

HCAL 2270/2020  
[2021] HKCFI 1208

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST  
NO 2270 OF 2020**

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BETWEEN

HUI CHI FUNG

Applicant

and

SECRETARY FOR JUSTICE

Putative  
Respondent

KWAN KAR WING

1<sup>st</sup> Putative  
Interested Party

CHENG KWOK CHUEN

2<sup>nd</sup> Putative  
Interested Party

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Before: Hon Alex Lee J in Court

Date of Hearing: 12 March 2021

Date of Judgment: 7 May 2021

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J U D G M E N T

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Introduction

1. This is about the application of the Applicant (“**Hui**”) for leave to apply for judicial review against two decisions (“**Decisions**”) of the

Putative Respondent (“**SJ**”), both of which are said to have been made on 24 August 2021<sup>1</sup>. Hui has filed an affirmation<sup>2</sup> in support of his application.

2. Very briefly stated, the Decisions were about SJ’s withdrawal of two sets of criminal proceedings taken out by Hui in the Magistrates’ Court as private summons, one against the 1<sup>st</sup> Putative Interested Party (“**IP- 1**”)<sup>3</sup> and the other against the 2<sup>nd</sup> Putative Interested Party (“**IP-2**”)<sup>4</sup>, after she had taken over the conduct of those two sets of proceedings. Generally speaking, the two private prosecutions pertained to two separate incidents which occurred during the social unrest in late 2019. For the present purpose, it suffices to say, without expressing any views as to who was right and who was wrong, that the first incident concerns the shooting of a masked male on 11 November 2019 by IP-1 who was a traffic police officer on duty. The second incident was about the mode of driving of IP-2, a taxi driver, on 6 October 2019 in an area occupied by a group of protestors. It is noted that Hui was not physically involved in either of the two incidents.

3. Hui alleges that the Decisions are illegal, *Wednesbury* unreasonable and also unconstitutional. The remedies being sought include a certiorari to bring up and quash the Decisions, a mandamus to direct SJ to reconsider the Decisions and costs.

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<sup>1</sup> See Form 86, dated 17.11.2020.

<sup>2</sup> Also dated 17.11.2020.

<sup>3</sup> The charges were: (1) “shooting with intent”, contrary to s17(b), Offences Against the Person Ordinance, Cap 212 (ESS 13467/2000); (2) “discharging ammunition with reckless disregard for the safety of others”, contrary to s22(1), Firearms and Ammunition Ordinance, Cap 238 (ESS 13468/2000); and (3) “dealing with arms in a manner likely to injure or to endanger the safety of other persons”, contrary to s22(1), Firearms and Ammunition Ordinance (ESS13469/2000). These 3 summonses are collectively referred to as “**the Shooting Summonses**”.

<sup>4</sup> The charge was “dangerous driving”, contrary to s37(1), Road Traffic Ordinance, Cap 374 (ESS 12887/2000). This summons is referred to as “**the Driving Summons**”.

Preliminary issue

4. Since the proposed judicial review basically involves questions of law rather than facts, with a view to save time and costs, initially the court had directed a “roll-up hearing” of the leave application and the judicial review proper<sup>5</sup>. However, after the hearing date for the “roll-up hearing” was fixed, the court became aware that Hui, who is one of the defendants in an unrelated District Court case, has breached his bail terms and absconded from the jurisdiction. Besides, he had also failed to appear at the hearing of his magistracy appeal against conviction on 26 January 2021 which resulted in that appeal being dismissed<sup>6</sup>.

5. In view of the aforesaid development, the Court gave the following direction on 27 January 2021 and requested the assistance of the parties on the following preliminary issue:

“It has come to the Court's attention that a warrant of arrest has been issued against the applicant. Moreover, there is information to suggest that Hui might have provided misleading information to the court when he applied for permission to leave Hong Kong and then failed to return as promised.

Therefore, the Court would like to have assistance from the parties on the following preliminary issue: namely, whether, in the present circumstances the Court should hear the applicant's proposed JR at all.”

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5 *Kwok Cheuk Kin v 律政司刑事檢控專員梁卓然 & Secretary for Justice*, HCAL 2882/2018 & HCAL 687/2019, [2019] HKCFI 900

6 HCMA 306/2019

Chronology

6. I gratefully adapt the chronology prepared by Mr Ross, counsel for Hui, which I also supplement with the information contained in the affirmation<sup>7</sup> filed on behalf of SJ which is uncontroversial:

(1) On 22 January 2020, Hui laid an information against IP-1 by way of a letter to the Eastern Magistrates' Courts. On 9 June 2020, the Shooting Summonses<sup>8</sup> were issued by a magistrate.

