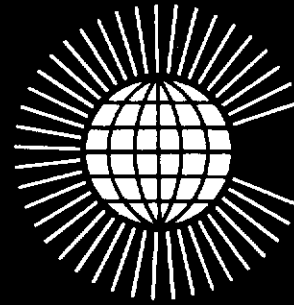


# Commonwealth Legal Assistance News



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## RECENT DEVELOPMENTS

### Strengthening international cooperation among Banking Supervisors

A call for banking and securities supervisors globally to work more closely together to prevent a repetition of the Barings' collapse has been made by the chairman of the British Securities and Investments Board. Mr Andrew Large said that even in the case of a relatively small group such as Barings, regulators must cooperate on a fully international basis. He praised the European model which requires that every bank have a lead regulator and a host country regulator in the other countries where it operates. However, any local irregularities must be notified to the bank's lead regulator.

### U.S. Court rules Alvarez-Machain can pursue civil claim

Following his highly publicised 1990 abduction from Mexico to the United States and his subsequent release from custody more than 32 months later, Dr Humberto Alvarez-Machain has started a tort action. He is seeking damages for, *inter alia*, kidnapping, torture, prolonged arbitrary detention and violations of his constitutional rights. In an important ruling in January 1995 a U.S. District Court issued a memorandum opinion in which, in general, it allows the plaintiff to pursue his claims.

### South Africa and United States securities regulators to cooperate

In March 1995 the United States Securities and Exchange Commission signed understandings with its South African counterparts to cooperate on enforcement matters. The understandings include a commitment to assist in law enforcement and declarations of intent to conclude comprehensive memoranda of understanding on information sharing.

## RECENT PUBLICATION

### **Extradition and the decision in *Soering***

In the well-known case of *Soering v United Kingdom* ((1989) Series A, No.161) the European Court of Human Rights held that a Convention State has a duty not to extradite a person to a jurisdiction where there are substantial grounds for believing that he would face a real risk of being subjected to inhuman treatment within the meaning of Article 3 of the European Convention. In an article entitled "Extradition and Expulsion Orders and the European Convention on Human Rights: The *Soering* Decision and Beyond" by John Kidd [(1994) 26 Bracton Law Journal, 67] the author argues that *Soering* has significantly contributed to the development of the international law of extradition. He notes that there are some well-known external constraints, one being the generally accepted duty not to extradite a person to a State where he would have a justified fear of being subjected to torture. Where *Soering* breaks new ground, if its principle is accepted as part of general international law, is to take the pre-existing torture duty a step further to embrace also extradition to face a threat of inhuman and degrading treatment.

The author argues that the danger here is that the decision could cause Convention States to be regarded as legally safe havens for those seeking to evade justice in countries with the death row phenomenon or other punishments or treatment inhuman or degrading by European standards. This could occur where, for example, a State provided for corporal punishment for drugs trafficking offences or crimes of violence. The author concludes that it is to be hoped that the decision might be more restrictively applied so that an unrealistically low threshold is not adopted.

## CASE NOTES

### **Extradition proceedings - Warrant for apprehension of fugitive offender - Power of DPP and Secretary of State to discontinue proceedings**

The applicant who was 84 years old and in poor health sought judicial review of the refusal by both the DPP and the Secretary of State to discontinue proceedings to extradite him to America to face charges of obtaining over \$10m by deception. He argued that section 23 of the Prosecution of Offences Act 1985 gave the DPP a discretion to discontinue the proceedings. Section 23 provides "(1) Where the [DPP] has conduct of proceedings for an offence this section applies in relation to the preliminary stages of those proceedings... (3) Where at any time during the preliminary proceedings the Director gives notice ... that he does not want the proceedings to be continued, they shall be discontinued...".

*Held:* application dismissed

1. The decision of the DPP that she had no power to discontinue the proceedings was correct as section 23 could not apply directly. Its wording could not be translated into extradition proceedings as the position of the DPP was not that of a prosecutor but

that of a private lawyer acting for a foreign client.

