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HONG KONG BAR ASSOCIATION

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29 June 2004

The Hon. Leung Oi-sie, Elsie, GBM, JP
Secretary for Justice,
Department of Justice,
4/F, Queensway Government Offices, High Block,
66 Queensway,
Hong Kong.

Dear Ms. Leung,

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

I refer to the captioned news article of the South China Morning Post, which reported that in legal proceedings commenced by a person named PV, the Court was supplied with documents alleging that PV was a risk to the security of Hong Kong but those documents were not made available to PV's legal representatives; and that your Department is to provide a "security clearance list of special advisers" to the Court so that one such person on the list will be asked to represent PV and given access to the documents, without letting PV know of the contents of the documents.

Having been made aware of this article, I had discussions with members of the Bar Council. After discussion, the Bar Council resolved that this letter should be written to you in the name of the Bar

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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吳銘福

HONG KONG BAR ASSOCIATION

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expressing our concerns on matters of constitutional and human rights importance that has arisen out of the legal proceedings concerning PV.

The Bar Council is seriously concerned about the course of the legal proceedings where the Court was to be supplied with documents making serious allegations against PV and relevant to the determination of whether PV should be allowed bail without the same documents being disclosed to PV's legal representatives and to PV himself. Such a course was not underpinned by any legislative provision and materially deviated from the procedure normally taken in legal proceedings where a claim is made of public interest immunity in respect of certain documents. In the ordinary case, if a claim for public interest immunity is sustained, the related documents and information are withheld from disclosure by all parties and would not be used. The Bar Council considers that the Court has in the case of PV, been placed in the invidious position by lawyers acting on behalf of the Director of Immigration who, while not wanting to disclose sensitive material at the public hearing but, on the other hand, asking the Court to look at and act on such material as material against the affected party and, at the same time, excluding the affected party and his lawyer from such material. Such a position was one that the Bar had urged the HKSAR Government to avoid when it commented on the provisions of the National Security (Legislative Provisions) Bill 2003 with respect to proscription mechanism in April 2003. The Bar Council asks that you would ensure that there be no further adoption of such a course of action in the future.

The Bar Council notes that Article 35 of the Basic Law of the HKSAR which applies to both civil and criminal proceedings, guarantees the right of access to the Courts and includes the right to 'choose a lawyer for the timely protection of their lawful rights and interests or for representation in the courts'. Your Department has undertaken to provide a "security clearance list of special advisers" to the Court in PV's case while at the same time providing legal representation

HONG KONG BAR ASSOCIATION

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to PV's adversary, the Director of Immigration. The Bar Council takes the view that right to choose a lawyer of one's choice under Article 35 must be fully protected. PV must be provided with a list of "special counsel" that allows him to make a realistic choice of able counsel to represent his interests. To this end, the Bar Council asks that you should personally intervene in this matter in your capacity as "an independent, unpartisan guardian of the public interest in the administration of justice" (per Lord Bingham in R v H [2004] 2 WLR 335, 353D-F) to see to it that the exercise is undertaken properly in protection of the fundamental constitutional right of the litigant.

Yours truly,



Edward Chan S.C.
Chairman

特別代訟人的「特別任務」



Document 2

武俠世界中的「盲俠」花滿樓以一敵四，「老頑童」周百通收起雙手也可與高手過招。在現實世界中，亦有人把法庭激辯以比武形容。但律師與武林高手不同之處是我們必須看過對方的「材料」才可出招，而不能像「盲俠」和「老頑童」般靠「感覺」行事。事實上，一個沒有機會參看指控材料，便要為當事人辯護的律師，與「盲俠」的情況確有點相似。幾個月前在一宗高院司法覆核案件中，便差點出現這種「盲俠比武」的現象。

一名斯里蘭卡的泰米爾族國民於四年前抵港後，先後向聯合國難民高級專員公署及特區政府分別申請難民及保護資格，理由是他多次被斯里蘭卡秘密警察拘留及虐待。去年入境處長因他逾期居留，發出遣送離境令，並把他拘留。他向高院申請司法覆核許可，推翻有關命令，並申請保釋外出。由於他的身份敏感，獲法庭頒「身份保密令」，把他改稱為「PV先生」(PV)。

