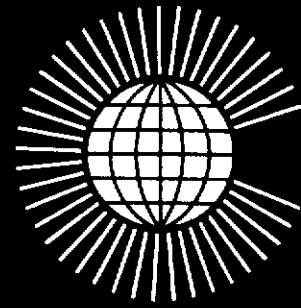


# Commonwealth Legal Assistance News



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## ARTICLES

**The Concept of Double Criminality in the Context of Extraterritorial Crimes: Gráinne Mullan [1997] Criminal Law Review 17**

This article considers the doctrine of double criminality against a background where domestic and international provisions are increasingly extending extraterritorial and transnational jurisdiction.

The author examines the dual criminality provisions of the Extradition Act 1989 (UK) and considers how they may be interpreted in various cases in which a country requesting extradition claims a jurisdiction which has one or more extraterritorial features.

There is an interesting examination of the interaction of national laws which give jurisdiction over the acts of nationals, wherever committed, those which confer jurisdiction to

deal with cases where nationals are the victims of crime and cases where "universal" jurisdiction is claimed.

Provisions in extradition laws which require not only a matching of the conduct constituting the offence for which extradition is sought, but also a matching of the jurisdictional claims of the requesting and requested countries are discussed. The phrase "corresponding circumstances" in section 2 of the UK legislation is examined in the context of various hypothetical cases and the question asked whether it is enough for the requested state to use *some* basis of extraterritorial jurisdiction, or whether it must use the *same* basis as that used by the requesting state?

In suggesting that the UK provisions have the potential to deny extradition and thereby grant safe havens, the author proposes that the UK legislation be amended to require that the UK recognise the theory of jurisdiction being relied upon by the requesting state. The suggested solution, it is argued, would reduce the chances of extradition being denied because of technical differences between legal systems.

While the author's examination of the relationship between jurisdictional claims and dual criminality is most interesting it appears to make light of the "exorbitant jurisdiction" issue reflected in many bilateral extradition treaties by the discretionary ground of refusal based on different types of jurisdictional claim.

**Crimes Sans Frontiers: Jurisdictional Problems in English Law: Dr Geoff Gilbert, International Criminal Law and Procedure, p. 102**

The author of this article recognises an increasing need for greater cooperation in law enforcement matters across Europe, but holds that the approach of the U.K. courts to jurisdiction over crimes with cross-border aspects is still highly isolationist. He argues that increased opportunities for crime that cut across borders as a result of the relaxation in frontier controls in the European Community creates a need for a coherent policy on criminal jurisdiction throughout Europe.

In exploring the developments in English law, the author concludes that there is an increasing need to be able to exercise jurisdiction over crimes across borders, and puts forward possible routes for future reform on the basis of steps that have already been taken in the rest of Europe and North America. The article explores the various principles of jurisdiction in international criminal law (active personality principle; passive personality principle; protective principle and universal jurisdiction) before considering in some detail the English approach.

Dr Gilbert concludes that the English view of jurisdiction in criminal matters is very conservative, with the courts rarely permitting themselves competence over extra-territorial offences. It is out of touch with the approach taken by other States operating the qualified territoriality principle and is unclear in practice and does not meet the needs of law enforcement at a time when crime is becoming increasingly global. He suggests that if the UK can accept treaty obligations to implement universal jurisdiction over certain crimes there is no reason why there cannot be a wider common-law basis for jurisdiction in criminal matters generally.

**Extraterritorial Abduction: An Australian Approach? By Natalie Klein, Faculty of Law, University of Adelaide (1996) 18 Adelaide Law Review 103**

The issue of irregular rendition is considered by the author of this article. The author points out that there are basically three approaches adopted by the courts when dealing with the issue of abduction of suspected international criminals by States for domestic trial: the first is the adherence to the ancient Roman maxim *male captus bene detentus* (an illegal apprehension does not preclude prosecution); second, the courts may exercise a discretion to refuse jurisdiction where there is an abuse of process; and third, violations of international law may constitute a bar to the exercise of jurisdiction.

The article considers each of these approaches in considerable detail and makes references to cases from both common and civil law jurisdictions. Starting with the United States cases *Ker v. Illinois* [(1886) 119 US 436] and *Frisbie v. Collins* [(1952) 342 US 519] which produced what is commonly referred to as the "Ker-Frisbie doctrine" the author follows the development of "abduction" cases through the USA, Britain, South Africa, New Zealand and Australia as well as Israel, France and other European countries.

A particularly interesting feature of the article is its dealing with international law and its development of the concept that abduction would so infringe universal human rights norms as to properly require courts to refuse jurisdiction. The author's conclusion is, however, that as individuals are not subjects of international law, reliance on violations of rights enshrined in international instruments would most likely go only to the issue of whether a court should exercise a discretion to refuse jurisdiction.

(Note: the author asserts that the only Australian case to deal with this issue involved an accused who was "taken by illegal means" from Mexico to Australia before being lawfully extradited. In fact the allegations of abduction from Mexico to the USA were never proved and were inconsistent with the known details of the arrest.)

