



I N S I D E

EXTRADITION CASES

- 2 Bail pending appeal of order for surrender.
- 2 Adjournment of extradition cases - principle against fragmentation of proceedings
- 3 Words and Phrases - "conduct constituting offence"; "acts or omissions"
- 4 Absconding during supervised release
- 4 Withdrawal of extradition request - "Deitrich stay"
- 5 Meaning of "warrant in force" - whether more than one request at a time
- 6 Extradition Crime - Computer Misuse
- 7 Bail pending appeal

LEGAL ASSISTANCE CASES

- 8 Enforcement of Foreign Revenue Laws

Commonwealth Legal Assistance News

Produced by the Commercial Crime Unit of the Commonwealth Secretariat as a service to Member Governments

For further information or copies, please contact: The Editor, Commercial Crime Unit, Legal & Constitutional Affairs Division (LCAD), Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX, United Kingdom
Tel: +44 (0) 171-747 6417/6240/6423
Fax: +44 (0) 171-839 3302
E-mail: d.stafford@commonwealth.int

Designed and printed by the Commonwealth Secretariat

CORRUPTION

International Co-operation: Criminal Law Convention on Corruption (Council of Europe)

This Convention was adopted by the Council of Europe in January 1999. Its main objective is the pursuit of a common policy against corruption, to be achieved through the adoption of appropriate measures and increased co-operation in criminal matters.

Member States of the Council of Europe, upon acceding to the Convention are obliged to take legislative and other domestic measures to criminalise active and passive bribery, bribery of the members of public assemblies, foreign public officials, foreign Members of Parliament, people in the private sector, officials of international organisations, and judicial officers of both domestic and international tribunals. The laundering of the proceeds of corruption and trading in influence, among other acts, are also to attract criminal sanctions. At the national level, member states are to take measures to facilitate the collection of evidence and confiscation of proceeds of corrupt conduct.

At the international level, State Parties are required to co-operate with each other "to the widest extent possible for the purposes of investigations and proceedings concerning criminal offences established in accordance with the Convention", and to call in aid any existing international instruments which may be applicable in this sphere. Where there is no instrument regulating the granting of this type of assistance or if the terms of the Convention afford a more favourable form of assistance, then member states are to use the provisions of the Convention (i.e., Articles 26 to 31).

Under these articles, member states must:

- promptly process requests for mutual legal assistance;
- only refuse assistance if the request is believed to undermine the requested party's "fundamental interest, national sovereignty, national security or *ordre public*";
- not invoke bank secrecy law as grounds for refusing a request;
- include and treat as extraditable offence, the criminal offences established in pursuance of the mandate of the Convention;
- where there is no extradition treaty, use the Convention as the legal basis for granting an extradition request;
- where they are unable to extradite their nationals, submit the case to the competent national authority for prosecution;
- forward to another state party without prior request, information which may be of relevance in the investigation of offences established under the Convention;
- establish or designate central authorities among whom there will be direct communication for the granting of mutual legal assistance.

The Convention requires fourteen ratifications in order to come into force.

Note: The Council of Europe Criminal Law Convention is to be supplemented by a convention dealing with civil law aspects of the corruption problem.

Extradition - bail pending appeal of Order to surrender - Words and Phrases: "Special Circumstances" - Medical Condition of Extraditee - Extradition Act 1988 Ss. 19(9) and 21(6) (Australia)

T was a Hungarian national who emigrated to Australia in 1995 and acquired Australian citizenship two years later. In May 1997, Hungarian Authorities issued a warrant for the arrest of T alleging "fraud, causing considerable prejudice" contrary to the Hungarian Criminal Code. The allegation was that in 1992 T wanted to sell a holiday home jointly owned with his father-in law. The prospective buyer wanted to demolish the structure on the property, but T's father-in-law would not agree to the demolition of the structure. The house was set on fire and T later made an insurance claim which was subsequently paid despite the insurer's suspicion that T may have destroyed the house. He had been arrested in Hungary on suspicion of starting the fire, but in the absence of evidence he was released.

