HCAL001366/2001

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IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 1366 OF 2001

BETWEEN

CHENG CHUI PING	Applicant
AND	
THE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION	1st Respondent
THE UNITED STATES OF AMERICA	2nd Respondent

Coram: Hon Hartmann J in Court

Dates of Hearing: 20 and 21 December 2001

Date of Handing Down Judgment: 7 January 2002

J U D G M E N T

Introduction

1. The applicant in these proceedings seeks an order of *certiorari* to quash a decision of the Chief Executive of the Hong Kong Special Administration Region ('the Chief Executive'). The decision is one dated 28 May 2001 made pursuant to section 13 of the Fugitive Offenders Ordinance, Cap.503 ('the Ordinance'). In terms of that decision, the Chief Executive ordered that the applicant be surrendered to the United States of America ('the United States') to stand trial there for various criminal offences.

2. This Court is urged to exercise its supervisory jurisdiction for two reasons, first, because, in determining whether the applicant should or should not be surrendered, the Chief Executive failed to take into account matters that he was obliged to take into account, that failure rendering his decision unlawful. Second, because the decision-making process has been so undermined by procedural impropriety that it cannot stand.

3. The first challenge, that of illegality, is founded on the assertion that, in determining whether the applicant should be surrendered, the Chief Executive failed to take into account 'the fact' that prosecution of the crimes for which the applicant is to be surrendered to the United States is now prevented by the effluxion of time under the laws of that state; in short, that the crimes are time-barred. Alternatively, it is asserted that the Chief Executive failed to take into account that, even if the time-bar assertion is not fully demonstrated on the applicant's papers, there is nevertheless a compelling argument that the crimes are time-barred.

4. As to why the Chief Executive should be burdened with the resolution of what is clearly a purely legal question of whether, under United States law, the crimes for which surrender is sought are (or may be) time-barred, it is contended by Mr Bruce, on behalf of the applicant, that, on the basis of the provisions of art. (8)(2)(c) of the Fugitive Offenders (United States of America) Order (L.N. 42 OF 1998), the agreement entered into between Hong Kong and the United States governing the mutual surrender of fugitives, the matter of time limitations is clearly a relevant consideration. On that basis, two arguments are advanced, each complementary to each other.

5. First, it is argued that, if the Chief Executive found as a matter of law that the crimes for which surrender is sought were time-barred or that, at least, there was an argument of such strength on the matter that it amounted to a compelling argument that they were time-barred, then it would be unlawful and/or irrational in the *Wednesbury* sense to return the applicant to face criminal charges in a country which did not have the power to prosecute those charges.

6. Second, it is argued that it would be unjust or oppressive to surrender the applicant against her will - a process depriving her of her right to liberty - when she would not at the end of it be the subject of any substantive trial process. As Mr Bruce expressed it : "If the offences are time-barred the applicant says that her right to liberty and security of person is breached both now and prospectively. She would be returned against her will to the US to face charges the US cannot now bring against her."

7. The second challenge, that of procedural impropriety, falls under two sub-headings. First, it is asserted that, if the Chief Executive required legal advice to determine whether the applicant should be surrendered, that advice had to come from an independent and impartial source, that is, from a source patently seen to be such. Contrary to that obligation of procedural fairness, the Chief Executive followed the traditional path of obtaining advice from the Department of Justice, the same body that has provided assistance to the United States, the party seeking the applicant's surrender. Second, it is asserted that the Chief Executive, having reached his decision, was obliged to give reasons for that decision. This obligation arises whenever a decision under section 13 is to be made or, failing such general obligation, was an obligation which arose in the particular circumstances of this case. The Chief Executive, however, declined to give reasons for his decision.

8. In summary, this application for judicial review focuses on the manner in which the Chief Executive, in determining whether to order the surrender of a person pursuant to section 13 of the Ordinance, is obliged to discharge the statutory function imposed upon him.

Background

9. The applicant is wanted for trial in the United States in the jurisdiction of the Southern District of New York. In December 1994, a grand jury returned an indictment against the applicant. In the light of that indictment, a warrant for the applicant's arrest was issued.

10. At about that time, it appears that the applicant was ordinarily resident in the United States. However, sometime in late 1994, she left the country and the warrant of arrest was not served upon her.

11. In June 2000, a further grand jury returned what is called a superseding indictment. This indictment encompassed all of the criminal conduct alleged against the applicant in the original indictment but also contained allegations of further criminal conduct. The superseding indictment contained seven charges. They state the United States offences for which the applicant's surrender is sought.

12. The first charge alleges that the applicant was a member of a conspiracy which ran from 1984 to about April 2000. The business of that conspiracy was to smuggle aliens into the United States (people from the People's Republic of China) and to hold them hostage in order to extract ransom monies from their families. The conspiracy further involved unlawful dealing in the receipt, possession and transfer of funds. The maximum sentence for such an offence of conspiracy in the United States is imprisonment for five years together with substantial pecuniary penalties.

13. The second and third charges allege that the applicant took part in the substantive crimes of taking hostage a number of the smuggled aliens and threatening them with death or injury in order to extract ransom monies from their families. It is alleged that the first of these offences took place in or about September 1992 when some 130 aliens were taken hostage while the second offence took place in or about April 1993 when some 30 aliens were taken hostage. The maximum sentence for offences of this nature in the United States is life imprisonment together with substantial pecuniary penalties.

14. The fourth, fifth, sixth and seventh charges all relate to the unlawful receipt, holding and transmission of monies arising out of the crimes detailed in the first two charges. The fourth charge alleges an offence in or about March 1991; the fifth charge an offence in or about December 1992; the sixth charge an offence in or about September 1993 and the seventh charge an offence in or about March and April 1994. The maximum sentences for monetary offences of this nature in the United States range from five to twenty years' imprisonment, together with substantial pecuniary penalties.

15. The broader criminal conduct reflected in the United States indictment has been described by Stock J (as he then was) in an earlier decision of this Court made when a writ of *habeas corpus* was sought by the applicant. See **Cheng Chui Ping v. Superintendent of Tai Lam Centre for Women & Another** [2000] 3 HKLRD 694. I can do no better than repeat the words of the Judge :

> ".... There was before the Magistrate a duly authenticated bundle of evidence in the form of a number of affidavits. They included an affidavit from Mr Michael McGovern, an Assistant United States Attorney, who is assigned to the Organized Crime and Terrorism Unit of the United States Attorney's Office.
>
> Put very broadly indeed, the nature of the evidence against the applicant is that she conducted extensive smuggling operations whereby she imported into the United States illegal immigrants from the Mainland of China. She did so according to these allegations in return for very large sums of money and employed crime gangs to assist her. Once the illegal immigrants were on USA soil, she then saw to it, it is alleged, that they were unlawfully detained, the object and duration of the detention being to ensure payment of the smuggling fees by their relatives abroad. In one transport, which is the subject of the US indictment, she is said to have smuggled 130 persons from Fujian province, undertaking to pay a gang US$750,000 for their assistance in bringing the immigrants in from a boat off shore. It is said that they were detained in an apartment in New York until the smuggling fees had been received. There is evidence about other smuggling operations, one including the smuggling of 300 persons from the Mainland of China into the United States of America and another in which it is said that in March 1994, she was involved in smuggling 105 persons into the United States abroad a Thai freighter."

