

立法會
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Panel on Administration of Justice and Legal Services

**Minutes of special meeting
held on Wednesday, 15 July 2009, at 1:00 pm
in Conference Room A of the Legislative Council Building**

Members present : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan (Deputy Chairman)
Hon James TO Kun-sun
Hon LAU Kong-wah, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon Paul TSE Wai-chun

Members absent : Hon Miriam LAU Kin-ye, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP

Public Officers attending : Department of Justice

Mr WONG Yan-lung, SC, JP
Secretary for Justice

Mr Ian Grenville Cross, SC, JP
Director of Public Prosecutions

Ms Amelia LUK
Law Officer (International Law)

Attendance by invitation : Hong Kong Bar Association

Mr Russell Coleman, SC
Chairman

Mr P Y LO

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Amy YU
Senior Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

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I. Issues relating to the Department of Justice's decision not to prosecute the bodyguards of the daughter of the President of the Republic of Zimbabwe in relation to an alleged assault of two journalists in Hong Kong
[LC Paper No. CB(2)2152/08-09(01) and FS29/08-09]

Briefing by the Administration

At the invitation of the Chairman, Secretary for Justice (SJ) said that in response to the Panel's request, the Department of Justice (DoJ) had provided for the meeting a paper on issues relating to the decision not to institute a prosecution of the bodyguards (the complainees) of Miss Bona Mugabe, the daughter of the President of the Republic of Zimbabwe, in relation to an alleged assault of two journalists (the complainants) in Hong Kong [LC Paper No. CB(2)2152/08-09(01)], and a supplementary note, tabled at the meeting, on the relevant principles, practices and statistical information concerning the claim for diplomatic and consular immunities in respect of criminal jurisdiction [LC Paper No. CB(2)2243/08-09(01)].

2. In relation to the incident concerning the bodyguards of Miss Mugabe, SJ explained the principles of prosecution and the decision not to prosecute the complainees, details of which were set out in DoJ's paper [LC Paper No. CB(2)2152/08-09(01)]. In particular, SJ drew members' attention to the following -

- (a) the crux of the matter was not whether the complainees had manhandled the complainants, but whether they were genuinely concerned with the safety of Miss Mugabe in the circumstances confronting them and had used reasonable force to protect her from the danger posed. If the evidence showed that the complainees had genuine concern for Miss Mugabe's safety, a potential defence of justification would be open to them. As stipulated in paragraph 8.2 of "The Statement of Prosecution Policy and Practice" (2009), it was established prosecution policy that a prosecutor must consider any defences which were plainly open to or had been indicated by a suspect before making a decision on whether to institute a prosecution. In assessing the case, DoJ fully recognized that some items of evidence, such as the contents of a sound recording of the incident provided by the complainants, might support the allegations of assault; however, having considered all the evidence in

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their full context and the particular circumstances of the case, DoJ came to the view that a prosecution was not justified, as the evidence showed that the complainees were genuinely apprehensive for the safety of Miss Mugabe and had taken reasonable force to minimize the danger posed;

- (b) contrary to what was asserted in some media reports, Miss Mugabe was in fact in the house as the events outside unfolded, waiting to depart. In the event, her trip to the university had to be aborted because of what occurred;
- (c) the degree of force used by the complainees and the seriousness of the injuries sustained by the complainants were also factors taken into account by DoJ in deciding whether to prosecute. One of the complainants, Mr O'Rourke, had not been hurt, while the other, Mr Galloway, had sustained mild bruises on the neck and had indicated at the scene that he did not need medical treatment; and
- (d) there had been suggestion in the press that the case should have been left to the court to decide. However, it should be emphasized that DoJ must not simply push off difficult or sensitive cases for trial, which would tantamount to an abdication of its constitutional responsibility to control criminal prosecutions free from any interference. Such doing would not only strain judicial resources and prejudice the interests of the suspect(s), it would also undermine the integrity of the criminal justice system. It was important that DoJ should act as the gatekeeper to ensure that only legitimate cases would proceed to court.

Discussion

3. Members noted that two respective submissions from the Hong Kong Journalists Association (HKJA) [LC Paper No. CB(2)2244/08-09(01)] and the International Bodyguard Association [LC Paper No. CB(2)2244/08-09(02)] were tabled at the meeting.

