[2009] UKPC 38
Privy Council Appeal No 0015 of 2009

JUDGMENT

Johannes Deuss *v* The Attorney General for Bermuda and The Commissioner of Police for Bermuda

From the Court of Appeal of Bermuda

before

Lord Phillips
Lord Scott
Lord Brown
Lord Mance
Lord Neuberger

JUDGMENT DELIVERED BY LORD PHILLIPS ON

4 November 2009

Heard on 2 April 2009

Appellant		*Respondent*
Claire Montgomery QC Instructed by (Peters and Peters)	Barrie	Rory Field McKay Howard Stevens Instructed by (Charles Russell LLP on behalf of DPP Bermuda)

LORD PHILLIPS:

Introduction

1. The appellant is a Dutchman who maintains a number of residences in Bermuda. He is the sole shareholder and chairman of the supervisory board of the First Curacao International Bank ("the Bank"). In the latter part of 2005 the Dutch fiscal investigatory authority carried out an investigation into the activities of the Bank. This led the Dutch Public Prosecutor to issue a warrant for the arrest of the appellant, a copy of which together with a translation was placed before their Lordships. This records that on 5 September 2006 the Public Prosecutor ordered the arrest of the appellant on suspicion of having committed three offences under the law of the Netherlands:

i) "deliberately handling stolen property" contrary to article 416 of the Criminal Code between 19.10.2000 and 14.12.2001;

ii) "deliberately/habitually laundering" contrary to article 420 of the Criminal Code between 14.12. 2001 and 5.9.2006;

iii) "being in charge of a criminal organisation" contrary to article 140 of the Criminal Code between 19.10.2000 and 5.9.2006.

2. The warrant included a list of "incriminating evidence". From this it appears that the case against the appellant is that he was complicit in the use of the Bank by criminals engaged in carousel VAT fraud to receive and launder the proceeds of their fraud.

3. On 28 September 2006 Crown Counsel in Bermuda presented to Mr Khamisi Tokunbo, a Magistrate, an information headed "Information for an Extradictable Offence". This recited that the appellant had been accused in the Netherlands of the offences set out above and attached in support of the information the warrant and its translation, together with a letter from the Governor of Bermuda and a letter from the Dutch Ministry of Justice. The latter two documents are not before their Lordships.

4. Acting on this information the Magistrate, on 28 September 2006, issued a warrant for the arrest of the appellant ("the provisional warrant"). This provided as follows:

> "WHEREAS it has been shown to the undersigned, one of Her Majesty's Magistrates that JOHANNES CHRISTIAAN MARTINUS AUGUSTINUS MARIA DEUSS is accused of the Extradition Crimes of Handling Stolen Property, Deliberate/Habitual Laundering, and Being in Charge of Criminal Organisation within the jurisdiction of The Kingdom of the Netherlands
>
> AND WHEREAS Information has been presented to me which would in my opinion, authorise the issue of a warrant for the arrest of a person accused of committing a corresponding offence within the jurisdiction of Bermuda
>
> AND WHEREAS there is information that the said JOHANNES CHRISTIAAN MARTINUS AUGUSTINUS MARIA DEUSS is or is believed to be in or on his way to Bermuda:
>
> THIS IS THEREFORE to command you forthwith, in Her Majesty's Name, to arrest the said JOHANNES CHRISTIAAN MARTINUS AUGUSTINUS MARIA DEUSS and bring him before one of her Majesty's Magistrates sitting at the Magistrates' Court in the City of Hamilton to be further dealt with according to law, for which THIS SHALL BE YOUR WARRANT."

5. The appellant was arrested on this warrant on 13 October 2006. He was released on bail three days later, upon signing a consent to being extradited without formal extradition proceedings. On 19 October 2006 he voluntarily surrendered himself to the authorities in the Netherlands. On 29 December 2006 he was released on bail in the Netherlands and has since returned to Bermuda. His trial in the Netherlands has not yet taken place.

6. The appellant commenced proceedings in Bermuda for judicial review of the issue of the provisional warrant, seeking among other relief an order that the provisional warrant be quashed. The originating documentation has not been included in the Record of Proceedings. Miss Montgomery QC, who appeared on the judicial review proceedings and before their Lordships explained that the object of the proceedings was not to prevent the appellant's extradition or trial in the Netherlands but to vindicate his case that his arrest

was unlawful. In these circumstances their Lordships find it surprising that the respondents do not appear to have resisted the appellant's application for judicial review on the ground that the issues that he sought to raise were academic.

7. The first point taken on behalf of the appellant in the judicial review proceedings before Wade-Miller J was that there was no longer in place between the United Kingdom and the Netherlands any arrangement under which extradition proceedings, including the issue of a provisional warrant of arrest, could lawfully be pursued with a view to extraditing a person from Bermuda to the Netherlands. Wade-Miller J dismissed this submission in a judgment delivered on 8 December 2006. She ruled that extradition from Bermuda to the Netherlands remained governed by the Extradition Act of 1870 ("the 1870 Act") as extended to the Netherlands by an Order in Council in 1899 and preserved in force by the Extradition Act 1989 ("the 1989 Act"). The Court of Appeal of Bermuda (Zacca P, Evans and Stuart-Smith JJA) dismissed the appellant's appeal against this ruling in the first part of its judgment of 25 April 2008. No appeal is brought against that part of the Court of Appeal's judgment.

8. Having failed on this first point, Miss Montgomery advanced further grounds of objection to the provisional warrant which can be summarised at this stage as being that the crimes referred to in the warrant were crimes under Dutch law that fell outside the scope of the extradition arrangements that were effective as between Bermuda and the Netherlands so that not merely was the warrant itself defective but no jurisdiction existed to issue a provisional warrant in respect of those offences. It was, from the outset, conceded by the respondents that the second and third offences of which the appellant was accused in the Netherlands did not render the appellants susceptible to extradition proceedings. The issue was whether the same was true of the first offence, namely "handling stolen property".

9. In a judgment delivered on 20 July 2007 Wade-Miller J held that the provisional warrant was lawfully issued in respect of this offence and, in the second half of its judgment of 25 April 2008, the Court of Appeal upheld her decision. The Appellant appealed to their Lordships pursuant to final leave granted by the Court of Appeal on 19 September 2008.

10. Their Lordships will briefly describe the central issue raised by Miss Montgomery on behalf of the appellant. The jurisdiction of the Magistrate to issue a provisional warrant was conferred by the 1989 Act, which preserved in large measure the provisions of the 1870 Act. Miss Montgomery submitted

that, on the true construction of this legislation, the Magistrate only had jurisdiction to issue a provisional warrant in respect of a person accused of an "extradition crime" as defined by the legislation. The relevant crime of which the appellant stands accused in the Netherlands, namely "handling stolen goods" does not, so Miss Montgomery submits, constitute an "extradition crime" under the law of Bermuda. Accordingly, the Magistrate acted without jurisdiction.

