[1999–00 Gib LR 268]

THAUERER v. ATTORNEY-GENERAL

MATICHEK v. ATTORNEY-GENERAL

SUPREME COURT (Schofield, C.J.): August 3rd, 1999

Extradition and Fugitive Offenders—request for extradition—Governor's order to proceed—Extradition Act 1870, s.7 governs order to proceed with extradition to France—Extradition Act 1989 not extended to Gibraltar by Order in Council or by operation of any other English or Gibraltar law

Extradition and Fugitive Offenders—request for extradition—Governor's order to proceed—when Extradition Act 1870 applicable, order to Magistrate to proceed with case valid under s.7—requirement that case be heard under s.9 follows automatically from confirmation of foreign jurisdiction's requisition and Governor's order to issue arrest warrant

Extradition and Fugitive Offenders—request for extradition—Governor's order to proceed—strict compliance with form prescribed by Extradition Act 1870, Schedule 2 unnecessary—no contravention of mandatory procedure

The applicants applied for orders of certiorari to quash the authority to proceed with their extradition issued by the Governor.

The French Government requested the extradition of the applicants by Gibraltar to answer charges relating to the importation of cannabis. The Governor issued an authority to the Stipendiary Magistrate to proceed in respect of each applicant, pursuant to the Extradition Act 1870, specifying offences under the Drugs (Misuse) Ordinance and Criminal Offences Ordinance. The applicants applied for an order of certiorari on the ground that the authority to proceed was in each case unlawful. Committal proceedings before the Magistrate were adjourned pending the applications.

The applicants submitted that (a) extradition between France and Gibraltar was governed by Schedule 1 to the Extradition Act 1989, not the 1870 Act, since (i) s.5(2) of the 1989 Act provided that the Act applied to all colonies, and an Order in Council under s.34(1) was not required to give effect to extradition procedures in a colony, (ii) Schedule 1 was applied by art. 3 and Schedules 3 and 5 of the Extradition (Torture) Order 1991, (iii) s.30(1) of the 1989 Act extended the Act's provisions to colonies in respect of which Orders in Council had been made under s.4, and (iv) the 1989 Act was applied to Gibraltar by the English Law

(Application) Ordinance; (b) the Governor's powers under the Extradition Act 1870, s.7 were confined to informing the Magistrate that an extradition request had been made and requiring him to issue an arrest warrant; and (c) the authorities did not accord with the prescribed form set out in Schedule 2 to the 1870 Act, as required by s.20.

The Crown submitted in reply that (a) the Extradition Act 1989 did not apply to extradition between France and Gibraltar, since (i) s.5(2) of the 1989 Act only related to extradition arrangements between the United Kingdom and its colonies, and s.34(1) required an Order in Council to extend the application of the Act to colonies and foreign countries, (ii) the Extradition (Torture) Order 1991 applied Schedule 1 of the 1989 Act to Gibraltar only in respect of offences of torture, and not generally, (iii) s.30(1) of the 1989 Act referred to Orders in Council made under s.4 applying Part III of the Act to colonies, and Gibraltar was excluded from the Part III provisions under the European Convention on Extradition Order 1990, and (iv) the 1989 Act was not listed in the Schedule to the English Law (Application) Ordinance as applying to Gibraltar; (b) once a direction to issue an arrest warrant had been given by the Governor under s.7 of the 1870 Act, the Magistrate was automatically empowered to proceed with hearing the case under s.9 of the Act; and (c) since the use of the form of authority set out in Schedule 2 to the 1870 Act was not mandatory, no improper procedure had been followed.

Held, dismissing the applications:

(1) The Extradition Act 1989 did not govern extradition procedures as between France and Gibraltar. Under s.34 of the 1989 Act, an Order in Council was required to give effect in a colony to any provision of the Act corresponding to a provision in the 1870 Act. The apparent conflict between s.34 and s.5(2) was reconciled if s.5(2) was construed as applying only to extradition arrangements between *the United Kingdom* and its colonies. From s.1(2) of the Act, it was clear that only in that context was no Order in Council required to extend the application of the Act to a colony (paras. 11–14).

