HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

THE ATTORNEY-GENERAL FOR
THE COMMONWEALTH APPELLANT

AND

RONALD TSE CHU-FAI FIRST RESPONDENT

THE GOVERNOR OF THE METROPOLITAN
RECEPTION AND REMAND CENTRE SECOND RESPONDENT

Attorney-General for the Commonwealth v Tse Chu-Fai (C13-1997)
[1998] HCA 25
3 April 1998

ORDER

1. *The cause be remitted to the Court of Appeal of New South Wales for the making of orders to give effect to the reasons for judgment of this Court.*

2. *The appellant and the first respondent have liberty, within the periods and in the sequence specified in the reasons for judgment, to file written submissions as to the appropriate order for costs of the cause in this Court.*

Cause removed under s 40 of the *Judiciary Act* 1903 (Cth)

Representation:

D M J Bennett QC with M A Wigney and N E Abadee for the appellant (instructed by Australian Government Solicitor)

D F Jackson QC with I A Shearer and D Jordan for the first respondent (instructed by Deacons Graham & James)

No appearance for the second respondent

CATCHWORDS

Attorney-General (Cth) v Tse Chu-Fai

Extradition – Application on behalf of extradition country for issue of warrant of arrest – Meaning of "extradition country" – Whether "Hong Kong" specified in Extradition (Hong Kong) Regulations a "territory for the international relations of which a country is responsible" – Whether "Hong Kong" specified in Regulations commencing on 29 June 1997 refers from 1 July 1997 to the Hong Kong Special Administrative Region of the People's Republic of China.

Evidence – Certificate by Minister for Foreign Affairs – Certificate containing views on matters within peculiar responsibility of Minister – Admissibility of certificate.

Words and phrases – "extradition country" – "territory for the international relations of which a country is responsible".

Extradition Act 1988 (Cth), ss 5, 12.

Extradition (Hong Kong) Regulations (Cth).

1 GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ. By order made 22 December 1997 under s 40 of the *Judiciary Act* 1903 (Cth), the whole of a cause pending in the New South Wales Court of Appeal was removed into this Court and a direction was given that the cause be argued before a Full Court. The cause is an appeal by the Attorney-General for the Commonwealth against an order of the Supreme Court of New South Wales made 21 November 1997. By that order, the Court directed Mr Ronald Tse Chu-Fai (the first respondent) be released from custody of the Governor of the Metropolitan Reception and Remand Centre (the second respondent)[1]. The order, in the nature of a writ of habeas corpus, was made on the footing that the first respondent was unlawfully detained. This was because the warrant under which he had been arrested on 17 July 1997 had been issued by the magistrate without the authority conferred by s 12(1) of the *Extradition Act* 1988 (Cth) ("the 1988 Act"). The text of that provision is set out later in these reasons.

2 The first respondent has been released from custody upon undertakings which have been given to the Supreme Court and will continue until the disposition of the appeal by the Court of Appeal.

3 In March 1997, an information was laid at a Magistrates' Court in Hong Kong alleging that the first respondent had committed 22 offences. The counts included conspiracy to defraud contrary to the common law and the Criminal Procedure Ordinance, conspiracy to falsify an account contrary to the Theft Ordinance and the Criminal Procedure Ordinance, and obtaining services and property by deception contrary to the Theft Ordinance. On 14 March 1997, a magistrate in Hong Kong issued a warrant for the apprehension of the first respondent.

4 Thereafter, the United Kingdom of Great Britain and Northern Ireland ("the UK") ceased to exercise sovereignty in respect of Hong Kong and on 1 July 1997 the People's Republic of China ("the PRC") assumed the exercise of sovereignty in Hong Kong and established the Hong Kong Special Administrative Region ("the HKSAR"). These steps implemented a treaty between the UK and the PRC which was initialled at Peking (now Beijing) on 26 September 1984 and which was identified as "Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong" ("the Joint

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1 The reasons for judgment are reported: *Tse Chu-Fai v Governor of the Metropolitan Reception Centre* (1997) 150 ALR 566.

Declaration")[2]. Section 1 of the *Hong Kong Act* 1985 (UK), which came into force on the exchange of instruments of ratification of the Joint Declaration, had provided that, as from 1 July 1997, the Crown was no longer to have "sovereignty or jurisdiction over any part of Hong Kong".

5 During the nineteenth century, the UK had concluded three treaties with the then Chinese Government. Under the Treaty of Nanking signed in 1842 and ratified in 1843, Hong Kong Island was ceded in perpetuity; under the Convention of Peking in 1860, the southern part of the Kowloon peninsula and Stonecutters Island were ceded in perpetuity; and under the Convention of 1898, the New Territories were leased to the UK for 99 years from 1 July 1898[3]. The PRC consistently took the view that these were unequal treaties[4], not concluded on the basis of the sovereign equality of the parties[5]. Paragraphs 1 and 2 of the Joint Declaration stated that the Government of the PRC had "decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997" and the Government of the UK would "restore Hong Kong to the [PRC] with effect from 1 July 1997".

6 On 14 July 1997, an extradition request to the appellant, the Attorney-General for the Commonwealth, was made under the hand of the Chief Executive of the HKSAR. This was followed by steps under the 1988 Act leading to the arrest and detention of the first respondent. It should be noted that the laws which founded the offences alleged against the first respondent in the information laid in March 1997 continued in operation in the HKSAR after 1 July 1997. That circumstance will be of primary importance on the disposition of the present appeal. It is convenient first to consider the scope and purpose of the 1988 Act.

