



Commonwealth Legal Assistance News

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NEWSLETTER OF THE COMMONWEALTH SECRETARIAT'S CRIMINAL LAW UNIT

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The Attorney General of Canada, on behalf of the government of the United States of America, sought an order for the committal of Adam, in order that he could be extradited to the US for fraud and money laundering offences. The charges against Adam were stated to be conspiracy to commit fraud, conspiracy to launder the proceeds of crime and laundering the proceeds of crime.

The allegations against Adam were that he held himself out as an international financial or business consultant with connections to lenders of “self liquidating” and “self-collateralising” loans. People who sought substantial loans for venture capital were invited to pay advance fees in exchange for promises that Adam and his associates would obtain funding for multi-million dollar loans, from private foreign trusts for which Adam was a trustee or to which he had an exclusive connection. Clients would then transfer large sums of money to Luxemburg and other places, with the understanding that they would be utilised to pay for the complex financing required to secure the loans. It was alleged that Adam and his co-conspirators instead applied the funds to their personal use and to finance fraudulent business activities.

Adam filed a preliminary objection challenging the jurisdiction of the extradition judge to hear the matter and a motion for a stay of the hearing on the grounds that his rights under the Canadian Charter of Rights had been violated and that there was an abuse of process.

He argued that the US had replaced its original indictment against him with another and that this amounted to an alteration of the material that had originally accompanied the diplomatic note and warrant of arrest. This type of action was not authorised by the Extradition treaty between the US and Canada, as it amounted to a unilateral alteration of the documents described in Article 9 of the Treaty.

In support of his application for a stay of proceedings, Adam contended that the extradition proceedings were being used by the US as a pretext for enforcing a civil claim and that the allegations made against him would at most amount to a claim for debt collection.

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Adam's counsel also contended that the actions of the US officials in their dealings with him cumulatively amounted to an abuse of process. In this regard he specifically raised a number of allegations of improper conduct including covert actions by U.S. authorities relating to his arrest and charges in Luxemburg, an attempt to kidnap him, and the issuing of the superseding indictment that was hidden from Adam for many months.

● **Held:** refusing the application and making a committal order;

1. Article 9 did not require a formal indictment or a charging document to be part of the request for extradition. It merely requires that the request for extradition should be accompanied by a statement of the facts of the case, the text of the laws of the requesting country describing the offence and prescribing the punishment for the offence and the law relating to any limitation for the legal proceedings. Besides, extradition treaties ought to be given a fair and liberal interpretation in order to enable a requested country to meet its international obligations without undue technicalities. "The courts have on many occasions reiterated that the requirements and technicalities of the criminal law apply only to a limited extent in extradition proceedings": *The Republic of Argentina v. Mellino* (1987), 33 CCC (3d) (S.C.C.) page 348.

In the present case the superseding indictment did not expand the criminal allegations against Adam, instead they had limited some of the charges and changed others hardly at all. The substitution was not in any way prejudicial to Adam.

In any case, a complaint of a breach of treaty obligation was not the concern of the court, but was a matter for the executive branch of government. Section 7 of the Extradition Act provides that "the Minister is responsible for the implementation of extradition agreements, the administration of this Act and dealing with requests of extradition made under them". The task of monitoring treaties was an executive function.

Under section 24(1) of the Extradition Act, the basis of jurisdiction for a judge is the Authority to Proceed. The judge's responsibility is to determine whether there is a prima facie case that the acts would constitute an offence had they been committed in Canada. The charging document in the United States was not a matter for the extradition judge and did not affect his or her jurisdiction.

In respect of the contention that the extradition proceedings were only being used as a pretext for collecting private debt, the duty of the court was simply to examine the affidavit evidence, the documents and any oral evidence brought before it and to determine whether there was admissible evidence of the allegations levelled against the person whose extradition is sought. It was not for the court to scrutinise the motivation of the requesting country's authorities. Any suggestion that the criminal process in the United States was being improperly and abusively used was a matter to be raised at trial in the US and was beyond the scope of the extradition judge.

On the issue of abuse of process, the jurisdiction of an extradition judge is limited to ensuring the fairness of the committal proceedings. "It must be established that there is something that makes the extradition proceedings unfair, divorced from the alleged unfairness of the ultimate prosecution before a Charter remedy is justified": *USA v. Cobb, et al* (1999) O. J. No. 3278. Besides it was not the place of the extradition judge to supervise the conduct of the diplomatic or prosecuting officials of a foreign state.