11. As will become apparent, this submission raises an issue of some difficulty as to the manner in which the statutory definition of an "extradition crime" operates in relation to a British possession. This issue is said to be one of general importance, insofar as the extradition regime under the 1870 Act, as adapted by the 1989 Act, remains in force in relation to some British Colonies. Nonetheless it seems that this is the first occasion, nearly 140 years after the 1870 Act was passed, that the central issue has arisen for judicial determination. In these circumstances their Lordships decided that it was appropriate to entertain the appeal, albeit that it was academic.

12. The appeal was heard in Nassau and the argument lasted no more than a day. It has since appeared to their Lordships that this case has proceeded on the false premise that the jurisdiction of the Magistrate to issue a provisional warrant only existed if the appellant was, in fact, accused of an "extradition crime". Their Lordships consider it desirable to explain why they have concluded that this premise is false, albeit that this will require a detailed analysis of the relevant jurisprudence.

The 1870 Act

13. The 1870 Act was, on its face, a fairly simple statute but it has given rise over the years to great uncertainty. Within three years it had proved necessary to pass a further Act, the Extradition Act 1873 ("the 1873 Act"), one of whose objects was to address doubts that had arisen as to the ambit of operation of the 1870 Act. Between that day and this, the Act and its amendments have given rise to problems of interpretation that have, on a large number of occasions, received consideration by the House of Lords.

14. Under English law a treaty entered into by the United Kingdom has no effect on domestic law unless incorporated by Parliament. The normal sequence of events is first the treaty and then the Act to give effect to it. The 1870 Act sought to reverse this process. It provided a code under which it would be lawful in both the United Kingdom and British possessions to give

effect to treaties under which the United Kingdom agreed to secure the extradition of "fugitive criminals". Thus section 2 provided:

> "Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.
>
> Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.
>
> Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement."

15. Section 5 provided:

> "When an order applying this Act in the case of any foreign state has been published in the London Gazette, this Act (after the date specified in the order, or if no date is specified, after the date of the publication), shall, so long as the order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any, contained in the order, apply in the case of such foreign state. An Order in Council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act, and that this Act applies in the case of the foreign state mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatever."

16. Section 17 provided that the Act, when applied by an Order in Council, should, unless otherwise provided by the Order, extend to every British

possession in the same manner as if th roughout the Act the British possession were substituted for the Un ited Kingdom or England as the case might require, subject to certain specified modifications.

17. In 1989 Pa rliament enacted a new Ex tradition Act ("the 1989 Act") to consolidate previous legisla tion, including the 1870 Act, and to give effect to recommendations of the Law Commission and the Scot tish Law Commission. This provided, however, by se ction 1(3) that where an Order in C ouncil under section 2 of the 1870 Act remained in force in relation to a foreign state, Schedule 1 to the 1989 Act should have eff ect in relation to that state, always subject to any limitations, restrictions, conditions, exceptions and qualifications contained i n the Orde r. Schedule 1 to the 1989 Act l argely repr oduced t he provisions of the 1870 Act.

18. Section 26 of the 1870 Act containe d defi nitions, w hich include d the following:

> "The term 'extrad ition crim e' m eans a crim e which, if committed in England or within E nglish ju risdiction, would be one of the crim es described in the first schedule to this Act.
>
> The term 'fugitive crim inal' m eans any person accused or convicted of an extradition crim e comm itted within the jurisdiction of any foreign state who is in or is suspected of being in som e part of Her Majesty's dominions..."

19. "Fugitive criminal" retained the s ame definition in the 1989 Act but th e definition of "extradition crime" in para 20 of Schedule 1 was significantly amended:

> "'extradition crim e', in relation to any foreign s tate, is to be construed by reference to the Order in C ouncil under section 2 of the E xtradition Act 1870 applying to that state as it had effect imm ediately before the coming into force of this Act an d to any amendments thereafter made to that Order."

20. The First Schedule to the 1870 Act provided as follows:

LIST OF CRIMES

The following list of crimes is to be construed according to the law existing in England, or in a British Possession, (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Murder, and attempt and conspiracy to murder.

Manslaughter.

Counterfeiting and altering money and uttering counterfeit or altered money.

Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.

Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force.

Rape.

Abduction.

Child stealing.

Burglary and housebreaking.

Arson.

Robbery with violence.

Threats by letter or otherwise with intent to extort.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master."

21. In *In re Nielsen* [1984] AC 606 at pp. 614-5 Lord Diplock commented that this list described the 19 "extradition crimes" in general terms and popular language. These descriptions would seem to have been designed to be incorporated in extradition treaties verbatim, with the advantage (i) that they could readily be translated, (ii) that they could readily be identified with crimes under the relevant foreign legislation and (iii) that in Britain or in a British possession it would readily be possible to identify, by reference to common law or statute, whether the conduct of which the putative fugitive criminal was accused in the foreign country constituted (a) an extradition crime

and (b) a crime under the law of the territory in question. The latter was important because it was a cardinal feature of the extradition regime that extradition would only be granted if the conduct of which the fugitive criminal was accused in the foreign country would constitute a criminal offence in the territory from which extradition was sought.

22. The 1870 Act made detailed provisions as to the procedure that had to be followed in the United Kingdom in respect of the surrender of fugitive criminals. These were not significantly altered in Schedule 1 to the 1989 Act. It is necessary to set out almost all of them in order to appreciate the manner of operation of the statutory scheme. In doing so their Lordships will include, in parenthesis, a reference to the equivalent paragraph in Schedule 1 and the wording of that paragraph (subject to amendments made by later statutes), where significantly different from the 1870 Act:

> "6. Where this Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.
>
> (*Paragraph 3)*
>
> 7. 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.
>
> (*Paragraph 4(1)*)
>
> A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such a requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.
>
> (*Paragraph 4(2). "Senior District Judge (Chief Magistrate)…or another District Judge (Magistrates' Courts") has been substituted for "police magistrate" here and in the following provisions.)*

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.

(*Paragraph 4(3)*

8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—

1. by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and

(*Paragraph 5(1)(a)*

2. by a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

(*Paragraph 5(1)(b) "police magistrate" has been deleted*)

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may if he think fit order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

(*Paragraph 5(2)*)

A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought and the prisoner shall accordingly be brought before a police magistrate.

(*Paragraph 5(3)*)

A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal.

(*Paragraph 5(4)*)

9. 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.

