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Commonwealth Law Ministers Meeting: Port of Spain, Trinidad and Tobago

Commonwealth Law Ministers considered both the London Scheme for the Rendition of Fugitive Offenders and the Harare Scheme on Mutual Assistance in Criminal Matters at their May 1999 Meeting.

Extradition:

In respect of the Commonwealth Scheme on the Rendition of Fugitive Offenders (the London Scheme), Ministers mandated Senior Officials to continue work on the Scheme with a view to making firm recommendations for consideration at the next Ministers Meeting.

Mutual Assistance:

In relation to the Scheme on Mutual Assistance in Criminal Matters (the Harare Scheme) Ministers adopted the following amendments to paragraphs 27 and 28 of the Scheme:

AMENDMENTS TO THE HARARE SCHEME ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Paragraph 27 of the Scheme

Add after sub-paragraph (5) a new sub-paragraph as follows:

The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:

- (a) for the giving of notice of the making of orders restraining or confiscating property; and
- (b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order
 - (i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and
 - (ii) restoring such property or the value of the interest therein to the applicant.

Commonwealth Legal Assistance News

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

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Designed and printed by the Commonwealth Secretariat

Paragraph 28 of the Scheme

Add after sub-paragraph (2) a new sub-paragraph as follows:

- (3) The law of the requested country may provide that the proceeds of an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be
 - (i) returned to the requesting country; or
 - (ii) shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.

Resource Implications of Mutual Assistance

Ministers also discussed the resource implications for some member countries, of responding to requests for mutual assistance in Criminal Matters. They adopted the following Guidelines which had been recommended to them by Senior Officials to be the basis on which costs could be apportioned between requesting and requested countries:

Law Ministers of the Commonwealth

Recalling that the purpose of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (the Harare Scheme) is to increase the level and scope of assistance rendered between Commonwealth governments in criminal matters;

Noting that Clause 12 of the Harare Scheme provides that, subject to sub-clause (2), unless expenses of an extraordinary nature are involved in responding to requests for assistance, the requested country will pay the costs of providing assistance; and

Noting the concern expressed by Law Officers of Small Commonwealth Jurisdictions over the impact on national resources caused by complying with requests for assistance

Adopted the following guidelines to assist member countries to deal with the financial and other costs incurred by jurisdictions in responding to requests for assistance:

Guidelines on the Apportionment of Costs Incurred in Providing Mutual Assistance in Criminal Matters

1. Where the execution of a request for assistance requires that the requesting country be represented before the courts of the requested country and where the human resources available to the Central Authority of the requested country are insufficient to

meet that requirement, the Central Authority of the requested country may brief an appropriate member of the private profession to represent the requesting country on its behalf. In such case the [Attorney-General] shall use his or her best endeavours to ensure that the person so briefed has no conflict of interest and that the best interests of the requesting country are protected.

2. Where a request for assistance requires that voluminous or complex documentary or other records be located and retrieved and where the human resources available to the Central Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may secure the services of appropriate specialists to undertake the work necessary to respond to the request. In such case the Central Authority shall use its best endeavours to ensure that the persons whose services are secured have no conflict of interest and that the best interests of the requesting country are protected.
3. Where the Central Authority of the requested country is of the opinion that the circumstances described in paragraphs 1 and 2 above exist, it shall, before proceeding to secure non-government persons to perform the functions, consult with the requesting country on the proposed action and secure, if necessary, the agreement of the requesting country to pay for the services so contracted for on its behalf, subject to any conditions with respect to the control of costs or of the conduct of the matter agreed by both countries.
4. Where a request for assistance requires the taking of action by police officers in the requested country and the Central Authority of that country is of the opinion that such action would so divert the available police resources as to cause prejudice to the peace of the country the request may be refused.
5. Where a request for assistance seeks the making or enforcement of an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence and where the law of the requested country would permit any person with an interest in such property to take action for damages arising from such restraint in the

event that the property was not later the subject of an order confiscating it the requested country may, if it considers it appropriate, require from the requesting country an indemnity against any loss incurred by the government of the requested country as a result of such action being successful.

