to 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 extraditable offence in respect of which the Attorney General may consent to his being so dealt with."

18. There is some difference of wording between Section 8(3)(b) dealing with lesser offences and Article 2(5) of the Treaty which provides as follows:

> "5. If extradition has been granted for an extraditable offence, it shall also be granted for any other offence specified in the request 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."

19. Article 14(1)(a) of the Treaty deals with specialty:

> "1. 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;"

The reference to "lesser included offence" refers back to Article 2(5). The appellant submitted that the notion of differently denominated offences is vague and does not protect rights on return.

20. Section 9(1) of the Act was not amended and provides that the Magistrate can only proceed to a hearing on the extradition application if the Attorney General

provides an ATP in pursuance of a request made by the government seeking extradition.

The 2004 Act

21. As stated above the 2004 Act made no change to the terms of section 4. It added the following to section 5:

> "(2) For greater certainty, a person may be returned under this Act whether or not the conduct on which the declared Commonwealth or foreign territory bases its request occurred in territory over which it has jurisdiction."

It provided a new definition of "extraditable offence" in a substituted section 6 which now provides:

> "6. (1) 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—
>
> (a) it is an offence against the law of that territory which is punishable under the law with death or imprisonment for a term of not less than twelve months;
>
> (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 extraterritorial offence, if it took place in corresponding circumstances outside Trinidad and Tobago, and would be punishable under the law of Trinidad and Tobago with death or imprisonment for a term of not less than twelve months; and
>
> (c) in the case of a declared foreign territory, extradition for that offence is provided for by a treaty between Trinidad and Tobago and that territory."

This definition of “extraditable offence” followed what is called the eliminative approach where the only offences not made extraditable were those which failed the minimum gravity or double criminality tests in the new section 6 or were not included in the extradition treaty. In effect this included all indictable offences.

22. Section 6 of the amending Act repealed section 7 of the Act. There was no material change to section 8 of the Act and section 9(2) was amended to specify the documents that must be provided to the Attorney General by the requesting state including in each case particulars of the person whose return is requested; particulars of the facts upon which and the law under which he is accused or was convicted; evidence that provision is made by the law of that territory for the specialty rule provided for by section 8(3), where the specialty rule is not made by an arrangement with that territory; and evidence sufficient to justify the issue of a warrant for his arrest under section 10.

Judicial review proceedings

The High Court decision

23. The judicial review proceedings were heard by Aboud J. He dealt first with the conclusive evidence and ouster clause in section 4(3) of the Act and concluded that he should disregard that subsection because of the fundamental human rights issues which would arise if the Attorney General did not act in accordance with the requirements of section 4(2) of the Act.

24. He then considered the construction of “in conformity” and concluded that it should receive a broad and generous construction in order to facilitate extradition rather than pedantically obstruct it. He considered that the level of conformity required should guarantee in broad terms that an extradition treaty did not compromise the fundamental rights of an accused person under domestic law. The judge proceeded on the basis that conformity with the Act rather than the Act as amended was required.

25. In respect of the argument about the conflicting definitions of “indictable offence” he considered that the First Schedule of the Act appeared to be an exhaustive list of almost every conceivable indictable offence. He further considered that it must be demonstrated that nonconformity would create the type of catastrophe in the real world for claimants that the appellant feared. He did not share those fears.

26. He considered that any differences on extraterritoriality could be managed by executive discretion. He was satisfied that the USA would adhere to its assurances. He did not consider that any divergences between the Treaty and the Act were material.

27. He was satisfied that the certificate issued pursuant to section 8(5) of the Act properly captured the meaning of the arrangement between the two governments. He accepted that the appellant had no legal right to make representations to the Attorney General before he decided to issue the ATP and concluded that the appellant declined to avail himself of the invitation that was subsequently issued.

The Court of Appeal decision

28. The Court of Appeal adopted a narrow and limited approach to the ouster clause and assumed jurisdiction to examine the validity of the USA Order. It further concluded that, given the impact of the extradition process on fundamental rights, the conclusive evidence provision should be dis-applied.

29. The Court agreed with the judge that the conformity required by section 4(2) of the Act was broad and liberal facilitating extradition as far as possible. It also concluded that conformity should be examined against the Act rather than the Act as amended because this was a time specific enquiry as to jurisdiction only.

