// Commonwealth Legal Assistance News

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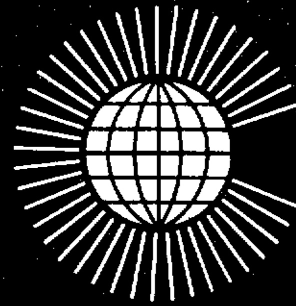

Issue 2, August 1993

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Contributions

The first issue of CLAN has attracted a number of orders for additional copies. Unfortunately there has been no response to the request for information. One of the essential elements of programmes of mutual legal assistance is the ability of officers in one country to have very ready access to information in other countries. CLAN tries to aid this process. Please help us by sending in details of your new laws, your cases, the names of officers in your Central Authorities or any other information which will help your colleagues.

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MISCELLANEOUS NEWS

Extradition Documents

Those Commonwealth countries which replied to the CCU April Questionnaire and asked for assistance with the establishment of bilateral extradition relations with non-Commonwealth countries have now received the first batch of resource material. Any other member country wishing to receive materials on the subject may either write to the CCU or, if they have not already done so, may send back their completed questionnaire.

Financial Action Task Force

The 1992-93 Annual Report of the Financial Action Task Force on Money Laundering was issued on 29 June 1993. The subjects covered by the report include the monitoring of progress of members in implementing the 40 Recommendations, a monitor of money laundering techniques and refinement of FATF recommendations and the external relations of the Task Force.

1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances - Ratification by Commonwealth Countries

The last issue of CLAN listed those Commonwealth Countries which had ratified the 1988 Convention. To that list we should have added **Malaysia** which ratified on 11 May 1993 and **Zambia** which ratified on 28 May 1993. The Editor apologises for these omissions.

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TRANSFER OF CONVICTED OFFENDERS

Article 19 of the Scheme for the Transfer of Convicted Offenders within the Commonwealth provides that any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.

Five member countries have given notice of their participation in the Scheme and provided copies of their legislation. They are:

Britain
Canada
Nigeria
Trinidad and Tobago; and
Zimbabwe

The notification for Britain states that the acceptance of the Scheme is also in respect of:

The Isle of Man

and the following territories for the international relations of which the United Kingdom is responsible:

Anguilla
Cayman Islands
Falkland Islands
Montserrat
St Helena and Dependencies
British Indian Ocean Territory
British Virgin Islands
Gibraltar
Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus

The proper channels of communication which have been notified to the Secretary General are:

BRITAIN

The Assistant Secretary
C4 Division
Home Office
50 Queen Anne's Gate
LONDON SW1H 9AT
U.K.

CANADA

Serge Boudreau
Manager, International Transfers
Correctional Services of Canada
340 Laurier Avenue
OTTAWA, ONTARIO, K1A OP9
CANADA

TRINIDAD & TOBAGO

The Minister of National Security
P.O. Box 873
Knox Street
Port-of-Spain
TRINIDAD & TOBAGO

ZIMBABWE

Minister of Justice, Legal and Parliamentary Affairs
P.O. Box 7706
CAUSEWAY
ZIMBABWE

MUTUAL ASSISTANCE REQUESTS AND THE NEED TO MAINTAIN CONFIDENTIALITY

Article 20 of the Harare Scheme on Mutual Assistance in Criminal Matters contemplates that the central authorities and the competent authorities of the requesting and the requested countries shall use their best efforts to keep confidential a request for assistance. This article is common in mutual assistance agreements of all types and is reflected in the UN Model Treaty, the Australian British and Canadian Model Treaties and most bilateral treaties.

It is obvious that the investigating or prosecuting authorities of the requesting state, particularly when their enquiries are being made early in the course of an investigation or proceeding, have a particular interest in not alerting the suspect or the accused of their interest. When the request requires the taking of compulsory measures in the requested state the law of that state will probably require, or contemplate, that certain matters be made public. For example, if the request is that evidence be taken compulsorily from witnesses in the requested state then it is likely that that evidence will be taken in open court (unless special provision is made). Similarly, requests for search and seizure will normally (if not invariably) be given effect to by way of the issue and execution of a search warrant in the requested state. Upon execution of the warrant the fact of the request will be likely to become known.

There are, however, circumstances when there is no need to alert the person being investigated. Prime examples are when requests relate to the identification or location of a person, the securing of details of the registration of a company, obtaining information available on public records, etc. The execution of requests for details such as these require, in the vast majority of cases, the taking of no measures requiring compulsion. These requests are often made at the early stage of an investigation and are designed to assist investigators and prosecutors collect vital information. If the subject of the request is alerted that questions are being asked he, she or it is given the chance to remove evidence, take action to defeat a successful investigation or even to remove himself, herself or itself from the jurisdiction. Of particular concern are cases where not only the fact that public records are being sought is released but also the identity of the inquiring agency.

