

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

Claim No. BVIHCR 2021/0017

**ON APPEAL FROM THE MAGISTRATES' COURT
Cause No. BVIMCR 2020/0261**

**AND IN THE MATTER OF AM APPEAL UNDER SECTION 103 of the EXTRADITION ACT 2003
(OVERSEAS TERRITORIES) ORDER 2016**

BETWEEN:

NYRON "BATT" ERICKSON

APPELLANT/REQUESTED PERSON

AND

THE UNITED STATES OF AMERICA

RESPONDENT/REQUESTING STATE

Appearances: Mr. Edward Fitzgerald Q.C., Mr. Hugh Wildman, and Mrs. Valerie Gordon, Counsel for the Appellant/Requested Person
Mr. John Black Q.C. and Mrs. Fiona Forbes-Vanterpool, Principal Crown Counsel for the Respondent/Requesting State

2022: June 20th, 21st, 22nd
2022: August 5th
Re-issued 11th August, 2022

JUDGEMENT ON APPEAL

[1] **FLOYD J:** This is an appeal of the decision of the learned Senior Magistrate, Tamia N. Richards, dated 1st July 2021, sending the extradition case of the appellant, Nyron "Batt" Erickson, to the Governor. The respondent had applied to extradite the appellant to the United States Virgin Islands.

On 13th August 2021, the Governor had issued an order for the extradition of the appellant. The appeal is brought pursuant to **s. 103** of the **Extradition Act 2003**, extended to the Territory of the Virgin Islands by the **Extradition Act 2003 (Overseas Territories) Order No. 990 of 2016**. The United States of America is a Schedule 2 extradition territory under **Part 2** of the **2016 Order**.

THE FACTS

- [2] The appellant is a citizen of the Territory of the Virgin Islands, a Belonger. On 20th October 2020, the government of the United States of America (USA), the respondent, requested the extradition of the appellant to the United States Virgin Islands (USVI). The extradition request is in respect of a criminal indictment issued by a federal grand jury sitting in Saint Thomas, USVI on 1st August 2019. The appellant and other co-accused were charged with conspiracy to launder monetary funds from outside the USA and unlawfully transporting the funds into the USA. The appellant and other co-accused were also charged with two counts of concealed bulk cash smuggling in amounts over \$10,000 into the USA.
- [3] On 17th January 2020, a provisional arrest warrant was issued for the appellant. After being at large for several months, the appellant surrendered to local authorities on 30th August 2020. The appellant appeared in court on 31st August 2020. On 16th September 2020, a status hearing was conducted and an extradition hearing was scheduled for 4th November 2020. On 20th October 2020, the Attorney General of the USA issued a certified Extradition Request. On 30th October 2020, the Governor of this territory issued a Certificate to Proceed, pursuant to **s. 70** of the **Extradition Act**. The Certificate to Proceed, the Extradition Request and supporting documents were sent to the Magistrate, pursuant to **s. 70(9)** of the Act and were also served on the appellant on 30th October 2020.
- [4] On 4th November 2020, an initial hearing took place in the Magistrates' Court, engaging **s. 78** of the Act. A hearing was scheduled for 18th January 2021, however, on 4th January 2021 further particulars were requested by the appellant, pursuant to **s. 78(2)c)** of the Act and the hearing was adjourned to 8th – 10th February 2021. A further adjournment occurred and the extradition hearing was rescheduled to 4th – 6th May 2021. On 1st July 2021, the learned Senior Magistrate dismissed the challenges of the appellant and remitted the case to the Governor, pursuant to **s. 87(3)** of the Act.

[5] The appellant filed a Notice of Application for leave to appeal and filed perfected grounds on 28th September 2021. An addendum was filed to the perfected grounds on 6th December 2021. The respondent did not object to the Application for Leave to Appeal and it was granted by this court on 15th December 2021.

[6] Written material for this appeal was filed by counsel for the appellant on 12th May 2022, and 9th, 16th, 21st June 2022. Written material for this appeal was filed by counsel for the respondent on 1st April 2022, and 13th, 20th June 2022. Oral submissions were received on 20th, 21st, 22nd June 2022. The court has considered all of the material provided and all of the submissions made by both parties to this appeal. The detailed and extensive submissions were thoughtful and helpful in the determination of this matter.

THE POSITION OF THE PARTIES

[7] Learned Queen's Counsel for the appellant submits seven grounds of appeal. The first six were listed in the filed material and the seventh was referred to in oral submissions.

1. **Inadequate Particulars:** The particulars supplied by the Requesting State were inadequate for the purposes of **s. 78(2)c)** of the Act and were insufficient to identify relevant extradition offences, contrary to **s. 137** of the Act.
2. **Forum:** Extradition would not be in the interests of justice under **s. 83A** of the Act. However, the learned Senior Magistrate was precluded from considering this by reason of the prosecutor filing a certificate under **s. 83C**. The appellant invites the court to quash the certificate under **s. 83D** and make its own considerations under **s. 83A (2)**.
3. **Flagrant Denial of Justice:** The appellant will not receive a fair trial and justice, in breach of **Article 6** of the **European Convention of Human Rights (ECHR)**.
4. **Right to Respect for Private and Family Life:** The extradition of the appellant would constitute a disproportionate interference with the rights and the interests of the appellant and his family under **Article 8 ECHR**.
5. **Abuse of Process:** The respondent's non-disclosure of the rulings of Molloy J. in the USA, dismissing with prejudice the case against the appellant's co-accused for prosecutorial misconduct, unfairly prejudiced the appellant.

6. **Unconstitutionality of Extradition in the Absence of a Prima Facie Case:** The particular designation order under **s. 84(7)** of the Act exempting the respondent (USA) from providing a prima facie case in extraditions from the Territory of the Virgin Islands (BVI), is unlawful and contrary to **s. 15** of the **Virgin Islands Constitution Order 2007**.
7. **The Applicable Legislation:** The **1972 Anglo-American Extradition Treaty** is applicable to the Territory of the Virgin Islands (BVI). Therefore, the evidential requirement that a requesting state provide a prima facie case in support of an extradition request remains.

