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Excerpts from the Communiqué of Commonwealth Law Ministers' Meeting held in Kingstown, St Vincent and the Grenadines, November 2002

COMMONWEALTH CO-OPERATION IN THE ADMINISTRATION OF CRIMINAL JUSTICE

(a) The London Scheme on Extradition within the Commonwealth

15. The Commonwealth Plan of Action on Terrorism encouraged Law Ministers to give priority consideration to revision to the London Scheme for Rendition of Fugitive Offenders which under its new title is to be the London Scheme for Extradition within the Commonwealth. Law Ministers revised the Scheme to modernise and make more effective what has, for almost 40 years, been an important feature of Commonwealth co-operation. Apart from technical changes (adjustments in terminology to reflect changes in usage since the Scheme was first adopted in 1966) and the amendment concerning the political offence exception, the revision makes a number of significant amendments:

- o The provisions dealing with double criminality are simplified and made consistent with the practice followed generally in the international community that dual criminality is a pre-condition for extradition.
- o New provisions deal with extra-territorial offences which feature in a number of international conventions (including conventions dealing with torture, terrorism and drug-trafficking), and which are increasingly created in national legislation dealing with such matters as computer crime. The revised Scheme allows for refusal, at the discretion of the requested country, in cases of unacceptable jurisdictional claims.
- o Provision is also included to allow the requested country to seek additional information where the extradition request is insufficient.
- o The mandatory and discretionary grounds for refusing extradition are restated to give greater clarity. Recognising that persecution on the basis of sex is an important issue, Ministers have decided to add this as a ground for refusal of extradition.
- o To minimise the possibility that a person whose extradition is refused on the ground that the person is a national or permanent resident of a Commonwealth country and may

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therefore wholly escape prosecution, the Scheme is amended to reflect recent international practice.

The Scheme as amended forms Annex B to this Communiqué.

(b) The Harare Scheme

16. Law Ministers agreed to make one immediate amendment to the Harare Scheme on Mutual Assistance in Criminal Matters, to clarify the position relating to the protection against self-incrimination and the process for determining questions of legal privilege. The Meeting asked that consideration be given by Senior Officials in the context of the review of the Scheme, to an amendment to encourage the provision of feedback to a country that had rendered assistance.

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(d) Regional courts

33. A number of regional courts have already been established and others are in contemplation. They have varying jurisdiction, original and appellate, and may have authority to give authoritative interpretations of regional agreements. Some courts were replacing the Judicial Committee of the Privy Council. This was seen as another topic which could be examined with a view to sharing experience on the operation of these courts and facilitating the transition to new appellate courts so as to ensure uniformly high standards of justice. Attention was drawn to the importance of Commonwealth countries ratifying the Rome Treaty establishing the International Criminal Court.

(e) United States Patriot Act

34. Law Ministers noted the provisions of recent legislation in the United States of America which authorizes the seizure of, and forfeiture actions in respect of, funds held in correspondent accounts in the United States of foreign banks. The legislation applies United States law to govern the forfeiture of funds corresponding in amount to those deposited in accounts in the foreign bank's own country, whether or not there be any traceable connection between those funds and the funds held in the correspondent account. The foreign bank cannot rely on the innocent owner defence. Ministers noted that the provisions of the US legislation have the potential to circumvent mutual legal assistance treaties between member countries and the United States.

35. Law Ministers recognised that the application of the Patriot Act subpoena power could place a bank in a situation of conflicting legal obligations and the loss of the correspondent account relationship and expressed their belief that the loss of such relationships can have significant effects on national economies, particularly those of small jurisdictions. They acknowledged and shared the concerns of Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions that banks operating in their territories retain their status as correspondent banks while at the same time being afforded appropriate national protection.

Kingstown
St Vincent and the Grenadines
21 November 2002

E X T R A D I T I O N C A S E S

Extradition – Duty of Minister to comply with statutory duty to consider all relevant factors before making surrender order – Need to consider relevance of time spent in custody prior to surrender as credit for imprisonment likely to be faced upon return – Whether surrender unjust and oppressive if flight was partly precipitated by officials of requesting state – (Canada)

J was charged with two counts of unlawful exchange of counterfeit obligations, in Georgia,

USA. He pleaded guilty and was sentenced to six months' imprisonment, concurrent on each count, to be followed by a three-year term of supervised release and was ordered to pay a special assessment of \$100.

