Australian court hears Julian Moti's challenge to "politically motivated" prosecution

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The Queensland Supreme Court yesterday commenced hearings on an application made by former Solomon Islands' attorney general Julian Moti for a permanent stay of proceedings in his prosecution by Australian authorities on statutory rape charges. Moti is seeking to have the charges thrown out of court on the grounds that the case is a politically driven abuse of judicial process.

The constitutional and international law expert was arrested in September 2006 in Papua New Guinea at the behest of Australian Federal Police agents in the Transnational Crime Unit. He was eventually extracted from Solomon Islands and arrested in Australia in December 2007. The purported basis for this series of provocative acts was sexual assault charges laid against Moti in 1998, which a Vanuatu magistrate discharged on the grounds of lack of evidence and dubious testimony provided by the alleged 13-year-old victim. No appeal on this decision was made by Vanuatu prosecutors; the case only publicly re-emerged in 2006 when Australian authorities demanded Moti's extradition from PNG and then the Solomons. The extradition was organised on the highly contentious basis of Australia's extraterritorial Child Sex Tourism Act, designed to allow the prosecution of paedophiles who evade prosecution in the countries where they commit their crimes.

The pursuit of Moti in 2006 and 2007, which was accompanied by a slanderous campaign waged by the media, formed a central part of Australian government's provocative regime change drive against the Solomons' government of Prime Minister Manasseh Sogavare. The Sogavare government had been identified as an opponent of the Australian-dominated Regional Assistance Mission to Solomon Islands (RAMSI)—the neo-colonial intervention force first deployed in July 2003. After coming to power in May 2006, Sogavare moved to limit RAMSI's control over the country's public finances, called on the occupation force to develop an "exit strategy", and announced an official investigation into the April 2006 Honiara riots, including RAMSI's role and responsibility for the violence. The proposed Commission of Inquiry was denounced by senior Australian government ministers.

It is now known that Australian authorities regarded Moti as a potential threat to RAMSI long before Sogavare became prime minister. In late 2004 the constitutional lawyer had been proposed as attorney general; Australian personnel in Honiara responded by exerting behind the scenes pressure on the government to sabotage the appointment. The campaign involved Australia's High Commissioner, Patrick Cole, demanding that the Australian Federal Police (AFP) investigate the dismissed 1998 Vanuatu child sex charges. Documents recently released voluntarily to Moti's legal team, including internal AFP memos and Cole's correspondence, definitively establish that the sole reason for the re-emergence of the charges was the High Commissioner's determination to prevent Moti becoming attorney general. (See: "Evidence backs Julian Moti's allegation of 'politically-motivated' charges")

Yesterday's proceedings in the Queensland Supreme Court began with Judge Glenn Martin setting aside subpoena applications served by Moti's counsel on the Department of Foreign Affairs and Trade (DFAT) and the AFP. The judgement follows similar rejections of earlier subpoena applications, and points to the sensitivity of the internal emails, memos, case files, and other documents held by the AFP, DFAT, the High Commission in Honiara, and Australian intelligence agencies in relation to their investigation into Moti.

Citing legal precedents, the judge insisted that it was not enough for Moti's counsel to have established that such documents were relevant to their charge that the criminal investigation was politically driven—they had to prove that it was possible that such material would materially benefit their case.

Judge Martin declared: "The accused has not been able, to my satisfaction, to link the continuing prosecution of the accused with the alleged political purpose behind the original investigation. This class of document and the other classes of documents relating to the investigation of the accused by Australian authorities fall into a category in which it has not been established by the accused that it is 'on the cards' that they will assist him to demonstrate political motivation for the prosecution as opposed to the investigation."

This is an extraordinary statement. Having all but acknowledged that the original investigation into the alleged sex offences was politically motivated, the court nevertheless concluded that it was also necessary for Moti's counsel to establish, prior to the release of any relevant documents, that the subsequent prosecution was also politically motivated. The Catch-22 scenario means that documents required to establish the political calculations underlying the prosecution can only be accessed if these political calculations can be demonstrated without the documents.

There is, moreover, the question of where the burden of proof ought to lie in relation to the motivations driving the prosecution. With Moti's counsel having now established that the sole reason the Vanuatu charges were reopened in 2004 was because of High Commissioner Cole's determination to block Moti's proposed appointment as attorney general, it could be argued that it ought to be up to the Australian prosecuting authorities and police to demonstrate the bone fides of their investigation

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through the release of all relevant documentation.

In any case, the court provided no evidence to substantiate its conclusion that Moti's counsel had not established that it was "on the cards" that the subpoenaed material would benefit their case. The context and, in some cases, the titles of the documents sought appeared to clearly indicate that the release of such material would almost certainly help further substantiate Moti's argument that he was targeted for political reasons.

For example, the subpoena applications included the contents of two DFAT files titled "07/503494 POLITICAL-ECONOMIC-DOMESTIC POLITICAL – Solomon Islands, MOTI, Julian SOI" and "07/500427-1 POLITICAL-ECONOMIC-INTERNATIONAL POLITICAL – Papua New Guinea (PNG) Australia Bilateral Relationship, Julian Moti Affair, PNG". Moti's counsel was also denied access to minutes, notes, and documents relating to an "inter-departmental committee" meeting held in December 2004 at the behest of High Commissioner Cole, and similar material relating to another meeting on the Moti investigation held in February 2006, involving representatives of the AFP, DFAT, and the attorney general's department.

