

For information
on 25 February 2008

LegCo Panel on Administration of Justice and Legal Services

Information Paper on Mr Chung Yik-tin's case

Purpose

This paper is in response to a request by the Chairman of the Administration of Justice and Legal Services Panel (“the Panel”) contained in a letter to the Secretary for Justice dated 20 February 2008. The letter from the Panel Chairman refers to the prosecution of Mr Chung Yik-tin, his remand in custody and the ultimate withdrawal of the charge against him. To facilitate the consideration of the Panel in respect of these matters the Panel Chairman requested a paper from the Secretary for Justice:

- (i) explaining the role of the Department of Justice in respect of the proceedings against Mr Chung;
- (ii) providing a detailed chronology of events relating to him; and
- (iii) indicating whether the Department intends to carry out any review of present procedures relevant to this case.

Background

2. On 31 January 2008 Mr Chung Yik-tin was charged with publishing an obscene article contrary to section 21(1)(a) of the Control of Obscene and Indecent Articles Ordinance (“COIAO”), Chapter 390. The case concerning Mr Chung was heard at the Tuen Mun Magistrates Court on 1 February 2008 when he was first brought before the court. Mr Chung was represented by counsel and instructing solicitors.

3. On 15 February 2008 the prosecution withdrew the charge against him. This decision to withdraw the charge was the result of our review of the prosecution immediately after we became aware of an interim classification as “indecent” by the Obscene Articles Tribunal (“the OAT”) in respect of the photograph that was the subject of the offence with which Mr Chung was charged. Detailed reasons for withdrawing the charge were set out in the prosecution’s statement to the court, a copy of which is at **Annex A**.

4. As the letter from the Panel Chairman indicated, the present request by the Panel is prompted by the public concern as to whether the suspected “obscene” article should have been submitted to the OAT before a prosecution was instituted, whether there were justifiable grounds for the prosecutor to oppose bail and whether the prosecution had been properly conducted.

5. We understand these concerns, and welcome the opportunity to allay them. However, it must be borne in mind that because investigations concerning Mr Chung are currently ongoing we are limited in what we can say about this person.

I. The Role of the Department of Justice

6. The Police investigation into the internet spread of images of Hong Kong celebrities commenced in response to complaints that were received in regard to them. In the course of their investigation the Police discovered that one of these photographs was uploaded from Hong Kong and stored at a website hosted in Thailand and that fact was made known through a local internet newsgroup that is available to the public. The Police identified the place from where this uploading had occurred and in the evening of 30 January 2008, searched it and found Mr Chung present inside. There the Police found a computer which had 12 photographs stored in it, some of which depicted explicit oral sex, and which were identical to those being circulated on the internet. Mr Chung then led the Police to his home where they found another computer which had stored inside it the same 12 photographs.

7. Under caution Mr Chung admitted to the Police that he had downloaded from the internet and stored in his computer the photograph that was the subject of his charge and had uploaded that photograph to a website hosted in Thailand and made that fact known through a local internet newsgroup. He further admitted that between 27 January 2008 and 30 January 2008, he had downloaded from the internet and stored in his computer other photographs of a similar nature that were also purportedly of Hong Kong celebrities.

8. Additionally the Police discovered that Mr Chung had on his person 6 platinum credit cards from 6 different banks all of which bore a name that Mr Chung had formerly used. In respect of the 6 credit cards he admitted also under caution that he had acquired them by making false representations to the issuing banks and had used them to incur a total indebtedness of HK\$570,000. He said he obtained 10 odd platinum credit cards by falsely representing to the banks his employment and regular income. He used the credit cards to obtain cash loans and credit facilities to maintain his living.

