CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 35/02

WILHELM IGNAZ ERICH GEUKING	Appellant
versus	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
DIRECTOR OF PUBLIC PROSECTIONS: THE PROVINCE OF THE CAPE OF GOOD HOPE	Third Respondent
MAGISTRATE, CAPE TOWN	Fourth Respondent

Heard on : 21 November 2002

Decided on : 12 December 2002

JUDGMENT

GOLDSTONE J:

Introduction

[1] Extraditing a person, especially a citizen, constitutes an invasion of fundamental human rights. The person will usually be subject to arrest and detention, with or without bail, pending a decision on the request from the foreign state. If surrender is ordered, the person will be taken in custody to the foreign state.

[2] The need for extradition has increased because of the ever-growing frequency with which criminals take advantage of modern technology, both to perpetrate serious crime and to evade arrest by fleeing to other lands. The government of the country where the criminal conduct is perpetrated will wish the perpetrator to stand trial before its courts and will usually offer to reciprocate in respect of persons similarly wanted by the foreign state. Apart from reciprocity, governments accede to requests for extradition from other friendly states on the basis of comity.[1] Furthermore, governments do not wish their own countries to be, or be perceived as safe havens for the criminals of the world.

[3] In December 1990 a court in the Federal Republic of Germany (the FRG) convicted Mr. Geuking (the appellant) on two counts of fraud and arson and sentenced him to imprisonment for two years and nine months. The appellant's appeal against his conviction and sentence was dismissed in May 1991. He then fled the FRG and in early 1992 took up residence in South Africa. In June 1992 the appellant was granted permanent residence in the former Ciskei and in November of that year he was granted a certificate of naturalisation and thus became a citizen of Ciskei. On 14 July 1995 the appellant became a South African citizen through naturalisation. It is not disputed on the papers that he ceased to be a citizen of the FRG.

[1] For a discussion of comity and reciprocity as a basis for extradition, see N. Botha "The Basis of Extradition: The South African Perspective" (1991/92) 17 *South African Yearbook of International Law* at 134 - 145.

[4] In a verbal note dated 25 November 1996, the embassy of the FRG requested the Republic of South Africa to extradite the appellant in order to implement the prison sentence and to introduce proceedings against him on a further 15 counts of fraud allegedly committed by him in the FRG. In the verbal note the appellant was described as a German citizen. The note also stated that the FRG was "prepared to extradite persons with similar criminal offences to the Republic of South Africa if these persons do not have German citizenship and if German extradition laws are satisfied."[2]

[5] Extradition is governed by the provisions of the Extradition Act of 1962[3] (the Act). Section 3(2) of the Act provides for the extradition of persons from South Africa to countries with which South Africa has no extradition treaty.[4] The FRG is such a country. Before the proceedings can commence, section 3(2) requires the consent of the first respondent (the President). On 30 May 1997 the President consented to the appellant's extradition without being notified that he was no longer a citizen of the FRG and had become a South African citizen.

[2] The courts of the FRG have jurisdiction in respect of criminal offences committed by their citizens outside the FRG and under the Constitution of the FRG citizens may not be extradited, save to international criminal tribunals and the International Criminal Court.

[3] Act 67 of 1962.

[4] Section 3(2) provides as follows:

> "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

[6] On 30 January 1998 the Minister for Justice and Constitutional Development (the Minister) issued a notification in terms of section 5(1)(a) of the Act[5] to the fourth respondent, the magistrate for the district of Cape Town (the magistrate), to inform him that a request had been received for the appellant's extradition. The magistrate duly issued a warrant for the appellant's arrest which was executed on 20 April 1998.

[7] Section 10(2) of the Act[6] provides that in extradition proceedings before a magistrate, a certificate from the appropriate authorities in the foreign state must be accepted as conclusive proof that such authority has sufficient evidence to warrant the prosecution of the person concerned. On 4 May 1998 the appellant's attorneys addressed a letter to the offices of the third respondent, the Attorney-General (now the Director of Public Prosecutions), to inquire whether a section 10(2) certificate would be used in the appellant's extradition enquiry. It was confirmed that this was the intention. A copy of the certificate was furnished to the appellant.

