

LCQ5: Human rights protection and procedural safeguards in relation to surrender of fugitive offenders

Following is a question by the Hon Charles Mok and a reply by the Secretary for Security, Mr John Lee, in the Legislative Council today (October 23):

Question:

It is stipulated in Article 10 of the Hong Kong Bill of Rights that everyone shall have the right to a fair and public trial. According to Article 3(f) of the United Nations Model Treaty on Extradition, extradition shall not be granted if the person whose extradition is requested has not received or would not receive, in the requesting State, the minimum guarantees in criminal proceedings as contained in Article 14 of the International Covenant on Civil and Political Rights (the Covenant). All the surrender of fugitive offenders agreements (SFO agreements) signed between Hong Kong and 20 jurisdictions were implemented after going through this Council's legislative procedure for subsidiary legislation. In this connection, will the Government inform this Council:

(1) whether it knows, among the jurisdictions which have signed SFO agreements with Hong Kong, the respective jurisdictions that have and have not implemented the Covenant as well as the respective numbers of them; how the Government, at an institutional level, ensures the provision of a fair trial and human rights protection for Hong Kong people subsequent to their being surrendered; whether it will add the relevant protection provisions to the legislation; if not, of the reasons for that;

(2) whether it has assessed if a situation will emerge in which a fair trial and human rights protection for Hong Kong people is undermined as a result of their being surrendered; if it has assessed and the outcome is in the affirmative, whether such a situation will affect the commercial, trade and other relationships between Hong Kong and foreign countries; and

(3) whether the Government assessed, before and after signing an SFO agreement with a certain jurisdiction, if there were serious discrepancies between the legal provisions and the actual enforcement of such provisions in that jurisdiction; if it made such an assessment and found the existence of such a situation, how the Government handled the relevant SFO agreements so as to ensure the provision of a fair trial and human rights protection for those Hong Kong people who had been surrendered?

Reply:

President,

The Hong Kong Special Administrative Region (HKSAR) Government has been actively taking forward co-operation with other jurisdictions concerned on surrender of fugitive offenders (SFO) and mutual legal assistance in criminal matters (MLA) under the framework of Fugitive Offenders Ordinance (FOO) and Mutual Legal Assistance in Criminal Matters Ordinance (MLAO). The juridical assistance network has been expanded through signing relevant agreements with more jurisdictions, with a view to enhancing international co-operation in combating crimes. The current FOO provides the legal basis for SFO between Hong Kong and other jurisdictions.

My reply to the three parts of Hon Mok's question is as follows:

(1) Before commencing negotiation on entering into an SFO arrangement with the relevant jurisdiction, HKSAR Government will consider a host of factors, including the jurisdiction's relevant legislation on SFO and the bilateral agreements already signed; as well as the average visitor flow, economic and social relationships between Hong Kong and that jurisdiction, etc.

SFO agreement is a bilateral arrangement on an equal and mutual basis. The model text used by HKSAR Government for negotiating long-term SFO arrangements was formulated by the Sino-British Joint Liaison Group before Hong Kong's return to China and is in line with international common practices.

After the return to China, the Government has passed the model text to the Legislative Council (LegCo) for reference. In fact, all long-term agreements are subject to LegCo's scrutiny by way of subsidiary legislation in order to have legal effect. Whether or not a jurisdiction is a contracting state to the International Covenant on Civil and Political Rights (ICCPR) is not a prerequisite for signing a long-term SFO agreement with Hong Kong.

At present, Hong Kong has signed long-term bilateral SFO agreements with 20 jurisdictions, among which 18 jurisdictions (i.e. Australia, Canada, Czech, Finland, France, Germany, India, Indonesia, Ireland, the Netherlands, New Zealand, the Philippines, Portugal, the Republic of Korea, Sri Lanka, South Africa, the United Kingdom and the United States) are contracting states to ICCPR and the remaining two (i.e. Malaysia and Singapore) are not.

According to section 3(1) of FOO, the procedures under FOO are subject to limitations, restrictions, exceptions and qualifications which may be contained in long-term SFO agreements signed between Hong Kong and the relevant jurisdictions. Therefore, mutually agreed clauses could be added to the agreements, as the case may require, during negotiation between the two parties. For example, all the 20 long-term SFO agreements signed by Hong Kong contain provisions relating to discretionary refusal to surrender on humanitarian grounds.

Besides, according to section 13(1)(b) of FOO, the Chief Executive has the power to refuse to surrender a person. In *Cheng Chui Ping v the Chief Executive of the HKSAR & Anor*, [2002] HKCU 5, the court held that the Chief

Executive has the power to refuse surrender if it would be wrong, oppressive or unjust to order the surrender. The person concerned is therefore entitled to make representations to the Chief Executive or seek judicial review to oppose the surrender, including claiming that it is wrong, oppressive or unjust to order the surrender, and raising other humanitarian grounds or safeguards provided for in the applicable law or relevant surrender arrangements.

The existing human rights protection and procedural safeguards under F00 are in line with international common SF0 practices. If the person concerned thinks that his rights may be prejudiced, he may apply for judicial review against the order issued by the Chief Executive. Reasons for making representation or raising objection may include, apart from surrender restrictions in F00 and justifications specified in related SF0 arrangements, relevant grounds as provided for in the Basic Law and the Hong Kong Bill of Rights Ordinance.

(2) SF0 is an international consensus to fight organised and cross-boundary crimes, and is also a globally accepted means to reduce crimes effectively. F00 targets fugitives who have committed serious crimes, and does not affect lawful commercial activities and individuals' rights and freedoms which are protected by the law. The current F00 is in line with international common practices and has struck a balance between serving the purpose of SF0 and ensuring human rights protection and procedural safeguards. As at December 31, 2018, 109 fugitives were surrendered by Hong Kong to other jurisdictions under bilateral agreements and multilateral treaties. The human rights of the person concerned are protected by Hong Kong courts throughout the surrender process. He may also apply for judicial review against the procedures or decision of his surrender under the Hong Kong Bill of Rights Ordinance or other applicable laws, and appeal all the way up to the Court of Final Appeal. The court may make its decisions by drawing reference from relevant cases, including related cases of other common law jurisdictions. These cases include whether or not the requesting party could provide the additional human rights protection assurance requested by the requested party in respect of that case. If the person concerned considers the Chief Executive's decision illegitimate, irrational or procedurally improper, he may also apply for judicial review.

(3) The making of surrender arrangements and SF0 are very serious matters to both jurisdictions involved. Any fugitive to be surrendered will be handled openly at the court of both places, with members of the public in the know and subject to extensive monitoring. The long-term surrender mechanism under F00 has been operating smoothly and effectively all along for 22 years. HKSAR has in place extremely stringent procedures for handling SF0 requests, with the executive authorities and the judiciary performing their respective duties and roles, in order to ensure compliance with all procedural and legal requirements and protection of the rights of the person concerned.