(2) On 24 February 2020, Hui laid another information and this time against IP-2. On 10 June 2020, the Driving Summons<sup>9</sup> was issued by a magistrate.

(3) In June and July 2020, there was an exchange of correspondence between the Department of Justice (“DOJ”) and Hui regarding the Shooting Summonses and the Driving Summons. Hui provided materials in his possession and made representations to DOJ as requested<sup>10</sup>.

(4) On 18 August 2020<sup>11</sup> and 20 August 2020<sup>12</sup> respectively, however, SJ invoked her power under s14(3), Magistrates Ordinance, Cap 227 and intervened and assumed the conduct of the Shooting Summonses and the Driving Summons. The magistracy was informed that DOJ was to withdraw the two

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<sup>7</sup> Affirmation of Cheng Hiu Yee, dated 8 February 2021.

<sup>8</sup> HCF-1 to HCF-3

<sup>9</sup> HCF-5

<sup>10</sup> Form 86, §§11-14; 17-20

<sup>11</sup> HCF-13

<sup>12</sup> HCF-14

sets of summonses and asked that an early mention date be fixed for that purpose.

(5) On 24 August 2020, DOJ formally withdrew the Shooting Summonses and the Driving Summons respectively, citing insufficiency of evidence and thus no reasonable prospect of conviction as the reason<sup>13</sup>.

(6) On 26 August 2020, Hui was arrested for “attempting to pervert the course of public justice”, “access to a computer with dishonest intent” and “criminal damage” in relation to an unrelated matter. Charges were laid against him on the following day and he was granted court bail on condition that, *inter alia*, he was not to leave Hong Kong and he was to surrender all his travel documents. The case was then adjourned to 6 November 2020 for the prosecution to prepare transfer papers to the District Court<sup>14</sup>.

(7) On 6 November 2020, Hui applied successfully to court to reclaim his travel documents on the ground that he was a Legislative Councillor and was required to attend a duty visit outside Hong Kong. Hui’s travel restriction was also amended to the effect that he was not to leave Hong Kong unless he was required to attend official duty visit, in which case he was to submit to the Police the itinerary no less than 72 hours prior to his departure. The case against Hui was transferred to the District Court, with the plea day fixed on 26 November 2020<sup>15</sup>.

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<sup>13</sup> Form 86, §§16 & 22.

<sup>14</sup> DCCC 958/2020

<sup>15</sup> CHY-2(2) (Bail Form); Hearing Bundle, item 32 (Transcript of proceedings on 6.11.2020).

- (8) Shortly after reclaiming his travel documents, Hui resigned from his office as Legislative Councillor, with immediate effect, on 12 November 2020.
- (9) On 13 November 2020, Hui's solicitors informed the DOJ that he was invited by the Parliament of Denmark to participate in several meetings and to conduct a duty visit. Hui asked the Police to lift his travel ban for the period from 20 November 2020 to 24 November 2020<sup>16</sup>.
- (10) On 17 November 2020, Hui sought leave to apply for judicial review of the Decisions.
- (11) On 18 November 2020, DOJ wrote to Hui's solicitors reminding Hui that he was running the risk of breaching court order under the proposed itinerary and the quarantine requirement, as the next hearing in the District Court was on 26 November 2020<sup>17</sup>. Hui's solicitors replied on the following day that Hui would liaise with the Denmark counterpart to reschedule the meeting and the duty visit to avoid the risk of breaching the bail condition<sup>18</sup>.
- (12) On 26 November 2020, Hui obtained bail at the District Court and was allowed to leave Hong Kong but only to conduct his duty visit in the capacity of a District Councilor and as a politician, provided that he furnish the Police with a full itinerary of the duty visit no less than 72 hours in advance. The case was adjourned to 26 January 2021.

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<sup>16</sup> Messrs Ho Tse Wai & Partners.

<sup>17</sup> CHY-4(2)

<sup>18</sup> CHY-4(3)

(13) On 27 November 2020, Hui's solicitors provided the Police with an itinerary and asked that the travel ban be lifted from 30 November 2020 to 4 December 2020<sup>19</sup>. Based on the representations of and the supporting documents provided by Hui's solicitors, the Police lifted the travel ban accordingly. Hui then left Hong Kong on or about 30 November 2020.

(14) On 3 December 2020, a post appeared on Hui's " Facebook" page stating that he had completed his visit to Denmark and that he would remain in exile and would not return to Hong Kong<sup>20</sup>. On 6 December 2020, another post appeared on his Facebook page stating that he had left Denmark for the United Kingdom<sup>21</sup>.

