IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2018 HCV 01862

BEFORE: **THE HONOURABLE MS. JUSTICE C. LAWRENCE-BESWICK**
THE HONOURABLE MR. JUSTICE K. LAING
THE HONOURABLE MRS. JUSTICE S. JACKSON-HAISLEY

IN THE MATTER OF THE JUDICATURE (PARISH COURT) ACT.

And

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

And

IN THE MATTER OF THE EXTRADITION ACT

And

IN THE MATTER OF AN APPLICATION FOR A WRIT OF *HABEAUS CORPUS AD SUBJICIENDUM*

BETWEEN	**SHEIKH ABDULLAH EL FAISAL**	**CLAIMANT**
AND	**THE COMMISSIONER OF CORRECTIONAL SERVICES**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**3RD DEFENDANT**

Mr Bert Samuels, Ms Bianca Samuels and Ms Tessa Simpson, instructed by Knight, Junor & Samuels, Attorneys-at-Law for the Claimant.

Ms Althea Jarrett instructed by the Director of State Proceedings for the 1st and 2nd Defendants.

Mr Jeremy Taylor, Senior Deputy Director of Public Prosecutions, Mr. Adley Duncan, Ms Syleen O'Gilvie and Ms Kelly Hamilton for the 3rd Defendant.

Extradition – Proceedings before Parish Court Judge – Whether Parish Court Judge has the power to order disclosure – Whether section 16(2) of the Constitution imports a requirement for disclosure into extradition hearings – Whether failure to provide original source data amounts to unfairness

Heard: 11th, 12th February and 5th June 2019

C. LAWRENCE-BESWICK, J (dissenting in part)

[1] I have had the privilege of reading the draft judgment of my learned brother. I agree with his conclusion but diverge in my views as it concerns disclosure in these extradition proceedings as well as the procedure adopted in claiming relief for a purported breach of the Constitution.

[2] The United States of America (the Requesting State) requested Jamaica (the Requested State) to extradite the Claimant to answer to charges before its Courts involving terrorism. After extradition proceedings in the Parish Court, designated as a court of committal, he was remanded into custody there to await his extradition from Jamaica. In this matter, he seeks a writ of *habeas corpus* to allow his discharge from that custody.

WRIT OF HABEAS CORPUS APPLICATION

[3] The Claimant in seeking a writ of *habeas corpus* argues that the proceedings in the extradition hearing were not fair, primarily because the State requesting his extradition did not disclose some of the original source documents which form the foundation of the request. In my view there was a lack of full

disclosure in the extradition proceedings which resulted in the proceedings being unfair in circumstances in which the Constitution states that a person is entitled to a fair hearing.

Amended Fixed Date Claim Form

[4] In his amended Fixed Date Claim Form[1] seeking the writ of *habeas corpus*, the Claimant relies on the following grounds:

> 1. *The learned trial judge wrongly failed to grant the application for disclosure of original source documents withheld being Facetime, Facebook and Skype conversations used by the Claimant/Applicant in accordance with the powers of a Judge the in (sic) committal proceeding.*
>
> 2. *The Applicant was committed without his Attorneys-at-law first receiving full disclosure before the hearing thereby abrogating his Constitutional right to having sufficient facilities to prepare his defence and or his common law right to full disclosure.*
>
> 3. *The Claimant's activities as a Muslim Cleric are protected by Section 17 of the Constitution which allows every citizen inter alia to "….. manifest and propagate his religion in worship, teaching, practice and observance."*

[5] The comprehensive judgment of my learned brother gives the details of the submissions made, including the authorities on which reliance was placed. I seek now therefore only to explain my views which have resulted in my dissenting in part, from that judgment.

EXTRADITION PROCEEDINGS

[6] It has long been accepted that extradition proceedings are not the same as trials. The rules are not as strict because there is an understanding between States, that if extradited, the accused would be given a fair trial/ hearing in accordance with the law in the State requesting his/her extradition.

---

[1] Filed on January 22, 2019

[7] However, are the extradition proceedings themselves, conducted in Jamaica, required by Jamaican law to be fair? Does fairness depend on the nature of the hearing?

[8] In my judgment, there are certain standards of fairness which must be met in all hearings in Jamaica. In extradition proceedings, the allegations and the consequences can be grave. Regard must thus be had for the rights of the State requesting the extradition, the State of whom the extradition is requested and also the rights of the individual concerned. All these rights must be protected in a fair hearing by the tribunal hearing the proceedings.

[9] In this matter, it is agreed that extradition proceedings must be fair because the Charter of Fundamental Rights and Freedom 2011 ("The Charter") has made it clear that fairness applies to hearings in Jamaica, including those for extradition.

Charter of Fundamental Rights and Freedom 2011

[10] I respectfully disagree with the analysis of my learned brother in respect of the effect of s. 16(2) of the Charter in regards to extradition proceedings as detailed in para. 164 of his judgment. To my mind fairness is not a fluid concept.

[11] The Charter, promulgated in 2011, addressed the issue of the rights and obligations of persons subject to hearings in Jamaica.

Section 16(2) of the Charter provides:

> *"In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."*

[12] Do extradition proceedings fit that definition? Extradition may result in a person being arrested and transported outside of this country for trial, or for sentencing, in a foreign country. That is clearly a result which is adverse to the

person's interest, not only because it may result in incarceration, but also because the trial/sentencing will be governed by foreign laws.

[13] In my judgment therefore, Section 16(2) of the Charter readily applies to extradition proceedings. It follows that a person "*shall be entitled to a* ***fair hearing*** *within a reasonable time*" in an extradition hearing. [Emphasis supplied]

Comparison between section 20 of the Constitution and section 16 of the Charter

[14] The right to a fair hearing in extradition proceedings becomes even clearer when one recognizes that section 16 has replaced section 20(2) of the Constitution which has now been repealed.

Section 20 of the Constitution reads;

> *(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> *(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent or impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.*

[15] Both the repealed section 20 of the Constitution and section 16 of the Charter refer to a person being given a fair hearing in proceedings for determinations concerning civil rights or obligations.

[16] However, section 16 adds a reference to "any legal proceedings which may result in a decision adverse to his interests" and mandates that in any such legal proceedings "he shall be entitled to a fair hearing".

[17] Section 16 of the Charter has thus deliberately extended the right to a fair hearing to include not only "a criminal offence" but also "any legal proceedings which may result in a decision adverse to his interests".

Extradition proceedings fall comfortably under the definition in section 16 and must therefore be conducted in a fair manner. The introduction into the Jamaican Constitution of section 16 thus brought with it the entitlement of persons facing extradition proceedings to have a fair hearing.

WHAT MAKES A HEARING FAIR?

[18] A clear description of what is involved in a fair trial was provided by Panton P in **Harry Daley v R**[2]. Although the reference there was to a person charged with a criminal offence being entitled to a fair trial, it must, in my view equally apply to a person facing extradition proceedings.

There the learned Judge said:

> *"49. In this country, whenever a person is charged with a criminal offence, he is entitled to receive a fair trial. Fairness involves, among other things, the prosecution not putting obstacles in the path of the conduct of the defence of the person charged, or withholding material relevant to the case. For example, where there are matters that are likely to be of importance to the defence and they are under the control of the prosecution, such matters ought to be disclosed. "The prosecution" means not the prosecutors who appear in court but includes persons such as police officers and other state officials connected with the investigation and conduct of the case against the accused person."*

[19] In this matter the Claimant asked that he be provided with the original source material which forms one of the bases of the application for his extradition and which is assumed to be in the possession of the State requesting his extradition. That is material relevant to the case and without it, contends the Claimant, the hearing would be unfair.

[20] On the other hand, the defence submitted that a hearing can be fair without disclosure, as was the extradition hearing about which there is complaint. In my view the test of fairness in extradition proceedings is the same test as that

---

[2] **(2013)** JMCA Crim 14 at para. 49

applied in a domestic criminal trial. My learned colleagues have applied a different test for fairness as they are of the view that extradition proceedings can be fair without disclosure.

[21] In my judgment a litigant placed before a Court in Jamaica must receive a trial whose degree of fairness does not depend on the nature of the hearings. Very simply put, fair is fair. In a domestic criminal trial, a person's liberty is in jeopardy. There he faces legal proceedings which may result in a decision adverse to his interests. That too is the position in extradition proceedings.

[22] I am not able to see a basis on which to say that the degree of fairness required in extradition proceedings conducted in a Jamaican court is different from that required in a domestic criminal trial. The Jamaican Court must be consistently fair in all legal proceedings. To my mind, that duty should not vary according to the type of proceedings. Nor should the duty be diluted by the expectation that the Requesting State will deal fairly with the accused during the trial in its foreign courts.

THE REQUEST FOR EXTRADITION

[23] The Requesting State must satisfy the Court of the Requested State that the offence concerned is an extradition offence and that the evidence would be sufficient to warrant his/her trial for that offence if the offence had been committed in Jamaica[3].

[24] It seems to me that in order for the proceedings to be fair, the accused must be given the accurate and complete evidence being presented against him, that is, there must be full disclosure. He should not face the tribunal and be required to assume and accept that the State requesting his extradition has provided all relevant material and that such material as is presented is accurate.

---

[3] Section 5 of the Extradition Act

[25] It is true that in order for the Extradition process to effectively function worldwide, there must be an understanding between States that when persons are extradited from one country to another, they will receive all the protection which the law provides for them in the Requesting State. The Extradition Treaty is based on trust, confidence and comity between States.

[26] However, to my mind, the person for whom extradition is being sought should not be expected or required to share that trust and confidence in, and comity with, a foreign State.

NATURE OF HEARING

[27] In this matter the Claimant faces the Court of the Requested State, Jamaica. He expects a fair extradition hearing in accordance with the laws of Jamaica. The Jamaican Court should not lower its requirements of fairness and expect to rely on the foreign Court to subsequently provide any element of fairness which had been omitted.

[28] To my mind, a fair hearing must include all the rights provided in the Constitution for proceedings. The nature of a fair hearing cannot change according to the proceedings, or the litigants involved, or the seriousness of the allegations.

[29] In my judgment the law must be certain, not only in its provisions, but also in its application. It is only then that the most vile person who commits a heinous crime can be assured of the fairness of his or her trial, which to my mind is a hallmark of a civilized and ordered society.

CONSIDERATION OF THE REQUEST FOR EXTRADITION

[30] It is clear that the Jamaican Court cannot order a Requesting State to perform or not perform any action in order to meet the requirements of the Jamaican law. However, it can, where appropriate, refuse to grant any order sought by a Requesting State in unfair circumstances.

[31] A person facing a trial must be given all relevant material which concerns his trial[4]. Of course, it may be withheld in the public interest or for national security reasons[5].

[32] Such disclosure has been considered to be essential for a fair trial because it allows the accused to have access to relevant material which he may not otherwise have had. There is also the possibility that such material may weaken the Crown's case or it may provide a different context which may alter the assessment of an accused's culpability.

Original Transcripts

[33] Here, the requesting State provided such proof as it chose to present and failed to disclose relevant source material. The proceedings were thus not fair in that regard.

A person or persons unknown transcribed material from audio and video recordings and this was presented as evidence for the Court's consideration. Whereas that transcription may have been professionally done and may have encapsulated all the important evidence which the Requesting State regarded as being relevant, it nonetheless did not allow for the accused to be privy to all material to which he would have been privy in a criminal trial in Jamaica.

DISCLOSURE

[34] A portion of the evidence presented against the Claimant in this matter, was the transcript of some conversations which he had with an undercover agent of the Requesting State. The source material was not disclosed.

---

[4] 1992 UKPC 16 **Linton Berry v R**
[5] **R v Ward** [1993] 2 All ER 577

[35] In Jamaica, all relevant material should be disclosed to the accused unless there is compelling reason to do otherwise. There is no evidence of any such compelling reason in this case.

