CACV000138/2002

CACV 138/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 138 OF 2002

(ON APPEAL FROM HCAL 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 Rogers VP, Stock JA and Seagroatt J in Court

Date of Hearing: 31 July 2002

Date of Judgment: 31 July 2002

Date of Handing Down Reasons for Judgment: 10 September 2002

REASONS FOR JUDGMENT

Hon Rogers VP:

1. This is an appeal from a judgment of Hartmann J given on 7 January 2002. The judge was considering an application for judicial review. The order sought was an order for certiorari to quash an order of the Chief Executive made pursuant to section 13(1) of the Fugitive Offenders Ordinance, Cap. 503, whereby the Chief Executive declared that the applicant, Cheng Chui Ping, be surrendered to the United States in respect of a number of offences which are set out in the order. Consequential relief of a declaration was also sought. Further orders were sought that the applicant be released or in the alternative that the Chief Executive should reconsider the applicant's case. The judge refused the application for judicial review. At the conclusion of the hearing of this appeal this court dismissed the appeal with costs and said that it would give its reasons in writing, which we now do.

Background

2. The full background has been set out in the judgment of Hartmann J. Briefly, in December 1994 a grand jury in New York returned an indictment against the applicant. Immediately following that the magistrate judge, Nina Gershon of the Southern District of New York, authorised the issuance of the accompanying Warrant for Arrest of the applicant. At about that time, it appears that the applicant was ordinarily resident in the United States. It has been put on oath that it is the case of the prosecuting authorities in the United States that the applicant left the United States in late 1994 after the United States authorities had arrested and brought criminal charges against a number of persons who are alleged to have been co-conspirators with the applicant and had executed a search warrant at the applicant's place of business. The allegation is that in those circumstances the applicant was "fleeing from justice". The charges against the applicant included the smuggling of illegal immigrants into the United States and the holding of them there as hostages until payment was received for the illegal smuggling. It is unnecessary to set out the charges.

3. In April 2000, the applicant was arrested in Hong Kong and has remained in custody here ever since. In June 2000, a further grand jury returned what is called a Superseding Indictment. This included not only the original charges but additional charges as well. There was a formal request from the Government of United States for the surrender of the applicant and supporting documents were forwarded to Hong Kong.

4. In August 2000, following a committal hearing in the Eastern Magistracy a committal order was issued. Following that, in September 2000, there was an application for *habeas corpus* which was dismissed by Stock J, as he then was, on 27 September 2000. In December 2000, written representations and a memorandum of law was submitted on behalf of the applicant to the Department of Justice giving reasons as to why the Chief Executive should not issue an order for surrender. These were answered by a written response on behalf of the United States Department of Justice which supplemented an affidavit of the Assistant District Attorney which had been supplied previously. There was a further round of submissions which concluded in April of 2001 when the applicant sent the final submissions to the Department of Justice. On 28 April 2001 the Chief Executive signed the order for surrender which listed eight offences for which the applicant would be surrendered. This was notified to the applicant in the following month and the applicant promptly requested reasons for the issue of the order to be given by the Chief Executive. That request was declined. The application for judicial review was then made and, as already stated, judgment was given in January.

This appeal

5. Two points are raised on this appeal. The first is that the judge was wrong in holding that the Chief Executive was under no obligation to determine whether or not the charges listed in the order for surrender were time-barred and secondly that the judge was wrong in holding that the Chief Executive was not obliged to give reasons for his decision to make the order for surrender.

6. In my view, the arguments on this appeal had no merit. In the first place, the Chief Executive is not under any duty to determine whether a charge in respect of which a person is to be extradited to the United States is time-barred in the United States. In the absence of a duty to do so there are sound reasons why the Chief Executive should not embark on a consideration of the question of time-bar. In this case there are questions of fact and law which would make it impossible for the Chief Executive to determine the question. In those circumstances there could not possibly be any requirement on the Chief Executive to give reasons since the only answer that could be given to the submissions made on behalf of the applicant were that they raised matters which it was not for the Chief Executive to decide.

