

Jersey & Guernsey Law Review – October 2011**EXTRADITION AT WHAT PRICE?****Shant Manok-Sanoian**

*The full impact of the Extradition (Jersey) Law 2004 (“the Law”) has recently been felt in Jersey as a result of the decisions of the Royal Court in *De Figueiredo v Commonwealth of Australia*.¹ This case was the first ever contested extradition to come before Jersey’s Royal Court and therefore the first time that the provisions of the Law have had to be considered and be the subject of a judicial ruling. The outcome of the case therefore is highly significant. This article examines the extradition procedures that were followed and considers the key issues that arose out of the proceedings.²*

Background

1 The case arises out of a request made by the Commonwealth of Australia on 29 January 2009 for the extradition of Mr de Figueiredo (“the appellant”), a chartered accountant of good character, from Jersey to Australia to face criminal charges relating to an alleged conspiracy to evade the payment of income tax. In essence, it was alleged that the appellant had taken part in a conspiracy with a number of Australian tax payers to defraud the Commonwealth of Australia by being involved in the implementation and operation of certain offshore schemes. The appellant had never been to Australia and the offences were alleged to have been committed by him whilst he was working as an accountant in Switzerland. He denied all and any wrongdoing.

The extradition procedure

2 The Law is modelled on the United Kingdom’s Extradition Act 2003 and valuable guidance is available from the decisions of the English courts in relation to comparable provisions of that Act. It follows that the law and practice in England is strongly persuasive when considering the procedure to be followed in Jersey.

¹ [2010] JRC 146 and [2010] JRC 197. See also “The long arm of the (Extradition) Law”, in *Miscellany* (2011) 15 J&G Law Rev 1.

² The author is grateful to Advocate Michael O’Connell who reviewed this article in draft.

3 It may be helpful at the outset of this article to examine briefly the extradition procedure under the scheme of the Law. Australia is classed as a designated territory of the first category under the Law. Part Two of the Law sets out the procedure to be followed where a designated territory sends a valid extradition request to Jersey.

4 Upon receipt of a valid extradition request, the Attorney General issues a certificate and sends the extradition request and certificate to the Magistrate who will then issue a warrant for the arrest of the person whose extradition is requested. The initial extradition hearing takes place before the Magistrate whose function is to determine whether all legal and procedural requirements under the Law have been satisfied. One of the key questions the Magistrate must determine is whether the offence specified in the extradition request is an “extradition offence” under art 3 of the Law. This will be examined in more detail below.

5 Once the Magistrate has determined that the offence is an extradition offence, the Magistrate must then determine whether there are any bars to extradition under art 16 of the Law. Article 16 sets out four bars to extradition and the Magistrate has to decide whether the person’s extradition to the designated territory is barred by reason of (a) the rule against double jeopardy; (b) extraneous considerations; (c) the passage of time; and (d) hostage-taking considerations. If the Magistrate decides any of these questions in the affirmative then the person is discharged. If, however, the Magistrate decides each of these questions in the negative, then the Magistrate must go on to consider whether the person’s extradition would be compatible with his human rights within the meaning of the Human Rights (Jersey) Law 2000. If the Magistrate decides that question in the affirmative, then the Magistrate must send the case to the Attorney General for a decision as to whether the person is to be extradited.

6 Upon receipt of the case from the Magistrate, the Attorney General is required to consider, pursuant to art 30 of the Law, whether he is prohibited from ordering the person’s extradition under art 31 (relating to the death penalty), art 32 (relating to specialty) or art 33 (relating to earlier extradition to Jersey from another territory) of the Law. If the Attorney General decides that he is prohibited under any of the above articles from ordering the person’s extradition then that person is discharged. If, however, the Attorney General decides that he is not so prohibited, then the Attorney General must order the extradition of the person to the designated territory.