[36] It is accepted by all parties that the Requesting State is under no duty to disclose all material to the Requested State in order to request a person's extradition. The learned Law Lords of the Judicial Committee of the Privy Council did however state that, "It does, however, owe the court of the requested state a duty of candour and good faith." [6]

Here the nondisclosure of the source material for the transcribed evidence showed less "candour and good faith" than required.

[37] The judicial tribunal of the Requested State is entrusted with the duty to determine if such material as has been provided by the Requesting State is sufficient to ground an Order for the Extradition requested.

[38] However, its power in that regard is limited. It is not empowered to order the Requesting State to provide any particular material, as has been comprehensively discussed by my learned brother in his judgment

[39] Nonetheless, the committal court of the Requested State is not a rubber stamp of the Requesting State. It is to make the order for extradition only when the Requested State examines the evidence submitted and determines if it is sufficient to make out a *prima facie* case of the offences charged. That examination must be done within the parameters of the law of the Requested State. Here that is the Jamaican law. There must be compliance with the Requested State's own domestic laws[7].

---

[6] **Knowles v (1) Govt. of the United States of America (2) Superintendent of Prisons of the Commonwealth of the Bahamas.** [2006] UKPC 38

[7] **Jurgen Harksen v. President of the Republic of South Africa** (no. 1) [2000] ZACC 29 per Goldston J, par.

[40] It would therefore behove the Requesting State to disclose all relevant material to ensure obedience to and respect for the laws of Jamaica which do mandate that full disclosure is required in order for proceedings to be fair. It cannot however be ordered so to do.

[41] The person whom the Requesting State seeks to extradite has no duty to prove that he should not be extradited. He can rely on the tribunal of the Requested State to thoroughly examine and consider the evidence against him whilst at the same time jealously protecting the rights accorded to him by the Jamaican laws.

[42] The tribunal hearing the proceedings therefore has the duty to adhere to:

i) the Extradition Act and Treaty,

and

ii) the laws governing the procedure in Jamaican Courts. That includes full disclosure by the accusing party, which, in extradition proceedings is the Requesting State.

THE EFFECT OF THE FAILURE TO DISCLOSE

[43] Some of the evidence of the Requesting State was transcripts of conversations between the Claimant and an agent. The Claimant's complaint was primarily that the actual recordings may have allowed him to find errors in the transcript or to identify a context to explain another interpretation of the conversations on the transcript. He has not suggested or argued as to any particular error in the transcript or as to any context which was omitted.

[44] Indeed, to the contrary, in his affidavit he acknowledges having had conversations with the witness, but avers that the conversations were not with a view to assisting in terrorism endeavours. The Claimant has not sought, even now, to indicate any fundamental challenge which he has to the accuracy of the transcripts.

[45] Nonetheless that does not affect the principle which in my view is fundamental to all hearings, including extradition hearings, in Jamaica, that is, the proceedings must be fair, which includes disclosure of all relevant material. It matters not whether the material is expected to be unchallenged.

Non-disclosure of the source material

[46] In this matter the tribunal made an order committing the Claimant to be extradited without being presented with the particular source material. It follows that the learned Judge regarded the evidence, without the source material, as being sufficient to prove a case for extradition.

[47] In a domestic trial, where there is insufficient or no disclosure, the tribunal can order that there be disclosure. Failure to obey such an order could have any of several consequences. However, in extradition proceedings, the tribunal has no such power. The Extradition Treaty refers to the Executive, not the Judiciary, being empowered to make any such requests for disclosure as advised.[8]

[48] True it is that the Parish Court Judge is a creature of statute and must apply the law as it exists. He/she therefore is obliged to apply the Extradition Treaty and Act neither of which refers to an obligation for disclosure in Extradition proceedings.

[49] At the same time the Parish Court Judge, adjudicating in the committal court, even as a creature of Statute, must jealously guard the provisions of the Constitution whilst upholding them in the proceedings in the court and also balance the rights of the Requesting State, the Requested State and the individual concerned.

---

[8] Article IX of the Extradition Treaty

[50] Where there is insufficient or no disclosure, the only option of the tribunal is to refuse to grant the order for extradition, if the insufficiency or absence of disclosure results in it having insufficient material to properly allow for the extradition order to be made.

EVIDENCE PRESENTED

[51] In this case, the evidence presented was not only the transcripts of the conversations. There was also evidence of the website of the Claimant as well as of his public speeches and publications. In sum, that evidence was provided to support the submission that he had been publicly communicating a violent interpretation of Islam by online facilities encouraging persons to kill those who are not of the Muslim faith.

[52] Indeed, the Claimant himself in his affidavit refers to having said as a Cleric, that the solution to tyranny is the bullet. He then provided the context for that. He explained that his words did not show that he endorsed violence as a means to gain power. Rather, it meant that the army in repressive countries has to remove brutal dictators from power.

[53] The charges for which Extradition was sought all concern terrorism related allegations as detailed in the judgment of my learned brother.

[54] In my view, excluding the transcribed evidence for which the source material was not disclosed, the Parish Court Judge in the committal court could properly conclude that the Claimant could be extradited to answer charges concerning terrorism contrary to the law of the Requesting State.

[55] I am fortified in my view by the fact that the Claimant has not challenged the adequacy of the evidence as being sufficient for a prima facie case.

THE EFFECT OF THE EXTRADITION TREATY AND THE EXTRADITION ACT

[56] The Treaty and the Act reflect agreements between stated Governments to allow for transfer between countries, of alleged criminals, for the purpose of their trial or sentencing. Both the Treaty and the Act must be obeyed in order to lawfully apprehend purported criminals who have travelled between States and to allow them to face due process.

[57] At the same time, the Constitution and other domestic laws of the State of whom extradition is requested, which in this matter is Jamaica, must be obeyed.

CONTRAVENTION OF THE CHARTER

[58] There was also a complaint about the manner in which arguments of a purported breach of the Constitution were introduced into this case, without the formal filing of documents specifically referring to that.

[59] Section 19(1) of the Charter provides for seeking redress from the Supreme Court for an alleged contravention of the Constitution. It provides:-

> *"If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress"*

[60] This section clearly contemplates that where a person is alleged to be aggrieved, the application to the Supreme Court under s 19 is not the sole method of seeking relief as the application is "without prejudice to any other action which is lawfully available."

[61] In this matter, at the committal court, although there had been a request for disclosure of the source material, there was no complaint or argument made specifically that the failure to disclose had breached a constitutional right per se.

[62] In my view, there need not be any formal application to ask for relief from a perceived breach of the Constitution in these circumstances. It would be different if the argument were being made that the Extradition Treaty and/or Act themselves were drafted contrary to the Constitution. That would involve an examination and assessment of the legislative provisions as against the Constitution and a formal application in that regard would be necessary. These proceedings could not properly make any order on such an issue, I agree with my learned brother's analysis in that regard,

[63] . Where the complaint is that the manner in which the extradition proceedings were conducted is unconstitutional there need be no strict adherence to formal filing of documentation, This is to be distinguished from a direct and formal challenge to the provisions of the Treaty itself which would require formal and precise pleadings.

[64] The proceedings are either fair and in accordance with the Constitution, or they are not fair, and contrary to the Constitution. It does not require any advance notice to the Crown or any party that such a complaint is being made.

[65] If such formal advance notice were required, then, where, during proceedings a litigant raises an alleged breach of a basic and fundamental Constitutional right, it would be a short step to either deprive him of bringing it to the attention of the Court or require him to file fresh proceedings to address it. Neither of those is appropriate. Where however, any embarrassment is caused to the Crown by the suddenness of the submission then an adjournment of appropriate duration would rectify that situation.

[66] Indeed the importance of ready access to the Courts in constitutional matters is highlighted by the centuries old practice of the right to seek a writ of *habeas corpus* by attendance in any court with no prior notice whatsoever.

GOOD FAITH

[67] The writ of *habeas corpus* can be granted, discharging the accused from custody for several reasons, including if it appears to the Supreme Court that the accusation against him is not made in good faith so that in the interest of justice it would, having regard to all the circumstances, be unjust or oppressive to extradite him.[9] In my view, the action of the Requesting State was, on its face, not made in good faith as it concerns one aspect of the proceedings, that is, disclosure.

[68] Not only did the Requesting State fail to provide the source material but it also gave no reason for that failure. The reasonable presumption must be that it was readily available because there were purported transcripts of its contents and the assurance that it would be available at the trial.

CONCLUSION

[69] The Charter of Rights introduced the right to a fair hearing in extradition proceedings. In my judgment that right includes the right to disclosure of all relevant material for the information and consideration of the Claimant.

[70] The tribunal in my view has a duty to protect that constitutional right of the Claimant, whilst applying the Extradition Treaty and the Extradition Act.

[71] In my judgment the Claimant was deprived of a fair hearing in a portion of the extradition proceedings because the Requesting State did not disclose the original source material, which omission is contrary to domestic laws.

[72] There was no indication as to the reasons the Requesting State did not provide it. There was no assertion that the omission was due to national

---

[9] S.11(3) Extradition Act

security or any other compelling reason. It can be properly assumed that the material existed and was accessible. Why then was it not made available to the Claimant so that his right under the Jamaican Constitution, to which he was entitled, could be protected?

[73] In my judgment, unlike that of my learned colleagues, the lack of disclosure of the source material of the transcripts made the hearing unfair as it concerns that issue.

[74] However, there was other material placed before the tribunal. Those included the Claimant's speeches and the postings on the Claimant's website. There was no complaint about those items of evidence which were considered during the extradition proceedings to determine if he could properly be extradited to face terrorism charges in the United States of America. There was no complaint apart from that of unfairness because of the absence of disclosure.

[75] That remaining evidence could have properly provided a prima facie case of the charges for which the accused was indicted in the Requesting State. Similarly, it would provide a basis to charge the Claimant for offences contrary to the Terrorism Prevention Act of Jamaica.[10]

[76] It is for that reason that I conclude in the same manner as my learned brother, not to order a writ of *habeas corpus* for the discharge of the Claimant from custody. At the same time my dissenting view is that in principle disclosure is required to enable an extradition hearing to be fair.

[77] I therefore would not order the writ of *habeas corpus*.

---

[10] Section 7

K. LAING, J.

THE CLAIM

[78] The claim was commenced by a Fixed Date Claim Form filed on 14th May 2018. By an Amended Fixed Date Claim Form filed on 22nd January 2019, the Claimant seeks the following reliefs:

> *1) A Writ of Habeas Corpus directed to the Defendants do issue (sic) to have the body of the Applicant before the Supreme Court at such time as the Court may direct upon the grounds set out in the Affidavit of the Claimant sworn and filed herein.*
>
> *2) That the Honourable Court grants a motion for the issuance of a writ of Habeas Corpus for the Claimant/Applicant to be released from custody.*
>
> *3) Costs.*
>
> *4) Such further and other relief that this Honourable Court deems just.*
>
> *5) Liberty to Apply.*

The Background

[79] On 6th April 2017, a grand jury sitting in New York County, United States of America, returned and filed with the Supreme Court in New York, an indictment containing five counts. These counts charged the Claimant with criminal offences against the laws of the State of New York as follows:

> *Count 1:* *Conspiracy in the Fourth Degree, as a crime of Terrorism, in violation of the Penal Law sections 105.10(1) and 490.25(1);*
>
> *Count 2:* *Soliciting or Providing Support for an Act of Terrorism the First Degree, as a Crime of Terrorism in violation of Penal Law sections 490.15 and 490.25(1);*
>
> *Count 3:* *Soliciting or providing Support for an Act of Terrorism the First Degree, in violation of Penal Law section 490.15;*
>
> *Count 4:* *Attempted Soliciting or Providing Support for an Act of Terrorism in the First Degree, as a Crime of Terrorism, in violation of Penal Law sections 110/490.15 and 490.25(1); and*

Count 5: Attempted Soliciting or Providing Support for an Act of Terrorism in the First Degree, in violation of Penal Law sections 110/490.15.

