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**Paper for the House Committee meeting on 18 October 2002**

**Report of the Subcommittee to study  
issues relating to the Fugitive Offenders (Sri Lanka) Order**

**Purpose**

This paper reports on the deliberations of the Subcommittee to study issues relating to the Fugitive Offenders (Sri Lanka) Order.

**Background**

2. The Fugitive Offenders (Sri Lanka) Order (L.N. 203 of 2001) is made under section 3 of the Fugitive Offenders Ordinance (Cap. 503) (the Ordinance). It sets out the limitations, restrictions, exceptions and qualifications applicable between the Hong Kong Special Administrative Region (HKSAR) and the Democratic Socialist Republic of Sri Lanka in relation to the procedures in the Ordinance for the surrender to one another of fugitive offenders.

3. This Order is made consequential upon the agreement to the arrangements for the surrender of fugitive offenders signed by the HKSAR Government and the Government of the Democratic Socialist Republic of Sri Lanka (HKSAR/Sri Lanka Agreement) on 3 September 1999.

4. At the meeting of the House Committee on 26 October 2001, Members agreed that a subcommittee be formed to study the Fugitive Offenders (Sri Lanka) Order and the Fugitive Offenders (Portugal) Order. The Subcommittee on Fugitive Offenders (Sri Lanka) Order and the Fugitive Offenders (Portugal) Order (the then Subcommittee) reported its deliberations to the House Committee on 16 November 2001.

5. The then Subcommittee was concerned about the implications of Article 6(2) of the HKSAR/Sri Lanka Agreement. It requested the Administration to provide detailed information on the international conventions concerning suppression of terrorism, how the provisions of the Ordinance worked and where the dividing line for substantial conformity lay.

6. As there were issues relating to the Fugitive Offenders (Sri Lanka) Order that needed to be further discussed with the Administration, the then Subcommittee recommended that the Order should be repealed.

7. The Chairman of the then Subcommittee, Hon James TO Kun-sun, moved a motion at the Council meeting on 21 November 2001 to repeal the Fugitive Offenders (Sri Lanka) Order. The motion was passed by the Council.

### **The Subcommittee**

8. At the House Committee meeting on 23 November 2001, Members agreed that a subcommittee be formed to study issues relating to the Fugitive Offender (Sri Lanka) Order. The membership list of the Subcommittee is in **Appendix I**.

9. Under the chairmanship of Hon James To Kun-sun, the Subcommittee has held three meetings with the Administration. The Subcommittee has considered submissions from the Hong Kong Human Rights Monitor (HKHRM), the Hong Kong Bar Association, The Law Society of Hong Kong and Ms Janice Brabyn, a lecturer of the Department of Law of The University of Hong Kong.

### **Deliberations of the Subcommittee**

#### Surrender of nationals

10. Under Article 3 of the HKSAR/Sri Lanka Agreement, the Government of Sri Lanka reserves the right to refuse the surrender of its citizens, and the Government of the HKSAR reserves the right to refuse the surrender of nationals of the People's Republic of China (PRC).

11. Members and the HKHRM have queried why the HKSAR/Sri Lanka Agreement only provides the HKSAR Government the right to refuse the surrender of PRC national, while the right to refuse the surrender of permanent residents of the HKSAR is not covered. They have pointed out that permanent residents of the HKSAR may not necessarily be PRC nationals, and express concern about the protection to these permanent residents. The HKHRM considers that a provision to permit refusal of the surrender of HKSAR permanent residents should be included, as Chinese and non-Chinese permanent residents should be treated equally.

12. The Administration has explained that it has not been a practice for common law jurisdictions to refuse surrender of their nationals. It has also not been a feature of Hong Kong's practice in extradition to refuse the surrender of its sovereign's nationals or Hong Kong permanent residents. Although section 13(4) of the Ordinance provides the right to refuse the surrender of PRC nationals, this provision has so far not been invoked and is intended to be used very rarely. The main reason for such a provision in surrender of fugitive offender agreements is to cover a situation in future where arrangements exist to permit the rendition of persons from the HKSAR to the Mainland, and both the PRC and the requesting foreign jurisdiction have jurisdiction concurrently over the same offence. Such provision will enable priority to be given to a Mainland request for the rendition of a Mainland Chinese national over a foreign request for the extradition of the same person for the same offence.

13. In the view of the Administration, reserving the right to refuse the surrender of HKSAR permanent residents would not result in practical benefits for them from being not surrendered because it has not been a practice for the HKSAR to refuse surrender of its permanent residents.

