HCAL000048/1998

1998 A.L. No. 48

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ADMINISTRATIVE LAW LIST

IN THE MATTER OF AN APPLICATION BY CHEN CHONG GUI FOR AN ORDER OF CERTIORARI

and

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

CHEN CHONG GUI	Applicant
AND	
THE HONOURABLE CHIEF EXECUTIVE OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION	Respondent

---

Coram: The Hon. Mr. Justice Yeung in Court

Date of Hearing: 29 September 1998

Date of Judgment: 29 September 1998

Date of Handing Down Reasons for Judgment: 12 October 1998

REASONS FOR JUDGMENT

---

1. This is an application by the Applicant Chen Chong Gui for a judicial review of the decision of the Chief Executive of the Hong Kong Special Administrative Region dated 26 June 1998 making an order for his surrender to the Government of the United States of America, leave having been granted by Hon. Sears J. on 23 July 1998.

2. At the hearing, having heard submission from counsel for the applicant and counsel for the Chief Executive, I dismissed the application with costs and indicated that I would give my reasons in writing. This I now do.

3. This case has a long history. For the purpose of the present proceedings, I need only succinctly set out the background of the case as follows.

4. The applicant was arrested on 14 April 1996 at the request of the Government of the United States of America for a number of alleged offences, including conspiracy, kidnapping, hostage taking, receipt of ransom, extortion and assisting illegal immigration into the United States. Formal request for his extradition was made in June 1996.

5. The extradition proceeding was heard in October 1996 and was defended on the basis that the applicant could not be extradited because of the defence of autrefois convict. It was the applicant's contention that he had been convicted of the offence of organising or transporting other persons secretly to cross the national boundary for the purpose of profits which offence, under the Chinese Criminal Code covered the offences for which his extradition was sought.

6. At the conclusion of the extradition proceeding, the presiding magistrate ruled that the question of autrefois convict could only be properly considered by the requesting party at the trial and it was not open to the applicant to raise the issue at the extradition proceedings. He ordered that the applicant should be surrendered to the Government of the United States of America and a committal order was made accordingly.

7. The applicant subsequently took out a habeas corpus application on the ground that the magistrate had wrongly ruled against him in respect of his plea of autrefois convict. The application was originally dealt with by the late Mr. Justice Jerome Chan who passed away in the course of the hearing. With the consent of the parties, the application continued before Deputy Judge Hartmann as he then was. Deputy Judge Hartmann ruled that a magistrate had no jurisdiction to consider the plea of autrefois convict in extradition proceedings.

8. The decision of Deputy Judge Hartmann was appealed against which appeal was dismissed. By way of obita, Mortimer VP in the leading judgment of the court had the following to say:-

> "That is not to say that the legislation provides no safeguard against double jeopardy. It is such a fundamental right. As Lord Reid observed in *Atkinson* [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.'

> Further, an applicant is not deprived of access to the courts if the treaty is not complied with. In certain circumstances he may raise non-compliance in habeas corpus proceedings. In others, it is open to him to judicially review the executive's final decision to extradite."

9. Subsequent to the decision of the Court of Appeal, the applicant through his solicitors, wrote to the Chief Executive suggesting that the question of autrefois convict must be decided by the Chief Executive and that the applicant is entitled to succeed on that plea. The Chief Executive was also invited to state the decision-making procedures that he wished to follow so that the issue of autrefois convict could be disposed of by a fair and independent determination.

10. In the same letter, it was suggested that the Department of Justice could not properly act as the legal advisers to the Chief Executive as it had been representing the U.S. Government in the extradition proceedings. The applicant also requested for copies of all correspondence or communications between the Department of Justice and the Chief Executive since the decision of the Court of Appeal.

11. On behalf of the Chief Executive, the Secretary for Security informed the applicant that legal advice to the Chief Executive would be given by the Solicitor General. The applicant was also told that the Chief Executive would be provided with a report based on the information disclosed during the course of the court proceedings and any representations that would be made on his behalf. A copy of the draft report was supplied to the applicant.

12. There had been subsequent correspondence between solicitors for the applicant and the Secretary for Security with mutual exchanges of expert legal opinions to be submitted to the Chief Executive for his consideration.

13. The Secretary for Security insisted that it was proper for the Solicitor General to give legal advice to the Chief Executive and that such advice was privileged as were correspondence between the Department of Justice, the Secretary for Security and the Chief Executive.

14. On the 26 June 1998, the Chief Executive ordered the surrender of the applicant to the United States of America. A copy of the Order was sent to the applicant's solicitors with a covering letter on 30 June 1998.

15. The applicant then asked the Chief Executive to give reasons for his order. The Secretary for Security informed the applicant that the Chief Executive was not required to give reasons in making the Order for Surrender. The applicant was simply told that the decision was made on the Report sent to the applicant on 25 June 1998 with enclosures as well as the legal advice from the Solicitor General.

16. In the present application, the decision of the Chief Executive was challenged by the applicant on the following grounds.