(*Paragraph 6(1) Words after "as if" substituted by "the proceedings were a summary trial of an information against him for an offence committed in England and Wales"*)

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.

(*Paragraph 6(2)*

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

(*Paragraph 7(1) sentence after "England" replaced by "make a case requiring an answer by the prisoner if the proceedings were for the trial in England and Wales of an information for the crime"*)

. . .

11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of Habeas corpus.

Upon the expiration of the said fifteen days, or, if a writ of Habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

It shall be lawful for any person to whom such warrant is directed and for the person so authorised as aforesaid to receive, hold in custody, and convey within the jurisdiction of such foreign state the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on or in pursuance of such warrant, it shall be lawful to retake his in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

(*Paragraph 8)*

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or, if a writ of Habeas corpus is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of her Majesty's Superior Courts at Westminster, upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to made such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary.

(*Paragraph 10*)

23. Extradition hearings in England have always been conducted before the Chief Metropolitan Magistrate, now the Senior District Judge or one of his colleagues, who have consequently acquired very great expertise in this field.

24. The Extradition Act 1877 of Bermuda provided by section 1:

> "All powers vested in, and acts authorised or required to be done by, a Police Magistrate or any Justice of the Peace in relation to the surrender of fugitive criminals in the United Kingdom, under the Extradition Acts 1870 and 1873, are hereby vested in, and may in Bermuda be exercised and done by, any magistrate, in relation to the surrender of fugitive criminals under the said Acts."

25. The relatively simple regime for which the 1870 Act made provision was quickly complicated by two developments. The first was the addition, by the 1873 Act, to the list of offences in Schedule 1 of the 1870 Act not merely of two more offences and an extension of the scope of crimes in relation to bankruptcy, all three in general terms, but of the Larceny Act 1861, which had been passed to "consolidate and amend the Statute Law of England and Ireland relating to larceny and other similar offences", three other Acts that had been passed in the same year to consolidate and amend the statute law of England and Ireland in relation to malicious injuries to property, forgery, and offences against the person, and a fourth Act passed in the same year to "consolidate and amend the statute law of the United Kingdom against offences relating to the coin". Reference to each of these statutes was followed by the phrase "or any Act amending or substituted for the same", which is not included in the first schedule to the principal Act".

26. The second complicating factor was the addition, in individual extradition treaties, and the Orders in Council that recited their terms, after the list of individual offences to which the treaty applied, of the following provision:

> "Extradition may also be granted at the discretion of the State applied to in respect of any other crime for which, according to the laws of both the Contracting Parties for the time being in force, the grant can be made"

Their Lordships will refer to this as "*the extension clause*". *The extension clause* left it open to the United Kingdom to add crimes to the list in Schedule 1 to the 1870 Act, thereby extending the number of extradition crimes in respect of which extradition could be granted, provided always that signatories to extradition treaties made such crimes extraditable under their own laws. Parliament periodically added further statutes to the list in Schedule 1. These included the Theft Act 1968.

27. It is now common ground that the provisions of the 1870 Act, as preserved by Schedule 1 to the 1989 Act, remain applicable in respect of Bermuda in the circumstances of the present appeal. The 1989 Act was itself repealed by the Extradition Act 2003. Paragraph 5 of the Extradition Act 2003 (Commencement and Savings) Order 2003 SI 2003/3103 (C122) provided, however, that the coming into force of the repeal of the 1989 Act should not apply for the purposes of any British overseas territory with the exception of Gibraltar until replacement provisions in respect of the territory in question had been brought into force. No relevant provisions have been brought into force in relation to Bermuda.

28. The way in which the provisions of the 1870 Act were intended to work in practice received the detailed attention of Lord Diplock in two appeals. The first, *R v Governor of Pentonville Prison Ex p Sotiriadis* [1975] AC 1, concerned the effect of a provision in the Federal Republic of Germany (Extradition) Order 1960 (SI 1960/1375) requiring a fugitive to be released if sufficient evidence for extradition was not produced within two months of the apprehension of the fugitive. The focus was thus on section 9 of the 1870 Act, in respect of which Lord Diplock remarked at p. 24:

> "The core of this procedure is a judicial hearing before a metropolitan magistrate at Bow Street, whose function is to determine whether the evidence adduced against the accused on behalf of the foreign state requiring his surrender would have been sufficient to justify his committal for trial in England if the crime in respect of which the requisition has been made had been committed there."

29. More germane, in the context of the present appeal, are Lord Diplock's comments at pp. 25-26 in relation to the issue of a provisional warrant:

> "The other procedure for which the Act provides is the precautionary arrest of the fugitive criminal to prevent

> him from fleeing the country before the requisition for his surrender has been received by the Secretary of State and signified to the metropolitan magistrate. This is the procedure by provisional warrant under section 8(2). The warrant may be issued not only by a metropolitan magistrate but also by any justice of the peace. It is issued on the same kind of information or complaint supported by the same kind of evidence as would justify its issue if the crime alleged had been committed in England. The informant or complainant may be a private individual acting on his own initiative. He need not be acting on behalf of any police or governmental authority of the foreign state where the crime is alleged to have been committed. The warrant requires the person alleged to be a fugitive criminal to be brought before the magistrate or justice of the peace by whom it was issued; but if issued by a justice of the peace he must, when the alleged fugitive criminal is brought before him, issue a further warrant ordering the prisoner to be brought before a metropolitan magistrate.
>
> . . .
>
> The purpose of this provision is clear. A person arrested on a provisional warrant is not at that stage subject to extradition at all and may never become so. He becomes subject to extradition only when a requisition for his surrender has been received by the Secretary of State. Although the provisional warrant charges him with an offence committed abroad the charge is as yet inchoate. It is not yet the subject of the judicial hearing for which the Act provides. There may never be a requisition for his surrender or, if there is, it may not be for the same crime as that with which the provisional warrant charges him or it may be for other crimes as well. He ought not to be kept in custodial limbo indefinitely, entitled neither to a hearing of the case against him nor to be set at liberty. So the magistrate is required to fix a date by which either those charges which alone can be the subject matter of the hearing must be formulated or the prisoner be discharged."