Attached to the supervised release were the following conditions: not to leave the judicial district without the permission of the court or probation officer; to pay any assessment that remained unpaid at the commencement of the term of the supervised release; to report to the probation officer, as directed by the court or

probation officer, and submit a truthful and complete report within the first five days of each month; to truthfully answer all inquiries by the probation officer and follow the instructions of the probation officer; and, to notify the probation officer within seventy-two hours of any change in residence or employment.

While serving the period of supervised release, the probation officer reported that J had breached some of the conditions of his supervised release, by, among other things, leaving the Northern District of Georgia without permission to travel to Canada.

A "Petition for Warrant and Order to Show Cause Why Supervised Release Should Not Be Revoked" was filed in a U.S. District Court and the judge ordered a warrant for J's arrest for breach of his supervised release conditions.

J alleged that in or around May 1997, the United States Immigration and Naturalization Service ("INS") wrote asking him to leave the United States voluntarily within sixty days. He then followed the dictates of the letter and voluntarily left the United States and went to Canada. J said that the letter did not specify where he was to go when he left the United States and his understanding was that the letter was simply a departure order and that he was required to leave the United States.

After J had left the US, the INS ordered his deportation to Nigeria. In July 2000, J was arrested in Canada, under a Warrant for Provisional Arrest and held in detention. Subsequently, the United States Embassy filed a diplomatic note requesting J's extradition. The Minister of Justice issued an Authority to Proceed based on the corresponding Canadian offences of possession of counterfeit money and uttering counterfeit money. A few days later, the Minister issued a second Authority to Proceed for "enforcement of sentences". Following a committal order, the Minister ordered J's surrender to the United States.

J appealed against the Magistrate's committal order and simultaneously applied for judicial review of the Minister's surrender order and warrant.

If he was surrendered, J would have faced a supervised release revocation hearing before a judge who would investigate the probation officer's allegations that he breached his supervised release. If there was a finding that he breached the terms of his release, he would face

a maximum sentence of two years' imprisonment.

J alleged that if he was deported to Nigeria, pursuant to the outstanding INS deportation order, his life would be in danger.

➤ **Held:** allowing the application for review and dismissing the appeal against the committal order;

1. Under the provisions of s. 29(1)(b) of the Extradition Act, the extradition judge must before making a committal order satisfy himself firstly, that the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed and, secondly, that the person before the court was the person who was so convicted. Section 44(1) of the Act requires the Minister to refuse to make a surrender order if he/she is satisfied that the surrender "would be unjust or oppressive having regard to all the relevant circumstances". J had made a submission to the Minister asking that he not be surrendered because of the time spent in Canadian custody. The Minister refused this submission. In the Court's interpretation of the relevant passage in the Minister's reply, it amounted to a finding that the period of custody was an irrelevant factor. The briefing note prepared by the Minister's staff indicated that, in all probability, the United States judge would not take the time spent in custody in Canada into account. In the Court's view, the Minister erred in law in treating this lengthy period of time, for which J might not claim any credit, as irrelevant. The fact that J had spent more time in custody in Canada, in harsh conditions, than he would have received for the offence for which his extradition was being sought was a relevant factor under s. 44. A surrender in those circumstances was capable of being unjust or oppressive.

This did not mean that the Minister was bound not to surrender J, because there could be reasons that would justify the surrender order notwithstanding the lengthy period that J had spent in custody in Canada. But the time spent in custody was a relevant factor which was capable of falling within s. 44(1) and the Minister was required to give reasons for finding that it did not warrant refusal to surrender.

2. The submission by J that he had left the US at the direction of the INS was also a relevant factor that should have been considered by the Minister and one which was capable of falling within s. 44(1). If J had

committed the offence, in part, at the direction of the United States government, it could be unjust to now return him to the United States.

3. There was also the question as to whether the United States intended to act upon its deportation order if J was surrendered. Although the letter from the Minister acknowledged that J was subject to an outstanding deportation order, it did not say anything about that possibility. If the appellant is sent back to the United States for an enforcement of sentence hearing, will he be subject to deportation? If so, extradition in such circumstances may be unjust, particularly given J's assertion that his life would be in danger if he is deported to Nigeria. Moreover, it was possible that detention, in the circumstances, would amount to an abuse of process that would shock the Canadian conscience, although it was not possible for the court to make that determination.

