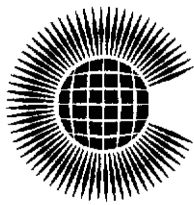

Commonwealth

Legal Assistance News 28

NEWSLETTER OF THE COMMONWEALTH SECRETARIAT'S COMMERCIAL CRIME UNIT APRIL 1999

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Council of Europe Convention on the Protection of the Environment through Criminal Law

The Council of Europe Convention on the Protection of the environment through Criminal Law opened for signature on the 4th of November 1998. Non member states of the Council may accede to the Convention after it enters into force.

The Convention's main aim is to use the criminal law to address major environmental concerns.

States parties are under an obligation to:

1. where the act causing the environmental degradation is carried out intentionally, impose criminal liability and appropriate punishment on perpetrators and accomplices;

2. where the act is done negligently, impose criminal liability, but they may at the time of ratification, opt to criminalise only offences that are committed with gross negligence;

3. impose administrative sanctions on other acts which may be treated as "lesser offences".

Acts which states parties are required to prohibit, where they cause death or threaten human, animal or plant life, include:

a. the release of substances or ionising radiation into air, soil or water; and

b. the unlawful disposal, treatment, storage, transport, export or import of hazardous wastes, nuclear material or other radioactive matter;

States parties must assume jurisdiction over offences committed within their territories, on board their flag ships or vessels and over their nationals generally. Offenders tmay be extradited or tried in the country of refuge. States parties are under an obligation to impose penalties that will reflect the serious nature of the offences prohibited, (Art.5). In addition the Convention deals the confiscation of the proceeds and instrumentalities of the conduct to be criminalised, as well as the compulsory restoration of the environment by violators. Corporate criminal liability is to be established.

A novel provision requires parties to permit environmental NGOs to participate in criminal proceedings.

A copy of the Convention could be found on the web at: http://www.coe.fr/eng/legaltxt/172e

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Extradition - Treaty compliance - Article 9 of Australia-Germany Extradition Treaty - words and phrases: "all available information" - Magistrate's powers under section 19 of Australian Extradition Act 1988 - Identification of requested person - adequate description of offences - whether earlier unsuccessful request estopped further request - Dual Criminality (Australia)

The extradition of the respondent from Australia was sought by the Federal Republic of Germany (FRG) for drugs related offences. The FRG first sought the respondent's extradition in 1991 but that application was not successful. The second application, which was the subject of the present case, was made in 1996. The warrant of arrest, issued in Koblenz in Germany, sought the arrest of George Parker, aka 'Gregory Parker' born on 1 June 1939 in Bocki, Poland. Parker has about thirteen other aliases.

The warrant stated that the respondent was 'highly suspected of seven legally independent acts between November 1990 and June 1991 in Lahnstein, Koblenz and at other places of having traded in narcotics in a not insignificant quantity without a licence pursuant to Section 3, paragraph 1 number 1 of the Narcotics Law and thus having acted conjointly as a member of a gang which has combined for the continued Commission of such acts.'

The respondent was subsequently arrested in Australia on a provisional warrant issued under the Australian Extradition Act. He applied for bail and the application was opposed by counsel for FRG who cited a previous instance when the respondent had escaped from custody in Austria while serving a nine month prison term for theft.

The 'identification documents' filed by FRG showed that the respondent had acquired Australian citizenship, had changed his name by deed poll on numerous occasions, and obtained passports on as many occasions. They also contained photographs of the respondent and his fingerprints, and furnished details of his accomplices. The summary of the case against the respondent was that he and his accomplices operated a gang and organised the transport of heroin from Thailand to Australia. They recruited couriers in Lahnstein, Koblenz and other German towns. Some of the couriers had been arrested and they led the investigtion to the respondent.

The magistrate found the respondent extraditable and so ordered. The respondent appealed to a single judge of the court (the primary judge) who found that there had not been compliance with Article 9(2)(a) of the Treaty. He reasoned that that Article required a requesting country to provide, along with the request for extradition, 'all available information'. Such information included the second and third identification documents which contained information on the identity and nationality of the respondent. The German authorities had this information at the time they made the request, but they did not submit it with the request. The primary judge therefore quashed the magistrate's order and released the respondent.

