LMM(80)29

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

Comment by the Barbados delegation

Professor Shearer's Paper on the review of the Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth has been examined by our experts in Barbados and I wish here to give our general views on the issues raised and the suggestions made in that Paper.

At the outset, I may mention—something which has now already been noted in para 4 of Professor Shearer's Discussion Paper, though it was not mentioned in his earlier Paper circulated to Governments last November—that we have recently enacted a new comprehensive legislation on extradition in Barbados—the Extradition Act, 1979—intended to replace the earlier laws applicable on the subject like the U.K. Fugitive Offenders Act, 1881 and the Extradition Acts 1870–1935. One of the objects in enacting this statute was to give legislative effect to the principles relating to the rendition of fugitive offenders within the Commonwealth as formulated in the 1966 Commonwealth Scheme. Since the Commonwealth Scheme itself was to be reviewed shortly at the present Commonwealth Law Ministers' Meeting, we have not yet brought our Extradition Act, 1979 into operation by proclamation—as we would otherwise have done. We have in mind a few amendments to that Act which we would finalise in the light of the discussions at this meeting on the review of the Scheme itself.

As to the *applicability* of our legislation to different parts of the Commonwealth, we have adopted the legislative technique of designating a Commonwealth country to which the Act would apply by subordinate legislation, with the Minister for External Affairs being empowered to make such designation by an Order subject to negative resolution by Parliament. We fully appreciate that in applying our extradition legislation to other parts of the Commonwealth, assurances of reciprocity, as such, should not be strictly necessary. Indeed, as Professor Shearer's Paper rightly points out, to do so may be contrary to the intentions of the Scheme and we would not, therefore, be looking for any assurances of reciprocity before making our Act applicable to other parts of the Commonwealth. We have, however, reserved our right to make special modification orders to deal with the problem of any inconsistencies or incompatibilities arising from the legislation of other countries—a matter which has been recognised as reasonable in Professor Shearer's Paper. The Minister for External Affairs in Barbados is therefore, empowered to make the Act applicable in relation to the return of persons to or from any designated Commonwealth country, subject to such exceptions, adaptations or modifications as may be specified in the order.

Now so far as the *'Returnable Offences'* under the 1966 Commonwealth Scheme are concerned, in the Schedule to our Extradition Act, 1979 we have included all the offences listed in Annex 1 to the 1966 Scheme. But since our Act was intended both to implement the Scheme and generally to accord with current international practice regarding the return of fugitives, we were naturally compelled to extend the list of extradition crimes in our Act to other offences like, acts or ommissions endangering the safety of an aircraft in flight or any person on board such aircraft, destroying or rendering any aircraft incapable of flight, hijacking of aircraft or other unlawful acts against the Safety of Civil Aviation specified in Article 1 of the Montreal Convention, 1971, offences against the laws relating to firearms and other weapons and explosives, offences relating to the sale or purchase of securities and commodities or against the laws relating to exchange control and income tax evasion. In terms of Professor Shearer's Paper they fall under both the categories of offences described therein, for which a revision of the Annex to the 1966 Scheme seems to have become necessary. Some of these additional offences are offences created by new international conventions to which Barbados has become a Party; others may be what are described in his Paper as 'other than international offences', which we felt should also now be made extraditable at any rate if the legislation of the other country concerned also recognised them to be so.

In view of this recent experience of ours in drafting our new legislation on extradition, we fully support the suggestion in Professor Shearer's Paper to revise Annex 1 of the 1966 Commonwealth Scheme to add an additional category of "offences established under international conventions to which both the requesting and the requested parts of the Commonwealth are Parties". We note that this suggestion has been supported in all the written comments on his Paper circulated to us from other members of the Commonwealth and indeed, as has been pointed out by some of them, it is imperative to do so for those countries who are parties to international conventions like the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970.

As regards the other suggestion in his Paper to include also a new papragraph in Annex 1 to the 1966 Scheme to cover offences which are not listed therein but are returnable under the laws of both the requesting and the requested parts of the Commonwealth, we are inclined to support that suggestion also to make the list of returnable offences under Scheme conform to current developments in the laws and practice of States. In supporting this suggestion we realize that to a certain extent the inclusion of

such a new provision in the Annex of Returnable Offences may impair the uniformity of application of the Scheme on Commonwealth-wide basis. But it may be remembered that the Commonwealth Scheme, even when it was adopted in 1966, was designed to be no more than a general basis upon which member States of the Commonwealth could enact their legislation and the proposed change should in our view, impart the necessary flexibility to the Scheme when a certain offence like say, violation of exchange control regulations was considered to be an extraditable offence in both the requesting and requested parts of the Commonwealth, though it may not be considered to be so in all the other parts of the Commonwealth at a given time. We would naturally be open to other suggestions on this point but we think that the limited inroad on uniformity involved in the suggestion in para 14 of Professor Shearer's Paper should be preferable as a solution to the problem in hand rather than the suggestion which has been made in some of the written comments to drop the enumerated list of offences altogether in the Annex to the Scheme and in its place say that an offence should be extraditable if it is punishable under the laws of both the requesting and the requested Commonwealth country by imprisonment or other deprivation of liberty for a specified minimum period. If that course is adopted, the revised Scheme would not provide much guidance to any new member of the Commonwealth in enacting its legislation on extradition and it would certainly be a much more drastic blow to the uniformity of application of the Scheme on a Commonwealth wide basis than is necessary as a solution to this problem.

