資料文件

立法會司法及法律事務委員會
區域法院的審訊

目的

本文件處理三個相關議題，即(i)定罪率；(ii)控方選擇審訊法院級別的權利；以及(iii)審訊方式。第一個議題關乎香港所有刑事審訊法院的定罪率，但由於這些統計數字可以就三個級別的刑事審訊法院作個別定罪率的細分，這些數字可就有陪審團進行的審訊，相對於只由一名專業司法人員單獨開庭的審訊，顯示被告人可能被定罪的機會。其餘兩個議題只關乎在區域法院進行的刑事罪行審訊。

(i) 定罪率

2. *《2008 年刑事檢控科工作回顧》*把各級法院的定罪率與 2007 年作一比較，並載列如下：

法院級別	2007	2008
裁判法院	76.6%	73.2%
區域法院	90.5%	92.6%
原訟法庭	93.4%	94.8%

3. 關於這些統計數字，必須注意兩點。首先，用以計算定罪率的統計數字，是以被告人數目及被裁定犯了任何實質或交替罪行的被告人爲基礎；有關數字並沒有計及其他被裁定罪名不成立的控罪(如有的話)。第二，上述定罪率包括認罪後被定罪的被告人。

4. 因此，在計算這些定罪率，首先是將在認罪後被定罪的被告人數目，加上不認罪但經審訊後被定罪的被告人數目，然後將分別於各級法院應訊的被告人總數(包括認罪及不認罪的被告人)作爲計算基礎，以計算出有關的百分比。

5. 爲了計算經審訊後的定罪率，刑事檢控科扣減了認罪後被定罪的被告人數目，然後以不認罪的被告人數目作爲計算基礎，以計算出一個百分比。

附件A 6. 請委員參考附件 A 的列表，便可更容易理解上述兩種計算定罪率的方法。該表亦列出 2009 年的統計數字。

7. 計算定罪率的另一個方法，是以被檢控人士總數作爲計算基礎。使用這個數字作爲計算基礎，可計算出認罪、經審訊後被定罪及獲裁定無罪的人各在被檢控人士總數中所佔的比例。如採用這個方法，香港的有關數字將會如下：

	區域法院	原訟法庭
2006		
整體定罪率	91.8%	92.3%
認罪案件	65.5%	68.3%
經審訊後被定罪案件	26.3%	24.0%
2007		
整體定罪率	90.5%	93.4%
認罪案件	69.5%	76.2%
經審訊後被定罪案件	21.0%	17.2%
2008		
整體定罪率	92.6%	94.8%
認罪案件	72.4%	75.0%
經審訊後被定罪案件	20.2%	19.8%

把這些數字形容爲不同的檢控結果在被檢控人士總數中所佔的比例，較將之形容爲定罪率更爲準確。就以 2008 年區域法院的數字爲例，該分項數字只顯示，在全部被檢控人士當中，有 92.6%的人被定罪：即全部被檢控人士當中，有 72.4%的人認罪，有 20.2%的人經審訊後被定罪。重要的是，上述數字並沒有顯示不認罪的人經審訊後的定罪率；就 2008 年區域法院及原訟法庭來說，經審訊後的定罪率分別是 73.3%及 79.3%。這些數字能更準確反映刑事司法體系的成效，以及律政司可以就適合案件提出檢控並成功檢控的能力。

8. 於 2010 年 6 月 7 日，立法會秘書處資料研究及圖書館服務部致函律政司並送達一份有關其他普通法司法管轄區(即聯合王國的英格蘭及威爾斯、加拿大和澳洲)定罪率的文件，並把香港區域法院及原訟法庭的整體定罪率與該三個選定普通法司法管轄區相類級別法院的整體定罪率作出比較。

9. 不過，基於多項理由，這種比較似乎並不恰當。首先，從該三個海外司法管轄區公佈的計算方法來看，它們計算定罪率的依據與刑事檢控科所採用的依據明顯不同[1]。從表面上看，這些司法管轄區並不是採用香港所採用的定罪率，而是採用只顯示檢控結果在被檢控人士總數中所佔比例的計算方法。正如上文所述，在香港，定罪率的計算是以被告人數目及被裁定犯了任何實質或交替罪行的

---

[1] 在英格蘭及威爾斯，定罪率是以案件計算。被告人認罪和經審訊後被定罪的百分比，是以採用下述方式處理的案件的總數作爲計算基礎：(i)法官作出無罪釋放的命令(包括具結擔保)、(ii)發出令狀等文書、(iii)法官作出無罪釋放的指令、(iv)被告人經審訊後被裁定無罪、(v)被告人認罪，以及(vi)被告人經審訊後被定罪。

在加拿大，定罪率是以檔案作爲計算基礎。認罪百分比已計及被告人承認干犯其他或性質較輕微的罪行的檔案數目。同樣地，經審訊後被定罪的百分比，亦已計及被告人因其他或性質較輕微的罪行被定罪的檔案數目。

至於澳洲方面，雖然定罪率是以被告人作爲計算基礎，但計算認罪百分比及經審訊後被定罪百分比的基礎，均計及被告人已獲控方撤銷控罪、已經去世、不適宜答辯、已移送其他法院及以其他不經審訊的方式最後解決等情況。

被告人作爲基礎，至於被告人被裁定罪名不成立的其他控罪，則予以扣減。

10. 第二，香港與該三個選定普通法司法管轄區的定罪率有差別，原因可以很多。因此，單憑定罪統計數字而不知其詳情及計算根據便下結論，是輕率的做法。

11. 律政司已向資料研究及圖書館服務部表達其關注事項，這些關注事項已在研究文件的最新文本反映。

12. 雖然就律政司的統計數字而急於作出結論是輕率的做法，但如果從這些數字可以引出任何結論，則這些數字顯示審訊方式對被告人被裁定無罪的機會影響輕微。律政司認爲本身的定罪統計數字不應引起任何關注。

