Commonwealth Legal Assistance News 41

NEWSLETTER OF THE COMMONWEALTH SECRETARIAT'S CRIMINAL LAW UNIT

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LEGISLATION

ANGUILLA

1. Criminal Justice (International Co-operation) Act 2000 (No. 14 of 2000)

Enables Anguilla to co-opérate with other countries in the investigation and prosecution of crime and implements the Vienna Convention on Narcotic Drugs and Psychotropic Substances.
The types of assistance that may be given and received include: service of documents, provision of evidence, transfer of prisoners to give evidence, search and seizure, enforcement of forfeiture orders and the seizure and detention of cash imported into Anguilla in excess of $10,000 or other sum prescribed by the Governor, and which is reasonably suspected of being the proceeds of drug trafficking or other criminal conduct.

Schedule 1 of the Act sets out the procedures to be followed in the Anguillan Courts when obtaining evidence for use overseas.

2. Proceeds of Criminal Conduct Act 2000 (No. 14 of 2000)

Provides, inter alia, for the enforcement and registration of external confiscation orders relating to criminal conduct generally, from designated countries

BRITISH VIRGIN ISLANDS

1. Financial Services (International Co-operation) Act, 2000

The Act is designed to provide assistance to foreign regulatory authorities to obtain information in respect of persons in the British Virgin Islands in relation to any regulatory functions. The Director of Financial Services is empowered to provide the necessary assistance in certain circumstances. The Director's powers include requiring the production of documents and the provision of other information with respect to any matter relevant to any inquiry to which a request relates.

CANADA

1. Mutual Legal Assistance in Criminal Matters Act 1988. Chapter M-13.6 (R.S. 1985 c.30) (As amended: S.C. 1999, c. 18, s. 97 – 128) 2000, S.C. 24

Provides for the implementation of treaties for mutual legal assistance in criminal matters. The application of the Act has been extended recently to international criminal courts and tribunals that may from time to time be designated. The recent amendments also introduced taking evidence by way of technology (video/satellite link) as a form of assistance.

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The term "Agreements" for mutual assistance in criminal matters includes multilateral instruments that contain a provision respecting legal assistance in criminal matters.

SINGAPORE

1. Mutual Assistance in Criminal Matters Act 2000

Provides for the rendering of formal and informal assistance to foreign countries in relation to criminal matters and permits the registration and enforcement of foreign confiscation orders. It also allows for applications to be made for production orders and search warrants in respect of foreign offences and permits the taking of evidence in criminal matters.

TONGA

1. Mutual Assistance in Criminal Matters Act 2000

Provides for international co-operation to be given and received by Tonga in investigations, prosecutions and related proceedings concerning serious offences against the laws of Tonga or foreign states.

2. Foreign Evidence Act 2000

Provides for the manner and form in which evidence obtained from outside Tonga may be admissible in Tonga.

EXTRADITION CASES

Extradition – interlocutory relief – power of the Court to release from Custody pending hearing – jurisdiction – preservation of subject matter of litigation – (Australia)

Pursuant to a request for T's extradition to Hungary, a Magistrate signed a warrant for T's arrest on 22 December 1998, acting under s12 (1) of the Extradition Act. T was granted bail and another Magistrate later ordered that T was eligible for surrender. T was unsuccessful in his application for review: (*Timar v Republic of Hungary* [1999] FCA 1518). T was further granted bail by the full Court on 10 November 1999: (*Timar v Republic of Hungary* [1999] FCA 1559). A further appeal against surrender was dismissed on 7 June 2000: (*Timar v Republic of Hungary* [2000] FCA 755). T was taken into custody on 7 June 2000.

On 18 January 2001, the Minister determined that T should be surrendered to Hungary, pursuant to s. 22 of the Act, and issued a warrant pursuant to s23 of the Act.

T, applied to the Court for orders pursuant to s39B of the *Judiciary Act 1903* (Cth) and for declaratory relief in respect of the exercise by the Minister for Justice and Customs (the Minister) of her powers pursuant to s22 and s23 of the *Extradition Act 1988* (Cth) ("the Act").

