HCAL 89/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO.89 OF 2004

In re W

Application for a writ of habeas corpus

Before : Hon Hartmann J in Court
Dates of Hearing : 15 and 16 July 2004
Date of Judgment : 16 July 2004
Date of Handing Down Reasons : 9 September 2004

REASONS FOR JUDGMENT

Introduction

1. On 14 July 2004, an application was made to this court in terms of s.22A of the High Court Ordinance, Cap.4 ('the Ordinance'), seeking the issue of a writ of *habeas corpus*. The matter came before Yam J *ex parte*. The person whose freedom was sought pursuant to the application was a woman who, for reasons which will become apparent, I shall call 'W'. It was not, however, W who made the application. The application was made on her behalf by a third party. The identity of that

third party is a matter to which I shall refer later in this judgment. In terms of the application, it was asserted that W was being unlawfully detained by officers of the Independent Commission Against Corruption ('the ICAC').

2. The following day, having adjourned the hearing overnight to allow for further submission on an *inter partes* basis, Yam J ordered the issue of a writ of *habeas corpus* pursuant to s.22A(5) of the Ordinance. In terms of the writ, the Commissioner of the ICAC was required to bring W before the court that same day.

3. It was subsequent to the issue of the writ that the matter came before myself for further determination.

4. On the return of the writ, although W was not herself brought before the court, the Commissioner of the ICAC, as he was obliged in terms of s.22A(7)(b) of the Ordinance, made a formal return to the following effect :

> " I, WONG Raymond Hung-chiu, the Commissioner of the Independent Commission Against Corruption, in obedience to the writ herewith do certify and return that [W] is a participant under the Witness Protection Programme, having signed a Memorandum of Understanding in terms of section 6 of Witness Protection Ordinance, Cap.564, on the 13th day of July 2004.
>
> She was arrested on 9th July 2004 and detained under the custody of the Independent Commission Against Corruption until the 10th day of July 2004 and has not been detained by the Independent Commission Against Corruption since that day and I accordingly make a Nil Return to the writ."

5. Mr Egan, the counsel who advocated the application, did not accept that the return necessarily reflected the true state of affairs. I was therefore obliged in terms of s.22A(9) of the Ordinance to enquire into the circumstances of the matter.

6. Having made enquiries, I discharged the writ. I did so on the basis that I was satisfied that W was a willing participant in a witness protection programme, as the Commissioner of the ICAC had stated in his return, and that accordingly she was not in any form of detention nor in any way restrained against her will.

7. At the time of making my determination and announcing it in open court, I gave brief reasons, stating that I would give fuller reasons in writing at a later stage. Those reasons are now given.

The constraints of the Witness Protection Ordinance

8. Witness protection programmes are established by statute; namely, the Witness Protection Ordinance, Cap.564. S.3 of that Ordinance defines the purpose of the programmes, stating that they are intended to provide 'protection and other assistance for witnesses whose personal safety or well-being may be at risk as a result of being witnesses'.

9. In order to ensure the safety and well-being of participants in witness protection programmes, the Ordinance encompasses the possibility that far-reaching measures may have to be taken, for example, participants may have to be uprooted from their settled surroundings and moved elsewhere, being provided with new homes, new occupations, or even, in

extreme cases, new identities. It speaks for itself, I think, that if the identity of a participant may be legitimately sought and discovered and then revealed to the public, the very purpose of the programme will be in danger of being undermined. Accordingly, the legislature has ensured that the identity of participants is protected by providing heavy penalties for any person who, without lawful authority or reasonable excuse, discloses information as to the identity of participants or in any way compromises their security. In this regard, s.17 of the Ordinance provides for imprisonment of up to ten years.

10. In light of the constraints of the Witness Protection Ordinance, the hearing that took place before me on the return of the writ was held in court but *in camera*. *Habeas corpus* proceedings, which look to safeguard the constitutional right of liberty of the subject, should not, unless the interests of justice otherwise demand, be sheltered from the public eye. In this instance, the proceedings were held *in camera* for a single reason; that is, to ensure that the identity of W was not allowed to pass into the public domain. My oral judgment in terms of which I discharged the writ, while given in open court, was necessarily tailored to the same end; namely, the protection of W's identity.

