

Australian High Court concludes hearing into Julian Moti appeal

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5 August 2011

A two-day Australian High Court hearing into the case of former Solomon Islands attorney general Julian Moti concluded yesterday. The seven justices heard further allegations of serious violations of the rule of the law by the Australian government in the South Pacific, but, as is usual, the court will not issue its decision on the matter for several weeks.

Moti, an Australian citizen and international and constitutional lawyer, alleges that the Australian government's attempt to prosecute him on child sex charges that were discharged by the courts of Vanuatu in the late 1990s is an unlawful abuse of the judicial system. He maintains that his opposition to Canberra's predatory operations in the Solomons and neighbouring states triggered a political vendetta that culminated in his forcible removal from Solomon Islands and arrest in Australia on December 27, 2007.

Discussion in the High Court yesterday again centred on the role played by Australian police and diplomatic officials in Moti's extraction—or "kidnapping", as his counsel stated—from the Solomons. Moti was nominally deported by the Solomon Islands' government of Prime Minister Derek Sikua, installed after his predecessor Manasseh Sogavare fell victim to a provocative regime-change campaign orchestrated in Canberra.

The Australian High Court heard overwhelming evidence indicating that the so-called deportation was in blatant violation of Solomons' law. Moti's counsel, Ian Barker QC, maintained that the Australian government was complicit in this illegal activity, and that the deportation was in fact a "disguised extradition." Because of this, Barker argued, the attempted prosecution of Moti must be permanently barred in order to uphold the rule of law and the integrity of the Australian courts.

The Commonwealth prosecutors attempted to prevent any scrutiny of the Australian government's role in colluding with Moti's illegal removal from the Solomons. They argued that firstly, no Australian court could rule on a matter of Solomons' law or the legality of the conduct of the Solomons' government, and secondly, in line with the "act of state doctrine", the overseas activities of the Australian executive ought not be subject to domestic judicial review. The High Court, however, indicated that it agreed with neither of these positions.

John Agius for the Commonwealth Director of Public Prosecutions was on the defensive for much of yesterday's proceedings.

Shortly after Agius began his presentation to the court, Justices Kenneth Hayne and Susan Crennan interrupted to insist that before determining whether Australian authorities had colluded or connived with an unlawful deportation, it was first necessary to assess the legality of Moti's removal under Solomon Islands' law, i.e., whether, as Justice Kenneth Hayne said,

the "removal of Mr. Moti was a removal with power or without."

Agius was also challenged to explain why Australian authorities issued visas and travel documents to Moti and the two Solomons' officials, a police officer and immigration official, who accompanied him on the plane to Australia.

Moti's counsel argued that the provision of these documents was evidence of Canberra's active involvement in the "deportation", contrary to the prosecution's position that the Solomons' government bore sole and independent responsibility. On Wednesday, the High Court heard that Moti was issued travel documents without requesting or paying for them, in apparent violation of the Australian Passport Act, and that the two Solomons' officials were issued visas by the Australian High Commission in Honiara after they signed blank forms that were filled in by an Australian official.

Ian Barker noted that it was highly improper for a deportee to be accompanied by security officials. "I have not read or heard anything in this case suggesting why it was necessary for him [Moti] to be accompanied by two Solomon Islands' law enforcement officers," he explained. "He was not infirm, he was not incapacitated, he was not going to be a danger to the aircraft, he did not ask to be accompanied on the trip. So he was compulsorily accompanied by two men who were, in effect, gaolers. They were an adornment to a sham extradition."

A series of emails and diplomatic cables sent by Australian officials in Honiara to Canberra just before Moti was removed from the Solomons made clear that everybody involved understood that the "deportation" was illegal. A magistrate's order prohibited the deportation, and Moti had seven days to appeal under the Solomons' Deportation Act before the deportation could be lawfully executed. The Australian High Commission in Honiara knew all this—yet instead of protesting against the serious violation of the rights of an Australian citizen, it rushed to issue travel documents, facilitating the unlawful deportation.

Justice John Heydon made the significant observation yesterday: "We went into the Solomon Islands in order to restore the rule of law. What happened on 27 December did not involve the Australian government participating in a process of restoring the rule of law."

Agius responded by insisting that "we did not go into the Solomon Islands to make their sovereign decisions for them." Justice Heydon replied: "But we did things without which their sovereign decisions could not have come to pass in the way they were planning them."

The Commonwealth prosecutor declared that the Solomons' government had insisted at the time that their deportation proceedings

against Moti were lawful. Justice Heydon again interjected to note that this was based on “rather laughable reasoning”, and had never been accepted by Australian diplomatic officials in Honiara.

Agius elaborated at length on the supposed sovereignty of the Solomon Islands and its government, and the alleged impropriety of any Australian official objecting to or even questioning its “sovereign” right to illegally deport an Australian citizen.