6. In reaching any agreement on the apportionment of costs, the ability to share forfeited or confiscated assets or the existence of any asset sharing agreement between the relevant countries shall be taken into account.
7. Nothing in these guidelines shall be interpreted as detracting from the requirement contained in Clause 12 of the Harare Scheme that countries consult in cases where the requested country is of the opinion that the expenses required in order to comply with a request are of an extraordinary nature.

Interpol Red Notices

Ministers also took note of the changes made to the INTERPOL Red Notice System, in 1997 and

(a) acknowledged that the new INTERPOL Red Notices provide significant information on proposed requests for extradition;

(b) agreed that INTERPOL Red Notices in the new form should be treated by all member countries as requests for provisional arrest or, in cases where the locating country requires more information than is contained in the Red Notice, as advance notice of formal requests for provisional arrest;

(c) agreed that where they treat INTERPOL Red Notices as advance notices of formal requests for provisional arrest they will immediately notify the country which sought the issue of the Red Notice when the subject is located within their jurisdiction and seek the additional information required for the making of an application for the issue of a warrant within their own country;

(d) agree that when making application to the INTERPOL General Secretariat for the issue of a Red Notice, all relevant information will be sent to INTERPOL, including a copy of the relevant warrant and include in the application, the text of the laws creating the offence/s for which surrender will be sought and selecting the third option listed under extradition in part 3 of the application form and adding to that section the names of any Commonwealth country which has designated the applicant country under its law.

E X T R A D I T I O N C A S E S

Extradition: Natural Justice - Bias - Judge unpaid director and chairman of body closely linked with one of the parties - non-disclosure of connection - whether automatic disqualification of judge. (UK)

The application which is the subject matter of this case sprung from the decision of the House of Lords dated 28th November 1998, in which three out of five judges decided that General Pinochet Urgarte of Chile was not immune as ex-head of state, from extradition proceedings in the UK. One of the judges in the majority was Lord Hoffmann. After the decision, lawyers for the applicant discovered that Lord Hoffmann was an unpaid director and Chairman of Amnesty International Charity Limited (AICL), which is a charity controlled by Amnesty International (AI). The British arm of AI is Amnesty International Limited (AIL).

At the main hearing, AI had been allowed to intervene in the proceedings against the General and had been represented by counsel. The Secretary of State had signed the Authority to Proceed with the extradition proceedings following the House of Lords' decision. In conceding that Lord Hoffman was connected to AI, AI's lawyers explained that Lord Hoffman had not been consulted and had not had any other role in its interventions in the case.

The General filed a petition asking that the House of Lords' order of 25 November 1998, be set aside completely or in the alternative, that the opinion of Lord Hoffmann be declared to be of no effect, on the ground that his links with AI were such as to give the appearance of possible bias.

It was argued on behalf of Pinochet that:

- although there was no precedent on the point, the House of Lords could set aside its

own orders where they have been found to have been improperly made, since there was no other court which could do so;

- applying the test in *R v. Gough* [1993] AC 646, Lord Hoffmann's links with AICL were such that there was a real danger that he was biased in favour of AI or that they gave rise to "a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that Lord Hoffmann might have been so biased" (re the test in *Webb v. R* [1994] 181 C.L.R. 41)

On behalf of the Respondents, it was accepted that the Lords could indeed set aside their own orders in appropriate cases; but that this was not a case for such revocation. It was argued that the correct test was that laid down in *R v. Gough* and it was impossible to say here that there was real danger of bias against Pinochet. Moreover, the General having first petitioned the Home Secretary on the matter, had opted to use the office of the Home Secretary as the correct tribunal to adjudicate on the issue. He could not now call on the House of Lords to deal with the issue after it had been rejected by the Home Secretary.