(ii) 審訊法院級別

13. 在 2009 年 1 月 13 日舉行的事務委員會會議上，委員得悉香港大律師公會主席在 2009 年法律年度開啓典禮的致詞中所提出的關注。他指許多商業詐騙案，包括重大而複雜的案件，都是在區域法院審訊，而不是在原訟法庭於陪審團席前審訊。對於現行容許控方全權選擇審訊法院的做法可能剝奪了被告人在有陪審團的情況下接受審訊的權利，委員同樣表示關注。

14. 根據香港的法律，每項公訴罪行均須先在裁判法院進行交付審判程序，直至檢控人員在某個時間結束該項交付審判程序爲止。屆時，他會選擇在裁判法院循簡易程序審理有關罪行，或在區域法院一名法官席前審訊。如果控方希望有關罪行在原訟法庭審理，則須告知法院，然後被告人可選擇在裁判法院進行初步研訊，或以送達他的交付原訟法庭審訊的文件爲依據，交付原訟法庭審訊。控方如選擇區域法院作爲審訊法院，被告人便會在區域法院一名法官席前接受審訊，而非在有陪審團的情況下接受審訊。

15. 檢控人員選擇審訊法院的決定權，曾在一宗司法覆核案件中予以考慮，該案是由兩宗串謀行騙案的當事人就控方選擇區域法院而非原訟法庭審訊的決定所提出的司法覆核。這項司法覆核申請(見附件 B *蔣麗莉 訴 律政司司長*(高院憲法及行政訴訟 2008 年第 42 號及 107 號))是由韋毅志法官審理。律政司於 2009 年 2 月 2 日應事務委員會的要求而提供資料，說明檢控人員在選擇審訊法院時所會考慮的因素(立法會 CB(2)756/08-09(01)號文件)。律政司亦在回應中表示，雖然並無計劃檢討現行做法，但律政司會因應司法覆核程序的結果，再研究是否需要或適宜進行檢討。

附件 B

16. 韋毅志法官於 2009 年 2 月 9 日就該兩宗司法覆核中的第一宗作出裁決，他指出，香港既無設定在陪審團席前接受審訊的絕對權利，亦無機制供被控以可公訴罪行的人士選擇接受審訊的方式。律政司司長才有權決定一宗可公訴罪行應在原訟法庭在法官及陪審團席前接受審訊，或在區域法院一名法官席前審訊。韋毅志法官認爲基於案件的實際案情，律政司司長爲其決定將法律程序轉移到區域法院審理所提出的理據是充分的。至於第二宗的司法覆核，韋毅志法官在 2009 年 6 月裁定，《裁判官條例》的條文容許檢控人員選擇審訊法院(第 88 條)，並沒有篡奪司法權力以致違憲。

17. 2009 年 9 月，上訴法庭維持韋毅志法官所作的決定(見附件 C *蔣麗莉 訴 律政司司長*(民事上訴案件 2009 年第 55 及 151 號))。申請人後來向終審法院提出上訴許可的申請。

附件 C

18. 有關的上訴許可申請於 2010 年 3 月由終審法院上訴委員會聆訊(見附件 D *蔣麗莉 訴 律政司司長*(終院刑事雜項案件 2009 年第 64 及 65 號))。上訴委員會在駁回就有關證明多項法律論點及上訴許可的申請時確認，香港沒

附件 D

有由陪審團審訊的權利。上訴委員會決定，基於《裁判官條例》(第 227 章)第 88 條把司法職能分配給律政司司長而指稱該條文不合憲，並沒有合理論據。首席法官李國能在作出上訴委員會的判決時表示：

> 15. ...選擇進行檢控的審訊法院級別，明顯屬《基本法》第六十三條所涵蓋的事宜；該條文賦權律政司司長主管檢察工作，不受任何外界干涉。韋毅志法官的結論是完全正確的。
>
> 16. 只要考慮就作出任何有關法院級別決定的背景和依據，便可清楚明白上述情況。在背景方面，如選擇審訊法院級別是一項司法職能，則裁判官便須就有關選擇聽取陳詞和考慮該選擇的證據，了解指稱罪行及被告背景的一些詳情，因而把純粹就選擇審訊法院級別作出的決定變成一個小型審訊。那不可能是裁判官的恰當職能。
>
> 17. 此外，作出選擇的依據顯示，該職能不屬司法性質。2009 年《檢控政策及常規》就選擇審訊法院級別作出以下指引：
>
> > “被告人在審訊後可能被判處的刑罰，是檢控人員選擇審訊法院時必須考慮的重要因素。檢控人員也會考慮案件的整體情況、指稱罪行的嚴重程度、被告人的過往紀錄及任何加重刑罰的因素。”(第 14.1 段)
>
> 18. 這些明顯是可以爲檢控人員提供恰當指引的事項，但亦是裁判官在審訊前極之不宜探究的事項。很明顯，最不恰當的情況就是在裁判官席前就某人可能被判處的刑罰、被告人的過往紀錄或加重刑罰的因素進行辯論，而該人是完全享有無罪推定權的。現行的制度透過將選擇審訊法院的問題視作控方的選擇，而其後移交其他法院審理則屬強制性質，便能適當地避免出現上述情況。

李國能首席法官以上的評論，其意義不只在於他說明選擇審訊法院的職能，憑藉第六十三條的實施而歸屬控方，重要的是他同時指出，由於在選擇審訊法院的決定過程中牽涉的種種因素，這項職能應歸屬控方才適當。鑑於這些具

