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19 July 2004

Dr the Hon Margaret Ng
Room 116
New Henry House
10 Ice House Street
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Dear Dr. Ng,

Appointment of a Special Advocate

Thank you for your letter of 26 June 2004. I apologise for the delay in reverting to you, but it was not appropriate for me to write before the Court had made its decision in the case concerned.

You have raised a number of important questions on the basis of what you have read in the report of 25 June 2004 in the South China Morning Post.

The appointment of a special advocate to represent PV, the Applicant in the present case, was made at the request of the judge on the suggestion of the Applicant's counsel. I will try my best, without compromising the confidentiality of the case concerned, to explain the circumstances leading to the judge's request and to respond to the points you have raised in the same sequence as they appear in your letter:-

(1) In this case, a claim for public interest immunity (PII) was made by the Director of Immigration in respect of certain highly confidential security information relevant to the consideration of PV's bail application. The learned judge ruled that it was in the public interest that the information should not be revealed to PV or 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. On the other hand, it was

necessary to give the judge full access to all confidential materials to enable him to form his view on the validity of the PII claim. This is in line with the established procedure for PII claims. The courts in deciding whether bail should be granted have long experience in refusing disclosure of information which, in the public interest, should not be disclosed.

(2) The procedure adopted by the judge in the present case was suggested by Mr Dykes, SC, leading counsel for PV. It is based on the UK model as explained in the House of Lords decision of *R v H and others* [2004] 2 WLR 335. According to the UK case law, such arrangement should only be used in exceptional circumstances. It is recognized by the courts that although it does not cure all the problems associated with the withholding of information from the individual and his lawyers, the arrangement does accord the individual concerned a *substantial* measure of procedural justice. In *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, the UK Court of Appeal explained in para 13 as follows:

> "the involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. In other words he can look after the interests of the appellant, in so far as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant."

(3) There is no list of "lawyers with security clearance" kept by the Government. I understand from the Government Counsel who was present at the hearing of 24 June that, contrary to what was reported in the press, while the learned judge did recommend that *if possible*, more than one name of counsel be provided to PV for him to choose, His Lordship did not ask for a "list" of "security cleared" lawyers to be produced by my department.

(4) As pointed out above, the arrangement was initiated by PV's counsel, and was requested by the judge. My colleagues did their best to comply with the judge's request within the short time available, and a special advocate of PV's choice was appointed. In the event, with the assistance of the special

advocate, the judge determined the bail application in PV's favour. Any suggestion that Government had tried to introduce the "special advocate" "through the backdoor" is refuted. It is also difficult to see how this ad hoc arrangement, based upon common law principles, can pre-empt LegCo's deliberations in the anticipated Article 23 legislation.

(5) The judge and the parties involved all accepted that the Court has inherent jurisdiction to adopt such a procedure in the interests of justice. The judge also recognized the absence of legislative backup for this procedure and hence specifically sought and secured the consent of PV, through his leading counsel, to the arrangement. In *R v H and others, supra*, the House of Lords observed that "the courts have recognized the potential value of a special advocate even in situations for which no statutory provision is made" (para 21, p.345C).

The UK case law as endorsed by the European Human Rights Court suggests that the appointment of a special advocate can accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice. In the present case, the appointment of a special advocate was requested, in the interest of justice, by the judge at the initiation of the Applicant's own counsel. It was recognized by all concerned that this procedure should only be adopted in exceptional circumstances and only when all other viable options have failed.

I hope the foregoing clarifies the position and thank you for your interest in this matter.

Yours sincerely,

Elsie Leung

(Ms Elsie Leung)
Secretary for Justice

c.c. Mr Edward Chan, SC
Chairman
Hong Kong Bar Association