Neutral Citation Number: [2025] EWHC 183 (Admin)

Case No: AC-2023-LON-000996

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2025

Before :

MR JUSTICE KERR

- -

Between :

OMAX BYE	**Appellant**
- and -	
GOVERNMENT OF SINT MAARTEN	**Respondent**

- -
- -

Mr Graeme L Hall (instructed by **Sonn Macmillan Walker Ltd**) for the **Appellant**
Mr Peter Caldwell (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 16 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE KERR

Mr Justice Kerr :

Introduction

1. The respondent requesting territory wishes to extradite the appellant to St Maarten to stand trial for murder and possessing a firearm, under the law of St Maarten, an overseas territory of the Kingdom of the Netherlands. However, the respondent proposes that the appellant should be detained in the Netherlands during most of the pre-trial and trial process; and in Aruba for the final part of that process. The actual trial in Aruba is estimated to last two days.

2. The respondent proposes that if the appellant is acquitted, he will be released in St Maarten; and that if he is convicted, he will serve his sentence in a prison in the Netherlands and will be released in St Maarten when he has finished serving his sentence. It is therefore not envisaged by the respondent that the appellant will set foot in St Maarten until the end of the trial process and the end of any sentence if he is convicted.

3. The appellant says these proceedings are an abuse of process because while proposing to extradite the appellant to St Maarten, the respondent in fact intends to extradite him to the Netherlands. If the appellant is extradited, he will travel under escort not to St Maarten but to the Netherlands. The appellant says that is contrary to the Extradition Act 2003 (**the 2003 Act**): it only permits removal to the geographical territory of the category 1 or 2 territory requesting extradition.

4. The respondent submits that there is no abuse of process here: the appellant's interpretation of the 2003 Act is wrong. The correct interpretation is that extradition to a particular "territory" includes removal of the requested person to a place not physically within that territory, but where its law applies to the criminal proceedings and where it has and exercises jurisdiction over the requested person at his trial.

5. The issue I have just identified is the only remaining point in this appeal. It was not argued before the magistrates' court. Mr Graeme Hall, now appearing for the appellant, did not appear below. The only point taken below was that extradition would be incompatible with the appellant's rights under article 8 of the European Convention. In the earlier phases of this appeal, the present issue was added, among others. Permission to appeal was refused by Wall J on the papers, but granted on oral renewal by Chamberlain J, on this issue only.

6. In his judgment on renewal, he described the point as a "short and crisp point of law" which "ought, in the interests of justice, to be decided even though the point was not taken at first instance." He added that the point may "become relevant in other cases if extradition is later sought to territories which do not have their own detention facilities or, at least, do not have detention facilities which can be used in the individual case."

Outline of the Facts

7. The appellant is a national of St Kitts and Nevis, born in June 1985. The respondent alleges that the appellant shot Mr Amador Jones six times near a snack bar in St Maarten on 16 April 2011. Mr Jones died of his wounds the next day. The killing is said by the

prosecuting authorities in St Maarten to have occurred in the context of a feud about the trafficking of cocaine.

8. As Chamberlain J explained in *Heilligger v Government of Sint Maarten and Secretary of State for the Home Department* [2023] EWHC 422, at [1]:

> "The island of Saint Martin lies in the northeast Caribbean Sea. The northern part of the island is known by its French name, Saint Martin, and is constitutionally a *collectivité d'outre-mer* (overseas territory) of the French Republic. The southern part is known by its Dutch name, Sint Maarten, and is one of four autonomous *landen* (countries) of the Kingdom of the Netherlands. Curaçao, in the southern Caribbean Sea, is another. Sint Maarten and Curaçao have been designated category 2 territories for the purposes of the Extradition Act 2003 … ."

The fourth *land* within the Kingdom of the Netherlands is Aruba, also designated as a category 2 territory under the 2003 Act.

9. The appellant came to the United Kingdom in February 2022. The St Maarten authorities issued an arrest warrant for him 30 March 2022. On 18 April 2022, Deputy Senior District Judge Ikram issued a provisional arrest warrant. The appellant was remanded in custody. On 12 May 2022, the Minister of Justice for St Maarten issued an extradition request. On 26 May 2022, the Secretary of State issued a certificate under section 70 of the 2003 Act, confirming that the extradition request was valid.

10. In October 2022, the St Maarten public prosecutor made two sworn statements explaining the proposed arrangements for the appellant's detention and trial, if he were extradited. He was considered a high risk prisoner for whom St Maarten's one prison was not suitable. He would initially be detained in a Netherlands prison. The trial would take place under the laws of St Maarten, which would bear the cost of his defence lawyer.

11. The first part of the trial process would take place in the Netherlands. As described by the prosecutor, it approximately corresponds to our case management process. Often, the defendant does not appear at hearings at which he is represented by his lawyer, or appears by video link. If the appellant were convicted, he would serve his sentence in the Netherlands but the law of St Maarten would apply to any release on parole.