#### Substantial Conformity with the Ordinance

14. Article 6(1) of the HKSAR/Sri Lanka Agreement provides that -

"A fugitive offender shall not be surrendered if the requested Party has substantial grounds for believing -

- (a) that the offence of which that person is accused or was convicted is an offence of a political character;
- (b) that the request for surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecution or punishment on account of race, religion, nationality or political opinions; or
- (c) that the person might, if returned, be prejudiced at that person's trial or punishment detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinions."

15. Article 6(2) provides that murder or manslaughter, any offence against the laws relating to explosive and any offence within the scope of any convention which is binding on both Parties and which obligates the Parties to prosecute or grant surrender for such offence shall not be considered to be offences of a political character.

16. Members have pointed out that under section 5(1)(a) of the Ordinance, a person shall not be surrendered if it appears to the appropriate authority that the offence in

respect of which surrender is sought is an offence of a political character. Section 3(9) of the Ordinance provides that a Fugitive Offender Order shall not be made unless the arrangements for the surrender of fugitive offenders are substantially in conformity with the provisions in the Ordinance. Members have raised concern whether Article 6(2) is substantially in conformity with the Ordinance, and whether Article 6(2) is consistent with international trends in the area of extradition law.

17. The Administration has responded that Article 6(1)(a), (b) and (c) of the HKSAR/Sri Lanka Agreement corresponds to section 5(1)(a), (c) and (d) of the Ordinance. The only difference between the provisions in the Agreement and the Ordinance is the exception created by Article 6(2). The Administration does not consider that this exception results in the Agreement failing to be in substantial conformity with the Ordinance.

18. The Administration has explained that the courts have been unable to provide an exhaustive definition of what amounts to an offence of a political character. In considering whether an offence is an offence of a political character, the courts would take into consideration two factors. The first factor is the motive of the jurisdiction requesting extradition. If the motive is other than the normal enforcement of the criminal law, the offence itself may be treated as an offence of a political character. If this factor is not present, the courts would look at the second factor, the political motivation of the fugitive committing the offence. Article 6(1)(b) of the HKSAR/Sri Lanka Agreement covers the first factor taken into account by the courts, and Article 6(1)(c) covers the second factor.

19. The Administration has further explained that the courts, in ruling upon whether certain offences are offences of a political character within the meaning of provisions similar to Article 6(1)(a), have laid down criteria which are very similar to the grounds for refusing surrender that are explicitly set out in Article 6(1)(b) and (c). The exception created by Article 6(2) does not apply to Article 6(1)(b) and (c). Under section 3(1) of the Ordinance, limitations, restrictions, exceptions and etc. are permitted to be made in bilateral agreements signed between HKSAR and other jurisdictions. Because of the narrow scope of the qualification in Article 6(2) of the political offence exception, i.e. only three offences are excluded from being regarded as political offences for the purpose of Article 6(1)(a), the Administration considers that the HKSAR/Sri Lanka Agreement is substantially in conformity with section 5 of the Ordinance.

20. Regarding the international trend in respect of political offence exception, the Administration has provided members with information on the European Convention on the Suppression of Terrorism 1977, United Nations Convention for the Suppression of Terrorist Bombings 1998, United Nations Convention for the Suppression of the Financing of Terrorism 2000 and United Nations Security Council Resolution 1373. The Administration has pointed out that, as evidenced by these Conventions and decisions of the United Nations Security Council, the international trend is to limit the political offence exception as far as terrorist activity is concerned. Jurisdictions to

which these instruments apply should ensure that their domestic law reflects the limitations on the political offence exception contained therein.

21. The Administration has further pointed out that the existing Fugitive Offenders Orders in respect of the bilateral agreements with Australia, India, Malaysia, the Philippines and the United States as well as the Order implementing the extradition obligations in the Genocide Convention have set out limitations on the scope of the political offence exception.

22. Ms Janice Brabyn, a lecturer of the Department of Law of The University of Hong Kong has suggested that even though Article 6(2) may be technically compatible with the Ordinance, it should not be accepted in the absence of a clear legislative mandate. The Administration does not consider that such a mandate is necessary. Nevertheless, it has undertaken to consider amending the Ordinance to give a clearer legislative mandate for future Orders to specify exceptions to the political offence restriction on surrender contained in section 5(1)(a) of the Ordinance. The Administration has stressed that such an amendment would, however, be for the avoidance of doubt.