A stay of proceedings should only be allowed in very rare cases and the applicant must discharge the burden of proving that his Charter rights have been breached. Adam had not discharged that burden.

As regards whether there was evidence to justify committal, the threshold is whether a reasonable jury properly instructed would return a guilty verdict; it was not for an extradition judge to assess the credibility of the evidence. Taking the totality of the evidence available to the court, the Court was satisfied that Adam was the person sought by the US authorities and that there was reasonable evidence to warrant a committal had Adam committed his offences in Canada.

Her Majesty the Queen v. Richard Adam, Ontario Supreme Court of Justice, 5 July 2000 (unreported).

Extradition – whether extradition can be sought for facts that show an offence not listed in Extradition Act – Canadian Extradition Act – (Canada)

The Kingdom of Thailand made a request to Canada for the extradition of S to Thailand on charges of conspiracy and fraud. It was alleged that S worked as the personal adviser to the President

of BBC, a Thai bank. He was authorised to give instructions to other bank staff including the Vice Director of Financial Administration and International Banking facilities. He was also in charge of foreign exchange and 62 companies with head offices in Bangkok, which were also clients of BBC. He personally handled all the business of those companies with the Bank and approved their loan applications. He also controlled City Trading Corporation (CTC), a company that had no assets or employees. He approved a loan of the equivalent of 88 million Canadian dollars to CTC without referring it to the Board of Directors and without lodging the necessary securities for the loan. The money was not used for the purpose for which the loan was said to be needed, but was used instead to clear some outstanding loans owed to the Bank. He then left Thailand.

At the extradition hearing, S raised a preliminary objection on the basis that the Thai arrest warrant charged him with conspiracy in Thailand when that offence was not listed in the Canadian Extradition Act as an extradition offence. It was argued in response that while the charge alleged in Thailand was conspiracy the conduct in Canada would have constituted fraud, a listed offence. He also opposed Thailand's application for his extradition in substance on the basis that the evidence was insufficient to support a committal.

▷ **Held:** dismissing the preliminary objection and ordering committal for surrender;

1. In addressing the preliminary objection, the court said that the function of an extradition judge is to determine whether the offences that the fugitive is accused of, would constitute an offence if they had been committed in Canada. "There is no requirement under the Act to prove at the extradition hearing that the fugitive committed an offence in Thailand. That is a question for the Minister and not for the extradition judge. It is not part of an extradition judge's function to consider or determine matters of foreign law. The extradition judge determines only whether the conduct of the fugitive, if it occurred under Canadian jurisdiction, amounts to an extraditable offence under Canadian law." The judge therefore accepted the argument that it was the Canadian offence of fraud which was relevant for the list and not the conspiracy offence charged in Thailand. On this basis, the preliminary objection was dismissed.

2. On the substantive issues at the extradition hearing, the facts alleged against S showed a fraudulent intent on his part to deprive the BBC

of at least some of the money loaned to CTC. These facts, if presented to a jury with proper instruction, would result in a guilty verdict. The facts constitute sufficient evidence on which an extradition judge can order that the fugitive be committed to prison to await the Minister's decision to surrender him.

Kingdom of Thailand v. Rakesh Saxena, (Supreme Court of British Columbia), [2000] BCSC 1360. (unreported)

EXTRADITION - Appeal against decision to surrender - Whether primary judge erred in holding there was no extradition objection - claim of likelihood of prejudice at trial or punishment by reason of race - Whether evidence established that claim - Whether Indonesian supporting documents sufficiently indicated the conduct giving rise to the relevant offences - Admissibility of supporting documents - Whether supporting documents properly authenticated - Extradition Act 1988, ss7(c), 19, 20, 21 and 22 (Australia)

R was committed to prison to await surrender to Indonesia in September 1999. His application for review of the magistrate's decision was rejected by the Court of Appeal in March 2000 (*Rahadja v. Republic of Indonesia* reported in CLAN 30). R further appealed to a three-member panel of the Federal Court of Appeal of Australia against the decision to dismiss his application. He advanced the following grounds of appeal:

- (1) that he had an "extradition objection" in relation to the offences for which his surrender was sought, namely that he may be prejudiced at trial by reason of his race;
- (2) that the supporting documents provided by Indonesia and admitted into evidence by the magistrate did not sufficiently identify the conduct alleged to constitute the relevant offence for which extradition was sought;
- (3) that the supporting documents ought not to have been admitted into evidence by the magistrate because they were not duly authenticated in that it had not been properly established that the seal on the documents was one that purported to be an official seal of Indonesia or a minister or government department or officer of that government.