7 In the case of the appellant, the initial extradition hearing took place before the Assistant Magistrate in 2009. The Assistant Magistrate found that all the legal and procedural requirements for extradition had been satisfied and that there were no statutory bars to extradition and,

further, that the extradition would be compatible with the appellant's human rights. The Assistant Magistrate accordingly sent the case to the Attorney General who issued his order for extradition on 23 December 2009.

8 The appellant thereafter appealed against the Assistant Magistrate's decision and the Attorney General's order. There subsequently were two appeals heard by the Royal Court; one in respect of the Assistant Magistrate's decision and the other in respect of the Attorney General's order for extradition.

Appeal against the decision of the Assistant Magistrate

9 The appellant's first appeal was against the decision of the Assistant Magistrate to send the case to the Attorney General. There were three main grounds of appeal. The appellant argued that the Magistrate had erred in fact and law in holding that—

- (a) the conduct for which extradition was requested amounted to an extradition offence under the Law;
- (b) it was not unjust or oppressive to extradite the appellant; and
- (c) the extradition of the appellant was compatible with his human rights.

Extradition offence

10 In relation to the first ground, we must first examine what precisely amounts to an extradition offence within the meaning of the Law. The definition of extradition offence is found in art 3(2) of the Law which provides that—

“(2) The conduct constitutes an extradition offence in relation to the designated territory if—

- (a) the conduct occurs in the designated territory;
- (b) the conduct would constitute an offence under the law of Jersey, punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment, if it occurred in Jersey; and
- (c) the conduct is so punishable under the law of the designated territory”

11 The first question to be determined under art 3(2) is whether the alleged conduct occurred in Australia. The Assistant Magistrate held that the alleged conduct took place in Australia even though the

appellant had never set foot there as it was sufficient that the effect of the appellant's conduct was intentionally felt in Australia.³ The Royal Court found that this was the correct approach to take and upheld the Assistant Magistrate's finding on this point. Therefore, it is now settled law that a person does not have to be physically present in a particular territory for that person's conduct to have occurred in that territory. Rather, it is the effect of that person's conduct that is the determinative factor. In this case, the alleged offences involved the removal of the proceeds of tax evasion from Australia and the transfer of such proceeds to various offshore accounts, which proceeds would then be returned or repatriated to the alleged tax evaders in Australia via various means. The effect felt in Australia, it was argued, was the reduction of Australian tax which was the intended outcome of the alleged conspiracy.

12 The second question to be determined under art 3(2) is whether the conduct set out in the request would constitute an offence under Jersey law if it occurred in Jersey. This is based on the concept of dual criminality which lies at the heart of the extradition process. The object of the dual criminality rule is that the offence for which extradition is ordered should be within the criminal jurisdiction of both the requesting and the requested state.

13 Lord Millett in *R (Al-Fawwaz) v Governor of Brixton Prison*⁴ held that the two requirements of the dual criminality rule served two different purposes. The first requirement, that the offence for which extradition is ordered should be within the jurisdiction of the requesting state, serves a purely practical purpose as there is no point in extraditing a person for an offence for which the requesting state cannot try him. The second requirement, namely that the offence should also be within the requested state's own criminal jurisdiction, serves to protect the accused from the exercise of an exorbitant foreign jurisdiction.

14 In order to check that there is no exorbitant foreign jurisdiction, the Court of the requested state has to carry out a transposition exercise in order to assess whether the offence and the conduct giving rise to it would be justiciable in the requested state. This is relatively straightforward in cases where the entire conduct occurs in the designated territory. By way of example, if someone robs a person in Sydney, Australia, that conduct is simply transposed to Jersey and the question asked is whether, if it occurred in Jersey, it would amount to an offence under Jersey law carrying more than 12 months'

³ *Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67.

⁴ [2002] 1 AC 556.

imprisonment. However, complications can arise where the conduct occurs partly outside the designated territory, as an issue will then arise as to whether that part of the conduct which occurred outside the designated territory can be transposed to Jersey.