代表律師「雙眼被蒙」

入境處長反對他的保釋申請，因根據『可靠消息』，PV對「香港的和平、秩序和治安」構成威脅。律政司代表拒絕透露有關文件及資料，以防因揭露資料來源的身份，而影響特區與其他地區的情報交流。夏正民法官裁定有關資料及文件受「公眾利益保密權」保護，無須向PV及其律師披露。裁決使他們不能知悉重要資料而為PV案件作出辯護。正如夏正民法官當日在庭上形容，PV的資深大律師戴啓思有如「雙眼被蒙」(blindfolded)，很難就保釋申請陳詞。

為了維護PV的公平審訊權利，夏正民法官參閱英國上議院最近一宗案例(R v. H [2004] 2 WLR 335)後，建議律政司司長委任一名獨立的「特別代訟人」(Special Advocate)代表PV申請保釋。值得注意的是，為避免利益衝突，是項委任由律政司民事法律科屬下另一組沒有參與PV入境案的律師負責。

在PV和律政司司長同意下，最終委派了鄧樂勤資深大律師代表PV申請保釋。法庭並採納了以下的特別程序(參巧PV v. Director of Immigration [2004] 3 HKC 637 at para. 49)：

一、特別代訟人會見當事人及獲取指示；二、特別代訟人和律政司的法律代表出席閉門聆訊，在這階段他有機會參看具反對保釋理由的機密文件，但他不能將內容向當事人或其代表律師透露；三、特別代訟人就保釋申請陳詞，律政司代表回答陳詞；及四、案件返回公開聆訊階段，特別代訟人的職責也完成，而當事人原有的代表律師會就聆訊的其他事項陳詞，包括程序、保釋條件及堂費等問題。

「特別代訟人」制度源自英國，當地的「特別入境上訴委員會」有權驅逐或遣返任何危害公眾或國家安全的外國人。現行英格蘭及北愛爾蘭地區共有五條主體法令規定當事人只可聘用「特別代訟人」，這些案件

多涉及國家安全等敏感資料，例如反恐及取締被禁止組織上訴程序等。《基本法》廿三條立法諮詢文件亦提及採納類似程序，惹來輿論和大律師公會關注。

當法庭裁定一些文件或資料因涉及機密而不能向當事人披露時，「特別代訟人」制度或可對當事人的公平審訊權利作出一定的保障，但這制度同時也帶來不少問題。正如上議院大法官兵咸勳爵 (Lord Bingham) 在R v. H一案判詞中批評，「特別代訟人」與當事人之間有別於一般的「律師客戶關係」。「特別代訟人」既不能向當事人提供全面的法律意見，也不對當事人負責，雙方不存在信任。此外，制度欠缺透明度，公眾(包括傳媒)無法獲悉一宗涉公眾利益案件的內容和程序。最後，因為涉及另委一名律師，增加訟費成本及延誤案件審訊。所以「特別代訟人」程序必須在維護司法公義而又別無其他更好選擇下才應引用。

「真相」不明中勝訴

在近期本港一個刑事法會議中，加拿大最高法院法官班尼 (Ian Binnie) 便提供了另一種選擇。他們曾在一宗與PV案相類似的案例中(Suresh v. Canada <Minister of Citizenship an Immigration>[2002] 1 SCR 3) 下令移民部長向一名被指「危害國家安全」而被遣返的斯里蘭卡難民，提交足夠的文件和資料，好讓他可就指控作出抗辯。該命令要求政府刪去文件中有可能洩漏資料來源或損害國家安全的內容，才把文件資料交給申請人。對於這種中間落墨的處理方法，班尼法官認為法庭已在「國家安全」和「人權」兩大巨人之間作出了適當選擇。

隨著「特別代訟人」成功完成「特別任務」，本文主角PV最終獲釋。其中一項保釋條件限制他祇可在港島區活動，PV苦惱不能搭地鐵過海之餘，可能永不知道箇中原因，因為「真相」只能在案件的「保密裁決」部份才找到。

