In re Augusto Pinochet Ugarte

Introductory Note

The present volume contains a number of decisions relating to criminal proceedings against General Augusto Pinochet Ugarte, a former Head of State of Chile. While each decision is reported separately, together with the usual summary, the number of the decisions and the relationship between them necessitate a general introductory note. This note accordingly summarizes the factual background to the cases and the course of the proceedings.

General Pinochet was the Commander-in-Chief of the Chilean Army in September 1973. On 11 September 1973 he and other senior officers in the Chilean armed forces staged a coup in the course of which the President of Chile, Salvador Allende, died. Immediately after the coup, a military junta headed by General Pinochet assumed power in Chile. During the course of 1974, General Pinochet declared himself Head of State of Chile and was installed as President. He retired as President in 1990 but was appointed a Senator for life. It was alleged that during the period of military rule from 1973 to 1990 numerous opponents of the military Government were detained without trial, tortured and, in some cases, killed in Chile and that the Government was responsible for a number of assassinations and attempted assassinations outside Chile.

General Pinochet was arrested in London on 16 October 1998 pursuant to a provisional warrant of arrest issued by a Metropolitan Stipendiary Magistrate. A second warrant for arrest was issued a few days later (see p. 37). Both warrants were issued under Section 8(1)(b) of the Extradition Act 1989[1] in connection with a request for extradition from the Kingdom of Spain. A Spanish Magistrate, Judge Balthazar Garzon, had been investigating charges of murder, torture, hostage-taking and other crimes allegedly committed by General Pinochet following the military coup in Chile on 11 September 1973 and during the period when General Pinochet was Head of State of Chile. On the basis of these investigations, the Central Court of Criminal Proceedings No. 5, Madrid, requested the provisional arrest of General Pinochet. The formal request for extradition from the Kingdom of Spain was received by the United Kingdom Government in November 1998. The United Kingdom also received requests for extradition from Belgium, France and Switzerland. Only the Spanish request was proceeded with in the United Kingdom.

The particulars of offences in respect of which extradition was sought by Spain altered during the course of the proceedings (see pp. 53

[1] The relevant provisions of the Extradition Act are set out at pp. 6-20 below.

and 177-81). The first provisional warrant issued in London concerned charges of the murder of Spanish citizens in Chile. After the initial hearing before the Divisional Court (p. 27 below), however, this charge was not proceeded with. The principal charges referred to in the second provisional warrant and in the extradition request were torture, conspiracy to torture, hostage-taking, conspiracy to take hostages, murder and conspiracy to murder. With the exception of the allegations of murder and an allegation of conspiracy to murder opponents of the regime who had left Chile, all of the charges related to events which were said to have occurred in Chile. Initially, all of the charges related to events occurring between the date of the coup and the retirement of General Pinochet as Head of State. Before the third hearing in the House of Lords, however, charges of torture and conspiracy to torture relating to the period before the coup were added.

The basis for extradition between Spain and the United Kingdom was the European Convention on Extradition, 1957, which was given effect in United Kingdom law by the Extradition Act 1989 and the European Convention on Extradition Order 1990. Under these provisions, Spain was not required to establish that there was a prima facie case that General Pinochet had committed the crimes in respect of which extradition was requested. The requesting State, however, had to satisfy the requirement of dual criminality. It was, therefore, necessary that the crimes charged be "extradition crimes" within the meaning of Section 2 of the 1989 Act (see pp. 7-8 below). Where a requesting State sought extradition in respect of conduct which had allegedly taken place outside its territory, Section 2(1)(b) required that either "in corresponding circumstances equivalent conduct would constitute an extraterritorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment" (Section 2(2)) or the requesting State had to base its jurisdiction on the nationality of the offender and satisfy certain other conditions (Section 2(3)). Since General Pinochet was not a Spanish national, only Section 2(2), taken together with Section 2(1)(b), could apply.

Chile, Spain and the United Kingdom were all parties to the Convention against Torture, 1984[2] and the International Convention against the Taking of Hostages, 1979. The Torture Convention had been given effect in the United Kingdom by Section 134 of the Criminal Justice Act 1988, which provided that:

> (1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

[2] The relevant provisions of the Convention against Torture are set out at pp. 22-7 below.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if —

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence (i) of a public official; or (ii) of a person acting in an official capacity; and

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

Section 134 entered into force on 29 September 1988. Chile, Spain and the United Kingdom all ratified the Torture Convention in 1988.