11. At the time of writing this Reasons for Judgment, although I am not privy to W's present circumstances, I must assume that she remains protected by the provisions of the Witness Protection Ordinance. It would be wrong, therefore, to compromise that protection by giving particulars of persons who are relevant to this judgment but through whom the identity of W may be ascertained. It is for that reason that I describe not only W in a disguised manner but a number of other persons too.

12. However, while ensuring the protection of W, I believe these Reasons for Judgment should not otherwise be so truncated as to deny legitimate public interest.

Identifying the applicant

13. One of the difficulties that I encountered in respect of this matter was that of identifying the person who sought the writ of *habeas corpus*; in short, identifying the applicant. In this regard, the documents placed before the court during the course of the proceedings were, in my view, deficient.

14. An application for the issue of a writ of *habeas corpus* pursuant to s.22A of the Ordinance, while it will no doubt on most occasions be made by the person who alleges that he is in unlawful custody, may be made by a third party on behalf of that person. In this regard, s.22A(2) of the Ordinance reads :

> " (2) An application can be made by the person alleged to be detained, by any other person on that person's behalf, and, in particular, can be made by or on behalf of a person who claims to be legally entitled to the custody of another person."

15. In the present case, the notice of application was worded as follows :

> "In the matter of [W]
>
> and
>
> In the matter of an Application for
> a Writ of Habeas Corpus ad subjiciendum
>
> _____
>
> Application
>
> _____

‘ We hereby apply on behalf of [W] for the issue of a writ of habeas corpus directed to the Head of Operations, Independent Commission Against Corruption, commanding him to have [W] brought before the court in terms of the draft writ filed herewith.

We also file herewith a draft notice (Form 90) and supporting affirmation sworn by [F].’

Massie & Clement
Solicitors for the Applicant”

16. The draft notice in terms of Form 90 of the Rules of the High Court did not itself identify an applicant. The form, however, bore the endorsement at its foot :

“ Massie & Clement
Solicitors for [W]”

17. On the face of the notice of application and the Form 90 notice, therefore, it appears as if the solicitors, Massie & Clement, were making the application on behalf of W, their client, who was held *incommunicado* or had, in some practical sense, been denied access to them. While perhaps that may, in a very broad equitable sense, have been the approach adopted by the solicitors, in a more strict, procedural sense I do not see how that could be the case. On the evidence, it is apparent that W had never directly instructed Massie & Clement nor even that she knew *habeas corpus* proceedings were being instituted on her behalf.

18. The notice of application made reference to the affirmation of a man whom I shall call F, a solicitor’s clerk. In F’s affirmation, although he said he had spoken to W, F did not suggest that W had

instructed him to apply for a writ of *habeas corpus* on her behalf. There is nothing in the affirmation of F to identify him as the applicant.

19. However, F's affirmation had attached to it as an exhibit a handwritten letter written on the night of 13 July 2004 to the Head of Operations of the ICAC. The author of that letter was Mr Egan, counsel who moved the issue of the writ of *habeas corpus*. In his letter Mr Egan, complaining of his inability to gain access to W at the offices of the ICAC or elsewhere with the assistance of ICAC officers, said that he was acting on the instructions of a woman whom I shall call M, apparently a friend and business associate of W. Towards the end of his letter, Mr Egan wrote :

> "Since [M] has heard nothing further from [W] she now instructs me to :—
>
> (1) Make a formal complaint to the HKPF [the police] that the ICAC is holding [W] against her will (false imprisonment); and
>
> (2) To make an application to a High Court Judge for a writ of habeas corpus."

20. Although M did not herself make an affirmation in support of the application for the issue of a writ of *habeas corpus*, she later made an affirmation (dated 16 July 2004) which was placed before me when I was making enquiries pursuant to s.22A(9) of the Ordinance. I shall refer to the contents of that affirmation in greater detail later. At this time, however, it is sufficient to record that M said the following :

> "… on the next day, Tuesday 13th July 2004, I went to my solicitors Massie & Clement to instruct my solicitors to make enquiries about [W] with ICAC on my behalf"

Although fairly general, making no direct mention of an application for the issue of a writ of *habeas corpus*, the statement of M does support the statement made by Mr Egan in his letter of 13 July 2004 to which I have made reference in paragraph 19.

