Commonwealth Legal Assistance News

40

NEWSLETTER OF THE COMMONWEALTH SECRETARIAT'S CRIMINAL LAW UNIT

APRIL 2001

INSIDE

4. **Extradition – whether requesting state immune from suit for damages arising from arrest pursuant to request**

6. **Extradition - requirements for stay of proceedings – standard of proof for surrender to be ordered**

Asylum – Deportation to third country – Applicant entered UK through third country – asylum sought on basis of persecution by non-state agents – third country interpretation of persecution only applying to persecution by state – whether convention provision open to range of permissible interpretations – Asylum and Immigration Act 1996, s. 2(2)c - Geneva Convention relating to the Status of Refugees – (UK)

In 1997, A, a citizen of Somalia, claimed asylum in Germany, alleging that she had been persecuted by majority clans dominant near Mogadishu. The German Federal Office for the Recognition of Refugees rejected her asylum claim and refused her any other form of protection in Germany. She was ordered to leave Germany or face deportation to Somalia. She then went to the United Kingdom where she again applied for asylum. The Secretary of State for Home Affairs in the United Kingdom asked the German authorities to accept responsibility under the 1990 Dublin Convention (the Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities, 1990) for determining A's asylum claim. Ultimately, the German authorities accepted responsibility for determining her asylum claim. The Secretary of State then refused her asylum claim without consideration of its merits and certified under section 2 of the 1996 Act that A could be returned to Germany.

A then applied to the Divisional Court for a review of the Home Secretary's decision. The Divisional Court dismissed the application. She appealed to the Court of Appeal which allowed the appeal. The Secretary of State appealed to the House of Lords.

A parallel case of Aitseguer involved a national of Algeria who had been denied asylum in France. The facts of his case were very similar to that of A and the House heard both cases together.

The House of Lords determined that the central question in the matter was whether under section 2(2)(c) of the Asylum and Immigration Act 1996 ("the Act of 1996"), read with the 1951 Geneva Convention relating to the Status of Refugees (1951) and its Protocol (1967) ("the Refugee Convention"), the Secretary of State was entitled to authorise the removal of an asylum seeker to a safe third country on the basis that there was a permissible range of interpretations of protections of the Refugee Convention rather than one autonomous interpretation. In answering this question, the

Commonwealth Legal Assistance News

Produced by the Criminal Law Unit of the Commonwealth Secretariat as a service to Member Governments

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Designed and printed by the Commonwealth Secretariat

House of Lords examined the provisions of section 2(2)(c) of the Act of 1996 which had been repealed by the Immigration and Asylum Act 1999 ("the Act of 1999").
Their Lordships considered Article 1A of the Refugee Convention which provides, inter alia:

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who . . . (2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

and Article 33(1) which provides:

> "No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

The court found that there was a divergence in state practice concerning the interpretation of the word "persecuted" in Article 1A(2). The majority of contracting states, including the United Kingdom, do not limit persecution to conduct which can be attributed to a state. A minority of contracting states, including Germany and France, do so limit it. The two different approaches have been referred to as the persecution theory and the accountability theory.

In the case of A the German authorities took the view that governmental authority in Somalia had collapsed, so that there was no state to which persecution could be attributed. A claimed to belong to a persecuted minority clan, and that was unaffected by the general exclusion from the Refugee Convention of victims of civil war simpliciter, because she was able to demonstrate a differential impact: *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293, 311B.
In the case of Aitseguer, he claimed that he was a target of the Groupe Islamique Armé in Algeria. The Secretary of State accepted that there was a substantial risk that the French authorities would refuse his asylum claim on the ground that there was no state toleration or encouragement of the threats of this faction against Aitseguer, and therefore no persecution attributable to the Algerian state. The Secretary of State accepted that if A and Aitseguer were to be returned to Germany and France respectively, the restrictive view of Article 1A(2) encapsulated in the accountability theory, which prevails in Germany and France, will probably cause them to be returned to Somalia and Algeria where they may face torture and death. This acceptance was, however, subject to a possible argument that there were alternative forms of protection in Germany and France which might apply to the applicants. Leave was granted in both cases for the House to consider whether there is a material difference between a state where governmental authority has collapsed completely (as is the case in Somalia) and a state where governmental authority exists but is too weak to provide effective protection against persecution by non state actors (as is the case in Algeria).