- [8] Learned Queens Counsel for the appellant submits that the offence of money laundering must be described with clarity, including the role of the requested person. In this case, there is a lack of detail, such that a court cannot determine whether the activity is illegal under BVI law. The fact that it is a conspiracy charge does not remove the necessity to particularize the nature of the unlawful conduct. Further, the learned Senior Magistrate was wrong to focus on whether the particulars of the offence were made out in the requesting state rather than in the executing state.
- [9] The Senior Magistrate was precluded from considering whether the extradition was in the interests of justice because a prosecutor's certificate was tendered. Learned Queens Counsel for the appellant submits that the certificate should be quashed. The learned Director of Public Prosecutions (DPP) failed to provide any reasons to justify her position that there would be insufficient admissible evidence for the prosecution to be conducted in BVI. **Section 83D** of the Act confers a judicial review jurisdiction at the appellate stage. The court should therefore undertake its own assessment as to whether extradition is barred by reason of forum, using the interests of justice considerations found in **s. 83A (3)**.
- [10] The appellant relied upon the evidence of two experienced American defence attorneys to support the submission that he would experience a flagrant denial of justice and a breach of his right to a fair trial under **Article 6 ECHR**, if extradited. The Senior Magistrate, it is submitted, erred in concluding that **Article 6** rights did not offer protection through to the sentencing process. Learned Queens Counsel submits that the appellant will experience pressure to plead guilty. The American plea-bargaining system is not an acceptable one based upon the disproportionate disparity in punishment between a guilty plea and conviction after a contested trial.

- [11] Learned Queens Counsel submits that the Senior Magistrate was wrong in finding that the appellant's **Article 8 ECHR** right to respect for private and family life was not breached. In conducting the balancing exercise measuring the interests of the appellant and his family against the public interest in honouring the extradition request, mistakes were made. The test is not one of exceptionality or rarity, ordinary factors can render the extradition disproportionate. Delay since the offence was committed is also a consideration and may reduce the public interest in the extradition. The possibility of prosecuting a requested person in the executing state is a relevant consideration for the **Article 8 ECHR** balancing exercise, especially where children are concerned. That, in turn, relates back to the forum issue, the prosecutor's certificate and the interests of justice.
- [12] Learned Queen's Counsel for the appellant submits that the failure of the requesting state to disclose the fact that proceedings against the co-accused were dismissed with prejudice by Molloy J. when it was found that the delay caused by American prosecutors was designed to give the United States a tactical advantage in the case, constitutes an abuse of process. Such findings of prosecutorial misconduct should not be sanctioned. The learned Senior Magistrate was wrong to rely upon the affidavit of Assistant U.S. Attorney Potter without question. The failure to volunteer such serious information creates unfair prejudice to the appellant and usurps the integrity of the extradition regime.
- [13] Learned counsel, Mr. Wildman, for the appellant, challenged the lack of a prima facie case in the extradition material, engaging questions as to the applicable legislation and breaching the appellant's rights. Learned Queen's Counsel for the appellant did, however, acknowledge that, on the face of it, **s. 84(7)** of the Act and the designation order made thereunder, removed the need for the requesting state to provide a prima facie case. But that limited concession does not settle the matter. The designation order is unconstitutional, breaching the appellant's right to personal liberty guaranteed by **s. 15** of the **Virgin Islands Constitution Order 2007**. The constitutional right, extending to the provision of a prima facie case, prevails over the terms of the designation order exempting the United States from such requirement. This is inconsistent with the terms of the **1972 Anglo-US Extradition Treaty** which still governs. Learned Queens Counsel relied upon the case of **R. v Ferras**¹ in submitting that fundamental justice required the person sought for extradition be accorded an independent and impartial judicial determination on the facts and evidence on the ultimate question

¹ [2006] 2 S.C.R. 77

of whether there is sufficient evidence to establish the case for extradition. The court must be able to assess whether the evidence is sufficient and reliable, in satisfaction of the requested person's constitutional rights. This issue was not argued before the learned Senior Magistrate but it is more appropriately placed before this court as the natural forum for consideration of constitutional rights.

- [14] Learned Queens Counsel for the respondent submits that the particulars of the offences supplied in the Request are sufficient and adequate for the purpose of **s. 78(2)** of the Act. The learned Senior Magistrate applied the correct test in respect of BVI and USVI law. She was entitled to, and correctly did, draw inferences from the alleged facts in regard to the conspiracy case.
- [15] The provisions of **ss. 83A to 83C** of the Act enable the prosecutor to have input into the extradition question. Learned Queens Counsel for the respondent submits that the Senior Magistrate was correct to rely upon the prosecutor's certificate in disposing of the forum issue. The DPP is under no duty to provide reasons for the basis of her certificate. Whether fairness dictates that the DPP should give reasons nonetheless, depends upon the facts of the case. Although **s. 83D** permits the questioning of the prosecutor's certificate, it does not follow that reasons for such a decision must be given. The independence of the Office of the Director of Public Prosecutions (ODPP) must be respected. It is not for the court to determine the reasonableness of the DPP's decision or to substitute its belief for that of the DPP. The DPP followed the procedure in the statutory framework. It is submitted, therefore, that fairness does not require the DPP to provide reasons for determining that there would be insufficient admissible evidence for prosecution, and her belief that BVI is not the most appropriate jurisdiction to prosecute the appellant.
- [16] Learned Queens Counsel for the respondent submits that the Senior Magistrate correctly found that there was nothing unlawful or oppressive in the American plea-bargaining system. She correctly rejected the argument that the appellant would be punished for exercising his right to trial. In finding that the American plea-bargaining system did not constitute a breach of human rights, the learned Senior Magistrate did not misdirect herself on the **Article 6 ECHR** issue.

- [17] The Senior Magistrate carefully conducted the required balancing exercise under **Article 8 ECHR**, including a consideration of the impact of extradition on the appellant's children. This, submits learned Queens Counsel for the respondent, was proper and appropriate. The finding that the interference to the appellant's private and family life was a proportionate response to the legitimate aim of preventing crime and honouring treaty obligations, was well founded. It was entirely appropriate, submits learned Queens Counsel, for the Senior Magistrate to rely upon the prosecutor's certificate and the affidavit of the Assistant U.S. Attorney in determining that BVI was not the appropriate forum.
- [18] Learned Queens Counsel for the respondent submits that there was no evidence of deliberate manipulation of the extradition process on the part of the requesting state nor bad faith in the failure to disclose the results of the prosecution against the appellant's co-accused. The learned Senior Magistrate was entitled to place the weight that she did on the affidavit of the Assistant U.S. Attorney, which was also provided to the appellant. There was no usurpation of the integrity of the extradition regime.
- [19] The relevant law for the purposes of extradition between the United States and the Territory of the Virgin Islands is the **2003 Extradition Act**, extended to the territory by way of the **2016 Order**. The United States is exempt from the requirement to establish a prima facie case, as required by **s. 84(1)** of the **2016 Order**, by reason of **s. 84(7)** and the designation as a category 2 territory. Learned Queens Counsel for the respondent submits that constitutional rights are not absolute but rather are subject to prescribed limitations. **Section 15** of the **Constitution** permits the deprivation of liberty in accordance with the law in certain circumstances, including effecting extradition. The court in the **Ferras** case emphasized that **s. 7** of the Canadian **Charter** (similar to **s. 15** of the **Constitution**), does not guarantee a particular type of process for all situations where a person's liberty is affected. It guarantees a fair process, having regard to the nature of the proceedings at issue. **Article 8** of the **2003 Treaty** and **ss. 70** and **78(2)** of the **2016 Order** contain sufficient procedural guarantees and safeguards against arbitrary detention and deprivation of liberty, in accordance with due process, under **s. 15** of the **Constitution** and the principle of procedural fairness in **Ferras**.

