

Hong Kong

Post hand-over extradition arrangements put to the test

by John Reading

A recent decision in the High Court of Australia (*Attorney-General (Commonwealth) v Tse Chu-Fai* [1998] 72 ALJR 782) has tested the effectiveness of the Hong Kong Special Administrative Region ('Hong Kong')'s post hand-over extradition arrangements. The result however has confirmed that the concept of 'one country, two systems', a feature of the 1984 Sino-British Joint Declaration, enshrined in Hong Kong's Basic Law, is not just a hollow phrase.

Prior to 1 July 1997 Hong Kong was a colony or territory of the UK; on 1 July 1997 it became a special administrative region of the People's Republic of China ('China').

A few months before the hand-over in 1997, the Fugitive Offenders Ordinance came into force in Hong Kong and one of its features was to give effect to extradition treaties into which Hong Kong, with the consent of China, had entered with various countries. By 1 July 1997 a number of treaties had already been signed; further treaties have been signed since the hand-over and negotiations are continuing with various other countries, many of whom are expected also to sign treaties with Hong Kong.

One of the earliest of these treaties was between Hong Kong and the Commonwealth of Australia. Signed in 1993, it became effective by virtue of regulations made by the Governor General of Australia on 28 May 1997, which declared Hong Kong to be an 'extradition country' with effect from 29 June 1997.

In March 1997, a magistrate in Hong Kong issued a warrant for the arrest of a man named Ronald Tse Chu-fai, on fraud and other charges, and in July 1997 Hong Kong's Chief Executive made a request to Australia's Attorney-General for Tse's extradition to Hong Kong.

In September 1997, Tse applied to the New South Wales Supreme Court for a writ of habeas corpus and that court delivered its judgment in November 1997, granting the application. It was contended in the course of this application that Hong Kong was not an extradition country and that accordingly the treaty with Australia was invalid.

The case revolved around Hong Kong's present status: is it a territory of China, akin to its previous position as a dependent territory of Britain, or is it part of metropolitan China, i.e. just another province of China? Furthermore, irrespective of its status, how does its present position affect the validity of the various treaties it has entered into?

The outcome of the case depended on the interpretation of the definition of 'extradition country' in Australia's domestic legislation (a definition that is apparently not exclusive to Australia). Section 5 of Australia's 1988 *Extradition Act* provides:

'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;
- (ii) a territory for the international relations of which a country is responsible.'

Section 5(a) of the definition was not relevant because Hong Kong is not a country and there is no extradition agreement between Australia and China. The judge at first instance held (*Tse Chu-fai v Governor of the Metropolitan Reception Centre* [1997] 150 ALR 566) that:

'... On 1 July 1997, Hong Kong became a part of [China], fully integrated into that state. It ceased to be a colony of the UK, and was not transmogrified into a colony, territory or protectorate of [China] or a territory for the international relations of which [China] was responsible...'

Because of the nature of the case, i.e. a constitutional case requiring a consideration of various federal statutes and arrangements, and foreign law, the Attorney-General was granted leave under s. 40 of Australia's *Judiciary Act* 1903, to appeal directly to the High Court of Australia. After a hearing in March 1998, the court, consisting of six judges, delivered a joint judgment in April 1998. The court held that:

- (1) *There was a sufficient identity between Hong Kong referred to in the regulations and the Special Administrative Region. There had been no change in the relevant territorial area, and, despite changes in the legislative and executive institutions, the body of law in force had been maintained. The law, for the alleged contravention of which the respondent's extradition was sought, had remained constant.*
- (2) *The Special Administrative Region answered the description ... of a "territory for the international relations of which (China) is responsible", a position confirmed by reference to article 13 of the Basic Law. Further, the existence of a distinct body of law, administered within a defined region or area of a country, provides a sufficient criterion for the existence of a territory to which para. b(ii) applies. It is not to the point that such region or area is not geographically divorced from what might be called the metropolitan area of that country.'*

According to the High Court of Australia, the answer to the question as to Hong Kong's status is that it is part of metropolitan China. As to the effect that this status has on the various extradition and other treaties to which Hong Kong, with the consent of China, has become a party, it would seem that the answer is 'none'!

Ironically, this appeal was decided in favour of the appellant because of the continuity of Hong Kong's laws and the 'one country two systems' concept. ㊦

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