In January 1999, Hungary made a request to Australia for the extradition of T to Hungary to face trial for the alleged offences. T was arrested and granted bail by the Magistrate who conducted the extradition proceedings. The Magistrate then found that T was eligible for surrender to Hungary, and committed him to prison to await surrender.

T sought review of the Magistrate's order and sought release on bail pending the review. In arguing the application for bail, the applicant presented evidence that he suffered from serious high blood pressure which had accelerated since the commencement of the extradition process. This condition, together with the fact that he did not have any prior convictions, the delay between the time of the alleged commission of the offence and the request, the lapse of time since the commission of the alleged offences, and the nature and gravity of the offence, constituted "special circumstances" such as would warrant the grant of bail.

☉ **Held:** allowing the application;

1. A person who had been found eligible for surrender pursuant to s.19(9) of the Extradition Act must show that there were "special circumstances" in order to be released on bail pending hearing of the appeal against the order of

surrender. The expression "special circumstances" "refers to circumstances different, in some way that provide a ground for considering a grant of bail more favourably, from those of the ordinary case of fugitive remanded in custody".

2. In the present case the applicant's medical condition was such that if he was detained in custody pending the hearing of his application for review the risks to his life would increase significantly. This constituted special circumstances warranting the grant of bail.

Timar v. Republic of Hungary [1999] FCA 691 - Federal Court of Australia 24 May 1999

Extradition - application for adjournment of extradition proceedings pending hearing of other applications - whether magistrate failed to give consideration to relevant matters in exercising discretion not to adjourn - principle against fragmentation - denial of natural justice - Extradition Act 1988, Ss. 19 and 16 (Australia)

This application was one of a number filed by the applicants in the course of proceedings to extradite them to Mexico on fraud charges. The applicants asked the Federal Court of Australia to make orders of prohibition and certiorari in respect of the first respondent's decisions:

- that the applicants had had reasonable time to prepare for the proceedings under s.19 of the Extradition Act for their extradition;
- to commence the proceedings; and
- to make directions for the preparation and conduct of the proceedings.

They also sought injunctions to restrain the magistrate from taking further steps to proceed with the extradition proceedings.

The applicants, while opposing surrender to Mexico, maintained that there were substantial grounds within the meaning of s.19(2)(d), for believing that there was an "extradition objection" in relation to the alleged offences.

They had previously made a similar application to the magistrate who was conducting the extradition proceedings (the first respondent). They had sought from the magistrate an adjournment of the proceedings in order to await the determination of various other applications

which they had made to the Federal Court of Australia. Those applications:

- challenged the validity of the notices issued under s.16(1) of the Extradition Act. (the Attorney-General's authorisation);
- alleged that they did not have reasonable time to prepare for the s.19 proceedings, (the magistrate's hearing) and that therefore the statutory pre-condition for the exercise of the jurisdiction of the first respondent had not been satisfied.

(see *Peniche v. Vanstone* following)

The first respondent refused their application for adjournment, and ruled that both the applicants and Mexico had had a reasonable time to prepare for the proceedings. She found as a fact that the applicants had examined witnesses and obtained about 20 statements; that the s.16 notices served on them did not take them by surprise, and that about five months had elapsed.

☉ Held: dismissing the application;

1. Having read the transcripts of the hearing the Court rejected the applicants' submission that the magistrate failed to take into account the proceedings before the Federal Court.
2. The first respondent "did have regard to the fact that (1) the proceedings were pending in this Court and that they related directly to her jurisdiction; and (2) that the applicants and Mexico made competing submission as to the prospects of success of those proceedings". The magistrate therefore did not err in declining to form a view as to the merits of the proceedings before the Federal Court.
3. The Court disagreed that the principle against fragmentation did not apply in extradition proceedings. The principle against fragmentation is designed to protect "the public interest in the expeditious resolution of accusations of crime": This principle is extended to the review of extradition proceedings. The public interest that is being protected is the speedy resolution of criminal trials to be held in an extradition country. The risk that a lengthy extradition proceedings could turn out to be futile was potent, but that did not of itself justify the grant of an adjournment of the kind sought by the applicant. The structure of the Extradition Act did not favour the grant of an adjournment on those terms. There was no error in the approach taken by the magistrate in declining to grant the adjournment.
4. On the question of reasonable time to prepare for the proceedings, the applicant must show that the magistrate did not form the opinion that there