9. Having arrested Mr Chung the Police examined the evidence in their possession, in respect of both areas of criminal conduct in which Mr Chung appeared to be implicated. In respect of Mr Chung's fraudulent activities the Police had not yet concluded their investigation. As for his conduct in relation to the photographs of Hong Kong celebrities the Police formed the judgement that the photograph that Mr Chung uploaded from his computer to the internet was obscene; on its face the image did not only reveal a woman naked from the waist down and adopting what could only be said to be a sexually explicit pose, but a male was seen positioned close to her in a suggestive manner. However, before charging Mr Chung with an offence under section 21(1)(a) of the COIAO, the Police needed confirmation that his act of uploading the photograph to the internet amounted to a publication of the photograph. To this end, in the afternoon on 31 January 2008, the Police contacted and discussed with a counsel in the Prosecutions Division who confirmed that such an act could amount to publication of the photograph.

10. Thus the position in which the Police found themselves on the evening of 31 January was that they had in their custody a person whom they had decided to charge with the offence of publication of an obscene article and who had access to other similar photographs that he had not yet uploaded to websites under his control. Furthermore he was, by his own admission, involved in serious fraudulent conduct which had already caused his victim banks to suffer a loss of \$570,000. This person had no employment and no source of income. In these circumstances the Police viewed this suspect as a bail risk.

11. Knowing that an application to the court to remand him in custody would be contested, the Police sought the assistance of the same prosecuting counsel to represent the prosecution on the first appearance of the case at court the following day. Prosecuting counsel was shown a summary of facts and given a briefing by the Police instructing officers. In that briefing the Police instructed the prosecutions counsel that the subject photograph and other photographs found in Mr Chung's possession (which were not enclosed) were obscene and that Mr Chung had admitted the offence of publication of an obscene article. Based on the Police instructions and the summary of the evidence, prosecuting counsel was satisfied there were valid arguable grounds for the prosecution to oppose bail and prepared the submission setting out the basis of the prosecution's objections to Mr Chung being admitted to bail.

12. Prosecuting Counsel attended court in the morning on the following day 1 February 2008, when Mr Chung was to be brought to court. When Mr Chung appeared before the court he was represented by a private barrister and instructing solicitors.

13. Because the Police investigation into both areas of Mr Chung's criminal activity was not yet completed it was necessary to seek a fairly lengthy adjournment to enable the Police to conclude their enquiries. It was estimated that a period of 8 weeks was required for this purpose. Adjournments of this length are quite common in complicated Police cases, especially those involving the investigation of fraudulent conduct that requires the searching of bank records. In the present case, in addition to the need to obtain documentary evidence in relation to the credit card frauds, there was also the need to interview the relevant witnesses. The Prosecutor asked for the adjournment of 8 weeks and stated that on the next appearance, the prosecution would either ask for a plea to be taken or for the case to be transferred to the District Court. It was in these circumstances that the issue of whether Mr Chung should be admitted to bail fell to be decided by the Magistrate.

14. In adjudicating bail applications, a judicial officer is possessed of a broad discretion. Section 9G(2) of the Criminal Procedure Ordinance Chapter 221 sets out the matters that a court can take into account in exercising this discretion and these include the nature and seriousness of the offence (section 9G(2)(a)); the nature and weight of the evidence of the commission of the alleged offence (section 9G(2)(g)) and any other thing that appears to the court to be relevant (section 9G(2)(h)). Amongst the matters that a court may consider is other conduct of the accused in respect of which he is not yet charged but which may lead to him facing further charges. The prospect of further charges is clearly something which might impact upon a defendant's decision on whether to attend court on future adjournments of his case in compliance with his bail conditions.

15. Mention should also be made of section 79(1) of the Magistrates Ordinance, Chapter 227. The effect of this provision is that the period of time that an accused who is denied bail spends on remand in prison will not be more than 8 days, unless the accused and the prosecutor consent to a longer remand. The accused is entitled to have himself brought back before the court every 8 days so that his bail position can be reviewed. His return to court will happen automatically unless the accused, by his own positive act, waives his legal right to prevent this automatic event from occurring.

16. In opposing bail in Mr Chung's case, Prosecuting Counsel submitted that there were reasonable grounds to suspect that Mr Chung had committed not just the offence with which he was charged but also the additional offences of:

- (a) possession of obscene articles for the purpose of publication, namely other photographs found in his possession which he had not yet uploaded to the internet; and
- (b) fraud in relation to his possession and use of the credit cards.