[80] On or about 22nd August 2017, the United States of America requested the arrest and extradition of the Claimant pursuant to the Extradition Treaty between the Government of the United States (the "Requesting State") and the Government of Jamaica (the "Requested State"). The United States of America is a Treaty State within the meaning of section 2 of the Extradition Act of 1991("the Extradition Act") and is a foreign state to which the Extradition Act applies.

[81] The Claimant was duly arrested on 25th August 2017 and taken into custody pursuant to a Provisional Warrant of Arrest under the Extradition Act.

PROCEEDINGS BEFORE THE PARISH JUDGE

[82] On the 1st day of February 2018, the extradition hearing commenced in the Parish Court for the Parish of Kingston and St Andrew (the "Extradition Hearing"), before a Parish Court Judge (the "Parish Judge").

[83] Section 14 of the Extradition Act provides for the admission in evidence in any proceedings under that Act, ("Extradition Proceedings"), of duly authenticated documents which were provided by the Requesting State (the "Authenticated Documents"). Included in the Authenticated Documents tendered into evidence in support of the request for the extradition of the Claimant, was an affidavit of Ms Deborah Hickey who is an Assistant District Attorney for New York County. Ms Hickey deponed in her affidavit that the Requesting State's case against the Claimant would rely in part on the evidence of a female New York Police Department Undercover Officer ("Officer 716"). Ms Hickey asserted that Officer 716 will testify at the Claimant's trial as to the Officer's personal interactions with the Claimant which support the charges against him. Exhibited to Ms Hickey's affidavit were a number of exhibits including, Exhibit 5 - an affidavit of Officer 716, Exhibit 6 – a copy of a transcript of conversations

between the Claimant and Officer 716 via WhatsApp, Exhibit 7 – a copy of a transcript of conversations between the Claimant and Officer 716 via Skype – Exhibit 8 – a copy of transcripts of conversations between the Claimant and Officer 716 via FaceTime Audio Call, Paltalk messages, WhatsApp messages and WhatsApp Voice Messages.

[84] During the Extradition Hearing, Mr Bert Samuels who also then represented the Claimant, made an application for discovery of the original electronic recordings of the Claimant found in Exhibit 8 of the Authenticated Documents, as well as the video call recordings in Exhibit 7 of the Authenticated Documents. In order to avoid confusion as to the nature of the request, it is helpful to note that the exhibit numbers of Authenticated Documents are distinct from the exhibit numbers of Ms Hickey's affidavit, her affidavit being comprised in Exhibit 7 of the Authenticated Documents. Counsel grounded his request on Article VIll of the Extradition Treaty in particular 3(b) which provides as follows:

> *(3) A request for extradition relating to a person who is sought for prosecution shall also be supported by:*
>
> *a) ...*
>
> *b) such evidence as would justify the committal for trial of that person if the offence had been committed in the Requested State.*

[85] In summary, Mr Samuels submitted that this article contemplates that as new rules for committal proceedings are introduced in the Requested State, those new procedures would be adopted by the Court. The consequence of this, it was submitted, was that the Committal Proceedings Act gave the Claimant the right to request discovery in the terms in which it had been made.

[86] The Requesting State's response noted that in the Authenticated Documents, a reference had been made to the items requested by Counsel. It was submitted that it is the Requesting State that determines the evidence that they place before the Court of the Requested State in support of an extradition request, therefore, that request rises or falls on the evidence provided.

Furthermore, it was submitted that the Jamaican Court has no jurisdiction to compel the Requesting State to place additional evidence before it. However, it was acknowledged that pursuant to Article IX of the Extradition Treaty, the Executive Authority of the Requested State can request additional information where it believes the evidence submitted by the Requesting State is insufficient to make out a prima facie case against the subject of the extradition request.

The Parish Judge's ruling on the disclosure issue

[87] The learned Parish Judge reviewed Article IX of the Extradition Treaty which provides as follows:

> *"ARTICLE IX*
>
> *Additional Information*
>
> *1. If the Executive Authority of the Requested State considers that the information furnished in support of the request for extradition is not sufficient to fulfil the requirements of this Treaty, it shall notify the Requesting State in order to enable that State to furnish additional information before the request is submitted to a court of the Requested State.*
>
> *2. The executive authority may fix a time limit for such information to be furnished.*
>
> *3. Nothing in paragraph (1) or (2) shall prevent the executive authority of the Requested State from presenting to a court of that State information sought or obtained after submission of the request to the court or after expiration of the time stipulated pursuant to paragraph (2)."*

[88] In dismissing the applicant's request for further information, the learned Parish Judge ruled that Article IX of Extradition Treaty vests a discretion in the executive authority of the Requested State to request additional information, but does not vest the Court with any such discretion.

[89] The learned Parish Judge also examined the Committal Proceedings Act, and in particular section 2, which provides as follows: -

> *"2 (1) Preliminary examinations of indictable offences are hereby abolished and, in lieu thereof, committal proceedings as provided in this*

> *Act shall be held by a Resident Magistrate sitting as an examining Justice in a Court of Petty Sessions.*
>
> *(2) Reference in any enactment to "preliminary examination" or "preliminary enquiry" or other similar expression, shall, unless the context otherwise requires, be construed as a reference to committal proceedings as provided in this Act.*
>
> *(3) In this Act "indictable offence" means an offence that is triable in the Criminal Division of the Supreme Court.*

[90] The learned Parish Judge concluded that the provisions of the Committal Proceedings Act have no application to Extradition Proceedings. He opined that with respect to an Extradition Hearing a Judge of the Parish Court is to act as "*nearly as may be*" as if he were sitting as an examining justice. Accordingly, the Parish Judge has the powers conferred on an examining justice as outlined in the Justices of the Peace Jurisdiction Act and is to adopt the procedure contained therein, while having regard to the specific provisions of the Extradition Treaty and the Extradition Act.

[91] In his closing submissions before the Parish Judge, Mr Samuels indicated that he was placing reliance on section 13 (3)(1) of the Charter of Fundamental Rights and Freedoms, but was placing heaviest reliance on section 17 as it relates to the right of the Claimant to practice his religion. It was submitted that the Claimant, being a Muslim Cleric has a responsibility to seek to bring persons to the teachings of Muhammad and his freedom to practice and propagate his religion is protected by the operation of section 13 (3)(i) and section 17 of the Charter of Rights.

The Parish Judge's ruling on extradition

[92] On the 30th April 2018, the Parish Judge found that the Requesting State had made out a *prima facie* case and the Claimant was committed to be extradited to the United States of America.

THE APPLICATION BEFORE THIS COURT

The Preliminary Issue

[93] Mr Samuels submitted that the matter was not fully and properly before the Court for hearing and that the Court was estopped from hearing the matter because of a breach of rule 10.2 of the Civil Procedure Rules, 2002 ("CPR"), as the case for the Claimant had not been properly traversed on the pleadings. This application was based on the failure of the Defendants to have filed any affidavit evidence in support of their position indicated in their respective Acknowledgments of Service, that they intended to defend the Claim. In support of his submissions, Counsel relied on CPR 10.2, the material portion of which provides as follows:

> *"10.2 (1) A Defendant who wishes to defend all or part of a claim must file a defence (which may be in form 5)*
>
> *(2) However where -*
>
> > *(a) a claim is commenced by fixed date claim in form 2 and there is served with that claim form an affidavit instead of particulars of claim ; or*
> >
> > *(b) where any rule requires the service of an affidavit, the defendant may file an affidavit in answer instead of a defence."*

[94] Ms Jarrett, in responding, referred to the amendment to the CPR gazetted 15th November 2011 which has created a new rule 8.8(2) with the marginal note "*Fixed Date Claim Form Procedure*". Counsel highlighted sub-rule 8.8(2)(c) which provides that "*a defendant who wishes to rely on written evidence must within 28 days of service of the claim form file an affidavit containing that evidence*". Ms Jarrett submitted that implicit in this rule was an acknowledgment that the filing of an affidavit was not a mandatory requirement. Counsel argued that, furthermore, the entitlement of a litigant to defend a claim commenced by fixed date claim form on purely legal grounds, without having filed an affidavit, has been recognized by these Courts as evidenced in the Privy Council case of

Guyah v Commissioner of Customs [2018] UKPC 10 which proceeded without any affidavit on the Respondent's behalf.

[95] The Defendants indicated that they intended to defend the Claim on purely legal grounds and would not be relying on any issues of fact for which they needed to have filed affidavit evidence.

The Court's ruling on the preliminary issue

[96] The Court held that in these circumstances, having regard to the provisions of CPR 8.8(2)(c), as well as the fact that the Defendants were not required by any previous court orders to file affidavit evidence unless they wished to do so, the Defendants were entitled to defend the claim despite the fact that they had not filed affidavit evidence. Accordingly, the Court ordered that the matter proceed.

The submissions of the Claimant before this Court

[97] The Application before this Court is for a Writ of *Habeas Corpus*. The grounds stated in the Amended Fixed Date Claim Form are as follows:

> *"1. The learned trial judge wrongfully failed to grant the application for discovery of original source documents withheld being, facetime, Facebook and Skype conversations used by the Claimant/Applicant in accordance with the powers of a Judge the (sic) in committal proceeding.*
>
> *2. The Applicant was committed without his Attorneys-at-Law first receiving full disclosure before the hearing thereby abrogating his Constitutional right of having sufficient facilities to prepare his defence and or his common law right to full disclosure.*
>
> *3. The Claimant's activities as a Muslim Cleric are protected by Section 17 of the Constitution which allows every citizen inter alia to "…manifest and propagate his religion in worship, teaching, practice and observance"."*

[98] For the purposes of this judgment, I will refer to all the original material which the Claimant asserts should have been provided to him as "Source

Material", which, depending on the context, may refer specifically to some and in other instances, all such material.

[99] It was not patently clear initially, but in circumstances which I will later address, Mr Samuels confirmed that the Claim was pursuant to Section 11(c) of the Extradition Act which provides as follows:

> *"(3) On any such application the Supreme Court may, without prejudice to any other order of the Court, order the person committed to be discharged from custody if it appears to the court that-*
>
> *(c) because the accusation against him is not made in good faith in the interest of justice, it would, having regard to all the circumstances be unjust or oppressive to extradite him."*

SUBMISSIONS OF THE CLAIMANT ON THE REFUSAL OF THE PARISH JUDGE TO ORDER DISCLOSURE

The Constitutionality of the Extradition Treaty

[100] Mr Samuels submitted on behalf of the Claimant that section 4(2) of the Extradition Treaty appears to give it legislative status and consequently, like all other local laws, it is subject to the test of Constitutionality.

[101] Mr Samuels reminded the Court that section 2 of the Constitution sets out the status of the Constitution and provides that if any other law is inconsistent with it, the Constitution shall prevail and the other law to the extent of its inconsistency be void. Counsel argued that it is not an answer to simply assert that the Extradition Treaty is a contract between State and State because the Constitution prevails.

[102] It was submitted that Article IX of the Extradition Treaty (previously quoted herein), offends the constitutional principle of separation of powers because it purports to confer on the executive, the exclusive power to request additional information and thereby excludes the Courts from control of the discovery process. Counsel submitted that to the extent that it does so, it is void.

[103] Counsel also referred to section 1(9) of the Constitution which provides as follows:

> *"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law."*

Counsel submitted that section 1(9) of the Constitution gives this Court supervisory powers over the executive, including the executive who refused to grant the requested discovery to the Claimant, and accordingly it is against the backdrop of section 1(9) and section 2 of the Constitution that we should examine the force of section 16(2).