No requirement to consider the question of time-bar

7. Extradition to the United States is governed by the Fugitive Offenders Ordinance, Cap. 503 and the Fugitive Offenders (United States of America) Order made thereunder. Under those provisions there is a marked absence of any requirement upon either the court of committal, exercising the functions set out under section 10, or upon the Chief Executive, in making an order for surrender under section 13, to consider the question of time-bar. The matters to be considered by the court of committal are set out in section 10(6)(b). It is unnecessary to set out that subsection, it suffices to say that the matters to which the court of committal must have regard are as to whether there has been a relevant offence, as to whether the supporting documents had been produced and were duly authenticated and as to whether the evidence produced would be sufficient to warrant committal for trial according to Hong Kong law if the offence had been committed in Hong Kong.

8. The only other matters to which the magistrate would have to have regard would be those which are listed in section 5 of the Ordinance, which prohibits the surrender of a person or the keeping in custody of a person for the purposes of surrender in a number of circumstances. Section 5 reads:

> " (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) *(provisions relating to cases where there has already been a prosecution)*

(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."

The provisions of section 13 come into operation once a person has been committed. Section 13(1) reads as follows:

"Where a person who has been committed pursuant to an order of committal is not discharged under Section 14, 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."

The other provisions in section 13 are irrelevant for the purposes of this case.

9. Under the Order in Council made in 1976 entitled Fugitive Criminal United States of America (Extradition) Order which was extended to Hong Kong and was previously in force here, it was provided that extradition should not be granted if "the prosecution for the offence for which extradition is requested has become barred by lapse of time according to the law of the requesting or requested Party;". An equivalent provision does not now exist. The only reference to time limits for prosecution which are contained in the legislation and subsidiary legislation, is contained in Article 8(2)(c) of the Fugitive Offenders (United States of America) Order. That reads as follows:

"ARTICLE 8

(2) All requests shall be accompanied by:

> ...
>
> (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."

This latter provision is not a provision which requires either the court of committal or the Chief Executive to examine the question of time limits for bringing a prosecution in the requesting country.

10. As explained in the judgment of the court below in citing a number of cases, an extradition treaty is a contract between two States and has to be construed as such a contract. Once the requirements of the Ordinance and the subsidiary legislation have been complied with extradition should follow except if there are clear and cogent circumstances which would dictate that that should not happen. As Stock J said in **Cosby v Chief Executive of the HKSAR** [2000] 3 HKC 662 at 684 it may be that the Chief Executive might conclude that a particular request was bogus or misrepresented such that the conclusion would be reached that a prosecution would be made for offences quite different from that upon which the extradition proceedings were granted.

11. There may be other political reasons why the Chief Executive may not make an order for surrender under section 13, but it would be wholly wrong for the Chief Executive to embark upon an inquiry as to matters which are not specified in the Ordinance or in the subsidiary legislation made under the Ordinance. The question of time-bar requires determination of a factual dispute, which would present the Chief Executive with practical difficulties. The Chief Executive is not a court of law, he has no power to compel witnesses, still less to take evidence on oath. A determination of the law relating to a time-bar would be a question of foreign law. That is always a difficult question of fact for any court. A court in determining foreign law would inevitably have to receive evidence as to the foreign law and that, again, would require the calling of witnesses. Hence, there are no doubt good reasons why the running of a limitation period is not specified as a ground for refusal of surrender. Unless the matter of time-bar for the prosecution of an offence for which extradition was sought was so clear that it was beyond argument, it would be highly undesirable for the Chief Executive or a court, foreign to the requesting jurisdiction, to determine the matter.

12. In this context reliance was placed by Mr Bruce, on behalf of the applicant, upon one sentence in the judgment of Stock J in **Cheng Chui Ping v Superintendent of Tai Lam Centre for Women** [2000] 3 HKC 777 at 793. However, that sentence followed immediately after citation of the passage from the Cosby case quoted above where it was suggested that possibly if the matter were clear that the Chief Executive might conclude that the application had been bogus or misrepresented. Furthermore, it followed a passage which read:

> "As for the question of the limitation period for prosecution in the requesting jurisdiction, there is nothing in the Ordinance which requires the Chief Executive or the magistrate to ask whether the Hong Kong offence or the conduct which constitutes the Hong Kong offence is time barred in the requesting jurisdiction."