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2 (1984) 23 *International Legal Materials* 1366 at 1371.

3 (1984) 23 *International Legal Materials* 1366 at 1367.

4 McCorquodale, "Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination", (1995) 66 *British Year Book of International Law* 283 at 327. See also (1984) 23 *International Legal Materials* 1366 at 1367.

5 See as to this doctrine, Brownlie, *Principles of Public International Law*, 4th ed (1990) at 615-616.

The 1988 Act

7 Part II of the 1988 Act (ss 12-27) is headed "EXTRADITION FROM AUSTRALIA TO EXTRADITION COUNTRIES" and Pt IV (ss 40-44) is headed "EXTRADITION TO AUSTRALIA FROM OTHER COUNTRIES". Section 4 excludes the operation of two Imperial statutes known as the *Extradition Acts* 1870 to 1935 and the *Fugitive Offenders Act* 1881. This exclusion is in aid of several of the principal objects of the 1988 Act stipulated in s 3. One principal object is "to codify" the law relating to the extradition of persons from Australia to extradition countries and New Zealand. Another is to enable Australia to carry out its obligations under extradition treaties. With respect to the first object, it is settled that extradition from Australia cannot take place in the absence of statutory authority[6].

8 In *United States v Cotroni*[7], the Supreme Court of Canada identified as follows the importance of such legislation:

> "The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today."

9 The general principles of extradition law expressed in the concepts of double criminality[8] (s 10(2)), political offence (s 7(a)) and speciality[9] (s 25(2)) appear throughout Pt II of the 1988 Act. They express particular interests of national sovereignty and respect for individual rights. Given the presence of those safeguards, the general scope of Pt II should not be given any narrow interpretation. In particular, the definition in s 5 of "extradition country", upon which this litigation largely turns, should be given a fair reading which facilitates the principal objects of the legislation specified in s 3.

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6 *Barton v The Commonwealth* (1974) 131 CLR 477 at 483, 494-495.

7 [1989] 1 SCR 1469 at 1485.

8 See *Riley v The Commonwealth* (1985) 159 CLR 1 at 15-19.

9 See *Trimbole v The Commonwealth* (1984) 155 CLR 186 at 190.

10 Section 16(1) of the 1988 Act empowers the Attorney-General upon receipt of an extradition request from an extradition country in relation to a person to state, by notice in writing in the statutory form expressed to be directed to any magistrate, that the request has been received. The Attorney-General is not to give the notice unless of a certain opinion with respect to various matters specified in s 16(2). The Attorney-General must be of the opinion that the person in question "is an extraditable person in relation to the extradition country" (s 16(2)(a)(i)). The Attorney-General must also be of the opinion that, if the conduct of the person constituting the extradition offences for which surrender is sought or "equivalent conduct"[10] had taken place in Australia at the time of receipt of the extradition request, the conduct or equivalent conduct would have constituted an extradition offence in relation to Australia (s 16(2)(a)(ii)). Notice is not to be given if the Attorney-General is of the opinion that there is a relevant "extradition objection" (s 16(2)(b))[11].

11 Section 12(1) is of central importance. It states:

> "Where:
>
> (a) an application is made, in the statutory form, on behalf of an extradition country to a magistrate for the issue of a warrant for the arrest of a person; and
>
> (b) the magistrate is satisfied, on the basis of information given by affidavit, that the person is an extraditable person in relation to the extradition country;
>
> the magistrate shall issue a warrant, in the statutory form, for the arrest of the person."

12 It will be apparent that the operation of s 12(1) turns upon the application of two requirements. The first is the making of the application "on behalf of an extradition country". The second is the satisfaction of the magistrate that the

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10 There is an interpretive provision with respect to "equivalent conduct" in s 10(3).

11 There is an interpretive provision in respect of "extradition objection" in s 7. It includes such matters as political offences and acquittal or pardon in the extradition country.

person is "an extraditable person in relation to the extradition country". A person is an "extraditable person" in relation to a country if the criteria in s 6[12] are satisfied. These include the requirement that the offences in respect of which a warrant is in force are "extradition offence[s]" in relation to the country in question.

13 The term "extradition offence" is defined in s 5 to identify certain offences "against a law" of a country. A reference to "a law of a country includes a reference to a law of, or in force in, a part of the country" (s 9). Further, each colony, territory or protectorate of the country, each territory for the international relations of which the country is responsible, and each ship or aircraft of or registered in the country is deemed to be part of the country (s 8(1)). This is subject to an exception provided in s 8(1) in the case of a colony, territory or protectorate that itself is an extradition country[13].

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12 So far as immediately relevant, s 6 states:

> "Where:
>
> (a) either
>
> (i) a warrant is or warrants are in force for the arrest of a person in relation to an offence or offences against the law of a country that the person is accused of having committed either before or after the commencement of this Act; ...
>
> (b) the offence or any of the offences is an extradition offence in relation to the country; and
>
> (c) the person is believed to be outside the country;
>
> the person is, for the purposes of this Act, an extraditable person in relation to the country."

