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Immigration - application for asylum – allegation of persecution by non-state agents – whether failure of state to provide adequate protection amounts to persecution – Convention Relating to the Status of Refugees, 1951, article 1A (2) – (UK)

H was a citizen of Slovakia and a member of the Roma people, otherwise referred to as 'Gypsies'. He went to the United Kingdom with his wife and child and claimed asylum on the ground of persecution by 'skinheads'. The Secretary of State for the Home Department of the UK refused his application and he appealed to the Special Adjudicator. The Adjudicator rejected his appeal holding that H was not a credible witness. H further appealed to the Immigration Appeals Tribunal, which found that H's account of his experiences in Slovakia were similar to those already recounted by numerous other Roma people and thus the Adjudicator's finding on credibility should be reversed. However, the Tribunal went on to dismiss the appeal, finding that H had not satisfied the requirements of the Refugee Convention. In so doing, the Tribunal held that while H had a well-founded fear of violence, only the failure of the State to provide protection could convert discrimination into persecution and H had not met the burden of establishing that in this case. The Court of Appeal dismissed an appeal from this decision. H then appealed to the House of Lords.

The issues for the consideration of the House related to the proper construction of Article 1A(2) of the Geneva Convention on the Status of Refugees, 1951. Their Lordships found that the appellant's claim to refugee status in the UK was based upon the alleged insufficiency of state protection against persecution by non-state agents, and not on persecution by the state itself or its agents. The appellant had alleged that in the face of such persecution, the state through its police services failed to provide him with protection.

The Court found that in the light of the problem as stated, three questions arose for their consideration, viz:

- "(1) does the word "persecution" denote ill treatment, or does it denote sufficiently severe ill treatment against which the state fails to afford protection?
- (2) is a person unwilling to avail himself of the protection of the country of his nationality where he is unwilling to do so because of his fear of persecution by non-State agents despite the state's protection against those agents' activities, or must his fear be a fear of being persecuted there for availing himself of the state's protection?

Commonwealth Legal Assistance News

Produced by the Criminal Law Unit of the Commonwealth Secretariat as a service to Member Governments

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Designed and printed by the Commonwealth Secretariat

- (3) what is the test for determining whether there is sufficient protection against persecution in the person's country of origin – is it sufficient to meet the standard required by the Convention, that there is in that country a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the law enforcement agencies? Or must protection by the state be such that it cannot be said that the person has a well-founded fear?"

○ **Held:** dismissing the appeal;

1. The Refugee Convention is an international instrument the wording of which must be taken to have been the product of the inevitable process of negotiation and compromise. The meaning of the words used should be determined having in mind the purpose or purposes, which it was designed to serve. This purpose is found in the principle of surrogacy which aims to afford protection and fair treatment to those for whom neither is available in their own country. According to Professor James C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991) p. 112, "persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community."

The failure of state protection is central to the whole system. It also has a direct bearing on the test that is to be applied in order to answer the question whether the protection against persecution, which is available in the country of nationality, is sufficiently lacking to enable the person to obtain protection internationally as a refugee. If the principle of surrogacy is applied, the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge its duty to establish and operate a system of protection against persecution of its own nationals.

The Court found however that in Slovakia there was an effective state authority able to provide protection, which it enforced through the police force. The police did not always conduct proper investigation and were sometimes very slow. But there was also evidence that the police had intervened to provide protection when they had been asked to do so and that stiff sentences were at times imposed for racially motivated crimes. The House of Lords accepted the Tribunal's conclusion that the violent attacks on Roma were isolated and random attacks by thugs.

2. As to the first question raised, there are two tests to be satisfied for a person to avail himself of protection under the Convention: the "fear test" and the "protection test". A person may satisfy the fear test because he has a well-founded fear of being persecuted, yet he may not be a refugee within the meaning of Article 1 because he is unable to satisfy the protection test.

In the context of an allegation of persecution by non-state agents, "persecution" implies a failure by the state to make protection available against the ill treatment or violence that the person suffers at the hands of his persecutors. In a case where the allegation is persecution by the state or its own agents, the problem does not arise. There is a clear case for surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents, the failure of the state to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents, which is necessary in the interests of the consistency of the whole scheme.