4. Referring to the submission from HKJA, the Chairman said that HKJA was concerned that the alleged assault was against journalists who were performing no more than their ordinary journalistic duties. It also expressed grave concern about the silence on the part of the Administration on the impact of the incident on freedom of the press in Hong Kong and requested the Administration to make known to the public its position on the matter.

5. SJ said that the Administration respected the freedom of the press and was unequivocally committed to safeguarding it. He further said that the decision not to prosecute was reached after full consideration of all the evidence and circumstances of the case, including the fact that the complainants were journalists. He reiterated that the crux of the matter was whether the complainees had a genuine concern for the

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safety of Miss Mugabe and considered it necessary to take actions to minimize the danger posed. He stressed that it was an important principle of the rule of law that the prosecution authority should apply the same legal criteria in evaluating the suitability of a case for prosecution, irrespective of the identity of the persons involved.

6. Mr Russell Coleman, Chairman of the Hong Kong Bar Association, considered that the established prosecution policy had been fairly applied in the decision-making process of the case. He pointed out that the evidence available to the prosecuting authority had been assessed internally and external independent assessment had also been sought which matched the internal view of DoJ. He added that he did not see a particular decision on the particular facts of the case as impacting the well-known freedom of the press in Hong Kong.

7. Mr LAU Kong-wah said that while the Hong Kong community respected freedom of the press, it should be appreciated that there were limits to such freedom. The complainants were trying to exercise their freedom to investigate stories, whereas the complainees saw it as their duty to protect the safety of Miss Mugabe. Unfortunately, some manhandling occurred while both sides were trying to perform their respective duties. He further said that regardless of one's political views towards the father of Miss Mugabe, her right to personal safety in Hong Kong should be respected. He noted that while the legal representative of the complainants alleged that Miss Mugabe was nowhere to be seen at the time of the incident, according to the Administration, she was in the house at that time, ready to depart for the university. He asked whether there was any evidence to substantiate the Administration's claim that she was in the house at the time of the incident. Such information was crucial as it could show whether the complainees were justified in taking actions to protect her. SJ responded that the Police, after having conducted a full investigation into the complaint, had confirmed that Miss Mugabe was at the scene at the time the incident occurred. She was about to leave the house to travel to the university. The trip was subsequently cancelled because of what happened.

8. The Deputy Chairman was concerned that DoJ's view that the most important factor against prosecution of the bodyguards was that they were genuinely concerned for Miss Mugabe's safety raised the question as to whether bodyguards, in particular those protecting well-known personalities and the rich, had special privileges, in that they could use force against journalists and ordinary citizens without being prosecuted so long as they pleaded genuine concern for the safety of those they protected, irrespective of whether such concern was reasonable. Mr James TO and Mr Paul TSE echoed similar views. Mr Paul TSE said that a bodyguard's perception of a threat was subjective and it was important to conduct an objective assessment of the reasonableness of such perception. Mr TSE was concerned that the incident would set a bad precedent for similar cases involving bodyguards in future.

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9. SJ responded that there was no question of bodyguards being accorded special consideration in criminal prosecution decisions. He stressed that the decision not to prosecute the complainees was made having regard to the totality of evidence as detailed in the Administration's paper. In assessing the evidence, it should be borne in mind the common law principle that a person was entitled to use such force as was reasonable in the circumstances as he genuinely believed them to be in the defence of another. The reasonableness of the belief was not a prerequisite for it to be a ground of defence. The reasonableness or unreasonableness of the accused's belief would, nevertheless, be one of the factors in considering whether the belief was genuinely held. Director of Public Prosecutions (DPP) supplemented that the principle to which SJ referred was laid down in a judgment of the Privy Council. At the request of the Chairman, DPP undertook to provide the citation of the judgment for members' reference. DPP further said that the same test would apply regardless of the position or status of the suspect. He stressed that while there was some manhandling on the occasion, the force used was only minimal. Indeed, the journalist did not consider it necessary to have a medical check-up, and was persuaded to do so by the police officer. DPP added that the principle laid down by the Privy Council had served the community well over the years and he did not consider that the case had set any bad precedent for the future.

