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The Right to Bail in Extradition Proceedings: Malaysia's Criminal Law Perspective

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Article	Abstract
<p>Keywords: Bail pending extradition; Considerations for bail; Malaysia; Presumption against bail; Special circumstances.</p> <p>Article History Received: Jun 21, 2024; Reviewed: Jan 6, 2025; Accepted: Jan 27, 2025; Published: Jan 31, 2025.</p> <p>DOI: 10.28946/slrev.Vol9.Iss1.3914.pp1-21</p>	<p>This article delves into the issue of bail pending extradition in Malaysia. It adopts a doctrinal legal research methodology, focusing on analysing legislation and court decisions to objectively understand how current laws and practices determine bail applications within the context of Malaysian extradition law. The study reveals that Malaysia's Extradition Act 1992 does not explicitly provide for bail pending extradition, except under limited circumstances. Malaysian courts have utilised section 44 of the Extradition Act 1992 to apply bail provisions from the Criminal Procedure Code. The study finds that Malaysian courts adopt a cautious approach when determining bail applications in extradition cases. However, this judicial approach presents challenges, particularly in extradition cases involving offences governed by specific statutes other than the Criminal Procedure Code. The findings suggest that the reliance on section 44 should be re-evaluated to address these challenges. The article concludes by recommending further research to assess the need for an explicit and comprehensive provision for bail in the Extradition Act 1992 to ensure legal consistency and a uniform application across all types of offences.</p>

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INTRODUCTION

In Malaysia, it is common to hear about accused persons requesting to be released on bail¹ while awaiting trial. Nonetheless, it is rare to come across cases where fugitive criminals who are subjected to extradition seek bail while awaiting the conclusion of the extradition proceedings. In some instances, the court has refused bail applications in extradition cases, such as the case of Wong Ong Hua and Ling Ying Ching, both Malaysian citizens, who were among seven individuals wanted for extradition by the United States of America ("USA") on allegation of

¹ There are two categories of bail available under Chapter XXXVIII of the Criminal Procedure Code (Act 593) (Malaysia) - police bail and court bail. The police bail is only relevant to domestic investigations in Malaysia and is not related to extradition process. Therefore, the discussion in this article will focus on court bail.

money laundering and cybercrime offences.² It was reported that on 15 December 2020, the High Court in Kuala Lumpur initially refused their bail application in the course of their extradition proceedings.³ However, a news report on 26 January 2023 stated that both men had been released on bail by another High Court in Kuala Lumpur while awaiting the determination of their extradition case.⁴ This leads to a crucial question—how are bail applications pending extradition decided in Malaysia?

In terms of statistics, Table 1 provides information on bail applications pending extradition made to and decided by Malaysian courts from 2020 until 2023.

Table 1: Breakdown of bail applications pending extradition according to courts in Malaysia⁵

Courts	2020		2021		2022		2023	
	Granted	Refused	Granted	Refused	Granted	Refused	Granted	Refused
Magistrate Court	0	1	0	0	0	0	0	1
Sessions Court	0	0	1	0	0	0	1	1
High Court	0	2	0	0	0	0	1	0
Court of Appeal	0	0	0	0	0	0	0	0
Federal Court	0	1	0	0	0	0	0	0
Total	0	4	1	0	0	0	2	2

Source: Attorney General's Chambers of Malaysia

Table 1 shows that only three out of nine applications were granted by the courts, representing one-third of the total number of applications.⁶ This indicates that the courts in Malaysia had refused more bail applications pending extradition during this period. Nevertheless, the differing outcomes across various courts suggest that the issue of bail pending extradition in Malaysia is still uncertain. This uncertainty is further demonstrated in recent cases, such as the previously mentioned case of Wong Ong Hua and Ling Ying Ching, where the courts issued differing bail decisions.

In this regard, extradition matters in Malaysia are governed by the Extradition Act 1992 (Act 479) ("EA 1992"). However, this Act does not explicitly provide for bail in extradition proceedings, except under limited circumstances.⁷ To address this limitation, Malaysian courts

² Office of Public Affairs (U.S. Department of Justice), "Seven International Cyber Defendants, Including 'Apt41' Actors, Charged In Connection With Computer Intrusion Campaigns Against More Than 100 Victims Globally," accessed January 24, 2024, <https://www.justice.gov/opa/pr/seven-international-cyber-defendants-including-apt41-actors-charged-connection-computer>.

³ Farah Marsita Abdul Patah, "Dua ditahan hingga ekstradisi ke AS," *Berita Harian*, December 15, 2020, <https://www.bharian.com.my/berita/kes/2020/12/765260/dua-ditahan-hingga-ekstradisi-ke>.

⁴ Ahmad Johari Mohd Ali, "Dua lelaki dikehendaki DoJ berjaya cabar perintah ekstradisi," *Berita Harian*, January 26, 2023, <https://www.bharian.com.my/berita/kes/2023/01/1056408/dua-lelaki-dikehendaki-doj-berjaya-cabar-perintah-ekstradisi>.

⁵ The hierarchy of courts in Malaysia starts with the Magistrates Court, followed by the Sessions Court, the High Court, the Court of Appeal and finally, the Federal Court, which is the highest court in Malaysia.

⁶ These bail applications were new applications made to the courts under section 44 of the Extradition Act 1999 (Act 479) (Malaysia) and section 388 of the Criminal Procedure Code (Act 593) (Malaysia) at various stages of the extradition proceedings, and do not involve any appeal applications.

⁷ See sections 28 and 37 of the Extradition Act 1992 (Act 479) (Malaysia).

have invoked section 44 of the EA 1992⁸ to apply bail provisions from Chapter XXXVIII of the Criminal Procedure Code (Act 593) ("CPC"), provided they do not conflict with the EA 1992.⁹ Nonetheless, how exactly the courts apply these bail provisions in extradition cases remains unclear.

Meanwhile, there is currently limited academic research dedicated to the issue of bail pending extradition.¹⁰ The current body of research mostly focuses on the doctrine of the presumption against bail in extradition cases and the "special circumstances" examination.¹¹ Valenstein¹² discussed the lack of statutory rights to bail in extradition proceedings and the potential for a better balance between the interests of the fugitive criminals and the requested state. He pointed out the lack of clarity in defining special circumstances rule. He contended that bail consideration should account for the presumption in favour of bail, which is similar to the one applied to accused persons in domestic criminal trials. He further suggested that the risk of fugitive criminals fleeing and the possible danger to the community could be addressed through conditions for release, such as seizing the passport or assets, making flight difficult. Meanwhile, Hall¹³ proposed a better approach to bail in extradition cases, stressing that the decision to grant bail should focus on the risk of fugitive criminals fleeing and the possible danger to the community. He also suggested that the burden of proof should be on the fugitive criminals to demonstrate that they will not flee. While agreeing that the burden of proof should rest on the fugitive criminals, Persily¹⁴ argued that a more rigorous approach should be taken. He suggested that the "special circumstances" should be revised only to include circumstances that directly pertain to the probability of the fugitive absconding, such as the risk of fleeing and the requirement for specific assurances of the fugitive criminal's presence at every step of the extradition proceedings. Iraola¹⁵ further discussed the factors that the American courts have considered in determining "special circumstances" warranting bail in extradition proceedings. However, Fougere¹⁶ believed that fugitive criminals do not have a right to bail pending extradition. Instead of granting bail, fugitive criminals should only have the option to contest the

⁸ Section 44 of the Extradition Act 1992 (Act 479) (Malaysia) states that "The provisions of the Criminal Procedure Code in relation to matters not covered by this Act shall apply in so far as they are not inconsistent with the provisions of this Act, and in the event of any inconsistency between the provisions of this Act and the Criminal Procedure Code the provisions of this Act shall prevail."

⁹ *Michael Lee @ Weng Onn Lee v Public Prosecutor* [1999] 1 MLJ 171 at 175; *Ng Chong Hwa v Public Prosecutor* [2019] 1 CLJ 823 at 826-827.

¹⁰ Joshua J. Fougere, "Let's Try This Again: Reassessing the Right to Bail in Cases of International Extradition," *Columbia Journal of Law and Social Problems* 42, no. 2 (2008): 193, <https://jlsplaw.columbia.edu/wp-content/blogs.dir/213/files/2017/03/42-Fougere.pdf>.