12. In the second statement the prosecutor explained that the final phase of the trial, an oral hearing expected to last two days, would take place in Aruba, where the appellant would be detained in a court cell for the duration of the trial. If convicted, he would serve his sentence in the Netherlands. If acquitted, or on completion of his sentence, he would be returned to and released in St Maarten.

13. In a further statement made in December 2022, the Solicitor-General of St Maarten explained that the Dutch authorities had stated they would not comply with the request to implement the above arrangements (known as an "ORD" request) while the extradition process in the United Kingdom is ongoing; but they would comply with the ORD request if and when the appellant were extradited by the United Kingdom authorities.

14. The extradition hearing took place on 6 January 2023 before Senior District Judge Goldspring. He rejected the article 8 point and sent the case to the Secretary of State.

On 1 March 2023, the latter ordered the appellant's extradition to St Maarten. The appellant appealed against the ruling that the case should be sent to the Secretary of State. Wall J refused permission to appeal on the papers, on 13 August 2023. On 5 November 2024, Chamberlain J granted permission on the single ground of appeal now before me.

Relevant Legal Framework

15. The Kingdom of the Netherlands (as stated in the skeleton argument of Mr Peter Caldwell for the respondent without dissent from the appellant) comprises:

> "four countries: (a) the Netherlands; (b) Aruba; (c) Curaçao; and (d) Sint Maarten. In addition, the Islands of Bonaire, Sint Eustatius and Saba are special municipalities of the Netherlands. Although the separate countries of the Kingdom are self-governing, certain matters concerning the Kingdom as a whole (such as foreign affairs) are within the competence of the Kingdom itself. Only the Kingdom has international legal personality and thus can be considered to be a State with the power to conclude, ratify and accede to international legal agreements, such as treaties and conventions. Thus, it is the Kingdom (and not its constituent parts) that entered into extradition relations with the United Kingdom; it is the Kingdom that is responsible in international law for the legal obligations that arise from that relationship; and it is the Kingdom that has responsibility for ensuring that the Appellant's rights under the European Convention of Human Rights are respected."

16. The Kingdom of the Netherlands (**the Kingdom**) was one of the six founding member states of the European Economic Community (**EEC**), being a signatory to the Treaty of Rome, signed on 25 March 1957. A protocol to the Treaty of Rome excluded the Caribbean parts of the Kingdom from the application of the Treaty of Rome, which was confined to the European parts of the Kingdom.

17. The same year, the European Convention on Extradition (**the ECE**) was signed in Paris, on 13 December 1957. The signatories were Council of Europe member states, including the Kingdom and the United Kingdom. The official languages were English and French. Article 27(1) confined the application of the ECE to "the metropolitan territories of the Contracting Parties".

18. However, there were exceptions and qualifications in article 27(2) and (3) in the case of France, the Federal Republic of Germany (i.e. West Germany) and the United Kingdom. Article 27(4) provided, and still provides, in the English text:

> "By direct arrangement between two or more Contracting Parties, the application of this Convention may be extended, subject to the conditions laid down in the arrangement, to any territory of such Parties, other than the territories mentioned in paragraphs 1, 2 and 3 of this article, for whose international relations any such Party is responsible."

19. On 13 November 1962, a Convention was signed in Brussels, amending the Treaty of Rome to make "the special system of Association defined in Part Four of that Treaty applicable to the Netherlands Antilles". However the ECE did not then extend beyond the Kingdom's European territory, as the Kingdom made clear in a declaration made on 21 January 1965. That was the position when the UK joined the European Community (**EC**) on 1 January 1973.

20. Extradition statutes in this country go back to the 1840s. Until the 2003 Act, the most recent was the Extradition Act 1989, now repealed. I was not taken to that Act but understand that after it was passed it applied to cases of extradition under the ECE until the advent of the 2003 Act. In the Explanatory Notes to the 2003 Act (paragraph 8), it is explained that the Extradition Act 1989:

> "is essentially a consolidation of three earlier pieces of legislation: Part 1 of the Criminal Justice Act 1988, the Fugitive Offenders Act 1967 and the Extradition Act 1870 (as amended)."

