19/97

SUPREME COURT OF VICTORIA

PAPAZOGLOU v THE REPUBLIC OF THE PHILIPPINES

Beach J

28-29 November, 10 December 1996

EXTRADITION – DETERMINATION WHETHER PERSON ELIGIBLE FOR EXTRADITION – MATTERS TO BE TAKEN INTO ACCOUNT BY MAGISTRATE – WHETHER PROVISIONS OF EXTRADITION TREATY RELEVANT TO DETERMINATION – WHETHER MAGISTRATE PERFORMING ADMINISTRATIVE OR JUDICIAL FUNCTION – WHETHER MAGISTRATE HAS POWER TO STAY PROCEEDING AS AN ABUSE OF PROCESS: *EXTRADITION ACT* 1988 (CWTH) SS7, 11(1)(6), 19(1)(2).

1. When determining whether a person is eligible for extradition, a magistrate is confined to considering those matters specified in section 19(2)(a)-(d) of the *Extradition Act* 1988 (Cwth). A magistrate is not concerned with provisions of an extradition treaty except those which may be relevant to s19(2)(b). It is for the Attorney-General to have regard to the provisions of any such treaty when determining whether the eligible person is to be surrendered.

***Todhunter v United States of America & Anor* [1995] FCA 1198; (1995) 57 FCR 70; 129 ALR 331, followed.**

2. A magistrate conducting a proceeding to determine whether a person is eligible for surrender is performing an administrative or ministerial function and the magistrate's statutory obligations, couched as they are in mandatory terms, leave no room for the implication of a discretionary power to stay the proceeding as an abuse of process.

***Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183, applied.**

BEACH J: [1] I have before me an originating motion filed in the court by the plaintiff, Alexander Papazoglou, whereby the plaintiff seeks a review of the decision of His Worship, Mr Bernard Coburn M. delivered 11 October 1996 that he be committed to prison to await surrender under a surrender warrant or temporary surrender warrant to the Republic of the Philippines, or release pursuant to an order under subsection 22(5) of the *Extradition Act* 1988 (Commonwealth) (the Act). The background to the originating motion may be summarised as follows: During the years 1984 to 1988 inclusive the plaintiff carried on business in Melbourne as a travel agent through a company controlled by him called Goldair (Aust) Pty Ltd. (Goldair). Goldair has been described in the proceeding as a consolidator of travel agents. It directed a large volume of business to Philippine Airlines Inc (PAL) a corporation controlled and operated by the Republic of the Philippines. It is alleged that during the years 1984 to 1988 the plaintiff falsified production reports thereby obtaining moneys from PAL totalling approximately $11 million, to which he and Goldair were not entitled. On 14 December 1988 PAL filed a proceeding in this court against the plaintiff, Goldair, and certain other parties seeking to recover the moneys which it alleged had been overpaid. In February 1989 the auditors for PAL reported the matter to the Victoria Police. The plaintiff was arrested, charged with a number of criminal offences and released on bail. In 1990 the plaintiff was re-arrested, charged with a further 130 criminal offences and again **[2]** released on bail. By a deliberate decision of the Director of Public Prosecutions all charges laid against the plaintiff related to the calendar years 1986, 1987 and 1988.

By a deed of settlement dated 30 April 1990 the plaintiff, Goldair, and certain other parties settled the civil proceeding brought against them by PAL. Pursuant to the terms of the deed, Goldair agreed to pay to PAL a sum of $5,500,000 and the plaintiff guaranteed the performance by Goldair of its obligation in that regard. It was a further term of the deed that PAL by its counsel, and in open court, withdraw the allegations of fraud made by PAL against the plaintiff. In due course that occurred.

In August 1991 there was a committal hearing in respect of 94 counts of obtaining property by deception and 23 counts of false accounting brought against the plaintiff. The plaintiff accepted

his committal for trial on the hand up brief, and was duly committed to stand trial in the County Court at Melbourne. Thereafter there were negotiations between the plaintiff's legal advisers and the Director of Public Prosecutions with a view to reducing the number of charges brought against the plaintiff in return for a plea of guilty. Ultimately it was agreed by the parties that the plaintiff would plead guilty to 24 counts of furnishing false information contrary to the provisions of s831(B) of the *Crimes Act*. Again, by deliberate choice of the Director of Public Prosecutions, the charges to which the plaintiff pleaded guilty covered the period from 1 January 1986 to 31 January 1988 and related to sums of money totalling approximately $3,350,000.

