



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



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LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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Urgent by fax (2524 3762)
5 June 2019

Ms CHUI Shih-yen, Joceline
Principal Assistant Secretary for Security (Special Duty)
Security Bureau
10/F, East Wing, Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Dear Ms CHUI,

**Fugitive Offenders and Mutual Legal Assistance in
Criminal Matters Legislation (Amendment) Bill 2019**

At the meeting of the Panel on Security held on 4 June 2019, the Administration was requested to clarify a number of legal issues arising out of some cases provided to the Panel. As requested by the Panel, the relevant issues are now put into writing. We shall be grateful for your clarifications on these legal issues as stated in the **Appendix**.

We would appreciate it if you could let us have your reply as soon as possible, preferably on or before 12 June 2019.

Yours sincerely,

(Timothy TSO)
Senior Assistant Legal Adviser

Encl.

c.c. Department of Justice
(Attn: Mr Paul TSANG, SBS, Law Officer (International Law))
(By Fax: 3918 4792)
Legal Adviser
Clerk to Panel on Security

The test of "wrong, unjust or oppressive" in considering whether a person should be surrendered

1. At the special meetings of the Panel on Security held on 1 and 3 June 2019, representatives from the Department of Justice referred to the test of "wrong, unjust or oppressive" in considering whether a person should be surrendered. The relevant cases were subsequently provided to Panel members for reference. One of such cases is *CHENG Chui Ping v The Chief Executive of the Hong Kong Special Administrative Region and the United States of America*, HCAL 1366/2001. In paragraph 71 of the judgment, the Court of First Instance referred to *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.

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."

In paragraph 72 of the judgment, it was further stated that:

"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."

Based on the above passages, please clarify whether the test of "wrong, unjust or oppressive" in considering whether a person should be surrendered could be applied by a magistrate in committal proceedings under section 10 of the Fugitive Offenders Ordinance (Cap. 503), or the test could only be applied by the Chief Executive.

2. Please also clarify whether the magistrate in committal proceedings, apart from the provisions of Cap. 503 (in particular sections 5 and 10), may consider other factors or safeguards (e.g. those relating to human rights) which are not expressly provided for in Cap. 503 nor in the special surrender arrangements under the captioned Bill. Does the magistrate in committal proceedings have any "residual discretion" in not making an order of committal even though the relevant criteria in section 10 of Cap. 503 are satisfied?

Orders for surrender made by the Chief Executive and judicial review

3. In *CHEN Chong Gui v The Chief Executive of the Hong Kong Special Administrative Region* [1999] 1 HKLRD 693 (see pages 694I and 701E-I), it was held that the practice had always been that the Chief Executive did not give reasons for administrative decisions such as an order for the surrender of a fugitive. The legislature did not require him to give reasons for his decision in extradition cases, and it was well established that there was no such duty at common law. It was also mentioned in the judgment of this case 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". It was the exception, rather than the rule, that reasons for his decision be given in extradition cases. In the circumstances, please clarify whether the Chief Executive is required by law to give reasons relating to orders made for the surrender of fugitive offenders.

4. In *CHENG Chui Ping v The Chief Executive of the Hong Kong Special Administrative Region and the United States of America*, CACV 138/2002, the Court of Appeal stated in paragraph 17 of the judgment that:

"..... 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."

Please clarify whether the court, in considering applications for judicial review relating to orders made by the Chief Executive for the surrender of fugitive offenders, is precluded from looking at the merits of the relevant decisions. Please also clarify whether the court may consider factors or safeguards (e.g. those relating to human rights) which are not expressly provided for in Cap. 503 nor in the special surrender arrangements under the captioned Bill.

Whether the Chief Executive and/or the court may consider the issue of time-bar for the prosecution of offence(s) in considering whether a person should be surrendered

5. In *CHENG Chui Ping v The Chief Executive of the Hong Kong Special Administrative Region and the United States of America*, CACV 138/2002, the Court of Appeal stated that:

"..... 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)....." (paragraph 7)

"..... 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." (paragraph 11)

"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." (paragraph 20)

Based on the above passages, please clarify whether the Chief Executive and/or the court, in considering whether a person should be surrendered under Cap. 503, may consider the issue of time-bar for the prosecution of the offence(s) for which extradition is sought.