

Issues considered by courts in proceedings relating to surrender of fugitive offenders under the Fugitive Offenders Ordinance

The application of the Fugitive Offenders Ordinance (Cap. 503) (the Ordinance) has been considered by the courts in committal proceedings before magistrates under section 10 of the Ordinance and challenges brought in higher courts against the committal orders and orders for surrender made under the Ordinance by way of application for habeas corpus under section 12 of the Ordinance or by way of judicial review. The issues involved are complex. According to our research undertaken within the limited period of time, the following are some of the issues that have been considered by the courts in the above proceedings.

Purpose of extradition under the Fugitive Offenders Ordinance

2. It has been held by the courts that the purpose of the extradition process under the Ordinance as a whole, or the committal hearing before a magistrate, which is part of that process, is not to determine the guilt or innocence of an accused person. It is merely an inquiry to determine whether there is sufficient evidence to warrant sending the fugitive to the demanding State so that he may stand trial in that State. Because persons are only surrendered to states with which Hong Kong has reached extradition agreements, it is taken that an accused person will enjoy a fair and impartial trial in the state seeking his surrender¹.

Courts' approach to interpreting extradition legislation

3. The courts considered that it is necessary to adopt a balanced approach in extradition law. Throughout extradition law there are two principal threads. First, in exercising powers of extradition, courts of law must be vigilant to protect individuals from the overreaching of their rights by the government. Justice to the individual is always of supreme importance. Secondly, the courts considered that it is imperative of legal policy that extradition law must, wherever possible, be made to work effectively. While the courts considered that there was some controversy about this point, they recognized the importance that extradition should function properly given the transnational interest in bringing suspected

¹ *R. v. Schmidt* (1987) 33 C.C.C. (3rd) 193, La Foret J cited in *Cheng Chui Ping v The Chief Executive of HKSAR and The United States of America* HCAL 1366/2001, CFI.

criminals who have fled abroad to justice through extradition process. Accordingly, the courts have held that extradition treaties and extradition statutes ought to be accorded a broad and generous construction so far as the text permits in order to facilitate extradition².

Committal proceedings before a magistrate

Procedure of committal proceedings

4. In committal proceedings held pursuant to the making of a request for surrender, a magistrate is to consider the evidence which accompanies the request for surrender detailing the conduct of the alleged offender in order to establish whether it is such that a jury, properly directed, could convict upon it - the *prima facie* case test³. The magistrate is not required to weigh the evidence or to decide the credibility of witnesses; his duty is to determine if the evidence would justify the committal of the fugitive for trial if the alleged crime had been committed in the requested State. The trial and the full determination of the fugitive's rights will take place in the courts of the demanding country⁴. The rules of evidence to be applied to the material before the magistrate in order for him to determine whether a *prima facie* case has been established are those of the requested State⁵, which would be Hong Kong if Hong Kong is requested to surrender a fugitive⁶.

5. Courts both in Hong Kong and in other jurisdictions consistently have emphasised, irrespective of the particular legislative regime in effect at any given time, the unique nature of extradition proceedings and the necessity to maintain the simplicity of their procedure. The procedure

² *Ho Man Kwong v Superintendent of Lai Chi Kok Reception Centre and The Commonwealth of Australia* HCAL 17/2011, CFI; *Cartwright and Another v Superintendent of Her Majesty's Prison and Another* [2004] 1 WLR 902 Lord Steyn; *Re Ismail* [1999] 1 AC 320, HL.

³ See *Cherk Ching v Superintendent of Lai Chi Kok Reception Centre and Anothe.* [2005] 4 HKLRD 105; *Lay Eng Teo v Superintendent of Tai Lam Centre for Women and United States of America* CACV 3897/2001 [2002] 4 HKC 384; *Re Chong Bing Keung* [2000] 1 HKC 256, CA.

⁴ *Re United States of America & Smith* (1984) 10 C.C.C. (3d) 540 at 554, Houlden J, quoted in *See Cherk Ching* above.

