

## JUSTIFYING SENTENCING DISCOUNTS FOR FOREIGNERS



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*Should foreign offenders be entitled to a discount on sentence for the hardships they will experience in a Hong Kong jail? There have been conflicting decisions from the Court of Appeal on this issue. One approach is to say that the offender waives any right to complain about such hardships which are, after all, foreseeable. Another approach is to say that the hardships are too real for the law to ignore and must be considered (with any other relevant factors) to ensure that the punishment is proportional to the crime. The author argues, from both a legal and a philosophical perspective, that the second approach should be followed.*

### Introduction

In recent months, the issue of whether foreign offenders are entitled to a discount on sentence for the exceptional hardship they will face in a Hong Kong jail has received a significant amount of public attention.<sup>1</sup> This is a little surprising given that, prior to 2001, the issue had been considered in no less than twelve Court of Appeal judgments dating back to 1980.<sup>2</sup> Despite the extensive judicial consideration of the issue, there is a lack of principled analysis as to whether hardship in prison due to one's foreignness is a relevant sentencing factor, and if it is, how it should affect the determination of sentence.<sup>3</sup> Indeed, the public criticism of recent cases signals a general dissatisfaction with the manner in which the judiciary has approached the issue.<sup>4</sup>

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<sup>1</sup> See generally, P. Tse, "Foreigners in their own land", *HKiMail*, 14 Sept 2001; A. Eu, "Prisoner transfers better than term discounts", *South China Morning Post*, 1 Oct 2001, p 10; "Confusion in court", *South China Morning Post*, 2 Oct 2001, p 11; C. Buddle, "Courts split on 'foreign' matter", *South China Morning Post*, 5 Oct 2001, p 15; D. Cox, "Foreign prisoners feel so isolated", *South China Morning Post*, 6 Oct 2001, p 13; R. Shandasani, "'Nobody out there cares about us'", *South China Morning Post*, 7 Nov 2001, p 16; D. Wong, "Special jail treatment sends wrong message", *South China Morning Post*, 10 Nov 2001, p 17.

<sup>2</sup> See *R v Kumar*, unrep., Cr App No 179 of 1980 (Court of Appeal); *R v Ohmert*, unrep., Cr App No 213 of 1985 (Court of Appeal); *The Queen v Shipra* [1988] 2 HKLR 493; *The Queen v Okoye*, [1991] 95 HKCU 1; *AG v Rojas* [1994] 2 HKCLR 69 (hereafter referred to as *Rojas*); *R v Nwafor*, unrep., Cr App No 89 of 1993 (Court of Appeal); *R v Oweh*, unrep., Cr App No 208 of 1994 (Court of Appeal); *R v Infante et al.* [1996] HKLY 328; *The Queen v Tekendra* [1997] 517 HKCU 1; *R v Edgar*, unrep., Cr App No 22 of 1997 (Court of Appeal); *Secretary for Justice v Sugiyana*, unrep., App for Rev No 4 of 1996 (Court of Appeal); *HKSAR v Axel-Supardi* [2000] HKEC 653.

<sup>3</sup> However, the reasoning in *HKSAR v Chau Chun Yee*, unrep., Criminal Case No 264 of 2001 (Court of First Instance, 24 Sept 2001) is an exception.

<sup>4</sup> See n 1 above.

This article reviews briefly the recent Court of Appeal cases and then examines the conflicting moral principles that underlie the tension in the case law. It will be argued that on the basis of the proportionality principle, consequential hardships to all offenders, not only foreign ones, should be taken into account in fashioning a just and appropriate sentence. Finally, the factors affecting the weight to be given to consequential hardships in a particular case will be considered.

