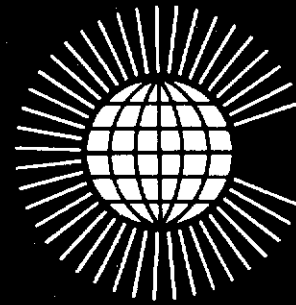


Commonwealth Legal Assistance News



Issue 6, February 1995

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RECENT DEVELOPMENTS

The European Court of Human Rights rules retrospective confiscation orders violate the European Convention

The European Court of Human Rights in *Welch v United Kingdom* (noted below, p.2) has held unanimously that the imposition of a confiscation order in respect of property acquired before the entry into force of the confiscation law under the UK Drug Trafficking Offences Act 1986 (DTOA86) constituted a violation on the imposition of retrospective penalties under Article 7 of the European Convention on Human Rights.

The decision is of great significance because of its wide-ranging repercussions

for Commonwealth countries that have enacted legislation based on the DTOA86 and also have constitutional provisions similar to Article 7 of the European Convention.

Developing cooperation in combatting drug smuggling in India and Pakistan

Following agreement between the Governments of India and Pakistan on technical cooperation on drug control, a meeting of the two Governments at Secretary level was held in New Delhi, India on 15-16 September 1994. Both sides agreed to: (i) exchange information on money laundering by drug traffickers; (ii) exchange information relating to assets acquired by drug traffickers apprehended in either country and their money laundering activities; and (iii) take measures to use controlled delivery on an experimental basis.

Extradition order revoked due to fraud

The United States Court of Appeals for the 6th Circuit

has revoked a 1986 extradition order made against John Demjanjuk on the grounds that justice department attorneys committed "fraud on the court" when they accused him of being the notorious guard known as "Ivan the Terrible" at Nazi concentration camps. The decision provides a precedent for a court to revoke an extradition order where there is evidence of prosecutorial misconduct, such as failing to disclose to the courts and defence counsel exculpatory information in their possession during litigation.

LEGISLATIVE DEVELOPMENTS

United States of America: Mutual Assistance in Business Regulation

The International Antitrust Enforcement Assistance Act 1994 authorises the Federal Trade Commission to provide, pursuant to an antitrust mutual assistance agreement in effect with a foreign antitrust authority (FAA), antitrust evidence to the FAA to assist that authority determine whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by that authority, or to enforce any such foreign antitrust laws.

Pursuant to an antitrust mutual assistance agreement, the U.S. Attorney General may conduct investigations to obtain evidence relating to a violation of the foreign antitrust laws administered or enforced by the FAA and may provide such evidence to the authority to assist it in investigations or in the enforcement of foreign antitrust laws.

The new law indicates the increase of mini-mutual assistance treaties between agencies with specialised competence. It presages similar agreements in areas such as environmental enforcement.

CASE NOTES

Right to freedom from retrospective penalties - Drug Trafficking Offences Act 1986 - Imposition of confiscation order retrospectively - whether contravened article 7 of the European Convention on Human Rights - whether confiscation amounted to a penalty

In 1988 the applicant was convicted of various drugs offences committed in 1986 and sentenced to 22 years' imprisonment. A confiscation order was made pursuant to the Drug Trafficking Offences Act 1986, section 2(3) of which entitles a court to assume that any property which the offender currently holds or which has been transferred to him in the preceding six years is the proceeds of drug trafficking. In default of the payment of the order, he was liable to serve a consecutive two years' prison sentence.

The DTOA applied only to proceedings which were commenced after it came into force on 12 January 1987, but in respect of such proceedings, it applied irrespective of when the offences were committed. In this case the proceedings against the applicant commenced after this date.

The applicant complained to the European Court of Human Rights that the confiscation order made against him amounted to the imposition of a retrospective criminal penalty contrary to Article 7 of the European Convention on Human Rights. The respondent claimed that the aim of the order was essentially confiscatory, in that it deprived drugs traffickers of illegally made profits, and preventative, in that it removed the possibility of using illegally gained funds to carry out further illegal activity, and that therefore it should not be regarded as a "penalty" within the meaning of Article 7.

Held: the compensation order amounted to a penalty and thus there was a violation of the Convention

There were several aspects of the making of an order under the 1986 Act which were in keeping with the idea of a penalty, even though they may be considered as essential to the preventive scheme inherent in the Act - the sweeping statutory assumptions in section 2(3); the fact that the a confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit; the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused; and the possibility of imprisonment in default of payment by the offender.

