



Commonwealth Legal Assistance News

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Extradition – Whether government action amounted to deportation or disguised extradition – Constitutional duty of sending state in cases where the offence charged carries the death penalty – legal efficacy of consent to deportation or extradition – (South Africa)

M was suspected by authorities in the United States to be involved in the bombings of the American Embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania) on 7 August 1998. M was a national of Tanzania and was alleged to have been directly involved in the bombing of the embassy there.

On 16 August 1998, M went to South Africa where he applied for asylum using an assumed name and a false passport. Subsequently, he obtained employment in Cape Town on a temporary residence permit that had to be renewed periodically pending the decision on his application for asylum. In the meantime, however, M had been indicted by a grand jury in the United States and on 17 December 1998 a warrant for his arrest was issued on charges of "murder, murder conspiracy [and] attack on US facility". Interpol, also put out an international "wanted" notice for M with photographs and description. On 30 August 1999 an FBI agent identified M while searching through the asylum-seekers records in Cape Town with the permission of the Chief Immigration Officer, Department of Home Affairs, Cape Town, Mr Christo Terblanche ("Terblanche"). These records contained both fingerprints and photographs of applicants for asylum and the agent was able to make the identification despite the pseudonym M used. Terblanche then sent the Directorate Alien Control, Department of Home Affairs Head Office in Pretoria a copy of the warrant for M's arrest as well as copies of an associated letter to Interpol and the FBI "wanted" poster. Terblanche also requested that M be declared a prohibited person as a matter of urgency and not be allowed to leave the country.

When M called at the refugee receiving office in Cape Town on 5 October 1999 for the extension of his temporary residence permit, he was arrested in the presence of Terblanche, an FBI agent and an immigration officer. According to Terblanche, he warned M of his rights to remain silent and to obtain legal representation, and M indicated that he did not want any legal representation. M disputed this allegation. M was then taken to a holding facility at Cape Town International Airport, where he was questioned by three officers. Two of them, including Terblanche subsequently deposed in

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affidavits that M had been given a choice as to whether he should be removed from South Africa to Tanzania or the United States and had expressed a clear and reasoned preference for the latter. However, their statement did not record this point.

M was then handed over to members of the FBI. He was interrogated by them over a period of two days, during which he made a lengthy statement. M was consequently flown to the US by special plane.

In New York, the next day, M appeared in court and was informed for the first time by the trial judge that he faced the death penalty on a number of charges. M applied unsuccessfully to the High Court at the Cape of Good Hope for declaratory and mandatory relief against the government of South Africa contending that his arrest, detention, and removal by FBI agents to the United States constituted a disguised extradition in breach of the law. He argues that the South African authorities had breached the provisions of the Aliens Control Act ("the Act") and the regulations published thereunder. Moreover, M's constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment had been infringed. He then sought leave to appeal to the Constitutional Court.

The issues to be determined by the Constitutional Court were identified to be *inter alia*:

- (i) The validity of the deportation of M;
- (ii) Deportation or extradition involving the possibility of capital punishment;
- (iii) The legal efficacy of consent to deportation or extradition.

▷ **Held:** allowing the application;

The validity of the deportation

In principle there is a clear distinction between extradition and deportation. Extradition involves basically three elements: acts of sovereignty on the part of two states; a request by one state to another state for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial or sentence in the territory of the requesting state. Deportation is essentially a unilateral act of the deporting state in order to get rid of an undesired alien. The purpose of deportation is achieved when such alien leaves the deporting state's territory; the destination of the deportee is irrelevant to the purpose of deportation. One of the important distinguishing features between extradition and deportation is therefore the purpose of the state delivery act in

question. Where deportation and extradition coincide in effect, difficulties can arise in practice in determining the true purpose and nature of the act of delivery.

In Britain and the rest of the Commonwealth the universally accepted view has long been that surrender may not be granted in the absence of a treaty obligation and statutory warrant; at the very least there must be statutory warrant.

In South Africa, the state's power to deport, undesirable aliens, is derived from the Aliens Control Act. Regulation 23 (promulgated under the Act) empowers the state to determine the destination of a deportation. It provides that:

Any person to be removed from the Republic under the Act, shall —

- (a) if he or she is the holder of a passport issued by any other country or territory, be removed to that country or territory; or
- (b) if he or she is not the holder of such a passport —
 - (i) be removed to the country or territory of which he or she is a citizen or national; or
 - (ii) if he or she is stateless, be removed to the country or territory where he or she has a right of domicile."