30. It also examined the apparent conflict between the enumerative method in the First Schedule and the eliminative method in the Treaty where the relevant offences were not individually identified but comprised all indictable offences. The Court accepted that the list of extraditable offences in the First Schedule of the Act was so exhaustive that it was hard to imagine any offences that did not also comprise offences under Article 2(1) of the Treaty. That was sufficient for broad conformity.

31. The Court of Appeal concluded that section 7(1) of the Act extended to extraterritorial offences "committed within the jurisdiction of Trinidad and Tobago". The Court also appeared to accept that by virtue of section 8(3)(c) of the Act the Attorney General could consent to extradition for any other First Schedule offence even if it were extraterritorial and domestic law did not provide for extraterritoriality.

32. Despite the minimum gravity provision it was accepted that section 8(3)(b) of the Act enabled the requesting state to pursue offences punishable by periods of less than one year's deprivation of liberty where it was a lesser offence proved by the facts before the Magistrate in proceedings under section 12 of the Act. The Court saw no

merit in the submission that the wording of Article 14(1)(a) of the Treaty on the issue of specialty was not in conformity with the Act. Any alleged nonconformity would not result in a violation of the specialty rule.

33. Finally, the Court accepted the entitlement of the Attorney General to issue the Certificate and concluded that there was no denial of natural justice in the issue of the ATP.

Issues

34. Before the Board, the appellant raised the following main issues:

(1) whether the issue of conformity or vires is to be assessed by reference to the Act in its current form, or the original Act;

(2) the degree of conformity required to permit an Order to be made under section 4(1) of the Act;

(3) the status of the undisclosed special arrangement entered into with respect to the appellant; and

(4) whether there was procedural or substantive unfairness in the procedure leading to the issuance of the ATP.

The respondent cross-appeals against the Court of Appeal's decision that the conclusive evidence clause and/or the ouster clause in s 4(3) of the Act does not prevent the court examining whether or not the Treaty was in conformity with the Act.

Issue 1: Whether the issues of conformity or vires are to be assessed by reference to the Act in its current form, or the original Act?

35. Trinidad and Tobago operates a dualist system of law as a result of which international treaties negotiated by the executive do not have direct effect in domestic law. Section 4 of the Act provides a mechanism whereby the Act can apply to a foreign territory if an extradition treaty has been negotiated with that territory. That mechanism is the declaration in an Order made under section 4(1) by the Attorney General that the Act applies.

36. The negotiation of the extradition treaty is, therefore, a condition precedent to the exercise by the Attorney General of the power to make an Order subject to negative resolution in Parliament. The USA Order was an exercise of that power and required the Attorney General to be satisfied at the time of making the Order that there was compliance with the conditions set out in section 4(2) of the Act.

37. The amending Act did not alter the terms of section 4 nor did it purport to have any impact on the lawfulness of Orders made prior to the date of the amendments to other sections of the Act. Clearly if the Attorney General were dealing with a treaty negotiated subsequent to the amendment of the Act that would constitute a new state of affairs. It would be necessary to consider the question of conformity having regard to the Act as amended but that does not support the conclusion that the test for the lawfulness of Orders made prior to the amendments was changed. Nor is there any basis for contending that an additional test of compliance with the Act as amended should be applied to such Orders when the Attorney General is considering whether to issue an ATP. That would constitute a rewriting of the statute.

38. That outcome is not surprising. The amendments introduced in 2004 were modest. No change was made to section 4, dealing with the application of the Act, and section 8, dealing with the return provisions, was amended solely to prohibit return if the purpose of the prosecution was based on gender or sexual preference. The change to section 5 was by way of clarification. The amended section 6 changed the definition of extraditable offence from an enumerative to an eliminative approach. It remained focused on indictable offences. The amended section 7 was again by way of clarification in relation to abuse of process and section 9(2) provided for the enumeration of documents rather than the general description which had previously applied.

39. The remaining amendments were essentially of the same character being either by way of clarification or updating. In that context the implication of a new legal test for the validity of Orders made by the Attorney General prior to the amendment of the Act, potentially having an effect upon international diplomatic relations, is not sustainable.

Conclusion on Issue 1

40. The Board concludes, therefore, that the test of conformity should be assessed by reference to the form of the Act at the time when the Order was made.

