

Response from the Administration

At the Subcommittee meeting on 7 November to deliberate on the Fugitive Offenders (Sri Lanka) Order and the Fugitive Offenders (Portugal) Order, the Administration undertook to provide the following information to facilitate the work of the Subcommittee –

- (a) *Whether there were provisions in the International Covenant on Civil and Political Rights (ICCPR) and other international treaties as applied to Hong Kong providing that surrender might be refused if the requested Party considered that the person sought would not receive a fair trial in the territory of the requesting Party.*

Article 14 of the ICCPR sets out a number of requirements which are aimed at ensuring that accused persons receive a fair trial. It makes no reference to extradition and is directed towards imposing obligations on the jurisdiction where the trial is in fact being conducted.

In relation to the extent to which the ICCPR might possibly oblige a requested Party to enquire into the issue of "fair trial", jurisprudence under the ICCPR and the European Convention on Human Rights does not appear to have directly addressed this issue.

In *Soering v United Kingdom* 11 EHRR 439(1989), which was a case dealing with the extradition of a person for a death penalty offence, the European Court of Human Rights did however observe :

"an issue might exceptionally be raised under Article 6 (a provision analogous to ICCPR Article 14) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country (at para 113)".

Commentators have noted that the requested Party will normally accord a wide margin of appreciation to the requesting Party when accusations are levelled at its standards of criminal justice and would probably refuse extradition only where there is clear evidence of a flagrant and systematic denial of fair trial rights in the requesting Party (Dugard & Wan den Wyngaert, "Reconciling Extradition with Human Rights", 92 AJIL 187 (1998)). And of course if that situation existed the appropriate course would be termination of the Agreement.

(b) *What the jurisprudence on fair trial in the context of extradition was.*

Extradition is a process whereby persons are surrendered to another jurisdiction, usually pursuant to a treaty or agreement, to stand trial in that other jurisdiction. It is a fundamental assumption that the person will receive a fair trial in the requesting jurisdiction. The following dicta from courts in Hong Kong Canada and the United Kingdom are relevant :

- (a) Hong Kong¹
 "To supplement the local legislation, which gives effect to treaty obligations, by imposing doctrines of fairness applicable to domestic proceedings is to run a real risk of interfering with such treaty obligation".
- (b) Canada²
 "While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it with the criminal trial process. It differs from the criminal process in purpose and procedure, and, most importantly, in the factors which render it fair. Extradition procedure, unlike criminal procedure, is founded on concepts of reciprocity, comity, and respect for difference in other jurisdiction".
- (c) UK³
 "It is of course right to observe that the law of extradition proceeds upon the fundamental assumption that the requesting state is acting in good faith and that the fugitive will receive a fair trial in the courts of the requesting state. If that were otherwise, one must assume that our government would not bind itself by treaty to such process. But that is not to say that it is the duty of our courts to inquire into the adequacy or otherwise of the procedural safeguards offered to a defendant before those courts. Our courts have consistently resisted attempts to import the requirements of domestic criminal procedure into extradition proceedings. Provided that there has been compliance with the terms of the Extradition Act, fairness is not a criterion relevant to the function of the committing court".

The issue of a fair trial was raised by fugitives in a number of requests made by Hong Kong prior to the resumption of sovereignty (generally

¹ In re Thongchai Sanguadikul [1994] 1 HKCLR

² Re Kindler [1991] 84 DLR (4th) 438

³ Ex parte Lee Wai Kit [1993] 3 All ER 504

on the premise that the fugitive would not be guaranteed a fair trial in the system in place in Hong Kong post 1997)⁴. In such cases Hong Kong filed affidavit evidence (for use either by the courts or by the executive of the requested jurisdiction) giving details of the various protections in place.