ANALYSIS

[20] The court will deal with the grounds of appeal as enumerated by the appellant, beginning with **Inadequate Particulars**. That issue is dealt with in the decision of the learned Senior Magistrate at paragraphs 92 - 110 of her decision. The focus of this ground of appeal relates to the charge of money laundering and not the charges of bulk cash smuggling. The focus of the appellant's concern relates to the particulars of the offence for the purposes of **s. 78(2)** of the Act. Under that section, it is incumbent upon the requesting state to provide particulars of the offence specified in the request. This is read in conjunction with **s. 137**, wherein the requested person's conduct must be found to constitute an extradition offence in relation to the extradition territory and under the law of the extradition territory. As learned Queen's Counsel for the appellant points out, this is often referred to as the requirement of dual criminality. The alleged offence must be based on conduct that would support prosecution in not only the requesting state's jurisdiction but also in the jurisdiction of the requested person, if it had occurred there.

[21] Queen's Counsel for the appellant relies upon the case of **FK v Germany**² at **para 54**:

"There is consequently no requirement for full and exhaustive particularization, the appropriate level of particularization being dependent upon the circumstances of the specific case... However, sufficient circumstances must be set out to enable the requested person and the requested state (i) to identify the offence with which the requested person is charged; (ii) to understand, with reasonable certainty, the substance of the allegations against the requested person and in particular when and where the offence is said to have been committed and what is said to have been done."

[22] At para 95 of her decision, the learned Senior Magistrate referred to the case of **Von Der Pahlen v Government of Austria**³ at **paras 21 – 22** which dealt with how far the extradition warrant had to go:

"The purpose is that the person concerned should know the essence of the offence which he is alleged to have committed, which will include some description of his conduct, where it occurred and over what period. The amount of detail required to achieve this purpose is a matter of degree."

² [2017] EWHC 2160 (Admin)

³ [2006] EWHC 1672 (Admin)

- [23] It is clear that the Senior Magistrate was alive to the issue of particularization. She reviewed the Grand Jury Indictment and the affidavits of Assistant U.S. Attorney Potter in reaching her conclusions. The affidavit, dated 14th October 2020, refers to three incidents involving customs agents in St. Thomas, USVI and individuals that are allegedly connected to the appellant by admissions from the persons stopped, as well as by text messages. Some messages are attributed to the appellant and some to an unknown third party. Some messages refer to the purchase of what is referred to as weed, and some to the movement of money between BVI & USVI. There was some joint travel also noted between the persons stopped. All of the incidents referred to related to the importation of sums of money well in excess of the allowed undeclared amounts. The reference by the Senior Magistrate to inferences to be drawn from the evidence are completely appropriate. It accords with the instructions that a court would give to a jury based on circumstantial evidence, particularly in cases of alleged conspiracy. The Senior Magistrate was attempting to articulate how the evidence related to the alleged offences, which was entirely appropriate. This court respectfully disagrees with learned Queen's Counsel for the appellant. There is no unsafe inference being drawn from the text message allegedly coming from the appellant indicating that \$35,000 is to purchase weed. It simply cannot be that such an amount of cannabis would be for personal use. It must be for resale and therefore part of illicit drug activity. Such text messages must be considered in light of the utterances and the actions of the appellant's co-accused, in reference to the appellant.
- [24] It is clear that the learned Senior Magistrate accepted the affidavit of Assistant U.S. Attorney Potter, in conjunction with the indictment, as to identifying the illegal drug activity. It must be related to weed or cannabis, given the text message content and the utterances of the co-accused. That is a controlled substance in both USVI and BVI. Amounts purchased for \$35,000 are substantial and cannot be for personal use. The appellant's role is alleged to be the providing of funds to make purchases. The location of the activity is between USVI and BVI, with at least one specified purchase occurring in St. Thomas, USVI. None of that requires any leap of faith and is entirely evident in the documents presented by the requesting state, as the learned Senior Magistrate correctly found.
- [25] The Senior Magistrate did not restrict her considerations to whether the material was sufficient to establish an offence in USVI. At paras 106 - 110, she went on to consider whether it also constituted an offence in BVI, as she was required to do. The Senior Magistrate was satisfied, with reference to

the **Criminal Code 1997, ss. 311 & 312, Proceeds of Criminal Conduct Act, s. 28(1), Customs Management and Duties Act 2010, s. 110(b)** and **Archbold Criminal Pleading Evidence and Practice 2021, paras 33 - 05, 33 - 9, and 33 - 14**, that the test of dual criminality was met. The court cannot find any fault with that. In addition, the learned Senior Magistrate had before her the Prosecutor's Certificate dated 28th January 2021. The certificate confirmed that the learned DPP had decided that there were one or more offences for which the appellant could be prosecuted in BVI that corresponded to the extradition offences. That would have fortified the conclusion of the Senior Magistrate regarding dual criminality.

[26] Overall, it is clear that the test for particularity was met in the decision of the learned Senior Magistrate. The case for the requesting state did not consist of witness statements nor other detailed evidence because, quite simply, they were not required under the terms of the governing legislation. In that way, there is some overlap between this ground of appeal and the ground relating to the applicable legislation, and whether a prima facie case was necessary. That will be reviewed later. The information provided in the affidavit of the Assistant U.S. Attorney must be taken as a whole, as the Magistrate did, when considering the conspiracy allegation. The essence of the alleged offences clearly involved the transfer of large amounts of money between BVI and USVI to facilitate the purchase of cannabis. The amounts were so great that it could not be for personal use but rather for resale. The role of the appellant was alleged to be the supplying of money for the purchase. The dates and locations of the three incidents referred to were clearly set out in the documentation. There was no ambiguity. The particulars of the offences and the property in question were all set out. The Senior Magistrate was satisfied in relation to all three counts, although she pointed out at para 97 of her decision that there had been no real argument against the Bulk Cash Smuggling counts, which appears to also be the case in this appeal. The Senior Magistrate was correct to find, on the basis of the evidence presented, that sufficient particulars existed for the appellant to know and understand the allegations in the case against him. This ground of appeal is therefore dismissed.

[27] The next consideration is **Forum**. Under **s. 83A** of the Act, extradition is barred by reason of forum if the extradition would not be in the interests of justice. Considerations in that regard are found at **s. 83A (2)**. It includes whether a substantial amount of the activity was performed in this territory and, having regard to matters specified in **s. 82A(3)** relating to the interests of justice, whether the

extradition should take place. However, under **s. 83B**, the Senior Magistrate was precluded from reviewing these forum considerations because the DPP filed a prosecutor's certificate under **s. 83C**. The Senior Magistrate therefore, at paras 208 - 211, held that the prosecutor's certificate, which she found was supported by the affidavit of the Assistant U.S. Attorney, disposed of the forum issue. Learned Queen's Counsel for the appellant sought to quash the prosecutor's certificate under **s. 83D** and have this court review the question of forum bar in the interests of justice, according to **s. 83A**.