⁵ See, for example, *R v Governor of Pentonville Prison, ex parte Kirby* [1979] 1 WLR 541 at 543H; *R v Governor of Pentonville Prison, ex parte Chinoy* [1992] 1 All E R 317; *Attorney General v LUI Kin Hong Jerry* CACV125/1996) adopted in *Ho Man Kwong*.

⁶ *Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre and the Commonwealth of Australia* HCAL 17/2011, CFI.

departs many of the checks and balances which one finds in other areas of the law, particularly with developments in human rights law: three of the more striking departures are that there is no right of cross-examination; discovery is not available; there is no right to lead evidence which contradicts evidence tending to show the commission of the offence in respect of which extradition is sought. The courts considered that there are good reasons for these departures: the proceedings before the magistrate are a consequence of international agreements based upon comity and reciprocity; it is taken that the requesting party acts in good faith; the magistrate's function is to determine whether there is a *prima facie* case for a fugitive to answer; the proceedings before the magistrate do not determine guilt or innocence of the fugitive, which is reserved for decision in the event that he is extradited; it is not the magistrate but the Chief Executive, who decides whether a person should be surrendered; there is the protection of habeas corpus proceedings; and the necessity for a committing magistrate to be required to decide matters of foreign law is avoided⁷.

Matters to be considered by the court of committal

6. The matters to be considered by the magistrate in determining whether there is a *prima facie* case are set out in section 10(6)(b) of the Ordinance. These matters include whether there has been a relevant offence, whether the supporting documents had been produced and were duly authenticated and whether the evidence produced would be sufficient to warrant committal for trial according to Hong Kong law if the offence had been committed in Hong Kong. The magistrate is also required to have regard to section 5 of the Ordinance which prohibits the surrender of a person or the keeping in custody of a person for the purposes of surrender in specified circumstances. It has been held by the courts that once the requirements of the Ordinance and the relevant subsidiary legislation have been complied with, extradition should follow except if there are clear and cogent circumstances which would dictate that that should not happen⁸.

7. Apart from the matters specified in sections 5 and 10 of the Ordinance as well as the provisions in the arrangements for the surrender

⁷ *Ho Man Kwong v Superintendent of Lai Chi Kok Reception Centre and The Commonwealth of Australia* HCAL 17/2011, CFI.

⁸ *Cheng Chui Ping v The Chief Executive of the Hong Kong Special Administrative Region and The United States of America* CACV 138/2002, CA.

of fugitive offenders applicable to Hong Kong and the place outside Hong Kong as recited in the relevant order made by the Chief Executive in Council under section 3 of the Ordinance, the magistrate is not required to consider any other matters not so specified. Thus, it has been held by the courts that the magistrate was not required to consider whether prosecution of the offences in respect of which the surrender was requested in the requesting State was there time-barred as there is no provision in the Ordinance about time limits for prosecution in the requesting country⁹.

8. In committal proceedings, the magistrate was to restrict himself to the question of whether the evidence produced to him would, according to the law of Hong Kong, amount to an offence listed in the Schedule to the Ordinance in Hong Kong and to avoid considerations of the substantive law of the requesting State¹⁰.

Whether magistrates have the duty to give reasons for their decisions

9. The question of whether a magistrate in extradition proceedings is under a duty to give reasons was considered by the Court of First Instance in *Cosby v Government of the USA and Another*¹¹. It was held that there was no legal duty for the magistrate to give reasons explaining his decision to order a person's committal, beyond saying that there was sufficient evidence to do so¹².

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⁹ *Cheng Chui Ping v Superintendent of Tai Lam Centre for Women and Another* [2000] 3 HKC 777, CFI; *Cheng Chui Ping v The Chief Executive of the Hong Kong Special Administrative Region and The United States of America*, CACV 138/2002, CA.

¹⁰ *Re Nielsen* [1984] AC 606 (HL) applied in *Cosby v Chief Executive HKSAR*, CFI [2000] 3 HKC 662.

¹¹ [2000] 3 HKC 688.

¹² *Cosby v Government of the USA and Another* [2000] 3 HKC 688; *Lay Eng Teo v Superintendent of Tai Lam Centre and The United States of America* HCAL 540/2001.