➔ **Held:** Granting the application;

1. The concession by both parties that the House of Lords had jurisdiction in appropriate cases to rescind or vary an earlier order was right in principle and on authority. The House would however not re-open an appeal unless in cases where, through no fault of a party, he or she had been subjected to an unfair procedure.

2. There were two implications to the principle that a man may not be a judge in his own cause:

- (a) where he is a party who has financial or proprietary interest in the cause; and
- (b) where his conduct may give rise to a suspicion that he is not impartial.

Under the first category, the judge is automatically disqualified from sitting in the case without inquiry into the likelihood of bias. The present case fell into that category of cases. Neither AI nor AICL had any financial interests in the outcome of the case against General Pinochet, but AI had interest in securing that he was tried and convicted of crimes against humanity. The question was whether in a non-financial litigation, anything other than financial or proprietary interest in its outcome was enough to warrant

automatic disqualification. Although the authorities deal with automatic disqualification on grounds of financial interests, there was no good reason in principle to so limit it. AI, AICL and AIL are all various parts of an entity working in different areas to achieve the same goal, and a judge who is directly involved with any of them (in this case, AICL) must be automatically disqualified from a case involving one of them. This was necessary for the maintenance of the impartiality of the Judiciary. There should not be distinctions if the famous dictum was to be observed:

"it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (Hewitt, CJ, in *R v. Sussex Justices Ex Parte McCarthy* [1924] 1 KB 256, 259).

Lord Hoffmann was therefore automatically disqualified as a matter of law by reason of his directorship of AICL., a company controlled by AI which had an interest in the outcome of the case.

3. The Home Secretary had no power to set aside the House of Lords' order; therefore that alternative was not one that could be said to have existed for Pinochet to exercise a right of election. Moreover, General Pinochet did not have the time to investigate further the facts contained in the letter of AI's solicitors at the time he made his application to the home Secretary.

Order of 28 November set aside. Matter to be re-heard by a differently constituted House.

R v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex parte Pinochet Urdarte (No. 2) [1999] W.L.R. 272.

Extradition - Commonwealth countries - whether treaty required - effect of defective warrant of arrest - Specialty Rule - Authority to Proceed - Extradition (Commonwealth and Foreign Territories) Act 1985 (Trinidad and Tobago)

The United Kingdom requested the extradition of the applicant, from Trinidad and Tobago (T&T) to face charges of conspiracy to "evade prohibition on the importation of a controlled drug, namely cocaine, contrary to the laws of the UK". The Magistrate sitting at the Port of Spain Magistrate's Court, committed him to prison to await the Attorney General's warrant of surrender, to the UK.

The applicant applied to the High Court of T&T for judicial review of the Magistrate's order and an

order of *certiorari* to quash the said order. He canvassed the following points:

1. There was no treaty between T&T and the UK allowing extradition to take place between the two countries. Before extradition could take place, there must be an "arrangement" (a treaty) subsisting between the two countries which would allow extradition to happen, the absence of which rendered such extradition illegal.

2. The warrant of arrest which accompanied the request for extradition from the UK was defective in that it did not state the specific offences for which extradition was sought and the country which sought it. The warrant simply stated "offences relating to the importation of class-controlled drugs and that these offences are extraditable under section 2 of the Extradition (Commonwealth and Foreign Territories) Act 1985". This was too vague. The applicant's arrest was accordingly a nullity or at least illegal.

3. The magistrate did not have before him evidence of the applicability of the *Specialty Rule* to fugitives returned from designated Commonwealth countries, because the affidavit sworn in support of the application made reference to section 18 of the UK Extradition Act, which section deals with extradition from 'a foreign state' and not from 'a Commonwealth country' which is covered by s. 19.

4. The Authority to Proceed issued by the Attorney-General did not satisfy the requirements of the double criminality rule in that it referred to section 5(5) of the Dangerous Drugs Act of T & T, while the UK charges also contained conspiracy which is not an offence under section 5(5). Since the Magistrate's jurisdiction was founded on the Authority to Proceed, he was confined to it in deciding whether the offence specified therein satisfied the double criminality rule.

