
**IN THE HIGH COURT OF MALAWI**

**LILONGWE DISTRICT REGISTRY**

**(CRIMINAL DIVISION)**

**CRIMINAL REVIEW CASE NO: 11 OF 2021**

**(Being Extradition Application No. 1137 of 2020 in the Chief Resident Magistrate Court sitting at Lilongwe)**

**IN THE MATTER OF A REQUEST BY THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA TO THE GOVERNMENT OF THE REPUBLIC OF MALAWI FOR THE EXTRADITION OF MR SHEPHERD BUSHIRI AND MRS MARY BUSHIRI**

**– AND –**

**IN THE MATTER OF SECTION 9 AND 13 OF THE EXTRADITION ACT CAP. 8:03 OF THE LAWS OF MALAWI; AND IN THE MATTER OF SECTION 25 AND 26 OF THE COURTS ACT; AND IN THE MATTER OF SECTION 360 OF THE CRIMINAL PROCEDURE AND EVIDENCE CODE**

**CORAM : HON. JUSTICE R.E. KAPINDU**

Dr. S. Kayuni Director of Public Prosecutions/

Mr. M.Gamadzi, Counsel for the State;

Mr. W. Kita, Counsel for the Fugitive Offenders

Mr. C. Saukila, Court Clerk/Official Interpreter

**ORDER ON REVIEW**

KAPINDU, J

[1] This is the Court's decision following an application for the review of certain decisions made by the Chief Resident Magistrate's (CRM's) Court sitting at Lilongwe in Extradition Application No. 1137 of 2020. The proceedings relate to two Fugitive Offenders (the Fugitive Offenders herein), namely Mr. Shepherd Buxley Bushiri and Mrs. Mary Bushiri. The two fugitive offenders are husband and wife, respectively. They are widely known for their prophetic ministry in the charismatic Christian circles around the world. They fled from the Republic of South Africa where various criminal charges had been laid against them. Prior to their flight, they had been resident in the Republic of South Africa for several years.

[2] It is as a result of the abovesaid criminal charges, and the Fugitive Offenders' subsequent flight to Malawi, which is their country of nationality, that the Government of the Republic of South Africa is requesting the Government of the Republic of Malawi to, by way of extradition, surrender back the fugitive offenders herein to that country in order for them to face trial in respect of the said charges.

[3] The extradition proceedings herein commenced in the CRM's Court at Lilongwe last year. The record shows that a number of rulings were made by the CRM in relation to various preliminary applications that the Fugitive Offenders made. In one of those rulings, the CRM made a decision that pursuant to the provisions of section 9(1) of the Extradition Act (Cap. 8:03 of the Laws of Malawi), committal proceedings for extradition under the Act must proceed by way of a Preliminary Inquiry as provided for under Part VIII of the Criminal Procedure and Evidence Code (Cap. 8:01 of the Laws of Malawi) (CP & EC). The learned CRM further directed that such Preliminary Inquiry

Process would, among other things, require that the relevant witnesses in respect of the charges for which the fugitive offenders are being sought in the Republic of South Africa would have to physically come to Malawi to testify before the Court.

[4] Following that ruling, the learned Director of Public Prosecutions (DPP), Dr. Steve Kayuni, representing both the State and the Requesting State, namely the Government of the Republic of South Africa, formed the view that before proceeding with the matter, it was necessary for this Court to review the decision so as to determine its correctness in law. Upon examining the Notice for review together with its supporting Affidavit and Skeleton Arguments, this Court formed the view that there were sufficient grounds for this Court to call for the record and review the proceedings in the Court below.

[5] This, very briefly, is the background to the present review proceedings.

[6] Extradition in Malawi, like in many other countries, is governed by a specific piece of legislation. The governing statute for extradition in Malawi is the Extradition Act. That Act outlines the processes and procedures that need to be followed in order for a fugitive offender to be surrendered to the requesting State.

[7] The learned DPP raised four issues for the determination of this Court upon review, namely:

i. Whether the learned CRM erred in law when, contrary to law, the honourable Court ordered that a preliminary inquiry within the meaning of section 9 of the Extradition Act is akin to proceedings under Part VIII of the Criminal Procedure and Evidence Code.

ii. Whether the learned CRM erred in law when, contrary to law, the honourable Court ordered that the physical presence of witnesses in Court will be the only way there can be authentication of the evidence available in the Request from the Government of Republic of South Africa.

iii. Whether the learned CRM erred in law when, contrary to law, the honourable Court ordered that receipt of evidence in accordance with law meant physical depositions of witnesses under oath when the depositions were already in the Request for Extradition from the Government of the Republic of South Africa.

iv. Whether the learned CRM erred in law when, contrary to law, he considered that physical presence of witnesses is the only way of authenticating depositions on the Request.

[8] Both parties, namely the State on the one hand and the Fugitive Offenders on the other, presented well-reasoned Skeleton Arguments, and also made very good oral submissions that this Court has found very helpful and informative in coming up with this decision.

[9] When the matter came up for hearing, the learned DPP began his address to the Court by stating that the review proceedings before the Court were of special significance because in the Malawian justice system, since the enactment of the Extradition Act in 1968, there has been no determination by the High Court on the issues that now fall for determination. He stated that at the heart of the present review proceedings is the fact that the justice system is vexed with the implications of section 9 of the Extradition Act.

[10] The DPP stated that the present proceedings have been brought before this Court for review not because the State is disagreeable with the decision of the learned CRM; but rather because there is need for clarity so as to ensure smooth case management of the matter.

[11] I must immediately state that I disagree with the learned DPP on this point. The manner in which the issues for determination have been couched, as shown in paragraph 7 above, shows that the DPP is in fact in sharp disagreement with the CRM's decision. The learned DPP emphatically states that the impugned decisions of the CRM were made *"contrary to law."* He cannot say this, and then immediately turn around and say that the review application that he has brought is merely about seeking clarity and that it is not an expression of disagreement. The statement is untenable. The tenor of the language in the State's review documents shows strong disagreement with the CRM's decision. The Court might perhaps have agreed with the DPP if the issues were expressed differently, in language that sought clarity rather than faulting the CRM's decision.

[12] Having said this, I must quickly clarify that I see nothing wrong in law for the DPP, or indeed any other party, to raise issues of disagreement that they might have with a subordinate Court for purposes of review proceedings in the High Court. It was open for the DPP to express disagreement with the CRM's decision and there is nothing wrong, per se, with such an approach. As long as the DPP satisfied the threshold that has been set by the courts for triggering the review process, which in this Court's view he did, he was at liberty to express disagreement with the committal Court where this was necessary. Where this Court finds fault with the DPP is for him to be heard to say that he was not really expressing disagreement with the Court below, when the facts clearly show that he was in fact strongly disagreeing with the same. This Court therefore proceeds with this

review on the understanding that the DPP is in sharp disagreement with the Court below in respect of the impugned decision.

[13] Back to the issues, the learned DPP contended that the learned CRM erred in law by refusing to acknowledge duly authenticated documents from the Republic of South Africa, and by requiring witnesses to physically come to Malawi to testify at a Preliminary Inquiry following the practice and procedure prescribed under the CP & EC. It was the DPP's argument that if the framers of the Extradition Act had intended to refer to the CP & EC, they would have expressly done so.

[14] The learned DPP invited the Court to observe that the term *"Preliminary Inquiry"* under Malawian law is mentioned in two different statutes; namely the CP & EC and the Child Care, Protection and Justice Act (Cap 26:03 of the Laws of Malawi) (CCPJA), and that the Preliminary Inquiry processes under these two statutory regimes are very different. He proceeded to state that guidance on how the inquiry process is to proceed can be sought from section 13 of the Extradition Act.

[15] The DPP then changed tack and turned to the effect of Malawi's treaty obligations under international law vis-à-vis the subject of extradition.

[16] He emphasized that it is important for Malawi to interpret her statutory obligations in a way that is consistent with her treaty obligations. He stated that under the bilateral Extradition Agreement concluded between Malawi and South Africa, the two countries have corresponding obligations which have to be honoured as a matter of comity between the two States.

[17] It was his submission that duly authenticated documents from South Africa have to suffice, and that requiring witnesses to travel all the way from South Africa to Malawi for purposes of a Preliminary Inquiry would amount to Malawi reneging from her treaty obligations. He submitted that our criminal justice system should be understood to have been structured in such a way as to honour the country's treaty obligations.

[18] The DPP reminded the Court that the committal proceedings for purposes of extradition herein do not constitute a trial; and that trial will take place in the Republic of South Africa. He therefore submitted that the understanding that the learned CRM attached to the Preliminary Inquiry process falls foul of the law and that it is erroneous.

[19] The DPP also pointed out that among the offences alleged by the South African prosecution authorities against the 1st Fugitive Offender are sexual offences. He invited the Court to remind itself that this category of offences brings out another critical issue for this Court's consideration, which is that requiring victim witnesses of sexual offences to come to Malawi to physically testify at a Preliminary Inquiry, as the CRM directed, would amount to retraumatizing them through a process that is not even supposed to be a trial.

[20] Those, in summary, were the arguments advanced by the learned DPP on behalf of the requesting State.

[21] On his part, Counsel for the Fugitive Offenders, Mr. Wapona Kita, begun by commenting that the remarks made by the learned DPP represented a very good proposition for law reform. He stated, in this connection, that the DPP's remarks represented the "ought" position and not the "is" position as far as the law was concerned. He then

invited the Court to remain vigilant in ensuring that the review should be decided based on the law as it stands in Malawi and not on the premises of the law as it ought to be.

[22] Counsel submitted that even if others might perhaps think that the current position of the law in Malawi, of requiring physical presence and direct examination of witnesses at a Preliminary Inquiry is archaic, the fact remains that under Malawian law as it now stands, such a Preliminary Inquiry must be held as a procedure of receiving evidence in extradition proceedings.

[23] Counsel Kita stated that there is an argument that had been advanced by the State that the Republic of South Africa did not require witnesses to travel there for purposes of testifying at extradition committal proceedings. He conceded that that was indeed so, but he was quick to point out that this was because the law in that country did not provide for such a requirement.

