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CASE DIGEST

This CASE DIGEST provides brief analyses of cases that represent current aspects of transnational law. The Digest includes cases that establish legal principles and cases that apply established legal principles to new factual situations. The cases are grouped in topical categories and references are given for further research.

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I. CRIMINAL LAW

GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE EXTENDS TO FOREIGN CRIMINAL INVESTIGATIONS WHERE UNITED STATES NARCOTICS AUTHORITIES REASONABLY RELIED ON FOREIGN LAW ENFORCEMENT OFFICERS' REPRESENTATIONS THAT SEARCH COMPLIED WITH THE FOREIGN COUNTRY'S LAW—*United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987).

The Drug Enforcement Agency (DEA) notified Philippine narcotics authorities of a plan to smuggle thirty-two tons of marijuana from Thailand through the Philippine Islands to the United States. In response to notification, the Philippine authorities commenced electronic surveillance of an apartment in Manila occupied by one of the defendants and provided the DEA with tapes of telephone conversations intercepted with a wiretap. The DEA sought and received assurances from high ranking Philippine law enforcement officials that all necessary authorization for the wiretaps was being obtained, but, in fact, no judicial authorization was sought or received. On the basis of information in one of the tapes, the DEA engaged the United States Coast Guard to intercept a ship, the *Pacific Star*, off the coast of Panama. After the DEA obtained Panamanian authorization, the Coast Guard ship *Citrus* intercepted the *Pacific Star*, boarded the ship and seized marijuana that the crew was attempting to destroy.

At trial, defendants were convicted for possession of a controlled substance in United States customs waters with intent to distribute and for conspiracy to destroy goods to prevent seizure, in violation of 18 U.S.C. § 2 (1982), 21 U.S.C. § 955a(c) (1982) and 18 U.S.C. §§ 371, 2232 (1982). The court of appeals affirmed the convictions, holding *inter alia* that the seized marijuana and other evidence was properly admitted over the defendants' fourth amendment objection to the Philippine wiretap. The court held that the fourth amendment applied to the search because the participation of the United States agents was so substantial that the action was a "joint venture," but that Philippine law governed whether the search was reasonable. Applying Philippine law the court found the wiretap was unlawful and thus was an unreasonable search under the fourth amendment. Applying United States law to decide whether the illegally obtained evidence should be excluded, the court admitted the illegally obtained evidence under the good faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897 (1984). The court noted that the good faith exception is based on the premise that the exclusionary rule does not function as a deterrent when law enforcement officers act on a reasonable belief that their conduct was legal. The court reasoned that the same premise applies to reasonable reliance on foreign law enforcement officers' representations that there has been compliance with their own law. In addition to *Leon*, which dealt with reliance on a facially valid search warrant, the court relied on *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), which held that the officers could rely on a magistrate's representations that all necessary changes to the form of the warrant would be made. The court concluded that permitting reasonable reliance on foreign law enforcement officers' representations about their compliance with foreign law is a rational accommodation to the exigencies of foreign investigations. *Significance*—This decision extends the exclusionary rule's good faith exception to foreign searches conducted as part of a joint criminal investigation between the United States and a foreign government. United States law enforcement officers may reasonably rely on foreign law enforcement officers' representations that the foreign search complied with the foreign country's law.

II. FOREIGN SOVEREIGN IMMUNITIES ACT

ASSETS OF A WHOLLY-OWNED FOREIGN INSTRUMENTALITY ARE NOT SUBJECT TO ATTACHMENT TO SATISFY JUDGMENT AGAINST A FOREIGN STATE UNLESS PLAINTIFF OVERCOMES PRESUMPTION OF INDEPENDENT STATUS—*Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559 (11th Cir. 1987).

Hercaire International, Inc., a Florida corporation, sued the Republic of Argentina for breach of contract arising out of ongoing business relations. Hercaire alleged Argentina failed to pay for aircraft parts it contracted for during the Falklands War. Argentina filed a counterclaim alleging that Hercaire breached a settlement agreement in a related matter. In this litigation, Argentina expressly waived sovereign immunity for itself and its agencies. The district court entered a directed verdict in favor of a portion of Hercaire's claims and subsequently ordered United States marshals to seize a Boeing 727 aircraft owned by Aerolineas Argentinas (Aerolineas) after it landed at Miami International Airport to satisfy judgment against Argentina. Aerolineas posted a cash bond equal to twice the judgment amount to regain possession of its aircraft and appealed. The district court issued an Order Denying Release of Substitute Security and found that Aerolineas implicitly waived sovereign immunity under the Foreign Sovereign Immunity Act. 28 U.S.C. §§ 1610(a)(1), 1610(b)(1) (1982). In addition, any presumption of Aerolineas' separate juridical existence was overcome by the fact that Argentina owned 100% of Aerolineas' stock.