The following were certified to be the issues raised by the two cases:

1. Does Article 1A(2) of the Refugee Convention have a proper international meaning, the interpretation of which is decided by the court as a question of law, in relation to the consideration of claims of persecution by non-state agents?

2. If so, what is that international meaning insofar as it is relevant in the present case?

3. Was the Secretary of State entitled to conclude that:
   (i) Germany was a safe third country in respect of asylum claims made by a person from a country where there was no state to protect her from persecution by non-state agents?
   (ii) France was a safe third country in respect of asylum claims made by a person from a country where there is a state but it is unable to provide protection from persecution by non-state agents?

4. Was the Secretary of State entitled to rely on forms of protection other than the grant of asylum which are available in the state to which he is proposing to send the asylum seeker and, if so, by reference to what criteria?

Held: dismissing the appeal;

1. First Issue: Is there an autonomous meaning of article 1A(2)?

It was accepted, rightly, by the Secretary of State that it was a long standing principle of English law that if it would be unlawful to return the asylum

seeker directly to his country of origin where he was subject to persecution in the relevant sense, it would equally be unlawful to return him to a third country which it was known would return him to his country of origin: *Reg. v. Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514, at 532D-E.

It followed that the enquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It was necessary to determine the autonomous meaning of the relevant treaty provision. In *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (UK) Ltd.* [1978] A.C. 141, 152, Lord Wilberforce observed that a treaty should be interpreted "unconstrained by technical principles of English law, or by English legal precedent, but on broad principles of general acceptation".

It followed therefore that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in Articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: Article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.

Their Lordships rejected the Secretary of State's contention that under the legislative changes of 1996 the Secretary of State was not required, when considering whether to issue a certificate under section 2, to proceed on the basis that there is only one true interpretation of the Refugee Convention. The Court found that the subject of the Refugee Convention is fundamental rights, and if Parliament had intended to introduce in 1996 the relativist and imprecise notion of "the Convention as legitimately interpreted by the third country concerned", which tends to undermine the protections guaranteed by the Geneva Convention, it would have been done with express words. Unanimity on all perplexing problems created by multilateral treaties is unachievable. National courts can only do their best to minimise the disagreements. But ultimately they have no choice but to apply what they consider to be the autonomous meaning. Here the difference is fundamental and cannot be overcome by a form of words. The House was bound to take into account the obligations of the United Kingdom Government and to apply the terms of section 2(2)(c) of the Act of 1996. Moreover, the contention of the Secretary of State was in conflict with the logic of treaty law, and in particular the logic of the Refugee Convention, and was not supported in the language of the 1996 Act.

If there is one autonomous meaning of the Refugee Convention, the task of the Secretary of State will in some ways be simplified. He need only consider and apply the true interpretation of the Refugee Convention rather than a multiplicity of potential issues about the legitimacy of particular interpretations by other countries.

2. *Second Issue: What is the relevant autonomous meaning of the Refugee Convention?*

In *Adan v. Secretary of State for the Home Department* [1999] 1 A.C. 293 the House of Lords authoritatively rejected the accountability theory and adopted the persecution theory. Following on the supposition that Article 1A(2) must be given on autonomous interpretation, the persecution theory represents that interpretation.
The Handbook on Procedures and Criteria for Determining Refugee Status, 1979, published by the U.N. High Commission for Refugees ("UNHCR"), states in paragraph 65:

> "Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."

The relevant autonomous meaning of Article 1(A)(2) of the Refugee Convention is therefore as

explained in *Adan*. The House, like the Court of Appeal held that there was no material distinction between a country where there is no government (like Somalia) and a country where the government is unable to afford the necessary protection to citizens (such as Algeria). Both are covered by Article 1A(2).

3. *Was the Secretary of State's certification lawful?*

On the facts of the two cases before the House it was concluded that the Secretary of State wrongly proceeded on the twin assumption that there was a band of permissible meanings of Article 1A(2) and that the practice hitherto adopted in Germany and France falls within the permissible range. The Secretary of State materially misdirected himself.

4. *Alternative Protection in France and Germany*

The House was not in a position to express any opinion on alternative procedures for the protection of asylum seekers in Germany and France.