13 Sub-section 8(1) states:

> "For the purposes of the application of this Act in relation to a country (other than Australia):
>
> (a) a colony, territory or protectorate of the country;

(Footnote continues on next page)

14 It is apparent from the foregoing, particularly s 9, that the operation of the terms "extradition offence" and "extraditable person" (and thus the second requirement in s 12(1)) may turn upon the law of, or law in force in, a "part" of a country. The term "part" is not defined. The immediate issues on this appeal turn upon the first requirement in s 12(1), that concerned with "extradition country". But, as will become apparent, in dealing with this requirement the territorial operation of a particular body of law is a significant consideration.

The dispute

15 The case for the first respondent proceeded on the footing that, if the HKSAR is an "extradition country", it was open to the magistrate to be satisfied that the first respondent is an extraditable person in relation to the HKSAR. The first respondent founded his successful application for habeas corpus on the proposition that application for the issue of the warrant for his arrest had not been made "on behalf of an extradition country". The appellant contends that the criterion in s 12(1) was satisfied because the HKSAR is an "extradition country".

16 The dispute therefore involves the construction of the definition of "extradition country" in s 5 and of regulations giving specific content to that definition. Section 5 states:

> "'extradition country' means:
>
> (a) any country (other than New Zealand) that is declared by the regulations to be an extradition country;
>
> (b) any of the following that is declared by the regulations to be an extradition country:
>
> (i) a colony, territory or protectorate of a country;

> (b) a territory for the international relations of which the country is responsible; and
>
> (c) a ship or aircraft of, or registered in, the country;
>
> are, except in the case of a colony, territory or protectorate that is an extradition country, each deemed to be part of the country."

(ii) a territory for the international relations of which a country is responsible; and

(c) until the regulations provide that this paragraph does not apply in relation to the foreign state, any foreign state to which the former Foreign Extradition Act applied by virtue of section 9 of that Act".

17 Under the 1988 Act, extradition from Australia to New Zealand is dealt with under the special provisions of Pt III (ss 28-39). The statutory reference in par (c) of the definition of "extradition country" is to the *Extradition (Foreign States) Act* 1966 (Cth). This was repealed, on the coming into force of the 1988 Act, by s 4 of the *Extradition (Repeal and Consequential Provisions) Act* 1988 (Cth). Section 4 also repealed the *Extradition (Commonwealth Countries) Act* 1966 (Cth). The 1988 Act thus replaced two former legislative regimes, one dealing with foreign states and the other dealing with relations between Commonwealth countries. The expression "country" in pars (a) and (b) of the definition of "extradition country" in the 1988 Act is apt to cover all such entities.

18 Section 55 of the 1988 Act confers upon the Governor-General the power to make regulations, not inconsistent with the 1988 Act, which prescribe all matters required or permitted by that statute to be prescribed. On 28 May 1997, the Governor-General made two sets of regulations. The first is the Extradition (Hong Kong) Regulations ("the 1997 Regulations")[14]. These comprise regs 1-5 which state:

"1. These Regulations may be cited as the Extradition (Hong Kong) Regulations.

2. These Regulations commence on 29 June 1997.

3. In these Regulations, unless the contrary intention appears:

'Surrender Agreement' means the Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong, a copy of which is set out in the Schedule.

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14 SR No 123/1997.

4. Hong Kong is declared to be an extradition country.

5. The *Extradition Act 1988* applies in relation to Hong Kong subject to the Surrender Agreement."

19 Regulation 5 is to be read in the light of s 11(1) of the 1988 Act. Section 11(1) states:

> "The regulations may:
>
> (a) state that this Act applies in relation to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country, being a treaty a copy of which is set out in the regulations; or
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> (b) make provision instead to the effect that this Act applies in relation to a specified extradition country subject to other limitations, conditions, exceptions or qualifications, other than such limitations, conditions, exceptions or qualifications as are necessary to give effect to a multilateral extradition treaty in relation to the country."

Provision for regulations in respect of multilateral extradition treaties is made by s 11(1A). The term "extradition treaty" is defined in s 5 as follows:

> "**'extradition treaty'**, in relation to a country, means a treaty to which the country and Australia are parties (whether or not any other country is also a party), being a treaty relating in whole or in part to the surrender of persons accused or convicted of offences".

The term "treaty" includes "a convention, protocol, agreement or arrangement" (s 5).

20 The issues which arise in this appeal may be encapsulated by asking whether the "Hong Kong" identified in reg 4 with effect from 29 June 1997 has the same relevant identity after 1 July 1997 as the HKSAR. If the answer is in the negative, s 12(1) of the 1998 Act did not confer the necessary authority upon the magistrate who issued the warrant on 14 March 1997. If it is in the affirmative, the next question is whether the HKSAR is a "territory" or (as the primary judge found) an

integral part of the PRC which, not being an extradition country, could not itself have made an application for the issue of a warrant for the arrest of the first respondent in accordance with the 1988 Act.

The status of Hong Kong

21 In the period between the commencement of the 1988 Act and 29 June 1997, provision in respect of Hong Kong was made by the Extradition (Commonwealth Countries) Regulations ("the Commonwealth Regulations")[15]. The Commonwealth Regulations implement what is known as the London Scheme and declare (reg 3) each of the "countries, colonies, territories and protectorates" which were specified in the Schedule to be an extradition country. In respect of each of the above (which have included the UK as well as the entry "Hong Kong"), the Commonwealth Regulations make a further special provision pursuant to par (b) of s 11(1) of the 1988 Act. The entry "Hong Kong" in the Schedule to the Commonwealth Regulations was omitted by the second set of regulations made on 28 May 1997. These are the Extradition (Commonwealth Countries) Regulations (Amendment)[16]. They also were stated to commence on 29 June 1997.

