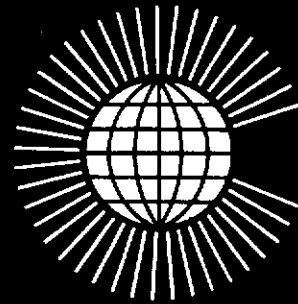


Commonwealth Legal Assistance News



Issue 5, December 1994

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Oxford Conference on Mutual Legal Assistance

The Conference, organised with the support of the United Nations International Drug Control Programme (UNDCP) and the United Nations Inter-regional Crime and Justice Research Institute (UNICRI), was held at Christ Church, Oxford, from 5 to 9 September 1994.

Participants represented mutual assistance central authorities from around the world and included attorneys-general, law enforcement officers, prosecutors and business regulators. All major legal systems were represented.

Conference recommendations included the following:

- countries should use their best efforts to prepare and update national guides on mutual assistance practices and procedures;
- international organisations should work together towards the compilation and distribution of national mutual assistance guides;
- there should be a review of the rules of evidence in common law jurisdictions;
- countries should consider the desirability of removing obstacles to the successful operation of mutual assistance schemes;

The Conference Report, *inter alia*, covers:

- The scope of existing mutual legal assistance;
- The role of the courts in the development of mutual assistance jurisprudence;
- Establishing a Central Authority;
- Mutual assistance in customs cases;
- Mutual assistance in business regulation cases.

Working Group Reports cover the role of central authorities; money laundering cases; business regulation cases; and customs cases.

TREATIES

Extradition

ECOWAS Draft Convention on Extradition: The Ministers of Justice of the Member States of the Economic Community of the West African States (ECOWAS), at their Meeting in Lagos (April 1994), approved a Draft Convention on Extradition adopted by the Meeting of ECOWAS Legal Experts.

Thailand and the People's Republic of China signed a Treaty on 26 August 1993.

Mutual Assistance

A Treaty signed by the United Kingdom and Panama 1 March 1993 entered into force on 1 September 1993.

The United Kingdom and the United States of America signed a Treaty on 6 January 1994 accompanied by an exchange of letters on the provision of mutual assistance in criminal matters. It has not yet entered into force.

An Agreement between the United Kingdom and the Argentine Republic on judicial assistance against illicit drug trafficking entered into force on 1 June 1994.

Transfer of Prisoners

Thailand has treaties with the following States: Canada, Finland, France, Italy, Portugal, Spain, Sweden, UK and the USA.

The United Kingdom and Egypt signed an Agreement on 29 November 1993. The Agreement is not yet in force.

LEGISLATIVE DEVELOPMENTS

United Kingdom: surrender of fugitive offenders

The *Backing of Warrants (Republic of Ireland) (Rule of Speciality) Order 1994* (SI 1994/1952, in force on 22 August 1994), introduces a statutory speciality rule into the backing of warrants arrangements for the surrender of defendants to and from the Republic of Ireland. Under the rule, an order for a person's delivery up to the custody of the Irish police may not be made if it is shown that Irish law does not make provision corresponding to the provisions of the 1994 Order.

The Order introduces a statutory bar on a person who has been delivered up to the United Kingdom by the Republic under the backing of warrants arrangements being dealt with in the United Kingdom for an offence committed before his surrender other than that for which he was delivered up, except where his case is a specified case under the Order. The Order also introduces a statutory bar on such a person being extradited to another state for an offence committed before his surrender unless his case is a specified case under the Order.

CASE NOTES

Extradition

Extradition Treaty between Canada and the United States 1976 - Extradition requested for criminal charges entailing the death penalty - Whether Minister to seek assurances that death penalty would not be imposed

The applicant was extradited from Canada to the United States to stand trial in California on various criminal charges, including kidnapping and 12 murders committed in 1984-85. If convicted he could face the death penalty. Under article 6 of the Extradition Treaty between Canada and the United States, the power to seek assurances that the death penalty would not be imposed is discretionary and in this case the Minister of Justice decided not to seek such assurances. The applicant claimed that the decision to extradite him, without first having obtained those assurances violated his rights under the International Covenant on Civil and Political Rights 1966. The Supreme Court of Canada held that the applicant's extradition without assurances as to the imposition of the death penalty did not contravene Canada's constitutional protection of human rights nor the standards of the international community. In his complaint to the United Nations Human Rights Committee the applicant submitted, *inter alia*, that the execution of the death sentence by gas asphyxiation, as provided for under California statutes, constituted cruel and inhuman treatment or punishment *per se*, and that the conditions on death row were cruel, inhuman and degrading.