[28] Learned Queen's Counsel for the appellant submitted that this was the first time that a prosecutor's certificate had been maintained under this Act, and while there was no general requirement to provide reasons, the DPP should have done so. Extradition is a serious matter. Full details of the reasoning behind the prosecutor's certificate were required, in order for the court to review and determine whether sufficient reasons existed for the decision of the DPP. In this case, the DPP has not identified the corresponding criminal offence charges in this territory and more importantly, has not explained why there would be "insufficient admissible evidence for the prosecution" in this territory. The certificate should be quashed because, learned counsel Mr. Wildman for the appellant submitted, it is not open to the decision-maker, post facto, to provide supplemental reasons for the decision. It is not enough for the DPP to simply recite the relevant statutory test at **s. 83C (4)**. It is insufficient for the DPP to merely follow a formulaic guide. More is needed, to ensure fairness.

[29] Learned Queen's Counsel for the respondent submits the DPP is under no duty to provide reasons for issuing the certificate. He acknowledges that there is a power of judicial review by way of questioning the certificate under **s. 83D** of the Act. But he questions whether fairness dictates that in this case. Learned Queen's Counsel for the respondent refers to the case of **R. v Civil Service Appeal Board Ex Parte Cunningham**⁴, wherein the court held that when a statute conferred on anybody, the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. Further, counsel submitted that while a decision by a DPP not to prosecute can be reviewed, it did not follow that reasons for such a decision must be given. The role of the DPP is to decide, in the

⁴ [1991] 4 ALL ER 310

public interest, whether a prosecution should be brought. See the case of **R. v DPP Ex Parte Treadway**⁵.

- [30] Clearly, the learned DPP has done what is required of her in stating the grounds for issuing a certificate in this case. She has followed the terms and the wording found at **s. 83C** of the Act. The appellant has a totality of material provided to him in support of the request to extradite. The prosecutor's certificate is but a part of that. The appellant has the overview of the case found in the Assistant U.S. Attorney's affidavit. Presumably, the DPP had the same material. The decision of the learned DPP to issue a certificate regarding the prosecution of extradition offences is part of the DPP's overall prosecutorial function. The ODPP is an autonomous branch of the criminal justice system. Its mandate is to prosecute criminal offences, and it must be free to make decisions on whether and when to prosecute, based on the traditional values of whether it is in the public interest and whether there is a reasonable prospect of obtaining a conviction. That is essentially reflected in the terms of **s. 83C (4)c** of the Act.
- [31] Crown prosecutors play a pivotal role in the administration of the criminal justice system. The ODPP must be allowed to perform the functions with which it has been entrusted without interference. Discretion in pursuing justice is an important aspect of that role. It is a fundamental principle that Crown counsel must be allowed to carry out their prosecutorial responsibilities independent of any outside influences. Prosecutors must be allowed to use their professional judgement when carrying out their duties as ministers of justice. Many discretionary decisions are made daily by Crown prosecutors. The independence of the roles and responsibilities of the various players upon which the criminal justice system depends, must be respected. The DPP is the chief law officer of the Crown. ODPP authority flows from **s. 59** of the **Virgin Islands Constitution Order 2007**. Under **s. 59(1)**, there is a DPP whose office is a public office. Under **s. 59(4)**, powers conferred upon the DPP are vested in him or her to the exclusion of any other person or authority. Under **s.59(6)**, the DPP is not subject to the direction or control of any other person or authority in the exercise of the powers conferred on him or her under this section. All of this illustrates the strict and necessary independence of the ODPP in carrying out its duties.

⁵ [1997] Lexis Citation 2136

- [32] Thus, while **s. 83D** of the Act allows for the questioning of a prosecutor's certificate, it should not be done unless abundantly supported and found to be necessary. In this case, the DPP has followed the terms of the legislation as found in the content of her certificate. It cannot be said that there is a lack of information generally about the case that the appellant faces. He is not left in the dark, so to speak. There is no indication of bad faith or mala fides on the part of the learned DPP in reaching the conclusions found in her certificate. She is not, according to the legislation, required to provide reasons for her decision not to prosecute the appellant in this territory for the corresponding offences. That is in keeping with her role and function. The learned Senior Magistrate was correct not to find fault with this extradition based upon forum, in view of the prosecutor's certificate, and this court is not convinced, for the reasons advanced, that the certificate should be quashed and the forum bar explored in the interests of justice. For all of these reasons, this ground of appeal is dismissed.
- [33] **Flagrant Denial of Justice.** The next ground of appeal involves whether there has been or would be a flagrant denial of justice if extradition went forward, based on **s. 87** of the Act and a breach of the appellant's **Article 6 ECHR** right to a fair trial. The question for consideration is whether the extradition is compatible with the Human Rights Convention. The appellant relied upon the evidence of two experienced American criminal defence lawyers, Joshua L. Dratel and Lindsay A. Lewis. If extradited to stand trial in USVI, the appellant would be pressured into pleading guilty because he would face a significantly greater sentence if convicted after trial. The plea discount is enormous in American criminal cases. Sentencing considerations are extensive and American judges can take into account unproven criminal allegations and draw negative inferences not found in sentencing in this jurisdiction.
- [34] The learned Senior Magistrate dealt with this issue at paras. 150 - 174 of her decision. She referred to several cases to support her conclusions. As was stated in **MacKellar v The United States of America & H.E The Governor of the Cayman Islands**⁶ at **para 72**, flagrant denial of justice is a very stringent test. At **paras 73 – 75**, the court confirmed that, in order to take into account relevant conduct, there should be a nexus between the extradition crime and the extraneous behaviour. The ambit of evidence that can be considered is therefore limited. The sentencing judge must also examine the reliability of the evidence. Several safeguards exist to assist a defendant in the U.S.

⁶ [2020] Grand Court of the Cayman Islands Case No. 06385/2017

criminal justice system, including the assistance of counsel in negotiating with the prosecution about the evidence, making objection to the admission of the evidence, testing and probing the evidence, presenting evidence to rebut and making submissions in mitigation. Those are similar to the safeguards for a fair trial listed under **Article 6 ECHR**.

