HCAL 2/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 2 OF 2008

BETWEEN

	RV	Applicant
	and	
	DIRECTOR OF IMMIGRATION	1st Respondent
	SECRETARY FOR JUSTICE	2nd Respondent

Before : Hon Hartmann J in Court
Date of Hearing : 22 February 2008
Date of Handing Down Judgment : 10 March 2008

J U D G M E N T

Introduction

1. This application for judicial review raises the fundamentally important question of whether the power of the Secretary for Justice to

institute criminal proceedings is subject to the supervisory jurisdiction of the courts and, if so, in what circumstances.

2. Prior to the Basic Law coming into effect, this court was bound by the judgment of the Hong Kong Court of Appeal in *Keung Siu Wah v. Attorney General* [1990] 2 HKLR 238. That judgment held that a decision of the Secretary for Justice (then the Attorney General) whether or not to bring criminal proceedings was not subject to judicial review. On behalf of the applicant, however, it is asserted that the Basic Law, on a true construction, must now permit this court in an appropriate case to judicially review such a decision.

3. The applicant, a citizen apparently of the Republic of Congo, came to Hong Kong in January 2005, being permitted to remain as a visitor for 14 days.

4. Within a few days of his arrival, the applicant filed a claim with the Hong Kong Sub-Office of the United Nations High Commissioner for Refugees ('the UNHCR') to be recognised as a refugee in accordance with the provisions of the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol ('the Refugee Convention'). In short, the applicant sought the recognition of the UNHCR that he was a person who, if returned to the Republic of Congo, was at real risk of being persecuted on account of his race, religion, nationality, membership of a particular social group or political opinion.

5. The Refugee Convention has never been extended to Hong Kong. The Government has a firm policy of not granting asylum, a

matter to which I shall turn later. However, an *ad hoc* arrangement has been reached with the UNHCR in terms of which, on an independent basis, the UNHCR will determine matters of refugee status. If a person is recognised as a refugee, Hong Kong will grant that person temporary refuge until the UNHCR – not the Hong Kong Government – is able to settle him elsewhere in the world.

6. That being said, the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment ('the Convention Against Torture') has been extended to Hong Kong. Claims made under that Convention oblige the Hong Kong Government itself to conduct a screening exercise.

7. Many refugee claimants make claims also under the Convention Against Torture. The applicant followed this procedure. He lodged his claim some nine months after his arrival in Hong Kong : in early October 2005. His claim was based on the assertion that, if returned to the Republic of Congo, there were substantial grounds for believing that he would be in danger of being subjected to torture.

8. In respect of persons who break Hong Kong's immigration laws in order to enter Hong Kong and seek asylum here, the Secretary of Justice has a reasonably long-standing prosecution policy. I am told that it was in place at all times material to this present application. In terms of that prosecution policy, pending the final determination of their claims, asylum seekers and/or torture claimants – persons in the position of the applicant – are not normally prosecuted for immigration offences related to

their entry into Hong Kong and remaining here contrary to their conditions of stay.

9. In March 2007, that policy was reduced to writing and published in a legal circular. An introduction to the policy reads as follows :

> "Basically, an asylum seeker or torture claimant will not be prosecuted for an immigration offence relating to his claim, e.g., landing and remaining without permission, pending a determination by the relevant authorities. If a charge has been laid, it will be adjourned. If he commits an offence unrelated to his claim, such as theft or using a false instrument, he will be prosecuted for that offence alone."

10. The applicant had entered Hong Kong on a false travel document, a purported passport issued by the Government of Cameroon. It appears that the applicant had left the Republic of Congo by crossing its northern border with Cameroon and had been able to purchase the false passport in that country. He had then used that false passport to leave Cameroon, to transit several other countries, including Kenya, and to enter Hong Kong. After entering Hong Kong, he had disposed of the false passport which later was used – or attempted to be used – by a third party.

11. Although the applicant lodged a claim with the UNHCR within a few days of entering Hong Kong, he gave no notification of this to the Hong Kong immigration authorities. The Immigration Department was only able to deal with him face to face some eight months after he had come to Hong Kong and after he had been referred to the Department by police officers who had apparently stopped him on the street.