(2) Nor did art. 3 of the Extradition (Torture) Order 1991 apply Schedule 1 of the 1989 Act generally to France and Gibraltar, since the short title, recitals and Schedules to that Order made it plain that it related only to offences of torture. Its purpose was to bring torture within the extradition scheme and not to alter the entire extradition regime. An explanatory note to the Order reinforced this interpretation (paras. 15–19).

(3) Furthermore, s.30(1) did not operate so as to apply the 1989 Act, since it referred to Orders in Council under s.4 extending the provisions of Part III of the Act to relevant territories, and Part III did not apply here because the European Convention on Extradition did not extend to Gibraltar. Nor did it appear that the 1989 Act was contained in the

English Law (Application) Ordinance so as to apply here (paras. 20–22).

(4) Accordingly, the 1870 Act applied to the present proceedings. The Governor had acted within his powers under s.7 in ordering the Stipendiary Magistrate to proceed with the case against the applicants. The requirement that the case be heard (in accordance with s.9) followed automatically from the Governor's signifying that a requisition had been made by a French diplomatic representative and requiring that the Magistrate issue a warrant for the arrest of the fugitive criminal. Furthermore, the fact that the authorities to proceed did not precisely follow the form contained in the 1870 Act, Schedule 2, was immaterial, since the form adopted did not contravene any mandatory procedure. On the proper construction of s.20, which provided for the use of the Schedule 2 form, an authority was valid provided that no improper procedure had been followed. The applications would be dismissed (paras. 5–10).

Cases cited:

(1) *Ashworth (Oliver) (Holdings) Ltd.* v. *Ballard (Kent) Ltd.*, [2000] Ch. 12; [1999] 2 All E.R. 791, *dicta* of Laws, L.J. applied.

(2) *Att.-Gen.* v. *Prince Ernest Augustus of Hanover*, [1957] A.C. 436; [1957] 1 All E.R. 49, *dicta* of Lord Somervell of Harrow applied.

(3) *Farinha, In re*, [1992] Imm AR 174, distinguished.

Legislation construed:

Extradition Act 1870 (33 & 34 Vict., c.52), s.7: The relevant terms of this section are set out at para. 5.

s.9: The relevant terms of this section are set out at para. 6.

s.20: The relevant terms of this section are set out at para. 10.

Extradition Act 1989 (c.33), s.1(2): The relevant terms of this sub-section are set out at para. 13.

s.4: "Where general extradition arrangements have been made, Her Majesty may, by Order in Council, reciting or embodying their terms, direct that this Act, so far as it relates to extradition procedures under Part III of this Act, shall apply as between the United Kingdom and the foreign state . . . with which they have been made, subject to the limitations, restrictions, exceptions and qualifications, if any, contained in that Order."

s.5(1): The relevant terms of this sub-section are set out at para. 13.
(2): The relevant terms of this sub-section are set out at para. 12.

s.30(1): The relevant terms of this sub-section are set out at para. 20.

s.34(1): The relevant terms of this sub-section are set out at para. 12.
(2): The relevant terms of this sub-section are set out at para. 12.

Extradition (Torture) Order 1991 (S.I. 1991/1702), recital: The relevant terms of this recital are set out at para. 18.

art. 3: The relevant terms of this article are set out at para. 15.

F.H. Panford, Q.C. and *S.J. Bullock* for Thauerer;
F.H. Panford, Q.C. and *S.L. Ffrench-Davis* for Matichek;
R.R. Rhoda, *Attorney-General*, and *K. Warwick* for the respondent.

1 **SCHOFIELD, C.J.:** These applications have been consolidated because the facts and circumstances on which they are based are substantially the same. The applicants are currently detained in custody following a request for their extradition by the Government of France. His Excellency the Governor has signed an authority to proceed pursuant to the Extradition Act 1870, specifying in the case of each applicant offences of conspiracy to import a controlled drug, namely, cannabis resin, punishable in Gibraltar under s.1(1) of the Criminal Offences Ordinance, and various related offences punishable in Gibraltar under the Drugs (Misuse) Ordinance. These are serious offences and I am told that several alleged co-conspirators have already been dealt with by the French courts, some having been acquitted and others having been convicted and having received substantial prison sentences.

2 Committal proceedings before the Stipendiary Magistrate have been adjourned pending these applications for certiorari. Leave was granted to proceed with these applications on the applicants' submission that the authorities to proceed signed by His Excellency are unlawful and should be quashed for the following reasons:

(a) They order the Stipendiary Magistrate to proceed under the Extradition Act 1870, whereas, it is submitted, extradition between France and Gibraltar is governed by Schedule 1 to the Extradition Act 1989.