[24] Counsel Kita stated that according to section 10(2) of the South African Extradition Act, a certificate from the DPP of the requesting State constitutes conclusive evidence based on which a Magistrate can extradite someone. As such, he contended that there would be no need indeed for witnesses to travel to South Africa if the DPP of the requesting State issues such a committal certificate. He therefore submitted that the two positions in these two jurisdictions were not comparable.

[25] I took time to examine section 10(2) of the South African Extradition Act. The said section 10(2) of the Act provides that:

> *"For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign*

*State, the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned."*

[26] I agree with Counsel Kita that there is no corresponding provision in this regard under Malawian Law. Perhaps the position could have been similar if section 9(2) of the Extradition Act had also adopted as an alternative to the preliminary inquiry process, the proviso to section 263 of the CP & EC.

[27] On the issue of compatibility of Malawi's domestic statutory provisions with Malawi's international law obligations, Counsel Kita stated that the matter was already dealt with in the Court below. He argued that according to the jurisprudence from the Supreme Court of Appeal, Malawian domestic statutes are superior to international law.

[28] Counsel proceeded to state that in fact this position is consistent with Article 1 of the Extradition Agreement between Malawi and RSA as the said provision clearly states that the obligations imposed thereunder are subject to domestic laws on extradition. He therefore submitted that the Extradition Agreement itself elevates domestic law over the treaty obligations. Counsel Kita went on to point out that even under the SADC Extradition Protocol, a similar position obtains.

[29] Counsel then referred to the DPP's contention that if the framers of the Extradition Act had intended for the Preliminary Inquiry process under the Extradition Act to be the process provided for under the CP & EC, they could have said so. Counsel Kita contended that he would likewise argue that if the framers of the Act meant that the process was

as provided for under section 13 of the Act, as argued by the learned DPP, they would equally have said so.

[30] Counsel Kita submitted that if indeed the Preliminary Inquiry process envisaged under the Extradition Act was not the one provided for under the CP & EC, as the learned DPP argued, then one would be left to wonder as to which other process could have been envisaged. It was his contention that the Preliminary Inquiry process envisaged could only be the Preliminary Inquiry procedure under the CP & EC because this is the only statute that provided for a Preliminary Inquiry in 1968 when the Extradition Act was enacted. It could not possibly be the CCPJA which was only enacted as recently as 2010.

[31] Counsel reminded the Court that the CRM held that Extradition Proceedings are criminal in nature because of section 9(1) of the Extradition Act which envisages a Preliminary Inquiry process under the CP & EC. He stated that in fact the State advanced this argument before the CRM, and that he therefore wondered why the State now sought to turn away from its earlier position. He queried whether perhaps the State was playing with the CRM's Court when it argued that the Preliminary Inquiry envisaged under the Extradition Act was the one under the CP & EC.

[32] Counsel Kita therefore strongly maintained that holding a Preliminary Inquiry process, other than the one under the CP & EC, would be unlawful.

[33] On the second ground of review, Counsel Kita stated that the allegation contained in that ground was simply not borne out by the facts on the record as the Court below never said that the witnesses herein would come to Malawi to authenticate their documents. It was

his submission that the true position was that the learned CRM stated that he would not proceed to pronounce a finding on the issue of authentication because, in any event, the witnesses would come to Malawi and that they would tender those documents themselves. In other words, the CRM pronounced no determination or finding on the issue of authentication.

[34] On the third ground of review, he stated that this ground brings to the fore the issue of receiving evidence under section 9 of the Extradition Act and admissibility of evidence when conducting a Preliminary Inquiry in terms of section 13 of the same Act. He argued that depositions are not just what the witnesses would have stated in their statements in the Republic of South Africa. He stated that under Malawian law, specifically under section 265 of the CP & EC, the depositions would only be deemed concluded and complete if there is physical presence of the witnesses as their responses to questions asked during examination would be added and the depositions would then be signed by the witnesses and the presiding Magistrate. He therefore argued that the learned Magistrate was right in finding and determining as such.

[35] Counsel Kita cited the case of *USA vs Assange* [2021] EWHC 3313 (Admin) in the United Kingdom, in which, he stated, witnesses from the USA went to the UK to testify in extradition proceedings. He repeated that the adoption of the depositions as signed in South Africa was not the end of the story, as the witnesses would also have to be cross-examined.

[36] On Ground four, Counsel Kita stated that the ground must be dismissed outright as the learned Magistrate never said what is alleged

in that ground; and that the State is putting words in the learned CRM's mouth. To recap, Ground four states:

> *"Whether the learned Chief Resident Magistrate erred in law when contrary to law [he] considered that physical presence of witnesses is the only way of authenticating depositions on the Request."*

[37] Counsel Kita argued that the learned Magistrate never stated this, that the record does not support such statement ever having been made, and that this ground must therefore be dismissed outright.

[38] Counsel also mentioned that he noted that in their affidavit in support, the State raised issues of Covid-19 logistics, and wondered how these issues were connected to the finding of the learned CRM on the issue of Preliminary Inquiry. He stated that these issues were already raised before the same Magistrate and that there is a decision dated 8th June, 2021 and that the State is not seeking a review of that decision.

[39] All in all, Counsel Kita questioned the sincerity of the State in bringing these review proceedings, arguing that if one examines the record, the State should have been the last to bring the application herein, in view of the fact that they argued in favour of the very position that they are now impugning in these review proceedings.

[40] In response, the learned DPP stated that when the State argued that the proceedings under section 9 are by way of Preliminary Inquiry, the State meant a Preliminary Inquiry process as understood at common law. On the *Julian Assange* case, the DPP contended that the UK Extradition Act is now completely different from ours as it is no longer

based on the 1870 Extradition Act of the UK upon which the Malawian Extradition Act is modelled.

[41] On the issue of the nexus between the issue of authentication of documents and the decision of the learned Magistrate, Dr. Kayuni argued that an examination of the decision of the learned CRM of 29th March, 2021 on physical presence of witnesses clearly shows that the physical presence of witnesses is linked to the authentication of documents. He stated that in that decision, the learned CRM held that the physical presence of the witnesses took care of the authentication issue.

[42] He therefore prayed that the Court should rule in favour of the positions advanced by the State on behalf of the Government of the Republic of South Africa, on all the four grounds.

[43] Such were the arguments advanced before me. I am once again very thankful to Counsel for their lucid and highly illuminating submissions.

[44] I wish to state upfront that when a Court makes the decision to call for and review a proceeding in a subordinate Court, section 26(1) of the Courts Act provides that this Court "may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require."

[45] In the instant case, this Court has taken the decision that it will not remove the present proceedings from the CRM's Court into this Court, as there does not seem to be any reason to warrant such a course of action, and indeed none of the parties even suggested such course of action. The Court will instead only issue directions as to the further conduct of the same as justice may require. Thus the Court will provide

clarity on the law, and the CRM will proceed with conduct of the matter in view of the directions on the law that this Court will provide.

[46] I must begin by addressing the issue of jurisdiction of the Court which was brought in by Counsel Kita, *in limine,* on behalf of the Fugitive Offenders during argument. I will address this issue together with the first ground of review.

[47] The law on the issue of jurisdiction in Malawian courts is well settled. The issue of jurisdiction can be brought up by a party at any time and at any stage of the court proceedings. This is very clear from the Supreme Court of Appeal decision in the case of *Hetherwick Mbale vs Hissan Maganga*, MSCA Civil Cause No. 21 of 2013 (the *Mbale case*).

[48] The foundation of the Fugitive offenders' case on the point of jurisdiction is that the learned DPP has argued that the learned Magistrate erred in law when, contrary to law, he ordered that a preliminary inquiry within the meaning of section 9 of the Extradition Act, is akin to proceedings under Part VIII of the CP & EC.

[49] The fugitive offenders' Counsel accuses the State of breathing hot and cold on this issue. This is so, according to Counsel Kita, because when an earlier application was made suggesting that extradition proceedings were not criminal in nature but rather of a *sui generis* character; the State relied on the very argument that extradition proceedings must take the form of a Preliminary Inquiry under the CP & EC, in their eventually successful quest to persuade the learned Magistrate that extradition proceedings in Malawi take the form of criminal proceedings.

[50] I agree with Counsel for the fugitive offenders that the State indeed argued that the committal hearing in extradition proceedings must take the nature of a preliminary inquiry. The record shows that the learned DPP, during argument on this issue, stated that *"Section 9 of the Act talks of it [the process] as a matter of Preliminary Inquiry which is only in respect of accused persons."* This is all with reference to the Preliminary Inquiry argument that the learned Magistrate recorded as having been advanced by the DPP in support of the argument that the committal proceedings needed to be characterized as criminal.

[51] The learned Magistrate, in his decision, is the one who then proceeded to hold that the Preliminary Inquiry process envisaged under section 9(1) of the Extradition Act was the one provided for under the CP & EC.

[52] This Court is of opinion that the DPP erred in law in his approach. The conclusion that the Preliminary Inquiry envisaged under section 9(1) of the Extradition Act is the Preliminary Inquiry process that is provided for under Part VIII of the CP & EC seems contextually inescapable and generally unassailable.

[53] I recall that the learned DPP stated that by referring to a Preliminary Inquiry process, he meant a Preliminary Inquiry as understood at common law. With respect, the Court has researched on this matter in-depth and cannot locate an established common law process of preliminary inquiry. Preliminary Inquiry processes in all common law jurisdictions explored by the Court, including in the United Kingdom where our own legal tradition on the point is drawn from, are governed by statute, and this has been so for a very long time. In the United Kingdom, it dates back to at least the 19th century. I find that there is no common law preliminary inquiry process known to Malawian law.

[54] The suggestion that a Preliminary Inquiry is mentioned under two pieces of legislation, namely the CP & EC and the CCPJA, and that the Court should not therefore readily adopt the position under one statute, namely the CP & EC, whilst ignoring the one under the CCPJA is, to my mind, untenable. Firstly, on this contention, I agree with the fugitive offenders Counsel's originalist argument that the only Preliminary Inquiry process which was known to Malawian law in 1968, when the Extradition Act was enacted, was the process under the CP & EC. The CCPJA was inexistent at the time as it was only enacted fairly recently in 2010.

