EXTRADITION: THE KEYSTONE IN THE ADMINISTRATION OF JUSTICE FOR TRANSNATIONAL CRIMES*

by

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Introduction

The problem of fugitive criminals who evade arrest by escaping to other jurisdictions has been a perennial thorn in the side of law enforcement, especially in light of the various transnational crimes being committed such as money-laundering, drug trafficking and modern slavery. Thus, in order to ensure that countries do not become havens from justice, the process of extradition has been carefully crafted to resolve this issue. This form of international cooperation, elegant in its simplicity, involves fugitive criminals, or those accused of crimes, being sent by their host country back to the country where the crime was allegedly committed in order to face trial or serve their sentence in that jurisdiction. As expressed by the Supreme Court of Canada in *Kindler v. Canada (Minister of Justice)*[1] and quoted by our Federal Court in *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor*, it is a system "*founded on concepts of comity and reciprocity*"[2] between different sovereign nations. Typically, this process would take the form of bilateral or multilateral treaties that would then be gazetted as law via orders promulgated under a broader legislative umbrella of extradition law. In rare circumstances, however, as seen in the primary extradition legislation of Malaysia, Singapore and Brunei, such relationships have

been bred into the bone of the statute and would thus necessitate Parliamentary majority to amend or remove such provisions,[3] as opposed to a simple executive action which would merely require ministerial discretion.

Currently, excluding the statutory provisions for Singapore and Brunei under Part V of the Extradition Act 1992 ("**Extradition Act**"), Malaysia enjoys extradition arrangements with eight other countries, these being Australia,[4] Hong Kong,[5] India,[6] Indonesia,[7] South Korea,[8] Thailand,[9] Ukraine[10] and the United States of America.[11] Although an extradition treaty with Kazakhstan had entered its third round of negotiations in early 2018,[12] to date, no treaty has been publicly finalised. However, notwithstanding the absence of any extradition treaty with the requesting state, the Minister of Home Affairs still retains the discretion to issue special directions for a request for extradition to proceed through the Extradition Act process if the Minister deems it fit to do so.[13] In the case of *Chua Han Mow v. Superintendent of Pudu Prison*,[14] an analogous provision of this power under the Extradition Act's predecessor[15] was described by Syed Othman FJ as "*the most effective means of telling the prospective criminals in other countries, particularly those involved in crimes organised on international levels, with which Malaysia has no extradition treaty, that Malaysia is no sanctuary for them*".[16] In any event, however, any request for extradition must still adhere to the limitations set out the relevant statute, order or special direction that would generally contain certain restrictions, some of which will be discussed below.

The Seven Cardinal Rules

Although the precise terms of the various extradition processes are governed by each treaty, order, statute or convention, as the case may be, there are certain hallmarks that invariably present themselves in many of these arrangements. In particular, there are certain cardinal rules that form the bedrock of most extradition relationships around the world.

(1) **The rule of dual criminality**:[17] Whilst it may go without saying, the offence committed or alleged to have been committed must be an extraditable offence. This means that not all offences attract the possibility of extradition. As to what constitutes an extraditable offence with respect to Malaysia's arrangements with other sovereign nations (including any attempt, conspiracy or abetment thereof),[18] this is defined under section 6(2) of the Extradition Act which states that the offence must be punishable in Malaysia with a minimum of one year of imprisonment or death,[19] sometimes phrased as "*a more severe penalty*" in the treaty language.[20] However, section 6(2) also stipulates that the offence must also attract a similar threshold of minimum punishment in the cooperating country.[21] This need for the offence to be similarly criminalised in both jurisdictions is what is known as the rule of dual criminality. As expounded by our Federal Court in the case of *Menteri Dalam Negeri, Malaysia & Anor v. Seyed Ramin Paknejad*:

> "*Simply put, the rule of dual or double criminality in extradition law is that requirement that to be an extraditable offence the act constituting the offence must be an offence in*

both the requesting and requested States and must have been committed in the territory of the requesting State."[22]