The UN Human Rights Committee observed that the issue was not whether the applicant's rights had been or likely to be violated by the United States, which was not a party to the Optional Protocol to the Covenant, but whether by extraditing him to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant; and that as for a possible violation by Canada of article 6 of the Covenant by its decision to extradite the applicant, two related questions arose:

(a) did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (i.e. a necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr Ng?

Held:

1. The extradition of the applicant would have violated Canada's obligations under article 6 of the Covenant if the decision to extradite without assurances had been taken summarily or arbitrarily. The evidence revealed that the Minister of Justice had reached his decision after hearing extensive arguments in favour of seeking assurances and advanced reasons, in particular, for the absence of exceptional circumstances, the availability of due process and of appeal against conviction, and the importance of not providing a safe haven for those accused of murder.

2. In the circumstances of this case, execution by gas asphyxiation, if imposed on the applicant, would not meet the test of "least possible physical and mental suffering", and constituted cruel and inhuman treatment, in violation of article 7 of the Covenant.

Accordingly, Canada, which could reasonably have foreseen that the applicant, if sentenced to death, would be executed in a way that amounted to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing the applicant without first having sought and received assurances that he would not be executed.

3. Canada was requested to make such representations as were possible to avoid the imposition of the death penalty and to ensure that a similar situation did not arise in the future.

Ng, Charles Chitat v Canada, UN Human Rights Committee, 5 November 1993 (Communication No. 469/1991)

Extradition crimes - Foreign law - European Convention on Extradition 1957 - Extradition Act 1989 (UK) - Whether accused entitled to give evidence - Whether evidence of law of requesting state admissible to show that applicant could not be convicted in requesting state

Sweden requested the extradition of the appellant to stand trial in Sweden for conduct which, if it had occurred in the United Kingdom, would have constituted offences under the Theft Act 1968 and the Companies Act 1985. In committal proceedings the magistrate had refused to allow the applicant to call evidence concerning details of the alleged offences and, being satisfied that they were extradition crimes had committed the applicant on bail to await the Secretary of State's decision as to his return. The Divisional Court of the Queen's Bench Division dismissed his application for *habeas corpus*. He appealed to the House of Lords.

Held: In dismissing the appeal:

1. A magistrate in committal proceedings under the Extradition Act 1989 was restricted to consideration of the conduct, facts and foreign law as set out in the request for extradition to determine whether the conduct would breach the relevant law in each country. The question whether the conduct of the accused amounted to the offence alleged was a matter for the foreign country to determine at trial in the foreign state and the magistrate was not entitled to hear evidence directed to it.

2. The accused was entitled to make representations because no order for committal should be made against a person who has not been allowed to object and to state his reasons for objection. However, he was not entitled to adduce evidence about foreign law. Of course, if the presentation of the law of the foreign state set forth in the extradition request were inaccurate or incomplete in a relevant and material respect and the correct law could not be presented by agreement, then the accused would have his remedy in *habeas corpus* proceedings.

Per curiam: Where requests for extradition alleged acts of violence, theft, fraud or the like courts should be slow to pay heed to any representations that such acts did not constitute offences under foreign law.

In re Evans, House of Lords, U.K. [1994] 1 WLR 1006

Extradition Treaty between the United Kingdom and the United States of America - Sentencing process of foreign state - Whether English court empowered to investigate - Whether sentencing a separate proceeding for extradition

The United States requested the extradition of the applicant to stand trial in the United States for charges relating to the importation of drugs into the United States. In committal proceedings he was detained in prison pending a decision by the Home Secretary as to his extradition. In an application for *habeas corpus* he argued, *inter alia*, that he ought not to be extradited to the United States since he would be dealt with there for offences in respect of which his extradition had not been ordered. This was because in sentencing the applicant the time barred offences committed by him could, under United States statutory law, be taken into account even though the conduct could not be the basis of separate legal proceedings.

Held: In dismissing the application:

1. The process of sentencing could not be classified as a separate determination or proceeding against an extradited person for the purposes of article 12 of the Treaty as contained in Schedule 1 to the United States of America (Extradition) Order 1976.
2. Therefore, a risk of an increase in sentence referable to earlier conduct, for which prosecution was time barred, could not prevent extradition. It was not for the court to enquire into the way in which a foreign state would sentence after conviction.

