

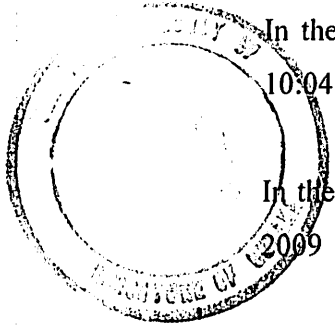
Extradition

GUYANA SUPREME COURT
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IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

CIVIL JURISDICTION

2017-HC-DEM-CIV-FDA-⁵⁹¹2015



In the matter of the Fugitive Offenders Act 1988 Chapter 10:04 of the Laws of Guyana

-and-

In the matter of The Fugitive Offenders (Amendment) Act

-and-

In the matter of The United States of America (Extradition) Order in Council 1935, No 574 of 1935

-and-

In the matter of Articles 40, 139, 144 and 153 of the Constitution of Guyana

Between

Marvin Williams also referred to as Troy Thomas by the Guyana Police Force

-and-

The Attorney General

Respondent

Before: Honourable Madam Justice Jo-Ann Barlow

Appearances:

Mr. C.A. N. Hughes, Mr. Bernard Da Silva and Mr. Daren Wade for the Applicant

Ms. K. Kyte-Thomas, Solicitor-General and Ms. B Bishop-Cheddie, Assistant Solicitor-General for the Respondent

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DECISION



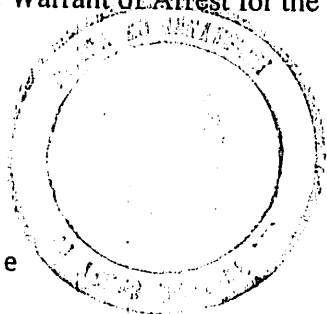
The Government of the United States of America made a request of the Government of Guyana for the extradition of a citizen of Guyana to face charges in the United States of America. Pursuant to an agreement that was entered into by the Governments of the United Kingdom and the United States of America.

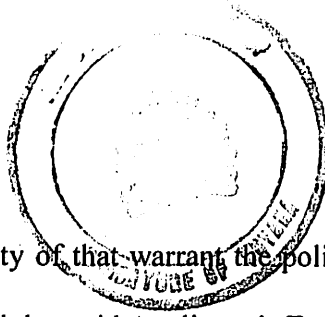
The charges set out in the supporting documents are murder in the second degree and two counts of criminal possession of a weapon. The requesting state identified the fugitive as Troy Thomas.

Pursuant to that request the Minister of Public Security, The Hon Khemraj Ramjattan issued an Authority to Proceed in accordance with section 12 (1) and 36 of The Fugitive Offenders Act Chapter 10:04. That Authority to Proceed is dated the 18th of January 2018.

On the 19th of January 2018, Vice President and Minister of Foreign Affairs, The Hon. Mr. Carl B. Greenidge issued under his hand, a Certificate indicating and confirming the existence of an Agreement made between the Government of the United Kingdom and the Government of the United States of America. That Certificate indicated that the arrangement arising out of the aforesaid Agreement extends to and remains in force in Guyana. The terms of that Arrangement were attached to the Certificate that was issued by the Minister.

On the 23rd of January 2018, the Chief Magistrate (ag), Her Worship Sherdel Isaacs - Marcus issued a Warrant of Arrest for the arrest of Troy Thomas.





Acting on the authority of that warrant the police arrested the Applicant on the 14th of March 2018 and they contend that said Applicant is Troy Thomas to whom the warrant referred. He was taken into custody and subsequently remanded to Prison to await extradition proceedings.

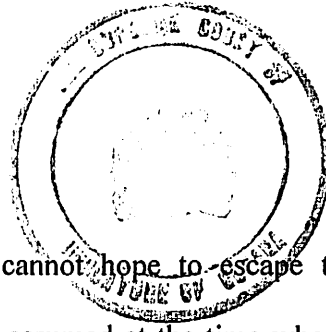
Committal proceedings for the purpose of extradition commenced on the 23rd of March 2018 before the said Chief Magistrate (ag). The matter was then adjourned to the 26th of March 2018. At the hearing on 26th of March 2018, Counsel for the Applicant made certain challenges before the Magistrate and indicated that those challenges would attract the attention of the High Court. While the matter was called on subsequent dates in the Magistrate's Court no further proceedings were taken in the committal proceedings since that court decided to await the outcome of the challenges brought in the High Court.