R. v. Secretary of State for the Home Department, ex parte Adan; R. v. Secretary of State, ex parte Aitseguer [2001] 1 All ER 593

Extradition – Plaintiff detained pursuant to extradition request from Germany – Action for damages arising from arrest and detention – Whether Germany immune from suit under the State Immunity Act – Whether Germany had submitted to jurisdiction of Ontario Courts under Immunity Act by requesting extradition – whether extradition proceedings separate and distinct from plaintiff's lawsuit – Whether "personal injury" exception to sovereign immunity in s. 6(a) of State Immunity Act applied to mental distress not linked to physical injury – State Immunity Act R.S.C. 1985 – (Canada)

S sued the Federal Republic of Germany (Germany) claiming damages for personal injuries suffered as a result of his arrest and detention in Canada pursuant to a warrant issued under the authority of s. 13 of the *Extradition Act*, S.C. 1999, c. 18. Germany brought a motion under Rule 21.01(3)(b) of the Rules of Civil Procedure for an order dismissing the action claiming that it was immune from the suit by virtue of the *State Immunity Act*, R.S.C. 1985, c. S-18.

The judge at first instance found in Germany's favour and dismissed the action, and also ordered a stay of the action pending the determination of the extradition proceedings against S.

S appealed to the Court of Appeal for Ontario. In his claim, S alleged that Canada and Germany owed him a duty of care to ensure that the extradition proceedings were authorized by the treaty between Canada and Germany and were conducted in a manner that was consistent with the *Extradition Act* and the *Canadian Charter of Rights and Freedoms* (the *Charter*). S further claimed that Germany's request for extradition was not authorized by the treaty and that his subsequent arrest and detention were not authorized by the *Extradition Act* and violated his rights under ss. 7 and 9 of the *Charter*. He contended that Germany knew, was recklessly indifferent, or was wilfully blind to the illegality of its conduct. S argued that Germany was liable for the breach of the duty it owed to him and for Canada's conduct, since Canada acted as Germany's agent in the extradition process.

Germany on the other hand argued that it was immune from suit by virtue of the State Immunity Act. Section 3(1) of the Act provides:

> Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

S argued that even if Germany had immunity under s. 3, it had submitted to the jurisdiction of the Ontario courts as contemplated by s. 4 of the *State Immunity Act* by instituting the extradition proceedings. The extradition proceeding was, he contended, the same proceeding as the lawsuit he initiated in the Superior Court after his arrest and detention on the extradition warrant. S also argued that in any event, his claim fell within the exception to sovereign immunity set out in s. 6(a) of that *Act*, which provides that:

> "A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to ... (a) any death or personal injury ... that occurs in Canada"

S. 4 provides: ... "(2) In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it ...

(b) initiates the proceedings in the court; ...

(4) A foreign state that initiates proceedings in a court or that intervenes or takes any step in proceedings before a court, other than an intervention or step to which paragraph 2(c) does not apply, submits to the jurisdiction of the court in respect of any third party proceedings that arise,

or counter-claim that arises, out of the subject-matter of the proceedings initiated by the state or in which the state has so intervened or taken a step."

S had alleged that he suffered personal injury, including mental distress, denial and restriction of his liberty, and damage to his reputation as a result of Germany's deliberate, reckless, or negligent failure to adhere to its treaty with Canada, the *Extradition Act*, and the *Charter*. He did not allege that he suffered any physical injury.

It was argued on behalf of S that personal injury included any interference with, or injury to the person and was not limited to physical injury: *Walker v. Bank of New York Inc.* He maintained that there was no principled basis for holding a foreign sovereign accountable in a Canadian court for tortuous conduct which causes a physical injury in Canada but not for the same tortuous conduct if it causes other forms of interference with, or harm to the person. S. 6(a) should be interpreted in such a way that would produce a "reasonable and just outcome".

Germany on the other hand submitted that the Court had held that claims which do not involve physical injury were not within the scope of the exemption to sovereign immunity created by s. 6(a): *United States of America v. Friedland*

Held: dismissing the appeal;

1. If, on a motion to dismiss based on a sovereign immunity claim, a court were to conclude that it was not "plain and obvious" that the claim should succeed and direct that the matter proceed to trial, the foreign state would be in the untenable position of either not participating in the trial and risking an adverse result, or participating in the trial and thereby losing its immunity claim. The scheme set out in the *State Immunity Act* is workable only if immunity claims are decided on their merits before any further step is taken in the action.