The FRG appealed to the Full Federal Court of Australia contending that the primary judge erred in holding that there was non-compliance with Article 9(2) of the Treaty. A purposive interpretation of the Article did not require that all information available to the FRG relating to the identity and nationality of the respondent should accompany the request; the documents were out of date and of dubious relevance and were therefore without use in the pursuit of the request. The respondent on the other hand argued that it was not for the FRG to select from the range of documents it possessed, the documents which were of relevance to it's case and those which were not. The FRG was bound to submit all the information that it possessed.

The respondent also raised the following questions of law for the determination of the court:

a. Whether the magistrate was entitled to infer that the respondent was the person referred to in the extradition request;

b. Whether the request contained an adequate description of each offence;

c. Whether the request was accompanied by a statement of the acts or omissions alleged in each offence;

d. Whether the unsuccessful 1991 request precluded the making of another request;

e. Whether the conduct would have constituted an extradition offence if it had been committed in Tasmania (the state where there Parker was arrested.

The relevant parts of Article 9 of the Treaty provide as follows:

"1. A request for the extradition of a person claimed shall be in writing. All documents furnished in support of a request for extradition shall be duly authenticated.

2. The request shall be accompanied by:

(a) all available information concerning the identity and nationality of the person claimed; and . . ."

Under section 19 of the Extradition Act, a magistrate is required to conduct proceedings in order to determine whether a person is eligible for surrender in relation to the extradition offence(s) for which surrender of the person is sought by the requesting country. The magistrate can however, only do so under certain conditions, one of which is that the Attorney General must have given notice of the receipt of the extradition request to the magistrate.

➲ Held: allowing the appeal

1. The decision as to whether the requesting state has furnished 'all available information' rests with the requested state. The notice to be given by the Attorney General under section 16 is discretionary; so that if he is not satisfied that the information accompanying the request is adequate, he would not exercise the discretion and may request further information. "In our view, the question that might arise under Article 9(2)(a) is one which is committed to the Attorney General, as being a matter which could affect the exercise of discretion under s.16 or s.22 of the Act. His or her determination in this regard is not one that can be reviewed by a magistrate."

2. As to the issues raised by the respondent in his Notice of Contention, the Court held as follows:

a. it was not for the magistrate to determine whether or not the respondent was the person named in the extradition request, but for the Attorney General when determining that the respondent was extraditable.

b. Article 9(3) requires that the request be accompanied by a description of each alleged offence and statement of the acts constituting the offences. The arrest warrants adequately provide these, stating seven different offences and giving information regarding their commission and the persons involved. The magistrate was therefore right to find that the request complied with the Treaty.

c. As to the fourth contention, an extradition proceeding is not a criminal trial and the dismissal of the 1991 proceeding was not equivalent to an acquittal. "The concepts of autrefois acquit and res judicata have no application" in extradition proceedings.

3. As to the issue of dual criminality, at the relevant time (August 1996), the offences alleged to have been committed by the respondent in Germany would surely have constituted offences had they been committed in Australia, since under Tasmanian law, recruiting couriers in Tasmania for the purposes of transporting heroin would constitute an offence.

Federal Republic of Germany v. George Parker, Federal Court of Australia, 2 July 1998

Extradition - Bail pending application for review of extradition order - Existence of "special circumstances" - section 21 of the Australian Extradition Act (Australia)

Section 26 of the Australian Extradition Act provides that a court may grant bail to a person who is seeking review of an extradition order on such terms and conditions as it may deem fit, provided that "there are special circumstances justifying such a course".

The appellant had filed an application for the review of an order to extradite him to the United Kingdom where he was alleged to have committed certain offences. He had migrated to Australia from the UK and lived in Perth, Western Australia with his wife and two children. Pending the hearing of the review, he applied for bail. The special circumstances he relied on in support of his application were that he had a very low risk of flight; he was the primary carer for his son the absence from whom would create an adverse impact on the boy; he had previously complied with all bail conditions; he had a very strong connection with Australia and was unlikely to jump bail; and that he needed to be out of custody in order to better pursue his application for review.