The word "shall", which introduces the provisions of paragraphs (a) and (b) dealing with what is to be done with a person who "is to be removed from the Republic under the Act", is clearly mandatory in form and there is nothing in the context to indicate the contrary. Once a decision has been made to deport a person, the state has no discretion but to remove the person to the destination as prescribed in paragraphs (a) and (b).

It is common cause on the facts of this case that if the destination of deportation is to be determined exclusively by the provisions of regulation 23, the United States is not a destination permitted by the regulation. It follows that in the present case the South African authorities were not empowered to deport M to the United States.

Deportation or extradition and the death penalty

Counsel for M contended that the South African state, under section 7(2) of the Constitution, was under an obligation to ensure that M's right to human dignity, right to life and right not to be treated or punished in a cruel, inhuman or degrading way were protected. This duty included an obligation not only to refrain from imposing cruel and degrading treatment, but also forbids it knowingly to participate, directly or indirectly, in

any way in imposing or facilitating the imposition of such punishment. Therefore, even if it were permissible to deport M to a destination to which he had consented and even if he had given his informed consent to such removal, the government would have been under a duty to secure an undertaking from the United States authorities that a sentence of death would not be imposed on him, before permitting his removal to that country.

Deportation is usually a unilateral act while extradition is consensual and different procedures apply for both cases especially where the legality of the expulsion is challenged. The distinction however, was irrelevant in the circumstances of the present case. The procedure followed in removing M to the United States of America was unlawful whether it was characterised as a deportation or an extradition. Moreover, an obligation on the South African government to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country cannot depend on whether the removal is by extradition or deportation. That obligation depends on the facts of the particular case and the provisions of the Constitution, not on the provisions of the empowering legislation or extradition treaty under which the "deportation" or "extradition" is carried out.

The circumstances under which M entered South Africa were such that the authorities were justified in wanting to deport him. However, it was the events following M's arrest that raised problems. It should have been apparent to the South African authorities at the time they made the arrangements with the FBI to remove him to America, that M would face the death penalty once he was sent to the US. The South African authorities could have asked for assurances from the American authorities that the death penalty would not be imposed should he be found guilty of the charges against him. The Court took note of the fact that such assurance had been obtained by Germany in the extradition of a co-suspect, Salim, in the said bombings.

Counsel for the government argued that while a request for assurances would be necessary in the context of extradition, such a requirement is not applicable in deportation cases. In support, he relied on a series of Canadian cases, the most recent being *Halm v Canada (Minister of Employment and Immigration)* (T.D.) [1996] 1 FC 547 and on the judgment of the Court of Appeal of England and Wales in *Soblen* [1962] 3 All ER

641. These decisions are not directly relevant to the question that has to be decided in the present case, which depends upon the values and provisions of the Constitution. *Soblen's* case was decided before the implementation in Britain of the European Convention on Human Rights. At that time there were no constitutional or treaty constraints which curtailed the powers of the executive. The only question was whether the removal of the applicant complied with the requirements for deportations under English law. The Court held that it did. That decision is of little assistance in deciding what the South African Constitution required the government to do in the present case.

The Canadian cases were all decided before the recent Supreme Court of Canada decision in *Minister of Justice v. Burns and Rafey*, 2001, Supreme Court of Canada, unreported. In that case, the Court concluded that because of developments since their last consideration of the issue, extradition in capital cases without assurances was unconstitutional in the absence of exceptional circumstances. The deportation issue would likely have to be reconsidered in light of that decision.

But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, the Constitution of South Africa sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under it, these rights are not qualified by other principles of justice. Where the removal of a person to another country is effected by the state in circumstances that threaten the life or human dignity of such person, there are Constitutional implications for the state. There can be no doubt that the removal of M to the United States of America posed such a threat. South African law considers a sentence of death to be cruel, inhuman and degrading punishment and inconsistent with the values and provisions of the Constitution: *S. v. Makwanyane and Another* 1995 (3) SA 391.