2. There was no warrant under the legislation granting the Secretary of State a power to reconsider an order already made to a magistrate to issue a warrant for the apprehension of a fugitive criminal.
3. At that point in time only the American government had the power to discontinue the proceedings and the applicant would not have an opportunity to make representations to the Secretary of State until committal proceedings had taken place.

*R v Director of Public Prosecution, ex parte Thom*, Queen's Bench Division, U.K., *The Times* 21 December 1994

**Extradition - Evidence against applicant contained in telephone calls intercepted in the United States - Admissibility at extradition proceedings**

The United States Government sought the extradition of the applicant from the United Kingdom. The evidence adduced at the proceedings for his committal for extradition largely consisted of three telephone calls allegedly made from the United States to the applicant in Ireland and which were intercepted in the United States by United States Government agents. The stipendiary magistrate found there was a prima case against the applicant. The applicant then brought an application for habeas corpus on the grounds that by virtue of the Interception of Communications Act 1985 (ICA), evidence obtained from the telephone intercepts was rendered inadmissible in all proceedings in the United Kingdom. Section 1 of the ICA provides that "...a person who intentionally intercepts a communication in the course of its transmission ... by means of a public telecommunication system shall be guilty of an offence...".

*Held:* application dismissed

1. Section 1 of the ICA could not be construed so as to create an offence triable in the United Kingdom although committed by a non-resident by an act outside the United Kingdom.
2. For the purposes of excluding evidence under section 9 of the ICA it was necessary to show the commission of an offence under section 1 by a public telecommunications operator or any person engaged in the running of a public telecommunication system within the United Kingdom and there was no evidence that any such person in the United Kingdom had been so involved.

*R v Governor of Belmarsh Prison, ex parte Martin*, Queen's Bench Division, U.K., [1995] 1 WLR 41

**Discovery - Claim of privilege - Refusal to produce documents as being contrary to public interest - Duty of the Secretary of State**

The plaintiff was arrested in South Africa and put on a plane bound for London where he was arrested and charged with offences under the Theft Act 1968. He was subsequently committed for trial but applied for judicial review on the ground that the circumstances in which he was brought into the United Kingdom meant the proceedings constituted an abuse of process (see *Bennett v Horseferry Road Magistrates' Court* [1994] AC 42; noted in CLAN Issue 2, August 1993). The Divisional Court subsequently heard the application and quashed the committal on the ground that the procedure adopted amounted to disguised extradition and thereby an abuse of process and the indictment was subsequently dropped (but see *Bennett v Her Majesty's Advocate*, noted in CLAN Issue 6, March 1995).

The plaintiff had sought discovery of communications which passed between the relevant authorities in the United Kingdom and South Africa in relation to his removal therefrom. However, the Secretary of State later signed a certificate claiming public interest immunity in respect of the relevant documents. The plaintiff then brought an action against the Secretary of State claiming damages (a) for misfeasance in public office in that he had signed the certificate of public interest immunity and (b) negligence in issuing the certificate in that he had a duty of care towards the plaintiff to balance the public interest in government confidentiality against the rights of the plaintiff as a litigant to a fair hearing. The Secretary of State applied to strike out the claim on the grounds that it disclosed no reasonable cause of action or was an abuse of the process of the court.

*Held:* application allowed

1. The statement of claim failed to plead an essential ingredient of the tort of misfeasance in public office, namely the intent to injure the plaintiff. Consequently no cause of action was disclosed.
2. It was at least arguable that the Secretary of State was under a duty to consider, before objecting to discovery of any particular documents of a class *prima facie* entitled to public interest immunity, whether the public interest in non-disclosure was outweighed by the public interest in those documents being available in the administration of justice.
3. Even if the Secretary of State was under a public duty to balance the two interests, it would not be fair, just or reasonable to impose on him in respect of his exercise of that duty a private law duty of care in favour of a private litigant who wished to see the documents for the purposes of his litigation. Accordingly it followed that the statement of claim failed to disclose a cause of action for negligence.