Issue 2: The degree of conformity required to permit an order to be made under section 4(1) of the Act

41. Section 4(2) of the Act requires that the Treaty should be in conformity with the Act. That plainly does not require exact correspondence and the wording of section 4(2)(a) dealing in particular with the restrictions on return of fugitive offenders points towards conformity having a broader rather than a narrow meaning.

42. Although section 4(2)(a) provides for conformity in particular with the restrictions on the return of fugitive offenders the provisions of section 8(3) of the Act make it clear that specialty protection for the alleged offender on return can be achieved either by the law of the requesting state or by an arrangement made with that territory. That suggests that the absence of the necessary restrictions on return in a treaty does not give rise to a lack of conformity.

43. Section 4(1) of the Act provides that the Act will apply subject to any exceptions, adaptations, modifications or other provisions as may be specified in the Order. This is considerably wider than the corresponding provision in the 1870 Act which confined the powers under the Order to such conditions, exceptions and qualifications as may be expedient. It must follow that any adaptations or modifications made by an Order to the Act would not lead to non-conformity.

44. The structure of the Treaty is broadly similar to corresponding provisions in the Act. Both provide for the definition of extraditable offence, the requirement that extradition should be conduct based, the need for minimum gravity, the inclusion of lesser offences and the obligation to honour specialty.

45. The context is that these provisions are meant to be of general application in relation to treaties negotiated with different foreign territories. Of necessity, therefore, these provisions need to accommodate the diversity of the treaty obligations entered into with different states. A narrow interpretation of conformity could restrict the ability of Trinidad and Tobago to achieve beneficial extradition arrangements with other territories.

46. The context also requires recognition of the fact that the Treaty has no direct effect in domestic law in Trinidad and Tobago although it will have effect in the USA as it is a monist jurisdiction. The implication is that the protection of the fundamental rights of the alleged offender are to be found in the Act. If the Treaty is in conflict with the Act the court is obliged to ensure adherence to the requirements of the Act.

47. In agreement with the Court of Appeal the Board considers that the context of extradition is also of great importance in considering the question of conformity. In *R v Governor of Ashford Remand Centre, Ex parte Postlethwaite* [1988] AC 924, 947 Lord Bridge of Harwich noted:

> "… [extradition arrangements] 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."

48. The fact that the common law had to face the reality that crime was now established on an international scale and had ceased to be largely local in origin and effect was accepted by Lord Griffith in *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 and in *In re Ismail* [1999] 1 AC 320, 327 Lord Steyn, reflecting this fact, said:

> "Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permits it in order to facilitate extradition."

49. These factors point firmly towards a broad and generous construction of conformity and to some extent this was recognised by Clare Montgomery KC, counsel for the appellant, at paragraph 55 of her written submissions. She there submitted that the particular extradition context of section 4(2) required there to be conformity simpliciter between any treaty and the general provisions of the Act and strict conformity with the restrictions on return.

50. In essence it was submitted that there were four features of the differences between the Treaty and the Act which intruded upon the rights of persons brought within the extradition regime. In those circumstances the appellant relied on the observations of Lord Hope of Craighead in *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1 at [24] that where the liberty of the subject is at stake generosity must be balanced against the rights of the persons who are sought to be removed. It was submitted that these four features required a test of strict conformity.

Extraditable offence

51. The first of the four features related to the definition of extraditable offence. In the Act the First Schedule enumerated each of the offences or types of offences in respect of which an extradition order can be made. The enumerative approach reflected the approach taken in the Extradition Acts 1870 – 1935 where the First Schedule was regularly amended to add offences. This was a cumbersome approach where it was necessary to identify each indictable offence in new criminal legislation and make the necessary amendment to the First Schedule.

52. The Treaty, made in 2000, adopted the eliminative approach, discussed at para 21 above by including all indictable offences. That was the approach subsequently taken by the amending Act in 2004. It seems clear, therefore, that the change in the definition of extraditable offence was influenced by a difference of statutory style in the identification of extraditable offences with the enumerative approach being abandoned in favour of the eliminative approach.