22 Before 1 July 1997, Hong Kong answered the description in par (b)(ii) of the definition of "extradition country" in s 5 of the 1988 Act of a territory for the international relations of which a country, namely the UK, was responsible. Hong Kong also answered the description in par (b)(i) of a colony or territory of the UK.

23 The 1997 Regulations were stated to commence on 29 June 1997 whilst that state of affairs applied. The appellant submitted and the first respondent denied that, on and from 1 July 1997, Hong Kong answered the description in par (b)(ii) of a territory for the international relations of which a country, namely the PRC, is responsible. The first respondent appeared to accept that the 1997 Regulations were within power when made but submitted that, beginning 1 July 1997, a

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15 SR No 281/1988. These Regulations had been made on 24 November 1988, before the commencement of the 1988 Act on 1 December of that year. The necessary power in that respect was conferred by s 4(1) of the *Acts Interpretation Act* 1901 (Cth).

16 SR No 122/1997.

legislative condition for their continued operation came to an end[17]. This was because the HKSAR is, for the purposes of the definition of "extradition country" in s 5 of the 1988 Act, merely a part of the PRC and not "a territory for the international relations of which" the PRC is responsible. The primary judge accepted this submission. He concluded in favour of the first respondent on the basis that the 1988 Act does not provide for a part of a country to be separately declared as an extradition country.

24 There are two corollaries to the above submissions by the first respondent. One is that "Hong Kong", as it is declared in reg 4 of the 1997 Regulations to be an extradition country, is not the same "territory", within the meaning of par (b)(ii) of the definition of "extradition country" in s 5 of the 1988 Act, as the HKSAR, so that the 1997 Regulations did not operate beyond 30 June 1997. The other is that, in the absence of a declaration under s 5(a) in respect of the PRC itself, the scope of s 5 does not extend to any fresh regulations that might hereafter be made in respect of the HKSAR alone.

The Surrender Agreement

25 Before turning to resolve these issues of construction, it is appropriate to consider the circumstances pertaining to the conclusion of the Surrender Agreement and the making of the 1997 Regulations. These matters were the subject of detailed evidence, including an affidavit by a Deputy Principal Government Counsel of the HKSAR. In large measure the position sufficiently appears from the Explanatory Statement issued by the authority of the Attorney-General and Minister for Justice in respect of the making of the 1997 Regulations. This includes the following:

> "The Regulations give effect in Australian domestic law to the Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong, signed at Hong Kong on 15 November 1993 ('the Agreement'). The text of this Agreement was tabled in the House of Representatives on 29 June 1994 and in the Senate on 23 August 1994[18]. In accordance with the Government's policy of greater parliamentary involvement in Australia's treaty-making processes, a National

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17 cf *Mathieson v Burton* (1971) 124 CLR 1 at 10.

18 The text appears in *Australian Treaty Series, 1997*, No 11.

Interest Analysis ('NIA') for the Agreement, prepared by the Attorney-General's Department, was tabled in Parliament on 18 June 1996. (The NIA notes the reasons why Australia should become a party to the Agreement.)

On 7 May 1997 the Government of Hong Kong notified Australia, in accordance with Article 21 of the Agreement, that its domestic requirements for the Agreement's entry into force had been complied with. Australia's requirement for the Agreement's entry into force is the making of the proposed Regulations. The Agreement enters into force 30 days after the date on which the Parties have notified each other that they have complied with their respective requirements for the entry into force of the Agreement. The Government of Hong Kong will be notified on 30 May 1997 that Australia's requirements for the Agreement's entry into force have been complied with. Thirty days after that date, that is on 29 June 1997, the Agreement will enter into force. Accordingly, 29 June 1997 is also the commencement date of the Regulations.

Extradition between Australia and Hong Kong was previously conducted under the Commonwealth Scheme for the Rendition of Fugitive Offenders ('the London Scheme'), an arrangement of less than treaty status in relation to extradition among Commonwealth countries and their dependent territories. The London Scheme is given effect in Australia by the Extradition (Commonwealth Countries) Regulations made under the *Extradition Act 1988*.

On its reversion to Chinese sovereignty on 1 July 1997 Hong Kong will cease to be part of the Commonwealth and hence will no longer come within the scope of the London Scheme. The Agreement has been negotiated in order to establish a continuing extradition relationship with Hong Kong after 1 July 1997. (Australia has no bilateral extradition relationship with the People's Republic of China.) *The Chinese Government has consented to the negotiation and conclusion of the Agreement by Hong Kong.*

From the commencement of the Regulations, the Extradition Act will apply to Hong Kong subject to the Agreement. The Extradition (Commonwealth Countries) Regulations (Amendment) will simultaneously omit Hong Kong from the Schedule to the Extradition (Commonwealth Countries) Regulations, so that the Extradition Act will no longer apply to Hong Kong

subject to the limitations, conditions, exceptions or qualifications set out in those Regulations.

As with all of Australia's extradition treaties, the Agreement contains all the internationally accepted human rights safeguards which are now a part of modern extradition. Under the Agreement, extradition will not be permitted where the fugitive is sought for or in connection with his or her race, religion, nationality or political opinions or would be tried, sentenced or detained for a political offence. In addition, extradition may be refused where the fugitive could be liable to the death penalty, unless satisfactory assurances are given by the requesting party that the death penalty will not be imposed or, if imposed, will not be carried out.