➲ Held: dismissing the application

Previous cases such as *Schoenmakers v. Director of Public Prosecutions* (1991) 30 FCR 70, *Holt v. Hogan* (1993) 117 ALR 378, and *Kainhoffer v. the Director of Public Prosecutions* (1993) 120 ALR 98 had decided what special circumstance would permit the court to exercise its discretion to grant bail. The applicant raised arguments similar to those in *Kainhoffer*, but in that case there was evidence of the serious medical condition of the child which had arisen as a result of the continued

incarceration of the parent. The circumstances outlined were thought not to amount to special circumstances and were rejected by the court. It did not therefore appear to the court that any of the listed circumstances qualify under the "high onus established by Parliament for establishing special circumstances". Except for the factor relating to child-care, all the other listed circumstances had been rejected in the other cases. In the case of the child-care factor, "the absence of primary care is, without any additional medical evidence, not of the requisite weight"

The applicant would not therefore be granted bail.

Stephen Gerard McDade v. United Kingdom & Peter Malone **Federal Court of Australia (Perth) 15 February 1999.**

Extradition - Backing of Warrants Procedures - extradition to New Zealand - sections 28 and 34(1)(a)(i) of Australian Extradition Act 1988 - Words and Phrases: "indorse" -(Australia)

An Australian police detective learned of the presence in Australia of an illegal immigrant who was wanted in New Zealand for allegedly committing 'aggravated robbery with an offensive weapon'. He made inquiries from colleagues in New Zealand and immigration authorities in Australia which confirmed this information. The New Zealand authorities subsequently issued a warrant for the arrest of the appellant and forwarded the warrant to Australia. The Australian detective was erroneously advised that he could arrest the appellant on the basis of the warrant without more which he proceeded to do. At the time of its execution, the warrant did not have a magistrate's endorsement authorising its execution in Australia as is required by section 28 of the Extradition Act. The appellant was arrested and taken before the District Court in South Australia where the judge declined jurisdiction and directed that the matter be taken before a magistrate.

The DPP later detected the defect in the warrant and arranged for its indorsement by a magistrate. The magistrate signed the Form 17 (the prescribed form) and returned it. The DPP noted that there had not been "an endorsement on the warrant" as required by section 28 and sent it back. The Magistrate then added the words "endorsed" and appended his signature.

The appellant was taken before another magistrate who was then advised of the defect in the warrant at the time of it's execution. She thereafter ordered the release of the appellant, who was immediately re-arrested upon leaving the court under the authority of the endorsed warrant. The appellant was again arraigned before the same magistrate who ordered him detained in custody pending extradition proceedings.

He appealed against the order, contending that the whole process with respect to the arrest warrant, its execution and the second arrest were flawed since the procedure prescribed by the Extradition Act was not followed. He argued that at the time of the first arrest and detention, no application had been made to a magistrate nor any affidavit supplied and that the warrant had not been endorsed. The efforts to remedy these errors were not sufficient because the purported endorsement was not made according to the procedure laid down by law.

➲ **Held**: allowing the appeal:

The Court would follow the decision in R. *v. Metropolitan Police Commissioner: Ex Parte Melia* [1957] 3 All ER 440 which held that pinning a document that contained the endorsement to a warrant did not amount to *"an indorsement as required by law"* The endorsement had to be found somewhere on the document that was the originating warrant from the requesting country. The Court also found that the word *'Indorsement'* came from the Latin *'in'* which meant *'upon'* and *'dorsum'* meaning *'a back'*. Indorsement therefore meant *'anything written or printed upon the back of a deed or writing'*: (Jowitt's Dictionary of English Law 2nd Edition).

Since in this case the endorsement was not on the warrant of arrest itself, but on a separate form, the indorsement was not done as prescribed by section 17. "Without such endorsement, the arrestee would be entitled to challenge the right of a police officer to execute a warrant of a foreign country in Australia."

The circumstances of this case demonstrate the importance of the New Zealand warrant bearing the indorsement as required by Form 17. That indorsement directs the arresting police officer as to what is to happen with the arrested person, namely that he or she should be brought before a magistrate as soon as practicable. In the present case this did not occur as there was no direction to that effect on the New Zealand warrant.

The arrest was therefore illegal. Release of the Applicant ordered.

Peter Robert Samson v. Rosanne Helen Mcinnes (Stipendiary Magistrate) & Commonwealth Director of Public Prosecutions **Federal Court of Australia, (Adelaide) 27 November 1998.**

Extradition - Role of Minister of Justice in extradition proceedings - US-Canada Extradition Treaty Article 9 - Extradition Act, sections 10&19 - Double Criminality - identification of fugitive - validity of foreign warrant - Bias...(Canada)

The United States sought the extradition of the applicant for trial in the State of Florida on five charges of conspiracy to traffic cocaine, armed robbery, attempted murder, conspiracy to commit a first degree murder and first degree murder. Following extradition proceedings in Canada (Quebec Superior Court), he was found extraditable on all charges and committed for detention pending surrender.