[8] On 13 May 1998 the appellant brought an application in the Cape High Court (the High Court) for relief which, in summary, sought an order:

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[5] Section 5(1)(a) provides as follows:

> "Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person-
> (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister".

[6] Section 10(2) provides as follows:

> "For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned."

(a) Declaring sections 10(2) and 3(2) of the Act to be inconsistent with the Constitution and invalid;

(b) Reviewing and setting aside the President's consent in terms of section 3(2) to the appellant's extradition;

(c) Reviewing and setting aside the Minister's decisions to countersign the consent and to notify the magistrate in terms of section 5(1)(a), that the extradition request had been received;

(d) Reviewing and setting aside the magistrate's decision to issue a warrant for the appellant's arrest;

(e) Declaring these decisions and arrest warrants to be null and void and of no force and effect, in consequence of the invalidity of such decisions and acts.

[9] At the time that the matter was heard by the High Court, this Court had already held that section 3(2) is consistent with the Constitution.[7] In consequence the appellant abandoned the relief he had sought in respect of that provision of the Act.

[10] On 11 June 2001 the High Court dismissed the appellant's application.[8] Having been granted a positive certificate in terms of rule 18 of this Court's rules, the

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[7] *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC); 2000 (5) BCLR 478 (CC) at paras 17 – 18.

[8] The judgment is reported as *Geuking v President of the Republic of South Africa and Others* 2002 (1) SA 204 (C); 2001 (11) BCLR 1208 (C). References in this judgment will be to the report in the South African Law Reports.

appellant launched an application for leave to appeal directly to this Court. That application was granted.

[11] The appellant seeks in this Court:

(a) To have the consent of the President reviewed and set aside on the grounds that:

(i) he was not authorised by the Act to grant it; and that, in any event,

(ii) it was granted on the basis of incorrect information as to the citizenship of the appellant.

(b) An order declaring that the provisions of section 10(2) of the Act are unconstitutional and invalid.

The Scheme of the Act

[12] In the *Harksen* case[9] this Court described the three bases upon which extradition may be sought under the Act.[10] As already noted, there is no extradition agreement between this country and the FRG and the latter has not been designated by the President. It follows that the request received from the FRG can only be acted upon under the provisions of section 3(2) of the Act.[11] As pointed out in *Harksen,* this provision is designed to enable South Africa to accede, on the basis of reciprocity or

[9] Above n 7, para 5.

[10] Id para 5. The first is under an extradition agreement between the Republic and the requesting state. The second is where there is no such agreement. And, the third is to states "designated" by the President.

[11] Above n 4.

comity, to a request for extradition from a state with which there is no extradition agreement.[12]

[13] After the process of extradition has been initiated by the issue of a warrant of arrest by a magistrate under section 5(1)(a),[13] section 9(1) requires that the arrested person be brought before him or her as soon as possible for the purpose of holding "an enquiry with a view to the surrender of such person to the foreign State concerned." Under section 9(2) the inquiry "shall proceed in the manner in which a preparatory examination is to be held", i.e. a preparatory examination held in terms of Chapter 20 of the Criminal Procedure Act[14] (the CPA). This means that the enquiry must be held in open court (section 152 of the CPA), subject to the provisions of section 9(3) of the Act;[15] the evidence must be led on oath or affirmation (sections 162 and 163 of the CPA); and oral evidence is subject to cross-examination and re-examination (section 166 of the CPA). The State first leads evidence and thereafter the person has the opportunity of making a statement, testifying or calling witnesses (sections 128, 133 and 134 of the CPA).

[14] Under section 9(3) of the Act, the magistrate may receive any deposition, statement on oath or affirmation (irrespective of whether it was taken in the presence

[12] Above n 7.

[13] Above n 5.

[14] Act 51 of 1977. See *Ex parte Graham: In re United States of America v Graham* 1987 (1) SA 368 (T) at 371 D.

[15] Below para 14.

of the person whose extradition is sought), any record of conviction, or any warrant issued by a foreign state, or any copy or sworn translation thereof. Provision is made in section 9(3) of the Act for the authentication of such documents.