This means that the commission of an offence in Malaysia that is not criminalised in Australia, for example, would not engage the extradition machinery under the Extradition (Australia) Order 2006, where dual criminality is built into the requirement of an extraditable offence.[23] It should be noted that Malaysia's arrangements with Singapore and Brunei do not require dual criminality and only require the commission of an offence that attracts a punishment of six months in the requesting state.[24] However, since these two particular relationships fall outside of the ambit of the general provisions of the Extradition Act and are subject to separate sections, this departure from the rule is very much the exception rather than the norm.[25]

(2) **The rule of speciality**:[26] This particular rule is found under section 8(e) of the Extradition Act. It was also succinctly explained in *Seyed Ramin Paknejad*, where the Federal Court held that:

"[t]he rule of speciality is that rule in extradition law that prohibits the State requesting the extradition of a person from prosecuting or punishing the extradited person for offences other than those for which the request for his extradition was based and for which he was extradited, subject to exceptions as provided for in the applicable extradition law."[27]

What this means is that if an individual is extradited to the United States of America for a charge of alleged sexual offence, they cannot subsequently charge him or her with an unrelated drug trafficking offence, unless the second offence was committed after extradition.

(3) **The rule against double jeopardy (*non bis in idem*)**: This means that if a state requests extradition of an individual who has already been tried for any particular factual matrix in that host country, whether it leads to acquittal, pardon or conviction, he or she will not be extradited to another country to be tried for the same offence. We can see this rule being applied, for example, in the Extradition (Republic of India) Order 2010.[28] Indeed, this fundamental rule against double jeopardy is enshrined under Article 7(2) of the Malaysian Federal Constitution which states that:

> "*A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted*".[29]

(4) **The rule against offences of a political character:**[30] Under Malaysian law, this exception is codified under section 8(a) of the Extradition Act. However, whilst the Extradition Act and the relevant case law do not clearly define what is meant by an offence of a political character, the House of Lords case of *Schtraks v.*

Government of Israel and Ors[31] may be of some assistance. In that case, Viscount Radcliffe held that:

> "*In my opinion the idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee," "political asylum" or "political prisoner."*"[32]

In other words, if the offence is completely unrelated to issues of political control or government, then it is unlikely to constitute a "political offence", and the fact that an offence has become politicised does not necessarily make it an offence of a political character.[33] In the case of *R v. Governor of Winson Green Prison, Birmingham, ex p Littlejohn*, Lord Widgery further explained that:

> "*an offence may be of a political character, either because the wrongdoer had some direct ulterior motive of a political kind when he committed the offence or because the requesting state is anxious to obtain possession of the wrongdoer's person in order to punish him for his politics rather than for the simple criminal offence referred to in the extradition proceedings*."[34]

It should be noted that section 9 of the Extradition Act does provide certain exceptions to this rule, with particular regard to wilful

crimes against a Head of State or specific acts identified under a multilateral treaty to which Malaysia is a party to.[35]

(5) **The rule against time-barred offences:**[36] This means that extradition will not be granted if the offence upon which the request is founded has already been barred by time according to the law of the requesting country. An example of this can be seen in the Extradition (Republic of Korea) Order 2013.[37]

(6) **The rule against refoulement**:[38] This is a principle of international law that prohibits the extradition of individuals back to places where they would be punished or imprisoned by reason of their race, religion, nationality or political opinions.[39] In effect, this acts as a safeguard to prevent the extradition process from being abused to facilitate state-sponsored persecution of certain demographics. This rule is codified under sections 8(b) and (c) of the Extradition Act.