There is no merit to S's arguments based on s. 4 of the *State Immunity Act*. The extradition proceedings were separate and distinct from the lawsuit. Extradition proceedings are part of the process through which Canada honours its obligations to other nations. S's claim was a private action for damages. The fact that S's claim was based on conduct that occurred during the extradition process did not in any way make the extradition proceedings and the lawsuit one and the same proceeding. Even if it could be said that Germany initiated the judicial proceedings under the *Extradition Act* (a characterization that is very hard to accept since it was Canada that sought the warrant for S's arrest), those proceedings were entirely distinct from a lawsuit that S initiated.

"It is entirely contrary to concepts of comity and mutual respect as between nations to hold that a country that calls upon Canada to adhere to its treaty obligations and to assist in extradition to that country does so only at the expense of submitting to the domestic jurisdiction of Canadian courts in matters connected to the extradition request. Extradition is fundamentally a matter between sovereign nations, each exercising its sovereign authority. As a matter of policy, I see no reason why the exercise of that sovereign authority by a foreign state should somehow cost that foreign state its right to claim sovereign immunity in Canadian domestic courts."

2. The Court must decide whether any of the cases decide whether S's claim was one for personal injury within the meaning of s. 6(a).

In *Walker*, the United States was sued for damages for unlawful imprisonment, fraud and misrepresentation. The United States moved to dismiss a claim for personal injury on the basis of sovereign immunity under the terms of the *State Immunity Act*. The Court of Appeal held that the United States was entitled to sovereign immunity under the *Act*.

McKinlay J.A., for the Court, began her analysis of s. 6(a) by doubting that it should be interpreted by reference to the distinction drawn in the common law doctrine of sovereign immunity between public and private functions performed by foreign states. She pointed out, at 509, that the exception to sovereign immunity found in s. 6(a) did not exist at common law. She went on, however, to hold that s. 6(a) clearly required that the personal injury occur in Canada.

"We agree with the position of counsel for the respondent [Walker] that the scope of personal injury covered by s. 6 is not merely physical, but could include mental distress, emotional upset, and restriction of liberty"

In *Friedland*, the plaintiff sued the United States claiming that torts committed by the United States had caused him injury, including damage to his reputation, emotional upset, and personal embarrassment. The plaintiff did not allege physical injury. The Court allowed an appeal by the United States and dismissed the action; it said:

"We agree with counsel for the appellants [the United States] that the "personal injury" exception refers primarily to physical injury and

that s. 6(a) extends to mental distress and emotional upset only in so far as such harm arises from or is linked to a physical injury. This interpretation is consistent with the generally accepted international understanding of the "personal injury" exception to sovereign immunity."

3. The scope of the "personal injury" exception to state immunity as understood by international lawyers is consistent with the conclusion arrived at in *Friedland*. S. Sucharitkul, "Jurisdictional Immunities of States and their Property" in *Yearbook of the International Law Commission*, 1983, vol. II (New York: United Nations, 1985) 25, UN Doc. A/CN.4/363.

"It is clear from the type of physical damage inflicted upon the person or property that a cause of action could arise from any activities undertaken by a foreign state ... within the state of the forum. Damage to reputation or defamation is not personal injury in the physical sense, nor can interference with contract rights or any rights, including economic or social rights, be viewed as damage to tangible property."

4. The interpretation of "personal injury" adopted in *Friedland, supra*, finds support in the French version of s. 6(a):

> L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant:
> a) des décès ou dommages corporels survenus au Canada;

Also support could be found for interpreting "personal injury" as meaning physical injury in its combination in s. 6(a) with the word "death". The two read in combination connote physical harm to the person.

Schrieber v. Federal Republic of Germany et al. [2001] 52 O.R. (3d) 578

Extradition – charge of conspiracy to exchange arms for drugs – requirements for stay of proceedings – standard of proof for surrender to be ordered – Canadian Charter of Rights and Freedoms – Extradition Act – (Canada)

The United States of America requested from Canada, the extradition of A and L to stand trial for conspiracy to violate the American ***Arms Export Control Act*** and ***Iranian Embargo Act***, and in the case of A also for conspiracy to distribute heroin. The Minister of Justice of Canada issued an authority to proceed with respect to both men.