21. The Extradition Act 1989 was, therefore, the governing domestic legislation when, on 8 November 1994, the Kingdom presented a Diplomatic Note to the UK that the application of the ECE was extended to the Netherlands Antilles and Aruba. The UK government then undertook an extensive review of extradition law, as explained in the Explanatory Notes to the later 2003 Act:

> "9. The Government set out its proposals to reform the law on extradition in a consultation document 'The Law on Extradition: A Review' in March 2001. It was the outcome of an exercise started in 1997 to consider the legislative requirements of two European Union Conventions on Extradition. However, it developed into a much more extensive inquiry, following the adoption at the Tampere Special European Council in October 1999 of the principle of mutual recognition of judicial decisions by Member States of the European Union.
>
> 10. The publication of the Review followed an extensive period of consultation with officials from a number of organisations including the Crown Prosecution Service, Lord Chancellor's Department, Bow Street Magistrates' Court, Metropolitan Police, Foreign and Commonwealth Office and others. Its proposals, which were aimed at modernising arrangements between the United Kingdom and its extradition partners, included:
>
> • creating a four level framework with countries being designated for each tier by way of an Order in Council;
>
> • a simple fast track extradition procedure for Member States of the European Union;
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> • retention of current arrangements for non-European Union states with modifications to reduce the duplication and complexity of extradition procedures;
>
> • a single avenue of appeal for all extradition cases; and
>
> • accession to the 1995 and 1996 European Union Conventions on Extradition."

22. However, as explained in paragraph 12:

> "… The proposals in the Review have also been overtaken by progress in respect of extradition to other European Union Member States. This Act [*i.e. the 2003 Act*] includes provisions implementing the following European Community Legislation: the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)."

23. The main elements of the Framework Decision were transposed into UK law, in what became Part 1 of the 2003 Act, in force from 1 January 2004. Part 2 governed extradition to other designated territories to which the ECE applied. As Sir Igor Judge P (as he then was) put it in *R (Norris) v Secretary of State for the Home Department*

[2006] 3 All ER 1011 at [25] (in the context of extradition arrangements with the United States of America), the 2003 Act:

> "introduced a reformed, radically changed scheme, and provides the legislative structure which governs the process of extradition from the United Kingdom … ."

24. The differences between the Part 1 procedures and the Part 2 procedures are well known and need not be set out in detail here. Part 1 proceedings start with issue of a European Arrest Warrant (**EAW**) and certification thereof as valid. Part 2 proceedings are started by issue of a certificate of validity by the Secretary of State, following receipt of an extradition request from a category 2 territory.

25. Designation of "category 1 territories" is provided for by section 1 of the 2003 Act. For "category 2 territories" the equivalent provision in Part 2 is section 69. The miscellaneous and general provisions in Part 5 include section 223(8) which provides:

> "(8) A territory may be designated by being named in an order made by the Secretary of State under this Act or by falling within a description set out in such an order."

26. The designation of territories under Parts 1 and 2 of the 2003 Act was done by means of two statutory instruments, the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 (**the Part 1 designation order**) and the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (**the Part 2 designation order**). Updating amendments designating new territories have been added from time to time.

27. With rare exceptions, the territories have been designated by name, not by description[1]. Under the Part 1 designation order, among the territories designated as category 1 territories on 1 January 2004 were "The Netherlands" and other EU states. In the Part 2 designation order, many non-EU territories and overseas territories of EU states outside the geographical boundaries of Europe were designated as category 2 territories.

28. On 31 August 2005, the Kingdom made a declaration confirming that the ECE continued to govern extradition relations between the Caribbean parts of the Kingdom and the other signatories to the ECE. The Netherlands Antilles were then dissolved in 2010, following constitutional reforms in the Kingdom. At that stage in the history, the fatal shooting of Mr Amador Jones occurred, in St Maarten in April 2011.

29. The Kingdom issued a further Diplomatic Note dated 27 June 2013, stating that its reservations and declarations in relation to the territorial extent of the ECE:

> "apply to Aruba and, as succeeding to the Netherlands Antilles, to Curaçao, Sint Maarten and the Caribbean part of the Netherlands (the islands of Bonaire, Sint Eustatius and Saba) in their relations with the States with which notes were exchanged on the extension of the Convention."

30. The Council of the European Union issued a Decision 2013/755/EU of 25 November 2013 on the association of overseas countries and territories with the European Union. This confirmed that the Caribbean territories of Aruba, Curaçao, Sint Maarten, Bonaire,

[1] Exceptions are the "Hong Kong Special Administrative Region" and "The Sovereign Base Areas of Akrotiri and Dhekalia (that is to say the areas mentioned in section 2(1) of the Cyprus Act 1960)".

Sint Eustatius and Saba enjoy the status of (in the English language) "Overseas Country and Territory" (**OCT**).

31. In *Prunus SARL v. Directeur des Services Fiscaux*, Case C-384/09, [2011] 3 CMLR 7, at [AG26] (concerning the application of tax laws to properties in France owned by entities in the British Virgin Islands) Advocate-General Cruz-Villalón explained the position of OCTs thus:

> "the OCTs are not sovereign States with international legal personality but rather 'territories' linked to a Member State on the basis of special historical, social and political ties. Even though they are political communities which are formally integrated into the State with which they share a special bond, they are afforded a particular status in the Treaties, specifically based on the territorial scope of EU law. Thus, art.355 TFEU reiterates the provisions of art.52 TEU (which lists the signatory Member States for the purpose of defining the territorial scope of the Treaty) and then goes on to state that, in addition to that provision, a number of provisions are to apply, including para.2, which provides that OCTs are covered by '[t]he special arrangements for association set out in Part Four.'"

