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### Law Enforcement Initiative to Combat Mail Fraud: US – NIGERIA

International Law Enforcement Reporter, Vol.14, Issue 12, December 1998 p.507

In an effort to curb the proliferation of mail fraud flowing from Nigeria into the United States, the governments of Nigeria and the United States have implemented an initiative to intercept fraud mails emanating from Nigeria. Under the initiative US postal inspectors inspect mail from Nigeria in order to pick out fraudulent letters, in a bid to avoid them getting to their addressees who may otherwise be defrauded.

The initiative stems from a growing number of complaints from people who were either defrauded or received mail fraud letters. Under the mail fraud scheme, better known in Nigeria as a "419" (a name stemming from the decree No. 419 which was passed by the Nigerian government to deal with that type of fraud), the perpetrators would write to the target using very official looking stationery and requesting financial information such as bank account numbers. They would then offer to transfer millions of American dollars into the bank account, claiming that the money had been stolen or fraudulently obtained from the Nigerian Government, through oil deals or procurement contracts. The letters would then state that the perpetrator needs a bank account to use as a conduit to get the money out from Nigeria. The target is usually promised a percentage of the amount to be transferred. If he/she accepts the offer, he/she is then required to pay the perpetrator a large amount of dollars, but small in relation to the amount he/she is promised if the deal falls through. This payment is said to be for legal fees, personal expenses and bribes, necessary to effect the transaction. In cases where the target falls into the trap and pays the money, the perpetrator then simply disappears without trace and the money with him/her.

The fraud scheme became so rampant that the US postal services received more than 25,000 complaints a year. Since the agreement came into force 2.3 million "fraud letters" have been intercepted in the US. The agreement is an example of the proactive law enforcement required to combat transnational crime.

### Home Thoughts From Abroad

Stephen O'Doherty, New Law Journal, 4 December 1998, p. 1802

"The police anxiety to bring back fugitives, should not outweigh the need to abide by the requirements of the judicial system. Failure to adhere to these principles means that proceedings might be stayed." These are the concluding words of a very interesting article written by Stephen O'Doherty, Assistant Chief Crown Prosecutor, London.

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The author in this article usefully brings together the cases involving a bypassing of the extradition system. He ranges from Mackeson through Driver and Bennett and on to Westfallen, Soper and Nangle and explains in a very readable way the various decisions of the courts on the exercise of criminal jurisdiction in cases where the defendant comes before the court from another country by way of circumstances involving neither extradition nor informed and voluntary presence. The article draws a distinction between police action which may amount to disguised extradition and those which result in luring the accused to voluntarily enter a country. It looks at the Thai case of *Liangsirprasert v. US Government* in which the Privy Council held that there was no abuse of power because the accused had voluntarily entered Hong

Kong in order to collect his illicit from a drug deal, even though he was led to Hong Kong by an undercover agent in order for him to be extradited from there instead of from Thailand with whom the US had no extradition treaty.

### New Citations

*United States v. Montgomery* reported in 26 CLAN is now reported at [1999]1 All ER 84

*R. v. Governor of Brixton Prison; ex parte Coughi* reported in 25 CLAN is now reported as *Re Coughi* in [1999] 1 All ER 466

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

### **Extradition – proceedings in France for extradition – application for relief relating to alleged misleading conduct by the DPP in connection with those proceedings – whether submission of allegedly misleading affidavit to the French court is an abuse of process**

Australian warrants were issued alleging contravention of the Corporations Law by the applicant and proceedings were commenced for his extradition to Australia from France. The applicant sought orders that the Commonwealth DPP Prosecutions take steps to correct statements made in connection with the extradition proceedings which are alleged to have been misleading and to have constituted an abuse of process such as would attract the intervention of the Court.

Australia's request for extradition was accompanied by an affidavit of law and an affidavit of facts. The deponent of the affidavit of law was a legal officer employed in the Sydney office of the DPP. The affidavit of law sets out relevant provisions of the Corporations Law. After referring to relevant sections of the law, the affidavit went on to say:

13. *In the present case the relevant corporation, Fay Richwhite Futures Australia Limited, was a company incorporated in New South Wales, and was accordingly a local corporation. All relevant acts took place in New South Wales. It follows that the conduct alleged against [the applicant] falls within the scope of the Corporations Law of New South Wales.*

That statement, was apparently incorrect in so far as it referred to FR Futures as the relevant corpora-

tion. The applicant was not an employee of FR Futures. It may be arguable that he was an officer of FR Futures although that has not been alleged.

