In re Lee, 12 ROP 196 (Tr. Div. 2005)
In the Matter of the
EXTRADITION OF ANDY LEE.

Special Proceeding No. 05-003

Supreme Court, Trial Division
Republic of Palau

Decided: March 29, 2005

LARRY W. MILLER, Associate Justice:

This matter is before the Court following a hearing on the application of the Republic of Palau for the extradition and surrender of Andy Lee to the United States of America. This opinion constitutes the findings of the Court pursuant to § 22 of the ⊥197 Extradition and Transfer Act of 2001, RPPL 6-5 (the "Act").[1] That section provides that the Court "shall grant the application" for extradition and surrender upon finding, by a preponderance of the evidence, that:

> (1) the person is the person named in the arrest warrant of the requesting country;
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> (2) the offense for which extradition is sought is an extraditable offense;
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> (3) the requesting country is an extradition country; and
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> (4) the supporting documents have been filed and, where required, properly authenticated;
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> (5) the supporting documents and other evidence adduced in the extradition proceedings support a finding of probable cause to believe that the person committed the extraditable offense as such offense was presented and defined by the requesting country, or is in violation of a court order issued in the requesting country in respect of an extraditable offense; and
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> (6) there is no legally sustainable ground to deny the application.

Id., § 22(b)(1)-(6). Lee does not contest that the required showings have been made pursuant to subsections (1), (3) and (4), and his counsel acknowledged at closing argument that his objection pursuant to subsection (6) simply reiterated his objections pursuant to subsections (2) and (5). The Court therefore focuses its attention on the latter two subsections.

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[1] It was agreed that the hearing held would constitute both the surrender hearing and the preliminary hearing provided for in §18 of the Act. Because the required showings under §18 are also included in the requirements for a surrender hearing under §21 of the Act, *compare* §18(a)(1)-(3) *with* §21(c)(1)-(3), they need not be discussed separately.

Subsection (2) requires a finding that "the offense for which extradition is sought is an extraditable offense." Section 5(b) of the Act defines "extraditable offense" as "an offense which occurred in the requesting country and is or would be a criminal offense under the laws of both the requesting country and the Republic, . . . punishable by imprisonment or other deprivation of liberty for over one year." Section 5(b) further explains that "[i]n determining whether an offense is an extraditable offense . . ., terminology and categorization are not dispositive, and the totality of the acts or omissions alleged shall be considered in determining the constituent elements of the offense." Also pertinent to this discussion is Article II, §1(a)(2) of the Agreement on Extradition, Mutual Assistance in Law Enforcement Matters and Penal Sanctions Concluded Pursuant to Section 175 of the Compact of Free Association (the "Treaty"),[2] ⊥198 which defines "extraditable offenses" as

> Offenses, regardless of whether listed in the Schedule of Offenses appended to this Agreement or not, which are punishable under both the federal laws of the United States and the national laws of Palau, by deprivation of liberty for at least a period exceeding one year or by a more severe penalty.

Together, these provisions establish the principle of "dual criminality," by which the extraditable offense must be one that is punishable under the laws of both countries, but which "does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions." *Collins v. Loisel*, 42 S. Ct. 469, 470-71 (1922); *see generally* 31A Am. Jur. 2d *Extradition* § 40 (2002).

The indictment of Lee charges him with four counts of Alien Smuggling, in violation of 8 U.S.C. § 1324(a)(B)(ii), and one count of Conspiracy to Commit Alien Smuggling, in violation of 18 PNC § 371. Although Palau has its own Conspiracy provision, 17 PNC § 901, there is no crime known as Alien Smuggling. The Republic points out, however, that pursuant to 13 PNC § 1011, it is a crime, punishable by up to two years' imprisonment, to enter the Republic unlawfully and therefore also a crime to aid and abet someone in committing that offense. *See* 17 PNC § 102. It therefore argues that the acts of which Lee is accused by the United States would also be punishable as a serious offense here in Palau.

Lee resists this conclusion by arguing that the crime of Alien Smuggling is different from the concomitant offense in the Republic because it includes as an element that the act be committed "for the purpose of commercial advantage or private financial gain," which is not present in Palau's statutes. He argues therefore that Alien Smuggling is not a crime punishable in the Republic within the meaning of the Treaty. And, although acknowledging that Palau does have a Conspiracy statute, he points to Article II, § 3(a), of the Treaty as providing that conspiracy to commit a crime is an extraditable offense but only if the underlying crime is itself

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[2] *In re Munguy* , 6 ROP Intrm. 22, 28 (1996), held that this Treaty superseded the Trust Territory era extradition statute codified at 18 PNC §1001 et seq. Section 3 of the new Act provides that it "shall not supersede the extradition provisions of the Compact of Free Association, whose provisions shall be deemed an extradition treaty for the purposes of th[e] Act."

an extraditable offense.