¹¹ This doctrine was first established by the Supreme Court of the USA in *Wright v Henkel* 190 U.S. 40 (1903). In this case, the court ruled that while the law did not expressly provide courts with the authority to grant bail in extradition proceedings, it did not imply that courts lacked such power entirely. The court further held that bail could be granted if "special circumstances" justified it. This principle is widely accepted in various jurisdictions, including Australia and Hong Kong SAR, where courts require the demonstration of special circumstances before granting bail in extradition cases.

¹² Carl A. Valenstein, "The Right to Bail in United States Extradition Proceedings," *Michigan Journal of International Law* 4, no. 1 (1983): 107-21, <https://repository.law.umich.edu/mjil/vol4/iss1/5>.

¹³ Jeffrey A. Hall, "A Recommended Approach to Bail in International Extradition Cases," *Michigan Law Review* 86, no. 3 (1987): 599-619, <https://repository.law.umich.edu/mlr/vol86/iss3/4>.

¹⁴ Nathaniel A. Persily, "International Extradition and the Right to Bail," *Stanford Journal of International Law* 34 (1998): 407-42, <https://academiccommons.columbia.edu/doi/10.7916/D8N306DT/download>.

¹⁵ Roberto Iraola, "The Federal Common Law of Bail in International Extradition Proceedings," *Indiana International & Comparative Law Review* 17, no. 1 (2007), <https://journals.indianapolis.iu.edu/index.php/iiclr/article/view/17526/17623>.

¹⁶ Fougere, "Let's Try This Again: Reassessing the Right to Bail in Cases of International Extradition."

lengthy extradition proceedings through *habeas corpus*. In a more recent work, Groves¹⁷ examined the origins of the "special circumstances" test for bail in extradition cases and Australia's potential for law reform. He further investigated the distinctions between bail in extradition and domestic criminal trials, emphasising the necessity for a more equitable and human rights-oriented approach to bail in extradition cases. These works exhibit the principles and practices regarding bail pending extradition and the priority to balance the needs of the state in enforcing international obligations with the fundamental rights of individuals involved in the extradition process. Still, the discussion is primarily from the perspective of foreign jurisdictions, particularly the USA and Australia.

From Malaysia's perspective, Wan Arfah¹⁸ had the occasion to discuss the case *Set Kon Kim v Officer in Charge, Ceras Police Station*,¹⁹ involving a fugitive criminal who was a Malaysian citizen and wanted by Australia. The fugitive criminal was committed to prison as a result of extradition committal proceedings initiated against him. He then filed a *habeas corpus* application to secure his release from the committal order until his actual extradition to Australia. While his *habeas corpus* application was being considered, he also requested bail, which the court then rejected. Nevertheless, Wan Arfah did not address the matter of bail pending extradition and instead directed her focus to the inability of the court to grant a petition of *habeas corpus* to a person detained under an extradition committal warrant.

Therefore, to the best of the researcher's knowledge, no literature has specifically examined or discussed the issue of bail applications in extradition cases from a Malaysian context or to what extent Malaysia has adopted the accepted principles and practices regarding bail pending extradition. This article seeks to address this gap.

Against the above background, this study will explore the topic of bail pending extradition in Malaysia. This area has not been widely researched but is important in the administration of justice. The primary objective of this study is to analyse bail applications in extradition cases in Malaysia, focusing on how courts rely on section 44 of the EA 1992 to apply bail provisions from the CPC. This study will also discuss the law and practices of bail under the CPC and other specific legislations to provide an overview that connects bail provisions under these laws to their application in extradition proceedings. By conducting critical analysis, this article offers an objective understanding of the procedural and substantive legal issues related to bail applications in extradition cases in Malaysia while identifying gaps and providing recommendations for further research to improve the legal framework and ensure a just and efficient process.

RESEARCH METHODS

This study adopts a legal research approach and falls under doctrinal legal research. It thoroughly analyses relevant legal provisions in the EA 1992 and the CPC of Malaysia and data from other primary and secondary sources, including case law, parliamentary debates, textbooks, journal articles and news reports. The relevant sources were searched through library search and online databases. Additionally, information was obtained directly from the Attorney General's Chambers of Malaysia. The collected data was analysed critically to understand the key issues and challenges regarding bail pending extradition in Malaysia.

¹⁷ Matthew Groves, "Bail in Extradition Proceedings," *Criminal Law Journal* 44, no. 5 (2020): 298-319.

¹⁸ Wan Arfah Hamzah, "Set Kon Kim v. Officer in Charge Cheras Police Station: Reflections on the Malaysian Law of Extradition - Legislation and Judicial Decision," *Journal of Malaysian and Comparative Law* 12 (1985): 245-50, <https://ejournal.um.edu.my/index.php/JMCL/article/view/15960>.

¹⁹ *Set Kon Kim v Officer in Charge, Ceras Police Station* [1984] 1 MLJ 73.

ANALYSIS AND DISCUSSION

Definition of Bail and Extradition

Bail is a legal mechanism that allows someone to be released from custody or confinement by providing collateral as assurance that they will appear in court when required.²⁰ It is a legal process that allows persons accused of an offence to be temporarily released from custody if sufficient securities are deposited with the court and undertakings are provided by the bailor²¹ to ensure their presence throughout the trial.²² In the case of *Yusof bin Mohamad v Public Prosecutor*,²³ bail was defined similarly by Abdul Malik Ishak J as the act of releasing someone who is in custody, under arrest, or under any other form of restraint by obtaining surety for their appearance.

In simple terms, bail is a security or bond taken from or on behalf of the accused person to ensure their presence in court on a specified date. When the person is charged with a criminal charge before a court, temporary release may be granted with the imposition of security and on certain conditions as an assurance that the person will return to court for further hearings or proceedings. This process emphasises the aspect of individual trust and responsibility towards the justice system, as the individual is released with the expectation that the accused person will honour the promise to appear in court as scheduled.

Setting a bail sum that is neither exorbitant nor punitive is crucial to guarantee the appearance of the accused individuals in court without imposing an unreasonable financial burden on them.²⁴ This security is intended to guarantee attendance and not as a punishment. If the accused complies with all court appearances, bail will be returned at the end of the trial. However, if they are found guilty and fined, the bail paid can be used to settle the fine.²⁵

Meanwhile, extradition is defined by Shearer²⁶ as the act of one state surrendering a person accused or convicted of a criminal offence against the laws of another state, based on reciprocity. Similarly, Starke²⁷ specified that extradition is a formal procedure in which one state surrenders a person to another state, typically based on an agreement, reciprocity, or comity. This is done for the person to be tried or serve a term for the committed offence. Extradition, as defined by Bassiouni,²⁸ is a formal procedure in which one state surrenders a person to another state. This surrender hinges on an agreement, reciprocity, comity, or the laws of the state. Lastly, Sadoff²⁹ described extradition as a collaborative law enforcement procedure where an accused or convicted person of an offence but has yet to complete their sentence is transferred from the requested state to the requesting state to face trial or serve a sentence.

From the given definitions, extradition is a process by which a state transfers an individual to another state, in accordance with an agreement or reciprocal undertaking, to be tried or

²⁰ Mimi Kamariah Majid and Oi Kuan Lee, *Malaysian Law on Bail*, (Kuala Lumpur: Malaysian Law Publishers, 1986), 1.

²¹ A bailor is a person willing to provide security for the bail amount set by the court and undertakes to produce the accused person as and when required by the court.

²² Hasbollah Mat Saad, Maizatul Azila Chee Din and Mohd Aziz Abdul Aziz, *Criminal and Constitutional Law in Malaysia: A Comparative Approach*, Rev. ed. (Bukit Beruang, Melaka: Pena Hijrah Resources, 2016), 24.

²³ *Yusof bin Mohamed v Public Prosecutor* [1995] 3 MLJ 66.

²⁴ See section 389 of the Criminal Procedure Code (Act 593) (Malaysia). See also *Manickam & Ors v Public Prosecutor* [1982] 1 MLJ 227 at 229; *Moh Ting King v Public Prosecutor* [1995] 3 MLJ 461 at 463.

²⁵ Joshua Kevin Sathiaselan, Wie Mun Leng and Damien Chan, *Criminal Procedure and Practice in Malaysia*, (Ampang: CLJ Publication, 2021), 115-16.

²⁶ Ivan A. Shearer, *Extradition in International Law*, (Manchester: Manchester University Press, 1971), 21.

²⁷ J. G. Starke, *Introduction to International Law*, 10th ed. (London: Butterworth & Co, 1989), 352.