(7) **The *prima facie* rule**:[40] This rule states that a fugitive offender shall only be surrendered if there is sufficient evidence to justify the committal for trial. Under Malaysian law, this is contained under section 19(4) of the Extradition Act which mandates a discharge of the fugitive if a *prima facie* case is not made out. However, if there is a binding arrangement between Malaysia and another country that provides for the *prima facie* requirement to be dispensed with, section 4 of the Extradition Act allows the Minister of Home Affairs give a direction in writing to apply the modified

procedure under section 20 that does not require a *prima facie* case to be made out.[41]

One example of such a binding arrangement can be observed in the Extradition (Australia) Order 2006, whereby Article 4(6) of the relevant treaty states that: "*Neither Party shall require, as a condition to extradition pursuant to this Treaty, that the other Party prove a prima facie case against the person sought*."[42] This departure from the *prima facie* rule was one of the contentious issues brought up in the Federal Court case of *Said Mir Bahrami*, where it was alleged that dispensing with the *prima facie* rule amounted to a deprivation of the appellant's fundamental right to a fair trial.[43] The Federal Court ultimately found no merit in that argument, and held that:

> *"... extradition proceeding is in the nature of a committal proceeding. It cannot be equated with a trial proper. A committal proceeding of this nature is not a trial to determine the guilt of the appellant but only to determine whether the evidence adduced is sufficient to commit the appellant for the purpose of extradition."*[44]

In other words, dispensing with the *prima facie* rule was determined by our apex court not to violate an individual's fundamental right to a fair trial. Indeed, this trend of disapplying the *prima facie* rule in certain arrangements appears to be gaining traction in other jurisdictions as well. For example, the United Kingdom has abolished the need for a *prima facie* case with respect

to requests from signatories of the European Convention on Extradition and other designated nations.[45]

Some jurisdictions have additional hurdles to overcome which are not *in pari materia* with any of the provisions of the Extradition Act. The United Kingdom, for example, requires the Court to assess whether the extradition request comports with the rights under the European Convention of Human Rights.[46] In a similar vein, under Australian extradition law, there is a prohibition on extraditing fugitives who face the death penalty.[47] This obstacle had become a live issue in the attempted extradition of Sirul Azhar Umar from Australia to Malaysia,[48] whose sentence of death for the murder of the Altantuya Shaariibu had been upheld by the Federal Court in the case of *Public Prosecutor v. Azilah bin Hadri and Sirul Azhar bin Hj Umar*.[49]

Under Malaysian law, however, beyond the grounds for refusal listed under the Extradition Act and the relevant treaty (and in certain circumstances, the Federal Constitution), there is generally no obligation for the Court to measure the extradition request against any other extraneous instrument.

Circumventing Extradition Law

From time to time, certain sovereign countries, after failing in their application for extradition, or after making the decision not to make an application at all, opt to act unilaterally and simply abduct the alleged criminal from the country where they are located. Such a practice is,

with respect, wholly untenable in law. We refer to *Seyed Ramin Paknejad* where it was held that:

> "*The extradition of fugitive offenders must be as provided for by the Legislature. In the case of the* Creole *referred to in* Jones and Dooby on Extradition and Mutual Assistance*, 3rd edn, at p. 10, the House of Lords held the unanimous view that extradition without an Act of Parliament was unlawful*."[50]

This system of Government-sponsored abduction can sometimes be referred to as "extraordinary rendition", which the European Court of Human Rights described in the case *El-Masri v. the Former Yugoslav Republic of Macedonia* as "*an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment*".[51] Such a practice was roundly condemned in that case as being "*outside the normal legal system*"[52] and which, "*by its deliberate circumvention of due process, is anathema to the rule of law*".[53] Indeed, given its failure to draw any authority from an Act of Parliament, such a process is likely to be caught by the prohibition set out in *Seyed Ramin Paknejad*[54] and would thus be considered unlawful in Malaysia.

Legality aside, this may also have a significant detrimental effect on foreign relations. A helpful illustration is the case of Trịnh Xuân Thanh, a former Vietnamese politician who was wanted by the Vietnamese authorities for charges of embezzlement and economic mismanagement in relation to a state-owned construction company.[55] He had fled to

Germany and was in the process of applying for asylum.[56] During this time, he was reportedly abducted and repatriated back to Vietnam without any participation of the German authorities.[57] As a result, the German Federal Foreign Office took particular umbrage, issuing a statement that "*the kidnapping of Vietnamese citizen Trinh Xuan Thanh* [sic] *on German soil is an unprecedented and blatant violation of German law and international law*".[58] Notwithstanding the fact that Vietnam strenuously denied any such involvement,[59] the incident led to two Vietnamese Embassy officials being declared *persona non grata* and the German government suspending their strategic bilateral partnership with Vietnam.[60] Thus, whilst it may be tempting for law enforcement to bypass the correct channels to ensure a faster and more convenient procurement of a fugitive person of interest, the negative foreign relation repercussions and the damage to a nation's diplomatic clout would be irreparable.