[35] The court in **McKinnon v Government of the United States of America**⁷ addressed this issue at **para 37**, in referring to not only a broad and liberal construction of extradition laws (to serve the transnational interest in bringing to justice those accused of serious cross-border crimes...), but also the need in the conduct of extradition proceedings to accommodate legal and cultural differences between the legal systems of the many foreign friendly states with whom the U.K. has entered into reciprocal extradition arrangements. Learned Queen's Counsel for the appellant submitted that the potential sentence the appellant could face if convicted after trial in the U.S.A. was "very substantially more," as described in the **McKinnon** case. At **para 38**, the court recognized the disparity between consequences dependent upon the appellant co-operating or not was very marked. However, it would need to go significantly beyond the defendant's "just deserts" upon conviction to constitute unlawful pressure. The learned Senior Magistrate considered the **McKinnon** case at length and found the facts of the case at bar not to reach that level of undue pressure.

[36] The Senior Magistrate also referred at length to the case of **United States of America v Julian Assange**⁸, which in turn mentioned the case of **Babar Ahmad v United Kingdom**⁹, on the issue of "plea bargaining" and its coercive powers in the American criminal justice system, in which a defendant receives a reduction in sentence for guilty plea in advance of trial. Nothing unlawful nor improper was found to exist in that process. While it is more common in the U.S.A., it also exists in the European criminal justice system. In the American context, constitutional protections exist to ensure voluntary guilty pleas, informed decisions and judicial inquiries.

⁷ [2008] UKHL 59

⁸ January 4, 2021 (Unreported)

⁹ (2010) 51 E.H.R.R.

- [37] The court in the **Assange** case also examined the decision in **Welsh and Another v Secretary of State**¹⁰, regarding the issue of “upwardly enhancing” a sentence for an extradition offence to include other offences for which extradition had been refused. That is akin to what was discussed in the evidence of attorneys Dratel and Lewis, where an American sentencing judge could consider evidence relating to matters which the appellant had not been convicted of. The court in **Welsh**, while noting it may be possible to disagree with the merits or effects of the process, found that the broader American approach did not mean it was a breach of specialty (the specialty arrangements). At **para 237**, the court in the **Assange** case noted that these comments confirmed the court’s view that the U.S. approach to determining what is relevant to sentencing, is broader than the procedure adopted in the U.K., but is nonetheless legitimate. Significantly, the court emphasized that “if the defence was right, the availability of sentence enhancement would render ALL extradition requests by the U.S. doomed to failure. This cannot be the case.”
- [38] The court in the **Assange** case also mentioned the **MacKellar** case at **para 238**, stating that the same argument had been advanced unsuccessfully in that case. The court in **MacKellar**, it was noted, had set out the matters a U.S. judge would have to be satisfied about before a sentence could be increased and noted the safeguards in place to ensure there was no denial of justice.
- [39] The learned Senior Magistrate was alive to all of these issues and considered them at length. This court can find no basis upon which she did so erroneously or incorrectly. There would be no flagrant denial of justice and the appellant’s **Article 6** rights would not be violated if extradition proceeded. The right to a fair trial under **Article 6 ECHR** includes the right to a fair and public hearing, the presumption of innocence, the right to be informed promptly and in detail of the nature of the accusation, the right to have adequate time and facilities to prepare a defence, the right to defend in person or through legal assistance, and the right to an interpreter. All of those rights are enshrined in the American criminal justice system. This ground of appeal must therefore be dismissed.

¹⁰ [2006] EWHC 156 (Admin)

- [40] **Right to Respect for Private and Family Life.** The next ground of appeal encompasses **Article 8 ECHR** and the right to respect for private and family life. This was dealt with by the learned Senior Magistrate at paras 175 – 207 of her decision. The appellant relied upon his affidavit and that of his mother to establish his connection to this territory. As the Senior Magistrate recognized, the appellant has deep roots in the Territory of the Virgin Islands. He was born on 12th July 1992. He is a Belonger, having lived here all his life. He has three children but only one lives in this territory. The other two live in Florida and St. Thomas. The male child living in this territory has a medical condition which requires monitoring. The appellant provides financial support for his children. The appellant's extended family is in this territory. The appellant operates his own businesses in the trucking, heavy equipment and marine service industries. His extradition would have a negative impact upon his family and his businesses.
- [41] Learned Queen's Counsel for the appellant submits that it is a proportionality exercise, balancing the interests of the appellant and his family, with the public interest in honouring extradition treaties. This was recognized in several cited cases. In **H (H) v Deputy Prosecutor of the Italian Republic (SCE)**¹¹, the court noted that the question was always whether the interference with the private and family lives of the extradite and members of his family was outweighed by the public interest in extradition. There is a strong public interest in the United Kingdom honouring its international treaty obligations. However, exceptionality was not the test. In considering **Article 8** and family life, the child's best interests were a primary consideration. In addition to relying upon the strong family and business connections the appellant has to this territory, learned Queen's Counsel for the appellant also referred to the forum issue, submitting that the Senior Magistrate was wrong to rely upon the prosecutor's certificate (and therefore the affidavit of Assistant U.S. Attorney Potter) in finding this territory was not the appropriate forum for this prosecution. However, the forum argument has already been dealt with in this decision.

¹¹ [2013] 1 AC 338

[42] The proportionality test was reiterated in the case of **Norris v Government of the United States of America**¹², where the court stated at **para 106**, that whether extradition is necessary depends upon whether it is proportionate to the legitimate interest served by extradition in [the] case or ... whether a fair balance [is] struck between the competing public and private interests involved... It is of course relevant that extradition is by its nature very likely to have adverse consequences for the private or family life within the jurisdiction of the person being extradited. The mere existence of some adverse consequences will not be a sufficient counterweight, where there is a strong public interest in extradition.

[43] While it is true that the appellant has strong connections to this territory, that must be balanced with all of the other considerations. There can be no doubt that rights of citizenship are significant. As the court stated in **Pomieczowski v District Court of Legnica, Poland**¹³ at **para 49**: “The right of a person to enter and remain in the country of which he is a national is the most fundamental right of citizenship.” However, learned Queen’s Counsel for the respondent submitted that the public interest in this case strongly outweighed any adverse impact to the appellant’s family life. As was noted in the **Norris** case, some measure of interference with private and family life is inevitable and inherent in extradition matters. The learned Senior Magistrate considered all of this case law and then followed the **Article 8** rights test set out in the case of **H (H)**. First, the court asks whether there is or will be an interference with the right to respect for private and family life. In this case, the Senior Magistrate quite rightly concluded there would be. She then moved to the second consideration, whether that interference is in accordance with the law and pursues one or more of the legitimate aims listed in **Article 8**. She found, again quite rightly, that the interference was in accordance with the law and was designed to prevent crime or disorder, as set out in **Article 8**. This accorded with the public interest of honouring international treaty obligations. The Senior Magistrate then turned to the third consideration of whether the interference is “necessary in a democratic society” in the sense of being a proportionate response to that legitimate aim. In considering the serious nature of the allegations and the potential sentence, she correctly found that the interference with the appellant’s family and private life was necessary in a democratic society such as ours. It was a proportionate response to the legitimate aim of fighting transnational crime and honouring treaty

¹² (No 2) (SCE) [2010] 2 AC 487

¹³ (SCE) [2012] 1 WLR 1604

obligations. The interference with the appellant's **Article 8** rights was therefore justified. The Senior Magistrate examined and reviewed the appellant's circumstances and situation. While he has businesses here in this territory as well as family, two of his children live with their mothers elsewhere. His third child, although living in this territory, also has his mother here to care for him. The appellant provides financial support for his children.

