

JURISDICTION - DISGUISED EXTRACTION OR EXPULSION - CRIMES AGAINST HUMANITY.

Re Klaus Barbie. Cass. Crim., 6 October 1983. (1984) 88 R.G.D.I.P. 506.

The affair of Klaus Barbie has already been the subject of comment in this review: [1984] Australian I.L. News 47, 48. The affair was the subject of an action brought by Barbie to the Court of Cassation to quash a decree by the court of first instance which had refused to release Barbie on the grounds, inter alia, that he was the victim of a "disguised extradition" which was of no legal value, and because an arrest warrant directed against a person taking refuge overseas could not be executed on his voluntary return to France. The facts surrounding Barbie's return to France are detailed by Professor Charles Rousseau in (1984) 87 RGDIP 640. Briefly Barbie had been the Gestapo Chief in Lyon and believed to be the torturer and murderer of Jean Moulin. Barbie had taken refuge in Bolivia in 1951 and had acquired Bolivian nationality in 1957 under the name of Klaus Altmann. A request for extradition was refused by the Supreme Court of La Paz on 11 December 1974. He was arrested on 25 January 1983 by the Bolivian police for fraud based on the non-payment of a debt of \$10,000. The French Government again made a request for extradition based on the findings of a French court that he was guilty of war crimes. Proceedings were commenced in France for crimes against humanity including mass murders, arbitrary arrests, torture, deportation etc. When Barbie paid the debt of \$10,000, he was "expelled" on the 4th February. It was explained that the expulsion was based upon the fact that he had obtained Bolivian nationality with the aid of false papers and with a false name. He was taken to the airport and placed on a plane, the Bolivian Government refusing to give further details of the type of aeroplane and its itinerary. The aeroplane landed the following morning in French Guyana, France being the sole country ready to receive Barbie according to the Bolivian Minister of the Interior. He was then transferred to a French military flight where he was officially advised that an arrest warrant had been issued by the Lyon Instructing Judge. He was then taken to France and brought to Lyon to the Fortress of Montluc. This in fact had served as the Gestapo prison and housed captured members of the resistance, including Jean Moulin. Subsequently he was transferred to another prison.

As we noted in our earlier comment, Barbie was not the object of a "self help" operation by France. Barbie had been expelled by the Bolivian authorities. But this was a singular expulsion in that he was permitted no choice as to where he should go on leaving Bolivian soil. The suggestion that France was the only country willing to accept Barbie was contradicted by the fact that the Federal Republic of Germany had also requested his extradition.

The jurisdiction assumed by the French prosecuting authorities seemed to be supported by an earlier decision of the Court of Cassation: Re Argoud (1964) 45 ILR 90. French police, after a tip-off, arrested Argoud who had been kidnapped in West Germany and who was found bound and gagged in Paris. He had previously been sentenced to death in absentia by a French military court because of his role in an attempted coup against President de Gaulle. Germany did not make a claim for reparations and the French court held that the illegality could not be raised as a bar to jurisdiction by Argoud. The French authorities then could rely upon the principle male captus, bene detentus. However, in this case, the German authorities had indicated that they regarded the question of Barbie's arrest as one between France and Bolivia. It should also be noted that the new proceedings against Barbie for crimes against humanity were ones against which the Statute of Limitations do not apply. Under French law, the Statute does apply in relation to war crimes. The non-applicability of the Statute of Limitations resulted from a French law of the 26th December 1964; accordingly, it was argued that this law only had prospective and not retrospective effect.

The court ruled that the proceedings alleging the commission of crimes against humanity by Barbie, a German citizen, arose not only under internal French law, but also under "un ordre répressif international auquel la notion de frontiere et les règles extraditionnelles qui en découlent sont fondamentalement étrangères". Professor Rousseau describes this theory as an audacious innovation which goes against the principles of traditional international law. This rests on the coexistence of independent states exercising their respective jurisdictions in the interior of a space physically localised and juridically limited.

In finding jurisdiction under French law, the court indicated that jurisdiction resulted from Article 4 of the London Agreement of 8 August 1945 and Article 6 of the annexed Statute of the International Military Tribunal of Nuremburg as well as the Declaration of Moscow 30 October 1943. Reliance could also be had on the French law of 26 December 1964 which supports these provisions. Given the nature of these crimes, these provisions, in view of the Court, are in conformity with the principles of international law recognised by the community of nations.

REFUGEE - DEPORTATION - POLITICAL ASYLUM - Immigration and Naturalisation v. Stevic. No. 83-973. Supreme Court of the United States, 5 June 1984. Unreported.

This case involved a Yugoslav who contended that his anti-communist activities in the US would place him in danger if he were deported.

The Supreme Court unanimously reversed a decision of the Court of Appeals (678F.2d 401 (1982)) that as a result of the enactment of the Refugee Act, 1980, an alien no longer had the burden of showing "a clear probability of persecution" but instead could avoid deportation by showing a "well founded fear of persecution". The latter language is contained in the UN Protocol Relating to the Status of Refugees to which the US had adhered since 1968. According to Stevens J., the law was changed because of "... a desire to revise and regularise the procedure governing the admission of refugees into the United States. The primary substantive change Congress intended to make under the Refugee Act, and indeed in our view the only substantive change even relevant to this case, was to eliminate the piecemeal approach to the admission of refugees ...". "The amendment ... was expressly recognized to be a mere conforming amendment added 'for the sake of clarity', and was plainly not intended to change the standard."

Both parties had assumed that the standard for avoiding deportation and the standard applicable to requests for discretionary asylum. However the Court pointedly insisted that it had not been called upon to decide this question: "We do not decide the meaning of the phrase 'well founded fear of persecution' which is applicable by the terms of the Act and regulations to request for discretionary asylum."