

REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum by the Government of Jamaica

Adoption of the 1966 Scheme

1. A Bill to adopt the 1966 Scheme has now been drafted in Jamaica.

Reciprocal Application of the Scheme

2. It is felt that reciprocal application of the scheme should not be necessary.

In this connection we mention the Jamaican case of *R. v. Commissioner of Correctional Services, ex parte Raphael Constantine Dillon and Errol Williams* which concerned a request for the return of an offender made by Bermuda under the Fugitive Offenders Act 1881. It was argued on behalf of the applicant for habeas corpus that the Resident Magistrate had no jurisdiction to make an order at the instance of Bermuda as that country, having by its legislation adopted the 1966 Scheme, had opted out of the reciprocal provisions of the Act of 1881 by the repeal of that Act in respect of Bermuda and by replacing it with fresh statutory provisions which involved no mutuality with Jamaica. It was further argued that a country with the provisions of legislation adopting the 1966 Scheme cannot support a request to a country that has the Act of 1881 as the latter Act must be viewed as a scheme of multilateral relations with reciprocal rights and duties under it available only to participants under the Act. The Court held, however, that in Jamaica, as in other common law countries, no power exists to surrender a fugitive offender apart from statute, and where there is statutory authority, the power to surrender is not affected by the existence or lack of reciprocal legislation in respect of fugitive offenders in the State from which the request for surrender comes unless that is a requirement of the statute authorising the surrender.

Returnable Offence

3. Paragraphs 12 and 13 of Professor Shearer's Paper raises the question of the need for revision of Annex 1 to the 1966 Scheme, which describes "returnable offences", in the light of the unilateral action by some member countries of adding certain offences as returnable under their legislation, and having regard to the growing number of offences being created by international conventions.

The proposal for the revision of Annex 1 of the Scheme is strongly supported. It is of special importance to Jamaica as the draft (Jamaican) Extradition Bill will include as extraditable offences the following offences which are not included in the Scheme:

- i certain offences created by the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft;

- ii certain offences against the 1971 Montreal Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation;
- iii offences against the law relating to Exchange Control.

It is suggested that it would be useful to have the Law Ministers' Meeting discuss the rationale which, in the past, dictated the choice of certain offences for inclusion in, and the exclusion of other offences from, the extradition Scheme, and any changing attitudes, within the Commonwealth, to that rationale.

Double Criminality

4. Paragraph 16 of the Paper questions whether, having regard to the decision in *R. v. Governor of Brixton Prison, ex parte Gardner* [1968] 2 Q.B. 399, a decision on the 1967 U.K. Act, it is not now desirable to replace the words "the act or omission constituting the offence" now in s.3(1)(c) of the U.K. Act, and in any other Commonwealth legislation, with words such as "the facts on which the request for his return is founded" as in paragraph 10 of the 1966 Scheme.

The question is raised for consideration whether the proposed amendment would have the desired effect. It is suggested that what may be necessary is to consider the matter in terms of the documents to be looked at to determine whether the double criminality rule is satisfied, that is, whether the warrant and the authority to proceed should be the documents by which to determine whether the offence for which the extradition sought is an offence against the laws of the requested country, or whether, for that purpose, the magistrate should not look also at the depositions submitted.

The Speciality Rule

5. Paragraphs 21 of the Paper highlight possible interpretation problems as regards the words "any lesser offence" used in the formulation of the Speciality Rule in certain Commonwealth statutes. It suggests that for the words "any lesser offence proved by the facts before the committal court" there be substituted the words "any other offence proved by the facts before the committal court".

The history of the final text of the 1966 Scheme as regards this point is interesting. Originally the draft Scheme provided as follows:

In the case of a fugitive offender to whom this clause relates, his detention or trial in the part of the Commonwealth to which he has been returned for any offence committed prior to his return (other than one proved on the facts on which that return was grounded) will be precluded by law.

One of the participants at the Meeting objected that those words were too loose and suggested the substitution of the words “other than a returnable offence proved on the facts on which that return was grounded” for the words in brackets. That also was objected to on the basis that the effect would be “that if an offender was returned on a charge of manslaughter (a returnable offence) arising from a car accident and the charge failed it would be impossible to follow the normal procedure of substituting a charge of dangerous driving”. A suggestion was then made that the words in brackets be amended to read “(other than the one for which he was returned or any lesser offence proved by the facts on which the return was granted or, with the consent of the requested country, a returnable offence of the same nature as the offence for which he was returned)”. A number of delegates had reservations as to this provision on the basis that it would open up a new difficulty in trying to define “lesser”. A final decision was then postponed until the next session at which the reservations were withdrawn.