The Commercial Crime Unit is aware of cases where assumed confidentiality has been breached. For example, a government agency in one member country was attempting to deal with a case of a company carrying on unauthorised business. That agency sought, through the proper channels, to ascertain details of the directors, annual returns and accounts of the company which was registered in another member country. The authorities of the requested country, in the course of answering the request, alerted the company under investigation which, in turn, advised its office in the requesting country. By the time the authorities in the requesting country had gathered sufficient evidence to deal with the offending company they were met by its employees with the words "we were wondering when you would arrive".

Nothing can be further from the intent of mutual assistance schemes than conduct which jeopardises the conduct of an investigation rather than helps it. The clear intention of mutual assistance schemes, be they voluntary like the Harare Scheme, or legally binding like treaties, is co-operation to bring criminals to justice. Underlying every request by a competent authority in one country is the implicit request that only those details which legally must be released in the requested country will be divulged by the competent authorities of the requested country. Some treaties contain provisions requiring the requested country to notify the requesting country of cases where requests cannot be executed with absolute confidentiality. These provisions operate in the special circumstances outlined in those treaties. The absence of special obligations to consult on issues of security should never, in the spirit of mutual assistance, mean that the person or entity being investigation should be alerted. If your law requires you to alert every suspect please let the requesting state know before you execute the request. It may want to withdraw the request rather than jeopardise its investigation.

EXTRADITION CASE NOTES

Extradition - Illegal Rendition - Abuse of Process - Right of court to decline jurisdiction

The appellant was a New Zealand citizen accused of committing offences in the United Kingdom. He was located in South Africa and a decision was taken by the UK police, after consulting with the Crown Prosecution Service, that extradition from South Africa would not be sought. UK police spoke with South African police about the case and subsequently the appellant was "deported" from South Africa and, following a series of events both in and out of that country, he was placed on a plane to Heathrow. Upon arrival in the UK he was arrested. The appellant alleged collusion between the police forces of the UK and South Africa and forcible return to the UK against his will.

The case came before the House of Lords upon certification of a question of law by the Divisional Court. That question was:

> "Whether in the exercise of its supervisory jurisdiction the court has power to inquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction."

Held by the Court (Lord Oliver of Aylmerton dissenting), in allowing the appeal (and remitting the case for further consideration):

per Lord Griffiths

(i) that the judiciary should be willing to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Accordingly, if it comes to the attention of the court that there has been a serious abuse of power it should express its disapproval by refusing to act upon it;

(ii) the courts should not stand idly by if police flout extradition procedures and deprive an accused of the safeguards built into the extradition process for his benefit. The courts can refuse to allow the police and prosecuting authorities to take advantage of abuse of power by regarding such behaviour as an abuse of process and thus prevent a prosecution;

(iii) where process of law is available to return an accused through extradition procedures the courts of the UK will refuse to try him if he has been forcibly brought within their jurisdiction in disregard of those procedures by a process to which police, prosecutors or other executive authorities have been knowing parties; and

(iv) if a serious question arises as to the deliberate abuse of extradition proceedings a magistrate should allow an adjournment so that an application can be made to the Divisional Court which is the proper forum in which such a decision should be taken.

per Lord Bridge of Harwich:

(i) When a person is arrested and charged with a criminal offence it is a valid ground of objection to the exercise of the court's jurisdiction to try him that the prosecuting authority secured his presence within the territorial jurisdiction of the court by forcibly abducting him from some other state in violation of international law and of the law of the state from which he was abducted;

(ii) respect for the rule of law demands that courts do not turn a blind eye to executive lawlessness beyond the territorial boundaries of the jurisdiction of the courts; and

(iii) extradition (or abduction) comprises the effective commencement of the prosecution process and where it is abduction the prosecution process rests on an illegal foundation.

R. v. Horseferry Road Magistrates Court; ex p. Bennett (House of Lords, judgment delivered 24 June 1993)

Extradition - Delay - Power of the Court to consider Delay - Attorney-General's Discretion to refuse surrender on the grounds of delay - Abuse of Process

In February 1991 the United States sought the extradition from Australia of a person against whom a Grand Jury indictment had issued in March 1987. A warrant for apprehension was issued at the same time but that warrant was not in the form required by the Australia-US Extradition Treaty and a new warrant in the required form was issued in September 1990. The fugitive was arrested in May 1991.

Held: [Noting the decision in *Republic of Argentina v Mellino* (1987) 33 ccc (3d) 334] that a court did not have the power to stay an extradition application because of delay by the country seeking extradition on the ground that the power to grant a stay for abuse of process is vested in the trial court and is therefore a matter to be dealt with at the trial in the foreign country.

The Federal Court stated, obiter, that the Attorney-General may take delay into account in determining whether to surrender a person pursuant to his discretion which is at large.

Forest v. St Leger Kelly (Special Magistrate) and the Attorney-General of the Commonwealth of Australia. Federal Court of Australia - Judgment delivered 6 February 1992.