In re Forwell, Queen's Bench Divisional Court, U.K. (*The Times* 25 October 1994)

Committal proceedings - Applicant tricked into entering United Kingdom - Whether police conduct amounts to deception or abuse of power and/or process - Whether High Court has residual supervisory jurisdiction to order release of fugitive

The applicant, a German national, was wanted in Germany to stand trial for drug smuggling offences. His presence within the United Kingdom from Ireland was secured by means of a ruse by the English police. He was arrested and held in custody pending extradition. He applied for a writ of *habeas corpus* and judicial review of the Secretary of State's decision to issue an authority to proceed to the magistrate on the ground that the trick adopted by the police was an abuse of power by the executive and an abuse of process of the courts that had vitiated the whole extradition proceedings. The Queen's Bench Divisional Court dismissed his motion for *habeas corpus* and he appealed to the House of Lords.

Held: In dismissing the appeal:

1. In proceedings under the Extradition Act 1989, the High Court had power to intervene only in the circumstances predicated by section 11(3) of the Act and had no inherent common law supervisory power.
2. The safeguard for a fugitive in the case of an alleged abuse of the process of the court was the Secretary of State's general discretion under section 12(1) of the Act regarding the making of an order for the fugitive's return.
3. Unlike the case of *Bennett v Horseferry Road Magistrates' Court* ([1994] AC 42; see CLAN Issue 2, August 1993), here there was no question of forcible abduction. The only sanction attaching to the ruse by the British police was that the appellant, if he did not attend a meeting with the police officer in England, would be arrested when his presence in England was next detected by the authorities. To suggest that he had no alternative but to come to the United Kingdom and was thereby coerced was unrealistic.

In re Schmidt, House of Lords, U.K. [1994] 3 WLR 228; [1994] 2 All ER 65

Absence of extradition arrangement - Earlier unlawful detention - Whether second detention also unlawful - Letter of requisition signed by "consular officer" of British High Commission - Whether letter of requisition by a "foreign country" through its diplomatic services

The Hong Kong Government made a request to Malaysia for the extradition of the applicant to Hong Kong. This was dealt with under the Malaysian Extradition Ordinance because it was considered that the Commonwealth Fugitive Criminals Act 1967 was not applicable (Hong Kong not being a "prescribed Commonwealth country"). During the continuance of the proceedings, the Ordinance was replaced by the Extradition Act 1992 (the Act). As a result a new requisition was issued under the Act to replace that made under the Ordinance and to re-start to extradition proceedings. The applicant sought a writ of *habeas corpus* contending (a) that the Ordinance did not apply to extradition to Hong Kong and thus his detention under both the Ordinance and thereafter the Act was null and void; and (b) that there had been non-compliance with the 1992 Act which required that the request be made by a country through its diplomatic services.

Held: allowing the application:

1. Although the colony of Hong Kong was a foreign country for purposes of the Ordinance, there was no arrangement existing between Malaysia and Hong Kong as required under section 3 of the Ordinance. Therefore, in the absence of a special direction by the Minister, the detention of the applicant under the Ordinance was unlawful.
2. As the detention under the Ordinance was unlawful then the second detention was also unlawful because it was a continuation of an illegal detention.
3. The requisition letter was not a request as required by section 3 of the Act. The respondents had failed to prove that the writer of the letter was a consular official authorised by the Government of Malaysia to perform consular functions. Thus the request for extradition was not valid.

Tan Hock Chan v Mentri Dalam Negeri, Malaysia and Others, High Court (Kuala Lumpur), Malaysia [1994] 1 *Malayan Law Journal* 60

[Note: While the editors have difficulty with some procedural aspects of this case, in writing this report they have drawn on the words of the court]

Transfer of Prisoners

Transfer of prisoners - No statutory authority to transfer remand prisoners - Delay in bringing to trial - Extension of time limit

HM Advocate sought an extension by four months of the 12-month period specified in section 101(i)(ii) of the Criminal Procedure (Scotland) Act 1975, in respect of an indictment. This was because the Crown was unable to proceed to trial against the accused in Scotland because of a refusal by the English prison authorities to transfer him because he was on remand in an English prison charged with fraud allegedly committed in England. The application was refused by a single judge and HM Advocate appealed against the refusal.

Held: In allowing the appeal:

1. Where an accused person on remand in England could not be brought to trial in Scotland within 12 months from his first appearance on petition, there was sufficient cause for the Court to exercise its statutory discretion to allow a limited extension of the time limit, to enable the Crown to proceed to trial against the accused.