An alternative strategy often employed is to lure the fugitive back to the state where he or she is wanted or to a country where extradition is possible. In the case of *United States of America v. Beau Lee Lewis*,[61] the District Court Judge detailed a sting operation by the US authorities, known as Operation Chameleon, with a view to apprehend Anson Wong, a global animal smuggler based in Malaysia, known as the Lizard King:[62]

> "*In 1994, the Fish and Wildlife Service ("FWS") initiated an undercover operation by which it constructed a faux-wildlife importation and wholesale business, called "PacRim," as part of an*

> *elaborate sting aimed at trapping Wong. Two years prior to PacRim's inception, Wong had been indicted by a federal grand jury in Florida, but could not be extradited to the United States because the United States did not have an extradition treaty with Malaysia at the time*."[63]

Although the District Court Judge was correct in stating that there was no extradition treaty at the time, she did not detail as to why a request was not made with regard to a special direction by the Minister of Home Affairs.[64] Nonetheless, after several years of developing a working relationship with the target, the undercover officer in the sting operation convinced Anson Wong to travel from Malaysia to Mexico for a meeting whereupon the smuggler was subsequently arrested and extradited to the United States of America to face charges.[65] The apprehension of Anson Wong is just one of the many examples where a fugitive was dealt with without jeopardising the diplomatic relationship with the host country.

The Final Word

The law of extradition is an imperfect beast and the requirement for extradition requests to surmount hurdle after hurdle may often feel like a laborious, if not Sisyphean, task. However, when it does work, it can function with startling efficiency. In the case of *PP v. Kamal Hisham Ja'afar*,[66] Mohd Sofian Razak J described how, in that case, the respondent had been arrested in Singapore based on a Johor Bahru Magistrate Court's warrant of arrest. He was then brought before the Singapore State Court and expedited back to Malaysia all within a single day.[67] In addition to this, there are many other cases where fugitives

were successfully extradited out of Malaysia, as can be seen in *Chua Han Mow v. United States of America*[68] (to the United States of America), *Bahrami v. R*[69] (to Australia), *Wong Kim Poh v. Public Prosecutor*[70] (to Singapore), *Lee Chez Kee v. Public Prosecutor*[71] (to Singapore), *Public Prosecutor v. Ismail Piee*[72] (to Brunei), amongst others. However, there have also been many instances where the host country has denied a request for extradition for any number of reasons, whether through executive intervention[73] or judicial determination.[74] Whilst this may be a frustrating reality for law enforcement authorities to deal with, extradition remains one of the few lawful ways to access fugitives beyond a country's jurisdiction whilst still respecting the host nation's sovereignty. Extradition is a crucial weapon in the arsenal of transnational law enforcement and one that continues to be deployed in order to advance the administration of justice.

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Endnotes:

[1] *Kindler v. Canada (Minister of Justice)* [1991] 84 DLR (4th) 438, 488.

[2] *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor* [2013] 5 CLJ 447 at [17].

[3] See: Part V of the Extradition Act 1992.

[4] Extradition (Australia) Order 2006.

[5] Extradition (Hong Kong) Order 2000.

[6] Extradition (Republic of India) Order 2010.

[7] Extradition (Republic of Indonesia) Order 1992.

[8] Extradition (Republic of Korea) Order 2013.

[9] Extradition (Thailand) Order 1992.

[10] Extradition (Ukraine) Order 2017.

[11] Extradition (United States) Order 1997.

[12] **Law enforcement agencies of Kazakhstan and Malaysia held a consultation in Putrajaya**, Embassy of the Republic of Kazakhstan in Malaysia, 28th February 2018, retrieved from http://mfa.kz/en/kuala-lumpur/content-view/-5.