16. Viewed as a whole, therefore, the criminal conduct alleged encompasses not only unlawful trafficking in people but the exploitation of their vulnerability in order to extort money from them and their families. No suggestion has been made that what is alleged is a political offence or an offence of a purely technical nature; nor is there, as far as I am aware, any suggestion that, leaving aside the time-bar issue, it would be unjust or oppressive to try this applicant on the merits. What is alleged by the United States authorities is gross criminal conduct, universally deplored, international in its ramifications. *Inter alia*, these are matters, in my judgment, which are relevant to the decision-making power of the Chief Executive in terms of section 13 of the Ordinance, a power that has been described as 'political in its nature' and one which obliges the Chief Executive to weigh the representations of the applicant against Hong Kong's international treaty obligations. See **Idziak v. Minister of Justice et al** (1993) 77 CCC (3rd) 65, per Cory J at page 86.

17. On 17 April 2000, the applicant, being found in Hong Kong, was arrested at Chek Lap Kok Airport pursuant to a warrant for her provisional arrest issued in accordance with section 7(1)(b) of the Ordinance.

18. On 15 June 2000, the Chief Executive issued an authority to proceed. The authority was issued in terms of section 6 of the Ordinance and stated :

> " A request for surrender having been received from the United States of America for the surrender of CHENG Chui-ping, also known as 'Sister Ping', who is wanted in the said place for prosecution in respect of offences of :
>
> 1. arranging or facilitating for financial gain the illegal entry of persons into a jurisdiction, and
>
> 2. false imprisonment
>
> I hereby order that the said person be dealt with under Part II of the Fugitive Offenders Ordinance, Cap. 503, Laws of Hong Kong."

19. In terms of the authority to proceed, it was ordered that proceedings for committal in terms of section 10 of the Ordinance should take place. Those proceedings were heard on 21 and 22 August 2000. At their conclusion, the magistrate committed the applicant to custody to await the decision of the Chief Executive as to her surrender to the United States.

20. The order of committal was couched in terms which looked to the alleged criminal conduct of the applicant and expressed that conduct in terms known to our law. The order read :

> "Pursuant to s.10(6)(b) of the Fugitive Offenders Ordinance (Cap.503), I hereby order Cheng Chui Ping be committed to custody:
>
> (a) in respect of the following offences:
>
> (i) Cheng Chui Ping, between 1 July 1984 and 30 June 1985, conspired with others to arrange to assist the passage of unauthorised entrants, namely Weng Yu Hui and other persons; *being an offence of arranging or facilitating for financial gain the illegal entry of persons into a jurisdiction*;
>
> (ii) Cheng Chui Ping, on days unknown between 1 January 1985 and 30 June 1985, together with other persons, by force detained Weng Yu Hui against her will, with intent to procure a ransom for her liberation; *being an offence of false imprisonment*;
>
> (iii) Cheng Chui Ping, in or about March 1991, did an act preparatory to or for the purpose of arranging or assisting the passage of unauthorized entrants, namely did transmit the sum of US$30,000 to Thailand on behalf of Weng Yu Hui; *being an offence of arranging or facilitating for financial gain the illegal entry of persons into a jurisdiction*;
>
> (iv) Cheng Chui Ping, between 1 January 1992 and 31 December 1992, conspired with others to arrange or assist the passage of 130 unauthorised entrants; *being an offence of arranging or facilitating for financial gain the illegal entry of persons into a jurisdiction*;
>
> (v) Cheng Chui Ping, in or about September 1992, together with other persons, by force detained 130 unauthorised entrants against their will, with intent to procure a ransom for their liberation; *being an offence of false imprisonment*;
>
> (vi) Cheng Chui Ping, between 1 September 1991 and 1 July 1993, conspired with others to arrange or assist the passage of 300 unauthorised entrants; *being an offence of arranging or facilitating for financial gain the illegal entry of persons into a jurisdiction*;
>
> (vii) Cheng Chui Ping, in or about October or November 1992, did an act preparatory to or for the purpose of arranging or assisting the passage of unauthorized entrants, namely did transmit the sum of US$300,000 to Thailand on behalf of Guo Liang Qi; *being an offence of arranging or facilitating for financial gain the illegal entry of persons into a jurisdiction*;
>
> (viii) Cheng Chui Ping, in or about March and April 1994, did aid and abet other persons in the forcible detention of 105 unauthorised entrants against their will, with intent to procure a ransom for their liberation; *being an offence of false imprisonment*;

(b) to await the Chief Executive's decision as to her surrender, in respect of these offences, to the United States of America by which the request for surrender in respect of Cheng Chui Ping was made; and

(c) if the Chief Executive decides that she shall be surrendered to the United States of America, to await such surrender."

21. It was during proceedings before the magistrate that it was first asserted that the crimes for which the applicant was wanted for trial in the United States were time-barred according to the law of that state. The magistrate was invited to receive evidence of the applicable law so that he could determine the issue. The magistrate declined to do so, ruling that he had no jurisdiction to determine whether prosecution for the United States offences was time-barred.

22. In September 2000, having been committed to await her surrender, the applicant applied to this Court for a writ of *habeas corpus*. As I have indicated earlier, the application came before Stock J. The issue was that of the alleged time-bar on the prosecution of offences in the United States. It was submitted that the magistrate had been obliged in law to determine that issue and had been obliged to receive evidence of the applicable law so that he could do so. In a judgment dated 27 September 2000, Stock J dismissed the application. The magistrate, he said, had been under no such obligation.

23. The day after Stock J delivered his judgment, the solicitors representing the applicant wrote to the International Law Division of the Department of Justice to give formal notice that the applicant intended to request the Chief Executive not to order her surrender on the basis that the offences for which her surrender was sought were time-barred. The solicitors sought assistance in respect of the 'appropriate procedures' to be adopted to make the necessary representations.

24. In a letter dated 14 October 2000, an officer in the International Law Division of the Department of Justice advised that the applicant's representations should be sent to the Legal Policy Division of the Department, that division being responsible for forwarding such representations to the Chief Executive for his consideration.

25. Ms Wu Yuk Fung, a Senior Government Counsel in the Department of Justice, has (by way of affirmation) given evidence in the present proceedings as to the allocation of responsibilities in the Department. She has explained that the Department has six divisions, one being the International Law Division, another being the Legal Policy Division. Concerning the International Law Division, she has said :

> " The Mutual Legal Assistance Unit of the International Law Division may be requested by foreign governments to advise and represent them in legal proceedings conducted in Hong Kong. In the present case, the committal proceedings against the Applicant and her subsequent habeas corpus application were handled by the International Law Division."

