**Society for Community Organization (SoCO)**

**Press Release**

**Foreign prisoners’ X’mas wish: To return home (22 December 2014)**

**Introduction**

Hong Kong situation

Most foreign prisoners who wish to go back to their home countries to serve their sentences cannot do so because Hong Kong has only signed Transfer of Sentenced Persons (TSP) agreements with 13 countries/jurisdictions. The first was entered with United Kingdom in 1998, and the latest agreement was concluded with Czech Republic in June 2014.

The 13 countries/jurisdictions with agreements are Australia, Belgium, France, Italy, Portugal, Spain, United Kingdom, United States of America, Philippines, Sri Lanka, Thailand, Korea and Macao Special Administrative Region[[1]](#footnote-1).

In comparison Australia has agreements with 68 jurisdictions, USA has agreements with 89 jurisdictions and the United Kingdom has agreements with 94 jurisdictions[[2]](#footnote-2).

Many of the prisoners known to SoCO are however from Africa and South America and they cannot be transferred due to the lack of a transfer agreement. Although they can seek to be transferred on an ad hoc basis, the likelihood of success of extremely small. Foreign nationals are usually just removed from the country once the sentence is served without the benefit of any parole supervision or the rehabilitation measures available in prisons.

It’s important to note the same problem applies to Hong Kong residents imprisoned abroad. If a HK resident is imprisoned in a country which Hong Kong does not have any transfer agreement with, he/she will most likely not be transferred back to Hong Kong but must serve the whole sentence abroad before being able to come back to Hong Kong.

What is a transfer agreement?

When a person is serving a sentence in a foreign country, he may seek to be transferred to back to his home country to serve his sentence. Many prisoners wish to serve their sentences at home without language or cultural barriers and most importantly they wish to be near their families.

In order to be transferred, there must be a transfer agreement in place, in which the transferring country, the receiving country and the prisoner agree to the transfer. It is a requirement that the judgment of sentence and conviction is final and a certain minimum period remains to be served.

There is also a requirement of dual criminality meaning that the conduct underlying the offence is a criminal offence both in the sentencing and administering State.

Regarding the sentence the receiving State can either continue to enforce the sentence or convert the sentence.

If the parties agree on a continued enforcement of the sentence, the prisoner will serve the remainder of the original sentence in the receiving State. If the sentence is converted, the receiving State will impose a new sentence. This may be less severe, but not more severe than the original one.

Statistics on Hong Kong prison population

As at 30 September 2014, there was a total prison population of 7,097 and 1,598 remands. Figures from end 2013 show that out of 9,039 people under the Correctional Services Department’s management, 1,779 were females and 7,260 were males.

As at 6 June 2014, there were 1,016 sentenced persons from places outside Hong Kong/of other nationality. As seen in Table 1 the majority (653 sentenced persons) were from Asia, followed by 249 people from Africa.

Table. 1. No. of sentenced persons of other nationality/from places outside Hong Kong.

|  |  |
| --- | --- |
| **Continent** | **No. of sentenced persons** |
| Asia | 653 |
| Africa | 249 |
| South America | 85 |
| Western | 29 |
| **Total** | **1,016** |

Applications for outward transfer

During the period 1 June 2001-16 June 2014, the government received 259 transfer applications.

Of these only 23 have been successful, and nearly all (22) were to countries that have a Transfer of Sentenced Persons agreement with Hong Kong, while the last one was made through an ad hoc transfer. That person was from Nigeria.

When one compares the success rates, the rate with TSP agreement (33%) is much higher than that of the ad hoc applications (0.5%).

Table 2. Applications for outward transfer made by sentenced persons in HK (1 June 2001 – 16 June 2014).

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Country to be transferred to** | **No. of applications received** | **No. of successful applications** | **No. of unsuccessful applications** | **No. of withdrawn applications** | **No. of applications under process** |
| With TSP Agreement | 66 | 22 | 12 | 14 | 18 |
| No TSP Agreement | 193 | 1 | 49 | 6 | 137 |
| **Total** | **259** | **23** | **61** | **20** | **155** |

Applications for inward transfer

Hong Kong residents sentenced abroad[[3]](#footnote-3) may also apply to be transferred back to Hong Kong.

During the period 1 June 2001 – 16 June 2014 Hong Kong SAR received 90 applications from Hong Kong residents to be transferred back to Hong Kong. Of these 31 were successful. 20 people’s applications are under process, and 39 applications have been categorized as unnecessary/withdrawn.

As for the successful applications, the majority were from Thailand (28 applications) and 3 were from the USA (table 2).

Table 3. Applications for inward transfer made by HK residents (1 June 2001 – 16 June 2014)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Transferring country** | **No. of applications received** | **No. of successful applications** | **No. of unnecessary/withdrawn applications** | **No. of applications under process** |
| Australia | 32 | 0 | 23 | 9 |
| Philippines | 7 | 0 | 1 | 6 |
| Thailand | 47 | 28 | 14 | 5 |
| USA | 4 | 3 | 1 | 0 |
| **Total** | **90** | **31** | **39** | **20** |

**Transfer agreements**

There are two types of legal instruments that are available to transfer prisoners.

Multilateral instruments:

Firstly, there’s the European Convention on the Transfer of Sentenced Persons[[4]](#footnote-4). This has been ratified by 64 countries[[5]](#footnote-5), of which 18 countries are States outside Europe. Thus it is open to signature by non-member States. For instance Japan and Korea have ratified the Convention [[6]](#footnote-6), but not Hong Kong or China.

Besides from this, there are The Scheme for the Transfer of Convicted Offenders within the Commonwealth; The Inter-American Convention on Serving Criminal Sentences which has 17 States parties.