5. In conducting the committal proceedings, the magistrate wrongly considered himself as empowered to act under the Indictable offences (Preliminary Enquiry) Act as amended, which has nothing to do with extradition.

☉ **Held:** refusing the application;

1. The legislative intent of the 1985 Extradition Act of T&T was clear: whereas extradition with a foreign state requires a treaty, extradition with a declared Commonwealth country did not so require. Prior to the enactment of the 1985 Act extradition from Trinidad and Tobago to a

Commonwealth country would have been governed by the 1881 Imperial law and, unless an order declaring a Commonwealth country has been made under the 1985 Act the 1881 Act would still apply in accordance with s.24(1) of that Act.

2. The failure of the warrant to specify the laws of which country were infringed by the applicant, made the warrant defective. But the question to be asked is whether such defect was fatal to the proceedings? It is wrong to assume that the warrant for provisional arrest initiates the extradition proceeding. "It is the Authority to proceed issued by the Attorney General under section 9 (1) of the 1985 Act which initiates the proceedings. The purpose of the warrant ... is merely to secure the presence of the fugitive before the magistrate and ... it is clear ... that the issue of the Authority to proceed overreaches and destroys any illegality committed in the earlier stages of extradition". The defects in the warrant were not fatal to the committal proceedings such as to render them a nullity.

3. A magistrate has to be satisfied (a) that the offence is extraditable, and (b) that the evidence would be sufficient to warrant a trial had it been committed in T&T after which he must make a committal order, unless there are provisions in the law of the requesting country for the observance of the speciality rule. The magistrate must at some stage therefore determine what those provisions are. The observance of the speciality rule must be established as a fact and this can only be achieved by evidence. However, the failure to adduce evidence of the rule in the law of the requesting country at the committal stage can amount to no more than an irregularity which could be remedied, and does not render the committal invalid.

4. The Authority to Proceed is nothing more than a directive to the magistrate to commence committal proceedings, but does not confer jurisdiction on the magistrate or prescribe the limits thereof. It does not have to contain the equivalent local offence, and the attempt to do so in this case was gratuitous and the magistrate was right to ignore it. In relation to conspiracy, the offence in T&T is a common law offence, the main elements of which are an agreement to do an unlawful act or a lawful act by unlawful means. Since section 5(4) of the Dangerous Drugs Act (T&T) makes it an offence to traffic in dangerous drugs, an agreement to do so will constitute the common law offence of conspiracy. It did not matter that the offence in the UK is statutory and that in T&T is common law. The rule of double

criminality is satisfied if the conduct alleged could have constituted an offence in T&T had it been committed there.

5. The legal position in T&T is that the magistrate in a committal proceedings has the powers and jurisdiction as when he is at a preliminary enquiry. It followed therefore that the provisions of any law which touch and concern his powers and jurisdiction in a preliminary enquiry could be imported into the committal proceedings, with the caveat that they are not inconsistent with the Extradition Act.

George Arthur Stokes v. Beecham Maharaj, D.P.P. & The Commissioner of Prisons (Trinidad and Tobago) High Court of Justice, 20 May 1998.

Extradition: Extradition offence - Torture - Double Criminality Rule - UK Extradition Act 1989, s. 2: Immunity of former head of state - whether torture forms part of functions of former head of state - International Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment 1984 - Criminal Justice Act 1988 (UK)

Following the decision in *Ex parte Pinochet* (No. 2), the appeal was re-heard before a differently constituted Committee of the House of Lords.