Unlike most other Australian extradition treaties, the Agreement requires presentation of a *prima facie* case by the requesting party (which is also a requirement of the London Scheme) and permits extradition only in respect of a list of offences. The list has been drawn up to include all offences for which extradition is currently considered appropriate." (emphasis added)

26 It will be noted that the Government of the PRC consented to the negotiation and conclusion of the Surrender Agreement. Further, the Surrender Agreement itself states that the Government of Hong Kong was "duly authorised" to conclude the Surrender Agreement "by the sovereign government which is responsible for its foreign affairs"[19]. That sovereign government was the UK. However, the UK took these steps in the negotiation and conclusion of the Surrender Agreement in accordance with procedures agreed with the PRC and implemented through a body known as the Joint Liaison Group.

27 Annexure II to the Joint Declaration[20] provided for the establishment by the UK and the PRC of a Joint Liaison Group. The matters for consideration of that body had included (Art 4(b)) action to be taken by the two Governments "to ensure

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19 See *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 476-477; Marston (ed), "United Kingdom Materials on International Law 1993", (1993) 64 *British Year Book of International Law* 579 at 605-606; Marston (ed), "United Kingdom Materials on International Law 1996", (1996) 67 *British Year Book of International Law* 683 at 718-719.

20 (1984) 23 *International Legal Materials* 1366 at 1379.

the continued application of international rights and obligations affecting Hong Kong".

28 Reference also should be made to an exchange of Notes between the PRC and Australia. The PRC Note was received on 12 June 1997. It stated that the Government of the PRC "will resume the exercise of sovereignty in Hong Kong on 1 July 1997, and will establish the [HKSAR]". It went on to state that the Government of the PRC affirmed that the Surrender Agreement "will continue to be applicable in the [HKSAR] from 1 July 1997". The PRC Note continued that, from that date, this and certain other agreements:

> "will be regarded as agreements the [HKSAR] has been authorized by the Government of the [PRC] to have signed with the Government of Australia".

Australia replied by confirming that the Surrender Agreement and another agreement[21]:

> "will be regarded, from 1 July 1997, as agreements the [HKSAR] has been authorized by the Government of the [PRC] to have signed with the Government of Australia".

The Note also confirmed that these agreements "will continue to be applicable in the [HKSAR] from 1 July 1997". The result was that, with respect to the requirements of s 11(1)(a) of the 1988 Act, there were introduced no further "limitations, conditions, exceptions or qualifications" made necessary to give effect to the Surrender Agreement. Further, with respect to the obligations to surrender set out in Art 1 of the Surrender Agreement, the HKSAR was to be treated as the "requesting Party" in a case such as the present[22].

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21 The Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments which entered into force on 15 October 1993: *Australian Treaty Series, 1993*, No 30.

22 Article 1 states:

> "The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the requested Party and who is wanted by the requesting Party for prosecution or for the imposition or enforcement of a sentence in respect of an offence described in Article 2."

The Basic Law

29 It is convenient also briefly to consider some aspects of the constituent document of the HKSAR ("the Basic Law").

30 The Constitution of the PRC was adopted on 4 December 1982 and since has been amended. Article 31 states:

> "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions."

Paragraphs 1, 2 and 3 of Art 3 of the Joint Declaration stated the following among what the Government of the PRC thereby declared to be the basic policies of the PRC regarding Hong Kong:

> "(1) Upholding national unity and territorial integrity and taking account of the history of Hong Kong and its realities, the [PRC] has decided to establish, in accordance with the provisions of Article 31 of the Constitution of the [PRC], a Hong Kong Special Administrative Region upon resuming the exercise of sovereignty over Hong Kong.
>
> (2) The [HKSAR] will be directly under the authority of the Central People's Government of the [PRC]. The [HKSAR] will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government.
>
> (3) The [HKSAR] will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."

31 The Basic Law for the HKSAR was adopted by the National People's Congress and promulgated by the President of the PRC on 4 April 1990 to be "put into effect as of 1 July 1997"[23]. The Basic Law provides that the HKSAR is "an inalienable part of the [PRC]" (Art 1) and the National People's Congress "authorizes the [HKSAR] to exercise a high degree of autonomy and enjoy

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23 The text of the Basic Law appears in (1990) 29 *International Legal Materials* 1519.

executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of [the Basic Law]" (Art 2). In addition to the Chinese language, English also may be used as an official language (Art 9). The HKSAR shall have independent finances and the Central People's Government shall not levy taxes in the HKSAR (Art 106). The HKSAR shall maintain the status of a free port (Art 114) and will maintain its own shipping register under the name "Hong Kong, China" (Art 125).

32 Article 13 states:

> "The Central People's Government shall be responsible for the foreign affairs relating to the [HKSAR].
>
> The Ministry of Foreign Affairs of the [PRC] shall establish an office in Hong Kong to deal with foreign affairs.
>
> The Central People's Government authorizes the [HKSAR] to conduct relevant external affairs on its own in accordance with [the Basic Law]."