Briefly, the facts of the appeal are as follows: Following the issue of a Notice to proceed by the Minister for Justice and Customs, the Republic of Indonesia applied to a magistrate seeking R's extradition. The Magistrate took evidence including oral evidence from four experts who spoke on the state of the justice system in Indonesia at the time, the existence of discrimination against people of Chinese descent and the likelihood that R would be discriminated against in his trial if he was surrendered to Indonesia.

The evidence before the Magistrate also included "supporting documents" sent to Australia by the Indonesian government. These were in two bundles, one in the Indonesian language and the other in English. Each bundle was tied together with a ribbon of which the loose ends were secured on the back sheet by a red wax seal. By the time of the magistrate's hearing, both seals had deteriorated to the extent that it was impossible to read the inscription on them. However, the English bundle had the following typewritten on the back, adjacent to the red seal:

"Translation of red seal:

*' Directorate General for Legal Affairs
Department of Justice of the Republic of
Indonesia"*

JAKARTA, 24 June 1999

Ag. DIRECTOR OF CRIMINAL LAW

(signature)

NOOR MUHAMMAD AZIZ, SH

REG. NO. 040033020"

The facts leading to the request for R's extradition have been narrated in CLAN 30, August 1999.

On the basis of the condition of the documents, the appellant argued that the English documents should not have been admitted in evidence because they were not properly attested or sealed as required by the legislation.

In relation to the second ground, the appellant focused on the content of the warrant of arrest and summary of the case to allege that the offences for which extradition was sought were not clearly identified.

On the extradition objection, counsel for R submitted that the nature of the relevant test in determining whether there was an extradition objection under section 19(2)(d) was whether there were "substantial grounds for believing" that "the person may be prejudiced at his... trial or

punished... by reason of his... race". Counsel argued that the inquiry was speculative, because it was concerned with future and hypothetical events. In view of the relevant terminology, "it is inappropriate to apply an inflexible standard, such as the balance of probabilities, and a lesser degree of likelihood is sufficient to establish substantial grounds for the extradition objection". Counsel submitted that the minimum requirement was that the substantial ground of belief be "not trivial" or merely theoretical. It was sufficient if there is a real chance of prejudice and it did not matter that the chance might be far less than a fifty percent chance. Counsel also complained that the reviewing judge wrongly discounted from consideration, evidence on the ground that it was speculative or general in nature.

The respondents argued on the other hand that, although the test as stated by the appellant was correct, the judge was not wrong in his application of it. The fact that there was discrimination against Chinese in Indonesian society did not of itself, or in combination with other factors, lead to a conclusion that R may be prejudiced at his trial or would be in any worse position than any other defendant before an Indonesian court facing the same charge.

● **Held:** dismissing the appeal;

Extradition Objection

The submission by R's counsel as to the test that must be applied in considering whether there was an extradition objection was correct. As counsel say, the inquiry concerns future and hypothetical events. Necessarily, therefore, the Court was required to engage in speculation. And it was sufficient if the person raising the objection established a substantial or real chance of prejudice; it was not necessary to show a probability of prejudice or any particular degree of risk of prejudice.

Although R's counsel was right in submitting that the non-existence of an extradition objection is a matter about which the Attorney General must be satisfied (under s22) before deciding to surrender the person to the extradition country, that does not relieve the magistrate of the necessity to consider the matter, if it is raised as an issue by the person whose extradition is under consideration. In the present case, the issue was raised and the magistrate considered it. He ruled that the existence of an extradition objection was not established. The reviewing judge endorsed that ruling. The question then was whether the latter erred in doing so.

The court did not accept that the judge was under a misapprehension as to the test he was required to apply. In his reasons for judgment, the judge stated that the "specific question for determination" is "are there substantial grounds for believing that the applicant... may be prejudiced or punished or otherwise adversely differentially treated by reason of his Chinese Ethnicity". In the last sentence of that paragraph he again used the words "may be prejudiced". The words "would be treated" were used in the context of making the point that there was no evidence of a practice of treating persons of Chinese ethnicity differently, at trial, from other persons.

Notwithstanding this finding, but having regard to the importance of the issue to the appellant, the court considered whether the evidence placed before the magistrate provided substantial grounds for a belief that, if surrendered to Indonesia, R might suffer prejudice at his trial or punishment because of his race. The Court concluded that it did not.

