SET KON KIM v. *OFFICER IN CHARGE CHERAS POLICE STATION:* REFLECTIONS ON THE MALAYSIAN LAW OF EXTRADITION — LEGISLATION AND JUDICIAL DECISION

The decision of the High Court, Kuala Lumpur in *Set Kon Kim* v *Officer in Charge, Cheras Police Station*[1] provides an opportunity to reflect on existing legislation governing extradition.

Malaysia, like other Commonwealth countries, has two primary statutes governing extradition: the Extradition Ordinance 1958 (hereinaftar referred to as the Ordinance) and the Commonwealth Fugitive Criminals Act 1967 (hereinafter referred to as the Act). In principle, the Act is intended to govern extradition within the Commonwealth whilst the Ordinance, extradition to and from countries outside the Commonwealth. In fact, the delineation of the scope of these statutes is illusory. The Act does indeed govern extradition within the Commonwealth. Strictly speaking, it applies to prescribed Commonwealth countries *viz* such Commonwealth countries with which Malaysia has a binding arrangement for the extradition of fugitive criminals and in respect of which an Order applying the Act to such countries has been published in the Gazette.[2] An exception is made in the case of Brunei Darussalam and Singapore: the Act applies to these countries notwithstanding that no binding arrangement has been entered with them.[3] Nevertheless, section 1A enables, at the discretion of the Minister, the ad hoc application of the Act to a Commonwealth country for the purpose of extraditing thereto a particular fugitive criminal.[4] On the other hand, the Ordinance governs extradition to and from any foreign country with which Malaysia has entered an arrangement for the mutual surrender of fugitive criminals and in respect of which an Order applying the Ordinance to such foreign country has been published in the Gazette.[5] The delineation of the scope of the two statutes is rendered illusory because in the Ordinance "foreign country" is defined as including any Commonwealth country other than a prescribed Commonwealth country.[6] The Ordinance also contains a provision corresponding to section 1A of the

[1] [1984] 1 M.L.J. 73

[2] Section 1(2)

[3] Provise to section 1(2)

[4] This section was added vide section 3(a) Act A383/1977 with effect from 30.9.1967

[5] Section 3(1)

[6] See section 2. This definition was inserted vide section 31, schedule 11, Act 54/1967 with effect from 30.9.1967.

Act. Section 3A of the Ordinance enables, at the discretion of the Minister, the *ad hoc* application of that Ordinance to a foreign country in respect of which no Order has been published in the *Gazette* or in respect of which such an Order has been published but is not in force, for the purpose of extraditing thereto a particular fugitive criminal.[7] The net effect of the above-mentioned provisions of the Ordinance is to offer a Commonwealth country other than a prescribed Commonwealth country which desires the surrender of a particular fugitive criminal from Malaysia an option — either the proceed under the Act or the Ordinance. *Set Kon Kim's* case highlights this point. Set, a Malaysian, was a practising barrister and solicitor in Victoria, Australia until October 1982 when he returned to Malaysia. In 1979 the Australian authorities commenced investigation into certain offences, tantamount to criminal breach of trust, allegedly committed by him in Victoria. When he was located in Kuala Lumpur, the Australian authorities started extradition proceedings.[8] As Australia and Malaysia do not have a binding arrangement for the mutual surrender of fugitive criminals, the Australian authorities applied for Set's return under section 3A of the Ordinance.

The Act is a more elaborate and explicit version of the Ordinance. In the light of the above facts and the march of events, the question must be asked whether today there is any further justification for maintaining two statutes on extradition.

Set Kon Kim's case calls to attention another interesting question: whether the High Court can grant a writ of *habeas corpus* to a person detained on a warrant of committal pending extradition under the Ordinance on the ground that the surrender of such a person to the requesting state would, having regard to all the circumstances of the case, be unjust or oppressive by reason of the passage of time since the alleged commission of the offences. This was the last and alternative ground submitted by counsel for Set in his application for a writ of *habeas corpus* under section 365 of the Criminal Procedure Code. It was also a new ground, not argued at the committal proceeding. The learned judge, Mohamed Dzaiddin J., held that the Court has no power to grant the writ on such ground. To quote the learned judge:

> ". . .This court has no power to do so. Section 365 of the Criminal Procedure Code gives power to the High Court to direct persons detained under the Extradition Ordinance or the Commonwealth Fugitive Criminals Act 1967 be set at liberty. The section does not specify on what grounds can they be set free. The Extradition Ordinance 1958 does not provide the power. This is different in the case of the Commonwealth Fugitive Criminals Act 1967, where section 27 of the Act empowers the Minister if it appears to him that by reason of the trivial nature of the case or application for surrender or

[7]This section was added vide section 2(b) Act A383/1977 with effect from 1.12.1960.