The effect of section 16(2) of the Charter of Fundamental Rights and Freedoms, 2011

[104] Mr Samuels relied on Section 16(2) of the Charter of Fundamental Rights and Freedoms, 2011, which provides as follows: -

> *"In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interest, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."*

Counsel argued that the new Charter of Rights, 2011, introduced a novel consideration in the protection of a fair hearing in any legal proceedings which may result in a decision adverse to the interest of the subject, whether criminal, civil or otherwise. This protection was greater than that afforded by the previous iteration of that clause contained in the now repealed section 20 of the Constitution. In effect, it created a paradigm shift in giving protection to a wider class of hearings of which extradition hearings are subsumed as a part. Section 16(2) therefore extended the protection of the Claimant's rights to due process to an extradition hearing, notwithstanding the fact that the Parish Judge's function was limited to determining whether there is a *prima facie* case made out.

[105] It was submitted that the right to disclosure was a necessary ingredient of the Extradition Proceedings, protected by Section 16(2) of the Charter, especially having regard to the quasi-criminal nature of such proceedings. It was argued that this is so, not only because the liberty of the subject is involved, but by implication, pursuant to the section 10(2) of the Extradition Act, which provides as follows:

> *"For the purposes of proceedings under this section, a court of committal shall have, as nearly as may be, the like jurisdiction and powers (including power to remand in custody or to release on bail) as it would have if it were sitting as an examining justice and the person arrested were charged with an indictable offence committed within its jurisdiction".*

[106] Mr Samuels argued that not only is discovery necessary for there to be a fair trial, but because of the effect of section 16 (2), it is also necessary for there to be a fair Extradition Hearing. Counsel made the point that at common law discovery has been held by several decisions of the Court to be part of the guarantee of a fair hearing. Counsel relied on the Court of Appeal decision of **Harry Daley v R** (2013) JMCA Crim 14 to advance that position. In particular, reliance was placed on paragraph 49 of the judgment where the learned President of the Court of Appeal made the following statement:

> *"49. In this country, whenever a person is charged with a criminal offence, he is entitled to receive a fair trial. Fairness involves, among other things, the prosecution not putting obstacles in the path of the conduct of the defence of the person charged, or withholding material relevant to the case. For example, where there are matters that are likely to be of importance to the defence and they are under the control of the prosecution, such matters ought to be disclosed. "The prosecution" means not just the prosecutors who appear in court but includes persons such as police officers and other state officials connected with the investigation and conduct of the case against the accused person."*

[107] Mr Samuels submitted that although it might on the face of it appear to be a leap to include the **Harry Daley** principles of discovery to extradition proceedings, the Court as guardian of the rights of the individual must apply those principles to extradition hearings in order to ensure that the individual

receives the fair hearing to which is contemplated by section 16(2) and to which he is duly entitled thereby.

The additional evidence point

[108] During Mr Samuel's address, Ms Jarrett for the 1st and 2nd Defendants interposed and submitted that because the Claimant was seeking to rely on "fresh evidence" (the term of course being used loosely by the parties and myself during the hearing to refer to additional evidence), as contained in the Affidavit of the Claimant, then it must be in support of one of the grounds in either section 7(1) or 11 of the Extradition Act. Ms Jarrett questioned whether the reference by Mr Samuels to the Claimant's right to practice his religion was an assertion that the Requesting State was not truly seeking to extradite the Claimant for terrorism offences, but rather, because of his religion. She questioned whether reliance was being placed on section 7(1) (b) of the Act which is the only section with refers to religion. This reliance, she argued, would be consistent with the amendments contained in the Amended Fixed Date Claim Form and in particular the newly inserted paragraph 3 of the grounds. Having initially said that the operative section was 7 of the Act, and that section 11(4) did not require him to particularize where in section 7 he should fit his reliance, Mr Samuels corrected himself and confirmed that he was in fact relying on section 11(3) that is that the accusation against the Claimant is not made in good faith and the Claimant was squarely within that section.

[109] Section 7(1)(b) of the Extradition Act is set out hereunder:

> *"7-(1) A person shall not be extradited under this Act to an approved State or committed to or kept in custody for the purposes of such extradition, if it appears to the Minister, to the court of committal, to the Supreme Court on an application for habeas corpus or to the Court of Appeal on an application against a refusal to grant a writ of habeas corpus-*
>
> *(a) that the offence of which that person is accused or was convicted is an offence of a political character; or …"*

Section 11(3) and 11(4) which have the marginal note "Application for *Habeas Corpus* etc." are in the following terms:

> *"…(3)On any such application the Supreme Court may, without prejudice to any other power of the Court, order the person committed to be discharged from custody if it appears to the Court that-*
>
> *(a) by reason of the trivial nature of the offence of which he is accused or was convicted: or*
>
> *(b) by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large, as the case may be; or*
>
> *(c) because the accusation against him is not made in good faith in the interest of justice,*
>
> *It would, having regard to all the circumstances, be unjust or oppressive to extradite him.*
>
> *(4) On any such application the Supreme Court may receive additional evidence relevant to the exercise of its jurisdiction under section 7 or under subsection (3) of this section."*

[110] In justifying his reliance on section 11(3) to ground the admission of additional evidence in the form of additional affidavit evidence of the Claimant, Mr Samuels argued that the concept of good faith and justice is inextricably bound up in the concept of discovery and that in exercising and demonstrating good faith, it is necessary for the Requesting State to disclose the Source Material. Counsel also explained that the reference in the Claimant's affidavit to the fact that he has been a Muslim Cleric for the past 26 years is in order to support the fact that his religious rights are protected by section 17 of the Constitution.

[111] The case advanced by the Claimant was accurately and succinctly captured in the conclusion of Mr Samuels' written skeleton submissions on behalf of the Claimant which I think is worth reproducing hereunder:

> *"1. It is submitted that both under the Constitution and under the powers given to examining justices under the Justices of the Peace Jurisdiction Act, the Claimant ought to have been granted disclosure.*

> *2. For the Requested State to extradite the subject, without giving the original sources and full context of conversations and transcripts relied upon by the Requesting State, thereby preventing him from verifying the veracity and accuracy of the typed transcript against him, is to fail to make an 'accusation against him in good faith in the interest of justice, having regard go all the circumstances and it would therefore be unjust or oppressive to extradite him'."*

SUBMISSIONS OF THE 1ST AND 2ND DEFENDANTS ON WHETHER THE PARISH JUDGE COULD HAVE ORDERED THE REQUESTING STATE TO PRODUCE THE SOURCE DOCUMENTS

[112] Ms Jarrett commenced her submissions with the exposition on the nature of extradition hearings. Counsel noted the observations of Mr Justice Sykes (as he then was), sitting in the Full Court in **Martin Giguere vs The Government of the United States of America and the Commissioner of Correctional Services** [2012] JMSC Full 4, a case which was post the implementation of the Charter of Rights. At paragraph 12 of the judgment the learned Judge stated as follows: -

> *"As is well known, extradition is a primarily political process where the executive of one state agrees with the executive of another state that each will surrender to the other, persons within its borders who are sought by the other state. The courts are interposed to answer the purely legal questions and thereafter, if the courts decide that extradition is legally permissible in any given case, then it is for the executive branch of government of the requested State to decide whether the person will be surrendered to the requesting State."*

[113] Counsel highlighted the fact that the Extradition Treaty is an arrangement between two sovereign states and that even if the Courts decide that extradition is legally permissible, it remains for the executive branch of the Requested State to decide whether the person will be surrendered to the Requesting State. Counsel conceded that although the extradition of the person is ultimately a political decision, the Court is not expected to rubber stamp the request and that a *prima facie* case must be established through a meaningful judicial process. Counsel candidly conceded that section 16(2) of the Constitution did apply to the Extradition Hearing before the Parish Judge in the

sense that the Claimant is entitled to a fair hearing. However, Counsel further submitted that the Extradition Hearing does not need to be conducted in exactly the same manner that a domestic trial would be conducted in order for the hearing to satisfy the test of fairness as contemplated by section 16(2).

[114] Counsel submitted that when one examines the transcript of the Extradition Hearing and the Authenticated Documents, it is clear that the Parish Judge had a reasonable basis on which to find that a *prima facie* case had been made out and the requirement for a fair hearing under section 16(2) of the constitution had been duly met.

[115] In support of her submission that the Parish Judge had no power to order the Requesting State to produce evidence not contained in the Authenticated Documents, Ms Jarrett relied on the judgment of the Jamaican Court of Appeal in **Emmanuel v Commissioner of Correctional Services & another** 73 WIR 291 in which Harrison JA referred to the decision of the Court in **Walter Gilbert v The Director of Public Prosecutions and Director of Correctional Services** (1997) 34 JLR 471. At page 298 of **Emmanuel** (supra) Harrison JA confirmed that there was no requirement under the Extradition Act or the Extradition Treaty which provided for the proceedings before the grand jury in the Requesting State to be disclosed at the Extradition Hearing and neither does this Court nor the examining magistrate have any jurisdiction to enforce any such production.

[116] Ms Jarrett placed heavy reliance on the case of **Knowles v Government of the United States of America and Another** [2006] UKPC 38 to support her position that even in a jurisdiction with a constitutionally protected Bill of Rights, there was no requirement for disclosure in the manner required in a domestic trial and there was no authority for the Parish Judge to order such disclosure. Counsel referred to and relied specifically on paragraphs 34 and 35 of the judgment which are in the following terms:

> *"34 Some doubt has arisen concerning a requesting state's duty of disclosure in extradition cases. Giving the judgment of the Divisional Court in* ***R v Governor of Pentonville Prison, Ex p Lee*** *[1993] 1 WLR 1294, 1300, Ognall J distinguished between extradition proceedings and domestic criminal proceedings, observing that "fairness is not a criterion relevant to the function of the committing court". It was suggested in* ***R v Governor of Brixton Prison, Ex p Kashamu*** *(unreported) 6 October 2000, that this observation could not stand in the light of articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms but in* ***Lodhi v Governor of Brixton Prison*** *[2001] EWHC Admin 178 at [108]–[115], Ognall J's judgment was held by another Divisional Court to remain good law. This was because it had been held by the European Commission in Application No 10479/83 v United Kingdom (1984) 6 EHRR 373 that article 6 has no application to extradition proceedings.*
>
> *35 The Board would hesitate to adopt the full breadth of Ognall J's observation. There are many respects in which extradition proceedings must, to be lawful, be fairly conducted. But a requesting state is not under any general duty of disclosure similar to that imposed on a prosecutor in English criminal proceedings. It does, however, owe the court of the requested state a duty of candour and good faith. While it is for the requesting state to decide what evidence it will rely on to seek a committal, it must in pursuance of that duty disclose evidence which destroys or very severely undermines the evidence on which it relies. It is for the party seeking to resist an order to establish a breach of duty by the requesting state. The Board would endorse the general approach laid down by Mitting J (sitting with Lord Woolf CJ in the Divisional Court) in* ***Wellington v Governor of Belmarsh Prison*** *[2004] EWHC 418 (Admin) at [26]. In the present case the appellant has failed to discharge the burden lying on him."*

[117] Ms Jarrett also took the Court directly to the principles laid down by Mitting J in **Wellington v Governor of Belmarsh Prison** [2004] EWHC 418 (Admin) at paragraph [26] (to which reference was made in paragraph 35 of **Knowles**).

[118] Counsel submitted that there was nothing in the evidence submitted by the Claimant which would suggest that there was any bad faith on the part of the Requesting State. Counsel referred to the fact that the Claimant in his affidavit admits to having had conversations with Officer 716 and in the absence of any evidence provided by the Claimant as to what he says is the real context behind the conversations, the Parish Judge acted properly in finding that there was a *prima facie* case. Counsel asked the Court to note that the challenge by

the Claimant was not to whether the Parish Judge properly found that a *prima facie* case was made out or whether the offences for which he is charged in the United States also offend our Terrorism Protection Act.

