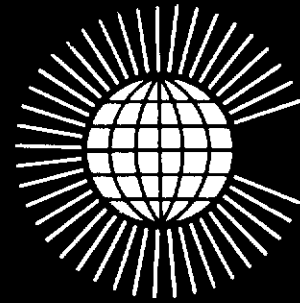


Commonwealth Legal Assistance News



Issue No. 10, December 1995

CONTENTS

Drug Trafficking	1
Technical Assistance	
Restraint of Proceeds	
Extradition	
Articles	2
Cases	3 - 5
Transfer of Convicted Offenders	5
Commonwealth Schemes	5
Mutual Assistance in Criminal Matters	6

EU Assistance to Developing Countries to Combat Narcotics Trafficking

Reported in the November 1995 issue of the International Enforcement Law Reporter is a new Regulation covering the provision of assistance to developing countries in combating drug trafficking. The action was taken by the European Union pursuant to the UN drugs conventions of 1961 (and its 1972 protocol), 1971 and 1988 and pursuant to the Lomé Convention.

Developing countries which have ratified these agreements will receive priority. Projects singled out for particular attention are those which will involve the preparation of master plans for drug control drawn up in consultation with the United Nations Drug Control Programme.

Restraint of Assets: New National Initiatives:

Relying on the International Emergency Economic Powers Act the President of the United States has issued an order blocking a significant amount of property and prohibiting transactions with "significant narcotics traffickers".

The measure is designed not only to restrain assets but also to impose economic sanctions on individuals and companies with significant links to the narcotics trade. Immediately identified in the order are some named individuals and companies including finance companies, import and export companies and pharmaceutical investment bodies.

The legislation relied upon by the President is found at 50 U.S.C. 1701 et seq. and s. 301 of Title 3 of the United States Code.

CONTRIBUTIONS

This is a very short issue of CLAN because we ran out of cases to report. We could not have done without the material in the International Enforcement Law Reporter and a selection of cases sent by Barbados. Please send us your national contributions so that others gain the benefit of your experience.

EXTRADITION

ARTICLES

Separation of Powers: Constitutional validity of extradition law

In a recent case a United States District Court Judge held that the right of the executive branch of government to ultimately review decisions by the courts to extradite was unconstitutional and in violation of the separation of powers doctrine.

The case which gave rise to the decision was a request by Canada to the US for the extradition of two people accused of kidnapping. The plaintiffs successfully argued that the extradition law of the US, in conferring on the Secretary of State the power to review the legal conclusions of federal extradition judges, is unconstitutional. The Court held that while the statute gave the Secretary of State the power to decide whether to surrender, the Constitution forbade him from exercising that power.

Under US extradition procedures (set out in 18 USC s. 3184) a judge conducts a hearing in which evidence is received and decisions are made on issues relating to whether the offence is one for which extradition can be granted under the relevant treaty, whether dual criminality exists and whether there is "probable cause" to believe that the accused committed the crime for which he is sought. At the end of this hearing a ruling is made on the extraditability of the accused. The judge certified the finding to the Secretary of State "that a warrant may issue". The Secretary of State has the sole discretion to decide whether to sign a warrant of surrender. In addition to the finding in the case before it the court certified as a class all persons presently or in the future under threat of extradition from the US and issued an order enjoining the US from extraditing anyone to any country. Pending the hearing of the appeal lodged by the Solicitor-General, a stay of this decision was ordered by the Court of Appeal for the District of Columbia on 29 September.

The US procedures are the same as those operating in many Commonwealth countries which, like America, have constitutional provisions separating the functions of the executive and the judiciary.

(This summary has been drawn from articles appearing in the International Enforcement Law Reporter, Volume 11 (1995), Issues 10 and 11.) CCU will monitor the case and report the outcome of the appeal.

Aspects of Extradition and Deportation

A number of South African cases are examined in an article by Mr Neville Botha of the University of South Africa in an article entitled "Aspects of Extradition and Deportation". The author examines various cases involving the removal of fugitives from former "independent homelands" to South Africa. In so doing he examines principles of international law relevant to illegal rendition and the application of principles enunciated in leading cases such as *Alvarez-Machain* and *Mackeson* to local cases. The cases demonstrate a wide variety of methods used by law enforcement officials to secure the attendance of the fugitives into the jurisdiction and attitude of the courts to those methods. The article appears in [1993/1994] SAYIL (South African Yearbook of International Law) at p. 163.

