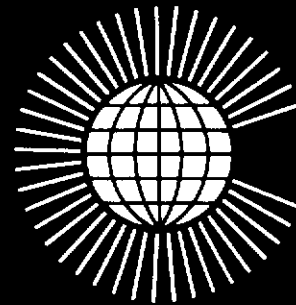


Commonwealth Legal Assistance News



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ARTICLES

EXTRADITION

Recent Decisions of the French Conseil d'Etat - by Roger Errera, [1996] Public Law. Winter, page 708

This article considers the relationship in French extradition law between constitutional principles, treaties and statute law and seeks to highlight the link between the Conseil d'Etat's judicial decisions and its advisory opinions.

The French Constitution provides that ratified treaties take precedence over statute. The 1927 extradition statute provides that extradition may not be granted for political offences or when the request is politically motivated. Where extradition was granted pursuant to a treaty which placed no bar on extradition where the request had a political aim, the fugitive could not invoke the protection provided in the 1927 statute.

The French Council of State has the duty to review extradition orders to ensure they are in conformity with the European Convention on Human Rights and to check whether the individual will receive fair treatment in the requesting state.

Against the background of domestic and international extradition law, in 1994 and in 1995, the Prime Minister asked the Conseil d'Etat to give its opinion on two issues:

(1) Is the French statutory prohibition of the extradition of nationals a constitutional principle?

(2) Is the rule according to which extradition may not be granted if the offence has a political character a constitutional principle?

The Conseil d'Etat advised that:

(1) the statutory prohibition on the extradition of nationals is not a constitutional principle.

(2) the refusal of extradition where the offence has a political character was a fundamental principle recognised by the laws of the Republic. "The twin rules, which make an exception for political offences and bar extradition where there is a political aim, had parallel and almost identical status" which it was "impossible to disassociate".

Separation of Powers - USA Extradition Statute - Injunction against US Government by Jacques Semmelman - [1996] 90 American Journal of International Law 102.

In an interesting article the author examines the decision in *Lobue v. Christopher* 893 F. Supp. 65 (see article in CLAN, issue 10) which determined that the US extradition law (USCA s.3184) was invalid because it breached the doctrine of separation of powers.

In a reasoned argument Mr Semmelman puts the view that the premise that the legality of an extradition pursuant to a treaty is a determination constitutionally committed to the judicial branch is wrong. He argues that just as the Executive is not bound to indict following a magistrate's finding that there is probable cause to hold a defendant for indictment does not violate the separation of powers doctrine, so the Executive is not bound to extradite. The fact that the Executive only has the opportunity to "review" cases unfavourable to the fugitive is given as a clear indication that the Executive is not "reviewing" the magistrate's decision - it is merely exercising its discretion not to surrender the accused notwithstanding legal certification.

That the author's views have been vindicated can be seen from the decision reported later in this issue in the *Lo Duca* case where the court determined that in "hearing" an extradition case the magistrate was not performing judicial functions.

(Note: the report of the Australian case *Grollo v. Palmer*, Crimewatch Issue 16 also deals with the separation of powers and the performance by members of the judiciary of "non-judicial" functions).

EXTRADITION CASE NOTES

Extradition - whether document produced was a duly authenticated warrant or copy warrant - words and phrases "accused" - Extradition Act 1988 (Australia)

The Republic of Austria requested the surrender of Maria Kainhofer, "for prosecution in Austria in respect of a number of misappropriation and malversion offences under the Austrian Penal Code."

Initially the magistrate committed the fugitive to prison to await a surrender determination by the Attorney-General. This decision was confirmed on first appeal but quashed on appeal to the full Federal Court which directed the magistrate to order her release. The Full Court held that the magistrate's order could not properly have been made unless the magistrate was satisfied, in accordance with s.19(2)(a) and 3(a) of the Act, that the supporting documents furnished by the Republic of Austria provided for the arrest of the respondent as a person "accused" of the offences to which the warrant referred. The case went on appeal to the High Court of Australia the issue for determination being whether the documents submitted in support of the request included a duly authenticated warrant issued for the arrest of the fugitive as an accused person.