### Conflicting Decisions from the Court of Appeal

The recent controversy over discounts on sentences for foreigners appears to have been ignited by the Court of Appeal's decision in *HKSAR v Rohrer*,<sup>5</sup> handed down on 21 August 2001. The decision gave rise to a flurry of lower court decisions that took seemingly conflicting positions on the issue.<sup>6</sup> Rohrer was a German-speaking Swiss national who, using false travel documents, had come to Hong Kong from Thailand to cash 61 counterfeit travellers' cheques. He was sentenced to an imprisonment term of four years and four months. The court held that Rohrer was entitled to a reduction in sentence of three months because imprisonment would be a harsher regime for a foreigner who "might find himself isolated linguistically and culturally, having to face an unfamiliar diet, and deprived of the opportunity of visits from his family and friends."<sup>7</sup>

Rohrer appeared to recognise that the impact of imprisonment on a foreigner was a mitigating factor that could give rise to a specific reduction in sentence. This seemed to go beyond what the court had previously held in *Attorney General v Rojas*, and other authorities, that no specific discount should be given and "while it is a factor to be taken into consideration, it is not one which would affect sentence to any substantial degree."<sup>8</sup>

Less than two months later, the Court of Appeal was asked to revisit the issue in two cases heard together, *Secretary for Justice v Tse Ki Wu* and *Secretary for Justice v Ng Kit and Chan Tat Wah*.<sup>9</sup> In these cases, Rohrer was applied to reduce the sentence of three mainland Chinese offenders convicted of burglary and immigration offences. In an obvious effort to confine the holding of *Rohrer*, the court found that "a specific and substantial discount of

<sup>5</sup> [2001] 3 HKLRD 175.

<sup>6</sup> See generally "Robbers' jail terms cut for being foreign", *HKiMail*, 31 Aug 2001; "Mainland trio are foreigners, says judge", *HKiMail*, 17 Sept 2001; "Judge rejects leniency for 'foreigner'", *South China Morning Post*, 19 Sept 2001; "Hard line taken on mainland 'foreigners'", *South China Morning Post*, 25 Sept 2001; "Jail term appeal over bland food dismissed", *South China Morning Post*, 26 Sept 2001; "Judges reject foreigners' pleas for reduced terms", *South China Morning Post*, 4 Oct 2001; "II denied sentence cut on 'foreignness' grounds", *South China Morning Post*, 25 Oct 2001.

<sup>7</sup> *Rohrer* (n 5 above), para 14.

<sup>8</sup> *Rojas* (n 2 above), p 73.

<sup>9</sup> [2001] HKEC 1331 (hereafter referred to as *Tse Ki Wu*).

3 months was given by reason of the particular circumstances of [that] case”, which did not establish any new principle.<sup>10</sup> In relation to foreigners in general, the court held that the hardship arising from being “foreign” in a Hong Kong jail “is only an aspect of the overall circumstances to be considered when a court determines the appropriate sentence to be imposed ... and it is a factor for which, depending on the circumstances of the case, little or no weight at all should be given.”<sup>11</sup>

The court went on to observe that the previous authorities did not find “justification for a reduction of sentence simply by reason of the foreigner having come to Hong Kong and committed an offence, *who should take the consequences as he finds them*, including any hardship he might experience in a foreign prison if he were caught and convicted”.<sup>12</sup> In relation to mainland Chinese nationals, the court held that, as Hong Kong is part of China, they should not be considered “foreigners”, and that:

“[a]s a matter of general rule, a person is not qualified to claim any discount by being imprisoned in a part of his own country even [if] it is far away from his home. The fact that his family finds it difficult to visit him because of the distance involved *is the defendant's own making*.”<sup>13</sup>

The holding is difficult to reconcile with that in *Rohrer*, as it could easily be said that Rohrer should also have “taken the consequences as he found them” and that his hardship “was his own making”. The court fails to explain what was special about Rohrer’s circumstances that justified a specific discount of three months. It is not surprising that the decision was criticised as failing to clarify the confusion surrounding this issue.<sup>14</sup>

It now appears that the Court of Appeal has effectively overruled *Rohrer* in *HKSAR v Hong Chan-Chi*, handed down on 13 Dec 2001.<sup>15</sup> *Hong Chan-Chi* involved a very serious offence of trafficking 3kg of cocaine from Peru to Hong Kong. The offender, originally from Taiwan, pled guilty and was sentenced to 17 years’ imprisonment after the sentencing judge discounted the sentence by one year on grounds of Hong’s foreignness. In Hong’s appeal for a further sentence reduction, the Court of Appeal held that the sentencing judge erred in giving the one year discount, as the discount was based on a factor that “carried no weight at all.”<sup>16</sup> Citing its earlier decision in *Rojas*, the

<sup>10</sup> *Ibid*, para 19.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*. Emphasis added.

