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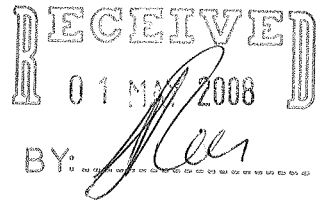

Treaty on Extradition between the State of United Arab Emirates and Australia

Submission 4
TT 12 March 2008

Introduction

Civil Liberties Australia (CLA) recognises the importance of creating working relationships with other countries to assist in the resolution of criminal investigations and does not formally oppose the ratification of the treaty.

However, CLA encourages the Commonwealth to carefully consider how it will introduce legislation to bring the treaty into Australian domestic law. The Commonwealth should not overlook its responsibility for ensuring the age-old policy that punishment for crimes is proportionate and reasonable; the responsible Minister should be formally required to consider these elements when contemplating extradition of a person residing in Australia to face criminal charges overseas.

It is a point of concern for CLA that the UAE retains the death penalty and corporal punishment for a number of crimes under its Penal Code. Under the UAE Penal Code the death penalty can be imposed for a range of offences including murder, rape, arson causing death and treason. This is inconsistent with penalty schemes in Australia, inconsistent with the Australian Government's formal stance (and signature on international agreements) on the death penalty, and inconsistent with the formal policy position of both the Labor Party and the Liberal Party.

UAE Law

The UAE has a complex legal structure containing a dual courts system where shari'a courts and civil courts operate in parallel, covering different areas of the law. Shari'a law generally applies to all criminal and family law matters.

The UAE Penal Code may be applied to criminal cases if evidence required by shari'a is found to be insufficient. Although defendants have the right to a fair public trial, they do not necessarily have a right to a speedy trial. An individual can be detained for extended periods of time without formal recourse to seek bail.

Defendants have the right to legal counsel but only after police have completed their investigation. All trials are conducted before judges, rather than judges and juries, and trials involving national security (only heard by the Federal Supreme Court) and public morality issues are not heard publicly.

Although it has been identified by the Commonwealth that the UAE Penal Code retains capital and corporal punishment schemes, penalties that are imposed according to shari'a law are at present either unpublished or vaguely described in the major international sources such as the United Nations' databases.

CLA appreciates that the language of the treaty creates mutual obligation for requesting jurisdictions to provide full and frank information regarding alleged offences and penalty schemes applicable to the person who is the subject of the extradition request. Although it is desirable for Australia and the UAE to operate under a system of trust and good faith, the disparity between the legal systems in Australia and the UAE may none-the-less present practical problems in accurately identifying dual criminality (where there are corresponding offences in the two jurisdictions) and reconcilable sentencing schemes between the two jurisdictions.

Australian Administration of the *Extradition Act 1988*

Although there are explicit safeguards in the treaty and relevant legislation (namely, those found in the *Extradition Act 1988* (Cth) and the associated regulations) to prevent the extradition of individuals facing charges attracting the death penalty, there have been instances in the recent past where government decisions have been made allowing the extradition of individuals to face charges that may attract the death penalty. CLA is concerned with the direction of these governmental decisions.

In the case of *Rivera v Minister for Justice and Customs* [2006] FCA 1784 a request for the extradition of Mr Rivera was made to the Minister for Justice and Customs (Minister). The Embassy of the United States of America in Canberra provided a

diplomatic assurance that the death penalty would not be sought or imposed against Mr Rivera. The Minister decided to surrender Mr Rivera to the United States of America (USA) in August 2006. Mr Rivera applied to the Federal Court of Australia to have the Minister's decision reviewed.

Mr Rivera made several arguments regarding the denial of natural justice and biased administration. Mr Rivera argued that even though an assurance had been given, "any jury could find special circumstances for the imposition of the death penalty even without the express endorsement of the prosecutor or judge". Furthermore, Mr Rivera argued that he was not given reasonable opportunity to see comments regarding department submissions regarding his case and that the Minister had refused to take up an offer to interview expert witnesses who could attest that there was a possibility that Mr Rivera would still be given the death penalty despite an assurance; that prejudicial publicity would be renewed on his return to the USA; and that there would be a high chance of racial prejudice at the venue where he was to be tried.

The Minister submitted in reply that:

> "it was not a rule of natural justice that the Minister must undertake in this case for himself some sort of roving, judicial style inquiry involving a vast array of witnesses who were alleged, but not shown, to be able to shed light on relevant issues."

Mr Rivera also argued that there was an apprehension of bias in the handling of his matter. He noted incidents where an officer had directed obscene language toward him. This officer was removed from her role soon after. The inappropriateness of such comments would have reasonably raised concerns over the objectivity of the decision-making process.