Held:

The Full Court of the Federal Court fell into error in determining the appeal on the ground that the magistrate could not properly have been satisfied that the supporting documents included a duly authenticated warrant for the arrest of the respondent which disclosed that she was a person "accused" of the offences in the warrant.

Obiter: In considering whether a person is an extraditable person under the Act it is necessary to bear in mind the statutory object of enabling Australia to carry out its obligations under extradition treaties with countries that adopt a variety of criminal procedures different from those of Australia.

Per Gummow J.

In the common law the term "accused" is not a legal term of art. It may be used in purely domestic legislation to encompass terms such as charge, indict, impeach, arraign and incriminate as well as to refer to the laying of an information in a private prosecution. The need to construe extradition legislation in a fashion apt to accommodate criminal procedure of extradition countries which operate in a different fashion to that generally applicable in common law jurisdictions has long been recognised. Nineteenth century authorities have dealt with the issue whether in the extradition country it was necessary for a warrant for arrest to have been issued and whether proceedings had been instituted against the person whose extradition was sought.

The Act applies to the Republic of Austria subject to the Treaty. The extradition treaty between Australia and Austria provides that "the parties agree to extradite to each other ... any persons who are wanted for prosecution..." The term "accused" in the definition of "extraditable person" is, in the case of Austria, to be read accordingly provided there is in force or issued by the requesting country (Austria) a warrant for the arrest of the person.

One would expect a clear indication in the statutory text if, by reference to "accusation", Australia was to give greater recognition to the criminal processes of other countries than that which it could ever seek itself. On the other hand the proposition that there must be an authorised public accusation of equivalent effect to what in common law systems would be treated as an indictment or the laying of an information cannot be accepted. A reasonable cosmopolitan interpretation must be given and the difference between the denomination or categorisation of procedures should not be given too great a weight. The fundamental question is whether the person is one in respect of whom there has been taken by the competent authorities of the extradition country a decision to invoke the operation of the criminal law by taking whatever steps are necessary to initiate what might fairly be described as a prosecution.

In this case Austria has asked for arrest and surrender for prosecution. The warrant which accompanied the request stated that the fugitive should be taken into custody on strong suspicion of having attempted to commit various offences. It also notes that she had been arrested, committed to custody and subsequently conditionally released, that the conditions of release had been breached and that she was charged with offences. It also refers to impending punishment. These references colour the meaning to be given to the term "suspected". A fair reading of these materials indicates that the respondent is wanted for prosecution on charges. It follows that within the meaning of the Act the respondent is a person in respect of whom there is in force a warrant for arrest in relation to offences against the law of Austria which she is accused of having committed.

(The court also considered at length the proper interpretation of the Act insofar as it relates to the jurisdiction and competence of the magistrate hearing the matter to determine the question whether a person is an extraditable person and the reviewability of decisions made under the Act by the Attorney-General and the courts.)

Director of Public Prosecutions (Cth) and Another v Kainhofer. 132 Australian Law Reports (ALR) 483 (30 November 1995)

Extradition - re-extradition to third country - simplified procedure inappropriate - different offences charged in third country

The applicant had been extradited to the UK from France and convicted of false accounting. Following service of the sentence imposed the Secretary of State ordered his surrender to the United States of America. He applied for an order of certiorari to quash a decision of the Secretary of State to deliver him up to the USA. In the alternative he sought an order requiring the consent of France to his extradition to the USA and the issue of a writ of habeas corpus. Prior to these applications he had sought judicial review of the decision to surrender him to the USA on the ground that his extradition from France had not authorised his re-extradition. Subsequently he signed a waiver under the UK Extradition Act 1989, Sch 1, para. 9. He later made clear in correspondence that he considered that the Secretary of State was not absolved from obtaining the consent of the French authorities to his re-extradition.

Held, allowing the application for judicial review and remitting the case:

The Secretary of State had a continuing obligation to seek the consent of the party who had surrendered the fugitive and the simplified procedure was inappropriate.