30. Lord Diplock returned to the procedures required by the 1870 Act in *In re Nielsen* [1984] AC 606. This appeal related to the role of the metropolitan magistrate under section 9 and 10 of the 1870 Act in the context of an application for extradition under the treaty between Denmark and the United Kingdom. It became apparent that at section 9 hearings it had been the invariable practice, "so far as living memory stretches", for the magistrate to

receive evidence of the law of the requesting state designed to show that the offence of which the fugitive was accused in that state was "substantially similar" or "similar in concept" to the relevant extradition offence, as construed according to English law (p 622). In the Divisional Court Robert Goff LJ, giving the judgment of the court, decided that this question did not fall within the jurisdiction of metropolitan magistrate. He held (1984) 79 Cr App R 1 at pp 11-13:

> "Now it is important to observe that the legal proceedings in this country depend entirely upon the Secretary of State issuing his order to proceed. It is true that, without such an order, a provisional warrant may be issued for the arrest of the fugitive under section 8(2). But if the Secretary of State decides not to issue an order to proceed, he may cancel that warrant and order the fugitive to be discharged from custody (under section 8).The Secretary of State has a discretion whether to issue an order to proceed, and the question whether the offence is of a political character is only one of the matters which he may take into account in considering the exercise of his discretion. But since, as we have already observed, the Act which confers his powers upon the Secretary of State only applies subject to the limitations, etc, if any, contained in the Order in Council (which incorporates the Treaty), he can only act within that framework. Accordingly he has to consider, before issuing an order to proceed, whether the requisition and the documents presented with it comply with the terms of the Treaty. If he satisfies himself that this is so, then (subject to any question of the offence being of a political character) he issues his order to proceed.
>
> Once he does so, however, the effect of the order to proceed is that proceedings are launched before the police magistrate in this country. As we read the statute, these proceedings are not only proceedings under English law; but they do not involve any consideration of foreign law at all, unless such evidence forms part of evidence tendered to show that the relevant crime is an offence of a political character. The first step in those proceedings is the issue by the magistrate of a warrant for the apprehension of the fugitive criminal. In the case of a full warrant, all that is required of the magistrate is (1) that he should have received the order to proceed, and (2) that he should be sufficiently satisfied on the evidence that the issue of the warrant will be justified if

the crime had been committed, or the criminal convicted, in England. For this purpose, the magistrate is not concerned with foreign law at all. Consistent with that, the order to proceed issued by the Secretary of State refers only to an offence identified in terms of English law, which is selected by him with reference to the crime of which the fugitive is accused or convicted by the foreign law. In the case of an accused person, the magistrate is concerned only with the question whether the evidence reveals conduct which would justify the issue of the warrant if the acts had been done in England, and will as a matter of practice consider that question with reference to the English crime or crimes specified in the order to proceed.

So also with the hearing before the magistrate, if the warrant for the fugitive's apprehension is issued and he is apprehended. The same English procedure is still continuing, launched pursuant to the order to proceed. The evidence which the magistrate shall receive is, in the case of an accused person, that which may be tendered to show that the crime of which the prisoner is accused is (1) an offence of a political character, or (2) is not an extradition crime. The definition of extradition crime in section 26 of the Act is 'a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to the Act', which are of course all offences by English law. In our judgment, it is plain from this definition that the word 'crime' in it must refer to *conduct* of the fugitive which is complained of, and cannot relate to the foreign offence. So all that the magistrate is concerned with (apart from the question of a political offence) is evidence tendered to show that the conduct complained of is not an offence by English law. In practice, the relevant offence or offences are those specified in the order to proceed. He is not authorised to receive any evidence of foreign law, unless such evidence is relevant to the question whether the offence is one of a political character. Exactly the same construction must, we consider, be placed on the words of the opening paragraph of section 10, which we have already quoted. Under that paragraph, in the case of an accused person, apart from considering whether the foreign warrant is duly authenticated, the magistrate has only to consider whether the evidence would justify the committal for trial of the prisoner if the crime of which he is accused, i.e. the *conduct* complained of, had been

committed in England. There is, in our judgment, no warrant in section 10 of the Act for the magistrate to consider any question of foreign law. Indeed if the magistrate decides to commit the fugitive to prison, the form of committal warrant authorised by the Act refers only to the fugitive having been accused of the commission of crime by recital of the crime or crimes specified by the Secretary of State in his order to proceed.

If, however, the fugitive is committed to prison, the Act contemplates that he may seek to challenge that warrant by habeas corpus proceedings. In such proceedings, the prisoner may challenge the lawfulness of his committal to prison on any ground open to him. Those grounds are not restricted to matters arising out of the proceedings before the magistrate. For the lawfulness of his committal to prison depends not only upon the magistrate having acted lawfully, but also upon the Secretary of State having done so in issuing his order to proceed. Accordingly, at that stage, the prisoner may contend that the Secretary of State has not acted lawfully in issuing his order to proceed, for example, by not paying due regard to the provision of the relevant Order in Council (including the terms of the Treaty incorporated into it).

This, as we read it, is the statutory scheme for extradition of an accused person from this country, as set out in the Extradition Act 1870. The scheme is entirely sensible in that it leaves the question of compliance with the Treaty to the Secretary of State, subject only to consideration (so far as permissible) by the High Court in habeas corpus proceedings; and leaves to the magistrate matters appropriate to his consideration in accordance with ordinary English law and procedure. Of course, questions of foreign law must arise for consideration by the Secretary of State, and may arise for consideration by the High Court in habeas corpus proceedings. This is because, under the relevant Treaty, no fugitive can be extradited unless he has committed a crime specified in the Treaty. . .

It is at the stage of compliance with the Treaty that the awkward point arises that the relevant English and

> foreign crimes may not precisely correspond. But, on the authorities, precise correspondence is not required. The crucial question is whether the conduct complained of is both criminal by the foreign law within one of the crimes described in the foreign law list in the Treaty, and would, if committed in England, be criminal by English law within one of the crimes described in the English list in the Treaty (aw well as, of course, being an extradition crime within the Act)."

31. Giving the leading speech in the House of Lords Lord Diplock agreed with the broad thrust of Robert Goff LJ's analysis. After a lengthy analysis of the relevant provisions of the 1870 Act, he summarised the position as follows at pp. 624-5:

> "The jurisdiction of the magistrate is derived exclusively from the statute. It arises when a person who is accused of conduct in a foreign state, which if he had committed it in England would be one described in the 1870 list (as added to and amended by later Extradition Acts), has been apprehended and brought before the magistrate under a warrant issued pursuant to an order made by the Secretary of State under section 7 or confirmed by him under the last paragraph of section 8.
>
> At the hearing, sections 9 and 10 require that the magistrate must first be satisfied that a foreign warrant (within the definition in section 26 that I have already cited) has been issued for the accused person's arrest and is duly authenticated in a manner for which section 15 provides. Except where there is a claim that the arrest was for a political offence or the case is an exceptional accusation case, the magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state.
>
> The magistrate must then hear such evidence, including evidence made admissible by sections 14 and 15, as may be produced on behalf of the requisitioning foreign government, and by the accused if he wishes to do so; and at the conclusion of the evidence the magistrate must decide whether such evidence would, *according to the law of England*, justify the committal for trial of the accused for an offence that is described in the 1870 list

(as added to and am ended by subsequent Extradition Acts) provided that su ch offence is also inc luded in the extraditable crim es listed in the English language version of the extradition treaty. In making this decision it is English law alone that is releva nt. The requ irement that he shall m ake it does not give him any jurisdiction to inquire into or receive evidence of the substantive criminal law of the forei gn state in which the conduct was in fact committed."

