

MEMORANDUM TO CABINET BY THE HON. MINISTER OF  
COMMONWEALTH AND FOREIGN AFFAIRS AND THE HON.  
MINISTER OF JUSTICE

Review of the Fugitive Offenders Act 1881

The British Government have been reviewing the Fugitive Offenders Act 1881 with a view to discussing with other Commonwealth Governments its substitution by other arrangements more in conformity with the present-day state of the Commonwealth.

2. The attached Memorandum (Annexure A) from the Commonwealth Relations Office outlines the views of the British Government on the subject. In brief, the proposals are the following:-

- (a) a formal multilateral agreement should be negotiated under which Commonwealth countries would undertake to surrender to each other fugitive offenders in accordance with the provisions of such Agreement (paragraph 3 of the C.R.O. Memorandum);
- (b) each Commonwealth Government would then enact legislation to give effect to the provisions of the Agreement (paragraph 3 of the C.R.O. Memorandum);
- (c) paragraphs 5 and 6 of the C.R.O. Memorandum list a number of offences for which, it is proposed, extradition should be granted;
- (d) paragraphs 7 and 8 refer to the proposed inclusion in the Agreement of (a) the so-called "Speciality Rule" (under which an offender may only be prosecuted in the country to which he is extradited for the offences giving rise to his extradition or offences committed after his return) and (b) an article excluding extradition where the offence for which it is sought carries the death penalty in the requesting but not the requested country;
- (e) paragraphs 9 to 11 concern Political Offences. The British Government favour in general the prohibition of extradition for such offences, but have suggested that it might be useful for certain political offences, such as espionage, to continue to be liable to extradition under a system of bilateral agreements.

3. The British have circulated the annexed Memorandum to all Commonwealth Governments and have invited their views on the matter.

4. The Crown Advocate-General agrees with the proposals contained in paragraph 2 (a), (b), (c) and

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(d) above, subject - in the case of (c) - to the desirability of correlating the definition of certain listed offences with that in Maltese criminal law which is not based on English law, and in particular to the ascertainment that the crime of embezzlement (which Maltese law classifies under crimes against the public administration) is included among the crimes listed in paragraph 5 of the C.R.O. memorandum.

5. Paragraph 2 (e) above, concerning Political Offences, poses certain difficulties. The Crown Advocate General has commented at some length, and a copy of his minute is appended (Annexure B). The advice tendered by the Crown Advocate General is that if the Government of Malta were to continue to favour extradition for political offences between Commonwealth countries, which was the stand it took at the London Independence Conference, the question could arise whether such extradition in pursuance of an agreement as suggested by the British Government would conflict with the provisions of section 44 of the Malta Constitution (Annexure C attached). The Crown Advocate General gives it as his opinion that extradition in such cases would be in order provided the new arrangements governing extradition are (a) general, (b) for the extradition of persons between Commonwealth countries and (c) adhered to by Malta.

6. What the British Government are suggesting however (paragraph 11 of Annexure A) is that while respecting the general law of extradition which precludes rendition for political offences, Commonwealth Governments may consider including in their legislation a provision that, by bilateral agreements between themselves and any other Commonwealth country, (i) the general prohibition against rendition for political offences shall be waived and (ii) certain offences of a political character shall qualify for rendition. The paragraph in question goes on to say that it is for consideration whether (ii) should be confined to espionage or should extend to all offences against the security of the State.

7. This suggestion is not practicable for Malta. Bilateral agreements providing for extradition for political offences would not be possible under Section 44 of the Malta Constitution inasmuch as they would cease to be "general" arrangements as required by sub-section (4) of that section. It is not considered desirable to subscribe to this suggestion of the British Government in the knowledge that any legislation to implement it would have to be passed by a two-thirds majority of Parliament as provided by Section 67 (2) (a) of the Constitution.