On the hearing of an application for extradition before the French Court, the persons present are the judges, lawyers for the accused and representatives of the French authorities. There is no formal representation of the foreign state, in this case Australia. The applicant was present at the hearing and was represented by a very experienced advocate before the French Court. At the hearing, he opposed the request for extradition on the basis of issues which his lawyer contended would be available to him by way of defence to the charges.

In response to a request from France, a supplementary affidavit was sworn contained, material on the limitation period and information of the acts alleged in relation to each charge and details of relevant statutory provisions. When the extradition request came before the French Court there were present the three judges constituting the Court, a lawyer appearing for the French authorities, the applicant and his lawyer and various court officials. The applicant's lawyer argued that extradition should not be granted and referred to the case of an accomplice who was charged with the same offences as the applicant and that, given that those charges were not successful against her, they could also not be maintained against the applicant for the same reasons. The applicant's lawyer then went on to say that those facts were not made clear in the documents which were submitted to the French authorities

The lawyer for the French authorities argued that the documents as provided by the Australian

authorities showed a clear case for extradition and that all the necessary requirements were present.

➔ **Held:** dismissing the application

It is apparent that, on the hearing of the extradition application before the French Court, the applicant is entitled to be represented by legal advisors. He has been and will be given ample opportunity to be heard and to make such submissions as he is advised in opposition to the extradition application. There is no likelihood of procedural unfairness in relation to the hearing of the application and that if, as alleged, the material furnished by means of the supplementary affidavit is misleading or incomplete, the applicant has had and will have ample opportunity to correct any misleading impression which it may have created.

It is against that background that this Court is called upon to consider the relief sought.

The function and purpose of an affidavit of law in support of an extradition application is to inform the foreign court of the general principles of law in force in Australia both under statute and under the common law. It would not be incumbent upon any deponent, in performing that function or with that purpose in mind, to refer to specific decisions which have no binding authority, particularly if the view is reasonably tenable that such decisions are wrong. If the statements of general principle contained in the original affidavit of law and in the supplementary affidavit are correct, there is no reason why the existence of an inconsistent decision, albeit based on identical facts, need be drawn to the attention of the foreign court.

The applicant has been afforded the opportunity to place before the French Court full particulars concerning the prosecution of the co-accused and the outcome of that prosecution, including the reasons for that outcome. Further, it would be open to the applicant to adduce expert evidence of Australian law contradicting the statements of general principle made in the affidavit of law.

The failure to state in the supplementary affidavit that certain of the warrants are duplicitous, assuming that to be correct contrary to the DPP's contentions, does not render the supplementary affidavit misleading. In any event, it has been possible and will be possible for the applicant to inform the French Court of his contentions as to the duplicitous nature of the warrants thereby enabling the French Court to form its own judgment on that question, if it be relevant to the question of extradition.

The applicant contended that the concept of

"abuse of process" should not be confined to cases where the prosecution has misused the process of a court. Reliance was placed on *Regina v Horseferry Road Magistrates Court; Ex parte Bennett* [1994] 1 AC 42

Some analogy can be drawn between the circumstances of *Bennett's Case* and the circumstances which are alleged in the present case. If an accused person were extradited to Australia for the purposes of prosecution as a result, for example, of fraudulent deception of the extraditing State, that might well be a reason why an Australian court would not permit the prosecution to proceed.

Lord Griffiths observed that if a practice developed in which the police or prosecuting authorities of one country ignored extradition procedures and secured the return of an accused person by a mere request to police colleagues in another, the extradition procedures would be flouted, thereby depriving the accused of the safeguard built in to the extradition process for his or her benefit. If a requesting country, in purported pursuance of the extradition procedures, in effect bypassed them by engaging in, say, fraudulent deception, the consequences could be the same.