The fact that the government claimed to have deported and not to have extradited M was of no relevance. European courts draw no distinction between deportation and extradition in the application of Article 3 of the European Convention on Human Rights. Nor does Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of which South Africa is a signatory

and which it ratified on 10 December 1998. It makes no distinction between expulsion, return or extradition of a person to another state to face an unacceptable form of punishment. All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. It is the same standard that is demanded by the Constitution from the government in circumstances such as those that existed in the present case. M's removal to the United States could not have been effected without the cooperation of the South African immigration authorities, which was given knowing that he would be put on trial in the United States to face capital charges. That he should be arrested and put on trial was clearly a significant and possibly the predominant motive that determined the course that was followed. Otherwise, why instruct the officials at the border to prevent him from leaving South Africa? And why cooperate in the process of sending him to the United States, a country with which he had no connection? They must also have known that there was a real risk that he would be convicted, and that unless an assurance to the contrary were obtained, he would be sentenced to death. In doing so they infringed M's rights under the Constitution and acted contrary to their obligations to uphold and promote the rights entrenched in the Bill of Rights.

Consent to deportation or extradition

The South African government contended that irrespective of whether M's removal was characterized as deportation or disguised extradition, he had consented to be removed to the United States. However, the Court was skeptical as to whether a person in M's position could validly consent to being removed to a country in order to face a criminal charge where his life was in jeopardy. Besides, for such a consent to be enforceable, it had to be fully informed with the applicant being aware of the extent and nature of the rights he was waiving through such consent. It was the view of the Court that authorities ought not to be encouraged to obtain consents of such a nature. M should have been made aware that that he could not lawfully be delivered to the United States without an undertaking as a condition to such delivery that if convicted the death sentence would not be imposed on him or, if imposed, would not be carried out. Clearly this duty on the part of the South African government was important to M and, inevitably, any consent given by him in ignorance of that duty and of the literally vital protection it afforded him, was

inchoate. This duty was to remain until it was shown that the unqualified consent by M to be taken to New York, there to be put on trial for his life, was given at a time when he knew and understood his right to demand of the South African authorities that they perform their duty to uphold the Constitution.

The onus to prove such waiver was on the government. The immigration officers alleged that M freely chose to go to New York in the custody of the FBI agents. M denied this. Even if the court as it decided, assumed in favour of the government that its factual version of the consent has been sufficiently established, the government's position would remain the same. Firstly, none of its deponents even suggest that M was aware of his crucial right to demand this protection against exposure to the death penalty, or that they themselves ever considered this feature, let alone contemplated informing M about it. On the contrary, the impression created by their affidavits is that they were content to let M go to New York once he had made the election to do so. Secondly, there is the profoundly disturbing circumstance that, on the government's own showing, M was at no time afforded the benefit of consulting a lawyer despite the fact that he was in a very serious predicament. It follows that the election Mohamed allegedly made there and then to accompany the FBI agent to the United States must have been to some extent influenced by his being cut off from legal advice. Although there was no finding that there was an infringement of the constitutional right to consult a lawyer, the circumstances supported the finding that there was a material impairment of M's ability validly to waive any of his rights.

The Court accordingly concluded that it had not been established that any agreement which M might have expressed to his being delivered to the United States constituted a valid consent on which the government could place any reliance. The Court therefore rejected its contention in this regard and declared unlawful, M's handing over to the United States government agents for removal by them to the United States.

The Court expressed the following view obiter:

"South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the state lead by example...

The legitimacy of the constitutional order is undermined rather than reinforced when the state

acts unlawfully. Here South African government agents acted inconsistently with the Constitution in handing over M without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice. They also acted inconsistently with statute in unduly accelerating deportation and then despatching Mohamed to a country to which they were not authorised to send him."

Mohamed and Another v. President of South Africa and Six Others CCT 17/01 Unreported of 28 May 2001

Extradition – Order banning broadcast or publication of matters likely to form part of evidence at proceedings – likelihood of bias of jury at trial – (Canada)

E, a German citizen, lived in Yellowknife in the Northwest Territories, Canada. He was arrested in May 2000 pursuant to a provisional arrest warrant. The warrant was issued under the Canadian Extradition Act, following a request for his extradition by the Federal Republic of Germany. He was alleged to have been involved with a German terrorist organisation and was charged with the following offences under the laws of Germany :

- a) being a member of an association whose aim and activities are directed toward committing criminal acts and causing public danger;
- b) jointly causing an explosion using explosives in Berlin, thereby endangering property;
- c) jointly attempting to cause an explosion using explosives in order to endanger property.