[55] In the premises, the process under the CCPJA should, on that ground alone, not arise at all in these proceedings. Parliament never intended that the Preliminary Inquiry process for extradition proceedings be the one under the CCPJA.

[56] Secondly, even if one were to argue that the Extradition Act is a living instrument and that it must therefore be interpreted purposively in the light of progressive developments in the law; the argument that the Preliminary Inquiry process envisaged under the Extradition Act could possibly be the one under the CCPJA would remain untenable.

[57] It is apparent that the Preliminary Inquiry process under Division 4 of the CCPJA is specifically tailored to meet the needs of children in childcare, child protection and child justice proceedings. It is, in this Court's view, an unwarrantable stretch of the legal imagination, and indeed absurd, to suggest that Parliament could have intended that fugitive offenders under the Extradition Act should be handled under child law, with the needs of children in mind.

[58] I therefore agree with Counsel Kita that the only plausible implication of the Extradition Act's reference to a Preliminary Inquiry process must have been the process under the CP & EC. If indeed the DPP had intended to refer to a Preliminary Inquiry under the common law as he suggested, such contention was, with respect, without merit. The learned Magistrate was entitled to ignore it and to instead refer to a Preliminary Inquiry as provided for under the CP & EC in his decision.

[59] But having noted that in his arguments, as shown on the record, the learned DPP did not necessarily argue that he was referring to a Preliminary Inquiry under the CP & EC, a fact that negates Counsel Kita's forceful contention during oral argument, I do not accede to Counsel Kita's invitation that the Court should readily conclude that the DPP has abused the Court process by raising the issue of the nature of a Preliminary Inquiry in extradition proceedings for purposes of review by this Court. A finding of abuse of the Court's process is never lightly made by the Court.

[60] Counsel Kita argued that if the Court were to agree with the DPP's argument that the Preliminary Inquiry process referred to under section 9 of the Extradition Act is not the process envisaged under the CP & EC, then this would entail that the earlier finding of the CRM that the extradition proceedings are criminal in nature would have been wrong. Resultantly, he argued, this Court, being in the Criminal Division of the High Court, would therefore have no jurisdiction to entertain the present review proceedings. I must quickly note, in this regard, that I have already disagreed with the DPP's argument. I have held that the Preliminary Inquiry referred to in section 9(1) of the Extradition Act is the one provided for under the CP & EC. Be that as it may, I still find it apposite to clarify on the issue of the character of Extradition Proceedings, as the issue arose and was substantially ventilated by the parties during the review hearing.

[61] Both parties cited several cases in support of their positions. I have gone through and appreciated the case law cited but will not recite it here. All I will say is that I agree with the conclusion reached by the learned CRM that in the specific case of Malawi, extradition proceedings take the character of criminal proceedings. Whilst there is some merit in the argument that such proceedings should be understood to be of a *sui generis* character, as was argued by Counsel Kita, when one examines the specific statutory provisions on the matter in context, the logical conclusion that one deduces and draws, is that they must be understood to assume the nature of criminal proceedings.

[62] The Preliminary Inquiry process takes the form of criminal proceedings as it follows the procedure laid down under the CP & EC. To recap, the Court has already found that there is no other applicable preliminary inquiry process to the present proceedings other than the one under the CP & EC. The long title to the CP & EC that summarises the overall purposes of the Act, states that the CP & EC was passed as an *"Act to provide for the law relating to procedure and evidence in criminal proceedings".* The Preliminary Inquiry process is therefore an aspect of the *"criminal proceedings"* that are referred to in the long title to the CP & EC.

[63] In addition, section 9(4)(a) of the Extradition Act requires that the Court hearing the extradition committal proceedings should satisfy itself that the evidence tendered would be sufficient to warrant the trial of the fugitive offender for *"that offence if it had been committed within the jurisdiction of the Court."* This necessarily entails that the committal Court must conduct a preliminary assessment on the nature of the alleged offence.

[64] Among other things, the Court must carefully examine the elements of the offence(s) in issue and such evidence as would have been tendered at that stage and make a decision as to whether such evidence satisfactorily shows that if the offence alleged by the requesting State had been committed in Malawi, there would be probable cause for putting the fugitive offenders on trial. Clearly, such assessment, as is envisaged under the Extradition Act, must be and is part of the criminal procedure process. The intricate process of examining the import and elements of various offences, and relating them to available evidence, must surely be the work of a Court conducting a criminal proceeding. There is nothing *sui generis*, let alone civil, about such an assessment process. At the pain of repetition, it is a process that clearly belongs to a Court conducting criminal proceedings.

[65] The Court agrees with Counsel Kita that some comparative jurisprudence shows that other jurisdictions have characterised extradition proceedings as *sui generis*. The Court is of opinion that on the specific circumstances and state of the law in each such jurisdiction, courts in those countries have probably been right in characterising the proceedings as *sui generis* in nature. In Malawi however, as explained above, the position at law is different and any proper and faithful construction of the language of statute leads to the distinct conclusion that the Preliminary Inquiry process under the Extradition Act is a criminal procedure process.

[66] The Court also noted Counsel Kita's contention to the effect that if this Court were to agree that these proceedings are not criminal in nature, but rather of a *sui generis* character, then the conclusion should be that by that fact alone, this Court should conclude that it had no jurisdiction to entertain these proceedings.

[67] In the written arguments, Counsel did not suggest where such proceedings would then belong, but during oral argument, he suggested and clarified that the same should belong to the Civil Division of the High Court. He cited section 6A (1) of the Courts Act (Cap 3:02 of the Laws of Malawi), that establishes the various divisions of the High Court as the foundation for his argument. Section 6A (1) of the Courts Act provides that:

> *(1) The High Court shall have the following divisions—*
> *(a) the* ***Civil Division*** *which* ***shall hear civil matters*** *not provided for under another Division of the High Court;*
> *(b) the Commercial Division which shall hear any commercial matter;*
> *(c) the* ***Criminal Division*** *which* ***shall hear any criminal matter****;*
> *(d) the Family and Probate Division which shall hear any family and probate matter; and*
> *(e) the Revenue Division which shall hear any revenue matter.*

[68] Counsel then referred to the definition of a criminal matter under Section 2 of the Courts Act which states that:

> *"criminal matter" means a matter requiring a person to answer for an offence under any written law other than revenue law.*

[69] Counsel Kita picked up his line of argument from these provisions to submit that this Court would have no jurisdiction to handle the criminal review brought before it if it agreed that the proceedings were *sui generis* in character.

[70] What Counsel did not do, however, was to go further and outline how civil matters that are to be dealt with by the Civil Division have been defined. We can of course quickly exclude the most specialized Divisions from the possibility of entertaining extradition proceedings without the need for elaborate justificatory explanations. Their narrow thematic mandates are self-evidently exclusionary of the prospect of entertaining such proceedings. For what it is worth, very brief explanations are provided herebelow.

[71] The Commercial Division deals with commercial matters and extradition proceedings are clearly not commercial proceedings. The Family and Probate Division deals with civil matters which concern the entry, subsistence and exit from a marriage, or the succession to, or inheritance of, property; and incidental matters to all these. Again, extradition proceedings are definitely not a species of any such proceedings. Finally, the Revenue Division deals with civil or criminal matters which concern taxes, duties, fees, levies, fines, or other monies imposed by or collected under the written laws set out under the Malawi Revenue Authority Act. Without question, extradition proceedings fall outside the jurisdictional compass of that Division. In the circumstances, we remain with the Civil Division which has a more generalized mandate, just like the Criminal Division.

[72] Under Section 2 of the Courts Act, both terms, that is to say, *"a civil matter"* and *"a criminal matter"* are defined. The Courts Act states that *"civil matter"* means a civil matter that is not a commercial, criminal, family or probate matter. It is noteworthy that although this definition excludes the other matters, namely commercial, criminal, and family or probate matters, by stating that a civil matter "*means a* ***civil matter*** *that is not..."* [Emphasis added], the definition still says, in essence, (and at the risk of sounding redundant in the use of language), that a

civil matter must, as a first qualification thereof, necessarily be a *"civil matter."* It does not say that a *"civil matter"* means *"any matter..."* If the term *"any matter"* had been used, it would have made a world of difference as it would then have easily included proceedings that are *sui generis* in character. This interpretation is fortified by the actual language used in section 6A(1)(a) of the Courts Act which states that *"the Civil Division...shall hear* ***civil matters..."*** [Emphasis added]. Clearly therefore, the mandate of the Civil Division is restricted to civil matters. *Sui generis* matters are neither civil matters nor criminal matters. That is the very reason they are characterised as *sui generis*. It can therefore not be argued that the term "civil matter" should be understood as also meaning "*sui generis* matter", when at the same time the term "*sui generis*" means that the matter is neither civil nor criminal in nature. The contrary to this position would only reflect counterintuitive reasoning.

[73] I must mention at this juncture, that the Civil Division should not be confused with what used to be called the *"General Division"* during the pre-2016 days when the Commercial Division was the only specialised division of the High Court. Since the enactment of section 6A of the Courts Act that introduced various specialised divisions of the High Court, there is no *"General Division"* of the High Court. Conceptually, one could perhaps be forgiven to suggest that the High Court, loosely, has a *"General Civil Division"* and a *"General Criminal Division."* This is because by default, in the absence of an express statutory exclusion, these divisions are mandated to handle any civil matter or any criminal matter respectively. These instances however offer no solace for the quick conclusion that *"any matter"* that is neither a commercial, criminal, family, probate or revenue matter, must necessarily be dealt with by the Civil Division, even if it is not essentially civil in character, as Counsel Kita seemed to suggest. That contention

has no legal foundation because the specialized jurisdiction of the Civil Division, as pointed out above, is confined to civil matters. Section 6A of the Courts Act that he cited clearly bears this point out.

[74] The question then becomes: How then would proceedings that are of a *sui generis* character be dealt with?

[75] The starting point in answering this question lies, in this Court's considered view, in section 108(1) of the Constitution of the Republic of Malawi which confers upon the High Court (generally), *"unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law."* This is no doubt a catch-all provision which is aimed at ensuring that there should be no justiciable matter in this country that should not be judicially entertained because no Court has original jurisdiction to hear or otherwise deal with and determine it.