He specifically, asked for the following relief:

> "1. An order that the respondent validly exercise the discretion conferred on her by section 22(2) of the Extradition Act 1988 as to whether the applicant should be surrendered to the Republic of Hungary for extradition.
>
> 2. A declaration that the Warrant dated 11 January 2001 issued by the respondent purportedly under section 23 of the Extradition Act 1988 in relation to the applicant (hereinafter referred to as the Warrant) is a nullity in that the respondent failed to validly exercise her discretion as required by the provisions of section 22 of the Extradition Act 1988.
>
> 3. An order setting aside the Warrant.
>
> 4. An injunction restraining the respondent, her subordinate officers, servants and/or agents from:
>
> (a) taking or causing to be taken any action on the Warrant; and
>
> (b) taking or causing to be taken any action on any order and/or Warrant which may have been made and/or issued in pursuance of the Warrant."

The central issue in the proceedings was whether the Court had the jurisdiction and/or power to release T from custody pending the hearing and determination of the substantive proceeding.
The Minister objected to the application on the ground that the Court could only make an interim order of a kind which it also had power to make as a final order. She relied on the alleged maxim "the stream cannot rise higher than its source": per Beaumont J in *Minister for Immigration, Local Government and Ethnic Affairs v Msilanga* (1992) 34 FCR 169.

T contended that the Court had the jurisdiction to determine the application for relief in the Motion and therefore had the power to order his release.

T argued that his challenge to the warrant was in effect a challenge to the Minister's decision not to order his release. Subsequently, the Court had the jurisdiction to order his release on an interlocutory basis because *in effect* the final relief sought included T's release from custody. Moreover, the Court had the jurisdiction to preserve the subject matter of the substantive proceeding - the relevant subject matter in this proceeding being T. It was submitted that there was a real risk that if T was not released, his health would deteriorate to such an extent that he would be "a destroyed man". An order effecting T's release was said to be one which would operate to preserve the subject matter of the litigation.

➲ **Held:** dismissing the application;

1. Section 23 of the Federal Court Act gives the court power to make interlocutory orders in appropriate cases. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30, the Court said that:

> *"The general principle which informs the exercise of the power to grant interlocutory relief is that the Court may make such orders, at least against the parties to the proceeding against whom final relief might be granted, as are needed to* ***ensure the effective exercise of the jurisdiction invoked****. The Federal Court had jurisdiction to make interlocutory orders to prevent frustration of its process in the present proceeding."*

The Court has power to make interim orders within the limits of the final relief which is sought. Consequently, a court may order interlocutory relief, including release from custody, where the final relief seeks the review of a decision to hold the applicant in custody; see *Minister for Immigration, Local Government and Ethnic Affairs v Msilanga* (1992) 34 FCR 169 ("*Msilanga*") and *Betkhoshabeh v Minister for Immigration and Multicultural Affairs* [1999] FCA 470, (1999) 92 FCR 504 at [77] and [78], per Weinberg J ("*Betkhoshabeh*"). However, the present case differed from *Msilanga* and *Betkhoshabeh* in that the substantive proceeding was not one in which there was a challenge to a decision not to order T's release. The Court disagreed with the submission that *in effect* T's challenge to the warrant was a challenge to the Minister's decision not to order his release. On the contrary, the substantive proceeding concerned the legality of the warrant issued under s23 of the Act and the final relief sought was to have the Minister validly exercise the discretion given to her under s. 22(2) of the Act.

2. The Court disagreed with the proposition that it can never make interim orders of a kind which it does not have the power to make as final orders. In ensuring "the effective exercise of the jurisdiction invoked", it may be appropriate for the Court to make interim or interlocutory orders which extend beyond the final relief sought. For example, where it is necessary to provide for the protection and enforcement of rights or the preservation of the subject matter at issue, or to preserve the integrity of the Court's processes: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30 at [35], (1998) 195 CLR 1 at 33 and *Patrick Stevedores No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 31 at [1], 153 ALR 641 at 641, per Hayne J.

3. It has long been recognised that a court may take steps to preserve the subject matter of the proceedings. Most famously, in *Tait v The Queen* (1962) 108 CLR 620 ("*Tait*"), a full court of the High Court of Australia stayed the execution of a prisoner so his application for special leave to appeal could be heard.