Immediately following his arrest, General Pinochet applied to the Divisional Court for an order of habeas corpus, seeking to quash the warrants on the ground that under the State Immunity Act 1978, Section 20(1) (see p. 22 below), as a former Head of State of Chile he was entitled to State immunity as the charges against him concerned acts which he was alleged to have performed in the exercise of his functions as Head of State. Section 20(1) gave a Head of State the same immunities as those accorded by the Diplomatic Privileges Act 1964 to the head of a diplomatic mission. The 1964 Act incorporated into United Kingdom law certain provisions of the Vienna Convention on Diplomatic Relations, 1961, including Article 39(2) (see p. 42 below), which provided that while the immunities of a diplomatic agent normally ceased when he left the country to which he was accredited, "with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist". General Pinochet also argued that the warrants of arrest contravened the provisions of the Extradition Act.

The Divisional Court (Lord Bingham of Cornhill CJ, Collins and Richards JJ) gave its judgment in Re *Augusto Pinochet Ugarte* (p. 27 below) on 28 October 1998. The Court held that the first warrant was defective in terms of the Extradition Act and that General Pinochet was entitled to immunity in respect of the charges covered by the second warrant. The Crown Prosecution Service, which represented the Government of Spain in the proceedings, appealed to the House of Lords in respect of the decision on the second warrant, contending that General Pinochet was not entitled to immunity in respect of the offences charged.

The House of Lords (Lords Slynn of Hadley, Lloyd of Berwick, Nicholls of Birkenhead, Steyn and Hoffmann) heard the appeal on an expedited basis, the hearings commencing on 4 November 1998. Amnesty International was given leave to intervene in the appeal. By three votes to two (Lords Slynn and Lloyd dissenting), the House of Lords allowed the appeal: *Regina* v. *Bow Street Metropolitan Stipendiary*

Magistrate, ex parte *Pinochet Ugarte (No 1)* on 25 November 1998 (p. 50 below). The majority decided that Section 20 of the State Immunity Act 1978 accorded immunity to a former Head of State only in respect of acts performed in the exercise of his functions as Head of State and that torture and hostage-taking could not be regarded as falling within the functions of a Head of State. The majority also rejected General Pinochet's argument that the doctrines of act of State and non-justiciability precluded the English courts from inquiring into allegations that he had committed such crimes while he was Head of State.

Following this decision, the Secretary of State gave authority to proceed with the request for extradition from the Kingdom of Spain in respect of the charges of torture, conspiracy to torture, hostage-taking, conspiracy to take hostages, attempted murder and conspiracy to murder (p. 108 below). The Secretary of State also announced that he had given precedence to the Spanish request for extradition over requests received at a later date from France and Switzerland.

General Pinochet, however, petitioned the House of Lords to set aside the decision of 25 November 1998 on the ground that one of the members of the majority, Lord Hoffmann, was an unpaid director and Chairman of Amnesty International Charity Limited, a company controlled by Amnesty International. On 17 December 1998, the House of Lords (Lords Browne-Wilkinson, Goff of Chieveley, Nolan, Hope of Craighead and Hutton) unanimously decided to set aside the earlier decision and to order a rehearing of the appeal in the main proceedings before a differently constituted House of Lords. The reasons for this decision were given on 15 January 1999: *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No 2)* (see p. 112 below).

At the rehearing before the House of Lords (Lords Browne-Wilkinson, Goff of Chieveley, Hope of Craighead, Hutton, Saville of Newdigate, Millett and Phillips of Worth Matravers), which began on 18 January 1999, the Republic of Chile was given leave to intervene in order to assert immunity on behalf of General Pinochet. Amnesty International was also given leave to intervene.

Following the rehearing of the appeal, the House of Lords gave judgment, on 24 March 1999: *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No 3)* (see p. 135 below). The House of Lords held that:

(1) the rule of double criminality embodied in Section 2 of the Extradition Act 1989 required that the offences in respect of which extradition was sought had to have been crimes in the United Kingdom at the time when they were allegedly committed;

(2) (Lord Millett dissenting) since torture committed outside the United Kingdom had become triable in the United Kingdom only when Section 134 of the Criminal Justice Act 1988 entered into force, the

charges of torture and conspiracy to torture based on events which had occurred before that date did not satisfy the rule of dual criminality;

(3) (Lord Goff dissenting) immunity for a former Head of State from charges of torture was incompatible with the provisions of the Convention against Torture. Accordingly, General Pinochet was not entitled to immunity in respect of charges of torture relating to events after 8 December 1988, the date by which Chile, Spain and the United Kingdom had all ratified the Convention. The appeal from the decision of the Divisional Court was accordingly allowed in respect of those charges of torture and conspiracy to torture only;

(4) the appeal was dismissed in respect of the charges of hostage-taking, conspiracy to take hostages, murder and conspiracy to murder.