²⁸ M. C. Bassiouni, *International Extradition: United States Law and Practice*, 6th ed. (New York: Oxford University Press, 2014), 2.

²⁹ David A. Sadoff, *Bringing International Fugitives to Justice: Extradition and Its Alternatives*, (Cambridge: Cambridge University Press, 2016), 43.

sentenced for a committed offence. This formal process is based on the laws and agreements between the involved states, and it ensures that individuals accused or convicted of criminal offences are transferred to the requesting state to be prosecuted or punished accordingly.

Types of Bail Under the CPC and Other Related Laws

The types of bail in Malaysia depend on the classification of the offence set by the laws, which can be bailable, non-bailable, or unbailable.³⁰

Bailable Offence

Subsection 2(1) of the CPC states that an offence is considered bailable if it is listed as bailable in the First Schedule of the CPC or deemed bailable by any other currently applicable statute. The fifth column of the said First Schedule prescribes which offences under Malaysia's Penal Code are bailable. It is also established in the First Schedule that offences penalised with imprisonment for less than three years or with a fine alone, and are not included by the Penal Code, are also deemed bailable offences.

Section 387 of the CPC states that when a person accused of a bailable offence appears or is brought before a court and is willing to give bail at any point during the proceedings, that person shall be granted release on bail.³¹ In other words, a person accused of a bailable offence has the right to be released on bail. In *Yusof bin Mohamad*,³² the High Court stated that "Bailable offences are offences where the accused persons can be released on bail as of right." Hence, the court has limited discretion when dealing with a bailable offence. Conditions cannot be imposed for the release of the accused person.³³ As the court must grant bail in the case of a bailable offence, the discretion of the court is left to determine the amount of the bail.

Some bailable offences include causing death through reckless or negligent acts,³⁴ attempting to commit culpable homicide,³⁵ voluntarily causing hurt,³⁶ cheating,³⁷ unlawfully entering someone's property³⁸ and forging documents.³⁹

Non-bailable Offence

The same definition in subsection 2(1) of the CPC applies to non-bailable offences. Similar to bailable offences, the fifth column of the First Schedule of the CPC prescribes which offences under Malaysia's Penal Code are non-bailable offences. Additionally, the First Schedule specifies that offences against laws other than the Penal Code, which carry a minimum punishment of three years imprisonment or a more severe penalty, are classified as non-bailable offences.

Section 388 of the CPC divides non-bailable offences into three categories.⁴⁰ The first category relates to non-bailable offences that do not carry the death penalty or imprisonment for life. In such cases, the accused person may be released on bail. The second category involves

³⁰ Majid and Lee, *Malaysian Law on Bail*, 28, 36; Mimi Kamariah Majid, *Criminal Procedure in Malaysia*, 3rd ed. (Kuala Lumpur: University of Malaya Press, 1999), 413, 34; Hamid Sultan Abu Backer, *Janab's Key to Criminal Procedure*, 4th ed. (Kuala Lumpur: Janab (M) Sdn. Bhd., 2018), 38, 42; Sathiaselalan, Leng and Chan, *Criminal Procedure and Practice in Malaysia*, 118.

³¹ Subsection 387(1) of the Criminal Procedure Code (Act 593) (Malaysia).

³² *Yusof bin Mohamed v Public Prosecutor* [1995] 3 MLJ 66 at 69. See also *Public Prosecutor v Dato Balwant Singh* [2002] 4 CLJ 155 at 159.

³³ Abu Backer, *Janab's Key to Criminal Procedure*, 592.

³⁴ See section 304A of the Penal Code (Act 574) (Malaysia).

³⁵ See section 308 of the Penal Code (Act 574) (Malaysia).

³⁶ See sections 321 and 323 of the Penal Code (Act 574) (Malaysia).

³⁷ See sections 415 and 417 of the Penal Code (Act 574) (Malaysia).

³⁸ See sections 442 and 448 of the Penal Code (Act 574) (Malaysia).

³⁹ See sections 463 and 465 of the Penal Code (Act 574) (Malaysia).

⁴⁰ Sathiaselalan, Leng and Chan, *Criminal Procedure and Practice in Malaysia*, 120-21.

non-bailable offences that are punishable by death or imprisonment for life. In such cases, the accused person shall not be granted bail. However, the third category is an exception to the second category. If the accused is under sixteen, female, or suffering from an illness or infirmity, they may be released on bail even if they fall under the second category.

In contrast to bailable offences, the basic principle is that those charged with non-bailable offences do not have an automatic right to bail. The court has the sole discretion to grant or refuse bail in the case of non-bailable offences, but the discretion must be exercised judiciously.⁴¹ Hence, the burden of proof is on the person accused of a non-bailable offence to justify their entitlement to be granted bail.

The court should consider several factors before bail may be granted to the person accused of the non-bailable offence. In the case of *Yusof bin Mohamad*,⁴² the High Court considered several factors when making its decision. These factors included: (i) the seriousness of the offence; (ii) the quality of the evidence against the accused; (iii) the likelihood of the accused being present at the trial; (iv) the possibility of witnesses being influenced if the accused is released on bail; (v) the overall interest of the public and the state; and (vi) any other relevant considerations, such as the accused's likelihood of committing further offences or their attitude towards the case and those involved.

The considerations would rely on the circumstances of each case in deciding whether to allow bail. In addition, the concerns must be weighed against all parties' interests, not only the accused person. As the High Court in *Yusof bin Mohamad*⁴³ further ruled that:

"It must not be forgotten that the abovementioned considerations are not meant to be exhaustive. Indeed, the considerations may be extended from time to time, developing, as it were, the law of bail. But one thing is certain. It is this. That the grant, refusal or cancellation of bail is a judicial act and has to be performed with judicial care after seriously considering the interests of all the parties concerned."

Non-bailable offences include acts of terrorism,⁴⁴ inflicting serious injury using dangerous weapons or means,⁴⁵ kidnapping,⁴⁶ rape,⁴⁷ money laundering,⁴⁸ corruption⁴⁹ and unauthorised access to computer material.⁵⁰

Unbailable Offence

Apart from Chapter XXXVIII of the CPC, which consists of sections 387 to 394 that provide general provisions on bail, there are other legislations which provide specific provisions that bail shall not be granted in certain circumstances or for certain offences. This is what is known as an unbailable offence, which means bail is absolutely prohibited.⁵¹ This is due to the gravity of the

⁴¹ *Yusof bin Mohamed v Public Prosecutor* [1995] 3 MLJ 66 at 73; Majid and Lee, *Malaysian Law on Bail*, 36; Sathiaselan, Leng and Chan, *Criminal Procedure and Practice in Malaysia*, 122.

⁴² *Yusof bin Mohamed v Public Prosecutor* [1995] 3 MLJ 66 at 72-73. See also other landmark cases discussing various considerations and circumstances for bail consideration—*Public Prosecutor v Wee Swee Siang* [1948] MLJ 114; *Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162; *Dato' Seri Anwar Ibrahim v Public Prosecutor* [1991] 1 MLJ 321; *Public Prosecutor v Dato Mat Shah* [1991] 2 CLJ 1112.

⁴³ *Yusof bin Mohamed v Public Prosecutor* [1995] 3 MLJ 66 at 73.

⁴⁴ See section 130C of the Penal Code (Act 574) (Malaysia).

⁴⁵ See section 324 of the Penal Code (Act 574) (Malaysia).

⁴⁶ See sections 360, 363 and 364 of the Penal Code (Act 574) (Malaysia).

⁴⁷ See sections 375 and 376 of the Penal Code (Act 574) (Malaysia).

⁴⁸ See subsection 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613) (Malaysia).

⁴⁹ See sections 16, 17, 18, 20, 21, 22, 23 and 24 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) (Malaysia).

⁵⁰ See sections 3 and 4 of the Computer Crimes Act 1997 (Act 563) (Malaysia).

⁵¹ *Loy Chin Hei v Public Prosecutor* [1981] CLJ (Rep) 178 at 181; *Public Prosecutor v Leong Ying Ming* [1993] 2 CLJ 143 at 145.

offences under these specific provisions.⁵² The term “unbailable” does not appear in the CPC since unbailable offences are offences under statutes other than the Penal Code.⁵³ These specific provisions are regarded as an exemption to the overall principle of bailable and non-bailable offences outlined in Chapter XXXVIII of the CPC.⁵⁴

For instance, section 41B of the Dangerous Drugs Act 1952 (Act 234) (“DDA 1952”) stipulates that bail cannot be granted to a person charged with any offence under that Act if its punishment is death or imprisonment for more than five years. In addition, bail is not allowed if the offence is punishable with imprisonment for five years or less, and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person. Similarly, section 12 of the Firearms (Increased Penalties) Act 1971 (Act 37) (“FIPA 1971”) prohibits granting bail to anybody charged with any offence under this Act.