Whatever the characterisation of the measure of confiscation, the fact remained that the applicant faced "more far-reaching detriment" as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted.

The court stressed that this conclusion concerned only the retrospective application of the legislation and did not call into question the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking.

Welch v United Kingdom, European Court of Human Rights, 9 February 1995

Extradition Treaty between Australia and the Philippines - Extradition objection - Whether "extradition objection" based on "political opinions"

The applicants were wanted in the Philippines to face charges of murder and were committed to prison by a magistrate to await surrender. They appealed to the Federal Court for a review of the magistrate's order, *inter alia*, on the ground that the magistrate was in error in failing to be satisfied that there were

substantial grounds for believing that there was an extradition objection in relation to the offence alleged.

Section 7(c) of the Extradition Act 1988 provides that there is an "extradition objection" if the person against whom extradition is sought may be prejudiced by reason of his/her political opinions in the requesting state. They argued that the second applicant would be prejudiced by reason of the political beliefs of some of her relatives in the Philippines who were involved with the subversive "New People's Army" and her association with those relatives whilst the first applicant may suffer by virtue of his association with her.

Held: In dismissing the appeal,

1. There was no evidence to establish what the political opinions of either applicant were and, therefore, there was no basis on which it could be submitted that the magistrate was in error.
2. It was not an extradition objection that a person might suffer prejudice because that person had a connection with another person who held certain political opinions, still less was it an extradition objection that a person might suffer prejudice because that person had a connection with another person who in turn had a connection with a further person who held certain political opinions.

Stanton and Clark v DPP and Republic of the Philippines,
Unreported, Federal Court of Australia, 12 January 1993

Extradition - Committal proceedings - Committing magistrate refusing to admit evidence on basis that it was prejudicial to the accused - Jurisdiction of Supreme Court - whether jurisdiction to review order on ground that magistrate had improperly declined jurisdiction - whether magistrate had exceeded his jurisdiction

The appellant N, was brought before a magistrate in proceedings for his extradition to Jersey. The magistrate refused to admit evidence of a tape recording of a conversation between N and his uncle and aunt which was crucial to the extradition proceedings. The Attorney General applied ex parte for leave to appeal for judicial review of the decision, specifically requesting an order of certiorari to quash such decision. The Supreme Court allowed the application holding that the magistrate had no discretion to exclude evidence on the basis of its prejudicial effect as this was a matter for the trial judge. On appeal to the Court of Appeal.

Held: Appeal dismissed

1. The refusal of the magistrate to admit crucial evidence effectively meant that he had improperly declined jurisdiction

to consider the case before him. Thus the Supreme Court had jurisdiction to review the decision of the magistrate during the course of the extradition proceedings.

2. A committing magistrate in extradition proceedings has no discretion to refuse to admit admissible evidence. Here the magistrate had acted in excess of his jurisdiction in refusing to admit the evidence on the basis of its prejudicial effect and improperly declined jurisdiction to inquire into the evidence presented.

R v Stipendiary Magistrate, ex parte Attorney General,
Court of Appeal, Gibraltar [1993] 4 LRC 140

Extradition - applicant absconding after pleading guilty - extradition request - whether applicant a convicted person for extradition purposes

The applicant pleaded guilty in New York to drugs offences. He was remanded on bail [pending sentence] but then absconded and was arrested in the United Kingdom. He resisted an extradition request on the grounds that he was not a convicted person within the terms of the Extradition Act 1989, schedule 1, but rather was only an accused person, and applied for a writ of habeas corpus.

Held: dismissing the appeal

The applicant had pleaded guilty in New York and there was thus no longer any question as to guilt or innocence. Accordingly, he could not avoid being treated as a convicted person for the purpose of extradition.

Re Sarig (Avishalom), Divisional Court, U.K. [1993] Crown Office Digest 472.

Scottish Court issuing warrant of arrest - Petitioner in England - Whether petitioner removed from South Africa to England by illegal rendition - Whether abuse of process - Whether court to decline jurisdiction

The petitioner was wanted in Scotland to face trial on two charges of fraud. He sought the suspension of a warrant for his arrest on the grounds, *inter alia*, that the execution of the warrant was in reliance upon actions leading to the presence of the petitioner within the United Kingdom which he averred were illegal.

He submitted that as a result of collusion between the English and South African authorities, he was deported from South Africa to New Zealand on a plane going via Heathrow, where he was arrested. This was a deliberate flouting of extradition procedures. He requested that the warrant be suspended for so long as the petitioner was present within the United Kingdom as a result of his arrest.

