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Paper for the House Committee meeting on 5 January 2007

Report of the Subcommittee on Fugitive Offenders (Germany) Order and Fugitive Offenders (Republic of Korea) Order

Purpose

This paper reports on the deliberations of the Subcommittee on Fugitive Offenders (Germany) Order and Fugitive Offenders (Republic of Korea) Order.

The subsidiary legislation

Fugitive Offenders (Germany) Order

2. The Fugitive Offenders (Germany) Order (L.N. 251) (the Germany Order) is made under section 3 of the Fugitive Offenders Ordinance (Cap. 503). It directs that the procedures in the Ordinance shall apply as between Hong Kong and the Federal Republic of Germany in relation to the bilateral surrender of fugitive offenders agreement signed between the two jurisdictions on 26 May 2006, subject to the limitations, restrictions, exceptions and qualifications contained in the Order.

Fugitive Offenders (Republic of Korea) Order

3. Made under section 3 of Cap. 503, the Fugitive Offenders (Republic of Korea) Order (L.N. 252) (the Korea Order) directs that the procedures in the Fugitive Offenders Ordinance shall apply as between Hong Kong and the Republic of Korea in relation to the bilateral surrender of fugitive offenders agreement signed between the two jurisdictions on 26 June 2006, subject to the limitations, restrictions, exceptions and qualifications contained in the Order.

4. The two Orders are subject to a mechanism of scrutiny by the Legislative Council (LegCo) provided in section 3(2) to (6) of the Fugitive Offenders Ordinance under which LegCo has the power only to repeal the Orders.

5. The scrutiny period of the two Orders has been extended from 20 December 2006 to 10 January 2007 by a resolution of the Council.

6. The two Orders will come into operation on a date to be appointed by the Secretary for Security by notice published in the Gazette.

The Subcommittee

7. At the House Committee meeting on 24 November 2006, Members agreed that a subcommittee be formed to study the two Orders. Under the chairmanship of Hon James TO, the Subcommittee has held two meetings with the Administration. The membership of the Subcommittee is in the **Appendix**.

Deliberations of the Subcommittee

The Germany Order

Omission of the reference to "magistrate" in Article 8(3)

8. The Subcommittee notes the omission of the reference to "magistrate" in Article 8(3) of the Germany Order, and has requested the Administration to make clear that "other competent authority" referred to in the Article covered the magistrate of Hong Kong. Hon James TO has expressed concern whether such omission would render it impossible for Hong Kong to request Germany to surrender a fugitive offender to Hong Kong if the warrant of arrest is issued by a magistrate in Hong Kong.

9. The Administration has explained that "magistrate" is omitted from Article 8(3) of the Germany Order at the request of Germany on the ground that magistrates in Germany do not have the power to issue warrants of arrest. Such omission, however, would not render it impossible for Hong Kong to request Germany to surrender a fugitive offender to Hong Kong if the warrant of arrest is issued by a magistrate in Hong Kong as Germany recognises that magistrates in Hong Kong have such power and it is understood by both sides that "other competent authority" and "judge" referred to in the Article are generic terms which are wide enough to cover magistrates.

10. The Administration has also confirmed in writing that magistrates in Hong Kong are competent authorities under Hong Kong law for issuing arrest warrants in that magistrates in Hong Kong are empowered under sections 9, 73 and 74 of the Magistrates Ordinance (Cap. 227) to issue warrants of arrest. In addition, the Administration has made reference to Hong Kong Legal Dictionary, LexisNexis Butterworths, in which a judge is described as "a person invested with authority to decide questions in dispute between parties, and to afford appropriate punishment to offenders.", and the term includes a magistrate of Hong Kong. Besides, it is the intention of both parties that the terms "judge" and "competent authority" cover "magistrate" and that the omission of "magistrate" would not pose a problem to acceptance of an arrest warrant issued by a magistrate in Hong Kong.

Recovery of expenses borne by Hong Kong for surrender of fugitive offenders

11. Hon James TO is of the view that Hong Kong should consider sharing the profits realised from property confiscated by the requesting party from a person so surrendered by Hong Kong to cover expenses borne for surrendering the person. Hon Miriam LAU considers that this matter might be considered in the light of international trend and the relevant domestic legislation.

12. The Administration has pointed out that Cap. 503 under which the Germany Order is made does not provide for the sharing of confiscated proceeds for the purpose of covering the expenses borne for surrendering a person. In fact, Article 12(2) of the Germany Order obliges a requested party to bear expenses for the arrest and detention of a fugitive offender and for conduct of legal proceedings for securing the surrender of the offender. A similar provision is found in the model agreement on surrender of fugitive offenders and the agreements on surrender of fugitive offenders in force between Hong Kong and other jurisdictions. While sharing of proceeds of crime following confiscation is not provided in fugitive offenders orders, the Administration has pointed out that this is an area that is covered in mutual legal assistance agreements.