*Bennett v Commissioner of Police of the Metropolis and Others* Chancery Division, U.K., [1995] 2 All ER 1

**Extradition - Whether evidence in extradition proceedings was subject to exclusionary rule in domestic criminal law - Police and Criminal Evidence Act 1978, section 78**

The applicant was committed to custody by a stipendiary magistrate to await a decision as to whether to extradite him to the United States to stand trial for a series of serious offences. He applied for a writ of habeas corpus submitting that the magistrate was wrong to rule that section 78 of the Police and Criminal Evidence Act (PACE) had no application to extradition proceedings. Section 78 permits a trial judge to exclude evidence if it appears that its admission "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

*Held:* application dismissed.

1. Extradition proceedings were not criminal proceedings and section 78 only applied to the latter.
2. There were plain distinctions between the position of examining magistrates in domestic proceedings and stipendiary magistrates in extradition proceedings. In the latter, *inter alia*, (i) there was no opportunity to challenge evidence; (ii) there was no abuse of process jurisdiction; and (iii) the Judges Rules and the Codes of Practice under PACE that replaced them did not apply.

*R v Governor of Belmarsh Prison, ex parte Francis* Divisional Court, U.K., *The Times* 12 April 1995

**CENTRAL AUTHORITIES (Commonwealth Countries)**  
(as notified to the Commercial Crime Unit)

**Barbados**

Attorney-General,  
Sir Frank Walcott Building,  
Culloden Road,  
St Michael,  
Barbados

Tel: 1 809 432 7600  
Fax: 1 809 435 9533

**The Gambia**

Attorney General's Chambers,  
Ministry of Justice,  
Marine Parade,  
Banjul,  
The Gambia

**Namibia**

The Permanent Secretary,  
Ministry of Justice,  
Private Bag 13302,  
Windhoek,  
Namibia

**Seychelles**

Attorney General,  
Attorney General's Office,  
P O Box 58,  
National House,  
Republic of Seychelles

Tel: 248 224041  
Fax: 248 225063

**New Zealand**

Crown Counsel,  
Law Officer Team/Criminal and Crown Solicitors  
Team,  
Crown Law Office,  
St Pauls Square,  
45 Pipitea Street,  
P O Box 5012,  
Wellington,  
New Zealand

Tel: 64 4 472 1719  
Fax: 64 4 473 3842 or 64 4 499 5804

**Tuvalu**

The Attorney-General,  
Office of the Attorney General,  
P O Box 63,  
Vaiaku,  
Funafuti,  
Tuvalu

Tel: 688 20 823 (direct)  
688 29 815 (Office of the Prime Minister)  
Fax: 688 20 819 or 688 29 843

**Vanuatu**

Attorney General,  
Attorney General's Office,  
Private Mail Bag 048,  
Port Vila,  
Vanuatu

Tel: 678 22362  
Fax: 678 25473

**Western Samoa**

Secretary for Justice,  
Justice Department,  
P O Box 49,  
Apia,  
Western Samoa

Tel: 685 22 671  
Fax: 685 21 504  
Telex: 21 Malo SX

Attorney General,  
Office of the Attorney General,  
P O Box 27,  
Apia,  
Western Samoa

Tel: 685 20 295  
Fax: 685 22 118  
Telex: 21 Malo SX

**Zimbabwe**

Attorney-General,  
Office of the Attorney General,  
Private Bag 7714,  
Causeway,  
Harare,  
Zimbabwe

Tel: 263 4 703353-4-5-6-7  
Fax: 263 4 706503

**Hong Kong**

Attorney General,  
Attorney General's Chambers,  
4/F High Block,  
Queensway Government Offices,  
66 Queensway,  
Hong Kong

Tel: 852 2867 2003  
Fax: 852 2869 0720  
Telex: 81710 HKAGC HX

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