32. The reference to "an exceptional acc usation case" related to an earlier passage in Lord Diplock's speech, at p 621:

> "In the principal treaty with Denmark, the list of crimes in respect of which surrender of fugitive criminals will be granted is confined to those contained in the 1870 list, and it was f or crimes within this lis t alone that th e Secretary of State's orders to proceed in the instant case were m ade. That is the r eason why the m agistrate had not, in m y view, any jurisdic tion in the instan t case to make any findings of fact as to Danish substantive criminal law or to hear expert evidence about it.
>
> It would have been otherw ise if the conduct of which Nielsen was accused in Denm ark had not been covered by any description of an E nglish crim e in the 1870 list but had been added to the list of extradition crim es by later Extrad ition Acts. For, in that event, it wou ld only have been brought into the list of extradition crim es applicable to f ugitive c riminals f rom Denm ark by the supplementary treaty of 1936 of which the relevant provision is the add ition to ar ticle I of the p rincipal treaty of the words:
>
> 'Extradition may also be grante d at the discretio n of the High Contracting Party applied to in respect of any other crim e or offence for which, according to the laws of *both* (m y em phasis) of the High Contracting Parties for the time being in force, the grant may be made.'
>
> Had it been necessary for the Danish Governm ent to rely upon the supplem entary tr eaty it would have been necessary for the m agistrate to hear evidence of Danish law in order to satisfy him self that the conduct of the accused in addition to constituting in English law an extradition crim e inclu ded am ong those subs equently added to the 1870 list, also constituted an offence that was treated as an extradition crime in Denmark.

> Whether in an accusation case the police magistrate has any jurisdiction to make findings as to the substantive criminal law of the foreign state by which the requisition for surrender of a fugitive criminal is made will depend upon the terms of the arrangement made in the extradition treaty with that state. Some treaties may contain provisions that limit surrender to persons accused of conduct that constitutes a crime of a particular kind (for example, one that attracts specified minimum penalties) in both England and the foreign state. Accusation cases arising under extradition treaties that contain this kind of limitation I shall call 'exceptional accusation cases'. In an exceptional accusation case it will be necessary for the police magistrate to hear expert evidence of the substantive criminal law of that foreign state and make his own findings of fact about it."

33. These observations by Lord Diplock were obiter dicta. They qualified the view that had been expressed by Robert Goff LJ in the Divisional Court. Their Lordships will refer to them as "*Lord Diplock's qualification*" This falls into two parts. The first deals with the situation where an "*extension clause*" is relied upon to found extradition. The second deals with what Lord Diplock described as "exceptional accusation cases".

34. In *R v Governor of Pentonville Prison, Ex p Sinclair* [1991] 2 AC 64 the House of Lords appeared to question *Lord Diplock's qualification*. In that case no issue was raised as to whether the relevant offences constituted extradition crimes. There was an issue, however, of whether the United States had complied with its obligations under the relevant extradition treaty. The relevant issue for present purposes was whether the metropolitan magistrate had jurisdiction at the section 9 hearing to consider that issue or whether it could only be considered by the High Court on habeas corpus or judicial review proceedings. Lord Ackner conducted an exhaustive analysis of the jurisprudence, including lengthy citations from the judgment of Robert Goff LJ and the speech of Lord Diplock in *Nielsen.* He expressed his conclusions in one short paragraph at pp 91-92:

> "Your Lordships are concerned with the construction of an Act passed over a hundred years ago. I cannot accept that the legislature intended that it was to be part of the function of the police magistrate to preside over lengthy proceedings occupying weeks, and on occasions months, of his time hearing heavily contested evidence

> of foreign law directed to whether there had been due compliance with the many and varied obligations of the relevant Treaty. The inconvenience of such a procedure is well demonstrated by the current litigation. Had the challenges which the applicant wished to make been ventilated initially before the Divisional Court in habeas corpus proceedings, it is unlikely that the court would have permitted the lengthy oral evidence which the magistrate, as matters stood, felt himself obliged to hear. Certainly for the future, if your Lordships concur that the magistrate has no jurisdiction to decide either whether there has been an abuse of the process of the court, or whether the requirements of the Treaty have been satisfied, his powers being limited to those specified in sections 3(1), 8, 9 and 10, much time should be saved both in the magistrates' and in the Divisional Court."

All the other members of the Committee, which included Lord Goff, agreed with Lord Ackner. Although Lord Ackner did not expressly hold that *Lord Diplock's qualification* was wrong, it seems to their Lordships that this was implicit in his conclusion.

Discussion

35. In the light of this jurisprudence their Lordships will summarise the position in the United Kingdom in circumstances where the relevant procedure is still governed by the provisions of 1870 Act as they appear in Schedule 1 to the 1989 Act. The procedure includes three significant stages:

(i) the issue of a provisional warrant by a justice of the peace;

(ii) the extradition hearing before the Senior District Judge or one of his colleagues;

(iii) a challenge to extradition in the High Court on an application for habeas corpus or judicial review.

36. The jurisprudence to which their Lordships have referred at such length deals with the demarcation of functions between the District Judge on the extradition hearing and the court on an application for habeas corpus or judicial review. Robert Goff LJ and Lord Ackner considered that at the extradition

hearing the District Judge was not concerned with whether extradition fell within the terms of the treaty. Absent any suggestion of the extradition being politically motivated he simply had to consider whether the conduct alleged against the fugitive would have amounted to a crime if committed within his own jurisdiction and whether, on the evidence adduced before him, there was a case to answer. The District Judge was not concerned with whether the extradition fell within the terms of the Treaty, or any issue of foreign law. These were matters that fell within the jurisdiction of the High Court on an application for habeas corpus or judicial review.

37. Lord Ackner did not comment on the statutory requirement that the metropolitan magistrate or District Judge should "receive any evidence . . . tendered to show that the crime of which [he] is accused . . . is not an extradition crime". Prior to 1989 this, by definition, required no more than that the District Judge should consult the list of extradition crimes in the schedule to the 1870 Act. This led Robert Goff LJ to observe at p 12 that all that the magistrate was concerned with was evidence tendered to show that the conduct complained of was not an offence under English law.