The appellant also argued that the evidence given by the four witnesses was not contradicted by evidence led on behalf of the Republic of Indonesia and that since it was not inherently improbable, the evidence ought to be accepted for whatever, on a fair reading, it is worth. The critical question was the worth of the evidence, having regard to the specific issue the magistrate had to decide. On the basis of the expert evidence, the magistrate found:

1. *The justice system in Indonesia is dysfunctional.*
2. *Corruption is rife amongst judicial officers.*
3. *The judicial officers are controlled by the Minister of Justice and there is no separation of powers.*
4. *Governmental interference occurs in most cases.*
5. *It is extremely rare for a defendant in any case against the State to be successful."*

However, the magistrate went on to correctly point out that "proof that the Indonesian justice system is in a deplorable state will not, of itself, prove the existence of any extradition objection. If the practice of 'scapegoating' Ethnic Chinese is so widespread one would have expected there to have been numerous examples of Chinese Ethnic before the Court and prejudiced because of their race. The respondent's experts could not point to one."

In conclusion, even if it was true that Indonesian authorities were more disposed to decide not to prosecute a non-Chinese Indonesian than a Chinese Indonesian that fact did not establish that there were substantial grounds for believing that R might be prejudiced at his trial or punished by reason of his race. The question was what would happen at trial or on sentence, not whether persons of a different race would have a better chance of avoiding trial at all.

Identification of the conduct the subject of the offences

Under this ground of appeal, R complained that there had been a default concerning the obligation imposed by s 19(3)(c)(ii), namely that the "Summary of the Case" document did not satisfy the requirement for a "statement in writing setting out the conduct constituting the offence." Counsel submitted that the offences for which extradition was sought could not properly be identified from the warrants and statements of alleged conduct submitted by Indonesia. The documents did not specify any date, place or time of the alleged offence, and they also argued that the language in the warrant was duplicitous because it alleged both of the alternative offences available under Article 49 clause (1)a.

The Court in *McDade v United Kingdom* [1999] FCA 1868 stated in respect of section 19(3)(c)(ii) that:

"The provision of a statement setting out the conduct constituting the offence is designed to assist the magistrate in the performance of the tasks which the magistrate is charged to perform by virtue of s 19 of the Act: see *Todhunter v United States of America* (1995) 57 FCR 70 ('*Todhunter*') at 90 and *Zoeller* at 300. Presumably, too, the statement is designed to assist the Attorney-General in making any subsequent determination. See, for example, s 22(3)(d) and *Wiest* at 519 per Gummow J." ... What is being sought is a clear and coherent statement of the actual acts and omissions which are said to constitute the offence. The statement must 'speak with sufficient specificity' and coherence to serve its purpose: see *Linhart v Elms* at 583 per Gummow J and *Wiest* at 483 per Sheppard J. The statement must be such as to permit the magistrate charged with conducting proceedings under s 19 to be satisfied,

one way or the other, as to whether the conduct said to constitute the offence in the extradition country or the equivalent conduct, would constitute an extradition offence had it taken place in that part of Australia where the proceedings are being conducted: see *Todhunter* at 90, citing *Riley v Commonwealth* (1985) 159 CLR 1 at 18-19 per Deane J, and *De Bruyn* at par 7 per Hill and Hely JJ. ... Having regard to the purposes of a s 19(3)(c)(ii) statement, a document will not meet the requirements of that provision if it is so vague and general or so disorganised that the relevant acts and omissions cannot be reasonably identified. Whether a statement relied on in satisfaction of that provision is to be accepted as a statement setting out the conduct constituting the relevant extradition offence or offences is essentially a 'matter of practical judgment and assessment, not for over-zealousness in discerning deficiencies': *Zoeller* at 294 and *Wiest* at 519."

The conduct constituting each of the two offences in respect of which surrender was ordered had been set out with sufficient precision in the five-page document headed "Summary of the Case". There was compliance with the requirements of section 19(3)(c)(ii) of the Act in this case, and the primary judge did not err in so finding. Neither the rule of specialty, nor Article 8 of the Extradition Treaty with Indonesia, read with subsections 22(3)(d) and 22(4) of the Act, would be undermined by the surrender of the appellant in respect of the two offences identified in the warrant.

Admissibility of the supporting documents

In respect of this ground of appeal, the Court noted that it was common ground that subsections 19(2) and (3) of the Extradition Act prescribe the documents which must be tendered in support of an application for extradition. Subsection 19(3) identifies specific documents, but paragraph 19(2)(b), when read with section 11, contemplates the possibility that regulations may make special provisions applicable to requests from some countries. In this case, those regulations require that certain other documents be provided, including an English translation of all documents to be tendered. The Republic of Indonesia relied upon subsections 19(6), 19(7) and 19(7A) of the Act to facilitate the receipt

into evidence of all necessary documents including the translation.