21. I would add that during the course of the hearing before me, when I requested Mr Egan to state the identity of the applicant, he confirmed that it was M.

22. In the circumstances, although the matter has not leant itself to an easy resolution, I have come to the conclusion on the preponderance of the evidence that the applicant must have been M.

23. I have dwelt at some length on the question of who was to be identified as the applicant in these proceedings. I have done so because the question is not one that looks to an arid procedural point of no consequence. To the contrary, it is fundamental, I believe, that a third party who makes such an application, ostensibly on behalf of a detained person, must be able to identify himself.

24. Unless identified, how else can a third party show that he has standing in the matter, that he is not a mere stranger or perhaps vexatious volunteer? The principle, which, I believe, is still applicable, was stated 150 years ago in *Ex parte Child* (1854) 15 CB 237, at 238 per Jervis CJ :

> "A mere stranger has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by habeas to be discharged from restraint."

25. Unless an applicant is identified, how else can that applicant demonstrate, as he must in terms of O.54, r.1(3), that he should be entitled to move the application rather than the detained person himself who is, for whatever stated reason, unable to make an affidavit or affirmation? The Rule reads :

> "(3) Where the person restrained is unable for any reason to make the affidavit required by paragraph (2), the affidavit may be made by some other person on his behalf and that affidavit *must* state that the person restrained is unable to make the affidavit himself and for what reason." [my emphasis]

26. In the present case, when the application came before Yam J, it was supported only by the affirmation of F which, in my view, did not comply with the mandatory requirements of O.54, r.1(3).

27. The need to demonstrate standing in the matter is also, in my opinion, the precursor of establishing responsibility. If the person who moves the application cannot be identified, who is to bear responsibility for the application? Who, for example, if the need arises, is to be held responsible for any abuse of process that the court may determine has occurred or for payment of any costs that may fall due?

The validity of the writ

28. In terms of s.22A(7) of the Ordinance, a writ of *habeas corpus* issued by the court must contain a clear direction of the day and hour when the person to whom the writ is directed must produce the person alleged to be unlawfully detained and must also make a formal return on the writ. S.22A(7), in so far as it is relevant, reads :

> "(7) The person to whom a writ of habeas corpus is directed must, not later than the time and on the date *specified in the writ* —
>
> (*a*) produce before the Court of First Instance the person alleged to be detained; and
>
> (*b*) make a formal return to the writ."
>
> [my emphasis]

29. In the present case, the writ issued by the court did not itself specify the day and hour. In the course of his submissions before me, although he did not press the matter, Mr McCoy, for the Commissioner of the ICAC, argued that this failure rendered the writ, a jurisdictional document, invalid.

30. There was no need in this case for me to determine this issue. However, it is pertinent, I believe, to observe that the reason why the writ did not contain the required details is because it was formulated in terms of O.54, r.10 of the Rules of the High Court, being in the form of Form 89. It appears that the provisions of O.54 do not in all respects comply with s.22A of the Ordinance. I trust that this dichotomy will shortly be a matter of history. In the meantime, however, it is fundamental, I believe, that, in so far as there may be a dichotomy, the provisions of the Ordinance must be met.

A consideration of events

31. On 9 July 2004, officers of the ICAC arrested a number of persons in connection with alleged offences of private sector corruption. One of those arrested, seemingly a principal suspect, was the chairman of

a public company. I shall refer to him as 'the Chairman'. W, who was also arrested that day, was his personal secretary.

32. On the day of his arrest, ICAC records reveal that the Chairman made a telephone call to the woman, M, the applicant in these proceedings. During the hearing before me, it was asserted that M was the Chairman's mistress. To my memory, that assertion was not denied.

33. Two days after his arrest, on the afternoon of 11 July 2004, the Chairman was interviewed under caution. When that interview took place the Chairman was accompanied by F, the solicitor's clerk to whom I have earlier made reference.

34. ICAC records further reveal that on the day he was interviewed under caution; that is, on 11 July 2004, the Chairman telephoned both M and F in order to arrange bail money.

35. As for W, the evidence indicates that, having been arrested, she agreed to assist the ICAC in its investigations. W was formally released from ICAC custody sometime on 10 July 2004. However, in order to ensure her safety, arrangements were put it hand to place her in a witness protection programme. She became a participant in that programme on 13 July 2004 after a memorandum of understanding had been signed pursuant to s.6 of the Witness Protection Ordinance.