32. By an amendment to the Part 2 designation order effective from 15 April 2015, the Secretary of State designated the six Netherlands OCTs (Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius and Saba) as category 2 territories. That account of the history explains why the Netherlands itself, i.e. the European part of the Kingdom, is designated under Part 1 of the 2003 Act; while the Netherlands OCTs, including St Maarten, are designated under Part 2.

33. For completeness, under the Brexit-related legislation, for those who, like the appellant, were arrested after 11pm on 31 December 2020, the EAW arrangements pursuant to the Framework Decision are replaced by equivalent arrangements (with some modifications I do not need to go into here) under Part Three (Law Enforcement and Judicial Cooperation in Criminal Matters), Title VII (Surrender) of the Trade and Cooperation Agreement (**TACA**)[2].

Submissions

Summary of Appellant's Submissions

34. For the appellant, Mr Hall submitted that it was an abuse of process to seek the appellant's extradition to St Maarten while not intending that he would ever set foot there until the end of the trial process or the end of any sentence. The court, he pointed out, has an implied power to stay extradition proceedings where extradition may usurp the integrity of the 2003 Act. It is not necessary to show bad faith on the part of the requesting party.

35. His argument, he said, was simple: the requesting territory is the only territory to which the appellant can lawfully be extradited. He cannot be sent to the Netherlands or Aruba because neither is the requesting territory, neither has sought the appellant's extradition and that is because the alleged offences were not committed on their territory but on

[2] The full title is slightly longer: "*Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part*".

that of St Maarten. It is irrelevant, said Mr Hall, that St Maarten is, constitutionally, part of the Kingdom. It is a separate territory designated under Part 2 of the 2003 Act as a territory in itself.

36. The Secretary of State could have designated the whole of the Kingdom as a single territory but has not done so. In oral argument, Mr Hall gave the example of a request for extradition by Sierra Leone, with the requested person subsequently facing trial in Singapore. The requested person would have to address potential bars to extradition in both the requesting territory and the territory to which the trial was to be outsourced.

37. That would be a usurpation of the statutory scheme outside the contemplation of the legislature when enacting the 2003 Act, he said. In support of his propositions of law on abuse of process Mr Hall cited, uncontroversially, *R. (Bermingham) v. Serious Fraud Office* [2007] QB 727 per Laws LJ at [97]; *Auzins v Latvia* [2016] 4 WLR 75 per Burnett LJ (as he then was) at [44]; *Giese v USA* [2018] 4 W.L.R. 103 at [32] per Lord Burnett CJ at [32]; and *Jasvins v. Latvia* [2020] EWHC 602 (Admin) (Davis LJ and Swift J) (see at [13]-[20]).

38. Mr Hall submitted that this was a paradigm case of abuse. It is *per se* abusive, he argued, to seek extradition of a person to a place – i.e. the Netherlands and Aruba - to which the statutory scheme contains no power to extradite him. If the argument had been raised before the Senior District Judge, Mr Hall contended, he would have been obliged to stay and would have stayed the proceedings as an abuse.

39. Chamberlain J had been right on this occasion, said Mr Hall, to suspect that he had been wrong when refusing permission in *Heilligger v Sint Maarten* [2023] EWHC 422 (Admin); where he concluded at [37] that an argument similar to that advanced here "confuses legality with logistics". The scheme of the 2003 Act is that extradition to a "territory" means to the geographical location of that territory, not to a different territory in which it can exert its jurisdiction.

40. *Heilligger*, Mr Hall submitted, was a permission decision and, strictly, should not be cited as the judge did not give permission to cite it (see *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001, at [6.1]-[6.2]). The interpretation of the statutory scheme in *Heilligger* is, in any case, "unheralded", i.e. unprecedented. Surrender to the legal custody of a territory is not the same as surrender to that territory. Legality should precede logistics, not vice versa.

41. Mr Hall referred me to Lord Reid's observation in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, at 613, that "[i]n the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further enquiry is permissible. … ."

42. The Supreme Court had warned against impermissible glosses in *Merticariu v Romania* [2024] 1 WLR 1523 at [50]-[51] (per Lord Stephens JSC and Lord Burnett, in the context of retrial rights), holding that to be "entitled" to a retrial is not to be entitled to *apply* for a retrial. Here the impermissible gloss was to read in the "jurisdiction" of the territory rather than to require extradition to the territory itself. It was inescapable that the extradition sought here was to a category 1 territory (the Netherlands) not a category 2 territory (St Maarten).

43. Mr Hall accepted that it was open to separate jurisdictions within a sovereign state to make logistical arrangements for detention in another jurisdiction within that same state, for example because of a lack of adequate court or detention facilities. But, he submitted, that contention of the respondent "impermissibly elides what a requesting state does - post-extradition – to what the UK has to do according to domestic legislation prior to authorising extradition".