In the Launder case, the Secretary for State considered representations made by the fugitive that the PRC could not be relied upon to uphold the legal framework in place in Hong Kong post 1997. The Secretary for State rejected the proposition, and his decision was subsequently upheld in the House of Lords on judicial review. In the Jerry Lui case, the First Circuit Court of Appeals in the USA refused to investigate "the fairness of a requesting nation's justice system" under the well-established rule of non-inquiry. Such considerations were a matter properly left for the Secretary of State. The Secretary subsequently ordered Lui's surrender to Hong Kong.

Finally it should be noted that, although the courts will not make a general enquiry as to the prospects of a fair trial in the requesting jurisdiction a number of the grounds of refusal in section 5 of CAP 503 are to ensure fairness to the fugitive. Two of these grounds of refusal are particularly relevant to the question of whether a fugitive will receive a fair trial. These are -

(1)(c) that the request for surrender concerned (though purporting to be made on account of a relevant offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions.

(1)(d) that he might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

⁴ Ex parte Lee Wai Kit [1993 3 AER 504]; Ex parte Launder 1997 1 WLR 839; USA v Lui Kin-hong 110 F 3d 103

- (c) ***Whether there was any mechanism to enable the requested Party to take necessary action if it found that a person, after having been surrendered could not receive a fair trial in the territory of the requesting Party.***

One of the fundamentals of any extradition Agreement is that a surrendered fugitive will receive a fair trial in the requesting jurisdiction. If there was clear evidence that a fugitive did not receive a fair trial the requested jurisdiction would make strong representations to the requesting jurisdiction. If the question could not be suitably resolved termination of the Agreement could follow.

And if it was clear that a person extradited from Hong Kong did not receive a fair trial, in the place to which he was surrendered the matter could be referred to the UN Committee established pursuant to Article 41 of the ICCPR.

- (d) ***Whether to surrender a person for serving in the territory of the requesting Party an imprisonment sentence upon his conviction in absentia would be in conformity with international obligations in connection with the right to fair trial.***

Again it should be noted that Article 14 of the ICCPR does not deal with the extradition of persons. The Article does however provide that a person charged with a criminal offence is "to be tried in his presence" (Article 14(3)(d)).

The Human Rights Committee established pursuant to the ICCPR has held that criminal trials in absentia are acceptable when the defendant has been given ample notice, and adequate opportunity, to attend the proceedings.

".... [P]roceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under Article 14 (of the ICCPR) presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him Judgement *in absentia* requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance...."

(Mbenge v Zaire 16/77)

Section 5(1)(b) of the CAP 503 is entirely consistent with the views of the Human Rights Committee in relation to convictions in absentia.

(e) ***Relevant provisions in the Fugitive offenders Ordinance (CAP 503) concerning the basis on which a person could resist extradition.***

Section 5 (General restrictions on surrender); **section 10** (Proceedings for committal); **section 2(2)** ("relevant offence"); **section 2(1)** (definition of "supporting documents").

Section 5(1) sets out the mandatory grounds for refusal of surrender. **Section 5(2)** reflects the fact that a fugitive is entitled to "specialty" protection; in other words if the law of the requesting jurisdiction or the relevant agreement does not provide for specialty protection the fugitive cannot be surrendered. **Section 5(3)** deals, in corresponding fashion, with "no-resurrender" protection. **Section 10(6)(b)** sets out the matters in respect of which the court of committal (i.e. the magistrate) must be satisfied before ordering committal of the fugitive to await the Chief Executives decision re-surrender. In this regard the fugitive can argue that

- the offence in respect of which his surrender is sought is not a "relevant offence" as defined in **section 2(2) (10(6)(b)(i))**. If "double criminality" does not exist the offence will not be a "relevant offence".
- duly authenticated supporting documents have not been produced **(10(6)(b)(ii))**.
- if he is wanted for prosecution evidence to warrant commit for trial has not been produced **(10(6)(b)(iii))**, and
- if he is a convicted person the sentence has been served or less than 6 months remains to be served **(10(6)(b)(iv))**.