The benefit of ratifying a multilateral agreement is that a State can enter into agreements with several other States in one go, and avoid the lengthy and costly process of negotiating new bilateral treaties. On the other hand bilateral agreements offer flexibility regarding which States a State enters into agreements with and allows for special provisions.

Bilateral agreements

Many bilateral agreements are entered into by States, also where there are multilateral agreements. For instance United Kingdom has 23 bilateral agreements with other States/jurisdictions.

**Benefits of transferring prisoners**

Reintegration

One of the most important aims of prisons is to rehabilitate offenders into society so they will not reoffend again. Keeping good contact with family members and having access to training and employment programmes is therefore important for prisoners to reintegrate into society.

If a prisoner is a foreigner and not a resident of Hong Kong that person will normally be deported back to his country of origin after serving his sentence. He will thus not be integrated into Hong Kong society upon release. As the training and employment programmes in Hong Kong prisons are aimed at reintegration in Hong Kong, it would be better if a foreign prisoner, if he so wishes, goes back to his country of origin to serve his prison term. He would then be able to make full use of the reintegration services and measures available there.

Having family support improves the likelihood of successful reintegration. If foreign prisoners could serve their sentences in their home country, they would be able to receive family visits just like local residents are allowed visits from their families and friends.

Law enforcement

Besides from the rehabilitative benefits of transferring prisoners, it is also beneficial from a law enforcement perspective. Prisoners who are not transferred will in most cases just be deported to their country when released. However, in such a case the receiving country has no control over the timing or mode of that person’s arrival, nor what the person will do. Nor does it have any information about the offence committed.

However, as stated by the United Nations Office of Drugs and Crime in its *Handbook on the International Transfer of Sentenced Persons* if a person is transferred the State can use its own criminal justice system to exercise some control over the prisoners prior to and following release into the community, thereby benefitting crime prevention and law enforcement. Also if transferred the receiving State has detailed information about the offence and the prisoner’s adjustment to life in prison[[7]](#footnote-7).

**Recommendations:**

1. **The HKSAR should enter into more bilateral agreements with countries in order to transfer foreign prisoners. It should proactively negotiate agreements with countries from which its foreign prisoner population comes from.**
2. **The HKSAR should ratify the European Convention on the Transfer of Sentenced Persons in order to enter into agreements with multiple countries at the same time.**

**Case stories:**

**Mary**

Mary was arrested in 2010 for drug trafficking and was sentenced to 17 years and 8 months’ imprisonment. At the time of arrest her daughter was 7 years old, now 11 years old. She admitted in court that she trafficked cocaine worth HK$2.7 million for a reward of 4,000 USD, because of debt. She was a businesswoman selling garments, but because of a fire her business dropped substantially.

As she is not a HK resident, she will be deported back to Kenya once she has served her sentence. However, she wishes to serve her sentence in Kenya because her daughter and mother are there. She is a widow. Her husband died 8 years ago. Her mother is old and suffers from serious illness, but takes care of W’s daughter. W worries that her mother is unable to take care of her daughter, and wishes to be there for her daughter, give her advice and be a mother for her, even if she has to do that from prison. At least if she is in a Kenyan prison, her daughter and mother can come visit her. Here in Hong Kong she is only able to make a 10 minute phone call every 2 months. Her mother is illiterate so she cannot write letters. Her family cannot afford to come visit her.

W applied for a transfer to Kenya right after she had been sentenced. She didn’t appeal against her sentence initially because a transfer application can only be made if there are no court proceedings pending. Hoping to be transferred fast, she therefore didn’t appeal. However, she was disappointed when she found that Kenya doesn’t have any transfer agreement with Hong Kong and the likelihood of transfer was therefore extremely small. After learning this, she applied for leave to appeal against sentence out of time, which was however rejected.

**Crystal**

Crystal has no previous convictions. She was 9 when her father passed away, and she was left taking care of her aged and sick mother. She has three children, who at the time of her arrest were 12, 10 and 4. The father had died in 2007. Someone promised to pay for their education and treat her mother’s illness if she agreed to traffic drugs to Hong Kong. She agreed, but was caught in Hong Kong airport. She didn’t receive any reward for trafficking the drugs. In short she was used as a drug mule.

Now her 80 year old mother is taking care of her three children. She applied for transfer in August 2011 and is still waiting.

She suffers from high blood pressure and anaemia.

Like other prisoners, she can only call her three children and mother once every 2 months for 10 minutes. Obviously it is impossible for her to have any meaningful conversation with all children within the 10 minutes.

(*The names of the prisoners have been changed due to privacy concerns)*

1. Letter from Security Bureau 17 July 2014. Please note that Macao’s transfer agreement does not appear on the List of Transfer of Sentenced Persons Agreements (Gazette References) http://www.doj.gov.hk/eng/laws/table5ti.html [↑](#footnote-ref-1)
2. <http://www.prisonersabroad.org.uk/uploads/documents/prisoners/Prison%20transfer%20v7.1.pdf>, extracted 14/8/14 [↑](#footnote-ref-2)
3. Excluding Macau SAR [↑](#footnote-ref-3)
4. Entry into force 1 July 1985 <http://conventions.coe.int/Treaty/EN/reports/html/112.htm>. This however, has been replaced by framework decision 2008/909/JHA in respect of transfer decisions among European Union member States. [↑](#footnote-ref-4)
5. <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=14/08/2014&CL=ENG>, extracted on 14/8/14 [↑](#footnote-ref-5)
6. http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=08/08/2014&CL=ENG [↑](#footnote-ref-6)
7. United Nations Office of Drugs and Crime 2012: *Handbook on the International Transfer of Sentenced Persons,* p. 13 [↑](#footnote-ref-7)