Despite rejecting all the subpoena applications, Judge Martin approved Moti's request for the release of certain documents under the disclosure obligations of the Queensland Criminal Code. The Director of Public Prosecutions and the Commissioner of the AFP were directed to release material "in the possession of the prosecution that is relevant to the proceeding but on which the prosecution does not intend to rely at the proceeding".

It remains unclear what documents will be released as a result of this finding. Lawyers representing the AFP told the court that it will take them at least three weeks to go through the various documents and assess which are covered by the disclosure ruling. After this, it is likely that the AFP will challenge the release of much of the material on the grounds of public interest immunity.

Moti's permanent stay of proceedings hearing commenced after the subpoena ruling. Supreme Court Judge Debra Mullins presided.

John Agius for the Commonwealth Director of Public Prosecutions began by declaring that even if the AFP investigation into Moti in 2004 was initiated for political reasons it "wouldn't matter anyway". He then claimed that it was beyond the remit of the court to rule on the legality of Moti's extraction from the Solomons in December 2007, following the ousting of the Sogavare government and Moti's dismissal as attorney general. Agius argued, repeatedly and vehemently, that no evidence or testimony ought to be heard by the court in relation to the involvement of Australian police and diplomatic personnel in the deportation.

In other words, just as nothing ought to be discussed in relation to the political calculations behind Moti's prosecution, so nothing should be raised in relation to the activities of Australian forces in Honiara, even if they were unlawful. Were it accepted by the court, Agius's position would have made it impossible for Moti's counsel to argue for their permanent stay of proceedings application.

Moti's counsel, Dyson Hore-Lacey SC, described Agius's positions as a "nonsense", "see no evil, speak no evil, hear no evil" approach, akin to Monty Python.

Judge Mullins rejected the prosecution's arguments, noting that while she could obviously not pass judgement on the legality or illegality, under Solomon Islands' law, of acts committed in Honiara, she was obliged to consider the involvement of Australian personnel in Moti's deportation given that abuse of judicial process forms a central part of the permanent stay application.

Hore-Lacey's opening statement to the court focussed on one of the several grounds submitted to the court in support of the permanent stay application—Moti's unlawful deportation from the Solomons to Australia. He made no attempt to establish Canberra's political calculations in relation to Moti and its wider strategic interests in the Solomons. Hore-Lacey's summary chronology of Moti's activities and legal and professional standing between 1998 and 2007 omitted reference to the Australian government's involvement in the Solomons, the activities of RAMSI personnel, and the documented political motivations of High Commissioner Cole in instigating the AFP investigation into the Vanuatu accusations against Moti.

Hore-Lacey argued that AFP and senior Australian High Commission officials had orchestrated Moti's "kidnapping" in December 2007. The deportation was in violation of an order issued by a Solomons' magistrate explicitly barring such action. Hore-Lacey said that AFP liaison officer Peter Bond was present at every key meeting held prior to Moti's extraction, and that Australian personnel organised travel documents on behalf of Moti without his knowledge or authorisation. The SC declared that Agius's argument that the Australian government had nothing to do with the deportation "is just not facing reality".

The court heard witnesses who appeared from RAMSI's headquarters in Honiara via video link.

Wilson Rano is a Solomons' lawyer and was representing Moti in December 2007. He testified that on the day of Moti's extraction, he spoke with an unidentified AFP officer who said that the extradition process was taking too long and that they had a plane waiting to fly Moti to Australia. Rano also said that at the airport, just prior to Moti's forced departure, he saw AFP agent Peter Bond hand to Solomons' immigration officials what he believed to be travel documents for the former attorney general. Rano added that he saw then Australian High Commissioner Peter Hooton at the airport observing proceedings.

In cross examination, Agius suggested that Rano was mistaken and that Bond had passed no documents to anyone at this time. He also referred to two witness statements claiming that Hooton was in Australia and could therefore not have been at the airport when Moti was deported. Hore-Lacey later challenged this assertion, demanding the prosecution provide supporting evidence such as Hooton's passport or airline passenger records.

Also giving evidence yesterday from Honiara was Robson Djokovic, former political analyst for the Sogavare government. Djokovic testified that he saw the consular vehicle that is normally driven by the Australian High Commissioner at the airport when Moti was being flown out. He also said that two Solomons' officials—a senior immigration officer and a policy analyst in the prime minister's office—had earlier told him that the authorities wanted to avoid a lengthy deportation process. When questioned by Agius, who described this evidence as rumour, Djokovic added that he had spoken with cabinet officials who said that Peter Bond was present in the cabinet meeting convened by the new prime minister, Derek Sikua, to reach agreement on Moti's deportation.

After further witness testimony is heard today, Moti's permanent stay of proceedings application will resume in mid-October. Hearings are

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expected to then continue for several days, with proceedings potentially further dragged out if the AFP attempts to resist the disclosure of relevant documents on public interest grounds.

Judge Mullins nevertheless yesterday upheld the scheduled start date of early November for Moti's trial, should his appeal for a permanent stay fail.

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