Concerning the Legal Policy Division, she has said :

> " One of the functions and duties of the Legal Policy Division is to advise the Chief Executive on requests for surrender. It is not and has never been the function or duty of the Legal Policy Division to represent or give advice to foreign governments in seeking extradition of persons from Hong Kong. The legal advice to the Chief Executive in connection with the order for surrender was given by the Solicitor General who heads the Legal Policy Division. He played no part in either the committal proceedings or the habeas corpus application. Indeed both as a matter of practice and in the present case, the Legal Policy Division does not and has not given any advice or representation whatsoever to the Government of the United States of America, and at no time did the Legal Policy Division represent or advice the Government of the United States of America in any matter concerning that state's request for surrender of the Applicant."

26. It is, therefore, apparent that in all matters pertaining to the exercise of the Chief Executive's discretion to surrender the applicant, if legal advice was required, it was given by members of the Department's Legal Policy Division who had not represented nor given advice to the party seeking the applicant's surrender, namely, the United States. It would go too far to say that any form of 'Chinese wall' existed but there was a clear separation of responsibilities between the two divisions, the members of each being obliged to give full and objective advice to their respective 'clients'.

27. Having taken on responsibility for assisting the applicant to place her representations before the Chief Executive, Mr Scott, the Senior Assistant Solicitor General in the Legal Policy Division, wrote to the applicant's solicitors on 18 October 2000 in the following terms :

> "Under established practice, representations to the Chief Executive for or against surrender may be made in writing and addressed to the Legal Policy Division of this department. The representations will be forwarded to the Chief Executive for his consideration. In general terms, such a procedure was approved by Yeung J in **Chen Chong Gui v Chief Executive of HKSAR** [1998] 4 HKC 426, 433G-434B."

28. In the judgment to which reference was made in that letter, Yeung J determined essentially the same issues that have now been placed before me. I will make further reference to that judgment in due course. It is, of course, of considerable persuasive value. At this juncture, however, it suffices to refer to two of my learned brother's determinations.

29. First, Yeung J ruled that, in the process of determining whether to order the surrender of a fugitive pursuant to section 13, the Chief Executive was entitled to obtain legal advice from his officials and was not obliged to reveal that advice. In this regard, he said :

> " In making a policy decision such as the surrender of a fugitive to a foreign state, a minister is entitled to get advice, including legal advice from his officials. Such advice is always considered to be confidential and the minister should not be compelled to reveal such advice. ...."

30. Second, Yeung J ruled that, having made his decision in terms of section 13, the Chief Executive was under no obligation to give reasons for that decision. In this regard, he said :

> " There has always been the practice that the Chief Executive would not give reasons for an administrative decision such as an order for the surrender of a fugitive. Is such a practice per se unlawful or unfair which necessitates the intervention by the courts?
>
> There was no suggestion that the legislature required the Chief Executive to give any reasons for his decision in extradition cases. It is also well established that no such duty exists at common law."

31. However, Yeung J's determinations were not accepted as correct by those representing the applicant. Formal notice of this was given in a letter dated 22 December 2000 which (in part) read :

> " In the event that our above points concerning the procedure in *Chen Chong Gui* are not accepted by you, it is our view that there will not have been a transparent and fair process and we would reserve expressly the right to challenge any decision of the Chief Executive ...."

32. Thereafter, the applicant's solicitors submitted detailed written representations to support the contention that the crimes for which the applicant's surrender were sought were time-barred under United States law. In support of these representations, a lengthy legal opinion from the applicant's New York attorneys was obtained.

33. It is to be noted that when the United States Department of Justice were asked by the International Law Division to comment on this legal opinion, the applicant's New York attorneys were given an opportunity to reply to those comments and took advantage of that opportunity. That reply too formed part of the applicant's extensive representations.

34. In the event, Ms Cheng Wan Yuk, Principal Assistant Secretary for Security of the Government Secretariat, has given evidence (by way of affirmation) that the representations made on behalf of the applicant as to the time-bar issue and the representations on the same issue made by the United States Government were placed before the Chief Executive. In this regard, she has said :

> " The Security Bureau was responsible for, and I was involved in, providing administrative assistance to the Chief Executive to help him with his consideration of whether to make an order for surrender of the Applicant to the United States of America.
>
> ....
>
> .... I confirm that the Applicants and the U.S. Government have made or submitted .... representations to the Chief Executive and further confirm that *the Chief Executive did have all these representations before him for his consideration before he made the order for surrender*.
>
> ....
>
> The Chief Executive did not give reasons for his decision. This is in accordance with the long standing practice that no reason is given for this type of decision." *[my emphasis]*

35. Accordingly, when he determined the matter of surrender, the Chief Executive had before him for his consideration *both* the representations of the applicant and the United States in respect of the time-bar issue. It has always been an issue hotly in contention, one that involves disputed questions of fact as well as disputed contentions as to how properly United States law should be read. As Mr Yue, for the 1st respondent, emphasized, it must be appreciated that the time-bar issue is not (and has never been) a 'fact', as the applicant's counsel would have it, it can only accurately be described as being (always) 'an issue in dispute'. That, in my opinion, must be correct. The question, therefore, is whether the Chief Executive was obliged in law to himself resolve that dispute, if not fully then at least to the extent that he could determine whether it would be wrong, unjust or oppressive to order the applicant's surrender.

36. The answer to that question demands a consideration of the powers given and the duties imposed upon the Chief Executive under the Ordinance and the Fugitive Offenders (United States of America) Order ('the USA-Hong Kong Agreement') and thereafter a consideration of those powers in accordance with the established jurisprudential principles applicable to what are generically termed 'extradition proceedings'.

The Ordinance and the USA-Hong Kong Agreement

37. Section 13 of the Ordinance gives the power to the Chief Executive to order the surrender of a person. In this regard subsection (1) reads :

> " Where a person who has been committed pursuant to an order of committal ...., the Chief Executive may order him to be surrendered to the prescribed place by which the request for surrender concerned was made and shall specify in the order the offence or, as the case may be, offences in respect of which the person's surrender is so ordered, unless-
>
> > (a) the person's surrender is prohibited, or prohibited for the time being, by this Ordinance; or
> >
> > (b) the Chief Executive decides under this section to make no such order in that person's case."

38. Two categories are therefore created; one in which refusal to surrender is mandatory, one in which it is discretionary.

39. Section 5 of the Ordinance lists the circumstances in which refusal to surrender is mandatory. By way of illustration, the section begins :

> "(1) A person shall not be surrendered to a prescribed place, or committed to or kept in custody for the purposes of such surrender, if it appears to an appropriate authority--
>
> (a) that the offence in respect of which such surrender is sought is an offence of a political character (and irrespective of how that offence is described in the prescribed arrangements concerned);
>
> (b) ....
>
> (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;
>
> (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; or
>
> (e) that if the offence had occurred in Hong Kong, the law of Hong Kong relating to previous acquittal or conviction would preclude the prosecution, or the imposition or enforcement of a sentence, in respect of that offence."

