Case Comments

Decisions of International and Foreign Tribunals

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France

Re Frechengues (Cour de Cassation, Criminal, 10/15/69), B. 252, pp. 605-607; 64 Am. Journal of International Law (July 1970) 715. Frechengues was arrested in Spain on December 28, 1967, was held in custody there following a request by France for his extradition, and was delivered to France on May 16, 1968, when he was placed in detention pursuant to an arrest warrant issued by a *juge d'instruction* (Examining Magistrate) of Marseilles. After Frechengues' conviction, the Court of Appeals of Aix-en-Provence fixed the date of his detention in France as the date from which his period of detention should be measured in computing the time to be deducted from his sentence. Defendant filed a petition *(pourvoi en cassation)* with the *Cour de Cassation* to annul the decision of the lower court as violative of Articles 23 and 24 of the Penal Code for the reason that the time of detention in Spain should have been recognized.

The court held that the "preventive detention" which Article 24 requires be deducted from a sentence, is restricted to preconviction dentention imposed pursuant to a warrant of committal or arrest issued by a *juge d'instruction;* that since such warrants are only effective in France, the period of detention for purposes of Article 24 is computed from the day of incarceration (*sic*—but the Article uses the word "detention"); and that steps taken by foreign authorities to assure his surrender to French authorities are not pre-conviction detention for which deduction must be made from the sentence imposed.

United Kingdom

In re Al-Fin Corporation's Patent, [1969] 2 W.L.R. 1405 (Chancery

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Div., 4/2/69); 64 Am. J. of International Law (July, 1970) 708. An American corporation sought a five-year extension of its patent under Section 24 of the Patents Act, 1949, contending that a shortage of nickel between 1950 and 1953 due to the Korean War had inhibited its full realization of the potentialities of the patented invention. Having received an adverse ruling from the comptroller's examiner on the basis of the comptroller's earlier holding in *Harshaw Chemical Co.'s Patent* that the Korean conflict did not constitute "hostilities between His Majesty and any foreign state" (as provided in Section 24 of the Patents Act) because North Korea is not recognized as a "foreign state," the company filed this action in the Chancery Division, seeking reversal of the decision in *Harshaw,* presumably anticipating that such a result would dictate a favorable holding by the chancellor in the instant matter.

The court overruled *Harshaw,* holding that the term "foreign state" as used in Section 24 comprehended both recognized and unrecognized states, if the latter comprises "a sufficiently defined area of territory over which a foreign government has effective control," and that North Korea met the conditions for a viable state. The court concluded that, accordingly, the applicants are entitled to proceed with the application for extension on that basis.

Atkinson vs United States of America Government, [1969] 3 W.L.R. 1074 (House of Lords, 11/5/69), 64 Am. J. of International Law (July 1970) 711. Atkinson had been arrested and charged with armed robbery and attempted murder in Louisiana, and in a plea-bargaining session before trial, he agreed to plead guilty to the charge of attempted armed robbery for which he was sentenced to eighteen months imprisonment, and the other charges were dropped. He subsequently escaped from prison in Louisiana and was thereafter arrested in England on a warrant which erroneously stated that Atkinson had been convicted of armed robbery and attempted murder. When it was shown that the actual conviction, and his breaking out of prison, are not extraditable offenses under the 1931 Extradition Treaty between the United Kingdom and the United States, the Louisiana authorities requested his extradition on charges of attempted murder and aggravated burglary. The Chief Metropolitan Magistrate ordered Atkinson committed for extradition on the charge of attempted murder, but declined to commit on the charge of aggravated burglary on the ground that the offense was essentially the same as the offense of attempted armed robbery, so that the plea of *autrefois convict* is applicable. Atkinson applied to the Queen's Bench Division for a writ of *habeas corpus,* contending that (i) he was not "found" in the United Kingdom within the meaning of Article 1 of the treaty because the charges set out in the extradition request had been

dropped; (ii) those charges were being made for the purpose of acquiring custody of his person so that he could be returned to prison; and (iii) the District Attorney in New Orleans had indicated in his affidavit supporting the request, that the fugitive would be returned to prison to complete his sentence, a procedure which would violate the principle of specialty stated in Article 7 of the treaty. The Divisional Court granted the United States' appeal on the ground that the magistrate was not authorized to accept the plea of *autrefois convict,* dismissed Atkinson's application for writ of *habeas corpus,* and remitted to the magistrate with direction to commit on the charge of aggravated burglary.

Atkinson appealed to the House of Lords, contending that to revive the charge of attempted murder, dropped in the plea-bargaining process in Louisiana, in order to obtain extradition, was "oppresive and contrary to natural justice." Lord Reid held that, while extradition for the purpose of compelling Atkinson to serve out his sentence, a non-extraditable offense, would violate the treaty, if there is sufficient evidence to justify committal on the charges of attempted murder, the magistrate may not refuse committal on the ground that the action would be oppressive or contrary to natural justice. He pointed out that any question as to denial of natural justice is to be resolved by the Secretary of State at his discretion. In response to appellant's argument that he had not been "found" in the United Kingdom, Lords Morris and Guest held that this term means only that a fugitive must be present in the United Kingdom when the extradition charges were preferred against him in the requesting state.

