



I N S I D E

4. **Extradition - Whether offences referred to in request were offences listed in extradition treaty - Whether request lawful - (Australia) Constitutional law (Cth) - Whether Executive power to request surrender of fugitive offender from foreign state abrogated by statute**

6. **Extradition - Application for judicial review of order to surrender without assurances that pre-surrender detention will be credited upon conviction - extent of court's jurisdiction in such review**

Extradition – Bail pending appeal – Bail pending Minister's decision on surrender – factors to be considered – Section 20 of Extradition Act – Section 679 of Criminal Code – (Canada)

Trinidad and Tobago requested the provisional arrest of R. He was arrested in Etobicoke, Canada in November 1999. He was subsequently committed for extradition on charges of murder and accessory after the fact to murder. He appealed the decision and was at the same time awaiting the Justice Minister's decision as to whether or not he would be surrendered. In the meantime, R filed an application for bail under section 20 of the Extradition Act of Canada.

The offence of murder carries a mandatory death sentence in Trinidad and Tobago.

At the hearing of the bail application Counsel for R and for the State essentially agreed on the modifications that were necessary to the Criminal Code test for release when dealing with an application under the Extradition Act. Accordingly, the main issue that the Court had to decide was whether R had met the requirements of that test.

The offences for which R was wanted in Trinidad related to the murder of one Clint Huggins for which R and three other were jointly charged. At the time of his death, Huggins was a key prosecution witness in the trial of a notorious gang leader in Trinidad and eight of his associates.

In considering R's personal circumstances, the Court found that R had lived in Canada since 1998 with his Canadian wife. He had suffered a major heart attack in the same year. His mother and sister also lived in Canada. He had no criminal record in Canada. In Trinidad, he was once charged with possession of marijuana for the purpose of trafficking for which he was reprimanded and discharged. At the time of his arrest, R was working as a welder. His sister and mother proposed to stand as sureties for him.

R's application for bail was brought under section 20(a) and (b) of the Extradition Act which provide that:

"Section 679 of the Criminal Code applies, *with any modifications that the circumstances require*, to the judicial interim release of a person pending

- (a) a determination of an appeal from an order of committal made under section 29;

Continued on page 2

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- (b) the Minister's decision under section 40 respecting the surrender of the person; or
- (c) a determination of a judicial review of the Minister's decision under s. 40 to order the surrender of the person.

The relevant part of section 679 of the Criminal Code was Subsection 3 which provides:

"In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

- (a) the appeal or application for leave to appeal is not frivolous;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.

Relying on *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), R's counsel argued that in respect of the application for bail pending appeal, in the extradition context, the public interest in having the committal order enforced weighs less heavily against the granting of bail than does the public interest in immediate enforcement of a sentence where the appeal is against a criminal conviction.

With respect to the application for bail pending the Minister's surrender decision, R's counsel argued that there were two options open to the court: either ignore ss. 679(3)(a) altogether, because there was no appeal to evaluate, or apply a test modelled on that used in interim stay applications, namely, whether the applicant has raised a serious question for the Minister's determination: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

Counsel for the respondent objected to the suggestion that ss. 679(3)(a) should be ignored, and argued that the modified test should be "whether the issues raised in the applicant's submissions to the Minister are not frivolous".

➔ **Held:** allowing the application in part;

1. S. 679(3)(a) should not be ignored. Parliament had indicated a clear intention in that section that bail not be granted unless the issues raised by an applicant reach a certain threshold. The Minister's surrender decision is triggered only once a committal order has been made. Although an executive decision

embracing considerations well beyond the test in *Sheppard*, and a decision subject to only limited judicial review, there was no reason to exempt applicants from the obligation of demonstrating issues warranting the Minister's consideration as a pre-condition to making a release order.

The test proposed by the respondent preserved the language of s. 679(3)(a), and was the practical equivalent of the test proposed by the applicant: *R.J.R -MacDonald*

2. *Application for Release Pending the Minister's Surrender Decision*

In respect of the application for bail pending the Minister's surrender decision, R had satisfied the first branch of the test for release. The charge pending against him in Trinidad was murder for which the punishment is stated to be death by hanging.

In *United States of America v. Burns* (2001), 151 C.C.C. (3d) 97, the Supreme Court of Canada confirmed that, while there is no absolute constitutional prohibition on extradition to face capital punishment, "assurances [that the death penalty will not be imposed] are required in all but exceptional cases". In this case, because of the mandatory nature of the penalty to be imposed, there was no indication of how such assurances might be provided. However, the Minister was entitled, under ss. 44(2) of the Extradition Act, to refuse to make a surrender order "if satisfied that the conduct in respect of which the extradition request is made is punishable by death". In addition, under ss. 40(3), the Minister is entitled to impose a condition that the person be prosecuted only for the offence specified in the surrender order.