[15] The purpose of the enquiry is to be found in section 10(1) of the Act.[16] It is for the magistrate to determine, upon a consideration of the evidence, whether:

(a) the person is liable to be surrendered to the foreign state concerned; and

(b) in the case where such person is accused of an offence, there is sufficient evidence to warrant a prosecution for the offence in the foreign state.

If so satisfied, the magistrate is required to issue an order committing such person to prison and there to await the decision of the Minister with regard to surrender. At the same time the magistrate is obliged to inform the person that he or she may within 15 days appeal against such order to the High Court.

[16] Under section 10(3) of the Act, if the magistrate finds that the evidence does not warrant the issue of an order of committal or that the evidence required is not forthcoming within a reasonable time, the person shall be discharged. Under section 10(4) of the Act, the magistrate issuing a committal order shall forthwith forward to

[16] Section 10(1) provides as follows:

> "If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) *(a)* and *(b)* (i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court."

the Minister a copy of the record of the proceedings together with such report as he or she may deem necessary.

[17] Section 11 of the Act vests in the Minister the ultimate decision to surrender to a foreign state a person who has been committed by a magistrate. Under section 11(b) the Minister is given a discretion to refuse to surrender a person on the following grounds:

(a) where criminal proceedings are pending against such person in the Republic, until such proceedings have been concluded or where the proceedings result in a sentence of imprisonment, until such sentence has been served;

(b) where such person is serving, or is about to serve, a sentence of a term of imprisonment, until such sentence has been completed;

(c) if the Minister "is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned"; or

(d) "if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion."

[18] A person committed by a magistrate under section 10 may within fifteen days appeal to the High Court against such order.[17] On appeal, the court may make such order as it may deem fit.[18]

[19] I now turn to consider the issues raised by the appellant in this appeal.

The Consent of the President

[20] The submission made on behalf of the appellant is that section 3(2), whilst requiring the consent of the President for extradition to a state with which there is no extradition agreement, does not in terms or by necessary implication empower the President to grant such consent.[19] In support of the submission that the power could not be implied counsel relied on the judgment in *Rennie NO v Gordon and Another NNO*.[20] In my opinion, this decision is authority against the appellant's case. In the course of his judgment, Corbett JA said:

> "Over the years our Courts have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands".[21]

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[17] Section 13(1) of the Act.

[18] Section 13(2) of the Act.

[19] This argument does not appear to have been made in the High Court.

[20] 1988 (1) SA 1 (A).

[21] Id at 22 E – F.

Counsel for the appellant conceded that the power is not to be found elsewhere and that without it, effect cannot be given to the provisions of section 3(2) of the Act. If the President does not have the power to consent under section 3(2), South Africa would be unable to accede to an extradition request from a country with which there is no extradition agreement and which has not been designated by the President. This, too, was conceded by counsel.

[21] Since the promulgation of the Act, it has never been doubted by our courts that section 3(2) empowers the President to consent to surrender a person in response to a request under that section. Indeed it has been so assumed by the Supreme Court of Appeal[22] and in *Harksen* by this Court.[23]

[22] In support of his submission that section 3(2) does not empower the President to grant his consent to the surrender, counsel for the appellant also relied on a decision of the Federal Court of Australia in *Oates v Attorney-General* [24] That case concerned a request for extradition under a power it was held vests in the Crown itself. The Australian court was therefore dealing with the interpretation of a statutory provision the context of which is entirely different to that with which we are concerned in this case. The *Oates* decision thus cannot provide support for the appellant's submission.

[22] *S v McCarthy* 1995 (3) SA 731 (A) at 738 J – 739 A.

[23] Above n 7, para 15.

[24] An unreported judgment delivered on 2 April 2002.

[23] It follows that there is no substance in this argument and it falls to be dismissed.

The Constitutional Validity of the President's Consent

[24] The appellant's attack on the validity of the consent of the President under section 3(2) of the Act is founded upon the fact that incorrect information as to the appellant's citizenship was supplied in the request for extradition. It was also submitted that when the surrender of a South African citizen is sought, the President is obliged to have regard to the provisions of section 21(3) of the Constitution which provides that:

> "Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic."