On 6th of April 2018 the Applicant moved the High Court by way of a Fixed Date Application challenging the committal process and basing that challenge on a number of grounds which will be highlighted as the judgement progresses:

IDENTITY OF THE REQUESTED PERSON

Before proceeding further with this application it must be ascertained whether the Applicant before this Court and the Magistrate's Court is also known as and answers to the name Troy Thomas.

A person is entitled to assume, use and be known by any name without consequences.



However in assuming that name, that person cannot hope to escape the consequences of liabilities and responsibilities that he would have assumed at the time when he used a different name.

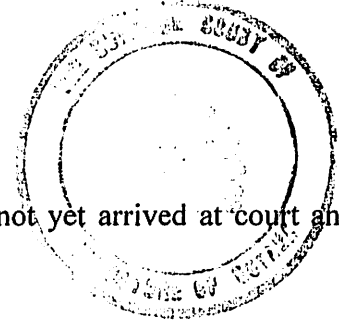
This Court embarked on a search of the available sources to determine the name of the Applicant for present purposes. In that search the Court examined certified copies of the case jacket of the committal proceedings that were commenced in this matter before Her Worship Magistrate Sherdel Isaacs-Marcus. Magistrate Isaacs-Marcus was very meticulous in her recording of material and relevant information.

On the first day of the matter, 23rd of March 2018, the Magistrate recorded that the defendant (as he was then called), was absent since he was not brought from the Camp Street prison. This Court is cognizant of the fact that the warrant of apprehension was issued in the name Troy Thomas. It stands to reason that the person who was admitted at the prison was admitted under the name Troy Thomas. That however is not conclusive that he is indeed Troy Thomas.

A further examination of the case jacket revealed that even if the Applicant calls himself by another name, he answers to the name Troy Thomas. This Court finds this to be conclusive proof of the name by which the Fugitive/Applicant is known.

On the 23rd of March 2018 the Fugitive /Applicant appeared represented by counsel and made no complaint about the name by which he was then being called, that is, Troy Thomas. The testimony from one witness was completed and the matter was adjourned to the 26th of March, 2018 at 13:15 hrs. for continuation.

On the 26th March 2018, the Magistrate recorded thus and I quote
"Def pres answers to the name Troy Thomas. Ct asks are you Mr. Troy Thomas? Def says yes



ma'am". At this point Counsel for the Fugitive Applicant had not yet arrived at court and the matter was adjourned to a later hour awaiting counsel's arrival.

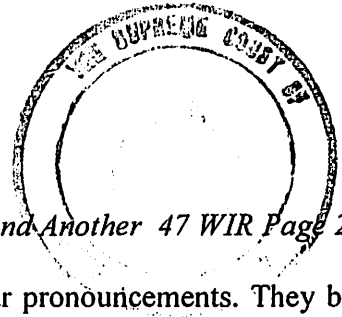
Later that day when the matter was again called, the case jacket reveals the following and I quote "Mgt calls again Mr. Troy Thomas. Def answers yes." Counsel have still not arrived. Later that afternoon the Magistrate recorded "name Troy Thomas called defendant stands".

This Court believes that the information contained on the case jacket which is an exhibit in this matter, leads to the inescapable conclusion that the person who was arrested and appeared before Her Worship Magistrate Marcus-Isaacs and whose application is before this Court is Troy Thomas. The Magistrate would have other material before her on which she will make her own finding as to the person before her. For extradition purposes, the Magistrate must be satisfied for herself that there is sufficient evidence before she makes her decision.

The Court does not condemn the use of another name by the Applicant. That, he is free to do. The Court however finds it greatly troubling that in the face of all of the information known to the Applicant and to Counsel, the Applicant would still assert to this Court that he is not and has never been known as Troy Thomas.

