

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

香港添馬添美道 2 號

2 Tim Mei Avenue, Tamar, Hong Kong

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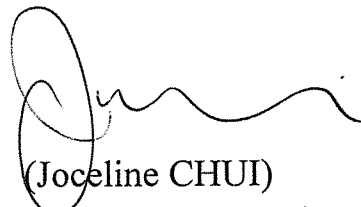
Mr Timothy TSO
Senior Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Mr TSO,

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

Thank you for your letter dated 5 June 2019 seeking clarifications on a number of legal issues arising out of some cases provided to the Panel on Security. The reply from the Administration is at Annex.

Yours sincerely,

A handwritten signature in black ink, appearing to be "Joceline CHUI".

(Joceline CHUI)
for Secretary for Security

c.c. Department of Justice

Legal issues raised by the Senior Assistant Legal Advisor
by letter dated 5 June 2019 (“the Letter”)

(I) The test of “wrong, unjust or oppressive” in considering whether a person should be surrendered and scope of judicial review (paragraphs 1, 2 and 4 of the Letter)

1. For the sake of completeness, we would like to deal with the above questions by first providing a general outline of the procedures in processing surrender requests under the Fugitive Offenders Ordinance (Chapter 503 of the Laws of Hong Kong) (“FOO”), where surrender arrangements (whether long-term or case-based) are in place between Hong Kong and another place.
2. There are three stages involved in the above procedures. They comprise the preliminary executive stage, the judicial stage and the final executive stage.
3. The preliminary executive stage and the final executive stage involve decisions made by the Chief Executive through the exercise of executive power. The Chief Executive must exercise her power in accordance with the law which includes the Basic Law, the Hong Kong Bill of Rights Ordinance (Chapter 383 of the Laws of Hong Kong) (“HKBORO”) and FOO. Her decisions are subject to scrutiny by the court by way of

judicial review. In such judicial review, the court does not look at the merits of the Chief Executive's decision concerned, but those traditional bases for seeking judicial review, such as illegality, irrationality, or procedural impropriety.

4. In the context of surrender of fugitive offenders from Hong Kong to other parts of China, Article 95 of the Basic Law is relevant. It provides that the HKSAR may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of China, and they may render assistance to each other. Hence, if there is going to be any surrender of fugitive offenders from Hong Kong to the Mainland, such surrender, as required by Article 95 of the Basic Law, will have to be through consultations and in accordance with law which will include the Basic Law, HKBORO and FOO.
5. FOO is modelled on the UK Extradition Act 1989 where power to consider surrender vests in the executive authority. A similar regime is practised in Australia under its Extradition Act 1988 and New Zealand under its Extradition Act 1999. The interface of the executive and judicial stages is set out below.

Preliminary Executive Stage

6. At the preliminary executive stage, the Chief Executive decides whether to act on the request received. If she decides in the affirmative, she will issue an authority to proceed for the holding of a committal hearing

before a magistrate. The Chief Executive cannot issue an authority to proceed if it appears to her that an order for surrender in relation to the wanted person could not lawfully be made under the provisions of FOO, or would not in fact be made¹. In other words, the Chief Executive has to be satisfied that the request could be processed in accordance with FOO. The wanted person may challenge the decision to issue the authority to proceed by way of judicial review².

Judicial Stage

Power of court of committal

7. On receipt of the authority to proceed issued by the Chief Executive, the magistrate, sitting as the court of committal, will hold a hearing and has to be satisfied of the following matters before making a committal order -
 - (i) the offence for which the person is wanted is a relevant offence meeting the requirement of double criminality, i.e. with respect to the proposed case-based surrender arrangements, the offence is punishable under the law of the requesting place with imprisonment for 7 years or more, or any greater punishment, and the conduct underlying the offence would constitute an offence specified in the 37 categories of offences under Schedule 1 to FOO and punishable

¹ Section 6(2) of Cap. 503.

² *Cosby v Chief Executive HKSAR* [2000] 3 HKC 662 at 663A and 672F, and *In the Matter of Applications for Leave to Apply for Judicial Review under Order 53, Rule 3, Rules of the High Court and In the Matter of a Decision of the Chief Executive of the HKSAR and In the Matter of Robert Henry Cosby (Applicant)* [1999] HKCU 1251. In these cases, the grounds of judicial review considered included *Wednesbury* unreasonableness and the decision being fundamentally at fault.

with imprisonment for 7 years or more, or any greater punishment, under Hong Kong law if the conduct had taken place in Hong Kong;³

- (ii) the supporting documents in the form of affidavits or solemn statements of witnesses containing the evidence have been duly authenticated;
- (iii) for a person wanted for prosecution, the evidence is admissible according to the law of Hong Kong and is sufficient to make out a prima facie case against the wanted person;
- (iv) for a person wanted for the imposition or enforcement of a sentence, there is evidence of a conviction and that a sentence will be imposed; or if the sentence has been imposed, either the sentence has not been carried out or in the case of a term of imprisonment, not less than 6 months of the term remains to be served; and
- (v) the restrictions under section 5 of FOO prohibiting committal do not apply. They include prosecution or punishment of an offence of a political character, prosecution or punishment on account of the wanted person's race, religion, nationality, or political opinions, or a person being prejudiced at trial or punished by the said reasons, double jeopardy and conviction in absentia.