(15) On 8 December 2020, Danish politician Anders Storgaard published a post containing the following text on his Facebook page<sup>22</sup>:

*“On September 14, a message from Ted ticked in saying that he had temporarily released bail, but they detained his passport. There was only one way to get it back: if, due to an important visit as a parliamentarian, he had to travel out to talk about something harmless to the regime. In that case the court was not allowed to hold his passport back. He asked if I wanted to help - I answered yes of course.”*

(16) On 12 January 2021, an article entitled "A Hong Kong Dissident's Daring Escape"<sup>23</sup> was published by the Wall Street Journal, which contained excerpts of an interview between

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<sup>19</sup> CHY-4(6)

<sup>20</sup> CHY-6

<sup>21</sup> CHY-7

<sup>22</sup> CHY-8

<sup>23</sup> CHY-9

Wall Street Journal and Anders Storgaard. The following text appeared in the article:

*“Messrs. Rohden and Storgaard contacted their friend after he was released on bail. Mr. Hui responded with a strange suggestion. As a former member of the Legislative Councils Environmental Affairs Panel, he wanted to come to Denmark to talk about climate change. Beijing purports to care about the environment, and Mr. Storgaard and Mr. Rohden intuited this might be a chance for Mr. Hui to escape. So they made an audacious plan: to stage a fake climate conference in Copenhagen in early December, invite their friend, and get him to safety.*

*Fearing that Mr. Hui’s phone might be tapped, they didn’t tell him about the ruse. To the Danes’ relief the courts presiding over Mr. Hui’s prosecution approved his trip. But a few days before his departure, police asked for a full program and other supporting documentation. The Danes sought help from Uffe Elbaek, a member of Parliament representing the leftist Independent Greens, who was one of the few people aware of their plan. ‘It was very stressful,’ Mr. Elbaek recalls. ‘We had to come up with a program in a half day’s time so we could persuade the local authorities in Hong Kong, so Ted could get out for this visit.’”*

(17) On 15 January 2021, there were passages posted on Hui’s Facebook page<sup>24</sup> in which he acknowledged the assistance of Storgaard and Rohden in his leaving Hong Kong.

(18) On 26 January 2021, Hui failed to appear at the adjourned hearing. As a result, the court issued a warrant of arrest<sup>25</sup>

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<sup>24</sup> CHY-10. The passages were written in Chinese as follows:

“今天，華爾街日報報導有關我的流亡決定知來龍去脈。其實當中細節，早在其他媒體報導過，無甚可觀。反而，報導中的兩位丹麥年輕人一儘管仍未選上國會議員一對捍衛自由的道德勇氣及決心，令人敬佩。

他們兩位是 Anders Storgaard 及 Thomas Rohden，他們因為協助我離開香港，被批評提供虛假會議內容，製造了一場中丹外交政治風波，承受不少壓力。”

<sup>25</sup> CHY-11

against him on the same day, with the case being adjourned to 23 March 2021 for mention.

7. It should also be noted that, apart from the District Court case mentioned above, Hui is also a defendant in a number of outstanding criminal cases in West Kowloon Magistrates' Court<sup>26</sup> for which he was also granted bail<sup>27</sup>. Needless to say, Hui has also failed to appear at the adjourned hearings of those cases as appointed. As at the date of this judgment, Hui still has not returned to Hong Kong.

### Contention of the Parties

#### *SJ's contention*

8. In response to the preliminary issue raised by the court, Mr Chan, counsel for SJ, contends that the court should not entertain Hui's leave application at all. He relies on the following propositions:

- (1) judicial review is a discretionary remedy. As such, Hui's conduct is a relevant consideration in determining whether he should be entitled to complain about the decision under challenge and be granted a remedy: *R (Youssef) v Foreign Secretary*<sup>28</sup>; *Lewis, Judicial Remedies in Public Law*<sup>29</sup>; and *Fordham, Judicial Review Handbook*<sup>30</sup>. The proposition that Hui's non-compliance with court orders would militate

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<sup>26</sup> Namely WKCC 3842/2020, WKCC 4002/2020 & WKCC 4003/2020.

<sup>27</sup> Including cash, reporting conditions, residing at the address given and informing Police of any change of address.

<sup>28</sup> [2016] AC 1457 at §61 (per Lord Carnwath JSC)

<sup>29</sup> 6<sup>th</sup> Ed., 2021, at §12-005

<sup>30</sup> 7<sup>th</sup> Ed., 2020, at §31.

strongly against the court exercising its discretion in favour of him or her can hardly be disputed: *Liquidators of China Medical Technologies Inc v Tsang Tak Yung Samson*<sup>31</sup>;

(2) the Court has an inherent jurisdiction, both in civil and criminal matters, to maintain its authority and to prevent any obstruction, interference or abuse with its process and the administration of justice: *Financial Secretary v Wong*<sup>32</sup>; *Connelly v DPP*<sup>33</sup>; & *Credit Lyonnais v SK Global Hong Kong Ltd*<sup>34</sup>;

(3) as a facet of (2) above, in the particular context of the present case granting Hui leave to review the Decisions would bring the administration of justice into disrepute or would be an affront to the public conscience: *Polanski v Conde Nast Publications Ltd*<sup>35</sup>; and

(4) Hui simply lacks the requisite standing in bringing the proposed judicial review against the Decisions: *Kwok Cheuk Kin v President of the Legislative Council*<sup>36</sup>.