53. The Court of Appeal concluded that it was hard to imagine any offences in the First Schedule that did not also comprise offences under the Treaty. That is true but the point made by the appellant is that there are offences falling within the Treaty which are not caught by the First Schedule. The conclusion that the First Schedule offences and the Treaty offences were effectively the same is not accurate. The Treaty offences include sexual offences, firearms offences, explosives offences and common law offences which are not included in the First Schedule.

54. The question is whether this leads to nonconformity. In each case the offences are indictable. Each complies with a minimum gravity requirement. The different drafting approaches to the identification of extraditable offence in the Act and the Treaty are well recognised mechanisms. Where the Act adopts an enumerative approach it is almost inevitable that there will be divergence between the Act and any treaty taking an eliminative approach. In respect of any new treaty where the Act now has an eliminative approach there will almost certainly be divergence if the treaty adopts an enumerative approach.

55. These distinctions are to be expected in making arrangements of this type. The requirement for conformity does not render such arrangements unlawful. It is the Act that has the force of law and until the amendment to the Act extradition could only be granted for offences enumerated in the First Schedule. The fundamental rights of the alleged offender were protected by the Act.

Dual criminality and extraterritoriality

56. Section 7 (1) of the Act provided a definition of extraditable offence in respect of declared foreign territories:

> "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 12 months and which, if committed in Trinidad and Tobago or within the jurisdiction of Trinidad and Tobago, would be one of the offences described in the First Schedule."

57. This is another example of a provision which is based on the Extradition Act 1870 which defines "extradition crime" as "a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act." The issue of the meaning of "within English jurisdiction" arose in *R (Al-Fawwaz)) v Governor of Brixton Prison* [2002] 1 AC 556. The House of Lords was satisfied that the words were intended to add something to crimes committed in England and that the reference must, therefore, be to extraterritorial crimes.

58. The Court of Appeal relied upon *Al-Fawwaz* to support the conclusion that the same wording in section 7(1) of the Act must be a reference to extraterritorial crime and that consequently the Treaty provision in the first part of Article 2(4) was in conformity with the Act.

59. The appellant submitted that the Court of Appeal did not, however, refer to section 6(1)(b) of the Act describing an extraditable offence for the purposes of a declared Commonwealth territory as including an offence which would have been an offence in Trinidad and Tobago either "if it took place within Trinidad and Tobago, or in the case of an extraterritorial offence in corresponding circumstances outside Trinidad and Tobago".

60. The Board does not accept that the wording of section 6(1)(b) affects the construction of section 7(1) accepted by the Court of Appeal. The wording of section 7(1) clearly demonstrates its legislative history. Section 6, however, had no such history since the Extradition Act 1870 did not contemplate the requirement for extradition between Commonwealth countries. Those drafting the legislation, therefore, had to find their own words to deal with extraterritoriality.

61. Secondly, if the appellant's submission were correct the reference to the jurisdiction of Trinidad and Tobago would have little meaning. It was submitted that this was a reference to physical territories over which Trinidad and Tobago would assert jurisdiction such as a local ship or aircraft. In such cases it is highly likely that they would constitute offences taking place in Trinidad and Tobago. Given that extraterritoriality was being asserted in relation to declared Commonwealth territories in the Act and that the 1870 Act had also been found to include extraterritoriality using this wording there was no basis for a construction which concluded that section 7 did not give rise to extraterritorial jurisdiction.

Minimum gravity

62. Minimum gravity is provided for in Article 2 (1) of the Treaty:

> "1. An offence shall be an extraditable offence if, under the laws of Trinidad and Tobago, it is an indictable offence and if, under the laws of the United States, it is punishable by deprivation of liberty for a period of more than one year or by a more severe penalty."

That corresponds with section 7 (1) of the Act set out at paragraph 56 above.

63. Article 2(5) of the Treaty deals with convictions on return for other offences specified in the request.

> "5. If extradition has been granted for an extraditable offence, it shall also be granted for any other offence specified in the request 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."

64. Section 8(3)(b) of the Act at paragraph 16 above includes a provision for the conviction of lesser offences proved by the facts proved before the Magistrate at the extradition hearing. There is no requirement in section 8(3)(b) for the lesser offence to be an extraditable offence and consequently the minimum gravity provision set out in section 7(1) of the Act does not apply to a lesser offence falling within section 8(3)(b) of the Act. The Board agrees with the Court of Appeal that the minimum gravity provisions in the Treaty and the Act are in conformity. There is some difference in the wording between the provisions in that the Act's definition is fact or conduct based

whereas Article 2(5) might be interpreted as dependent on the denomination of the offence. That is relevant to specialty which is dealt with next.