12. The applicant was interviewed under caution by an immigration officer and thereafter he was made the subject of criminal charges. These charges were initially laid by the Immigration Department but within a matter of a week or so the conduct of the prosecution fell under the advice and supervision of the Secretary for Justice and remains so to this date.

13. Although the charges have been subject to amendment, they have consisted essentially of one charge of using a false travel document; that is, the fake Cameroon passport, and one charge of making false representations in respect of that passport to an immigration officer in order to enter Hong Kong. A charge alleging that the applicant had breached his conditions of stay by overstaying was withdrawn at a very early stage of the criminal proceedings.

14. When, at the end of September 2005, the applicant was brought before a magistrate at Shatin Magistracy, prosecuting counsel sought an adjournment of the criminal proceedings in accordance with the prosecution policy pending a final determination of the applicant's claim made to the UNHCR to be recognised as a refugee.

15. It is to be noted that at that time the applicant had not yet made his claim under the Convention Against Torture. That was to be made about 10 days later in early October 2005.

16. The application for an adjournment made at the end of September 2005 was to be the first of many applications for adjournment,

applications made – and granted – during the course of 2005, 2006 and 2007.

17. The applicant's claim made to the UNHCR to be recognised as a refugee was refused 'at first instance', if I may use that term, in April 2005. The applicant, however, appealed that decision, the UNHCR having its own internal appeal procedure. The appeal was dismissed two years later, in April 2007, the UNHCR then closing its file on the matter.

18. In respect of the applicant's claim under the Convention Against Torture, although, as early as February 2007, the Hong Kong Government had come to a provisional conclusion that the applicant's claim should be refused, inviting representations as to its concerns, his claim was not finally refused until 18 January 2008 – after I had granted leave to the applicant to make this present application for judicial review.

19. Concerning the applicant's claim under the Convention Against Torture, it must also be noted that in May 2007 the Secretary for Security was informed that the applicant had been granted legal aid to challenge the fairness of the procedure under which Convention claims are determined by the Government. That application for judicial review – in which the applicant is one of several representative applicants – is due to be heard by this court during the course of this year.

20. In August 2007, however, although the applicant's claim under the Convention Against Torture had not been finally determined, the

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magistrate at Shatin ruled that, after such a long delay, there should be no further adjournments of the criminal proceedings.

21. Prosecuting counsel sought an adjournment overnight in order to take instructions. The following day, counsel renewed the application for an adjournment. It is important to note that this was opposed by the applicant's counsel and refused by the magistrate. Prosecuting counsel informed the court that her instructions were therefore to proceed to trial. Hearing dates were set for early January 2008.

22. The applicant's counsel indicated that, when the trial commenced, an application for a permanent stay of proceedings would be made. It appears that the issues to be advocated in the stay application were to be substantially the same issues that have formed the basis of this application for judicial review.

23. The trial, however, did not take place. On an urgent application, on the afternoon before the trial, I granted leave to the applicant to pursue his present application for judicial review. The leave included an order for a temporary stay of the criminal proceedings.

24. Turning to the application for judicial review itself, the lawfulness of four separate decisions is challenged. The decisions presumably are identified as milestone decisions in the criminal prosecution of the applicant. I say that because all four decisions are integral to the institution of the criminal proceedings and therefore to the power of the Secretary for Justice to institute such proceedings and to bring them to trial.

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25. The first three decisions are described as follows :

(i) The decision of the Director of Immigration dated 15 September 2005 to charge the applicant with the offence of Making a False Representation to an Immigration Assistant contrary to section 42(1)(a) of the Immigration Ordinance.

(ii) The decision of the Director of Immigration dated 29 September 2005 to charge the applicant with the offence of Using a False Travel Document contrary to section 42(1)(b) of the Immigration Ordinance.

(iii) The decision of the Director of Immigration to amend the said charges on 25 June 2007.

26. In my view, the second and third decisions are more correctly to be described as decisions made by the Secretary for Justice. I say that because the evidence indicates that, by the time of the applicant's second appearance in court, as I have said earlier, his prosecution had fallen under the advice and supervision of the Secretary.

27. The fourth decision challenged was made on 21 August 2007. It is described as follows :

> The decision of the Department of Justice made on 21 August 2007 to proceed with the prosecution of the charges of Using a False Travel Document contrary to section 42(1)(b) and Making a False Representation to an Immigration Assistant contrary to section 42(1)(a) of the Immigration Ordinance against the applicant.