<sup>13</sup> *Ibid*. Emphasis added.

<sup>14</sup> “Reducing confusion”, *South China Morning Post*, 6 Nov 2001, p 17.

<sup>15</sup> *HKSAR v Hong Chan-Chi*, unrep., Criminal Appeal No 187 of 2001 (Court of Appeal, 13 Dec 2001).

<sup>16</sup> *Ibid*, paras 17 and 26.

court found that it was “difficult to see how [the court in *Rohrer*] could have come to the conclusion it reached”, and that “the decision to give a specific discount for the ‘foreigner’ element in *Rohrer* was contrary to well-established practice and, as such, was given *per incuriam*.”<sup>17</sup> The court noted that since the appellant was ineligible under the Transfer of Sentence Persons Ordinance (Cap 513) for transfer to Taiwan to serve his sentence, he was to be treated on exactly the same basis as someone from mainland China. In an obvious effort to try to settle the issue once and for all, the court stated that:

“... it should be made clear to non-residents of Hong Kong, whether from the Mainland (or Taiwan) or from far-flung jurisdictions, that if they come here in order to break the law, they will be treated no differently, and certainly no more leniently, than other criminals who are normally resident here.”<sup>18</sup>

### Consequential Hardships as a General Sentencing Problem

To properly understand the underlying tension in these recent Court of Appeal decisions, it must first be recognised that the issue is not one confined to foreignness or foreigners. Rather, the issue is part of a more general problem of how the law of sentencing should respond to the offender’s personal characteristics or circumstances that bear on the degree of hardship felt from the sentence. It is almost inevitable that a sentence of imprisonment will cause additional hardship to offenders over and above the immediate loss of liberty. If one goes to jail for committing a crime, one stands to lose one’s employment, professional qualifications, and social status in the community. As well, the conditions of imprisonment may be particularly harsh, not only for the foreigner, but also for the pregnant, the aged, the seriously ill, police informants and sexual offenders. These hardships can be described as consequential hardships, as they are consequent upon the sentence.

Consequential hardships, however, should be distinguished from those hardships that are part of the sentence itself. These hardships, which can be described as sentence hardships, are those that come within the contemplation or purpose of the chosen form of sentence. For example, one of the generally accepted purposes of imprisonment is to deprive the offender of liberty by separating him or her from law-abiding members of the community. Thus, hardships that are necessarily incidental to imprisonment, such as not being able to watch one’s favourite cable television programme or to have the companionship of one’s pet, are included within the sentence. It is because society reasonably expects these hardships and discomforts to come within

<sup>17</sup> *Ibid*, paras 15–16.

<sup>18</sup> *Ibid*, para 21.

the sentence that no special regard is given to them. This is different from consequential hardships, which arise precisely because of the unique personal circumstances of the offender and lie outside the contemplated effects of the sentence.

By seeing the foreignness issue as a problem about consequential hardships, it shifts the point of inquiry from “how foreign is this offender” to “how hard will this sentence impact on this offender given his or her foreign background”. Consequently, the approach of many courts, including the court in *Tse Ki Wu* and *Hong Chang-Chi*, to draw a line between those who are “foreign” and those who are not is somewhat misguided. How different an offender is from the ethnic make-up of Hong Kong in general and the Hong Kong prison population in particular will not necessarily reveal how imprisonment will in fact impact on the offender. There must be other evidence to this point.

### Conflict Between Principles of Waiver and Proportionality

The tension between *Rohrer* and the two subsequent cases, *Tse Ki Wu* and *Hong Chang-Chi*, reflects a broader conflict of basic moral principles in sentencing. This conflict can be seen in relation to other forms of consequential hardships as well. The fundamental question giving rise to the conflict is whether the sentence, which would otherwise be appropriate, should be mitigated in view of the consequential hardships that the particular offender will experience as a result of his or her personal circumstances.