[8]See *Sek. Kon Kim* v. *Attorney-General* (sic) [1984] 1 M.L.J. 60 for the facts.

> return is not made in good faith or in the interest of justice or being made for political reasons or any other reason, it is unjust or inexpedient to surrender the fugitive criminal, the Minister may by order stay any proceedings and direct any warrant issued or endorsed to be cancelled and the person be discharged."[9]

Earlier the learned judge had made the point that the ground submitted by counsel for Set:

> "is a creation of statute as provided under the English Fugitive Offenders Act 1967 section 8(3). The Criminal Procedure Code merely gives this court a discretion to grant the writ of habeas corpus. . ."[10]

With great respect to the learned judge it is humbly submitted that though his decision — that a High Court has no power under section 365 of the Criminal Procedure Code to grant a writ of *habeas corpus* to a person detained under the Ordinance on the ground that his return to the requesting country would, having regard to all the circumstances of the case, be unjust or oppresive by reason of the passage of time since the alleged commission of the offences — was correct,[10A] the rationale of that decision is not above reproach.

The reasoning of the learned judge proceeded thus: section 365 of the Criminal Procedure Code gives the High Court discretion or power to grant a writ of *habeas corpus* to a person detained under the Ordinance or the Act. Since that section does not spell out the grounds on which such discretion or power can be exercised, such grounds must be ascertained by examining the provisions of the Ordinance or the Act. The Ordinance does not provide the answer; the Act does. This progression of reasoning prompts several questions: what is the position where (as is the case) the Ordinance or the Act[11] does not spell out the grounds on which the court may set at liberty a person committed to custody pending extradition? Is the court merely precluded from setting at liberty a person on a ground not expressly spelt out by the Ordinance or the Act? Or is the court precluded altogether from exercising the discretion or power granted it under section 365 of the Criminal Procedure Code? Is the exercise of the court's discretion or power, in fact, dependant upon the grounds for such exercise being spelt out in the Ordinance or the Act?

It is respectfully submitted that rather than proceed along the above lines, the learned judge should have concentrated on the duty and jurisdiction of the High Court on applications for *habeas corpus* in extradition cases. The court hearing such an application

[9] [1984] 1 MLJ 77

[10] *ibid.*, p. 76.

[10A] *Infra*, p.

[11] *Infra*, p.

> "is not a court of appeal from the magistrate on questions of fact, but has only to ensure that he had sufficient evidence before him. The court will always examine whether the magistrate had jurisdiction to order the committal."[12]

The learned judge, in fact, started on the right footing when he reminded himself before even examining the grounds submitted by counsel for Set that in cases of this nature

> "it has been held that there is power in the superior court to review the case as it appeared before the magistrate, not only to look at the evidence before the magistrate, but to consider whether any magistrate, properly applying his mind to the question, could reasonably have come to the conclusion that a strong and probably presumption of guilt had been made out which would justify the magistrate in making the committal order."[13]

More guidelines on the limits of the writ of *habeas corpus* and on the limits of the hearing on *habeas corpus* applications can be derived from the following cases decided in the United States.[14] Holmes J in *Fernandez v. Phillips*[15] stated

> "The writ of *habeas corpus* is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire into whether the magistrate had jurisdiction; whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."

In *Gallina* v *Fraser*,[16] the court limited the hearing on an application for a writ of *habeas corpus* into what is required to surrender the relator (the person whose surrender is requested), and sees the function as such:

1. that the Commissioner was duly authorized to issue the warrant for the relator's arrest and conduct a hearing;
2. that the Commissioner had jurisdiction over the person of the relator;
3. that the extradition to the demanding nation was requested pursuant to a treaty of extradition then in force between the demanding nation and the United States;
4. that the offences of which the relator was charged were within the terms of such a treaty and not excluded from its operation by any exceptions expressed therein;

[12] *Halsbury's Laws of England*, Fourth ed., Vol. 18, para 234 and the cases cited thereunder.