Thus in order to satisfy the "fear test" in a non-state agent case, the applicant for refugee status must show that the persecution which he fears, consists of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection. This had not been established here.

3. In light of the finding on the first issue, the Court's determined that the second issue had lost its relevance. In obiter the Court noted that if the second part of the test is to be satisfied, the applicant's fear must be a well – founded fear of being persecuted for availing himself or herself of the state's protection.

4. As regards the third issue, the primary duty of providing security to a person lies with the home state, in the absence of which the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. It is instead a practical standard, which takes proper account of the duty which the State owes to all its own nationals.

Horvath v. Secretary of State for the Home Department [2000] 3 All ER 577

Extradition – Supporting documents – Sufficiency - validity of warrant: whether reviewable – whether certification proper – adequacy and correctness of statement on penalty - abuse of process by requesting country - (Australia)

The United Kingdom had sought the extradition of Bennett from Australia for two offences of fraud allegedly committed in Scotland. A magistrate in New South Wales determined that Bennett was eligible for surrender in relation to both offences. The magistrate accordingly ordered under section 19(9) of the *Extradition Act 1988* ("the Act") that Bennett be committed to prison to await a decision by the Attorney-General of the Commonwealth of Australia either to surrender him to the United Kingdom or to release him.

Bennett then applied to the Federal Court of Australia under s. 21(1) of the Act, for a review of the magistrate's order, challenging the sufficiency of the supporting documents.

He argued that the warrant was insufficient on various grounds in particular that:

1. the original Scottish warrant was invalid under Scottish law in that the signature on it was illegible and the Sheriff concerned was not otherwise identified by name in it; and, it was not sealed.
2. the copy included in the packet was not a proper document in that it was not sealed within the meaning of subparagraph 19(7)(b)(i) of the Act, because the required seal had not been directly affixed to it.
3. the certification on the copy was insufficient for the purpose of paragraph 19(7)(a) of the Act since it was merely initialled by a person not identified by name, and in any event, it had not been established that that person was an "officer" of the United Kingdom within the meaning of the law.

Bennett also argued that other material, the statement of the penalty and the conduct, was insufficient.

He further contended that his incarceration during the extradition proceedings amounted to previous punishment such that extradition should be refused and that the proceedings before the magistrate were an abuse of process on the part of the United Kingdom.

● **Held:**

1. As to the validity of the warrant, the question whether a document purporting to be a warrant issued by an extradition country is invalid by reason of its failure to comply with formal requirements prescribed by the law of that country is not a question for a magistrate under s. 19 of the Act. As stated in *Zoeller* "The magistrate is no expert in foreign law. He [or she] is not required to determine what the facts are that are the minimum facts necessary to constitute the foreign crime. That there has been a foreign crime committed is for the purpose of the proceedings before the magistrate proved by the warrant duly authenticated."

Moreover, there was no justification for not treating the copy warrant as sealed in the relevant sense, simply because no seal has been directly affixed to it: see *Ingram v Attorney-General for the Commonwealth* [1980] 1 NSWLR 190 at 200-01 (Yeldham J) The seal affixed to the bundle of documentation was sufficient.

In respect of the certification question, paragraph 19(7)(a) of the Act does not require that a document be certified by an officer in or of the extradition country, but only that it purported to be so certified. Moreover, it could be inferred from the name of the office and the place of certification (Aberdeen) that the office of Sheriff Clerk Depute is an office within the relevant Sheriff Court.

In all the circumstances, the court was satisfied that the UK had produced a duly authenticated copy of a warrant issued by it for the appellant's arrest.

2. As regards the requirement that the extradition country produce a duly authenticated statement in writing setting out a description of and the penalty applicable in respect of the offence, the Court noted that one of the documents produced by the requesting country was a sworn deposition by the Principal Procurator Fiscal Depute in Aberdeen which contained a sufficient description of the elements of, and punishment for, the offence of fraud. This information was sufficient for purposes of the tasks expected of the Magistrate.

