***Her Majesty The Queen and the Federal Republic of Germany* v. *Albert Helmut Rauca:*[1] : International Law—Nationality—Jurisdiction—Extradition.**

CASE SUMMARY

The fugitive, Albert Helmut Rauca, was apprehended under a s.10 warrant of the *Extradition Act*[2] issued June 17, 1982 by Parker A.C.J.H.C.. Rauca was accused of the extraditable crime of aiding and abetting the murder of approximately 10,500 persons between 1941 and 1943 in Kaunas, Lithuania. The Federal Republic of Germany (the "Requesting State") sought the extradition of the fugitive from Canada (the "Requested State") on the basis of an extradition treaty between the two States entered into force in 1979 (hereinafter referred to as the "Treaty").[3] It was submitted by the Requesting State that the crime was committed within its jurisdiction.

Lithuania was invaded by Germany in 1941. Between 1941 and 1943, the fugitive was alleged to have been a member of the *Einsatzgruppen* in Lithuania, a specialized group whose duties included the destruction of "racially inferior" groups. In 1950, Rauca came to Canada and became a citizen.

At trial before Evans C.J.H.C., the fugitive was committed for surrender as the evidence was sufficient to justify a *prima facie* case against him for the alleged crimes. On appeal to the Ontario Court of Appeal, this decision was affirmed. Briefly, there were two main arguments on behalf of the accused. First, it was argued that the *Extradition Act* (which implemented the Treaty) was inconsistent with the *Canadian Charter of Rights and Freedoms*, as its application restricted the fugitive's right to mobility (s.6) as a Canadian national, and therefore, was inapplicable. The Courts responded to this Charter argument by essentially stating that the fugitive's extradition was a limitation "demonstrably justified" in the circumstances (as outlined by s.1 of the *Charter*). The second argument was that the Requesting State lacked jurisdiction to request extradition of the fugitive as the crimes were committed in Lithuania. As to this argument, both the High Court and the Court of Appeal determined that there was sufficient jurisdiction in the Requesting State to allow extradition.

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[1](1982), 30 C.R. (3d) 97 (Ont. H.C.J.); aff'd at (1983), 4 C.C.C. (3d) 385 (Ont. C.A.)

[2]R.S.C. 1970, c. E-21.

[3]Extradition Treaty Between Canada and Germany, C.T.S. 1979, No. 18.

HISTORICAL BACKGROUND
Extradition

The history of the Canadian *Extradition Act* is a long one reaching back to 1870.[4] Essentially, the Act attempts to provide in Part I (with which we are here concerned) for two things. First, it attempts to delineate a standard procedure for extradition. Second, it sets out the "machinery" for implementing extradition arrangements such as the Treaty in this case.[5] Such an approach, in short, recognizes that the practice of extradition in Canada depends primarily upon the existence of bilateral treaties[6] and that constitutionally, while the executive has the power to form such treaties, they must be implemented by the Parliament of Canada.[7]

There are no specific provisions in the Act dealing with either the question of nationality or jurisdiction. These matters (and other substantive matters) are generally found in the relevant extradition treaty.[8]

With respect to the application of the *Extradition Act* and questions of nationality, it is clear that the practice in Commonwealth countries such as Britain and Canada has been to allow extradition of its nationals.[9] A number of other countries, including the Requesting State, do not allow extradition of nationals. It would appear that the policy favouring the barring of extradition in the case of nationals is that a national should be protected by the laws of his sovereign and not removed from his "natural judges."[10] The opposite viewpoint (being the Canadian approach) seems to be more rational.

In the first place, barring extradition on the basis of nationality gives the fugitive immunity purely because of an accident of birth.[11] As well, while the national is entitled to the protection of his sovereign, he himself owes a duty of obedience to the laws of the territory in which he finds himself.[12] Further, in most extradition treaties (including that in the present

[4]For a discussion of the history of extradition in Canada, see Magone, "Extradition" 3 C.B.R. 179 (1925); LA FOREST, EXTRADITION TO AND FROM CANADA, Ch 1 (1977).

[5]See section 3 of the *Extradition Act*, *supra* footnote 2.

[6]BASSIONI,M., INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER, 9-18 (1974); SHEARER, I.A. EXTRADITION IN INTERNATIONAL LAW, 27-43 (1971).