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28. This last decision is the one made by prosecuting counsel when the magistrate refused any further adjournments. In face of that refusal, prosecuting counsel had two options only, either to withdraw the charges or to proceed to trial.

29. By way of relief, the applicant has sought orders of *certiorari* to bring up and quash each of the four decisions. In addition, or alternatively, he has sought an order, presumably a permanent order, prohibiting any further continuation of the criminal proceedings against him.

30. Although, in the event, nothing has turned on it, it is to be noted that the challenges to all four decisions were out of time, the final decision – the crucial one – having been made some four months before the commencement of judicial review proceedings.

Grounds of challenge

31. The decisions to institute criminal proceedings against the applicant and to persist with them are challenged on a number of grounds. In broad summary, the grounds may be described as follows :

32. First, it is said that the decisions are inconsistent with, and contradict, the Secretary for Justice's own prosecution policy. That policy directs that persons in the position of the applicant will not be prosecuted for the commission of immigration offences necessary to get them into Hong Kong pending a determination of their claims by the relevant authorities.

33. Second, it is said that the decisions undermine the applicant's basic right to seek asylum in Hong Kong, a right enshrined in international law. It is also said that the third and fourth decisions undermine the applicant's right to seek protection from torture under the Convention Against Torture.

34. Third, it is said that the decisions constitute an abuse of process.

35. Whether there is any merit in these grounds is of course irrelevant if this court has no jurisdiction to judicially review the power of the Secretary for Justice exercised in the bringing of criminal prosecutions.

Is a decision to prosecute subject to judicial review?

36. Art.63 of the Basic Law provides for prosecutorial independence. It reads :

> "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference."

37. On behalf of the applicant, it is submitted that the control of criminal prosecutions by the Secretary for Justice, who heads the Department of Justice, is today therefore a constitutional duty. The scope of that duty, and the manner in which it may be lawfully exercised, must therefore be subject to the scrutiny of the courts which themselves have a constitutional duty to interpret the provisions of the Basic Law in so far as those provisions concern matters which fall within the 'autonomy of the Region' : see art.158 of that Law.

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38. However, as I said at the beginning of this judgment, prior to the Basic Law coming into effect, it was clearly the law in Hong Kong that the power of the Secretary for Justice (then the Attorney General) to control criminal prosecutions was not subject to judicial review.

39. In *Keung Siu Wah v. Attorney General (supra)*, in giving the principal judgment of the Court of Appeal, having conducted a review of the authorities, Fuad VP said (page 255) :

> "In my judgment it is a constitutional imperative that the Courts do not attempt to interfere with the Attorney General's discretion to prosecute, but once the charge or indictment comes before a Court for hearing, it can consider whether the prosecution should be allowed to continue if grounds amounting to an abuse of process are raised."

40. In a short, supporting judgment, Penlington JA said (page 256) :

> "… the authorities are overwhelming that the decision of the Attorney General whether or not to prosecute in any particular case is not subject to judicial review."

41. That clear statement of the legal position has not, however, been universally followed in other common law jurisdictions.

42. As to the position in England and Wales, in his speech in *R. v. Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 (at 171), Lord Steyn ruled, without dissent from other members, that, in very restricted circumstances, the decision of the Director of Public Prosecutions is amenable to judicial review. Lord Steyn expressed himself in the following terms :

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> "My Lords, I would rule that, absent dishonesty or mala fides or an exceptional circumstances, the decision of the Director to consent to the prosecution of the applicants is not amendable to judicial review."

43. That judgment, of course, is not binding although it is of persuasive authority.

44. In at least three jurisdictions where the powers of the prosecuting authority are drawn from the terms of a written constitution – Fiji, Mauritius and Trinidad and Tobago – it has been held that such powers, being defined and limited by the terms of the constitution, are, in certain very limited circumstances, amenable to judicial review.

45. A judgment which has been followed by the Privy Council, is that of the Supreme Court of Fiji in *Matalulu and Another v. Director of Public Prosecutions* [2003] 4 LRC 712.

46. The then constitution of Fiji gave power to the Director of Public Prosecutions to control criminal prosecutions and to do so free of the 'direction or control of any other person or authority'. The Supreme Court held that the exercise of such powers was amendable to judicial review. As to why this was so, the court said (at 735) :

> "The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional limits."