以上內容純屬個人意見，並不代表香港大律師公會的立場。

(有關大律師公會的資料，可在大律師公會的網址<http://www.hkba.org>找到。)

馬浩輝大律師

香港大律師公會會員

二零零四年十二月十八日

NEWS

IN BRIEF

A-G'S IRAQ ADVICE

The Attorney General Lord Goldsmith QC has reiterated that the government will not be releasing his advice on the legality of the war on Iraq, in spite of demands to produce the Opinion under the Freedom of Information Act 2000. He said he "was not proposing to disclose advice given confidentially within government" and denied claims that he had been "leaned upon" by the Prime Minister to pronounce that the war was legal. Speaking on BBC Radio 4's *Today* programme last week he said: "It was my genuine and independent view that action was lawful under existing United Nations Security Council resolutions." Meanwhile, a Populus poll for *The Times* suggests that British support for the war in Iraq has dropped to a record low. The poll, conducted over the 7/8 January weekend, found that fewer than one in three British people believe the war was justified.

POLYGRAPH RUBBISHED

A new report warns against relying on polygraph tests to detect guilt in criminal cases because the technique is inaccurate. The British Psychological Society (BPS), which published the report, also raised ethical issues relating to the use of such tests involving offenders. Polygraph tests rely on the premise that those answering questions untruthfully experience certain physical changes, such as sweating and changes in blood pressure and breathing, but the report warns that those answering accurately may also show similar changes when undergoing polygraph tests. The BPS says even in the most favourable circumstances, polygraphic lie detection accuracy is not high, and people incorrectly judged by polygraph may be wrongly convicted.

SPRING QCS

Further to the announcement on 24 November 2004 of a new process for the selection and appointment of Queen's Counsel in England and Wales, the Bar Council and the Law Society, with support from the Department for Constitutional Affairs, have continued to work towards the implementation of the process in 2005. It is anticipated that applications for the award of QC will be invited in the spring. The date of announcement of the awards for 2005 will be decided by the independent selection panel

'Secret' court for terrorist suspects faces inquiry

MPs have begun an inquiry into the secretive workings of the Special Immigration Appeals Commission (SIAC), from which two lawyers have resigned.

The Constitutional Affairs Select Committee last week launched an inquiry into SIAC, the court that hears appeals from terrorist suspects facing deportation from the UK on national security grounds, where the case against them is considered too security-sensitive to be disclosed.

The committee's chair, Alan

Beith MP, said: "Depriving a person of their liberty, without charge or trial, is one of the gravest sanctions a state can impose. We will be taking evidence from those who have been involved with SIAC as well as hearing from organisations and individuals with expert knowledge of this area."

Special advocate Rick Scammel last week became the second lawyer to quit SIAC. Leading QC and special advocate Ian Macdonald resigned last month in protest at the government's "odious" terror

laws, following the House of Lords' critical ruling that the government's indefinite detention of alleged terrorists in Belmarsh Prison without trial contravened the European Convention on Human Rights.

The government is expected to announce next week the changes it intends to make to anti-terror laws in response to the Belmarsh case. Home Secretary Charles Clarke is exploring the option of returning suspects to their home countries if he is assured they would not be subject to the death penalty.

Self-defence and the rights of burglars and householders

The law will not be changed to give householders greater legal rights to protect themselves from burglars, Home Secretary Charles Clarke has said.

In a written statement last week, Mr Clarke said the current law that people can use "reasonable force" to protect themselves, was "sound, but needs to be better explained to all concerned, especially for householders". The Crown Prosecution Service and the Association of Chief Police Officers will publish joint guidance to help the public understand their rights and what

constitutes "reasonable force".

According to the CPS, only 11 prosecutions have been brought against people defending their home or commercial premises from burglars, and these included a case where a man laid in wait for a burglar, beat him, tied him up, threw him into a pit and set fire to him, and one where a man repeatedly shot poachers in the back as they fled his land.

Ken Macdonald QC, Director of Public Prosecutions, said: "I recognise public confidence must be improved. This can only be achieved following clarification

of this law."