The preliminary view on this matter arrived at after discussion is that the proposed amendment is undesirable as it would permit the trial of an extradited offender for a more serious offence than that for which he was extradited, provided the facts before the committal magistrate proved such an offence. It is considered that it would be preferable to retain the words “any lesser offence”.

Nationality Rule

6. Jamaica’s position on the Nationality Rule, which is dealt with in paragraphs 24 and 25 of the Paper, appears from the following provision included in the draft (Jamaican) Extradition Bill:

The Minister may, in his discretion, refuse to extradite a fugitive on the ground that the fugitive is a citizen of Jamaica, but he shall not refuse to extradite the fugitive on that ground if the fugitive is also a citizen of the approved State that has requested the extradition.

Political Offences and Terrorism

7. It is not proposed, at this stage, to express any views on the proposals in paragraphs 27–29 that offences commonly associated with terrorism should not be regarded as political offences and hence, that offences such as hijacking, dangerous acts in relation to aircraft, offences against diplomats, kidnapping, the use of bombs and firearms and other serious offences involving violence would not be so regarded. It may be mentioned, however, that under the draft (Jamaican) Extradition Bill the reference to an “offence of a political character” will not include—

- a) any offence against the life or person of the Head of any approved State or the aiding, abetting, counselling or procuring of the offence; or
- b) an offence against the law relating to genocide;
- c) offences against the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.

Circumstances Precluding Return

8. Paragraph 32 of the Paper queries whether the triviality and bad faith grounds are still necessary as circumstances precluding the return of an offender.

The triviality ground, it is said, might be argued to be unnecessary in the light of the specified list of returnable offences under the Scheme coupled with the requirement that they be punishable by a possible penalty of at least 12 months’ imprisonment by the law of the requesting State. That argument seems to break down when one considers (a) that the reference to the 12 months’ or more imprisonment is really a reference to the *maximum* period of imprisonment to which a person may be sentenced for the offence and (b) that this refers to the maximum imprisonment which the offence carries under the law of the requesting State. It is felt, therefore, that the triviality ground should be retained.

The Paper describes the “bad faith” ground as a difficult one to invoke against a fellow member of the Commonwealth, since it can scarcely be done without directly impugning the motives of the requesting country. The same argument could be raised however as regards the prohibition against extradition for an offence of a political character and yet it is widely agreed that such a provision is desirable in Commonwealth extradition legislation. It is also said that it is arguable that the bad faith ground is subsumed under the political offence concept. It seems however that bad faith is a wider concept and therefore not completely covered by the provision relating to offences of a political character. It seems therefore that that ground also should be retained.

Paragraph 30 of the Paper also suggests the addition of a further factor by reference to which the judicial or executive authority would determine whether, having regard to all the circumstances, it would be unjust or oppressive to extradite. That factor would be the state of health or other personal circumstances of the fugitive. The words “or other personal circumstances” the Paper argues, should provide sufficient flexibility to deal with any other cases of an unusual nature. It is not proposed at this stage to express any views on this proposal. The matter will be given further consideration.

Costs

9. Paragraphs 34–35 of the Paper deal with arrangements for legal representation of the requesting State in the requested State in extradition matters and the question whether certain existing arrangements should not now be formalised by inclusion in the Commonwealth Scheme. On this matter the preliminary view, arrived at after discussion, is that arrangements as to costs should not be formalised in this way.

Appeals

10. Paragraphs 36–37 of the Paper raise the questions whether the requesting country should not be given a right of appeal a magistrate’s refusal to com-

mit. This question has been reserved for further consideration. No view will therefore be expressed on it at this stage.

Return by Consent

11. The proposal in paragraph 38 regarding “consent orders” for return is considered a useful one and is supported.

Legal Aid

12. As regards the proposal in paragraph 39 of the draft Paper, our preliminary view is that the Scheme should not deal with the availability of legal aid to persons against whom extradition proceedings have been instituted and that the matter should simply be left to be governed by any relevant legal aid legislation.