The Court could not speculate on the Minister's ultimate decision, however, it was clear that the mandatory death penalty provision raised an issue for the Minister's consideration that was not frivolous. Nevertheless, there were important factors weighing against R's release under the second and third branches of the test. On the second branch of the test, the mandatory death penalty in the event of conviction undoubtedly gave rise to a strong temptation to flee weighing against the likelihood of surrender. On the third branch of the test, there were several factors that weigh against release. They include the finding by a Superior Court judge that there was sufficient evidence to warrant a committal; the seriousness of the charge; the fact that the murder

amounted to a contract killing of a state witness; and the importance of Canada fulfilling its international obligations.

However, the Court was satisfied that R had met the test for release for the following reasons:

(1) On the second branch of the test, aside from the discharge R had no criminal record, and in particular, no history of offences for failing to appear or breaching court orders. Significantly, there was no evidence of any attempt by R to evade the charges against him.

(2) Other than in Trinidad, R's roots were in Etobicoke. He had worked and lived there for many years and his mother, sister and estranged wife lived there. Aside from an unsubstantiated suggestion in the Trinidadian request, that R "is a member of a notorious drug gang" in Trinidad, there was no suggestion that, once his travel documents were surrendered, R had the type of connections that could enable him to flee. Moreover, although his health problems would not appear to preclude his ability to flee, they did not enhance the prospect of flight.

(3) R's mother and sister were appropriate sureties and satisfactory conditions of supervision could be fashioned to minimize any risk that R would not surrender. The Court was satisfied that they would meet their obligations even though R faced the death penalty if returned. Moreover, the decision in *Burns* raised a serious question concerning the likelihood of an outright surrender.

In the view of the court, both the flight risk posed by the prospect of the death penalty and any risk that the sureties would fail to fulfill their obligations because of it can be minimized by requiring R's arrest or remand prior to the Minister's surrender decision. The Court was therefore satisfied that, provided appropriate conditions were imposed, R had established that he would surrender into custody.

(4) On the third branch of the test, the court concluded that there were four important considerations that worked in R's favour:

(i) although R had been committed for extradition, unlike in the ordinary situation of bail pending appeal, the presumption of innocence remained operative, as did the *Charter* right not to be denied reasonable bail without just cause.

(ii) to the extent that it had been disclosed, the prosecution's case against R relied primarily on the testimony of a

witness who had provided contradictory and piecemeal statements and who had been granted immunity from prosecution. The prosecution's case against R was less than formidable.

(iii) Without speculating on the Minister's ultimate decision, R's submissions raised a very serious issue concerning whether a surrender order would be made.

(iv) The Minister's decision had taken more than fourteen months, whereas the outer limit for the decision under the Act was 150 days from the date of committal. In the absence of a waiver, in default of a surrender decision within the stipulated time periods, a detained person is entitled to apply, under s. 69 of the Act, for an order that he be discharged from custody. Although R had given a waiver the court did not consider that that meant that it was therefore unnecessary that the Minister's surrender decision be made in a timely way. The continuing delay was one factor that weighed in favour of a release order.

Taking these four considerations into account, the court was satisfied that R had demonstrated that the public interest considerations favouring his release outweighed those favouring his detention, and that his continued detention pending the Minister's surrender decision was not necessary in the public interest.

3. *Application for Release Pending Appeal of the Committal Order*

The application for bail pending appeal of the committal order was adjourned to await the Minister's decision on surrender, because the court considered that the risk of flight could change significantly based on the Minister's surrender decision, and R should surrender as a condition of bail pending that decision.

Canada (Attorney General) v. Ragoonanan
[2003] 63 Ontario Reports 465

Extradition - Whether offences referred to in request were offences listed in extradition treaty - Whether request lawful - Whether Executive power to request surrender of fugitive offender from foreign state abrogated by statute - Extradition Act 1988 (Cth), ss. 3, 11, & 40 Extradition (Foreign States) Act 1966 (Cth), ss 9, 21. (Australia) Constitutional law (Cth).

O's extradition had been sought in 1996, by Australia, from Poland, on charges of conspiracy to defraud, improper use of position as a company director and failure to act honestly as a company director.

The extradition hearing was heard on appeal by the Federal Court of Australia, at which O was unsuccessful. [That case was reported in CLAN: ...] O appealed further to the High Court of Australia, contending that the request was invalid, and should be quashed on the ground that the offences to which it referred were not listed in the 1932 Extradition Treaty between Australia and Poland.

