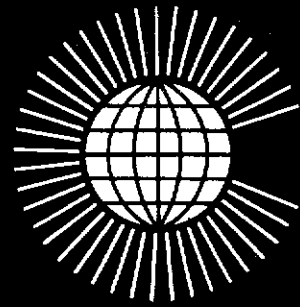


Commonwealth Legal Assistance News



Issue 4, June 1994

CONTENTS

1994 Oxford Conference	1
Material Cultural Heritage	2
Extradition Case Notes	3
Mutual Assistance Case Notes	5
International Agreements	5
Banking	6
1988 Convention	6

CLAN Articles

Copies of documents referred to in CLAN can be obtained from the Commercial Crime Unit.

Contributions

One of the essential elements of programmes of mutual legal assistance is the ability of officers in one country to have very ready access to information in other countries. CLAN tries to aid this process. Please help us by sending in details of your new laws, your cases, the names of officers in your Central Authorities or any other information which will help your colleagues. Please send your contribution to the address below.

Thanks to Roger McMeans of the Hong Kong Attorney-General's Chambers for various cases reported in this issue.

1994 OXFORD CONFERENCE ON MUTUAL LEGAL ASSISTANCE

The Commercial Crime Unit, in collaboration with UNICRI and with support from the UNDCP, is conducting the 1994 Oxford Conference with the theme being Mutual Legal Assistance. It is only in recent years that countries have sought to create formal structures facilitating co-operation in the investigation and prosecution of crime and recovery of the proceeds of crime.

The Conference will provide a venue for the discussion of issues of particular concern to those involved in combatting crime with an international dimension. It will assist both experienced central authorities and those whose countries are about to establish bilateral and multilateral mutual legal assistance relations. The problems facing small developing countries will be the subject of special attention. The Conference will provide delegates with an invaluable opportunity to exchange views and to make personal contacts.

Further information can be obtained from the Commercial Crime Unit.

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***** NEW COMMONWEALTH SCHEME *****

THE MAURITIUS SCHEME FOR THE PROTECTION OF MATERIAL CULTURAL HERITAGE

The Scheme relating to the Protection of Material Cultural Heritage was adopted by Law Ministers in Mauritius at their triennial meeting in November 1993. Britain is not yet able to join but has promised to give informal support.

The Scheme, now known as "The Mauritius Scheme", governs mutual assistance between Commonwealth Countries in returning items of cultural heritage which have been illegally exported from another member country. The Scheme, which is complementary to other existing arrangements regarding the recovery of items of cultural heritage, is intended to take effect in each country after being adopted and implemented by that country. Although it is not retrospective, arrangements may be made through bilateral discussions amongst countries with a view to repatriating specific items of importance which have been removed from their jurisdictions in the past.

It covers all items of cultural heritage as classified by, and subject to export control by each country. Classification will not necessarily be based on monetary value as most Commonwealth countries do not at present use this criteria for establishing the significance of their material cultural heritage - but the items must be significant enough to be worthy of the recovery effort and must come within the criteria laid down in the Scheme.

Intending purchasers who have made appropriate enquiries will be issued with either a validation certificate (confirming that the item in question may be lawfully exported) or an export certificate which grants permission to export. If a holder of an item of cultural heritage is in possession of either of these documents, he will have a complete defence in the event that the legality of **possession** of the item is questioned. In the absence of either an export permit or a validation certificate, the owner will forfeit the item unless he is held to be an innocent purchaser for value who has acquired a valid title in which case he must be reasonably compensated by the country of export for returning the item. The burden of proving innocent purchase for value rests with the owner/holder.

The Scheme requires that each participating country makes it an offence to unlawfully export from its territory an item of its own cultural heritage covered by the Scheme and that each country consider making it an offence to unlawfully import an item of cultural heritage covered by the Scheme and unlawfully exported from another country.

Requests for assistance should include details such as the description of the item, its location (if known) and an official notification confirming that the item is covered by the Scheme and was illegally exported. Countries are required to designate a central authority to which request for assistance may be directed and notify the Commonwealth Secretary-General of the designated body. Countries were also urged to take urgent steps to enact legislation which would bring the Scheme into force. Australia has generously offered to assist in developing a model legislation to assist member countries.