有說服力的評論，律政司認爲沒有充分理由更改現時決定審訊法院的程序。

(iii) 審訊方式

19. 這個議題涉及的問題是，區域法院的刑事審訊應否在一名專業法官席前單獨開庭審訊（即現行做法），或應否在有陪審團的情況下審訊（即原訟法庭的做法）。本事務委員會上一次提出地方法院應否設有陪審團這個議題是在 1997 年 3 月。有關這議題的資料文件，於 1997 年 6 月 16 日由當時的律政署提交事務委員會委員閱覽(附件 E)。1997 年的文件內容包括香港和英國陪審團制度的比較，不把陪審團制度延用於地方法院的原因，以及政府所持的立場；當局認爲延用這制度於地方法院需要長時間、詳細和深入的研究。這研究除涉及英國外，還須包括其他司法管轄區的刑事司法制度。

附件 E

20. 《基本法》第八十一條提出多項規定，其中包括原在香港實施的司法體制予以保留。第八十六條也訂明，原在香港實行的陪審團制度的原則予以保留。《基本法》和《香港人權法案條例》均沒有賦予被告人選擇在有陪審團的情況下接受審訊的權利。

21. 終審法院上訴委員會在其判詞中，除拒絕給予蔣女士上訴許可外，還否定以下的說法：區域法院的審訊由於是沒有陪審團的審訊，因此無論如何不及原訟法庭的審訊公平。該判詞第 9 段指出：

> 正如申請人所接受的，在香港被告人並沒有權利選擇在有陪審團的情況下受審。雖然申請人非常希望在有陪審團的情況下受審，她卻沒有表示在區域法院法官席前單獨開庭審訊的情況下，她無法獲得公平審訊。事實上，任何人在區域法院面對審訊時，均不能負責任地作出這樣的說法。

22. 如果根本不涉及審訊是否公平，便難以證明有陪審團的審訊相比由一名法官單獨審訊，可以帶來好處。從定罪率的統計數字，我們可以理解到法庭策略能爲被告人增加無罪釋放機會的觀念是不正確的。統計數字中亦沒有任何數據支持，有陪審團的審訊可容許更多被告人以其母語審訊這個論點。統計數字清楚顯示，雖然區域法院以中文審理刑事案件的數目近年持續增加，但原訟法庭以中文審理的案件數目卻沒有相若的增幅。自 2007 年以來，雖然操華語的陪審員人數增加，但並沒有使原訟法院在有陪審團的情況下以中文審訊的案件數目顯著增加。這點表明，在區域法院引入有陪審團的審訊，不一定會令區域法院增加使用中文。審訊採用的語言似乎不受審訊方式所影響。

法院級別	以中文聆訊的審訊案件數目		
	2007	**2008**	**2009**
原訟法庭	24.7%	23.8%	26.1%
區域法院	31.9%	47.8%	55.5%

23. 由一名法官單獨審訊所賦予被告人的重要益處，是他會收到法庭爲何將他定罪的理由。有陪審團的審訊只會讓被告人得知法官如何給予陪審團結案指引，而不會就陪審團的裁決背後的理由向他提供任何說明。被告人能夠獲得區域法院法官的裁決理由，對被定罪的被告人來說是一個重大的好處，因爲他既可了解爲何會被定罪，也可就其定罪擬定上訴的理由。

24. 不利於在區域法院引入陪審團制度的考慮因素，是對合資格陪審員人數的需求大增，以及要提供所需的設施而對資源造成影響。

對陪審員需求的增加

25. 下表的統計數字取自司法機構，顯示自 2007 年起在原訟法庭進行有陪審員審訊的案件數目：

年份	有陪審員審訊的案件數目	選任爲陪審員的人數	通知準陪審員出席遴選程序所發出的傳票數目
2007	77	**541**	**18,172**
2008	69	487	**17,078**
2009 (截至 10 月止)	73	515	**14,260**

26. 另一方面，同期在區域法院進行的刑事審訊案件數目如下：

年份	審訊案件數目
2007	647
2008	588
2009 (截至 10 月止)	612

27. 根據以上的統計數字，尤其是區域法院所審理的龐大刑事案件數目，如在區域法院引入陪審團制度，將意味着有需要出任陪審員的公眾人士數目會大幅增加。

其他對資源的影響

28. 雖然政府當局絕不容許財政方面的考慮因素對被告人接受公平審訊構成影響，但如果公平審訊沒有受到影響，則當局不能漠視在區域法院引入陪審團制度對資源造成的整體影響。在區域法院引入這類審訊所需的資源龐大，例如需要在各法庭內設置陪審員座區、陪審員集合處、供陪審員使用的獨立通道及設施、陪審團討論室及夜宿設施。

29. 當局評估引入這個制度的可行性時，還須考慮其他經常開支，例如向擔任陪審員的人士提供的津貼，以及爲確保區域法院的陪審團制度有效運作所須支付的行政人員費用。我們亦應緊記，這個制度會爲整體社會帶來間接成本。不論陪審員是否自僱人士，他們都不能如常上班，這可能會對他們的生產力和效率造成不利的影響。

結論

30. 經仔細檢討 1997 年的文件及考慮所有情況後，政府當局的立場維持不變，目前並無計劃爲區域法院引入陪審團制度。

律政司
刑事檢控科
2010 年 6 月

附件 A

	被告人總數（認罪及不認罪）(A) = (B)+(C)	認罪後被定罪的被告人數目 (B)	不認罪的被告人數目 (C) = (D)+(E)	不認罪但經審訊後被定罪的被告人數目 (D)	不認罪並於審訊後獲裁定無罪的被告人數目 (E)	經審訊後的定罪率 (F) = (D)÷(C)	包括認罪案件的定罪率 (G) = [(B)+(D)]÷(A)
裁判法院							
2007	14,683	6,456	8,227	4,786	3,441	58.2%	76.6%
2008	14,125	5,931	8,194	4,415	3,779	53.9%	73.2%
2009	14,546	6,656	7,890	4,217	3,673	53.4%	74.7%
區域法院							
2007	1,576	1,096	480	331	149	69.0%	90.5%
2008	1,277	925	352	258	94	73.3%	92.6%
2009	1,586	1,190	396	274	122	69.2%	92.3%
原訟法庭							
2007	366	279	87	63	24	72.4%	93.4%
2008	368	276	92	73	19	79.3%	94.8%
2009	422	321	101	66	35	65.3%	91.7%