The Constitutional Challenge

[119] Ms Jarrett submitted that the Claimant's case appeared to include a constitutional challenge to the Extradition Treaty and to the extent that this is what was being attempted it was impermissible by the method being used and the 1st and 2nd Defendants were objecting to this. Ms Jarrett referred to paragraph 38 of Mr Samuel's written submissions in which he stated as follows:

> *"It is submitted that the provisions of the Extradition Treaty offends the sacred doctrine of the Separation of Powers by purporting to vest the power to request additional information and thus disclosure exclusively in the Executive."*

[120] Ms Jarrett relied on section 63 (2) of the Criminal Justice Administration Act which she submitted makes it clear that in the application for *Habeas Corpus* the Applicant must state all the grounds on which he applies. Counsel relied on the case of **Forbes (Trevor) v Director of Public Prosecutions** (unreported), Court of Appeal, Jamaica, Supreme Court Miscellaneous Appeal No 9/2004 judgment delivered 3 November 2005, in which the Court of Appeal addressed the significance of that section. Counsel submitted that, in any event, if what was being attempted was a constitutional challenge to the Extradition Treaty on the basis that it was void due to its unconstitutionality, such an application would have had to be pursued by an application pursuant to section 19 of the Charter. Counsel argued that this position was supported by the case of **Montique (Hartford) v Commissioner of Customs & Others** (unreported), Court of Appeal, Jamaica, SCCA No 96 of 2005 judgment delivered 8th March 2007, and relied on the statement of Smith JA at page 32 (Counsel noting that references to section 25(2) of the Constitution

should be read and understood to be references to the current section 19), as follows:

> *"…In any event in **Mitchell v United States Government** [1990] 27 JLR 565 this Court held that an applicant may not have recourse to a so-called constitutional motion seeking a writ of Habeas Corpus when he is simultaneously seeking a similar remedy under the provisions of the Extradition Act. The reason the Court gave was that the remedy provided under section 25(2) of the constitution is of a civil nature and no provision is made for the joinder with any other proceedings; further an application for habeas corpus is a criminal cause or matter notwithstanding that the proceedings are civil in form and it would be incongruous for such criminal proceedings to be joined with the civil proceedings under section 25(2) of the Constitution…."*

[121] Counsel also submitted that in view of the fact that Mr Samuels had confirmed that he is placing reliance on section 11(3)(c) of the Extradition Act, as the case of **Knowles** demonstrates, this is a ground of challenge which must find its way in the Fixed Date Claim Form by which the application for *habeas corpus* is made. However, it is not contained in the Amended Fixed Date Claim Form of the Claimant.

The 3rd Defendant's application to file additional evidence

[122] At the start of the second day of the hearing, Mr Taylor made an application to file an affidavit in order to respond to the Claimant's affidavit filed in support of the Claim. His application was supported by Ms Jarrett who pointed out that the 1st and 2nd Defendants had not been served up to the start of the second day of the hearing before this Court.

[123] Mr Samuels asked to be allowed until 2 p.m. to respond to the application and the Court so permitted. On the Court's resumption after the luncheon adjournment, Mr Samuels revisited in some measure his earlier position adopted at the start of the hearing, that the Defendants had not filed any affidavit evidence as (in his view) they were required to do pursuant to the CPR and in his view, the case management orders of the Court. However, more importantly, and appropriately, he sought to make the point that the Defendants

had indicated at the start of the hearing that they were content to proceed with the hearing with submission as to matters of law only. Counsel argued that the Claimant had commenced his case with the clear understanding that there is no affidavit opposing his and if the 3rd Defendant was to be permitted to file an affidavit after the Claimant had closed his case, the Claimant would be embarrassed.

[124] The Court ruled that the Defendants had been content to rely on legal submissions only and although they had the opportunity at or near the start of the case to say otherwise they did not and having considered all the circumstances, the Court was not inclined to allow the filing of any additional affidavits at that stage of the hearing. Accordingly, the hearing continued as scheduled.

The submissions of the 3rd Defendant on the refusal of the Parish Judge to order disclosure

[125] At the time for his presentation, Mr Taylor's substantive submissions were laid on the foundation of an acknowledgment of the nature of extradition proceedings and a distinction between such proceedings and other criminal proceedings. Counsel proffered five postulates of extradition, namely that (i) extradition is a major instrument for the suppression of crime; (ii) the Requesting State will accord due process to the subject; (iii) the proceedings are sui generis or unique;(iv) compliance shall be in good faith; and (v) there is an underlying risk of flight.

[126] Counsel relied on the observations of Sykes J in **Giguere** at paragraph 43

> *"Having regard to the nature of extradition, the requested state and the courts there have to assume that the requesting state is acting in good faith unless there is cogent evidence to the contrary. The reason is that extradition is state to state, not court to court. Both states have agreed to assist each other by returning fugitives wanted in one state to the other. Thus, if one state gives assurances to the other that the anonymous witness will turn up at trial then unless there is very good reason to doubt*

> *this assurance, then the courts of the requested state should act on that assurance. Good faith is presumed."*

[127] In his written submissions Mr Taylor also referred to the summary by MacLachlin CJ on the role of the Court in extradition proceedings as stated in the Supreme Court of Canada in **United States of America v Ferras**; **United States of America v Latty**, [2006] 2 S.C.R. 77 as follows:

> *"[22] The meaningful judicial process just described involves three related requirements: a separate and independent judicial phase; an impartial judge or magistrate; and a fair and meaningful hearing.*
>
> *[23] The need for a separate and independent judicial phase recognizes that extradition involves both executive and judicial acts. The judicial aspect of the process provides a check against state excess by protecting the integrity of the proceedings and the interests of the "named person" in relation to the state process.*
>
> *…[26] I conclude that the principles of fundamental justice applicable to an extradition hearing require that the Person sought for extradition must receive a meaningful judicial determination of whether the case for extradition prescribed by s. 29(1) of the Extradition Act has been established — that is, whether there is sufficient evidence to permit a properly instructed jury to convict. This requires an independent judicial phase, an independent and impartial judge and a judicial decision based on an assessment of the evidence and the law."*

[128] Mr. Taylor submitted that Article VIII of the Extradition Treaty and section 14 of the Extradition Act governs the procedures and documents required in relation to an extradition request. Counsel also submitted that the Requesting State is the sole arbiter of the material it chooses to place before the court in support of its application. Counsel also relied on the case of **Emmanuel v Commissioner of Correctional Services and Another** (supra) in which there was a challenge to the admissibility of evidence contained in an affidavit of conversations with the applicant on the ground that neither the actual tapes containing those recordings or transcripts of those recordings were ever placed before the court at the committal proceedings. Harrison P, with whom the other judges of the Court of Appeal agreed, held that the relevant affidavits had been duly authenticated and therefore was admissible.

[129] Counsel referred the Court to a number of cases such as **R v Governor of Pentonville Prison and Another, ex parte Lee** [1993] 1 WLR 1293 at 1300 which, having regard to **Knowles**, he indicated was relied on for the narrow point that the Magistrate could not order discovery. In support of his postulate that extradition proceedings are sui generis, Counsel also relied on the case of **United States of America v Dynar** [1997] 2 S.C.R. 462 in which the court stated that "…*the role of the extradition judge is limited and the level of procedural safeguards required, including disclosure must be considered within this framework.*"

The 3rd Defendant's submissions on the separation of powers constitutional issue

[130] Mr Taylor submitted that the Treaty is an agreement between executive and executive and that it was in the sole discretion of the executive of the Requested State as to whether the subject would be extradited.

[131] Counsel also relied on the case of **Lebert Ramcharan and Donovan Williams v Commissioner of Correctional Services and Another** (2007) 73 WIR 312, in which the appellant argued that his designation as a kingpin by the President of the United States of America was a discrimination against him by reason of his nationality. This authority would have been helpful if the Claimant was asserting that his extradition was to punish or prosecute him on account of his religion as Mr Taylor suggested could have been inferred. However, in light of Mr Samuels' confirmation that he was not relying on section 7 of the Extradition Act, this authority lost much of its significance.

[132] Mr. Taylor submitted that since the Claimant was asserting lack of good faith and relying on section 11(3)(c) of the Extradition Act, he was required to produce clear and cogent evidence to invoke that provision and he had not done so. Counsel noted that Ms Jarrett had taken the Court to portions of the transcripts relied on by the Requesting State and noted that in his affidavit the

Claimant spoke only to audio messages and did not specifically address the text messages, examples of which he proceeded to highlight to the Court.

[133] Mr. Taylor closed his address to the Court with his submissions that the Parish Judge was correct to find that on the evidence before him, a *prima facie* case had been made out, not in bad faith or punishing tehClaimant in relation to his religion, but rather, for his activities in violation of the New York Terrorism Statute. Furthermore, Counsel submitted that as the case of **Harry Daley** confirmed, there was sufficient evidence to support the conclusion that the United States justice system has adequate measures in place in order to ensure that the Claimant will receive a fair trial.

THE CLAIMANT'S REPLY

[134] In his reply, Mr Samuels proceeded to reiterate the point that included in the Claimant's request at the Extradition Hearing was a request for the WhatsApp messages. Therefore, to the extent that Mr Taylor suggested that these messages were unchallenged and therefore by themselves, were capable of supporting the finding of a *prima facie* case against the Claimant, that suggestion was inaccurate. I should note for the avoidance of doubt that I have considered Source Material as defined to include the original WhatsApp messages.

[135] Counsel submitted that all the cases relied on by Ms Jartett and Mr Taylor, except **Giguere**, were prior to the Charter of Rights provisions which came into force in April 2011. Accordingly, they do not address (and could not have addressed) the foundation of his complaint relating to the effect of section 16 (2).

[136] Counsel referred to the preamble to the Charter of Rights, which indicates that a new comprehensive and effective protection of our rights was being introduced. Counsel submitted that there should be no reliance on any case law authorities from a jurisdiction without a written constitution which is

superior to Parliament. Counsel also took the opportunity to emphasise the crux of the Claimant's application which was that the effect of section 16(2) is that non-disclosure makes a hearing unfair and that (contrary to some of the English decisions), all the rights that a person enjoys in a trial, they should also enjoy at an extradition hearing irrespective of whether the Treaty provides for that. Furthermore, there is no proviso to section 16 (2) and the rights guaranteed thereby are absolute save and except in very limited cases. Counsel argued that there are some important lessons to be learnt from the case of **Knowles** which are in favour of the Claimant's position and referred the Court in particular to paragraphs 35 and 36 of that judgment. These points will be addressed in the analysis below.

ANALYSIS

IS THERE A PROPER CONSTITUTIONAL CHALLENGE TO THE EXTRADITION TREATY?

[137] I accept the submissions of Ms Jarrett that there is no proper challenge to the constitutionality of the Extradition Treaty such as would enable this Court to make a declaration in these proceedings that it is unconstitutional and void. In my view, as a matter of procedure, it would be inappropriate for this Court to make a declaration that the Extradition Treaty is void where it was not clear that such an application was being sought on the Fixed Date Claim Form and there was no case management which would have assisted in focusing the parties on this issue. I am fortified in my conclusion by the dicta in **Hartford Montique** (supra) to which reference was already made in this judgment and also by the statement by the Court in **Trevor Forbes** (supra) at page 3:

> *"I think it is fair to say that Mr. Phipps Q.C. did not resist the objection of the respondents as, by virtue of section 63(1) of the Criminal Justice (Administration) Act, an application for Writ of Habeas Corpus must state all the grounds, upon which it is based. And by virtue of section 63(2) ibidem no further application, whether on the same grounds or any other ground, can be made in absence of fresh evidence.*

> *In the **Vivian Blake** case (supra) Forte, JA, (as he then was) was of the view that to permit new grounds to be advanced at the appeal stage would be to allow the appellant to do through the process of appeal that which he was shut out from doing by virtue of section 63 (1) and (2) of the Criminal Justice (Administration) Act.*
>
> *In the **Desmond Brown** case (supra) Panton JA, emphasized that "… there can be no hide-and-seek … they are to set out **all** their grounds at that stage. They are not permitted to withhold a ground, and then spring a surprise at a later stage."*
>
> *Although the constitutional ground was not stated in the application for the Writ, the Court was of the view, that counsel should be permitted to argue such a ground as ex facie it seeks to question the validity of the Act under which the Proceedings were brought."*

[138] However, in my view, the conclusion that this Court is unable to consider whether it should declare the Extradition Treaty void does not cause any prejudice or injustice to the Claimant. The essence of his case is that the non-disclosure of the Source Material to him was unfair having regards to section 16(2) of the Constitution and his arguments in that regard have been fully advanced and considered.