44. Mr Hall also accepted that a purposive interpretation was appropriate to avoid frustrating the process of extradition and to promote conformity between national legislation and international treaty obligations; but only where there was a genuine ambiguity in the language of the national legislation (*Office of the King's Prosecutor, Brussels v. Cando Armas* [2005] 3 WLR 1079, per Lord Hope at [24]). Here, there was none. A foreign state's law cannot be used to "reverse engineer" the meaning of the 2003 Act.

45. The position was different in *In re Ismail* [1999] 1 AC 320, on which the respondent relies, said Mr Hall. There, the issue was the meaning of the word "accused" in section 1 of the 1989 Act; a term that was undefined in that Act. The court had to decide and understandably adopted a broad and generous construction. In the case of a requesting "territory", also undefined in the 2003 Act, the Secretary of State, not the court, decides what are the territories to which a person may be extradited, by designating them.

46. In support of the appellant's construction, Mr Hall pointed to what he said were a number of anomalies and difficulties that would arise if the respondent's construction were adopted. Under Part 1, the judge must order extradition "to the category 1 territory in which the warrant was issued" (sections 21(3) and 21A(5)) if that is compatible with the requested person's Convention rights. The same words are used where the Supreme Court allows an appeal by the requesting state (section 33(5) and (7)).

47. Under Parts 1 and 2, a person can only consent to extradition "to the category 1 territory in which the warrant was issued" (section 45(1)); or "to the category 2 territory to which his extradition is requested" (section 127(1)). Under Part 2, the Secretary of State can only certify a request where there is a statement that "the request is made with a view to his arrest and extradition to the category 2 territory for the purpose of being prosecuted for the offence" or for the purpose of being sentenced (section 70(4) and (4A)).

48. Under Part 2, Mr Hall pointed out, the Secretary of State may order the person's discharge where the person has been granted leave to enter or remain in the UK "on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove the person to the territory to which extradition is requested" (section 93(6A)(b)). Such human rights concerns, he said, would not be relevant if the requested person were to be sent to a different territory.

49. In similar vein, Mr Hall complained that the specialty provisions in the 2003 Act would be unworkable if the respondent's construction were adopted. Where a person is extradited to a category 2 territory, he can only be prosecuted for an offence committed before his extradition took place if the law in the requesting state provides that "he is first given an opportunity to leave the territory" (section 95(3)(b)). It is impossible to leave a territory one has never entered.

50. Further, Mr Hall submitted, under Part 2 the Secretary of State can accept an undertaking from a category 2 territory that a serving UK prisoner who is to be extradited to be prosecuted in the category 2 territory will "be kept in custody until the conclusion of the proceedings against him for the offence and any other offence in respect of which he is permitted to be dealt with in the category 2 territory" (section 119(3)(a)). That envisages the requested person being in custody in the requesting territory itself, not a different territory.

51. Finally, says Mr Hall, under Part 2 "[i]f … the person has made an asylum claim (whether before or after the making of the request), the person must not be extradited in pursuance of the request before the asylum claim is finally determined" (section 121(3)(b)). An asylum complaint based on a risk of persecution in, say, St Maarten would not be relevant if the complainant was to be sent not there but to a different jurisdiction where the perceived risk of persecution could be very different.

52. In oral argument, I asked whether the abuse of process would be cured if the appellant were flown to St Maarten and stepped on the tarmac at the airport there, before being flown on to the Netherlands. Mr Hall answered that it would depend on the facts; there could well be an abuse if the trip to St Maarten were no more than a sham ritual. He accepted that a professed intent pre-extradition to effect post-extradition outsourcing of detention or trial facilities may mean human rights concerns in more than one territory have to be addressed.

53. In response to an invitation from me to add any brief written submissions based on the language of the ECE, Mr Hall pointed out that most of the countries to which the Part 2 territories relate are not parties to the ECE. The latter cannot be relevant to the operation of the 2003 Act for the many non-ECE Part 2 territories. The 2003 Act is a "reformed, radically changed scheme … [it] created a new extradition regime" (*R. (Norris) v. Secretary of State for the Home Department* [2006] EWHC 280 (Admin), per Sir Igor Judge P at [25]).

54. Further, under the ECE, the Contracting Parties are sovereign states; the ECE applies to their "metropolitan territories" (article 27(1)) and they have power themselves to delineate the territory to which the ECE applies; whereas in the 2003 Act the Secretary of State alone decides which Part 2 territories are designated. Thus, it was the Kingdom, not the Secretary of State, that decided the ECE's territorial application should extend to Curaçao, Sint Maarten, Bonaire, Sint Eustatius, Saba, the (former) Netherlands Antilles and Aruba.