5. Given the mandatory nature of s. 44(1)(a), the Minister must consider all relevant circumstances, singly and in combination, to determine whether surrender would be unjust or oppressive: *United States of America v. Bonamie* (2001), 293 A.R. 201 (C.A.). He must give reasons for his decision. The decision to surrender a fugitive to an extradition party is as important as the humanitarian and compassionate determination under s. 114(2) of the *Immigration Act*, R.S.C. 1985, c. I-2 (now s. 25(1) of the *Immigrant and Refugee Protection Act*, R.S.C. 2001, c. 27), dealt with in *Baker*. J was entitled to reasons that were responsive to the factors relevant to his situation.

The Court dismissed the appeal from the committal order, but granted the application for judicial review, setting aside the decision of the Minister of Justice and referred the matter back to the Minister for determination in accordance with its reasons.

United States of America v. Johnson a.k.a. Umexurike Court of Appeal of Ontario, December, 12 2002, Reported in Ontario Reports, vol. 62, April 2003. ([2003] 62 O.R. 327.)

Extradition – request for extradition stating that person sought to serve sentence – whether conviction in absentia under the circumstances should be treated as conviction *in contumacy* – whether duty of Secretary of State to inform extradition judge whether the person sought is convicted or accused person – extent of extradition judge's right to order committal – UK/US Extradition Treaty - paragraphs 7(1) and (2) of Schedule 1 to the UK Extradition Act 1989 – (UK)

G was involved in an incident in Manhattan, New York, in which one Sean Jennings was subjected to an unprovoked violent attack on his way to the subway. G and his brother were subsequently arrested and charged with this assault. This offence carries a sentence of more than one year under the laws of the State of New York. When he was granted bail, the judge gave him what is known as a "Parker" warning: *The People v Parker*, 57 NY 2d 136, 454 NYS 967, 440 NE 2d 1313 (1982), that if he intentionally absented himself, his trial could go ahead in his absence and that he could also be sentenced without being there. G subsequently appeared once for trial and then jumped bail. Various attempts to find him proved unsuccessful. He was then tried in his absence and sentenced.

On 10 October 2001 British police officers accidentally came across G acting in an unusual manner and questioned him. They subsequently discovered that he was on the Interpol wanted list. They alerted the US Embassy in London which wrote to the Secretary of State requesting G's provisional arrest, under Article VIII of the UK/USA treaty of extradition, on the ground that G was wanted in the USA to serve a sentence of imprisonment. A provisional arrest warrant was issued under paragraph 5(1)(b) of Schedule 1 to the 1989 Act.

The United States then formally requested the extradition of G. The US authorities attached to the Request, a statement by an assistant District Attorney, which made it clear that the request was being made on the ground that G was a convicted person and not as an accused person who had yet to face trial.

Salmon, J. in *R v Governor of Brixton Prison, ex parte Caborn-Waterfield* [1960] 2 QB 498 referring to section 10 of the Extradition Act 1870 from which paragraphs 7(1) and (2) of

Schedule 1 to the 1989 Act are derived, stated that:

“When an accused person is committed under the first paragraph of section 10 and surrendered to a foreign government he is surrendered for trial. Before that course is taken the magistrate has to be satisfied that a prima facie case is made out. When a convicted person is committed under the second paragraph of section 10 and surrendered to a foreign government he is surrendered to serve his sentence, in which case all that is necessary in the magistrates’ court is to prove his conviction.”

The US did not suggest in any way that G’s conviction in absentia in following the “Parker warning” would be open to reconsideration if he were to be returned to the USA and to submit himself once again to the jurisdiction of that court. It had been made clear all along that his extradition was being sought as a convicted person so that he could be required to serve his sentence, and not as a person accused.

However, the case presented by the Secretary of State in issuing his order to proceed under paragraph 4(2) of Schedule 1 to the 1989 Act, stated that G’s extradition was being sought as a person “who is accused of the commission of the crimes of causing grievous bodily harm with intent and inflicting grievous bodily harm within the jurisdiction of the United States of America.”