附件B、C及D

附件 B　　高院憲法及行政訴訟 2008 年第 42 號及 107 號
蔣麗莉　訴　律政司司長

附件 C　　民事上訴案件 2009 年第 55 及 151 號
蔣麗莉　訴　律政司司長

附件 D　　終院刑事雜項案件 2009 年第 64 及 65 號
蔣麗莉　訴　律政司司長

司法機構並沒有發出上述英文判決書的中文翻譯本。

Annex B

HCAL 42/2008
HCAL 107/2008

HCAL 42/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 42 OF 2008

BETWEEN

CHIANG Lily	Applicant
and	
Secretary for Justice	Respondent

HCAL 107/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CONSITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 107 OF 2008

BETWEEN

CHEE Hoi Suen Henry	1st Applicant
YU Man Chiu Raymond	2nd Applicant
and	
Secretary for Justice	Respondent

Before: Hon Wright J in Court
Date of Hearing: 2 February 2009
Date of Handing Down Judgment: 9 February 2009

J U D G M E N T

---

1. There does not exist, in Hong Kong, any absolute right to trial by jury nor any mechanism by which a person to be tried of an indictable offence may elect to be so tried. The decision as to whether an indictable offence be tried in the Court of First Instance by a judge and jury or in the District Court by a judge alone is the prerogative of the Secretary for Justice.

The background

2. The applicant in HCAL42/2008 was granted leave, by Hartmann J, on 16 May 2008 to judicially review a decision by the Secretary of Justice to transfer her trial on five charges, one of conspiracy to defraud contrary to Common Law, two of making a false statement as

a company director and one of fraud all contrary to the Theft Ordinance, Cap. 210, and one of authorizing the issue of a prospectus containing an untrue statement about shares contrary to the Companies Ordinance, Cap.32. The hearing was fixed for 2 February 2009.

3. The applicants in HCAL107/2008 were jointly charged with 13 counts of conspiracy to defraud contrary to Common Law. In addition the 1st applicant was charged with one count of offering an advantage to an agent contrary to the Prevention of Bribery Ordinance, Cap. 201. The Secretary for Justice made a similar decision to transfer their trials to the District Court. On 29 September 2008, given that the proceedings in HCAL42/2008 had already been fixed for hearing, I granted them leave to review that decision and directed that these two matters be heard together, the issues being the same in each.

4. The facts which gave rise to the charges are not germane to these proceedings. Suffice it to say, that amongst other arguments, each applicant unusually characterized the facts of the charges against her/him as bringing the offences into a serious category. Each suggests that this is a factor which should be taken into account by the respondent in determining venue. As will be seen, it has been. The course of the proceedings thus far against each applicant was broadly similar – nothing turns on such minor variations, or differences in dates of court appearances, as may exist.

5. Once a person has been charged with an offence he is brought before a magistrate whereupon proceedings for his committal for trial commence. That is in accordance with the procedure prescribed by Part III, s. 72(1) of the Magistrates Ordinance, Cap. 227 (the Ordinance).

Thereafter those committal proceedings continue until one of three things happens: first, with or without a preliminary enquiry which is at the option of the accused person, the accused person is either discharged or is committed to the Court of First Instance for trial before a judge and a jury or, if he has entered a plea of guilty to the charge, for sentence by a judge sitting alone; secondly, the respondent makes application to the magistrate under Part IV, s. 88 of the Ordinance, an application which the magistrate is obliged to grant, to transfer the trial for hearing in the District Court before a judge sitting alone; or, thirdly, the respondent decides that the offence should be tried summarily by a magistrate in accordance with the provisions of Part V of the Ordinance and gives his consent in terms of s. 94A. In the two latter events, the committal proceedings terminate.

6. In respect of these applicants, the respondent decided to follow the second course and applied to the magistrate to transfer the proceedings to the District Court. Each applicant took exception to that decision: each professed a desire to be tried in the Court of First Instance. The committal proceedings were adjourned to enable representations to be made to the respondent.

7. Those representations were made, and in very similar terms. Each set out her/their contentions in fine detail; the letters were expressed to have been written based on advice received from counsel; statistics were quoted; “principles” set out; references were made to decided cases in their plaint for the respondent to reconsider his decision. Particular emphasis was placed on two factors, first, the contention that Article 86 of the Basic Law had an effect beneficial to the applicants of which they would be deprived if they were to be tried in the District Court and,

secondly, that the pool of jurors now available in Hong Kong had increased substantially in recent times.

8. The respondent, in each instance, considered the representations that had been made to him but maintained his decision to have each applicant tried in the District Court.

9. He advised the applicant in HCAL42/2008 of that fact, by letter dated 20 March 2008, in these terms:

> "Having carefully considered your letter, I maintain my decision that the District Court would be a proper venue for the trial in this case and that the trial should be held in the District Court. Should your client be convicted it is unlikely that her conduct would attract a sentence of imprisonment greater than the jurisdiction of the District Court. I note that you have not referred to any matter peculiar to your client which would prevent her from receiving a fair trial in the District Court. I have no doubt that your client can and will receive a fair trial in the District Court and I see no good reason why her case should not be tried there. My decision was not affected in any way by resource constraints."