was reasonable time, according to law. Where a decision-maker is required to hold an opinion of the kind required under s.19(1)(d) of the Extradition Act precedent to an exercise of power, then that opinion must be arrived at reasonably. There was no apparent error in the magistrate's approach to her findings. It could not be said that she exceeded her jurisdiction in forming the opinion that the applicants and Mexico had reasonable time to prepare for the proceedings.

5. There was no merit in the submission that the first respondent directed a date for the extradition proceedings with a pre-determined position, because, among other things, the records show that she had permitted the applicants to make submissions on the date.

Peniche v. Hannan [1999] FCA 915

Extradition - Words and Phrases: "conduct constituting offence"; "acts or omissions" - mens rea - application of provision referring to "maximum penalty" where foreign criminal law provides for imprisonment without limit - Extradition Act 1988 ss. 5,10,16,19,& 21 (Australia)

This case concerned an appeal by the Republic of South Africa against the order of a magistrate in Australia that the respondent was not eligible for surrender to South Africa to face charges of fraud and theft.

The reason for the magistrate's decision was that he was not satisfied of the species of double criminality required by s. 19(2)(c) because the provisions involved elements of dishonesty and the conduct attributed to the respondent did not "indicate directly or indirectly any deception, nor any indication of dishonesty on the part of the respondent." He also found that the "statements of conduct do not tie the respondent to any such activity directly".

The offence particularised against the respondent was that the accused defrauded First National Bank of South Africa by fraudulently obtaining the guarantee of two cheques which he used to purchase gold from Rand Refinery Ltd. The Bank thereby sustained loss.

The arguments upon which the magistrate denied surrender were:

1. Each of the relevant Australian offences upon which dual criminality could be found involved dishonesty or wrongful intent with guilty

knowledge which the statement of De Bruyn's conduct did not show.

2. That the double criminality rule required that the offence for which extradition is sought should carry a maximum penalty of at least twelve months. The South African offences did not however prescribe any maximum penalty; the rule had not therefore been satisfied.

3. That the accompanying document had not been authenticated by the South African Minister for Justice as was required by law.

☉ **Held:** allowing the appeal;

1. References in the legislation to acts or omissions by virtue of which an offence was alleged to have been committed, must take the necessary mental states for granted. It is clear that the provisions of the Act which refer to elements of the offence include any necessary mental element. Therefore, the course adopted by South Africa of including in the accompanying statement the allegations of knowledge and intent, was one that was open to it; they showed the extradition offences alleged.

2. There was difference between the law applicable in New South Wales and in South Africa in respect of onus of proof, in that in South Africa once certain objective issues have been proved, the onus of disproving guilty intent rests on the accused. This is not the kind of matter that is capable of denying the form of double criminality adopted by the Extradition Act. The concern of the Act is with the elements of the offence, not with the precise mode of proof of those elements.

3. The Australian Extradition Act was not concerned with the question whether a foreign system of law used a form of words in prescribing a maximum penalty for an offence which were totally different from those used in Australia. What mattered was the substance of the matter. In this case the evidence showed that although no maximum penalty was prescribed for the offences alleged against the respondent, in practice, the maximum penalty was more than imprisonment for not less than twelve months.

4. As regards the issue of the authentication of the supporting documents, even though the copies of the documents served on the fugitive did not bear the relevant certificates and seals, it was sufficient that the originals produced to the Magistrate did comply with the legislation.

5. The respondent was eligible for surrender in relation to all of the extradition offences alleged.

The court directed the Magistrate to order by warrant that de Bruyn be committed to custody to await surrender.