Extradition and Expulsion Orders: The implications of the Soering Decision

In an article published last year Mr John Kidd examines the significance of the decision in the case *Soering v. The United Kingdom* and its contribution to the development of the international law of extradition and the extension of the Soering principle into the law relating to deportation. In an interesting examination of the issues the author examines the relevant provisions of not only the European Convention on Human Rights but also provisions of the United Nations Torture Convention and the "death penalty" protocols to European and United Nations instruments. The article can be found in (1994) 26 Bracton Law Journal at p. 67. (The journal is published by the University of Exeter).

CASE NOTES

Extradition: fugitive tricked into entering the jurisdiction: whether court has residual supervisory jurisdiction to hear an application to release the fugitive because of police deception or abuse of power.

The fugitive (S), who was alleged to have committed drug trafficking offences in Holland and Germany, moved to Ireland. When he was finally located an officer of the UK Metropolitan Police posed as an officer investigating cheque fraud offences and persuaded S to come to the UK to attend an interview. The Officer suggested that the purpose of the interview was to exclude S from the supposed inquiry and advised that if he did not attend voluntarily he would be arrested when he next visited the UK. S came to the UK where he was arrested on the basis of a provisional warrant issued at the request of the German Government. He was remanded in custody. S then applied for the issue of a writ of habeas corpus on the ground that the deception by the police amounted to an abuse of process or an abuse of power. The Divisional Court refused the application on the ground that the supervisory jurisdiction of the High court under s.11(3) of the Extradition Act 1989 (UK) to order the discharge of a person committed to custody in extradition proceedings was confined to the circumstances listed in the section and that any residual unfairness in returning the fugitive was a matter for the Home Secretary. S appealed to the House of Lords.

Held: in dismissing the appeal -

(1) The High Court has, in proceedings under the Extradition Act 1989, a discretion to intervene only in the circumstances outlined in s.11(3). It has no inherent common law supervisory power to intervene. Where the case does not fall within s. 11(3) the court has no jurisdiction to entertain an application for the issue of a writ of habeas corpus.

(2) S was tricked into coming into the UK: he was not coerced. The police conduct was not, therefore, so grave or serious as would have warranted the intervention of the High Court even if it possessed the power to do so.

Schmidt v. Federal Republic of Germany [1994] 2 All ER 65 (House of Lords)

Extradition: Identification Evidence: Construction of Extradition Treaty: Request for Surrender

The United States, through its Consul General, submitted a request for the extradition of the fugitive S. Following a hearing the magistrate committed the fugitive for surrender. S. appealed on two grounds - that there was no evidence to show that he was the person named in the documents and that there was no adequate evidence of a request for extradition.

Held: In dismissing the appeal:

(1) Among the exhibits submitted was a large photograph of the appellant. At the hearing before the Magistrate no objection was taken on the issue of identity. In extradition cases identification parades are not required. The practice is to admit identification by photograph. If there is anything unsatisfactory about the identification by photograph it is for the Magistrate and not for the appeal court.

(2) There was more than enough evidence on which the Magistrate could hold that the request for extradition was made as required by the Treaty between Barbados and the United States. Treaties ought to receive a liberal interpretation and the Court should not, unless constrained by the language used, interpret an extradition treaty in a way which would hinder the working and narrow the operation of most salutary international arrangements. Extradition treaties must be construed as contracts between two sovereign states and it is a mistake to think that they should be construed as though they were domestic statutes.

Leon Sealy v. Government of the United States of America Unreported, Barbados Supreme Court of Judicature, No. 13 of 1992.

Extradition: Review of Magistrate's Decision: Limitation Period for Making application for leave to appeal: international extradition practice: words and phrases "may".

The fugitive was committed in custody to await surrender to the United States and, in accordance with the statutory provision he was not to be surrendered for 15 days during which time application could be made for leave to appeal or to apply for a writ of habeas corpus. The statute required the Magistrate to advise the fugitive of the 15 day period and its purpose. It was common ground that the procedure was not followed and the fugitive sought leave to appeal out of time.

Held: in dismissing the application for leave to appeal, that the court did not have discretion to grant an extension of the time within which leave to appeal may be sought. The statute provides that "leave ... may not be granted unless" and sets out the time limits. No power is given to the Court to extend the time limited for applications and the Court should hesitate before reading into the Act provisions that are not there. The statutory provision is designed to accord with current international practice regarding the return of fugitives and unilateral judicial modifications of the statutory provisions may impede or obstruct the functioning of that practice.

Robert Harding Walker v. The Government of the United States of America: Unreported, Barbados Supreme Court of Judicature, No. 115 of 1990.