40. Section 5 of the Ordinance does not prohibit surrender if, according to Hong Kong law or the law of the requesting state, the offences for which surrender is sought are determined to be time-barred. By contrast, it is to be noted that under subsection (1)(e) there is such a prohibition in respect of defences of *autrefois acquit or autrefois convict*.

41. Section 13 itself sets out specific circumstances in which the Chief Executive shall, in the exercise of his power, have the discretion not to order surrender. There are four such circumstances : first, where the person faces criminal charges in Hong Kong; second, where the person, if surrendered, may face the death penalty; third, where there are competing requests for surrender and to surrender to one state would mean a refusal to surrender to the other (or others) and, fourth, where the person to be surrendered is a national of the People's Republic of China. Section13 is silent on the matter of defences being time-barred.

42. The Ordinance does not, therefore, in stated terms, provide any form of bar to surrender where a prosecution for an offence is or may be time-barred. What then of the USA-Hong Kong Agreement, is any such bar, in stated terms, provided for in that treaty arrangement? Although various bars of other kinds are contemplated (see arts. 3, 4, 5, 6 and 7) no such bar is stated. As Stock J said in **Cheng Chui Ping v. Superintendent of Tai Lam Centre for Women & Another (supra)**, the judgment given in respect of this applicant's application for *habeas corpus* :

> ".... The arrangement does not bar surrender where a prosecution for an offence in the United States is time-barred. We have seen that in art.6, there is a provision reflected in the Ordinance that a fugitive offender shall not be surrendered if the offence of which the person is accused is an offence of a political character. We have seen that there is a bar in relation to the surrender for an offence where the person sought has been convicted or acquitted in the jurisdiction of the requested party. But there is no prohibition against surrender for offences the prosecution of which is time-barred. *There used to be; and that is significant. In the extradition treaty between the United States and the United Kingdom applied to Hong Kong before the entry into force of the present agreement, no doubt before July 1997, art.5 expressly stipulated that extradition would not be granted if prosecution for the offence for which extradition was requested had become barred by lapse of time according to the law of either the requesting or the requested party. ...." [my emphasis]*

43. In my judgment too it is significant that the previous treaty arrangement with the United States was governed by a provision prohibiting extradition if prosecution was barred by lapse of time according to the law of either Hong Kong or the United States but no such provision appears in the present arrangement. That omission was clearly intended.

44. Abbell and Ristau, the authors of *International Judicial Assistance* (Vol. 4, International Law Institute, Washington D.C.), in considering the evolving nature of United States extradition treaties, speak of provisions concerning time limitations on the prosecution of offences. While earlier treaties invariably included such provisions, those more recently concluded do not. This, say the authors, is to avoid the difficulties occasioned by requested states having to decide whether applicable limitation laws in requesting states do or do not bar prosecution. In particular, the authors refer to the 1984 treaty between the United States and Ireland and say, at 107:

"Because of the problems ..... with respect to the proscription of extradition through the application of either the requesting or requested countries' statutes of limitations, the treaty between the United States and Ireland, which entered into force in 1984, purposely left out any provision relating to statutes of limitations, thereby leaving the issue of whether prosecution is barred by reason of lapse of time to be raised as a defense at trial in the requesting country. Since the Irish treaty, the United States has signed several extradition treaties that either contain no lapse of time provision, or expressly provide that the decision whether to grant extradition is to be made without regard to the statutes of limitations of either country. It is anticipated that the United States will endeavor to persuade its treaty partners to deal with this issue in this manner in future extradition treaty negotiations."

45. The only mention of time limits in the USA-Hong Kong Agreement appears in art. 8 under the heading of 'Required Documents' :

"(1) ....

(2) All requests shall be accompanied by:

(a) a description of the person sought, together with any other information which would help to establish his identity and nationality including, if known, his whereabouts;

(b) information describing the facts of the offence and the procedural history of the case; and

(c) *a statement of the provisions of the law describing the offence for which surrender is requested and a statement of the punishment which can be imposed therefor and a specification of any time limit which is imposed on the institution of proceedings*.

(3) If the request relates to a person wanted for prosecution, it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the requesting Party and by such evidence as, according to the law of the requested Party, would justify his committal for trial if the offence had been committed within the jurisdiction of the requested Party.

(4) If the request relates to a person found guilty, convicted or sentenced, it shall also be accompanied by:

(a) a copy of any certificate or record in relation to the finding of guilt, the conviction or the sentence; and

(b) if the person was found guilty or convicted but not sentenced, a statement or record to that effect by the appropriate court and a copy of the warrant of arrest; or

(c) if the person was sentenced, a statement that the sentence is enforceable and indicating how much of the sentence has still to be served." *[my emphasis]*

46. The time-bar point in these proceedings arises out the supply of required information under art. 8(2)(c). Mr McGovern, an Assistant United States Attorney, attested to the fact that :

> "Title 18, United States Code, s.3282, sets forth the statute of limitations that governs prosecutions of the offenses charged in the indictment. This section provides:
>
> > Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for an offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

47. Mr McGovern further attested that the applicant had left the United States in late 1994 after charges against co-conspirators had been brought and that, although she had since then re-entered the United States, she had done so under a false name, that is, in a clandestine manner. He said :

> ".... Accordingly, it is clear that she has been 'fleeing from justice' ever since her departure from the United States or about late 1994, and that the statute of limitations has been tolled during the period of her flight. Accordingly, prosecution of the charges contained in the superseding indictment is not barred by the statute of limitations. ...."

48. Article 8 has to do with a range of details formally required. But why are they required? They are required because they are necessary to the proper discharge of the functions imposed by the treaty arrangement, as read with our domestic law, upon the relevant Hong Kong authorities; the arms of policing, immigration and security, the judiciary and the Chief Executive.

49. Article 8(2)(a) requires a description of the person sought together with other information that will assist in establishing identity. That information will be required by the arms of policing, immigration and security and perhaps by the courts if there is a dispute as to identification.

50. Article 8(2)(c) requires a statement of the provisions of the law describing the necessary offences, a statement of punishments that can be imposed and time limits imposed on the institution of proceedings. Those details, which provide a picture of the nature and seriousness of the offences, may be required for any number of reasons. For example, they will assist the Chief Executive in deciding, in the event of competing requests for surrender, to which requesting state the general justice of the matter dictates that surrender should be made. In addition, as Stock J said in **Cosby v. Chief Executive of the HKSAR** [2000] 3 HKC 662, at 684 :

> ".... What the Chief Executive must address is whether it appears to him that an order for surrender could not lawfully be made. By reason of art 8(2) of the agreement, the attention of the Chief Executive will be directed to such time limit as may exist for the institution of proceedings for the *actual offence* for which surrender is *requested*, and s 2(2)(a) of the Ordinance obviously contemplates prosecution in the requesting jurisdiction for a special offence against the law of that jurisdiction. *If, therefore, it is apparent that the foreign offence for which prosecution will take place is time barred, that may be evidence upon which the Chief Executive might conclude that the request is bogus or misrepresented and that the fugitive might be prosecuted for conduct quite different from that upon which the extradition proceedings are grounded. ...." [my emphasis]*

51. The requirement under art. 8 to supply information of relevant law does not mean, however, that the Chief Executive, in the exercise of his discretion to order surrender, is obliged to dissect that information to determine whether, as a matter of law, it would tell for or against a successful prosecution in the requesting state. That, I am certain, is not the contemplated purpose for the requirement that such information accompany requests for surrender. The wording of art. 8 and its standing within the broader context of the USA-Hong Kong Agreement makes that plain.