In determining whether section 388 of CPC overrides section 41B of the DDA 1952 in *Public Prosecutor v Chew Siew Luan*,⁵⁵ the Federal Court ruled that the cardinal rule of interpretation of *generalibus specialia derogant* is applicable which means, “where a special provision is made in a special statute, that special provision excludes the operation of a general law.” In this regard, the court determined that the provisions governing the granting of bail under the DDA 1952 should be construed within the context of the Act rather than within the framework of the CPC. Hence, the particular provisions outlined in section 41B of the DDA 1952 take precedence over the general provisions of the CPC. Similarly, the specific provisions in the FIPA 1971 override the general ones stated in the CPC.⁵⁶

Bail Under the EA 1992

Circumstances Where Bail Is Available under the EA 1992

Bail under the EA 1992 is expressly available under two circumstances. The first circumstance falls under the special Part V, which consists of sections 25 to 28 and applies to the extradition of a person from Malaysia to Singapore or Brunei Darussalam. This Part provides a simplified mechanism for extradition based on endorsing an arrest warrant. Essentially, it is a mechanism in which a court in the requesting state issues an arrest warrant for a person who is in the requested state. The requested state endorses and executes the foreign arrest warrant and surrenders the person without the need for supporting documentation. This process is intended to be simpler and quicker than the general extradition process, and it is a wholly judicial process with limited executive involvement.⁵⁷

According to section 28 of the EA 1992, if someone is arrested based on an arrest warrant endorsed under section 26 of the EA 1992, they must be presented before a Magistrate immediately. Only if the Magistrate is convinced that the apprehended individual is the one

⁵² Bashir Ahmad Mallal, *Mallal's Criminal Procedure*, 8th ed., ed. James Foong Cheng Yuen and Zainun Ali (Kuala Lumpur: Lexis Nexis Malaysia Sdn. Bhd., 2020), 737.

⁵³ Abu Backer, *Janab's Key to Criminal Procedure*, 599; Sathiaselvan, Leng and Chan, *Criminal Procedure and Practice in Malaysia*, 126.

⁵⁴ Mazura Md Saman and Jamal Rodzi Dahari, “Bail and the Principle of Generalibus Specialia Derogant in the Malaysian Military Justice System,” *ZULFAQAR Journal of Defence Management, Social Science & Humanities* 4, no. 1 (2021): 70-71, <https://doi.org/10.58247/jdmssh-2021-0401-08>.

⁵⁵ *Public Prosecutor v Chew Siew Luan* [1982] CLJ (Rep) 285 at 287.

⁵⁶ Mallal, *Mallal's Criminal Procedure*, 741.

⁵⁷ Attorney General's Department of Australia, *A New Extradition System: A Review of Australia's Extradition Law and Practice* (Canberra: Attorney General's Department of Australia, 2005), 30, cited in Clara Spencer, “Reflections on the Effectiveness of Extradition in the ASEAN Region,” in *Cross-Border Law Enforcement: Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives*, ed. Saskia Hufnagel, Clive Harfield, and Simon Bronitt, *Cross-Border Law Enforcement Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (Abingdon Oxon: Routledge, 2012), 151-153.

mentioned in the warrant are they required to transmit custody of that person to the relevant court in Singapore or Brunei Darussalam. Alternatively, the Magistrate has the authority to grant bail to the individual on the condition that they agree to appear before the relevant court in Singapore or Brunei Darussalam at a designated time stated in the bond and bail bond. This decision may be made in the interest of justice and only applies to cases where bail is legally permissible. However, the current discussion will not address bail within the context of this specific Part V. Figure 1 shows the judicial process involving the simplified extradition mechanism under Part V of the EA 1992, including the stage where a Magistrate may grant bail under this mechanism.

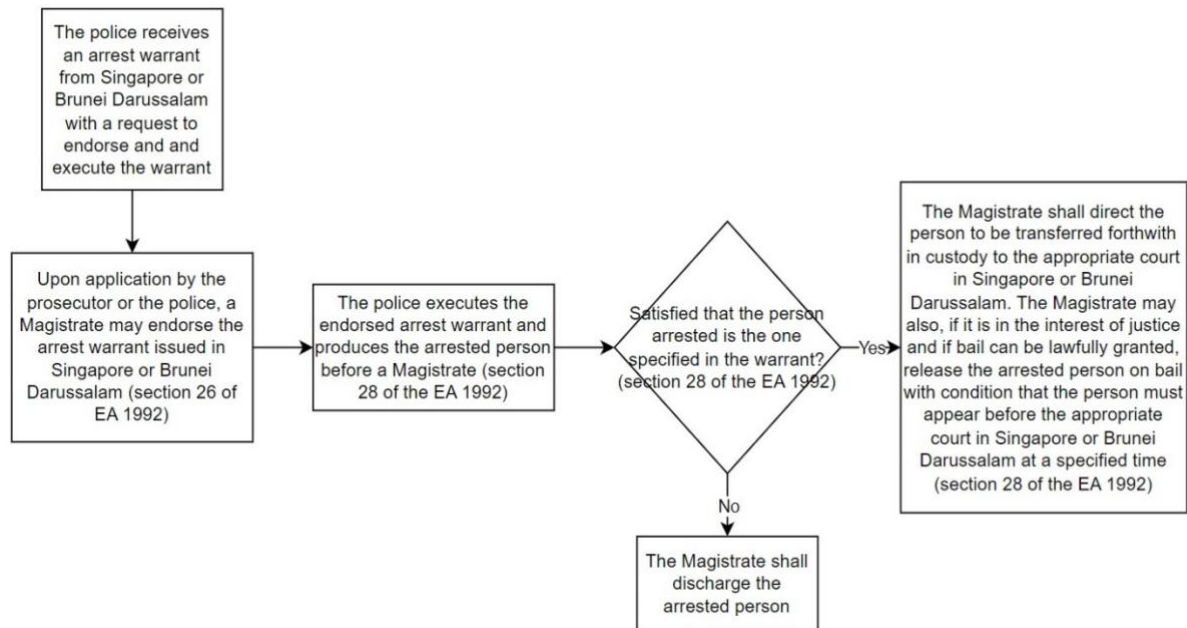


Figure 1: Judicial process involving simplified extradition mechanism

Figure 1 illustrates that bail can be obtained under section 28 of the simplified extradition mechanism EA. This is an alternative to being transferred into the custody of the relevant court in Singapore or Brunei Darussalam.

Meanwhile, the second circumstance is under subsections 37(3) and (5) of the EA 1992. This provision applies when the prosecutor files an application for review against the decision of the Sessions Court in discharging a fugitive criminal in a committal hearing. This provision is relevant to the present discussion on bail in the general extradition proceedings.

In this extradition proceedings, the Sessions Court is empowered under section 18 of the EA 1992 to inquire into an extradition matter through committal proceedings. The committal proceeding is conducted according to procedures set in either sections 19 or 20 of the EA 1992. The committal proceedings will result in one of two outcomes: either the fugitive criminal will be ordered to be imprisoned until a surrender warrant is issued by the Minister, enabling extradition to the requesting state, or the person will be discharged, resulting in no extradition to the requesting state.

If the fugitive criminal is discharged by the Sessions Court, the Public Prosecutor can request a review of the discharge order from the High Court within ten days of the discharge date.⁵⁸ When the Public Prosecutor requests a review, it is required to notify the Sessions Court of its intention. This notification serves as a stay of the discharge order issued by the Sessions Court.⁵⁹ In this circumstance, the Sessions Court may grant bail to the fugitive criminal pending the High

⁵⁸ Subsections 37(1) of the Extradition Act 1992 (Act 479) (Malaysia).

⁵⁹ Subsections 37(2) of the Extradition Act 1992 (Act 479) (Malaysia).

Court's determination of the review application.⁶⁰ The High Court may also release the fugitive criminal on bail pending its determination of the review application.⁶¹

Figure 2 shows the judicial process involving the general extradition proceedings under the EA 1992, including the stage where the Sessions Court or the High Court may grant bail under section 37 of the EA 1992.