The background to the present appeal briefly stated are as follows - General Pinochet, a former Head of State of the Republic of Chile, was arrested while visiting the UK for medical treatment. The arrest was made pursuant to a request for provisional arrest and extradition by the government of Spain for offences allegedly committed by the General while he was Head of State of Chile. An application for habeas corpus was filed on behalf of the General in the Divisional Court. The application was allowed and the Divisional Court quashed the warrant, holding that as a former head of state, the general was entitled to immunity from the criminal process. The Crown Prosecution Services, on behalf of the Government of Spain, appealed to the House of Lords and Amnesty International, also intervened in the proceedings. By a majority decision of three to two, the House of Lords allowed the appeal, holding that the General did not have immunity against prosecution for torture and hostage taking, the crimes for which he was charged. (That decision was reported in C.L.A.N 26 and can be found in [1998] 4 All E.R. 897)

Ex parte Pinochet Urgarte (No. 2) (above) was an appeal by Pinochet against this decision. In the present appeal, the original appellant (Spain) again argued that the General did not enjoy immunity from prosecution for the offences for which he was charged. By this time however, Spain had also particularised further charges against the General including torture, conspiracy to torture, conspiracy to murder, attempted murder and murder, said to have been committed in Spain and other countries including France as far back as 1972.

The General argued that he could not be extradited for the latter class of charges because they were not "extraditable crimes" within the meaning of section 2 of the Extradition Act of the United Kingdom.

The question of law that had to be decided by the House of Lords was whether the alleged offences were extradition crimes, and if so whether the General was entitled to immunity for trial for those crimes. If as a matter of law they are not extradition crimes, or the General was entitled to immunity in relation to whichever crimes there were, then there was no legal right to extradite him to Spain or indeed to stand in the way of his return to Chile. If on the other hand, there were extraditable crimes in respect of which Pinochet was not entitled to immunity, then it would be open to the Home Secretary to extradite him.

➤ **Held:** allowing the appeal in part; (*Lord Goff of Chieveley dissenting*)

1. Under the Extradition Act of 1989, the double criminality rule required that the relevant conduct constitute a crime under English Law at the date when the act constituting the offence was committed, not at the date that the request for extradition was made (ref. Schedule 1).
2. The charges for hostage taking in count 3 did not disclose any offence under the Taking of Hostages Act 1982 because the offence is constituted by the elements of taking and detaining a hostage in order to compel another person who is not the hostage to do a particular act. In count 3, the alleged hostages were the ones forced to do the acts complained of. The element of getting another to do something was therefore missing, thereby removing the conduct complained of, from the ambit of the offence.
3. It could be gathered from the Convention against Torture and Cruel and Inhuman or Degrading Treatment that:

- “(i) torture within the meaning of the Convention can only be committed by ‘a public official or other person acting in an official capacity,’ but these words include a head of state. A single act of official torture is torture ‘within’ the Convention;
- (ii) superior orders provide no defence;
- (iii) if the states with the most obvious jurisdiction (the Article 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction;
- (iv) there is no express provision dealing with state immunity of heads of state, ambassadors or other officials;
- (v) since Chile, Spain and the United Kingdom are all parties to the Convention, they are bound under the Treaty by its provisions whether or not such provisions would apply in the absence of treaty obligations.”

4. The issue was whether international law granted state immunity in relation to the international crime of torture, and if so, whether Chile is entitled to claim such immunity since it signed the Torture Convention and was contractually bound to give effect to its provisions. Pinochet, as a former head of state enjoys immunity *rationae materiae* in relation to acts done by him as head of state as part of his official functions as head of state. It cannot be said that the implementation of torture as defined by the Torture Convention is a state function. The Convention created a world-wide universal jurisdiction over the offence of torture. It is bizarre to say that for international law purposes, it can be an

official function to do something which international law prohibits and criminalises. Moreover, “an essential feature of the international crime of torture is that it must be committed by or with the acquiescence of a public official or other person acting in an official capacity”; as such all defendants in torture cases would be state officials. If the implementation of torture was to be treated as official business sufficient to found an immunity for the former head of state, then it must also be the same for the officials who carried out the actual torture. It would then follow that there cannot be any successful prosecution of torture unless the state concerned (Chile) waives its immunity. These “factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention”.