R v Secretary of State for the Home Department, ex p. Ali Akbar (U.K. QBD) (Unreported) July 31, 1996

Extradition - Hong Kong - fair trial - transfer of sovereignty to People's Republic of China

L applied for judicial review of a decision of the Secretary of State, under the Extradition Act 1989 (UK). L claimed that:

- (i) on the question of a delay of 13 years, the Secretary of State had erred by taking into account the seriousness of the offence;
- (ii) because he could not have been extradited from Germany, his arrest in the UK was an infringement of his right to freedom of movement under Article 48 of the Treaty of Rome 1957; and
- (iii) the Secretary of State had fettered the exercise of his discretion to order surrender by adherence to a political collective cabinet decision, that L would still receive a fair trial and a humane sentence after the transfer of sovereignty to the People's Republic of China.

Held:

- (i) that the Secretary of State had exercised his discretion fairly and properly in considering the question of delay;
- (ii) that it would be contrary to public policy to allow Art. 48 to override the extradition procedure; and
- (iii) on the question of transfer of sovereignty of Hong Kong, it was clear that the issue was justiciable. In considering himself bound by a collective cabinet decision that, under the Joint Declaration Treaty 1984, protection for L's legal rights would be in place and effective, the Secretary of State had not properly directed himself on his responsibilities to ensure that L received a fair trial and appropriate and humane sentence.

R v Secretary of State for the Home Department, ex p. Launder, (U.K., QBD) (Unreported) August 6, 1996 (For earlier report on this case see CLAN Issue 8)

Extradition - murder - allegation of Mafia killing - whether Italian prosecution in good faith - lapse of time not indicative of unjust or oppressive conduct - hearsay evidence irrelevant to question of unjust or oppressive conduct

G, an Italian citizen resident in the UK since 1991, applied for habeas corpus under the terms of the Extradition Act 1989 (UK) following his arrest at the request of the Italian Government. He was the subject of allegations made by an Italian police informant, implicating him in a murder committed in Sicily in 1988. The original Italian arrest warrant, charged premeditated murder, possessing a rifle in a public place, possession of a rifle without a licence and firing four shots without a licence. The application for the issue of the writ was made on grounds relating to the passage of time and the accusations not being made in good faith in the interests of justice. He claimed that it would be unjust or oppressive for him to be returned to Italy.

Held, dismissing the application:

G had failed to show that the accusations had not been made in good faith so as to qualify as unjust or oppressive under s.11(3)(b). The strength or weakness of the evidence, including the hearsay nature of the informant's evidence itself, was not a factor to be considered in an application under s.11.

Although the prosecutor's conduct was inappropriate, it did not show that the accusations against G were not made in good faith. The passage of time between the offence and the arrest, and the time between the informant's first statement and the decision to seek G's arrest, did not show bad faith and also the inaccuracies in the supporting material did not indicate that the decision to arrest was due to G's unwillingness to co-operate in the investigation. There was no reason to believe that he would not receive a fair trial in Italy.

Re Gesugrande (U.K.) (Unreported) July 30, 1996, Queen's Bench Division

Extradition - Theft Act offences - prima facie evidence of crime

P's extradition was sought by the USA in relation to charges of theft of computer chips, obtaining computer chips by deception and using a false instrument. Documents found at the address where the goods were delivered linked P to the company which had ordered the goods. P claimed that there was no evidence linking him with the false instrument or the delivery address itself, and that certain evidence given by a law enforcement officer was not admissible, as it amounted to hearsay.

Held, dismissing the application:

The documents were significant in that they connected P with the company which ordered the goods and he had been recognised as the person placing the order in a telephone call to the supplier; and

Although the stipendiary magistrate conducting the enquiry into the offences found no direct evidence that P had ever been in possession of the false instrument tendered in payment for the computer chips, it could reasonably be deduced from his involvement in the ordering process that P both foresaw and intended that delivery would be made to the address where payment would be required. The evidence therefore disclosed a prima facie case without the need to consider the status of the law enforcement officer's disputed evidence.

