

REPORT OF THE MEETING OF SENIOR OFFICIALS

Held in Auckland, New Zealand, on 19 April 1990

Prepared by the Commonwealth Secretariat

INTRODUCTION

1. Senior Officials from 24 countries met in Auckland, New Zealand, on 19 April 1990 under the Chairmanship of Mrs Janice Lowe (New Zealand). They reconvened in Christchurch on 22 April 1990.

This paper supplements paper LMM(90)12 and reflects the views expressed by Senior Officials at that meeting. It deals with amendments to two Commonwealth Schemes, those on the Rendition of Fugitive Offenders within the Commonwealth and on Mutual Assistance in Criminal Matters within the Commonwealth.

RENDITION

2. Proposals for the amendment of clause 5 of the Commonwealth Scheme for the Rendition of Fugitive Offenders have been under consideration for a number of years. The Government of Australia raised the issue of the "prima facie case requirement" at the Law Ministers' Meeting in Harare in 1986, and the Canadian Government has subsequently prepared papers for consideration by Senior Officials, both in London in June 1989 and in New Zealand in April 1990.

3. Clause 5(4) of the Scheme provides as follows:

"Where a warrant has been endorsed or issued as mentioned in clause 3(1) the competent judicial authority may commit the fugitive in prison to await his return if -

(a) such evidence is produced as establishes a prima facie case that he committed the offence of which he is accused, and

(b) his return is not precluded by law,

but otherwise, will order him to be discharged."

4. This provision contains a number of elements. It ensures that the fugitive's position is examined by the competent judicial authority in the requested part of the Commonwealth. It requires that authority to consider all evidence admissible under the law of the requested part of the Commonwealth (the part in which the fugitive is to be found, rather than that in which the ultimate trial will take place). It requires that authority to be satisfied that the case against the fugitive warrants his standing trial for the offences alleged against him.

5. The arguments advanced during consideration of these issues by Senior Officials in June 1989 are summarised in the Report of that meeting (LMM(90)11) as follows:

"in the course of the discussions a variety of views was voiced. A number of delegates expressed their view that:

- the position was emerging where extradition was becoming much simpler as between a Commonwealth country and non-Commonwealth country than it is between two fellow Commonwealth countries, a position which seemed to them to be incongruous given the special nature of the Commonwealth association and its history of maximising judicial assistance;
- some delegations had experienced serious difficulties with extradition arising from the existing prima facie case requirement and its uneven, and at times overly-severe, application by some judges and some magistrates;
- the proposal maintained the concept of non-return of a fugitive in the absence of a sufficiency of evidence for trial, while modifying formal evidential requirements in a way which would eliminate the source of difficulty with the existing prima facie rule and at the same time preserving the safeguard and essential fairness of a form of the prima facie rule.

Other delegates, in expressing reservations about the options, observed that:

- the prima facie rule was a traditional requirement of common law systems, and the fact that some common law countries have moved away from this position in their dealings with non-common law countries was no reason why they should do so as between themselves;
- in respect of their own experience the prima facie requirement was working satisfactorily and was not the source of any serious problems;
- across the field of mutual legal assistance in criminal matters there were more compelling priorities for legislative and political action than a move away from the strict requirement of the prima facie case requirement in extradition proceedings;
- the surrender of a person within a country to the jurisdiction of the courts of another was a serious step which called for proper safeguards in sensitive legal and political factors."

6. That Meeting asked that the proposal be given further study by Canada and for it, in consultation with Australia, to submit a further paper to Officials taking account of the views expressed in the discussions.

7. The Canadian paper argued that the requirement of evidence in the form of first person affidavits, devoid of hearsay, was particularly onerous and expensive, and that the common law rules as to admissibility were disproportionately onerous for application to proceedings on rendition and could be expanded without material loss of protection to rendition.

8. The Canadian proposal would enable Commonwealth countries wishing to retain the Scheme in its present form to do so, while also providing for bilateral arrangements between pairs of countries for the application of the Scheme with modifications designed to ease the difficulties experienced in the operation of clause 5(4). In its eventual form, the proposal enables countries to negotiate whatever modifications are appropriate in their circumstances, but presents one particular model which many countries might choose to adopt.

9. This model involves the use of a "record" of the case, stating the evidence available against the fugitive, and supported by an affidavit of the officer responsible for its preparation and by a certificate of the Attorney-General of the requesting part of the Commonwealth that in his opinion the material justifies a prosecution. It would remain the responsibility of the competent judicial authority of the requested part of the Commonwealth to consider whether the available material was sufficient to warrant committal for trial, but it would have to take into account the contents of the record, regardless of whether or not they would be admissible in evidence under the law of the requested part.

10. The Canadian explanation of the proposal was as follows:

"The crux of the present proposal is to allow the courts of the requested part, in cases of persons accused of an offence, to receive a record of the case from the requesting part as the evidentiary basis for its decision. Receipt of the record would be contingent solely upon compliance with the formal and substantive conditions enumerated. The principal objective and advantage of this proposal is that it would eliminate much of the disparity that can arise between the legal systems and standards of different jurisdictions. It creates a unique document of process that would not only promote uniformity among legal systems but would significantly enhance speed and efficiency of preparation. Provided that the record is prepared in compliance with the terms of the Scheme, a provision to compel receipt of the record will also overcome many formal objections to admissibility.