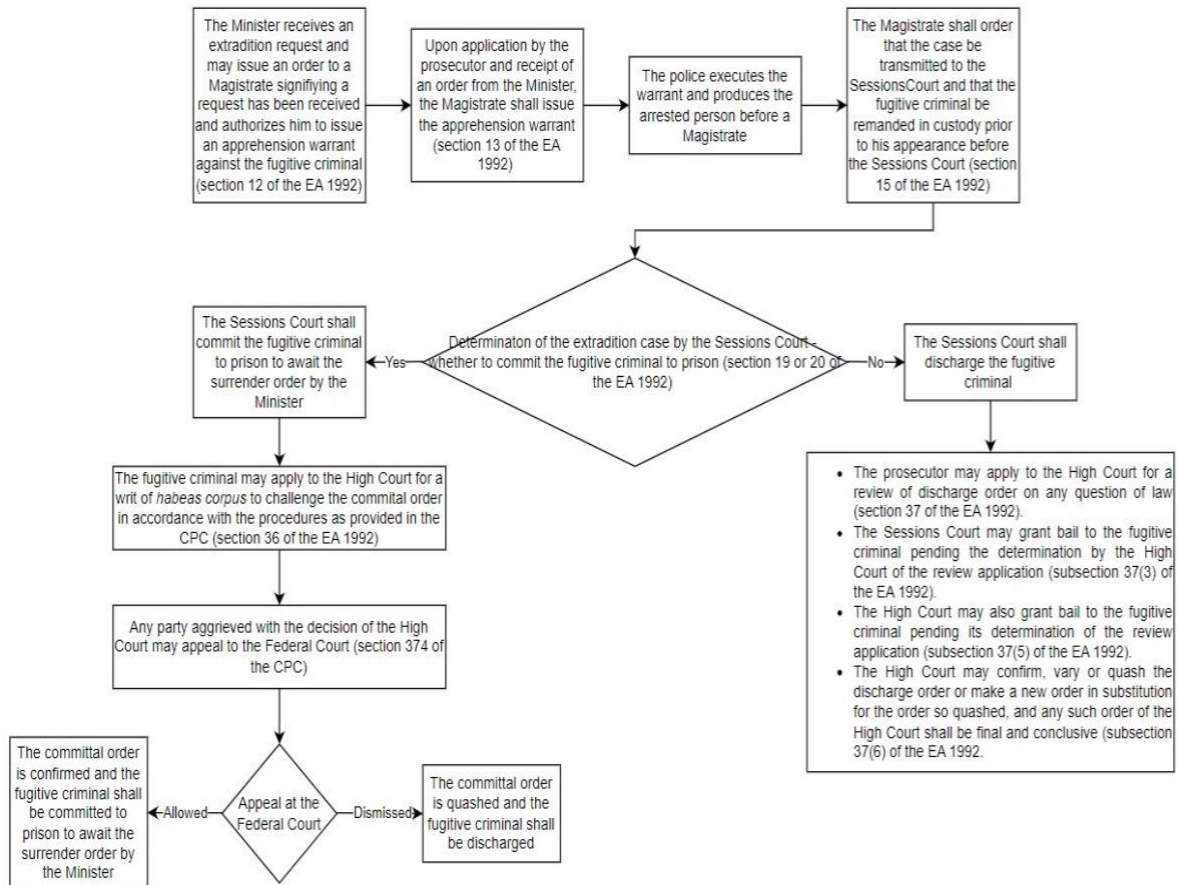


Figure 2: Judicial process involving general extradition proceedings

Figure 2 shows that under general extradition proceedings, bail is available at the review stage under section 37 of the EA 1992.

Bail in Other Circumstances Under the EA 1992

Based on Figures 1 and 2, a question arises about bail at the other stages, including pre-committal proceedings⁶² and during the committal proceedings at the Sessions Court, as well as the *habeas corpus* application at the High Court and the appeal of the High Court's decision to the Federal Court,⁶³ namely, whether the fugitive criminal can be released on bail during these stages. To answer this question, it is important to go through the history of extradition laws in Malaysia, especially after its independence in 1957.

⁶⁰ Subsections 37(3) of the Extradition Act 1992 (Act 479) (Malaysia).

⁶¹ Subsections 37(5) of the Extradition Act 1992 (Act 479) (Malaysia).

⁶² Pre-committal proceedings refer to the stage when the extradition case is at the Magistrate Court. See sections 12 to 17 of the Extradition Act 1992 (Act 479) (Malaysia) which deal with the power of the Magistrate to issue an apprehension warrant against the fugitive criminal, to transmit the case to the Sessions Court and to remand the fugitive criminal in custody until his appearance before the Sessions Court.

⁶³ Section 36 of the Extradition Act 1992 (Act 479) (Malaysia).

In this regard, the Extradition Ordinance ("EO 1958") was enacted in 1958 to consolidate the laws relating to extradition and repeal the extradition laws of the Malay States as listed in the Third Schedule of the Ordinance. The enactment of this Ordinance also stopped the application of the Extradition Acts 1870 to 1935 of the United Kingdom to the States of Penang and Malacca. The EO 1958 came into force on 1 December 1960.

The Commonwealth Fugitive Criminals Act ("CFC 1967") was enacted in 1967 to make better provisions for the extradition of fugitive criminals involving Commonwealth countries. Section 2 of the CFC 1967 gave the term "Commonwealth country" the same definition as defined in the Federal Constitution of Malaysia 1957⁶⁴ and included the Republic of Ireland. The enactment of this Act also stopped the application of the Fugitive Offenders Act 1881 of the United Kingdom to Malaysia. The CFC 1967 came into force on 30 September 1967.

There was no provision on bail in the EO 1958. However, there was a provision on bail in the CFC 1967. Section 23 provided that:

"In the case of a person who is a fugitive criminal arrested or detained under this Act, the provisions of the appropriate Criminal Procedure Code relating to bail shall apply in the same manner as they would apply if such a person was accused of committing in Malaysia the offence of which he is accused of or has been convicted."

The above provision is the enabling law that allowed for reference to relevant provisions on bail in the CPC when dealing with bail applications under the CFC 1967.

Thereafter, the EA 1992 was enacted in 1992 to repeal the EO 1958 and the CFC 1967. When tabling the Extradition Bill for the second reading at the House of Representative of Malaysia ("Dewan Rakyat") on 30 October 1991, Syed Hamid bin Syed Jaafar Albar, the then Minister at the Prime Minister's Department and the Minister of Justice, informed the Dewan Rakyat that since the enactment of the EO 1958 and the CFC 1967, there had been many new developments in the area of extradition. Moreover, there were provisions in these laws that were redundant or overlapping. Therefore, it was timely to have a comprehensive and updated law on extradition. He also informed that the Bill includes existing provisions from the aforementioned laws, which have been revised and reorganised. In addition, the Bill incorporated several new provisions.⁶⁵

However, it is worth noting that the provision for bail as per section 23 of the CFC 1967 was not incorporated in the EA 1992, among others. There was also no explanation in the Hansard on why this provision was left out of the Extradition Bill. While it can be reasonably argued that this is an indication that the legislature's intention was clear not to provide for bail pending extradition except during the stage of review application as per section 37 and in Part V of the EA 1992, it is important to highlight how the courts in Malaysia approach this matter.

In dealing with bail under the EA 1992 at the stage of the pre-committal and committal proceedings at the Sessions Court, the High Court in the case of *Michael Lee @ Weng Onn Lee v Public Prosecutor*,⁶⁶ while refusing a bail application, held that:

"There is no specific provision in the Act for a court to grant bail. Although there is no specific provision as in s 23 of the Fugitive Criminals Act 1967 (with which the Act repealed the Extradition Ordinance) stating that the provisions of the Criminal Procedure Code (FMS Cap 6) '(the CPC)' relating to bail shall apply in the same manner as they would apply if such person was accused of committing in Malaysia the offence for which he is accused or has been convicted (see its application in *Sek Kon Kim v A-G* [1984] 1 MLJ 60 at p 61), there is a

⁶⁴ Article 160(2) of the Federal Constitution (Malaysia) defines "Commonwealth country" as any country recognized as such by the Yang di-Pertuan Agong, effective from July 1, 1965. Previously, it referred to specific countries like the United Kingdom, Canada, Australia, New Zealand, India and any other country declared by Parliament to be a Commonwealth country.