**The Political Offence Exception to Extradition: How to Plug the "Terrorists' Loophole" without departing from fundamental human rights: Christine van den Wyngaert: International Criminal Law and Procedure p. 297**

The author of this article opens by suggesting that despite the amendment of domestic laws and the practice of excluding certain offences from the scope of the political offence exception in extradition treaties, practice shows that refusals to extradite still occur even among like minded states. The main focus of the article is on the question what standards exist, or should exist, in the extradition process to protect the individual.

Commencing with an examination of the "terrorism" treaties and conventions, the author concludes that the combined effect of the political offence exception and the *aut dedere aut judicare* principle (which requires states refusing to extradite to submit the case for prosecution in their own courts) is that the political offence exception in relation to terrorist offences is not akin to a defence of justification in domestic law. She goes on to argue, however, that the prospects of successful domestic prosecution are remote given issues of public opinion, pressure from third states or terrorist threats. Her conclusion is that while "the legal loopholes in inter-state co-operation have been filled, the political loopholes persist."

In a fairly radical vein, the article argues that the political loopholes should not be filled lightly because crimes committed in states where human rights violations occur should not automatically give rise to extradition. The conclusion reached by the author is that instead of *per se* exceptions to the political offence exception, countries should adopt an approach of *normative* exceptions which would require the requested state to permit its courts to examine the facts and the context of the case.

From the perspective of the offender, the author considers whether the provisions which permit refusal of extradition in cases where the requested state believes that the request has been made for the purpose of prosecuting a person on account of race, religion, nationality or political opinion provides sufficient protection for the accused. Her conclusion is that the requested state will often have great difficulty determining whether a fair trial will be accorded and will also have political difficulties where the requesting state has close political, economic or military ties with it.

While tentatively proposing solutions which envisage including the "discrimination" clause in extradition treaties in the human rights instruments or making the "fair trial" provisions in international human rights instruments apply to extradition cases, the author returns to the conclusion that *per se* exemptions are not the answer to the problems which occur when extradition is sought for terrorist offences.

**Mutual Assistance in Criminal Matters - freezing of bank accounts**

An article in "The Weekly Gleaner" of March 5-11 1997 carries a report that the Supreme Court of Jamaica, on the application of the DPP, froze five bank accounts alleged to contain the proceeds of drug trafficking. The freezing of the accounts was requested by the United Kingdom and the action taken in Jamaica relied on the provisions of its Mutual Assistance (Criminal Matters) Act 1995.

The owners of the bank accounts filed a constitutional motion in the Supreme Court seeking redress. They claim that the freezing of the accounts is a violation of their constitutional right to the enjoyment of their property and that the powers given by the mutual assistance legislation are incompatible with the Constitution. No doubt many countries will be interested in the result of this case and CLAN will report developments when they are received from our colleagues in Jamaica.

## CASE NOTES

### Extradition - Drug Offences - failure to provide schedules listing heroin as a protected drug

An extradition request by Italy to the United Kingdom did not include, amongst the extradition documents, a copy of the Italian schedules confirming that heroin was a prohibited drug. The question before the court was whether the magistrate could nevertheless find that the authority to proceed issued by the Secretary of State related to an extradition crime.

#### *Held:*

The magistrate was not prevented from finding that the authority to proceed related to an extradition crime by the mere omission of the Italian schedules confirming that heroin was a prohibited drug. Instead, the magistrate could rely on a sworn statement for example, that heroin was included in the schedules. However, the Home Secretary would be justified in not proceeding further with the extradition request until the schedules were provided.

✓ *Re Agkurt*, (UK) *The Independent*, December 9, 1996, Queens Bench Division

### Extradition - time limits for surrender

The UK sought the extradition of A from France. Prior to his return to the UK, a further UK warrant was issued for his arrest on charges of false accounting and the USA sought his extradition from the UK to face drug money laundering charges.

In January 1993, A was returned to the UK where he was sentenced to six years imprisonment. The French authorities agreed to his re-extradition to the USA for the offence of money laundering. After his release, the USA submitted a formal request for extradition for the offence of blackmail. Surrender was ordered but it was in the meantime discovered that:

- (a) the original USA request to which France had consented to re-surrender did not cover the offence of blackmail; and
- (b) French permission for re-surrender on the blackmail charge may not be forthcoming because under French law the offence would be time barred.

Delays in obtaining the necessary permissions followed. A sought leave to challenge the surrender order as he had not been surrendered within the required two month period following committal for surrender.

#### *Held*, allowing the application:

The Home Secretary had failed to show sufficient cause for the delay in surrender. The November order had been made on an inaccurate construction of the French order and clarification had not been sought from France until A had been in custody for five months, which was unnecessary. After A's arrest in September 1995, the Home Office was obliged to take steps to expedite A's surrender and removal from the UK. A's detention in custody for fourteen months was not acceptable and for part of that period, (from May to July), no steps had been taken by the Home Office either to seek clarification on this matter or to bring it to an end.