Bennett had submitted also that the statement of the penalty applicable in respect of the offence was erroneous. Again it was a misconception to think that it was for a magistrate or a Court of Review to judge the correctness of the statement as to the penalty applicable under Scottish law in respect of the offence of fraud.

3. As to the requirement to produce a duly authenticated statement in writing setting out the conduct constituting the offence, the Court noted:

"[W]hat has to be produced ... is relevantly a statement of the acts or omissions, or both, by virtue of which the offence is alleged to have been committed. ... What is relevantly required is a statement of what is alleged to have been actually done or omitted, not a mere re-statement of the charge in respect of which extradition is sought." Zoeller, p297

A warrant could simultaneously be a supporting document of the type referred to in s. 19(3)(a) of the Act and a supporting document of the type referred to in s. 19(3)(c)(ii) of the Act, and, in this case, the copy warrant, in so far as it incorporated by reference the contents of the copy petition could be an adequate "conduct" statement for the purposes of s. 19(3)(c)(ii) of the Act. Indeed there was no reason why the petition alone could not be an adequate "conduct" statement for purposes of the Act.

4. In relation to the double criminality requirement imposed by s.19(2)(c) Bennett had argued that the conduct which was alleged against him as offences under Scottish law involved the obtaining of money in England, rather than in Scotland. Therefore, when the double criminality requirement was being considered, the conduct alleged against him should, by analogy, have been treated as involving the obtaining of money somewhere outside New South Wales' but, s. 178BA of the Crimes Act did not apply to the obtaining of money anywhere outside of New South Wales.

In the opinion of the Court, this argument was without merit since s.19(2)(c) assumes that the appellant's conduct which constituted an offence under Scottish law would have amounted to an offence in Australia had it been committed there. This assumption encompasses any obtaining which is part of that conduct. Moreover, even if it were assumed that the obtaining did occur outside New South Wales, an offence would still have been committed under s.178BA of the Crimes Act, provided that the deception had occurred in New South Wales.

On a related point, it was suggested that even though the maximum penalty for fraud was unlimited imprisonment, the test as to whether the offence fell within the definition of extradition crime in terms of penalty, should be

based on his individual circumstances. Thus as he was likely to receive a sentence of less than the mandated two years, the offence was not an extradition offence crime. The Court rejected this argument finding that the determination should be made on the basis of the offence at a general rather than particular level.

Bennett also submitted that extradition should be refused as he had already been "punished" for this offence due to the time spent in custody in relation to the extradition proceedings. The Court rejected this argument holding that previously punished must be interpreted as a sentence imposed after conviction.

5. As regards the submission that the proceedings were an abuse of process by the UK, the authorities show that this was not an issue for the magistrate or reviewing Court to determine: *McDade v. A-G* Unreported of 1 May 1998; *Dutton v. Republic of South Africa* [1999] 84 FCR 291.

Paul James Bennett v Government of the United Kingdom [2000] FCA 916.

Extradition - bail pending appeal against decision of magistrate that applicant is eligible to be extradited - special circumstances - need for medical treatment (Australia)

On the 23rd of March 2000, a magistrate in Australia found H to be eligible for surrender to New Zealand and remanded him in custody to await the executive decision on his removal. He applied for judicial review of that decision and also asked for bail pending the hearing of that application, which was listed for the 10th of August 2000.

The special circumstances on which H relied for his bail application were:

- (i) the state of his health, his need for special medical treatment and the effects on his health of continued incarceration pending the hearing and determination of his application; and
- (ii) the prospects of success in his application for review of the magistrate's decision.

He presented a report from a medical psychiatrist which showed that his medical condition was potentially life threatening. The Court also received evidence from the Chief Executive of the

Correctional Health Service to the effect that H was receiving adequate medical attention while in prison custody.

● **Held:** dismissing the application;

1. The Correctional Health Service was alert to H's medical problems and had taken steps to have appropriate treatment made available to him. There was nothing to show that he would have ready access to a superior regime of health care if he were released on bail.

2. As to the prospects of success of the application for review, the Court was prepared to assume that H may have an arguable case for review. However at the same time, the Court noted that the delay in fixing the hearing of the application had been at the instance of H, who needed time to obtain legal representation for the hearing. Further, in comparison with the time that the applicant has been in prison, the time remaining until the hearing was short.