Should the Claimant have included his reliance on section 11(3)(c) of the Extradition Act as a ground in the Amended Fixed Date Claim Form?

[139] The case of **Knowles** appears to support Ms Jarrett's argument that reliance on section 11(3)(c) of the Extradition Act is a ground which ought to have been included in the Amended Fixed Date Claim Form. It appears that Mr Samuels had not intended to rely on this ground. As I have noted earlier in this judgment, after Ms Jarrett questioned whether the references to religious freedom was in support of a reliance on section 7(1)(b) of the Extradition Act, Mr Samuels initially said the reliance was on section 7 but shortly thereafter changed his position and said he was relying on 11(3). There was no objection to the admission of the additional evidence prior to the start of the hearing. The Defendants filed no evidence in response thereto and in those circumstances the Court received the additional evidence notwithstanding the fact that the reliance

on section 11(3) of the Extradition Act was not included in the Amended Fixed Date Claim Form.

[140] Because Mr Samuels confirmed that he is not relying on section 7 of the Extradition Act, I have deliberately refrained from any analysis of the issue of whether the request for his extradition is for the purpose of prosecuting or punishing the Claimant on account of his race, religion, nationality or political opinions. In any event, the evidence before the Court does not support the position that the request for the Claimant's extradition is for any of these reasons or that his constitutional right to practice and propagate his religion is being abridged. The allegations are not against his religion, *per se*, but in respect of his activities (albeit related to his interpretation of his religion) which are contrary to the aforementioned New York Statutes. The point was well made by Ms Jarrett that the right to practise one's religion is not absolute.

WHAT IS THE EFFECT OF SECTION 16(2) OF THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOM?

[141] Many Bills of Rights are in the form of broad statements of principle. Jamaica is one of the States that has gone further and formulated those rights in a very detailed manner. Jamaica has included those provisions in our Constitution. Canada and the Commonwealth of the Bahamas are also among the jurisdictions which have constitutionalised their Bill of Rights provisions. The Canadian Charter of Rights and Freedoms addresses legal rights in several subsections, the relevant portion of the right to a fair hearing is addressed in section 11 as follows:

> *" PROCEEDINGS IN CRIMINAL AND PENAL MATTERS.*
>
> ***11.*** *Any person charged with an offence has the right*
>
> > ***(a)*** *to be informed without unreasonable delay of the specific offence;*
> >
> > ***(b)*** *to be tried within a reasonable time;*

> ***(c)*** *not to be compelled to be a witness in proceedings against that person in respect of the offence;*
>
> ***(d)*** *to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; …"*

[142] Another example of a bill of rights provision in protection of legal rights can be seen in the first sentence of Article 6(1) of the European Charter of Human Rights ("ECHR"), which provides as follows:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

[143] Mr Samuels submitted that section 16(2) of our Charter of Fundamental Rights and Freedoms, 2011 introduced a novel consideration in the protection of a fair hearing in any legal proceedings. The Pre-Charter of Rights section 20(2) of the Constitution provided as follows:

> *"(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such determination are instituted by any person before such court or authority, the case shall be given a fair hearing within a reasonable time."*

By way of contrast, Section 16(2) of the Charter of Fundamental Rights and Freedoms, 2011 provides as follows: -

> *"In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interest, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."*

[144] Therefore, it can be reasonably argued that there is merit in Mr Samuels' submission that section 16(2) of the Jamaican Charter of Fundamental Bill of Rights is broader in its scope than its predecessor, and also broader than its Canadian Counterpart, to the extent that section 16(2) expressly extends the right to a fair hearing to all "*legal proceedings which may result in a decision adverse to his interest*".

[145] Mr Samuels' position is that because of the broad ambit of section 16(2) of our Constitution, the Canadian cases relied on by the Defendants are of no value because they do not analyse the issue of fairness in the context of a similarly wide constitutional provision as that of Jamaica. Counsel also submitted that the English and European cases are also of no value for our purposes, because of the supremacy of Parliament in those jurisdictions. He argued that the finding by the European Commission in **Application No 10479/83 v United Kingdom** (1984) 6 EHRR 373 (referred to in paragraph 36 of **Knowles** (supra)), that Article 6 of the ECHR has no application to extradition proceedings, makes his point clearly, since such a result could not have obtained given our constitutional structure).

[146] The foundation of the Claimant's case is that because section 16(2) of our Constitution extends to extradition hearings then, *ipso facto*, the test of fairness in Extradition Proceedings must necessarily be the same test as that applied in a domestic criminal trial. This is perhaps a convenient juncture for me to state that I am not convinced that this necessarily follows as a matter of law or logic.

[147] The cases outside our jurisdiction are important for purposes of assisting our analysis, not because they are decisions exactly on all fours applying identical constitutional provisions, but rather, because they provide analyses of the nature and scope of an extradition hearing, *vis a vis* a trial. It is that distinction which has formed the underlying rationale which has hitherto caused those courts to conclude, that the importation of all the criminal trial procedures, (including full discovery), is not necessary in order to ensure that the process of any extradition hearing is fair to the subject.

[148] Ultimately, it is for this Court to decide whether the impact of section 16(2) is indeed to establish one fixed universal test of fairness across all hearings which might result in a decision adverse to the subject. In doing so, this Court must at all times remain cognisant of the differences between the provisions of

those States which have a statutory bill of rights and those which have gone further and opted for constitutional protection of those rights. As between those States which have chosen to constitutionalise those rights, this Court ought to feature in its analysis, the difference between the Jamaican provisions and those of the other members of that group with constitutional protection.

IS THE SAME FAIRNESS TEST TO BE UNIVERSALLY APPLIED IN ALL PROCEEDINGS WHICH MAY RESULT IN A DECISION ADVERSE TO A LITIGANT'S INTEREST?

[149] The Claimant's argument is that the effect of section 16(2) is to make the test of fairness in a trial the same as that to be applied in an Extradition Hearing. It is my view that in order to achieve this, the Court would have to "*transplant into the extradition process all the disclosure requirements*" of a trial (to borrow with modification the language contained in **Dynar** (infra)).

[150] In this application, there is no issue with the time within which the hearing was held or with the independence and impartiality of the tribunal. Nor is there any assertion that there was insufficient evidence before the Parish Judge. The main pillar of the assertion of unfairness is the fact that the Claimant was denied the original Source Material from which the transcripts were allegedly made. The importance of such source data in the context of a trial lies in the fact that it affords a person the opportunity to confirm their accuracy and to speak to any deletions or omissions. The source data is also important in order to verify the accuracy of transcripts derived therefrom which have been provided as well as to allow the Claimant to rely on other expressive features only discernible from the original recordings, (such as tone and emotion) which may serve to add colour to the language used.

[151] Having regard to the importance of the integrity and accuracy of the source data in a trial, it is my view that the conclusion of the Court in **Harry Daley**

v R (supra) expressed at paragraph 53 of the judgment was inevitable, as the Court said:

> *"[53] Earlier, mention was made of the fact that the defence had sought disclosure of the devices used for recording the conversations. This was denied and is the source of complaint before us. We do not see the need to rule on whether such disclosure ought to have been made, given the view that we take of the process. There is an admission that there have been deletions and omissions in respect of the recordings and transcriptions that were put in evidence. We are of the view that where recordings are made and are being relied on to prove a case, the entire recordings and the context are to be placed before the court for a determination to be made by the court on the question of relevance. It is not a matter for the investigator to determine."*

[152] It cannot be gainsaid that the Parish Judge was required to ensure that the Claimant is given a fair hearing. That is conceded by the Defendants. The issue at the crux of this application is whether in the context of the Extradition Hearing, such a hearing can be considered to have been fair within the meaning of section 16(2) of the Charter of Rights, without the Claimant having been provided with the original Source Material.

[153] I am of the opinion that the Extradition Hearing can only be considered to have been fair if there is a fundamental distinction between the nature of an Extradition Hearing on the one hand and the nature of a trial on the other, (which continues to exist today notwithstanding section 16(2)), which necessitates and/or justifies a difference in the disclosure requirements in each case. There is a plethora of case law authorities which emphasize this distinction and I repeat for emphasis that I fully appreciate the position advanced by Mr Samuels that as a result of the operation of the relatively new section 16(2) a distinction in disclosure requirements cannot be maintained or justified. However, when one examines the cases, the common thread running throughout is that it is the very fundamental difference in purpose as between a trial and an Extradition Hearing, which influences the way in which fairness must be assessed in each forum.

[154] It was never the intention of the legislators to make extradition proceedings synonymous with trial proceedings. Section 10 of the Extradition Act

clearly enunciates that the court of committal shall hear the case in the same manner, as nearly as may be, as if he were sitting as an examining justice and as if that person were brought before him charged with an indictable offence committed within his jurisdiction. As an examining justice the court is required to act in accordance with the provisions of the Justice of the Peace Jurisdiction Act, in particular the provisions of section 43 which require the establishment of a *prima facie* case. The phrase '*as nearly as may be*' must be taken to mean as nearly as may be consistent with the terms and purpose of the Extradition Act. However, proper regard must be had to the limited function of the Judge in extradition proceedings and the fact that there are significant differences between a preliminary enquiry and an extradition hearing. These differences include but are not limited to the fact that the evidence led by the Requesting State is not usually in viva voce form, but is contained in documentary evidence (such as affidavits), as well as the fact that the subject does not have the right to cross-examine the witnesses whose evidence is contained in the documents.

[155] In the course of giving the judgment (by majority) of the Supreme Court of Canada in **Kindler v. Canada (Minister of Justice)** (1991) 84 D.L.R. (4th) 438. McLachlin J. said, at p. 488:

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

I am attracted to this concise formulation of the nature of the law of extradition which is based on a recognition that extradition occupies a unique position and I accept the learned Judge's assessment as accurate. The learned Judge in the paragraph that follows noted thus:

> *"This unique foundation means that the law of extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the*

process of extradition, they are necessarily tempered by other considerations.