⁶⁵ Malaysia, *Parliamentary Debates*, Dewan Rakyat, Second Reading, October 30, 1991, 12454 (Syed Hamid bin Syed Jaafar Albar) <https://www.parlimen.gov.my/files/hindex/pdf/DR-30101991.pdf>.

⁶⁶ *Michael Lee @ Weng Onn Lee v Public Prosecutor* [1999] 1 MLJ 171 at 175.

provision under s 44 of the Act which states that the provisions in the CPC about matters not covered by the Act shall apply in so far as they are not inconsistent with the provisions of the Act."

In the above case, the High Court noted that the EA 1992 has no specific provisions for granting bail. This contrasts with the now-repealed CFC 1967, which had a specific provision in section 23 regarding bail. The High Court observed that the EA 1992 lacks such a provision; however, section 44 of the same Act stipulates that the provisions of the CPC with respect to matters not addressed by the Act may be utilised to the extent that they do not conflict with the Act's provisions. The High Court referred to the decision in the case of *Sek Kon Kim v Attorney-General*⁶⁷ and was of the view that the relevant provisions of the CPC can be applied to bail in extradition cases if they do not conflict with the EA 1992. By using the principle under the CPC, the High Court was convinced that there was no conflict with the EA 1992.

It is worth noting that when *Sek Kon Kim v Attorney-General* was decided in 1983, two statutes governing extradition matters in Malaysia were in force, as explained before. Given the absence of bail provisions in the EO 1958, the High Court acknowledged the provision in section 23 of the CFC 1967. The court expressed the view that, with regards to the EO 1958, it had unfettered discretion to grant bail pending extradition under the relevant provisions of the CPC.

However, when *Michael Lee's* case was decided in 1998, the EO 1958 and the CFC 1967 were repealed and replaced by the EA 1992. Nonetheless, the High Court in this case, resorted to and invoked the provision of section 44 of the EA 1992 as it was convinced that the absence of the specific provision to grant bail under the EA 1992 falls under matters not covered by the Act and hence, provisions pertaining to bail under CPC are applicable in determining bail applications under the EA 1992.

The court's inherent power to grant bail in extradition cases in the absence of a specific law or rule that authorises it is a subject of debate. A power is inherent only if it is indispensable for the court to proceed with a case.⁶⁸ Hence, Fougere⁶⁹ contended that the courts should not be deemed to possess an inherent power⁷⁰ to issue bail in extradition cases since bail is not required for the extradition proceeding to transpire. In other words, granting bail is not a duty that is essential to the performance of the court's functions in extradition cases. As a result, the court lacks the inherent power to grant bail in extradition cases without a specific law or rule, and the sole recourse for fugitive criminals is to dispute the extended extradition proceedings through *habeas corpus*.

Nevertheless, based on the Malaysian cases mentioned above, although there is no direct provision on bail pending extradition in the EA 1992 except as provided under sections 28 and 37, decisions by the Malaysian courts show that they were of the view that they have unfettered discretion whether to grant bail pending extradition. The view adopted in *Micheal Lee* on the discretionary power to grant bail pending extradition was subsequently followed in other cases involving bail applications under EA 1992. Fugitive criminals sometimes cite the instances of *Tan Hock Chan v Menteri Dalam Negeri Malaysia*⁷¹ & *Ors* and *Public Prosecutor v Ottavio*

⁶⁷ *Sek Kon Kim v Attorney-General* [1984] 1 MLJ 60.

⁶⁸ William W. Van Alstyne, "The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause," *Law and Contemporary Problems* 40 (1976): 111, <http://dx.doi.org/10.2307/1191373>; Jeffrey C. Dobbins, "The Inherent and Supervisory Power," *Georgia Law Review* 54, no. 2 (2020): 421, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3395460.

⁶⁹ Fougere, "Let's Try This Again: Reassessing the Right to Bail in Cases of International Extradition," 208.

⁷⁰ Fougere uses 'inherent power' to identify only essential judicial functions. He contends that for actions like granting bail in extradition proceedings—which are not inherently necessary—courts must have explicit authority from legislative bodies.

⁷¹ *Tan Hock Chan v Menteri Dalam Negeri Malaysia & Ors* [1994] 2 CLJ 286.

*Quattrocchi*⁷² as the basis for their application for bail pending extradition.⁷³ Although the reasons why bail was granted in both cases were unclear, the facts of these cases exhibit that the fugitive criminals were released on bail by the courts pending the determination of the extradition cases against them.

However, the circumstances are different when the Sessions Court directs that the fugitive criminal be committed to prison until the Minister's decision is made on their extradition to the state that has requested it. The individual can seek redress under section 36 of the EA 1992 by applying to the High Court for a writ of *habeas corpus*. This should be carried out according to the procedures specified in the CPC, particularly in Chapter XXXVI. Therefore, any incidental issue arising from *habeas corpus* proceedings, including bail, must also be confined to the procedures provided in Chapter XXXVI of the CPC.

No provision under Chapter XXXVI of the CPC provides for bail pending the disposal of the application for a writ of *habeas corpus* under section 365 of the CPC or pending the disposal of an appeal, if any, of an application for a writ of *habeas corpus* under section 374 of the CPC. This leads to the question of whether a fugitive criminal could rely on provisions for bail under section 388 of the CPC in a *habeas corpus* application.

In the case of *Andrew s/o Thamboosamy v Superintendant of Pudu Prisons, Kuala Lumpur*,⁷⁴ one of the issues raised in the appeal to the Federal Court was whether the court had any authority to grant bail to the appellant under section 365 of the CPC. The appellant had been detained under subsection 34(1) of the Immigration Ordinance 1959 and subsequently filed for an order of *habeas corpus*, arguing that his detention was unlawful and improper.

The Federal Court observed that the learned trial judge had juxtaposed the Criminal Procedure Code of the Federated Malay States (FMS CPC) provisions with those of the Criminal Procedure Code of the Straits Settlements (S.S. CPC) concerning *habeas corpus*. The trial judge determined that subsection 394(a) of the S.S. CPC permits the court to order the release of a detained individual on bail at its discretion, even if the detention is lawful. In contrast, the FMS CPC lacks an equivalent provision. Consequently, under the FMS CPC, if the arrest is unlawful, the court is obliged to release the individual; however, if the detention is lawful, the court is not empowered to grant bail, and the individual must remain detained. The Federal Court concurred with the learned trial judge's interpretation.

The current CPC in Malaysia is derived from the FMS CPC. It was modified and expanded throughout the country by the Criminal Procedure Code (Amendment and Extension) Act 1976 (Act A324) on 10 January 1976. However, it does not have a provision equivalent to subsection 394(a) of the S.S. CPC. Therefore, it is safe to argue that the absence of a similar provision as found in section 394 of the S.S. CPC manifests the legislature's intention that bail is not available in *habeas corpus* proceedings.

The above principle in *Andrew s/o Thamboosamy* was also extended to the bail application pending the final determination of the *habeas corpus* application. In *Re Meenal w/o Muniyandi*,⁷⁵ the High Court refused the application for bail pending judgment of the court for an order of *habeas corpus* on the ground that "... there is no power to grant bail under section 365 of the Criminal Procedure Code – see also *Andrew s/o Thamboosamy v. Superintendant of Pudu Prisons, Kuala Lumpur*, supra."

The above principle is also applicable in extradition cases. As mentioned before in *Set Kon Kim v Officer in Charge, Ceras Police Station*, following the applicant's consent to waive the extradition proceedings, he was ordered to be committed at Balai Polis Lock-up Ceras on a

⁷² *Public Prosecutor v Ottavio Quattrocchi* [2003] 2 CLJ 613.

⁷³ *Ng Chong Hwa v Public Prosecutor* [2019] 1 CLJ 823 at 827.

⁷⁴ *Andrew s/o Thamboosamy v Superintendant of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156.

