

Unlawful Australian government action alleged in Julian Moti case

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The Australian High Court yesterday began hearing an appeal brought by former Solomon Islands' Attorney General Julian Moti, who alleges that the government's attempt to prosecute him is politically motivated and unlawful.

In 2004, the Australian Federal Police (AFP) began investigating sexual assault allegations against Moti that were made in Vanuatu in the late 1990s. The charges were thrown out of court due to the contradictory and demonstrably false testimony provided by the alleged victim. The case was, however, dredged up by Australian diplomatic officials in the Solomon Islands as part of a campaign to prevent Moti from becoming attorney general of that country.

The international and constitutional lawyer had been identified as an opponent of Canberra's agenda in the Pacific, including the neo-colonial Regional Assistance Mission to Solomon Islands (RAMSI). Australian authorities utilised extraterritorial sex tourism legislation to pursue Moti, an Australian citizen, and he was arrested in late December 2007 after being forcibly removed from his home in the Solomon Islands and bundled onto an aeroplane to Brisbane.

Moti has always denied the rape allegations. He has spent more than three years seeking to bar a prosecution on the grounds that the entire case amounts to an abuse of judicial process, violating fundamental principles concerning the rule of law.

In December 2009, the Queensland Supreme Court issued a permanent stay of proceedings, blocking any prosecution on the grounds that extraordinary payments made by the AFP to the family of the alleged victim had brought "the administration of justice into disrepute" and were "an affront to the public conscience." This decision, however, was subsequently overturned by the Queensland Supreme Court of Appeal.

The High Court will now determine the matter, considering both the witness payments and the legality of Moti's December 2007 removal from the Solomons.

Yesterday's hearing was dominated by the latter. Moti's counsel, Ian Barker QC, argued that Australian federal police and diplomatic officials were actively involved in a "deportation" that involved a "flagrant breach of his rights according to Solomon Islands law." The former attorney general's removal was in violation of a magistrate's order that explicitly prohibited deportation, and disregarded Moti's

right to appeal the deportation order within seven days.

The Australian government colluded and connived in this illegality, Barker argued. This amounted to a "disguised extradition" or kidnapping. Under established common law precedent the courts ought to refuse to allow a prosecution to proceed.

Barker made clear that extradition and deportation are distinct categories in international law—deportation is the expulsion of an "alien" from a state's territory, whereas extradition involves arrangements between states for the surrender and detention of alleged criminals. Extradition is subject to many more stringent legal checks and conditions than deportation, which is why it is illegal for governments to orchestrate a "disguised extradition" utilising the cover of deportation proceedings.

Among the precedents cited by Ian Barker was *Regina v Mullen* (1999). The British House of Lords quashed the conviction of Nicholas Mullen, who had been sentenced to 30 years imprisonment for alleged involvement in IRA bomb attacks. Before his arrest, Mullen was living in Zimbabwe. British secret intelligence service agents told their Zimbabwean counterparts that they wished to avoid "complicated extradition proceedings" and then covertly collaborated in a so-called deportation. Mullen was forcibly removed from Zimbabwe—in violation of the country's deportation laws, with a three-day appeal period disregarded—and flown to London, where local police were waiting to arrest him.

Moti's counsel yesterday cited the conclusion of the British Lord Justices that "the conduct of the security services and police in procuring the unlawful deportation ... represents a blatant and extremely serious failure to adhere to the rule of law." They added that "the need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy."

Barker went on to argue that the Queensland Supreme Court had erred in ruling that the legality or illegality of Moti's removal from the Solomon Islands in December 2007 was "non-justiciable." In other words, an Australian court could not rule on a matter of Solomons' law or the legality of the conduct of the Solomons' government.

Moti's counsel stated that it was "logically" necessary to first establish whether the "deportation" had been legal before it could be determined whether Australian officials had colluded in unlawful

activities. It appeared that the High Court justices agreed with Barker's argument as he was not questioned on the issue. Several hours were subsequently spent examining in detail different aspects of the role played by Australian government officials in Moti's extraction from the Solomons.