Those who have answered this question in the negative have relied on a kind of “waiver” justification. This waiver principle is articulated as follows: “an offender waives any right to complain about any consequential hardships he or she foresees or ought reasonably to have foreseen at the time of the offence.” Echoes of this waiver principle are found in the court’s decision in *Tse Ki Wu*. The principle is framed objectively, as well as subjectively, since most offenders give little thought to consequences, believing that they will “get away” with the crime. Another reason for the objective standard is that it will rarely be easy for a court to determine at the sentencing hearing the genuine foresight of the offender at the time of the offence.

However, there are a number of difficulties with the waiver principle, irrespective of the appeal it may have in the context of sentencing foreign offenders. First, the harshness of the principle, when taken to its logical conclusion, simply does not reflect sentencing reality. Courts do not normally say to the aged,<sup>19</sup> the pregnant,<sup>20</sup> and the sick,<sup>21</sup> “well, you should have

<sup>19</sup> See *R v Chan Tak-sang et al.* [1987] HKLR 1203 at 1207.

<sup>20</sup> See *HKSAR v Wu Fei-wan*, unrep., Mag App No 985 of 1997, (Court of First Instance); *R v Lee Yuk-Ling et al.*, unrep., Mag App No 786 of 1992, (Supreme Court of Hong Kong, Litton JA).

<sup>21</sup> See *R v Chan Kui-sheung* [1996] 3 HKC 279; *R. v Leatherbarrow* (1992) 13 Cr App R(S) 632.

thought about your situation when you committed the offence. Now it is too late." Indeed, Hong Kong courts have recognised that where a police officer stands to lose his or her job and pension upon conviction, "losses and hardships of this kind suffered by an offender over and above the sentence imposed by the court may be taken into account as mitigating factors."<sup>22</sup> It might be said that the harshness is mitigated by the opportunity to show that one did not reasonably foresee the consequences when the offence was committed. But in reality, it will be exceptionally difficult to convince a judge of this lack of objective foresight, especially if one is alleging that the consequence is serious enough to take into mitigation on sentence.

A second and more significant problem with the waiver principle is that it is in conflict with the principle of proportionality, which is recognised by some as a fundamental principle of sentencing.<sup>23</sup> The proportionality principle requires that the punishment be proportional to the seriousness of the offence and moral blameworthiness of the offender. Rather than ignore consequential hardships, this principle requires such hardships to be considered as part of the punishment in ensuring overall proportionality.

The proportionality principle is intimately connected with retributive or desert-based notions of punishment and can be traced as far back, if not farther, to the writings of the 18th century philosopher, Immanuel Kant:

"what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself ... [O]nly the *law of retribution (ius talionis)* – it being understood, of course, that this is applied by a court (not by your private judgment) – can specify definitely the quality and the quantity of punishment ..."<sup>24</sup>

In *Regina v M. (C.A.)*, the Supreme Court of Canada recognised retribution as a legitimate principle of sentencing.<sup>25</sup> The court described the link between retribution and proportionality in these terms:

<sup>22</sup> See *AG v Poon Ping-kwok et al.* [1992] 2 HKCLR 231 at 233, applied in *HKSAR v Leung Chun Choi* [2000] HKEC 618, where the court expressly rejected the view that there should be no credit given because the offender had "brought the matters upon himself".

<sup>23</sup> Section 718.1 of Canada's *Criminal Code*, RSC 1985, Ch C-46 provides under the heading "Fundamental Principle" that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

<sup>24</sup> I. Kant, *The Metaphysics of Morals*, trans M. Gregor (Cambridge: Cambridge University Press, 1991), p 141.

<sup>25</sup> [1996] 1 SCR 500.

“Retribution in a criminal context ... represents an objective, reasoned and measured *determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct.* Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.”<sup>26</sup>

The reason for the conflict between the waiver principle and the proportionality principle lies in the assertion that consequential hardship due to one’s personal circumstances constitutes part of the punishment in addition to the sentence. In other words, proportionality requires that both the formal sentence and the consequential hardships flowing from the application of the sentence be counted together as the overall punishment. The hardships are real enough that the law cannot ignore them.

