

# Hong Kong – the China Point

by John Wood



Extradition orders in the UK and the USA have been contested on the basis that it may no longer be possible to receive a fair trial in Hong Kong. John Wood argues that the House of Lords and the Supreme Court were right to resist this assertion.

**H**ong Kong is no longer a British Crown Colony. As the world knows, it was handed back to China at midnight on 30 June 1997 and is now a Special Administrative Region (SAR) of the People's Republic of China. During the last few years, much hard work has been put in by many people in the UK and the US to put into place extradition treaties between those countries and Hong Kong. There is no question, at this time, of a treaty with China, but it goes without saying that, as China has responsibility for foreign affairs, it needs to be consulted and must give its consent to any arrangements that Hong Kong makes with foreign countries.

## LEGISLATIVE BACKGROUND

It is perhaps ironic that there now has to be a treaty with the UK in view of the pre-handover arrangements: the UK's *Fugitive Offenders Act 1967* was applied to Hong Kong by the *Fugitive Offenders (Hong Kong) Order 1967*. From 1 July 1997, these provisions no longer have effect, having been replaced, so far as the UK is concerned, by the *Hong Kong Act 1985* and an Order in Council made on 8 April 1997 called the *Hong Kong (Extradition) Order 1997*. The Order is subject to the negative resolution procedure but has not yet achieved the force of law. So far as Hong Kong is concerned, the *Fugitive Offenders Ordinance No. 23 of 1997* was made on 26 May 1997.

The extradition agreement between the UK and Hong Kong was submitted to the Sino-British Joint Liaison Group in May 1997 but, not surprisingly, time was too short for it to be cleared by 30 June. The Hong Kong SAR government is pursuing clearance with the Chinese government but I find it difficult to imagine that the Chinese will raise any objection and the agreement should be in force in the not too distant future.

So far as the position between Hong Kong and the US is concerned, the *Extradition Act 1989* is the primary act. However, the relevant treaty – the US and UK treaty dated 8 June 1972 which was extended to Hong Kong by an exchange of diplomatic

notes on 21 October 1976 – was made under previous legislation. Whether that agreement remained in force after 30 June 1997, so far as Hong Kong is concerned, is a matter of some contention. There is an extradition agreement between the US and Hong Kong signed on 20 December 1996 but it has not yet been approved by the Senate Foreign Relations Committee. A hearing has been held but, given the suspicion of a number of senators towards China, consent in the near future can by no means be guaranteed.

At present, no arrangement is in place between Hong Kong and the People's Republic of China (PRC) in relation to the surrender of fugitive offenders. Article 95 of the Basic Law of Hong Kong – which can loosely be termed the constitution of Hong Kong and keeps the pre-handover capitalist system in being for the next 50 years – provides that the Hong Kong government may maintain judicial relations with judicial organs of other parts of China and that they may render assistance to each other.

For some time now, there have been excellent relations and close co-operation between Hong Kong and its neighbour, Guangdong Province. In view of the ability of some violent criminals to cross the border without apparent difficulty, it is very important that there should be arrangements in place for the mutual surrender of fugitives. Concern has been expressed about the possibility that Hong Kong might informally surrender to China not only Chinese nationals but also those extradited to Hong Kong; but, in view of Hong Kong's history and its obedience to the rule of law, this likelihood seems to be remote, though it cannot be completely ruled out.

## LAUNDER AND LUI

It is proposed to examine the different approaches to extradition in courts in the UK and the US by comparing the way the House of Lords dealt with the case of *R v Home Secretary, ex parte Launder* [1997] 1 WLR 839 with the way the District

Court for Boston, Massachusetts dealt with the case of *Lui Kin-Hong v United States* Case 96 CV-10849, 24 April 1996. The judgment in Lui was appealed by the US Attorney in Boston on behalf of the government of Hong Kong.

The facts in each case are only of passing interest. Ewan Quayle Launder faces 14 charges of corruption in that it is alleged he received the equivalent of about £4m in corrupt payments in connection with loans given by Wardley, the investment banking company of the Hong Kong and Shanghai Bank.

Lui also faces charges of corruption, some ten in all, amounting to the equivalent of about £2.5m which it is alleged he received whilst employed by British America Tobacco in Hong Kong for granting to Giant Island Ltd and associated companies a virtual monopoly in respect of the distribution and export of certain brands of cigarettes to China and Taiwan. The payments were made to overseas bank accounts in Lui's name. One of the problems facing the prosecution of Lui is that the principal witness against him was abducted, tortured and murdered in Singapore.