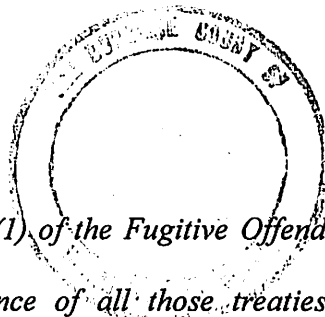
IS THERE AN EXISTING TREATY BETWEEN GUYANA AND THE UNITED STATES OF AMERICA

This issue has engaged the courts of this country and has been answered in the affirmative on more occasion than one. See *Sobers v Director of Prisons* 60 WIR 304 and *Stephen Edward King v Director of Prisons and another* 47 WIR 210



Chancellor George in the case of *King v The Director Of Prisons And Another* 47 WIR Page 210 more particularly at page 215 paragraphs a- to h made some clear pronouncements. They bear repeating in their entirety-

*'The Extradition Acts 1870 to 1932 and the 1931 treaty were clearly laws which were 'in force in, or otherwise [had] effect as part of the laws of, British Guiana'; and, not being in any way inconsistent with either the Guyana Independence Act 1966 or the Independence Order, were accordingly preserved. When the country became a Republic in 1970 the same constitutional device was used to preserve the existing laws (see section 3 of the Republic Act 1970) and later still when further constitutional changes were effected in 1980, section 7 of the Constitution of the Co-operative Republic Act 1980 was drafted in the same mould. It follows, therefore, that until the coming into force of the Fugitive Offenders Act 1988 on 1 January 1989, the United Kingdom Extradition Acts 1870 to 1932 as well as the treaty continued to be part of the laws of independent Guyana. But counsel further contends that the repeal of the Extradition Acts 1870 to 1932 by section 40 of the Fugitive Offenders Act 1988 would have resulted in the consequential repeal of the Order in Council which (he submits) was made under and by virtue of the Acts. This submission, however, seems to be founded on his mistaken assumption that the treaty owes its existence, as distinct from its enforceability, to the Order, when in fact it had an existence that is wholly independent of the Order, having been (as I have said) entered into in the exercise of the prerogative powers of the Crown (see *The Parlement Belge* (1879) 4 PD 129 and *Attorney-General of Canada v Attorney-General of Ontario* [1937]*



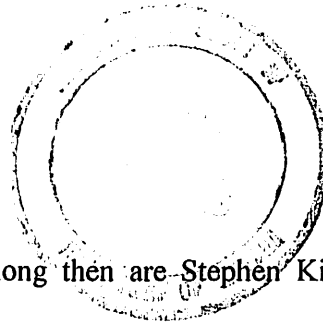
AC 326. And this brings me to section 4(1) of the Fugitive Offenders Act 1988 which in effect acknowledges the existence of all those treaties that before Independence had extended to and remained in force in the country and which went on to recognise their enforceability by making the provisions of the new Act applicable to them. It is the obvious implication of this measure which in effect made the Extradition Acts 1870 to 1932 otiose that necessitated the repeal of the latter.

Chancellor George's statement in that Court of Appeal matter is enough to put this matter to rest but it would not hurt to refer to Small J who was the first instance judge in the very matter. He explained in school master like fashion how the Order in Council survived the repeal of the Extradition Acts 1870 to 1931.

He posited at page 41 of the unreported decision that the incorporation of the Treaty into the laws of Guyana was duly done and completed before The Fugitive Offenders Act 1988. Nothing repealed by The Fugitive Offenders Act 1988 could have affected that which was already done under the Applied Acts that Fugitive Offenders Act repealed.

The Applicant's excursion into the principles enunciated in the Boyce and Joseph matter CCJ 2006, has no applicability to the matter at hand.

The court looked at the conduct of both the United States of America and Guyana to glean therefrom the parties' relations under the provisions of the United Kingdom - United States of America Treaty. Does their conduct suggest that they accept the existence of such an Agreement? The Court has found that by their conduct the courts see the Treaty Arrangement as being in force. Many were the requests of the United States of America for Fugitives whom it



believed were in Guyana. Numbered among them are Stephen King, Garfield Sobers, Barry Dataram and most recently this Application for the Applicant Troy Thomas. It is also public knowledge that Guyana has sought from the United States of America the return of the Fugitive Marcus Bishram.

Finally on this issue, the Certificate that was issued by the Minister assigned responsibility for Foreign Affairs confirmed the existence of the arrangement referred to in section 4 (1) of the Fugitive Offender's Act 10:04. That Certificate is conclusive proof of the matters stated in it, without proof of the signature of the Minister – section 6 of the Fugitive Offender's Act Chapter 10:04

It follows therefore that a challenge by the Applicant to the existence of a treaty arrangement between Guyana and the United States of America without more does not advance the Applicant's cause.

