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19 July 2004

Mr Edward Chan, SC  
Chairman  
Hong Kong Bar Association  
LG2, High Court  
38 Queensway  
Hong Kong

Dear Edward,

**Re: PV (SCMP, 25 June 2004, page A2)**

Thank you very much for your letter of 29 June 2004.

I note the concerns raised in the name of the Bar on matters arising out of the legal proceedings concerning PV. As the concerns raised in your letter and those in Dr the Hon Margaret Ng's of 26 June 2004 are similar, I attach a copy of my reply to Dr Ng for your reference.

In this letter, I propose to deal only with points which are not specifically touched upon in my reply to Dr Ng.

The Bar Council is concerned that the PII procedure adopted in this case had departed from the usual PII procedure whereby, if a PII claim is sustained, the related documents and information are withheld from disclosure and would not be used. The Bar Council also considers that the Court has been placed in an invidious position by those acting on behalf of the Director of Immigration.

Having regard to the nature of the confidential information in this case, it was absolutely necessary for the materials to be placed before the judge in deciding whether to grant bail to PV. For obvious reasons, abandonment of the use of such materials would not have been in the public interest and was not an option. Equally important was the need to withhold such confidential information from PV and his representatives. The rationale of withholding such information from PV's lawyers was to avoid

placing them in an impossible position of not being able to communicate fully and freely with their own client. It has long been recognized that in matters involving security and people's lives, the public interest in protecting security and people's lives outweighs the public interest in disclosing confidential materials to the individual concerned.

I agree that the Court had a difficult situation to deal with in this case. The UK case law indicates that the courts have inherent jurisdiction to appoint a special advocate in the interests of justice and in the absence of statutory provisions. Such an arrangement can accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice. That was the suggestion put forward by Mr Dykes, SC, leading counsel representing PV in the present case, and adopted by the learned judge.

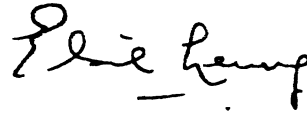
I am asked by the Bar Council to ensure that there be no further adoption of such a course of action in the future. If the Bar Council is referring to the PII procedure whereby confidential materials would only be shown to the judge but not the applicant or his lawyers, I am afraid no such guarantee can and should be made. One cannot rule out the possibility of a future case with similar, or even worse, risks requiring the same protective measures as in the present case. If the Bar Council is referring to the appointment of a special advocate, as can be seen from the foregoing and from my reply to Dr the Hon Margaret Ng, the arrangement is only used in very exceptional circumstances. The role taken by my department is merely a facilitating one. Indeed, we did not ask for such appointment and we merely acted in compliance with the judge's request.

I agree with the Bar Council that the right to choose a lawyer under Article 35 of the Basic Law must be fully protected. In this case, I believe it was. As the House of Lords in *R v H and Others* [2004] 2 WLR 335 at 353E-F observed, it was in my capacity as "an independent, unpartisan guardian of the public interest in the administration of justice" that I approved "the list of counsel judged suitable to act as special advocate" in the present case, in the same way as when, "at the invitation of a court, I appoint an *amicus curiae*." However, I should point out that my department had neither been requested by the judge nor had it undertaken to provide a "security clearance list of special advisers" to the Court as alleged in the press. In compliance with the judge's recommendation that more than one name be provided to PV *if possible*, my department did all it reasonably could within the short time available and managed to put forward to PV several names of senior counsel who had confirmed their availability to attend the adjourned hearing fixed for 2 July. The final choice rested with PV.

You asked me to personally intervene in the selection of counsel in my capacity as "an independent, unpartisan guardian of the public interest in the administration of justice". I confirm that I have been kept fully informed of developments in this case, and have reviewed the process of selection of counsel again. I am fully satisfied that it was undertaken properly and effectively.

I hope the foregoing clarifies our position and thank you for bringing the Bar's concerns to my attention.

Yours *sincerely,*



(Ms Elsie Leung)  
Secretary for Justice

c.c. Director of Public Prosecutions  
Solicitor General  
Law Officer (Civil) (18)  
*Fla*