Republic of South Africa v. De Bruyn [1999] FCA 516: Federal Court of Australia 28 April 1999

Extradition - Absconding during supervised release - application for habeas corpus - United States Extradition Order 1976 (UK)

B was convicted and sentenced in the United States for theft. His sentence consisted of a prison term of 5 years and 5 years of supervised release. While serving the latter 5 years supervised release, he escaped to the United Kingdom. The US government sought his extradition to the US to finish his sentence. He was arrested in the UK in response to the extradition request. He applied for habeas corpus.

☉ **Held:** dismissing the application;

The term "sentence" in the US Extradition Order of 1976, (articles iii(4) and vii(4)) included a sentence of supervised release as well as a prison term. The supervised release was part of the sentence of the Court and was not an ancillary order. B was therefore unlawfully at large.

R v. Governor of Brixton Prisons ex parte Burke; Times, 15 April (1999), (QBD)

Extradition - Application for Attorney General to withdraw Extradition Request - possibility of Applicant obtaining "Dietrich Stay" - Extradition Act 1988 (Australia)

The applicant J and two others were charged in Australia with conspiracy to cheat and defraud under Common Law. Australia sought J's extradition from the UK. Meanwhile the other co-accused had obtained a stay of prosecution based on the *Dietrich* principle.

J had (in *R v. Secretary of State, ex parte Johnson* [1998] 4 All ER 635) applied to the English Courts for review of the Secretary of State's decision to order his extradition on the basis that since his co-accuseds' prosecution had been stayed, he was likely to risk a very long wait in Australia before his case could come to trial. The English Court rejected his argument and refused his application. J then unsuccessfully sought withdrawal of the extradition request by the Attorney-General of Australia.

J now applied to the Australian Courts for an order that the request for his extradition be withdrawn. It was argued on his behalf that

- there was no likelihood that there would ever be a trial of this matter because of the successful *Dietrich* application by the co-accused.;
- there was no indication from the DPP that J would be tried separately
- J was unlikely to obtain legal aid to defend the charges that would be brought against him with the prospect that he would thereby also succeed in a *Dietrich* application

☉ Held: (*inter alia*) dismissing the application;

1. The power granted to the Attorney General by s.40 of the Extradition Act, (to request a person's extradition from another country), must be exercised reasonably, so that if he has reasonable cause to believe that the person would not be tried if he is returned to Australia, it would be unreasonable for him to proceed with the extradition request. However, it was not necessary that the Attorney General be assured that the charges would be prosecuted. It is sufficient that he was satisfied that there were reasonable prospects that the charges would proceed to trial in the event that the accused was returned to Australia.

2. In order to succeed in a *Dietrich* Application, it was not sufficient for the applicant to show lack of financial resources, he must satisfy the Court that his impecuniosity was occasioned through no fault of his own. In the case of the applicant, his argument on this ground would not succeed because:

- even if it be assumed that he is impecunious that does not mean that a *Dietrich* application would be successful;
- the Crown is entitled to investigate the reasons for his impecuniosity;
- it may be that the prosecution would wish to investigate whether there are "exceptional circumstances, such that a stay might be denied Mr. Johnson even though the Court concludes that he cannot afford legal representation through no fault of his own."

Per incuriam,

3. The unexplained delay of almost six months by J to make his application following the success of the *Dietrich* application by his co-accuseds also mitigated against the success of this application.

4. If the Court intervened in the proceedings at this stage it would result in the fragmentation of the extradition process. The return of J would force the prosecuting authorities to make a final

decision regarding the prosecution of the other co-accused persons. But if the Court intervened the matter would be thrown back into a state of uncertainty.

Johnson V. Williams (Attorney General) [1999] FCA 586: Federal Court of Australia, 7 May 1999

Challenge to validity of notices under s.16 of Extradition Act 1988 (Australia) – effect of stays of arrest warrants in Mexico – meaning of warrants "in force" – validity of requests made by requesting country – whether only one request at a time permissible – whether requesting country under duty to disclose stays and limitation problems – whether breach of natural justice regarding refusal of access to extradition documentation.