[7]See the classic constitutional case of the *A.G. Can.* v. *A.G. Ont.* (Labour Conventions Case), [1937] A.C. 326 for a discussion of the division of power between the executive and legislative branches as to the formation and implementation of treaties. See as well P. HOGG, CONSTITUTIONAL LAW IN CANADA 181-186 (1977). As extradition involves matters of criminal law, it falls to the Parliament of Canada to implement extradition treaties.

[8]For example, the provisions as to nationality and jurisdiction in the Treaty, *supra* footnote 3, are found in Articles I and V.

[9]See LA FOREST, *supra* footnote 4 at 77-80.

[10]CASTEL AND WILLIAMS, INTERNATIONAL CRIMINAL LAW CASEBOOK, YORK UNIVERSITY, 712 (1975/76)

[11]*Ibid.* 713.

[12]*Ibid.*

case), the national receives adequate protection since there is a discretion left to the executive to refuse the extradition of a national.[13] Thus, the Canadian approach has been to allow the extradition of nationals in appropriate circumstances. The case law clearly supports this principle as *In Re Burley*[14] shows:

> Whatever may be considered to have been the general rule in relation to a Government surrendering its own subjects to a foreign government, I cannot say that I have any doubt that under the Treaty and our Statute, a British subject who is in other respects brought within the law, cannot legally demand that he ought not to be surrendered merely because he is a natural born subject of Her Majesty.[15]

The requirement of jurisdiction in extradition means essentially that the crime must be committed within the jurisdiction (or "territory") of the Requesting State. Numerous cases establish this fundamental principle[16] and extradition treaties almost invariably provide such a requirement. In general, the extradition crime is committed within the territory (national boundaries) of the Requesting State and thus creates no problem. However, in certain circumstances, such as those in the present case, there arises a problem as to jurisdiction where the crime is committed within a territory which is not under the *de jure* control of the Requesting State at the time the crime is committed and only *de facto* control exists. In *Schtraks* v. *Government of Israel*[17], the House of Lords clearly laid down the principle that extradition may be granted notwithstanding a lack of *de jure* sovereignty and that only a *de facto* jurisdiction is recognized. An additional problem unique to the Federal Republic of Germany questions its ability to prosecute offences committed under the authority of the Third Reich. It would appear that a number of States have recognized this jurisdiction.[18]

The Canadian Charter of Rights and Freedoms

On April 17, 1982, the *Canadian Charter of Rights and Freedoms* came into force. The relevant sections 1 and 6(1) which read as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
>
> 6(1). Every citizen of Canada has the right to enter, remain in and leave Canada.

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[13]Article V, *supra* footnote 3.

[14](1865), 1 C.L.J. 34.

[15]See (1983), 4 C.C.C. (3d) 385 at 404 (Ont. C.A.)

[16]*R.* v. *Lavaudier* (1881), 15 Cox. C.L.L. 329; *R.* v. *Governor of Holloway Prison* (1902), 18 T.L.R. 475; *Kossekechetko* v. *A.-G. Trinidad*, [1932] A.C. 78. See discussion in LA FOREST, *supra* footnote 4 at 45-50.

[17]*Schtraks* v. *Government of Israel*, [1964] A.C. 556, [1962] 3 W.L.R. 1013 (H.L.).

[18]See for example the American case of *U.S.* v. *Ryan* 360 F. Supp. 265 (1973) (U.S.D.C., N.Y.), aff'd. 478 F.2d 1397 (1973).

Since the coming into force of the Charter, there have been numerous attempts to test the scope of its application. The present case however is one of the few giving consideration to the meaning of s.1, clearly the most important section for all practical purposes.

Present Case: Charter

In both the Ontario High Court and the Ontario Court of Appeal, Mr. Rauca claimed that the extradition of a Canadian national would violate the right of mobility as guaranteed by s.6 of the *Charter*. This argument failed at both levels.

The issue was divided into two parts by both courts, the first matter being to establish whether a guaranteed right had been infringed. The onus was *prima facie* on Rauca to show that his mobility rights as a Canadian citizen had been infringed. Both courts accepted that, *prima facie*, extradition *was* such an infringement. The second part concerns whether the infringement is "demonstrably justified"; the onus being on the Federal Democratic Republic to show that the limitation of this right falls within section 1 of the Charter.