³ The Government will move a committee stage amendment to raise the maximum imprisonment requirement for offences to which special surrender arrangements apply from those punishable with imprisonment for “more than 3 years” to “not less than 7 years”.

8. If the court of committal is satisfied of the above matters, it shall commit the person to custody to await the Chief Executive's decision on the making of a surrender order.
9. Compared to the final executive stage at which the Chief Executive has the power to decide whether or not to surrender on broader grounds (discussed in paragraphs 15 and 16 below), the matters to be considered by the court of committal in making a committal order are more confined. As observed by Stock J in *Cheng Chui Ping v Superintendent of Tai Lam Centre for Women & Another*⁴, the court of committal is bound to make a committal order if the circumstances under section 10(6)(b) of the Ordinance have been met and that committal is not prohibited by section 5 of the Ordinance. In other words, the court of committal will not consider the test of "wrong, unjust or oppressive" mentioned in paragraph 1 of the Letter. It should also be observed that the court of committal does not order or purport to order the surrender of the person, but to commit the person to custody to await the decision of the Chief Executive, who *may* or *may not* order surrender.
10. If any of the conditions set out in paragraph 7 above is not met, the court of committal shall discharge the person.

⁴ [2000] 3 HKLRD 694, at 702D-703J.

Residual power of court of committal

11. The jurisdiction of the court in the judicial stage to order a stay of the proceedings on the ground of abuse of process by the requesting party was raised by the wanted person in *Huang Yuan Yuan Ian v Superintendent of Lai Chi Kok Reception Centre & Another*⁵. Without deciding on the jurisdiction point, the court considered the merits of the allegation of abuse and found that there was no abuse in the case. A similar ground of abuse of process was raised in a committal hearing in 2013 in *Between the Government of Australia and Xiao Hui*, ESMP 2327/2013. The court again did not rule on the jurisdiction point but found that on the facts of the case, the allegation of abuse had no merits. The issue of whether the court of committal has residual jurisdiction to order a stay of proceeding on the ground of abuse of process is thus open, pending resolution in a suitable case. Even if it is determined that the court of committal has no such jurisdiction, any allegation of abuse of process can be brought to the attention of the Chief Executive for consideration at the time of her deciding whether to make a surrender order.

Final Executive Stage

12. By the committal order, the court certifies that the wanted person is eligible for consideration of surrender. The case enters the final executive stage during which the Chief Executive will decide whether to order surrender.

⁵ [2006] HKCU 73 at paras. 59-77.

13. Prior to the decision on surrender, the person is entitled to make representations to the Chief Executive opposing surrender, including whether it is wrong, oppressive or unjust to order the surrender, and other humanitarian grounds or safeguards provided in the applicable law or relevant surrender arrangements.
14. The Chief Executive needs to be satisfied that none of the statutory restrictions in sections 5 and 13 of FOO apply to the case. They include the restrictions mentioned in paragraph 7(v) above and assurance against the imposition or enforcement of death penalty. Apart from the statutory restrictions stipulated in FOO, the Chief Executive also needs to take into account other restrictions, humanitarian or otherwise, set out in the relevant arrangements for surrender of fugitive offenders (see paragraph 23 below) and other applicable Hong Kong law (including the Basic Law and HKBORO) as raised by the wanted person in the representations to the Chief Executive⁶.
15. Under section 13(1)(b) of FOO, the Chief Executive has residual power to refuse to surrender a person. For instance, she can refuse to do so if she considers that it would be wrong, unjust or oppressive to order the

⁶ In *Chen Chong Gui v Chief Executive of HKSAR* [1999] 1 HKLRD 693, Yeung J (as he then was) said at 702B that the legislative scheme on extradition envisages that the Chief Executive may have to consider matters of law in addition to factual or humanitarian matters. In *Chan Hok Shek v Superintendent of Lai Chi Kok Reception Centre & Another* [2010] 3 HKC 94, at paras. 30 and 35, Wright J. observed that it was incontrovertible that a duty of candour and good faith is owed in any proceedings before any court, not simply in extradition proceedings, and that any breach of such duty by a requesting party would be a matter which could be placed before the Chief Executive for consideration at the time of her determining whether to order surrender.

surrender: see paragraphs 71 and 72 of *Cheng Chui Ping v The Chief Executive of the HKSAR & Anor*, [2002] HKCU 5, citing *Atkinson v USA Government* [1971] 2 AC 197 at 233 in support. In *Cheng Chui Ping*, Hartmann J (as he then was) held that a discretion to refuse to surrender in order to protect an individual vests in the Chief Executive, and the Chief Executive has the power to refuse surrender if it would be wrong, oppressive or unjust to do so.