Extradition - Delay - Extent of the Secretary of State's Discretion

In 1987 the United States requested the surrender of the applicant to serve sentences imposed on him in 1977. The applicant had been allowed by the US trial judge to leave the jurisdiction prior to serving his sentence for the purpose of settling his family. He had been unable to return to the US and had lived openly, at addresses known by US authorities. Fourteen years passed between the imposition of sentence and the signing of the Secretary of State's order.

Held: The Secretary of State has a wide discretion when considering whether or not to order the extradition of an individual and that the terms of the UK-US Extradition Treaty, which states in each material paragraph, that "extradition shall be granted ..." should not be regarded as imperative. Although the Home Secretary is under no obligation to give reasons for his decision, an explanation for the exercise of his discretion was called for and could properly be expected in this case which has unprecedented and most unusual features. A Home Secretary acting reasonably could not possibly use his discretion but to refuse the U.S. request.

R v. Secretary of State for the Home Department ex parte Sinclair [1992] Imm. A.R. 293

Extradition - Extraterritorial Offences - Drug Trafficking - Evidence of Accomplice

The United States had requested the surrender by Malaysia of a person accused of conspiracy to import heroin into the United States and of importation, as an aider and abettor, of heroin into the US. The fugitive did not enter the United States. The evidence against him was that of an alleged accomplice who arranged the shipment and was subsequently arrested in America.

Held by the High Court of Malaysia:

(i) There is necessity for corroboration in material particular implicating the accused whose accomplice evidence is given. No corroboration can be found in this case.

(ii) There is no evidence that the conspiracy offence alleged was committed by the fugitive in the United States because he could not be sufficiently linked to either the heroin found or the taped telephone calls.

(iii) The Dangerous Drugs Act of Malaysia has no extraterritorial effect and offences under it, if committed outside the jurisdiction of Malaysia are not punishable under its laws. The alleged offence is extra-territorial and is not an extradition offence under the Extradition Act 1992 (Malaysia).

Public Prosecution v. Lin Chien Pang aka "Teacher Lin" "Saenwoo Asue" [1993] 1 AMR 14

Extradition - Whether requisition for Surrender a condition precedent to arrest - Whether unlawful remand affects proceedings - Evidence to support issue of arrest warrant - Extraterritorial Offences

The United States of America presented to the Government of Singapore, under cover of third party notes, copies of warrants, indictments and complaints relating to three fugitives. The third party notes sought provisional arrest but not surrender. Three fugitives were arrested and remanded in custody. The request for surrender and supporting evidence was received by Singapore approximately one month after the arrests.

Held:

(i) (*on the question whether an early unlawful remand of the fugitives for periods in excess of that permitted by statute rendered subsequent remands unlawful*) - **that** the court, in habeas corpus proceedings, was not concerned with past illegality unless such illegality subsists and vitiates present detention. The remand orders subsisting at the return of the writs were valid and for the purpose of these proceedings the applicants were in lawful custody.

(ii) (*on the question whether a formal requisition of surrender to the Minister is a condition precedent to the issue of an arrest warrant*) - **that** s.10(1)(b) of the Extradition Act (Cap 103) permitted the issue of a warrant of apprehension to avoid any delay that may be involved in a foreign government proceeding by way of a requisition to the Minister.

(iii) (*on the question whether hearsay evidence can support an application for the issue of a warrant under s.10 of the Extradition Act*) - hearsay evidence is admissible in an application under s.10(2) of the Act because at that stage the magistrate is not required to make any finding of fact. The magistrate, in hearing an application under s.10(2), is not conducting an extradition hearing but merely initiating the process of bringing the fugitive before him for the purpose of conducting a hearing.

(iv) Section 2(2) of the Extradition Act makes it clear that a person falls within the definition of "fugitive" if he is alleged to have committed an offence within the jurisdiction of the requesting state and it is not necessary for the crime to be committed at a place within that state.

Son Kaewsa & Ors v. Superintendent of Changi Prison & Anor. [1992] 1 SLR 276 (High Court of Singapore).

Extradition - Absence of the Accused

The fugitive's surrender by the Cayman Islands had been sought by the United States. He was arrested and remanded in custody prior to his making a successful application for release on bail. In contravention of the terms and conditions of his bail the fugitive left the jurisdiction prior to the court ruling on the request.

Held: Because the respondent and his attorneys were present throughout the giving of evidence prior to his departure there was no necessity, or requirement at law, for the respondent to be present at the making of the order. The respondent's intentional removal of himself from the jurisdiction after the giving of the evidence cannot invalidate a subsequent committal on the evidence given and the making of an order is not a miscarriage of justice.

Douglas, Senior Magistrate, issued a bench warrant for apprehension and arrest and ordered that, if or when the warrant was executed, the defendant be taken into custody to await extradition to the United States.

United States v. Delisser [1990-91] Cayman Islands L.R. 11