✓ *Re Akbar*, (U.K.) (Unreported) October 29, 1996, Queens Bench Division (CO 3690/96)

## Extradition - Judicial Review of Request for Extradition

The case concerned Lui Kin - hong, Jerry, who was the subject of extradition proceedings in the US following a formal request by the Governor of Hong Kong dated 8 February 1996. That request was supported by a large amount of evidence. The particular evidence which was the subject of this case consisted of an affirmation to which was annexed as an exhibit the statement of a deceased man implicating Lui in the offences and was provided by the Hong Kong Government and certified for use in the United States extradition proceedings by the US Consul-General on the basis that they were "properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the courts in Hong Kong"

In an application which came before Sears J, it was decided that it was unfair to submit to the Consul-General evidence that was inadmissible in Hong Kong criminal proceedings and declaratory relief was granted. The Attorney-General appealed to set this aside.

The Attorney-General submitted that:

1. this was not a justiciable matter;
2. no demonstrable legal right of Lui had been infringed because he has no rights under the extradition treaty;
3. the certificate of the Consul-General was for use in the United States court, was made under United States law and thus its meaning and effect is not justiciable in a Hong Kong court;
4. the application was for an advisory opinion of the court for use in the United States proceedings. That was not a matter which the Hong Kong court would accede to; and
5. the extradition request of the Governor of Hong Kong was not subject to judicial review.

*Held*, allowing the appeal:

Lui had not demonstrated any infringement of a right or illegality which was justiciable in a Hong Kong court. It was not unlawful under Hong Kong law to submit evidence or material which may be admissible in the United States court but not admissible in Hong Kong. The Certificate of the US Consul-General that the documents "are properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the courts in Hong Kong" was provided for use in the US courts and its true meaning and effect was for the US court to determine.

There was no procedural unfairness shown. It was not procedurally unfair to provide evidence for use in the US extradition proceedings which may be admissible in the US court but which is inadmissible in Hong Kong criminal proceedings.

There was no basis upon which the judge could properly exercise his discretion to grant the declaration and it should be set aside.

✓  
*The Attorney-General v Lui Kin-Hong, Jerry*, Hong Kong Court of Appeal, December 1996. [1996, Civil Appeal No 125]

### Extradition - conviction in absentia

An application was made by K for habeas corpus ad subjiciendum on the grounds that there was not adequate evidence that he was unlawfully at large, and that under s.6(2) of the Extradition Act 1989 (UK), it was not in the interest of justice that he be sent back to Finland, since he had effectively served his sentence during two months served on remand there and while in custody in the UK.

Section 6(2) provides:

"A person who is alleged to be unlawfully at large after conviction of an extradition crime shall not be returned to a foreign state, or committed or kept in custody for the purposes or return to a foreign state, if it appears to an appropriate authority -

- (a) that the conviction was obtained in his absence; and
- (b) that it would not be in the interests of justice to return him on the ground of that conviction."

K had been convicted in 1991, in Finland, of the fraudulent use of a Diner's card to obtain credit in excess of £100,000 and was released pending appeal, at which point he went to Egypt before being arrested in London in 1995.

*Held*, refusing the application:

The Government of Finland had proved its case to the criminal standard pursuant to s.9(8) of the Extradition Act 1989. It was clear that K had been convicted in his absence in the Court of Appeal in Helsinki and the purpose of s.6(2) was to afford protection from an unfair conviction obtained in absentia, not to allow a fugitive to escape extradition by the various possibilities of parole.

✓ *Kiriakos, Re* (U.K.) (Unreported) November 7, 1996, Queens Bench Division (CO/744/96)

### Extradition - surrender warrants - mala fides to be proved by applicant

Applications were made by JC and CC for judicial review of decisions, pursuant to s.12 of the Extradition Act 1989 (UK), to issue warrants for their extradition to Canada to face charges of dishonestly obtaining mortgage advances and goods and services from builders and suppliers. JC argued that the Secretary of State had not given specific reasons for his decisions and that those reasons that were given were given so long after the decision that they amounted to ex post facto rationalisations. CC argued that the issue of bad faith had not been addressed by the Secretary of State and that he had been subject to such delay that the accurate recollection of oral evidence would be prejudiced.

*Held*, dismissing the applications:

The reasons for the decisions had been given accurately and in good faith. It was for the party asserting bad faith to prove the allegations and the Secretary of State's acceptance of the explanations of the Canadian authorities was not impeachable. Part of the delay had been caused by a lacuna in the Canadian equivalent of the Theft Act 1968 but much of the remaining delay was caused by the applicants leaving Canada.

✓ *R v. Secretary of State for the Home Department, ex p. Chetta*, (Unreported) (U.K.) November 8, 1996, Queens Bench Division (CO 2325/95)