55. The 2003 Act is domestic legislation while the ECE is an international treaty. They are two different instruments. However, the term "territory" in the ECE, on a natural reading, refers like the 2003 Act to the geographical territory and does not have any political or jurisdictional connotation. The same reasoning applies, in the case of Part 1 territories, to any equivalence between Part 1 of the 2003 Act and the Framework Decision (and later the TACA provisions).

Summary of Respondent's Submissions

56. Mr Caldwell made the following main points. He did not take issue with the existence and scope of the abuse of process jurisdiction, as explained in the cases cited by Mr Hall, which I have already mentioned. Mr Caldwell submitted that there was no

possible abuse here because the proposed arrangements did not violate the 2003 Act: the appellant's physical removal to and detention in the Netherlands and Aruba, while remaining under the jurisdiction of St Maarten, is extradition to the territory of the latter.

57. Mr Caldwell referred to authorities that spoke eloquently for, he submitted, a broad, generous, purposive interpretation of "territory" in the 2003 Act. The law of extradition is, Lord Russell of Killowen CJ said in *R v. Arton (No. 1)* [1896] 1 QB 108, at p.111):

> "founded upon the broad principle that it is to the interest of civilised communities that crimes acknowledged as such should not go unpunished and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice."

A "liberal interpretation", he added in *R. v. Arton (No. 2)* [1896] 1 QB 509, at p.517, "means no more than that they should receive their true construction according to their language, object and intent".

58. An extradition treaty is "a contract between two sovereign states" and should not be "construed as though it were a domestic statute" (per Lord Widgery CJ in *R. v. Governor of Ashford Remand Centre, ex p. Beese* [1973] 1 WLR 969, at p.973B-C). The court should not, "unless constrained by the language used, interpret any extradition treaty in a way which would hinder the working and narrow the operation of most salutary international arrangements" (in the words of Lord Russell in *Arton (No. 2)*, at p.517).

59. These propositions have strongly influenced decisions on the interpretation of the Extradition Act 1989 and, later, the 2003 Act; see Lord Steyn's speech in *In re Ismail* [1999] 1 AC 320, at pp.326H-327A, on the meaning of "accused" in the 1989 Act; Lord Hope's judgment in *Office of the King's Prosecutor Brussels v Cando Armas* [2005] 3 WLR 1079 at [24] and [40], on the meaning of "conduct" in the 2003 Act; and Ouseley J's judgment (Laws LJ agreeing) in *Welsh v. Secretary of State for the Home Department* [2007] 1 WLR 1281, at [236]-[137], on speciality arrangements in the 2003 Act.

60. Advocating the same approach to the scope of a "territory" in the 2003 Act, Mr Caldwell submitted that while the Secretary of State may choose to designate any territory by its name or by description, it is intrinsic to the concept of a designated territory and, indeed, is its defining characteristic, that it must enjoy legal sovereignty, such that its own law is applicable to the case against the requested person and it is able to exercise autonomous jurisdiction in the case.

61. The power to designate territories is not limited to states with international legal personality, nor to territories which exercise territorial sovereignty within their geographical boundaries, he submitted. The international legal order has moved on from the paradigm case of a requesting state seeking extradition of a person from another state (as described by Lord Bingham CJ in *R. v. Bow Street Stipendiary Magistrate, ex p. Pinochet Ugarte* [1998] 4 LRC 628, at 641).

62. Mr Caldwell suggested, in answer to a query from the court, that designation of a territory not exercising sovereign legal jurisdiction over the case at issue could be *ultra vires*. I noted in that regard that among the territories designated under Part 2 of the

2003 Act is the British Antarctic Territory which, so far as I am aware, does not have its own law and does not exercise sovereign jurisdiction. I doubt whether there has ever been a case of extradition to or from that particular territory; its unusual status is probably no more than a curiosity.

63. Mr Caldwell submitted that the Secretary of State would be well aware, when designating small island territories, that often they do not have their own trial court facilities or detention facilities. So far as the Caribbean OCTs of the Kingdom are concerned, that is evidently the case; and it is no coincidence, said Mr Caldwell, that that Secretary of State has chosen to designate those OCTs in a manner that mirrors the way in which the Kingdom has historically chosen to order the participation of its OCTs in the ECE arrangements.

64. It was not unusual, said Mr Caldwell, for detainees to be transferred between territories of a sovereign state; as where, by section 41 of and Schedule 1 to the Crime (Sentences) Act 1997, a prisoner is transferred within the British Isles or to the Channel Islands. The extradition from Libya to the Netherlands of Abdelbaset al-Megrahi, prosecuted in the Netherlands under Scots law in a court constituted under the law of Scotland, shows how flexible effective extradition arrangements can be (albeit in that case under special arrangements provided for by an Order in Council[3]).