### *Hui's contention*

9. On the other hand, Mr Ross submits that the Court does not have a basis for preventing the judicial review leave application from proceeding. He relies on the following:

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<sup>31</sup> (2020) 23 HKCFAR 145, at §14 (per Bokhary NPJ)

<sup>32</sup> (2003) 6 HKCFAR 476, at §113 (per Litton NPJ)

<sup>33</sup> [1964] AC 1254, at 1301 (per Lord Morris) & at 1347 (per Lord Devlin)

<sup>34</sup> [2003] 4 HKC 104, at §2 (per Ma CJHC, as he then was)

<sup>35</sup> [2005] 1 WLR 637, at §§17, 30-32 (per Lord Nicholls); §§40, 50 & 56 (per Lord Slynn); §69 (per Lady Hale) & §§86-92 (Lord Carswell)

<sup>36</sup> [2021] HKCA 169, at §§17-28 (per Lam VP)

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- (1) the doctrine of “fugitive disentitlement”, which was developed under common law in the United States to prevent fugitive criminal defendants from pursuing their appeal rights *in absentia*, does not form part of the law of the United Kingdom and New Zealand: see *Rowland v Bock*<sup>37</sup>, approved by the majority in *Polanski v Conde Nast Publications Ltd*<sup>38</sup>; and in New Zealand: *Dotcom v Deputy Solicitor-General*<sup>39</sup>;
- (2) the European Court of Human Rights sitting as a Chamber has held that the doctrine of “fugitive entitlement” would run counter to the European Convention on Human Rights guarantee of equal treatment that is inherent in the principle of equality of arms. Further, the Court found that there was no scope for a rule on “fugitive disentitlement” in the Convention legal system: *The Conde Nast Publications Ltd and Carter v United Kingdom*<sup>40</sup>;
- (3) it is noted that in *Re Chow Kam Fai David*<sup>41</sup>, the Court of Appeal did not allow Mr Chow, a judgment debtor who had disobeyed an order for examination and left Hong Kong for Macau, to give evidence under cross-examination in bankruptcy proceedings via a video conference facility (VCF). However, that case is distinguishable from the present one in that Hui is not required to give evidence in the judicial review and that there has been no application from SJ to cross-examine him;

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<sup>37</sup> [2002] 4 All ER 370

<sup>38</sup> *Supra*, at §33 (per Lord Nicholls); §59 (per Lord Hope); & §69 (per Baroness Hale), Lord Slynn & Lord Carswell dissenting.

<sup>39</sup> [2015] NZHC 1197

<sup>40</sup> Application No 29746/05

<sup>41</sup> [2004] 2 HKC 645, in which *Polanski's case, ante*, was considered.

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- (4) while it may be the case that the “fugitive” may not litigate remotely the criminal case that motivated him to become a 'fugitive', it is not the case that the “fugitive” is *per se* barred from continuing civil proceedings, whether related or not: *Dengen v United States*<sup>42</sup>;
- (5) Hui's connection to the judicial review proceedings, apart from being the applicant, was also the underlying criminal prosecution where he was the private prosecutor; and
- (6) Hui has no personal advantage from either the judicial review or the prosecutions. The “fugitive” status of Hui has no connection to the present judicial review.

## Consideration

### *Private prosecution*

10. The common right of a member of the community to institute and prosecute an offence is regarded as a “valuable constitutional safeguard against inertia or partiality on the part of the authority”: *Gouriet v Union of Post Officer Workers*<sup>43</sup>; see also generally *Criminal Procedure – Trial on Indictment*<sup>44</sup> by Andrew Bruce. This right, however, is not immutable: *R (Gujra) v Crown Prosecution Service*<sup>45</sup>.

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<sup>42</sup> (1996) 517 US 820, 135L, Ed 2d 102, at §§12, 74 & 75

<sup>43</sup> [1978] AC 435, 477 (per Lord Wilberforce)

<sup>44</sup> At III [104]

<sup>45</sup> [2012] 3 WLR 1227

11. In Hong Kong, the right to institute and conduct a private prosecution has received statutory recognition in s14(1) of the Magistrates' Ordinance which reads:

“A complainant or informant who is not acting or deemed to act on behalf of the Secretary for Justice may if he so wishes and without any prior leave conduct in person or by counsel on his behalf the prosecution of the offence to which the complaint or information related but the Secretary for Justice may at any stage of the proceedings before the magistrate intervene and assume the conduct of the proceedings...”