Royal Government of Greece vs Governor of Brixton Prison ex Parte Kotronis, [1969] 3 W.L.R. 1107 (House of Lords, 11/5/69); 64 Am. J. of International Law (July 1970) 714. The extradition of Christos Kotronis, a Greek national, was requested by Greece for the reason that he had been convicted in Athens on a charge of obtaining money under false pretenses and sentenced to three years' imprisonment. After the Bow Street Magistrates' Court ordered him committed to prison pending his surrender to Greek authorities, Kotronis applied for a writ of *habeas corpus* on the ground that he had been convicted *in absentia,* and that he had learned of the proceeding some three years later while living in England. Reversing the decision of the Queen's Bench Division, and rejecting Kotronis' contention that the Greek proceeding violates natural justice, the House of Lords ordered Kotronis committed to prison pending extradition. Lord Reid noted that while an English court may question whether a foreign civil judgment violates natural justice, a different situation prevails with respect to a foreign criminal judgment, and citing the *Atkinson* case, reiterated that any question as to denial of natural justice in the matter will be resolved by

the Secretary of State at his discretion. Also refusing to accept respondent's argument that as an opponent of the Greek Government, he would be detained on political charges before or in lieu of serving the sentence on the charge for which he was being extradited, the court said that would be a clear breach of faith on the part of the Greek Government and it is "impossible for our courts or your Lordships sitting judicially to assume that any foreign Government with which Her Majesty's Government has diplomatic relations may act in such a manner." Lord Morris of Borth-y-Gent observed that "it is for the courts to say whether the statutory conditions have been complied with to the extent that a fugitive criminal could be surrendered; it is for the Secretary of State to decide whether, having regard to all the circumstances, he should be surrendered."

India

State of West Bengal vs Jugal Kishore More and Another, 1969 S.C.W.R. 56-AIR 1969 S.C. 1171; 9 Indian J. of International Law (July 1969) 427. A non-bailable warrant for the arrest of More issued by the Chief Presidency Magistrate, Calcutta, was forwarded by the Ministry of External Affairs to the High Commissioner for India, Hong Kong, who in his turn requested the Colonial Secretary, Hong Kong, for an order extraditing More under the Fugitive Offenders Act, 1881, to India for trial for offenses described in the warrant. The Central Magistrate, Hong Kong, endorsed the warrant and directed the Hong Kong Police to arrest More, which was done. More's father sought an order quashing the warrant of arrest and all proceedings taken pursuant thereto. The High Court did so, holding that the Chief Presidency Magistrate had no power to issue the warrant of arrest in the manner he had done and that there was no legal basis for the requisition made by the Ministry of External Affairs to Hong Kong for extradition of More. The High Court accordingly ordered that the warrant against More and the subsequent proceedings be quashed. Appeal was filed by the Government of West Bengal against the order of the High Court.

The Supreme Court allowed the appeal. It was first noted that the "law relating to extradition between independent States is based on treaties. But the law has operation national as well as international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the state, the procedure to be followed by the

Court in deciding whether extradition should be granted and on what terms, is determined by the municipal law."

The Court held that the Indian Extradition Act of 1903, which provided for the more convenient administration of the Extradition Acts of 1870 and 1873, and the Foreign Jurisdiction Act of 1881 (acts of the British Parliament), had been adopted in certain particulars by the President of India, following India's becoming a Republic in 1950; that the Fugitive Offenders Act, 1881, and the Extradition Act, 1870, in their application to India, had not been repealed by the Indian Parliament and, by virtue of the India (Consequential Provision) Act 1949, they remained applicable to the extent that they were consistent with the constitutional scheme. Since the extradition followed the procedure recognized prior to January 26, 1950, the extradition procedure was valid.

Further, while recognizing that the provisions of the Extradition Act, 1962, could not be availed of, in securing the presence of More in India for trial, because Hong Kong is not included in the list of Commonwealth countries from which extradition of fugitives may be secured under that act, the court held that this did not bar the requisition made by the Ministry of External Affairs if it was able to persuade the Colonial Secretary, Hong Kong, to deliver More for trial in India and the Colonial Secretary was willing to hand More over for trial in India.

Cipriano Negredo vs Union of India, AIR 1969 Goa, Daman & Diu 76; 9 Indian J. of International Law (July 1969) 434. Petitioner was employed with T.A.I.P. (Air Transport Service of Portuguese India). Following the acquisition of the territories comprised in Goa, Daman and Diu by the Government of India, by military action, the services of the staff employed by T.A.I.P. were terminated. The petitioner filed a writ under Article 226 of the Constitution of India to quash the order by which he was dismissed from service and to require the Government to reinstate him.