10. He advised the applicants in HCAL107/2008 of that fact, by letter dated 14 August 2008, in these terms:

> "You have not referred to any matter peculiar to your clients which would prevent them from receiving a fair trial in the District Court. We have no doubt that your clients can and will receive a fair trial in the District Court and we see no good reason to commit your clients to the Court of First Instance for a jury trial.
>
> In arriving at that conclusion, full weight has been given to the facts of the case, the alleged culpability of your clients, the prejudice and potential prejudice caused to the bank, the likely sentences in the event of conviction and all matters you have raised."

11. It is not contended by any of the applicants that they are unable to have a fair trial in the District Court. Mr Dykes SC, appearing

for the applicant in HCAL42/2008, indicated in his written skeleton submissions and reasserted in oral submissions:

> "2. In short, the issues are whether adequate reasons have been provided by [the respondent] to justify the decision and whether sufficient consideration has been given by [the respondent] in the choice of venue... having regard to the constitutional status of jury trial under the common law and, in the light of Article 86 of the Basic Law, which provides that the principle of trial by jury previously practised in Hong Kong shall be maintained.
> ...
> 9. It is not the applicant's case that she has an absolute right to jury trial. The "principle" referred to in Article 86 of the Basic Law is to be understood as referring to a system in which a person accused of an indictable offence would be tried on indictment before a jury, unless and until the Attorney General intervened and required summary trial before a magistrate or District Judge.
>
> 10. It is not the applicant's case that she cannot have a fair trial in the District Court...
>
> 11. It is not the applicant's case that there is necessarily something inherently and irredeemably unfair and wrong in giving the prosecution the right to decide where a case should be tried...."

12. Ms Lan who appeared for the applicants in HCAL107/2008 indicated in her submissions that she adopted all that had been said by Mr Dykes. It must be said, however, that during the course of her oral submissions she frequently made reference, variously, to a "*right*" and a "*qualified right* to a trial by jury" which, in the light of her acceptance of Mr Dykes's position and concessions, I took to be a phrase of convenience rather than a contention that such a right actually exists.

13. Although when commencing his oral submissions Mr Dykes indicated - I paraphrase - that the contentions were that the respondent had not attached sufficient weight to trial by jury under the Basic Law and Common Law and that the reasons furnished by the respondent were

not adequate in the public law sense, at the conclusion of submissions he, correctly in my view, identified the issue as being the adequacy of the furnished reasons.

14. Thus the true issue in these proceedings is the adequacy of the reasons for the respondent deciding to transfer the trials to the District Court and refusing to alter his decision and not the effect of the deprivation of some constitutional right - which the applicants accept does not exist. That affects the course which it is necessary to adopt in determining the issue – see *Dr Kwok-hay Kwong v The Medical Council of Hong Kong* CACV373/2006 §§18 -20: particularly, the numerous authorities to which I have been referred, in respect of the approaches adopted in this and other jurisdictions where there is a derogation from an existing constitutional right, are of little or no assistance.

The principle of jury trials before the Basic Law

15. Article 86 of the Basic Law reads:

> "The principle of trial by jury previously practised in Hong Kong shall be maintained."

16. The Article is clear and unambiguous. All that it is saying is that whatever principle applied in relation to jury trials prior to the Basic Law coming into effect would continue to apply thereafter. The applicants cannot be in any better position now than they would have been prior to the Basic Law coming into effect: they will be in the same position.

17. What was that principle which was previously practised? A challenge to the jurisdiction of the District Court based on the contention that the District Court Ordinance was *ultra vires* because its effect was to

extinguish a right to trial by jury was unsuccessful – see *R v WONG King Chau & Others* [1964] DCLR 94. Similarly, a review of an order to transfer a trial to the District Court based on the "essential question" identified by a Full Bench of the Court in *In an application by David Lam Shu-tsang & another for an Order of Certiorari* (1977) HKLR 393 as being "... is the trial of charges for indictable offences by a single judge sitting alone against the wishes of the person accused trial in accordance with law" failed, the court noting, at 399:

> "Neither Part V of the Magistrates Ordinance nor any section of the District Court Ordinance conferred any right to elect trial by jury. It is doubtful if there can be said to have been such a right to *elect* at Common Law. Indeed when considering the right to jury trial at Common Law it is well to remember that that right originated not as a privilege but as an obligation."

continuing, at 400:

> "Section 88 [of the Magistrates Ordinance] in itself does not take away the right to trial by jury although its operation has the effect of removing charges for indictable offences which an accused person faces to a court of a single judge as soon as the Attorney General applies for an order to that effect. This is in our view the clear unambiguous and intended effect of the section. It is capable of no other interpretation and we cannot interfere with its operation unless the decision of the Attorney General to apply for a transfer under it can be successfully attacked. Section 88 is primarily procedural although its direction to the magistrate to act "upon application made by or on behalf of the Attorney General" necessarily enables the Attorney General, in the exercise of his discretion to make application."

18. Three judgements, Pickering JA and Li and Cons JJ, were delivered in the Court of Appeal consequent upon an appeal against that decision: see *David Lam Shu-tsang & another v Attorney General* CACV42/1977. The appeal was dismissed. Pickering JA, having noted in the decision in *Wong King Chau and others* said, at 6:

> "... the section providing for mandatory transfer of indictable offences upon the application of the Attorney General contained no saving clause, nothing to the effect that the Attorney General must consult the wishes of the accused and nothing giving the accused any right of objection to the transfer. The discretion as to whether to apply for transfer was invested solely in the Attorney General and, upon his exercising that discretion by making a transfer, the obligation to transfer lying upon the magistrate was absolute. The scheme of the legislation is clear beyond a peradventure and it entails, with equal clarity, the deprivation of the former common law right to trial by jury.
>
> Mr Leggatt would have it that there is no necessity for his client to elect trial by jury since he enjoys the right to such trial and could only be put to election by statute. For the reasons I have given it appears to me that there is no right to election and no right to trial by jury and that the result has not been arrived at by what Mr Leggatt terms "a side wind" but by the unambiguous pattern of the legislation. It is not, with respect, correct to say that the right to trial by jury has not been taken away by either the District Court Ordinance or the Magistrates Ordinance. Certainly it has not been wholly taken away but it has so been taken by the former Ordinance in the case of any criminal charges which are bought in the District Court whilst the latter Ordinance provides the mandatory machinery for transferring to that court such cases as the Attorney General in his unfettered discretion determines to prosecute there." [emphasis supplied]

19. Consequently, the principle of trial by jury that applied prior to the Basic Law coming into effect was clear: an indictable offence was triable either by judge and jury, in the High Court, or by judge alone, in the District Court, at the discretion of the Attorney General. The order of the magistrate transferring the trial to the District Court is one which is not subject to appeal: s. 89(2) of the Ordinance. Article 86 preserved the *status quo ante*.

20. The Attorney General's discretion was, and hence the respondent's discretion is, unfettered, although not necessarily entirely free of judicial supervision:

> "20... 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 process and, possibly, judicial review of decisions taken in bad faith.
> ...

per Stock JA (Ma CJHC and Kwan J, concurring) in *Re: C (A Bankrupt)* [2006] HKC 582 in considering the implications of Article 63 of the Basic Law. See, further, the comments of the Full Bench in *In an application by David Lam Shu-tsang & another for an Order of Certiorari*, *supra*, at 401.

21. It was suggested that there existed a "legislative presumption" that a person would be tried by a judge and jury unless the Attorney General intervened. With respect, when the District Court was created it brought into effect a system, but neither that creation nor that system brought into existence any presumption, legislative or otherwise.

22. The respondent was entitled to arrive at his decision to transfer these two trials to the District Court. Representations were made to him to reconsider that decision. He considered those representations but declined to alter his decision. This was a course which he was entitled to follow in the exercise of his discretion.

Adequacy of the reasons

23. I was invited by Ms Lan to decide whether or not there is a duty on the respondent to provide reasons for a decision as to venue of a trial. That is a matter which I do not have to decide as the respondent has furnished reasons for his decision: where reasons are furnished, even absent a duty to do so, they are "... open to scrutiny and review upon ordinary public law principles, which may include the question of their

adequacy." (*R v Criminal Injuries Compensation Board, ex parte Moore* [1999] 2 All ER 90 at 95J)

24. It is obviously a matter of importance that any reasons furnished be scrutinized in the context in which they were supplied. There will be instances where comprehensive and detailed reasons may be required: there will be instances where the briefest of reasons will suffice. Whether reasons are to be regarded as adequate is a matter which will vary from instance to instance and which will depend upon, amongst other things, the factual circumstances which pertain, the nature of the decision made, the legislative framework within which it is made and the nature of the decision maker.

25. It is of importance in these applications to bear in mind that the respondent had made the decision, which was within his discretion, to transfer the trials to the District Court without reference to the applicants. It is self-evident that that is what occurs in the ordinary course. This was an unexceptional and unexceptionable event. Once the respondent's decision became known to the applicants, they sought a reconsideration of it emphasising in their representations specific aspects which they had been advised required particular consideration by the respondent.

26. In an appeal in which the issue was the choice of charges to be laid, but is of equal applicability in regard to the selection of venue, Beeson J said in *HKSAR v Pearce* [2006] 3 HKC 105 at §56:

> "The choice of charge and venue for trial is the responsibility of the Secretary for Justice... Charges are laid and venue chosen according to prosecution policy guidelines taking into account the gravity of the offence, the elements that can be proved and other factors such as prevalence, deterrence, community mores etc. The prosecutorial burden is a heavy

> one and it is for the Secretary for Justice to decide in what manner it is borne....”

27. The considerations to which the judge referred are, as commonsense dictates, matters which will be considered in every instance. Prosecution policy guidelines are well known and publicly available. As such, it seems to me that it would be unrealistic to expect the respondent, as part of his reasons for arriving at a given decision, to say that he had acted in terms of the guidelines.

28. The reply to each of the letters of representation made by the applicants, the relevant paragraphs being set out in full at §§9 and 10, *supra*, specifically indicated that, in respect of the applicant in HCAL42/2008, the respondent had "... carefully considered your letter..." and, in respect of the applicants in HCAL107/2008, that "... full weight has been given to... all the matters you raise.". Bearing in mind that those representations sought a reconsideration of a pre-existing decision and were detailed, I am satisfied that the response by the respondent indicating, in effect, that the arguments, contentions and submissions of the applicants, had been considered but did not alter the original decision was all that was necessary in the circumstances. To have expected the respondent to have dealt with each contention and each point put forward is simply unrealistic in the context of this matter.

29. The respondent's response in each instance went further. The respondent was at pains to point out that, in each instance, nothing had been put before him "peculiar" to each of the applicants that would prevent her/him from receiving a fair trial the District Court. It has been suggested that this is an irrelevant consideration because a fair trial in every venue is a fundamental right. I do not think that suggestion to be

correct. The response demonstrates that if anything specific to any particular applicant had been invited to his attention the respondent would have factored that into account. The point about this part of the respondent's response is not that it is stating the obvious, as is suggested, but that it illustrates that he has given full consideration not only to the specific representations that have been made to him, but to additional matters which he perceived also potentially of relevance.