We do not comment at length concerning the observations in Professor Shearer's Paper on the *Double Criminality rule* and the decision in *Gardner's* case in the United Kingdom. In our Extradition Act, 1979 in Barbados we have formulated the relevant provisions of s.4 of our Act on the lines of s.26 of the Extradition Act, 1870 in the United Kingdom rather than Section 3(1) of their new Fugitive Offenders Act, 1967. So the question of the Double Criminality rule being likely to be applied more stringently than was required under the 1966 Commonwealth Scheme is not likely to arise in Barbados.

But, with respect, this seems to us to be a matter calling for amendment or revision of the extradition law in the United Kingdom and some other Commonwealth countries who have enacted legislation on lines similar to section 3(1) of the U.K. Fugitive Offenders Act, 1967—if the Governments of the countries concerned deem it expedient—rather than a matter for review of the Commonwealth Scheme. Clause 10 of the Scheme, as it stands, seems to be quite adequate to make the point that it is the conduct of the accused viewed as a whole or the facts underlying the offence that must constitute an offence under the law of the country in which he is found. That is all that the Double Criminality rule should really call for.

At present our Extradition Act does not explicitly speak of extra-territorial offences but we have in mind an amendment of the Act to make it clear that the definition of "extradition crime" would extend to extra-territorial offences also, for which courts in Barbados could clearly have jurisdiction under general principles of international law.

Now with regard to the difficulties referred to in Professor Shearer's Paper in giving legislative form to the definition of other offences caught by the *Speciality Rule* and the suggestion in his Paper that the word "other" in clause 13 of the 1966 Scheme be substituted by the word "lesser", I might mention that in our Act we have adopted more or less the phraseology of the Commonwealth Scheme while formulating the restriction on surrender of a fugitive criminal to a Commonwealth country under our Act. We have to be satisfied that the fugitive surrendered shall not be dealt with in that other Commonwealth country for or in respect of any offence committed before his surrender other than the extradition crime for which his surrender was requested or any 'lesser' offence proved by the facts on which that surrender was based. In the reverse case our Act provides that any fugitive offender surrendered to Barbados by a Commonwealth country shall not, unless he has been given a reasonable opportunity of returning to that country, be tried in Barbados for an offence committed prior to his surrender except the extradition crime to which the requisition for his surrender relates or any 'other' offence of which he could be convicted upon proof of the facts on which that requisition was based. We have in mind some amendments to the provisions of our Act on the Speciality Rule in other respects to remove some ambiguities in the existing provisions which have unfortunately crept in.

Anyway, so far as the suggestion in Professor Shearer's Paper to substitute the word "other" for the word "lesser" is concerned, we appreciate the difficulties which may have prompted that suggestion. At the same time, as the Government of Jamaica have pointed out in their written comments in conference document LMM(80)7 we can see some difficulty in simply substituting the word "lesser" in clause 13(b) of the Scheme by the word "other" as that would permit the trial of an extradited offender for a more serious offence than that for which he was extradited, provided it can be proved on the same facts. We would, therefore, suggest that in clause 13(b) the words "or any lesser offence proved by the facts on which that return was grounded" should perhaps be substituted by the words "any other offence proved by the facts on which his surrender was granted if it is also a returnable offence and not a more serious offence in terms of the maximum punishment attached thereto". We fully share the view expressed in Professor Shearer's Paper that, whatever the difficulties in practice in some of the applications of the Speciality rule, it serves a very valuable purpose and it cannot, therefore, simply be abandoned from the Scheme.

Turning next to the issue raised in Professor Shearer's Paper about the *Citizenship of Fugitives,* in Barbados we have not availed of the optional supplementary Provision (2) of Annex 2 of the 1966

Commonwealth Scheme to refuse the return of a citizen or permanent resident of Barbados in extradition, while giving legislative form to that Scheme through our Extradition Act, 1979. The Act is silent on the question of the nationality of the fugitive. But we fully endorse the concern expressed in Professor Shearer's Paper that unless countries, which on constitutional or other grounds, refuse to surrender their own citizens in extradition on the ground of their nationality make adequate provisions in their legislation to give jurisdiction to their own courts to try such persons themselves for offences committed abroad, justice would fail and it should be a matter for common concern to all the Commonwealth countries that a fugitive should not be allowed to escape on grounds of nationality alone.