One possible criticism of this assertion is that the sentence will necessarily vary according to the personal circumstances of offenders. This is true, but can it be justified? One aspect of the proportionality principle aims to reflect the harm arising from the offence onto the offender in the form of punishment. In assessing that harm, courts will normally look to the actual harm done and the impact on the victim in the particular case. So it is sometimes said that “the offender must take the victim as she finds him.”<sup>27</sup> Given this contextualised assessment of offence gravity, it would seem to follow, under the principle of proportionality, that in assessing the impact of punishment on the offender, regard should also be had to his or her particular circumstances. As Kant would say, what underlies proportionality is formal “equality”, so what is done on one side of the balance should also be done on the other.

By including consequential hardship in the definition of punishment, the proportionality principle requires that such hardship be considered when fashioning the appropriate sentence. This, however, is in sharp conflict with the waiver principle, which disregards such hardship. Nevertheless, the general approbation of the proportionality principle signals great doubt with the correctness of the waiver approach.

### Can the Diminished Importance of the Factor be Justified?

It is clear that the principle of proportionality underlies the decision in *Rohrer* and in the other pronouncements from the court recognising that consequential

<sup>26</sup> *Ibid*, para 80. Emphasis added.

<sup>27</sup> See *R v Blaue* [1975] 1 WLR 1411; *R v Creighton* [1993] 3 SCR 3 at para 91–6; *R v Nette* [2001] SCC 78 at para 79.

hardship of foreigners can be properly considered as a sentencing factor. However, there still remains a tension or paradox in the case law, and this is clearly evident in the court's decision in *Hong Chang-Chi*. On the one hand, the court is prepared to recognise the factor as legitimate (ie "a circumstance to be taken into consideration"). Yet on the other hand the court deprives the factor of any substance by categorically holding that it should be given little if any weight in determining sentence.<sup>28</sup> The question then is whether there can be any justification for diminishing the importance of the factor.

### *Serious Offences*

The tension can partially be resolved by considering the application of the proportionality principle in a practical context. The court's prescription to give the factor little if any weight is supported in respect of serious cases involving substantial terms of imprisonment. This is true for two reasons.

First, when dealing with serious offences, the degree of consequential hardship for foreigners (unfamiliar diet, cultural and language isolation, deprived opportunity of visits from family and friends) from an objective perspective can generally only constitute a very minor portion of the deserved punishment. In these cases, it is the harshness of the sentence itself (ie prolonged loss of liberty) that will do most of the work in ensuring that the gravity of the offence and moral blameworthiness are properly reflected on the offender. If undue weight is given to the consequential hardship by a reduction in the sentence, there is a real prospect that the overall punishment will be disproportionate.

Second, a sentencing judge should not ordinarily reduce a term of imprisonment unless the reduction can in fact address or alleviate the consequential hardship in question. In other words, there should be a rational connection between the nature of the consequential hardship and the judge's power to alleviate that hardship. When dealing with serious offences for which the offender stands to serve a considerable term of imprisonment (eg more than three years), the judge has very few sentencing options other than to lengthen or shorten the custodial time. Indeed, if sentencing judges had the power to order transfer of prisoners to serve their sentences in their home country or to mandate by injunction that prison officials address the dietary, cultural and language alienation of the foreign prisoner, then the recent controversy may never have arisen. It is submitted that the most sensible way to understand the outcome in *Hong Chang-Chi*, which involved a very serious trafficking offence, is on the basis of these two reasons.

Given the limited sentencing powers in serious cases, there is a real issue of whether reducing the term of imprisonment can in fact alleviate the types

<sup>28</sup> *Hong Chang-Chi* (n 15 above), para 14.



of hardship complained of by foreign prisoners. For example, reducing Rohrer's term by three months did not at all alleviate the dietary, social, cultural and language alienation he will experience during the remaining portion of his term. Of course, he will not have to endure these hardships for as long as he would otherwise have had to, but the reduction in term still did not address the essence of his complaints. The only power of the sentencing judge that could alleviate Rohrer's hardship is the power to order a non-custodial sentence. But given the seriousness of his offence, such an option was inconceivable as it would have breached the proportionality principle.