At the first appearance, the Attorney General of Canada applied for a publication ban in relation to any future bail hearing, under section 517 of the Criminal Code. E was placed in custody. He later appeared for the bail hearing and the request for a publication ban was repeated. The Canadian Broadcasting Corporation (CBC) appeared as an intervener, and opposed the ban. The ban was applied in respect of the bail hearing. E was subsequently released on bail.

In June 2000, E was charged with two offences under the Canadian Immigration Act 1985 of:

- a) unlawfully entering Canada by reason of fraudulent or improper means or

- b) misrepresentation of material facts;
- b) unlawfully and knowingly aiding another person to enter Canada by fraudulent or improper means or misrepresentation of material facts.

Three other people were also charged along with E. There was a great deal of media interest in E's case, which resulted in much information relating to the allegations in Germany being disseminated. There was also evidence of widespread public knowledge in Yellowknife of the case.

Prior to the extradition hearing, E brought an application to have a publication ban imposed with respect to the extradition hearing.

While section 28 of the Extradition Act allowed for the issuance of a ban in extradition hearings, it was conceded that there were no grounds to support a ban under the specific provisions of that section in this case. Therefore, counsel for E relied on the Court's powers at Common Law to issue the ban. It was contended that E's concern was not about a fair trial in Germany were he to be extradited but rather his right to fair hearing before a Yellowknife jury on the pending Immigration Act charges. Counsel argued that there was a connection between the Immigration Act charges and the extradition matters since inevitably the Crown would allege that E's motivation for going to Canada was to avoid detection and apprehension in Germany. The allegations of terrorist activity were so inflammatory as to prejudice his right to a fair trial on the Canadian charges. Extensive publicity of the extradition matters posed a substantial risk to the impartiality of any jury in the subsequent trial.

The requesting country, represented by the Attorney General of Canada, did not take any position on the application.

The Intervenor, CBC, invoked the fundamental right of freedom of the press and the public policy favouring complete openness of court proceedings. It also argued that there was not a sufficient basis for the position that the evidence to be submitted at the extradition hearing would be in any way material to the Immigration Act charges. They argued that the concern was, at best, speculative.

▷ Held:

1. The leading case on the common law discretionary power to order a publication ban is *Re Dagenais et al and Canadian Broadcasting Corp. et al* (1994) 94 C.C.C. (3d) 289 (S.C.C.). This case dealt with the interplay of freedom of the press and an individual's right to fair trial. The test

hinges on whether there is a real and substantial risk that a fair trial would be jeopardized if publication was not restrained. The right to fair trial is a principle of natural justice guaranteed by the Canadian Charter of Rights and Freedoms. But the fairness of the trial is an interest that goes beyond merely the accused in a criminal case. The prosecution, the accused and society as a whole, have an interest in trial fairness. Freedom of the press on the other hand is a fundamental feature of democratic society, constitutionally protected by the Charter. It can only be restricted in the clearest of circumstances. Concomitant with this freedom is the concept of open justice. The right to privacy is also of relevance here. E must be presumed innocent of the immigration charges until he is proven guilty, so also the other persons charged with him. In respect of the extradition charges, E is presumed innocent even if he is extradited to Germany. The Supreme Court in *A-G of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, pointed out that an accused person has an interest in maintaining his or her privacy. These were all matters to be taken into account in the balancing of constitutional interests.

2. A publication ban should only be ordered when:

- (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

per Lamer, J. in *Vickery v. Nova Scotia Supreme Court* (Probationary) [1991] 1 S.C.R. 671.

Within this framework, the Court must consider (a) the objective of the proposed publication ban (including whether there is a real and substantial risk to which the objective is directed); (b) the necessity of the ban (whether reasonable alternatives are available); and (c) whether the salutary effects of imposing the ban outweigh the deleterious impact of the ban.