[76] In the Supreme Court of Appeal decision of *The Liquidator of Finance Bank Limited (in voluntary liquidation) vs Kadri Ahmed and Sheith Aziz Bhai Issa* MSCA Civil Appeal Number 39/2008 (*Azziz Issa* case), their Lordships were at pains to accept that only the Commercial Division of the High Court, as it existed then, could handle commercial matters – to the exclusion of the remainder of the High Court. Tambala JA, delivering a unanimous decision of the Court, lamented thus:

> *"What will remain of the unlimited trial jurisdiction of the High Court once divisions of the High Court such as the Family Division, Criminal Division, Administrative Law Division and Employment Law Division are created and similar sub rules are in place? This Court takes the position that Order 1 rule 4(3) has a tendency to undermine the basic principles and values of*

*our Constitution, if interpreted and given effect in the manner Potani J., did. We find the approach unacceptable."*

[77] In the subsequent case of *Mbale*, Mbendera JA, delivering the judgment of the Supreme Court of Appeal, differed markedly with the earlier decision of that Court in *Azziz Issa*. The learned Judge stated that:

*"When one reads the reasoning in the **Aziz Issa** case, it is as if the Commercial Division is outside the High Court. It is as if a court different from the High Court had been established… The truth is that all that was established was a Division to deal with commercial matters. I consider that their Lordships in the **Aziz Issa** case were misled. The basis of their Lordship's decision seems to be that the expression 'High Court' is synonymous with 'the General Division of the High Court'. Clearly, that cannot be correct. As for the lamentation itself, I am inclined to think that when divisions are fully created, the jurisdiction conferred by S. 108 of the Constitution will inevitably be dispersed and diffused to the divisions. The judges will be assigned to the Divisions of the High Court. The dispersion of the jurisdiction will not undermine the Constitution. The intention of S. 108 of the Constitution was to empower High Court judges to deal with cases of whatever kind and dispense justice."*

[78] So here we are as a country, as the Justices of Appeal in both the *Azziz Issa* and *Mbale* cases had predicted, with specialized divisions of the High Court. As it turns out though, all the five divisions that were created were so specific in their mandates that no division was

specifically designated to deal with residual miscellaneous or *sui generis* matters that do not neatly fit within the established specialized domains.

[79] Be that as it may, it remains to be observed from both the *Azziz Issa* and *Mbale* cases, and indeed from all other jurisprudence touching on this point that our courts have generated over time, that no situation should result in the High Court failing to assume original jurisdiction under any law in Malawi. That would run counter to the express provisions of section 108 of the Constitution. As Mbendera JA stated in the *Mbale case*, "*The intention of S. 108 of the Constitution was to empower High Court judges to deal with cases of whatever kind and dispense justice."* So the High Court obviously has original jurisdiction to deal with any *sui generis* matter under any law in Malawi.

[80] Still however, in a context where the High Court has been split into divisions, the question of a test as to which division should have jurisdictional primacy over any given *sui generis* matter arises. This is necessary to ensure orderly and systematic case management, and thereby avoid judicial confusion or indeed chaos.

[81] It seems to me that the test should be to objectively evaluate whether the matters in issue are pre-eminently or predominantly within the domain of one division and not the other. Even in cases which seem to trigger some jurisdictional overlaps between different divisions, there must be one division whose jurisdiction pre-eminently or predominantly stands out given the nature of the matter to be dealt with. One might, in this regard, use the language of statute in section 9(2) of the Courts Act by stating that the Registrar or the Judge, as the case may be, should assess and determine whether the matters in issue expressly and substantively relate to or concern the jurisdictional subject matter of a particular division of the High Court as compared

to the others. Put differently, the Court must look at the underlying basis of the *sui generis* matter.

[82] I am fortified in this view by the recent decision of my sister Judge, the Hon. Mtalimanja J, in the case of *Prakash Naidu vs Republic*, Miscellaneous Criminal Application No.2 of 2022, where she stated that:

> *"It will also be observed that the CPR in O.19, r. 26 provides for habeas corpus proceedings. In this Court's view, this law was readily available for the Applicant to invoke in applying for a writ of habeas corpus right in the Civil Division. Again, without going into the merits of this Application, it will be recalled that both parties have indicated that the infraction between the Applicant and the Respondent is anchored in the contract between the Applicant's employer Techno Brain and the Respondent. Emanating so from a civil matter, the present Application could and should have been brought under O.19, r.26 CPR. Habeas corpus proceedings in the Criminal Division could competently lie if the underlying basis were criminal proceedings against the Applicant. Clearly, this is not the case here."*

[83] Thus, in the instant matter, even if extradition proceedings were of a *sui generis* character, which is not the case, it would remain clear that their purpose is clearly to facilitate criminal proceedings, whether in Malawi or outside Malawi, and not civil proceedings in any case. This is clear from the language of the Extradition Act. It is an Act that makes provision for the extradition of offenders from and to Malawi, and a *"fugitive offender"* under the Act is defined as *"a person accused or convicted of a relevant offence committed according to the law of a designated country, who is in or is suspected of being in or on his way*

*to Malawi."* The proceedings deal with people who are either suspected of having committed crimes or who have been convicted for committing crimes. The underlying basis of the proceedings would remain in the criminal realm.

[84] I would therefore still conclude that it would be incorrect to argue that the Criminal Division of the High Court would be a wrong forum for the review of the extradition committal proceedings and that it would have no jurisdiction to entertain review proceedings such as the instant ones.

[85] I must also quickly say something about the consequences of commencing a matter in a wrong division of the High Court, in view of the Supreme Court's decision in the *Mbale case*. The *Mbale case* decided that where proceedings had been commenced in the Commercial Division of the High Court instead of the General Division of the High Court which was the correct forum for purposes of the subject matter in issue, the proceedings in the Commercial Division were null and void by reason of having been commenced in the wrong Division. Mbendera JA, delivering the decision of the Supreme Court of Appeal, was emphatic in this regard. The decision was clearly correct in the state of the law at the time, and it was made after a comprehensive analysis and review of all the major earlier Supreme Court of Appeal decisions impacting on the issue that fell for the Court's determination.

[86] What is noteworthy, however, is that since that decision was handed down in 2015, Parliament has changed some provisions of the Courts Act relating to divisions of the High Court. As stated earlier, in 2016, the Courts Act was amended and a new section 6A was introduced. Section 6A (1) has already been reproduced above. What is significant

to note is that the section proceeds to prescribe what should happen when proceedings are commenced in a wrong Division of the High Court, and also spells out the consequences for commencing a matter in a wrong Division. It states in subsections (2) & (3) that:

> *"(2) Where a person commences a matter or makes an application in a division other than the appropriate division in accordance with this section, the Registrar shall, on his own volition or on application, immediately transfer the matter to the appropriate division.*
> *(3) The Courts may order that any costs arising from the process under subsection (2) shall be borne by the party who commenced the matter in an inappropriate division."*

[87] It appears from these two subsections, that the scheme of the Courts Act now is that proceedings that are commenced in the wrong Division must be transferred to the appropriate Division. It seems to me that the position therefore is no longer that a proceeding commenced in a wrong Division, say a proceeding commenced in the Civil Division which should appropriately have been commenced in the Commercial Division, should *ipso facto* be void *ab initio*. This is so in view of the fact that the decision in the *Mbale case* on this point, and in as far as proceedings in the High Court are concerned, was overtaken by the abovesaid legislative changes in 2016.

[88] The new scheme of the law is that proceedings commenced in the wrong Division ought to be transferred to the right Division either on the Registrar's own motion or upon an application being made to the Court by any of the parties. The issue of transfer of the proceedings would not arise if the proceedings were to be declared void by reason of having been commenced in the wrong forum as was the case pre-2016.

This is a point that should therefore be borne in mind when the issue of a matter being litigated in a wrong division of the High Court arises.

[89] Pausing there, it must be emphasized that committal proceedings for purposes of extradition under the Extradition Act are not and were never intended to constitute a trial. The purpose for the holding of a preliminary inquiry is clear from the language of sections 9(2) and 9(4) of the Extradition Act. The Court is mandated, under section 9(4), to hear any evidence tendered in support of the request for the surrender of the fugitive offender to the effect that:

(a) the offence to which the ministerial authority to proceed with extradition proceedings, granted under section 7(3) of the Extradition Act, relates is a relevant offence; and

(b) that the evidence tendered would be sufficient to warrant the trial of the fugitive offender for that offence if it had been committed within the jurisdiction of the Court.

[90] In addition, under section 9(2) of the Extradition Act, the Court is mandated to receive evidence:

> *"which may be tendered to show that the case is one to which the relevant provisions of section 6 apply, or that the offence of which the person arrested is accused is not a relevant offence."*

[91] Section 6 of the Extradition Act, to which section 9(2) of the said Act refers, makes provision for general restrictions on surrender of a fugitive offender. The section is in the following terms:

*“ (1) A fugitive offender shall not be surrendered under this Act to a designated country, or committed to or kept in custody for the purposes of such surrender, if it appears to the Minister, to the court of committal, or to the High Court or the Supreme Court of Appeal on an application for directions in the nature of habeas corpus or for the review of the order of committal—*

*(a) that the offence of which the fugitive offender is accused or was convicted is an offence of a political character;*

*(b) that the request for his surrender (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions;*

*(c) that he might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.*

*(2) A fugitive offender shall not be surrendered under this Act to any designated country, or committed to or kept in custody for the purposes of such surrender, if it appears as aforesaid that if charged with that offence in Malawi he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.*

*(3) A fugitive offender shall not be surrendered under this Act to any designated country, or be committed to or kept in custody for the purposes of such surrender, unless provision is made by the law of that country, or by an arrangement made with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to Malawi, be dealt with in that country for and in respect*

*of any offence committed before his surrender under this Act other than—*

*(a) the offence in respect of which his surrender under this Act is requested;*

*(b) any lesser offence proved by the facts proved before the court of committal; or*

*(c) any other offence being a relevant offence in respect of which the Minister may consent to his being so dealt with.*

*(4) Any such arrangement as is mentioned in subsection (3) may be an arrangement made for the particular case or an arrangement of a more general nature, and for the purposes of subsection (3) a certificate issued by or under the authority of the Minister confirming the existence of an arrangement with any country and stating its terms shall be conclusive evidence of the matters contained in the certificate.*

*(5) The reference in this section to an offence of a political character does not include an offence against the life or person of the Head of the Commonwealth or of the Head of any designated country or any related offence referred to in section 5 (3).”*

[92] The issues raised in section 6 of the Extradition Act are obviously not up for the determination of this Court in these review proceedings. These are issues for the committal Court to determine in the event that they are raised during the inquiry process. Thus, the evidence that the committal magistrate is mandated to examine at the Preliminary Inquiry is limited to the purposes stated in sections 9(2) and 9(4) of the Extradition Act.