33 Chapter VII (Arts 150-157) is headed "External Affairs". Article 157 requires the approval of the Central People's Government to the establishment of foreign consular and other official or semi-official missions in the HKSAR. Consular and other official missions "established in Hong Kong" by states which have formal diplomatic relations with the PRC "may be maintained" (Art 157). The application to the HKSAR of international agreements to which the PRC is or becomes a party shall be decided by the Central People's Government "in accordance with the circumstances and needs of the [HKSAR], and after seeking the views of the government of the [HKSAR]" (Art 153). This Article also states:

> "International agreements to which the [PRC] is not a party but which are implemented in Hong Kong may continue to be implemented in the [HKSAR]. The Central People's Government shall, as necessary, authorize or assist the government of the [HKSAR] to make appropriate arrangements for the application to the [HKSAR] of other relevant international agreements."

Reference should also be made to Art 151 which states:

> "The [HKSAR] may on its own, using the name 'Hong Kong, China', maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields."

The Central People's Government shall, when necessary, facilitate the continued participation of the HKSAR "in an appropriate capacity in those international organizations in which Hong Kong is a participant in one capacity or another, but of which the [PRC] is not a member" (Art 152).

34 The provisions with respect to the legal system in the HKSAR are of particular importance for present purposes. Article 8 is significant for this litigation. It states:

> "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene [the Basic Law], and subject to any amendment by the legislature of the [HKSAR]."

The HKSAR "shall be vested with independent judicial power, including that of final adjudication" (Art 19).

35 The first two paragraphs of Art 18 state:

> "The laws in force in the [HKSAR] shall be [the Basic Law], the laws previously in force in Hong Kong as provided for in Article 8 of [the Basic Law], and the laws enacted by the legislature of the [HKSAR].
>
> National laws shall not be applied in the [HKSAR] except for those listed in Annex III to [the Basic Law]. The laws listed therein shall be applied locally by way of promulgation or legislation by the [HKSAR]."

The national laws listed in Annex III include those with respect to the Territorial Sea, Nationality, and Diplomatic Privileges and Immunities. Article 18 goes on to provide for the Standing Committee of the National People's Congress to delete from the list of laws in Annex III and to add to the list laws relating to defence and foreign affairs "as well as other matters outside the limits of the autonomy of the [HKSAR] as specified by [the Basic Law]". Provision is also made for the

application of national laws after a decision that the HKSAR "is in a state of emergency".

36 On 29 July 1997, the Court of Appeal of the HKSAR ruled that the common law survived the resumption of sovereignty by the PRC and that it was adopted by the Basic Law. The Court of Appeal also ruled that the validity and effect of proceedings commenced under an indictment before 1 July 1997 were preserved by the Basic Law after that date[24].

Construction of the 1988 Act

37 Against that background, we turn to the issues of construction of the definition of "extradition country" in s 5 of the 1988 Act.

38 It will be observed that pars (a) and (b) of the definition of "extradition country" speak of countries rather than states. That usage may be explained, as a matter of legislative history, by reference to the arrangements of less than treaty status which were made with respect to the Commonwealth of Nations under the London Scheme. However, there is nothing on the face of the definition to limit the term "country" in this way. Further, the 1988 Act is designed to provide comprehensively for extradition arrangements as the circumstances require from time to time.

39 Paragraph (b)(i) of the definition uses the terms "colony, territory or protectorate". These are apt to include the wide range of juridical entities found particularly in the previous systems of European imperial administration[25]. They

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24 *HKSAR v Ma Wai-Kwan*, unreported, 29 July 1997.

25 In Sched 1 to the *Interpretation Act* 1978 (UK), "[c]olony" is defined as meaning:

"any part of Her Majesty's dominions outside the British Islands except -

(a) countries having fully responsible status within the Commonwealth;

(b) territories for whose external relations a country other than the United Kingdom is responsible;

(c) associated states [a reference to the *West Indies Act* 1967 (UK)];

(Footnote continues on next page)

are used, with reference to the Commonwealth of Nations, in the definition of "Commonwealth country" in the Commonwealth Regulations.

40 Under such systems, there was scope for an overlap between the two limbs of par (b). An "extradition country" as declared by the 1997 Regulations might answer both (i) and (ii) of par (b)[26]. For example, the treaty under which France established a protectorate over Morocco, the Treaty of Fez of 1912[27], left Morocco as a sovereign state but Morocco "made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco"[28].

41 The term "responsible" in par (b)(ii) suggests authority or control. Nevertheless, responsibilities for the conduct of foreign affairs might be undertaken, and authority or control created, without any element of colonial subordination. The conduct after 1919 by Switzerland of the diplomatic relations of Liechtenstein is an example[29]. Another was the entrusting to Poland of the conduct of the foreign relations of the Free City of Danzig, established by the

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and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed for the purposes of this definition to be one colony".

26 See Fawcett, "Treaty Relations of British Overseas Territories", (1949) 26 *British Year Book of International Law* 86 at 97-99.

27 Parry (ed), *The Consolidated Treaty Series*, (1912), vol 216 at 20.

28 *Case Concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)* [1952] *International Court of Justice Reports* 175 at 188.

29 Brownlie, *Principles of Public International Law*, 4th ed (1990) at 74-76; Fawcett, "Treaty Relations of British Overseas Territories", (1949) 26 *British Year Book of International Law* 86 at 102; Oppenheim, *International Law*, 7th ed (1948), vol 1 at 169, fn 4.

Treaty of Versailles and placed under the protection of the League of Nations[30]. Circumstances of this character fall within the scope of par (b)(ii).