In another apparent blow to the Commonwealth Director of Public Prosecutions, the High Court justices indicated that they did not regard the activities of Australian officials in the Moti affair exempt from scrutiny under the "act of state doctrine", which holds that executive action overseas is not subject to domestic judicial review. Justice William Gummow noted that the act of state doctrine had not "poked its head up" in previous cases concerning unlawful removals. Justice Kenneth Hayne added that the need to assess such removals "by reference to the law of the jurisdiction from which the removal occurred" seemed to "deny any engagement of some act of state or broader concept."

Barker then forcefully challenged the finding issued by the Queensland Supreme Court that Australian officials had "rigorously abstained from expressing any view on what the Solomon Islands government proposed", before Moti's removal. He argued that this was "simply contra to the evidence—there was no rigorous abstention at all, there was active involvement."

Moti's counsel cited an email sent by AFP agent Peter Bond from Honiara on December 24, 2007, three days before Moti's removal, to a colleague in Canberra. Bond reported that deportation was soon expected, but added "I think it's still too early to celebrate just yet." He explained: "The [Deportation] Act clearly sets out that the deportee has seven days to appeal the 'Order'... I can still see this bogging down in court." Bond then received a reply: "thanks for a job...almost very well done."

Barker told the High Court: "the 'job' was to get Moti on the aeroplane to Brisbane, and they knew it was illegal because they knew of the seven-day period."

Moti's counsel continued that on the day of Moti's removal from the Solomons, agent Bond advised the country's police commissioner that the "deportation" was legal, despite knowing that was untrue. "Mr Bond was actively involving himself in the process of deportation," Barker told the court. "What business did he have of passing on legal advice to the Solomon Islands' commissioner of police, particularly when he knew it was wrong? ... He was not rigorously abstaining and standing back letting events unfold, he was taking part in them."

Moti's counsel also highlighted the testimony of a Solomons' police officer, who said that shortly before Moti was forcibly removed from his residence, Bond instructed him to "do it quickly, because the plane will be waiting." The Queensland Supreme Court concluded that the exchange was a "casual conversation." Barker asked the High Court to overturn this finding.

Moti's counsel pointed to the fact that Moti had been accompanied on the flight from the Solomons to Australia by two Solomons' officials, police officer Sam Kalita and immigration officer Billy Guporo. In a lawful and regular deportation, a state simply expels the

targeted individual from its territory, without specifically selecting to which neighbouring state the deportee will be sent and without deploying officials whose apparent task is to ensure the later arrest of the deportee. The presence of Kalita and Guporo, in other words, pointed to a disguised extradition.

Moreover, Moti's counsel continued, Australian officials were actively involved in this unlawful incident. Australian authorities paid for Kalita and Guporo to stay at a Brisbane hotel after they had delivered Moti, and also covered the two men's restaurant and alcohol expenses.

Prior to this, Australian officials in Honiara provided Kalita and Guporo with Australian visas in extraordinary circumstances. Three days before Moti's expulsion, AFP agent Peter Bond had the two officials sign blank visa application forms. These forms were then filled in by Bond or another Australian official. Several sections were ignored—including under "health", where applicants must divulge any serious conditions such as HIV infection. The forms were nevertheless approved on the same day they were completed, with no questions asked. Neither Kalita nor Guporo paid a processing fee.

Australia operates one of the most draconian "border protection" regimes in the world, and the approval of entry visas in this manner is unheard of. Would-be visitors to Australia from underdeveloped countries such as the Solomons are frequently refused entry on various grounds, for example if they are alleged to have insufficient money, pose a health risk, or are likely to claim refugee status. However, in the case of Kalita and Guporo, Barker noted, the "forms were not properly filled out—but it was good enough for the exercise that they were trying to accomplish."

The High Court also heard that Australian consular officials issued travel documents to Moti to facilitate the "deportation"—without his knowledge, consent, or payment, in apparent violation of the Australian Passports Act.

Further discussion on the matter of Moti's "deportation" or "disguised extradition" is likely to continue when the hearing resumes today. The High Court is also expected to consider the issue of the so-called witness payments made to the alleged victim's family.



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