[93] I must observe that the position under the Extradition Act of Malawi is consistent with the position in other commonwealth jurisdictions whose Extradition pieces of legislation, just like the Malawian one, are modelled upon the old British Extradition Act, 1870 (U.K.), 33 & 34 Vict., c. 52. In the case of *Canada vs Schmidt*, [1987] 1 S.C.R. 500, the Supreme Court of Canada stated that:

> *"An extradition hearing is not a trial. It is simply a hearing to determine whether there is sufficient evidence of an alleged extradition crime to warrant the Government under its treaty obligations to surrender a fugitive to a foreign country for trial by the authorities there for an offence committed within its jurisdiction. Thus, the judge at an extradition hearing has no jurisdiction to deal with defences that could be raised at trial unless, of course, the Act or the treaty otherwise provides."*

[94] The Court went on to state that:

> *"The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum."*

[95] The position expressed in these paragraphs is also good law in Malawi.

[96] In determining the scope and relevance of testimony, including the scope of cross-examination, the committal Court must therefore bear in mind that the Preliminary Inquiry is not a trial and must ensure that the proceedings are focused on ensuring the purposes set forth in

sections 9(2) and 9(4) of the Extradition Act. The learned CRM is therefore appropriately directed in this regard.

[97] The remarks of the Courts in cases such as *Canada v. Schmidt*, above, also remind us, in extradition proceedings, to always be mindful that Malawi has extradition agreements with various States, under various regimes at international law, and that our courts are to give such extradition treaties a fair and liberal interpretation with a view to fulfilling Malawi's obligations and reducing the technicalities of the criminal law implicating the extradition proceedings to a minimum.

[98] This brings me to the issue of the relationship between domestic law and Malawi's treaty obligations under international law which Counsel for the respective parties ventilated during argument.

[99] To recap, it was the learned DPP's contention that this Court must approach these review proceedings from the standpoint that Malawi has international obligations which she is bound to honour.

[100] On his part, learned Counsel for the Fugitive Offenders, Mr. Kita, argued that the position in Malawi is very clear that domestic law is supreme to international law. He cited the case of *In the matter of [CJ] and In the matter of the Adoption of Children Act* [2009] MLR 220 (SCA) as authority for this proposition.

[101] This Court agrees with Counsel Kita that the Supreme Court of Appeal decision *In the matter of [CJ] and In the matter of the Adoption of Children Act* is particularly instructive on this point. However, the Court is of the view that the passage from this decision, that best guides us on the point raised, is to be found at page 230 where Munlo, CJ stated that:

*"the courts will try as much as possible to avoid a clash between what our laws say on the subject and what the international agreements or conventions are saying on the subject, but where this is not possible, the provisions of our Constitution and the laws made under it will carry the day."*

[102] This passage is expressive of Malawi's dualist position when it comes to the domestic application of international law. Malawi's dualist status is evident from the provisions of section 211(1) and 211(3) of the Constitution. The entirety of section 211 of the Constitution is in the following terms:

*"(1) Any international agreement entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament.*
*(2) Binding international agreements entered into before the commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.*
*(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall form part of the law of the Republic."*

[103] It is important however to mention that whatever interpretive approach our courts may adopt with regard to the domestic application of international law, they must as far as possible, as was held by the Supreme Court of Appeal *In the matter of [CJ] and In the matter of the Adoption of Children Act,* seek to avoid conflict between domestic law and Malawi's international legal obligations. Courts must be mindful of the fact that the very first section of the Constitution of the Republic of

Malawi provides that *"The Republic of Malawi is a **sovereign State** with **rights and obligations under the Law of Nations**."* [Emphasis added].

[104] Section 1 of the Constitution expresses two fundamental concepts relating to Malawi's statehood. The first concept that it brings out is that of Malawi's sovereignty. It reminds the reader that our country is sovereign and that, guided by the Constitution, it will deal with all other actors on the international plane on that footing. As much as the section itself is a domestic law provision, it says to the rest of the world that under Malawi's democratic constitutional dispensation, those authorities to whom the Malawian people have delegated the responsibility of representing them, are bound in their conduct by this stricture of our supreme law. It is noteworthy in this regard that, as a matter of fact, Article 2(1) of the Charter of the United Nations emphasises the centrality of the sovereign equality of all States. The notion of sovereign equality of States is clearly premised on the underlying sovereignty of each State. In South Africa, the Constitutional Court, making reference to the preamble to the South African Constitution, has likewise pointed out that the reference to the concept of sovereignty under that country's Constitution is a very significant issue. In the case of *Law Society of South Africa and Others vs President of the Republic of South Africa and Others* [2018] ZACC 51, the Constitutional Court stated that:

> *"We promise in the Preamble to our Constitution to "[b]uild a united and democratic South Africa able to take its rightful place as a sovereign State in the family of nations". The words "rightful place as a sovereign state" are quite telling. Disagreement with other SADC family members is healthy, and typical of the richness that diversity at a regional level*

*ought to bring into the fold. It is not a sign of hostility, but a function of the seriousness with which any democratic and truly sovereign State ought to approach and discharge its obligations or play its role when the rule of law or the essence of justice is sought to be undermined in our region. Comity and sound diplomatic relations ought never to be a product of illegal or unconstitutional compromises that could, rightly or wrongly, be viewed as capitulating to the desires of others to exercise unchecked power to the potential prejudice of the rights of citizens…"*

[105] These are indeed very pertinent observations to which this Court cannot agree more.

[106] Secondly, Section 1 of the Constitution also expresses that, as a sovereign State at international law; Malawi has rights and obligations on the international plane which it is entitled to vindicate, in the case of rights, and to honour in the case of its international obligations. Comparatively, in *Law Society of South Africa and Others vs President of the Republic of South Africa and Others* (above), the Constitutional Court of South Africa unequivocally stated, at paragraph 75, that *"we have the duty to honour our international law obligations and act consistently with that commitment."*

[107] The constitutional recognition of the duty of Malawi to honour its international obligations is consistent with the principle of *pacta sunt servanda*, that is to say that States must fulfil their obligations under international agreements in good faith. In the *Nuclear Tests cases*, ICJ Reports, 1974, pp. 253, 267; 57 ILR, pp. 398, 412, the International Court of Justice (ICJ) stated that:

> *"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of* ***pacta sunt servanda*** *in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral obligation."*

[108] The principle of *pacta sunt servanda* is a time honoured customary international law principle. See Case *Concerning the Gabčikovo-Nagymaros Project, Hungary vs Slovakia,* Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, para. 109.

[109] As seen above, under section 211(3) of the Constitution, customary international law, unless inconsistent with the Constitution or an Act of Parliament, forms part of the law of the Republic. Thus, the principle that Malawi must fulfil its international obligations in good faith, being a rule of customary international law, forms part of Malawian law under the Constitution, and the court is unaware of any law in our jurisdiction which runs counter to the principle of *pacta sunt servanda*.

[110] In this context, when Courts are interpreting provisions under domestic law in view of applicable international law norms, they must also be mindful that the customary international law principle of *pacta sunt servanda*, that Malawi must honour its international agreements in good faith, is part of our domestic law under section 211(3) of the Constitution. In addition, whilst being mindful of and keeping fidelity to the text of the law under section 211(1) of the Constitution, Malawian courts must also be mindful of what relevant supranational tribunals

have said about the relationship between domestic law and international law. For instance, in *Legal Resources Foundation vs Zambia*, Comm. No. 211/98, the African Commission on Human and People's Rights held that:

> *"international treaty law prohibits states from relying on their national law as justification for their non-compliance with international obligations (Article 27, Vienna Convention on the Law of Treaties)."*

[111] The African Commission held likewise in *Media Rights Agenda and Others vs Nigeria*, (2000) AHRLR 200 (ACHPR).

[112] Courts must therefore bear these positions in mind when they engage in an enterprise of mediating domestic and international law norms and principles in situations of apparent tension or conflict between the two. As a general principle, the integrity of the system of the State within the broader family of nations and other subjects of international law, requires that the State should act faithfully and consistently to its obligations; and that it should not play double legal standards. Thus a State should not be announcing either bilaterally or generally to the international community, in terms of its international legal obligations, that "we, as a State, are bound to honour these commitments", and then turn around and say to its own citizens or other subjects of its jurisdiction at the domestic level that: "sorry, we are not really bound to honour those commitments here at home." Such a scenario would smack of State hypocrisy, would constitute a negation of morality in the application of law by the State to its own citizens and other subjects, and would amount to conduct that defeats the object and purpose of the international legal obligation in question. This seems to be the dilemma of dualism in those States where Parliament

has not been given the power to sanction the ratification of or accession to treaties, such as Malawi. International law abhors the practice of double standards in terms of the inconsistent conduct of States at the international level and at the domestic level, especially in dualist States, hence the legal principle that States should not rely on their national law as justification for their non-compliance with international obligations.

[113] Coming to the circumstances of the present matter, what the Court is saying is that when giving effect to the legal position pronounced by the Supreme Court of Appeal *In the matter of [CJ] and In the matter of the Adoption of Children Act*, courts must bear in mind the above articulated international law considerations, in particular the principle of *pacta sunt servanda* and, wherever practicable, avoid conflict between domestic law and the country's international obligations under international law.