30. Much has been made of the references in each of the respondent's responses to the fact that it seemed to the respondent that, in the event of conviction, any sentence would fall within the jurisdiction of the District Court. It has been submitted that that should not be the sole determining factor in respect of venue. As a basic, single proposition, that is obviously correct. But that does not mean that it is not an important factor to be taken into account and perhaps, in a given situation, the determinative factor. The Court of Appeal has frequently emphasized the necessity to bring trials in the appropriate venue taking into account the likely sentence to be imposed in the event of conviction: see, e.g., *KWOK Chi-wai & Anor. v HKSAR* CACC12/2005; *TAI Chi-wai & Anor v HKSAR* CACC497/2006. This is acknowledged in the current Code for Prosecutors (2009) published by the Department of Justice. It would be naive to suggest, and the respondent has not sought to do so, that it did not play an important role in these decisions.

31. Which leads to the contention that by certain accused having been tried in the Court of First Instance and others in the District Court there has been an inequality of treatment. That argument, it seems to me, may avail the applicants in the event that these proceedings related to the deprivation of a constitutional right, which they do not. In any event, the

contention ignores the reality of the situation which, as the applicants contentions demonstrate in HCAL107/2008, is that even where similar matters have been tried in the Court of First Instance the resulting sentences frequently fall within the jurisdiction of the District Court. However, as the respondent is required to consider venue in respect of each matter on its own merits and as each matter will have factors peculiar to it, comparison with other decisions without being aware, at least, of the facts of them is of no practical value.

32. The respondent has also been criticised for saying that he sees "no good reason" for the applicant in HCAL42/2008 not to be tried in the District Court and for the applicants in HCAL107/2008 to be committed for trial in the Court of First Instance. The respondent's assertion simply demonstrates that he had fully considered the consequences of the decision to transfer the trials to the District Court.

Conclusion

33. I am satisfied that the reasons which were furnished by the respondent for his decision to transfer the proceedings to the District Court were sufficient on the factual situation in each instance.

34. Consequently, each application is dismissed.

35. Costs are to follow the event: the applicants are to pay the respondent's costs, to be taxed if not agreed, in respect of their respective applications including the application for leave.

(A R WRIGHT)

Judge of the Court of
First Instance

Mr Kevin Zervos, SC, DDPP, and Mr. Alex Lee, SADPP, of the Department of Justice, for the Respondent.

Mr Philip Dykes, SC, Mr Hectar Pun, and Ms Jocelyn Leung, instructed by Messrs Fairbairn Catley Low & Kong for the Applicant (HCAL 42/2008).

Ms Gekko Lan, instructed by Messrs Joseph SC Chan & Co. for 1st and 2nd Applicant (HCAL 107/2008).

Annex C

CACV 55 & 151/2009

CACV 55/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 55 OF 2009
(ON APPEAL FROM HCAL NO. 42 OF 2008)

BETWEEN

CHIANG LILY	Applicant
and	
SECRETARY FOR JUSTICE	Respondent

CACV 151/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 151 OF 2009
(ON APPEAL FROM HCAL NO. 53 OF 2009)

BETWEEN

CHIANG LILY	Applicant
and	
SECRETARY FOR JUSTICE	Respondent

Before : Hon Ma CJHC, Stock VP & McMahon J in Court

Dates of Hearing : 15 & 16 July 2009

Date of Handing Down Judgment : 21 September 2009

J U D G M E N T

Hon Ma CJHC :

1. The two appeals (both arising in judicial review proceedings) have their origins in a decision of the Respondent (the Secretary for Justice) made in March 2008, in which it was indicated to the Applicant, an accused charged with several indictable offences, that the venue for her trial would be the District Court. In the first appeal, the issue is whether the Respondent's decision could be challenged on the basis that it was unreasonable. Wright J held it could not and dismissed the application for judicial review. In the second, where leave to institute judicial review proceedings was refused by the court below, the main issue is whether leave should have been refused on the basis that the application for judicial review constituted an abuse. Wright J did not decide this issue; instead refusing leave on the basis that no arguable ground existed. The abuse issue arose before us by way of a Respondent's Notice. Underlying both sets of proceedings for judicial review is the wish of the Applicant to be tried in front of a jury. However, I ought to make clear at the outset that these appeals are not about whether a right to a jury trial exists in Hong Kong; it is accepted there is no right or entitlement as such. It also ought to be made clear that while the Applicant wishes to have a trial by

jury, it is accepted that there is no question of any unfairness were a trial to take place in the District Court.

2. Before dealing with the issues that arise in these appeals in greater detail, I ought first set out the factual context and the relevant statutory scheme.

3. On 23 October 2007, the Applicant was arrested by the ICAC. In January 2008, the Applicant, together with another person, was charged with one charge of conspiracy to defraud and two charges of making a false statement as a director (contrary to section 21 of the Theft Ordinance Cap. 210) : -

(1) The conspiracy charge related to a company called Pacific Challenge Holdings Limited ("PCHL"), a company that had been founded by the Applicant in 1999. It is alleged that the Applicant conspired with others to defraud investors of that company, as well as the Securities and Futures Commission and the Stock Exchange of Hong Kong ("the SEHK"), by concealing the fact that under a share option scheme of PCHL involving some 23,880,000 shares, some of the company's employees who were to subscribe to the shares were merely nominees for the Applicant herself. The relevant date of this conspiracy was sometime between 1 February 2002 and 31 August 2002.

(2) The 2nd charge alleged that on 22 April 2002, the Applicant and other officers of PCHL agreed to publish an Announcement which was misleading or false in that the

company's employees who were given share options under the scheme referred to above, might not themselves be the beneficial owners of the shares.

(3) The 3rd charge related to the publication of an alleged false statement contained in a letter dated 6 June 2002 in which it was stated that 21,492,000 shares options would be granted to certain employees of PCHL. The allegation was that these employees were not be the beneficial owner of the shares under the option.