36. Accordingly, the uncontested evidence was that during the entirety of the *habeas corpus* proceedings, those proceedings being commenced on 14 July 2004, W was a participant in a witness protection

programme. Of course, the issue raised by the *habeas corpus* proceedings was not simply whether W was a participant in a witness protection programme but whether she was being detained against her will under the guise of the programme.

37. As I have indicated, the evidence before me revealed that both M and F had a close association with the Chairman, a principal suspect in the ICAC's investigations, M being alleged to be the mistress of the Chairman or at least a close female friend, F being alleged to be one of the Chairman's legal team representing his interests as a suspect in the ICAC investigations. In my judgment, in light of these associations — hardly of an inconsequential nature — it is, to say the least, surprising that neither M or F should reveal anything of them in their affirmations.

38. The authorities are plain in their meaning. An affirmation in support of an application for the issue of a writ of *habeas corpus* must fully disclose all material matters whether they stand to the advantage of the application or to its disadvantage. It is no excuse for an affirmant to say that he or she was not aware of the importance of material facts which have been omitted.

39. What then of M's affirmation, the one dated 16 July 2004 that was placed before me? In her affirmation, M said only that she was a friend of W and a shareholder with her in a company. M said that on 11 July 2004 she attempted to telephone W but got no reply. She left a message. She said that within a few minutes W returned her call, explaining in a whisper that ICAC officers were at her home and that she would not be able to join M that evening. The following day, 12 July

2004, M said that she had a further telephone conversation with W. She described the conversation in her affirmation in the following terms :

> "She [W] said she was having great difficulties in calling me because in the night before when they [ICAC officers] saw on the caller display that Mr— [presumably the Chairman] was calling her, they snatched her phone, confiscated her 'sim card' and refused to let her answer that call and then only gave the phone back to her. So she could not have made any call. She further said that she is able to make the call to me because she insisted on the Monday morning to go back to the office … to collect her personal belongings, while she was at the office she managed to get hold of another 'Sim card' without being noticed. She then told me she was calling from a toilet and she did not know where she is now but she is not at home and she was making this call in secrecy. She further said she will try to contact me in secret again that night. Since then I have not heard from her and I have been trying to contact her since."

M continued :

> "I believe [W] is in the custody of the ICAC although I do not know where. I believe she has been held in excess of 48 hours and thus any restraint without her consent is unlawful. I have not been told that she has been charged.

40. According to M, her last telephone conversation with W was at or about 11:00 in the morning on 12 July 2004, the day before W became a participant in a witness protection programme.

41. In his affirmation, the one filed in support of the *ex parte* application for the issue of the writ, F said that he received a telephone call from W in the early hours of the morning of 14 July 2004. If correct, this would have been after W had become a participant in a witness protection programme. F said that W was known to him as she had contacted him a few weeks earlier 'in relation to a non-criminal matter'. F spoke of his telephone conversation in the following terms :

> "She [W] sounded frightened on the phone and her voice was unsteady. She said she was 'being kept by ICAC people'. She said she didn't know where she was but wanted to see me. I told her that she was entitled to see a lawyer and that I could arrange this for her later that morning. I told her to confirm to those holding her that she wanted to see a lawyer. My impression was that she was scared and was uncomfortable with her situation. That she didn't want to be there."

F said that at about 11:00 in the morning that same day; that is, on 14 July 2004, he went to the ICAC offices in the accompany of counsel, Mr Egan. He said that the ICAC officer in charge of the case was told that they had come to see W 'at her request'. However, they were told by a senior officer that W was no longer in the ICAC offices. The officer however did not volunteer to attempt to locate W or to inform her that 'her requested legal representation had arrived'. F concluded his affirmation by saying :

> "As matters stand [W] has asked to see a lawyer. I believe she is in the custody of the ICAC although I do not know where. I believe that she has been held in excess of 48 hours and thus any restraint without her consent is unlawful."

42. In respect of the hearing seeking the issue of a writ of *habeas corpus* before Yam J on 14 July 2004, it was initially, I understand, an *ex parte* hearing. At that hearing, Mr Egan sought an *ex parte* order. The judge, however, directed that the application be adjourned overnight so that it could be heard *inter partes*.