The papers filed by the Secretary of State also included a certificate signed by the County Clerk and Clerk of the Supreme Court, New York County, in which it was stated that the appellant had been tried and found guilty of the crime of assault in the first degree and had been sentenced to a minimum of 5 and to a maximum of 15 years’ imprisonment. They also included a copy of the warrant for the appellant’s arrest as a convicted person issued by the Supreme Court of the State of New York.

During the committal hearing it was submitted for the Government of the United States that the appellant’s conviction should be treated as a conviction for contumacy and that he should be treated as a person accused as far as the request for extradition was concerned. G argued that there was no prospect of his conviction being set aside and that he should be treated as a convicted person. The information which was before the District Judge on this point was very limited, and she held that she was unable to

speculate about the prospects of success or otherwise of any application that G might choose to make, but that she was satisfied that there were a number of ways in which he might appeal against his conviction and seek a retrial. She held that his conviction was in contumacy and that he was correctly treated as an accused person. Having satisfied herself that there was ample evidence of an extraditable offence against G, she committed him to await the decision of the Secretary of State as to his return.

The matter went on appeal to the Administrative Court which had before it evidence which showed that it was well established that a trial may proceed in a defendant’s absence if he had voluntarily absented himself, that there are established procedures to ensure fairness to the defendant in these circumstances and that there was nothing to suggest that a conviction which resulted from such a trial was to be regarded as anything other than final. The court held that the District Judge was wrong to hold that G’s conviction was a conviction in contumacy. But the court went on to consider whether the District Court judge had jurisdiction to make the committal order. It held that the error did not affect the validity of the requisition itself, so it did not deprive the District Judge of the jurisdiction to commit the appellant under paragraph 7(3) of the Schedule on the basis that he was a convicted person within the scope of paragraph 7(2).

In the House of Lords, G’s counsel argued that it was the Secretary of State’s duty to state in his order to proceed whether the surrender of the fugitive criminal was being sought as a person who is accused or as a person who is alleged to have been convicted of an extradition crime. It was a question of categorisation, and it was for the Secretary of State to place the fugitive criminal into the correct category. The order to proceed thus set the parameters, and the District Judge had no jurisdiction to deal with the case outside those parameters.

Counsel for the Home Secretary argued on the other hand that, while it was for the Secretary of State to launch the proceedings, his function was to inform the District Judge that a requisition had been made. Thereafter there was only one jurisdiction which was for the District Judge to exercise, and this was simply to decide whether or not to commit the fugitive criminal.

The issue

The issue on appeal before the House of Lords was whether the District Judge had jurisdiction to make the order of committal by which G was detained.

➔ **Held:** allowing the appeal;

1. *The Secretary of State's function*

It is the function of the Secretary of State to ensure that a requisition for the surrender of a fugitive criminal of the foreign state complies with the operative treaty and to ensure that the United Kingdom gives effect to it in the manner specified by the Schedule to the Act.

The duties of the Secretary of State are:

- (1) to satisfy himself that the offence for which extradition is requested is for an act or omission of the kind which gives rise to a requirement to grant extradition in terms of the Treaty;
- (2) to ask himself whether the offence for which extradition is requested is of a political character;
- (3) to make up his mind what crime that act or omission would have amounted to according to the English law in force at the time it was committed if it had been committed in England.

The order to proceed specifies the crime for which the magistrate is required to issue his warrant under paragraph 5(1) for the apprehension of the fugitive criminal. It also states the extradition crime where, as in this case, the Secretary of State issues his order to proceed to the District Judge under paragraph 5(4) of the Schedule to authorise the continued detention of the fugitive criminal. The crime which he specifies is then treated for all the purposes of the Schedule as the extradition crime of which the fugitive criminal is accused or of which he is alleged to have been convicted within the jurisdiction of the foreign state.

The question whether the fugitive criminal is a person accused or is a person who has been convicted is crucial to the decisions that must be made about the documents which are to accompany the request for his extradition and to the decision which must ultimately be taken as to whether extradition is to be granted in response to the request. Article VII (3) and (4) also lays down the tests which the evidence must satisfy in each case. The evidence which accompanies the request for the extradition of

an accused person must be such as, according to the law of the requested party, would justify his committal for trial if the offence had been committed in the territory of the requested party. The evidence which accompanies the request for the extradition of a convicted person must show that the person requested is the person to whom the conviction refers.