The facts of this case

13. The material before the court included the affidavit of 6 June 2000 of Michael G. McGovern, an Assistant United States Attorney in the Southern District of New York. In paragraph 12 of that affidavit, Mr McGovern states that although some of the charges relate to periods more than five years before the filing of the Superseding Indictment, nevertheless section 3290 of Title 18, United States Code, provides that "[n]o statute of limitations shall extend to any person fleeing from justice." Mr McGovern goes on to explain that since the applicant had fled from the United States in 1994 the period of limitation did not run. It is also said that because the Superseding Indictment includes conduct which was charged in the earlier indictment, prosecution of that conduct is not barred by the statute of limitations for the additional reason that the original indictment was filed in December 1994, which was within the limitation period. It is also said that the Superseding Indictment included conduct which occurred within the previous five years.

14. The judge below said at paragraph 74 of his judgment:

> "74. 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. ...
>
> 75. In summary, there exist two 'very respectable' arguments, as Mr Bruce (the applicant's counsel) would describe them, the one saying that under United States law time-bars have not yet bitten, the other saying that they have."

15. In this court, as in the court below Mr Bruce presented a skeleton argument which contained the following:

> "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 Appellant is to be surrendered to the United States of America are time-barred under the law of that country, or in the alternative that there was at least a very respectable argument that they are time-barred."

When asked by the court as to whether he maintained the alternative part of that submission, it was difficult to discern the stance taken on behalf of the applicant. At one point Mr Bruce was disposed to accept the judge's conclusion. At another point he suggested that the matter was clear in his client's favour. Counsel was invited to explain why it was said that the matter was clear. For my part, I consider that it is sufficient to say that I consider the judge's conclusion is correct. There are questions of fact which would have to be determined, for example, as to whether the applicant had fled from the United States and there are questions of law specifically the interpretation of United States statutes and their application. These are matters for the trial court. They are not matters which could or should be decided in the extradition proceedings.

Whether reasons should have been given by the Chief Executive

16. Given the factual situation in this case that the matters put to the Chief Executive in relation to whether the offences, which are the subject of the extradition, were time-barred were matters which the Chief Executive should not attempt to decide, it seems to me to be futile to suggest that the Chief Executive should have given reasons. The only thing that the Chief Executive could possibly have said would have been that these were matters which were not for him to rule upon. Had the Chief Executive said that, there could be no possible complaint. Had the Chief Executive attempted to rule on the matter and decided the question of time-bar against the applicant, even if it were shown that his ruling were flawed or erroneous, judicial review could not be granted in this case because, as explained by the judge below and as repeated herein, the questions relating to time-bar for prosecution of the offences are not matters upon which the Chief Executive should have ruled upon particularly in this case.

17. There is only one further matter to which I would refer. In paragraph 94 the judge below said:

> "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."

This paragraph, coming at the end of a long and detailed judgment, may not express exactly what the judge intended to say. It may well be that, in some circumstances, it would be appropriate for the Chief Executive to give reasons in an extradition case. In this context it would seem from a number of recent decisions that reasons may in some circumstances be appropriate and called for. For example, I would draw attention to the observations of Henry LJ in **R v Secretary of State for the Home Department ex p Chetta and Another**, 11 July 1996 and of Lord Hope in the case of **R v Secretary of State for the Home Department ex p Launder** [1997] 1 WLR 839 at page 856H where he referred to the "commendable departure from the normal procedure in extradition cases, to give reasons for his decision in the letter of 31 July 1995." It remains to be considered in other cases whether and to what extent the Chief Executive should give reasons for his decision in extradition cases. Suffice it to say that in the present case, in my view, there was no call upon him to do so.