> (1) In making the Order for Surrender, the Chief Executive was acting in a judicial capacity and hence could not obtain information of any kind, including legal advice without disclosing them to the applicant.
>
> (2) Legal professional privilege did not apply to the relationship between the Chief Executive and the Solicitor General as the Chief Executive was the decision-maker.
>
> (3) The Department of Justice instituted and maintained the extradition Proceedings against the applicant and thus could not at the same time advise the Chief Executive on whether the applicant should be extradited.
>
> (4) Without giving reasons for his Order for Surrender, the Chief Executive was in breach of natural justice and had deprived the applicant the chance to properly challenge his decision.

17. The applicant, through his counsel contended that the decision making process failed to comply with the Basic Law and the Bill of Rights in that he had not been given a fair and public hearing by a competent, independent and impartial tribunal established by law in a criminal charge against him. It was also suggested that such process was in breach of natural justice.

18. The suggestion that in making the Order for Surrender, the Chief Executive was acting in a judicial capacity in a criminal charge and hence Article 39 of the Basic Law which incorporated Article 14 of the International Covenant on Civil and Political Rights and Article 10 of the Hong Kong Bill of Rights applied was, with respect a very bold one.

19. If such suggestion was correct, it would mean that any decision by the Chief Executive for the surrender of a fugitive could only be made in a public hearing which simply could not be the intention of the legislature.

20. Indeed it had long be recognised that such a decision was a pure executive decision and must not be equated to any criminal proceeding. In a leading case in the Supreme Court of Canada **Idziak v. Minister of Justice et al.** 77 C.C.C, 65 Cory J stated at p.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."

21. Similar observation was made in another Canadian case **Kindler v.Canada (Minister of Justice)** (1991) 84 DLR 438 where McLachlin J. said at p. 488

> "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 procedure 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. This unique foundation means that the law of Extradition must accommodate many factors foreign to our internal criminal law. While our conceptions of what constitutes a fair criminal law are important to the process of extradition, they are necessarily tempered by other considerations."

22. The aforesaid approach had always been followed in Hong Kong as demonstrated in **Re Thongchai Sanguandikul** [1994] 1 HKCLR 1 and more recently by Deputy Judge Hartmann as he then was in **Chen Chong Gui v. Senior Superintendent of Lai Chi Kok Reception Centre** [1997] 3 HKC 210.

23. The reference to Article 14 of the ICCPR and Article 10 of the Hong Kong Bill of Rights was a complete red-herring. The fact that the Chief Executive had to consider the issue of antrefois convict did not make his decision a judicial one.

24. Similar suggestions that the legal advice to the Chief Executive by the Solicitor General must be disclosed and that the Department of Justice should not be instituting and maintaining the extradition proceedings against the applicant and at the same time advising the Chief Executive on whether the applicant should be extradited were both made in **Idziak v. Minister of Justice et al.** (*Supra*). The Supreme Court of Canada rejected them both.

25. According to the Deputy Secretary for Security Mr. Wong Hung-chiu, Raymond, the Department of Justice contains 6 divisions, the Prosecutions Division, Civil Division, Law Drafting Division, Legal Policy Division, International Law Division and Administration and Development Division. 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.

26. 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. Cory J. in **Idziak's** case stated at p.86:-

> "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 involves 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."

27. There was no bias or unfairness, perceived or otherwise for the Solicitor General to advise the Chief Executive in his decision as to whether an Order for Surrender ought to be made.

28. 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. The point was extensively dealt with in **Idziak's** case (*supra*) and Cory J. stated at p.88 to 89 of his judgement:-

> "The appellant alleges that the Minister of Justice violated the principles of *audi aleterem partem* by considering a confidential memorandum when determining whether to issue a warrant of surrender .....
> The appellant has maintained that he should have received a copy of the Memorandum so that he could have prepared his own representations with full knowledge of 'the case against him'....., the confidential memorandum was not evidence to be used in an adversary proceeding. Rather, it was a briefing note to the Minister from a staff member who did not have any interest in the outcome. I agree with the findings and conclusion of Doherty J. that this document was indeed privileged ..... As a result, it did not have to be disclosed to the appellant. The failure to disclose did not constitute unfairness viewed in light of the nature of the proceedings before the Minister."

29. La Forest J. also said in the same case at p.70:-

> "In making a decision of this kind, the Minister is entitled to consider the views of his officials who are versed in the matter. I see no reason why he should be compelled to reveal these views. He was dealing with a policy matter wholly within his discretion."

30. The judges in **Idziak's** case (*supra*) were divided as to whether the confidentiality was grounded on solicitor-client privilege and the issue had not been resolved as such, they were however unanimous that the advice received by the Minister from his officials was confidential and the Minister should not be compelled to disclose it.

31. 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 court?