Principles underlying 'extradition proceedings'

52. In the old authority of **In re Tivnan** 5 B&S 645, at 678, Cockburn CJ stated :

> "It is said, and with truth, that the primary and original mischief, which the statutes of extradition meant to prevent, was that of persons committing crimes in one state, and escaping beyond the reach of the law of that state, and so enjoying impunity; and it is also contended that for that purpose alone were those statutes passed. That that was their primary and principal object I entertain no doubt. ...."

53. The courts of common law jurisdictions have long recognized that both domestic legislation and 'treaty arrangements' (to employ the term broadly) put into place to prevent the mischief spoken of by Cockburn CJ must not be interpreted in a manner which tends to defeat rather than assist the very purpose for which they were brought into being. In **Ex p Postlethwaite** [1988] AC 924, 947 referring to the judgment of Lord Russell of Killowen CJ in **In re Arton (No 2)** [1986] 1 QB 509, Lord Bridge of Harwich said :

> "I also take the judgment in that case as good authority for the proposition that in the application of the principle the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would 'hinder the working and narrow the operation of most salutary international arrangements'. The second principle is that an extradition treaty is 'a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute': *R v Governor of Ashford Remand Centre, Ex p Beese* [1973] 1 WLR 969, 973, per Lord Widgery CJ. In applying this second principle, closely related as it is to the first, it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."

54. The fundamental nature of extradition has been succinctly stated by La Forest J, a leading jurist in this area of the law, in **R. v. Schmidt** (1987) 33 CCC (3rd) 193. In his judgment (at page 208) he began :

> "Extradition is the surrender by one state to another, on request, of persons accused or convicted of committing a crime in the state seeking the surrender. This is ordinarily done pursuant to a treaty or other arrangement between these states acting in their sovereign capacity and obviously engages their honour and good faith. A surrender under these treaties is primarily an Executive act. .... it is under domestic law in the discretion of the Executive to surrender or not to surrender a fugitive requested by another State."

55. In Hong Kong, the applicable domestic law is the Ordinance. It is section 13 of that statute which gives to the Executive, that is, to the Chief Executive, the discretion to surrender or not surrender a person to another state with which Hong Kong has extradition arrangements.

56. The treaty or 'other arrangement' which Hong Kong has made with the United States is the USA-Hong Kong Agreement. The mutual surrender of fugitives between Hong Kong and the United States is done pursuant to that agreement.

57. La Forest J continued in his description by saying :

> ".... concern for the liberty of the individual has not been overlooked in these rather special proceedings. That is why provision is made in the treaties and in the *Extradition Act* to ensure that, before the discretion to surrender can be exercised, a judicial hearing must be held for the purpose of determining whether there is such evidence of the crime alleged to have been committed in the foreign country as would, according to the law of Canada, justify his or her committal for trial if it had been committed here. If so, the judge commits the fugitive for surrender, and the Executive may then exercise its discretion to surrender; if not, he or she is discharged ....

....

> The hearing thus protects the individual in this country from being surrendered for trial for a crime in a foreign country unless *prima facie* evidence is produced that he or she has done something there that would constituted a crime mentioned in the treaty if committed here. *It must be emphasized that this hearing is not a trial and no attempt should be made to make it one. The trial, when held, will be in the foreign country according to its laws for an alleged crime committed there, and it should require no demonstration that such a prosecution is wholly within the competence of that country. A judge at an extradition hearing has no jurisdiction to deal with defences that could be raised at trial unless, of course, the Act or the treaty otherwise provides." [my emphasis]*

58. Extradition proceedings, therefore, are not to be equated with domestic trial proceedings. In respect of special defences in law (pleas in bar, for example, such as *autrefois* acquit), La Forest J resisted the suggestion that such defences should be dealt with by the courts of the requested state, that is, the courts tasked with the extradition hearings. In this regard, he said :

> " Counsel for Schmidt argued, however, that the principle of double jeopardy is so fundamental to our criminal law that in providing that an extradition hearing should be conducted 'as nearly as may be' like a preliminary hearing, Parliament must have intended to import into the extradition hearing some way of presenting defences to prevent a person from being twice prosecuted for the same offence. That, however, would seem to me to import trial procedures into the hearing, an approach that is out of keeping with extradition law generally. *In domestic law, such pleas can be made at trial. In extradition matters, too, these are issues that can be raised at the trial in the foreign country. ...." [my emphasis]*

59. The principle that defences in law, such as pleas in bar, should properly be raised at trial in the foreign country is, in my judgment, a principle that must apply equally to the functions of the Executive in extradition law (in the present case, the Chief Executive) as it does to the functions of the courts. If the domestic courts of Hong Kong are not to resolve such matters - which are matters of law - how can it be said that the responsibility nevertheless rests on the Chief Executive to do so?

60. Double jeopardy is one defence that takes the form of a plea in bar. But a plea that offences are time-barred is another; it is a defence which, if pleaded and found good, bars the continuance of the prosecution. That being so, unless the ordinance or Hong Kong's treaty arrangements otherwise dictate, it would seem to me to be a defence not for our domestic courts to decide, nor for the Chief Executive, but rather, as La Forest J expressed it, an issue to be raised at trial in the foreign country.

61. What must be emphasised is that, in considering whether a *prima facie* case is made out, it is not for the judicial authorities in the requested state to usurp the function of the trial court in the requesting state; it is not their function to come to some provisional assessment so that they can say : "We believe the chances of conviction, if surrender takes place, are not assured; therefore we will refuse to commit." That would constitute a distortion of the integrity of the process.

62. The principle has been stated with most recent authority by the Divisional Court in **R. v. Governor of Pentonville Prison, ex parte Osman** [1990] 1 WLR 277, at 299 :

> " In our judgment, it was the magistrate's duty to consider the evidence as a whole, and to reject any evidence which he considered worthless. In that sense it was his duty to *weigh up* the evidence. But it was not his duty to *weigh* the evidence. He was neither entitled nor obliged to determine the amount of weight to be attached to any evidence, or to compare one witness with another. That would be for the jury at the trial. ..."

63. In a much earlier (unreported) judgment of the same court - **In re Godber (Divisional Court No.285/74)** - Lord Widgery CJ said :

> " I think one must always remember with particular care in these cases that the function of the Examining Magistrate, be it a domestic matter or one involving extradition, is simply to see that no man is required to face the expense and anxiety of a trial unless there is evidence against him which amounts to a *prima facie* case. It is not the function of the Examining Magistrate, or our function on this application, to try and decide the issues or to decide the case, or to reach a conclusion as to guilt or innocence. All that we have to do, as the Magistrate had to do, is to look at the evidence tendered by the prosecution and ask the question: On this evidence, is it right that this man should have his case put before a jury?"