16. As mentioned in paragraph 3 above, the Chief Executive's decision to order a surrender is subject to scrutiny by the court by way of judicial review⁷.

Comparison with other common law jurisprudence

17. Unlike the UK Extradition Act 2003 which empowers the court to consider certain human rights safeguards, FOO operates on the basis of the framework laid down in the UK Extradition Act 1989 and within the constitutional framework of the Basic Law and HKBORO. It gives the executive authority power to consider surrender with such power subject to judicial review by the court. A similar framework is used by Australia and New Zealand which gives their executive authorities residual discretion to order extradition, under section 22(3)(f) of the Australian Extradition Act 1988 and section 30(3)(e) of the New Zealand Extradition Act 1999 respectively. Exercise of such power is subject to judicial

⁷ See, for example, *Chen Chong Gui* (footnote 6 above), at 703J-704A.

scrutiny by way of judicial review. The relevant provisions are set out as follows -

Section 22(3)(f) of Australian Extradition 1988

“(3) For the purposes of subsection (2), the eligible person is only to be surrendered in relation to a qualifying extradition offence if -

...

(f) the Attorney-General, in his or her discretion, considers that the persons should be surrendered in relation to the offence.”

Section 30(3)(e) of New Zealand Extradition 1999

“(3) The Minister may determine that the person is not to be surrendered if –

...

(e) for any other reason the Minister considers that the person should not be surrendered.”

(II) Order for surrender made by the Chief Executive and judicial review (paragraph 3 of the Letter)

Whether the Chief Executive is required to provide reasons for decision

18. Although there is no general duty on the Chief Executive to give reasons for her decision in surrender cases, reasons in some circumstances may be required. If the Chief Executive in such circumstances ought to have

given reason but failed to do so, her decision may be challenged in the judicial review proceedings.

19. In *Chen Chong Gui v The Chief Executive of the HKSAR* [1999] 1 HKLRD 693, at 701G, Yeung J noted that “[t]here 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”.
20. In *Cheng Chui Ping v The Chief Executive of the HKSAR & Anor*⁸, at paragraph 97, Hartmann J also explained that “[e]ven 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”. Hartmann J did not consider such circumstances exist in *Cheng Chui Ping*. On appeal, the Court of Appeal also commented that “[i]t 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 reason may in some circumstances be appropriate and called for”⁹, but based on the circumstances of that

⁸ [2002] HKCU 5.

⁹ *Cheng Chui Ping v The Chief Executive of the HKSAR & Anor* [2002] HKCU 1076, at

particular case, the court considered that there was no call upon the Chief Executive to do so.

(III) 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 (paragraph 5 of the Letter)

21. The issue of time-bar is not a statutory restriction for surrender under FOO. The issue is not directly relevant for consideration by the court of committal. That said, if it is undisputed that a requesting party is pursuing an offence the prosecution of which is time-barred, there could be possible issue of abuse of process which might be raised before the court of committal (see paragraph 12 above) or with the Chief Executive in the final executive stage. As observed by Hartmann J (as he then was) in *Chen Chui Ping v The Chief Executive of the HKSAR & Anor*, [2002] HKCU 5, at paras. 74, 78 and 81:

“74. ...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....it cannot begin to be said that the applicant’s submission is unanswerable and that her case in law is patently made out.

It cannot be said that therefore, that the issue is so beyond argument that any resistance shown by the authorities of the United States must be in bad faith”;

...

78. If it could be demonstrated that in the particular circumstances of the 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 submission that it would be wrong, unjust or oppressive to order the surrender.

...

*81. If as Stock J said in *Cosby v Chief Executive of the HKSAR* [[2000] 3 HKC 662], 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 [sic], would no doubt consider the issue”.*

22. In addition, if it is provided in the relevant surrender arrangements that prosecution within the limitation period under the law of the requesting party is a condition for surrender, the provision would be relevant for consideration by the Chief Executive in the exercise of her power in the preliminary and final executive stages. Under the proposed special surrender arrangements regime, the requesting party will be requested to provide an assurance that the limitation period, if any, for the prosecution of the offence concerned has not expired. In light of the assurance, the

Chief Executive will take into consideration the issue of time-bar at both the preliminary and final executive stages. Failure to take it into account will run a real risk of a judicial review challenge. This is an example of the additional safeguards for the proposed special surrender arrangements, which are to be given legal effect under the proposed section 3A(1) of FOO¹⁰.

¹⁰ The proposed section 3A(1) provides that if there are special surrender arrangements in respect of a person, the procedures in Cap. 503 apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate in respect of the person, subject to any provision contained in the arrangements that, in addition to the procedures, further limits the circumstances in which the person may be surrendered.