## TWO APPLICATIONS FOR REVIEW

Launder's case is unusual in that he has had two bites of the cherry. In April 1994, the Bow Street Magistrates' Court ordered his return to Hong Kong. An application for habeas corpus was refused by the Divisional Court in December 1994 and in March 1995, the House of Lords refused leave to appeal. Following normal procedure, after reviewing the case, the Home Secretary decided that Launder should be surrendered to Hong Kong. This was in July 1995.

In December 1995 and January 1996, Launder obtained leave from the Divisional Court to judicially review the Home Secretary's decision and on 6 August 1996, he was successful on the somewhat novel basis that the Home Secretary had not personally directed his mind to the issue but had felt himself bound by the decision of the Cabinet on what has now become known as the 'China Point'. In this case the Divisional Court was not giving credence to the 'China Point' but was merely saying that the case should be considered again as the Home Secretary had not exercised his own independent judgment.

## WHAT IS THE 'CHINA POINT'?

The 'China Point' is not novel, having been taken in courts in the US and the UK, for example in *R v Governor of Brixton Prison, ex parte Osman* (No. 3) [1992] 1 WLR 36. Expressed in simple terms, the 'China Point' is that after 30 June 1997 there can be no guarantee that a fugitive criminal – or anyone else for that matter – would receive a fair trial in Hong Kong; that, if convicted, he would be in danger of being inflicted with cruel and inhuman punishment; and, furthermore, that there is nothing to stop China demanding his surrender and Hong Kong complying. The Hong Kong courts feel outraged at the suggestion that fair trials will be things of the past and the Correctional Services Department, which has an excellent reputation, far better than that of many places elsewhere, feels equal outrage.

## APPEAL TO THE LORDS

The Home Secretary appealed against the decision in Launder's favour, arguing that the Divisional Court had

misunderstood the evidence and affirming that he had exercised his own independent judgment. That point was speedily decided but, over several days, the House of Lords heard submissions on the 'China Point', ultimately allowing the Home Secretary's appeal and dismissing the applications for judicial review.

In criminal cases nowadays, the House of Lords often gives only one judgment – much to the relief of practitioners who will be grateful to Lord Hope of Craighead who deals with a multitude of difficult submissions with admirable clarity.

The House of Lords recognised that the supreme judicial authority was to remain in Hong Kong after the handover. The transfer of sovereignty was to create unique problems because there was not the slightest possibility that the trial could take place whilst Hong Kong was under British rule.

One of the greatest problems at present is that no one really knows what is going to happen in Hong Kong. Reliance can be placed only in the careful and extensive arrangements that have been put into place by the Basic Law and by the Sino-British Joint Declaration on the Question of Hong Kong, a document of some length which has the status of a treaty and which has been registered with the United Nations Organisation. It was ratified by the UK on 27 May 1985.

The Joint Declaration is an exceptionally important document. Paragraph 3(3) states that the laws currently in force in Hong Kong shall remain unchanged and in its elaboration of its basic policies regarding Hong Kong (see para. III, marginal notes 58–69), the government of China states that the judicial system previously practised in Hong Kong shall remain unchanged, that the courts shall be independent and free from interference and that the power of final judgment shall be vested in the newly created Court of Final Appeal. The prosecuting authority will control criminal prosecutions free from interference. From what I have learned, the only change has been to the authority's name: the Attorney General's Chambers is now the Department of Justice.

## TRUSTING CHINA

In his speech, Lord Hope said:

*'The question whether it is unjust or oppressive to order the applicant's return to Hong Kong must in the end depend upon whether the PRC can be trusted in the implementation of its treaty obligations to respect his fundamental human rights, allow him a fair trial and leave it to the courts, if he is convicted, to determine the appropriate punishment.'* *R v Home Secretary, ex parte Launder* [1997] 1 WLR 839 at p. 857B.

What is there to suggest China will exert its influence upon Hong Kong to, in effect, jettison the rule of law? And it has to be remembered that it is the courts of Hong Kong which will make the decisions, courts with judges who were appointed under British rule, brought up in the common law system and with not the slightest suspicion against them that they are likely to depart from the high standards of fairness and integrity they enjoy. Why should China jeopardise the continued commercial success of Hong Kong in this way? The reality is that it will not and, furthermore, it is difficult to see why it would do so in a corruption case that goes to the integrity of the business community and has nothing in the way of political ramifications. One is entitled to ask why the UK and US governments have agreed treaty obligations if they seriously doubted that the rule



of law in Hong Kong would be overcome by communist philosophy and dogma.