15 The appellant argued that the Australian charges did not include an allegation of a false representation being made on the part of the appellant and, further, that the evidence from the Australian prosecutors did not show that the appellant had agreed with anyone to submit any false tax returns. Making a false representation is a strict requirement and constituent element of the offence of fraud under Jersey law, following the principles set out in *Foster v Att Gen*,⁵ but it is not a constituent element of the offence under English or Australian law. The appellant argued that because the requirements of *Foster* fraud had not in effect been alleged, the alleged conduct could not constitute an offence under Jersey law after the transposition exercise because of this missing constituent element. Therefore, the conduct in question did not amount to an extradition offence within the meaning of the Law.

16 The Royal Court rejected this argument and held that the whole purpose of the conspiracy upon which the appellant had allegedly engaged was the evasion of the payment of tax which could only be achieved by deception and by the submission of false tax returns. The Royal Court not only held that the submission of false tax returns was a reasonable inference to draw from the evidence, it was also a necessary implication from the evidence, as it was an integral part of the alleged offences that the appellant had intended and envisaged that false tax returns would be filed with the Australian authorities. Accordingly, the Royal Court found that all the offences in respect of which extradition was requested amounted to an extradition offence within the meaning of the Law.

17 The Royal Court also found that the offences and conduct giving rise to them would be punishable under the law of Australia with imprisonment for a term of 12 months or more. Therefore, the Royal Court held that all the requirements of art 3(2) of the Law had been complied with and dismissed the appeal under this head.

Unjust or oppressive?

18 The second ground of appeal, namely as to whether it would be unjust or oppressive to extradite the appellant, was a question of fact

⁵ 1992 JLR 6.

and the Royal Court sat with Jurats for the purpose of deciding this issue. Article 19 of the Law provides—

“(19) Passage of time

A person’s extradition to a designated territory is barred by reason of the passage of time if (but only if) it appears that it would be unjust or oppressive to extradite the person by reason of the passage of time—

- (a) since the extradition offence was allegedly committed by the person; or
- (b) since the person is alleged to have become unlawfully at large,

as the case may be.”

19 The basic test in art 19 is whether extradition has been rendered unjust or oppressive in all the circumstances due to the passage of time. Lord Diplock in *Kakis v Government of the Republic of Cyprus*⁶ held that the concept of “injustice” was directed primarily towards the risk of prejudice to the accused at trial, and the concept of “oppression” was directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration.

20 The safeguard set out in art 19 is very important. Never perhaps more so than when a foreign country on the other side of the world seeks to extradite a citizen and native of Jersey who is of good character and who has never been to or set foot in that foreign country.

21 An issue arose as to what precisely was the relevant period of time for the Royal Court to take into consideration. The case of *Kakis* referred to above clearly showed that the relevant period of time was the time between the date of the offence and the conclusion of the extradition proceedings. However, the appellant went on to argue that the Royal Court should also take into account what would happen to him in Australia in order to determine the question of whether it was unjust or oppressive to extradite him. So while the prejudice must have taken place at the date of the extradition proceedings, the appellant argued that the future consequences of the prejudice already suffered were also a material part of the court’s consideration. In effect, this was an argument that future hardship or oppression should also be taken into account.

⁶ [1978] 1 WLR 779.

22 The Commonwealth of Australia argued that the relevant period to be taken into consideration started from the date when the prosecuting authorities had sufficient evidence to charge and therefore request extradition and that the Jersey Court was not entitled to take any future hardship or oppression into account. They also referred to the decision of the House of Lords (now Supreme Court) in *Gomes v Government of Trinidad and Tobago*⁷ which held that the law had moved on since *Kakis*, in part because of the developing abuse of process jurisdiction over the last 30 years, and that the essential question to ask when considering injustice is whether a fair trial is impossible in the requesting state taking into account the safeguards that exist in that requesting state.

