

Panel on Administration of Justice and Legal Services
Information paper for meeting on 28 February 2005

Appointment of Special Advocates

Purpose

This paper informs the Panel on Administration of Justice and Legal Services of the policy and procedure relating to the appointment of Special Advocates as well as the principles and criteria for selecting Special Advocates.

Background

2. In a judicial review heard in June and July 2004 before the Court of First Instance (the *PV* case)¹, the judge ruled that certain documents relied on by the Director of Immigration in opposing an application for bail were protected by public interest immunity and should not therefore be disclosed to the applicant. However, upon the application of the applicant's counsel, citing an English decision of the House of Lords (*R v H and others*)² in support, the judge made a request to the Secretary for Justice for the appointment of a Special Advocate to protect the interests of the applicant who could not be fully informed of all the materials relied on against him and to assist the court. The

¹ *PV and Director of Immigration*, HCAL 45/2004.

² *R v H and Others* [2004] 2 WLR 335, HL.

Secretary for Justice accepted the request, put forward several names of available counsel for selection by PV and subsequently appointed a Special Advocate. After hearing submissions from the Special Advocate, the judge granted bail to the applicant subject to conditions.

Appointment of a Special Advocate

Rationale and functions of Special Advocates

3. There is an overriding requirement to ensure that the trial process, viewed as a whole, must be fair³. However, the right to a fair hearing is not absolute but is subject to exceptions. For example, certain materials may be withheld from disclosure on the grounds that any disclosure would be injurious to the public interest. The appointment of a Special Advocate might in an appropriate case be necessary in the interests of justice to ensure the affected person's interests are safeguarded. As stressed in *R v H and others*, such an appointment will always be exceptional, never automatic and should not be ordered unless and until the trial judge is satisfied that no other course would adequately meet the overriding requirement of fairness to the affected person : it is to be used as a last and never a first resort⁴.

³ Article 14.1 of the ICCPR, Article 6(1) of the European Convention on Human Rights and Article 10 of the HKBOR, Cap. 383.

⁴ Para. 22, *R v H and Others*.

4. In essence, a Special Advocate represents the interests of the affected person in any proceedings in which certain confidential and highly sensitive information which is subject to public interest immunity will not be disclosed to the latter. A Special Advocate can also assist the court by ensuring the contentions of the party (usually Government) claiming public interest immunity are fully considered. There is not the usual client and lawyer relationship between the affected person and the Special Advocate. The latter is not responsible to the former although he is appointed to represent the former's interests⁵.

Procedure for appointment of a Special Advocate

5. In the *PV* case the Court broadly followed the procedures and guidelines set out in the House of Lords decision in *R v H and others*. In particular, the House of Lords endorsed the appointment of a Special Advocate by the Attorney General under the English system⁶. The rationale is that the Attorney General acts as an independent, unpartisan guardian of the public interest in the administration of justice. It is in that capacity that he approves the list of counsel considered suitable to act as Special Advocates. Where a Hong Kong Court in future calls for the appointment of a Special Advocate, it is likely that it will require the appointment to be made by the Secretary for Justice, adopting the procedure as expounded in *R v H and others* and the *PV* cases.

⁵ *ibid.*

⁶ Paras. 45 & 46, *R v H and others*.

Principles and criteria for selection of a Special Advocate

6. At present, the case law does not lay down any specific criteria to be followed in the selection of a Special Advocate. In the *PV* case, Hartmann J. expected the Secretary for Justice to propose a few names for consideration by the affected person. We understand that the Attorney General in the United Kingdom would, in any particular case, choose one name from a list of counsel compiled by his office.

7. On the basis of the foregoing, a Special Advocate will be selected for appointment by the Secretary for Justice from the list of Senior Counsel having regard to such factors as the availability of the Senior Counsel concerned and his relevant experience. Wherever possible, the Secretary for Justice will propose a few names for consideration by the affected person.

The way forward

8. In any appropriate case, we will consider following the guidelines set out by the Judiciary in the *PV* case and any subsequent cases for the appointment of Special Advocates in dealing with confidential and highly sensitive information which is to be withheld from disclosure on the grounds of public interest immunity to ensure justice and fairness to all parties.