The incorrect information as to the appellant's citizenship, so it was argued, was fatal to the validity of the consent.

[25] The High Court held[25] that the President's consent under section 3(2) of the Act sets in motion the extradition procedures under the Act and therefore constitutes an administrative act. However, it correctly pointed out that if that conclusion was incorrect it would not mean that there were no constraints upon the President in granting his consent. It would still be subject to the principle of legality and the

[25] Above n 8, at 217 J – 218 A.

provisions of the Constitution.[26] The High Court went on to hold[27] that in any event the President had exercised his power under section 3(2) lawfully having paid due regard to the jurisdictional facts referred to in that section and that the constitutional rights of the appellant had not been infringed.

[26] In the course of his argument in this Court, counsel for the appellant did not persist in his support for the finding of the High Court that the grant or refusal of consent by the President under section 3(2) of the Act was an administrative decision.[28] It is a policy decision which may be based on considerations of comity or reciprocity between the Republic and the requesting state.[29] The decision is based not on the merits of the application for extradition but on the relationship between this country and the requesting state. That the President is enjoined by the provisions of section 3(2) to have regard to the fact that the person has been convicted by or is accused of criminal conduct in the requesting state and that the offence is an extraditable offence does not alter the essential nature of the decision. According to Bassiouni, a leading authority on extradition law:[30]

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[26] Id at 218 B - D with reference to the decisions of this Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 148 and *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at para 19.

[27] Id at 218 E - 219 A.

[28] Whether this is an act by the President as head of state under section 84 of the Constitution, or as head of the executive under section 85 of the Constitution, is an issue we are not called upon to determine in this case.

[29] *Harksen v President of the Republic of South Africa*, n 7 at para 3.

[30] *International Extradition: United States Law and Practice* 4 ed (Oceana Publications, New York 2002) at 66.

> ". . . extradition is deemed a sovereign act, its legal proceedings are deemed *sui generis*, and its purpose is not to adjudicate guilt or innocence but to determine whether a person should properly stand trial where accused or be returned to serve a sentence properly imposed by another state."

[27] The President in deciding whether to consent to the surrender of a person under section 3(2) must be free to take into account any matter considered relevant to what is a policy decision relating to foreign affairs. It is not for the courts to determine what matters are appropriate or relevant for that purpose. The courts could intervene only if the President were to abuse the power vested in him or use it in a manner contrary to the provisions of the Constitution.[31]

[28] In the present case, the President stated in the affidavit he filed in the High Court that in deciding whether to grant his consent under section 3(2) of the Act the citizenship of the appellant would not have been a relevant consideration. I can find no constitutional ground for attacking that policy decision. Unlike the FRG and many other civil law jurisdictions, South Africa does not ordinarily prosecute its citizens for crimes committed beyond its borders. Criminal conduct would go unpunished if South African citizens were not extradited to face prosecution in the country where the crime was committed. The President is therefore entitled to adopt a policy that it is in the interests of the Republic to consent to a request for extradition proceedings against a person, regardless of his or her citizenship.

[31] See *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 29.

[29] The provisions of section 21(3) of the Constitution are not relevant to the President's consent under section 3(2). It is not a decision to extradite the person whose surrender is requested. Its effect is no more than to trigger the provisions of the Act applicable to the request and the procedures contained in the Act will then have to be complied with. The provisions of section 21(3) of the Constitution might well be relevant to the exercise of the discretion conferred on the Minister by section 11 of the Act. This is not a matter presently before this Court.

[30] It follows that, albeit for different reasons, the attack on the validity of the President's consent under section 3(2) of the Act was correctly dismissed by the High Court. The attack on the Minister having countersigned the consent of the President was founded solely upon the alleged invalidity of the President's consent. It follows that it was also correctly dismissed by the High Court.[32]

The Constitutionality of Section 10(2) of the Act

[31] As already mentioned,[33] in terms of section 10(2) of the Act,[34] the magistrate who holds the enquiry is obliged to accept as conclusive proof that there is sufficient evidence to warrant a prosecution in the requesting state, a certificate to that effect by an appropriate authority in the foreign state. The appellant submits that this provision infringes his constitutional rights to a fair public hearing (section 34),[35] a fair trial

[32] Above n 8, at 219 B - C.