RE EXTRADITION TO A THIRD STATE

The Applicant contends that the treaty has no clause which prevents the re-extradition of the requested person to a third state by the requesting state. He asserts that his detention and any proceedings for extradition are unlawful and in breach of his constitutional rights. He alleges that the provisions of section 8(3) (b) of the Act gives him that cloak of protection from extradition.

Section 8(3) (b) of the Fugitive Offenders Act Chapter 10:04 provides that a citizen shall not ... be extradited from Guyana under the Act to any... treaty territory or be kept in custody for the purpose of such extradition unless provisions have been made by ... the arrangement of that territory relating to the extradition of the fugitive offender for securing that he will not –



.... (b) be extradited by the Government of the ... treaty territory to any other Commonwealth country or foreign territory, to be dealt with for any offence committed before his extradition aforesaid under this Act without the consent of the Minister

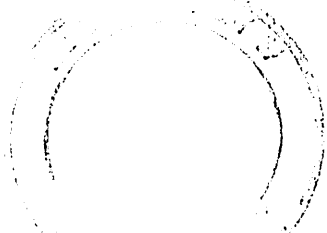
Given the terms of the section above, the question to be decided is whether the Articles of the Treaty provide any protection, expressed or implied, to prevent a fugitive from being sent to a third state by a requesting state who received him pursuant to a request for extradition.

The only relevant article of the Treaty Arrangement is Article 7 and it provides;

'A person surrendered can in no case be kept in custody or be brought to trial in the territory of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters than those for which the extradition shall have taken place (emphasis mine) until he has been restored or has had the opportunity of returning to the territories of the High Contracting Party by whom he has been surrendered. This stipulation does not apply to crimes or offences committed after the extradition.'

The formulation of Article 7 of the treaty arrangements is clear in its intent and meaning. The fugitive offender is to be tried only for the offence for which he was extradited. He cannot be detained on account of any other matter. On what basis then would the High Contracting party send the fugitive offender on to a third state?

This issue arose for discussion in the Court of Appeal decision of *King v DPP (supra)*. George C examined the reasoning of the United States Supreme Court in its consideration of the Ashburton Treaty and its method of enforcement in the case of the *United States v Rauscher*¹¹⁹



US 407. In that instance the prisoner was not indicted for the offence for which his extradition was sought but another offence.

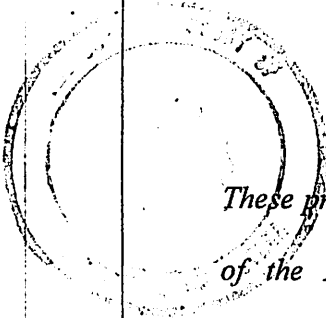
There was no provision in the treaty treating with the issue. At page 430 of the judgment of that case Mr. Justice Miller with whom Mr. Justice Grey concurred said in a majority judgement:-

"...the weight of the authority and of sound principle were in favour of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for the one offences described in the proceedings for extradition."

Furthermore earlier in the same judgment at page 422 Mr. Justice Miller said the following-

"As the right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted the extradition."

In Re Woodhall (1888) Cox CC 478 relying on the precedent set in Raucher's case the Court found that an extradited party could only be tried for the offence for which that party was extradited.



These pronouncements were made by the US Supreme Court even though the provisions of the Ashburton Treaty bore no dissimilarity to Article 7 of the treaty under consideration.

George C in *King v Director of Prisons* cited both matters with approval. While they did not treat with a prohibition against sending a fugitive to a third state, the Learned Chancellor felt that the United States Supreme Court, bound by its own precedent and in the spirit of consistency would "*find itself constrained by parity of reasoning to conclude that implied in that Article and from the general scheme of the treaty, there must be a similar prohibition, i.e. not to transfer the extradited person to a third country for any offence committed prior to his extradition*"

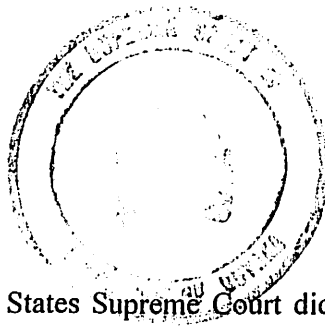
This Court having examined the available legal resources on the issue has found that that understanding exists and is implied that the fugitive would be tried for the offence(s) for which he was extradited only and would not be sent to a third state.