One point of distinction, however, between the present case and *Bennett's Case* is that in *Bennett's Case* the accused person was already within the jurisdiction of the United Kingdom. If the applicant had been extradited to Australia in circumstances where there had been a fraud on the extradition process, the appropriate relief would be a stay of the prosecution. However, in the present case, he has sought the Court's intervention at an earlier point, namely where there is alleged to be a threatened abuse of or fraud on the extradition process. The question is whether, in those circumstances, it would be appropriate to intervene by restraining the abusive or fraudulent conduct before the damage is done by the extradition of an accused person.

If bad faith were established, an Australian Court may well intervene in relation to the prosecution in Australia, for the reasons outlined by the House of Lords in *Bennett's Case*. That intervention, however, would normally be by way of stay of the prosecution proceedings. That in itself, may, as a practical matter, have an effect on the extradition proceedings. If the fact of such an order were communicated to the French Court, for example, that may result in dismissal of the application for extradition. In an appropriate case an Australian court may order a stay subject to conditions designed to ensure that the DPP takes steps to

rectify any conduct which was a fraud on or abuse of the extradition process. For example, the stay might be subject to a provision that if the conduct were rectified, the stay would be lifted.

The applicant has alleged bad faith on the part of the deponent of the supplementary affidavit of law. I am not persuaded that the deponent has been shown to be lacking in good faith in relation to the application to the French Court. While some criticism might be directed at the deponent in relation to the matters complained of they do not give rise to an inference of bad faith. They may demonstrate possible errors of judgment as to what should or should not have been provided to the French authorities conducting the extradition application before the French Court. Ultimately, however, there is no risk that there has been an abuse of or fraud on the extradition process such as would justify intervention by this Court.

In support of the contention that the Court should intervene at this stage, An analogy was drawn with search warrant cases. There is a real distinction between the search warrant cases and the present circumstances. The decision to extradite is the equivalent, if the analogy ran, of the decision to issue a search warrant. An application for a search warrant is made *ex parte* without any notice to the person affected by the search warrant. However, the extradition proceedings in France are not conducted *ex parte*. They are conducted only after notice to the accused person and no order will be made until after the accused person has had the opportunity of being heard and advancing such matters as he or she is advised in opposition to the order for extradition.

So long as an accused person is given ample opportunity by a foreign court to be heard and to refute any contentions advanced or statements made in support of extradition, the decision on extradition should be a matter for the foreign court. It would not be appropriate for an Australian Court to intervene in a foreign extradition process. It would not be appropriate for this Court to intervene to supervise the material submitted on behalf of an Australian prosecuting authority to a foreign court. Thus, this Court should not supervise the DPP in the contentions which might be advanced and the evidence which might be adduced in support of the extradition application to the French Court.

*Robert Anthony Bou-Simon V Attorney-General of The Commonwealth of Australia & Anor* 8 September 1998  
Federal Court of Australia

**Extradition – whether dismissal of the foreign country’s application for review and confirmation of the Magistrate’s order releasing the fugitive raised an estoppel or res judicata barring extradition – whether abuse of process – Extradition Act 1988 (Australia)**

The applicant, who was the subject of a proceeding for his extradition to South Africa in respect of certain alleged extradition offences, applied for a permanent stay of those proceeding, claiming the benefit of an issue estoppel or res judicata, or that the proceeding involves an abuse of process.

South Africa requested the extradition of the applicant and a magistrate held that evidence rendered by the Republic failed to satisfy the “sufficient evidence” test, which was required to be satisfied by virtue of the Extradition (Republic of South Africa) Regulations as they then stood. As a result, the magistrate determined that the applicant was not eligible for surrender to South Africa and ordered that the applicant be released.

South Africa sought a review of the magistrate’s. Before the matter could be heard there was significant amendment of the Extradition (Republic of South Africa) Regulations, with the result the burden on the Republic to satisfy the “sufficient evidence” test was eliminated. South Africa made a further request (“the second request”) for the extradition of the applicant, and a notice was issued under s 16 of the Act ( the Australian equivalent of an authority to proceed) issued in relation to the second request.

Following the issue of the second notice the applicant was again arrested He then made an application in which he sought an injunction to restrain the launching of a fresh extradition proceeding.