Specialty

65. Specialty is a rule of extradition law that is intended to ensure that the person extradited is not dealt with in the requesting state for any offence other than that for which he was extradited. The rule has been widely relaxed so that the requesting state may be permitted to deal with the defendant for offences other than those for which he was returned which are disclosed by the facts upon which the surrender was based and may be permitted to seek from the requested state its consent to try the defendant for another offence not covered by its original request provided the offences are extraditable (*The Law of Extradition and Mutual Assistance 3rd edition* (2013) para 5.73).

66. It is implicit in the specialty rule that there is a level of comity between the nations involved such as to ensure that the rule will be observed. It serves the further purpose of protecting the rights of the person being returned not to be exposed in the requesting state to allegations of offences other than those for which the requested state has returned him or her.

67. It follows, therefore, that it is desirable that there should be a sufficient degree of particularity about the extent, if any, to which the person returned is exposed to offences other than those for which that person has been extradited. In the case of a dualist country the extradition statute establishes the specialty rule implemented by that territory. In the case of a monist jurisdiction, such as the USA, the specialty rule is likely to be set out in the treaty.

68. This is the context against which one must examine the specialty arrangements in the Act. These arrangements are, of course, designed to accommodate the range of extradition treaties which may be negotiated with different territories. The Board has already noted at paragraph 45 above the diversity of treaty arrangements which have to be accommodated.

69. The specialty arrangement is contained in section 8 of the Act. Section 8(3) provides that the alleged offender can only be dealt with for offences committed prior to his return. There are three categories of such offences. The first is the offence in respect of which the person is being returned, the second is any lesser offence proved by the facts proved before the Magistrate and the third is any extraditable offence in

respect of which the Attorney General consents to the person being so dealt with. Section 8(4) imposes a due diligence requirement on the Attorney General to examine whether the offence could have been included in the original proceedings before the Attorney General gives consent.

70. Section 8(3) also describes the mechanism for ensuring that this arrangement is honoured. That is obviously critical for the person being returned. There are two alternatives. The first is that the Magistrate is satisfied that the law of the country to which the person is being returned is sufficient to secure the specialty arrangement. The statute recognises, however, that the law of the requesting state may not secure the rights of the person being returned as described in the Act and in those circumstances provides for the making of an arrangement with the territory to secure that outcome.

71. The consequence of this is that the statute does not contemplate that a sufficient return regime must be in place in the law of the requesting territory, including the Treaty, and the interpretation of conformity in section 4(2) of the Act must accommodate some divergence between the Treaty and the Act on the issue of specialty.

72. Article 14(1)(a) of the Treaty deals with the rule of specialty. It provides that in addition to the offences for which the person has been returned the person may also be detained, tried and punished for any differently denominated offence based on the same facts on which extradition was granted, provided such offences are extraditable or a lesser included offence. The appellant submitted that this could justify prosecuting a more serious offence than that for which the person was extradited. It is not the function of the Board to determine the meaning of this provision in the courts of the USA but it is certainly capable of being wider than the specialty provision contained in section 8 of the Act.

73. Article 14(1)(c) of the Treaty enables the person returned to be dealt with in respect of an offence for which consent has been provided by the executive authority of the requested state. In Trinidad and Tobago that power is exercised by the Attorney General and is contained in section 8(3)(c) of the Act. It is exercisable only in respect of extraditable offences as defined in the domestic legislation and the exercise of the power is subject to public law supervision.

74. The provision in section 8(3)(c) of the Act for the making of an agreement with the requesting state is clearly intended to provide protection for the person being returned. There are potential difficulties in relying solely on the law in the requesting

state. First, it would require the domestic court to be sufficiently convinced about its meaning. Secondly, since law may be made by someone other than the executive it may be necessary to guard against change in the law. The making of an agreement removes such concerns and secures the necessary protection for the returning person.

75. There are undoubtedly differences in the detail of the specialty arrangements between the Act and the Treaty, but these are an inevitable consequence of comparing detailed statutory arrangements with whatever treaty may need to be considered. These differences were catered for within the Act to secure the protection of the rights of the person being returned.