The applicants, Pasini and Cabal were citizens of Mexico. A total of thirteen warrants for the arrest of Cabal were issued in Mexico for offences relating to embezzlement and fraud. Cabal was arrested in Australia in November 1998 pursuant to a provisional arrest warrant and remanded in custody. Mexico then requested his extradition. A further arrest warrant was issued against Cabal in response to an additional request from Mexico for his extradition for taxation and money laundering offences.

In respect of Pasini, two warrants for his arrest were issued in Mexico alleging breaches of Mexican law some of which related to activities by Pasini in connection with the activities or affairs of Cabal. He was also arrested in Australia and his extradition sought. In all cases authorities to proceed were issued under s.16 of the Act.

Meanwhile, the applicants' lawyers in Mexico instituted proceedings known as "incidental suspension proceedings" in conjunction with what are known in Mexico as "Amparo proceedings". The Amparo proceedings challenged the lawfulness of the Mexican arrest warrants. The Mexican court made interim orders for a stay of the arrest warrants with conditions. The stay was subsequently made final until the determination of the Amparo proceedings.

In this case, the applicants challenged the validity of notices issued under s.16 of the Act and sought orders restraining the first respondent (the Minister) from taking any step in reliance on the notices and restraining the fourth respondent (the Magistrate) from conducting surrender proceedings under s.19 of the Act.

They argued that:

- they were not "extraditable persons" within the meaning of s.6 of the Act because the words "warrant ... in force for the arrest of a person" in the definition of "extraditable person" in s.6(a)(i) did not encompass a warrant that had been stayed pursuant to the Amparo laws of Mexico. The words could only refer to a warrant that may be immediately executed upon the person whose arrest was authorised by it. The effect in Mexican law of stays was, to deprive the warrants of force and effect until their legal efficacy was revived
- most of the offences were statute-barred.
- Mexico could only make one request for extradition at any one time, since the making of more than one extradition request would violate the principle of speciality,
- a provisional arrest warrant could not be executed on a person already in custody
- pursuant to art 16(1)(b) of the Treaty, Mexico was required to send, with each extradition request, an authenticated copy of each Amparo stay order.

On behalf of the Minister it was argued that "the purpose of the ... stays was to observe that the action of the Authority allegedly violating the Individual Rights remained untouched to be analysed by the District Judge so as to issue an Amparo resolution". Moreover, there were conditions attaching to each of the stays which required the applicants to (1) return to Mexican territory; (2) "pay a bail"; (3) "agree with the jurisdiction of the Judges"; (4) "appear before Criminal Judges in order to render a statement every time it is necessary"; and (5) "in certain cases, ... accept being under the custody of the police".

☉ Held: dismissing the application;

1. The applicants' construction point (in relation to s.6(a)(i)) although not a particularly strong one, was fairly arguable. The evidence as to what lay before the first respondent at the time she issued the notices under s.16(1) was also not complete. There was a serious question to be tried in relation to the Amparo stays.

2. Under Mexican law, none of the warrants subject to the Amparo stays could be executed against the applicants if the applicants were at this very moment to enter Mexican jurisdiction. However, it was not necessarily correct that if, according to laws of the requesting country, the persons could not be arrested if they were to be returned there, then they are not amenable to extradition to the country

3. As regards the issue of the balance of convenience, the validity of the s.16 notices cannot be determined in the proceedings to be conducted under s.19 of the Act: Also, if it were established that the s.16 notices were invalid, a necessary condition of the magistrate's jurisdiction to conduct s.19 proceedings would not exist. However, it cannot be accepted that, at this stage of the proceedings, any real risk posed by the challenge to the s.16 notices in this Court will be rendered nugatory if the fourth respondent is not restrained from conducting the s.19 proceedings.