42 Further, there may be a bilateral extradition treaty "in relation to" a "specified extradition country", within the meaning of s 11(1)(a), where the parties to the treaty are Australia and the country which has responsibility for the international relations of a territory within the meaning of par (b)(ii) of the definition in s 5. That territory, rather than the country having foreign affairs responsibility, might by regulation validly be declared to be an extradition country under par (b)(ii). In the absence of any empowerment of the extradition country itself, for example by the terms of a treaty, an application for the issue of a warrant under s 12 would be made by the responsible country. It would do so, as that section states, "on behalf of" the extradition country. It would not be to the point that the responsible country itself was not an extradition country.

43 The position established by the Basic Law for the HKSAR, as a matter of international law, may be "unusual"[31]. It has been suggested that the HKSAR displays the indicia of international legal personality[32]. In particular, we were taken to discussions dealing with the broadening of the previously limited status accorded under international law to regional autonomous entities[33]. It is unnecessary and inappropriate for this Court to embark upon these questions. Rather, the issue here concerns the construction of the 1988 Act, with due regard to its scope and purpose. The immediate question is whether the HKSAR as a special administrative region established under Art 31 of the Constitution of the PRC, whilst within the metropolitan area of the PRC, nevertheless may answer the description within par (b)(ii) of the definition of "extradition country" in s 5 of the

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30 *Case Concerning the Free City of Danzig and the International Labour Organisation* [1929-1930] *Annual Digest of Public International Law Cases* 410 at 411; Oppenheim, *International Law*, 7th ed (1948), vol 1 at 175-176, fn 4.

31 Shaw, *International Law*, 4th ed (1997) at 716.

32 Mushkat, "Hong Kong and Succession of Treaties", (1997) 46 *International and Comparative Law Quarterly* 181 at 193.

33 Hannum and Lillich, "The Concept of Autonomy in International Law" in Dinstein (ed), *Models of Autonomy*, (1981) at 215.

1988 Act of "a territory for the international relations of which [the PRC] is responsible".

44 The term "territory" may, according to its context, identify no more than a tract of land or an area of the earth's surface. In the law construed in *R v Governor of Brixton Prison; Ex parte Schtraks*[34] "territory" included any area under the effective jurisdiction of a particular state. The term may also identify a geo-political entity with some attributes of a distinct governmental organisation, such as a local administration operating in a particular area. Paragraph (b)(i) of the definition in issue here speaks of a territory "of a country", whilst par (b)(ii) speaks of "a territory", not of a country, but for the international relations of which a country is responsible.

45 Central provisions of the 1988 Act, including s 12 and those provisions with respect to the terms "extraditable person" (s 6), "extradition offence" (s 5) and "extradition objection" (s 7), involve consideration of the body of law of or in force in the "extradition country" in question. They thus require consideration, in respect of that which is declared an extradition country under par (b)(ii), of the body of law of or in force in a "territory". The existence of a distinct body of law which is administered within a defined region or area of a country provides, given the purpose and scope of the 1988 Act, a sufficient criterion for the existence of a territory to which par (b)(ii) applies. It is not to the point that this region or area is not geographically divorced from what might be called the metropolitan area of that country.

46 In the case of the HKSAR, there is in force a body of law distinct from that in force in the balance of the PRC. Further, there is a particular judicial structure for the determination of controversies as to respective rights and obligations arising under that body of law. We have referred in particular to the provisions of Arts 8, 18 and 19 of the Basic Law. These provide the necessary indicia for the character of a "territory" within the meaning of par (b)(ii) of the definition of "extradition country" in s 5 of the 1988 Act.

47 The question then arises as to whether the HKSAR is a territory "for the international relations of which" the PRC "is responsible". The "high degree of autonomy" referred to in Art 2 of the Basic Law includes the activities with respect to foreign states which are authorised in Art 151. However, the basic proposition

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34 [1964] AC 556 at 579, 587, 593, 604.

is stated in Art 13. This is that, whilst the PRC authorises the HKSAR to conduct relevant external affairs on its own in accordance with the Basic Law, nevertheless the PRC "shall be responsible for the foreign affairs relating to the [HKSAR]".

48 It follows that if the 1997 Regulations had been made with effect on or after 1 July 1997 and had identified the HKSAR as an extradition country, this would have been within the regulation-making power. This would have been so even if the country having responsibility for the international relations of the HKSAR, namely the PRC, was not itself an extradition country within the meaning of par (a) of the definition of "extradition country" in s 5 of the 1988 Act. It is no requirement of par (b)(ii) that the country there referred to itself has been declared an extradition country under par (a).

49 The final question is whether there is sufficient identity between "Hong Kong" as identified in the 1997 Regulations as they came into effect several days before 1 July 1997 and the HKSAR to support the conclusion that the 1997 Regulations had continued their valid operation[35]. The question should be answered in the affirmative. In light of the Explanatory Statement issued in respect of the 1997 Regulations, it cannot be said that when reg 4 speaks of "Hong Kong" it was intended to refer only to what was the Crown Colony of Hong Kong. Nor has there been such a change as to warrant the conclusion that, beginning 1 July 1997, a legislative condition for the continued operation of the 1997 Regulations came to an end. There has been no change in the relevant territorial area. There has been a change in the legislative and executive institutions of government in Hong Kong. Nevertheless, and this is the crucial matter, the body of law in force has, in terms of Art 8 of the Basic Law, been maintained. In particular, the body of law for the alleged contravention of which extradition of the first respondent is sought has remained constant.