On behalf of the Minister of Justice, it was argued that the offences were listed and even if they were not, their absence did not render the request invalid, and that in any event, the claims for relief should be dismissed on discretionary grounds related to delay on the part of the appellant.

The High Court considered that the issue raised by the appeal was a question of general importance concerning the capacity of the Executive Government to request the extradition from a foreign country, to Australia, of a person alleged to have committed an offence against a law of Australia, in circumstances where there was a treaty of extradition between Australia and the foreign country.

➤ **Held:** dismissing the appeal;

1. Article 3 of the Treaty contained a list of offences for which extradition could be sought and obtained, and this included fraud by a director or public officer of a company. Furthermore, developments in corporations law in Australia had resulted in the creation of many offences not known, at least in their modern form, in 1932. Whether such an offence, or conduct giving rise to the offence, would fall within the generic description of fraud by a company director, or its Polish counterpart, may

give rise to controversy in a particular case. Consistently with the scheme of the Act of 1870, subject to the matter of specialty, the focus of the treaty was upon the obligations of one state party to arrest, and surrender to the other, a fugitive who was within the territory of the former party, and the conditions to which those obligations were subject. Except for making stipulations as to procedure, the treaty said nothing about requests for extradition. In particular, it said nothing about requests by one party to the other for the surrender of a fugitive, not pursuant to obligations undertaken in the treaty, but as a matter of comity. Save for specialty, the treaty was wholly concerned with the circumstances in which, the procedures according to which, and the conditions upon which, each state party would be obliged to apprehend and surrender to the other a person in its territory.

Section 40 of the Extradition Act 1988 provides that "a request by Australia for the surrender of a person from a country (other than New Zealand) in relation to an offence against a law of Australia of which the person is accused or of which the person has been convicted shall only be made by or with the authority of the Attorney-General." This provision was different from section 21 of the 1966 Act in that it refers to "an offence" instead of "extraditable crime", and "request" instead of "requisition". Moreover s 40 of the 1988 Act is expressed in terms which assume the existence of a power in the Executive Government to make a request, and restrict the exercise of the power to the Attorney-General or a person acting with the authority of the Attorney-General. This assumption is reinforced by the language of s 3(b).

Section 11 of the Extradition Act 1988, empowering the minister to make necessary modifications in respect of certain countries, provides:

"11(1) The regulations may:

- (a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations; or
- (b) make provision instead to the effect that this Act applies in relation to a

specified extradition country subject to other limitations, conditions, exceptions or qualifications.

(2) For the purposes of subsection (1), but without otherwise affecting the generality of that subsection, the reference in paragraphs (1)(a) and (b) to this Act applying subject to limitations, conditions, exceptions or qualifications is deemed to include a reference to this Act applying subject to a modification to the effect that a number of days greater or less than the 45 days referred to in paragraph 17(2)(a) applies for the purposes of that paragraph.

(3) Until the regulations make provision as mentioned in subsection (1) in relation to an extradition country, being a foreign state to which paragraph (c) of the definition of 'extradition country' in section 5 applies, this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications to which the former Foreign Extradition Act, in its application in relation to the extradition country as a foreign state, was subject by virtue of section 9 of that Act."

As is reflected in the heading of s 11, from the time of the Act of 1870, the legislation has always allowed for extradition arrangements with particular states to be subject to limitations, conditions, exceptions or qualifications seen as appropriate to the particular circumstances.

2. *Barton v The Commonwealth*

The issue in *Barton* was whether a request made by Australia to the Federative Republic of Brazil, a state with which Australia had no extradition treaty, for the detention, with a view to surrender, of fugitives from Australian justice was invalid. The Court said that the concept of invalidity was not easy to relate to a communication, and that the real question must be whether the making of such a request was unlawful, and the Court answered that question in the negative. The Bench agreed that it was within the executive power of the Government to make such a request, and that nothing in the 1966 Act excluded that power, or limited it in any manner that had relevance to the case. In particular, s 21 of the 1966 Act did not limit the power of the Executive Government to make a request for extradition to a state with which Australia had no extradition treaty.

The majority of the Court in *Barton* acknowledged, and the history of extradition legislation shows, that the considerations relevant to surrender of a person from the United Kingdom, or Australia, are materially different from those which determine whether a request may be made to a foreign state to surrender a person to the United Kingdom or Australia. Such a request is an act of international intercourse, and it is for the state to which it is made to determine what its response will be. States may invoke comity as well as obligation, and if a requested state, which is not bound to accede to a request, chooses to do so, perhaps on terms as to reciprocity, then that is a matter for it.