47. As to when a decision would be subject to judicial review, the court said (at 735) :

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"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers."

48. The court continued by saying :

"It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. In excess of the DPP's constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by a disciplinary law (see s.96(4)(a)).

2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the discretion or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amendable to review.

3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.

5. Where the DPP has fettered his or her discretion by a rigid policy – eg one that precludes prosecution of a specific class of offences.

49. The court emphasised, however, that grounds for judicial review were limited :

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> "There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.
>
> A mistaken view of the law upon which a proposed prosecution is based will not constitute a ground for judicial review in connection with the institution of a prosecution. The appropriate forum for determining the correctness of the prosecutor's view is the court in which the prosecution is commenced."

50. In *Mohit v. Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343, in respect of very similar constitutional provisions to that of Fiji, the Privy Council chose to adopt the *Matalulu* principles, departing from the line of cases, including *Keung Siu Wah v. Attorney General*, which held that the prosecuting authority was not subject to judicial review. The headnote to *Mohit* reads in part :

> "… that the recognition of the right to challenge the DPP's decision did not involve the courts in substituting their own administrative decision for his; that where grounds for challenging the decision of the DPP were made out, it involved the courts in requiring the decision to be made again in a lawful, proper or rational manner; that the Board should assume that the decision of the DPP to discontinue a private prosecution, in exercise of his powers under section 72(3)(c) of the Constitution, was subject to judicial review unless there was some compelling reason to infer that such an assumption was excluded …"

51. In a later decision of the Privy Council, that of *Sharma v. Brown-Antoine and Others* [2007] 1 WLR 780 (at 788), it was emphasised that, while a prosecutorial decision, was in principle subject to judicial

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review, it was a 'highly exceptional remedy'. The Privy Council noted a uniformity of language by the courts, recording such phrases as 'sparingly exercised', 'very hesitant' and 'very rare indeed'.

52. The Privy Council went on to observe that —

> "The Board is not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute (see *Mohit* [2006] 1 WLR 3343, para 18): in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy."

53. In the present proceedings, of course, the decisions that are challenged are decisions to proceed with and maintain a prosecution, not decisions to decline to prosecute or to discontinue a prosecution.

54. As to why the courts have been so extremely reluctant to disturb decisions to prosecute by way of judicial review, the Privy Council gave five reasons (at 788) :

(i) The great width of the DPP's discretion and the polycentric character of official decision-making in such matters, including policy and public interest considerations, which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.

(ii) The wide range of factors relating to available evidence, the public interest and perhaps other matters which the prosecutor may properly take into account.

(iii) The delay inevitably caused to the criminal trial if a judicial review proceeds .

(iv) The desirability of all challenges taking place in the criminal trial or on appeal. In addition to the safeguards afforded to the defendant in a criminal trial, the court has a well-established power to restrain proceedings which are an abuse of its process, even where such abuse does not compromise the fairness of the trial itself.

(v) The blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts.

55. Whatever the developments in the law in other jurisdictions, it seems to me that I remain bound by the judgment of the Court of Appeal in *Keung Siu Wah v. Attorney General* unless it can be shown that, on a true construction, the Basic Law now provides that the power of the Secretary for Justice to control criminal prosecutions is amenable to judicial review.

56. As to that issue, my attention has been drawn to two recent judgments of the Court of Appeal. Neither, however, determines the issue.

57. In *Kwan Sun Chu, Pearl v. Department of Justice* [2006] 3 HKC 207, Tang JA, as he then was, recognised that developments in other common law jurisdictions, especially England, may, despite *Young v. Bristol Aeroplane Co. Ltd* [1944] KB 718, have left the matter open to review by the Court of Appeal. But he continued :

> "It is however unnecessary for me to express any definite view on the matter because I am of the view that, even if judicial review is available here as in England, this is not a case for leave. The application has no basis and is hopeless."

58. A judgment more directly in point is that of *Re C (A Bankrupt)* [2006] 4 HKC 528. In that judgment, Stock JA held that the power of the Secretary for Justice under art.63 of the Basic Law to control criminal prosecutions 'free from any interference' enshrined the long-held principle that the Secretary must be free to decide on the merits of a prosecution without political pressure.