The Conservatives have called for the law to be changed to allow householders fighting off intruders only to be liable for prosecution for the use of "grossly disproportionate force".



Firms face up to the cost of TAG

Small and medium-sized firms are being urged to take out liability insurance to protect themselves from the cost of legal action. The Solicitors Indemnity Fund (SIF) has announced that it will be providing indemnity for all solicitors and barristers who are members of the fund. This means that firms can now insure themselves against the cost of legal action taken against them by their clients. The SIF is a not-for-profit organisation that was set up in 1997 to provide indemnity for solicitors and barristers who are members of the fund. It is funded by contributions from its members. The SIF has announced that it will be providing indemnity for all solicitors and barristers who are members of the fund. This means that firms can now insure themselves against the cost of legal action taken against them by their clients. The SIF is a not-for-profit organisation that was set up in 1997 to provide indemnity for solicitors and barristers who are members of the fund. It is funded by contributions from its members.

The Solicitors Indemnity Fund, the Law Society's indemnity fund for all solicitors, gave way to the open insurance market in 2000. Many of the firms may also have to pay a fee to the fund. The open insurance market in 2000

公開：

大律師

年終年報，法律語言有如古語，司法程序複雜，老百姓打官司，花費驚人。

國王在登基之初，打算大振旗鼓來整頓，做一個偉大的立法者。他登基後的第一道命令，非常戲劇化。原因是他搜索枯腸，認定只有推陳出新，才能名流青史。因此，他一道命令禁止了當時所有法律，然後在無基礎上訂定新法。

遺憾的是，國王的教育並沒有考慮到他有一天會要更換法例，加入新法律。為此，他參考外國國家的條文，把他認為適用的條文搬過來，但他對外國的社會、政治和經濟認識不深，所以他到國外自修了幾門課，學習歸納方法，他傾力以

法律制訂要符程序公義

草擬法例被撤回重修，但是，時間已經過去了很久，國王內心的期限已經無法達成。為了撫順民情，國王指示凡是不切實際的條款務須廢除，改為切合實際的條款。專家日以繼夜地修改，這件大事終於完成，它的文字明確，前後一貫，所有的規範都是百姓力所能及，容易做到。國王下令把稿子付印。

好事實在多磨，就在法例即將生效時，大家卻發現法例的內容有許多已經不合時宜，這是因為從國王撰寫第一稿之後，太多時間浪費在修訂的工作上，這段時間，國家經濟與制度已出現重大轉變，修訂工作唯有立即開始。一篇報章報道「朝令夕改，不如無令」。國王實在心力交瘁，於是他把王位讓給年輕的宰相。宰相登基後公



香港脈搏

「談判成功」，出來的是一個折衷的「零三三方案」。由明年一月一日起，公務員與資助機構人員分兩年減薪至九七年的薪酬水平，起碼減開了《基本法》的爭拗，不必釋法。

其實在這種經濟時勢下，加上一「優」一「劣」有關減薪的新聞也「優」了數個月，公務員早有減薪的心理準備，只是數字和時間表而已。商界方面雖然有總商會舉前年一個調查出來替政府造勢，但相信總商會也會收貨，反而昨天態度最「惡」的是自由黨主席田北俊，說既然公務員分階段減薪，減薪緩和增加利得稅

民選聯主席官任成亦不甘示弱說，政府應考慮加稅和削減撥款也分階段進行。政府這時才會發現最大的「反對黨」原來已經坐在行政會議之內。聽說昨天田北俊與民選聯副主席葉國謙私下有一段對白，談及如何與政府討價還價，田大少不無得意地對葉氏說：「做生意還是自由黨好！」

站在政府立場，今年的處理方式，無論如何都比去年何松在沒有任何資料和醞釀或諮詢的情況下，「突然」在財政預算案內提出減薪百分之四點七五好，雖然這次有關減薪不能替政府帶來太大的財政收益，依然會有赤字，但起碼減去內閣政治爭拗的風險，接下來的只能在其他部門開支做到節流，此外，千萬保留即使戰爭陰影下，經濟真的會轉好！