8. Hon. Ministers are invited to recommend the acceptance by Malta of the proposals referred to in

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this memorandum at paragraph 2 (a), (b), (c) and (d) above, subject - in the case of paragraph 2 (c) - to clarification that "embezzlement" is included or covered in the list of extraditable offences. Hon. Ministers are further invited to consider whether, on the question of paragraph 2 (e) above regarding political offences, the attitude of the Government of Malta may be expressed in the following terms, viz:

- (i) Malta would have no objection to the retention of the existing power of extradition for political offences in a new general Commonwealth Agreement (in this connexion Hon. Ministers are invited to state whether political offences should stop short at espionage or offences against the security of the State);
- (ii) in view of the provisions of Section 44 of the Constitution it is not possible for Malta to provide for extradition for political offences under a system of bilateral (as opposed to "general") agreements with other Commonwealth governments.

EA 205/64

MEMORANDUMREVIEW OF THE FUGITIVE OFFENDERS ACT 1881General

1. The British Government has been considering the arrangements for the rendition of criminals provided for by the Fugitive Offenders Act 1881, with a view to discussing with other Commonwealth Governments to what extent it would be desirable for these arrangements to be modified in the light of the development of the Commonwealth.

2. The Act of 1881 was designed to deal not with extradition between independent sovereign states, but with the transfer of offenders between the different parts of a single Empire. In the changed circumstances of today its provisions no longer seem appropriate, and a number of Commonwealth countries have already replaced it by fresh legislation.

3. The arrangements under the Act differ in several aspects from those relating to extradition to and from sovereign states outside the Commonwealth. In the first place the arrangements within the Commonwealth, unlike those outside it, do not involve bilateral agreements. The British Government suggests that, in general, it would be appropriate to retain this feature of the existing arrangements, in recognition of the special relationship which exists between members of the Commonwealth. It therefore proposed for consideration that a formal multilateral Agreement should be negotiated under which the members of the Commonwealth would undertake to surrender fugitive offenders to each other in accordance with the provisions of the Agreement, which would indicate the offences in respect of which rendition would be granted. It might be thought right that the Agreement should deal also with the more important aspects of the procedure for securing rendition, in particular what evidence would have to be produced and what safeguards should be laid down for the protection of persons sought. Each Commonwealth Government would then enact its own legislation provided for rendition to other Commonwealth countries in accordance with the Agreement and would include such further procedural provisions as were required.

4. The remainder of this memorandum is designed to suggest, as a basis for discussion, some of the main provisions which might be included in the Agreement.

Detailed Proposals(a) Offences qualifying for rendition

5. The Fugitive Offenders Act differs from the enactments relating to extradition outside the Commonwealth in that, apart from its reference to treason and piracy, it does not contain a specific list of offences in respect of which the rendition of an offender may be granted but applies to all offences carrying a certain minimum penalty. In the circumstances of today it seems preferable to have a list of specific offences for which an offender could be surrendered. The following list, which is based on those included in extradition treaties recently made with foreign states, is suggested for discussion:-

1. Murder
2. Manslaughter

3. Offences against the law relating to abortion
4. Maliciously wounding or inflicting grievous bodily harm
5. Assault occasioning actual bodily harm
6. Rape
7. Unlawful sexual intercourse with a girl under sixteen
8. Indecent assault
9. Procuration
10. Bigamy
11. Kidnapping, abduction or false imprisonment
12. Dealing in slaves
13. Stealing, abandoning, exposing or unlawfully detaining child
14. Bribery
15. Perjury or subornation of perjury
16. Arson
17. Offences concerning counterfeit currency
18. Forgery or uttering what is forged
19. Stealing, fraudulent conversion, obtaining property by false pretences, receiving stolen property and other offences against property involving fraud
20. Burglary, housebreaking and similar offences
21. Robbery or robbery with violence
22. Blackmail and extortion by means of threats
23. Offences against bankruptcy law
24. Malicious damage to property
25. Acts done with the intention of endangering vehicles, vessels or aircraft
26. Offences against the law relating to dangerous drugs
27. Piracy
28. Revolt against the authority of the master of a ship or the commander of an aircraft

6. This list is not intended to be exhaustive, and consideration could be given to including some other offences e.g. aiding and abetting suicide and offences against the law relating to explosives or firearms. It is proposed that provision should also be made for granting extradition in respect of complicity in, or attempts or conspiracy to commit, any of the above offences.