[114] Therefore, in the instant matter, the committal Court below is directed that wherever it is appropriate to make reference to, expound and apply Malawi's extradition law obligations which were voluntarily assumed by the country under treaties, whether bilateral or multilateral, the international law considerations discussed above, and in particular the paramount customary international law principle of *pacta sunt servanda*, should not be lost sight of as it makes its decisions.

[115] I now turn to the critical issue of the exact nature of a Preliminary Inquiry in respect of extradition committal proceedings under the Extradition Act. The Court has already held that the Preliminary Inquiry envisaged under section 9(1) of the Extradition Act is the one

contained in Part VIII of the CP & EC. One therefore needs to carefully examine the provisions under Part VIII of the CP & EC in this regard.

[116] Part VIII of the CP & EC deals with provisions relating to the committal of accused persons for trial before the High Court. It must therefore be applied, *mutatis mutandis*, for purposes of committal proceedings under the Extradition Act. As this Court has stated earlier, in doing so, the committal Court is to be mindful that the committal proceedings are not a trial, and that it must bear in mind the purposes of the process as set out in sections 9(2) and 9(4) of the Extradition Act.

[117] The Court's exploration of the relevant Preliminary Inquiry provisions starts with Section 263 of the CP & EC which provides for the holding of a preliminary inquiry. It states that:

> *"Whenever a charge has been brought against a person of an offence not triable by a subordinate court or as to which the subordinate court is of the opinion that it is not suitable to be disposed of upon summary trial, a preliminary enquiry shall be held according to the provisions hereinafter contained by a subordinate court:*
>
> *Provided that no such preliminary enquiry shall be held in any case where the certificate of the Director of Public Prosecutions is produced to a subordinate court in accordance with Part IX."*

[118] Section 264 proceeds to state as follows:

> *"At the commencement of a preliminary enquiry, the magistrate shall read the charge to the accused but the accused shall not be required to make any reply thereto."*

[119] Section 265 of the Code then provides that:

> *"(1) When the accused charged with an offence described under section 263 comes before a subordinate court, on summons or warrant or otherwise, the court shall, in his presence, take down in writing, or cause to be so taken down, the statements on oath of witnesses, who shall be sworn or affirmed in accordance with the Oaths, Affirmations and Declarations Act. Cap. 4:07*
> *(2) Statements of witnesses so taken down in writing are termed depositions.*
> *(3) The accused may put questions to each witness produced against him and the answer of the witness thereto shall form part of such witness's depositions.*
> *(4) If the accused does not employ a legal practitioner, the court shall, at the close of the examination of each witness for the prosecution, ask the accused whether he wishes to put any question to that witness.*
> *(5) The deposition of each witness shall be read over to such witness and shall be signed by him and the magistrate."*

[120] The question that arises is whether these provisions require that physical presence of the witnesses before the committal Court is necessary as the learned CRM found. In addressing this question, the Court recalls that the issue of logistics of hearings during the Covid-19 pandemic arose during argument. In particular, in this connection, the issue was whether the Court could dispense with physical hearings and opt for remote virtual hearings in view of the Covid-19 pandemic and the travel restrictions that have generally been associated with measures to control the spread of the disease around the world.

[121] First, it is observable that only section 265(1) of the CP & EC expressly mentions the word "presence". The presence referred to in that provision is that of the accused person, namely that the accused person or, *mutatis mutandis*, the fugitive offender in the case of extradition, should be present during the Preliminary Inquiry.

[122] The Court has examined the jurisprudence of the United Nations International Criminal Tribunal for Rwanda, which jurisprudence has also been adopted in all other international criminal tribunals and courts on the issue of presence of the accused person. In the case of *Protais Zigiranyirazo v. The Prosecutor,* Case No. ICTR-2001-73-AR73, the ICTR observed, at paragraph 8, that:

> *"Article 20(4)(d) of the Statute [of the ICTR] provides that an accused has a right to be tried in his or her presence. This right has been equated with other "indispensable cornerstone[s] of justice", such as the right to counsel, the right to remain silent, the right to confront witnesses against them, and the right to a speedy trial."*

[123] The Court then proceeded to state at paragraphs 11 and 12 that:

> *"the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial. The language and practical import of Article 20(4)(d) of the Statute are clear. First, a matter of ordinary English, the term "presence" implies physical proximity. A review of the French version of the Statute leads to the same conclusion…Both the Tribunal's legal framework and practice as well as that of the International Criminal Tribunal for the Former Yugoslavia (ICTY) further reflect that Article 20(4)(d) provides for the physical*

*presence of an accused at trial, as opposed to his facilitated presence via video-Link… The Appeals Chamber further observes that other international, regional, and national systems also share the view that the right to be present at trial implies physical presence."*

[124] The Court concluded at paragraph 14 by holding that the right to be tried in one's presence is not absolute, that it is subject to general limitations within the remit of international law, and specifically stating that:

*"The parties acknowledge that an accused's right to be tried in his or her presence is not absolute. The ICTY Appeals Chamber has observed as much, and this Appeals Chamber agrees. An accused person can waive or forfeit the right to be present at trial."*

[125] The fact that the accused person has a right to be tried in his or her presence, and that generally presence means physical presence, therefore does not exclude the possibility of remote virtual proceedings in appropriate cases. It should also be recalled that these pronouncements by the ICTR and other international tribunals were made prior to the emergence of the Covid-19 pandemic that in the past couple of years has fundamentally changed the way that many public affairs, including Court proceedings, are conducted. The importance of this observation, concerning the impact of the Covid-19 pandemic on the manner of conducting court proceedings is well captured by the remarks of Kapanda JA in the case of *Mpinganjira vs Republic*, MSCA Criminal Case No. 9 of 2021 that I refer to below.

[126] Pausing here, the Court is mindful that at issue for purposes of the current review proceedings is the decision of the CRM requiring the physical presence of witnesses during the committal proceedings. The presence of the Fugitive Offenders themselves is merely tangential to that issue for purposes of this decision. Unlike in the case of the accused person, or fugitive offender in respect of extradition proceedings, there is no provision in the CP & EC that explicitly mentions the word "presence" in respect of witnesses. However, the fact that section 265 of the CP & EC envisages examination, including cross-examination of the witnesses, and the fact that, under section 265(4), *"the deposition of each witness shall be read over to such witness and shall be signed by him and the magistrate",* clearly suggests that the witness must, as a general rule, be present in order to present evidence and to be examined.

[127] The question that follows is whether the same principles that apply to an accused person likewise apply to the witness. The right of the accused person to be tried in his/her presence goes along with the concomitant right to challenge evidence. It is this concomitant right, and indeed the Court's own right as we see below, that also make it a general requirement in criminal proceedings that witnesses have to be physically present for their testimony.

[128] With regard to the Court, as was pointed out in *Mhango v City of Blantyre* [1995] 2 MLR 381 (SCA), the Court is entitled to form its impressions about the witnesses' behaviour and demeanour. It was held in that case that generally, the appellate Court must respect the findings of fact of the trial Court because the trial Court is *"best placed to form these impressions having seen the witnesses in the witness box."* There is a good case to be made that such observations by the trial Court are best made when the witness testifies physically. The prevalent view is that examination of a witness is best done in person

with the witness in an elevated witness box, to allow for proper assessment of his or her demeanour, and that remote virtual testimony sometimes hinders the Court and indeed those examining the witness from fully capturing cues such as hand gestures, facial expressions, the witness's gaze, and his or her posture, among others. The result is that the quality of the evidence gets significantly attenuated.

[129] Another concern is that in remote virtual proceedings, the court is unable to see what is happening behind the camera which may be relevant for the Court's holistic evaluation of the witness's testimony. It is even possible that a witness could be coached through such methods as texting, the use of a teleprompter or something similar as he/she testifies; and such witness interference might completely change the complexion and integrity of the proceedings from what they would have been if the testimony were physical.

[130] Additionally, another concern is that during physical testimony, the Court will frequently direct that witnesses stay outside the Courtroom until it is time to testify. Unless very robust and rigorous mechanisms are put in place by the Court, this is very difficult for the Court to guarantee during remote virtual proceedings.

[131] Finally, though by no means exhaustive of the extant concerns, there is the danger of sharing some sensitive exhibits over online internet platforms during virtual proceedings, which platforms the Court has no control over. There is always a possibility that these platforms might be or might at some point become vulnerabe to cyber attacks and thus leading to a potential online exposure of such sensitive evidential material.

[132] It therefore follows that whilst there is no provision under the CP & EC that seems to exclude the remote virtual hearing of the testimony of witnesses in criminal proceedings, there is need for courts to exercise due diligence and care when allowing a witness to testify remotely via virtual (online) link.

[133] With regard to health crises such as the Covid-19 pandemic, the Court is of the view that in appropriate cases, the Court might wish to be guided by health authorities and, depending on their advice from time to time, such a pandemic or other similar health crises might, per se, constitute a valid ground or reason for witnesses to be allowed to testify remotely via virtual (online) link.

[134] The point remains though that virtual proceedings remain a permissible exception or a departure from the general framework for the conduct of criminal proceedings in cases where witness testimony is required, which is for the witnesses to be physically present.

[135] Where, however, proceedings do not require any form of testimony from witnesses, the Court is of the view that virtual proceedings could as well proceed as a matter of course whenever convenience so dictates, resources permitting. This is so because in such cases, the risks associated with virtual testimony are either inexistent or reduced to a minimum.