As for the substantive test of sufficiency under the proposed alternative to the requirement for a prima facie case, the judge of the requested part would ask the following question:

Is the evidence presented in the record of the case that supports this request for rendition sufficient to warrant committal for trial, notwithstanding that some or all of the evidence contained in the record might be inadmissible in these courts?

This proposal comprises a substantive test of sufficiency according to the law of the requested part but upon evidence admissible under the laws of the requesting part. By definition, this proposal would entail a change in the test of sufficiency because it would expressly allow for the admission of evidence that might not be in a form or of a quality admissible according to the rules of evidence in the requested part. Accordingly, the proposal suspends the exclusionary rules of evidence in the requested part for the purposes of rendition. It would compel the judge to make a decision on the request for rendition without determining whether the evidence contained or described in the record would be admissible in the requested part. The evidence provided by the requesting part might, for example, contain hearsay. Statements or declarations might not have been made under oath or affirmation. Statements of the accused, evidence obtained by search and seizure and evidence obtained by electronic surveillance would not be tested for admissibility according to the exclusionary rules of evidence in the requested part. By contrast, questions relating to the reliability of evidence will have been initially determined by the Attorney General who approved the request and questions pertaining to the admissibility of evidence will be determined later by the trial court in the requesting part.

The principal attraction of the proposed test is that it effectively constrains the court of the requested part to receive and admit the record of the case as a complete foundation for determining the sufficiency of evidence contained in the record of the case that supports the request for rendition. Accordingly, it promotes greater uniformity in the law and alleviates problems that many requesting parts

have in meeting the requirements of admissibility in requested parts. Yet the alternative procedure preserves the requirement for judicial examination of the sufficiency of the request for rendition on each charge. The fugitive would face a request for rendition based primarily upon the same evidence intended for use at trial. The principle set out in this proposal assumes that the trial in the requesting part, which might be conducted according to different rules of procedure and evidence, meets the standards of fair trial expected of members of the Commonwealth."

11. At their discussion in Auckland, Senior Officials noted that a number of Commonwealth countries placed the highest value on existing rendition procedures and would not themselves wish to take advantage of the proposed freedom to adopt alternative practices in place of clause 5(4). Some were opposed to that freedom being given within the Scheme, while noting that clause 18 of the Scheme already permitted alternative arrangements to be made.

12. Other countries, however, recognised that there were indeed difficulties and felt that it was important to the future of the Commonwealth Scheme that provision for their resolution be made within the Scheme, rather than outside it. It was agreed, therefore, to transmit a revised proposal to Law Ministers for their consideration. It was noted in particular that Heads of Government, in the Communique of their Meeting in Kuala Lumpur, had asked Law Ministers to take action in this matter so as to ensure that Commonwealth extradition arrangements were no less onerous than those with non-Commonwealth countries.

13. After considerable discussion the proposal was modified in ways which attracted the support of most but not all of the countries represented at the Meeting. A drafting committee met to draft the proposal as amended and this now reads as follows:

(a) The following be added as a second sub-clause to clause 19:

"Two or more parts of the Commonwealth may make arrangements under which in matters of rendition between them clause 5(4) will be replaced either by Annex 3 or by other provisions agreed by the Governments of those parts."

(b) The text of the proposed new Annex 3 is as follows:

"ANNEX 3

ALTERNATIVE PROVISIONS AS TO COMMITMENTAL PROCEEDINGS

1. Where a warrant has been endorsed or issued as mentioned in clause 3(1) the competent judicial authority may commit the fugitive to prison to await his return if:
 - (a) the contents of the record of the case received under this Annex whether or not admissible in evidence under the law of the requested part, and any other evidence admissible under the law of the requested part, are sufficient to warrant a trial of the charges for which rendition has been requested; and
 - (b) the fugitive's return is not precluded by law, but otherwise will order the fugitive to be discharged.

2. The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting part if it is accompanied by:
 - (a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and
 - (b) a certificate of the Attorney General of the requesting part that in his opinion the record of the case discloses the existence of evidence under the law of the requesting part sufficient to justify a prosecution.

3. The record of the case will contain:
 - (a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;
 - (b) particulars of each offence or conduct in respect of which rendition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting part, including a certified copy of any such definition in the written law of that part;
 - (c) the original or a certified copy of any document of process issued in the requesting part against the person whom it seeks to have committed for rendition;
 - (d) a recital of the evidence acquired to support the request for rendition of the person sought; and
 - (e) a certified copy, reproduction or photograph of exhibits or documentary evidence."

MUTUAL ASSISTNACE IN CRIMINAL MATTERS

14. Senior officials gave consideration to a number of proposals for the further amendment of the Scheme for Mutual Assistance in Criminal Matters. As a result of discussions, the following amendments are recommended to Law Ministers.

15. Amendment of paragraph 1 (Purpose and Scope). Paragraph 1(3)(i) should be amended to read:

"tracing, seizing and confiscating the proceeds or instrumentalities of crime."