50 The result is that the magistrate was empowered by s 12 of the 1988 Act to issue the warrant under which the first respondent was detained.

The certificate

51 The primary judge rejected the tender of a certificate dated 9 September 1997 by the Minister for Foreign Affairs. This stated:

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35 cf *R v Governor of Brixton Prison; Ex parte Kahan* [1989] QB 716 at 722-724.

"I, ALEXANDER JOHN GOSSE DOWNER, Minister for Foreign Affairs, hereby certify that the Government of Australia recognises that the [HKSAR] of the [PRC] is a territory for the international relations of which the [PRC] is responsible."

52 Section 52 of the 1988 Act provides that certain certificates by the Attorney-General are, for the purposes of any proceedings under that statute, prima facie evidence of the facts stated in the certificate[36]. Plainly, the above certificate furnished by the Minister for Foreign Affairs was not authorised by s 52. Rather, it appears to have been tendered as an instance where the Court should take account of the views of the Executive on matters which are the peculiar responsibility of that branch of government[37].

53 In *Shaw Savill and Albion Co Ltd v The Commonwealth*[38], Dixon J spoke of "the exceptional rule giving conclusive effect to official statements" and to those matters of fact "which the Executive is authorized to decide", such as "the existence of a state of war, the recognition of a foreign state, the extent of the

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36 Section 52 states:

"A certificate by the Attorney-General stating that:

(a) Australia or another specified country is a party to a specified treaty;

(b) the treaty entered into force for Australia or that other country, as the case may be, on a specified date; and

(c) as at the date of the certificate, the treaty remains in force for Australia or that other country;

is, for the purposes of any proceedings under this Act, *prima facie* evidence of the facts stated in the certificate."

37 See *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 51.

38 (1940) 66 CLR 344 at 364.

realm or other territory claimed by the Crown[39], or the status of a foreign sovereign".

54 There is a fundamental question under Ch III of the Constitution of the competence of the Executive (even with respect to those facts identified by Dixon J) to determine conclusively the existence of facts by certificate where they are disputed constitutional facts[40]. No such issue arises in this case. The proper construction of par (b)(ii) of the definition of "extradition country" and of the term "Hong Kong" in the 1997 Regulations is a matter of law. Nor is the certificate specifically addressed to a fact of the particular category identified by Dixon J.

55 As we have indicated, extradition from Australia requires statutory authorisation. It is the province and duty of courts exercising jurisdiction with respect to matters arising under such a statute to construe and apply it. The Executive, a representative of which is a party to a controversy arising under the 1988 Act, cannot, by a certificate furnished by another representative, "compel the court to an interpretation of statutory words which it believes to be false"[41]. Nevertheless, as Scarman LJ pointed out in *In re James (An Insolvent)*[42], in construing the statutory provision which takes as a factum for its operation a matter pertaining to the conduct of foreign affairs, the communication of information by the Executive may be both helpful and relevant.

56 That is how the certificate tendered in the present case should be viewed. That Australia and the PRC conduct international relations with respect to the HKSAR is readily apparent from an agreement made between them on 26 September 1996, which entered into force on 1 July 1997[43]. It is entitled "Agreement Between the Government of Australia and the Government of the People's Republic of China Concerning the Maintenance of the Consulate-General of Australia in the Hong Kong Special Administrative Region of the People's

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39 See also *Ffrost v Stevenson* (1937) 58 CLR 528 at 549.

40 Lindell, "Judicial Review of International Affairs" in Opeskin and Rothwell (eds), *International Law and Australian Federalism*, (1997), 160 at 196.

41 *In re James (An Insolvent)* [1977] Ch D 41 at 71.

42 [1977] Ch D 41 at 72.

43 *Australian Treaty Series, 1997*, No 7.

Republic of China". This instrument recites the provisions of Art 157 of the Basic Law, to which reference was made earlier in these reasons. This concerns the maintenance of consular and other official missions established in Hong Kong by states which have formal diplomatic relations with the PRC.

57 The certificate should be understood as a statement that, at its date, 9 September 1997, Australia dealt with the PRC on the footing that it was responsible for the international relations of the HKSAR. Given the conclusion of the above agreement with effect from 1 July 1997, it would be a reasonable inference that this state of affairs had been in existence on 14 July 1997, the date of the receipt of the extradition request with respect to the first respondent. The certificate should have been admitted on that basis. However, it remained for the court, against the factual background, including the terms of the Basic Law, to construe and apply the terms of par (b)(ii) of the definition of "extradition country" and the term "Hong Kong" in the 1997 Regulations.

Conclusion

58 The cause should be remitted to the Court of Appeal for the making of orders to give effect to the reasons for judgment of this Court. The appellant and the first respondent should have liberty to file written submissions as to the appropriate order for costs of the cause in this Court. The first respondent should file its submissions within seven days and the appellant its submissions within seven days thereafter. Costs in the Court of Appeal should follow the event.

59 The orders to be made by the Court of Appeal should provide that:

(a) the appeal be allowed;

(b) the first respondent pay the appellant's costs of the appeal in the Court of Appeal; and

(c) the orders that the first respondent be released from custody by the second respondent and the appellant pay the first respondent's costs be set aside and in place thereof the summons filed 7 August 1997 be dismissed with costs.

60 Upon the making of those orders by the Court of Appeal, the undertakings given by the first respondent to the Supreme Court will require him to return to the custody of the second respondent.