23 The appellant was charged with offences which allegedly took place some 15 years ago. Some of the witnesses who would have been able to give evidence on behalf of the appellant were no longer available to give evidence. The appellant argued that the combination of the unavailability of evidence coupled with delay and the passage of time would render a fair trial in Australia impossible. Therefore, this would make it unjust and oppressive to order extradition.

24 The appellant's argument was rejected by the Royal Court. On the facts of the case, the Jurats decided that it would not be unjust or oppressive to extradite the appellant by reason of the passage of time. The Assistant Magistrate had earlier found that the unavailability of witnesses had nothing to do with the passage of time and that adequate safeguards existed in Australia's legal system to protect the appellant against his trial being rendered unfair. The Jurats upheld the Assistant Magistrate's decision on this point. Accordingly, this ground of appeal was dismissed.

Human rights

25 The final ground of appeal was whether the Assistant Magistrate was correct in finding that extradition was not incompatible with the appellant's human rights within the meaning of the Human Rights (Jersey) Law 2000, which incorporated the provisions of the European Convention on Human Rights ("ECHR") into the law of Jersey. The relevant articles of the ECHR are art 6 which guarantees the right to a fair trial and art 8 which guarantees the right to respect for private and family life.

26 In relation to his art 6 rights, the appellant tendered expert evidence and argued that there would be an unreasonable delay in this

⁷ [2009] UKHL 21.

matter reaching trial in Australia, were he to be extradited, which would mean that he would not receive a fair trial in Australia. The Royal Court agreed with the findings of the Assistant Magistrate who found that there would not be any unreasonable delay, bearing in mind the type of case and its complexity and the fact that the appellant would have an opportunity to argue for a stay of proceedings due to delay, or any other unfairness, at his trial in Australia if he wished to do so.

27 In relation to the appellant's art 8 rights, the Royal Court held that it was only in exceptional circumstances that the extradition of a person would be held to be an unjustified or disproportionate interference with the right to respect for family life. The consequences of interference with art 8 rights must be exceptionally serious before they can outweigh the importance of extradition. The Royal Court went on to state that only the gravest effects of interference with family life would be capable of rendering extradition disproportionate to the public interest that it serves and that it would only be in the rarest cases that art 8 would be capable of being successfully invoked. This was not such a case. It should perhaps be noted that a person's art 8 rights will almost always be affected by the extradition process, as the separation of a person from his family life and the distress and disruption that this causes will be inevitable. The Royal Court held that extradition in this case would not breach the appellant's human rights and accordingly dismissed the appellant's appeal against the decision of the Assistant Magistrate.

Appeal against the Attorney General's order

28 The appellant's second appeal was against the Attorney General's decision to order extradition. The crux of the appeal concerned the principle of specialty. Specialty is an important rule which is intended to ensure that an extradited person is only tried in a foreign country for the offences for which he is extradited. It serves a number of purposes; first to protect the judicial processes of the requested state against abuse after it has relinquished jurisdiction over the person; second, to reinforce the dual criminality rule considered above; and third, to protect the extradited person from having to face a charge after being sent to the requesting state of which he had no notice.

29 Before extradition can be considered by the requested state, the requesting state's adherence to the specialty rule must be established. The inflexibility and the importance of the specialty principle is perhaps reflected in the strict language of art 32(1) of the Law which provides that "The Attorney General shall not order a person's extradition to a designated territory if there are no specialty arrangements with that designated territory".

30 It will be seen that art 32(1) refers to specialty arrangements with a designated territory. What exactly does this mean? Insofar as a non-European Union country has agreed with another to extradite, there will usually be a formal extradition treaty in place setting out the requirements to be followed. However, as between Commonwealth countries, extradition or specialty arrangements are usually put in place on a case-by-case basis. It follows that whenever Jersey receives an extradition request from a Commonwealth country, the Attorney General must issue a certificate confirming the existence of specialty arrangements with that particular country. In the case of the appellant, the Attorney General issued a certificate in relation to specialty on 23 December 2009, the very same day the order for extradition was made. It is not known if the specialty certificate was issued before or after the Attorney General's decision to order the extradition of the appellant.