59. As to whether art.63 includes in its breadth and purpose any reference to judicial scrutiny, Stock JA went on to say (at 591, para.20) :

> "I apprehend that it is to such interference, that is to say, interference of a political kind, to which article 63 is directed. *But the rule that ensures the Secretary's independence in his prosecutorial function necessarily extends to preclude judicial interference, subject only to issues of abuse of the court's process and, possibly, judicial review of decisions taken in bad faith.* [my emphasis]

60. In support of this, Stock JA made reference to *Krieger v. Law Society of Alberta* [2002] 3 SCR 372, (387-388) :

> "The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. … It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. … This side of the Attorney General's independence finds further form in the principle that *courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process*. In *R v Power* [1994] 1 SCR 601, L'Heureux-Dubé J, said, at pp 621-23:

> ‘It is manifest that, as a matter of principle and policy, *courts should not interfere with prosecutorial discretion*. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive….’”

61. Stock JA continued by saying that —

> “What art 63 [of the Basic Law] does, apart from its prime purpose of prohibiting political interference is to reflect the boundary that protects the Secretary from judicial encroachment upon his right to decide whether to institute a prosecution, what charge to prefer, whether to take over a private prosecution, and whether to discontinue proceedings. Those are the prerogatives with which we are concerned:
>
> ‘The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.’
>
> per Viscount Dilhorne in *Gouriet v Union of Post Office Workers* [1978] AC 435, 487.”

62. These observations, it seems to me, emphasise that art.63 of the Basic Law protects the independence of the Secretary for Justice in his control of criminal prosecutions; certainly protects that independence from any form of political interference but also protects it from ‘judicial encroachment’.

63. Stock JA, however, went on to say :

> “This is not to say that the Courts are powerless to prevent an abuse of their process, but the exercise of such a judicial power, even though it may have the effect of bringing proceedings to a

> halt, arises after the institution of proceedings and, as the phrase 'abuse of process' itself illustrates, is a power directed at the preservation of the integrity of the judicial process. It is a necessary corollary to the exercise of judicial authority, itself preserved by the Basic Law."

64. Then importantly – but without deciding the point – Stock JA made the observation that —

> "There is also authority for the proposition that "dishonesty, bad faith or some other exceptional circumstances" might found a basis for challenge in the courts of the exercise in a particular case of a prosecutorial prerogative: see *R v Director of Public Prosecutions ex parte Kebilene*; though in this regard see also *Kwan Pearl Sun Chu v Department of Justice*."

65. I am bound therefore by the judgment of the Court of Appeal in *Re C (A Bankrupt)* to recognise that art.63 of the Basic Law enshrines the independence of the Secretary for Justice to control criminal proceedings as he thinks best and that, in the exercise of that power, the Secretary is free of both political interference and 'judicial encroachment'.

66. But it seems to me that the judgment of the Court of Appeal recognises that today the power of the Secretary for Justice to control criminal prosecutions is a constitutional power. It is a power bestowed by the Basic Law and defined by that Law. As such, it must be exercised within constitutional limits. In that fundamental respect, the source and nature of the power must be different from the source and nature of the power as it was exercised when the Court of Appeal gave its judgment in *Keung Siu Wah v. Attorney General*.

67. If the power must be exercised within constitutional limits, it seems to me that it must be for the courts, in any given case, to determine

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whether the exercise of that power has exceeded the constitutional limits or remained within them. Put another way, the limits of the constitutional power are defined by the constitution itself. Any definition of those limits must therefore require an interpretation of the Basic Law and that is a function of the courts. In this regard, see *Ng Ka Ling and Others v. Director of Immigration* (1999) 2 HKCFAR 4 (at 25) :

> In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. … In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law."

68. In my judgment, it must therefore be the case that, since the Basic Law came into effect, this court has the power to determine whether the Secretary for Justice, in his control of criminal prosecutions, has, or has not, acted within the limits of his constitutional power. The means for that determination is judicial review. To come to this conclusion is not a defiance of binding precedent, it is recognition of a new constitutional order and the duties of our courts in respect of that new order.

69. The more difficult question, in my view, is the determination of what are the constitutional limits, remembering that the Secretary for Justice must be able to control criminal prosecutions free of judicial encroachment.

