AS TO THE ADMISSIBILITY OF

Application No. 14037/88
by Lorrain Esme OSMAN
against the United Kingdom

The European Commission of Human Rights sitting in private on 13 March 1989, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
F. ERMACORA
G. SPERDUTI
E. BUSUTTIL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.C. SOYER
H.G. SCHERMERS
H. DANELIUS
G. BATLINER
J. CAMPINOS
H. VANDENBERGHE
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 30 June 1987 by Lorrain Esme OSMAN against the United Kingdom and registered on 2 July 1988 under file No. 14037/88;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, Mr. Lorrain Esme Osman, is a Malaysian citizen born in 1931. He is a banker by profession and is at present detained at HM Prison Pentonville, London, England. He is represented, in the proceedings before the Commission, by Mr. R. Johnson, a solicitor in the firm of Johnson and Walsh, Birmingham.

The facts of the case may be summarised as follows:

The applicant was committed to custody on 1 June 1987 by Bow Street Magistrates' Court to await his extradition to Hong Kong under the provisions of the Fugitive Offenders Act 1967. His extradition had been sought by the Hong Kong authorities on a number of charges of fraud and conspiracy to defraud shareholders of the bank of Malaysia.

The applicant applied for habeas corpus challenging the order of the Magistrate on grounds, inter alia, of insufficiency of evidence, want of jurisdiction and non-compliance with statutory

requirements. His application was refused by the Divisional Court of the Queen's Bench on 30 March 1988 and leave to appeal to the House of Lords refused on 14 July 1988.

The applicant applied again for habeas corpus based on two further grounds, firstly claiming diplomatic immunity as a diplomatic agent of the Republic of Liberia and secondly, submitting that the proceedings in Hong Kong and Malaysia, antecedent to the committal order, constituted an abuse of process. In its judgment of 29 December 1988 the Divisional Court found that the applicant did not qualify for diplomatic immunity and that the court had no competence to investigate alleged irregularities in proceedings overseas. The application for habeas corpus was accordingly dismissed.

The applicant states that if he were returned to Hong Kong and convicted of these offences, he would be likely to receive a very lengthy sentence of imprisonment. One of the applicant's associates, whose alleged involvement in these offences was of a lesser degree than that alleged against the applicant, pleaded guilty to four charges arising out of the same matter and was recently sentenced to fifteen years' imprisonment by the Hong Kong Court of Appeal. The Court of Appeal had increased a four-year sentence given by the trial judge.

The applicant maintains that were he to receive a similar sentence he would not have completed it by 1997. By a Joint Declaration of the Governments of the United Kingdom and the People's Republic of China on the question of Hong Kong made in 1984, it has been declared that China will resume sovereignty over Hong Kong as from 1 July 1997 (Articles 1 and 2).

Although the Joint Declaration purports to guarantee various rights and freedoms which, it declares, will continue to be enjoyed by people in Hong Kong after 1997, the applicant is fearful that after China has resumed sovereignty he will be subjected to further prosecution and/or punishment under the Chinese Criminal Code.

The Joint Declaration provides in Article 3 (3) that the Hong Kong Special Administrative Region (S.A.R.) will be vested with executive, legislative and independent judicial power and that the laws currently in force in Hong Kong will remain basically unchanged. These policies are to be stipulated in a Basic Law of the S.A.R., which will remain unchanged for 50 years. To ensure a smooth transfer of government and the effective implementation of the Joint Declaration, a Sino-British Joint Liaison Group will be set up to deal with transitional problems.

COMPLAINTS

The applicant complains that if he is returned to Hong Kong he will eventually be transferred to the Chinese authorities after the resumption of sovereignty. He fears that in such an eventuality he will be subjected to torture or to inhuman and degrading treatment, or be held guilty of a crime on account of acts or omissions which did not constitute a criminal offence under the relevant national or international law when they were allegedly committed and/or receive a heavier penalty than the one which was applicable at the time the criminal offence was committed. He invokes Articles 3 and 7 of the Convention.

The applicant claims that under the Chinese Criminal Code the death penalty may be applicable in respect of certain of the charges against him. Moreover, Chinese law does not recognise the prohibitions embodied in Article 7 para. 1 of the Convention on the retrospective imposition of criminal liability or the retrospective increase in applicable penalties.

He further claims that prisoners in China have been subjected to punishments which by international standards would be regarded as cruel, inhuman or degrading. He fears that after 1997 he might be the victim of such treatment.

THE LAW

1. The applicant complains that, if he is returned to Hong Kong to stand trial and convicted, he may on the resumption of Chinese sovereignty in 1997 face violations of his rights under Article 3 (Art. 3) of the Convention.

Article 3 (Art. 3) provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The applicant submits that under the Chinese Criminal Code his case may be re-opened and new heavier penalties, including the death penalty may be imposed. He also submits that prisoners under the Chinese authorities have been subjected to treatment contrary to Article 3 (Art. 3) of the Convention.

The Commission recalls its case-law that a person's deportation or extradition may give rise to an issue under Article 3 (Art. 3) of the Convention where there are serious reasons to believe that the individual will be subjected, in the receiving State, to treatment contrary to that Article (see No. 10308/83, Altun v. the Federal Republic of Germany, Dec. 3.5.83, D.R. 36 pp. 209-235; No. 10078/82, M. v. France, Dec. 13.12.84, D.R. 41 p. 103, also No. 10479/83, Kirkwood v. the United Kingdom, Dec. 12.3.84, D.R. 37 pp. 158-191; No. 14038/88, Soering v. the United Kingdom, Comm. Rep. 19.1.89, paras. 94-99). It is only in exceptional circumstances that the removal of a person will give rise to an issue under Article 3 (Art. 3) and the burden lies on the applicant to substantiate his fear that he will be exposed to treatment or punishment prohibited under that provision (see No. 8581/79, Dec. 6.3.80, D.R. 29 p. 48).

The Commission notes however that in the present case the applicant's fears of treatment contrary to Article 3 (Art. 3) depend on a number of hypothetical factors, namely, that the applicant is convicted, that he is sentenced to more than eight years imprisonment, that his detention falls under the control of the Chinese authorities and that the proceedings against him are re-opened. The Commission also recalls that the Sino-British Joint Declaration provides for the same laws and policies to be carried over for 50 years and that a Sino-British liaison committee is to be set up to make provision for transitional problems.

The Commission finds in these circumstances that the applicant has failed to establish that he is faced with an imminent act of the respondent Government which might expose him to any real risk of treatment contrary to Article 3 (Art. 3) of the Convention.

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant also complains that on return to Hong Kong he may, on resumption of Chinese sovereignty, face violations of his rights under Article 7 para. 1 (Art. 7-1) of the Convention, which provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Commission may however only examine complaints directed against one of the States Parties to the Convention. The respondent Government could not in this case be held directly responsible under the Convention for the retrospective imposition of criminal liability or retrospective increase in penalties allegedly provided for under Chinese law. The Commission also finds that the proposed extradition of the applicant to Hong Kong could not give rise to the responsibility of the respondent Government under Article 7 (Art. 7) of the Convention.

It follows that this complaint is incompatible ratione personae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission	President of the Commission
(H.C. KRÜGER)	(C.A. NØRGAARD)