65. Once it is understood that there is no principled objection to trial and sentence in a different physical location from that of the requesting territory, where the law of the requesting territory is applied and its jurisdiction is exercised, the remaining considerations are merely logistics. The extradition of a person is complete when he is surrendered to the custody of officials representing the requesting territory (*Seprey-Hozo v. Law Court of Miercuria Ciuc, Romania* [2016] 4 WLR 181, Cranston J).

66. Any assurances given by the requesting territory about pre-trial detention arrangements, the mode and location of trial and the arrangements for any sentence to be served are accepted and not susceptible to challenge without good reasons. There is a "fundamental assumption that the requesting state is acting in good faith" (per Kennedy LJ in *Serbeh v. Governor of HMP Brixton* [2002] EWHC 2356 (Admin) at [40]).

67. It follows, submitted Mr Caldwell, that the reasoning of Chamberlain J in *Heilligger*, at [37]-[38] is correct and should be followed. He pointed out that many of the smaller Part 2 territories do not have their own trial and detention facilities and it would be impossible to extradite anyone to them if "territory" referred to their physical boundaries rather than their legal jurisdiction. As long as the requested person is sent to a place where he will be subject to the jurisdiction of the courts of the requesting territory, there is no abuse.

68. The respondent says the provisions of the 2003 Act referring to a "territory" and said by the appellant to bear the geographical meaning of the word, work just as well if its juridical sense is preferred, giving it a purposive meaning to promote comity between nations and effective extradition arrangements. For example, a person can "consent" (section 45(1) and section 127(1)) to be extradited to the legal custody and jurisdiction of the requesting "territory".

[3] The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 (SI 1998/2251).

69. The appellant's reliance on section 121(3)(b) of the 2003 Act, preventing extradition until a final decision on asylum has been made, is misplaced, said Mr Caldwell. Any asylum decision would have to include consideration of the treatment to which the requested person would be subject in any and all his likely destinations. That is equally the position where the Secretary of State extradites the person to the physical requesting territory but knows it intends to transfer the person onwards, post-extradition, for detention or trial elsewhere.

70. As for the specialty arrangements (section 95(3)(b)), while it is indeed impossible to leave a geographical territory one has never entered, in a case such as the present, if there was any proposal to try a person for an offence allegedly committed prior to the extradition offence, either the UK would have to consent to that course; or, if it did not, his release from detention would have to be directed by St Maarten so that he could leave the Kingdom; or, alternatively, he would have to be taken to St Maarten and then given the opportunity to leave.

71. Invited by the court to make any additional observations on the relevance, if any, of the ECE and the language of the provisions, Mr Caldwell submitted that the ECE does not affect the meaning of "territory" in Part 2 of the 2003 Act and in the designation orders; but it does help to explain (taken together with the rest of the history) the historical reasons why the Secretary of State decided to designate the Netherlands in Europe as a Part 1 territory and its OCTs in the Caribbean as separate Part 2 territories.

Reasoning and Conclusions

72. It is unnecessary to discuss the scope of the jurisdiction to stay extradition proceedings as an abuse of process. The parties raised no issue in the appeal that would require consideration of that question. Applying the reasoning in the authorities on abuse of process cited by the appellant, I agree that it would be unlawful to extradite a requested person to a territory other than that of the requesting territory; to do so would amount to what is often called "rendition".

73. The appeal turns on the meaning of the words "extradited to the territory". I will refer to the appellant's proposed construction as the geographical interpretation and to the respondent's proposed construction as the juridical interpretation. The essence of the disagreement is that the appellant says the geographical interpretation is the only linguistically permissible one; while the respondent says the juridical interpretation is tenable and must be preferred for reasons of comity and to promote the purpose of facilitating extradition.

74. Is the geographical interpretation the only permissible one as a matter of language? The primary provision in Part 2 cases is section 93(4). The Secretary of State must, if the relevant conditions are met, order that the person be "extradited to the territory to which his extradition is requested". The equivalent provisions in Part 1 cases are sections 21(3) and 21A(5), both stating that if none of the bars to extraditions applies the judge must order the requested person to be "extradited to the category 1 territory in which the warrant was issued".

75. In my judgment, the geographical interpretation is not the only candidate as a matter of language. After careful consideration I reject the submission that this case is within the class identified by Lord Reid in *Black-Clawson*, where the words are "only capable of

having one meaning, that is an end of the matter and no further enquiry is permissible". The concept of a territory is undeniably geographical, but the act of extraditing a person is a legal act which, in my judgment, describes more than physical transport of the person to the location.

76. I accept that the words "extradited to the territory" are capable of meaning, as Mr Caldwell submits, delivering the requested person into the hands of agents of the requesting territory. It is therefore permissible to look into the context and purpose of the provisions in the 2003 Act to determine whether the juridical interpretation is viable and should be preferred. The appellant, rightly, did not quarrel with the proposition that a purposive construction is appropriate if, contrary to his primary submission, it is sustainable as a matter of language.