Section 8 (3)(b) of the Fugitive Offender's Act Chapter 10:04

Section 8(3)(b) of the Fugitive Offender's Act Chapter 10:04 provides as follows-

A person shall not be extradited'*unless provision has been made ... by the arrangement ... relating to the extradition of fugitive offenders for securing that he will not ...*

(b) be extradited by the Government of ... the treaty territory to any other Commonwealth country or foreign territory, to be dealt with for any offence committed before his extradition under the ... Act, without the consent of the Minister.'



It may be argued that the United States Supreme Court did not have to treat with provisions similar to section 8(3)(b) of the Fugitive Offender's Act so that Court was free to act on the implied term of the Treaty.

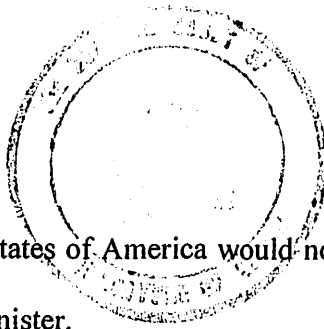
Section 8 (3)(b) of the Fugitive Offender's Act however merely states what the requesting state is prohibited from doing, a prohibition which is already implied by Article 7 of the 1932 United Kingdom-United States of America Treaty.

Section (8) (3) (b) of the Act is clear. That section prohibits the detention of any person for the purpose of extradition to the United States of America as a treaty territory unless provision has been made in the treaty for ensuring that the person extradited from Guyana to the United States of America will not be extradited to a Third Country without the consent of the Minister.

As said earlier the Guyana Court of Appeal in the case of Stephen King and later in the case of Garfield Sobers found that there was an implied provision in Article 7 of the 1931 United Kingdom-United States of America treaty which prohibited the United States of America from extraditing a fugitive offender sent from Guyana to a third country.

There was a seeming departure from this position in an Application for prerogative writs brought before the Court on behalf of the Applicant Barry Dataram, Civ. Apl. No 59/2008. In that case the then Chief Justice acting was treating with an Application for prerogative remedy for a person who had been arrested and detained and was awaiting committal proceedings for purposes of extradition.

The Applicant there questioned whether the 1931 United Kingdom-United States of America Treaty contained any express or implied provision for ensuring that a fugitive offender if



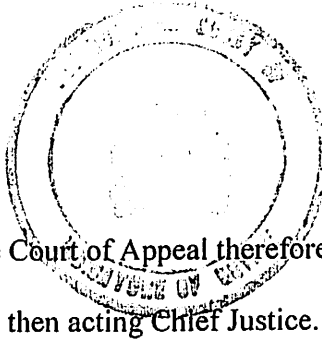
extradited to the United States of America would not be extradited to a Third State without the consent of the relevant Minister.

The then Chief Justice acting introduced a departure from the findings of a Court of Superior Jurisdiction which is inexplicable. He reasoned that in a new Treaty between the United States of America and the United Kingdom in 1976, the old Article 7 was replaced by the new Article VII and expressly stated that the fugitive was not to be extradited to a third state. He was of the view that this insertion of this new article into the new United Kingdom - United States of America treaty was significant in that it added something that was not in the previous treaty.

The Guyana Court of Appeal when dealing with the Stephen King's matter, opined that that new Article VII. which was inserted in the 1976 United Kingdom-United States of America extradition Treaty was nothing new. The Court found that it simply placed in express terms that which was already implied in the 1931 United Kingdom-United States of America Treaty and that which the United States Supreme Court had already pronounced upon.

The then acting Chief Justice in the Dataram Case found himself unable to follow the precedent which had been set by the Court of Appeal in the Stephen King matter and expressed the view that the matter was not res judicata and that he could make a finding of his own and he so did. He found that there was no implied term prohibiting the extradition of a fugitive to a Third State. This finding served to bring to an end proceedings for the extradition of the Applicant Dataram to the United States of America

The proceedings before the then Chief Justice acting were civil proceedings that arose out of a criminal cause or matter and at that time the applicable legislation did not permit any appeal to



the Court of Appeal from such matters. The Court of Appeal therefore declined jurisdiction when an appeal was filed from the decision of the then acting Chief Justice.

That decision stood as a blot on what had been accepted by the Guyana Court of Appeal as the interpretation to be given to Article 7 of the 1931 United Kingdom-United States of America Treaty.