掀開缺席審訊的面紗

為實施《基本法》第二十三條而草擬的《國家安全(立法條文)條例草案》刊憲後的一個討論熱點，在於草案經職權終審法院首席法官權力制訂規則，規管原訟法庭在聆訊那

取保安局長取銷本地團體的決定的上訴時的程序。草案這一部份引起爭議的地方，是草擬者設想到法庭在聆訊上訴時或有需要閉門聆訊，甚至要在上訴人及其委任的法律代表缺席的情況下進行聆訊，因而建議在賦權條文中有所規定。

特別辯護人的委派

筆者對有關建議背後比較法律引例作了一點考據，現報告如下：
草案建議的文本，源自英國《一九九七年特別入境上訴委員會法令》，在主要條文上和該法令的第五及第

六條十分相似。英國首席大法官於一九九八年依據該法令的授權，訂立規則，經國會上下兩院各自同意後生效，即《一九九八年特別入境上訴委員會(程序)規則》。這《一九九八年規則》就特別入境上訴委員會的程序有相當仔細的規定，特別是在可預見政府當局會因公取利益的需要反對將它所依賴的全部證據披露給上訴人知道，或委員會有可能會因公取利益需要在上訴人及其委任的法律代表缺席的情況下進行聆訊的時候，規定要將

情況通知律師，由他去委派一名「特別辯護人」，目的是在上訴人未能獲知政府當局的全部證據及在缺席聆訊的時候保障上訴人的權益。這特別辯護人可依規則得知政府當局的全部證據及出席所有聆訊(包括閉門及缺席聆訊)，並有權在閉門聆訊中盤問證人及陳詞，以維護上訴人權益。

利益的平衡點

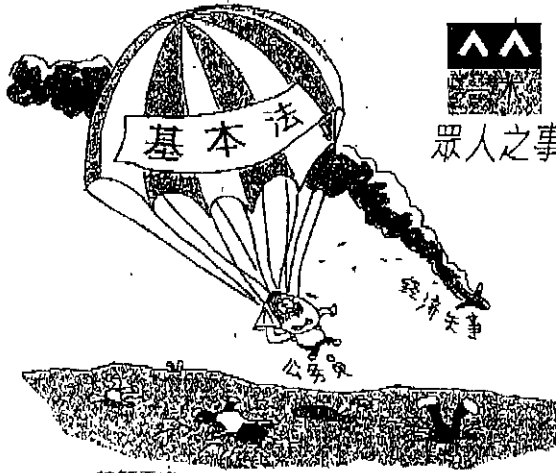
由此可見，《一九九八年規則》是在既要顧及上訴人應得到公平聆訊的權利，也要顧及保護某些公眾利益如情報機關的活動或執法機關的調查不給外泄的前提下制訂，其內容讓委員會有能力因應在其所屬的個案情況，斷定兩項利益的平衡點。公平聆訊的權利不是絕對，是可因某正當理由而受限制，而特別辯護人的制度便是在某程度上有關的限制變得較為相稱合度。

《一九九八年規則》看來運作正常至今未被挑戰。英國更在訂立《二〇〇〇年恐怖主義法令》時，在取締恐怖組織的範圍，也引入一個類似特別入境上訴委員會，包含了特別辯護人的制度

的上新體制。見《二〇〇一年被取締組織上訴委員會(程序)規則》。另外需注意的是，一點是根據《二〇〇〇年恐怖主義法令》，組織一旦被取締後，身為其成員和對它給予財務支援，均要負上刑責。

倘若草案建議獲得通過及頒布生效後，終審法院首席法官制訂的規則，筆者相信會以上述的《一九九八年規則》為藍本，而那時時候斷定平衡點的責任，或許要由聆訊上訴案的原訟法庭法官負責。立法會議員們或者可以在審議草案的時候要求特別辯護政府修訂草案建議，參考英國的法例，要有關的規則，在取得立法會的同意後，方可有

性。然而，在現階段，只有在認知草案建議的配套後，才有理性的討論。就讓這文章作為這討論的起步點吧！
文章內容純屬個人意見，不代表大律師公會或其執業委員會的立場。



特等乘客

評論

中港評論

及秩序