38. The position has not been so simple since 1989. The revised definition of "extradition crime" in para 20 of Schedule 1 to the 1989 Act requires reference to the relevant Order in Council. If that Order in Council incorporates a treaty that includes an *extension clause*, and reliance is placed on that clause, it would seem to follow that the District Judge may have to explore whether the requesting state has passed a statute making the conduct alleged against the fugitive a crime that is subject to the grant of extradition. If so, Lord Diplock's qualification in *Nielsen* was prescient.

39. These considerations are not directly relevant to the facts of the present case. This case is concerned with whether the Magistrate should have issued a provisional warrant. Was there any requirement at this initial stage for the Magistrate to have satisfied himself that the conduct of which the appellant was accused constituted an extradition crime? Whatever may have been the position prior to 1989 their Lordships have concluded that there has been no such requirement since the 1989 Act came into force. This conclusion is based on (i) pragmatic considerations and (ii) the wording of the relevant statutory provisions, taking into account the jurisprudence just considered.

40. As Lord Diplock pointed out in *Sotiriadis*, a provisional warrant may well be sought in a situation of urgency where the presence of the fugitive has been discovered somewhere within the jurisdiction but there is reason to fear that he may flee elsewhere. It would be contrary to the exigencies of the situation if, before issuing a provisional warrant, a justice of the peace were

required to make protracted enquiries in order to decide whether the conduct alleged against the fugitive constituted an extradition crime. Before 1989 the magistrate would merely have had to consider the list in schedule 1 to the 1870 Act to see whether an offence was an "extradition crime". Now he would be required to refer to the relevant Order in Council which might then put him on enquiry, and no easy enquiry, as to whether under the *extension clause* the conduct of which the fugitive was accused constituted a crime that was subject to extradition under the law of the country where it was allegedly committed.

41. The requirement for the fugitive criminal, upon arrest under a provisional warrant, to be transferred immediately to the jurisdiction of the Senior District Judge or one of his colleagues, who will be expert in the law of extradition, underlines the impracticality of expecting a justice of the peace to look beyond the jurisdiction with which he or she will be familiar. The reasoning that led Lord Ackner to conclude in *Sinclair* that the metropolitan magistrate did not have to consider the effect of foreign law during the extradition hearing applies with much greater force to the justice of the peace who is asked to issue a provisional warrant.

42. The wording of section 8(2) of the 1870 Act (paragraph 5(1)(b) of Schedule 1 to the 1989 Act) on its face only requires the magistrate to consider whether the conduct alleged against the fugitive offender would constitute a crime if committed within his or her jurisdiction. This contrasts significantly with the parallel provision that applies under the new regime introduced under the 1989 Act.

43. Section 2 of the 1989 Act greatly simplifies the definition of an extradition crime. In summary this is conduct that is punishable in both the relevant foreign territory and in the United Kingdom with imprisonment for a term of 12 months or more. In these circumstances practicality does not preclude consideration by a justice of the peace of whether the conduct alleged against a fugitive criminal constitutes an extradition crime, nor does the Act so require. Section 8(3) provides:

> "A person empowered to issue warrants of arrest under this section may issue such a warrant if he is supplied with such evidence as would in his opinion justify the issue of a warrant for the arrest of a person accused or, as the case may be, convicted within his jurisdiction *and it appears to him that the conduct alleged would constitute an extradition crime.*"

Significantly, the words that their Lordships have emphasised do not appear in paragraph 5(1)(b) of Schedule 1.

44. Miss Montgomery's answer to this point, had it been raised by the respondents, would no doubt have been that the Magistrate had to satisfy himself that the appellant was accused of an extradition crime because his power under paragraph 5(1) of Schedule 1 to the 1989 Act was expressly to issue a warrant for the arrest of a "fugitive criminal" and a person will, by definition, not be a "fugitive criminal" unless he is accused of an "extradition crime".

45. Their Lordships believe that this objection can be simply met by treating "fugitive criminal" in paragraph 5(1) as meaning "alleged fugitive criminal". This one can do because the definition paragraph 20, of Schedule 1 starts with the qualification "In this Schedule, unless the context otherwise requires". Their Lordships have concluded that where the words "fugitive criminal" are used in paragraph 5(1) the context requires that phrase to be read as "alleged fugitive criminal".

46. Their Lordships note that their conclusion is shared by *Stanbrook, Extradition Law and Practice*, 2nd Ed (2000), in that at 13.38 they state in relation to the 1870 procedure:

> "There is no requirement in the case of a provisional warrant that the offence alleged should be shown to be an extradition crime."

There is, however, no escaping the fact that the magistrate's jurisdiction is dependent upon there being in force an Order in Council under the 1870 Act in relation to the requesting state so that the magistrate should at least be satisfied of this.

47. In Bermuda there is no metropolitan magistrate. The Magistrate who issued the provisional warrant in this case, or one of his colleagues, would, as we understand the position, have conducted the extradition hearing if and when a requisition for the arrest of the appellant had been made to the Governor and an order made for the hearing. That stage was never reached. The appellant voluntarily returned to the Netherlands and no extradition proceedings took place.

48. Their Lordships have concluded that the Magistrate was entitled to issue the provisional warrant provided that he had received evidence that satisfied him that the appellant was accused of conduct within the jurisdiction of the Netherlands that would, had he committed it in Bermuda, have justified the issue of a warrant for his arrest. Whether the information that the Magistrate received qualified as such evidence and whether he asked himself the right question does not appear to have been explored.

49. These conclusions of their Lordships result from grappling with the complexities of this appeal after the hearing had been concluded. They are *obiter,* for this appeal has been academic from the start. Their Lordships did not consider it right, however, to address the issue canvassed between the parties on what appeared to them to be a false premise. If their Lordships are correct that the premise is false, the issue is doubly academic. Their Lordships none the less now turn to it.

Does the conduct alleged against the appellant constitute an extradition crime under the law of Bermuda?

The decision of the Court of Appeal

50. In approaching this question the Court of Appeal first considered whether "handling stolen property" fell within the list of crimes in Schedule 1 to the 1870 Act, as amended. Their conclusion was as follows:

> "43. The question whether the alleged offence of 'handling stolen property' is included in the statutory lists is complicated by the fact that when the reference to the Larceny Act 1861 in the schedule to the 1873 Act was replaced by 'the Theft Act 1968' (Theft Act 1968 Schedule 2 Part II) the 1870 Act was also amended, under the heading 'Consequential Repeals', by deleting various of the generic descriptions of crimes, including 'embezzlement and larceny' (Theft Act 1968 Schedule 3 Part III). The statutory list in the 1870/1873 Acts, therefore, as amended, no longer includes any generic category which even arguably could include the offence of 'handling stolen goods'.