Extradition: failure to comply with statutory procedure: time at which the Attorney-General may vacate a warrant or refuse surrender.

The fugitive was committed for surrender to the United Kingdom. He sought leave to appeal on the ground that the statutory requirement that the Magistrate report to the Attorney-General within seven days on the issue of a warrant and transmit to the Attorney a copy of the warrant issued, the foreign warrant and information of the complaint, was not complied with. The magistrate had, in accordance with a subsequent statutory provision, submitted to the Attorney-General the documents required following the issue of the committal order. The appellant argued that compliance with the later requirement could not cure failure to comply with the initial provision.

Held: The Act provides no sanction for non-compliance with the section requiring submission of the warrant, etc. The question is therefore whether the Magistrate's failure was in any way prejudicial to the fugitive. The Attorney-General was aware of the proceedings because the British High Commissioner had notified him of the request and sent the indictment and other evidence to the Attorney who had handed the documents to the police. The legislation gives the Attorney-General power to determine at any time that the fugitive may not be surrendered. In the circumstances of the case the fugitive was not prejudiced and the committal for surrender was not therefore invalidated.

Edward Elwood Tennyson Payne v. The Government of the United Kingdom Unreported, Barbados Supreme Court of Judicature, No. 65 of 1988.

TRANSFER OF CONVICTED OFFENDERS

Sri Lanka has enacted legislation to implement the Commonwealth Scheme for the Transfer of Convicted Offenders within the Commonwealth. In accordance with paragraph 19 of the Scheme, notice has been given to the Commonwealth Secretary-General. The proper channel of communication is:

The Secretary
Ministry of Justice and Constitutional Affairs
Superior Court Complex
Hulftsdorp
Colombo 12
SRI LANKA

PARTICIPATION IN COMMONWEALTH SCHEMES

At their Malta meeting earlier this year Senior Officials of Law Ministries asked the Secretariat to update the 1989 publication on the Scheme for the Rendition of Fugitive Offenders to ensure that current information on national laws was available to all member countries. They also asked that information on the Mutual Assistance in Criminal Matters Scheme (the Harare Scheme) and the Scheme on the Transfer of Convicted Offenders be included. To ensure that we have the correct information on your country could you please ensure that we have a copy of your current laws on these subjects. To help you, our list of holdings was published in the last issue of CLAN. Where your law provides that it applies to another country subject to regulation or order in council, please let us know what orders have been made so that the scope of assistance which can be provided can be recorded accurately.

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

CASE NOTES

Foreign evidence: witness unable to attend: proving inability to attend by admitting document

The appellant lodged an appeal against his conviction of drug offences. During the trial the prosecution sought applied under s.23 of the Criminal Justice Act 1988 to admit the statement of a witness "M" relating to an airline ticket issued to the appellant. During a *voir dire* evidence was given by the investigating officer of a discussion held with a drug liaison officer in another country as to the "M"'s inability to attend. The judge ruled that it was not reasonably practicable for the prosecution to call the liaison officer and that he could receive his statement under s. 23. He also ruled that having declared the liaison officer's statement to be admissible it revealed that it was not practicable for M to attend to give evidence so that his statement might also be read. It was argued for the appellant that it was not open to the trial judge to apply s.23 twice. To do so would admit second hand hearsay. (Section 23 provides that a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible of ...the person who made the statement is outside the UK and it is not reasonably practicable to secure his attendance).

Held: In dismissing the appeal, the Court of Appeal held that there was no second-hand hearsay because the two witnesses were proving different things. The Court also considered the question when it is not reasonably practicable for a witness to attend. It noted that the fact that a witness could attend did not answer the question. The Court considered that the judge must consider various questions of fact:

- (a) the importance of the evidence the witness could give and whether or not it was prejudicial to the defence if the witness did not attend;
- (b) considerations of expense and inconvenience which, while not major considerations, are relevant where, as in this case, the evidence of the liaison officer could not be seriously challenged in cross examination; and
- (c) the reasons put forward as to why it was not reasonably practicable for the witness to attend.

There was no reason why the inability of one witness to attend a trial should not itself be proved by the statement of another witness which was admitted under s. 23(2)(b) of the Act.

Regina v. Castillo The Times, 2 November 1995 (Court of Appeal - England - 27 October 1995)

DON'T FORGET TO ANSWER THE MONEY LAUNDERING SELF EVALUATION
QUESTIONNAIRE - A REPORT MUST BE MADE TO THE 1996 LAW MINISTERS
MEETING