12. As pointed out by Stock VP (as he then was) in *Ng Chi Keung v Secretary for Justice*<sup>46</sup>, the constitutionality of s14(1), Magistrates' Ordinance has to be considered against the backdrop of two relevant articles of the Basic Law: Articles 35 and 63. The former provides that Hong Kong residents shall have the right to access to the courts, and the latter says that the Department of Justice “shall control criminal prosecutions, free from any interference.”

13. DOJ has published its prosecution policy in the “Prosecution Code”. In Chapter 7, the following guidelines on “Private Prosecution” are made known to the public:

7.1 Under the common law a person has the right to commence a criminal prosecution in the public interest.

7.2 Section 14 of the *Magistrates Ordinance*, Cap. 227 enables a complainant or informant to conduct a prosecution either in person or by counsel.

7.3 The Secretary for Justice is entitled to intervene in a private prosecution and to assume its conduct, becoming a party to the proceedings at that time and displacing the original prosecutor. The Secretary for Justice may continue proceedings privately begun or may prevent them from continuing by declining to sign

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<sup>46</sup> CACV 32/2013

the charge sheet or indictment (see sections 74 and 75 of the *District Court Ordinance*, Cap. 336 and section 17 of the *Criminal Procedure Ordinance*, Cap. 221). A decision on the future course of the prosecution will be made in accordance with the *Prosecution Code* before a decision is made whether or not to intervene.

7.4 When considering whether or not to take over a private prosecution, the following factors should be included among those taken into account:

- a. the interests of public justice;
- b. the seriousness of the offence;
- c. the views of any interested party;
- d. any duplication of proceedings;
- e. consistency with decisions of the Department of Justice;
- f. the prospects of a fair trial.

The Secretary for Justice may also take into account the conduct of the original prosecutor.”

14. As to DOJ’s “Decision to Prosecution”, the *Prosecution Code* has the following to say in Chapter 5:

“5.1 Section 15(1) of the *Criminal Procedure Ordinance*, Cap. 221 states:

*‘The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.’*

5.2 That provision applies such discretion equally to the Director of Public Prosecutions and to prosecutors acting on behalf of the Secretary for Justice pursuant to delegations.

5.3 The effect of that provision is to endorse generally accepted and longstanding international practice under the common law – that the decision to prosecute includes two required components. The first is that the admissible evidence available is sufficient to justify instituting or continuing proceedings. The second is that the general public interest must require that the prosecution be conducted.

...”

*Amenability*

15. In *Ng Chi Keung v Secretary for Justice*<sup>47</sup>, Li J held that the application of the “reasonable prospect of conviction” test when discontinuing a prosecution which had been taken over did not involve any unjustifiable restriction of the common law right to bring a private prosecution. However, his lordship noted that SJ must act within her constitutional power and that she must not act on political instruction, in bad faith or fettered by a rigid policy. In this regard, his lordship agreed with the following dictum of Hartmann J (as he then was) in *RV v Director of Immigration*<sup>48</sup>:

“I am bound therefore by the judgment of the Court of Appeal in *Re C (Bankrupt)*<sup>49</sup> 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’.

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.

...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.”<sup>50</sup>

“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

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<sup>47</sup> [2016] 2 HKLRD 1330

<sup>48</sup> [2008] 4 HKLRD 529

<sup>49</sup> [2006] 4 HKC 582

<sup>50</sup> *Ibid.*, at §§ 65—67.

which I speak must be truly exceptional and must demonstrate that the Secretary has acted outside of his very broad powers...”<sup>51</sup>

See also *D v Director of Public Prosecutions*<sup>52</sup>.

*Hui’s standing*

16. Having briefly set out the legal framework of private prosecution, I shall now turn to decide whether Hui has the requisite standing to bring the proposed judicial review proceedings. This is because if he lacks standing, that could be the end of the matter.

17. Section 21K(3), the High Court Ordinance (Cap 4) provides:

“No application for judicial review shall be made unless the leave of the Court of First Instance has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.”

Thus, the court has to assess whether an applicant has a sufficient interest in the matter before granting leave to apply for judicial review.

18. As a premises of Mr Chan’s submission on this score, he points out that Hui, on his own admission<sup>53</sup>, has no right or interest over and above that of the general public in the present matter. Mr Chan submits that the protestor injured in the shooting incident and the protestors physically affected by the driving incident would be better placed to bring private prosecutions, and to challenge any decision of the SJ to take over such

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<sup>51</sup> Ibid, at §74.