77. I would be inclined to accept the juridical interpretation if it is viable. If it is correct, performance of the UK's international obligations is facilitated and promoted rather than hindered and undermined. Extradition to territories without adequate trial or detention facilities would remain feasible. The 2003 Act is the instrument that gives effect in domestic law to those obligations. The geographical interpretation is inconvenient because it restricts the manner and conditions in which extradition can be carried out.

78. The question then becomes whether the other provisions in the 2003 Act on which Mr Hall relies, are incompatible with the juridical interpretation. In my judgment, they are not. The judge's duty to order extradition "to the category 1 territory in which the warrant was issued" (sections 21(3) and 21A(5)) if that is compatible with the requested person's Convention rights, is consistent with either of the two interpretations.

79. The same is true of the provisions on consent to extradition to the requesting territory (section 45(1) in Part 1 cases and section 127(1) in Part 2 cases). A person may consent to be transported to a location; or, the person may consent to be delivered up into the custody of agents of the territory in accordance with its laws for the purpose of standing trial or to serve a sentence in accordance with its laws, which may permit trial or service of the sentence elsewhere.

80. Mr Hall relied, as I have said, also on section 93(6A)(b), stating that the Secretary of State may order discharge where the person has been granted leave to enter or remain in the UK "on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove the person to the territory to which extradition is requested". It is true, as Mr Hall points out, that on the juridical interpretation, the breach could occur outside the requesting territory's geographical boundaries.

81. The Secretary of State would have to consider that issue, if the juridical interpretation is correct. But the issue is no different applying the geographical interpretation. On that interpretation (and absent any "sham" return) the requested person may be transported to the requesting territory and thence removed to the location of the trial or sentence. That is not *per se* unlawful. The Secretary of State, therefore, may have to consider human rights concerns in more than one location, whichever interpretation is correct.

82. I consider next the specialty provisions in (for Part 2 cases) section 95 of the 2003 Act. The equivalent provision in Part 1 is section 17. I accept that to have "an opportunity

to leave the territory" more naturally means an opportunity to depart from it in a physical sense, than to cease being subject to its law and jurisdiction. In a case such as this, where the requested person will not be physically present in the requesting territory until after the end of the criminal process, leaving the "territory" would have to mean leaving its jurisdiction.

83. Although that is a somewhat strained construction, I have concluded that in the particular context it is acceptable to construe sections 95 and 17 as including a case where the requested person cannot physically depart from the requesting territory – not having set foot there – but is given an opportunity to leave the location in which the requesting territory is, under the relevant arrangements, exercising jurisdiction; and to depart thence to a place where the requesting territory does not have jurisdiction over the requested person.

84. I do not think the provision in Part 2 relating to serving prisoners creates any difficulty in accepting the juridical interpretation of "extradited to the category 2 territory". The Secretary of State can accept an undertaking that a serving UK prisoner who is to be extradited to be prosecuted in the category 2 territory will "be kept in custody until the conclusion of the proceedings against him for the offence and any other offence in respect of which he is permitted to be dealt with in the category 2 territory" (section 119(3)(a)).

85. When that provision was enacted in 2003, parliament and the government knew the UK was party to international extradition arrangements (such as under the ECE) with territories that did not have adequate trial and detention facilities to deal with all extradited persons. A person can be "dealt with" in a category 2 territory by means of arrangements between responsible law enforcement agents in that territory and in the different territory (such as in this case the Netherlands and Aruba) where the trial will take place and any sentence will be served.

86. As for the asylum provision in Part 2 cases, section 121(3)(b) provides, as Mr Hall pointed out, that "[i]f … the person has made an asylum claim … the person must not be extradited in pursuance of the request before the asylum claim is finally determined" (section 121(3)(b)). That provision does not require the asylum claim to be founded on expected treatment in the requesting territory. The basis of the asylum claim could be a risk of persecution in a different territory to which the requested person is expected to be taken.

87. For those reasons, which closely resemble those advanced by Mr Caldwell for the respondent, I prefer the juridical interpretation and I reject the geographical interpretation advocated by Mr Hall for the appellant. I do not accept that the juridical interpretation puts an impermissible gloss on the words used in the statute; nor that it artificially "reverse engineers" the meaning of those words. It is a tenable purposive interpretation which accords with principles of comity.

88. It does not matter that the Kingdom comprises several separate territories for extradition purposes. The reasons for that are historical, as the ECE and other instruments reflecting changes to the Kingdom's constitution show. Many Part 1 states, including the UK, have OCTs with their own particular status, history and place within the parent country's constitutional arrangements. I agree with the reasoning of Chamberlain J in

Heilligger and, having considered the issue in greater depth than he was able to, come to the same conclusion.

89. For those reasons, the decision of the Senior District Judge to send the case to the Secretary of State is upheld and the appeal is dismissed. The parties are asked to provide a draft order in the usual way. I am grateful to counsel for their diligent researches and well made submissions.