[136] In arriving at this conclusion, I am fortified by the decision in the case of *Mpinganjira vs Republic*. On the issue of holding virtual proceedings, the Court began by stating that:

> *"[I]t is deponed by the Appellant that the conduct of the court below to partially hear the matter virtually infringed his right to a public trial in accordance with the applicable Criminal law… [I]t is no secret that many judicial systems*

*across the globe are stumbling beneath a heavy burden of thousands of suits filed every year in court. The Malawi judicial system is not an exception. As if the burden of thousands of suits filed every year is not enough, the corona virus pandemic of 2020 [Covid-19] has affected every aspect of our lives… Necessity is forcing changes, particularly in the use of remote and online hearings that were impossible to imagine just before…2019…It therefore seems inevitable that interaction with the courts will soon be predominantly by digital means. Whether this increases access to justice will depend on how the IT is commissioned and whether sufficient resources are committed to its ongoing maintenance…"*

[137] The Court proceeded to state that:

*"As the pandemic has progressed, and jurisdictions have been forced to prolong or periodically reinstate lockdown measures, remote hearings have become commonplace. Courts have moved on from referring [to virtual] hearings as a necessary inconvenience, to affirming remote hearings, even whole trials [to be] conducted remotely, [and that these] can be as fair and as open as their face-to-face equivalents. Remote Court procedures are of course not new but they have traditionally been an exception to the default position of face-to-face proceedings…This Court accepts that virtual hearing is neither found in the Constitution nor in any statute… the recent developments as captured in Practice Direction No. 1 of 2021 seems to suggest that section 42(2)(f)(i) of the Constitution and Section 60 of the Courts Act could be understood to include virtual hearings.*

*Nevertheless, it is the view of this Court that what satisfies the constitutional requirement of court proceedings held in public is accessibility of the public to the court proceedings. Thus, if the public has access to hearings virtually then it should be understood to have satisfied the requirement of 'proceedings held in public' stipulated by the Constitution. Therefore, such proceedings are not unconstitutional…"*

[138] The Court further observed that:

*"It is well to note that Constitutions of Kenya, Canada, India and the United States do not provide for remote or virtual proceedings. [H]owever, court proceedings are being conducted virtually or remotely in those countries on a daily basis. It may be concluded then that Malawi should not be any different…[T]he next question to then ask is whether or not there is any provision of the Constitution that prohibits virtual hearing? The Court is of the view that no provision exists in the Constitution prohibiting virtual or remote hearing."*

[139] The Supreme Court cited with approval the dictum of Chandrachud, J of the Indian Supreme Court in the case of *Sautllini vs Vijaya Venketesll* [2018] 1 SCA 560 where he instructively observed that:

*"There is no reason for [the] court which sets precedent for the nation to exclude the application of technology to facilitate the judicial process. Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice."*

[140] The learned Justice of Appeal then cited with approval a Nigerian decision, stating that:

> *"Finally, in Nigeria, another common law jurisdiction, in* ***F.R.N v Fani Kayode*** *[2010] 14 NWLR (pt 1214) 48, the Law Lords opined that: "While judges must refrain from attempting to make laws from the bench, they must not shy away from adopting a proactive approach to the interpretation of the law. Judicial officers must not place on themselves, disabilities not imposed by law." (Emphasis supplied) Ibid. 503 paragraphs F-G."*

[141] He finally concluded by stating that:

> *"[T]his Court observes that, whilst the preference is for physical attendance in Court for the conduct of trials especially where the assessment of witness demeanour is likely to be of relevance, there is no law that precludes the Courts in Malawi from allowing virtual hearings or proceedings."*

[142] Thus, in so far as the decision of the learned CRM that the witnesses in the present matter for purposes of committal proceedings have to be physically present was couched in inflexible terms, the same was not entirely correct and it is hereby varied. Until perhaps more advanced technological measures, including heightened cyber security and internet speed among others are adopted and in place, courts should be rather slow in having recourse to remote virtual criminal proceedings where witness testimony is involved because of the various inherent risks that have been outlined above. Courts should however allow for

such virtual testimony where satisfactory reasons for such course of action have been provided.

[143] The position is therefore that whilst physical presence of witnesses is, as a general rule, to be preferred; in appropriate cases, where the Court is satisfied that valid grounds exist, remote virtual testimony by witnesses, where this is practicable, is acceptable and should be permitted. Otherwise, as shown above, adopting an unwavering requirement of personal and physical presence, to the exclusion of facilitative technological tools such as video conferencing, might result in a denial of justice. So long as there is no law that prohibits the virtual (online) testimony of witnesses, judicial officers must not place on themselves, disabilities which have not been imposed on them by law.

[144] There is another point of law relating to how the testimony of the South African based witnesses at issue herein may be taken. Where the committal Court has good grounds, it may make an application to the High Court requesting the High Court to make an Order that such witness or witnesses may testify in a South African Court and the record thereof may then be sent to Malawi. Under Malawian law, such record would then be used as an official record of the evidence, and the depositions taken will be considered as complete depositions as envisaged under the CP & EC and pursuant to section 9 of the Extradition Act. A number of statutory provisions stand as authority for this proposition.

[145] Section 208 of the CP & EC makes provision for the examination of witnesses outside Malawi. The section provides as follows:

> *"(1) Whenever in the course of any proceedings under this Code the High Court is satisfied that the examination of a witness outside Malawi is necessary in the interests of*

*justice, the High Court may issue an order for the examination of such witness to a court of competent jurisdiction outside Malawi under, and in accordance with, the Evidence by Commissions Act, or any other [law for the] time being in force relating to the taking of evidence in criminal proceedings outside Malawi. Cap. 4:03*

*(2) Whenever in the course of any proceedings under this Code before a magistrate it appears that the examination of a witness outside Malawi is necessary in the interests of justice, such magistrate shall apply to the High Court, stating the reasons for the application, and the High Court may issue an order under subsection (1) for the examination of such witness."*

[146] Section 209 of the CP & EC goes on to provide that:

*"Where a commission is issued under section 204 or an order is made under section 208, the proceedings may be adjourned for a specified time reasonably sufficient for the execution and return of the commission or of compliance with the order."*

[147] Further, according to section 3 of the Evidence by Commissions Act (Cap 4:03 of the Laws of Malawi):

*"Where in any criminal proceedings in Malawi an order for the examination of any witness, who is to be found outside the jurisdiction of the Malawi courts, has been made, and a commission, order or other request for the examination of such witness has been addressed to a court of competent jurisdiction in the country in which such witness is to be*

*found, such court or the chief judge thereof may nominate any judge or magistrate or other judicial officer within the jurisdiction of such court to take the examination of such witness and any deposition or examination so taken shall be admissible in evidence to the same extent as if it had been taken by or before the court to which the said commission, order or other request was addressed."*

[148] Section 4 of the Evidence by Commissions Act makes provision for the effect of evidence taken on commission. It states that:

*"Whenever, in pursuance of sections 2 and 3 any person is examined outside Malawi, such person may be examined on oath, affirmation or otherwise in accordance with the law in force in the place where the examination is taken, and any deposition or examination so taken shall be as effectual for all purposes as if the witness had been so examined before the court in Malawi ordering the examination."*

[149] What these statutory provisions mean, therefore, is that in appropriate cases, courts in Malawi may decide to order that witnesses who are required to testify for purposes of a Preliminary Inquiry under section 9 of the Extradition Act, should do so before a competent Court in the jurisdiction where they are based, for instance the Republic of South Africa in the instant case, in which case they do not have to travel to Malawi to testify at the Preliminary Inquiry.

[150] The advantage with such an approach is that all the disadvantages of a virtual hearing that have been outlined above would be obviated, whilst at the same time the inconvenience of having witnesses to

physically come to testify in a Preliminary Inquiry for purposes of the committal of fugitive offenders would likewise be avoided.

[151] It appears to this Court that Parliament was foresighted to see situations where it would be inconvenient, taxing, very costly or otherwise unreasonable or inexpedient to require witnesses who are based in other jurisdictions to always come physically to Malawi to testify whenever their evidence is needed by the Court. The fact that South Africa is a designated Country under the Extradition Act emphasises the confidence that Malawian institutions are to have in South African Courts in this regard.

[152] The CRM in the Court below evidently did not consider this option of getting the evidence of the witnesses.

[153] The Court recalls that the issue of authentication of documents was raised in the course of argument in these review proceedings.

[154] Firstly, this court takes the firm position that in so far as section 4 of the Evidence by Commissions Act is concerned, once the foreign Court takes any evidence and deposition pursuant to an Order by a Malawian Court, there is no need for any further act of authentication of such depositions under any law. The provision is clear that "*any deposition or examination so taken shall be as effectual for all purposes as if the witness had been so examined before the court in Malawi ordering the examination.*"

[155] Even if this Court were to be wrong in this conclusion, under the Extradition Act, there is a scheme of authentication of documents that is quite distinct from the general scheme for the authentication of documents under the Authentication of Documents Act (Cap 4:06 of

the Laws of Malawi). Section 13(1) (a) & (b) of the Extradition Act provides as follows:

> *(1)* ***In any proceedings under this Act****, including proceedings for the issue of directions in the nature of habeas corpus in respect of a fugitive offender in custody thereunder—*
>
> *(a) a document, duly authenticated, which purports to set out evidence given on oath in a designated country shall be admissible as evidence of the matters stated therein;*
>
> *(b) a document, duly authenticated which purports to have been received in evidence, or to be a copy of a document so received, in any proceeding in a designated country shall be admissible in evidence.* [Emphasis added]

[156] It is noteworthy in this regard that according to section 3(3) of the Extradition Act, as read with the First Schedule to the Act, the Republic of South Africa, along with the United Kingdom of Great Britain and Northern Ireland and the Republic of Zimbabwe, are definitive designated countries under the Act.