3. Although the Court did not treat lightly the deprivation of liberty of any person before it, particularly where that person was unwell, it was obliged to apply the direction of the legislature, which placed a significant onus on an applicant for bail in these circumstances. Moreover, the Court noted that Australia had continuing obligations to New Zealand reflected in the terms of s 35(6) of the Act.

4. Although the applicant was in seriously poor health and his continuing incarceration placed considerable pressure on him and his family, "pressures in one form or another will face many people who are incarcerated, whether it is pending trial or whether it is pending extradition." *McDade v United Kingdom* [1999] FCA 1685.

5. Having regard particularly to the medical and psychological services available to H in prison, the absence of evidence of an alternative medical regime for him should he be released from prison, and the comparatively short time remaining until the hearing of his application for review, the Court was not satisfied that the circumstances of H constitute "special circumstances" within the meaning of the Act.

6. The Court noted also that H would, if returned to New Zealand, be required to answer serious charges there. The "special circumstances" provision in the Act was necessary to reduce the high risk of persons sought for extradition offences, absconding. The evidence before the Court showed that H had failed on more than one

occasion to meet bail obligations in New Zealand and indeed, might have gone to Australia to evade a criminal hearing in New Zealand.

Moreover, there was no record of H having entered Australia and no evidence as to the means by which he entered the country. In the circumstances, the Court considered that there was a real possibility that he entered Australia under a false name, or otherwise irregularly, and that he might, if released on bail, decide to depart Australia in a similar way.

Heslchurst v. Government of New Zealand [2000] FCA 937.

Extradition – Details of specific charges with particulars not supplied to magistrate during committal proceedings – details of offences apparent from evidence adduced in support of committal application – whether failure to furnish list of charges caused procedural unfairness or injustice to applicant – whether specialty provision unenforceable – whether unjust to extradite applicant – Extradition Act 1994, ss. 7(3), 8(3), 10(1)(5), 11(3) – (The Bahamas)

The United States requested from the Bahamas, the extradition of C, a Canadian citizen on holiday in the Bahamas. He was indicted in the US on drug offences. He was arrested and the Foreign Minister of the Bahamas authorised the commencement of extradition proceeding. No list of offences was furnished to the magistrate or C, but they were served with affidavits and exhibits before the start of the committal proceedings. Evidence was also adduced which disclosed the nature of the alleged offences. The magistrate committed C to custody to await extradition pursuant to s.10 of the Extradition Act 1994. He applied unsuccessfully to the Supreme Court for a writ of habeas corpus on the ground that his detention was unlawful and he should be released because it would be unjust and oppressive to extradite him. His appeal to the Court of Appeal of The Bahamas was rejected and the appealed further to the Privy Council.

● **Held:** dismissing the appeal;

1. Since the applicant and his legal advisers knew before the committal proceedings, from the affidavits and exhibits served on them, the details of the offences for which his extradition was

sought, the failure to supply the magistrate with a list of charges had caused no procedural unfairness or injustice to the applicant.

2. The specialty provisions in article 14(1) of the Extradition Treaty between the Bahamas and the United States 1990 and s. 7(3) of the Extradition Act did not require that charges be formulated before the start of committal proceedings or in the committal warrant. The particular offences in respect of which the applicant had been extradited, would be apparent to an American court, from the affidavits and exhibits adduced in evidence at the committal hearings. The government of the United States had acted in good faith and it was not unjust to extradite C.

Charron v. Government of the United States of America and Another, unreported, 26th June 2000. (internet cite: <http://www.privacy-council.org.uk/judicialcommittee/2000/judgement/judgement025.htm>)

Asylum – gender discrimination – whether basis on which to claim persecution under (Article 1A of the Convention Relating to the Status of Refugees – (UK)

S and I were Pakistani women who sought asylum in the UK. Arguing that they had a well-founded fear of persecution because of membership of a particular social group, they claimed that they had been falsely accused of adultery by their husbands and forced to leave their homes. If they were returned to Pakistan, they would be prosecuted for sexual immorality and if found guilty they could be stoned or flogged to death. Although the Special adjudicator found that the authorities in Pakistan were unwilling or unable to protect them, he held they were not members of a particular social group. He therefore rejected their appeal, as well. On appeal, the Court of Appeal found that the appellants could not be said to be

members of a particular social group as required by the Convention Relating to the Status of Refugees. The Court held that “the group to which they putatively belonged, namely ‘Pakistani women ...accused of transgressing social mores ... who were unprotected by their husbands...’ lacked cohesiveness, co-operation or interdependence” Both S and I appealed to the House of Lords.