With regard to the reference in the Paper to the European Convention on Suppression of Terrorism, 1977 and the idea of excluding a number of offences commonly associated with *terrorism* from the concept of *political offences* by amending the existing clause 9 of the Scheme raised therein, we might say that in our Act we have made provision to make some of these offences like 'hijacking' and dangerous acts in relation to aircraft' extraditable crimes. Of course, even for those offences—as for any other extradition offences—the courts and the Attorney-General have the power to refuse extradition if on the facts of a particular case they come to the conclusion that, if surrendered the fugitive would be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions, etc. But whether clause 9 of the Commonwealth Scheme should be amended for this purpose in a future revision of that Scheme is a matter on which we would like to hear the views of other delegations.

Professor Shearer's Paper suggests the addition of a new sub-paragraph to the existing paragraph 3 of clause 9 of the Commonwealth Scheme on *'Other circumstances precluding return'* to refuse or delay the surrender of a fugitive if the state of health or other personal circumstances of the fugitive make it unjust or oppressive or too severe a punishment to return the fugitive immediately or before the expiry of a specified period, as the case may be. It is submitted in the Paper that the words "other personal circumstances of the fugitive" would provide sufficient flexibility to deal with any other cases of an unusual nature—apart from the fugitive's health which was in issue in the New Zealand case referred to in the Paper.

The Paper also draws our attention to the Canadian Fugitive Offenders Bill, 1978 (since lapsed) which ignored clause 9(3) of the Scheme altogether but included instead a new provision to say that the Minister may refuse to order the surrender of a fugitive where it appears to him that the fugitive would be likely to suffer an excessively severe or inhumane punishment for the returnable offence in respect of which his return was requested.

In our Act at present we have not included any provisions on the lines of clause 9(3) of the Commonwealth Scheme. But we have under consideration some proposals for an amendment of the Act to preclude the return of a fugitive in certain circumstances when the fugitive is likely to suffer undue hardship by his return and it would, having regard to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return him, or as the case may be, return him before the expiry of a fixed period. At this stage, therefore, all that we can say is that we do see a valid case for revision of clause 9(3) of the Commonwealth Scheme as part of its general review. We agree that the existing sub-clauses (a) and (b) of clause 9(3)—on the trivial nature of the case and on the accusation not having been made in good faith—are unnecessary for reasons indicated in Professor Shearer's Paper. The third sub-clause (c) on the passage of time since the commission of the offence should perhaps be retained and some other suitable new words should be added to take care of considerations like the state of health of the fugitive or the possibility of his suffering undue hardship like an excessively severe or inhumane punishment or trial by some *ad hoc* extraordinary tribunal where he may not receive a fair trial. But we would not, on the whole, favour the inclusion of any wide general exclusion clauses in the Scheme to preclude the return of a fugitive offender.

On the question of *costs* of extradition we have made a provision in our Act that all expenses incurred in respect of any fugitive whose surrender is sought must be paid by the Commonwealth country or foreign State that requisitions his surrender unless other provisions for the payment of expenses have been made by treaty, convention or arrangement applying to that Commonwealth country or foreign State. This does not necessarily mean that we anticipate receiving more requests for extradition from Barbados than we would be making from other countries. But so far as the Commonwealth Scheme is concerned, we feel that it would be better to leave the Scheme as it is on this point—silent—rather than write into it any words to the effect that government legal officers of the requested country would help by representing the requesting country in an extradition matter. With our limited man-power in the Attorney-General's Ministry, we would find it extremely difficult to meet such demand in every case and I am sure many other small countries represented here would feel the same difficulty. We would rather prefer leaving this matter of costs to bilateral arrangements, as and when the occasion arises.

Coming next to the question of *appeals* by requesting Governments, we appreciate the need for a requesting Government to have the possibility of a review of a Magistrate's finding when a Magistrate refuses to commit a fugitive offender for surrender. As has been pointed out already in the written comments of some other Governments, limited procedures for review or revision, especially on a Magistrate's finding on questions of law, exist already in many countries under appropriate provisions of their extradition Acts. However, if other Governments consider it desirable to write into the Scheme any provisions on making special review pro-

cedures available to requesting Governments, balancing those offered to the fugitive, as suggested in Professor Shearer's Paper we would be open to consider any specific proposals.

Finally, we would support the idea of including in the 1966 Scheme suitable provisions on *"consent orders"* whereby committal proceedings can be dispensed with on express waiver by the fugitive with suitable guarantees on the application of the Speciality Rule. If that proposal is accepted, consequential amendments to extradition legislation in Commonwealth countries would become necessary but there should not be much difficulty in incorporating suitable provisions to make this possible.

However, we would prefer the question of *legal aid* in extradition proceedings to be left to be governed simply by the relevant legal aid legislation in the requested country.

In *conclusion,* we welcome a review of the 1966 Commonwealth Scheme on the Rendition of Fugitive Offenders within the Commonwealth at this stage in the light of subsequent experience of different Commonwealth jurisdictions and related developments in the field of extradition law. We hope that as a result of our discussions, we can up-date and improve the Scheme to make it serve as even a more effective basis of co-operation within the Commonwealth in the future than it has been in the past.