The Chief Justice continued :

> "*.... merely to show that there is defence evidence which is as good as the prosecution's case, merely to show that kind of result, is not good enough in these proceedings because it merely shows that there is an issue for the jury to try* and it does not in any way prevent the prosecution from claiming that they made out a *prima facie* case." *[my emphasis]*

64. Pre-judging of guilt or innocence has no role in the extradition process. As Kaplan J said in **In re Thongchai Samguandikul** [1994] 1 HKCLR 1, at 15, no determination of guilt is made because it is taken that the person whose surrender is sought will enjoy a fair and impartial trial in the state seeking that person's surrender. In his judgment, Kaplan J cited with approval the dicta of McLachlin J in another Canadian case, **Re Kindler and Minister of Justice** (1992) 84 DLR (4th) 438 in which it was said :

> "While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedures and most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions."

65. Being founded on principles of comity, Hong Kong's extradition process recognizes and accommodates differences between our system of criminal justice and the system in place in reciprocating states. If an aspect of the law of a reciprocating state offends Hong Kong's notions of what in law is acceptable then the treaty arrangements can reflect that fact. An obvious example concerns the death penalty. But, outside of specific treaty arrangements, it is not, in my view, for surrender to be refused because the relevant laws in the requesting state may run contrary to our jurisprudence.

66. La Forest J, in his description of the extradition process, made it clear that it encompasses two phases : the judicial phase which determines essentially whether there is *prima facie* evidence of the commission of offences for which surrender is allowed and the executive stage at which the decision on broader grounds is made whether or not to surrender. This separation of the process into two phases has been described in another Canadian decision, that of **Idziak v Minister of Justice (supra)** in which Cory J said, at page 86 :

> ".... It has been seen that the extradition process has two distinct phases. The first, the judicial phase, encompasses the court proceedings which determine whether a factual and legal basis for extradition exists. If that process results in the issuance of a warrant of committal, then the second phase is activated. There, the Minister of Justice exercises his or her discretion in determining whether to issue a warrant of surrender. The first decision-making phase is certainly judicial in its nature and warrants the application of the full panoply of procedural safeguards. By contrast, *the second decision-making process is political in its nature. The Minister must weigh the representations of the fugitive against Canada's international treaty obligations* ....

> Parliament chose to give discretionary authority to the Minister of Justice. It is the Minister who must consider the good faith and honour of this country in its relations with other states. It is the Minister who has the expert knowledge of the political ramifications of an extradition decision. In administrative law terms, the Minister's review should be characterised as being at the extreme legislative end of the *continuum* of administrative decision-making." *[my emphasis]*

67. It is to be noted that the above passage was also cited with approval by Yeung J in **Chen Chong Chui v. Chief Executive of the HKSAR (supra)**.

68. From this, without the Ordinance or the USA-Hong Kong Agreement dictating otherwise, it is clear that the Chief Executive, in determining whether to surrender a person, does not carry out a judicial function. The decision he makes is an executive one; it is a decision, as Cory J described it, that is political in nature. In making such a decision, the Chief Executive must weigh the representations of the person whose surrender is sought against Hong Kong's most salutary international obligations.

69. The authorities make it clear that such international obligations, encompassed in formally ratified treaty arrangements, are not lightly to be set aside. In **The United States of America v. Cotroni** (1989) 48 CCC (3rd) 193, at page 226, La Forest J said :

> ".... Canada is under an international obligation to surrender a person accused of having committed a crime listed in an extradition treaty if it meets the requirements of the treaty, in particular presenting sufficient evidence before a judge to satisfy the requirements of a *prima facie* case. There is, it is true, some discretion in the federal government under the treaties to refuse surrender, for example, where the crime is one of a political character. There may, as well, be cases where the government, for high political purposes or for the protection of an accused, may be prepared not to conform with a treaty. But this executive discretion would rarely be exercised and is impossible to define in the abstract. That is scarcely surprising. The extradition process is not arbitrary, unfair or based on irrational considerations. ...."

70. In the present case, as I have earlier indicated, there is no suggestion that the Chief Executive should have exercised his discretion not to surrender the applicant for 'high political purposes'. As I understand it, Mr Bruce, for the applicant, has always contended that the Chief Executive was obliged to consider the time-bar issue for 'the protection of an accused', that is, the applicant herself; in substance, so that she need not for a futile purpose be surrendered to the United States.

71. It is not disputed that a discretion to refuse to surrender in order to protect an individual does vest in the Chief Executive. In this regard, the Court of Appeal in **Chen Chong Gui v. Senior Superintendent of Lai Chi Kok Reception Centre** [1998] 1 HKC 522 has cited with approval the dicta of Lord Reid in **Atkinson v. USA Government & Others** [1971] 2 AC 197 at 233 :

> "…. But the Act does provide a safeguard. The Secretary of State always has power to refuse to surrender a man committed to prison by the magistrate. *It appears to me that Parliament must have intended the Secretary of State to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man*. Section 10 of the Act of 1870 provides that when a magistrate commits a man to prison 'he shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.' So the magistrate will report to the Secretary of State anything which has come to light in the course of proceedings before him showing or alleged to show that it would be in any way improper to surrender the man. Then the Secretary of State is answerable to Parliament, but not to the courts, for any decision he may make.
>
> If I had thought that Parliament did not intend this safeguard to be used in this way, then I would think it necessary to infer that the magistrate has power to refuse to commit if he finds that it would be contrary to natural justice to surrender the man. But in my judgment Parliament by providing this safeguard has excluded the jurisdiction of the courts." *[my emphasis]*

72. The Chief Executive, therefore, has the power - it is not a duty - to refuse to surrender a person if he considers that it would be wrong, unjust or oppressive to order the surrender. Nor is the Chief Executive answerable to the courts in respect of the merits of any decision made in the exercise of that power.

The applicant's first challenge : failure to take account of the time-bar issue

73. Upon a consideration of the Ordinance and the USA-Hong Kong Agreement, and in light of the jurisprudential principles to which I have made reference, it seems to me that the submission made on behalf of the applicant that the Chief Executive was required to effectively resolve the time-bar issue is a submission that is fundamentally misconceived.

74. I comprehend the submission made on behalf of the applicant that it would be an exercise in futility to order the surrender of the applicant to the United States to face charges which can no longer, under the law of that state, be prosecuted. I further comprehend the submission that to compel the applicant to endure such an exercise in futility may be wrong, unjust or oppressive. If it was *undisputed* that the offences for which the applicant faces trial in the United States are now time-barred then no doubt these submissions would have value. But, of course, it is not undisputed that time-bars have now come into effect. That issue is very much in dispute. I have read the arguments of law put forward by the United States and by the applicant. They are complex and extensive. It is apparent that, to be resolved, extensive findings of fact and of law will be required. In my judgment, it cannot begin to be said that the applicant's submissions are unanswerable and that her case in law is patently made out. It cannot be said, therefore, that the issue is so beyond argument that any resistance shown by the authorities of the United States must be in bad faith. Indeed, Mr Bruce prudently couched his submissions in the following terms : "The Chief Executive erred in law in that, in his decision to make the declaration and order in the Order for Surrender, he took no account of the position that the crimes for which the Applicant is to be surrendered to the United States of America are time-barred under the law of the Country, or, *in the alternative that there is at least a very respectable argument that they are time-barred*."