> 44. However, the statutory list, as amended, includes 'any indictable offence under the Theft Act 1968' and 'handling stolen goods' is one such offence. A British magistrate would necessarily conclude, therefore, that the alleged offence was included in the statutory lists, in a case where the 1870/1873 Acts still applied and as a matter of English law."

The Court observed that the relevant provisions of the law of Bermuda were equivalent to those of the Theft Act.

51. The Court then considered the question of whether the Bermudan crime was "one of those included in the amended statutory list" in Schedule 1.

> "47. We remind ourselves that under section 17 the 1870 Act extends to Bermuda 'in the same manner as if throughout this Act [Bermuda] were substituted for the United Kingdom or England, as the case may require', and that in both the 1870 and the 1873 Acts the List of Crimes in the schedules is prefaced by 'The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act'. This expressly authorised the Bermudian magistrate to consider whether the alleged offence was a crime under Bermudian law, and where the descriptions were generic this presented no difficulty. It is only when the relevant description is specific, as opposed to generic, that it can be argued that the list must be interpreted, even by a Bermudian magistrate, as specifying the English crime only.
>
> …
>
> 50. In our judgment, these words require the Bermudian magistrate to have regard to the corresponding Bermudian legislation in relation to the specific crimes listed by reference to the United Kingdom Acts, and this approach is not inconsistent with the approach approved for the English magistrate in *In re Nielsen.* To hold otherwise would, it seems to us, be inconsistent with the object of section 17 of the 1870 Act and of the introductory words to the schedules of both Acts, that *mutatis mutandis* the Bermudian Magistrate should be

> the same position as his English counterpart. Moreover, by Article XVIII of the Treaty (quoted above) the United Kingdom agreed that its stipulations should apply in its foreign possessions 'but being based upon the legislation of the mother country shall only be observed on either side so far as they may be compatible with the laws in force in those … possessions'. The intention was clear, therefore, that extradition crimes should be defined by reference to the laws of the overseas territories, as well as of the 'mother country' concerned.

52. Finally the Court turned to the Treaty to see whether "handling stolen property" was covered by it. They concluded that it was by virtue of *the extension clause*, the implication being that this brought the Theft Act within the Treaty. The Court did not find it necessary to consider whether there was a parallel extraditable offence under the law of the Netherlands.

53. Miss Montgomery submitted that the reasoning in paragraph 50 of the Court's judgment was faulty. Any Bermudan crime that fell within the description of one of the generic crimes in the list scheduled to the 1870 Act constituted an extradition crime so far as Bermuda was concerned. Offences under any statute in the list that applied to Bermuda were also extradition crimes under Bermudan law. Where, however, a statute in the list did not extend to Bermuda, the offences that it contained did not constitute extradition crimes from the viewpoint of Bermuda.

Discussion

54. As Miss Montgomery pointed out, the draftsman of the Theft Act appears to have agreed with her submission. Section 33(4) of that Act provided:

> "No amendment or repeal made by this Act in Schedule 1 to the Extradition Act 1870 or in the Schedule to the Extradition Act 1873 shall affect the operation of that Schedule by reference to the law of a British possession; but the repeal made in Schedule 1 to the Extradition Act 1870 shall extend throughout the United Kingdom."

Thus, the amendments relied upon by the Court of Appeal did not take effect so far as the operation of the Schedule " by reference to the law of Bermuda" was concerned. This suggests that the draftsman of the Theft Act did not consider that the Act could satisfactorily replace in the Schedule the generic descriptions that included "embezzlement and larceny" so far as the application of the Schedule to British Possessions was concerned. The Theft Act cannot, however, assist in the task of construing the meaning of "extradition crime", as applied to Bermuda, in the Extradition Act 1870, which was enacted nearly a century earlier. That task is not an easy one. It must, however, be the starting point in considering the meaning of the revised definition of "extradition crime" in the 1989 Act.

The position under the 1870 Act

55. After making the substitution required by section 17, "extradition crime" is defined by section 26 of the 1870 Act as follows:

> "a crime which, if committed in Bermuda or within Bermudan jurisdiction, would be one of the crimes described in the first schedule to this Act"

56. The first schedule listed the crimes generically subject to the opening words:

> "The following list of crimes is to be construed according to the law existing in England, or in a British possession–(as the case may be), at the date of the alleged crime…"

Miss Montgomery submitted that the only significance of this provision was temporal – it made it clear that extradition could only be granted in respect of a crime in a requesting country if, at the time the crime was there committed, the conduct would also have been a crime in the country from which extradition was sought.

57. The key to applying the difficult provisions of the 1870 Act is to appreciate, as Robert Goff LJ pointed out in *Nielsen,* that the focus is on the

conduct that the fugitive is alleged to have committed in the country seeking extradition. In a British possession such as Bermuda the following questions had to be answered in order to decide whether a fugitive was accused of an extradition crime:

(i) What was the *conduct* alleged to be a crime in the foreign country?

(ii) Did that *conduct* constitute a crime under the law of Bermuda at the time that it was committed? If so,

(iii) Did the Bermudan crime fall within the generic description of one of the crimes in the schedule?

If the second and third questions were answered in the affirmative, the conduct of which the fugitive was accused constituted an "extradition crime".

58. No difficulty was involved in conducting this exercise in relation to the unamended schedule to the 1870 Act, for all the crimes were described generically. The problem arose when, under the 1873 Act, there was added to the schedule a number of statutes that did not apply outside the United Kingdom. The first two stages of the exercise could be carried out as before, but how did one approach the task of deciding whether the Bermudan crime that would have been committed had the conduct taken place in Bermuda was one of the crimes "described in the . . . Schedule"?

59. Miss Montgomery submitted that where the conduct fell within the schedule because it was conduct proscribed in a statute that applied only within the United Kingdom, you could not say that the crime that would have been committed if the conduct had taken place in Bermuda was a crime that was "described in the . . . Schedule". So far as the statutes in the schedule were concerned, "described in the . . . Schedule" meant "unlawful under a statute in the schedule". If the relevant statute did not apply outside the United Kingdom, the conduct proscribed by the statute would not constitute an extradition crime in any British possession.

60. The effect of Miss Montgomery's submission can be demonstrated by reference to the crime of "maliciously wounding or inflicting grievous bodily harm" that was one of the crimes listed in the Treaty, as set out in the 1899 Order in Council. Those crimes were not in the original schedule to the 1870 Act. They were, however, crimes covered by the Offences against the Person Act 1861 that was added to the Schedule by the 1873 Act. Assume, as seems likely, that stabbing someone was a crime under the law of Bermuda. A

fugitive who had stabbed someone in the Netherlands would be extraditable if found in England but not if found in Bermuda, because the statute in the Schedule to the 1870 Act did not apply to Bermuda. After 1989, however, it seems that the position would have changed. Under the new definition of "extradition crime" reference would have had to be made to the Order in Council rather than to the Schedule to the 1870 Act. The list of crimes in the Treaty set out in the Order in Council included "maliciously wounding". Thus the act of stabbing, which was a crime if committed in Bermuda, was covered by the generic description in the Treaty and had consequently become an extradition crime in Bermuda.