32. 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. (per Liu JA in **Tong Pon Wah v. Hong Kong Society of Accountants** [1998] 3 HKC 82 at p. 94)

33. There can be cases where the decision reached is wholly inconsistent with the known facts and circumstances. Without reasons to justify what appears to be irrational decision, it is open to the court in a judicial review case to infer that the decision is unreasonable. It has to be borne in mind though that "the absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision." and "a failure to give reasons by itself does not entitle the court to infer that the decision was unreasonable." (see the judgment of Watkins L.J. in **R. v. Secretary of State for the Home Department ex parte Phillipe Andre Sinclair** [1992] Imm AR 193.)

34. It was considered to be an exception rather than the rule for reasons for the decision to be given in extradition cases as Lord Hope observed in **R. v. Secretary of State for the Home Department ex parte Launder** [1997] 1 W.L.R. 839 at p. 856:

> "..... he decided, in a commendable departure from the normal procedure in extradition cases, to give reasons for his decision ....."

35. Mr. McCoy for the applicant was driven to concede that the authorities were against him on each of the points that he made. He seek to argue that the case of the applicant was unusual in that it not only involved his liberty, it was a case that the Chief Executive had to resolve a point of law as to whether autrefois convict was available to the applicant.

36. Every extradition case by its very nature involves the liberty of the fugitive. The legislative scheme on extradition also envisages that the Chief Executive may have to consider matters of law in addition to factual or humanitarian matters. There was nothing unusual about the applicant's case as such.

37. Ultimately it was a question of whether the applicant had been unfairly treated in the decision-making process by the Chief Executive.

38. There is no universal standard of fairness or "fair procedure". If there is no prescribed procedure for a decision, the court will imply such safeguards as may be necessary in order to achieve fairness in the circumstances of the particular case. As Lord Bridge expressed in **Lloyd v. McMahon** [1987] AC 625 at p.702:-

> "...the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

39. As Mr. Chan, on behalf of the Chief Executive quite rightly pointed out, in law there is no technical procedural irregularity or breach of natural justice. Actual injustice or a real risk of it must be shown. Cumming Bruce, L.J. succinctly stated the principle in **George v. Secretary of State** [1979] PCR 609 at p.621:-

> "..... I do not for a moment accept that, on the authorities, there is any ground for the view that there is such a concept known to the law as a technical breach of natural justice. 'A breach of natural justice' means that because of what has happened ..... either somebody has actually suffered injustice, or there is a real risk that somebody has suffered injustice."

40. Similar observation had been made in **R. v. The Chief Constable of the Thames Valley Police ex parte Cotton** [1990] IRLR 344 by Stocker L.J. at p.351:

> ".... I agree that there can be no such thing as a 'technical breach of natural justice'. In my view natural justice is to be equated in this regard to 'fairness' and it is only if there is a real risk of injustice or 'unfairness that a procedure adopted can be properly stigmatised as a procedural impropriety. Whether or not there is a real risk of unfairness must depend on the facts of each case." , and by Bingham L.J. on the same page:-
>
> ".... A test of fairness is to be preferred because, being very general, it can better embrace the almost infinite variety of situations which fall for consideration. The minimum that fairness demands in one case may be much more than fairness requires in another ..... I would readily accept the view ..... that there can be no such thing as a technical breach of natural justice ..... since (always assuming the absence of a prescribed statutory procedure) the court is concerned with matters of substance and not mere form, a procedure cannot be unfair in purely technical sense."

41. The only issue of substance raised by the applicant was the issue of autrefois convict, whether his conviction in China for the offence of organising or transporting other persons secretly to cross the national boundary under Article 177 of the Criminal Code could be a defence to the 14 extradition offences preferred against him by the US Government, including offences of conspiracy, forcibly detention, unlawful imprisonment, unlawful demand of money and forcible detention.

42. That particular issue had been dealt with by the magistrate in the extradition hearing. It was revisited by Deputy Judge Hartmann as he then was and the court of appeal in the habeas corpus application.

43. At the outset, the Chief Executive had been alerted of such issue by the applicant's solicitors. Representation on behalf of the applicants and expert legal opinions were submitted to the Chief Executive.

44. All materials submitted to the Chief Executive with the exception of the legal advice by the Solicitor General had been disclosed to the applicant and he was given opportunity to comment on those matters and to make representation. The Chief Executive, having considered those matters and the advice by the Solicitor General, made an order to surrender the applicant.

45. In the light of the duty of the Chief Executive in extradition proceedings and the statutory framework in which the decision to surrender the applicant was made, the procedure adopted was as fair as it could possibly be. There was no injustice or unfairness, perceived or actual. He would be given a fair trial in the U.S. court and no doubt his defence of autrefois convict would be raised again.

46. There was no suggestion that the decision to surrender the applicant was unlawful or Wednesbury unreasonable. The suggestion that there was procedural impropriety had not been made out. There was no basis upon which the court could legitimately interfere with the decision of the Chief Executive.

47. The application had to be dismissed.

(Wally Yeung)

Judge of the Court of First Instance
High Court

Representation:

Mr. Gerard McCoy, S.C. and Mr. Victor Luk instructed by Messrs. Michael Cheuk, Wong & Kee for Applicant.

Mr. Warren Chan, S.C. and Mr. Gerald Wu instructed by Department of Justice for Respondent.