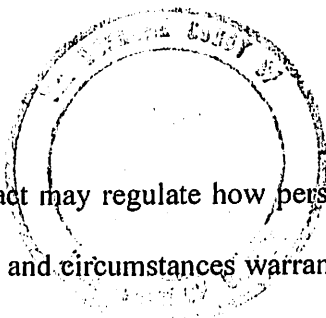
This Court makes bold to say that had an appeal to the Court of Appeal been possible, the decision in the Barry Dataram case would not have stood the test of time. Be that as it may, the Legislature in an attempt to return matters to even keel, passed the Fugitive Offenders (Amendment) Act 2009.

By this amendment sections were inserted into the Act that authorise the detention and extradition of any person to a Commonwealth or Treaty Territory notwithstanding anything contained in Section 3(b) or any other law or Treaty if the Minister considers the detention necessary in the interest of justice.

In determining whether it was in the interest of justice, the Minister must take several factors into account including but not limited to whether the offender would be extradited to a third country from the Commonwealth or a treaty territory to which he is sent.

The sections further provide that if there was absolutely no provision in the treaty or other arrangement prohibiting extradition to a third State, then subject to the Minister's exercise of his discretion, a person may still be extradited to a Treaty or a Commonwealth country.

The Applicant contends that by these measures the Legislature has attempted to amend the Treaty. This is an untenable position. The Legislature amended a piece of domestic legislation- ie



The Fugitive Offender's Act. While that act may regulate how persons will be extradited from Guyana it is not the treaty. As time passes and circumstances warrant, the Legislature is obliged to pass laws for the good governance of a country. Such laws include legislation that would see the county being able to lawfully respond to requests for extradition of a fugitive.

This Court finds no reason to impugn the legality of the aforementioned provisions.

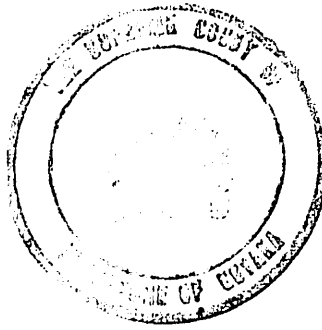
BREACH OF ARTICLE 139 OF THE CONSTITUTION

The Applicant contends that it is his constitutional right under article 139 of the Constitution of the Co-operative Republic of Guyana, not to be deprived of his personal Liberty. He contends that his personal liberty is being infringed by article 8 (3) (b) of The Fugitive Offenders Act. However the very constitutional provision on which he relies, places conditions on the enjoyment of that personal liberty.

Article 139(1) (i) provides that that liberty may be restricted for lawful means therein set out. The personal liberty of a citizen may be restricted if there are proceedings for his extradition or for the purposes of restricting that person while he is being conveyed through Guyana in the course of his extradition or removal as a convicted prisoner from one country to another.

This Court has already found that section 8(3)(b) of the Fugitive Offenders Act is a lawful section and proceedings launched in this matter which involve the application of the said section 8(3)(b) are also lawful.

There is therefore no breach of the Constitutional right of the Applicant to his personal liberty.



Section 8(3)(B) (b)

The Applicant made reference to section 8(3)(B)(b) of the Act as inserted by the Fugitive Offenders (Amendment) Act 2009 and while that provision bears no influence on the outcome of this matter, the Court is minded to make the following observation.

Section 8(3)(B)(b) of the amendment to The Fugitive Offenders Act provides that where a treaty territory or a treaty relating to the extradition of fugitive offenders **does not contain the provisions required by section 8(3)(b)**, the law or treaty should be read and construed by the Minister, Magistrate or Court of Appeal as if by necessary implication the provision was incorporated into the law or treaty.

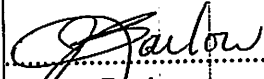
It strikes the Court as being somewhat curious. If the Law or any Treaty provision is devoid of any express or implied provision then to ask that a Court or any other Authority should read that provision into the treaty or law seems to be an invitation to indulge in unofficial or judicial lawmaking in a most unalloyed form.

Be that as it may, this Court has observed elsewhere that nothing turns on this provision for the treatment of the present Application.

CONCLUSION

This Court found that the Authority to Proceed was validly issued. The Declarations sought by the Applicant are therefore refused. The Magistrate is free to proceed with the committal proceedings which were commenced against the Applicant.

Costs in the sum of \$150,000.00 is awarded against the Applicant.



JoAnn Barlow
Puisne Judge
2018-05-25