17. It was argued by the prosecutor that the suspected offences were serious, the independent evidence in support of them was cogent and reliable and Mr Chung had admitted the offences under caution. All these matters, he said, constituted substantial grounds for believing Mr Chung would:

- (a) fail to surrender to custody as the court may appoint; or
- (b) commit an offence while on bail.

In respect of this second matter the prosecutor asked the court to note that Mr Chung published the photograph the subject of the charge from a computer at one address and stored other similar photographs in a computer at another address, and that he had no employment or income and was alleged to have practised fraud on at least 6 banks to maintain a living.

18. All these submissions were advanced by the prosecutor in open court and Mr Chung's defence counsel had the opportunity to address and challenge them. Defence counsel made lengthy submissions as to why bail should be granted. The submissions of both sides were carefully considered by the magistrate. It is noteworthy that in the course of the hearing, the magistrate had specifically called for the subject photograph in connection with his assessment of the seriousness of the offence. Defence counsel, after having sight of the subject photograph, did not question its description as obscene. Instead, he argued for bail on the basis that the charge involved the publication of only one "obscene" photograph. At the end the magistrate remanded Mr Chung in custody. In giving reasons for refusing bail, the magistrate said:

"The publication of an obscene article is basically a very serious offence. It does not matter if the person involved is a celebrity or not. As to the level of obscenity of the photograph, I have just seen it. If it is proven that you have published the article via such tools as the internet, then the harm would be extremely great.

Under such circumstances, I think that even there is only one photograph, a sentence of imprisonment will be inevitable upon conviction.”

19. It must always be remembered that neither the prosecutor nor the Police determine whether a defendant is granted bail. This is the role of the judicial officer who brings an independent mind to the question. It was only after hearing submissions from both the prosecution and the defence that the magistrate determined that Mr Chung should not be admitted to bail. The fact that the magistrate eventually refused bail, and that Mr Chung’s legal representatives did not apply to the Court of First Instance for bail upon refusal by the magistrate, puts it beyond doubt that there had been a sufficient basis for the prosecution to oppose bail at the material time.

20. Much of the concern in respect of Mr Chung has arisen because of the length of his remand in custody. As has already been mentioned, lengthy adjournments, especially in fraud cases, are not at all uncommon. But granting an adjournment for 8 weeks and refusing Mr Chung his first application for bail did not mean that he had to remain in custody for this period of time. As earlier mentioned, the law accords to an accused who is remanded in custody, the right to be brought back to court every 8 days to have the question of whether he should be granted bail reviewed. In response to the magistrate’s specific question on this matter, Mr Chung through his counsel expressly waived this right to be brought back every 8 days and it was only as a consequence of this waiver that the order of the court refusing him bail resulted in an effective remand for the entire 8 weeks. It should also be pointed out that the magistrate reminded Mr Chung through his counsel specifically of his right to apply for bail from the Court of First Instance, which was however not exercised by Mr Chung at all before the prosecution withdrew the charge on 15 February 2008.

21. As stated above, the decision to withdraw the charge against Mr Chung was made consequent upon a review of his prosecution (see Paragraph 3 above and **Annex A**).

22. Once a prosecution has been instituted, the prosecutor is under a duty to ensure that its continuation remains in the public interest. If circumstances change or if new material comes to light, the prosecutor may have to review the prosecution. If it becomes apparent that it is no longer in the interests of justice to proceed with the case, it should be stopped.

23. Thus when the Department of Justice learnt that the OAT had classified that the photograph was indecent as distinct from obscene, the prosecution reviewed the case in detail. The Department of Justice consulted the Television and Entertainment Licensing Authority and the Police. Having done that, it was not considered that there was a realistic prospect of the OAT finding that the photograph is obscene and so the prosecution concluded that the interests of justice required that the charge against Mr Chung be withdrawn.