Aerolineas appealed the trial court's ruling and claimed that the assets of a foreign state's wholly-owned national airlines are not subject to execution to satisfy judgment obtained against the foreign state where the airline was neither a party to the litigation nor connected with the underlying dispute. The Eleventh Circuit Court of Appeals upheld the directed verdict against Argentina, but vacated the Order Denying Release of Substitute Security issued against Aerolineas. The court of appeals held the assets of Aerolineas were not subject to execution to satisfy the judgment against Argentina because Aerolineas enjoyed a separate juridical existence as an instrumentality of Argentina and the express waiver of sovereign immunity by Argentina and its agencies did not operate as a waiver of Aerolineas' immunity. The court of appeals concluded that Aerolineas qualified as an instrumentality with a separate juridical existence and not as an agency based on the criteria set out by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). In *Bancec* the Supreme Court stated that a government instrumentality is typically established as a separate economic enterprise with powers to hold and sell property, to sue and be sued, to be primarily responsible for its own finances, and often not to be subject to the same budgetary and personnel requirements as a government agency. Accordingly, United States courts presume the assets and liabilities of an instrumentality are separate and distinct from those of its sovereign unless the presumption is overcome with proof that the sovereign controls the instrumentality to the extent that a principal and agent relation exists or proof that equity demands that recognition of the corporate entity would work a fraud or injustice. The court of appeals concluded that Hercaire failed to overcome the presumption that Aerolineas was not an instrumentality by proving either of the *Bancec* exceptions; therefore, the court vacated the Order Denying Release of Substitute Security of Aerolineas for the judgment against Argentina. *Significance*—This decision applies to a different fact situation standards announced by the Supreme Court in *Bancec* to distinguish a government agency from an independent government instrumentality that enjoys a separate juridical status.

III. Subject Matter Jurisdiction

United States District Court has Subject Matter Jurisdiction Over Mexican Consular Officials for Their Alleged Attempts to Suppress Critical Demonstrations Outside Mexican Consulate in United States Because Such Acts Fall Outside of Consular Function Immunity Granted by Vienna Convention on Consular Relations—*Gerristen v. De La Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987).

Jack Gerristen filed a complaint *pro se* against the President of Mexico, the Mexican Consulate, several consular officials, and employees of the Mexican government. In that complaint Gerristen alleged that consular officials and employees assaulted him while he attempted to distribute leaflets critical of the Mexican government in front of its Los Angeles consulate. Gerristen asserted subject matter jurisdiction existed under 28 U.S.C. § 1343 (1982), which confers jurisdiction over actions under color of state law that violate civil rights. The Mexican government filed a motion to dismiss on behalf of the defendants and asserted lack of subject matter jurisdiction. The district court granted this motion holding that the acts by the Mexican government, including the Mexican consulate, cannot constitute conduct under color of state law as required by 28 U.S.C. § 1343(a)(3).

On appeal the Ninth Circuit Court of Appeals reversed and remanded holding that subject matter jurisdiction exists over the alleged actions of the Mexican consul generals and the vice consuls under 28 U.S.C. § 1351 (1982) and the Mexican consulate under 28 U.S.C. § 1330 (1982). In sustaining jurisdiction the court of appeals examined the facts of the entire complaint notwithstanding its sole assertion that the statutory basis for subject matter jurisdiction existed under 28 U.S.C. § 1343. Moreover, the court of appeals assumed Gerristen's allegations were true for purposes of appeal. Viewing the complaint in this light, the court of appeals stated that 28 U.S.C. § 1351 grants the district court original jurisdiction over all civil actions and proceedings against consuls and vice consuls of foreign states unless a treaty has limited that jurisdiction. Upon examination of the applicable treaty in this case, the court concluded that it did not limit jurisdiction over the Mexican officials' alleged actions. *See* Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (the "Convention"). Article 43 of the Convention states that consular officials and employees shall not be amenable to the jurisdiction of the courts of the receiving state with respect to acts performed in the exercise of consular functions to actions "within the limits permitted by international law . . . [and] not prohibited by the laws and regulations of the receiving State." 21 U.S.T. at 82-85. The court of appeals interpreted the terms "within the limits permitted by international law" to prohibit interference with the internal affairs of the receiving state. The court of appeals characterized the alleged actions of the Mexican officials as "[w]rongful acts committed . . . within the United States to suppress criticism of Mexico within this country [which] constitute[d] an interference with the United States' internal affairs because these actions impair the citizenry's ability to promote self-government through robust discourse concerning issues of public import." Because the alleged actions fell outside the scope of international law, they also fell outside the scope of the article 5(a) consular functions grant of immunity.

