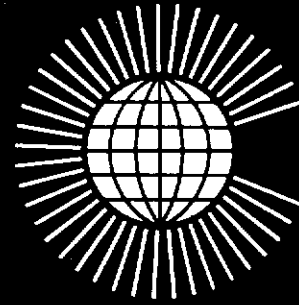


Commonwealth Legal Assistance News



Issue No. 15, October 1996

CONTENTS

Recent Articles	
Extradition	2
Case Notes	
Foreign Evidence	3
Extradition	4
War Crimes Tribunals	5
Central Authorities	6

New Multilateral Moves to Combat Transnational Crime

The Heads of Government of the G7 countries agreed on 28 June 1996 to act together to combat international crime. Their countries will work co-operatively in the issues of extradition and prosecution, information sharing, the prevention of crime which uses computers and other forms of advanced technology and on the protection of national borders.

In their efforts to fight transnational organised crime the Group committed itself to the mobilisation of all resources to bring fugitives to justice, combat corruption and recover the proceeds of crime. To achieve this end Heads of Government of the G7 countries recognised the need for enhanced international co-operation between agencies and a significant increase in the sharing of information particularly information on methods of investigation and prosecution.

Co-operation Between Business Regulators

The International Organisation of Securities Commissions (IOSCO) and the Basle Committee on Banking have issued a statement on the need for improved co-operation between regulators. This call, made in May, adds weight to the call of Commonwealth Law Ministers for the development of mutual assistance between business regulatory agencies.

The IOSCO and Basle Group statement identifies eight principles which should guide national efforts to protect against failings such as that of Barings Bank. The principles cover issues such as the need for international co-operation between regulators which is free from impediments; national supervision of banks and securities firms; adequate capital backing for banks and securities firms; proper risk management; reporting to ensure transparency; and strengthened supervision.

Other IOSCO initiatives include work on determining the beneficial ownership of accounts and assessing the ability of countries to share that information. The use of the Internet to perpetrate crimes and dealing with cross border fraud including the seizure and repatriation of assets to defrauded investors are subjects also being considered by IOSCO. When reports are available on these issues CLAN will provide more details.

RECENT ARTICLES

"Treaties - US-UK extradition treaties - rule of political offence-type exception" By Valerie Epps: (1996) 90 The American Journal of International Law 296.

This article discusses the case *In re Requested Extradition of Smyth* 61 F.3d 711, US Court of Appeals, 9th Circuit, 27 July 1995. in which the court had to consider the defence to extradition provided in Article 3(a) of the US/UK Supplementary Extradition Treaty of 1986.

Article 3(a) provides

"Notwithstanding any other provision of this supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality or political opinions, or that he would, if surrendered, be prejudiced at his trial, or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions."

Although the author describes this provision as "the unique defense to extradition" it is found in the United Nations Model Treaty and in most modern bilateral extradition treaties. It was introduced into the US-UK extradition treaty following first the consistent refusal of the US to extradite IRA members to the UK and second the negotiation of the supplementary treaty which, contained a long list of offences to which the political offence exception did not apply. The author argues that Article 3(a) "effectively reinstates the political offence exception and adds further grounds upon which extradition can be challenged.

The case analysed by the author involved a defendant who had been convicted of the attempted murder of a prison officer in Belfast, Northern Ireland, in 1978. He was sentenced to twenty years imprisonment but managed to escape in 1983. Several months later, he was discovered in San Francisco and the United Kingdom requested his extradition so he could serve the remainder of his sentence. The district court refused to comply with the request on the basis of its factual conclusions that the defendant would suffer discriminatory detention and punishment both in prison and after his release.

The main issue in this case was whether the district court had undertaken the proper level of inquiry into Smyth's treatment in the event he was returned to Northern Ireland and whether the district court had relied upon appropriate evidence in concluding that Smyth's extradition should be denied on the basis of his Article 3(a) defence.

The district court refused to order extradition on three grounds:

- the UK had failed to rebut the presumption that Smyth would face retaliatory punishment if surrendered;
- Smyth had established that he would be punished if returned to prison; and

- he would be punished, detained and restricted in his personal liberty upon release from prison.