The Minister of Justice, in exercise of his powers under the Canadian Extradition Act and the US/ Canada Extradition Treaty, ordered his surrender to the US. The applicant then made an application in the Federal Court of Canada asking for judicial review of the Minister's decision. He also sought to be discharged from custody and released from detention.

He raised the following arguments support of the application:

1. The extradition judge had failed to submit a report to the Minister as required under subsections 10(2) and 19(b) of the Act. The Minister did not therefore have jurisdiction to surrender the fugitive.
2. The Canadian Prosecutor who represented the US at the extradition hearing was not duly mandated.
3. The Canadian prosecutor was biased.
4. There was subsequent evidence to the effect that the person who swore to the main affidavit in support of the extradition request perjured himself.
5. The crime for which the applicant's surrender was sought was not a crime in Canada under the Canadian Criminal Code.
6. The warrant of committal signed by the extradition judge was defective.
7. There was no proper evidence that the applicant was the fugitive sought.
8. The Minister was wrong in applying a liberal interpretation to the Treaty and the Act, and should have reviewed the extradition proceedings.
9. There was no valid U.S. warrant of arrest at the time of the extradition hearing.
10. The applicant's counsel had written a letter to the police which was not given to the Minister before he made his decision and which would have had a 'potent' impact on his decision had he seen it.
11. The Diplomatic Note was not handled through diplomatic channels as required by Article 9 of the Treaty.
12. The U.S. request was flawed in that it was not accompanied by a proper description of the fugitive to be extradited.
13. The Minister did not have before him clear and convincing evidence that the surrender had to be made.
14. The Minister did not produce any evidence in support of his statement that American authorities had committed themselves not to impose the death penalty on the applicant.
15. The Minister failed to carry out his duty to protect the rights of the applicant under section 7 of the Charter.
16. The Minister allowed U.S. authorities to paint a false picture and to file contradictory and perjured evidence before the Canadian courts and thus failed to protect the integrity of the Canadian judicial system".

Held: dismissing the application

The 'double criminality' requirement contained in Article 2 of the Treaty requires that extradition "shall" be granted for conduct which constitutes an offence punishable by the laws of both Contracting Parties by imprisonment for a term exceeding one year.

Double criminality and sufficiency of evidence are matters for the extradition judge, not for the Minister. Thus, the discretion of the Minister is limited. It is not for the Minister to look into the evidence filed by the requesting state at the extradition hearing with a view to determine whether or not such evidence is sufficient.

The extradition process consists of two phases: the first involves judicial proceedings when the extradition judge may issue a warrant of committal. At this stage the fugitive is afforded all procedural protection available in a court of law. The second phase is political, and the Minister simply has to exercise a discretion as to whether or not to execute a judicially approved extradition. This he does by issuing a warrant of surrender.

Schmidt v. The Queen, (Supreme Court of Canada) decided that the Minister must before issuing a warrant, first determine whether the general system for the administration of justice in the requesting country sufficiently corresponds to the Canadian concepts of justice and any "judicial intervention must be limited to cases of real substance".

The Court then proceeded to hold the following in regard to arguments raised (seriatim) by the appellant:

1. The Act requires the extradition judge to send a report of the facts of the issue together with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice and to "transmit to the Minister of Justice a certificate of the committal, with a copy of all the evidence taken before the judge not already so transmitted, and such report on the case as the judge thinks fit".

Although the extradition judge did not comply with all these statutory requirements, this was not fatal to the Minister's order of surrender. The Minister had before making his surrender decision, already seen the reasons advanced by the extradition judge as well as a record of the evidence and the warrant of committal. The mere fact that the judge did not transmit "such report on the case as the judge thinks fit was not 'a case of real substance' to warrant the setting aside of the Minister's decision to order surrender.

2. There is a long standing practice in Canada whereby agents of the Attorney General of Canada represent the requesting state in extradition proceedings. The requirement under Article 17(1) of the Treaty is that "appropriate legal officers of the state in which the extradition proceedings take place shall, by all legal means within their power, assist the requesting state before the respective judges and magistrates". They do not have to be formally retained by the government of the requesting state and it was not for the Minister to concern himself with the particulars of their appointment.