[156] I am also wholly in agreement with the reasoning of the Supreme Court of Canada in the case of **Dynar** (supra), one of the cases commended to the Court by the 3rd Defendant, in which it was held as follows:

> *" [130] It follows that it is neither necessary nor appropriate to simply transplant into the extradition process all the disclosure requirements referred to in* ***Stinchcombe, supra, Chaplin, supra,*** *and* ***O'Connor, supra****. Those concepts apply to domestic criminal proceedings, where onerous duties are properly imposed on the Crown to disclose to the defence all relevant material in its possession or control. This is a function of an accused's right to full answer and defence in a Canadian trial. However, the extradition proceeding is governed by treaty and by statute. The role of the extradition judge is limited and the level of procedural safeguards required, including disclosure must be considered within this framework.*
>
> *[131] Procedures at the extradition hearing are of necessity less complex and extensive than those in domestic preliminary inquiries or trials. Earlier decisions have wisely avoided imposing procedural requirements on the committal hearing that would render it very difficult for Canada to honour its international obligations…..*
>
> *[132] The statutory powers of an extradition judge are limited. The hearing judge may receive sworn evidence offered to show the truth of the charge or conviction (s. 14), receive evidence to show that the particular crime is not an extradition crime (s. 15), and take into account sworn, duly authenticated depositions or statements taken in a foreign state (s. 16). The obligation on the Requesting State is simply to establish a prima facie case for the surrender of the fugitive and it is not required to go further than this. The committal hearing is neither intended nor designed to provide the discovery function of a domestic preliminary inquiry. See* ***Philippines (Republic) v. Pacificador*** *(1993), 1993 CanLII 3381 (ON CA), 14 0.R. (3d) 321 (C.A.), at pp. 328-39, leave to appeal refused, [1994] S. C.R. x. Specifically, disclosure of the relationship between United States and Canadian authorities in an investigation is not a requirement imposed on the Requesting State under either the Act or the treaty."*

[157] Some of the reasons for these requirements are also to be found in the case of **R v Governor of Pentonville Prison and Another, ex parte Lee** [1993] 1 WLR 1293 at 1300 where Ognall J commented as follows:

> *"It is of course right to observe that the law of extradition proceeds upon the fundamental assumptions that the requesting state is acting in good*

> *faith and that the fugitive will receive a fair trial in the courts of the requesting state. If it were otherwise, one may assume that our government would not bind itself by treaty to such process. But that is not to say that it is the duty of our courts to enquire into the adequacy or otherwise of the procedural safeguards afforded to a defendant before those courts. Our courts have consistently resisted attempts to import the requirements of domestic criminal procedure into extradition proceedings. Provided that there has been a compliance with the terms of the Extradition Act 1989, fairness is not a criterion relevant to the function of the committing court."*

[158] For the avoidance of any doubt, I wish to emphasize that my reference to the above portion of Ognall J's judgment is solely for the purpose of noting his observation on the nature of the extradition process. This case being from England, in contrast to the Canadian cases to which reference has been made, also helps to demonstrate the universality of the views held by Courts as to the nature of an extradition hearing. I find it necessary to state that I wholly disagree with his statement that "*fairness is not a criterion relevant to the function of the committing court*". In **Knowles** the Privy Council was hesitant to adopt Ognall J's observations because the Court was of the view that in order to be lawful extradition hearings must be fairly conducted. Critically, in **Knowles** notwithstanding that acknowledged need for fairness, the Privy Council expressly stated that a requesting state is not under any general duty of disclosure similar to that imposed by a prosecutor in an English trial.

[159] In my view, **Knowles** provides from our highest judicial authority, (albeit in a decision originating in another jurisdiction), confirmation that the standard of fairness is not rigid and inflexible. **Knowles** provides a proper basis for the conclusion that I have reached, that the test to be applied in Jamaica extradition proceedings, as far as the disclosure obligation of the Requesting State is concerned, is not exactly the same as the obligations of the prosecution in a criminal trial in Jamaica.

[160] Mr Samuels has submitted that **Knowles** is of little weight because although the Commonwealth of the Bahamas from which the case originates has a written constitution its Bill of Rights provisions are materially different from

those of Jamaica. Counsel was kind enough to provide the Court with copies of the appropriate sections and I think it is worth quoting portions of it hereunder.

> *"20. (1) If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> *…(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right of obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are institute by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."*

[161] I do not share the view expressed by Mr Samuels as to the inapplicability of **Knowles** simply because of the narrower way in which the relevant Bahamian provision is framed. That difference in the form of expression does not disqualify **Knowles** from favourable consideration by this Court in its deliberations. The right to a fair hearing which is sought to be protected is the same. More importantly, this protection is constitutionalized in the Bahamas and so, as a matter of law, it occupies the same hierachical position as the Jamaican Bill of Rights.

[162] Accordingly, for the reasons I have expressed above I have reached the conclusion that there are different procedural requirements that apply to extradition hearings as opposed to domestic trials. Fairness is a fluid concept (within obvious limits of course), which must be assessed within the context of the nature, form and function of the applicable proceedings. There are some elements of any hearing which are universal and must be present in order for any hearing to be considered fair, some of these are general fair hearing principles such as a right to consult with Counsel (an example given by Mr Samuels). However, beyond those universally accepted components, the necessity for others elements (such as discovery/disclosure) will vary depending on the nature of the proceedings and the need for those elements to be present in order to

make a hearing fair. In my opinion, this has to be assessed on a case by case basis.

[163] I am not of the opinion that the effect of section 16(2) is to equate the extradition hearing with a criminal trial in its discovery and/or disclosure requirements simply because section 16(2) requires fairness in each case. In my view, it is simply a different test of fairness having regard to the nature of the proceedings.

[164] In **Knowles**, the Privy Council stated that in discharging its duty of candour and good faith, the requesting state must disclose evidence which destroys or very severely undermines the evidence on which it relies. There is no cogent evidence as to the existence of such undisclosed evidence in his case.

[165] In the present case although the Requesting State has not provided the original Source Material requested and has not given a reason for not so doing, it has provided extensive transcripts including the identity and source of the information in each case. The Claimant was not given just a mere gist or summary. I repeat for the avoidance of any doubt, that I am fully cognisant of the use to which the Claimant asserts the Source Material would be put in challenging the case against him. However, in these circumstances, in my view, it could not reasonably be said that without the Source Material the applicant was denied an opportunity to effectively challenge the allegations against him.

[166] Another principle made clear by **Knowles** is that it is for the party seeking to resist an extradition order, to establish a breach of duty by the Requesting State. However, the point was well made by Counsel for the Defendants, that the Claimant, (as he was entitled to do), gave no evidence at the hearing challenging the accuracy of the allegations against him as contained in the transcripts presented by the Requesting State that were before the Court. Mr Samuels argued that the unfairness lay in the refusal to produce the Source Material. He submitted that even if the discovery would have produced nothing of

significance, that fact is immaterial because it is the refusal to produce (in and of itself), which creates the unfairness.

[167] However, the Court has found that there is no entitlement of the Claimant to the Source Material and therefore the refusal of the Parish Judge to order disclosure, could not, without more, have amounted to unfairness. I must admit, that during the application I considered whether the refusal of the Requesting State to provide a reason for the non-production of the Source Material could potentially be a factor of significance in the Court's assessment of assessing fairness. However, I have not been directed to, or otherwise identified, any authority to suggest that that is indeed the case. Accordingly, I find that the failure to explain the non-disclosure of the Source Material is also incapable of amounting to bad faith or contributing to a finding of bad faith on the part of the Requesting State.

[168] As a consequence of these findings, if the Claimant is seeking to demonstrate to this Court that the non-disclosure has caused unfairness, then he has to go further than to simply assert the fact of some non-disclosure and/or the absence of an explanation for that non-disclosure. He has to, at the very least, express in a cogent manner, his complaint in respect of the inaccuracy of the material before the Court. He has to explain how the Source Material would support an alternative view of the evidence, other than the one which appears, *prima facie*, on the face of the documents.

[169] Both Counsel for the Defendants took the Court through various extracts of the transcripts of the conversations between Officer 716 and the Claimant. Reference was also made to the evidence of other witnesses who explained the meaning of various terms used in the conversation. I have duly noted those various references. However, for purposes of his judgment, I do not think it is necessary for me to reproduce in detail all the transcripts of conversations to which the Court was taken by Counsel for the Defendants. By

way of example, I reproduce hereunder a portion of the extract of the transcript of the Skype conversation between the Claimant and Officer 716 :

12/05/2016

"…FAISAL: Umm…So, the things we want to discuss in details, you have to fly here and come here and we will discuss it.

OP#716: Okay…But-

FAISAL: I will tell you when to come. And…

OP#716: Uh huh. But um when I come, am I gonna leave from there? Because Rojin had told me …

FAISAL: Yea, when you come, we will discuss it. Don't worry.

OP#716: Okay.

FAISAL: But, to go from where you are, is problematic. So, you come and we will discuss it. And when you coming don't um tell anyone.

OP#716: Okay, I won't.

FAISAL: I don't trust people (x3), about that.

OP#716: Same here, I don't …

FAISAL: Did you?

OP#716: … I don't talk to anybody regardless. Umm so, that's the whole point. I wasn't gonna tell anyone

FAISAL: Aha.

OP#716: Sister Rojin knows, it's just that it's a problem to get there. I just don't know anybody there. So, she told me that you have somebody in mind for me. But I don't know umm … When I go to you, do I go straight, you know, to him, or what … like, do I come there for good to Jamaica or what?

FAISAL: Umm um um … How soon you want to get married?

OP#716: I mean soon enough, I just wanna leave umm … The whole thing is that, the only problem is that, I don't know anybody over there to get married in Dawla so …

FAISAL: I mean soon enough, I just wanna leave umm … The whole thing is that, the only problem is that, I don't know anybody over there to get married in Dawla so …

FAISAL: In Jamaica or the Dawla.

OP#716: Dawla.

FAISAL: Umm Inshallah. When you come, we will discuss all of that. How old are you now?

OP#716: 25…."

[170] The Requesting State is relying on expert evidence of Mr Evan Kohlman a contract consultant on terrorism matters. He explains the meaning of many of the terms used in the various conversations between the Claimant and Officer 716 and averred that the Islamic State of Iraq and the Levant ("ISIL") and the Islamic state of Iraq and Syria ("ISIS"), were formed from a sub-group of Al-Qaeda and are known terrorist organisations. He noted that ISIL operates in Syria and Iraq where they have declared the existence of their own state or caliphate. He explains that the term "*Dawla*" is the Arabic term for "state" and "nation" which within the context of ISIL is an abbreviation of the full Arabic name of ISIL.

[171] Mr. Kohlman states that in his opinion in many of the WhatsApp conversations the Claimant provided Officer 716 with advice on how to travel to join ISIL and foreign assistance in the form of foreign contacts who could facilitate such travel. In my view, this is a reasonable conclusion that could be reached by an ordinary person reading the transcript and applying the plain and ordinary meaning of the words, and guided by his definition of the unusual terms. Mr Kohlman opines that the actions of the Claimant as an intermediary were an essential recruiting component in ISIL's strategy of recruiting new members and facilitating their travel to join ISIL in Syria.

[172] Other than the plain meaning of those words and the other words attributed to the Claimant in the transcripts of his conversations with Officer 716 (including those conversations considered but not reproduced in this judgment), the Requesting State is also relying on information taken from his website and speeches. Mr Kohlman goes further to address this other evidence and

concludes that the Claimant uses various online platforms to connect with his supporters publicly and that he espoused a violent interpretation of Islam that encourages the killing of non-believers.

[173] One example of the evidence other than the conversations with Officer 716 on which the Requesting State indicated that it intends to rely, is an online video posted on 27th February 2016 allegedly containing a statement made by the Claimant in which he stated as part of a lecture entitled "*The manhaj of Establishing the Shariah*" that "*The way forward is not the ballot. The way forward is the bullet. That is the only method that the Rasul taught us.*" The Claimant in paragraph 6 of his affidavit explained as follows:

> *"6. That when I was a Cleric I said that the solution to the tyranny is the bullet, to the best of his knowledge information and belief, I meant that brutal dictators cannot be removed from power with the use of the ballot because of fear of reprisals and because there is no free and fair elections, it is the army in these repressive countries that have to remove them. My message was taken out of context to wrongly associate me with endorsing violence as a means to gain power"*

[174] The transcript of the video provided by the Requesting State is as follows:

> *Minute Count: 6:52 – 8:09*
>
> *"How can you get a kick in the teeth with democracy in Algeria in 1998 and then you got a kick in the teeth with democracy in Egypt in 2013. If they hang Morsi it's good for the ummah, you know why? Because he as a fitnah for the Muslims. When he came to power with democracy, many Muslims said 'look the way forward is democracy. This modern times, the 21st century. We don't need to do jihad anymore. The way forward is not the bullet, the way forward is the ballot. Just drop a paper in the box and win and you can bring in your Islam and your Sharia. You don't need to do jihad. It's outdated'. That was their narrative and their rhetoric. So Morsi, was fitnah for Muslims who were jahillyia, ignorant, the ignoramus, unsuspecting Muslims who are ignoramus, and who don't know anything about Islam. So when they hang Morsi, if they hang Morsi, they send a strong message to ummah of Muhammad sala alayhi wa salam the way forward is not the ballot. The way forward is the bullet. That is the only method that the Rasul taught us."*
>
> *Minute count:1052-11:09*

> *Well, the last, last week when I was here and we discussed Sharia,I said I cannot mince my words. I have to speak the truth. When Sharia comes to a country, you have to kill all the homosexuals. I cannot change Islam to please and appease the infidels"*

[175] In order to discharge the burden of establishing a breach of duty by the Requesting State by the failure to disclose the Source Documents, the Claimant must at the very least assert what he says was the correct context in which he spoke so as to cast doubt on the reasonable conclusion to be drawn from the statements attributed to him, such as the aforementioned video transcript and his numerous exchanges with Officer 716 on which the case of the Requesting State is grounded.