Following this decision, the Secretary of State gave a second authority to proceed in respect of charges of torture and conspiracy to torture after 8 December 1988 (p. 247 below). On 8 October 1999 a Metropolitan Stipendiary Magistrate at Bow Street Magistrates' Court decided to commit General Pinochet on those charges, *Kingdom of Spain* v. *Augusto Pinochet Ugarte* (p. 253 below). General Pinochet applied for habeas corpus to challenge the decision of the Magistrate but this application was not proceeded with, because it was overtaken by subsequent developments.

On 14 October 1999 the Republic of Chile made representations to the Secretary of State regarding General Pinochet's health. Following these representations, General Pinochet underwent a medical examination. On 11 January 2000 the Secretary of State concluded, in the light of the report of that examination, that General Pinochet was unfit to stand trial and decided to release him on health grounds. This decision was challenged in the High Court by the Kingdom of Belgium, Amnesty International and five other non-governmental organizations, which sought the right to inspect the medical report. Mr Justice Maurice Kay rejected their application (p. 263 below). They renewed their application before the Divisional Court, which granted the application of Belgium and ordered (p. 286 below) that the medical report be made available to the four States which had requested extradition (Spain, Belgium, France and Switzerland).

The medical report was then sent to the four States which made representations to the Secretary of State. On 2 March 2000 the Secretary of State confirmed his earlier decision and ordered the release of General Pinochet. General Pinochet left the United Kingdom for Chile the following day. At the time of going to press, proceedings against General Pinochet were under consideration in the Chilean courts.

In addition to the proceedings in the English courts, there were decisions concerning General Pinochet in the courts of Belgium, Spain and Luxembourg.

The present volume contains the following decisions and texts:

UNITED KINGDOM EXTRADITION ACT 1989

(Extract: ss. 1-14)[1]

PART I

INTRODUCTORY

General

1.—(1) Where extradition procedures under Part III of this Act are available as between the United Kingdom and a foreign state, a person in the United Kingdom who—

(a) is accused in that state of the commission of an extradition crime; or
(b) is alleged to be unlawfully at large after conviction of an extradition crime by a court in that state,

may be arrested and returned to that state in accordance with those procedures.

(2) Subject to the provisions of this Act, a person in the United Kingdom who is accused of an extradition crime—

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(a) in a Commonwealth country designated for the purposes of this subsection under section 5(1) below; or
(b) in a colony,

or who is alleged to be unlawfully at large after conviction of such an offence in any such country or in a colony, may be arrested and returned to that country or colony in accordance with extradition procedures under Part III of this Act.

(3) Where an Order in Council under section 2 of the [1870 c. 52.] Extradition Act 1870 is in force in relation to a foreign state, Schedule 1 to this Act (the provisions of which derive from that Act and certain associated enactments) shall have effect in relation to that state, but subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the Order.

Extradition crimes

2.—(1) In this Act, except in Schedule 1, "extradition crime" means—

(a) conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law;
(b) an extra-territorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies—
  (i) the condition specified in subsection (2) below; or
  (ii) all the conditions specified in subsection (3) below.

(2) The condition mentioned in subsection (1)(b)(i) above is that in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.

(3) The conditions mentioned in subsection (1)(b)(ii) above are—

(a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender;
(b) that the conduct constituting the offence occurred outside the United Kingdom; and
(c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.

(4) For the purposes of subsections (1) to (3) above—

(a) the law of a foreign state, designated Commonwealth country or colony includes the law of any part of it and the law of the United Kingdom includes the law of any part of the United Kingdom;
(b) conduct in a colony or dependency of a foreign state or of a designated Commonwealth country, or a vessel, aircraft or hovercraft of a foreign state or of such a country, shall be treated as if it were conduct in the territory of that state or country; and
(c) conduct in a vessel, aircraft or hovercraft of a colony of the United Kingdom shall be treated as if it were conduct in that colony.