The extradition judge had to determine whether there was sufficient evidence to order that A and L be committed for surrender. In addition, A applied for a stay of proceedings on the ground that the conduct of the US, during the course of these extradition proceedings, violated ss. 7 and 10(b) of the Canadian Charter of Rights and Freedoms (the "Charter") thereby denying him his right to a fair extradition hearing in accordance with the principles of fundamental justice.

The events leading to the extradition request arose out of an undercover operation headed by a US Special Agent Hamidi, whereby A and L arranged to exchange arms to Iran for heroin in the US. There followed a series of complicated meetings and arrangements, whereby it was agreed that the US would make a deal with L in exchange for information and testimony against A.

The US relied in their application for extradition on a number of authenticated documents some of which were affidavits from one Jeffery Cole, Assistant US Attorney and Hamidi, the Special Agent.

The Court determined that the issues raised by the case were:

1. Was A entitled to a stay of proceedings?
2. Were A and L to be committed for surrender?

Held:

1. The Law relating to extradition hearings in Canada had been clarified by the Supreme Court of Canada in the following cases: (i) *United States of America v. Kwok* (2001), 152 C.C.C. (3d) 225; (ii) *United States of America v. Cobb* (2001), 152 C.C.C. (3d) 270; (iii) *United States of America v. Shulman* (2001), 152 C.C.C. (3d) 294; and (iv) *United States of America v. Tsioubris* (2001), 152 C.C.C. (3d) 292.

In *Kwok, supra*, the Court confirmed that the Extradition Act sets out a two-stage process by which extradition proceedings are to be conducted: committal and surrender. The former is judicial in nature while the latter is a function of the executive branch. The other cases addressed the scope of an extradition judge's Charter jurisdiction at the committal stage of the extradition process. *Cobb*, held that as a result of the 1992 amendments to the Extradition Act, R.S.C. 1985, the extradition judge was now

competent to grant Charter remedies, including a stay of proceedings, on the basis of a Charter violation but only insofar as the Charter breach pertains directly to the circumscribed issues relevant at the committal stage of the extradition process. Thus, the issue to be determined by the extradition judge was not whether a fugitive will have a fair trial if extradited, but whether he or she would have a fair extradition hearing in Canada. In Cobb, it was held that s. 7 of the Charter permeates the entire extradition process and is engaged at both the committal and surrender stages. The Court held that although the committal hearing is not a trial, it must conform to the principles of procedural fairness that govern all judicial proceedings in this country.

However, the decision in Cobb was completely different from the present case on its facts. There; enough evidence was led to form a factual foundation and to establish the Charter breach on a balance of probabilities. In this case, the only evidence before the court of a Charter breach was that of an alleged co-conspirator who deposed that he was asked by the prosecuting attorney to find out details of A's defence and to obtain confidential information that existed between A and his lawyer. However, this was disputed in a properly authenticated affidavit submitted by the requesting authorities. The court found that there was not sufficiently established evidentiary basis to support an allegation of a breach of Charter rights. On that basis the court rejected the application for a stay of proceedings.

2. The US sought the committal of A and L pursuant to s. 29(1)(a) of the Extradition Act, S.C. 1999,which provides:

> 29. (1) A judge shall order the committal of the person into custody to await surrender if
>
> > "*(a)* in the case of a person sought for prosecution, there is evidence admissible under this Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner;

The issue of what evidence constitutes a *prima facie* case was considered in *United States of America* v. *Waddell* (1993), 87 C.C.C. (3d) 555 (B.C.C.A.), where it was confirmed that, the test for granting extradition is the same test which a trial judge applies in deciding whether the evidence would justify the withdrawal of the case from a jury: it should be resolved by determining whether there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty: *United States of America v. Sheppard* (1970), 30 C.C.C. (2d) 424 (S.C.C.).

3. Conspiracy is often categorized as an inchoate or incomplete crime, the essence of which is an agreement between two or more persons to carry out an illegal act. As opposed to the crime of attempt, there is no requirement that any preparatory steps be taken nor does there have to be any proximity between the crime agreed to and the agreement. The *actus reus* of conspiracy is the agreement; the *mens rea* is each conspirator's knowledge of the agreement and intention to carry it out.