[176] I fully appreciate the point made by Mr Samuels that that without possession of the Source Material, and without the ability to do an actual comparison, he would not be able to highlight with precision some of the editing he alleges was done, but nevertheless, the Claimant ought to be able to indicate in greater detail, what is it that he asserts is contained in the omitted material. He could explain, for example, how it is that the omission of this material has caused his conversations with Officer 716 to be taken out of context and has thereby given the wrong impression that he supports terrorism and is a recruiter for ISIS. If he is asserting that the editing was not just a matter of misleading context but was done in some other manner in order to create this inaccurate picture of his conversations, then he should also explain (in at least a very general sense), the mechanisms he asserts were used and how the false impression is presented.

[177] As it related to the Claimant's conversations with Officer 716, paragraphs 11 and 12 of the Claimant's affidavit asserts an alternative account of his conduct as follows:

> *11. That in relation to FaceTime audio call, WhatsApp messages and Paltalk audio between undercover Police 716, I invited her to Jamaica in order to talk her out of going to Syria and I would not have asked her to come to Jamaica or go to Canada or the UK in order to talk her out of going to Syria if I was an ISIS recruiter.*

> *12. That I have read the transcript of the alleged conversation I had with the undercover police 716 on Skype and Face Time and I am confident that should the original Face Time and Skype and Face Time recordings be made available, I would be able to compare them with the typed transcript given to me in the Requesting state's case against me and I know it would demonstrate that I was at no time recruiting her for ISIS. However, because I was not given full discovery at the Parish Court, particularly of those conversations, despite my request, my conversation with the undercover police has been edited and consequently taken out of context and the wrong impression has been given that I support terrorism and am a recruiter for ISIS.*

[178] The Claimant has asserted that he put Officer 716 in touch with the foreign contact so that he could dissuade her from wanting to move to Syria as she had asked for assistance in doing. However, the Claimant has not indicated in his evidence how the Source Material would support this explanation. The Claimant has also asserted that he invited Officer 716 to Jamaica in order to talk her out of going to Syria but he has not indicated how the Source Material would tend to support this explanation.

[179] Similarly, the Claimant has asserted that if he were given the Source Material and compared them with the typed transcript he knows it would demonstrate that he was at no time recruiting Officer 716 for ISIS but has not gone into particulars as to how this would be demonstrated.

[180] The assertions of the Claimant in his affidavit as to contextual and editing inaccuracy must also be juxtaposed against the evidence of Officer 716 in her affidavit at paragraph 6, where in relation to the transcripts of the WhatsApp conversations (exhibit 6), the Skype conversation (exhibit 7) and the FaceTime conversation (exhibit 8), she states as follows:

> *" … I reviewed the conversations contained in Exhibits nos. 6, 7 and 8 and attest that they fairly accurately reflect the conversations that I had with Shaikh Faisal and his associate Luqman Patel."*

[181] I should note that it does not appear to be the case that the Requesting State is asserting that the transcripts which were provided represent the entirety of all the conversations. The transcript of WhatsApp conversation

between the Claimant and Officer 716 date; timestamped 12/02/2016 10:26:47 PM – 12/02/2016 10:45:29 PM is as follows:

> *OP#716: My Plan is to leave work for good*
>
> *OP#716: For Hijrah*
>
> *FAISAL: Ok we will make a plan*
>
> *OP#716: Do you think it's easier from Jamaica?*
>
> *FAISAL: We will plan together*
>
> *FAISAL: Come let's discuss it*
>
> *OP#71: Shukraan sheikh*
>
> *FAISAL: It's easier from Jamaica*
>
> *FAISAL: Less suspicion*
>
> *[…]*
>
> *FAISAL: [picture sent]*
>
> *FAISAL: My car*

This conversation begins without any salutation and this suggests that there may have been some editing of that conversation. Even if not edited, and for some other reason this is the full extent of the recorded conversation, this conversation for example, taken by itself, would lack context. However all the conversations are not of a similar form. In assessing the Requesting State's request, all the conversations have to be taken together, and when this is done, I find that they lead to the reasonable conclusion that they are supportive of the interpretation the Requesting State submits should be placed on them.

[182] In my view, the evidence, presented by the Requesting State of the Claimant's conversations with Officer 716, in its totality, is capable of leading to a reasonable conclusion that the Claimant was providing assistance in the form of advice and foreign contacts to enable Officer 716 to travel from the United States in order to assist ISIL, a terrorist organization. This evidence of the interaction

between the Claimant and Officer 716, if considered without the evidence of the Claimant's publications on the internet, is in my view sufficient to support the decision of the Parish Judge.

[183] It is my finding, that these bare assertions of the Claimant that the conversations with Officer 716 have been edited and taken out of context so as to give a misleading impression, without more, are not sufficiently cogent. I do not find these assertions to be of much weight, and I find that the Claimant's evidence, in its totality, is insufficient to displace the burden placed on him of proving bad faith on the part of the Requesting State by the non-production of the Source Material.

COULD THE PARISH JUDGE HAVE ORDERED DISCOVERY?

[184] Having regard to the nature of Extradition Hearings, the Claimant was not entitled to the Source Material and the learned Parish Judge had no authority to order discovery of the Source Material. Section 14 of the Extradition Act sets out the evidence required and I reproduce that section in its entirety as follows:

> *"14. – (1) In any proceedings under this Act including proceedings on an application for habeas corpus in respect of a person in custody under this Act –*
>
> *a document, duly authenticated, which purports to set out testimony given on oath in an approved state shall be admissible as evidence of the matters stated therein;*
>
> *a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document so received in any proceedings in an approved State shall be admissible in evidence; and*
>
> *a document, duly authenticated, which certifies that –*
>
> *the person was convicted on the date specified in the document of an offence against the law of an approved State; or*
>
> *that a warrant for his arrest was issued on the date specified in the document,*

shall be admissible as evidence of the conviction or evidence of the issuance of a warrant for the arrest of the accused, as the case may be, and of the other matters stated therein.

(2) A document shall be deemed to be duly authenticated for the purpose of this section –

in the case of a document which purports to set out testimony given as referred to in subsection (1) (a), if the document purports to be certified by a judge, magistrate or officer of the Court in or by a judge, magistrate or officer of the Court in or of the approved State in question or an officer of the diplomatic or consular service of that State to be the original document containing or recording that testimony or a true copy of that original document;

in the case of a document which purports to have been received in evidence as referred to in subsection (1) (b) or to be a copy of a document so received, if the document purports to be certified as aforesaid to have been, or to be a true copy of, a document which has been so received; or

in the case of a document which certifies that a person was convicted or that a warrant for his arrest was issued as referred to in subsection (1) (c), if the document purports to be certified as aforesaid,

and in any such case the document is authenticated either by the oath of a witness or by the official seal of a Minister of the approved State in question.

(3) In this section "oath" includes affirmation or declaration.

(4) Nothing in this section shall prevent the proof of any matter, or the admission in evidence of any document, in accordance with any other law Jamaica."

[185] Counsel for the Defendants have submitted a plethora of case law authorities including Emmanuel (supra) which have decided that the Parish Judge has no such power. In my view those cases would still be decided the same way on those facts as it relates to the power of the Parish Judge to order disclosure, notwithstanding the advent of section 16(2) of the Constitution, the Committal Proceedings Act or the decision in Harry Daley (supra) . Accordingly, I accept that the Parish Judge correctly assessed the scope of his powers and I do not accept the submission of Mr Samuels that the Committal Proceedings Act now confers such a power on the Parish Judge.

WAS THE EXTRADITION HEARING FAIR?

[186] The Parish Judge is indeed required to act judicially, that is to say, act fairly, impartially and properly to consider all the evidence and all issues raised including those in favour of the fugitive as stated by the Full Court in **Giguere** (supra):

> *"[18] The magistrate is indeed required to act judicially, that is to say, act fairly, impartially and properly to consider all the evidence and all issues raised including those in favour of the fugitive. The magistrate is to approach the matter as if he or she were conducting a preliminary inquiry to see whether the person, had he been charged with an indictable offence in Jamaica, would be committed to stand trial at the Circuit Court. This is captured in section 43 of the Justices of the Peace Jurisdiction Act which reads:*
>
> > *When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the Justice or Justices then present shall be of opinion that is not sufficient to put such accused party upon his trial for any indictable offence, such Justice or Justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such Justice or Justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such Justice or Justices shall by his or their warrant ... commit him to prison to be there safely kept until he shall be thence delivered by due course of law, or grant him bail as hereinbefore mentioned. (emphasis mine)*
>
> *[19] What this means in practice was spelt out by Cooke JA in Boyd v The Commissioner of Correctional Services SCCA 47/2003 (unreported) delivered February 18, 2004, when his Lordship said 'the approach of the magistrate in extradition proceedings is the same as if he was (sic) deciding whether or not there should be a committal to the Circuit Court' (page 5). In this regard 'no more than that a prima facie case must be established and by that is meant only that there must be such evidence that if it be uncontradicted at trial a reasonable jury may (not probably will) convict upon it' (Cooke JA at page 6 citing and approving dictum from Edmund Davies J in Regina v Governor of Brixton Prison and another Ex Parte Armah [1966] 3 WLR 23, 31)."*

[187] In **Harry Daley** (supra) the Court's pronouncements with respect to the need for disclosure were made in the context of a criminal trial. However, **Emmanuel** (supra) was an appeal against the refusal of the Full Court of the Supreme Court to order *habeas corpus* and at page 296 of the judgment, Harrison P accepted that non disclosure as a general rule may create unfairness in a criminal trial, but found that section 8(2) of the Extradition Act "… *circumscribed the ambit of the material to be supplied at the hearing for committal.*"

[188] It is noteworthy that **Emmanuel** was before the enactment of section 16(2) in the new Bill of Rights in 2011, but for the reasons I have previously stated, I am not of the view that section 16(2) imports a requirement of disclosure/discovery into extradition hearings which is identical to that which is applicable in domestic trials. It is therefore my considered opinion that the analysis and conclusion reached in **Emmannuel** and **Knowles** remain apposite. Accordingly, I find that in the absence of any cogent evidence of any material inaccuracy or omission in the transcripts provided, which affected context and true meaning, the fact that the Claimant did not receive the Source Material did not result in any unfairness in the conduct of the Extradition Hearing. I also find that there was an absence of any other factors which led to the Extradition Hearing being unfair.

DID THE PARISH JUDGE HAVE SUFFICIENT EVIDENCE BEFORE HIM BEFORE MAKING THE ORDER TO COMMIT THE CLAIMANT FOR EXTRADITION?

[189] This is not a ground of challenge to the decision of the Parish Judge. However, in the interest of completeness, I wish to state that in my view the Parish Judge had ample evidence before him to have enabled him to conclude, in my view correctly, that a *prima facie* case was made out that the Claimant had committed crimes against the terrorism statutes of the State of New York as reflected in the grand jury indictment against him. I find that the conduct alleged

in that indictment also offends section 7 of the Terrorism Prevention Act of Jamaica and are extraditable offences.

CONCLUSION

[190] For the reasons stated above, I will not order a writ of *habeas corpus* for the discharge of the Claimant from custody.

S. JACKSON-HAISLEY, J

[191] I have read in draft the judgment of my brother Laing J and I concur with his reasoning and conclusion and there is nothing that I can usefully add.

ORDER

C. LAWRENCE-BESWICK, J

1. The orders sought by the Amended Fixed Date Claim Form filed 22nd January 2019 are refused.