[157] According to section 13(2) of the Extradition Act:

> *"(2) A document shall be deemed to be duly authenticated for the purposes of this section—*
>
> *(a) in the case of a document purporting to set out evidence given as aforesaid, if the document purports to be certified by a judge, or magistrate or officer in or of the designated country concerned to be the original document containing or recording that evidence or a true copy of such a document;*

*(b) in the case of a document which purports to have been received in evidence as aforesaid or to be a copy of 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."*

[158] It is therefore clear that the Extradition Act has its own specific provisions on authentication. There is no need for a general process under the Authentication of Documents Act because a specific authentication process is provided for under the specific Act, namely, the Extradition Act. The legal interpretive maxim here is that of *generalia specialibus non derogant* which means that general laws do not prevail over specific laws. In the Canadian case of *R vs Greenwood* [1992] 7 O.R. (3d) 1, Griffiths J stated that:

*"The maxim* ***generalia specialibus non derogant*** *means that, for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to those of a special one."*

[159] Again in another Canadian case of *Lalonde vs Sun Life* [1992] 3 SCR 261, the remarks of Gonthier J lend weight to this proposition. He stated that:

*"The principle is, therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special gives a complete rule on the subject, the expression of the rule acts as an exception to the subject-matter of the rule from the general Act."*

[160] Before I conclude, I wish to state that the Extradition Act has provision for an alternative process for extradition in respect of designated countries under the Act, other than the holding of a Preliminary Inquiry. This is so in cases where Part IV of the Act applies. The Surrender procedure under Part IV of the Act is provided for under section 18 of the Act. The section provides that:

> *"(1) Subject to the provisions of section 6, where a person arrested under a warrant endorsed in accordance with section 16 or a provisional warrant issued under section 17 is brought before a court, and in the case of a person arrested under a provisional warrant, the original warrant has been produced and endorsed, the court may if it is satisfied—*
>
> *(a) that the warrant is duly authenticated in the manner provided in section 13 and was issued by a person having lawful authority to issue the same; and*
>
> *(b) by evidence on oath, that the prisoner is the person named or otherwise described in the warrant,*
>
> *order the prisoner to be surrendered to the designated country in which the original warrant was issued, and for that purpose to be delivered into the custody of the person to whom the warrant is directed or any one or more of them and to be held in custody and conveyed to that country.*
>
> *(2) A person to whom the warrant is directed and the person so authorized may receive, hold in custody and convey the prisoner named or described in the warrant into the jurisdiction of the designated country concerned.*
>
> *(3) A court shall, so far as is necessary for the exercise of the powers conferred by this section, have the same powers, including the power to remand and admit to bail, as it has*

*in the case of a person arrested under a warrant issued by him.*

*(4) In proceedings, under this section, the court shall receive any evidence which may be tendered to show that the case is one to which the relevant provisions of section 6 apply."*

[161] How then would the provisions of Part IV of the Act apply? The answer to this question lies in an examination of a number of provisions.

[162] Section 3 of the Extradition Act provides that:

*"(1) The Minister may enter into arrangements with the government of any country providing, subject to the provisions of this Act, for the surrender on a basis of reciprocity, of fugitive offenders, and providing for any matters which, in the opinion of the Minister are incidental thereto.*

*(2) Where the Minister has entered into an arrangement with the government of any country in accordance with subsection (1) he may, by order, designate such country, hereinafter referred to as a designated country, as a country to which this Act shall apply subject to such conditions, exceptions, adaptations or modifications as may be specified in the order.*

*(3) The countries specified in the First Schedule shall be deemed to be designated countries to which the whole of this Act (other than Part IV) applies unless or until the Minister, by order, otherwise directs, and the Minister shall be deemed to have entered into appropriate arrangements with such countries in accordance with subsection (1)."*

[163] Pursuant to section 3(1) of the Extradition Act, as read with section 3(2) thereof, the Minister has entered into arrangements with a number of countries. Regulation 2 of the Extradition (Designated Countries) Order, promulgated under Government Gazette General Notices Nos. 71/1972; 28/1977 and 64/1998, provides that:

> *"The following countries, being countries with which arrangements have been entered into in accordance with section 3 (1) of the Act, are hereby designated as countries to which the Act, other than Part IV, shall apply: G.N. 64/1998*
>
> *Australia*
> *Bahamas*
> *Bermuda*
> *British Honduras*
> *British Indian Ocean Territory*
> *Botswana*
> *Cyprus*
> *Fiji*
> *Falkland Islands and Dependencies*
> *Gibraltar*
> *Gilbert and Ellice Islands*
> *Hong Kong*
> *Kenya*
> *Lesotho*
> *Mauritius*
> *New Hebrides*
> *Papua New Guinea*
> *Pitcairn Islands*
> *Singapore*

*Seychelles*
*Sovereign Base Areas of Akrotiri and Dhekelia*
*St. Helena (with Ascension and Tristan da Cunha)*
*Swaziland*
*Tanzania*
*Zimbabwe"*

[164] In addition to this list, under Section 3(3) of the Extradition Act, The First Schedule to the Act, lists the following as designated countries:

*"(1) The United Kingdom;*
*(2)The Republic of South Africa;*
*(3) Southern Rhodesia"*

[165] It will be recalled that section 3(3) of the Extradition Act provides that:

> *(3) The countries specified in the First Schedule shall be deemed to be designated countries to which the whole of this Act (other than Part IV) applies unless or until the Minister, by order, otherwise directs, and the Minister shall be deemed to have entered into appropriate arrangements with such countries in accordance with subsection (1)."*

[166] An examination of these provisions, and the lists of countries in issue, shows that so far, all of them are excluded from the application of Part IV of the Extradition Act. What is also clear is that it is all up to the Minister to decide whether Part IV of the Act should apply to any of these designated countries, in which case the more rigorous processes provided for under Part III of the Act may be excluded.

[167] In the result, in the absence of a contrary order and direction of the responsible Minister, Part III of the Extradition Act, whose provisions we have examined above, remains the governing Part in relation to the committal and surrender proceedings, and a Preliminary Inquiry is required.

[168] In conclusion, with specific reference to the questions and issues that both parties raised for purposes of determination upon review, the Court holds that:

i. The learned CRM did not err in law, and he was within the law when he ordered that a preliminary inquiry within the meaning of section 9(1) of the Extradition Act must be conducted in the same manner as Preliminary Inquiry proceedings under Part VIII of the CP & EC. Obviously, considering that the provision was designed as part of the process leading to a domestic trial of an accused person, the application of Part VIII of the CP & EC must be adapted, *mutatis mutandis*, in order to suit the nature and purposes of extradition committal proceedings for fugitive offenders.

ii. Extradition proceedings under Malawian law assume the character of criminal proceedings and not *sui generis* proceedings as contended by the Fugitive Offenders.

iii. In any event, the Criminal Division of the High Court is the appropriate forum to review, or otherwise decide on appeal, the decisions made by subordinate courts in extradition proceedings.

iv. It must be borne in mind that extradition committal proceedings are not conducted with a view to gathering preliminary evidence for purposes of trial in the Requesting State, but rather for the

purpose of establishing whether the State, on behalf of the Requesting State, has made a prima facie case that the available evidence warrants the surrender of the fugitive offender to the Requesting State, South Africa in the instant case, for trial; and also that the excluding factors that might militate against surrender under section 6 of the Extradition Act are absent.

v. The learned CRM did not hold that the physical presence of witnesses in Court is the only way in which there can be authentication of the evidence available in the Request from the Government of South Africa. Rather, an examination of the record shows that the learned CRM held that it was unnecessary for him to determine the question of authentication because, in his view, the witnesses who had made depositions in South Africa would in any event physically come to Malawi and tender the depositions by themselves.

vi. Authentication for purposes of committal proceedings under the Extradition Act is governed by section 13 of the Extradition Act. Since the Extradition Act itself provides for a procedure for the authentication of documents from foreign jurisdictions, it is that specific procedure that applies and not the general law on authentication of documents as provided for under the Authentication of Documents Act. This decision has expounded the manner in which such documents may be authenticated for purposes of committal proceedings for extradition.

vii. Whilst the law generally requires physical presence in Court by the witnesses, this is not an inflexible rule. The Court has discretion to allow remote virtual (online) court proceedings where witnesses may testify, in cases where there is justification for this approach and where the same is practical.

viii. Remote or virtual (online) testimony carries a number of risks and does not have all the advantages of observing a witness face-to-face physically on the part of the Court and the accused person or fugitive offender (or his/her legal practitioners). Courts must therefore allow virtual testimony where there are good grounds for doing so, and the decision lies in the discretion of the Court seized with the matter. Thus, in so far as the learned CRM held that the physical presence of the South African based witnesses in Malawi for purposes of the committal proceedings herein was an inflexible requirement, he erred.

ix. The High Court of Malawi may, where it deems it appropriate, order that foreign based witnesses, South African based witnesses in the instant case, should testify before a competent South African Court and their evidence and/or depositions will be sent to the committal Court in Malawi. The High Court may order this, either on its motion where the committal proceedings are before it, or upon request from the subordinate committal Court. Such an order may be made for a wide range of reasons that the Court considers expedient including for purposes of practical convenience, fairness, speed and economic disposal of the proceedings. The Court observes that this option of getting the testimony of witnesses was not considered by the learned CRM, and it is appropriate that he takes this option into account in making his decision(s).

x. In appropriate cases, a Court may also take into account considerations of travel inconveniences brought by Covid-19 travel restrictions in making a decision for the out-of-country examination of witnesses by a foreign Court, on behalf of a

Malawian Court. This obviously is not an exhaustive list of considerations.

xi. Concerns were raised about how witnesses in sexual offences might be handled. Under Malawian law, provisions that seek to protect witnesses in that category of crime, especially victim witnesses, has been made under section 71A of the CP & EC. Should such witnesses testify before a Malawian Court, the Malawian Court must therefore direct its mind to these protective provisions.

xii. In the event that the High Court orders that the evidence be adduced in a competent Court in a foreign jurisdiction on behalf of the Malawian Court, considering that under section 4 of the Evidence by Commissions Act such evidence is to be taken in accordance with the law in force in the place where the examination is taken, that is to say the law of the foreign jurisdiction, one trusts that the law of the Republic of South Africa also has an effective scheme for protecting such witnesses and that South African courts would, in such event, ensure that necessary witness protective measures are taken.

xiii. Further, in the event that the High Court orders that evidence be given in a Competent Court in a foreign jurisdiction on behalf of the Malawian Court, the committal Court in Malawi is bound to treat the depositions or other evidence from the foreign competent Court as full and effectual for purposes of concluding a Preliminary Inquiry under section 9(1) of the Extradition Act. This is provided for under sections 208 and 209 of the CP &EC as read with sections 3 and 4 of the Evidence by Commissions Act.

[169] Considering that the Court has, in some respects, faulted some of the findings of the CRM as having been erroneous, it is appropriate that he makes a fresh decision on the manner in which witnesses are to testify at the Preliminary Inquiry, taking into account the directions on matters of law that this Court has given in the instant decision upon review.

[170] The Court so orders and the subordinate Court having conduct of the extradition proceedings herein is so directed.

[171] The record herein reverts to the CRM at Lilongwe to continue with the extradition committal proceedings.

Made in Chambers at Lilongwe this 8th day of February, 2022.

**R.E. Kapindu**
**JUDGE**