[33] Above para 7.

[34] Above n 6.

[35] Below para 43 - 46.

(section 35(3)), and not to be deprived of his freedom arbitrarily or without just cause (section 12(1)(a)). He also argues that the provision is in conflict with the separation of powers mandated by the Constitution and more particularly that it is inconsistent with the independence of the judiciary guaranteed by section 165 of the Constitution.

[32] The appellant's attack on the provisions of Section 10(2) was not considered by the High Court on the ground that it was premature. The inquiry before the magistrate had not yet begun and, so it was held, it was not inevitable that the magistrate would be requested to rely on a certificate of the kind referred to in the section.[36]

[33] In finding that the attack on the constitutionality of section 10(2) was not ripe for determination, the High Court erred. The Director of Public Prosecutions had not only informed the appellant that such a certificate would be relied upon in the extradition enquiry but had furnished the appellant with a copy of the certificate. The rights claimed by the appellant under the Bill of Rights were thus clearly threatened. Such threat was sufficient to entitle the appellant to approach the High Court for relief under section 38 of the Constitution. It is there expressly provided that anyone acting in their own interest may approach a competent court "alleging that a right in the Bill of Rights has been . . . threatened."[37]

[36] Above n 8, at 220 C – 221 D.

[37] See *Ferreira v Levin NO and Others;Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 168.

[34] In respect of the reliance by the appellant on the separation of powers, the threat to use the certificate was also sufficient to oblige the High Court to consider that issue. In the light of the attitude of the Director of Public Prosecutions, the dispute was not academic. In addition, there are conflicting views in the High Court as to the constitutionality of section 10(2).[38] In *Ferreira v Levin NO and Others*[39] Chaskalson P said:

> "The applicants have a real and not a hypothetical interest in the decision. The decision will not be academic; on the contrary it is a decision which will have an effect on all s 417 enquiries and there is a pressing public interest that the decision be given as soon as possible. All the requirements ordinarily set by a Court for the exercise of its jurisdiction to issue a declaration of rights are therefore present. The question is whether different considerations apply in constitutional cases."

Chaskalson P went on to hold[40] (for the majority of the Court) that those considerations did apply in constitutional cases. Although that decision related to a provision of the Bill of Rights contained in the Interim Constitution, the same considerations apply to any case in which it is alleged that a constitutional right has been infringed or threatened.

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[38] In *Bell v S* 1997 (2) All SA 692 (E) at 698 G, the provisions were held to be constitutional and in *S v Von Schlicht* 2000 (1) SACR 558 (C) at 563 H – 564 C a similar view was expressed, albeit obiter. In *McCarthy v The Additional Magistrate, Johannesburg and Others* (Case No 96/21842) (unreported judgment of Heher J in the Johannesburg High Court delivered on 14 May 1998), the view was expressed, also obiter, that the provisions of section 10(2) were in conflict with the functioning of the judiciary and on that ground unconstitutional (at page 41 of the typed judgment).

[39] Above n 37, para 164.

[40] Id para 168.

[35] It follows that this Court is now obliged to decide the constitutionality of section 10(2) of the Act. I turn to that question.

[36] The starting point of this inquiry is to consider the nature of the inquiry which the magistrate is obliged to hold under the Act.[41] As appears from paragraph 15 above, in terms of section 10(1) of the Act[42] the magistrate must consider the evidence adduced and, in order to issue a committal warrant, he or she must be satisfied that:

(a) the person brought before him or her is liable to be surrendered to the foreign state concerned and,

(b) in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign state.

[37] In a case such as the present, in considering whether the person brought before him or her is liable to be surrendered, the magistrate must be satisfied that:

(a) the person who has been brought before him or her is the person sought by the requesting state;

(b) the President has consented to the surrender of that person under section 3(2);

[41] In this case the FRG relies on both convictions and alleged offences for which they wished to have the appellant extradited. In respect of the convictions, the section 10(2) certificate is not relevant.

[42] Above n 16.