3. The requirement in extradition proceedings is that the requesting state produces sufficient evidence to mount a *prima facie* case. It does not have to provide all the evidence it has against the fugitive. In any event, any allegation of bias was an issue to have been determined by the extradition judge and not the Minister.

4. The allegation of perjury was only relevant in the context of an eventual trial in Florida. The Minister was not to assess the credibility of persons whose affidavits had been considered by the extradition judge.

5. The double criminality requirement of Article 2 is not concerned with the name of the alleged offence but with the "conduct" of the fugitive and it did not matter that the particular conduct was called "felony murder" in the United States and something else in Canada; the important element was that the conduct of the fugitive constitutes an offence punishable in both countries. Besides, the existence of double criminality was a matter to be decided by the extradition judge and not the Minister.

6. The Minister did not have the authority to review the decision of an extradition judge who has concluded that there was sufficient evidence to justify the issue of a warrant of committal.

7. There was sufficient evidence before the judge to justify to him that the applicant was the person sought by the requesting state.

8. The duties of the Minister did not include monitoring the judicial proceedings under the Act, nor the conduct of counsel for the requesting state. His business was to give a liberal interpretation to the Treaty as a binding agreement between two contracting parties. If the conditions of the agreement were met by the requesting state and the conditions under the Act had been fulfilled, the Minister was under a legal obligation and a political duty to comply and surrender the fugitive.

9. A request for extradition must by law be accompanied by a warrant of arrest issued by a judge or other judicial officer in the requesting state. However, the warrant is not an essential ingredient under the Treaty and it was not the Minister's responsibility to deal with it. "Faced with an indictment from a grand jury, the Minister could not have refused to surrender the fugitive to the requesting state merely because the second capias was not before the extradition judge".

10. The detailed reasons given by the Minister for his decisions to order surrender is evidence that he was satisfied that the superseding indictment was valid; and it was not his role to weigh the evidence which led to it. It could not be said that his failure to consider the applicant's letter, dated shortly before the surrender decision, constituted "a case of real substance".

11. The evidence showed that the extradition request was transmitted from the Embassy of the United States to the Department of External Affairs of Canada. This was what is required by Article 9 of the Treaty; which provides that "the

request for extradition shall be made through the diplomatic channel". The Article does not require that the documents relating to the request must also be sent through the diplomatic channel; therefore the fact that the accompanying documents were sent directly to the Department of Justice was irrelevant.

12. The description of the applicant in the Diplomatic Note giving his name, citizenship details, date of birth, physical description and address amounted to sufficient evidence for the purposes of the extradition proceedings.

13. There was enough evidence before the Minister compel him to fulfil his obligations under the Act and the Treaty and order the surrender.

14. The court believed the Minister when he said that he had been assured that the death penalty would not be imposed on the applicant should he be surrendered for trial in Florida. Although there was no written guarantee to the effect, there was no reason to cast doubt on the integrity of the Minister and he would not be required to file an such assurance in court, unless counsel insisted on it.

15. The Canadian Supreme Court had held that surrender of a person by way of extradition was not a violation of his rights, provided the extradition is carried out in accordance with the principles of fundamental justice. The allegations of miscarriage of justice, or denial of fundamental rights, or failure to abide by the principles of procedural fairness had already been made at the proper time throughout the several hearings and appeals thereof and rejected. There was no new compelling reasons to alter those decisions.

16. The final argument compiled all the other grounds and must suffer the same fate. It is not for the Minister to go behind the decisions of the Superior Court judges or the Appeal Courts. The unfairness of the US authorities was a matter that would come up at the substantive trial of the appellant in Florida. The important issue for Canada was that the requesting state had advanced sufficient evidence to establish a *prima facie* case for extradition.

Raymond DesFosses v. Alan Rock (Minister of Justice of Canada), Federal Court of Canada, Ottawa, 16 October 1996

Extradition - Representative Charges - Whether unjust of oppressive to extradite - (Australia)

In 1998, a warrant was issued by New Zealand for the arrest of B on charges of rape alleged to have been committed by B over a period of time, in New Zealand. B was arrested in Queensland, Australia and taken before a magistrate (the second respondent), who ruled that B should not be extradited because he "would suffer a considerable hardship" if extradited. His reason for so holding was that a considerable length of time had elapsed between the time the offences were alleged to have been committed and the time he was arrested.

New Zealand applied for a judicial review of that decision and succeeded. B then appealed to the Full Federal Court of Australia.