Conclusion on issue 2

76. For the reasons set out the Board is satisfied that a broad and generous construction should be applied to the interpretation of conformity in section 4(2) of the Act and that the matters raised by the appellant do not lead to any breach of the conformity test.

Issue 3: The status of the undisclosed special arrangement entered into with respect to the Appellant

77. Section 8(5) of the Act makes provision for the making of an agreement in respect of specialty. The matters requiring consideration on this issue in the appeal concern the extent of disclosure required, whether the arrangement is sufficiently precise to achieve the statutory objective and whether the arrangement will be honoured by the requesting state.

78. On the first point, by letter dated 28 December 2015 the Attorney General's office sent a copy of the certificate signed by the Attorney General to the appellant's lawyers. Counsel for the Attorney General had already offered to make disclosure of the arrangement at a court hearing on 17 December 2015. The complaint by the appellant is the failure to provide details of the events leading up to the making of the arrangement.

79. The mechanism chosen by Parliament by way of certification is designed to establish a single approach in respect of a request by any foreign territory. The critical issue is the content of the arrangement. If the arrangement is vague or uncertain it will not satisfy the statutory criteria. *Dean (Zain Taj) v Lord Advocate* [2019] SLT 757, upon which the appellant relied, was a case in which there was a finding that the

memorandum made for the purposes of the Extradition Act 2003 did not provide the necessary protection and could not be cured by subsequent correspondence. In this case the certificate discloses the precise protection for which the Act provides. There is no element of uncertainty.

80. In *Ahmad v Government of the United States of America* [2006] EWHC 2927 (Admin) Laws LJ approved the statement of Kennedy LJ in *Serbeh v Governor of HM Prison Brixton* (unreported) 31 October at paragraph 40:

> "There is still a fundamental assumption that the requesting state is acting in good faith."

The concern of the appellant was not that the USA would act in bad faith but that it would interpret the Treaty and the arrangement in a way that would negate the specialty protection required by the Act.

81. The approach of the USA to the specialty protection provided for in the requested state was considered by the Divisional Court in *Welsh v Secretary of State for the Home Department* [2006] EWHC 156 (Admin); [2007] 1 WLR 1281. The appellants were alleged to have been engaged in investment scheme frauds affecting persons in the USA. The appellants contended that after their return to the USA the US authorities would deal with them in breach of the specialty rule. After a review of the authorities Ouseley J concluded at para 37:

> "The US courts treat the origin and purpose of the specialty rule as deriving from the state parties' interests in extradition, and regard adherence to it as a matter of international comity and respecting foreign relations embodied in the treaty arrangements. The purpose is to protect the sending state against abuse of its discretionary act of extradition: United States v Paroutian (1962) 299 F 2d 486. The United States accordingly applies the rule even where there is no treaty obligation requiring it to do so. That means that the position of the sending state is regarded as of the highest importance."

The Board has been provided with no basis for doubting that conclusion.

Conclusion on Issue 3

82. The certificate provided by the Attorney General disclosed a specialty arrangement which complied with the Act and which the USA could be expected to honour.

Issue 4: Whether there was procedural or substantive unfairness in the procedure leading to the issuance of the ATP

83. Section 9(1) of the Act makes provision for the issue of an ATP:

> "9. (1) Subject to the provisions of this Act relating to provisional warrants, a person shall not be dealt with thereunder except in pursuance of an order of the Attorney General (hereafter referred to as an authority to proceed), issued in pursuance of a request made to the Attorney General by or on behalf of the Government of the declared Commonwealth territory, or the declared foreign territory, in which the person to be returned is accused or was convicted."

84. In this case the appellant had been arrested on foot of a warrant issued by the Magistrate in light of information provided about the allegations of criminal conduct. The Magistrate determined whether or not the appellant should be held in custody or released and in this case set the terms for bail. An ATP is a condition precedent to dealing with extradition proceedings but involves no determination of the entitlement to extradition or the conditions, if any, to which the appellant may be subject in connection with the extradition hearing.

85. The Act makes no provision for representations to be made to the Attorney General prior to the issue of an ATP. In some cases the fugitive will be unaware of the application for the ATP particularly where there is a flight risk. In this case, however, the appellant was aware that there had been an application for an ATP as a result of his arrest under the provisional warrant issued by the Magistrate.