The court of appeals stated that jurisdiction over the Mexican Consulate exists under 28 U.S.C. § 1330(a) and 28 U.S.C. § 1602-11 (1982), the Foreign Sovereign Immunities Act, because the alleged acts of the consulate fall within the tortious acts exception to the FSIA's general grant of sovereign immunity. While § 1605(a)(5) of the FSIA grants immunity to "discretionary acts," the acts attributed to the Mexican Consulate in the complaint "including assault with a deadly weapon and kidnapping, are not decisions to 'establish governmental policy,' or decisions at the 'planning level, but . . . are acts to 'carry out policy', or acts at the 'operational level' " which are amenable to federal subject matter jurisdiction. *Significance*—This decision clarifies the scope of the consular functions immunity granted by the Vienna Convention on Consular Immunity. Assuming the allegations of the original complaint were true, the actions of the Mexican officials fell outside the limits permitted by international law and thus were not consular functions as defined in article 5(a).

IV. TAXATION

VIRGIN ISLANDS TAXPAYERS MAY TAKE ONLY A DEDUCTION AND NOT A FOREIGN TAX CREDIT FOR TAXES PAID TO A STATE IN THE UNITED STATES—*Johnson v. Quinn*, 821 F.2d 212 (3rd Cir. 1987).

Rupert and Ada Johnson, United States citizens residing in the Virgin Islands, filed a joint income tax return in the Virgin Islands for their worldwide income for 1978. In that return the taxpayers claimed a foreign tax credit for income taxes paid to the State of California; however, the Virgin Islands Tax Commissioner allowed the taxpayers to treat the California state taxes as an itemized deduction only and not as a foreign tax credit. The taxpayers filed a petition for redetermination in the district court as to the foreign tax credit issue, but the district court agreed with the Commissioner's ruling based on the mirror tax system theory and on Treasury Regulations § 1.901-1(g)(5). *Johnson v. Quinn*, 589 F. Supp. 810 (D.V.I. 1984). Under the mirror tax system the Virgin Islands uses the United States income tax laws as its own by substituting "Virgin Islands" for "United States" within the law whenever appropriate. *See Vitco v. Government of Virgin Islands*, 560 F.2d 180 (3d Cir. 1977), *cert. denied*, 433 U.S. 980 (1978).

On appeal, the taxpayers argued that under the mirror tax system the foreign tax credit provided by IRC § 901, 26 U.S.C. § 901 (1982), applied equally to their California state taxes as it would to taxes paid to a foreign country by a United States stateside taxpayer. The taxpayers claimed both situations reach the goal of avoiding double taxation. The Third Circuit Court of Appeals, however, affirmed the lower court and held the taxpayers were not entitled to the foreign tax credit for taxes paid to California, but were limited to a deduction only. The court of appeals cited two grounds supporting its decision. First, the court of appeals applied the equality principle modification of the strict mirror rule, which states the Virgin Islands must collect the equivalent to what the United States would collect on the same income. *See Chicago Bridge and Iron Co. v. Whealty*, 430 F.2d 973 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Thus, the equality principle limits the Virgin Islands taxpayers to the same deduction available to a United States stateside taxpayer. Second, Treasury Regulation § 1.901-1(g)(5) expressly disallows any foreign tax credit to inhabitants of the Virgin Islands. *Significance*—The court of appeals applied to a new fact situation the equality principle originally adopted in *Chicago Bridge*.

V. IMMIGRATION

SUBSEQUENT TO ENACTMENT OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, THE FAIR LABOR STANDARDS ACT DOES NOT APPLY TO ILLEGAL ALIENS—*Patel v. Sumani Corp.*, 660 F. Supp. 1528 (N.D. Ala. 1987).

An illegal alien sued his former employer under § 216 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1978), seeking to recover alleged unpaid minimum wages, unpaid overtime compensation and an additional equal amount as liquidated damages. The employer denied the allegations and also asserted that the FLSA does not protect the rights of illegal aliens. The district court agreed with the employer, finding that the alien employee was not an "individual" as defined in the FLSA and therefore had no standing to assert a claim under the FLSA. The court assumed *arguendo* that the employee had standing, but found that illegal aliens had no right to recover under the FLSA, because their inclusion would conflict with the policy of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. The court noted that by passing the IRCA, Congress intended to discourage illegal immigration by imposing criminal and civil sanctions against employees who hired illegal aliens. Court enforcement of the FLSA wage standards for illegal aliens would once again encourage illegal immigration and thus frustrate the purpose of the IRCA. At the same time the IRCA provides eligibility for legalization as the exclusive protection mechanism for aliens who can demonstrate that they have lived in the United States prior to January 1, 1982. Thus, former aliens who qualify for legalization would enjoy FLSA protection as United States citizens, but those aliens who do not qualify for legalization under the IRCA of 1986 receive no FLSA protection. *Significance*—This decision establishes a minority view, following enactment of the IRCA of 1986, that illegal aliens no longer enjoy protection under the FLSA.