70. In addition, any interpretation of the Basic Law, which requires a purposive approach, must recognise that continuity is integral to

an understanding of its structure. By way of illustration, art.8 provides that :

> "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

71. Clearly, the Secretary would act outside of his powers if it could be demonstrated that he has done so not on an independent assessment of the merits but in obedience to a political instruction. Art.63 specifically forbids such interference with the exercise of his powers.

72. Equally plain, in my view, is the conclusion that the Secretary would act outside of his powers if he acted in bad faith, for example, if one of his offices instituted a prosecution in return for payment of a bribe.

73. I am also of the view that a rigid fettering of his discretion would fall outside of the Secretary's constitutional powers; for example, a refusal to prosecute a specific class of offences detailed in a statute lawfully brought into law. Such an action would undermine the constitutional functioning of other organs of state : the executive and the legislature.

74. It is not possible, of course, to foresee and classify every circumstance in which this court can hold, without impermissable encroachment, that the Secretary has acted outside of his constitutional powers. There may be exceptional circumstances that arise. But this

proviso is not to be read as somehow acting to reduce the role of the Secretary to that of an ordinary administrator. The prosecutorial independence of the Secretary is a linchpin of the rule of law. That is the way it has been prior to the Basic Law and the way it now remains. The exceptional circumstances of which I speak must be truly exceptional and must demonstrate that the Secretary has acted outside of his very broad powers, powers that, as Viscount Dilhorne said (see para.60 above), he exercises free of direction by his ministerial colleagues and free also of the control and supervision of the courts.

75. In summary, I am satisfied that, under the Basic Law, the Secretary's control of criminal prosecutions is amenable to judicial review but only to the very limited extent that I have described.

76. In so far as it is still necessary to do so, I would emphasise that the remedy of judicial review will only be granted in the rarest of cases. As the Privy Council said in *Sharma v. Brown-Antoine and Others* (para.50 above) it is to be considered a highly exceptional remedy.

Looking to the merits of the applicant's challenge

77. The applicant's principal challenge to the lawfulness of the decisions made to prosecute him and to bring that prosecution to trial is the contention that the Secretary for Justice was acting contrary to his own prosecution policy.

78. I find nothing in the contention. First, it is not even correct that the Secretary was acting contrary to his own policy.

79. As to the terms of that policy (published in March 2007), para.8(1) states that :

> "A person who seeks asylum, torture claim or both will not normally be prosecuted for an immigration offence, e.g., entering Hong Kong illegally, overstaying, until their claims and all appeal procedures have been concluded. If a charge has been laid, the prosecution will apply for an adjournment."

80. The policy does not say that an asylum seeker or a person who makes a claim under the Convention Against Torture must never be prosecuted for an immigration offence related to that person's entry into Hong Kong. The policy goes no further than saying that such a person will not 'normally' be prosecuted. In short, a discretion whether or not to commence prosecution proceedings, or to continue with them, rests with the Secretary for Justice.

81. The policy also makes plain that, if a charge has already been laid, the charge will not be withdrawn. Instead, the prosecution will apply for an adjournment. This is what happened in the present case.

82. Of direct relevance to the present application, para.8(4) of the policy states that —

> "If the magistrate refuses to adjourn, prosecution will be considered on the merits of the case."

83. In the present case, when the magistrate declined any further adjournments, prosecuting counsel applied for an adjournment so that the merits of the case could be considered. Faced with two options,

withdrawal or proceeding to trial, prosecuting counsel decided to proceed to trial.

84. I fail therefore to see how it can be suggested that the prosecution of the applicant was inconsistent with, or contrary to, the Secretary's prosecution policy.

85. But even if it was contrary to that policy, no suggestion of political interference or bad faith can be made. The Secretary for Justice must be able to make exceptions. Indeed, not to be able to do so would constitute a fettering of his discretion. I fail therefore to see how it can be argued that the Secretary acted unconstitutionally in any of the ways that I have earlier set out.

86. On behalf of the applicant it is further argued that 'exceptional circumstances' are present in his case which demonstrate that the Secretary for Justice, in persisting with the prosecution, acted outside of his constitutional powers or, alternatively, that the prosecution has constituted an abuse of process.