⁷⁵ *Re Meenal w/o Muniyandi* [1980] 2 MLJ 299 at 303.

committal warrant issued by the Magistrate pending his extradition to Melbourne, Australia, to face 10 charges which had been preferred against him. The applicant petitioned the High Court for a writ of *habeas corpus* under section 365 of the CPC, requesting release pending his extradition. In the same application, the applicant sought bail while awaiting the decision on his application for a writ of *habeas corpus*. Mohamed Dzaiddin J ruled that he was without authority to grant bail since Chapter XXXVI of the CPC has no provision for such power.⁷⁶

The case of *Set Kon Kim v Officer in Charge, Ceras Police Station* can be distinguished from the earlier reported case of *Sek Kon Kim v Attorney General*. In the former case, the bail application pending disposal of the committal application was allowed by the same learned judge per section 388 under Chapter XXXVIII of the CPC. However, in the subsequent case involving the same fugitive criminal, during the application for a writ of *habeas corpus*, the learned judge refused to grant bail, citing the lack of authority under Chapter XXXVI of the CPC to do so in such proceedings.

The learned judge in *Michael Lee*, KC Vohrah J, held that if the extradition case results in the applicant's commitment to prison, a separate bail application would have to be made to secure his release pending review of the committal order.⁷⁷ However, this view contradicts the decision in *Set Kon Kim v Officer in Charge, Ceras Police Station*. The researchers are more inclined towards the decision in *Set Kon Kim v Officer in Charge, Ceras Police Station*, as the law does not provide bail in a *habeas corpus* proceeding. This would be consistent with the decisions in the cases of *Andrew s/o Thamboosamy* and *Re Meenal*. It is noted that the judgment in the case of *Set Kon Kim v Officer in Charge, Ceras Police Station* was not mentioned in the case report of *Michael Lee*. If the learned judge had been aware of it, he might have reached a different view.

In essence, in the absence of an express provision for bail pending extradition except in the review application at the High Court and proceedings under Part V of the EA 1992, the courts in Malaysia have ruled that they have unfettered discretion whether or not to grant bail by applying the provision of section 44 of the EA 1992 and “importing” the provisions relating to bail under Chapter XXXVIII of the CPC. However, this discretion is not applicable in the *habeas corpus* application at the High Court. Therefore, bail is available during the pre-committal proceedings and the committal proceedings at the Sessions Court, but not during the *habeas corpus* application at the High Court.

Consideration and Approach in Granting or Refusing Bail Pending Extradition in Malaysia

The discussion in this part will be based on an analysis of three important cases: *Sek Kon Kim v Attorney-General*, *Michael Lee* and *Ng Chong Hwa v Public Prosecutor*.⁷⁸

In *Sek Kon Kim v Attorney-General*, the fugitive criminal is a Malaysian citizen who was also a barrister and solicitor practising in Victoria, Australia. He returned to Malaysia at the end of October 1982 without winding up his affairs in his legal practice. In 1979, the Australian authorities initiated an investigation into several alleged offences including the fraudulent conversion of cheques valued at AUD 104,646.78. This offence is equivalent to a criminal breach of trust in Malaysia. Based on an order approved by the Minister of Home Affairs of Malaysia under the EO 1958, Sek Kon Kim was apprehended on 17 March 1983.

He was brought before a Magistrate on the same evening, who fixed the hearing date of the extradition proceedings for 7 April 1983. Meanwhile, he was held in remand custody. His counsel applied for his release on bail pending the hearing on 7 April 1983, but the Magistrate refused this application on the basis that he was a fugitive criminal under the EO 1958.

⁷⁶ *Set Kon Kim v Officer in Charge, Ceras Police Station* [1984] 1 MLJ 73 at 74.

⁷⁷ *Michael Lee @ Weng Onn Lee v Public Prosecutor* [1999] 1 MLJ 171 at 177.

⁷⁸ *Ng Chong Hwa v Public Prosecutor* [2019] 1 CLJ 823.

He then applied for bail before the High Court on the grounds that the alleged offence was not serious, he was only accused of committing the offence and not a convicted person, and that the alleged offence had occurred in 1973, by which time he had returned to Malaysia and continued his property development business. He was willing to submit his travel documents to the authorities and needed time to wind up his affairs before the hearing date. He was also willing to surrender to the Australian authorities and even go to Australia at his own expense to face the charges. On the other hand, the prosecutor insisted that there was no guarantee that he would appear in court on 7 April 1983 although he had offered to hand over his travel documents and provided sufficient security for such a guarantee. It was also argued that since returning to Malaysia at the end of October 1973, he had never returned to Victoria to settle his affairs there. Furthermore, Malaysia is obligated to ensure that the hearing is conducted on 7 April 1983, in accordance with the order issued by the Minister of Home Affairs.

The following factors were considered by Mohamed Dzaiddin J in evaluating the bail application: (i) the nature and gravity of the charged offence; (ii) the severity and degree of punishment that a conviction could result in; (iii) the assurance that the accused person would not abscond or obstruct the prosecution if released on bail; (iv) the risk of witness tampering and whether the accused person is likely to tamper with prosecution evidence if released on bail; (v) the accused's opportunity to prepare a defence; (vi) the character, means, and standing of the accused; and (vii) the extended period of detention of the accused and the likelihood of further delays. His Lordship also mentioned that these matters to be considered do not appear to be exhaustive and that there may be other points that a judge should consider depending on the circumstances of each case.

Sek Kon Kim was then granted bail on the condition of posting a bond of \$100,000 with two sureties acceptable by the court, and he had to surrender all his travel documents to the court. The High Court decided that the decision was reached after contemplating the nature and severity of the offence, the character, manner, and position of the individual in question, as well as the assurance provided by his counsel that, if necessary, he would surrender himself to the Australian authorities to face the charges. Additionally, the other factors in favour and against this application were also considered.

As can be observed, the matters considered in *Sek Kon Kim v Attorney-General* are generally similar to those set out in the bail application under the ordinary criminal application, such as in the earlier-mentioned case of *Yusof bin Mohamad*. This is understandable as the High Court at that time, as explained before, had resorted to the provisions in the CPC in dealing with the bail application under the EO 1958.

Meanwhile, in the case of *Michael Lee*, the fugitive criminal was wanted to face forty-two charges in Australia. He was apprehended on 9 February 1998. The committal proceedings against him commenced at the Sessions Court on 20 February 1998, and a further hearing was scheduled to begin on 2 November 1998.

Before this bail application, he had made two unsuccessful bail applications in the Sessions Court and one unsuccessful bail application in another High Court. In the present application, he pointed out four material changes in circumstances relating to his re-application for bail for the court to consider. They were: (i) there had been a long delay in the proceedings before the Sessions Court. Therefore, if he was remanded to custody, the ensuing proceedings to secure his discharge in the High Court, Court of Appeal and the Federal Court, if considered necessary to pursue in these courts, would mean that he would be in custody for several years; (ii) that even if he were to be extradited to Australia and was convicted on the abetment offences, he would not face higher sentences than those imposed on the principal, but the delay in the extradition proceedings here would mean that he, if convicted, would in effect serve a longer period of the sentence; (iii) that his wife who was running a *bona fide* business was having difficulty with the

business because of his absence; and (iv) that he had a joint venture with a German firm to market some of its products and if he did not deal with the German firm, it would be a lost opportunity.

However, the High Court in dismissing the bail application, had considered that: (i) the extradition proceedings will take place soon; (ii) it would be presumptuous to speculate on what the Australian authority might do if he is extradited to Australia; and (iii) there is insufficient evidence to support his good character, means, and standing. The court ruled that the reasons advanced by Michael Lee as constituting a change in the circumstances had to be viewed in the broader context—whether there was a likelihood of him absconding if released on bail. The court considered the nature of the offences for which he was sought in Australia, including fraud-related offences and false statements. Additionally, the court considered that the previous High Court had denied his bail application. Based on these factors, the court concluded that it was reasonable to assume that he was likely to flee and, therefore, justifiable to deny his bail application.

At this point, the courts have taken slightly different approaches in these two cases. In *Sek Kon Kim v Attorney-General*, the court's decision to grant bail focused, among others, on the guarantee provided by the fugitive criminal's counsel that he would not abscond. The court also considered the applicant's character, means, and standing, as well as the assurances he provided pertaining to his willingness to face the charges in Australia and the nature of the offence. However, in *Michael Lee*, the court considered that the likelihood of him absconding is an important factor, and other reasons must be viewed from this perspective. The difference in these considerations highlights how courts assess risks and specific factors in each bail application. In *Sek Kon Kim v Attorney-General*, the court was satisfied that there were factors indicating that the fugitive would adhere to bail conditions and not flee. Meanwhile, in *Michael Lee*, the court ruled that there were insufficient mitigating factors to reduce the risk of absconding.