In determining whether the Republic had discharged the onus, the courts looked at different materials. Evans C.J.H.C. determined that in order to satisfy the onus, the Republic must show that the limits imposed by the extradition laws are: reasonable, prescribed by law, and demonstrably justified in a free and democratic society.[19]

Evans C.J.H.C. read s.1 and s.6(1) together, making s.1 the overriding provision, and thereby restricting the other rights and freedoms in the Charter.[20] He developed a test of what amounts to demonstrably justified:

> The phrase, "reasonable limits" in s.1 inports an objective test of validity. It is the judge who determines whether a "limit" as found in legislation is reasonable or unreasonable. The question is not whether the judge agrees with the limitation but whether he considers that there is a rational basis for it—a basis that would be regarded as being within the bounds of reason by fair-minded people accustomed to the norms of a free and democratic society. That is the crucible in which the concept of reasonableness must be tested.[21]

Evans C.J.H.C. suggested that reference be made to other legal systems with similar principles. He states:

> The court must decide what is a reasonable limit in a free and democratic society by reference to Canadian society and by the application of principles of political science. Criteria by which these values are to be assessed are to

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[19](1983) 38 O.R. (2d) p. 705 at 716.

[20]*Ibid.* p. 714-715.

[21]*Ibid.* 715.

> be found within the charter itself, which means that the courts are entitled to look at those societies in which as a matter of common law freedoms and democratic rights similar to those referred to in the Charter are enjoyed.[22]

However, he in fact made his final decision on the Charter issue without using such a comparative analysis. Evans C.J.H.C. does not give very clear reasons for his decision, but, he appears to base his determination upon the past practice of extradition:

> I am satisfied that such statutory restriction which has as its objective, the protection and preservation of society from serious criminal activity, is one which members of a free and democratic society such as Canada could accept and embrace. To hold otherwise would be to declare that a procedure which has been accepted in our country for over a century and in most other democratic societies is no longer a reasonable and proper method of protecting our society from serious criminal activities.[23]

The Court of Appeal follows a similar approach in requiring the Federal Democratic Republic to satisfy the onus of showing that the infringement is demonstrably justified. However in their determination the court considers a wider breadth of variables. The court looks at several cases which consider the past practice in extradition law and international law.[24] The Court of Appeal, as distinguished from the High Court, placed some emphasis upon international law and discussed it in the decision.

With regard to international law, the court begins by stating that "no international convention written or otherwise militates against the extradition of a State's own nationals."[25] The court looked at the *International Covenant on Civil and Political Rights* and the *European Convention of Human Rights*. The court then held that municipal laws are the only real source of substantive law of extradition—not international law. The courts' use of international law in this case is not particularly illuminating.

It would appear again that the court bases its decision on past practice, our obligations at international law and the purpose of the *Extradition Act*:

> It is not necessary to turn to lengthy dictionary definitions of the words 'demonstrably justified'. They are words of common understanding and usage and they place a significant burden on the proponents of the limiting legislation. When the *rationale* and purpose of the *Extradition Act* and treaty under it are looked at (having in mind that crime should not go unpunished), Canada's obligations to the international community considered and the history of such legislation in free and democratic societies examined, in our view, the burden of establishing that the limit imposed by the *Extradition Act* and the treaty on s.6(1) of the Charter is a reasonable one demonstrably justified in a free and democratic society has been discharged by the respondents.[26]

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[22] *Ibid.* p. 716.

[23] *Ibid.* p. 717.

[24] *Re Southam Inc. and The Queen* (no.1) 41 O.R. (2d) 113; *Attorney-General* v *Times Newspapers Ltd.* [1947] A.C. 273; *Re Galarey*, [1896] Q.B. 230; *R* v *MacDonald, Ex p. Strult* (1901), 11 O.L.J. 85.

[25] (1983), 4 C.C.C. (3d) 385 at 401-402.

[26] *Ibid.* p. 406.

It is also felt that, at this level, there is a leap in reasoning from the discussion to the decision. It would seem that a variety of instruments are discussed (e.g. the international covenants) and a decision is then given without any emphasis upon the reasons. At both court levels it appears that there are difficulties in explaining the reasons for reaching a decision.