Re Peters (U.K.) (Unreported) July 22, 1996, Queen's Bench Division

Extradition - constitutional validity of the USA extradition law - dual criminality - violation of the Italian anti-Mafia law

Italy sought the extradition of Lo Duca for offences of "association of mafia type". The fugitive argued that the Italian anti-mafia law punishes only membership of an organisation. He also argued that the decision in *Lobue v. Christopher* striking down s.3184 of the USCA as unconstitutional bound the court.

Held, rejecting the application for review of decision refusing the issue of a writ of habeas corpus:

Courts and not judges exercise the judicial power. Section 3184 vests individual judges with jurisdiction over extradition requests and the distinction between "courts" and "judges" is dispositive. The performance of functions by extradition officers is not an exercise of judicial power. Extrajudicial duties authorised by s. 3184 do not undermine the integrity of the Judicial Branch. The Italian law punishes activities that were akin to those proscribed by the US conspiracy law and the Racketeer Influenced and Corrupt Organizations Act (RICO).

(Reported in 12 International Enforcement Law Reporter, December 1996, p. 492)

MUTUAL ASSISTANCE CASE NOTES

Criminal evidence - self-incrimination - disclosure of confidential banking information - foreign court requiring witness to disclose confidential banking information - whether witness subject to criminal liability - double actionability rule - civil procedure - jurisdiction - declaratory judgment - Rules of the High Court 1980, Ords 39,66 - Bankers' Books (Evidence) Act 1949, s.6 - Banking and Financial Institutions Act 1989 - Evidence Act 1950, s.132(2)

Hong Kong issued letters of request to Malaysia which resulted in the High Court in Malaysia recording evidence for use in proceedings against the fourth respondent in Hong Kong. (The first and second respondents were officers in the third respondent bank.) The judge of the High Court made orders under the Malaysian Bankers' Books (Evidence) Act 1949 requiring disclosure of certain matters. The first, second and third respondents sought a declaration that an order made by the court compelling production of customer account information under the Bankers' Books (Evidence) Act 1949, exempted them from committing a criminal offence against secrecy by revealing confidential client information under the Banking and Financial Institutions Act 1989, or breaching their civil duty of confidentiality by giving evidence in Hong Kong.

The High Court ruled that the protection afforded by s.6 of the Bankers' Books (Evidence) Act 1949 and that given by the Banking and Financial Institutions Act 1989 to information which had already been lawfully available to the court would be available to them only if they gave evidence in the High Court in Malaysia but not if they voluntarily agreed to and did give evidence in Hong Kong because the order could only operate within the territorial limits of the court's jurisdiction.

The Attorney-General of Hong Kong appealed to the Court of Appeal which considered the following questions:

- (i) whether in giving evidence either in Malaysia or in Hong Kong the respondents would be subjected to criminal or civil liability;

- (ii) whether the court could grant the declaratory relief sought; and
- (iii) even if it could, whether it ought to exercise its discretion to grant the declarations sought.

Held, allowing the appeal:

- (i) (a) where a court in Malaysia recorded evidence in municipal proceedings or in aid of proceedings pending before a foreign tribunal, s.132(1) of the Evidence Act 1950 removed the common law privilege against self-incrimination. However, under s.132(2), any answer that a witness was compelled by the court to give would not subject him to criminal liability. The protection provided by the subsection was available as though such evidence had been taken in Malaysia. Therefore neither the first, second nor third respondent might be held criminally liable for the answers each provided in the courts of Malaysia. A disclosure of confidential information in the courts of Hong Kong made in contravention of s.97 of the Banking and Financial Institutions Act 1989 could not form the basis of criminal liability in Malaysia since s.97 did not have extra-territorial effect;
- (b) the protection allowed by s.132(2) did not protect a witness in civil proceedings. Any alleged breach of confidence that occurred abroad would be actionable in Malaysia only if the particular disclosure would be actionable under the law of Malaysia if made in Malaysia in the same circumstances in which it was made in the foreign country, and if that disclosure was not justifiable under the law of the country in which the alleged breach of confidence took place, the respondents were able to rely on the defence of just cause or excuse since they were bound by law to make the disclosures;
- (iii) where it is doubtful whether particular conduct involves the commission of a criminal offence it is very convenient to be able to ascertain whether or not the conduct is in fact criminal by obtaining a ruling of the court in the form of a declaration. When one is considering discretionary remedies each case depends on its own facts. The issue is whether there are facts weighing in favour of granting the relief; and
- (iii) if the court exercised a discretion against the appellant, it would produce an unjust result in that the prosecution and defence in the Hong Kong proceedings would not be able to present relevant evidence to the jury. Therefore an original discretion should be exercised to grant the declaratory relief.