The position that the Solomons is a sovereign country is utterly absurd. In reality, “sovereignty” is nothing but a convenient legal fiction maintained by Canberra. The Australian-led intervention force the Regional Assistance Mission to Solomon Islands (RAMSI) has dominated the impoverished country ever since it began operations in mid-2003, taking effective control over the state apparatus, including the courts and prisons, police, finance and other government departments, central bank, and other institutions.

From the outset, RAMSI was driven by Canberra’s concern to advance its economic and geo-strategic interests throughout the South Pacific against rival powers, especially China. The Australian government has paid lip service to the “sovereignty” of its Solomons’ counterpart only when pliant, pro-RAMSI political figures are in power. When Manasseh Sogavare became prime minister in May 2006 and made a number of policy decisions that cut across Australian and RAMSI interests he was subjected to a highly provocative and unlawful campaign waged by Canberra that aimed at destabilising and bringing down his government.

Moti’s counsel further challenged the prosecution’s argument that Australian authorities had no choice but to issue travel documents for Moti and his two “gaolers”, given the “sovereign” decision to deport. He noted that under the Sogavare government, Canberra refused to issue travel documents to Solomons’ parliamentarians as a punitive measure designed to encourage government members to switch to the opposition. Barker cited an internal Australian diplomatic memo that read: “[A]s a major gesture if Sikua is successful and in the light of what SIG [Solomon Islands’ government] does about Julian Moti, we should announce the end of our visa restriction policy.” In other words, Barker concluded, “they had no hesitation at all in declining visas as a matter of political expediency.”

Agius yesterday outlined several arguments aimed at giving the High Court some means of dismissing Moti’s case despite the clear evidence of Australian connivance in illegal breaches of his rights. He first maintained that even if it were the case that issuing Moti and the two Solomons’ officials with travel documents amounted to facilitating an illegal deportation, this conduct was not grave enough to warrant quashing the prosecution of Moti.

The prosecution then maintained that the High Court needed to conduct a “balancing exercise”, weighing the evidence of Australian government complicity in an illegal breach of Moti’s rights against the “public interest” in allowing the sexual assault allegations to be resolved in a trial. Agius elaborated on the age of the alleged victim and other features of the allegations, a tactic apparently aimed at placing pressure on the judges to permit a trial to proceed. This appeared to get short shrift, however, with Justice Susan Kiefel immediately noting that “a breach of rule of law principles might weigh rather heavily against the public interest in a trial being conducted where that is being breached.”

On the other issue of contention in Moti’s appeal—the legality of the extraordinary cash payments issued to the so-called witnesses—Agius was

told that the court did not need to hear the prosecution on the matter.

When Moti’s counsel spoke about the payments, several judges asked why the question of excessive witness payments could not be examined in the course of a criminal trial, rather than requiring a permanent stay of proceedings. In December 2009 the Queensland Supreme Court found that the payments were “an affront to the public conscience” and that, despite public interest considerations in allowing a trial, a permanent stay of proceedings was necessary because “the seriousness of the abuse of process would not be acknowledged appropriately by any other order.”

In his closing reply to the Commonwealth’s arguments, Ian Barker raised a very significant incident that occurred in late 2006. The Solomon Islands’ solicitor general at the time, Nathan Moshinsky, issued legal advice that Moti could not be extradited from the Solomons. This was because extradition proceedings normally require an alleged offence to meet the condition of “double criminality”—i.e., the alleged offence is a crime both in the country issuing the extradition request and in the country to which the request is issued. In the Moti case, however, there was no double criminality because Solomon Islands had no equivalent legislation to Australia’s extraterritorial child sex tourism laws. As a consequence, Australian authorities had an enormous incentive to press for Moti to be deported, rather than commence extradition proceedings.

Ian Barker added that Australian officials did not accept Moshinsky’s advice. Moti’s counsel cited a letter forwarded by the attorney general in Canberra to Moshinsky, “suggesting a more persuasive alternative interpretation that could be considered.” This episode contradicted Agius’s argument that with Moti’s so-called deportation, “it would have been improper for the Australians to have given advice to the Solomon Islands and that they had to go along without the benefit of Australian advice [because] it would have amounted to meddling in their affairs.”

A notable feature of the High Court proceedings was the continued media blackout on the Moti case. The ABC was the only outlet to have journalists cover the High Court hearing, with the Murdoch media and Fairfax newspapers boycotting the event. The Australian media played a filthy role in 2006 and 2007, promoting Canberra’s provocations against the Sogavare government and acting as the Australian government’s mouthpiece regarding the sexual assault allegations against Moti. The details of these charges were made front-page news at the time—but now when damning evidence has emerged of Australian government illegality in the South Pacific there is a deafening silence.



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