(b) Speciality Rule

7. The British Government further proposes the inclusion in the Agreement of the speciality rule which is contained in all extradition treaties and in the legislation of some Commonwealth countries. Its effect is that an offender may not be prosecuted in the country to which he has been extradited for any offence, other than the offences for which his extradition was granted or offences committed after his return, until he has been given a chance to leave the country.

(c) Death Penalty

8. The European Convention on Extradition, and all the extradition treaties negotiated by Britain since World War II,

include some discretion to refuse extradition where the offence for which the surrender of a fugitive is sought carries the death penalty in the requesting but not the requested country. It is suggested that the Agreement should include a similar provision.

(d) Political Offences

9. Extradition treaties always contain a provision prohibiting extradition for offences of a political character, or if the prisoner can show that the requisition for his surrender has in fact been made with a view to try or punish him for such an offence. There is no similar provision in the Fugitive Offenders Act, which indeed specifically mentions treason as a returnable offence.

10. The British Government has considered most carefully whether, having regard to the special degree of association which exists between members of the Commonwealth, it would be appropriate to propose that within the Commonwealth it should still be possible to surrender persons for offences of a political character, or at least some such offences. It is recognised, however, that some Commonwealth countries have already enacted legislation excluding rendition, even to a fellow-member of the Commonwealth, for offences of a political character; and that, among the countries which have not so legislated, there may be some which feel that constitutional developments have made it no longer appropriate to surrender persons for such offences. It is therefore proposed that, subject to what is suggested below, the Agreement should contain a provision, comparable with those in the Extradition Act 1870, and in the European Convention on Extradition, prohibiting rendition for offences of a political character.

11. On the other hand, some Commonwealth Governments may consider that certain political offences, such as espionage, should continue to qualify for rendition, and that it would be intolerable if (for example) a spy fled from one part of the Commonwealth to another and could not be returned, even though the nature of his activities meant that both countries had an interest in bringing him to justice. The British Government would be interested to know whether other Governments are prepared to consider including in their legislation a provision that, by bilateral agreement between themselves and any other Commonwealth country, (i) the general prohibition which it is proposed should be included in the Agreement against rendition for offences of a political character shall be waived, and (ii) certain additional offences, of a political character, shall qualify for rendition. It is for consideration whether (ii) should be confined to espionage (the betrayal of secret information contrary to the interests of the State) or should extend to all offences against the security of the State, including sedition and treason.

(e) Groupings under Part II of the Fugitive Offenders Act

12. Part II of the Act provides for a simpler form of rendition, on the basis of backed warrants, between territories which are grouped together for that purpose by Order in Council. The British Government proposes to retain this simpler form of rendition for application to its dependencies, and to continue to group them for that purpose where appropriate, but subject to the views of the individual Commonwealth Governments concerned it considers that under new legislation it would be inappropriate in principle for its dependencies to be included in a group with one or more independent members of the Commonwealth. The arrangements for surrendering

fugitives to independent members of the Commonwealth should therefore, it is suggested, be the same in British dependancies as in Britain itself.

Conclusion

13. The proposals in this memorandum are tentative and are put forward for the purpose of facilitating Commonwealth consultation on this matter, but it is hoped that they may provide a basis on which agreement can be reached. The British Government will welcome the views of other Commonwealth Governments upon them. If it appears that it would be useful to do so, the British Government would be glad to arrange for a meeting of representatives of Commonwealth Governments to be held to discuss the proposals.

Commonwealth Relations Office,  
Downing Street,  
London, S.W. 1.

L-ARKIVJI NAZZJONALI TA' MALTA

Extract from minute dated 3rd February, 1965, by the Crown

Advocate General.