EXTRADITION CASE NOTES

Extradition - political offence exception - criminal conduct must be directed at requesting state.

The applicant was charged with criminal offence in the United States. The activities involved in the criminal offence were alleged to have been politically motivated towards the UK. The United States sought his extradition from Ireland. He raised political offence exemption under Ireland's Extradition Act of 1965.

Held: The political motive or purpose involved in the activities relating to the criminal offence must be directed at the Requesting State in order to constitute a political offence within the meaning of the Act. The applicant's claim was rejected.

P. McGuire (aka Maguire) v. Attorney General and the Governor of Portlaoise Prison. Irish Times, 24.1.94, p.16

Extradition - fresh evidence - Words & Phrases: "fresh"; "evidence" - availability of a writ of habeas corpus - nature of habeas corpus proceedings - extradition proceedings - international obligations

In March 1992 the Appellant was committed to prison pursuant to para 7(1) of the Schedule 1 to the Extradition Act 1989 (the "Schedule") pending extradition to the United States on drug related charges. The basis of the committal consisted of two affidavits of an accomplice. Application for the issue of a writ of habeas corpus was made in reliance on fresh "evidence" relating to the reliability of the accomplice upon whose evidence the committal was made.

Held: Appeal dismissed.

1. The function of the court in habeas corpus proceedings is to assess whether the detention is lawful. It does not rehear the committal proceedings or act as a court of appeal.
2. The only fresh evidence which is admissible in a challenge to a committal under the Schedule is that which bears on the Magistrates jurisdiction.
3. Even if the material sought to be adduced had been "evidence" it was not "fresh".

Thongchai Sanguandikul v. Government of the USA & another, Court of Appeal, Hong Kong, judgment delivered 27 August 1993

Extradition - Unexplained Delay in Request - Disregard for effect on subject - Abuse of Process

The United States sought the extradition of the applicant from the UK for offences discovered between 1983 and 1984. The delay between the time the offence was discovered and the time a request was made to the UK for extradition was mainly attributed to the United States Government. Meanwhile, the applicant, believing that he was no longer being extradited had married and had a family. The Secretary of State issued an order for his extradition in January 1993.

Held: The Home Secretary in exercising his discretionary powers had misdirected by granting extradition where the requesting state was responsible for delay since 1988 in making a request for extradition. The Home Secretary has a power to decide whether the delay was such that the trial

of the applicant would be unjust and oppressive and should not leave the question to the United States courts. Due regard should have been given to the rights and protection intended to be afforded by the extradition process.

R. v. Secretary of State for the Home Department , Ex parte Patel (QBD - The Times February 1994)

Extradition - identification by photograph - whether magistrate has any discretion to exclude prejudicial but relevant evidence in extradition proceedings.

The extradition of the applicant was sought by the US Government. Proceedings were instituted and the applicant committed on two drugs related charges. The only evidence of identification produced by the US government was contained in affidavits which referred to a photograph of the applicant taken in police custody. The applicant's name was clearly visible in the photograph as was the charge, unrelated to the present proceedings, on which he was being held.

The applicant sought judicial review of the committal on the grounds that the photograph was prejudicial and constituted inadmissible evidence. The application was refused.

Held: On the assumption that the photograph was prejudicial, it was nevertheless legally admissible. In extradition proceedings the Magistrate's task is to decide whether the legally admissible evidence before him was sufficient according to the law of Hong Kong to commit the accused for trial had the offence been committed in Hong Kong. The Magistrate has no discretion to exclude evidence on the basis of its perceived prejudicial effect; such power is reserved to the trial judge. The appeal was dismissed.

Cho Shu Wah v. Attorney General of Hong Kong, Supreme Court of Hong Kong (judgment delivered 26/10/93)

Extradition - Delay in Request - No violation of subject's right to due process

In 1974 the appellant was involved in an accident which resulted in the death of a seven year old boy. Shortly after he returned to the United States. In his absence he was charged with criminal negligence causing death and leaving the scene of an accident and an arrest warrant was issued. The Canada/USA extradition treaty did not specifically list the offences he was charged with. In 1988 a protocol was negotiated which made the offence extraditable. The amended treaty entered into force in 1991 and applied retroactively. In 1992 Canada requested extradition. The US government arrested and detained him. An appeal was lodged on the grounds, inter alia, that the granting of extradition without due regard to the 17 year delay in making the request deprived him of his constitutional right to due process of speedy trial.