Following the judgment of the House of Lords in *R v Horseferry Road Magistrates Court, Ex parte Bennett* [noted in *CLAN* Issue 2, August 1993 and reported in [1993] 3 WLR 90 and [1993] 3 All ER 138] the case was remitted to the Divisional Court for further consideration. In its decision of 10 March 1994 the Divisional Court held that the assumption upon which the House of Lords had proceeded in allowing the appeal had been established by the evidence. Bennett was released on 10 March 1994, but continued to stay in England as he had no passport.

The High Court of Justiciary, in dismissing the petition for restraining the execution of the warrant of arrest:

Held:

1. The Lord Advocate had played no part in the arrangements which led to the petitioner's arrest in London. Furthermore, having made his own inquiries, the Lord Advocate was entitled to conclude that there was no illegality or impropriety. Thus it was unreasonable, where there had been no collusion with the South African or English authorities, to insist that the police must refrain from arresting a person who was wanted for offences committed in this country when he arrived here simply because he was in transit to another country from where he could then be extradited.
2. There was no ground for restraining the execution of the warrant and to enforce the warrant would not be an abuse of the processes of the Scottish Court and, therefore, the petitioner could properly be tried in Scotland.

Bennett v Her Majesty's Advocate, Unreported, High Court of Justiciary, Edinburgh, 18 October 1994

Admissibility - letter from foreign embassy official - statement made in document - witness with diplomatic immunity - whether witness "outside" the UK

J was charged with importing cocaine from Columbia. Her defence was that she believed she was smuggling emeralds and sought to rely on a letter from X, an official at the Columbian Embassy in London. As X was immune from the process of the court and was not prepared to give evidence in person, D argued that he was at all times "outside" the UK and that the letter could be admitted under section 23 of the Criminal Justice Act 1988. The application was refused and D was convicted.

Held: dismissing D's appeal, the purpose of section 23 was plainly designed to apply to persons whose physical presence was outside the UK.

R v Jimenez-Paez, Court of Appeal, U.K. (1994) 98 Cr App R 239

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

South Africa

The Office of the Director-General: Department of Justice has advised the CCU that the *Foreign Courts Evidence Act 1962* (Act 80 of 1962) and the *Supreme Court Act 1959* (Act 59 of 1959) govern mutual legal assistance matters.

However, South Africa's ability to give such assistance is currently under review and this will probably lead to legislation to reform existing mechanisms.

Copies of all the relevant legislation are available from CCU.

Briefly, the South African position is as follows:

At present, requests for assistance should be made to the Director-General: Department of Justice who will determine the best way to proceed with the matter.

Assistance can only be given when proceedings are pending in the requesting state. However, informal requests can be made to an investigating agency where the statement can be obtained with the consent of the person concerned.

Other possible assistance includes the provision of public or official records and documents and responding to requests for search and seizure provided that such requests contain sufficient information to support an application for a search warrant.

A request for assistance may be refused where the request relates to criminal matters with a political character.

In addition, section 1 of the *Protection of Business Act 1978* requires that the consent of the Minister of Trade and Industry be obtained before information may be furnished regarding any business whether carried on in or outside South Africa.

Under the *Drugs and Drug Trafficking Act 1992* the clerk of the court must register a foreign confiscation order but only in respect of those countries designated by the Minister of Justice. There is no provision for the issuing of restraint orders.

Countries requiring assistance should address requests to the Director-General: Director of Justice, Private Bag X81, Pretoria, South Africa 0001 and marked for the Attention of the Director: Law Enforcement. Tel: 27 12 315 1111

**CENTRAL AUTHORITIES
(Commonwealth Countries)**
(as notified to the CCU)

Isle of Man

Requests for assistance from the Attorney General (Isle of Man) should be addressed to:

Attn: Mr A.A. Montgomerie,
Legal Officer (Fraud),
H.M. Attorney General,
Attorney General's Chambers,
Government Offices,
Douglas, IM1 3PP,
Isle of Man.

Tel: 44 1624 631343
Fax: 44 1624 631399

Requests for assistance from the Isle of Man Constabulary should be addressed to:

Attn: Detective Inspector G. Allen,
Fraud Squad,
The Chief Constable,
Police Headquarters,
Douglas, IM2 4RG
Isle of Man.

Tel: 44 1624 631349
Fax: 44 1624 631399

A copy of any of the materials contained in CLAN are available upon application to the CCU. The CCU also welcomes the submission of materials and information for inclusion in future issues of CLAN.