61. Their Lordships do not consider that the effect of the 1989 Act was to alter the crimes that constituted "extradition crimes" in this way. They do not accept Miss Montgomery's approach to the statutes listed in the Schedule to the 1870 Act as amended for the following reasons. First it adopts a different approach to crimes described generically and crimes identified by reference to statutes. Secondly it produces a result that is anomalous.

62. The scheme of the 1870 Act requires one to consider whether the *conduct* of which the fugitive is accused constitutes both a crime in the territory from which extradition is sought and one of the crimes "*described in*" the Schedule to the 1870 Act. This exercise can be performed in precisely the same way where the description in the Schedule is generic and where the description is to be found, with much greater specificity, in one of the statutes in the Schedule. The fact that the statute that contains the description only applies within the United Kingdom is irrelevant. Where the territory from which extradition is sought is a British possession, it is a precondition to extradition that the conduct also constitutes a crime in that territory. The description in the Schedule must match both the conduct and the crime constituted by the conduct in the territory from which extradition is sought.

63. Miss Montgomery's construction produces an anomalous result. She suggested no reason why conduct that was criminal both in the United Kingdom and in a British possession should render a fugitive subject to extradition if found in the United Kingdom but not in the possession, nor can their Lordships think of one. No such distinction would have been possible under the 1870 Act in its original form. Parliament cannot have intended to introduce such a distinction when it adopted the technique of adding statutes to the Schedule in 1873.

64. Thus, prior to 1989, conduct would constitute an extradition crime in Bermuda if (i) it was a crime under the law of Bermuda and (ii) it fell within

the description of any crime in the Schedule to the 1870 Act, whether that crime was described generically, or specifically by reference to the provisions of one of the statutes in the list.

65. Miss Montgomery submitted that, on this approach, deciding whether conduct amounted to an extradition crime would be no easy exercise for the Bermudan magistrate (on the premise that the exercise would be for him). She made the following point in her written case:

> "Furthermore the suggestion made by the Bermuda Court of Appeal that the magistrate in Bermuda could construe the reference in the list of crimes to 'any indictable offence under the Larceny Act 1861' to be equivalent to a reference to a Bermudian offence of receiving stolen goods is fraught with difficulty. It ignores the fact that receiving stolen goods was not necessarily an indictable offence under the Larceny Act 1861. Receiving was only indictable under section 91 of the Larceny Act 1861 if the original act of criminal acquisition was punishable as a felony. If the criminal act of acquisition was punishable summarily then under section 97 of the Larceny Act 1861, receiving that property was a summary only offence."

Miss Montgomery is correct in suggesting that the exercise might be difficult, but the difficulty was inherent in the system. Miss Montgomery's point would apply equally to determining whether conduct in a foreign country was an "extradition crime" in extradition proceedings commenced in the United Kingdom.

The position under the 1989 Act

66. What is the position under the 1989 Act? "Extradition crime…is to be construed by reference to the [relevant] Order in Council": para 20 of Schedule 1 to the Act. What if, as must often now be the case, the crime is not listed in the Order in Council, but reliance is placed on the *extension clause* in the Treaty? The effect of this is that extradition can be granted in respect of any crime for which under the laws of both the contracting parties a grant of extradition can be made. So, having referred to the Order in Council one has to look outside it to see whether the conduct of which the fugitive is accused constitutes an extraditable crime under the law of the foreign party to the

Treaty and the United Kingdom. So far as the United Kingdom is concerned, this leads one back to the schedule to the 1870 Act, as amended. If the conduct alleged falls within the description of an offence in one of the statutes in the schedule, it will constitute an extradition crime.

The position in this case.

67. It has always been accepted that the appellant is accused of a crime that is extraditable under the law of the Netherlands. The issue has been whether he is accused of an extradition crime so far as the law of Bermuda is concerned. The Court of Appeal identified the Theft Act 1968 as the statute in the amended schedule to the 1870 Act that rendered the conduct alleged against the appellant an extradition crime. The Theft Act was added to the Schedule by an amendment made by the Theft Act which substituted the Theft Act for the Larceny Act 1861. The Court of Appeal did not refer to section 33(4) of the Theft Act, which their Lordships have set out in paragraph 54 above. Having regard to that section it is arguable that the relevant statute is the Larceny Act 1861 "or any Act amending or substituted for the same", albeit that for all other purposes these earlier statutes were repealed by the Theft Act. Whichever may be the true position does not matter for present purposes.

68. The Court of Appeal did not adopt the correct approach to the issue of whether the appellant was accused of an extradition crime. They did not focus on the *conduct* alleged against the appellant and consider whether that *conduct* was (i) a crime under the law of Bermuda and (ii) an extradition crime. Instead they simply considered whether the description of the appellant's crime under the law of the Netherlands, "handling stolen property" matched a similar description under the law of Bermuda and under the Theft Act. If instead of the Theft Act, they had considered the Larceny Act 1861, or the subsequent Acts that "amended or substituted for" its provisions, namely the Larceny Act 1896 and the Larceny Act 1916, they would have found that these contained offences of receiving stolen property and reached the same conclusion.

69. What conclusion the Court of Appeal would have reached had it focussed on the question of whether the *conduct* of which the appellant was accused constituted an "extradition crime" was not explored. Miss Montgomery had, in the appellant's written case, raised a nice point as to whether the appellant's conduct amounted to a crime at all under the relevant statutes, having regard, in particular, to the decision of the House of Lords in *R v Preddy* [1996] AC 815. She did not, however, pursue this point, taking her stand simply on her submission that criminal statutes which did not apply to Bermuda could not be relied upon to establish that the appellant's conduct was

an extradition crime under the law of Bermuda. For the reasons that their Lordships have given she has not succeeded on that submission.

70. Sir Francis Piggott, Chief Justice of Hong Kong, stated in the preface to his *Treatise on the Law of Extradition 1910* that "the Extradition Act stands, I think, as a monument of successful draftsmanship". It should by now be apparent that this is not a view shared by their Lordships. The sooner that those treaties that keep alive the scheme of the 1870 Act are replaced by arrangements that reflect the modern law of extradition the better.

71. For the reasons that they have given, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. In the absence of any submission to the contrary within the next 14 days costs will follow the event.