- [44] It must be further noted that while the presence of children in the life of the appellant is a consideration under this heading, there are recognized parameters. The court stated, in the case of **M. M. v Canada (Minister of Justice)**¹⁴, that the best interests of children on surrender for extradition must be considered in light of other important legal principles and the facts of the individual case...The legal principle of the "best interests of the child" may be subordinated to other concerns in appropriate contexts; its application is inevitably highly contextual; and society does not always deem it essential that the "best interests of the child" trump all other concerns in the administration of justice.
- [45] The Senior Magistrate conducted the appropriate balancing consideration under **Article 8** and in the end determined that, as in the **Norris** case, the appellant's family life must, for the time being, take second place to the public interest in extradition. That would include, in the view of this court, subordinating the best interests of the appellant's children to other appropriate concerns. In this case, the Senior Magistrate's approach to the **Article 8** question was entirely correct. She reviewed the material and the case law, while conducting the required and appropriate balancing exercise. She took into account all material considerations and gave appropriate weight to each factor. For all of these reasons, this ground of appeal is therefore dismissed.
- [46] The next ground for consideration is **Abuse of Process**. The appellant submits that the behaviour of the American prosecutors in not disclosing the status of the case of the co-accused, amounts to an abuse of process. That case was dismissed with prejudice by District Court Judge Molloy on 3rd June 2020. The learned judge found that conspiracy to launder money, making false statements and bulk cash smuggling, were all serious crimes. However, he also found that the conduct of the state, which caused delay in the case, was intentional and calculated to give the United States a tactical

¹⁴ 2015 S.C.C. 62 at para 145

advantage. The court wanted to send a strong message in the ruling that was given. It was a significant lack of disclosure for the state, in the case at bar, to omit that evidence. Learned Queen's Counsel for the appellant submits that such prosecutorial misconduct in relation to the requested person's case should have been disclosed. The failure to do so unfairly prejudices the appellant and usurps the extradition regime.

[47] Learned Queen's Counsel for the appellant submits that decisions of prosecutors must be closely scrutinized, and relies upon the case of **Federal Public Prosecutor, Brussels, Belgium v Bartlett**¹⁵ wherein the court stated that the acts of a prosecutor, in contradistinction to those of a judge, must be subjected to a rigorous scrutiny, as a prosecutor, in contradistinction to a judge, is a party to the criminal proceedings in the requesting state.

[48] Learned Queen's Counsel for the respondent submits that there was no bad faith in this case because there was no duty on the part of the American prosecutor to disclose the results of the proceedings against the co-accused. Those proceedings were distinct and separate from the extradition proceedings against the appellant. Relevant evidence was not withheld because the requesting state was under no obligation to provide it. It was not relevant to the extradition case against the appellant. In the case of **R. v (Birmingham and others) v Director of the Serious Fraud Office**¹⁶, the court held that "no finding of abuse can be justified (in a case like the present where the category 2 territory has been designated for the purpose of section 84) by the prosecutor's refusal or failure to disclose evidential material beyond what was contained in the extradition request...the prosecutor does not have to establish a case to answer." In the case at bar, the material was procedural, not evidential, and thus even further removed from any disclosure necessity.

[49] Whether there has been an abuse of process is a question of law. Thus, the appropriate standard of review is correctness. Prosecutors have a duty to act fairly and the courts have an overriding duty to see that justice is done and injustice is prevented. The court, at an extradition hearing, may refuse an extradition request if it is found that there has been an abuse of process by the requesting state. In the **Birmingham** case at **para 97**, it was confirmed that the court has the power to refuse to

¹⁵ [2012] EWHC 2480 (Admin)

¹⁶ [2007] 2 WLR 635 at para 98

commit, justified by the imperative that the regime's integrity must not be usurped. At **para 100**, the court went further: "The prosecutor must act in good faith. Thus, if he knew he had no real case, but was pressing the extradition request for some collateral motive and accordingly tailored the choice of documents accompanying the request, there might be a good submission of abuse of process."

[50] The learned Senior Magistrate considered the abuse of process argument at paras 212 – 230 of her decision. She reviewed the requesting state's conduct and the affidavits of the Assistant U.S. Attorney. She considered the relevant cases, including **Hilali v The National Court, Madrid and Anon.**¹⁷, stating that instances of abuse of process as a bar to extradition are likely to be rare and there would have to be bad faith or something of that kind. She reviewed the material and found that it did not rise to that level. She accepted the position, as indicated in the requesting state's affidavit evidence, that the end of the cases against the co-accused had no bearing on the issue of the extradition of the appellant. There was no bad faith because such lack of disclosure was not shown to have undermined the case against the appellant and had no impact on the ability of the appellant to defend himself. In effect, she found that the integrity of the process had not been undermined or usurped. There was nothing sinister in the behaviour of the prosecutor for the requesting state. She was alive to the issue and considered it, as she must. In fact, rather than finding that the conduct was abusive, she found the issue, overall, to demonstrate that the United States is a functioning democracy that is guided by established rules and principles. The protections afforded by the American court to the co-accused will, she noted, be afforded to the appellant and all such defendants. This court is in agreement with that observation.

[51] The learned Senior Magistrate determined that the actions of the American prosecutors, on the facts in this case, did not reach the level of bad faith on their part to constitute an abuse of process. She was alert not to usurp the trial court's function. She conducted the necessary review and inquiry into the allegations of abuse and determined that it did not reach the level necessary to bar extradition. This court can find no fault with any of that, and for all of these reasons, this ground of appeal is therefore dismissed.