Legal assistance available to a person who refuses to be surrendered voluntarily

13. In response to Hon James TO's enquiry about the legal assistance available to a person the surrender of whom is being sought, the Administration has explained that for committal proceedings held at the magistrates court, the person concerned may apply to be represented by a lawyer provided by the Duty Lawyer Scheme. The Duty Lawyer Scheme maintains a list of qualified lawyers who have experience or interest in these proceedings. Where a committal order is made against that person, he will be advised by the court of his right to appeal against the order by way of habeas corpus proceedings. Where a surrender order is made, he may apply for judicial review. Proceedings relating to habeas corpus or judicial review are held at the Court of First Instance and courts above it, for which that person may apply for legal aid. According to the Legal Aid Department, there are sufficient solicitors and counsels who have expertise in the areas of administrative law/judicial review.

Duration of provisional arrest

14. The Subcommittee notes that Article 10 of the Germany Order provides that the provisional arrest of the person sought shall be terminated upon the expiration of 60 days from the date of his arrest if the formal request for his surrender has not been received, as opposed to only 45 days provided for in Article 8 of the model agreement on surrender of fugitive offenders. Although a similar extension could be found in Article 9 of the Netherlands agreement, Hon James TO has urged the Administration to exercise prudence in agreeing to similar provision in future agreements on surrender of fugitive offenders taking into account the need not to prolong the detention of the arrested person.

The Korea Order

Political offence restriction on surrender of fugitive offenders

15. The Subcommittee notes that Article 5(a) of the Korea Order provides that a person shall not be surrendered if the requested party has substantial grounds for believing that the offence for which surrender is requested is a political offence or an offence connected with a political offence. Article 5(a)(i) and (ii) of the Korea Order provides that a political offence does not include the offence of the taking or attempted taking of the life or an attack on the person of a Head of State or Head of Government or a member of the person's immediate family, and offences which, by reason of a multilateral international agreement, the Parties must not treat as political offences or offences connected with political offences. Similar provisions can be found in the existing fugitive offenders orders in respect of the bilateral agreements with Malaysia, India and the United States of America.

16. The Subcommittee also notes that at the suggestion of the then Subcommittee to Study Issues Relating to Fugitive Offenders (Sri Lanka) Order in 2002, the Administration had undertaken to consider amending the Fugitive Offenders Ordinance to give a clearer mandate for future orders to specify exceptions to the political offence restriction on surrender contained in section 5(1)(a) of the Ordinance. When this issue was considered by the Subcommittee on Fugitive Offenders (Finland) Order in March 2006, the Administration had reported to that Subcommittee that follow-up action was being taken to achieve the purpose. In response to members' enquiry about the progress that has been made since March 2006, the Administration has informed the Subcommittee that the Security Bureau, in consultation with the Department of Justice, is continuing its study on the necessary scope of amendments to be made to the Ordinance to provide for exceptions to the political offence restriction on surrender of fugitive offenders for the purpose of avoidance of doubt. The Administration would take into account in its study -

- (a) any other exception provision that has been made in the existing fugitive offenders orders in respect of the bilateral arrangements with other jurisdictions;
- (b) any necessary related amendment that would need to be made to the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525); and
- (c) international trend and practices of other jurisdictions in providing for exceptions to the political offence restriction.

The Administration has also advised that upon completion of the study, it would consult the Panel on Security as soon as possible, hopefully by 2007, before proceeding to draw up the relevant legislative proposal. At the suggestion of the Subcommittee, the Administration has undertaken to expedite the study as soon as possible.

Surrender of property

17. The Subcommittee notes that while article 13 of the model agreement refers to "articles", the word "property" is used in paragraphs 1-3 of Article 15 of the Korea Order instead. The Administration has explained that the purpose of using "property" in the Korea Order is to make the wording consistent with that adopted in sections 8 and 9 of the Fugitive Offenders Ordinance. Hon Margaret NG is of the view that the Administration should have taken into account that "property" has a wider meaning than "article" in the context of Article 15. Hon Miriam LAU has pointed out that the word "articles" is used in Article 15 of the Germany Order and if consistency is the reason for the change from "article" to "property", similar changes would need to be made to the Germany Order.

18. The Administration has clarified that the change is intended to reflect the provisions of sections 8 and 9 of the Fugitive Offenders Ordinance and Article 15 will be implemented in accordance with the Ordinance. The Administration has agreed to consider carefully in future surrender of fugitive offenders orders the need to use the word "property" in the context for surrender of property and, if so to adopt the same wording consistently for all future orders.

Remedy for persons wrongly detained for surrender to certain places outside Hong Kong

19. Hon James TO has suggested that persons detained for the purpose of surrender to certain places outside Hong Kong but are subsequently released because of insufficient documentation provided by the requesting parties should have avenue for remedies. The Administration has noted Mr TO's suggestion.

Recommendation

20. The Subcommittee recommends that the Fugitive Offenders (Germany) Order and Fugitive Offenders (Republic of Korea) Order be supported.

Advice sought

21. Members are invited to support the recommendation of the Subcommittee in paragraph 20 above.

**Subcommittee on
Fugitive offenders (Germany) Order
and Fugitive offenders (Republic of Korea) Order**

Membership list

Chairman Hon James TO Kun-sun

Members Hon Margaret NG
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP

Total: 4 Members

Clerk Miss Mary SO

Legal Adviser Ms Connie FUNG

Date 11 December 2006