In the present case, the respondents contended, and O denied, that Poland was under a treaty obligation to surrender the appellant. But O's argument depended, not only upon his contention that Poland was not under such an obligation, but, additionally, upon the proposition that, in those circumstances, it was unlawful for the Minister to request surrender.

The decision in *Barton* though not determinative of the issue in this case, made O's contention a surprising one. It means that, if Australia had no treaty of extradition with Poland, the request under consideration would have been lawful, but, because there is a treaty, then the request would be unlawful if it related to offences not covered by the treaty.

The resolution of the issue raised by O depended upon a consideration of the effect, if any, of the 1988 Act upon the executive power to seek the surrender by a foreign state of a fugitive offender, a power "essential to a proper vindication and an effective enforcement of Australian municipal law", bearing in mind that the statute will not be held to have abrogated the power unless it does so by express words or necessary implication.

3. *The lawfulness of the request*

In stating the Act's objective, section 3 makes a distinction between the extradition of persons from Australia and the making of requests for extradition by Australia. It codified the former while the object of the latter was to facilitate the making of requests by Australia.

The power to make an extradition request is vested in the Executive Government. Section 40 assumes the existence of the power, and regulates its exercise by providing that a request shall only be made by or with the

authority of the Attorney-General. The request in the present case complied with that provision.

O contended that s 11(3) of the 1988 Act operated so as to impose a further control upon the exercise of the power to make a request for extradition. The respondents did not deny that, at least as a theoretical possibility, in the case of a particular foreign state, there might be limitations, conditions, exceptions or qualifications to which the 1966 Act, in its application to that state, was subject by virtue of s 9 of that Act, and which could affect the power to request extradition. They however denied any suggestion that limitations, conditions, exceptions or qualifications of the kind referred to in s 11(3) could only relate to extradition from Australia. However, they contended that there was nothing of that kind that affected the power to request extradition in the present case.

There was no express limitation, condition, exception or qualification upon the power of either state party to the treaty to make a request to the other. Upon analysis, O's argument amounted to the proposition that the Order in Council, or the treaty, or both, by implication restricted the capacity of each state party to make to the other an extradition request by limiting it to a capacity to make requests only in relation to extraditable offences listed in the treaty. This proposition could not be sustained.

The 1932 Treaty defined the circumstances in which, and the conditions subject to which, each party was obliged to surrender fugitives to the other. It had nothing to say about the capacity of the parties to communicate or receive requests involving an appeal to comity, rather than obligation. There was no reason to interpret the treaty as denying, by implication, such a capacity; and there was good reason not to do so. Treaties had to be interpreted in good faith and "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose": Vienna Convention on the Law of Treaties. Apart from the matter of specialty, the treaty was concerned with rights to demand the surrender of fugitives, and obligations to comply with such demands. It was not concerned with restricting the capacity to make communications which did not invoke treaty obligations, and it was not clear what useful purpose would have been served by doing so. Furthermore, practical difficulties could result

from O's interpretation of the treaty. Where there was a dispute as to whether the offences referred to in the request were offences of a kind listed in the treaty, it would be necessary for the Polish authorities, and courts, to form a view, according to their own law, as to Poland's obligations under the treaty. They should not be required, additionally, to form a view as to the lawfulness, according to Australian law, of the request, or to defer acting on the request until that issue had been fully litigated in the Australian courts.

There was no ambiguity in either the 1966 or 1988 Act so far as *requests* for extradition were concerned. In neither Act was there a relevant express restriction on the Executive's power to make a request and an implied restriction could not be read into it.

4. For the above reasons, the Court also found it unnecessary to determine O's contention that the offences alleged against him were not offences of a kind listed in the 1932 Treaty.

Oates v. Attorney General (Cth) [2003] HCA 21

Extradition - Application for judicial review of order to surrender without assurances that pre-surrender detention will be credited upon conviction - extent of court's jurisdiction in such review - s. 57 of the Extradition Act, S.C. 1999 - (Canada)

In 1997, the United States of America sought the extradition of A from Canada on charges of conspiracy to commit mail fraud, wire fraud, money laundering, and related offences. On December 1, 2000 the Minister of Justice ordered his surrender to the United States. An application for a judicial review of that order failed and he sought to have the order amended to make it conditional on receiving assurances that he would be given enhanced credit in the United States for the five years he has spent in pre-trial custody in Canada. The Minister refused to make such an amendment. A now applied for judicial review of the Minister's refusal to amend his order. The Minister on the other hand asked the court to quash the application on the basis that it had no jurisdiction to hear it.