4. There was no reason why Mexico could not make more than one request for extradition at any one time:

5. The obligations in Art. 16(1)(b) of the Treaty were strictly alternative and, in consequence, the sending of authenticated copies of the warrants of arrest was sufficient to fulfil the obligation imposed by the Article on Mexico. But, a stay order was nevertheless, not a "judicial order ... which authorises the arrest of the person and from which the existence of the offence and its commission by the person sought may be reasonably inferred".

6. As there was no agreement among the experts on Mexican law on issue of whether or not there was a duty to disclose problems of limitation, the issue was one to be determined at the final hearing of the extradition proceedings.

Peniche v. Vanstone [1999]FCA 915

Extradition - Conspiracy to secure access to computer system without authority with intent to commit theft and forgery - whether extradition crime - Extradition Act 1989, s.1(3) & para 20 of Schedule 1 - Computer Misuse Act 1990, ss. 1 & 17 (UK) - words and phrases "entitlement to control"; "hacking".

Allison was accused by the Government of the United States of America, with conspiracy: "(1) to secure unauthorised access to the American Express computer system with intent to commit theft; (2) to secure unauthorised access to the American Express computer system with intent to commit forgery; and (3) to cause an unauthorised modification of the contents of the American Express computer system".

The evidence against Allison was that one O who was an employee of the American Express

company, gave to Allison confidential information regarding some accounts which Allison then fraudulently used to withdraw huge sums of money from cash tellers. O was a credit analyst who was assigned certain accounts to work on which did not include those relating to the information that she gave to Allison. She however was able to access that information. At no time did she have a blanket authorisation to access any account or file not specifically assigned to her. As a result of the conspiracy between O and Allison and others, American Express was defrauded of over US\$1m.

In the Magistrates' court and later in the Divisional Court it was held that as A was alleged to have conspired with O who, as an employee of American Express had access to accounts, dual criminality could not be established. The reasoning of these courts was that the UK Computer Misuse Act 1990 made it an offence for a person to cause a computer to perform a function with intent to secure unauthorised access and was directed at external hackers. It did not apply to misuse of information by a person authorised to access the computer and its information. If O could not have committed the UK offence, then A could not have conspired with O to commit the offence.

The United States Government appealed to the House of Lords.

● **Held:** allowing the appeal;

1. Although the Schedule to the Extradition Act did not make reference to Computer Crime, an offence under the Computer Misuse Act would fall under the rubric of "any other offence" punishable by more than one year imprisonment under the United States of America (Extradition) Order 1976. The provisions under the Computer Misuse Act 1990 and conspiracies to commit them were offence to which the Order could apply.

2. Section 1 of the Computer Misuse Act, was not concerned with authority to access kinds of data but rather with authority to access the actual data involved. S.17(5) makes it clear that authorisation to access data relates not merely to data or programme, but also to the kind of access secured and the section does not derogate from the requirement that the authorisation had to relate to relevant data.

The matter was remitted to the Magistrate for reconsideration.

R. V. Bow Street Magistrates' Court Ex parte Government of the United States of America [1999] WLR 620

Extradition – bail application pending appeal from decision of Magistrate that the applicant is eligible for extradition to the Republic of Indonesia – requirement of special circumstances – discretion – seriousness of alleged offences – risk of absconding (Australia)

A Magistrate decided that the applicant was eligible for surrender to the Republic of Indonesia in relation to two alleged extradition offences. The applicant sought review of that decision and applied for bail pending review of the Magistrate's determination. The court has discretion to grant bail if there are special circumstances justifying such a course.

The applicant's submissions were, inter alia, that the Magistrate:

- made findings to the effect that the applicant would not receive a fair trial;
- erred in relation to the admissibility of the supporting documents on the basis that they were "duly authenticated" and
- applied too high a standard in determining whether there were substantial grounds for believing that the applicant may be prejudiced at the trial by reason of his Chinese ethnicity.