The Court had the power to grant an order for release if it was required to preserve the subject matter of litigation, namely T. However, T had to show that the granting of an order for his release was a necessary and appropriate step to take in order to preserve the subject matter of the litigation. The evidence before the Court of T's medical condition showed that although T was clearly unwell, his life would not be at risk should he not be released from custody. There was no doubt that continued incarceration was stressful for him but he was in receipt of medical care and attention whilst in custody. The Court did not consider that his state of health was so bad that his release was necessary to secure his continued existence pending the substantive proceedings. In the absence of compelling medical evidence that T's life was at risk by continued detention, it could not be held to be an appropriate exercise of the Court's powers under s23 of the Federal Court Act.

Timar v. Minister for Justice and Customs [2001] FCA 295

EXTRADITION - request for surrender from Poland to Australia - whether making of request an exercise of executive statutory power under s 40 of *Extradition Act 1988* (Cth) - whether request need "conform" to Extradition Treaty - whether Treaty contained any stipulations with which request for surrender could comply - legal elements of the Australian offences outside scope of the crimes and offences listed in the Treaty understood in accordance with Australian law - (Australia)

Australia sought the extradition of O, from Poland. O resisted the extradition and brought this application in which he attacked, (1), the request

dated 7 July 1996 by which the first respondent ("the Attorney-General" and "the Attorney") on behalf of the Government of Australia requested the Republic of Poland to return him to Australia ("the Request"); (2), the failure of the Attorney to accede to a request made by his solicitors to withdraw the Request, and (3), a decision of the Attorney-General not to accede to a further similar request made on his behalf.

O submitted that the offences with which he was charged were outside the terms of the extradition treaty between Australia and Poland, signed on 11 January 1932. He sought a declaratory relief and consequential orders under s 39B of the *Judiciary Act 1903*.

➲ **Held**: dismissing the appeal;

1. On the issue of the lawfulness of the Request, O's submission was that

- the Request was made in exercise of a power given by s 40 of the Act and that the existence of the Treaty had the effect that the executive power of the Commonwealth was not, as it might otherwise have been, available to support the making of the Request;
- where there is, as there was here, an extradition treaty between Australia and another country, Australian law requires that any request by Australia for return of an alleged offender must "conform" to the treaty, and, in particular and in the case of a treaty based on enumerative crimes or offences, may be validly made only in respect of crimes or offences against Australian law, the legal elements of which fall within the legal elements of the crimes or offences listed in the treaty, as those crimes or offences are understood also according to Australian law; and
- the Attorney could not lawfully make the Request, having regard to the terms of the Act and of the Treaty.

In the view of the Court, only the five sections of Part IV of the Act (ss 40-44) address extradition to Australia, and of those, only s 40 touches on the making of the request for extradition. That section does not give power to make a request for the surrender of a person. Rather, it assumes that such a request may be made in the exercise of a power to be found elsewhere and requires that an exercise of that power be by or with the authority of the Attorney General - a requirement that was satisfied in the present case. The expression "a request under section 40" in these two provisions means "a request made in accordance with section 40"; that is, "a request made by or with the authority of the Attorney-General as required by section 40", not "a request made in exercise of a power given by section 40".

Unless it is displaced, it is part of the executive power of the Commonwealth to seek and accept from a foreign state the surrender of a person charged with a crime or offence against Australian law: *Barton v Commonwealth of Australia* (1974) 131 CLR 477. Far from displacing this aspect of the executive power of the Commonwealth, s 40 of the Act assumes its existence. In the absence of any other suggested statutory source of power to make the Request, s 40 is regarded as predicating a request made in the exercise of the executive power of the Commonwealth, and the Request as having in fact been made in exercise of it.

There was no scope for saying that by s 11(3) of the Act, "limitations, conditions, exceptions or qualifications" contained in the Treaty somehow affect the application of the Act so that the circumstances, in which the executive power of the Commonwealth to request extradition may be exercised, are confined. Apart from stipulating formal requirements with which a request must comply if it is to activate the requested state's Treaty obligation to surrender a person, the Treaty does not impose requirements in relation to the making of requests for extradition. In the absence of statutory constraint then, the executive power of the Commonwealth referred to in s 61 of the *Constitution* is at large so that the Attorney may lawfully request extradition of a person to answer any criminal charges in Australia where the Attorney perceives it to be in Australia's interests to make such a request. In *Barton*, the Court stated that:

> "The very conception of an invalid request is one with which we find some difficulty. We grasp readily enough the idea of an unlawful request, either by making a request which is forbidden by law or requesting an unlawful act ...."