In *Federal Republic of Germany v Haddad* (1990) 21 FCR 496 the Court expressed the view "that material placed before the Court to satisfy the requirements of s. 19(7)(b) should not be received, if written in a language other than English, unless its English meaning is proved or admitted." The effect of this statement was to require that authentication provisions designed to satisfy the requirements of subs. 19(7)(b) be translated into English. This was in relation only to the need for translation of the "substantive" aspects of the documents. Besides, the destruction of a seal without the intention of revoking the document in question does not affect its validity and this proposition applies to documents under seal, which are not deeds. Neither *Zoeller* nor *Haddad* could be taken to be authority for the proposition that, in all circumstances, words in a foreign language upon a seal relied upon for the purposes of subs. 19(7) must be translated into English. In many cases, such words, if translated, may assist in satisfying the requirements of paragraph 19(7)(b), but that does not lead to the conclusion that such a translation will always be necessary. Paragraph 19(7)(b) requires that the document in question purport to be sealed with an official or public seal. The paragraph does not require that a seal take any particular form.

There would seem to be no need for insisting that official or public seals used in foreign countries take any particular form. In particular, the law does not require that such a seal bear words that identify its status or identity. The requirement that the seal in question purport to be of the extradition country or of a Minister, Department of State or Department or officer of the Government of that country does not impose the additional requirement that any relevant seal so describe itself on its face. A seal bearing no words is capable of being an official or public seal of a country, Department or officer for the purposes of paragraph 19(7)(b). Counsel for the appellant suggested in the course of argument that it might be necessary to call evidence to identify the seal. However, the Court considered that subs. 19(7) was intended to facilitate the use of documents in extradition proceedings without the need to call oral evidence to prove their authenticity. The answer lay in the statutory requirement that such a document purport to be appropriately sealed. Such purport may be drawn from the document as a whole; not necessarily from the seal alone. Hill J, in *Kalamunda Meat Wholesalers Pty Ltd v*

Reg Russell & Sons Pty Ltd (1994) 128 ALR 149 at 155, considered the meaning of the verb "purport" in a different context. He adopted the following definition from the Macquarie Dictionary (2nd Ed Rev.):

1. To profess or claim: 'a document purporting to be official'.
2. To convey to the mind as the meaning of the thing intended; express; imply."

The Court accepted that definition and determined that the document met the requirements.

Rahadja v. Republic of Indonesia [2000] FCA 1297 (Internet Site: <http://www.scaleplus.law.gov.au/html/fedec/0/20003/0/FD004320.htm>)

Extradition – bail pending appeal – whether special circumstances established – Section 21 of the Extradition Act – (Australia)

The United States of America requested the extradition of K from Australia. The extradition magistrate determined under section 19(9) of the Extradition Act 1988 that K was eligible for surrender in respect of the offences of racketeering, visa fraud and alien smuggling and committed him to prison to await surrender. He then applied for review of the magistrate's decision pursuant to section 21(1) of the Act. At the same time he applied for bail under section 21(6)(f)(iv).

K relied on the following to establish the existence of special circumstances sufficient to warrant bail:

- (a) He was an Australian born citizen;
- (b) His family was resident in Australia and until his imprisonment he lived with his parents;
- (c) He had continuing employment in Australia, although his job would not be secured if he were to be refused bail;
- (d) He had no prior convictions;
- (e) He co-operated with the authorities; investigating the matter, prior to and at the time of his arrest;
- (f) He had previously been on bail for over nine months and had complied with all conditions imposed;
- (g) He had answered bail on all occasions;
- (h) He was not in Australia as a fugitive from the United States;
- (i) The offences for which he was sought in

- the United States were founded on conduct committed entirely in Australia;
- (j) A co-accused with weaker ties to Australia had been granted bail;
 - (k) He had an arguable case on appeal against the decision of the magistrate to extradite him.

▷ Held: dismissing the application;

1. The law relating to applications for bail under section 21(6) had recently been discussed by a Full Court in *Bertran v Minister for Justice* (1999) 165 ALR 155, which held that the phrase "special circumstances" justifying release on bail means "circumstances different in some way that provides a reason for a more favourable view of the grant of bail than that attending the ordinary run of extradition cases where a person might be expected to be remanded in custody".