Attorney-General of Hong Kong v Zaayah Wan Chik and Others (Malaysia) [1995] 4 Law Reports of the Commonwealth (LRC) 672

Western Samoa Offshore Finance Centre

The Office of the Registrar of International and Foreign Companies of Western Samoa has advised the CCU that the Internet contains false advertisements concerning the availability of Western Samoa Offshore Banks. It has expressed particular concern about *International Business Creations Inc.*, of 150 E.58th Street (33rd Floor) New York, NY 10155, USA. In a press release issued in January the Registrar advises that:

"The company is not a licensed trustee company in Western Samoa and has no authority to carry on offshore business within the Western Samoan jurisdiction and has not been authorised by Government to represent them in the marketing and promotion of the Western Samoa Offshore Centre."

CONFERENCES AND MEETINGS

Special Caricom Meeting - Maritime Interdiction - Regional Co-operation - Barbados, December 16, 1996

The Fifth Special Meeting of the Conference of Heads of the Caribbean Community (Caricom), was held on 16 December 1996. The Communiqué issued following the meeting notes that Heads of Government reviewed the issues of co-operation between the United States and Governments of the Caribbean Community in the fight against illicit drug trafficking. In re-affirming the importance of a healthy relationship with the US based on respect for sovereignty and territorial integrity, dialogue, consultation and mutually beneficial co-operation, Heads of Government recognised the right of sovereign countries to enter into mutually acceptable agreements. They rejected any suggestion or threat of coercive measures as a means of extracting compliance with predetermined policies and warned that unfounded allegations, innuendoes and the threat of punitive measures, aimed at the economic welfare of Caribbean States would only weaken the collective effort against drug trafficking and undermine the foundations of the good relations which the Region has enjoyed and seeks to maintain with the US.

Heads of Government recalled that the Regional Plan of Action against drugs adopted in 1996 provided for the consolidation of bilateral co-operation agreements in maritime interdiction into a regional agreement and decided to establish an Inter-Governmental Task Force charged with proposing a mechanism for implementation of this plan.

Asia Crime Prevention Foundation Fourth World Conference: Symposium on the Identification of Urgent Crime Prevention and Criminal Justice Problems in Asia Requiring More Effective Regional Cooperation, Bangkok, 15-17 November 1995

This Symposium was organised by the Thailand Chapter of the Asia Crime Prevention Foundation. A resumé of the Report of the Conference appears in *New Society, Issue No. 5, Spring 1995*, (the newsletter of the Asia Crime Prevention Foundation).

Trafficking in drugs, arms and human beings were listed as specific concerns of many participating countries as were fraud, corruption, computer crime, counterfeiting and smuggling.

Participants identified a need to combat official corruption by introducing strict codes of conduct. They identified a need for international co-operation based on understanding and knowledge of the socio-political, economic and traditional cultures and values of other countries. The need to strengthen family ties and traditional values was underlined.

In considering problems encountered in extradition and other forms of mutual assistance in criminal matters the symposium took note of calls to simplify and modernise extradition procedures in line with the United Nations Model Treaty on Extradition. The importance of arrangements for the provision of mutual assistance in criminal matters and for the transfer of sentenced persons was also identified.

Other subjects considered by the Symposium included strategies for enhancing the trust and co-operation of the general public towards criminal justice agencies and the role of the criminal law in environment protection.