[13] Extradition Act 1992, section 3.

[14] *Chua Han Mow v. Superintendent of Pudu Prison* [1978] 1 LNS 34.

[15] Extradition Ordinance 1958, section 3A.

[16] *Ibid*.

[17] Extradition Act 1992, section 6(2).

[18] Extradition Act 1992, section 6(3).

[19] Extradition Act 1992, section 6(2)(b).

[20] See: Extradition (Australia) Order 2006, Extradition (Hong Kong) Order 2000, Extradition (Republic of Korea) Order 2013, Extradition (Ukraine) Order 2017 and Extradition (United States) Order 1997.

[21] Extradition Act 1992, section 6(2)(a).

[22] *Menteri Dalam Negeri, Malaysia & Anor v. Seyed Ramin Paknejad* [2017] 4 CLJ 541 at 555.

[23] Extradition (Australia) Order 2006, Schedule, Article 2(1): "*an offence shall be an extraditable offence if it is punishable under the laws of both Parties by imprisonment for a period of not less than one year, or by a more severe penalty"*.

[24] Extradition Act 1992, section 25(2). For the Singaporean counterpart, see Extradition Act (Singapore), section 32(2). For the Bruneian counterpart, see Extradition (Malaysia and Singapore) Act (Brunei), First Schedule, item 5.

[25] See also: Extradition (Republic of Indonesia) Order 1992 and Extradition (Thailand) Order 1992, in which the extraditable offences are annexed or listed respectively without any reference to minimum sentencing.

[26] Extradition Act 1992, section 8(e).

[27] *Menteri Dalam Negeri, Malaysia & Anor v. Seyed Ramin Paknejad* [2017] 4 CLJ 541 at 551.

[28] Extradition (Republic of India) Order 2010, Schedule, Article 5(1): "*Extradition shall not be granted when the person sought has been convicted, acquitted or pardoned in the Requested State for the offence for which extradition is requested.*"

[29] Federal Constitution, Article 7(2).

[30] Extradition Act 1992, section 8(a).

[31] *Schtraks v. Government of Israel and Ors* [1964] A.C. 556.

[32] *Ibid*. at 591.

[33] *Ibid*. at 592.

[34] *R v. Governor of Winson Green Prison, Birmingham, ex p Littlejohn* [1975] 3 All ER 208 at 212.

[35] Extradition Act 1992, section 9.

[36] Extradition Act 1992, section 8(d).

[37] Extradition (Republic of Korea) Order 2013, Schedule, Article 3(1)(c): "*Extradition shall not be granted under this Treaty in any of the following circumstances: When the prosecution or the punishment for the offence for which extradition is requested would be barred by reasons prescribed by a law of the Requested Party relating to the statute of limitations.*"

[38] Extradition Act 1992, sections 8(b) and (c).

[39] See: Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of State Parties, Geneva, Switzerland, 12-13 December 2001, retrieved from http://www.unhcr.org/419c74d64.pdf: "*Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, whose applicability is embedded in customary international law*"; read together with Vienna Convention on the Law of Treaties 1969, Article 53.

[40] Extradition Act 1992, section 19(4).

[41] Extradition Act 1992, sections 4 and 20.

[42] Extradition (Australia) Order 2006, Schedule, Article 4(6).

[43] *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor* [2013] 5 CLJ 447 at [11].

[44] *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor* [2013] 5 CLJ 447 at [15].

[45] Extradition Act 2003 (United Kingdom), section 84(7). See also: House of Lords Select Committee on Extradition Law, Second Report, Extradition: UK law and practice, Chapter 10: Part 2 Countries, paragraph 368, 2nd February 2015: "*Signatories to the ECE and Australia, Canada, New Zealand and the US are further*

designated and are not required to make such a prima facie case." Retrieved from: https://publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/12613.htm

[46] Extradition Act 2003 (United Kingdom), sections 21 and 87. See also: *Norris v. Government of United States of America* [2010] UKSC 9.

[47] Extradition Act 1988 (Australia), section 22(3)(c). See also: *Vasiljkovic v. Commonwealth* [2006] HCA 40 at 26.

