

Jersey & Guernsey Law Review – February 2011

MISCELLANY

The long arm of the (Extradition) Law

1 Not long ago, all extradition hearings involving residents of Jersey took place before the Bow Street Magistrates' Court in London. Extradition was held to be an arcane and difficult process which required specialist knowledge. A Jersey magistrate would order the transfer of a defendant to London, but thereafter the hearing was in England. Extradition from the British Isles was then indeed a difficult, and a notoriously slow process. The Extradition Act 2003 was passed to streamline it, and it was decided that Jersey should assume responsibility for the rendition to foreign countries of local alleged offenders. The Extradition (Jersey) Law 2004 is based upon the 2003 Act. A recent request from the Commonwealth of Australia for the extradition of a chartered accountant to face charges of alleged money laundering and fiscal fraud¹ was the first occasion upon which the provisions of the new Law have been tested judicially.²

2 The structure of the new process in Jersey is relatively straightforward. If the Attorney General receives a valid request for extradition he must issue a certificate and send the request and his certificate to the Magistrate.³ The Magistrate then issues a warrant and a hearing will take place before him. The extradition hearing must begin no later than two months after the defendant first appears before him.⁴ The Magistrate must consider whether any of the statutory bars to extradition exist. These are the rules against double jeopardy, extraneous considerations, the passage of time, and hostage-taking considerations.⁵ If none of the statutory bars exists, the Magistrate must decide whether the person's extradition would be compatible with that person's Convention rights under the Human Rights (Jersey) Law 2000. If the answer is in the affirmative, the Magistrate must send the case to the Attorney General for a decision as to whether the person is to be extradited.⁶ The Magistrate must inform the defendant that he has a right to appeal against the Magistrate's decision although that appeal will not be heard until the Attorney has decided whether or not to extradite.⁷ The Attorney General himself has only limited functions. He has to determine whether he is prohibited from ordering extradition under art 31 (death penalty), art 32 (relating to specialty) or art 33 (relating to earlier extradition to Jersey from another territory). If not, and subject to considerations of national security etc, the Attorney General *shall* order the defendant's extradition. There is in this respect no discretion.

¹ The accountant was a partner in a Swiss partnership. He was arrested on a visit to Jersey. Others wanted by the Commonwealth of Australia remain at liberty in Switzerland which does not grant extradition, it seems, for fiscal fraud.

² *De Figueiredo v Commonwealth of Australia* [2010] JRC 146; *ibid.* [2010] JRC 197; *ibid.* [2010] JRC 213

³ Article 7.

⁴ Article 12.

⁵ See arts 16–19.

⁶ Article 24.

⁷ Article 29.

3 If the Attorney does order the extradition of the defendant, an appeal lies to the Royal Court against that order.⁸ Here again, the powers of the Court are tightly circumscribed. An appeal may only be allowed if there is an issue not raised before the Attorney, or there is new information that was not available at the time, and the Court finds that that issue or new information would have led to a different decision and a refusal to order extradition. The general thrust of the Law seems to be in favour of requiring defendants to face trial for alleged offences in the requesting state, so long as it is a designated country.

4 It was against that statutory background that the hearings involving Mr de Figueiredo took place. The Assistant Magistrate found that all the requirements for extradition had been satisfied and she accordingly sent the case to the Attorney General. The Attorney General found that he was not prohibited from ordering extradition and decided that the defendant should be extradited to Australia. The defendant appealed against both decisions to the Royal Court. Sir Richard Tucker, Commissioner held that the appeals involved questions of law save as to whether extradition was “unjust and oppressive” by reason of the passage of time. In that respect alone he would sit with Jurats.⁹

5 In the first appeal against the Assistant Magistrate’s decision¹⁰ the principal issue was whether the conduct alleged against the defendant in Australia was criminal under the law of Jersey. Essentially the argument was that *Foster*¹¹ fraud (unlike fraud in England or Australia) required some form of false representation, and that it was not alleged that the defendant agreed with anyone to submit a false tax return to the Australian tax authorities. There could therefore be no transposition of the alleged offences in Australia into equivalent Jersey offences. Counsel for Australia contended that a number of people were providing a comprehensive tax evasion system to Australian clients, including offshore tax structures providing the taxpayers with false invoices and ATM cards enabling the withdrawal of laundered funds, and it was plain that false tax returns would be made—deceiving the taxman was the name of the game. The Court held that the Assistant Magistrate had correctly concluded that all the charges would constitute offences under the law of Jersey. The double criminality test was satisfied. Tribute was paid to the Assistant Magistrate for an “impeccable” ruling.