[3] On 20 August 1992 the plaintiff appeared before His Honour Judge Ross in the County Court at Melbourne and pleaded guilty to the charges. On 28 August 1992 His Honour sentenced the plaintiff to an effective term of imprisonment of 6 years and directed that he serve a minimum term of 4 years before being eligible to be released on parole. The plaintiff served his minimum term of imprisonment without incident and was released on parole on 8 August 1996. However, immediately upon his release on parole the plaintiff was arrested by officers of the Federal Police pursuant to a warrant issued for the extradition of the plaintiff to the Republic of the Philippines in respect of offences alleged to have been committed by the plaintiff in that country in the years 1984 and 1985. The alleged offences relate to the plaintiff's dealings with PAL and are of the same character or nature as the offences to which the plaintiff pleaded guilty in August 1992. Not unnaturally, the plaintiff is aggrieved at what has now befallen him, having believed that by pleading guilty to the offences he did in this state, all matters of a criminal nature relating to him and his dealings with PAL were finalised.

On 16 September 1996 the Republic of the Philippines formally requested the extradition of the plaintiff to that country. On 18 September 1996 the Federal Attorney-General gave notice to a magistrate under s16(1) of the Act that the request had been received. On 3 October 1996 His Worship, Mr Bernard Coburn, M. **[4]** commenced a hearing pursuant to s19 of the Act to determine whether the plaintiff was eligible for surrender in relation to the extradition offences. That section reads:-

> "(1) Where:
> (a) a person is on remand under section 15;
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> (b) the Attorney-General has given a notice under subsection 16(1) in relation to the person;
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> (c) an application is made to a magistrate by or on behalf of the person or the extradition country concerned for proceedings to be conducted in relation to the person under this section; and
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> (d) the magistrate considers that the person and the extradition country have had reasonable time in which to prepare for the conduct of such proceedings;
>
> the magistrate shall conduct proceedings to determine whether the person is eligible for surrender in relation to the extradition offence or extradition offences for which surrender of the person is sought by the extradition country.
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> (2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:
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> (a) the supporting documents in relation to the offence have been produced to the magistrate;
>
> (b) where this Act applies in relation to the extradition country subject to any limitations, conditions, exceptions or qualifications that require the production to the magistrate of any other documents — those documents have been produced to the magistrate;
>
> (c) the magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and
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> (d) the person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence.

*[His Honour then set out the remaining provisions of the Section and continued]...***[6]** On 11 October 1996 His Worship determined that the plaintiff was eligible for extradition to the Republic of **[7]** the Philippines and ordered that he be committed to prison to await surrender under a surrender warrant or temporary warrant or release pursuant to an order under subsection 22(5) of the Act. That subsection reads:-

> (5) Where the Attorney-General determines under subsection (2) that the eligible person is not to be surrendered to the extradition country in relation to any qualifying extradition offence, the Attorney-General shall order, in writing, the release of the person."

The plaintiff now seeks a review of the magistrate's order pursuant to the provisions of section 21 of the Act. The relevant subsections of that section read:- *[After setting out the relevant provisions, His Honour continued]...*

The following are the grounds upon which the plaintiff seeks the review:-

> "1. That the Magistrate erred in law in holding that he had no power to stay the proceedings as an abuse of process.
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> 2. That the Magistrate erred in law in failing to stay the proceedings as an abuse of process.
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> **[8]** 3. That the Magistrate erred in law in holding that the Plaintiff was eligible for surrender in relation to the extradition offence for which surrender of the Plaintiff was sought by the Republic of the Philippines.
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> 4. That the Magistrate erred in law in holding that he was not satisfied that there are substantial grounds for believing that there is an extradition objection in relation to the extradition offences for which surrender of the Plaintiff was sought by the Republic of the Philippines.
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> 5. That the Magistrate erred in law in holding that the provisions of Article 4 of the Treaty on Extradition between Australia and the Republic of the Philippines could not be taken into account in determining whether there were substantial grounds for believing that there is an extradition objection in relation to the offence.
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> 6. That the Magistrate misdirected himself as to the correct interpretation of Section 11(6) of the *Extradition Act* 1988 (Commonwealth).
>
> 7. That the Magistrate erred in law in holding that the supporting documents in relation to the extradition offences for which surrender of the Plaintiff is sought by the Republic of the Philippines had been produced to him."