3. In respect of the objective of the ban, the intention is to diminish the risk that the trial might be rendered unfair by adverse pre-trial publicity. Therefore one must ask the question how real and substantial is the risk in this specific case? Although it was not for the court to say what evidence might be led at the trial on the immigration charges, if it outlined the allegations regarding the terrorist activities, it would amount to bad character evidence. The general rule is that

such evidence is inadmissible unless its probative value outweighs its potential prejudicial effect: *R. v. Arp* [1998] 3S.C.R. 339. Such evidence could undermine the presumption of innocence and other legal protections since it could plant the desire in the juror, consciously or unconsciously, to punish the accused for those other bad acts and his bad character generally. The juror might be led to think that the accused person had a propensity to commit crimes, and thereby distract his/her attention from the real issues in the case before the Court.

The Court was of the opinion that it did not make sense to allow extensive pre-trial publicity of matters that may be ruled inadmissible and highly prejudicial at the eventual trial on the Immigration Act charges. The risk to fairness of the trial was a real and substantial one.

4. On the question of the necessity of the ban, the Court considered whether reasonable alternative measures were available so as to obviate the need for a publication ban. *Re Dagenais* listed the following alternative measures: a) adjourning the trial, b) changing its venue, c) sequestering jurors, d) allowing challenges for cause and *voir dire*s during jury selection, and e) providing strong judicial direction to the jury. Due to the length of time until the trial was scheduled to start, the tendency of the media to refresh the public's mind just before a sensational trial, the relatively small population of Yellowknife and other factors, these alternatives could not be said to be viable options to offset the real and substantial risk to the fairness of the Immigration Act trial.

5. The deleterious effect of the proposed publication ban was the restriction on the freedom of the press to fully report on a court process. However, that restriction was tempered in this instance, by the nature of the extradition hearing itself, at which the extradition judge is not expected to come to a decision regarding guilt or innocence or the truth of the allegations. Thus, the potential prejudice of publishing mere allegations was greater than the deleterious effect of restricting publication of what were merely allegations. Also the effect could be further restricted in this case, by limiting the ban temporally. The salutary benefits of a publication ban are 1) protecting the fairness of the trial, b) preserving E's privacy from the dissemination of mere allegations and c) avoiding delays in the Immigration Act trial. On the whole a balance was struck between the salutary and deleterious effects of a publication ban as requested by E.

Thus a publication ban was imposed in relation to the extradition hearing.

Federal Republic of Germany v. Walter Lothar Ebke and Canadian Broadcasting Corporation (as Intervenor) [2000] NWTSC 69 (unreported).

Extradition – Australia to New Zealand – whether warrant purported to be issued by a judge of New Zealand – whether extradition unjust, oppressive or too severe a punishment – Jurisdiction – application under s 39B Judiciary Act 1903 – ability of Court to make declarations as to proper construction of Extradition Act 1988 – Whether review under s 35 Extradition Act 1988 – constitutes a rehearing de novo - (Australia)

On 23 June 1999 an Australian magistrate in New South Wales endorsed a New Zealand warrant for the arrest of H, under s 28 of the *Extradition Act 1988* (Cth) (“the Act”), thus authorizing the execution of the warrant in Australia by any police officer. The applicant was arrested on the endorsed warrant. Subsequently, H was ordered to be surrendered to New Zealand pursuant to section 34(1)(c) of the Act. H applied to the Federal Court seeking the quashing of the endorsement under section 39B of the Judiciary Act 1903 and review under s 35 of the Act of the order of the magistrate made under s 34(1)(c) of the Act.

○ Held: dismissing the application and confirming surrender;

Jurisdiction

Section 39B of the Judiciary Act does not expressly authorise the Court to make an order quashing an endorsement made under s 28 of the Act. However, the Court has jurisdiction under s 39B(1A) of the Judiciary Act “in any matter ... arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter”. This jurisdiction extends to the making of declarations as to the proper construction of the Act (*Bertran v Vanstone* (FC) [1999] FCA 1117).

A New Zealand Warrant

H challenged the s 28 endorsement on the warrant on the basis that, the warrant was not a “New Zealand warrant” within the meaning of the Act as it was not “a warrant that purports to be

issued by a court, a judge, a magistrate or an officer of a court, of New Zealand” (s 5 of the Act).