75. In summary, there exist two 'very respectable' arguments, as Mr Bruce would describe them, the one saying that under United States law time-bars have not yet bitten, the other saying that they have. The relevant jurisprudential principles in this field of the law are unambiguous: the tribunal to decide the issue is the trial court in the United States. On behalf of the applicant, however, it is suggested that the Chief Executive must somehow resolve the conflict. In practical terms that means he must render a judgment in respect of the applicant's defence, determining whether or not it is good in law. I use the word 'defence' because that is what it is : a defence in law. Leaving aside the practical difficulties of resolving matters of foreign law and of deciding relevant issues of fact (for example, what was the applicant's true motive in departing the United States, was it with guilty knowledge or in innocence?), is not the Chief Executive being asked to take on a judicial responsibility? Is he not being asked also to usurp the function of the trial court in the United States? I have referred earlier to authorities which state that in extradition proceedings it is not for the judicial authorities in the requested state to determine the amount of weight to be attached to evidence; in short, to assess the likelihood of conviction or to determine matters of innocence or guilt. If that constraint is binding on the judicial authorities in Hong Kong, surely, in matters of solely of law, it must also apply to the Chief Executive whose function in any event is not to act as a judicial tribunal.

76. It is not for the authorities in Hong Kong - judicial or executive - to determine the applicant's guilt or innocence, whether that be in respect of substantive issues of fact or law. Those are matters for the trial court in the United States if the applicant is surrendered. Yet, in practical terms, the applicant does seek a predetermination of her defence. However she may describe it, that is the essence of what she seeks.

77. Nothing has been placed before the Chief Executive or this Court to suggest that the request for surrender has been a 'bogus' request or in any way deliberately 'misrepresented'. I fail to see how the applicant has (or can) establish that her surrender would, in terms of her rights, simply be unacceptable, offending our view of what is fair and right.

78. If it could be demonstrated that, in the particular circumstances of this case, the applicant's arguments as to time-bar would not receive a full, fair and impartial hearing in the United States then firmer ground may exist upon which the applicant could build her submissions that it would be wrong, unjust or oppressive to order her surrender. But the applicant concedes that she will be given full opportunity to place her time-bar arguments before the courts of the United States.

79. The extradition process, as I have outlined, exists not to determine guilt or innocence but to ensure the surrender of persons to face trial in a foreign state when it has been shown that such surrender is warranted because there is evidence against them, presented in good faith, which amounts to a *prima facie* case. How then can it be said that it would be wrong, unjust or oppressive to return the applicant in full accordance with that process when, on her own admission, she will be given a fair trial in the place to which she is surrendered and at that trial will be able to present her defence as to time-bars? She may well have a good defence in that regard, she may even be successful in it. But that takes the matter no further. It indicates nothing more than that she will, as she accepts, be given a fair hearing according to the laws of the United States, laws which include the protections of a constitutional rights document.

80. In my judgment, therefore, the Chief Executive was under no obligation, either as a general duty or in the circumstances of this case, to effectively determine the time-bar issue in the manner advocated on behalf of the applicant.

81. If as Stock J said in **Cosby v. Chief Executive of the HKSAR (supra)**, the time-bar issue provided evidence that the request for surrender may be 'bogus or misrepresented' then the Chief Executive, in the exercise of this powers, would no doubt consider the issue. But that is not the case. Mr Bruce, for the applicant, has criticised the United States for failing, as he saw it, to enter into a full and direct debate on the legal merits of the time-bar issue but that falls far short of any suggestion of a 'bogus or misrepresented' request for surrender. In my view, quite correctly, the United States chose not to exhaust its energies on a legal debate that was essentially of no relevance.

The applicant's second challenge: failure to obtain independent legal advice

82. Article 12(1) of the USA-Hong Kong Agreement states that:

> "The requested Party shall at its own expense make the necessary arrangements for the requesting Party's legal representation and assistance in any proceedings arising out of a request for the surrender of a fugitive offender. In the event that the requesting Party arranges its own additional legal representation and assistance, it shall bear any additional expenses incurred."

In the discharge of this obligation, traditionally Hong Kong has arranged for the representation of the United States (and other requesting states under other treaty arrangements) by providing the service of the Department of Justice. As indicated earlier, in the present case that representation has been provided by members of the Department's International Law Division. The Department of Justice, however, also provides advice to the Chief Executive to assist him in determining pursuant to section 13 of the Ordinance whether to order the surrender of a person to a requesting state. In the present case that assistance has been rendered by members of the Department's Legal Policy Division.

83. On behalf of the applicant, Mr Bruce has objected to this dual role. In respect of the Chief Executive's process of decision-making, he has said that obtaining advice from the same source as the party seeking to secure the surrender carries with it both the appearance of bias and the significant risk that the advice received will be flawed by actual bias, if only unconscious bias. Mr Bruce has taken no objection to the Chief Executive receiving assistance by way of legal advice; his objection is that the advice is not manifestly seen to be independent.

84. Mr Bruce sees no significance in the fact that separate divisions of the Department of Justice have represented the United States and advised the Chief Executive. As he expressed it: the divisional structure is a matter of pure administrative convenience, it has no existence in law, it is ephemeral.

85. In these circumstances, I believe that the correct test to be applied is the one laid down in **R. v. Cough** [1993] AC 646, taken as the correct test by the Privy Council in an appeal from Hong Kong : **Panel on Takeovers and Mergers v. Cheng Kai Man William** [1995] 3 HKC 517. That test, explained by Simon Brown LJ in **R. v. Inner West London Coroner ex parte Dallaglio** [1994] 4 All ER 139, may be expressed thus. Is there a real danger (that is, a real risk) of injustice having occurred as a result of bias? The concern, therefore, is not strictly with the appearance of bias but rather with establishing the possibility of actual although unconscious bias.

86. That being the test, I do not see that any such real danger or real risk has been demonstrated. I say so for the following reasons:

> a. In my judgment, it is significant that the divisions of the Department of Justice which represented the United States and advised the Chief Executive have acted independently of each other. As such, the advice given to the Chief Executive was given by persons who had played no part in either the committal proceedings before the magistrate or the *habeas corpus* proceedings before this Court.
>
> b. There is nothing to suggest that members of the Legal Policy Division who advised the Chief Executive were motivated by any misplaced sense of loyalty, even if only unconscious, to their colleagues in the International Law Division.
>
> c. In any event, the decision made by the Chief Executive was not, as I have said, a judicial one; it was an executive decision, one of a political kind. The advice would have been tailored to the nature of the decision; advice therefore of a different nature to that given earlier by members of the International Law Division to the United States.