(b) They purport to direct the Stipendiary Magistrate to proceed under the Extradition Act 1870, when that Act confers no such power on the Governor.

(c) The authorities to proceed do not accord with the form contained in Schedule 2 to the Extradition Act 1870.

3 I can deal with the arguments under (b) and (c) very briefly. Mr. Panford, Q.C. did not emphasize them in his oral submissions, and although he did not formally abandon them, I do not think he regards them as his strongest points. His main argument is that the authorities to proceed were issued under the wrong enactment. His subsidiary argument goes that even if they were correctly issued under the Extradition Act 1870, they were wrong in form.

4 The authorities to proceed order the Stipendiary Magistrate to proceed with the case against the applicants in the following terms:

> "Now I hereby, by this my order under my hand and seal, signify to you that such requisition has been made and order that the

Stipendiary Magistrate for the City of Gibraltar proceed with the case in accordance with the provisions of the said treaty and the Extradition Act 1870."

5 It is argued for the applicants that the Governor's powers are limited to those contained in s.7 of the Extradition Act 1870 (if that Act is held to apply), and those powers do not include power to order the Stipendiary Magistrate to proceed with the case. Section 7 reads:

> "A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.
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> If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody."

For our purposes, for "United Kingdom" read "Gibraltar" and for "the Secretary of State" read "His Excellency the Governor." This section gives the Governor power to require the Stipendiary Magistrate to issue a warrant for the apprehension of a fugitive criminal after signifying that a requisition has been made by a diplomatic representative of the foreign state concerned.

6 Section 7 is followed by s.9, which reads:

> "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.
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> The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime."

So, once a fugitive criminal is brought before the Stipendiary Magistrate, he is directed by s.9 to hear the case. Section 9 is a directive section and once the Governor requires the Stipendiary Magistrate, pursuant to s.7, to issue a warrant, the requirement to hear the case automatically follows.

7 I do not consider that His Excellency erred in ordering the Stipendiary Magistrate "to proceed with the case in accordance with" the provisions

of the treaty and the Act. The order to issue the warrant is in accordance with s.7 and a requirement for the Magistrate to hear the case follows from that order.

8 The second limb of this argument, as set out at (c) in para. 2 above, is that the authorities to proceed were wrong in form, not only in ordering the Stipendiary Magistrate to proceed with the case but in its heading which is: "Authority to proceed under the Treaty between Her Majesty and the French Republic for the Mutual Surrender of Fugitive Criminals and the Extradition Act 1870." It is argued that the term "authority to proceed" was first introduced by the Extradition Act 1989, and that the forms used by His Excellency in the current cases do not follow the form contained in Schedule 2 to the Act of 1870.

9 Mr. Panford has pointed out that in extradition cases procedures must be strictly adhered to and he has drawn the court's attention to the case of *In re Farinha* (3). In that case the authority to proceed had not specified the equivalent offences in the United Kingdom law to those with which the offender was charged under the law of the requesting state. It was mandatory under the Act of 1989 for the authority to proceed to specify the offences which it appeared to the Secretary of State would be constituted by equivalent conduct in the United Kingdom. The Divisional Court held the committal of the offender to be bad in the following words ([1992] Imm AR at 178):

> "In my judgment, the authority in this case is defective and the committal is accordingly bad. If it be objected that the point is a technical one and that there is no obstacle to the issue of a fresh authority, then I respond that the courts must be vigilant to ensure that the extradition procedures are strictly observed and that the Secretary of State has addressed his statutory need to identify the offence constituted by equivalent conduct."

However, that was a case where a mandatory procedure was not followed. The form of order in the present cases does not offend any mandatory rule and (subject of course to my consideration of the arguments under head (a) above) does not demonstrate that any wrong procedure was followed.

10 Section 20 of the Act of 1870 reads as follows:

> "The forms set forth in the second schedule to this Act, or forms as near thereto as circumstances admit, may be used in all matters to which such forms refer, and in the case of a British possession may be so used, mutatis mutandis, and when used shall be deemed to be valid and sufficient in law."