¹⁷ [2006] EWHC 1239

- [52] **Unconstitutionality of Extradition and the Applicable Legislation.** The last two grounds of appeal, the applicable legislation and the unconstitutionality of extradition in the absence of a prima facie case, are interrelated, and the court will therefore consider them together under one heading. Learned Queen's Counsel for the appellant accepted that this point was not taken before the Senior Magistrate. However, the High Court is the natural forum for constitutional arguments. In fact, enforcement of the protective provisions of the constitution is found at **s. 31** therein with application being made to the High Court. No issue was taken by learned Queen's Counsel for the respondent in this ground of appeal being raised.
- [53] The requesting state seeks the extradition of the appellant pursuant to the **Extradition Treaty of 1972**. The **1972 Treaty** was extended to the United Kingdom Overseas Territories by Schedule 2 of the **United States of America (Extradition) Order 1976**. The **Extradition Treaty 2003** between the United States and the United Kingdom repealed the **1972 Extradition Treaty** between those states. However, the **2003 Extradition Treaty** was not initially extended to the United Kingdom Overseas Territories. Therefore, the **1976 Order** remained in effect until it was revoked by the **Extradition Act 2003 (Overseas Territories) Order 2016**. The **2016 Order** extends the provisions of the **United Kingdom Extradition Act 2003** to the Overseas Territories, including the Virgin Islands. This impacts the argument of the appellant that there is a requirement on the part of the requesting state to present a prima facie case.
- [54] Learned Counsel, Mr. Wildman, for the appellant, relies upon **s. 84(1)** of the **2016 Order** and submits that admissible evidence of criminal conduct must be tendered in support of the extradition request. The evidence must be admissible according to the laws of the Territory of the Virgin Islands. In the absence of evidence, no order can be made and no basis for an order of extradition exists. However, it is conceded that **s. 84(7)** of the **2016 Order** removes the need for the United States to provide a prima facie case. It is the constitutionality of **s. 84(7)** that counsel for the appellant rely upon to further advance their position. Exempting the United States from the requirement to provide a prima facie case violates the appellant's right to liberty and security of the person under **s. 15** of the **Virgin Islands Constitution Order 2007**. Detention therefore becomes arbitrary. The exemption is also inconsistent with the **1972 Treaty** which is actually referred to in the extradition request in this case and still applies. **Article IX** of the **1972 Treaty** refers to extradition based upon sufficient evidence

according to the law of the requested party, as submitted by Mr. Wildman. The **1972 Treaty** is therefore still relevant.

- [55] If the submission on the need to provide a prima facie case is correct, then clearly no such case exists. No witness statements were provided, only a general narrative. Although cases such as **MacKellar** have indicated that **s. 84** of the **2016 Order** preserves the requirement for the requesting state to present a prima facie case, this requirement does not apply where the requesting state is a designated territory under **s. 84(7)**. Thus, it is not subject to the prima facie evidence requirement. However, learned Queen's Counsel for the appellant submitted that no argument as to the constitutionality of such designation was presented in **MacKellar**. The legislation should therefore be examined in light of the provisions of the constitution. To that end, counsel for the appellant relied upon the Supreme Court of Canada case of **R. v Ferras**¹⁸, which held that a person cannot be extradited upon demand, suspicion or surmise. It is never a case of simply "rubber stamping" the request. Fundamental justice requires that a person sought for extradition be accorded an independent and impartial judicial determination on the facts and evidence on the ultimate question of whether there is sufficient evidence to establish the case for extradition.
- [56] The **Ferras** case referred to the Canadian **Extradition Act**, which requires a prima facie case, or specifically, admissible evidence of conduct that, had it occurred in Canada, would justify committal for trial in Canada. That is consistent with the guarantee under **s. 7** of the Canadian **Charter of Rights and Freedoms** that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. That, it is submitted, accords with the provision of **s. 15** of the **Virgin Islands Constitution Order 2007**. The constitution is paramount, overriding legislation such as the **2016 Order**, and a prima facie case is necessary in order to comply with due process, fundamental justice and the rule of law.
- [57] Learned Queen's Counsel for the respondent submits that the legislation is clear. **Article 23** of the **Extradition Treaty 2003** confirms that the **1972 Extradition Treaty** shall cease to have any effect as between the United States and the United Kingdom. The **2003 Treaty** was extended to the Territory of the Virgin Islands by virtue of the **2016 Order**. Therefore, the **2003 Treaty** governs.

¹⁸ [2006] 2 S.C.R. 77

Article 8 of the **2003 Treaty** requires the requesting state (United States of America) to provide listed material in support of the extradition request. That is also noted in **ss. 70 and 78** of the **2016 Order**. These threshold requirements must be met for the request to proceed. It is submitted that this provides sufficient procedural safeguards against arbitrary detention and loss of liberty, such that the requirements of personal liberty protection under **s. 15** of the constitution are fulfilled. The exemption from providing a prima facie case under **s. 84(1)** of the **2016 Order**, granted to the United States by **s. 84(7)**, does not offend the constitutional rights of the appellant because of the requirements under **ss. 70 and 78** combined with **s. 87**, which engage a **Human Rights Convention** consideration.

[58] Learned Queen's Counsel for the respondent submits that **ss. 15(1) and 15(2)(g)** of the **Virgin Islands Constitution Order 2007**, allow for the infringement of a person's right to liberty as authorized by law, including for the purpose of extradition. Therefore, as long as the legislative framework is being complied with, due process is being followed and any deprivation of liberty that entails, is not a breach of the appellant's constitutional rights because it is authorized by law.

[59] There can be no doubt of the fundamental importance of a person's right to liberty and security of the person, as mandated by the **Virgin Islands Constitution Order 2007**. That right cannot be breached, "save as may be authorized by law." This is similar to the provisions of the Canadian **Charter of Rights and Freedoms**. But the Canadian **Charter** goes further, and it is that more extensive right that the **Ferras** case speaks to.

[60] The phrase "principles of fundamental justice" as cited in **s. 7** of the Canadian **Charter**, does not describe a protected right itself but rather qualifies the protected right not to be deprived of life, liberty and security of the person. The meaning of the principles of fundamental justice was to be determined having regard to the purpose of the section and its context in the charter. The term fundamental justice was not synonymous merely with natural justice. The principles of fundamental justice are to be found in the basic tenets and principles not only of (the) judicial process, but also of the other components of the legal system. While many of the principles of fundamental justice are procedural in nature, they are not limited solely to procedural guarantees. Whether any given principle might be said to be a principle of fundamental justice within the meaning of this section will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the

judicial process and in the legal system. See the case of **Reference re Section 94(2) of the Motor Vehicle Act**¹⁹.

- [61] In the more specific context of extradition hearings, in order to arrive at the conclusion that the surrender of a fugitive would violate the principles of fundamental justice, it would be necessary to establish that the fugitive would face a situation that is simply unacceptable. See the case of **United States of America v Allard and Charette**²⁰.
- [62] These basic considerations remain. They were further expanded upon with the interpretation of **s. 7** of the **Charter of Rights and Freedoms** in the **Ferras** case. However, as was confirmed by the Supreme Court of Canada in the **M.M.** case at **para 10**, while the **Ferras** case addressed the extradition judge's role in assessing the weight to be given to the evidence relied on to support committal, it "has received varied treatment by (Canadian) appellate courts." Even the court in **Ferras** recognized, at **para 33**, that the absence of particular indicia of reliability or availability of evidence in itself does not violate the principles of fundamental justice applicable to extradition proceedings. No particular form or quality of evidence is required for extradition, which has historically proceeded with flexibility and in a spirit of respect and comity for extradition partners.
- [63] To apply the **Ferras** principles, one must examine the **Extradition Act** and Treaty requirements in Canada. For example, it was held that the admission of affidavit evidence and depositions at an extradition hearing of an accused fugitive, as permitted by the **Extradition Act** and Treaty, does not offend **s. 7** of the Charter, notwithstanding the fugitive is not given an opportunity to cross-examine on those affidavits and depositions...The purpose of an extradition hearing is not to determine guilt or innocence, but is merely an inquiry to determine whether there is sufficient evidence to warrant sending the fugitive to the demanding state for trial...It is a basic presumption of extradition proceedings that the fugitive will receive a fair and just trial in the demanding state. See **United States of America v Smith**²¹. This raises two issues, one regarding the basic presumption of

¹⁹ [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289

²⁰ [1987] 1 S.C.R. 564, 33 C.C.C. (3d) 501

²¹ (1984) 10 C.C.C. (3d) 540

fairness of proceedings in the requesting state and the second, the substance of the Canadian legislation as opposed to that found in this territory.