43. At that *inter partes* hearing the next morning, I understand that Mr Ryan, counsel for the ICAC, informed that court that W was not in any form of custody but was a participant in a witness protection programme. I further understand that Mr Ryan protested that forcing W

to come to court may place undue pressure on her, something that the witness protection programme was designed to avoid.

44. Yam J, however, had F's affirmation before him which, on its face, painted a disturbing picture. It was an affirmation which, on its face, appeared to have been made by a party having no interest in acting on behalf of or seeking to advance the interests of any of the suspects in the ICAC investigation. It is little wonder in the circumstances that Yam J directed that a writ be issued in order to bring W to court and to do so within a matter of hours.

45. But, as I have said, in my judgment, neither of the affirmations used in support of these proceedings were made by parties independent of the ICAC investigation. Both affirmants, as I have outlined earlier, were intimately associated with the Chairman, a principal suspect in the ICAC investigations and a man seemingly with his future at stake. It speaks for itself, I believe, that the Chairman would instinctively have been anxious to know the degree to which, if at all, W was cooperating with the ICAC and whether she would continue to do so.

46. I am unable to say what decision Yam J would have reached if the affirmation before him had made the disclosure which I believe F was under a positive duty to make. But, in light of what I understand to have been Mr Ryan's protestations that making W the subject of a writ of *habeas corpus*, far from helping her, may act to place undue and entirely improper pressure upon her, I think it likely that Yam J would have viewed the matter in a different light.

47. When the matter came before me on a return of the writ, I was assisted not only by an affirmation by an ICAC investigating officer setting out relevant background but also by an affirmation of W herself.

48. In her affirmation, W confirmed that she was a voluntary participant in a witness protection programme and that she was not in any way held against her will. In this regard, she said :

> " I have chosen to regulate my movements and contacts in accordance with the advice given to me by those providing me with protection and assistance."

49. W confirmed that she had a mobile telephone and was free to communicate with whom she wished. Although she did not disclose the place where she was staying, she said that she was aware of its location. As to her telephone conversation with F, apparently in the early hours of the morning of 14 July 2004, W said the following :

> " In the time since I have been in participation in the witness protection programme, I have not tried to contact any lawyer or legal adviser prior to the occasion when I spoke to [F]. I telephoned this person only because I received a text message on my mobile phone from M, who is the girlfriend of [the Chairman]. I was the personal secretary to [the Chairman]. The text message I received from M was : '[W] request to call [F] Lawyer at once [number given] M.' which I understood to be a request from M to me to call a lawyer [F] at that number."

50. F in his affirmation had said that he knew W, having been contacted by her just ' a few weeks ago' in relation to a civil law matter. W, however, refuted this, saying that she did not know F and was sure she had not had any prior communication with him.

My determination

51. My determination was made on the basis that, if an applicant is able to discharge the initial burden of demonstrating a *prima facie* case, then the burden of establishing that a detention is lawful or that there is no detention falls on the respondent, the respondent in the present case being the Commissioner of the ICAC. As to the standard of proof, in my judgment, while a civil standard must apply, being variable in degree according to the circumstances, in all instances 'clear and cogent' evidence that a detention is lawful or that there is no detention at all is required : see, for example, *Truong* (1994) 31 ALD 729, at 731, cited in *Habeas Corpus, Australia, New Zealand, the South Pacific* by Clark and McCoy, page 229.

52. In my judgment, it is dubious whether the applicant was able to establish a *prima facie* case. But if I am wrong in that regard and at least a *prima facie* case was demonstrated, I am satisfied that clear and cogent evidence was produced to show that W was not in any form of unlawful detention. That evidence was the affirmed statement of W herself supported by the other affirmations put before me by the Commissioner.

53. It is to be emphasised that W's affirmation was not made at the offices of the ICAC or at some place that was or could be a place of detention. To the contrary, it was evident that W had gone or been taken to the offices of a private firm of solicitors and had affirmed her statement at those offices before a solicitor of this court. In such circumstances, it would have been simple for W, if she was being deprived of her liberty

and was seeking a way of release, to have stated that fact to the solicitor and to have refused to sign.

