

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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3 December 2013

Miss Betty Ma
Chief Council Secretary
Council Business Division 2
Legislative Council Complex,
1 Legislative Council Road
Central, Hong Kong

Dear Miss Ma,

**Subcommittee on Fugitive Offenders (Czech Republic) Order, Mutual
Legal Assistance in Criminal Matters (Spain) Order and Mutual Legal
Assistance in Criminal Matters (Czech Republic) Order
Meeting on 22 November 2013**

We refer to your letter dated 22 November. The Administration's response to the concerns raised by Members at the captioned meeting is set out below.

Listing of Offences

Members were concerned that the agreement on surrender of fugitives (SFO) between Hong Kong and the Czech Republic had not set out the list of offences for which surrender may be granted, and one would not know from the

text of the agreement the types of offences for which fugitives might be surrendered.

The agreement between Hong Kong and the Czech Republic adopts a formulation whereby there is no list of offences in the agreement (referred to as the “alternative formulation” below). The Legislative Council Panel on Security was consulted on the alternative formulation in June 2005 (vide attached LC Paper No. CB(2)1409/04-05(02). During the consultation, we had made it clear that in future negotiations with prospective partners on SFO agreements, Hong Kong would, depending on the circumstances, adopt either the approach of setting out the list of offences in the agreement (referred to as the “list approach” below) or the alternative formulation. Members had no objection to the proposal.

In fact, a number of our negotiation partners, particularly European countries, have indicated during SFO negotiations their difficulties in adopting the “list approach” in the agreements, as it was incompatible with their domestic laws and practices. Owing to such differences, a number of negotiations had been stalled. In order to move forward these negotiations and to conclude the agreements with a view to widening Hong Kong’s international network in combating crimes, we consulted the Legislative Council in 2005 and thereafter have accepted, where appropriate, the alternative formulation as a way to articulate offences for which fugitives might be surrendered pursuant to SFO agreements.

The alternative formulation complies completely with the requirements under the Fugitive Offenders Ordinance (the Ordinance) (Cap. 503). Schedule 1 to the Ordinance is a list of relevant offences under Hong Kong’s law. The Ordinance provides that the relevant offences must come within any of the descriptions specified in Schedule 1 and are punishable in Hong Kong with imprisonment for more than 12 months, or any greater punishment. Any surrender must also fulfil the requirement of double criminality under the Ordinance and SFO agreements. The alternative formulation therefore does not change Hong Kong’s rights or obligations with respect to SFO under the agreement.

The SFO agreement between Hong Kong and the Czech Republic is the first agreement to adopt the alternative formulation. A Member suggested at

the meeting of the Legislative Council Panel on Security in June 2005 that the HKSAR Government should publicise the lists of offences when adopting the alternative formulation for the first time. We therefore plan to publicise the lists of offences to be exchanged with the Czech Republic through Government notice in Gazette and the Department of Justice's website for public viewing. In future, when we are to submit to the Legislative Council orders made under the Ordinance which involve the alternative formulation, we will invite our contracting partners to exchange the lists beforehand and submit them together with the orders to the Legislative Council for consideration in one go.

As for the suggestion that the Administration should submit the lists of offences to be exchanged between Hong Kong and the Czech Republic by means of subsidiary legislation, according to section 3(1)(a) of the Ordinance, the Chief Executive in Council may make orders "reciting or embodying the terms of the arrangements". As the lists of offences to be exchanged are not part of the arrangement, it is not appropriate to submit them to the Legislative Council by means of subsidiary legislation.

"Accusation against the person is not made in good faith in the interests of justice" as a discretionary refusal ground to surrender requests

Members were concerned that Article 15(c) of the model agreement was not included in the SFO agreement between Hong Kong and the Czech Republic. Article 15(c) of the model agreement provides for "accusation against the person is not made in good faith in the interests of justice" as a discretionary ground to refuse surrender requests.

In fact, the above discretionary refusal ground is now rarely used internationally. It is not contained in a number of SFO agreements Hong Kong has entered into, such as the agreements with Australia, New Zealand, the USA, Germany, etc. Neither is it found in the United Nations model text of SFO agreement. Article 7 of the agreement between Hong Kong and the Czech Republic provides that a person shall not be surrendered if the surrender request is made for the purpose of prosecution or punishment on account of race, religion, nationality, sex or political opinions, or if the person might be prejudiced at that person's trial on account of the above reasons. These safeguards are consistent with relevant requirements in many other SFO agreements in international community, and are capable of dealing with many

situations arising from surrender requests not made in the interests of justice.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Huggin" with a stylized flourish extending to the right.