This quote was entirely consistent with, and supportive of, the existence (and co-existence with the Act) of executive power in the Commonwealth to request the extradition of O to answer the seventeen charges against him, whether or not they fall within Article 3 of the Treaty. The Treaty does not purport to give rights to O, and, not being incorporated into Australian municipal law, it cannot do so.

2. O also sought a declaration that a request for his extradition should "be made in conformance with the treaty". But such a request could not be made in conformity or in disconformity with the Treaty, the reason being that apart from Article 9, the Treaty contains no requirements of a request for extradition. Although Article 9 sets out formal requirements with which, apparently, such a request must comply if it is to activate the other party's

Treaty undertaking, it contains no limitation as to the circumstances in which a request may be made. The Treaty contains reciprocal undertakings to surrender persons, not limitations on either country's power to request the other to do so. The Treaty is directed to the nature and extent of the undertaking by the requested country and the circumstances in which that undertaking is enlivened. Clearly, it is only in respect of "a crime or offence listed in Article 3 of the Treaty" that Poland and Australia have each undertaken to the other to surrender a convicted or alleged offender. The Request contemplated the engagement of Poland's Treaty obligation, but the issue of how to respond with such request was a question for the authorities of a requested state. Australian law does not require that in order to be lawful the Request must, in truth and as a matter of objective fact, engage a Treaty obligation of Poland to surrender a person to Australia. If it did, considerable practical difficulties would arise. For example, in the present case, Australia would be limited to making requests to which Poland, in accordance with Polish law as determined by the courts of Poland and having regard to the Polish language version of the Treaty, had undertaken to accede. It was difficult to accept that the Treaty was intended to impose on the Australian authorities the burden of correctly determining, in effect, what the Polish courts would decide, at the peril of making an invalid request, that is, a request which an Australian court would declare invalid after itself correctly determining, in effect, what the Polish courts would decide.

3. On the question of bad faith and abuse of process, courts had recently been confronted with the question of whether there was jurisdiction to grant relief in respect of an unlawful removal of a person to a country to be tried on criminal charges there.

In *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 (CA) ("*Levinge*") it was held that the Supreme Court of New South Wales had jurisdiction to prevent an abuse of its process by staying criminal proceedings where the prosecuting authorities "knowingly circumvented", or connived in the knowing circumvention of, an applicable extradition treaty. The making of such a request was simply an exercise of the executive power of the Commonwealth to which Poland would respond as it saw fit. It was impossible to say that in making and not withdrawing the request, the Attorney had knowingly circumvented, or connived in a knowing circumvention of, the Treaty. No evidence was led to show that there was bad faith on the part of the Attorney or anyone else. The Australian authorities had not misled, deliberately or otherwise, the Polish authorities or courts. There was no ground for intervention to be found in the principles recognised in *Levinge*, or subsequent cases.

4. In respect of the relationship of the Treaty, the Act and double criminality, the questions to be asked are:

- What do the Treaty and the Act provide?
- Do their provisions somehow produce the result that Australian law restricts the executive power of the Commonwealth to request O's extradition?

O had submitted that "the Treaty permitted extradition only in respect of crimes or offences listed in Article 3 thereof". However, neither the Articles referred to nor any other Articles in the Treaty support this submission. The Treaty simply contains mutual promises to deliver up. It does not contain any promise not to deliver up or not to request delivery up. The principle of double criminality is reflected in the Treaty in Article 3, but not in any way that assisted O.

> "Extradition shall be reciprocally granted for the following crimes or offences when they are punishable in accordance with the laws of both the High Contracting Parties (...):"

Accordingly, it is, relevantly, only when "fraud by a...director...of any company" is a crime or offence punishable in accordance with the laws of both Australia and Poland, that a request by one of them to the other for surrender of a person will engage the Treaty obligation of that other. But nothing in the Treaty prevents a request being made and acceded to outside the scope of the mutual obligations undertaken.

5. O sought a declaration that he had a legitimate expectation that unless he was previously advised to the contrary and given a chance to make representations, any request for his extradition would:

> "*(a) be made in conformance with the Treaty; and*
>
> *(b)* be made only in relation to a crime or offence listed in Article 3 of the Treaty."