It was decided by the Federal Court of Australia (FCA) that the Minister was not obliged to pursue lines of inquiry proposed by Mr Rivera by contacting and speaking to people; that Mr Rivera was not entitled to see and comment on departmental submissions; and that the mere failure to make them available did not constitute a denial of procedural fairness.

The court followed the principle in *McCrae v Minister for Customs and Justice* [2005] FCAFC 180 (*McCrae*) in determining whether the assurance given by the Embassy of USA was of a character of an undertaking in which the death penalty would not be imposed. The principle in *McCrae* stated:

> "Consistently with the object of the provision, there is much to be said for the view that the expression "by virtue of an undertaking" requires that the decision-maker consider whether the undertaking is one that, in the context of the system of law and government of the country seeking surrender, has the character of an undertaking by virtue of which the penalty of death would not be carried out".

The FCA found that the assurance given by the Embassy of the USA and the District Attorney did have the "character of an undertaking by virtue of which the penalty of death would not be carried out" because for a jury to impose the death penalty due to special circumstances, the District Attorney must first charge Mr Rivera of special circumstances potentially attracting the death penalty and the District Attorney had given assurance that he would not make such a charge against Mr Rivera.

Although the FCA considered the relevant arguments submitted by Mr Rivera, there is still the question of why the Minister had not considered these issues in his original decision. If this is a reflection of how the Commonwealth *Extradition Act 1988* and the various regulations are interpreted and implemented by the Minister, CLA has concerns that even though there are express protections found in the various legal instruments, there will still be circumstances where surrender warrants will be granted regarding individuals suspected of crimes that attract sentences that are not consistent with Australia's sentencing laws.

The case of *de Bruyn v Minister for Justice and Customs* [2004] FCAFC 334 (*de Bruyn*) provides a good example of how past Ministerial decisions have focused too stringently on the formal construction of the legislation as opposed to the intended operation of the legislation. In the case of *de Bruyn* the Minister had decided to permit the extradition of Mr de Bruyn based on the assessment that unless there was

certainty that the extradited individual would contract HIV/AIDS as a result of being imprisoned in South Africa, it would not be oppressive or contrary to humanitarian considerations to surrender the person. The Minister's decision was held to be wrong by the Federal Court of Appeal. The exposure to a level of risk of infection should be considered as incompatible with humanitarian considerations.

The regulations were drafted to rule out the possibility of an extradited individual being placed in an environment that would be oppressive or inhumane and appear to be protective in nature. It would therefore be immaterial on a reading of the intention of the legislation to consider the question of whether there is a chance or not that a person will be placed in an environment that would be oppressive or inhumane, but rather the material question lies in the nature and degree of the chance.

The two cases raise a set of issues. Firstly, even with diplomatic assurance from a country which is party to a bilateral treaty with Australia – similar to the treaty now proposed for Australia and the UAE – there may be special circumstances that would render the assurance illusory. Secondly, even with express legislative provisions requiring the Minister to be satisfied that individuals will not be extradited if they are facing charges that attract the death penalty or may be prosecuted for discriminatory reasons, the power is discretionary where the Minister is not legally obligated to investigate claims made by the person to be extradited regarding the character of an assurance that is given. Thirdly, extrinsic factors regarding the prison or detention environment to which the person to be extradited will be subjected to, have not been adequately considered in the past when considering whether the person to be extradited would be placed in an oppressive or inhumane environment.

Recommendations

CLA makes the following recommendations regarding policies it believes should be adopted when the Commonwealth drafts the regulations that will bring the treaty into Australian domestic law:

1) Assurances that are given regarding the extradition of individuals must have the "character of an undertaking by virtue of which the penalty of death would not be carried out".
2) If a person provides information attesting against the effectiveness of the assurance the Minister must consider the evidence.
3) If a person requests that the Minister hear evidence regarding the effectiveness of the assurance, then the Minister must consider the request with the view of allowing the request, unless it would be too onerous for the Minister to do so.
4) If the Minister refuses to consider evidence or refuses to hear evidence of the nature mentioned in 3 and 4, then the Minister must provide written explanation to the person to be extradited as to why the evidence will not be heard or considered.
5) When the Minister is considering whether to extradite an individual, the Minister must take into account the particular prison and detention environment (that the person will be extradited into) to assess whether the person will be put in an environment that would be tantamount to a death sentence, although not formally recognised as such, or whether the person will be subject to treatment tantamount to torture or inhumane treatment according to Australian and international standards.

If the Minister decides to extradite an individual, the Minister must provide to the person to be extradited written evidence that the Minister has considered the particular prison and detention environment in which the extradited person will be placed and why the Minister has come to the decision to extradite the individual.

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