(Huggin Tang)
for Secretary for Security

c.c.: Department of Justice (Attn.: Ms. Elizabeth Liu)

Legislative Council Panel on Security

Bilateral Agreements on Surrender of Fugitive Offenders Article on Offences

Purpose

This note outlines an alternative formulation of the article in bilateral agreements on surrender of fugitive offenders (SFO) concerning offences in respect of which surrender can be granted.

Background

2. Hong Kong is committed to playing a full part in international cooperation in law enforcement and has embarked on a programme to establish a network of bilateral agreements on SFO. Implementation of these agreements is taken forward in accordance with the Fugitive Offenders Ordinance (the Ordinance) (Cap. 503). Each agreement has to be covered by an order made by the Chief Executive in Council and approved by the Legislative Council under section 3. Pursuant to section 4 of the Ordinance, a person in Hong Kong who is wanted in a place with which Hong Kong has an SFO agreement may be arrested and surrendered to that place for the prosecution or imposition of sentence in respect of a “relevant offence”. A “relevant offence” is conduct which, if it had occurred in Hong Kong would constitute an offence – (i) coming within any of the descriptions specified in Schedule 1 to the Ordinance and (ii) punishable in Hong Kong with imprisonment for more than 12 months, or any greater punishment. Schedule 1 to the Ordinance in turn lists 46 categories of offence.

3. Hitherto, for the purpose of negotiations with prospective SFO agreement partners, we have adopted the “list” approach by seeking to list in the agreements some or all of the 46 categories of offence in Schedule 1 to the Ordinance as offences for which surrender is to be granted. A copy of the relevant provisions in the model text is at **Annex A**.

4. As of end April 2005, Hong Kong has signed SFO Agreements with 13 foreign jurisdictions. These jurisdictions are Australia, Canada, India, Indonesia, Malaysia, The Netherlands, New Zealand, Philippines, Portugal, Singapore, Sri Lanka, United Kingdom and the United States of America. The “list” approach mentioned in paragraph 3 above has been adopted in each of these Agreements.

5. However, a number of our prospective partners, particularly the European countries such as France and Switzerland, have indicated difficulties in agreeing to adopt the “list” approach, as the approach is not compatible with their domestic law and practice which generally permit extradition in respect of all criminal offences with a penalty above a certain threshold. Negotiations with these countries have stalled as a result.

Proposed alternative formulation

6. It is in Hong Kong’s interest to be able to establish a wider network of SFO partners for the purpose of combating crime. We consider that an alternative formulation should be possible to both address the concerns mentioned in paragraph 5 above and satisfy the requirements of the Ordinance. The proposed alternative formulation is set out at **Annex B** and explained below.

7. Paragraph (1) of the proposed article will oblige the Parties to the Agreement to grant surrender in respect of offences for which surrender is permitted under their domestic law. As far as Hong Kong is concerned, surrender of fugitives will only be permitted for “relevant offences” as defined in section 2(2) of the Ordinance, i.e. the categories of offence specified in Schedule 1 to the Ordinance which carry more than 12 months’ imprisonment. Paragraph (1) will therefore not change the categories of offence for which surrender may be granted under the Ordinance.

8. Paragraph (2) of the proposed article complements paragraph (1) by ensuring that the Parties to the Agreement shall provide each other with a list of the offences for which surrender will be granted. For Hong Kong’s part the list of categories of offence in Schedule 1 to the Ordinance will be provided to the other Party. It can therefore be seen that although such offences will not be listed in the SFO Agreements, both Hong Kong and its partners will be clearly aware of the list of offences for which SFO is permitted.

9. The proposed new formulation will not change Hong Kong’s obligation with respect to SFO. The requirements under the Ordinance will invariably continue to be complied with. It is a mere adjustment of the approach to facilitate our negotiations with foreign jurisdictions, for the purpose of extending our partnership in bringing fugitive offenders to justice. The list of categories of offences for which surrender may be granted under the Ordinance will be preserved, although it is not explicitly specified in the SFO Agreements.

Way Forward

10. We intend to adopt either the list approach or the alternative approach set out in paragraphs 6 to 9 above in our future negotiations with prospective SFO agreement partners, depending on the circumstances of each individual case. Any future SFO Agreement concluded will only be implemented by an order made by the Chief Executive in Council and approved by the Legislative Council in accordance with section 3 of the Ordinance.