(c) the offence in respect of which the person is sought by the foreign state is an extraditable offence. An "extraditable offence" is defined in section 1 of the Act to mean:

> "any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State";

(d) there is sufficient evidence to warrant a prosecution of the offence in the foreign state;

(e) if a section 10(2) certificate is relied on, that it was issued by an appropriate authority in charge of the prosecution in the foreign state concerned.

[38] As mentioned earlier,[43] the enquiry must be held in open court in the manner in which a preparatory examination is held. In particular, the person concerned is entitled to testify and adduce evidence. The identity of the person before the magistrate – as being the person named in the request – has to be established and can be challenged or contradicted by documentary or oral evidence. Likewise, consent of the President has to be proved and can be challenged or refuted. In the ordinary course however, proper proof of the document evidencing the consent would suffice.

[43] Above para 13.

[39] In the determination of whether the offence is an extraditable offence the magistrate would have to consider whether the evidence produced by the foreign state would constitute an offence under the law of the Republic. Sufficient detail of the offence alleged against the person concerned would thus have to be placed before the magistrate in order for that determination to be made. Under section 9(3) of the Act, the evidence may take the form of a deposition, statement on oath or affirmation, whether taken in the presence of the person concerned or not, and must be duly authenticated in the manner provided in section 9(3)(a)(iii) of the Act.[44] The magistrate would have to be satisfied that these requirements are satisfied.

[40] The magistrate would then have to consider whether the evidence which has thus been produced would constitute an offence under South African law. The name of the offence would not be determinative. The question for consideration is whether the conduct which the evidence discloses constitutes an offence in our law which would be punishable with a sentence of imprisonment for a period of six months or more. It must also be established that the offence is not one under military law and is not also an offence under the ordinary criminal law of the Republic.

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[44] Section 9(3)(a)(iii) of the Act provides for authentication by signature and seal of office –

> "*(aa)* of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office in a foreign State or a South African foreign service officer grade VII or an honorary South African consul-general, vice-consul or trade commissioner;
> *(bb)* of any government authority of such foreign State charged with the authentication of documents in terms of the law of that foreign State;
> *(cc)* of any notary public or other person in such foreign State who shall be shown by a certificate of any person referred to in item *(aa)* or *(bb)* or of any diplomatic or consular officer of such foreign State in the Republic to be duly authorized to authenticate such document in terms of the law of that foreign State; or
> *(dd)* of a commissioned officer of the South African National Defence Force in the case of a document executed by a person on active service".

[41] The question of fact dealt with by way of a section 10(2) certificate is whether the evidence adduced before the magistrate would also warrant the prosecution of the person concerned under the law of the foreign state. It is one of a number of factual issues which are required to be considered by the magistrate and is the only one that does not depend on evidence readily available in South Africa. Furthermore, it is a question which would not normally be within the knowledge or expertise of South African lawyers or judicial officers.

[42] In considering the constitutionality of section 10(2) it must be borne in mind that:

(a) the proceedings before the magistrate do not constitute a trial. In the event of the surrender of the person, his or her trial will be held in the foreign state. That, after all, is the purpose for which the extradition is sought;

(b) if the magistrate finds that the person is liable to be surrendered to the foreign state, the person has a right of appeal to the High Court;

(c) if there is no appeal or if the decision of the magistrate is confirmed on appeal, the record of the proceedings together with such report as the magistrate may deem necessary must be forwarded to the Minister;

(d) the Minister is then required to exercise a discretion under section 11 of the Act[45] and notwithstanding the finding of the magistrate, may refuse

[45] Above para 17.

the surrender on any one or more of the grounds specified in that section of the Act.[46]

(e) the person concerned is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the magistrate's decision under section 10, but could have a bearing on the exercise by the Minister of the discretion under section 11.

[43] With that background I turn to consider the constitutional attacks of the appellant. The first relates to the right of access to the courts. Section 34 of the Constitution provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

On behalf of the appellant it was submitted that the conclusive presumption under section 10(2) has the effect of obliging the magistrate to commit the person concerned without being able to determine the dispute (if one arises) as to whether the conduct alleged constitutes criminal conduct in the foreign country. It was submitted further that this conclusive presumption prevents the magistrate from determining a dispute on the requirement of the double criminality principle.