The Ninth Circuit Court *held*:

Smyth had failed to show that he would suffer the proscribed treatment and that there was little evidence on these issues. The district court's evidentiary presumptions should be rejected (the presumption of retaliatory harm against Irish nationals found guilty of crimes against security forces or prison officials was improper because it failed to show whether the harm would be inflicted on account of the defendant's religion, nationality or public opinions, as required by Article 3(a);

The district court's imposition on the UK of the burden of producing evidence that likely retaliatory treatment would be on account of Smyth's religion or political opinions was improper, as the Treaty requires the extraditee to establish "by a preponderance of the evidence" the specified type of punishment or retaliatory harm. Smyth had not proved that he would suffer such punishment.

There was inadequate evidence that Smyth would suffer discriminatory treatment upon his return to prison as a result of his religion, nationality or political opinions. (The evidence put before the district court about conditions at the Maze Prison related to the 1970's and 1980's; the stricter-than-normal security measures and any harsher treatment that might be applied to Smyth could be explained on the basis of the likelihood of his escape and any likelihood of harsher treatment could be related to the serious nature of Smyth's crime and not his religion, nationality or political opinion.

The article argues that the supplementary treaty openly alters the tradition practice of noninquiry. It further suggests that the case cried out for but did not receive a balancing of the usual rule of noninquiry against the novel language of Article 3(a) in the context of careful treaty interpretation. The conclusion reached by the author is that extradition defendants who can raise an Article 3(a) defence not only get the opportunity to raise what is essentially an expanded political offence exception, but also enjoy very considerably expanded appellate review because Article 3(b) provides that an Article 3(a) defence shall be immediately appealable by either party. The final question asked by the author - whether this result was intended by either the US or the UK is an interesting one.

CASE NOTES

Foreign Evidence - Extraterritoriality - applicability of Canadian Charter of Rights and Freedoms outside Canada - admissibility of evidence obtained by foreign police officers

The appellant faced trial in Canada on the basis of statements to police in the United States. These statements were made in the course of an investigation to determine if the appellant was lawfully in the United States and to ascertain the circumstances of an alleged offence in the United States by the appellant's boyfriend. During her questioning, the appellant was also asked about her involvement in Canada relating to the escape of her boyfriend while he was being held for extradition to the United States.

The trial judge excluded one of her statements on the ground that the police had not given her a second right-to-counsel warning during their questioning when the focus changed from the immigration matter and the possible American offence to her possible involvement

with the escape, which would have been required by the Canadian Charter if the interrogation had been carried out by the Canadian police, but which was not required under US law.

The appellant was acquitted but the Court of Appeal found the exclusion of the statement to be an error and ordered a new trial. The appellant appealed.

The issues were as follows:

- Did the failure of the United States police to comply with Canadian law make the statement inadmissible in Canada?
- Does the Charter apply outside Canada's boundaries?
- Do the principles of fundamental justice and the right to fair trial allow exclusion of evidence which had been obtained outside Canada?

Held:

The provisions in the Canadian Charter guaranteeing the right to counsel (para. 10(b)) and providing for the exclusion of evidence (subs.24(2)) do not necessarily extend to evidence obtained by foreign police agencies which is subsequently used in a Canadian Court.

No unfairness resulted from the fact that the statement taken in conformity with US law even though had it been taken in Canada in the same circumstances it would not have been admissible. Dissimilarity between foreign legal rules and the Charter requirements does not establish that admitting the evidence would render the trial unfair.

As the evidence had been obtained by American investigators not acting out of any connection with Canadian authorities, the rights under para. 10(b) could not have arisen until after the alleged breach had occurred and to insist that foreign authorities meet Canadian legal standards would frustrate the international cooperation between law enforcement authorities.

R v Harrer [1995] 3 S.C.R.

Extradition - Germany - Spain - human rights - political asylum - minimum standards of international law

This case concerned the application by an alleged ETA terrorist for a ruling that extradition to Spain would violate basic human rights under the German Constitution. The Higher Regional Court of Berlin had decided that the extradition should take place.

Held - by the Federal Constitutional Court:

The applicant did not have a right to political asylum in Germany due to the absence of political persecution in Spain and accordingly his basic human rights were patently not infringed.

Minimum standards of international law did not prevent the applicant's extradition as the extradition court found that the proceedings awaiting the applicant in Spain conflicted neither with the elementary requirements of the rule of law nor with human dignity. That

court also found that the applicant was not likely to be subjected to torture or other forms of humiliating treatment. There was no evidence that the disease from which the applicant was suffering would not be adequately treated during pre-trial detention in Spain.

The fact that only the allegedly tainted evidence had enabled the Spanish authorities to track down the applicant did not cause any doubt, for the applicant could not invoke the inadmissibility of evidence in a German criminal trial to apply in Spain as well, as such an effect did not belong to the minimum standards of international law.