31 Article 32(3) of the Law provides that—

“(3) There are specialty arrangements with a designated territory if (but only if) under the law of that designated territory or arrangements made between it and Jersey, a person who is extradited to the designated territory from Jersey may be dealt with in the designated territory for an offence committed before the person's extradition only where:—

- (a) the offence is one to which paragraph (4) refers; or
- (b) the person is first given an opportunity to leave the designated territory.”

32 Article 32(4) of the Law provides, so far as is material, that—

“(4) The offences to which this paragraph refers are:—

- (a) the offence in respect of which the person is extradited;
- (b) an extradition offence disclosed by the same facts as that offence, other than one in respect of which a sentence of death could be imposed;
- (c) an extradition offence in respect of which the Attorney General consents to the person's being dealt with.”

33 Finally, art 32(6) of the Law provides that—

“(6) A certificate issued by or under the authority of the Attorney General confirming the existence of arrangements with a designated territory that is a Commonwealth country or a British overseas territory and stating the terms of the arrangements is conclusive evidence of those matters.”

34 The words “but only if” in art 32(3) and “conclusive evidence” in art 32(6) of the Law demonstrate the strictness of the statutory

language, which is reflective of the absolute requirement that extradition must not be ordered in circumstances where there is anything less than total compliance with all statutory requirements. Indeed, the English Courts have repeatedly confirmed that extradition procedures and rules must be strictly observed, Lord Hope having stated that “the importance of this principle cannot be over-emphasised”.⁸

Grounds of appeal

35 Turning to the appeal itself, there were two main grounds of appeal pursued by the appellant. The appellant argued that—

- (a) the order of the Attorney General did not state that he was satisfied that he was not prohibited from ordering the appellant’s extradition under art 30(1)(b) of the Law (relating to specialty); and
- (b) the Attorney General was prohibited from ordering extradition because the specialty arrangements set out in his certificate did not comply with art 32 of the Law.

36 When the Attorney General issued his order for extradition on 23 December 2009, he did not state that he was satisfied that he was not prohibited under art 30(1)(b) of the Law from ordering the appellant’s extradition. In fact, what the order actually said was that the Attorney General was satisfied that he was not prohibited from ordering the appellant’s extradition under art 30(1)(a) (relating to the death penalty) and 30(1)(c) of the Law (relating to earlier extradition to Jersey from another territory). The order failed to mention anything about art 30(1)(b) of the Law.

37 Furthermore, the wording of the specialty certificate issued by the Attorney General did not follow the exact wording of art 32 of the Law. It was contended on behalf of the appellant that the specialty arrangements set out in the certificate were actually wider than the Law required which meant that the appellant was exposed to the risk of being prosecuted in Australia for any offence not tied back to the law of Jersey. This led to the appellant arguing that the Attorney General’s decision to order extradition was defective and, furthermore, that the Attorney General was prohibited from ordering his extradition given that the specialty arrangements in place with Australia were inadequate to guarantee his minimum rights and protection.

⁸ *R (Guisto) v Governor of Brixton Prison* [2004] 1 AC 101 *per* Lord Hope at para 41.

38 Matters were somewhat complicated further by the Attorney General issuing a second specialty certificate approximately nine months later (in September 2010) in order to cure the defects in the earlier specialty certificate. The appellant argued that the second specialty certificate was inadmissible for a number of reasons; first, there had been no new decision of the Attorney General to order extradition; second, the Attorney General could not lawfully make a new decision as the scheme of the Law did not permit a reconsideration of the Attorney General's decision to order extradition after it had already been made; and third, the Law did not permit the issuance of two "conclusive evidence" certificates confirming the existence of specialty arrangements. Even if the second certificate was ruled to be admissible, the appellant argued that it was irrelevant as the wording of it was still defective.