During the course of the hearing before me, the plaintiff abandoned ground 7 and it can be disregarded. In addition to seeking a review of the magistrate's order pursuant to section 21 of the Act, the plaintiff seeks a declaration that the proceeding brought by the Republic of the Philippines is an abuse of process.

The first issues I propose to deal with are those relating to Article 4 of the Treaty of Extradition between Australia and the Republic of the Philippines, and the magistrate's interpretation of section 11(6) of the Act. The Treaty of Extradition between Australia and the Republic of the Philippines is contained in the *Extradition (Republic of the Philippines) Regulations* (Statutory Rule No 470 of 1990) which commenced on 18 January 1991. **[9]** Article 4 of the treaty reads:- *[After setting out Article 4 of the Treaty, His Honour continued]...* **[10]** It was argued by counsel for the plaintiff that the magistrate was required to take account of the provisions of that Article in determining whether the plaintiff is eligible for surrender; in particular the provisions of clause 2(e) to the effect that extradition may be refused if the extradition of the person would be unjust, oppressive, incompatible with humanitarian considerations, or too severe punishment. I am not persuaded that that is so.

Subsections 11(1) and (6) of the Act read:

> "11. (1) The regulations may:
> (a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty

in relation to the country, being a treaty a copy of which **[11]** is set out in the regulations; or

(b) make provision instead to the effect that this Act applies in relation to a specified extradition country subject to other limitations, conditions, exceptions or qualifications.

(6) For the purpose of determining under subsection 19(1) whether a person is eligible for surrender in relation to an extradition offence for which surrender of the person is sought by an extradition country, no limitation, condition, qualification or exception otherwise applicable under this section (not including a limitation, condition, qualification or exception having the effect referred to in subsection (4)) has the effect of requiring or permitting a magistrate to be satisfied of any matter other than a matter set out in paragraph 19(2)(a), (b), (c) or (d)."

It would seem to me that on its face subsection (6) has the effect of confining a magistrate to the matters specified in paras 2(a), (b), (c) and (d) of s19 when determining whether a person is eligible for extradition. This certainly was the view taken of the subsection by the Full Court of the Federal Court in *Todhunter v United States of America & Anor* [1995] FCA 1198; (1995) 57 FCR 70; 129 ALR 331. In that case the court was dealing with an appeal from the review of a magistrate's determination by a single judge of the court.

In considering articles in the extradition treaty between Australia and the United States of America the court said at p74:

"The Act ... contemplates that the primary operation of its provisions may be qualified so as to give effect to particular extradition treaties. This is achieved by s11. This has an impact both upon the proceedings before the magistrate (but subject to s11(6) to which we later refer) and upon the materials to be taken into account by the Attorney-General in the exercise of the discretion as to whether the eligible person should be surrendered."

[After referring to what the Court said at page 75, His Honour continued]... **[12]** At page 76, the court continued:

"The effect of the Regulations is to draw into municipal law the terms of the Treaty. This comes about in the following fashion. Section 11(1)(a) of the Act provides that the Regulations may state that the Act applies in relation to a specified extradition country "subject to such limitations, conditions, exceptions or qualifications" as are necessary to give effect to a bilateral extradition treaty in relation to the country. Section 11(1C), which was introduced by s4 of the *Extradition Amendment Act* 1990 (Cth) (the 1990 Act), states that for the purposes of, *inter alia*, subs (1) the limitations, conditions, exceptions or qualifications that are necessary to give effect to a treaty "may be expressed in the form that this Act applies to the country concerned subject to that treaty". Section 11(1C) came into effect with the Royal Assent to the 1990 Act on 22 October 1990. Nevertheless, the 1988 Regulations are to be regarded as if s11(1C) had been in force on the date of the commencement of the 1988 Regulations. This follows from s4(2) of the 1990 Act.