In the Court's opinion the Attorney was not limited to making requests of these kinds. It followed that O could not have a legitimate expectation that he would be given the advice, and given the chance to make representations. Moreover, (i) the Request, like the request to a Justice to issue a warrant for arrest, represented an early step in the prosecuting process and such a step does not attract a duty to accord procedural fairness: *Clyne v Evans* (1984) 2 FCR 515; *Nguyen v Critchlow* [2000] NSWSC 1145 (Ireland AJ) at [82]; (ii) advice that a request for extradition is to be made would give fugitives an opportunity to frustrate or delay the extradition process; (iii) in many cases, the Attorney will not know a fugitive's whereabouts in the requested country and so will be unable to communicate with

him or her; (iv) the fugitive has the opportunity to make representations against his or her extradition to the authorities of the requested state.

6. O had also argued that the Attorney's decision to make the Request was invalid because it did not consider whether the charges were for crimes listed in Article 3 of the treaty. It had already been stated that the Attorney was not required to determine whether the legal elements of the three offences charged fell within the legal elements of Article 3's "fraud by...a director...of any company", in each case determined according to Australian law. The Act does not limit the Attorney's entitlement to request extradition and there was no implication to be found in the subject-matter, scope or purpose of the Act that the Attorney was required, when deciding whether to request extradition, to have regard to whether the offences charged were within a crime or offence listed in Article 3 of the Treaty, however that notion was understood: cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-42. Besides, the Attorney did refer to whether the offences charged were in respect of crimes or offences listed in Article 3, although not in the sense or the manner relied on by O.

7. O canvassed a third alternative declaration that the decision to make the Request was invalid because it was so unreasonable that no reasonable person could have made it: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. "*Wednesbury* unreasonableness" was, concerned with the exercise of a discretion and had no relevance to a case such as the present one in which the question for decision was the anterior and fundamental question, whether the lawfulness of the Request necessarily depends on the criterion mentioned. In any event, unreasonableness had not been established.

Oates v. Attorney-General for the Commonwealth of Australia [2001] FCA 84.

IMMIGRATION AND ASYLUM CASES

Immigration - Deportation for reasons of national security – deportation conducive to public good – extent of discretion of Secretary of State – standard of proof – allegation of involvement with terrorist groups – Immigration Act 1971 (UK)

R, a Pakistani national, applied for indefinite leave to remain in the United Kingdom. The Secretary of State for the Home Department refused his application on the basis that he had received confidential information that R was involved with an Islamic terrorist organization called Markaz Dawa Al Irshad (MDI). The Home Secretary decided that R's continued presence in the UK would represent a danger to national security, and that his departure would be conducive to the public good in the interest of national security because of his association with terrorist groups.

R appealed to the Special Immigration Appeals Commission. The Secretary of State was allowed to make two statements, one that was open to R and one that was only available to the Commission. The Commission found that the evidence submitted by the Secretary of State did not justify refusing R the right to stay in the United Kingdom. It said that the Secretary of State had "not established that the appellant was, is, and is likely to be a threat to national security", and his decision was not in accordance with the Law or Immigration Rules.

The Secretary of State appealed to the Court of Appeal which overturned the Commission's decision finding that it had taken too narrow a view of what could constitute a threat to national security in so far as it required that the conduct relied on by the Secretary of State be targeted at the UK or its citizens. It said that the test was not whether it had been shown "to a high degree of probability" that the individual was a danger to national security but that a global approach should be adopted "taking into account the executive's policy with regard to national security". Accordingly it allowed the appeal and remitted the matter to the Commission for re-determination applying the approach indicated in their judgment.

R appealed to the House of Lords.

➲ **Held**: dismissing the appeal;

1. The Immigration Act 1971, contemplates first a decision by the Secretary of State to make a deportation order under section 3(5) of that Act, *inter alia* in respect of a person who is not a British citizen "(b) if the Secretary of State deems his deportation to be conducive to the public good". What is "conducive to the public good" is primarily an issue for the discretion of the Secretary of State. The decision of the Secretary of State to make a deportation order is subject to appeal to the Special Immigration Appeals Commission against "any matter in relation to which he would be entitled to appeal to an adjudicator or the Appeal Tribunal

against a decision to make a deportation order, except for a deportation that is conducive to public good."