The Court noted that it must first be determined "whether the winding of T.A.I.P." and termination of the services of its staff was an "act of State," which "tersely put, . . . is an act which does not purport to be done under colour of a legal title but in exercise of the sovereign authority in external politics." And in *Pema Chibar vs Union of India,* AIR 1966 SC 442, it was held "that the territories of Goa, Daman and Diu had been acquired by the Government of India from the Portuguese Government by conquest, and if so the acquisition was necessarily in the nature of an 'act of State.' "

The Court concluded that the "history of about 20 days following the liberation of the territories makes it abundantly clear that T.A.I.P. was

wound up and the services of its employees were terminated in exercise of the right of the new sovereign and not pursuant to any legal authority and as such there is no escape from the conclusion that both the acts, namely, the closure of T.A.I.P. and the termination of the services of its employees, were in the nature of 'acts of State.' "

Abdul Salam vs Union of India and Others, AIR 1969 A11 223; 9 Indian J. of International Law (October 1969) 528. This was a second appeal by Abdul Salam from a decree dismissing his suit for permanent injunction to restrain the Union of India and the State of Uttar Pradesh from deporting him to Pakistan. Appellant alleged that he was born in Aligarh and domiciled there at the commencement of the Constitution of India and is a citizen of India; that in March 1950 he had gone to Pakistan temporarily because of fear of disturbances; and that he was compelled to obtain a Pakistani passport in order to see his seriously ill father.

The Court held that the jurisdiction of the Civil Court to try a suit asking the Court to restrain the Government from deporting a plaintiff alleging himself to be a citizen is not barred under S. 9(2) of the Act. "What is barred is the permit of the Court to decide the question whether he has acquired the citizenship of another country, provided this question arises in the suit. If it does arise, the Civil Court cannot try the question itself. The proper course for it would be to refer any question covered by S. 9(2) to the Central Government and stay further hearing of suit till the decision of the Central Government is received and then decide the suit in accordance with law."

It was further held by the Court that "the power to decide the question whether a person has acquired the citizenship of a foreign country is quasi-judicial in nature," which "means that the authority must act judicially and must give a reasonable opportunity to the person affected by its decision to rebut the presumption which may arise against him under clause (i) of the Schedule III of Rule 30 of the Citizenship Rules."

Malkiat Singh vs State of Punjab, AIR 1969 Punj. 250; 9 India J. of International Law (October 1969) 529. Petitioner, asserting that he is an Indian citizen domiciled in Punjab, sought admission to the Medical College in Punjab, admission to which was restricted to persons domiciled in Punjab. Admission was denied and this suit followed.

The Court held that "domicile" is "a synthesis of the factum [an indefinite, not purely fleeting, residence] and the animus [a present intention to reside in the country where the residence has been taken up]." The Court then quoted Lord Cranworth's observation that, "By 'domicile' we mean home, the permanent home, and if you do not understand your

permanent home, I am afraid that no illustrations drawn from foreign writers will very much help you to it." Finding that petitioner's allegations met the test, the petition was allowed.

Ahmadunnisa Begum vs Union of India, AIR 1969 A.P. 423; 9 India J. of International Law (October 1969) 530. The daughter of the late General His Exalted Highness Sir Mir Osman Alikhan, the former Ruler of Hyderabad State, brought this suit challenging the issuance of the certificate by the Government of India to the grand-son of the late Nizam in recognition of his succession to the full ownership of the Nizam's property. It was alleged that after the conclusion of the Merger (Accession) Agreement, the late Nizam became a private citizen and that, inasmuch as he was a Muslim of sunni sect, succession to his private property should be governed by his personal law, *viz.,* Hanafi school of Muslim Law. The issue before the court was "whether inheritance to the private property of a Ruler is governed by the agreement or covenant entered into between the Ruler and the Government of the Dominion of India."

The only reference in the agreement "is of a recognition of succession according to law and custom to the gaddi of the State and to the personal rights, privileges and dignities and titles of the late Nizam." The court then stated:

> 'Personal' rights referred to in Article IV undoubtedly are personal rights qua the Ruler. But rights to private property have nothing to do with succession to the gaddi. One person may as heir succeed to the private property and another person may be recognized as an heir to the gaddi. With the former the Government of India has no concern, while it has the power to recognize the latter. It cannot be denied that by the very nature of the rights which the late Nqzim had, to the full ownership, use, enjoyment and possession of his private property, to deal with it as he liked, to gift it, to create a trust or charity, to bequeath it by will to the extent he could under his personal law, are such that the Government of India could not have been invited to exercise any power or control over them.

Republic of China

Public Procurator vs Ho Ch'Ih-Nung, Wu-Ch'i-nien [1968] i tzu No. 8672 (District Court of Taipei, Taiwan, Aug. 22, 1968); 64 Am. J. International Law (July 1970) 708. Defendant, a seaman on the S.S. *Hsiang-yun,* operated by the China Navigation Co., Ltd., jumped ship when his vessel arrived at Baltimore, and was subsequently arrested by United States immigration authorities and deported to the Republic of China. He was tried by the District Court of Taipei on a charge of violating an order issued by the Executive Yuan (Cabinet) under Article 11 of the National General Mobilization Law, providing that a seaman who deserts

his vessel abroad shall be punished for violating the National General Mobilization Law. In considering the question of jurisdiction, the court held that the defendant could be punished in accordance with the law of the Republic of China because "an offense committed on board a vessel of the Republic of China outside the territory of the Republic of China shall be considered an offence committed within the territory of the Republic of China."