Return to foreign states

3.—(1) In this Act "extradition arrangements" means arrangements made with a foreign state under which extradition procedures under Part III of this Act will be available as between the United Kingdom and that state.

(2) For this purpose "foreign state" means any state other than—

(i) the United Kingdom;
(ii) a country mentioned in Schedule 3 to the [1981 c. 61.] British Nationality Act 1981 (countries whose citizens are Commonwealth citizens);
(iii) a colony; or
(iv) the Republic of Ireland,

but a state which is a party to the European Convention on Extradition done at Paris on 13th December 1957 may be treated as a foreign state.

(3) Extradition arrangements may be—

(a) arrangements of a general nature made with one or more states and relating to the operation of extradition procedures under Part III of this Act (in this Act referred to as "general extradition arrangements"); or
(b) arrangements relating to the operation of those procedures in particular cases (in this Act referred to as "special extradition arrangements") made with a state with which there are no general extradition arrangements.

4.—(1) Where general extradition arrangements have been made, Her Majesty may, by Order in Council reciting or embodying their terms, direct that this Act, so far as it relates to extradition procedures under Part III of this Act, shall apply as between the United Kingdom and the foreign state, or any foreign state, with which they have been made, subject to the limitations, restrictions, exceptions and qualifications, if any, contained in the Order.

(2) An Order in Council under this section shall not be made unless the general extradition arrangements to which it relates—

(a) provide for their determination after the expiration of a notice given by a party to them and not exceeding one year or for their denunciation by means of such a notice; and
(b) are in conformity with the provisions of this Act, and in particular with the restrictions on return contained in Part II of this Act.

(3) An Order in Council under this section shall be conclusive evidence that the arrangements therein referred to comply with this Act and that this Act, so far as it relates to extradition procedures under Part III of this Act, applies in the case of the foreign state, or any foreign state, mentioned in the Order.

(4) An Order in Council under this section shall be laid before Parliament after being made.

(5) An Order in Council under this section which does not provide that a person may only be returned to the foreign state requesting his return if the court of committal is satisfied that the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the court shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Return to Commonwealth countries and colonies

5.—(1) Her Majesty may by Order in Council designate for the purposes of section 1(2) above any country for the time being mentioned in Schedule 3 to the [1981 c. 61.] British Nationality Act 1981 (countries whose citizens are Commonwealth citizens); and any country so designated is in this Act referred to as a "designated Commonwealth country".

(2) This Act has effect in relation to all colonies.

(3) Her Majesty may by Order in Council direct that this Act shall have effect in relation to the return of persons to, or in relation to persons returned from, any designated Commonwealth country or any colony subject to such exceptions, adaptations or modifications as may be specified in the Order.

(4) Any Order under this section may contain such transitional or other incidental and supplementary provisions as may appear to Her Majesty to be necessary or expedient.

(5) For the purposes of any Order in Council under subsection (1) above, any territory for the external relations of which a Commonwealth country is responsible may be treated as part of that country or, if the Government of that country so requests, as a separate country.

(6) Any Order in Council under this section, other than an Order to which subsection (7) below applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(7) No recommendation shall be made to Her Majesty in Council to make an Order containing any such direction as is authorised by subsection (3) above unless a draft of the Order has been laid before Parliament and approved by resolution of each House of Parliament.

PART II

RESTRICTIONS ON RETURN

6.—(1) A person shall not be returned under Part III of this Act, or committed or kept in custody for the purposes of return, if it appears to an appropriate authority—

(a) that the offence of which that person is accused or was convicted is an offence of a political character;
(b) that it is an offence under military law which is not also an offence under the general criminal law;
(c) that the request for his return (though purporting to be made on account of an extradition crime) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
(d) that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

(2) A person who is alleged to be unlawfully at large after conviction of an extradition crime shall not be returned to a foreign state, or committed or kept in custody for the purposes of return to a foreign state, if it appears to an appropriate authority—

(a) that the conviction was obtained in his absence; and
(b) that it would not be in the interests of justice to return him on the ground of that conviction.

(3) A person accused of an offence shall not be returned, or committed or kept in custody for the purposes of return, if it appears to an appropriate authority that if charged with that offence in the United Kingdom he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.

(4) A person shall not be returned, or committed or kept in custody for the purposes of such return, unless provision is made by the relevant law, or by an arrangement made with the relevant foreign state,