23. Since a number of previous Orders which contain such exceptions have been validly made in accordance with the provisions of section 3(1) and (9) of the Ordinance, and Sri Lanka has already completed its internal procedures for implementing the Agreement, the Administration considers that the making of the Fugitive Offenders (Sri Lanka) Order should not be delayed.

24. Members note that the Hong Kong Bar Association is of the view that Article 6(2) is substantially in conformity with the provisions of the Ordinance, and The Law Society of Hong Kong has no objection to the arrangements proposed in the Fugitive Offenders (Sri Lanka) Order.

#### Human rights situation in Sri Lanka

25. Members share the concern of the HKHRM about the human rights situation in Sri Lanka. The HKHRM has pointed out that the guarantee of a fair trial is the prerequisite for concluding any agreement on surrender of fugitive offenders with another jurisdiction. It is a fundamental assumption that the Parties to an extradition agreement will act in good faith and ensure that a surrender fugitive will be guaranteed a fair trial. The years of civil war and the prolonged state of emergency make it extremely doubtful whether a fugitive offender would receive a fair trial in Sri Lanka. The HKHRM has made particular reference to the concerns about human rights abuses in Sri Lanka in reports of the United Nations (UN) Commission and the United States Department of State issued between 1995 to 2000. For example, Sri Lanka has been under the regime of the Emergency Regulations and Prevention of Terrorism Act since 1983. This statute gives the security forces and police wide powers of arbitrary arrest and detention without trial.

26. The Administration does not agree that because there have been reports of human rights abuses in the context of the civil war in Sri Lanka, it follows that a returned fugitive offender will not have a fair trial. The Administration has advised that internationally accepted safeguards have been incorporated into the Constitution of Sri Lanka and in the Rules of Evidence and Procedures to protect the rights of the accused. In accordance with the cease-fire agreement which came into force on 23 March 2002, the Government of Sri Lanka has undertaken to refrain from making arrests or detaining suspects under the provisions of the Prevention of Terrorism Act. Any necessary arrests will be made pursuant to the normal criminal law, i.e. the Code of Criminal Procedure Act.

27. According to the Administration, the Government of Sri Lanka has also established several committees to look into human rights problems in the country and taken steps to implement the recommendations of these committees. Sri Lanka has been opening up to independent scrutiny of its human rights situation. It has invited UN bodies to visit Sri Lanka. In addition, Sri Lanka has as recent as early 2001 concluded a bilateral extradition agreement with the United States which has been approved by the US Senate and Congress. In the view of the Administration, there is no evidence that a fugitive returned from Hong Kong to Sri Lanka will suffer adversely because of any situation of internal conflict.

28. At the request of members, the Administration has provided the concluding observations made in the reports of the UN bodies after their visit to Sri Lanka. These UN bodies are the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1997), UN Secretary General's Special Representative for Children and Armed Conflict (1998), UN Working Group on Enforced or Involuntary Disappearances (1998) and Committee Against Torture (1998).

29. Given the concern about the human rights situation in Sri Lanka, the Administration has undertaken to consider, in each case, whether a review of the general human rights situation in a particular jurisdiction should be conducted before negotiations for an surrender of fugitive offenders agreement are commenced.

### **The Subcommittee's view**

30. The Subcommittee does not object to the re-gazettal of the Fugitive Offenders (Sri Lanka) Order.

### **Follow-up actions by the Administration**

31. The Administration has undertaken -

- (a) To consider amending the Ordinance to give a clearer legislative mandate for future Orders to specify exceptions to the political offence restriction on surrender contained in section 5(1)(a) of the Ordinance (paragraph 22 above refers); and
- (b) To consider, in each case, whether a review of the general human rights situation in a particular jurisdiction should be conducted before negotiations for an surrender of fugitive offenders agreement are commenced (paragraph 29 above refers).

### **Advice Sought**

32. Members are invited to note the deliberations of the Subcommittee in paragraphs 10 to 30 above.

Council Business Division 2  
Legislative Council Secretariat  
8 October 2002

**Subcommittee to study issues relating to the  
Fugitive Offenders (Sri Lanka) Order**

**Membership list**

**Chairman** Hon James TO Kun-sun

**Members** Hon Margaret NG

Hon Jasper TSANG Yok-sing, GBS, JP

Hon Miriam LAU Kin-yee, JP

Hon Audrey EU Yuet-mee, SC, JP

(Total : 5 Members)

**Clerk** Mrs Sharon TONG LEE Yin-ping

**Legal Adviser** Mr KAU Kin-wah

**Date** 20 December 2001