The effect of the Treaty is to place the responsibility on the requesting party to decide to which of these two categories the person whose extradition is requested belongs. The assumption on which it proceeds is that all the information that is needed to place him into the appropriate category is available to the requesting party. Article VII requires that a decision be made as to whether the person requested is a person accused or has been convicted. It is for the requesting party to take that decision.

Although Schedule 1 to the 1989 Act does not expressly provide that the Secretary of State should say into which category the case of the fugitive criminal falls, it is an inescapable fact that the tests that are to be applied under the Treaty according to the law of the requested party differ according to the category to which the case of the fugitive criminal belongs. The Secretary of State has to satisfy himself as to which of these categories, if any, the case falls into before he signifies to the District Judge that a requisition has been received and, where paragraph 5(4) applies, authorises the continued detention of the fugitive criminal. The function of the order to proceed is to indicate to the District Judge that he is so satisfied.

It has been customary for the Secretary of State to narrate in the body of the order to proceed whether the fugitive criminal whose return is requested is accused, or has been convicted, of the crime which he has identified as the extradition crime. The form provided for this purpose by section 20 of and Schedule 2 to the Extradition Act 1870 provided for the person's category to be specified, as "accused [*or* convicted] of the commission of the crime." And this has been preserved by section 37(4) of the 1989 Act. It is the function of the Secretary of State to ensure, before he issues the order to proceed, that the request is accompanied by a warrant of arrest in the case of a person accused or by a certificate or the judgment of conviction in the case of a person convicted, as this is one of the conditions for extradition which the Treaty specifies.

2. *The jurisdiction of the District Judge*

In *In re Nielsen* [1984] AC 606, 619D Lord Diplock said that the magistrate had no jurisdiction under section 10 of the Extradition Act 1870 to issue his warrant for committal of the fugitive criminal for any crime other than the one which the Secretary of State had specified in an order to proceed.

“It is the function of the Secretary of State to see that the provisions of the treaty have been satisfied. It is for him to identify the category into which the requested person has been placed by the foreign state. The District Judge does not have jurisdiction to change that person’s category. Paragraph 7 of the Schedule lacks any provision to that effect. He must deal with the case as it has been presented to him by the order to proceed. The case which has been presented to him must stand or fall according to the rules that apply to that category in terms of paragraph 7(1) or (2), as the case may be.

“This is not to say that the District Judge lacks jurisdiction to examine the question whether the requested person has been placed into the correct category.”

The question whether a conviction is a conviction for contumacy under foreign law is treated as a question of fact in domestic law. It is within the jurisdiction of the District Judge, should the question be raised, to hear expert evidence so that he can determine whether or not the conviction which is alleged against the requested person is of that character. A requested person who is alleged to have been convicted of an extradition crime but who believes that his conviction is a conviction in contumacy is entitled to object to the terms in which the order to proceed has been expressed.

In *R v Governor of Brixton Prison, ex parte Caborn-Waterfield* [1960] 2 QB 498, 512 Salmon J said that there was no reason to suppose that the parties to the treaty which was in issue in that case intended that those who are in reality convicted persons should be dealt with otherwise than as convicted persons.

The Administrative Court, having held that the appellant was in reality a convicted person, and not an accused person, should have dealt with the case in the manner that the Court of Appeal did in *R v Governor of Brixton Prison v Caborn-Waterfield* [1960] 2 QB 498:

“There can be no doubt that upon the true construction of the statute the applicant’s committal as an accused person was wrong in law. Accordingly, the application succeeds and the applicant, who has surrendered to his bail and is before this court, will be discharged.”

R v Governor of Pentonville Prison, ex parte Zezza [1983] 1 AC 46 endorsed the *Caborn-Waterfield* judgment and held that it was authority against the view that the English court would not look at the nature or substance of the conviction upon the basis of which the conviction was sought. Also, in *In re Sarig* 26 March 1993 [1993] COD 472 (DC), the extradition of the applicant, who was convicted in absentia, was sought by the Government of the United States of America. It was contended that this was a conviction in contumacy, but it was clear from the evidence that it was not. The court held that the magistrate was right to commit him as a person who had been convicted, and not as a person accused.

In re Guisto (FC) (application for a writ of Habeas Corpus [2003] UKHL 19
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