**Security Bureau
Department of Justice**

April 2005

**Provisions in the Model Text regarding
Offences for which Surrender is to be granted**

OFFENCES

(1) Surrender shall be granted for an offence coming within any of the following descriptions of offences in so far as it is according to the laws of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty :

1. Murder or manslaughter, including criminal negligence causing death; culpable homicide; assault with intent to commit murder
2. Aiding, abetting, counselling or procuring suicide
3. Maliciously wounding; maiming; inflicting grievous or actual bodily harm; assault occasioning actual bodily harm; threats to kill; intentional or reckless endangering of life whether by means of a weapon, a dangerous substance or otherwise; offences relating to unlawful wounding or injuring
4. Offences of a sexual nature including rape; sexual assault; indecent assault; unlawful sexual acts on children; statutory sexual offences
5. Gross indecency with a child, a mental defective or an unconscious person
6. Kidnapping; abduction; false imprisonment; unlawful confinement; dealing or trafficking in slaves or other persons; taking a hostage
7. Criminal intimidation
8. Offences against the law relating to dangerous drugs including narcotics, psychotropic substances, precursors and essential chemicals used in the illegal manufacture of narcotics and psychotropic substances; offences relating to the proceeds of drug trafficking
9. Obtaining property or pecuniary advantage by deception; theft; robbery; burglary (including breaking and entering); embezzlement; blackmail; extortion; unlawful handling or receiving of property; false accounting; any other offence in respect of property or fiscal matters involving

fraud; any offence against the law relating to unlawful deprivation of property

10. Offences against bankruptcy law or insolvency law
11. Offences against the law relating to companies including offences committed by officers, directors and promoters
12. Offences relating to securities and futures trading
13. Offences relating to counterfeiting; offences against the law relating to forgery or uttering what is forged
14. Offences against the law relating to protection of intellectual property, copyrights, patents or trademarks
15. Offences against the law relating to bribery, corruption, secret commissions and breach of trust
16. Perjury and subornation of perjury
17. Offence relating to the perversion or obstruction of the course of justice
18. Arson; criminal damage or mischief including mischief in relation to computer data
19. Offences against the law relating to firearms
20. Offences against the law relating to explosives
21. Offences against the law relating to environmental pollution or protection of public health
22. Mutiny or any mutinous act committed on board a vessel at sea
23. Piracy involving ships or aircraft
24. Unlawful seizure or exercise of control of an aircraft or other means of transportation
25. Genocide or direct and public incitement to commit genocide
26. Facilitating or permitting the escape of a person from custody

27. Offences against the law relating to the control of exportation or importation of goods of any type, or the international transfer of funds
28. Smuggling; offences against the law relating to import and export of prohibited items, including historical and archaeological items
29. Immigration offences including fraudulent acquisition or use of a passport or visa
30. Arranging or facilitating for financial gain, the illegal entry of persons into a jurisdiction
31. Offences relating to gambling or lotteries
32. Offences relating to the unlawful termination of pregnancy
33. Stealing, abandoning, exposing or unlawfully detaining a child; any other offences involving the exploitation of children
34. Offences against the law relating to prostitution and premises kept for the purposes of prostitution
35. Offences involving the unlawful use of computers
36. Offences relating to fiscal matters, taxes or duties
37. Offences relating to unlawful escape from custody; mutiny in prison
38. Bigamy
39. Offences relating to women and girls
40. Offences against the law relating to false or misleading trade descriptions
41. Offences relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement
42. Impeding the arrest or prosecution of a person who has or is believed to have committed an offence for which surrender may be granted under this Agreement

43. Offences for which persons may be surrendered under multi-lateral international conventions; offences created as a result of decisions of international organizations
44. Conspiracy to commit fraud or to defraud
45. Conspiracy to commit, or any type of association to commit, any offence for which surrender may be granted under this Agreement
46. Aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting to commit any offence for which surrender may be granted under this Agreement

The Proposed Alternative Formulation

OFFENCES

- (1) Surrender shall be granted for an offence:
 - (a) which is punishable under the laws of both Contracting Parties by imprisonment or other form of detention for more than one year or a more severe penalty, and
 - (b) for which surrender is permitted by the law of the Requested Party.
- (2) Each Contracting Party shall provide to the other a list of the offences for which surrender may be granted under its law. Each Contracting Party shall provide such a list no later than the date on which it notifies the other Contracting Party that its requirements for the entry into force of this Agreement have been complied with. Each Contracting Party shall promptly inform the other of any subsequent changes to its list.