However, there was no discussion in either case regarding whether bail should be granted only in the presence of "special circumstances." It was only discussed in the case of *Ng Chong Hwa*. In this case, the prosecutor argued that the "special circumstances" test should be used to determine whether bail should be granted pending extradition proceedings. However, the applicant's counsel suggested that this test should not be adopted as it is not applicable in Malaysia. The learned judge, Collin Lawrence Sequerah J, ruled that the fact that the applicant was facing extradition proceedings increased the likelihood of him fleeing and was, therefore, a relevant factor to consider when deciding whether to grant bail. His Lordship ruled that although some jurisdictions might refer to this as "special circumstances", the label given to it is not significant as what matters is that the court considers specific factors when deciding on a bail application.⁷⁹ In other words, His Lordship believed that the deciding factor or consideration for granting bail is the same as what might be referred to as "special circumstances" in other jurisdictions. It does not matter what the label is attached to that term; what matters is that when deciding on a bail application, the court must consider certain factors regarding whether to grant the bail. Although His Lordship did not explicitly state that the "special circumstances" test applies in Malaysia, his ruling aligns with the principle that bail in extradition cases is only available upon showing special circumstances.

The case of *Ng Chong Hwa* involves an extradition request by the USA on criminal charges related to the 1Malaysia Development Berhad (1MDB) scandal. Ng Chong Hwa was apprehended on 1 November 2018 based on the USA's request, which was submitted pursuant to Article 11 of the Extradition Treaty between Malaysia and the USA. In anticipation of extradition proceedings at the Sessions Court, the Magistrate's Court ordered his remand for sixty days on 2 November 2018.

⁷⁹ *Ng Chong Hwa v Public Prosecutor* [2019] 1 CLJ 823 at 829-830.

The main reasons for the bail application are that the applicant is said not to present a flight risk, the need for access to his lawyer to prepare extradition proceedings and the sixty-day remand period by the Magistrate's Court is considered too long and oppressive. Nevertheless, the High Court refused to grant Ng Chong Hwa bail for a few reasons. The court considered that he is facing extradition proceedings, which increases the likelihood of him being a flight risk. This is a pertinent factor to consider when determining whether to grant bail, as the likelihood of absconding is elevated by the extradition proceedings themselves. Treaty obligations are also a significant factor to consider. Compliance with these obligations is of paramount national importance to the state, and extending bail would jeopardise their fulfilment. Consequently, evaluating the public's and the state's collective interests is imperative. Furthermore, the severity of the accusations against him in the USA underscores the possibility of him fleeing to evade the consequences of those charges, which is not merely "imaginary." Despite his willingness to surrender his passport and submit to an electronic monitoring device, there is no assurance that he is less of a flight risk despite being prohibited from leaving the state.

The High Court also considered that if access to the applicant is not denied, the inconvenience caused to the applicant's counsel in meeting him in prison is not a valid reason for granting bail. Furthermore, extradition proceedings are expected to commence soon as the complete extradition request from the USA was already received and sent to the Ministry of Home Affairs for the Minister's order to transfer the case to the Sessions Court to continue with the committal proceedings. Hence, any concerns about possible delays in the proceedings and detention for longer than necessary are no longer valid.

Here, it can be observed that the court's approach in *Ng Chong Hwa* aligns more closely with the cautious approach in *Michael Lee*. The court considered the likelihood of absconding a significant factor in denying bail. Various factors influenced this decision, such as the absconding risk, the gravity of the foreign allegations, the international obligations, and the nature of the extradition proceedings. This approach reflects a careful balance between the individual rights of the fugitive criminal and the broader implications of international legal commitments in honouring the extradition process.

When considering bail applications in extradition cases, the Malaysian court adopts a cautious approach, carefully balancing various factors and the broader context of the case. Cases such as *Sek Kon Kim v Attorney-General*, *Michael Lee* and *Ng Chong Hwa* provide insight into how the court assesses each bail application based on specific circumstances surrounding each case. In determining whether to grant or refuse bail in these extradition cases, the court's consideration demonstrates that the factors to be taken into account are not exhaustive. The court should conduct a careful and thorough consideration, giving serious thought to the interests of all parties involved. It does not matter whether the term is referred to as "special circumstances" or not; what matters is that when deciding on a bail application, the court must consider certain factors on whether to allow the bail. The main factors that often come into consideration are the nature and seriousness of the alleged offence, the flight risk, and the public and national interest. These cases also show that the court's approach to assessing bail applications in the context of extradition cases has evolved to a more comprehensive and cautious assessment of the possibility of absconding. The fugitive criminal is responsible for demonstrating that the risk of absconding has been substantially reduced to the court's satisfaction or that there is no flight risk.

Section 44 of the EA 1992 and the Unbailable Offence

The courts in Malaysia have used section 44 of the EA 1992 to apply the provisions relating to bail under Chapter XXXVIII of the CPC when deciding bail applications under the EA 1992. However, the said Chapter XXXVIII only covers bailable and non-bailable offences. Unbailable

offences are not covered by the CPC and are governed by different laws prohibiting the granting of bail.

Although there have been extradition cases decided under the EA 1992 involving corresponding unailable offences in Malaysia under the DDA 1952, no bail issue was discussed in these cases.⁸⁰ It is not known whether the fugitive criminals in these cases have applied for bail pending the extradition proceedings. This raises a concern about how to deal with unailable offences, such as drug trafficking and firearms-related offences, in extradition cases in Malaysia. This is important as these offences are becoming increasingly rampant nowadays. Drug trafficking activities that involve the smuggling of drugs from Thailand's Golden Triangle area remain prevalent and pose a significant threat to Malaysia's political and national security. These activities are frequently associated with other criminal activities, such as corruption, misconduct, breach of trust among government officials, and firearms smuggling in Malaysia.⁸¹ Meanwhile, the illegal firearms trade is responsible for over 500,000 deaths annually and highlights the growing threat faced by the ASEAN Member States, including Malaysia.⁸²

In other words, it is uncertain whether Malaysia's current legal framework and approach to bail during extradition proceedings are adequate for all types of offences, particularly unailable offences. The question remains unanswered, and this opens the possibility of revisiting section 44 of the 1992 EA to determine its adequacy in fully integrating the CPC's bail provisions into extradition proceedings.

CONCLUSION

This study highlights that although the EA 1992 does not include a provision for bail, except as specified in sections 28 and 37, courts in Malaysia have used section 44 of the EA 1992 to "import" the bail provisions under Chapter XXXVIII of the CPC when determining bail applications pending extradition proceedings. The courts demonstrate that they have unfettered discretion on whether to grant bail pending extradition. It also reveals the possible limitation of this approach, especially with offences that fall under the unailable category, which Chapter XXXVIII of the CPC does not cover. In determining bail applications in extradition cases, courts may consider various factors, including the flight risk, the severity of the offences, and any potential international implications. In Malaysia, the current approach requires careful consideration of all relevant factors in the broader context of the likelihood of the fugitive criminal absconding if released on bail. This meticulous approach aligns with the overarching principle of presumption against bail in extradition cases, where bail is typically granted only under special circumstances.

The study suggests that due to the possible limitation, the current approach of relying on section 44 of the EA 1992 to incorporate the provisions of Chapter XXXVIII of the CPC in dealing with bail in extradition cases in Malaysia needs to be re-evaluated. Further research is recommended to assess the need and implication of an explicit and comprehensive bail provision in the EA 1992 that can uniformly apply to all offences, ensuring legal consistency in bail pending extradition cases. This future research could lay the groundwork for a reformed extradition law that effectively balances the rights of fugitive criminals with the demands of international legal cooperation.

⁸⁰ See, for example, *Public Prosecutor v Lin Chien Pang Aka "Teacher Lin" "Saenwoo Asue"* [1993] 2 CLJ 225; *Menteri Dalam Negeri, Malaysia & Anor v Seyed Ramin Paknejad* [2017] 4 CLJ 541.

⁸¹ Amer Fawwaz Mohamed Yasid, "Drug Trafficking from Thailand's Golden Triangle Region and Its Implications on Malaysia's Political Security," *Journal of International Studies* 19, no. 2 (2023): 14-15, <https://doi.org/10.32890/jis2023.19.2.1>.

⁸² Syahmin AK and Fidelia, "The International Cooperation to Eradicate Illicit Firearms Trafficking in Southeast Asian Region," *Sriwijaya Law Review* 2, no. 2 (2018): 186, <http://dx.doi.org/10.28946/slrev.Vol2.Iss2.121.pp183-192>.

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