24. The action of the Department in withdrawing the prosecution against Mr Chung was solely in response to a new development arising in the case and is no reflection on the propriety of anything done or said by the prosecuting counsel in the case.

25. It has been suggested in some quarters that the Police and the Department of Justice should invariably obtain an interim classification from the OAT before charge. Such a suggestion flows from an inaccurate understanding of the COIAO and of the regime it creates in order to deal with indecent and obscene articles. First, the COIAO does not require a pre-charge classification. On the contrary, the COIAO makes it clear that in civil or criminal proceedings articles should only be sent to the OAT for classification when the question of whether the article is indecent or obscene will be a live issue in those proceedings (see section 29(2) and 29(3) of the COIAO).

26. In particular, section 29(3) of the COIAO provides:

Where in any civil or criminal proceedings before a court or magistrate a person admits for the purposes of this Ordinance that an article is obscene or indecent or that any matter publicly displayed is indecent the court or magistrate may accept that admission and so find against that person, and subsections (1) and (2) shall not apply.

Thus if a defendant pleads guilty to an offence involving obscene articles he may be convicted on the basis of his admissions and the article the subject of the charge need not be referred to the OAT for a determination of whether it is obscene. In *Yu Fui-tat v HKSAR* (2004) 7 HKCFAR 293 the Court of Final Appeal at paragraph 3 of the judgment of Sir Derek Cons NPJ recognized that the regime laid down by the COIAO did not require pre-trial classification by the OAT. The OAT's classification is only necessary once it becomes known that the question of whether the article the subject of the charge is obscene will be a live issue at trial.

27. The Court of Final Appeal said:

Thus, where a person is charged with an offence which involves this question the ensuing trial, if the person pleads not guilty, will necessarily comprise proceedings in two separate courts. This will not however happen if the person pleads guilty, unless for some reason the court or magistrate declines to accept the admission implicit in the plea.

Until the subject photograph was classified as indecent by OAT upon submission by a third party, there was no reason to question whether the particular photograph was indecent or obscene. With all their experience the Police considered the article as obscene. The magistrate was shown the article and he unhesitatingly regarded it as obscene. The defence counsel was shown the article and he did not dispute that the image was obscene. There was simply no reason to doubt that the image was obscene at the time.

II. Providing a Chronology of Events

28. The above sets out the events relating to Mr Chung's case. A chronology is attached at **Annex B**.

Annex B

III. Whether the Department of Justice will Review its Procedures

29. The Department of Justice is always willing to review its procedures when such a review is necessary. Our view relating to the issue on pre-charge classification has been set out above. The COIAO is being reviewed by the Administration and we will be vigilant to see if any necessary review of the related prosecution procedure is necessary. However, we would like to emphasize this: the fact that in a particular case a prosecution does not proceed to trial or result in a conviction does not necessarily mean that the outcome of that case was due to a flaw in the procedures.

Department of Justice
February 2008

HKSAR v Chung Yik-tin
TMCC 467 of 2008

On 1 February 2008, an information was laid against Mr. Chung Yik-tin before the court.

2. That information contained a charge of :

"Publishing an obscene article, contrary to section 21(1)(a) of the Control of Obscene and Indecent Articles Ordinance, Chapter 390".

3. The particulars of offence charged Mr. Chung with having published an obscene article - a photograph.

4. This court had the opportunity to examine that photograph, and at that preliminary stage was satisfied that it met the requirement of the offence.

5. This court was told that Mr. Chung was suspected to have committed other offences, namely :

(1) 1 offence of possession for the purpose of publication of an obscene article, contrary to section 21(1)(b) of the Control of Obscene and Indecent Articles Ordinance (Chapter 390);

(2) 7 offences of fraud, contrary to section 16A of the Theft Ordinance (Chapter 210).

6. Once a prosecution has been instituted, the prosecutor is under a duty to ensure that its continuation remains in the public interest. If circumstances change or if new material comes to light, the prosecutor may have to review the prosecution. If it becomes apparent that it is no longer in the interests of justice to proceed with the case, it should be stopped.