➔ **Held:** dismissing the application

Courts have held repeatedly that the failure of one application for extradition raises no bar to the making of another. Wide though the principle of double jeopardy it does not deny that proposition. The conventional view is that a determination that a person is not eligible for surrender relates only to the circumstances prevailing at the time the determination is made and does not preclude a subsequent determination that the person is so eligible.”

Moreover, no question of abuse of process arises. As expressly pointed out in *Wiest v DPP* [1988] 23 FCR 472 at 486-7 and 527-8, a determination that a person is not eligible for surrender does not finally decide that issue and a fresh application can be

brought. In *re Rees* [1986] AC 937 also provides an answer to the applicant's argument, which asserts that the renewed attempt to secure his extradition, involving a second s 19 hearing, is an abuse of process. The course adopted was an appropriate one. In my opinion, the applicant's case falls at the first hurdle; the circumstances do not enable me to find anything in the nature of an abuse of process.

Even if there were merit in the applicant's complaint concerning abuse of process, he would be confronted by a further hurdle. His application is not for judicial review of the decision of the Attorney-General to issue the second notice but for a stay of the proceeding before the magistrate under s 19 of the Act. The Act confers on the court no express power so to control this proceeding. Once the Attorney-General's notice has been given and the terms of s 19(1) have been fulfilled, the Act requires that "the magistrate shall conduct proceedings to determine whether the person [the subject of the application for extradition] is eligible for surrender ... ." Nothing in the Act suggests that the magistrate is entitled to go outside that question to the anterior question whether the Attorney-General's notice should have been issued, or whether the foreign state's requisition should have been rejected as involving an abuse. The authority of a magistrate to conduct proceedings under s 19 depends on the matters specified in sub-s (1). Lacking any power to review those decisions, a s 19 magistrate must proceed on the footing that the order and the notice, if not invalid *ex facie*, were validly made. Just as that language is incompatible with an implied power in the magistrate to determine the proceedings under s 19 as an abuse of process it is incompatible with the Supreme Court, in the exercise of its inherent jurisdiction, determining that the proceedings are an abuse of process. The powers granted to the Supreme Court (or the Federal Court if the application is made to it) are limited to confirming the magistrate's order or quashing it and (in the latter case) directing the magistrate to make an order under s 19(9) or (10) as may be appropriate: s 21(2). The Court is limited, when conducting its review, to the material that was before the magistrate. These narrowly confined provisions lend no support to the contention that it was intended that the Supreme Court's jurisdiction under the Extradition Act to review a magistrate's determination should co-exist with its inherent jurisdiction to terminate the proceedings before the magistrate as an abuse of process.

*Dutton v Republic of South Africa* Federal Court of Australia, 7 January 1999

**Extradition – second request for surrender following failure of first proceeding due to procedural irregularity – exercise of the discretion of issue an authority to proceed – issues to be taken into account in issuing authority to proceed – Extradition Act 1989 (UK) as applied in the Cayman Islands – European Convention on Extradition (Dependent Territories) Order 1996 (Note: for the earlier extradition case see CLAN Issue 21, p. 4)**

Switzerland made the second request for the surrender of the fugitive for offences relating to bankruptcy and included in its request additional evidence which had been seized from the fugitive's home by Caymanian Police pursuant to a Swiss request for mutual assistance. The Governor issued his authority to proceed and the fugitive sought leave to obtain judicial review of the Governor's issue of the authority. The significant grounds of the application were:

- a) the Swiss Government was not entitled to make a second request having failed in the first;
- b) the Governor had not taken into account the improper conduct of Switzerland in delaying its second application until a change in the law no longer required it to produce a *prima facie* case in support of its request; and
- c) The Governor ought no to have issue the authority because to surrender the fugitive would have been unjust or oppressive;

➔ **Held:** dismissing the application

The Swiss Government was not precluded from making a second request for extradition although the Governor may take into account the likelihood of success of such an application in determining whether it issue and authority to proceed. The action of the Swiss Government were not dishonest and the new evidence submitted in support of the applications was not unlawfully obtained by Switzerland but rather the Cayman Police has unlawfully implemented a Swiss request for assistance. The probitive value of the evidence for the Cayman Courts was not affected and it was for the Swiss Court, if the fugitive was surrendered, to determine whether that evidence was admissible.