In my judgment, it matters not that the forms used did not exactly conform to those set out in Schedule 2 to the Act, provided that, as in

this case, they do not demonstrate that any improper procedure was followed.

11 The applicants' main argument is that His Excellency proceeded under the Extradition Act 1870 instead of the Extradition Act 1989 and that, accordingly, the authorities to proceed are bad on their face. The Extradition Act 1989 contains two distinct extradition procedures. It is common ground between the parties that the procedure in Part III of the Act does not apply to Gibraltar. The applicants, however, argue that the procedure in Schedule 1 applies to Gibraltar.

12 One argument is that the 1989 Act is applied by s.5(2) of the Act, which reads: "This Act has effect in relation to all colonies." However, that sub-section is apparently inconsistent with s.34, sub-ss. (1) and (2) of which read:

> "(1) Her Majesty may by Order in Council direct that any provision to which this section applies shall have effect in any colony.
>
> (2) This section applies—
>
> (a) to any provision of this Act that corresponds to a provision of the Extradition Act 1870 with amendments made by the Criminal Justice Act 1988; and
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> (b) to any provision of this Act that corresponds to a provision of the Fugitive Offenders Act 1967 with amendments and repeals made by the Criminal Justice Act 1988."

13 Reading s.5(2) in isolation, there is no necessity for an Order in Council to be made for the 1989 Act to apply to Gibraltar. I am persuaded by the Attorney-General that the explanation for this apparent inconsistency with s.34 lies in reading s.5(2) in its context. Section 1(2) of the Act reads as follows:

> "Subject to the provisions of this Act, a person in the United Kingdom who is accused of an extradition crime—
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> (a) in a Commonwealth country designated for the purposes of this subsection under section 5(1) below; or
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> (b) in a colony,
>
> or who is alleged to be unlawfully at large after conviction of such an offence in any such country or in a colony, may be arrested and returned to that country or colony in accordance with extradition procedures under Part III of this Act."

For the sake of completeness I should set out s.5(1):

> "Her Majesty may by Order in Council designate for the purposes of section 1(2) above any country for the time being mentioned in Schedule 3 to the British Nationality Act 1981 (countries whose citizens are Commonwealth citizens); any country so designated is in this Act referred to as a 'designated Commonwealth country'."

These provisions deal with extradition between the United Kingdom on the one hand and Commonwealth countries and colonies on the other. For the extradition procedures to be brought into effect in relation to a Commonwealth country, such country must be designated by Order in Council (s.5(1)) but no such designation is required in respect of a colony (s.5(2)). In relation to all other provisions of the Act, an Order in Council is required for it to apply to a colony (s.34).

14 In accepting that construction, I am endeavouring to give effect to what appears to be the clear intention of the legislature and I am accepting an argument that Parliament cannot have intended there to be inconsistent provisions within its statute.

15 The applicants further argue that the 1989 Act has been applied to Gibraltar by the Extradition (Torture) Order 1991. This Order, which applies to Gibraltar, came into force on August 22nd, 1991. Article 3 of the Order reads:

> "Schedule 1 to the 1989 Act shall apply in the case of a State mentioned in Schedule 3 to this Order under and in accordance with the extradition treaties listed in the second column of that Schedule (being treaties which continue to apply in respect of extradition between that State and one or more of the Territories specified in Schedule 5) as supplemented by Article 3 and paragraphs 1 and 4 of Article 8 of the Convention (set out in Schedule 1 to this Order) which entered into force for those States on the dates specified in the third column of the said Schedule 3; the Orders in Council which give effect to the said extradition treaties shall be construed accordingly."

France is referred to in Schedule 3 to the Order, and Gibraltar in Schedule 5. The Order therefore applies to extradition procedures between France and Gibraltar. The effect of art. 3, say the applicants, is to apply generally the provisions of Schedule 1 of the Extradition Act 1989 to extradition procedures between France and Gibraltar. The Attorney-General argues, on the other hand, that the application of the 1989 Act is limited to offences of torture and it would be wrong to hold that the 1991 Order brought Schedule 1 of the 1989 Act into general application.