[46] The procedure which the Minister is obliged to follow under section 11 is not before us and we have heard no argument on it. It is both unnecessary and inappropriate in these proceedings to express any view with regard thereto.

[44] In dealing with this argument it is important to have regard to the nature of extradition proceedings and the limited function of the hearing before the magistrate. Extradition proceedings do not determine the innocence or guilt of the person concerned. They are aimed at determining whether or not there is reason to remove a person to a foreign state in order to be put on trial there. The hearing before the magistrate is but a step in those proceedings and is focused on determining whether the person concerned is or is not extraditable. Thereafter it is for the Minister to decide whether there is indeed to be extradition. What is fair in the hearing before the magistrate must be determined by these considerations.

[45] From the earlier analysis of what the magistrate is required to consider, it is clear that he has to be satisfied that the conduct alleged by the foreign state constitutes criminal conduct in this country. In order to make that determination the magistrate has to be furnished with sufficient detail of the alleged conduct. If the magistrate considers that the evidence does not disclose criminal conduct under South African law that would be an end of the matter and the person would have to be discharged. If the alleged conduct in the foreign state does constitute criminal conduct in this country, the magistrate is then required to rely on the certificate with regard to the narrow issue as to whether the conduct also warrants prosecution in the foreign country. It is not inappropriate or unfair for the legislature to relieve the magistrate of the invidious task of deciding this narrow issue unrelated to South African law. As already mentioned, it is a question in respect of which South African lawyers and judicial officers will usually have no knowledge or expertise.

[46] The certificate from the appropriate authority in the foreign state to the effect that the conduct in question warrants prosecution in that state is sufficient for the purpose of extradition. Its conclusiveness is binding on the magistrate only in relation to his consideration of the question whether the person concerned is extraditable. If the person concerned is extradited the foreign court will have to determine the issue covered by the certificate. Furthermore, in the exercise of his discretion under section 11 of the Act, the Minister might well be obliged to consider an attack made in good faith against the conclusion of the foreign authority contained in the certificate. In all of these circumstances the provisions of section 10(2) cannot be said to deprive the person concerned of a "fair public hearing". In my view this ground of attack is without merit.

[47] The appellant also relies on the fair trial provisions enshrined in section 35(3) of the Constitution. What must be stressed here is that the fact that the enquiry envisaged in section 9(2) must proceed in the manner in which a preparatory examination is held[47] does not transform the enquiry into a trial. The person facing extradition is not an accused person for the purposes of the protection afforded by section 35(3) of the Constitution. As pointed out earlier, the enquiry does not result in a conviction or sentence. This does not mean, however, that the person concerned is not entitled to procedural fairness at all stages of the extradition proceedings.[48] It

[47] Above para 13.

[48] See *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 11.

follows that the provisions of section 35(3) of the Constitution are not relevant to it. The reliance on it by the appellant is therefore misplaced.

[48] Then the appellant claims that by reason of the provisions of section 10(2) of the Act he stands to be deprived of his freedom arbitrarily or without just cause in violation of the provisions of section 12(1) of the Constitution. Section 12 entrenches the fundamental right to freedom and, as this Court has held before, contains both a substantive and procedural aspect.[49] In response to this argument, it should be noted that the deprivation of freedom occasioned by an extradition occurs not when a magistrate concludes an enquiry, but when the Minister decides in terms of section 11 that the extradition should take place. Be that as it may, it is clear from the preceding discussion that the procedure before the magistrate requires the magistrate to decide that the offence in question is indeed an "extraditable offence" and that the person concerned is "liable for extradition". The role of the section 10(2) certificate in reaching such conclusions is a narrow one, related only to the question of whether the

[49] See *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 23 - 4 where Ackermann J reasoned as follows:

> "The substantive and the procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so. In the first place it may not occur 'arbitrarily'; there must, in other words, be a rational connection between the deprivation and some objectively determinable purpose. If such rational connection does not exist the substantive aspect of the protection of freedom has by that fact alone been denied. But even if such rational connection exists, it is by itself insufficient; the purpose, reason or 'cause' for the deprivation must be a 'just' one. What 'just cause' more precisely means will be dealt with below.
>
> Although para *(b)* of s 12(1) only refers to the right 'not to be detained without trial' and no specific reference is made to the other procedural components of such trial it is implicit that the trial must be a 'fair' trial, but not that such trial must necessarily comply with all the requirements of s 35(3). This was the Court's unanimous holding in respect of s 11(1) of the interim Constitution in *Nel's* case and is equally applicable to s 12(1)*(b)* in the context of the entrenchment of the 'right to freedom and security of the person' in s 12(1) of the 1996 Constitution, there being no material difference between the two provisions."

alleged conduct is sufficient to give rise to an offence in the foreign jurisdiction. As such its conclusive character does not detract from the fact that the magistrate's enquiry and conclusion is sufficient, in the context of the purpose of the enquiry which is to facilitate extradition, to meet the constitutional requirement of just cause. Moreover, as found above, the procedure before the magistrate is fair. For these reasons, the appellant's argument that the 10(2) certificate occasions a breach of section 12(1) of the Constitution cannot be upheld.

[49] Finally, the appellant claims that the conclusive nature of the section 10(2) certificate constitutes an invasion of the independence of the judiciary and is thus inconsistent with the provisions of section 165 of the Constitution.[50] The submission is that the magistrate is required by section 10 of the Act to conduct a judicial enquiry which affects the freedom of the person concerned. The legislature or a foreign prosecutor should not be allowed to dictate the manner in which the magistrate must make this decision. Reliance was placed upon the statement of Heher J in *McCarthy v The Additional Magistrate, Johannesburg and Others*,[51] to the effect that:

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[50] Section 165 of the Constitution reads as follows:

> "(1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[51] Above n 38 at pages 40 - 1 of the typed judgment.

> "In my view a restrictive statutory prescription of the nature in question is in conflict with the doctrine of separation of powers and does constitute interference with the functioning of the judiciary because, by legislative injunction, it blindfolds a court in a matter which involves the liberty of persons who are brought before it. Every such person must be fully entitled to submit to a court that the say-so of a witness or deponent should not be relied upon because the witness is fallible or dishonest or mistaken or merely wrong; conversely a court must have the power to act upon such a submission. If one were to give constitutional recognition to section 10(2), one must needs accept as a principle that the legislature can instruct the courts as to whose evidence they may rely upon and whose they must reject. By such recognition a court yields its power to make true and meaningful decisions before the supremacy of parliament and justice is watered down. Were it pertinent to have done so, I would therefore have upheld the applicant on this point."

[50] In my opinion, both Heher J and counsel for the appellant failed to distinguish between ordinary domestic proceedings and extradition proceedings. They also conflated a legislative provision of the kind now under consideration with regard to foreign law with one relating to domestic law. As already mentioned, the certificate is conclusive solely with regard to a question of foreign law. The inquiry by the magistrate does not constitute a trial in which guilt or innocence has to be determined. As pointed out by Bassiouni,[52] extradition proceedings are sui generis and the Act in essence regulates the exercise of a sovereign state power. Viewed in this context, the provisions of section 10(2) do not interfere in any way with the independence of the judiciary by rendering conclusive the opinion on foreign law by an appropriate foreign official from the country seeking the extradition. In my opinion, the provisions of section 10(2) in no way interfere with or detract from the independence of the judiciary or violate the separation of powers.

[52] Above para 26.

[51] It follows that the attacks on the constitutionality of section 10(2) of the Act must be dismissed. The appeal falls to be dismissed.

[52] With regard to costs, it is relevant that the appellant raised issues which cannot be said to be frivolous or in bad faith. The High Court incorrectly held the constitutionality of section 10(2) was not ripe for determination. That issue and the controversy surrounding it have been laid to rest. That is clearly in the public interest. In these circumstances a costs order should not be made against the appellant.

The Order

1 The appeal is dismissed.

2 There is no order as to costs.

Chaskalson CJ, Langa DCJ, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Goldstone J.

For the appellant:	A. Katz and J. De Waal instructed by C&A Friedlander Inc, Cape Town.
For the respondents:	M.A. Albertus SC and A. Schippers instructed by the State Attorney, Cape Town.