JURISDICTION

Before considering the courts' approach to this issue, it is necessary to mention some of the relevant facts concerning jurisdiction. As we have seen, the alleged "murders" of 10,500 persons occurred in Kaunas, Lithuania between 1941 and 1943. The evidence from the reported decisions regarding jurisdiction is as follows: On June 22, 1941, the German Army invaded Lithuania and by the end of that month, the German forces were in complete control of the country and remained as such until August 1944. There was no other government in power in Lithuania. Lithuania was subject to German administration, the German Civil Code and Code of Criminal Procedure. As to the position of the Requesting State itself, the evidence established that they have consistently affirmed their competency to prosecute National Socialist crimes of violence. One of the expert witnesses in the case stated by way of affidavit that the German Reich and the Federal Republic of Germany were essentially identical.[27]

On the basis of these outlined facts, both the Ontario High Court and the Court of Appeal came to the conclusion that the Requesting State had sufficient jurisdiction to try the fugitive for the alleged crimes. In short, the issue can really be divided into two questions. First, did the German Reich (i.e. the Germany before 1945) have sufficient control over Lithuania during the time in question to establish jurisdiction over Rauca? Secondly, what is the relationship between the Germany of World War II and the Requesting State?

In the Ontario High Court, Evans C.J.H.C. came to the conclusion that *de facto* control of a territory created sufficient jurisdiction to deal with the accused fugitive and as such, the Requesting State had sufficient jurisdiction; a *de jure* jurisdiction not being necessary:

> Germany was in *de facto* occupation of Lithuania in 1941. It was part of the German territory of Germany through conquest. The fact that it was forced at a later date to relinquish possession does not alter the fact that at the relevant time, it was German territory.[28]

Similiarly, the Court of Appeal found that the Requesting State had jurisdiction to try Rauca. In analyzing this issue, the Court made reference to the case of *Schtraks* and the American case of *In Re Ryan*.[29] *Schtraks* in

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[27](1982), 30 C.R. (3d) 97 at 105-107 (Ont. H.C.J.); (1983), 4 C.C.C. (3d) 385 at 393-395 (Ont. C.A.).

[28](1982), 30 C.R. (3d) 97 at 106-107.

[29](1983), C.C.C. (3d) 385 at 407-408.

particular makes it very clear that a *de facto* control is sufficient to establish jurisdiction for purposes of extradition. The Court of Appeal concluded as follows:

> The evidence establishes that the place where the alleged offences took place was occupied and under the *de facto* control of Germany. In our opinion, "territory" as used in the treaty under consideration includes those areas occupied and under the *de facto* control of Germany during the Second World War. We therefore are of the view that Evans C.J.H.C. was right in holding that the Requesting State had jurisdiction to seek extradition of the fugitive.[30]

As to the second aspect of the issue of jurisdiction; i.e., whether or not the Requesting State was in a position to prosecute as the successor or "identical state personality" of the German Reich, both courts are silent. The only comment which might be said to have been made with respect to this matter was by the Court of Appeal as follows:

> . . . the Republic of Germany has recognized that it has an obligation to punish German personnel who committed such crimes and that it is a proper place (although perhaps not the only one) for the trial of men and women charged with such offences, for a German national is by the German law punishable there for such crimes wherever committed.[31]

ASSESSMENT

The determination of this issue on the Charter is one of quite momentous proportions when one reflects upon the possible outcome of this case. Had the courts determined that the Charter had been violated and that the *Extradition Act* and the "Treaty" were inapplicable to a Canadian national, Canada would have been faced with the prospect of actually prosecuting a Nazi fugitive for war crimes committed during the Second World War.[32]

There can be no doubt that the decision of the Court of Appeal as to the Charter and its application to the extradition of Canadian nationals is fundamentally correct.[33] Both courts have determined that the practice of extraditing Canadian nationals for crimes committed abroad is one that has been accepted by Canadians as being "demonstrably justified". Frankly, why the issue was raised and why the court spent so much time dealing with it is somewhat mystifying, as the answer to Rauca's argument seems perfectly clear. His argument is analogous to that of an accused in a criminal case who argues that his rights of mobility have been infringed. (An even

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[30] *Ibid.*, at 409

[31] *Ibid.*

[32] Or alternatively, Rauca would go untried and unpunished: see CASTEL AND WILLIAMS, CANADIAN CRIMINAL LAW: INTERNATIONAL AND TRANSNATIONAL ASPECTS, 346-347 (1981).