The Commission was empowered to review the Secretary of State's decision on the law and also to review his findings of fact. It was also given the power to review the question whether the discretion should have been exercised differently. Whether the discretion should have been exercised differently will normally depend on whether on the facts found, the steps taken by the Secretary of State were disproportionate to the need to protect national security.

2. As to the meaning of "national security" R contended that the interests of national security did not include matters which had no direct bearing on the United Kingdom, its people or its system of government. Relying on *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, R contended that "National security" had the same scope as "defence of the realm". He further submitted that since the Secretary of State based his decision on a recommendation of the Security Services it could only be on matters within their purview and that their function, under section 1(2) of the Security Service Act 1989, was:

> "the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means."

The court did not accept that this risk had to be the result of "a direct threat" to the United Kingdom as R argued. Nor did it accept that the interests of national security were limited to action by an individual which could be said to be "targeted at" the United Kingdom, its system of government or its people as the Commission considered. The Commission agreed that this limitation was not to be taken literally since they accepted that such targeting:

> "includes activities directed against the overthrow or destabilisation of a foreign government if that foreign government is likely to take reprisals against the United Kingdom which affect the security of the United Kingdom or of its nationals".

Their Lordships accepted as far as it goes a statement by Professor Grahl-Madsen in *The Status of Refugees in International Law* (1966):

> "A person may be said to offend against national security if he engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned or in activities which are directed against a foreign government which as a result threaten the former government with intervention of a serious nature".

It however held that these were not the only examples of action that make it in the interests of national security to deport a person. In contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. "The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the actions of others. To require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse affect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate. Whether there is such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made".

3. Their Lordships did not consider that the three categories mentioned under 15(3) of the 1971 Act, namely "national security", "the relations between the United Kingdom and any other country" or "for other reasons of a political nature", are to be kept wholly distinct even if they are expressed as alternatives. For example, reprisals by a foreign state due to action by the United Kingdom may lead to a threat to national security even though this was action such as to affect "relations between the United Kingdom and any other country" or to be "of a political nature". The relevant question is whether the deportation was conducive to the public good. The House of Lords accepted the Secretary of State's submission that the reciprocal co-operation between the United Kingdom and other states in combating international terrorism was capable of promoting the United Kingdom's national security, and that such co-operation itself was capable of fostering such

security "by, inter alia, the United Kingdom taking action against supporters within the United Kingdom of terrorism directed against other states". "There is a very large element of policy in this which is, ... primarily for the Secretary of State. This is an area where ... particularly the Secretary of State can claim that a preventative or precautionary action is justified. If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom."

National security and defence of the realm may cover the same ground though the latter is capable of a wider meaning. Even if they are the same it could be right to say that defence of the realm may justify action to prevent indirect and subsequent threats to the safety of the realm. The United Kingdom was not obliged to keep within its borders a terrorist who was taking action against some other state (or even in relation to a contested area of land claimed by another state) if that other state could realistically be seen by the Secretary of State as likely to take action against the United Kingdom and its citizens. The interests of national security should not therefore be confined in the way which the Commission accepted.

4. Counsel for R also argued that the Court of Appeal erred in rejecting the Commission's ruling that the Secretary of State had to satisfy them, "to a high civil balance of probabilities", that the deportation of a lawful resident of the United Kingdom, was made out on public good grounds because he had engaged in conduct that endangered the national security of the United Kingdom and, unless deported, was likely to continue to do so.

However, the Secretary of State, in deciding whether it was conducive to the public good that a person should be deported, was entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He could also have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in the country. In doing so he must have material on which he could reasonably conclude that there was a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him was proved, and his conclusion was justified, to a "high civil degree of probability". Establishing a degree of probability was not relevant to the reaching of a conclusion on whether there should be a deportation for the public good.

5. Although the Commission has powers of review both of fact and of the exercise of the discretion, it was bound to give due weight to the assessment and conclusions of the Secretary of State in the light of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. The Secretary of State was in the best position to judge what national security required even though his decision was open to review.

Secretary of State for the Home Department v. Rehman [2001] UKHL 47

Internet cite:www.parliament.the-stationery-office.co.uk/pa/id2001/idjudgement/jd0.../rehman-1.html

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