6 The second appeal against the decision of the Attorney General¹² raised an important issue on specialty. Specialty is the rule, in brief, that prevents an extradited person from being prosecuted for any offence other than those for which he has been extradited. Article 32 provides that the Attorney General shall not order extradition if there are no specialty arrangements with the designated territory. Such arrangements can be contained in an extradition treaty or in a diplomatic note from the designated territory dealing with the case in question. Article 32(6) provides that a certificate from the Attorney

⁸ Article 45.

⁹ [2010] JRC 138A.

¹⁰ [2010] JRC146.

¹¹ See *Foster v Att Gen* 1992 JLR 2.

¹² [2010] JRC 197.

General stating the terms of any specialty arrangements is “conclusive evidence of these matters”. It was alleged that the first certificate issued by the Attorney General did not meet the requirements of art 32. Shortly before the appeal hearing, Australia issued a second diplomatic note and the Attorney General filed a second certificate which met the alleged defects in the first certificate. It was argued, *inter alia*, that the second certificate should not be received, the Attorney General being, in effect, *functus officio* and unable to supplement the first certificate. The strict requirements of the Law had not been complied with, and the defendant ought therefore to be discharged. The Court held that the second certificate was admissible for the purpose of clarifying and, if need be, remedying the provisions of the earlier certificate. It cited with approval a *dictum* of the Divisional Court in *Welsh v Secy of State for the Home Dept* where Ouseley J stated—“The recognition of important technical requirements is not the same as the erection of technical hurdles wherever ingenuity can manage it.”¹³ The Court was satisfied on the facts that the defendant, if surrendered to Australia, would have all the specialty protection required by art 32.

7 Another objection raised by the defendant was that the Attorney General’s decision was vitiated by a lack of structural impartiality. The point was that, because the Attorney General received the application from Australia for extradition, and initially presented it to the Magistrate, he could not then be seen to be an impartial decision maker in the context of whether extradition should be ordered. The Court rejected the submission both because this was not a ground of appeal specified in art 46 and because no fair-minded and informed observer would have considered the Attorney General’s decision to be partial or biased.

8 Unusually, the 2004 Law provides that there is no appeal from a decision of the Royal Court to the Court of Appeal. The only appeal lies direct to the Judicial Committee of the Privy Council¹⁴ with the leave either of the Royal Court or the Privy Council. Furthermore leave can only be granted if the Royal Court has certified that there is a point of law of general public importance involved in the decision, and the court granting leave considers that the point ought to be considered by the Privy Council. The Royal Court did not certify a point of law of general public importance.¹⁵ Mr de Figueiredo’s appeals accordingly failed and he will now stand trial in Australia.

9 Under art 5 of the Extradition Act 2003 (Commencement and Savings) Order 2003 as amended, extradition from the Bailiwick of Guernsey continues to be governed by the Extradition Act 1989, notwithstanding the repeal of that Act in the United Kingdom. This means that while the initial decision to execute a warrant of arrest is made in the Guernsey courts, all decisions in the extradition process thereafter are taken in London.

¹³ [2007] 1WLR 1281 at para 136.

¹⁴ Article 52.

¹⁵ [2010] JRC 213.

10 Most internationally recognised statutory bars to extradition such as double jeopardy, the passage of time and specialty are common to the 1989 Act regime and the regime under the 2003 Act as reflected in the Extradition (Jersey) Law 2004. However, there are a number of significant differences between the two regimes. One is the fact that under the 1989 Act the Secretary of State has a general discretion to refuse an extradition request. Another difference is that under the 1989 Act, all extradition requests must be based on *prima facie* evidence except in the case of requests from signatories to the Council of Europe Convention on Extradition, 1957, who need only to provide information. Under the 2003 Act, although some countries still have to establish a *prima facie* case, the range of countries which need only provide information is much more extensive.

11 The Guernsey authorities are currently conducting a review into extradition, and as part of that process are closely monitoring developments in the United Kingdom where a review of the 2003 Act is underway. The Guernsey authorities do not expect to take any final decisions on extradition until the outcome of the United Kingdom review is known.