5. General Pinochet could not be said to have been acting in an official capacity, if as alleged, he organised and authorised torture after 8 December 1988 (when he lost his immunity), for him to be entitled to immunity *rationae materiae* because such actions were contrary to international law.

6. In the case of the murder charges and conspiracy to murder, the ordinary rules on immunity apply.

Appeal allowed in part, so as to allow extradition proceedings to proceed in respect of the charges of conspiracy to torture and the single act of torture alleged in charge 30. Home Secretary to amend order in the light of changed circumstances.

R.v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex parte Pinochet Urgate (No. 3), [1999] 2 W.L.R. 827.

M U T U A L A S S I S T A N C E C A S E S

Serious fraud - Notice to produce - application for injunction, certiorari, prohibition and declaration - whether Appeal Court can review decision of Court below. - Nature of matter - whether determined by nature of relief sought (UK)

The United States of America sought from the State of Guernsey assistance in obtaining evidence from various persons in respect of criminal proceedings against two persons. The request was accompanied by “disclosure directives” issued in

the US and signed, under threat of proceedings, by the defendants in the US case.

The Guernsey Procureur issued notices to three Guernsey companies requiring them to produce to the Procureur’s nominees various documents. The companies sought review of the decision of the Procureur to issue the notices either by way of judicial review or by prerogative writ. The Deputy Bailiff of Guernsey before whom the application was argued, held that “the validity of the Notices was not amenable to any of the remedies sought both by their nature and by reason of the absence

of any law of judicial review or of any remedy of certiorari or prohibition in the Island”.

On an application to the Court of Appeal for leave to appeal the issue before the court was whether the court had jurisdiction to review the decision made by the Procureur.

➔ Held: dismissing the application

The power of the Procureur is found in the Criminal Justice (Fraud Investigations) (Bailiwick of Guernsey) Law 1991 (the Act) which may be exercised where it appears to him on reasonable grounds that there is a suspected offence involving serious or complex fraud wherever committed and there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs of any person. The Procureur may by notice in writing require the person whose affairs are being investigated or any other person whom he has reason to believe has relevant information to attend and answer questions or otherwise furnish information or produce documents. A person may not be required to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on any banking or fiduciary business unless the person to whom the obligation is owed consents or the Procureur has authorised the requirement to make the disclosure or produce the document.

The terms of the Act make it clear that it is the intention of the legislature to override, in cases where such a Notice is given, the obligations of confidence which normally attach to banking or fiduciary business. The public good was seen by the legislature to override private rights.

Counsel for the plaintiffs argued that since the plaintiffs were using private remedies to seek to protect a private right, namely the right to confidentiality in banking matters, the application was of a civil nature and was therefore within the remit of the Appeal Court to decide. Identification of a matter as a civil or criminal matter did not depend on the nature of the remedy sought, on the nature of the right sought to be enforced, or on the particular court before which the remedy was sought; “..in English law the nature of the matter, criminal or otherwise, has to be treated as dependent on the nature of the act sought to be impugned or questioned and not on the means which the person complaining adopts to protect his private rights”. (*In Re O. (Restraint Order: Disclosure of Assets)* [1991] 2WLR 475). The nature of the statutory power conferred by the Criminal Justice (Fraud Investigations) (Bailiwick of Guernsey) Law 1991, the terms of the notices, and the background of the case in the US and the nature of the request of the US Department of Justice, all make it clear that the matter was of a criminal nature.

Section 24 of the Guernsey Appeal Law deals with appeals after conviction and sentence. In this case there had not been any conviction or sentence and therefore there could not be any appeal. The matter in respect of which leave to appeal was sought was not properly categorised as a civil matter.

Century Holdings Limited and Fepor S.A. suing on behalf of Transatlantic Air Discounters Ltd. (Liquidated) v. her Majesty's Procureur, Court of Appeal of Guernsey, (April 1997)

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