Held: Appeal dismissed. There is no constitutional right to speedy extradition. Recognising a right to speedy extradition would conflict directly with the rule of non-inquiry which precludes magistrates from taking into account the criminal justice systems of foreign states. A right to a speedy extradition "would simply be an oblique method of forcing treaty partners to adhere to the speedy trial guarantee contained in the U.S. Constitution. Delay alone does not violate due process rights.

Martin v Warden, Atlanta Penitentiary, F.2d 2270 (11th Cir. 1993)(USA).

MUTUAL ASSISTANCE CASE NOTES

Mutual Assistance - Power of Home Secretary - Inappropriate use of ex parte procedures

The Australian authorities, in their investigation into a major tax evasion case, requested the UK for assistance in obtaining relevant documents from certain solicitors' and accountants firms in the UK - both companies professionally associated with the Australian companies being investigated. The Home Secretary gave the police direction enabling them to use their powers to apply for either a search warrant or a production order. Neither firm was represented at a ex parte hearing at the Central Criminal Court where an application for search warrant was approved. A police raid was later carried out at the firms and documents were taken. The firms applied for judicial review of (i) the Secretary of State's exercise of his statutory powers to grant the request (ii) the ex parte decision of the judge at the Central Criminal Court to issue the warrants.

Held:

- i. The Secretary of state must not only decide whether to grant a request but also how assistance is to be granted to a Requesting Country. Therefore, the power to decide how assistance should be provided should not be delegated to the police.
- ii. The Central Criminal Court judge, should have given reasons for granting the application, particularly when exercising such "Draconian jurisdiction".
- iii. The warrants should not have been made ex. parte without evidence that both firms would have destroyed or removed the documents.

R. v. Secretary of State for the Home Department Ex Parte Propend Finance Pty Ltd and Others,
17 March 1994 QBD Coram Butler-Sloss LJ & Laws J.

INTERNATIONAL AGREEMENTS

Belize/United States of America Shiprider Agreement

The governments of the United States and Belize have entered into an agreement on combatting illicit drug trafficking. This agreement relates to shipriders program and enforcement in Belizean territorial waters. The agreement will enable designated law enforcement officials of both countries to carry out in the territorial sea and internal waters of Belize including the air space over such waters - such functions as:

- i. pursuit and/or embarkation of suspicious vessels and aircraft fleeing into Belizean waters;
- ii. enforcement of the relevant country's laws with due regard to international law;
- iii. conducting counter-drug patrols.

Other subjects covered includes extent of the use of force, self defence, search and seizure, jurisdiction over detained vessels, human rights, disposition of seized assets, diplomatic immunity and mode of implementation of the programme. The agreement came into force in December 1992.

BANKING INFORMATION

BELIZE - LICENCED BANKS

Information has been received that Belize presently has no licensed off-shore banks in operation. Under the Banking Act of Belize, only four (4) commercial banks are licensed to operate in Belize. These are:

Atlantic Bank Limited
Barclays Bank Plc
Belize Bank Limited
Bank of Nova Scotia

If any information is received in your jurisdiction on other entities purporting to be licensed as banks in Belize, please send this information to:

Mr. Ricardo Pelayo
Manager, Banking Supervision
Central Bank of Belize
P.O. Box 852, Belize City
Tel: 501-2-77216 Fax: 501-2-77106

DRUGS - INTERDICTION AT SEA

1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances - Proposed establishment of a Working Group

The Expert Group commissioned by the United Nations to consider issues relating to the establishment of a working group on maritime cooperation to promote unilateral implementation of the relevant provisions of the 1988 Convention have concluded their report. They recommended that the proposed working group on maritime cooperation should:

- (a) examine bilateral and regional agreements with a view to examining the principles and guidelines of such agreements or arrangements;
- (b) examine and compile a list of barriers to international cooperation in maritime interdiction in territorial waters and beyond, in conformity with the international law of the sea;
- (c) recommend ways to improve and facilitate international cooperation in combating illicit traffic by sea, considering the fact that there was broad scope for cooperation that went beyond the activity of boarding;" and

that the working group should examine issues arising under four major headings namely exchange of information, technical assistance, legal issues and implementation procedures.