☉ **Held:** allowing the appeals;

1. Pakistani women live in a society that discriminates against them and leaves them without state protection. The fact that some women were able to escape this persecution does not preclude their existence as a social group. The appellants were part of that social group for purposes of the Convention.

2. Given the prevalence of state-tolerated and state-sanctioned gender discrimination in Pakistan, the appellants had a well-founded fear of being persecuted by reason of belonging to that social group, should they be returned to Pakistan

3. Article 1A(2) of the Convention does not require that a particular social group should have the additional element of ‘cohesiveness, co-operation and interdependence’. Although the element of cohesiveness might prove the existence of a particular social group, the meaning of the phrase ‘particular social group should’ not be so limited. “A particular social group was a collection of persons who share a common immutable characteristic which makes them a cognisable group within their society. This characteristic may be an innate one such as sex, colour or kinship ties”.

To be a ‘particular social group’ within the meaning of Article 1A, the group must exist independently of the persecution.

R. v. Immigration Appeals Tribunal and Another, Ex parte Shah; Islam and Ors. v. Secretary of State for the Home Department, (2000) 2 CHRLD 424

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Evidence – Request must come from foreign court – Request for police investigations not proper – matter no longer within jurisdiction of requesting magistrate (Cayman Islands)

On the basis of a letter of request submitted by the United Kingdom, the Attorney General of the Cayman Islands applied to the court for an order

to take the evidence of witnesses in relation to a charge of conspiracy to rob. The letter of request, signed by the Stipendiary Magistrate at Manchester’s City Court, set out the particulars of the accused and the offence charged and sought evidence in relation to the matter. The AG sought an order for the examination of certain witnesses and the production of specified documents.

● **Held:** dismissing the application;

For an order to issue under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978 in relation to a criminal proceeding, the court must be satisfied that the request has been issued by or on behalf of a court or tribunal and that the evidence to which the application relates is to be obtained for the purposes of criminal proceedings, which have been instituted before the requesting court.

In this case, while there was a letter filed that was signed by the stipendiary magistrate of the court where the committal proceedings had been pending at the time, (the accused had since been committed for trial) the letter made no specific request in terms of the evidence sought. Details of the evidence sought and a summary of the facts were included in material submitted by Crown Counsel in the UK, in applying to the magistrate for a letter of request. Those materials could not be incorporated by reference into the magistrate's letter as there was nothing before the court to indicate that the magistrate had vetted or considered those materials in issuing the letter of request.

In addition, even if these materials were to be considered as part of the request, the inquiries sought were not permissible under the Order. In essence, the application sought the court's approval of directives to the police to conduct certain inquiries in the Cayman Islands. The Order cannot be used for that purpose; it can only be used to take evidence for court proceedings.

In addition, the continued validity of the letter of request was also in question, given that in the intervening time since the letter had been sent, the accused had been committed and the matter was no longer before the magistrate's court

In the Matter of a Request for International Judicial Assistance from Manchester City Stipendiary Magistrate [1999] CILR 35 (Cayman Islands, Grand Court)

Freezing orders – foreign proceedings – principles governing – section 25 Civil Jurisdiction and Judgements Act – (UK)

The respondents had been granted an asset-freezing order ancillary to proceedings in a foreign court against the applicants, pursuant to section 25 of the Civil Jurisdiction and Judgements Act 1982. The applicants applied to the High Court

for a variation of that order. In granting the variation order, the Court stated the following general principles in respect of the application of section 25:

1. The court should always exercise caution before granting any freezing order.
2. Particular caution was required when a freezing order was sought under section 25: *Credit Suisse Fides Trust v. Cuoghi* [1998] QB 818.
3. Factors such as comity and the need to stop international fraud meant that where there are sufficient grounds to warrant it, the High Court should grant an injunction under section 25.
4. In making the order, certain basic requirements must be satisfied namely that the claimant had a good arguable case and that there was a real risk of dissipation: *Refco Inc. v. Eastern Trading Co.* [1999] 1 Ll LR 159.
5. Although it should be slow to do so, it might be appropriate for the High Court to grant a freezing order even if the foreign court had refused to grant an order.
6. The granting of a worldwide freezing order by a foreign court did not prevent a British court from granting a freezing order in respect of assets or persons resident in Britain.
7. However, a court must before making such overlapping order, be given cogent reasons for so doing. This is necessary so that the court's time is not wasted and that there is no risk of double jeopardy on the defendant and no opportunity for forum shopping by the claimant: *In re Bank of Credit and Commerce International SA* [1994] 1 WLR 708, 713.
8. Where it becomes appropriate to grant a freezing order under section 25 in respect of British assets and there is a resulting overlap with a foreign worldwide order, it would be sensible for the court to indicate which court is to have primary responsibility for enforcing the injunction. This would reduce the chances of double jeopardy and forum shopping.
9. An overlapping freezing order under section 25 must of necessity track precisely the terms of the foreign order. Any inconsistency could lead to uncertainty and extra complications for the defendant.

Ryan and Another v. Friction Dynamics Ltd. and Others Times, 14 June 2000

Judicial Assistance – foreign revenue proceedings – whether requested court enforcing foreign revenue laws – Bankruptcy Act 1988, s.1 (Isle of Man)

M was declared bankrupt in Northern Ireland and the Petitioner, Mr McLean was appointed as the trustee in bankruptcy of the estate of M. He discovered that M had bank accounts in the Isle of Man over which it appeared he might still have full control.

McLean obtained an order from a Northern Ireland court requesting judicial assistance from the Isle of Man Court in the form of holding private examinations of three individuals in the Isle of Man. These individuals were officials of three different banks operating in the Isle of Man. An application was brought in the Isle of Man for orders compelling the examinations.

The banks as noticed parties, submitted that the granting of the request would amount to the direct or indirect enforcement of the revenue laws of another jurisdiction and was therefore inconsistent with public policy.

● **Held:** granting the application;

1. The power to consider applications for the kind of assistance requested is contained in the Bankruptcy Act 1988 (Tynwald). Section 1 provides:

- (1) "The High Court shall assist the courts having bankruptcy jurisdiction in any relevant country or territory.
- (2) For the purposes of subsection (1), a request made to the High Court in any relevant country or territory shall be authority for the High Court to apply, in relation to any matters specified in the request, the bankruptcy law which is applicable by either court in relation to comparable matters falling within its jurisdiction; and in exercising its

discretion under this subsection, the High Court shall have regard in particular to the rules of private international law"

This section shows that the High Court in the Isle of Man has a mandatory duty to assist the court having bankruptcy jurisdiction, paying due regard to the rules of private international law. The relevant rule of private international law is as stated in *Dicey and Morris on the Conflict of Laws* 12th Edition, Rule 3:

"English Courts have no jurisdiction to entertain an action: (1) for the enforcement either directly or indirectly, of a penal, revenue or other public law of a foreign state; or (2) founded upon an act of state"

2. The question for the Court was thus: is it a direct or an indirect enforcement of a foreign revenue law to order the giving of evidence by witnesses in the Island to a foreign court?

In *re State of Norway's applications* (Nos. 1 & 2) the House of Lords held that it was not an enforcement of a foreign country's revenue laws to order witnesses to attend before an examiner in London and give oral evidence in respect of issues before a Norwegian court. An enforcement of foreign revenue laws will occur if the foreign court were seeking a remedy, which in essence was designed to give the foreign law extra-territorial effect. In this case, there was no extra-territorial exercise of sovereign authority in seeking the assistance of the Manx Courts to obtain evidence to be used for the enforcement of the revenue laws of Northern Ireland in Northern Island itself.

In Re McCoy [1996-98] MLR 327

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