7. Yesterday the Department of Justice learnt that the Obscene Articles Tribunal had made an interim classification in respect of the photograph that is the subject of the charge and which the court saw on the last appearance. The Tribunal concluded that the photograph was indecent as distinct from obscene. In light of this, the prosecution reviewed the case in detail. The Department of Justice consulted the

Television and Entertainment Licensing Authority and the police. As it is not considered that there is a realistic prospect of the Obscene Articles Tribunal finding that the photograph is obscene, the prosecution considers that it is in the interests of justice for the charge against the defendant to be withdrawn at this point.

8. On the last appearance, information was available to the court in connection with the decision whether or not to grant bail. The court had regard to :-

- (1) the nature and seriousness of the alleged offence and the suspected offences to be laid, including the suspected offences of fraud on seven banks;
- (2) in the event of conviction, the manner in which the accused person was likely to be dealt with; and
- (3) the nature and weight of the evidence of the commission of the alleged offence or suspected offences by the accused person.

9. This court remanded the defendant in custody pending legal advice and further investigations, one of which was the investigation of the suspected fraud offences involving seven banks, and the other was the investigation of the computers to ascertain any possible offences of publishing obscene articles. These investigations are continuing. The police are pursuing these investigations with the utmost expedition, and legal advice will be provided in due course on any possible charges.

10. In these circumstances, the prosecution respectfully applies to withdraw the charge, and invites the court to discharge the defendant unconditionally.

Senior Government Counsel
15 February 2008

Chronology of Events Relating to the Prosecution of Mr Chung Yik-tin

30 January 2008

Police arrested Mr Chung.

31 January 2008

Police contacted and discussed with a counsel in the Prosecutions Division who confirmed that Mr Chung's act of uploading the photograph to the internet amounted to "publication" of the photograph. Knowing that an application to the court to remand him in custody would be contested, the Police requested the counsel's assistance the following day.

Prosecuting counsel was supplied by the Police with a summary of facts and a briefing, containing instructions that the subject photograph and other photographs found in Mr Chung's possession (which were not enclosed) were obscene and that Mr Chung had admitted the offence of publication of an obscene article.

Police charged Mr Chung.

1 February 2008

Mr Chung was brought to the court. He was represented by a private barrister and instructing solicitors.

The prosecutor outlined the application for the remand arguing that the suspected offences were serious (apart from the charge of publication of obscene article Mr Chung was suspected to have committed an offence of possession of obscene articles for the purpose of publication, and fraud in relation to his possession and use of credit cards), the independent evidence in support of them was cogent and reliable and Mr Chung had admitted the offences under caution, constituting substantial grounds for believing Mr Chung would fail to surrender to custody as the court may appoint or commit an offence while on bail.

The defence counsel applied for bail and made lengthy submissions.

The magistrate, defence counsel and prosecutor viewed the photograph which was the subject matter of the charge.

The defence counsel after having sight of the subject photograph did not question its description as obscene and argued for bail on the basis that the charge involved the publication of only one 'obscene' photograph.

The magistrate commented that conviction of publication on the internet of only one such photograph would result in the imposition of a custodial sentence.

The magistrate remanded Mr Chung in custody pending the next hearing. Mr Chung, with the benefit of counsel's advice, waived his right to be brought back to court every 8 days to have his bail position reviewed. The magistrate also reminded defence counsel of Mr Chung's right to apply for bail from the Court of First Instance.

14 February 2008

The Department of Justice became aware of an interim classification by the OAT that the photo the subject of Mr Chung's charge is indecent. The prosecution of Mr Chung was immediately reviewed. After the review which included consultation with TELA and the Police, the Department of Justice decided that the charge against Mr Chung should be withdrawn.

15 February 2008

Mr Chung was brought before the court pursuant to an order of a magistrate. The prosecution applied to withdraw the charge against Mr Chung and Mr Chung's counsel applied for his client's costs of the proceedings. The charge against Mr Chung was withdrawn and he was discharged from custody.