DoJ

10. Referring to the submission from the International Bodyguard Association, the Deputy Chairman said that the bodyguard profession had also expressed concern that DoJ's decision not to prosecute the complainees would undermine the credibility of bodyguards as it would give the public the wrong perception that bodyguards could take actions to harm ordinary citizens whenever they were carrying out security work. The Association also stressed that the actions of the bodyguards concerned were in breach of professional standards.

11. In response to Mr James TO, SJ confirmed that the complainees had given oral statements to the Police. Mr James TO queried whether the force used by the bodyguards was reasonable in the circumstances of the case. To his understanding, Miss Mugabe was inside the house and there was considerable physical distance between her and the complainants when the incident occurred. As such, it appeared to him that the force used by the bodyguards to ensure her safety was hardly proportional to the actual danger posed, if any. He enquired about the actual physical distance between the complainants and Miss Mugabe at the time of the incident and the basis for the Administration's view that the force used by the complainees was reasonable in the circumstances.

12. DPP said that he did not have information on the exact physical distance between the complainants and Miss Mugabe at the time the incident took place, but stressed that the actions of the bodyguards should be viewed in their full context. He elaborated that the position confronting the bodyguards was that the complainants suddenly appeared at the scene just as Miss Mugabe was about to leave the house, with two cars waiting outside ready to take her to the university. The bodyguards refused to accept the letter carried by the complainants and told them to post it, which they declined to do. Although the complainants had identified themselves as

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journalists, the bodyguards were suspicious of the bona fides of the complainants, who had given different explanations for their visit and had refused to produce identification. The complainants initially said that they wanted to deliver the letter but later said that they wanted to talk to people in the house but had made no appointment. They made their way to the doorstep of the house, the door to which was open with Miss Mugabe waiting inside. Under the circumstances, it was not surprising that the bodyguards were apprehensive for the safety of Miss Mugabe and took measures to ensure her safety.

13. The Chairman said that it was not clear from the information available to the Panel what sort of danger Miss Mugabe had been exposed to during the incident. She enquired whether the Administration had any evidence of the complainants trying to get into the house.

14. DPP reiterated that the complainers were naturally concerned for the safety of Miss Mugabe in the circumstances which confronted them and saw it as their duty to protect Miss Mugabe from any sort of danger, whether actual or perceived. He added that although there was certainly some manhandling, the journalists were not being severely hurt. The complainers' prime concern was to move the complainants away from the house where Miss Mugabe was waiting, as borne out by the statements of witnesses at the scene.

15. Mr James TO noted with concern the Administration's view, as stated in paragraph 12 of its paper, that the complainers were justified in taking action to protect her "from any danger" as they were genuinely concerned for her immediate safety, which contrasted with the standard adopted by professional bodyguards, as pointed out in the submission from the International Bodyguard Association, who would take action to protect their principals "if they were under real threat of immediate danger". He further pointed out that the International Bodyguard Association had expressed concern about the far-reaching consequences of DoJ's decision not to prosecute the complainers, which threatened to place bodyguards in an invidious position, if instructed by principals to use excessive force with members of the press and told to justify such actions by claiming genuine fear for safety of the principals. In his view, SJ had made a wrong decision and should be held politically accountable for it.

16. Noting from paragraphs 7 and 8 of the Administration's paper that while it was an established policy not to give detailed reasons for prosecution decisions, DoJ recognized the need in this case to provide more detail on the basis of the prosecution decision, given that part of the evidence had been placed in the public domain and concerns had been generated, Mr LAU Kong-wah expressed concern that DoJ would have to do the same for other cases which aroused public concern in future. He stressed that it was vitally important to uphold the principle laid down in Article 63 of the Basic Law that DoJ should control criminal prosecutions, free from any interference.

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17. SJ stressed that it was an established policy in Hong Kong not to give detailed reasons for prosecution decisions. Once it was decided not to prosecute a suspect, it was important not to release the evidence into the public arena, with a view to protecting the interests and respecting the rights of privacy of those suspected of crime but not charged with any offence. The present case was exceptional in that there had been much publicity and part of the evidence had already been placed in the public domain. The Panel Chairman had also requested DoJ to explain the prosecution decision in view of public concern about the case. In the light of the above considerations, DoJ considered that from the public interest point of view, it was necessary to reveal rather more about the basis of the prosecution decision, but even then there were strict limits. He stressed that the provision on this occasion of more detail as to the basis of the decision ought not to be regarded as a precedent for other such cases in future.