[33] The approach of the courts has in fact been followed recently in a Nova Scotia extradition case. See *Re Decter and United States of America* (1983), 148 D.L.R. (3d) 496 (N.S.S.C., T.D.).

better example of the meaning of "demonstrably justified" is given by the Court of Appeal as follows: "A readily demonstrable example of this is 'freedom of speech' which is limited or qualified by the laws of defamation, obscenity, sedition, etc.")[34]

More important, however, than the actual outcome of the decision in this case, is the technique of interpretation that is used; i.e., the preliminary determination that a guaranteed right *prima facie* has been infringed and then a consideration of whether that infringement is demonstrably justified. That this approach is logical cannot be denied.

Another aspect of the Charter argument to which some comments should be directed concerns the use of international legislation and comparative legislation. Reference has already been made to the comments of Evans C.J.H.C., suggesting a use of comparative analysis and his own lack of reliance on such an approach. The Court of Appeal made reference to international legislation in its interpretation of the Charter, but this reference is at best cursory and does no more than to support what had already been decided. The decision of the Court was by no means based upon such international legislation, and the mention made seems almost in deference to its existence as opposed to its importance. If criticism can be directed toward the Charter argument, it is with respect to the lack of use of international legislation in interpretation. This criticism is particularly true in this case since the crimes with which the fugitive was charged have been a matter of concern at international law since World War II.[35] In effect, the crimes with which Rauca was charged in this case were more international in nature than domestic, and as such, international law might have been given a greater recognition by the court.

As to the issue of jurisdiction, little need be said by way of assessment. The courts in analyzing this matter do not really give a complete answer to the two questions raised by the issue. ((1) Did the Third Reich have sufficient control over Lithuania during the time in question to establish jurisdiction over the fugitive? (2) What is the relationship between the Germany of World War II and the Requesting State?). While the courts clearly answer the first question based upon such authority as *Schtraks*,[36] the answer to the second question is never expressly given, it is merely assumed. This is not to say that the conclusion is incorrect, but only that the reasoning behind it is lacking. As stated, it would appear that the Court of Appeal is recognizing the general competency of the Federal Republic in matters of this nature although it never explicitly makes this point.

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[34](1983), 4 C.C.C. (3d) 385 at 401.

[35]See for example, the decisions of the International Military Tribunal at Nuremburg in TRIAL OF MAJOR WAR CRIMINALS, 1947 and also the *Genocide Convention*, 78 U.N.T.S. 277 [1949]; C.T.S. No. 27 (entered into force January 12, 1951).

[36]*Supra*, footnote 17.

CONCLUSION

In general, it might be said that the decisions of both courts in this case are well-reasoned, subject only to the comments already made. By way of conclusion, reference should be made to two very general questions that arise because of the decision in this case. The first relates to the matter of extradition itself in a very wide sense. It is clear that there has been a stretching of the normal conception of jurisdiction to ensure that Rauca fits within the provisions of the extradition treaty between the Federal Republic of Germany and Canada. One can only question whether this in fact achieves the fundamental purpose of extradition which, as the Court of Appeal notes, is to return the fugitive to the state most competent to try him for the offences in question. Whether or not West Germany is the most competent jurisdiction to try these offences is difficult to answer. However, it is suggested that it is certainly preferable to a trial in Canada for the substantive crimes in question.

The second matter of interest concerns the interpretation of the Charter and its implications. Surely, no one would seriously argue that the courts in this case were incorrect in their decision. However, this realization in itself raises a fundamental question as to the Charter and its future application, namely, was the Charter intended to *change* the rights enjoyed by Canadian nationals or merely to *codify* what rights were thought to exist? Perhaps it is too early to speculate on this question. However, the decisions of both the High Court and the Court of Appeal in this case would seem to suggest that it is merely a codification. This suggestion appears most vividly in the continuing emphasis of the courts that the infringement was demonstrably justified because the practice of extraditing nationals has existed for over a century. In terms of future implications, this would seem to indicate that the Charter does not change the existing practices of law.

> Nevertheless, the Charter was not enacted in a *vacuum*, and the rights set out therein must be interpreted rationally; having regard to the *then* existing laws, and, in the instant case, to the position that Canada occupies in the world and the effects of the multitude of extradition treaties it has had with other nations.[37]

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[37](1983), 4 C.C.C. (3d) 385 at 404.

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