The matters set out in **section 5** can be adjudicated on by the court or the Chief Executive. The matters set out in **section 10** will normally be dealt with by the court alone. If, however, following an adverse decision by the court on whether, for instance double criminality existed, representations could be made to the Chief Executive; the Chief Executive would consider these representations in the context of exercising his discretion whether to order surrender.

- (f) *A table setting out the "three-stage" procedure regarding extradition i.e. the committal proceedings, making representations to the Chief Executive and application for habeas corpus, and the matters/grounds that would be considered in each of the stage.*

The process by which a decision is taken to surrender (or not surrender) a fugitive cannot be conveniently tabulated into a "three-stage" process. The following is a summary of the various steps in the process.

The court of committal (Magistrate) conducts a hearing in accordance with **section 10** (Proceedings for committal) of CAP 503 after an authority to proceed has been issued by the Chief Executive. The authority to proceed will issue after receipt of the request for surrender unless the Chief Executive considers that an order for surrender could not lawfully be made under the Ordinance or would not in fact be made. In practice a recommendation will not be made to the Chief Executive that he issue an authority to proceed until the "supporting documents" (see definition in **section 2** of CAP 503) have been scrutinized.

The court of committal will either decide to commit the fugitive to custody to await the Chief Executive's decision re surrender or discharge the fugitive. The court of committal's decision may be appealed by either the fugitive or the requesting jurisdiction. Appeals lie to the Court of First Instance, then, as of right, to the Court of Appeal and then, by leave, to the Court of Final Appeal. During this judicial phase the fugitive may make submissions in relation to the matters covered in sections 5 and 10 of CAP 503.

The Chief Executive may not surrender a fugitive who remains liable to be surrendered following the judicial phase until 15 days have elapsed. This period gives the fugitive an opportunity to make representations to the Chief Executive. As indicated in the answer to question (e) the fugitive may make representations in relation to any of the matters covered by **sections 5 and 10** of the Ordinance. The fugitive may also make representations in relation to any of the discretionary grounds of refusal contained in the relevant Agreement. And if the Chief Executive's decision is to order surrender that decision may be judicially reviewed.

Finally it should be noted that if there is delay in ordering the surrender of a fugitive or executing an order for surrender the Court of First Instance, may, on the application of the fugitive, order his discharge (see **section 14** of CAP 503).

(g) *Case law(s) concerning offences of a political character*

There are two categories of offences which fall within the meaning of "an offence of a political character". The first category comprises offences which are political by their nature. Treason and sedition are examples of this category. The second category comprises offences which, although on their face offences against the ordinary criminal law, are, because of the context in which they are committed, offences of a political character.

Bearing in mind that the term "offence of a political character" is not defined in statute recourse must be had to the decisions of the courts to ascertain what offences fall within the second category of political offences.

Attached is a short paper setting out the leading decisions in this area. To summarise, the courts in considering whether an offence is an offence of a political character (second category) principally take account of two factors. The first is the motive of the jurisdiction requesting extradition. If the motive is other than the normal enforcement of its criminal law the offence itself is of a political character. (see judgment of Viscount Radcliffe in Schtraks in the attached paper). If the first factor is not present the courts will look at the motive of the fugitive in committing the offence. The fugitive must have a political motive in committing the offence but that, in itself, may not be enough. Essentially that motive must be so proximate to the commission of the offence as to outweigh the ordinary criminal purpose of commission of the offence (see Lord Reid in Schtraks and its

application in Littlejohn and Budlong)

What emerges from a study of the case law is that the courts have been unable to provide an exhaustive definition of what constitutes an offence of a political character. Rather the courts have identified factors to be considered in the light of the circumstances surrounding the commission of an offence which are relevant to this question.