87. The argument is based on the fact that, *after* criminal proceedings had been instituted against him, the applicant made a claim to the Hong Kong authorities under the Convention Against Torture. The argument may be explained in the following way.

88. In a recent judgment (*C and Others v. Director of Immigration*, unreported, HCAL 132/2006 and 1, 43, 44, 48 and 82/2007) I said that, while the Refugee Convention had not been extended to Hong

Kong, the Convention Against Torture had been extended, that Convention containing the provision that :

> "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

89. In that judgment, albeit *obiter*, I recognised that in customary international law torture had been accepted as a peremptory norm; that is, a norm which is not subject to derogation. I said (para.127) that :

> "In England certainly, the prohibition against systematic torture has also been accepted as a peremptory norm. See, for example, *Jones v. The Ministry of the Interior, Al-Mamlaka Al-Arabiya* [2005] 2 WLR 808, *per* Mance LJ, para.31 :
>
> > '… It is common ground, as I have indicated, that systematic torture would, if established, constitute a high international crime contrary to *jus cogens*—or peremptory international law. …"

90. Although in the judgment I did not deal specifically with the point, it could be said to follow that it is a peremptory norm of customary international law, incorporated into Hong Kong's domestic law, that a successful torture claimant is not to be returned to a country where he is at risk of being the victim of torture.

91. It is argued on behalf of the applicant that, to avoid the risk of *refoulement* of a genuine torture claimant, Hong Kong has a positive obligation to put in place a rational system under which torture claimants can have their claims fairly and efficiently assessed. Hong Kong has accepted that it has such an obligation.

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92. It is, however, further argued that a rational prosecution policy of claimants is integral to such a policy and that 'the principle of non-penalisation must form the cornerstone of such a policy if it is to be consistent with the obligations assumed by Hong Kong under the Convention Against Torture itself and the relevant norms of customary international law concerning those who claim asylum as victims of torture'.

93. I confess to having difficulties with the assertion that a rational prosecution policy constitutes a legal obligation, more particularly that the principle of non-penalisation must form the cornerstone of such a policy. But even if that assertion is correct, it is not, in my view, a matter which goes to the power of the Secretary for Security under the Basic Law to institute and control criminal proceedings.

94. An authority which is illustrative is *R. v. Uxbridge Magistrates' Court and Another, ex parte Adimi* [2000] 3 WLR 434 (at 446 onwards) in which the Divisional Court looked to the meaning and effect of art.31 of the Refugee Convention in so far as it impacted on the prosecution of persons who came into the United Kingdom on false travel documents and then claimed refugee status or were in transit intending to claim that status in a third country.

95. Art.31(1) of the Refugee Convention provides that :

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to

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the authorities and show good cause for their illegal entry or presence."

96. The United Kingdom was, and remains, a signatory to the Refugee Convention.

97. The applicants claimed that all refugee claimants apprehended with false documents should not be subject to prosecution until their claims had been determined. In response, for the Government, it was said that, if prosecuted, a claimant could raise the entitlement to immunity under art.31 before the criminal courts, doing so, if necessary, as the basis for an application for a stay.

98. At no time was it suggested that the prosecuting authorities had no inherent power to institute prosecutions. The Divisional Court was concerned rather how best, on a true understanding of the obligations arising out of art.31, to achieve a fair balance. Simon-Brown LJ (at 449E) made the observation that :

> "Overall there seem to me strong reasons why the Secretary of State rather than the Crown Prosecution Service should assume responsibility for deciding when asylum seekers should be prosecuted in this class of case. Decisions should depend more upon considerations arising out of the proper administration and control of immigration and asylum than upon the need to suppress and punish criminal activity generally."

99. In the present case, the applicant's challenge arises out of Hong Kong's obligations under the Convention Against Torture. The Convention does not have an article equivalent to art.31 of the Refugee Convention.