87. As I have said, Yeung J was faced with the same challenge in **Cheng Chong Gui v. Chief Executive of HKSAR (supra)**. He also rejected the submission of a real danger of bias :

> "The committal proceedings against the applicant, his subsequent habeas corpus application and the appeal in relation thereto were handled by the Prosecutions Division. The legal advice to the Chief Executive in connection with the order for surrender was given by the Solicitor General who heads the Legal Policy Division and he played no part in the other proceedings.
>
> A reasonable and independent observer, fully informed of the background would not conclude that the aforesaid arrangement was bias or unfair. Indeed such arrangement was common in extradition cases."

88. Yeung J appears to have adopted the test laid down by the High Court of Australia in **Webb v. R** [1994] 181 CLR 41. But whichever approach is used, we are in agreement as to the outcome.

89. To support his conclusion, Yeung J cited the dicta of Cory J in **Idziak v. Minister of Justice (supra)** :

> "It is correct that the Minister of Justice has the responsibility to ensure the prosecution of the extradition proceedings and that to do so the Minister must appoint agents to act in the interest of the requesting state. However, the decision to issue a warrant of surrender involved completely different considerations from those reached by a court in extradition hearing. The extradition hearing is clearly judicial in its nature while the actions of the Minister of Justice in considering whether to issue a warrant of surrender are primarily political in nature. This is certainly not a case of a single official acting as both judge and prosecutor in the same case. At the judicial phase the fugitive possesses the full panoply of procedural protection available in a court of law. At the ministerial phase, there is no longer a *lis* in existence. The Act simply grants to the Minister a discretion as to whether to execute the judicially approved extradition by issuing a warrant of surrender."

90. Mr Bruce has criticised reliance on this dicta on the basis that there is no such thing in Hong Kong as a 'judicially approved extradition'. I find no substance in that criticism. Read as a whole, it is clear that Cory J, in the use of that phrase, was simply referring to the first phase of all extradition processes, namely, the judicial phase. To that extent (and in that context) all 'extraditions' from Hong Kong are 'judicially approved'.

91. Finally I note that La Forest J in **United States of America v. Cotroni (supra)** was so little taken with the argument of bias arising out of a purported conflict of interest that he dismissed it in one sentence :

> "I might add that I find the argument that the fact that the executive discretion to refuse surrender and the duty to present requests for extradition in court, both fall within the responsibilities of the Minister of Justice, somehow create an unacceptable conflict to have no merit."

The applicant's third challenge: failure to give reasons

92. In considering this matter within the context of extradition proceedings, it is to be noted that the ordinance places no obligation on the magistrate in committal proceedings to give reasons for his decision nor is there authority in common law that he must do so. This is despite the fact that he fulfills a judicial function which is subject to review by way of *habeas corpus* proceedings. This has recently been confirmed in a decision of the Privy Council - **Rey v. Government of Switzerland** [1999] 1 AC 54, at 66 - in which Lord Steyn said:

> "Despite a growing practice in England of stipendiary magistrates to give reasons in extradition proceedings it has not been held that magistrates are under a legal duty to do so."

He continued:

> "...In these circumstances their Lordships are not prepared to hold that there is a general implied duty upon magistrates to give reasons in respect of all disputed issues of fact and law in extradition proceedings. But their Lordships must enter a cautionary note: it is unnecessary in the present case to consider whether in the great diversity of cases which come before magistrates in extradition proceedings the principle of fairness may in particular circumstances require a magistrate to give reasons."

93. That being the case in respect of the committal magistrate, and there being no stated or implied obligation in the Ordinance, I confess that I can find little, if anything, to suggest that the Chief Executive should bear the burden of giving reasons for his decision.

94. First, the Chief Executive, in the exercise of his powers, is not answerable to the courts. There is no imperative, therefore, to supply reasons for the benefit of judicial scrutiny. This court is not an appellate court looking at the merits. It considers only the lawfulness of the decision-making process.

95. Second, the decision is an executive decision, one founded, in its broadest sense, on political foundations. In making such decisions, the Chief Executive may intuitively be sure that they are correct but find it difficult to articulate that certainty. Indeed, it may be argued that if the Chief Executive was obliged to give reasons in such circumstances he may be forced to resort to legalism, a result that Lord Donaldson acknowledged as unfortunate in **R. v. Civil Service Appeal Board ex parte Cunningham** [1991] 4 All ER 310, at 318.

96. Third, no doubt in recognition of the nature of the decision made, traditionally executive decisions to surrender have not been accompanied by reasons and reasons have not been expected by the courts. In this regard, see, for example, **R. v. Secretary of State for the Home Department ex parte Launder** [1997] 1 WLR 839, at 836, where Lord Hope said :

> "He [the Secretary for State] decided, in a commendable departure from the normal procedure in extradition cases, to give reasons for his decision....."

97. Even though, in making administrative decisions, no general duty to give reasons exists, it is well accepted that there may be occasions when the circumstances dictate that exceptionally they should be given. Invariably, this arises in cases where the decision on its face appears so aberrant that fairness dictates that the person affected by it should know if the apparent aberration is in the legal sense real (and so challengeable) or only apparent. See, for example, **R. v. Higher Education Funding Council ex parte Institute of Dental Surgery** [1994] 1 WLR 242. Do such circumstances exist in the present case? I am sure they do not. My reasons for so stating are to be taken from what I have said earlier in this judgment.

98. On the same basis, I am satisfied - as Yeung J was satisfied in **Cheng Chong Gui v. Chief Executive of HKSAR (supra)** - that the broader rules of fairness do not dictate that reasons should be given. As Lord Mustill said in **R. v. Home Secretary ex parte Doody** [1994] 1 AC 531, at 560, what fairness demands is not to be applied by rote identically in every situation.

99. The core issue here was whether the Chief Executive was obliged to determine a legal issue, not because of its broader impact on the propriety of the surrender request, but in order to assess the likelihood of that legal issue being successfully argued in the United States and thus making the surrender unnecessary. That patently, in my view, was not the function of the Chief Executive. Accordingly, the rules of fairness did not dictate that he condescend to give reasons.

Conclusions

100. For the reasons given, I am satisfied that the applicant's application for judicial review must, on all grounds, be dismissed.

101. As for costs, I see no reason why they should not follow the cause. Costs are therefore awarded to the respondents.

(M.J. Hartmann)
Judge of the Court of First Instance
High Court

Representation:

Mr Andrew Bruce, SC, leading Mr Raymond Pierce, instructed by Messrs AdrianYeung & Cheng, for the Applicant

Mr Benjamin Yu, SC, leading Mr Nicholas Cooney, instructed by Department of Justice, for the 1st Respondent

Mr Wayne Walsh, DPGC of Department of Justice, for the 2nd Respondent

Remarks:
Application for Judicial review by the Applicant to Court of Appeal. Appeal dismissed. Please refer to Appeal Judgment of CACV000138/2002.