Lauder has taken his case to the European Commission of Human Rights which has asked the Home Secretary for his observations. The new Home Secretary in the Labour government has invited Lauder to make further submissions. With respect, if those submissions succeed on the basis that the Hong Kong courts and administration cannot be trusted, it seems pointless to enter into a treaty as extradition would become a dead letter.

### THE APPROACH IN LUI

On 20 December 1995, Lui was arrested in Boston for the purpose of extraditing him to Hong Kong and after several court hearings was ordered to remain in custody pending an extradition hearing. After a three day hearing, a magistrate found that the evidence justified the extradition of Lui and so certified on 20 August 1996. A few days later Lui filed for a writ of habeas corpus.

The application was heard in the Boston Federal District Court which, on 7 January 1997, upheld Lui's appeal and granted the writ.

The approach of Judge Joseph Tauro in the District Court was quite unlike that of the Divisional Court and the House of Lords. He, rightly, came to the view that the chances of trying Lui before 1 July 1997 were so remote as to be discounted and therefore concluded that, at the time of his trial, Lui would be in the custody of China, not of the UK. China could try Lui before the courts of the Hong Kong Special Administrative Region. If found guilty, Lui would be punished not by the Crown Colony of Hong Kong or the UK but by China.

This is a breathtaking assertion. There is not a word about the Joint Declaration or the Basic Law. Nor is there a mention of the concept of 'one country, two systems' or any reference to those paragraphs in the Joint Declaration about the independence of Hong Kong's judges. There is just a bald statement that, after the handover, Hong Kong's judges would be employed by China even though China had responsibility only for foreign affairs and defence. The US Attorney on behalf of the US and Hong Kong had, in fact, submitted that the court lacked jurisdiction to examine the reality of whether Hong Kong would be competent to satisfy its treaty obligations but the District Court took the contrary view.

Judge Tauro said that the language of the treaty between the UK and the US itself prohibited extradition if Hong Kong, as the Crown colony, was unable to try and punish Lui. He went on to assert that the legislative history during the ratification process confirmed this view. Of course, in English courts it is rare to discuss what occurred in the legislative process and, so far as I am aware, it has not been done in an extradition case. The point made by the judge was that, in its ratification hearings of a narrower political offence provision in the UK/US treaty, which was brought in to enable terrorists to be extradited more easily, a number of senators expressed concern about judicial processes in the UK and that such ratification would not have been made if the treaty provisions could be extended to China.

### HONG KONG POLICY ACT

It remains only to mention the Hong Kong Policy Act passed by Congress in 1992 which states:

*'For all purposes, including actions in any Court in the US, the Congress approves the continuation in force on and after 1st July 1997 of all treaties, and other international agreements including multilateral conventions entered into before such date between the US and Hong Kong, or entered into before such date between the US and the UK unless or until terminated in accordance with the law.'*

During the passage of the Act in the Congress, a senior government lawyer stated:


*'On extradition we are now negotiating with the Hong Kong government on a new treaty to replace the existing US/UK agreement, which would continue in force after the reversion to China.'*

Although this is slightly ambiguous it does appear that the speaker took the view that the treaty as it applied to Hong Kong was to continue. Given the terms of the Hong Kong Policy Act and this statement, it comes as something of a surprise that the US Attorney made the concession that, in the absence of any action by the President or the Congress, the existing arrangements lapsed. The argument put forward was that if Congress had intended that the existing treaty did not permit extradition before the handover, it would have been expected that a Congressman would have raised this issue. Not surprisingly, Judge Tauro was most unimpressed with this argument. It is interesting that in *Oen Yin-Choy* 858 F 2nd 400 (9th Circuit 1988) the court rejected the contention that Hong Kong's reversion acted as extradition to China but the judge chose not to follow that as the case was heard some eight years before and trial and sentence would be complete before 1997.

It is hardly a surprise that the US government appealed to the Federal Court of Appeal for the first circuit. The court held there was a valid treaty in existence, that sufficient evidence to extradite had been adduced and that the matters raised by Lui concerning his rights and protection should he be returned to Hong Kong were a matter for the Secretary of State for the State Department and not the court. An application to the Supreme Court for leave to appeal was refused and Lui returned to Hong Kong on 22 May 1997.

### CONCLUSION

These cases illustrate fundamental differences in the approach to extradition to Hong Kong prior to the handover although, perhaps, the House of Lords and the Federal Court of Appeal are not so far apart. It now remains to see what happens to the draft treaties. They are important, especially for the US.

Over the last few years, there has been considerable extradition traffic between Hong Kong and the US especially in relation to drugs and there have been some substantial fraud cases where Hong Kong has sought extradition from the UK. What is certain is that neither the US nor the UK will wish to become safe havens for Hong Kong criminals. 

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