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In Re Castioni, (1891) 1 QB 149, the fugitive, being dissatisfied with the administration of the Swiss Government, joined other people to stage an uprising against the government and killed a member of the government in the course of the movement. After being charged with the offence of murder, the fugitive escaped to England. The Swiss Government requested his extradition. The fugitive opposed extradition on the ground that the offence he was accused of was of a political character. Hawkins, J., with the concurrence of Stephen J and Denman J, held that certain crimes were of a political character if

“those crimes were incidental to and formed a part of political disturbances” (see page 166 of judgment)

The fugitive succeeded in his plea because the circumstances of the case indicated that he had committed the offence in the course of a political uprising. The crime was held to be incidental to and formed a part of the political disturbances staged against the Swiss Government. Two observations can be made from the ratio of Hawkins J. First, it would be an offence of a political character if the fugitive committed the criminal offence with the object (motive) of staging a political disturbance. Second, there must be a nexus between the criminal act and a political disturbance.

In Re Meunier, (1894) 2 QB 415, the fugitive was an anarchist and he was accused of causing explosion at a cafe and in certain barracks in France as a protest against the French Government. The French Government requested his extradition after the fugitive had escaped to England. The fugitive resisted extradition by pleading that the offence was a political offence. Cave J. held that

“in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not” (see page 419 of judgment)

The fugitive's plea of political offence failed because he committed the offences with the mere intention of expressing his hatred, distrust of, or disbelief in government as an institution. It appears that the court in Meunier had followed closely the principles laid down in Castioni in that in construing an offence of a political character, the fugitive had to commit the offence with the object of staging a political disturbance and that there must be a nexus between the criminal act and the political disturbance.

The interpretation in Castioni and Meunier was regarded as being too restrictive in R v. Governor of Brixton Prison, ex parte Kolczynski, (1955) 1 QB 540 (“the Polish Seamen Case”). Seven Polish seamen served as members of the crew in a trawler fishing in the North Sea. The activities of the seamen in the trawler were monitored by a political officer who was gathering evidence to prosecute them on account of their political opinion when they returned to Poland. Knowing that they would be prosecuted for their political opinion if they returned to Poland, the seamen took control of the trawler and went to England. The Polish Government requested their extradition for various criminal offences including that of wounding. In distinguishing the case from that of Castioni, and Meunier, Cassels J. said:

“The words “offence of a political character” must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891, when Castioni’s case was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this case the members of the crew of a small trawler engaged in fishing were under political supervision and they revolted by the only means open to them. They committed an offence of a political character, and if they were surrendered there could be no doubt that, while they would be tried for the particular offence mentioned, they would be punished as for a political crime. Thus they have brought themselves within section 3(1) (i.e. that the political offence exception) and made good their claim to have the restrictions referred to observed.” (see p. 549 of Judgment)

The Polish seamen succeeded in opposing their extradition by invoking the political offence exception. Kolczynski appeared to be a departure from Castioni and Meunier in that it did not require a nexus between the criminal conduct and a political disturbance. One must appreciate the departure in light of the fact that the case was decided at the apex of the Cold War. The construction was adopted to meet the special circumstances, in particular, the political climate at that time.

The judgment of Viscount Radcliffe in the House of Lords decision of Schtraks v. Government of Israel, (1964) AC 556 marked the return of the court to the more restrictive approach laid down since Castioni. The fugitive in Schtraks was wanted by Israel for the offences of perjury and child abduction. The child that he had abducted was his own nephew. He applied for a habeas corpus on the ground that if he did not remove the child away from the child’s parents, the child would be converted by his parents to other religion and would be deprived of the chance of receiving orthodox religious education. He claimed that his conduct had attracted a lot of political discussion in Israel and further submitted that the offences he was accused of was of a political character. In rejection his plea, Viscount Radcliff said the followings:-