It is in the interests of justice that the Governor consider at an early stage matters which might ultimately lead him to refuse to extradite a person on the ground that it would be "unjust or oppressive" to surrender him. At this stage there is no evidence that this would be the case but if the applicant wishes to make further representations he can do so at committal or upon subsequent application for habeas corpus.

The decision of the Governor to issue his authority was not so irrational that no reasonable person applying his mind to the question could have arrived at the same decision.

*Kruger v. Governor* 1997 Cayman Islands Law Reports 73

**Extradition – Grant of bail during extradition proceedings – powers of the High court on review of decision to refuse bail – applications for bail when fugitive remanded for surrender – Extradition Act 1992 (Malaysia)**

Australia sought the extradition of the fugitive who was arrested in February 1998 and remanded in custody until the scheduled hearing of the case in November 1998. The fugitive applied for bail twice in the sessions court and was refused and once in the High Court where again his application was unsuccessful. He made a second application to the High Court citing various grounds relating to:

- a. the length of time he was to remain in custody pending determination of the case;
- b. the effect of delay in the extradition proceedings on the total time likely to be spent in custody if he was convicted of the offence in Australia;
- c. the effect of his custody on his wife's business; and
- d. the effect of his custody on his own business opportunities.

➔ **Held:** dismissing the application

Although the Extradition Act contains no specific provisions on bail it incorporates by reference the Criminal Procedure Code (CPC) provided the provisions of that law are not inconsistent with the extradition law. The provisions of the CPC on bailable and non-bailable offences are therefore relevant. There can be renewed applications for bail in the High Court provided that the consideration of the court on the reapplication touch on a material change of circumstances which were not considered in the earlier application.

It would be presumptuous for the court in Malaysia to speculate on what might be the sentence handed down by an Australian court and hence ground b. failed. As the matter was soon to be heard, ground a. failed. In respect of grounds c and d, the court had to take into account the nature of the offences alleged in the extradition request. It must view the arguments advanced in favour of granting bail in the broader context and consider the likelihood of the applicant absconding. Given his previous conviction of offences under the Malaysian Passports Act 1966 and that he is charged with passport offences in Australia, the view that he is likely to abscond is justifiable.

The High Court, when considering whether or not to grant bail, should not delve into the sufficiency or admissibility of evidence and the law as to whether offences had been made out for the purpose of extradition. That is a matter for the court seized of the extradition proceedings.

*Michael Lee @ Weng Onn Lee v. Public Prosecutor* [1999]  
1 Malaysian Law Journal 171

**Extradition – whether Minister acted in accordance with the requirements of natural justice and procedural fairness – whether procedural fairness required a further opportunity for respondent to respond to factual matters in issue.**

*Background*

In 1995 Mr Foster was being prosecuted in Australia. He was given bail which allowed him to travel to the United Kingdom. Whilst in the United Kingdom he was prosecuted by the United Kingdom authorities for false trading offences and was sentenced to a term of imprisonment. In August 1996 Mr Foster was allowed out of gaol in the United Kingdom for a seven day period. He did not return to prison at the end of that time and his leave was revoked by a senior prison officer. The offences for which the UK seeks his occurred at about that time.. Mr Foster asserts that he was not seeking unlawfully to escape from the authorities but was absent because of an undercover role he had undertaken to assist the police to uncover corrupt prison officers associated with an "Asian mafia".

In October 1996 Mr Foster travelled to Australia using a false passport and a false name. He claims that he was provided with a false passport by the Derbyshire Constabulary, an allegation which the Constabulary deny. Mr Foster was arrested at Darwin airport by Australian and he eventually pleaded guilty to the Australian Corporations Law charges and was sentenced to imprisonment. He was due to be released from gaol on or about 15 April 1997 when his custodial sentences for the Australian offences would come to an end. In April 1997 he was arrested pursuant to a provisional warrant issued in respect of six offences in the United Kingdom of which Mr Foster was accused by the United Kingdom Serious Fraud Office.