➤ **Held:** dismissing the application, but ruling that the court had jurisdiction to hear the application.

1. On the issue of the court's jurisdiction to hear the application for judicial review, the Court considered the provisions of section 40(1), 42, 57 and 62(1) of the Extradition Act, 1999., which provide respectively:

"40. (1) The Minister may, within a period of 90 days after the date of a person's committal to await surrender, personally order that the person be surrendered to the extradition partner.

"42. The Minister may amend a surrender order at any time before its execution.

"57. (1) Despite the Federal Court Act, the court of appeal of the province in which the committal of the person was ordered has exclusive original jurisdiction to hear and determine applications for judicial review under this Act, made in respect of the decision of the Minister under section 40.

"62. (1) No person may be surrendered

(a) until a period of 30 days has expired after the date of the committal for surrender; or

(b) if an appeal or a judicial review in respect of a matter arising under this Act, or any appeal from an appeal or judicial review, is pending, until after the date of the final decision of the court on the appeal or judicial review.

Counsel for the Minister had argued that this scheme gave the court jurisdiction to review only the Minister's initial surrender order, and did not extend to a decision made following a request for reconsideration. Otherwise an applicant could engage in an endless series of requests for the Minister to reconsider, each time seek judicial review of each and thereby frustrate the principle that extradition proceedings are to be conducted expeditiously.

The Court rejected this argument on the following grounds:

(a) The Minister's decision was made under section 40 of the Extradition Act. A sought an amendment under section 42. The court has jurisdiction to hear an application for judicial review in respect of the Minister's decision under s. 40. Although A's application related to a review of the Minister's section 40 decision the Court's jurisdiction is not limited to that sort of review alone.

(b) It is recognized under the Extradition Act that there could often be a time lag between the Minister making a surrender order and its execution. If circumstances arise in that time frame which make a change to that order essential, a refusal to do so by the Minister may appropriately be the subject of judicial review. The same would be true if, after making a surrender order, the Minister made a change to it that was not warranted, for example, by removing a condition that the accused had insisted upon. The breadth of the jurisdiction given by s. 57 simply recognizes that fundamental changes can occur in the circumstances of an extradition prior to a surrender order being executed.

Although the Minister's concern about an endless series of judicial review applications frustrating the expeditious execution of a surrender order, was legitimate, that, however, was primarily a consequence of the wording of s. 62(1) of the *Extradition Act* which provides for a stay of execution of the surrender order without the need to demonstrate an arguable case, irreparable harm and a favourable balance of convenience as is required for most stay orders. The Minister can always seek to expedite the hearing of a judicial review application. If that is not a sufficient answer to the Minister's concern, a change in the wording of s. 62(1) may be required.

The need for finality can sometimes be a sufficient basis for the Minister to deny reconsideration and for the court, in its discretion, to deny judicial review. However, in this case, the Minister did consider A's submission and rejected it because he found no merit in his contention that it would violate his *Charter* rights if he were surrendered without assurances that on conviction he would be credited on an enhanced basis for his time in pre-trial custody in Canada.

2. On A's contention that the Minister's failure to amend the surrender order to assure that he receive enhanced credit for his pre-trial custody constituted a violation of his *Charter* rights, the court considered, relying on *USA v. Burns* [2001] 1 S.C.R. 283, that s. 7 that must govern the outcome of this case.

The question for the court was whether the Minister's refusal to seek an assurance of enhanced credit for pre-trial custody meant that on surrender, A would face a penalty that was simply unacceptable or shocked the conscience: *Pacificador*. In this context the American federal

sentencing law, Title 18 U.S.C. s. 3585, requires that a defendant shall be given credit for pre-sentencing custody. Hence if convicted in the United States, A would have a statutory entitlement to some credit for his pre-trial custody, although with no guarantee that the credit would be more than one-for-one.

It could not be said that it was "simply unacceptable" for A to be sentenced in the United States in the absence of a guarantee of enhanced credit for pre-trial custody fixed at some level greater than one-for-one, for example, at a minimum of two-for-one. There was no such guarantee in Canada for domestic sentencing. And it could hardly be said that a sentencing regime that does not do so either, produces unacceptable results. The Supreme

Court of Canada in *R. v. Wust*, [2000] 1 S.C.R. 455 held that availing credit for pre-trial custody was to be done on a case by case basis, not on the basis of guarantees.

The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

Thus, the Minister's refusal to amend the surrender order to attach the condition sought did not violate the applicant's *Charter* rights.

Richard Adams v. Canada