Hon Stock JA:

18. The suggestion that the Chief Executive was bound to determine whether the charges were or were not time barred in the United States of America has not a scintilla of merit. The extensive space which has been devoted in the papers before us, pages and pages, plus authorities, to suggest that there was such a duty, was remarkable for its resolute refusal to come to terms with three immovable facts:

> 1. That Article 1 of the Agreement between the United States of America and the Government of Hong Kong, which is at Schedule 1 to the Fugitive Offenders (United States of America) Order, *requires* the Government of Hong Kong to surrender any fugitive offender found in Hong Kong to whom the agreement applies, subject only to the provisions of that agreement.
>
> 2. The provisions of that agreement specify precisely the circumstances in which surrender may be refused. See Articles 3, 4, 5, 6 and 7; *and the running of a limitation period is not one of them.*

> 3. The statutory instrument which governs the powers and duties of the Chief Executive when addressing requests from foreign jurisdictions for the surrender of fugitive offenders specifies precisely the grounds upon which surrender may be refused; *and the running of a limitation period in the requesting jurisdiction is not one of them.*

Once these simple fundamentals are recognized, the only possible remaining recourse is a plea to the exercise of some residual discretion to refuse to surrender.

19. Whilst it is true that the power to surrender is couched in the Ordinance as a discretion, it will be a rare case indeed for surrender to be refused absent one of the statutory bars or a bar provided by the relevant international arrangement. One proceeds on the footing that where Hong Kong, with appropriate authority, enters upon an international agreement, it will honour the obligations which arise under that agreement, no less when the object of the agreement is mutual assistance for the apprehension and prosecution of fugitive offenders. This principled approach has been explained in Canada in this way:

> "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."

See : **USA v Cotroni** (1989) 48 CCC(3rd) 193, 226.

20. The type of consideration which is prayed in aid in this case, namely an argument by one side - and that is all it is - that prosecution for the offences for which surrender is requested is time barred, is wholly removed, entirely divorced, from the type of exceptional and very rare circumstance that one might envisage as justifying the exercise of some residual discretion not to surrender.

21. Whilst there may well be circumstances in which the Chief Executive *is* called upon by the treaty terms to make a determination of fact (see, for example, article 7 of the USA - Hong Kong agreement and its reference to humanitarian considerations) it is, with respect, and against the framework of the statute and the treaty to which we have referred, nonsensical to suggest that the Chief Executive was required to decide this issue of United States limitation law. The issue was not relevant to the exercise of his function under the statute or treaty; and is an issue, if and when it arises, to be decided by the courts which are intended to decide it, namely, the domestic courts of the United States.

22. The contention, which we see in Mr Bruce's skeleton argument, that this was a case which 'cries out ... for a clear justification ...' to surrender, in other words, a case that called for reasons, does not in the circumstances withstand examination. What is it that the appellant could have expected as a reason for ordering her surrender which could possibly have assisted her? She knows, for there is evidence to the effect, that her contention as to time was put before the Chief Executive; that, on the question of time, there are two suggested schools of thought; and that the very highest she can put it is that hers is a respectable argument. All that the Chief Executive could have said was that the ground advanced by the appellant as a reason not to surrender was not a ground to be found in the legislation or in the treaty; that in any event the point was at best arguable, and not one for him to resolve; and that, accordingly, he was bound to order her surrender. In each aspect of that answer he would have been entirely correct; and the truth is that the appellant knows full well that that is the long and the short of the Chief Executive's decision and the reason for it. If there are cases where reasons will be required - and it is unnecessary for present purposes to decide if and when that may be so - this case is certainly not one of them.

Hon Seagroatt J:

23. I agree with both judgments.

(Anthony Rogers)	(Frank Stock)	(Conrad Seagroatt)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

Representation:

Mr Andrew Bruce SC and Mr Raymond Pierce, instructed by Messrs Adrian Yeung & Cheng, for the Applicant/Appellant

Mr Simon Westbrook SC and Mr Nicholas Cooney, instructed by Department of Justice, for the 1st Respondent

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