16 The applicants' argument is that art. 3 is clear and unambiguous and it would, therefore, be a wrong principle of interpretation to look beyond

its provisions to the short title, preamble or recitals of the Order to contradict its plain words. However, when construing a statutory provision, the court must look at the enactment as a whole and cannot ignore the context in which the particular provision is placed. In the English Court of Appeal decision of *Oliver Ashworth (Holdings) Ltd.* v. *Ballard (Kent) Ltd*. (1), Laws, L.J. recited ([1999] 2 All E.R. at 806) the following passage from the opinion of Lord Somervell of Harrow in *Att.-Gen.* v. *Prince Ernest Augustus of Hanover* (2) ([1957] 1 All E.R. at 61):

> "The title and the general scope of the Act constitute the background of the contest. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole, or any part, of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where SIR JOHN NICHOLL left it in 1826.
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> > 'The key to the opening of every law is the reason and spirit of the law—it is the animus imponentis, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context . . . meaning by this as well the title and preamble as the purview or enacting part of the statute—'
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> (SIR JOHN NICHOLL in *Brett* v. *Brett* . . .)."

Laws, L.J. went on to say (*ibid*.): "In my judgment the first principle which this authority vouchsafes is that in construing any enacting provision in [a] statute regard must be had to the whole of the Act . . ."

17 If one looks at the Extradition (Torture) Order 1991 as a whole, it is, to my mind, clear that its intention is to bring torture within the scheme of extradition. The intention of the Order is not to change the whole regime of extradition, as suggested by the applicants. The short title refers to torture and the recital to the Order specifically refers to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and to no other convention or type of offence, and Schedule 1 to the Order recites the whole Convention. For good measure, the explanatory note, whilst not being part of the Order and having restricted interpretative value, sets out what appears to be clear from the body of the Order, the purpose of the Order, in the following terms:

> "This Order applies the Extradition Act 1989 so as to make extraditable the offence described in section 134 of the Criminal Justice Act 1988 (c.33) and an attempt to commit such an offence in the case of States Parties to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

adopted by the General Assembly of the United Nations on 10th December 1984 . . ."

18 I find support for this interpretation in para. 6 of the recital to the Extradition (Torture) Order which sets out the statutory provisions which Her Majesty is acting under in making the Order in the following terms:

"Now therefore, Her Majesty, in exercise of the powers conferred upon Her by sections 2 and 21 of the Extradition Act 1870 and sections 4(1), 22(3), 30(1) and 37(3) of the Extradition Act 1989 or otherwise in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows . . ."

There is here no reference to s.34 of the 1989 Act which is the provision which confers power upon Her Majesty to apply the Act to Gibraltar.

19 For these reasons I do not accept the applicants' contention that the Extradition (Torture) Order 1991 has applied the 1989 Act to Gibraltar and that the Order incorporates the crime of torture into the extradition regime as a supplementary provision. The incorporation of torture into the extradition regime was the sole purpose of the Order.

20 I can deal quite briefly with the two other statutory provisions which the applicants claim apply the 1989 Act to Gibraltar. First, reference is made to s.30 of the Act of 1989 which reads:

"(1) Upon the making of an Order in Council under section 4 above—

(a) the provisions of this Act relating to general extradition arrangements; and

(b) section 21 above,

shall, unless the Order otherwise provides, extend to every colony, as regards the extradition arrangements to which the Order refers, but subject—

(a) to the modifications set out in subsections (2) and (5) below;

(b) to any further modifications as to procedure prescribed by the law of the colony; and

(c) to the limitations, restrictions, exceptions and qualifications, if any, contained in the Order."

Thus, goes the argument, by s.30(1)(a) the Act is applied to Gibraltar.

21 However, s.4 of the Act relates to extradition procedures under Part III of the Act and it is common ground that Part III is not applicable to extradition between Gibraltar and France because the European Convention on Extradition Order 1990 was limited to the United

Kingdom, the Channel Islands and the Isle of Man, and was not extended to Gibraltar.

22 Lastly, it is suggested that the English Law (Application) Ordinance 1962 may apply the 1989 Act to Gibraltar. I have not been shown that the Act is contained in the Schedule to the 1962 Ordinance and I am satisfied that that Ordinance has not applied the 1989 Act to Gibraltar.

23 For all these reasons, I find that His Excellency was acting under the Extradition Act 1870 when issuing the authorities to proceed in relation to the two applicants and that the Extradition Act 1989 does not apply. It follows that I do not grant the orders sought by the applicants.

24 Costs will go to the Attorney-General.

Applications dismissed.
