Summary of Judicial Decision

Kwok Cheuk Kin ("Kwok") v 律政司刑事檢控專員梁卓然
(Putative Interested Party: Secretary for Justice ("SJ")) HCAL 2882/2018;
Tsang Kin-shing ("Tsang") v SJ
HCAL 687/2019; [2019] HKCFI 2215

Decision	:	**Applications for leave to apply for judicial review dismissed**
Date of Hearing	:	**23 August 2019**
Date of Judgment/Decision	:	**6 September 2019**

Background

1. On 12 December 2018, the Department of Justice ("**DoJ**") issued a press release stating that a decision had been made not to prosecute the former Chief Executive Mr. Leung Chun-ying ("**Mr. Leung**") and the Hon. Mr. Holden Chow Ho-ding ("**Mr. Chow**") (collectively the "**Decisions**") in relation to the "UGL Incident" and the alleged collusion between Mr. Leung and Mr. Chow in respect of the Select Committee formed by the Legislative Council to inquire into the said "UGL Incident". The factual details of the "UGL Incident" and the said alleged collusion are set out in paragraphs 2 to 11 of the judgment.

2. Kwok and Tsang filed these applications for leave to apply for judicial review challenging the Decisions. The intended grounds of challenge include that the Decisions were illegal as the DoJ (i) misinterpreted / misapplied the Briefing Out Policy by failing to seek legal advice from independent outside counsel prior to arriving at those decisions; and (ii) erred in law by failing to evaluate the relevant law and available facts, which allegedly demonstrated reasonable prospects of conviction.

Issues in dispute

3. The main issues in dispute are:

   (1) Whether the Decisions are amenable to judicial review; and

   (2) Whether the two applications for judicial review are reasonably arguable.

Department of Justice's Summary of the Court's rulings

(full text of the CFI's judgment at ***https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=124160&QS=%2B&TP=JU***)

4. The CFI dismissed the two applications for leave to apply for judicial review since the Applicants failed to show any ground that SJ has acted outside the constitutional limits of her power to control criminal prosecution under Article 63 of the Basic Law **("BL 63")**. The two applications were found to be not reasonably arguable, and have no realistic prospect of success. (paragraphs 1

and 42)

5. The CFI found that on the face of BL 63, it vests in SJ a very wide discretion to decide whether to prosecute any person, which discretion is to be exercised free from any interference. (paragraph 24)

6. The CFI visited a number of authorities prior to and post 1 July 1997 on whether a decision of the Attorney General or SJ to prosecute or not to prosecute a person suspected of having committed a criminal offence is amenable to judicial review. In particular, the CFI referred to the decision of Hartmann J (as he then was) in *RV v Director of Immigration* [2008] 4 HKLRD 529. In summary, Hartmann J mentioned three particular types of cases where SJ would be regarded as having acted outside the constitutional limits when making a prosecutorial decision, namely, (i) acting in obedience to political instruction, (ii) bad faith, and (iii) rigid fettering of prosecutorial discretion, while making it clear that the above are not exhaustive of the circumstances in which judicial interference would be justified. The prosecutorial independence of SJ should not be put on the same footing as an ordinary exercise of discretion by an administrator, and thus her decision to prosecute (or not to prosecute) could not be reviewed by the court based on ordinary judicial review grounds. (paragraph 31)

7. The CFI considered that *Re Leung Lai Fun* [2018] 1 HKLRD 523 represents the latest judicial guidance from the Court of Appeal **("CA")** on the issue. It is the CFI's duty to follow the CA's judgment in *Re Leung Lai Fun* (which endorsed the analysis of Hartmann J in *RV*) to hold that it is only where a prosecutorial decision of SJ can properly be said to be "unconstitutional" that the court may interfere with the decision. To reach the high threshold of unconstitutionality, it is not sufficient to establish mere conventional grounds of judicial review. It is, however, open to the Court of Final Appeal, and possibly the CA as well, to develop the law in this jurisdiction along the lines of the overseas authorities which would enable the court to exercise a greater control over prosecutorial decisions made by SJ. (paragraphs 36 and 39)

8. In the present case, the CFI found that the intended grounds of judicial review are ordinary judicial review grounds which, even if established, are not sufficient to show that the Decisions are beyond the constitutional limits of SJ's power to control criminal prosecutions under BL 63. (paragraph 40)

9. In light of the above, the CFI found it unnecessary to deal with other arguments raised by the parties such as standing, delay/extension of time and existence of an alternative remedy (i.e. private prosecution). The CFI also observed that it would be particularly inappropriate for it to consider the ground of "error of law" in this case, because that would inevitably require an examination of whether there is sufficient evidence for the prosecution of Mr. Leung and Mr. Chow. Whether a person is guilty of having committed a criminal offence

should only be determined by a judge or a jury in a trial after having considered all admissible evidence. It would not be fair to either Mr. Leung or Mr. Chow for the CFI to express any view on the sufficiency of the evidence to prosecute. (paragraph 41)

10. The CFI made no order as to costs, taking the view that there are no special or unusual circumstances in the present case to depart from the general rule that an unsuccessful applicant in an application for leave for judicial review will not be ordered to pay costs. (paragraph 44)

Civil Division
Department of Justice
6 September 2019