<sup>52</sup> [2015] 4 HKLRD 62 (per Zervos J, as he then was)

<sup>53</sup> See §45, “Submission for Applicant on Preliminary Issue” dated 11.3.2021.

private prosecutions, so the argument goes, reinforces the point that Hui lacks standing and is nothing more than a mere busybody.

19. To deal with Mr Chan’s submission on standing, I will begin with the basic principles. The relevant principles are fully set out by the Court of Appeal in *Kwok Cheuk Kin v President of Legislative Council*, supra, which I respectfully adopt and follow. In particular, I bear in mind that the requirement of standing in public law is said to be a “liberal” one, which takes into account a host of factors including (but not limited to) the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, the nature of the breach of duty against which relief is sought: *Re Wong Chi Kin*<sup>54</sup>, citing Rose LJ in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement*<sup>55</sup>. On the other hand, if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing merely because he raises an issue in which there is, objectively speaking, a public interest: *R (Feakins) v Secretary of State for Environment*<sup>56</sup>.

20. As pointed out by the Court of Appeal in *Kwok Cheuk Kin v President of Legislative Council*, the courts should be informed by this overarching question, namely: “*in the particular context whether the preservation of the rule of law requires standing be given to this applicant to ventilate the issues raised in the application in light of the interest he has.*”<sup>57</sup>

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<sup>54</sup> CACV 80/2014, unreported, dated 26.9.2014, at §§11-18.

<sup>55</sup> [1995] 1 WLR 386.

<sup>56</sup> [2004] 1 WLR 1761, Dyson LJ (as he then was) at §23.

<sup>57</sup> Supra, at §28.

21. Here, the particular context is that Hui was the prosecutor who took out the private summonses, whilst the protestors concerned were not. With respect, Mr Chan's submission is too broad-brush and he conflates two connected but different questions: (i) who would have been the more appropriate person to take out the private prosecutions and (ii) who is now the appropriate person, if any, to challenge the Decisions. For the sake of argument, even assuming that the protestors concerned would have been better placed than Hui to take out the prosecutions, Mr Chan has not elaborated on why the former would now also be better placed to challenge the Decisions than Hui, who was privy to the discussions with the DOJ leading to the making of the Decisions.

22. Secondly, if Mr Chan's submission were right, then it may give rise to the strange situation where the prosecutor (who applied for and was granted the summonses by the Magistrates Court) has no standing to judicial review SJ's decision to intervene, whilst other people (who did not apply for the summonses) have standing<sup>58</sup>.

23. Thirdly, with respect, Mr Chan's submission may carry a greater force if he can successfully argue that Hui should not have been issued with the private prosecutions in the first place. However, I do not understand that Mr Chan is prepared to go that far. Since Mr Chan is not seeking to argue that it was wrong to allow Hui to take out the private prosecutions in questions in the first place<sup>59</sup>, I am unable to agree that Hui does not have a sufficient interest in the matters. After all, it was Hui's

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<sup>58</sup> As to this, I note that it is said that Hui does not intend to call the injured protestor in the Shooting case to give evidence at the trial of the Shooting Summonses: see §16(c), Form 86.

<sup>59</sup> On this point, which has not been argued before me, I express no view.

private prosecutions that were being overtaken and then dropped against his wish.

24. In my judgment, but for what I am going to discuss below, I am inclined to the view that the fact that it was Hui's private prosecutions that were intervened and dropped would give him standing in the present leave application.

*Hui as a fugitive – its relevance*

25. Mr Chan has helpfully drawn my attention to some US case authorities which suggest that “fugitive disentitlement” is applicable to both criminal<sup>60</sup> and civil cases (such as custody<sup>61</sup>, tax<sup>62</sup> and immigration judicial review<sup>63</sup>) where there is a sufficient connection between the fugitive status and the case in question to justify the sanction as a reasonable response.

26. I agree with Mr Chan, however, that for the present purpose it is not necessary to decide whether “fugitive disentitlement” as a doctrine or general rule forms part of the common law in Hong Kong and, in view of the majority decision in *Polanski's case*, I am prepared to proceed on the basis that it does not.

27. On the other hand, it would be instructive to understand why the majority in *Polanski's case* decided that there should not be a rule of “fugitive disentitlement” generally applicable to all types of civil proceedings. The issue in that case was whether Polanski, the claimant in a

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<sup>60</sup> *Degen v United States* (1996) 517 US 820, 135 L Ed 2d 102, at pp.108-109.