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100. Although art.14(1) of the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations, declares – as a proclamation of ethical values, rather than legal norms – that everyone has the right to seek and to enjoy asylum from persecution, Hong Kong has never had a general policy of asylum. In January 1999, in answer to a question asked by a Legislative Councillor concerning requests for political asylum, the Government gave the following written response :

> "Apart from being a port of first asylum for Vietnamese boat people, the Government has never had any policy of granting political asylum to any person, before or after the handover. As from 9 January 1998, the port of first asylum policy for Vietnamese boat people has been abolished.
>
> With regard to requests for permission to remain in Hong Kong on exceptional humanitarian or compassionate grounds, as in the past, the Director of Immigration may, in accordance with the Immigration Ordinance, exercise discretion to authorise a person to remain in Hong Kong.
>
> …
>
> Since we do not have a policy of granting political asylum, no particular procedure has been formulated for the processing of such applications."

101. Hong Kong has taken on the obligation not to *refoul* a person who is at risk of torture and, in determining that issue, has set up a screening process. Nothing has been put before me, however, to suggest that it has, integral to its obligations under the Convention Against Torture and/or under customary international law, undertaken never to prosecute a claimant who has entered Hong Kong illegally, no matter what the circumstances of that illegal entry. As I have said earlier, the Secretary of Justice's prosecution policy speaks of what is normally to be done, not of what must always be done.

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102. In the present case, it appears that the applicant left the Republic of Congo, entered Cameroon and in that country purchased a false travel document. He then used that false document to transit several countries before using it to deceive Hong Kong immigration officers and enter Hong Kong. After his entry, it appears that he passed on his false passport to a third person who then attempted to use it. In a cautioned statement, the applicant described this third person as 'my friend' but did not know his name.

103. In such circumstances, on that basis alone, I do not see how it can be suggested that, in persisting with criminal proceedings after the applicant had made his claim under the Convention Against Torture, the Secretary for Justice was acting in defiance of his constitutional powers. The assertion, in my view, is entirely misconceived.

104. What may constitute an abuse of the process of the court is, of course, a very different issue to the issue of whether the Secretary for Justice, in his control of criminal prosecutions, has acted outside of his constitutional powers.

105. Whether the criminal court will find the prosecution of the applicant to constitute an abuse of the court's process is another matter. Perhaps it will, perhaps it will not. But, in my view, that is not – at this juncture – a matter for this court.

106. As I have said, the applicant has sought to put the abuse of process matter before this court. That is, at best, premature; at worst, again, misconceived.

107. In this regard, I refer to the recent observations of the Court of Appeal in *Yeung Chun Pong & Others v. SJ*, CACV 330/2006 unreported, in which, as an addendum to the judgment, the Court warned against the increasingly unmeritorious use of judicial review as a means of making collateral challenges in criminal proceedings. In this regard, Stock JA said the following :

> "There is a clear public interest in ensuring that charges, once before a court, must be tried. There is built into the system a host of safeguards to secure for an accused a fair, and an appropriately speedy, determination. If those safeguards are not afforded in a particular instance, there is provided by the legislature a prescribed appeal mechanism. That mechanism does not envisage interlocutory appeals or collateral challenges. That is for very good reason, namely, that in practice most trials would constantly be interrupted to the disadvantage of effective decision-making and the disruption of the system as a whole. Sometimes disruption to and delay of a particular trial caused by a judicial review application – or even by repeated applications in the one case – may derail a prosecution properly brought by the effect of that delay upon witnesses or their availability.

108. In respect of allegations of abuse of process – essentially the position in the present application – Stock JA issued a warning that the power to order a stay by this court on a judicial review should only be exercised in the most exceptional circumstances. He said the following :

> "Courts elsewhere have also become increasingly troubled by the frequency of applications to stay proceedings on the grounds of abuse of process, and by assumptions made as to the extent of the discretion. This is not to assert that meritorious applications are never made, nor to discourage counsel from their clear duty when their professional judgment, properly informed of the exceptional circumstances that will warrant a stay, dictates the making of an application. Yet it is obvious at every level of our court system that unmeritorious applications are made far too frequently. The effect is to prolong court proceedings, to cause them to be interrupted by collateral applications upon review,

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and unnecessarily to increase costs and the burden upon the administration of justice."

109. In the present case, it is plain to me, having heard full argument, that this court should not have been asked to determine a stay based on abuse of process before the criminal court itself has even had an opportunity to consider such an application.

110. For the reasons given, therefore, this application for judicial review must be refused.

111. In respect of costs, I understand that the applicant has been legally aided. There will be an order for legal aid taxation.

112. If an order for costs is sought against the applicant by the respondents, I will grant that order.

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

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