In *R. v. Cotroni; Papalia v. The Queen* (1979), 45 C.C.C. (2d) 1 (S.C.C.) it was opined that the essence of criminal conspiracy was proof of agreement, which is really the gist of the offence. The *actus reus* is the fact of agreement: *Director of Public Prosecutions v. Nock*, [1978] 3 W.L.R. 57 at p. 66 (H.L.). The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy.

"In its simplest form, conspiracy is an agreement by two or more persons to commit a criminal offence, or to achieve a lawful object by commission of a criminal offence. There must be an intention by two or more persons to the agreement to put the common plan into effect. Where only one of the persons had the intention of carrying out the common plan, a conspiracy has not been made out: *R. v. O'Brien* (1954), 110 C.C.C. 1 (S.C.C.). There is therefore no requirement that each conspirator participate in any overt acts provided that he or she was in agreement with the common plan to commit the offence: *Belyea v. R.* (1932), 57 C.C.C. 318 (S.C.C.). Nor is there a requirement to show proximity between when the agreement was made and when the object of the agreement, the offence, was carried out.

Whether an agreement has been reached between the parties to the alleged conspiracy or whether it is still in the stage of discussion and negotiations is a question of fact to be determined by the trier of fact. It is not necessary for each or any of the members to know all of the details of the plan so long as the agreement includes substantially all the elements of the offence which is being

conspired to: R. *v. Lessard* (1982), 10 C.C.C. (3d) 61 (Que. C.A.).

The Supreme Court of Canada in *Sokoloski v. The Queen* 1977), 33 C.C.C. (2d) 496 considered the question of the definition of agreement. In that case there was evidence that D had sold a substantial quantity of a controlled drug to the accused, Sokoloski. The trial judge found as a fact that due to the quantity and street value of the sale D must have known that it was for resale. It was neither an offence to purchase the controlled drug nor to possess it for personal consumption. At issue was whether D and Sokoloski could be found guilty of conspiracy to traffic.

The dissenting opinion was to the effect that a seller and a buyer could not be guilty of conspiracy by the one being willing to sell and the other being willing to buy when it was not an offence to buy, and, hence not an offence to agree to buy. "The agreement between them is simply a reflection of different promises in a bilateral contract; they are not parties to the same promise."

The majority held that it was an error in law to hold that in order to establish a conspiracy, as charged, it was necessary to prove an agreement between the parties jointly to manufacture, sell, transport or deliver a controlled drug without requisite authority.

The case highlighted the difficulty of defining exactly what is an "agreement".

In reality, whether an agreement will be found to exist depends very much on the facts of each case. In the present case, the Authorities to Proceed state that the Canadian offence which corresponds to the alleged conduct is conspiracy to export goods included in an export control list without a permit. It was fundamentally important that before "negotiations" between Hamidi and A could lead to a purported agreement, A and at least one other person had to agree amongst themselves to commit the object of the conspiracy. There was not even a *prima facie* indication in the evidence that this had occurred. The meetings and correspondence essentially consisted of negotiations to determine whether an agreement could be reached.

In the court's view, the evidence hardly indicated an agreement or that the parties were *ad idem* to export goods in an export control list without a permit. The prosecution had failed to prove an agreement. The Requesting State had not made out a *prima facie* case with respect to Count 1 and the accused were discharged on Count 1 of the Authorities to Proceed.

With respect to Count 2 against A alone, there was also no evidence A and any other person ever reached the point of agreeing to exchange heroin for Klystron tubes. The evidence simply demonstrated that this possibility was discussed and that there were some preliminary negotiations. In short the facts simply showed that agents of the United States of America made overtures and offers of illegal activity to A who responded to them in the course of various discussions between July, 1995 and April, 1998. There was no exchange of anything or agreed date for such exchange. Thus, the conspiracies alleged were not supported by the evidence of the Requesting State. A judge charging a jury would be obliged to take the case away from them by directing that they return a verdict of not guilty. No properly instructed jury could convict A of the conspiracies alleged, and he was accordingly discharged on the second count.

United States of America v. Reza Akrami and Mohsen Lessan . 2001 BCSC 0781 (BC Supreme Court) Internet cite: http://www.courts.gov.bc.ca

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