The Court rejects Lee's contentions. Applying the principle set forth above, numerous courts have concluded that an offense is extraditable even though it is defined more broadly in the country to which extradition is sought. *E.g., Bozilov v. Seifert*, 983 F.2d 140, 143 (9th Cir. 1993); *United States v. Sensi*, 879 F.2d 888, 893 (D.C. Cir. 1989); *Theron v. United States Marshal*, 832 F.2d 492, 496-98 (9th Cir. 1987); *In re Russell*, 789 F.2d 801, 804 (9th Cir. 1986).[3] That is to say, in each of those cases, it was *easier* to obtain a conviction in the country seeking extradition. *See, e.g., Theron*, 832 F.2d at 497 ("[F]or purposes of dual criminality, it is immaterial that South Africa's law is broader than the analogous law ⊥199 in this country."). Here, by contrast, the additional element of a commercial or financial motivation renders U.S. law *more* stringent than Palau's. *A fortiori*, then, the Court can find no basis to conclude other than that the crimes with which Lee is charged are punishable in both countries and thus constitute extraditable offenses.

The Court turns, therefore, to Lee's objection regarding subsection 5. Lee contends that the documents submitted with the extradition application do not adequately show he committed the offenses with which he is charged. In considering this objection, it is important first to note the standard to be applied. Although § 22 prescribes a preponderance-of-the-evidence standard, there is no requirement that the Court find by a preponderance of the evidence that Lee committed the offenses. Rather, and somewhat confusingly, the Court need only find that "the supporting documents and other evidence adduced in the extradition proceedings support a finding of *probable cause* to believe that" Lee committed these offenses. § 22(c)(5) (emphasis added). "It is not necessary in extradition proceedings that the evidence against the respondent be such as to convince the committing judge or magistrate of his guilt beyond a reasonable doubt, but only such as to afford reasonable ground to believe that the accused is guilty of the offense charged." *Sidali v. I.N.S.*, 107 F.3d 191, 199 (3d Cir. 1997) (quoting *United States ex rel. La Pizzo v. Mathues*, 36 F.2d 565, 568 (3d Cir. 1929)).

Having reviewed the supporting documents, including principally the affidavit of a U.S. Customs Enforcement Officer, the Court believes that such a finding is warranted. The affidavit sets forth in some detail a scheme to bring four citizens of the People's Republic of China, carrying falsified passports purportedly issued by Singapore and Malaysia, into the United States. It explains that Lee took the same flights from Hong Kong to Manila and Manila to Koror with the four, and with a fifth person who has admitted to having been hired as an escort, and that he had also flown on the same flight with two of them from Koror to Yap. The affidavit then sets forth that a "confidential reliable source" who was shown Lee's passport photo "identified Lee as one of the conspirators that was involved in the scheme."

The Court agrees with Lee's counsel that more information could have been provided linking Lee to the scheme. No information is provided concerning the identity of the

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[3] *Bozilov* is noteworthy because the language in the exradition treaty at issue there is substantially identical to the language in the Treaty here. *Compare Basilov*, 983 F.2d at 142 (quoting Article 2(1) of the Extradition Treaty between the United States and the Federal Republic of Germany) *with* Article 2, Section 1 of the Treaty.

"confidential reliable source" and, somewhat curiously, although the affidavit points out that two of the Chinese nationals who were detained in Palau "could identify him," it does not go on to say whether such an identification was ever made or even attempted.

Nevertheless, the Court is inclined to agree with the Republic that there is no requirement that the Court be provided with all available evidence, but simply with enough to make a finding of probable cause. There is ample evidence of an agreement to bring aliens into the United States illegally, there is a remarkable congruence between Lee's movements and the movements of those known to have been involved in the scheme, and -- to belay the concern that remarkable congruence was merely a remarkable coincidence -- there is an identification of Lee, albeit from a source the United States government wishes to keep confidential, as an active participant in the scheme. The different aspects of the evidence presented complement each other. While the statement of an unnamed source that Lee is involved in alien smuggling would not suffice on its own ⊥200 to establish probable cause, that statement, coupled with other evidence of an alien smuggling scheme, and with Lee's own actions seemingly consistent with such a scheme, does suffice.[4] Moreover, the Court believes it is not inappropriate to recognize that Lee has been indicted by a grand jury in Guam, which -- with the secrecy protections that surround its work -- presumably had a fuller picture of the available evidence.

For all of these reasons, the Court declares Lee to be extraditable for the offenses charged in that indictment and submitted to this Court. The Republic may submit an appropriate surrender warrant at its earliest convenience.

[4]Although the affidavit does not provide direct evidence of Lee's joining in the conspiracy, it is clear that "circumstantial evidence may be used to prove the essential elements of conspiracy such as the existence of an agreement between the parties evincing a common purpose or plan, with a specific unlawful purpose, as well as the defendant's guilty knowledge, criminal intent, and participation in the conspiracy." 16 Am. Jur. 2d *Conspiracy* § 41 (1998); *see also id.* § 39 ("Where the existence of a conspiracy is shown, only slight additional evidence is required to connect a particular defendant with the conspiracy.").