[48] Sipalan, Joseph, **Malaysia seeking to extradite man convicted in Mongolian model murder**, *Reuters*, 8th June 2018, retrieved from: https://www.reuters.com/article/us-malaysia-politics-mongolia/malaysias-mahathir-says-looking-to-extradite-man-convicted-in-mongolian-model-murder-idUSKCN1J40F6.

[49] *Public Prosecutor v. Azilah bin Hadri and Sirul Azhar bin Hj Umar* [2015] 1 CLJ 579.

[50] *Menteri Dalam Negeri, Malaysia & Anor v. Seyed Ramin Paknejad* [2017] 4 CLJ 541 at 550.

[51] *El-Masri v. the Former Yugoslav Republic of Macedonia*, no. 39630/09, ECHR 2012 at 221.

[52] *Ibid.* at 239.

[53] *Ibid.* at 239.

[54] *Menteri Dalam Negeri, Malaysia & Anor v. Seyed Ramin Paknejad* [2017] 4 CLJ 541 at 550.

[55] Pearson, James, **Vietnamese ex-oil executive withdraws from appeal trial**, *Reuters*, 7th May 2018, retrieved from https://www.reuters.com/article/us-vietnam-security/vietnamese-ex-oil-executive-withdraws-from-appeal-trial-idUSKBN1I816M.

[56] *Ibid*.

[57] **Statement by Federal Foreign Office Spokesperson on German-Vietnamese Relations**, German Federal Foreign Office, 2nd August 2017, retrieved from https://www.auswaertiges-amt.de/en/newsroom/news/ 170802-vnm/291756.

[58] *Ibid.*

[59] **Vietnam energy executives stand trial on corruption charges**, *BBC News*, 8th January 2018, retrieved from: https://www.bbc.com/news/ world-asia-42601860.

[60] Alkousaa, Riham, **Germany expels second Vietnamese diplomat over 'Cold War-style' abduction**, *Reuters*, 22nd September 2017, retrieved from: https://www.reuters.com/article/us-germany-vietnam/ germany-expels-second-vietnamese-diplomat-over-cold-war-style-abduction-idUSKCN1BX1TD.

[61] *United States of America v. Beau Lee Lewis* 2008 U.S. Dist. LEXIS 102878.

[62] **Wildlife kingpin who traded from Penang**, *The Star Online*, 7th September 2010, retrieved from: https://www.thestar.com.my/news/ nation/2010/09/07/wildlife-kingpin-who-traded-from-penang.

[63] *United States of America v. Beau Lee Lewis* 2008 U.S. Dist. LEXIS 102878.

[64] Compare: *Chua Han Mow v. United States of America* 619 F. Supp. 1332; 1985 U.S. Dist. LEXIS 14883.

[65] *United States of America v. Beau Lee Lewis* 2008 U.S. Dist. LEXIS 102878.

[66] *PP v. Kamal Hisham Ja'afar* [2016] 1 CLJ 303 at [8].

[67] *Ibid*.

[68] *Chua Han Mow v. United States of America* 619 F. Supp. 1332; 1985 U.S. Dist. LEXIS 14883.

[69] *Bahrami v. R* [2017] NSWCCA 8*;* See also: *Said Mir Bahrami v. Pengarah Penjara Sungai Buloh, Selangor* [2013] 5 CLJ 447.

[70] *Wong Kim Poh v. Public Prosecutor* [1992] 1 SGCA 2.

[71] *Lee Chez Kee v. Public Prosecutor* [2008] SGCA 20.

[72] *Public Prosecutor v. Ismail Piee* [2010] MLJU 1967.

[73] Watt, Nicholas, **Pinochet to be set free**, *The Guardian*, 12th January 2000, retrieved from: https://www.theguardian.com/world/2000/jan/12/ pinochet.chile3.

[74] See: *Jansons v. Latvia* [2009] EWHC 1845 (Admin). Consider also: *Agil v. Gurry, Special Magistrate*, BC8803055 FCA 20/12/1988, unreported.