39 In addition, the Commonwealth of Australia submitted affidavit evidence in order to explain the extent and nature of its specialty arrangements with Jersey. The Royal Court admitted this affidavit evidence, despite the existence of English case law clearly showing that extrinsic evidence was inadmissible in construing identical statutory language to that in our Law⁹. The Royal Court, however, was of the view that it was entitled to look at evidence that came in after the making of the extradition order in deciding whether specialty requirements had been complied with.

40 The Royal Court also held that the second specialty certificate was admissible for the purposes of clarifying and remedying the wording of the earlier defective certificate. It did not have the effect of destroying the first specialty certificate or nullifying the Attorney General's order for extradition. The Royal Court was of the view that the purpose of the specialty certificate was to enable the Court to be satisfied that a sufficient arrangement was in place between Australia and Jersey and if a slip occurred in the wording of the certificate, as was the case here, the Royal Court would not be prevented from looking at the reality of the situation or from receiving additional information or indeed a further specialty certificate from the Attorney General. Curiously, the Royal Court held that it was unnecessary to consider in any detail the status or validity of the first specialty certificate.

41 The admissibility of the second specialty certificate was procedurally unfair in the appellant's view, as the second specialty certificate clearly was not (and could not have been) taken into

⁹ *R v Secy of State for the Home Department, ex p Hill* [1999] QB 886 and *R v Governor of Pentonville Prison, ex p Lee* [1993] 3 All ER 504.

consideration and the arrangements contained therein were not yet in place when the Attorney General made his decision to order extradition in December 2009. However, this point did not find favour with the Royal Court, nor was it dealt with clearly in the reasoned judgment which followed.

42 The Royal Court went on to find that the Attorney General's failure in his order to make any reference to specialty (namely art 30(1)(b) of the Law) did not invalidate his order for extradition as, in the Court's view, it was clear from all the evidence that the Attorney General was well aware and had already considered the question of specialty when ordering the appellant's extradition. The appellant's appeal was accordingly dismissed.

Conclusion

43 It should be noted that leave to appeal to the Privy Council was refused by the Royal Court in respect of both appeals. The appellant was extradited to Australia in December 2010 and is currently awaiting trial.

44 It can be seen from the above that very complex and undeniably technical arguments were put forward on behalf of the appellant in the appeal hearings. This should come as no surprise and is perhaps to be expected given that extradition proceedings, by their very nature, are complex and involve much technical legal argument. It may be said that the outcome of this case shows a degree of relaxation in judicial attitude to the necessity for strict observance and compliance with technical requirements of the law in the interests of comity and co-operation with other states. To that end, it is arguable that the Royal Court has taken a different approach to the technical requirements of extradition legislation as compared with English Courts.

45 This case also raises interesting questions concerning the degree of structural impartiality in respect of the Attorney General and his functions. In the earlier stages of the extradition proceedings, the Commonwealth of Australia was represented and advised by representatives of the Attorney General from the Jersey Law Officers' Department. The Attorney General is of course the ultimate decision maker as to the extradition of a person and exercises his function in a quasi-judicial capacity. It follows that if his department is also acting in the capacity as solicitor to the requesting state, this may create the appearance of bias towards that requesting state in relation to any decision the Attorney General has to make under the Law.

46 This situation does not occur in the United Kingdom as the prosecution is carried out on behalf of the requesting state by the Crown Prosecution Service ("CPS") and the decision as to extradition

is taken by the Secretary of State. The CPS and the Secretary of State are always separately represented in any court proceedings in order to maintain independence and impartiality, which concepts are often said to be the cornerstone of justice. A way of remedying this problem in Jersey, and to avoid the appearance of bias, would be for the requesting state to instruct private lawyers at the outset of the extradition proceedings in order to maintain independence and impartiality. Indeed, it will be interesting to see how extradition proceedings are conducted in this jurisdiction in the future.

47 As a final note, it remains to be seen what impact this particular extradition order will have on Jersey's financial services industry.

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