18. Mr Paul TSE agreed that as a matter of principle, DoJ should not give detailed reasons for its prosecution decisions in order to protect the suspect from an unfair trial outside the court. Nonetheless, in cases involving significant public interest, he considered it important for DoJ to explain its prosecution decisions to the public to allay public concern.

19. The Chairman said that SJ was invited to explain the prosecution decision at a Panel meeting as some Panel members had expressed concern about DoJ's decision not to prosecute the complainees. It was for SJ to decide whether he should attend the meeting to explain the matter. She was glad that SJ saw the need to respond to public concern about the incident and accepted the invitation to attend the meeting. She added that it was necessary for DoJ to strike a proper balance between its prerogative to control criminal prosecutions free from any interference and the need to allay public concern over its prosecution decisions to prevent the public losing confidence in the impartiality of criminal prosecutions. The Deputy Chairman concurred with the Chairman's view that it was important for the Administration to explain its reasons for not prosecuting the bodyguards to maintain public confidence on the independence and impartiality of criminal prosecutions.

20. Mr LAU Kong-wah said that he respected members' right to scrutinize the Administration's decisions and raise issues of public concern for discussion. At the same time, he considered it important to respect DoJ's prerogative to decide on prosecution matters pursuant to Article 63 of the Basic Law.

21. The Chairman did not subscribe to the Administration's view that the incident was not serious as the journalist had only sustained minor injuries. She pointed out that the non-violability of freedom of the person was a cornerstone of the rule of law and any application of physical force, however slight, was an assault and an invasion of freedom of the person. She also queried the claim that the situation was so dangerous that the bodyguards had to resort to force. She wondered why the bodyguards had not closed the door in the first instance, which would have sheltered Miss Mugabe from potential danger. It appeared to her that it was easier to close the door than to assault the journalists.

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22. DDP clarified that he made the point that only minimal force had been used by the complainees in response to a member's query on the degree of force that had been used on the occasion. He further said that the door was open at the time the incident occurred as Miss Mugabe was about to depart. The bodyguards had been trying to get the complainants away from the house where Miss Mugabe was waiting with a view to enabling her to depart. The transcript of the sound recording also made it clear that the complainees wanted the Police to be called and insisted that the complainants should remain until the Police arrived. After considering all the evidence, DoJ came to the view that they had acted legitimately in defence of Miss Mugabe.

23. The Chairman said that according to the Administration's paper, the complainees were, respectively, a police officer and an intelligence officer in the employ of the Government of the Republic of Zimbabwe serving as bodyguards of Miss Mugabe. In her view, when making the decision, DoJ should have taken into account whether, in the professional consideration of the complainees, it would have been more appropriate for them to close the door and call the Police, rather than resorting to direct violence.

24. SJ made the following points -

- (a) with the benefit of hindsight, one might say that the bodyguards could have closed the door or taken another course of action. However, regard needed to be had to the difficulty they faced, in that context, in weighing to a nicety each and every action they took to ensure Miss Mugabe's safety;
- (b) the decision DoJ was called upon to make was whether criminal prosecution should be instituted against the complainees for the alleged assault, and not whether the complainees had performed up to the professional standard expected of bodyguards;
- (c) in principle, prosecution could be instituted even if the persons concerned had not sustained any injuries. DoJ raised the point that the complainants had suffered only mild injuries, as the degree and reasonableness of the force used as well as the seriousness of the incident were pertinent factors to be considered in deciding whether to institute prosecution; and
- (d) DoJ considered it necessary in this particular case to reveal more detail as to the basis of its prosecution decision with a view to assuaging public concern about the incident. The decision not to prosecute the bodyguards was made regardless of the identity of the persons involved, but in compliance with the well-established prosecution policy, and with the benefit of independent outside legal advice.

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25. To conclude the discussion, the Chairman said that justice was not a cloistered virtue, and even the prosecution decisions of SJ were subject to public scrutiny.

II. Any other business

26. There being no other business, the meeting ended at 2:05 pm.

Council Business Division 2
Legislative Council Secretariat
18 August 2009