86. It was not suggested that it was unfair for an ATP to be issued by the Attorney General without an opportunity for representations in cases of flight risk. It follows that the submission on fairness in this appeal must proceed on the basis that there is an obligation in some cases only to provide an opportunity for representations.

87. Insofar as this includes those who are aware that an ATP has been issued and have already appeared before a Magistrate it is necessary in assessing fairness to acknowledge that someone in that position is perfectly entitled to make any representation they wish to the Attorney General. That occurred in this case. Representations were made about procedural fairness. No representations were made, however, on the issue of conformity between the Act and the Treaty and whether conformity had to be assessed on the basis of the Act as amended.

88. The appellant relied on *Ramjohn v Permanent Sec, Ministry of Foreign Affairs* [2011] UKPC 20; [2012] 2 LRC 362 to support his submission on fairness. That was a case concerned with public appointments. In one case the Prime Minister revoked an appointment because of an allegation of impropriety and in the second the Prime Minister vetoed an appointment because it was suggested that the nature of the job had changed. In neither case was the person affected advised of the reasons for the decisions.

89. The requirements of fairness in those cases were clearly very different from the present situation. In each case there was a person directly affected who had no opportunity to evaluate or contest the reasons for the denial of entitlement to the post. The correct comparator here is the determination of the entitlement to extradition by the court. It is the court which determines the requirements of fairness and the Attorney General, like any other participant in the proceedings, is bound by those determinations.

90. The requirements of fairness in the issue of an ATP were considered in *R v Secretary of State for the Home Department, Ex parte Norgren* [2000] QB 817. In that case the appellant challenged the power of the Home Secretary to issue an order to proceed with extradition proceedings on the basis of the absence of dual criminality. The Home Secretary indicated to the appellant and the court that, in light of the challenge, he would not issue an order to proceed which is the equivalent of an ATP under the United Kingdom's Extradition Act 1989. The appellant wrote asking for confirmation that, if a further request was made by the requesting state, he would have an opportunity to make representations before an order to proceed was issued. The Home Secretary did not respond and after receiving a further request issued an order to proceed in connection with those charges.

91. The appellant issued judicial review proceedings seeking to quash the order to proceed on the basis of a failure to permit prior representations. The court dismissed the application on the basis that the statutory scheme governing extradition made no provision for representations to be made to the Secretary of State by the subject of the request before an order to proceed was issued, that the Secretary of State had neither

invited the applicant's representations nor given the reassurance sought and that, further, it was not standard practice in the domestic context to warn a person of impending arrest and there were obvious practical reasons not to do so in the case of a fugitive criminal.

92. In considering the requirements of fairness in this case all of those factors need to be taken into account. The scheme of the Act did not provide for representations; prior to the general election, the Attorney General had not invited representations and there is nothing in the Act which suggests that the requirements of fairness for the issue of an ATP vary depending upon any preliminary steps taken in support of the extradition.

93. After the general election the new Attorney General provided an opportunity for representations as set out above. Although there was no obligation upon him to do so he was perfectly entitled to take that course. By their letter of 16 September 2015 the appellant's lawyers responded that they could not accede to an arrangement which imposed a continuing fetter upon the liberty of their client. The lawyers did not ask for an extension of time or suggest a timetable for the making of representations. Their client was on continuing bail and the only factor affecting his liberty was the requirement to stay in Trinidad and Tobago and surrender his passport and to report twice per week to police.

94. In light of the timetable set by the Magistrate requiring any ATP to be issued by 21 September 2015 the offer by the new Attorney General was inevitably subject to agreeing a fresh timetable with the court. It was the appellant's choice to decline that opportunity. The Attorney General did not act unfairly.

Conclusion on Issue 4

95. The Board is satisfied that there was no unfairness in the procedure leading to the issue of the ATP.

Conclusion

96. In light of the conclusions reached by the Board on the issues raised by the appellant the appeal must be dismissed. The cross-appeal gives rise to constitutional issues about the relationship between the executive, the legislature and the courts in Trinidad and Tobago. Since the appeal must in any event be dismissed the Board does not consider it necessary in this appeal to address those issues.