2 *BvR 66/96*. Federal Constitutional Court of Germany (Judgment of 29/5/96.) This report is drawn from the Bulletin of Legal Developments, published by the British Institute of International and Comparative Law, ISSN 0007-4969.

Extradition - accusations made in bad faith or politically motivated - exercise of discretion by magistrate

The fugitive was accused of murder in Kenya. The killing occurred when the fugitive and colleagues who were police officers opened fire on unarmed persons. Travelling on false documents he eventually arrived in Singapore where he was arrested pending receipt of the request for extradition from Kenya. Following extradition procedures the fugitive was committed to custody to await the issue of the warrant for his surrender by the Minister of Law. He applied for a writ of *habeas corpus* alleging that the charges brought against him in Kenya were not made in good faith and that they contained an element of political favour and that he had been framed. He further alleged irregularities in the extradition documentation including the mis-spelling of his middle name.

The Extradition Act of Singapore contains the usual Commonwealth provisions relating to the right of the requested country to refuse surrender where the offence alleged is an offence of a political character and where the accusation against the person is not made in good faith.

According to the fugitive, the "political" element arose because a person whose deposed evidence supported the extradition request had visited a Kenyan Minister's house after the incident which gave rise to the request. The applicant/fugitive also sought to argue that Singapore contravened the Commonwealth Extradition Act (sic).

Held - denying the application

The court hearing a *habeas corpus* application does not rehear the case that was before the lower court. Its function is to consider whether the applicant was lawfully detained and to hear any issue as to whether the offence charged is political in nature.

The offences reportedly committed were not in pursuance of any political objective and the feature that a relative of the victim called at the residence of a Kenyan Minister soon after the incident to relate the event does not transform the offences referred to as being political. Nor does it render the charges suspect or lacking in good faith. The depositions placed before the learned district judge amply justified the issue of a warrant of commitment. There is very little before the court to conclude that it would be unjust or oppressive or too severe a punishment to return the applicant to face trial. The case is heard under Singapore extradition law - there is no "Commonwealth Extradition Act".

John Muhia Kangu v. Director of Prisons [1996] 2 SLR 747 (Singapore)

WAR CRIMES TRIBUNALS

United Kingdom

Issue No. 12, April 1996 of CLAN contained an article on assistance to war crimes tribunals. The United Kingdom legislation to give effect to the UN resolutions came into force on 17 May 1996. It is the United Nations (International Tribunal) (Rwanda) Order 1996, SI 1996 1296; which was made under the United Nations Act 1946, s.1.

The Order provides for the United Kingdom to implement a resolution of the Security Council of the United Nations relating to Rwanda. It has effect for the purpose of enabling the United Kingdom to cooperate with the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between January 1, 1994 and December 31, 1994, established by Resolution 955 (1994) of the Security Council of the United Nations International Tribunal in the investigation and prosecution of persons accused of committing International Tribunal crimes and the punishment of persons convicted of such crimes.

SHIP RIDER AGREEMENTS

A relatively recent development in international efforts to combat crime is the "shiprider" agreement by which two countries agree that the law enforcement authorities of one country may board foreign flag vessels, may place its people aboard another country's ships, pursue suspect vessels in another country's territorial seas, and fly over another country's territory and order suspect planes to land there.

The conclusion of such agreements is obviously a politically sensitive issue. Very real questions can arise as to whose law governs what when officials of two countries are involved in joint exercises. Despite the potentially very difficult legal questions, the situation in the Caribbean with drug traffickers openly disregarding the law enforcement authorities of the Caribbean nations and of the United States (which is the destination for many of the drugs passing through the transit countries in the region) calls for robust action. The International Enforcement Law Reporter deals, in its September issue with the signature by the USA of nine ship rider agreements with Caribbean countries. The first of these was signed a few years ago - others are more recent.

Predictably many Caribbean Commonwealth countries have strong reservations about the agreements. Others have, however, accepted that they need US assistance to patrol their waters and attack the drug traffickers.

MUTUAL ASSISTANCE CENTRAL AUTHORITIES

AUSTRALIA

Assistant Secretary
International Branch
Attorney General's Dept
Robert Garran Offices
Barton A.C.T 2600
Australia

Tel: 61-6-250-6227
Fax: 61-6-250-5920

FINLAND

The Ministry of Justice
Etelaesplanadi 10
00130, Helsinki
Finland

Tel: 358-918-251
Fax: 358-918-257730