[13] *Ibid.*, Vol. II para 1473, see [1984] 1 M.L.J. 74.

[14] Bassiouni, *International Extradition and World Public Order*, 1974, pp. 525-526

[15] 268 U.S. 311, 312 (1925)

[16] 177 F. Supp. 856, 860 (D. Conn. 1959).

5. that there was competent, legal evidence of the criminality of the relator prescribed to the Commissioner on which to base his decision to commit the relator, and
6. that the Commissioner committed no error of law prejudicial to the rights of the relator;

then the petition for writ of *habeas corpus* must be dismissed.

The above authorities lead to the conclusion that in extradition cases a court hearing an application for a writ of *habeas corpus* does not have an unlimited discretion to grant such writ. It can exercise its discretion if the magistrate making the committal order either did not have jurisdiction or did not have before him sufficient evidence to warrant a *prima facie* finding of guilt such as would justify the making of the committal order. Mohammed Dzaiddin J.'s decision in *Set Kon Kim's* case that the court did not have the power to grant a writ of *habeas corpus* on the ground that Set's return to Australia would be unjust or oppresive by reason of the passage of time since the alleged commission of the offences was therefore correct. The court's power to grant the writ on such ground has to be conferred by statute. That ground, as the learned judge correctly pointed out,[17] is expressly spelt out in section 8(3) of the English Fugitive Offenders Act 1967.[18] The court's power to grant the writ on such ground is not, however, provided for in any Malaysian statute.

On the last mentioned point, Mohamed Dziddin J's judgement quoted above[19] obfuscates rather than elucidates. The learned judge was faced with the question whether the *court* has power to issue a writ of *habeas corpus* on the ground dealt with above. Having stated clearly that the Ordinance does not provide for such power, the learned judge added that the position is different in the case of the Act and cited section 27 thereof. The latter, however, deals with the discretion or power not of the *court* but of the *Minister* to set at liberty a fugitive criminal on certain specific grounds. The discretion of the Minister is entirely different and separate from the discretion of the court. The court, it is submitted, cannot avail itself of the discretion or power expressly conferred upon the Minister.

The difference between the discretion of the court and the discretion of the Minister becomes crystal clear when section 27 of the Act is compared with paragraph 9(3) of the Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth.[20] That Scheme was established in April 1966 at the Meeting of the Commonwealth Law Ministers in Lon-

[17][1984] 1 MLJ 76.

[18]That ground was included in the all-embracing words "or otherwise" in the corresponding section of the predecessor statute *viz.* section 10 of the Fugitive Offenders Act 1881. See *Re Naranjan Singh* [1961] 2 AER 565 which established that the wide construction of those words was the proper construction.

[19]*Supra*, p.

[20]Cmnd. 3008, 1966.

don. It was formulated on the rationale that Commonwealth extradition arrangements should be based on reciprocity and substantially uniform legislation incorporation certain features commonly found in extradition treaties. Accordingly, the Scheme sets out principles which could form the basis of legislation within the Commonwealth. Malaysia acceded to this Scheme in 1967 by enacting the Act. Paragraph 9 of the Scheme sets out the circumstances precluding return of fugitive offenders. Sub-paragraph (3) states

> "The return of a fugitive offender, or his return before the expiry of a specified period, will be precluded by law if the competent *judicial* or executive authority is satisfied that by reason of —
>
> (a) the trivial nature of the case, or
> (b) the accusation against the fugitive not having been made in good faith or in the interests of justice, or
> (c) the passage of time since the commission of the offence,
>
> it would, having regard to all the circumstances under which the offence was committed, be unjust or oppressive or too severe a punishment to return the fugitive or, as the case may be, to return him before the expiry of a period, specified by that authority (emphasis added)."

On the contrary, section 27 of the Act merely provides:

> "If it appears to the *Minister* that, by reason of —
>
> (a) the trivial nature of the case,
> (b) the application for the surrender or return is not being made in good faith or in the interests of justice or being made for political reasons, or
> (c) for any other reason,
>
> it is unjust or inexpedient to surrender the fugitive criminal, the *Minister* may by order stay any proceedings and direct any warrant issued or endorsed to be cancelled and the person be discharged (emphasis added).

This section clearly shows that the Malaysian Parliament, in its wisdom have decided to confer a discretion to set at liberty a fugitive criminal solely upon the Minister.

Wan Arfah Hamzah