54. Mr Egan submitted that I should nevertheless, place no faith in W's affirmation. The logical conclusion to draw, he said, was that the affirmation was not the product of W's mind. Mr Egan went so far as to allude to the 'Stockholm syndrome', a psychological condition, as I understand it, in which a kidnapped person bonds with his or her kidnappers. On a rational approach to the evidence before me, it was, in my view, a startling submission and quite untenable.

55. It was clear that in Mr Egan's view the simplest and most direct way of resolving the matter was not by looking to the affirmations but rather by having W brought to court. The purpose of bringing her to court was either to subject her to cross-examination, presumably by Mr Egan himself, or so that W could be the subject of a confidential interview with myself. Leaving aside the multiple objections that may be raised in the present case to either of those courses, they assumed that the ICAC had the power to bring W to court; in short, that she remained in ICAC custody. Indeed, Mr Egan contended that a participant in a witness protection programme was *per se* in a form of custody. I rejected that submission. A reading of the Ordinance makes it plain that a participant enters a programme freely and is free to leave it at any time. The provision of care and protection under a witness protection programme does not constitute any form of detention. That being the case, if W was a voluntary participant in a witness protection programme, ICAC officers had no power to force her to attend court. In any event, being satisfied on the evidence before me of W's true position, I was concerned that

attempting to find some way of compelling W to come to court may place unwanted pressure on her at a time (in all probability) of considerable vulnerability on her part.

56. I discharged the writ because, in my judgment, while I could make no findings of credibility on the affirmations alone, I was nevertheless satisfied that W's affirmation, read in context and supported by the other affirmations filed in opposition, provided sufficient evidence that she was not in any form of unlawful detention nor in any way being held against her will.

57. As for the affirmations of M and F, what has to be borne in mind, in my view, is that W's alleged conversations with M all took place before W joined the witness protection programme. As for W's conversation with F, while that took place after W had entered the programme, F at no time went so far as to say that W complained to him that she was being held against her will and wanted his assistance in obtaining her release. F instead was forced to rely on the subjective impression that W was 'scared and uncomfortable' and an equally subjective conclusion that she 'didn't want to be there'. But having regard to F's failure to make full and frank disclosure, I was not inclined to place too much reliance on his purely subjective impressions.

58. In my judgment, the failure of both M and F to make full and frank disclosure was cause, in the circumstances of this case, for real concern as to their good faith :

(a) The Chairman, as I have said, was a principal suspect in the ICAC's corruption investigations. W had been his personal secretary. If W was to testify for the prosecution it must have been apparent that the Chairman was likely to be in jeopardy as a result of that testimony.

(b) M was the Chairman's mistress F, although not legally qualified, was a member of his legal team. M and F had every motive to seek to advance the Chairman's interests by attempting to gain access to W.

(c) It was therefore critical, if their good faith in the matter was to be demonstrated, that they should lay bare their association with the Chairman. If one had failed to do so, an argument for oversight may have been made perhaps. But when both failed to make disclosure that, in my view, smacked not so much of oversight but of intent.

59. Mr McCoy SC, who appeared as leading counsel for the Commissioner of the ICAC on the return of the writ, submitted that the application bore the hallmarks of a 'contrived artificiality' in which the real concern was not W's unlawful detention but rather to forge a means of gaining access to W. I confess that by the conclusion of the hearing that too was my concern.

60. It must be emphasised that courts will act vigorously to protect the integrity of the processes of which they are guardian. As Hutton LCJ said in *Re Copeland's Application* [1990] NI 301 :

> " The High Court in this jurisdiction is vigilant to protect the rights of all citizens against unlawful detention and the High Court acts with great expedition to hear applications for habeas

> corpus where it is alleged that a citizen is being unlawfully detained. In this case, as we have stated, the applicant was arrested on Friday morning, the single judge sat to hear the ex parte application on Friday evening, and this court sat on Saturday morning. But the High Court must also seek to ensure that its process is not abused by persons … who may seek to disrupt the lawful functions which the police carry out in their investigations …"

Costs

61. I will hear from the parties as to costs.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

Mr Egan, instructed by Messrs Massie & Clement, for the Applicant

Mr McCoy, SC leading Mr Ryan of Department of Justice, for the Respondent