[64] This court recognizes and supports the presumption that the appellant will receive a fair and just trial in the requesting state, and has already so ruled in this decision. The substance of the Canadian legislation is also important and must be considered. Under **s. 33(1)** of the **Extradition Act**, the record of the case must include a document summarizing the evidence available to the extradition partner for use in the prosecution. An extradition treaty exists between the government of Canada and the government of the United States of America. The Canadian extradition legislation and treaties allow for certain procedures, such as affidavit evidence and depositions. That must be taken into account when examining cases such as **Ferras**. We must consider and compare that to the terms of the legislation and treaties in effect in this territory. What is in force here, allows for an extradition case involving the United States to proceed without a prima facie case.

[65] The court in **Ferras** referred to the legislation in force by way of the Treaty between Canada and the United States, which recognized the basic requirement of the certification of available evidence to establish a prima facie case. The legislation sets out what evidence can be admitted at the committal stage and the definition of the extradition judge's role. With regard to evidence, the **Extradition Act** provides for evidence to be admitted, even if not otherwise admissible under Canadian law, if contained in the certified request. In the **M.M.** case at **para 36**, the court confirmed the role of the extradition judge to decide whether he or she is satisfied that the person before the court is the person sought, and whether there is evidence admissible under the **Extradition Act** and available for trial of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed. The reference to the Act in force is important and allows this court to consider the **2016 Act**, that dispenses with the need of the requesting state (United States of America) to establish a prima facie case for extradition.

[66] The court in the **M.M.** case went on at **para 62** to confirm that **Ferras** did not envisage any change in the test for committal; there was no challenge to the statutory test in **s. 29** of the **Extradition Act** which links committal for extradition to the test for committal for trial. This is crucial in confirming the need to refer back to the enabling legislation. It is that legislation in this territory, at **s. 84(7)**, which

removes the need for this requesting state to present a prima facie case. In fact, the court in the **M.M.** case also stated, in the same paragraph, that the fact that some of the evidence was hearsay and came from unsavoury witnesses, did not rebut the presumption of reliability. This also deals, to some extent, with the appellant's objection to the value of the evidence submitted by the requesting state.

[67] It is this expansion and clarification in the **M.M.** case of the findings in the **Ferras** case, that is useful for consideration in the case at bar. The test for extradition remains whether there is evidence that is sufficient to justify committal for trial as set out in **s. 29** of the **Extradition Act**. Any weighing of evidence must only be in the context of deciding whether the evidence undermines the presumed reliability of the requesting state's evidence to the point that it should be discarded. The test for the surrender of the fugitive must be applied in light of a panoply of relevant factors including the circumstances of the person sought and the principles of comity and reciprocity that underlie extradition.

[68] If **Ferras** and **M.M.** emphasize the need to refer back to and rely upon the enabling legislation or the applicable **Extradition Act**, then we must conduct the same examination in this case. As noted, according to the provisions of **s. 84(7)**, with the United States, as a category 2 territory so designated, the judge must proceed to decide the case under **s. 87**. That is to say, the need for the requesting state to provide sufficient evidence or a prima facie case, is dispensed with. However, the rights of the appellant are still considered because **s. 87** requires the judge to decide whether the person's extradition is compatible with the **Human Rights Convention**. That was not only considered by the learned Senior Magistrate, but has already been considered by this court in this decision.

[69] Furthermore, as the Senior Magistrate indicated in her decision at para 105, sufficient particulars were provided to satisfy **s. 78** of the **2016 Act**, and therefore to apprise the appellant of the nature of the case against him. Since the provisions of **s. 84(7)** meant that the requirement of a consideration of whether a prima facie case existed according to **s. 84(1)** was removed, the Senior Magistrate correctly turned to consider the appellant's rights under **s. 87**. By following this path, the Senior Magistrate ensured that there was no arbitrary detention of the appellant. The legislative procedural safeguards were maintained.

[70] The appellant has the right to liberty and security of the person under **s. 15(1)** of the **Virgin Islands Constitution Order 2007**. That must be considered. However, unlike the right to life, liberty and security of the person under **s. 7** of the Canadian **Charter of Rights and Freedoms**, **s. 15(2)(g)** of the **Constitution** provides for a very specific exception to the right to liberty. **Section 15(2)(g)** allows for the deprivation of that right for the purpose of effecting the expulsion, **extradition or other lawful removal** of that person from the Virgin Islands (emphasis added). The procedure for extradition in this case must follow the terms of the **2016 Order**, in particular the procedure set out in **s. 84(7)**. It is that exception that allows for the deprivation of the appellant's liberty because it is in accordance with legislative procedure currently in force. It is therefore authorized by law, not only by **s. 15(2)(g)** of the **Constitution** but also **s. 84(7)** of the **2016 Order**.

[71] This court is therefore satisfied, for the reasons advanced, that although the appellant's constitutional right to liberty and security of the person has been breached, it is saved by the provisions of **s. 15(2)(g)**. His detention is for the purpose of extradition, and follows the lawful procedure authorized by the **2016 Order**, which is the applicable extradition legislation. Unlike **s. 7** of the Canadian **Charter**, the extradition procedure under the **2016 Order**, including **s. 84(7)**, is specifically provided for under the terms of **s. 15(2)(g)** of the **Constitution**.

[72] For all of these reasons, this ground of appeal is hereby dismissed.

[73] In sum, the court finds that it would not be oppressive, unjust or an abuse of process for the extradition of the appellant to proceed. For all of the reasons stated, the appeal of the decision of Senior Magistrate Tamia N. Richards, dated 30th June 2021, is hereby dismissed, pursuant to **s. 104(1)(c) of The Extradition Act 2003 (Overseas Territories) Order 2016**. It necessarily follows that the order of the Governor directing the appellant's extradition remains in force and any companion appeal of that order is hereby dismissed pursuant to **s. 109(1)(b)** of the same **Act**.

Richard G. Floyd
High Court Judge

By the Court

Registrar