A notice under s 16(1) of the Act signed by the Attorney-General enabled the United Kingdom's extradition request to be heard by a Magistrate. The extradition hearing before a Magistrate was set down for 1 December 1997. Mr Foster failed to appear. On this occasion he had absconded. The

hearing continued in his absence. Mr Foster was arrested on 7 February 1998 in Melbourne, and a Stipendiary Magistrate found him eligible for surrender to the United Kingdom in relation to five of the six extradition offences. Mr Foster's application to the Supreme Court for review of the Magistrate's order was dismissed.

Foster's solicitor made detailed submissions to the Attorney-General concerning the exercise of the Attorney's discretion to order surrender. The submission gave detailed reasons why Mr Foster believed he would be at grave risk of physical danger (including possible torture at the hands of criminals) in the requesting country if he were surrendered. Submissions were made as to the triviality of the offence, as to the lack of good faith on the part of the Serious Fraud office in seeking his extradition, and as to other sufficient causes why Mr Foster should not be surrendered.

The submission made on behalf of Foster argued that it would be unjust or oppressive or too severe a punishment for Mr Foster to be surrendered. It also asked that the solicitors be given the opportunity to respond to any submissions and/or assertions of fact which might be made to you by any relevant authority regarding our client's request that you decline surrender.

That submission was acknowledged on behalf of the Attorney-General by officers of his Department. Further extensive submissions were forwarded by the solicitor and others. Officers of the Attorney-General's Department prepared for the consideration of the Minister a summary of the events known or alleged since 1995, and to that summary annexed a paper which summarised and reviewed in detail Mr Foster's submissions and his assertions. The paper summarised evidence provided by Mr Foster and where relevant summarised the response of the UK authorities to the allegations. The paper also contained comments and the departmental assessment of the merits of the submissions. The entire documentation itself was separately forwarded to the Attorney-General's Office.

➔ **Held:** allowing the appeal

It does not follow that because not every document received by way of submission or annexure was placed before the Minister that the Minister did not take into account relevant considerations. The summary, which was before the Minister, adequately and fairly covered the substance of the material submitted by or on behalf of Mr Foster. The relevant considerations for and against each of the matters urged by Mr Foster were set out in this summary. The evidence does not disclose any basis for a finding that the Minister

failed to take into account relevant considerations.

It was contended that Mr Foster was denied natural justice because the decision was based on evidence of his character. This submission cannot be accepted. The Minister's decision was conditioned upon there being a determination under s 19 of the Act by a Magistrate that Mr Foster was a person eligible for surrender in relation to specified extradition offences. That condition has been fulfilled. In exercising the discretion the Minister had to be satisfied as to the matters raised in the relevant provisions of the Act and Regulations. To the extent that those matters were not admittedly established, there was ample evidence to support a finding of satisfaction on the part of the Minister.

Insofar as the Minister's decision rejects Mr Foster's submissions that the extradition offences were trivial, and that the request for extradition was not made bona fide, any elements of suspicion or speculation in the totality of the evidence arise only by giving weight to the assertions of Mr Foster. If those assertions are put aside, that is, given no weight, the balance of the information is not merely speculation and matters of suspicion. The weight that is to be given to matters to be taken into account is for the decision-maker. The Minister was entitled to give weight to the version propounded by the United Kingdom authorities, and not to give weight to Mr Foster's version. It is not the function of a court on judicial review to substitute its own decision by re-exercising the discretion afresh:

It is questionable whether procedural fairness required that any further opportunity be given to Mr Foster to make submissions. Whether that be so or not, a further opportunity was given to address important matters of fact where the Attorney-General's Department had gathered information inconsistent with Mr Foster's submissions. In our opinion the submission that Mr Foster was not given adequate opportunity to be heard or to place material before the decision-maker should be rejected.

*Attorney-General v Foster* Federal Court of Australia, February 1999

## INTERESTING WEB SITES

All Australian statutes, subordinate legislation and judicial decisions can be found on the web site maintained by the Attorney-General's Department. Its address is <http://scaleplus.law.gov.au>  
Decisions of the House of Lords can be found on <http://www.parliament.the-stationery-office.co.uk>



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