● **Held:** dismissing the application

Bail

Special circumstances must exist before bail can be granted, but there is a discretion to be exercised after special circumstances are found. The first step is a condition precedent to the exercise of the jurisdiction to grant bail in the sense that it is a requirement that must be satisfied, though its satisfaction does not conclude the decision-making process because there is still a discretion to be exercised. The purpose of the special circumstances requirement is to reduce what is perceived as 'the very high risk of persons sought for extraditable offences absconding.'

Prospects of success:

The applicant's submission is that the "supporting documents" produced to the Court, on their face, did not "purport" to be duly sealed and authenticated in accordance with the requirements of the Act. The argument based on the lack of proper authentication is not of such force as to constitute a special circumstance.

The claimed "special circumstance" based on the Magistrate's findings as to the probability that the applicant, if released to Indonesia, would not

receive a fair trial proceeds on the basis that under the Act the Attorney-General is given a broad discretion to determine that an eligible person is not to be surrendered. Accordingly, this must be taken into account and given great weight when deciding whether bail should be granted. Given the width of the Attorney-General's discretion and the fact that it is a Ministerial discretion, it cannot be predicted with any degree of accuracy what view the Attorney-General would reach. Accordingly, the possibility of a particular exercise of discretion on the part of the Attorney-General, in the present case, cannot be said to give rise to any special circumstance.

Having regard to the matters raised by the applicant either taken alone or cumulatively, the prospects of success of the applicant are insufficient to give rise to special circumstances which warrant the release on bail.

Discretion

While it was not strictly necessary to deal with the exercise of judicial discretion to grant bail, the court noted that it was important to bear in mind the nature and gravity of the alleged offences which were extremely serious. The incentive to escape the risk of surrender must be very strong indeed and there is a real possibility that the applicant might abscond.

The threshold to establish "special circumstances" has not been met and, having regard to the nature and extent of the alleged offences, this is not an appropriate case to warrant a grant of bail. Appropriate conditions which would effectively eliminate the obvious risk of absconding cannot be imposed.

Rahardja v Republic of Indonesia [1999] FCA 1413: Federal Court of Australia, 15 October 1999

LEGAL ASSISTANCE CASES

Foreign Law: Enforcement of Revenue Laws: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

The plaintiffs were Danish Companies in liquidation previously owned by the defendant who had sold them in 1992. Prior to the sale the entire assets of the companies were disposed of for cash which was used to acquire the defendants shares. In 1994, the companies were put into liquidation for asset-stripping. They owed the Danish government 40 million Danish Kroner in tax liabilities, but they had no assets.

Under Danish Company Law, it is illegal for companies to provide financial assistance for the acquisition of their own shares. Relying on this law the Danish tax authorities appointed a liquidator and funded the action of the companies to seek restitution of their value and for loss suffered by the asses-stripping. Their claim was struck out by the High Court. They appealed to the Court of Appeal.

The issues for determination by the appeal court were as follows:

1. Whether the authorities on indirect enforcement survived the UK's accession to the European Common Market and more particularly the United Kingdom's implementation of the 1982 Brussels Convention;

2. Whether the claim which the plaintiff sought was a revenue matter within the meaning of Article 1 of the Brussels Convention ;

3. Whether the refusal of English courts to extend indirect enforcement to revenue laws of another country was incompatible with the EC Treaty irrespective of the provisions of the Brussels Convention.

☉ **Held:** dismissing the Appeal;

1. It was a fundamental rule of English law that English Courts would not directly or indirectly enforce the penal, revenue or other laws of other countries. Nothing in foreign jurisprudence or commentaries supported the view that indirect enforcement cases should be treated differently as a result of the UK's membership of the Brussels Convention and the present case required the indirect enforcement of revenue laws of Denmark.

2. The plaintiff's claim involved a liquidator as agent for a foreign state seeking, in effect, to give extra-territorial effect to a foreign revenue law.

3. Article 1 of the Brussels Convention states that it "shall not extend in particular to revenue customs or administrative matters". Although there was no definition of revenue matter in the Convention, there was no authority to support the view that indirect revenue claims were not covered by the exception.

QRS 1 Aps and Others v. Frandsen, Times, 27 May 1999