The effect of the introduction of the Treaty in this way into municipal law is qualified by s11(6). This has an important bearing upon the operation of s19 and the function of the magistrate under that provision. It will be necessary later in these reasons to refer in more detail to s19. It is sufficient now to note that the effect of s11(6) is that for the purpose of the magistrate's making of a determination under s19(1) as to whether a person is eligible for surrender, no limitation, condition, qualification or exception which otherwise applies under s11, "has the effect of requiring or permitting a magistrate to be satisfied **[13]** of any matter other than a matter set out in paragraph 19(2) (a), (b), (c) or (d)".

And finally, at p88, the court said:

"It follows, in our view, that there was compliance with the requirement of Art XI of a statement of the law relating to the limitation of legal proceedings. A further and different issue arises if the question is whether in the present case prosecution for any of the offences has become barred by lapse of time according to the laws of the United States. If that be so then Art VII states that extradition "shall not be granted". However, as we have indicated, whether extradition is to be granted is a matter for the Attorney-General under s22. The Attorney-General would have to be satisfied that circumstances do not exist which have the effect that the surrender of Mr Todhunter must be refused because of the operation, through s11, of an exception in the bilateral extradition treaty: s22(3)(e)(i), (iii) of the Act. Unless the Attorney-General was so satisfied, the Attorney-General could not make a determination adverse to Mr Todhunter under s22(2), that is, for his surrender. But that is a matter not before the Court in this proceeding, and the relevant stage of the application of s22 has not been reached."

What the court is clearly saying in those passages is that when determining whether a person is eligible for surrender, a magistrate is confined to considering those matters specified in subsection 2 of s19. A magistrate is not concerned with provisions of an extradition treaty except those which may be relevant to subsection 2(b). It is for the Attorney-General to have regard to the provisions of any such treaty when he is determining whether the eligible person is to be surrendered. In my opinion that is the correct view of the matter and grounds 5 and 6 must fail.

I turn next to grounds 1 and 2, namely, that the magistrate erred in law in holding that he had no power to stay the proceeding as an abuse of process, and erred in law in failing to so stay it. **[14]** The question whether the magistrate had power to stay the proceeding on the ground that it is an abuse of process will be answered in this case according to whether the proceeding before the magistrate was a judicial inquiry or whether he was performing an executive or ministerial function. In *Todhunter* the court held at p80 that the proceedings before the magistrate were administrative in nature and did not involve the exercise of the judicial power of the Commonwealth. In so doing it followed the earlier decisions of the court in *Schlieske v Federal Republic of Germany* (1987) 76 ALR 417; 26 A Crim R 341 and *Zoeller v Federal Republic of Germany (No 2)* (1989) 23 FCR 282; (1989) 91 ALR 341; 45 A Crim R 327. The court further held that the judicial power was first enlivened in the proceeding before the primary judge.

Further assistance in determining this issue is gained from the decision of the High Court in *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183. In that case the court was considering the function of a magistrate conducting committal proceedings. The court held that such proceedings are not a judicial inquiry but are conducted in the exercise of an executive or ministerial function. The court held further that s41(6) of the *Justices Act* 1902 (NSW) which identified the primary function of a magistrate in New South Wales at the conclusion of the hearing of committal proceedings in relation to an indictable offence, left no room for the implication of a discretionary power to terminate the proceedings in a manner other than provided by the section. The magistrate, if of the opinion that having regard to all the evidence before him a jury would not be likely to **[15]** convict a defendant was required to order forthwith that the defendant be discharged; if he was not of that opinion he was required to commit the defendant for trial. A magistrate had no power to order a stay of committal proceedings as an abuse of process. At page 15, Dawson J said:

> "The committal proceedings in question in this case were heard by a magistrate sitting as a Local Court. See *Local Courts Act* 1982 (NSW), ss7 and 8. As Gibbs J pointed out in *Ammann v Wegener* [1972] HCA 58; (1972) 129 CLR 415 at p436; [1972-73] ALR 675; 46 ALJR 638, it does not follow that because a magistrate is not exercising judicial functions he cannot be said to sit as a court. It is common enough for courts which are not subject to constitutional restraints to exercise administrative functions. Moreover, whilst not required to make a judicial decision, the magistrate was no doubt bound to act judicially in arriving at a result, that is to say, he was bound to act justly and fairly. There is controversy whether the existence of that duty, coupled with the nature of the function performed by the magistrate, is sufficient to subject him to prohibition and the question must still be regarded as undecided. In *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at p83; 21 ALR 505; 53 ALJR 11; 37 ALT 122, Mason J thought that such a result did follow, but the other members of the court went no further than to affirm the availability of declaratory relief in a proper case.
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> The fact that a magistrate sits as a court and is under a duty to act fairly does not, however, carry with it any inherent power. Indeed, in my view, the nature of a magistrate's court is such that it has no powers which might properly be described as inherent even when it is exercising judicial functions. *A fortiori* that must be the case when its functions are of an administrative character. In *R v Forbes: Ex parte Bevan* [1972] HCA 34; (1972) 127 CLR 1 at p7; [1972-73] ALR 1046; 46 ALJR 401, Menzies J pointed out that:
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> > "`Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorizing provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as `inherent jurisdiction', which, as the name **[16]** indicates, requires no authorizing provision. Courts of unlimited jurisdiction have inherent jurisdiction'."

At p16, His Honour said:

> "On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court."

At p18, His Honour continued:

> "There is no room in the face of these statutory obligations, couched as they are in mandatory terms, for the implication of a discretionary power to terminate the proceedings in a manner other than that provided."

And finally, at p19, His Honour said:

> "Be that as it may, the fact remains that in committal proceedings a magistrate is performing an administrative or ministerial function which is governed by statute and the terms of the statute afford no basis for the implication of any power to dispose of those proceedings by the imposition of a permanent stay."

See also *In re Schmidt* (1995) 1 AC 339; [1994] 2 All ER 784; [1994] 3 WLR 228. In my opinion a magistrate conducting a proceeding to determine whether a person is eligible for surrender is performing an administrative or ministerial function and his statutory obligations, couched as they are in mandatory terms, leave no room for the implication of a discretionary power to stay the proceeding as an abuse of process. Grounds 1 and 2 therefore must fail.

The remaining grounds relate to the magistrate's decision that the plaintiff was eligible for surrender. It was said that the magistrate erred in law in making such a finding and that he should have been satisfied that there were substantial grounds for believing that there is an extradition objection in relation to the offences.

Section 7 of the Act defines extradition objection. **[17]** The section reads:-

> "7. For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:
> (a) the extradition offence is a political offence in relation to the extradition country;
>
> (b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;
>
> (c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions;
>
> (d) assuming that the conduct constituting the extradition offence, or equivalent conduct, had taken place in Australia at the time at which the extradition request for the surrender of the person was received, that conduct or equivalent conduct would have constituted an offence under the military law, but not also under the ordinary criminal law of Australia; or
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> (e) the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence."

If my view of s11(6) is correct, in determining whether there were substantial grounds for believing that there was an extradition objection in relation to the offences, the magistrate could not go beyond the matters spelled out in s7. In my opinion the simple fact of the matter is that the plaintiff failed to satisfy the magistrate that any of the subsections were applicable in his case; there is simply no evidence that any of them were applicable. *[His Honour then dealt with and dismissed the application for a declaration that the proceeding brought by the Republic of the Philippines was an abuse of process and continued]...*

[20] The order of His Worship, Mr Bernard Coburn, M. made on 11 October 1996 is

confirmed. I dismiss the application for a declaration that the proceeding brought by the Republic of the Philippines is an abuse of process. I order that the defendant's costs of the review including reserved costs be taxed and the paid by the plaintiff.

APPEARANCES: For the Plaintiff: M Weinberg QC with Mr O Holdenson, counsel. Solicitors: Goulopoulos Shiels & Mangopoulos. For the Defendant: Miss B King QC, counsel. Solicitors: Director of Public Prosecutions (Cwth).