In this respect, the hardships of foreign offenders are different from consequential hardships that can in fact be addressed by a reduction in custodial duration. For example, shortening a jail term may allow an older or ill offender to avoid illness or further complications and possibly death while in prison. Also, if the prison system had a rule that discriminated against foreigners by disallowing them access to an early release programme available only to local inmates, then this is a hardship for which compensation can be made in the form of a reduced term of imprisonment.<sup>29</sup>

#### *Less Serious Offences*

While these considerations may justify giving the factor minimal weight for serious offences, the same is not necessarily true in regard to less serious offences, which tend to involve a lesser degree of societal harm. In applying the proportionality principle to less serious offences, the consequential hardship may be sufficiently punitive to merit careful consideration in deciding the formal sentence so as to ensure overall proportionality. For example, if an offender stands to lose his job if he is imprisoned for more than a month, this significant added hardship should be carefully considered by the sentencing judge in deciding whether to impose a custodial term and, if imposed, whether to keep it under one month.

Furthermore, in the realm of less serious crimes, the court has many more sentencing options to tailor the punishment to the particular circumstances of the offender. If there is evidence to find that the offender will experience additional hardship, over and above those normally associated with imprisonment, this factor becomes an important consideration in deciding whether to order some alternative non-custodial form of sentence (eg discharge, fine, community service order, probation, or suspended sentence).

<sup>29</sup> There is some suggestion that a problem similar to this presently occurs in Hong Kong. See "Nobody out there cares about us" (n 1 above).

## Maintaining a Principled Approach to the Issue

Returning to the issue of the Court of Appeal and sentencing discounts for foreigners, it has been argued that any denial of a discount on the grounds of “waiver” is unprincipled and should not be followed. The proportionality principle requires that consequential hardships, if proven, should be taken into consideration in deciding the formal sentence. In its consideration, the court is attempting to ensure that the overall punishment (consequential hardships plus formal sentence) is not disproportionate to the seriousness of the offence and the moral blameworthiness of the offender.

It follows that the Court of Appeal’s admonition to give the factor little or no weight should not be taken as applying categorically to all cases. While the admonition may generally be valid for serious cases, where the consequential hardship pales in comparison to the societal harm involved, it does not hold true for less serious offences, where the question of whether to order custody or not is a real one.

It also follows from the proportionality principle that any absolute rule that Chinese nationals, whether from the mainland or Taiwan, will never suffer consequential hardships due to their cultural and ethnic backgrounds is flawed. Such stereotyping should be avoided. Each case must be decided on the evidence before the court, and there is sufficient cultural diversity in the mainland and Taiwan to ground a plausible argument for recognition in certain cases.<sup>30</sup>

## Conclusion

As mentioned, one of the problems underlying the controversy of sentencing discounts for foreigners is the court’s lack of sentencing options to address or alleviate consequential hardships. This practical constraint raises a more general issue concerning sentencing law reform and the extent to which the law should provide more expansive sentencing powers (especially in serious cases) to enable tailor made sentences that can avoid consequential hardships. For example, a regime of self-imposed house arrest with electronic monitoring, much like the Canadian conditional sentencing regime,<sup>31</sup> is an alternative that allows for greater flexibility and creativity in fashioning just and appropriate sentences. These sentences allow the offender to serve a sentence of imprisonment in the community but under

<sup>30</sup> See generally on ethnic diversity in China, Harrell, Stevan, ed, *Cultural Encounters on China’s Ethnic Frontiers* (Seattle: University of Washington Press, 1995).

<sup>31</sup> On the conditional sentencing regime in Canada, see generally, ss 742, 742.1–742.7 of the *Criminal Code* (n 19 above) and *R v Proulx* [2000] 1 SCR 61.

strict conditions and with immediate incarceration if found in breach of the conditions. Comprehensive reform and rationalisation of Hong Kong's sentencing laws are long overdue.<sup>32</sup>

The position taken in this article will undoubtedly attract criticism because it supports unequal treatment between foreign and local offenders. However, this criticism is misplaced. Under the proportionality principle, equality is achieved by providing all offenders with the same opportunity to have their unique consequential hardships recognised to ensure that the overall punishment is no more than what is deserved.

<sup>32</sup> See "Sentencing system full of contradiction", *South China Morning Post*, 12 Nov 2001, p 14.