<sup>61</sup> *Pesin v Rodriguez*, 244 F3d 1250 (11th Cir 2001)

<sup>62</sup> *Conforte v CIR*, 692 F2d 587 (9th Cir 1982)

<sup>63</sup> *Sapoundjiev v Ashcroft*, 376 F3d 727 (7th Cir 2004)

libel case who was himself a fugitive from justice, should be given leave to give his evidence by video conference link for his claim in England from France where he could not in law be extradited, so as to avoid the risk or likelihood of arrest. In this context, the law lords were in agreement that the civil court has to balance two conflicting policy considerations: (a) it should not frustrate a properly brought claim to ventilate a fugitive's rights from being properly and fairly litigated and (b) it should not take steps the effect of which is to frustrate or impede the due execution of the criminal process (or to facilitate or enable a fugitive to escape from his or her just desert) <sup>64</sup>.

28. Where the minority parted company with the majority was in the application of the opposing principles, the weight which should be given to each in the case before them and where the balance should be struck<sup>65</sup>. The majority in *Polanski* held that the claimant was entitled to bring proceedings in England to protect his civil rights notwithstanding that he was a fugitive from justice; that although there was a public interest in not assisting a fugitive from justice to escape his just desserts the claimant would in fact do so whether or not a video link order was made, and there was a strong public interest in allowing a claim properly brought in England to be properly and fairly litigated; that if the administration of justice was not brought into disrepute by the claimant bringing proceedings in England it would not be brought into disrepute by allowing him recourse to the procedural facility of video conference link; that, as a general rule, where proceedings were properly brought in England a claimant's unwillingness to

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<sup>64</sup> *Supra*, at §§17, 30-32 (per Lord Nicholls); §§40, 50 & 56 (per Lord Slynn); §61 & 63 (per Lord Hope); §69 (per Lady Hale); & §§86-92 (Lord Carswell).

<sup>65</sup> *Supra*, at §56 (per Lord Slynn); & §91 (per Lord Carswell).

come to England because he was a fugitive from justice was a valid, and could be a sufficient reason for making a video link order.

29. In my judgment, *Polanski's case* concerns a legal and factual context so different from the present case that it is readily distinguishable. As can be seen from the holding of the majority, the fact that Polanski was entitled to the libel claim in England and that the claim was properly brought weighed heavily in his favour. As such, the libel proceedings did not constitute an abuse of the process of the court. The issue before the House of Lords was whether he should be allowed to take a procedural step in the proceedings (giving evidence via VCF) which would allow him to remain out of the jurisdiction. Lord Nicholls, who gives the leading majority speech, points out that whether the use of the court's procedures in a particular way would bring the administration of justice into disrepute or would be an affront to the public conscience, called for an overall balanced view. A fugitive from justice was not as such precluded from enforcing his rights through the courts. The claimant's status as a fugitive offender did not deprive him of any rights he would otherwise possess in respect of the subject matter of his action. The contrary approach, adopted in the name of the public interest, would lead to wholly unacceptable results in practice. It would mean that for so long as a fugitive remained on the run from the criminal law, his property and other rights could be breached with impunity. That could not be right. Such harshness had no place in the law that knew no principle of fugitive disentitlement.

30. As regards the decision of the European Court of Human Rights concerning the admissibility of the defendant's appeal, the relevant part reads as follows:

“In the view of the Court a fugitive from justice does not lose his entitlement to protection of his right to reputation merely because of his status as a fugitive. The applicant’s fugitive status was, in any event, irrelevant to the libel proceedings which had been brought by RP to vindicate his right to reputation allegedly damaged by accusations that were unconnected with the criminal proceedings in the US. The Court also considers that the State cannot be condemned under Article 6 of the Convention for providing a particular litigant with facilities that were available to other litigants simply because of his status as a fugitive from justice. The deprivation of such facilities would run counter to the Convention guarantee of equal treatment that is inherent in the principle of equality of arms. For the Court, there is no scope for a rule on fugitive disentitlement in the Convention legal system (see, *mutatis mutandis*, *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277 A, p. 15, § 38; *Omar v. France*, judgment of 29 July 1998, Reports of Judgments and Decisions 1998 V, § 40; *Krombach v. France*, no. 29731/96, § 87, ECHR 2001 II). Further, it considers that the applicants had suffered little, if any, disadvantage as a result of the submission of RP’s evidence by VCF whereas, in the event of a refusal of the relevant order, RP would, in practice, have been requested to abandon his action in denial of his right of access to court. In these circumstances, the Court does not consider that the order enabling RP to submit his evidence by VCF hindered the principle of equality of arms or rendered the proceedings unfair in any other way.”

(Emphasis supplied)

31. Viewing in the aforesaid light, *Polanski’s case* does not assist Hui in the present application. The present application is not about the protection of any substantive legal right of Hui or “equality of arms” but the legality or rationality of the Decisions. With respect, Mr Chan is right to emphasize the discretionary nature of judicial review proceedings and their remedies. Unlike the situation in *Polanski’s case*, Hui does not have the *right* to judicial review and, even if he is successful in the judicial review, the court still retains a discretion not to award any remedies.