"We have a special provision in the human rights chapter of our Constitution on prohibition of deportation (section 44). It is there provided - and so far as I know there is no comparable provision in other Commonwealth constitution - that extradition is only permitted in pursuance of arrangements made by treaty and under the authority of a law. Having said that in subsection (1) of section 44, it was necessary, in order to save the Fugitive Offenders Act 1881, to provide in subsection (4) that "the provisions made by or under the Fugitive Offenders Act 1881, as for the time being in force in Malta, for the removal of persons from Malta to another country to undergo trial or punishment in that country in respect of an offence committed in that country and any general arrangements for the extradition of persons between Commonwealth countries to which Malta for the time being adheres shall be deemed, for the purposes of subsection (1) of this section, to be arrangements made by treaty and - the provision adds - subsection (2) shall not apply in relation to the removal or extradition of a person under such provisions or arrangements."

What subsection (2) of section 44 provides is that "no person shall be extradited for an offence of a political character". So the question that is posed by the contemplated repeal of the Fugitive Offenders Act 1881 is the following. It is true that the last part of subsection (4) provides that the prohibition of extradition for an offence of a political character shall not apply to any general arrangements for the extradition of persons between Commonwealth countries to which Malta for the time being adheres. But if the Fugitive Offenders Act 1881 is repealed a new Act will have to be passed by the Maltese House of Representatives giving effect to such general arrangements. This is necessary in view of section 44 (1). And would not such a law, if it permits extradition for political offences, run counter to section 44 (2)? On the whole, I incline to the view that it would not, for the following reason. I take the words "and any general arrangements for the extradition of persons between Commonwealth countries to which Malta adheres" to refer to future arrangements. Indeed the scope of subsection (4) is to assimilate for the purposes of subsection (1) certain arrangements which are not treaties proper to treaties. Now it was known that if the Fugitive Offenders Act 1881 were to be repealed - and subsection (4) was indeed inspired by the knowledge of the impending review of the Act - whatever other arrangements were to be made would have to be given effect by new legislation. When the last part of subsection (4), therefore, was added this could not but be postulated. Its object appears to have been that of securing that future general arrangements for the extradition of persons between Commonwealth countries to which Malta for the time being adheres will not be affected by the prohibition of extradition for offences of a political character. But for that prohibition not to apply, the arrangements must be (a) general (b) for the extradition of persons between Commonwealth countries and (c) adhered to by Malta. The same conditions are necessary if the new arrangements are to be deemed to be arrangements made by treaty for the purposes of section 44 (1).

Now most of this is relevant if the Government of Malta proposes to continue to favour extradition for offences



of a political character between Commonwealth countries, which was the stand taken in the London Independence Conference. But in this context it must be considered that -

- (i) the general law of extradition precludes the rendition of political offenders
- (ii) even within the Commonwealth itself there are countries (India, Ghana and Cyprus) which have followed the general law of extradition.

Government should therefore take a policy decision on this point, after considering paras. 9 - 11 of the Memorandum. In any event, even if Government decides to continue to favour in the forthcoming new arrangements the application of extradition to offences of a political character on the basis of the above interpretation of the last part of section 44 (4), it must be kept in view, for the purposes of paragraph 3 of the Memorandum, that for the new arrangements to be deemed to be arrangements made by treaty for the purposes of section 44 (1) of the Constitution, the aforesaid conditions must be fulfilled."

Section 44 of the Malta Constitution.

Prohibition of deportation

44. —(1) Extradition is only permitted in pursuance of arrangements made by treaty and under the authority of a law.

(2) No person shall be extradited for an offence of a political character.

(3) No citizen of Malta shall be removed from Malta except as a result of extradition proceedings or under any such law as is referred to in section 47 (3)(b) of this Constitution.

(4) The provisions made by or under the Fugitive Offenders Act, 1881, as for the time being in force in Malta, for the removal of persons from Malta to another country to undergo trial or punishment in that country in respect of an offence committed in that country and any general arrangements for the extradition of persons between Commonwealth countries to which Malta for the time being adheres shall be deemed, for the purposes of sub-section (1) of this section, to be arrangements made by treaty, and subsection (2) shall not apply in relation to the removal or extradition of a person under such provisions or arrangements.