“In my opinion the idea that lies behind the phrase “offence of a political character” is that the fugitive is at odds with the State that applies for his extradition on some issues connected with the political control or government of the country. The analogy of “political” in this context is with “political” in such phrases as “political refugee,” “political asylum” or “political prisoner.” It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect. It is this idea that the judges were seeking to express in the two early cases of In re Castioni and In re Meunier when they connected the political offence with an uprising, a disturbance, an insurrection, a civil war or struggle for power: and in my opinion it is still necessary to maintain the idea of that connection.” (see page 591 of Judgment)

Viscount Radcliff had adopted the approach of looking at the motive of the requesting state in determining whether an offence is of a political character. It is a political offence if the extradition was for purpose other than the enforcement of its criminal laws. Viscount Radcliff further affirmed the views of the courts in Castioni and Meunier in that there should be a nexus between the criminal conduct and an uprising. I think a nexus of this kind is required in order to prove that the requesting state is after the fugitive because of the uprisings staged against the requesting state.

While agreeing that the offence the fugitive was accused of in Schtraks was not of a political character, Lord Reid approached the term from a different angle and held that the motive of the fugitive in committing the offence must be relevant and may be decisive. He pointed out that:

“A fugitive member of a gang who committed an offence in the course of an unsuccessful putsch is as much within the Act as the follower of a Garibaldi. But not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge I would not think that that could be a political offence. So it appears to me that the motive and purpose of the accused in committing the offence must be relevant and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause and quite a different thing to commit the same offence for an ordinary criminal purpose.” (see page 583 of judgment)

The views of Viscount Radcliff in Schtraks was quoted with approval by three of the Law Lords in Cheng v. Governor of Pentonville Prison, (1973) AC 931, another House of Lords decision.

The fugitive in Cheng v. Governor of Pentonville Prison (1973) AC 931 was born in Taiwan and was a member of a political group which aimed at overthrowing the Taiwanese Government. In 1970, Chiang Ching-kuo, the son of Chiang Kai-Shek visited New York. The fugitive was implicated in an enterprise of attempting to murder Chiang Ching-kuo and was charged in the United States of attempted murder. The fugitive later arrived in England. A request was made by the United States for his extradition for the attempted murder charge. The applicant contended that the offence that he was accused of in the United States was an offence of a political character. By a majority of three to two, their Lordships rejected the fugitive's plea. In particular, Lord Hodson held that:

““Political character” in its context connotes the notion of opposition to the requesting state. The applicant was not taking political action vis-a-vis the American Government and the American Government is not concerned with the relations between the America and Taiwan in asking for extradition but is concerned only with enforcing the criminal law.” (page 593 B of judgment)

Since the case of Schtraks, the court had been invited in two subsequent cases to approach the term by following Lord Reid's approach of looking at the motive of the fugitive in committing the offence. In R v. Governor of Winson Green Prison Birmingham, ex parte Littlejohn, (1975) 3 All ER 208, the fugitive was accused of robbing a bank in the Republic of Ireland. The fugitive was a member of the Irish Republican Army. He escaped to England after the offence. In fighting his extradition to Ireland, he claimed that the robbery was staged to raise fund for the IRA and was thus an offence of a political character. Lord Widgery rejected his habeas corpus application and held that:

“... we were saying in substance that although the Littlejohns had been concerned with the IRA, and although their interest in robbing this bank was not simply to obtain money on their own account, yet that was not a sufficient political association to make the offence of a political character within the Act” (page 211a of judgment)

In R v Governor of Pentonville Prison, ex parte Budlong and another, (1980) 1 All ER 701, the fugitives were senior members of the Church of Scientology which was involved in a number of litigations with the US Government. They were accused of instructing members of the church to break into certain US Government offices to obtain certain files relating to the affairs of the church. They were charged with burglary and the US Government requested their extradition. The fugitives pleaded that they committed the offences with the motive of changing the policy of the US Government towards the church and the offences that they were accused of were of a political character. Griffiths rejected their plea and held that they committed the offences in order to obtain advantage for the church in the litigation with the US Government and that the offences were committed to further the interest of the church.