In order to determine the question of whether it would be 'unjust, oppressive or too severe' to extradite B, the court had to look at the nature of the charges levelled against B. In the course of arguments, the court's attention was drawn to the fact that the warrant was imprecise and the 'summary of facts' had several flaws including the description of the charges as 'representative'. Moreover, it was intimated on behalf of New Zealand that New Zealand intended to proceed on the charges as representative charges.

Held: granting the application

In as much as it appeared normal to proceed against an accused on representative charges in New Zealand, this was not the practice in Australia. In fact such a practice would violate the fundamental requirement that there should be certainty as to the offence charged. Although the legal systems in the two countries were in many ways similar, on this procedural point there was divergence, and the court could only measure injustice or oppression by using the Australian standards because the court cannot pass judgment on the judicial system of another country.

It could not be said that B would have a fair hearing if extradited to New Zealand. Extradition was therefore refused.

Bannister v. New Zealand [1999] FCA 362 (Federal Court of Australia)

The Pinochet Case

In Britain, the Home Secretary, Jack Straw, has ruled that extradition proceedings should commence against the former Chilean dictator General Augusto Pinochet. This follows the House of Lord's ruling that:

(a) the General did not have immunity from prosecution for crimes falling under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment of 1984. Britain, Spain and Chile, the three countries involved in this saga, are all signatories of this Convention; and

(b) there could be no dual criminality in respect of 28 of the 31 charges which the General faced, because those alleged offences had been committed before 29 September 1988, which is the date when extra-territorial torture became part United Kingdom law. The three remaining charges could be the subject of an authority to proceed under the Extradition Act 1989.

Detailed judgment to be reported in next issue.

MUTUAL ASSISTANCE CASES

Evidence - Evidence taken abroad - Examiner must be independent of both prosecution and defence - Evidence Ordinance (Cap 8) (Hong Kong)

L was introduced to the complainants who were businessmen based in the United States, as someone who could make arrangements for them to obtain letters of credit for the purchase of equipment abroad. The fees for his services were ten percent of the amount arranged. L represented that two American banks would issue the letters of credit. The complainants entered into the arrangement with L and L faxed them a copy of the purported letters of credit. In fact, the letters were fake and had not been issued by the said banks. However, the complainants seeing the faxed letters believed them to be genuine and paid the required fees.

L was charged with various offences including theft and obtaining property by deception. In order to prove it's case the prosecution had to obtain evidence from the United States to enable it to show that the letters of credit were false. Pursuant to a letter of request transmitted to the American Court, an order was made for the deposition to be taken by a lawyer of the Hong Kong AG's Chambers who was to be one of the examiners. The evidence was duly obtained by depositions under section 77E of the Hong Kong Evidence Ordinance. At the trial, the evidence was excluded because defence counsel had not been informed of the procedure adopted and a re-trial was ordered. Another letter of request was issued by the Registrar but it was not transmitted to the American authorities; the examiner simply asked the witnesses to re-confirm their depositions with minor alterations. Then, counsel who took the depositions also signed the re-re-re-re-amended charge sheet against L. L was tried and convicted.

On appeal, the issues for determination were:

a. whether the evidence obtained abroad was admissible;

b. whether such evidence constituted a 'deposition' within the meaning of Part viiiA of the Evidence Ordinance; and

c. whether there was a material irregularity in that counsel from the Hong Kong AG's Chambers who acted as examiner in the United States was also involved in preparing the prosecution case, gave evidence for the prosecution, and afterwards signed the re-re-re-re-amended charge sheet against the appellant.

Held: quashing the convictions;

1. Since the evidence obtained under the first letter of request had been ruled inadmissible, that letter of request had become 'dead' and therefore the letter of request that was of relevance was the second letter of request pursuant to which the depositions in question were taken.

2. The second depositions were not depositions within the meaning of the Evidence Ordinance since they were not taken 'pursuant to a letter of request' as is required under section 77F(1). The letter of request had not even been communicated to the American authorities. The second depositions were therefore inadmissible.

3. (per incuriam) It was inappropriate that a person who accepted appointment as examiner abroad for the purposes of obtaining evidence for use in criminal proceedings, should be involved in the case for the prosecution (or for that matter the defence).

Liu Sung Wai v. HKSAR (Hong Kong Court of Final Appeal) [1998] 4 HKC p.644

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