

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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4 February 2014

Miss Betty Ma
Chief Council Secretary
Council Business Division 2
Legislative Council Complex,
1 Legislative Council Road
Central, Hong Kong

Dear Miss Ma,

**Subcommittee on Fugitive Offenders (Czech Republic) Order, Mutual
Legal Assistance in Criminal Matters (Spain) Order and Mutual Legal
Assistance in Criminal Matters (Czech Republic) Order
Meeting on 21 January 2014**

At the Subcommittee meeting on 21 January, Members enquired about the interpretation of "an offence of a political character" under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO) and whether there is any case law showing the recent international judicial trend towards excluding terrorist offences from "offences of a political character". The relevant information is provided below.

Under the MLAO, there is no statutory definition of an "offence of a political character". How the term is to be interpreted by the court depends on case law.

“Offences of a political character” as a ground for refusing extradition and mutual legal assistance (MLA) requests derives from the practice of granting asylum to political refugees. In a 1996 United Kingdom case dealing with asylum seeking, where a person who belonged to an organisation which aimed to overthrow the government had been involved in a bomb attack on an airport killing 10 people, and an attack on army barracks to seize weapons killing one person, the court said that acts of terrorism likely to cause indiscriminate injury to persons having no connection with the government of the state were outside the concept of a political crime and that the attacks on both the airport and the barracks had been properly characterized as terrorist offences¹. Further, one of the judges acknowledged “the whole trend of the more modern decisions and writings is towards an acceptance that certain acts of violence, even if political in the narrow sense, are beyond the pale, and that they should not be condoned by offering sanctuary to those who commit them” and that “there is detectable in the international legislation and the debates surrounding it a recognition that terrorism is an evil in its own right, distinct from endemic violence, and calling for special measures of containment”². Another judge said: “It is clear that the events of recent years having produced violent acts which in number, in extent and in character go far beyond the sort of cases which were considered in the 19th century when the concept of treating political acts, albeit criminally, differently from ordinary crimes was developed. It seems that in consequence the international community has been striving to avoid giving the benefit of political asylum to those who can truly be categorised as terrorists”³.

The Court of Justice of the European Union has taken a similar approach. In a 2010 case involving two Turkish nationals seeking asylum in Germany who belonged to or supported groups involved in terrorist acts, the court said “the interpretation recommended by the United Nation High Commissioner for Refugees and generally accepted both in legal literature and in practice, is to consider the criminal acts which are generally described as terrorist acts as being disproportionate to the purported political objectives in so far as they involve the use of indiscriminate violence and are directed at civilians or persons unconnected with the objectives pursued” and that “... Subject to an assessment of all the relevant circumstances of the individual case, such acts are likely to be categorised as non-political crimes”⁴.

Article 3(2) of the MLA Agreement with Spain, which excludes “terrorist offences” from the category of “an offence of a political character, therefore seeks to put beyond doubts the scope of “an offence of a political character” as

¹ T v Home Secretary [1996] AC 742 at 7787 F-G

² Ibid at 772H-773A

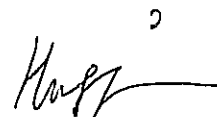
³ Ibid at 774F

⁴ Federal Republic of Germany v B, Same v D [2012] 1 WLR 1076 at 1097C-D

established by case law, rather than modifying it as such.

It should also be noted under section 5 of the MLAO, a MLA request shall be refused if, *in the opinion of the Secretary for Justice*, the request relates to the prosecution or punishment of a person for an external offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character. In forming such an opinion, it would be appropriate for the Secretary for Justice to take into account the case law and the provisions in the relevant MLA agreements. We will continue to keep in view the international judicial trend in this regard.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Huggin Tang', with a small superscript '2' above the final part of the signature.

(Huggin Tang)
for Secretary for Security

c.c.: Department of Justice (Attn.: Ms. Elizabeth Liu)