32. As regards *Degen v United States*, ante, referred to by Mr Ross, which is about a fugitive seeking to defend his property in related forfeiture

proceedings, it has a totally different factual and legal context which is clearly distinguishable.

33. In my judgment, when it comes to how the court should exercise its discretion in judicial review proceedings, due weight should be given to the following:

(1) The courts have been at pains to point out that the leave requirement serves as an important filter to keep judicial review within its proper bounds and to prevent abuse of the court's process.

(2) Although it might be argued that Hui's proposed judicial review has the importance of vindicating or protecting the rule of law, as Lord Reed observed, "the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted": *AXA General Insurance Ltd v HM Advocate*<sup>66</sup>.

(3) That the court has inherent jurisdiction to prevent any abuse of its process and the administration of justice cannot be doubted. It follows that if the granting of leave in the present case, as Mr Chan contends, would amount to an abuse or bring the administration of justice into dispute, then that, in my view, would afford a valid reason to refuse leave. However, this would be a fact-sensitive issue.

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<sup>66</sup> [2012] 1 AC 868, at §170.

*Hui as a fugitive – its significance*

34. It is also noteworthy that neither Hui nor his legal team denies this Court’s observation that “there is information to suggest that Hui might have provided misleading information to the court when he applied for permission to leave Hong Kong and then failed to return as promised.”

35. In view of the position of Hui’s legal team and also the chronology of events set out above, this Court has cogent reasons to believe that Hui was involved in a plan to mislead the court and the Police into believing he was leaving Hong Kong temporarily when he in fact intended not to face his trial(s). Notably, it would also appear that Hui was aware that he was in breach of the bail condition (as the duty visit was bogus) and he made a conscious decision to flee the jurisdiction (by not returning to Hong Kong). Moreover, it would appear that Hui’s plan to flee the jurisdiction was conceived even before he presented his Form 86.

36. More importantly, Hui did not just fail to answer bail as appointed. His provision of misleading information to the court to procure the return of his travel documents and the lifting of his travel ban on condition (namely only for a duty visit) amounts to a criminal contempt. I note the point made by Mr Ross that Hui’s absconding was due to reasons not relating to the present application. However, as put by Mr Chan, Hui’s conduct shows that he has no regard at all for the dignity and authority of the court and the administration of justice. As such, it would also be an affront to the public conscience, and would bring the administration of justice into disrepute, if he were able to invoke this Court’s jurisdiction, which he despises, for his own ends.

37. In so deciding, I have already taken into account the policy consideration of not frustrating a properly brought claim to ventilate a fugitive's rights. However, as pointed out by Lord Reed in *AXA General Insurance Ltd v HM Advocate*, ante, the approach to leave applications for judicial review is not "right-based" but "interest-based". In the present case, Hui admittedly does not have any private interest in the two prosecutions in question.

38. I have also considered whether, by refusing leave to Hui, legitimate interests of other parties might be adversely affected. However, I am satisfied that this would not be the case. In this regard, it is pertinent to note the prosecution had simply withdrawn the Shooting Summonses and the Driving Summons rather than offered no evidence against IP-1 and IP-2. Therefore, it is highly arguable that the plea of *autrefois acquit* is not applicable to either of them. Secondly, there is nothing before me to suggest that Hui's present application is supported by any of the protestors concerned. Lastly, the refusal of leave would not bar any civil claims which may be brought against IP-1 and IP-2.

### Conclusion

39. Based on the above, I decline to entertain Hui's leave application and refuse him leave.

### Costs

40. Mr Chan seeks costs of the present application.

41. The relevant legal principles, which are well-known, are as stated in *Leung Kwok Hung v President of the Legislative Council (No 2)*<sup>67</sup> and applied in *Ahmad Ali v Director of Legal Aid*<sup>68</sup>, all of which I need not repeated here.

42. Based on what I have said about Hui's conduct, I make an order *nisi* that SJ shall have the costs of this application (on indemnity basis), to be taxed if not agreed. If neither party applies for a variation within 14 days from the date of this judgment, the order shall become absolute upon expiry of that period.

(Alex Lee)  
Judge of the Court of First Instance  
High Court

Mr Philip Ross, instructed by Messrs Chan & Associates, for the Applicant

Mr Anthony Chan and Mr Howard Tang, instructed by the Department of Justice,  
for the Putative Respondent

Mr Alex Fan, instructed by Messrs Hon & Co, for the 1<sup>st</sup> Putative Interested  
Party

2<sup>nd</sup> Putative Interested Party, did not appear

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<sup>67</sup> (2014) 17 HKCFAR 841

<sup>68</sup> HCAL 470/2019, [2019] HKCFI 1303