2. The absence of a statutory authority for the transfer of a person held on remand was against the intention of Parliament in laying down the statutory limit and, therefore, legislation to authorise the transfer of such persons to stand trial elsewhere in the United Kingdom was urgently needed.

HM Advocate v R, High Court of Justiciary sitting as the Court of Criminal Appeal, Scotland, (*The Times*, 21 October 1994)

CULTURAL PROPERTY

UNIDROIT: protection of cultural property

The International Institute for the Unification of Private Law (UNIDROIT) published in February 1994 the Report of its Committee of Governmental Experts on the International Protection of Cultural Property, Report on the Fourth Session (Rome, 29 September to 8 October 1993) (UNIDROIT Study LXX - Doc. 48). The Report presents a Preliminary Draft UNIDROIT Convention on [the International Return of] Stolen or Illegally Exported Cultural Objects.

CENTRAL AUTHORITIES (Commonwealth Countries)

(as notified to the Commercial Crime Unit)

Malawi

The *Mutual Assistance in Criminal Matters Act* 1991 (No. 24 of 1991) makes provision with respect to the Harare Scheme relating to Mutual Assistance within the Commonwealth and concerning mutual assistance in criminal matters between Malawi and non-Commonwealth countries. The *Mutual Assistance in Criminal Matters (Designation of Authority) Order* 1994, made pursuant to section 4 of the 1991 Act, designates the Attorney-General as the appropriate authority for purposes of implementing the provisions of the Act.

Attorney-General,
Private Bag 333,
Lilongwe 3,
MALAWI

Tel: 265 782 411
Fax: 265 782 176
Telex: 44766

Zambia

Central Authority (Competent Authority) appointed under the *Mutual Legal Assistance in Criminal Matters Act* (No. 19 of 1993), for purposes of requests by Zambia (s.9) and of requests by foreign states (s.10) -

The Attorney-General,
Attorney-General's Chambers,
Ministry of Legal Affairs,
P.O. Box 50106, Lusaka,
ZAMBIA

Tel: 260 1 250438
Fax: 260 1 253695

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

China

For States' parties to Conventions and bilateral treaties -

Bureau of International Judicial Assistance,
Ministry of Justice,
11 Xiaguangli,
Sanyuanqiao,
Beijing 100016,
PEOPLE'S REPUBLIC OF CHINA

For non-treaty States -

Ministry of Foreign Affairs,
225 Chaoyangmennei Avenue,
Beijing 100701,
PEOPLE'S REPUBLIC OF CHINA

The Netherlands

Customs Intelligence Centre (D.I.C.): Information.
This centre is the point of reference for the Netherlands customs, foreign customs organisations and related services

P.O. Box 1005,
3130 EE Vlaardingen,
THE NETHERLANDS

Tel: 31 10 45 5700
Tel: 31 10 45 5726 (24 hours)
Fax: 31 190 43 41020

Switzerland

Federal Office for Police Matters,
Section for International Legal Assistance,
Bundesrain 20,
CH-3003 Bern

Tel: 41 31 322 43 39
Fax: 41 31 322 53 80

Thailand

Central Authority of Thailand

u Attorney-General,
Office of the Attorney-General,
International Co-operation in
Criminal Matters Division,
Na-Huppei Road,
Bangkok 10200,
THAILAND

Tel: 66 2 2247302
Fax: 66 2 2265700

United States

Central Authority
Office of International Affairs,
Criminal Division,
U.S. Department of Justice,
Bond Building, Suite 5100,
1400 New York Avenue, N.W.,
Washington D.C. 20005
USA

Tel: 1 202 514-0000
Fax: 1 202 514-0080

EXTRADITION REQUESTS

Norway

Under Act No. 39 of 13 June 1975 relating to Extradition of Offenders etc, requests for extradition to be made through diplomatic channels to the -

Central Authority of Norway,
Ministry of Justice,
Civil Department,
P.O. Box 8005 DEP.,
N - 0030 Oslo,
NORWAY

Tel: 47 22 34 54 81
47 22 34 54 87
Fax: 47 22 34 27 22
Telex: 21 403 JDEP N

Sweden

Requests for extradition (Act on Extradition of Offenders 1957, No. 668) and assistance for documentation from Sweden to be made through the following-

Orjan Landelius,
Ministry for Foreign Affairs,
Stockholm, SWEDEN,

Tel: 46 8 7866061

Contributions: Please help us to ensure that CLAN fully reflects current legal developments by sending in details of your new laws, your cases, the names of offices in your central authorities, or any other information which will help your colleagues.