2. The argument put forward under (k) above was a neutral consideration. The Court cannot be asked to attempt to predict whether an applicant would be successful on a review, especially where the judge hearing the application is also the same judge to hear the substantive appeal. The most that a judge in those circumstances could reasonably do was to simply assume that the applicant had an arguable case.

3. In respect of point (j), the evidence presented before the court was unsatisfactory. Besides, it would appear that the said co-accused was granted bail in circumstances that included the fact that he required surgery to his eye. This fact made the two cases sufficiently dissimilar for any the court to make any useful comparison.

4. In respect of the remaining factors relied on by K, although the risk of absconding while on bail was not high, absence of a likelihood of flight did not constitute special circumstances to justify bail.

On the whole, the Court was not satisfied that any of the matters relied upon individually or taken together, would constitute special circumstances, justifying release on bail.

Kurr v. United States of America [2000] FCA 1236

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Extradition – applicant suspected of murder – confession obtained through undercover operations – confession forming evidential basis for extradition proceedings – whether evidence ought to have been excluded by magistrate – Confessions obtained in circumstances likely to render unreliable ‘any confession’ made by accused – Police and Criminal Evidence Act 1984, sections 76 and 78; Extradition Act 1989, section 9(8) – (United Kingdom)

P was suspected of the murder of one Stacey Koehler in Canada in March 1995. He was found to be living in England and working in a nursing home. The Royal Canadian Mounted Police Force, in collaboration with the UK police, mounted an undercover operation to obtain evidence from P regarding the said murder. They obtained evidence which included P's confession to the murder. The government of Canada relying on the evidence obtained by the police officers, requested the extradition of P from the UK to stand trial in Canada for murder. The Secretary of State gave authority to proceed under section 7(4) of the Extradition Act and the matter went before the Stipendiary magistrate. The issue before the magistrate was whether, the evidence before him 'would be sufficient to make a case requiring an answer by P if the proceedings against him were the summary trial of an information against him'. The magistrate answered this question in the affirmative in his ruling and ordered that P be committed.

P then applied for habeas corpus and judicial review. He contended that the magistrate erred in concluding that there was sufficient evidence under section 9(8) of the Extradition Act. He argued that the magistrate ought to have excluded the evidence of the confession made by P to the undercover police officer, under section 76 and or 79 of the Police and Criminal Evidence Act (PACE) or under the Common Law.

▷ Held: dismissing the applications;

1. Where a magistrate in an extradition hearing has correctly directed his mind to the law, a court on review can only interfere with the findings of fact relating to the admissibility of evidence if

they have been found to be made outside the range of conclusions available to a magistrate acting reasonably. The authorities are clear on the point that the Divisional Court is not a court of appeal, and cannot retry or rehear a case. 'The Court does not hear the case by way of appeal so as to reverse the magistrate's decision on fact or alter a discretion properly exercised': per Lord Reid in *R. v. Governor of Brixton Prison, ex p Armah* [1968] AC 192 at 230. Thus a magistrate's decision on admissibility of evidence under section 76 of PACE, in such a context would only be reviewed on grounds of *Wednesbury* principles.

2. Although the laid down test for deciding whether a confession had been rendered unreliable was in a sense hypothetical because it relates not to the particular confession but to any confession, the reference to 'any confession' in section 76(2)(b) of PACE must be understood to mean "any such" or "such a", confession as the applicant made. The abstract element involved was not whether the actual confession was untruthful or inaccurate, it was whether whatever was said or done was, in the circumstances existing at the time of the confession, likely to have rendered such a confession unreliable, whether or not it might be seen subsequently, with hindsight and in the light of all the material available at the trial that it did not or did not actually do so.

3. Where a magistrate is concerned with the fairness of admitting evidence under section 78 of PACE, he is entitled to have regard to the extradition context in which the issue arose. Thus in this case the issue for the magistrate's consideration was not whether the confessions would be excluded in a purely English context. Rather, it was whether bearing in mind that the ultimate issue was whether P should to stand trial in the requesting country, the magistrate ought to exclude the confessions as part of the evidence. A magistrate ought only to exclude evidence if to admit it would outrage civilized values. Since the circumstances of the case did not fall within this exceptional class, the magistrate was right not to have excluded the confessions under section 78.

R v. Bow Magistrates' Court and another, ex parte Proulx (Re Proulx) Divisional Court Judgement, 28 July 2000; also reported as [2001] 1 All ER 57.