The question is whether the warrant on which the magistrate made an endorsement under s 28 of the Act was a warrant that professed “to be issued by a ... a judge ... of New Zealand, being a warrant for the arrest of a person accused ... of an offence against the law of New Zealand”. Clearly, the warrant on the face of it appeared to have been issued by a judge, namely J Cadenhead, District Court Judge. However, the words “New Zealand” did not appear on it. However, the terms of the warrant indicated that it was issued “at Auckland”. Although it might be correct, as indicated by H, that there are other places in the world named Auckland, it was the Court’s view that they were places of minor significance. The Court was satisfied that the warrant professed or claimed to have been issued in Auckland by a District Court Judge. The failure of the warrant expressly to state that it was a New Zealand warrant was presumably explicable on the basis that it was in the usual form of a warrant for domestic use in New Zealand. The provisions of Part III of the Act are intended to facilitate the ready movement of fugitives between Australia and New Zealand with limited formality. For this reason, it seemed unlikely that the legislature intended that an unduly formal approach should be taken in respect of proof that a warrant was a “New Zealand warrant”.

Nature of the right of Review under section 35 of the Act

As the right to apply to the Court for a review of the magistrate’s order is a remedy given by the Act, the nature of that right must ultimately depend on the terms of the Act (*Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273-274).

The terms of s 35(6)(d) suggest that the rehearing before the Court is a rehearing as at the date of the review of the magistrate’s order. That is, the Court is required to determine for itself the rights of the parties as disclosed by the evidence before it, having regard to the law as at the date of the review: *Kenneally v New Zealand*. See also *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616.

The powers of the Court are not exercisable in the proceedings for review only where error by the magistrate can be demonstrated; rather the Court is to determine itself what order is appropriate to be made regardless of whether error by the magistrate is demonstrated (*Allesch v Maunz* [2000] HCA 40 at para 23). Even in a case in

which New Zealand applied to the Court for a review of the order of the magistrate, on a hearing de novo in this strict sense, the person whose surrender to New Zealand is sought would have to start again and seek to satisfy the Court of the matters specified in s 34(2) of the Act.

The discretion given to the Court by s 35(6)(d) to "have regard to evidence in addition to or in substitution for the evidence that was before the magistrate" suggests against the review hearing being a hearing de novo in the strict sense. It is appropriate, for an application for review to identify the grounds upon which the applicant says that the order of the magistrate should be quashed and, in the absence of special circumstances, for the consideration of the Court to be limited to those grounds.

Unjust, oppressive or too severe a punishment to surrender the person to New Zealand

H had claimed that the "magistrate erred in finding that she was not satisfied that there were substantial grounds for believing that there was an extradition objection in relation to the offence". H submitted that he was unfit to travel to New Zealand and as a result, it would be unjust and oppressive to surrender him. Moreover, it was oppressive for the requesting country to have proceeded three times with the execution of the extradition warrants involving the same matter, abandoning the venture twice and now attempting to proceed on a faulty warrant

Section 34(2) of the Act requires the magistrate to be satisfied that it would not be "unjust, oppressive or too severe a punishment to surrender [him] to New Zealand". The dissenting judgment in *New Zealand v Venkataya*, considered the meaning of the words "unjust" and "oppressive" as used in s 34(2) of the Act. Sackville J said:

"The words 'unjust' and 'oppressive', as used in s 34(2) of the 1988 Act, are directed at two concepts that address rather different issues,

although they overlap to some extent. As stated by Olsson J in *Perry v Lean* (at 537):

'The former primarily (but not exclusively) concerns itself with the risk of prejudice to the accused in relation to the conduct of a proposed trial. The latter is more related to hardship to an accused resulting from changes in his or her circumstances that have occurred during the period to be taken into consideration. However there is room for overlapping and between them the two concepts cover all cases where to return the accused would, in the whole of the circumstances, simply not be fair.'

The evidence concerning his health was carefully considered at his bail application: (*Heslehurst v Government of New Zealand* [2000] FCA 937). (reported in CLAN 35) Although, the Court was satisfied that H was in seriously poor health, it was not convinced that his health was such that it would be oppressive to surrender him to New Zealand.

On the issue of the numerous previous arrests, the court was not satisfied that H had suffered hardship by reason of having been arrested more than once on an endorsed warrant in respect of the same accusations. It would therefore not be oppressive to surrender him to New Zealand. Nor would it be unjust or too severe a punishment to do so.

Heslehurst v Government of New Zealand [2000] FCA 1311

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