4. By a letter dated 29 February 2008, the Respondent informed the Applicant's solicitors, Fairbairn Catley Low & Kong ("FCLK") that at the next court appearance (scheduled for 3 March 2008), two additional charges would be laid against her. The two additional charges were : -

(1) A 4th charge alleging that between 16 January 2001 and 5 December 2001, the Applicant together with others made a false representation with intent to deceive the SEHK in relation to another company, Eco-Tek Holdings Limited ("Eco-Tek"), a company also founded by the Applicant in 1999. The false statement was it was represented that after a placing and capitalization issue, 8,844,800 shares of that company was held by one Yip Yuk-chun, when in truth the Applicant had an interest in some or all of these shares. The charge was made under section 16A of the Theft Ordinance.

(2) A 5th charge under section 351 of and Schedule 12 to the Companies Ordinance Cap. 32, in which it was alleged that on 21 December 2001, the Applicant and another person authorized the issue of a prospectus for Eco-Tek that contained a false statement to the same effect as in charge 4.

5. The letter of 29 February 2008 also stated that at the court hearing scheduled for 4 March 2008, the prosecution would seek to transfer all five charges to be tried in the District Court. This was an obvious reference to section 88 of the Magistrates Ordinance, Cap. 227 (to which I shall return when I deal with the relevant statutory scheme), whereby upon the application of the Respondent, a committing magistrate would have to make an order transferring all relevant charges for trial in the District Court.

6. On 3 March 2008, FCLK responded in a letter indicating that the Applicant wished to have a trial by jury on the charges. The Respondent was accordingly requested to reconsider his position to take into account this wish. The hearing originally scheduled in the Magistrates Court on 4 March 2008 was adjourned to 25 March 2008.

7. By a letter dated 20 March 2008, it was indicated to FCLK that the original decision to apply to have the five charges tried in the District Court, would be maintained and that, accordingly, the prosecution would ask that there be a transfer to the District Court. At the hearing on 25 March 2008, the Respondent did apply for the transfer of the criminal proceedings to the District Court, but no order was made and the matter was again adjourned (presumably it had been indicated that judicial review proceedings were being contemplated by the Applicant).

8. It was this letter of 20 March 2008 that led to the application by the Applicant for leave to institute judicial review proceedings. The Form 86A application was issued on 5 May 2008 this was the 1st judicial review proceedings with which we are concerned (HCAL 42/2008) ("the 1st Judicial Review"). Hartmann J granted leave on 16 May 2008 and also ordered that there be a stay of the criminal proceedings pending the outcome of the judicial review proceedings.

9. The substantive hearing of the 1st Judicial Review took place on 2 February 2009. Wright J also heard at the same time another judicial review that had been brought by two other applicants who were charged with thirteen charges of conspiracy to defraud and a charge of offering an advantage to an agent. These other judicial review proceedings (HCAL 107/2008) involved a separate decision to that in the 1st Judicial Review, but as common issues arose in both, Wright J directed that they be heard at the same time. We are now no longer concerned with HCAL 107/2008: following the judge's dismissal of that application for judicial review, the Applicants in those proceedings did not appeal.

10. At the hearing on 2 February 2009, the Applicant was represented by FCLK as her solicitors, and, as counsel, Mr Philip Dykes SC, Mr Hectar Pun and Miss Joycelyn Leung. Following the hearing, on 9 February 2009, Wright J handed down his judgment in which both applications for judicial review were dismissed. I shall be dealing in greater detail with the issues arising in this judicial review later in this judgment; for the time being, it suffices to say that the judge was of the view that adequate reasons had been given by the Respondent for the decision to have the charges tried in the District Court. The Applicant appealed by a Notice of Appeal dated 13 March 2009 (CACV 55/2009).

11. With the 1st Judicial Review dismissed, the criminal proceedings against the Applicant were able to resume. On 16 March 2009, the committing magistrate (Ms Bina Chainrai) made an order under section 88 of the Magistrates Ordinance transferring the criminal proceedings against the Applicant to the District Court for trial. It will be recalled that at the hearing on 25 March 2008, the prosecution had already applied for a transfer (see paragraph 7 above).

12. The Applicant and her co-accused appeared in the District Court on 3 April 2009 but the matter was adjourned to 8 May 2009. On 7 May 2009, the Applicant and the Respondent consented to an adjournment to 18 August 2009 pending the outcome of the appeal from the 1st Judicial Review.

13. On 14 May 2009, the Applicant instituted another application for judicial review, this time against the decision of the magistrate made on 16 March 2009 transferring the criminal proceedings against her to the District Court ("the 2nd Judicial Review"). Wright J heard the application for leave on 1 June 2009. This was an inter partes hearing; the Respondent (as the putative Respondent in these new proceedings) made submissions.

14. The same day, Wright J dismissed the application for leave on the basis that it was not arguable, applying the test laid down by the Court of Final Appeal in *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676.

15. The Applicant has appealed the decision refusing leave by a Notice of Appeal dated 29 June 2009 (CACV 151/2009). Before dealing with the issues in both this appeal and CACV 55/2009, I ought to set out the relevant statutory context.

A. *The statutory scheme*

16. Criminal offences in Hong Kong are divided into summary offences and indictable offences : -

(1) Summary offences are criminal offences other than treason, or where the words "upon indictment" or "an indictment" appear in a relevant statute, or where an offence has been transferred to the District Court for trial under Part IV of the Magistrates Ordinance (see section 14A(1) of the Criminal Procedures Ordinance, Cap. 221).

(2) An indictable offence is an offence other than a summary one. It means a crime or offence for which a magistrate is authorized or empowered or required to commit an accused for trial before the District Court or the Court of First Instance (see section 2 of the Magistrates Ordinance).

17. Summary offences may subject to limited circumstances only be tried in the Magistrates Court. Many indictable offences, on the other hand, may be tried either summarily, or in the District Court or the Court of First Instance. Where an offence is stated in an Ordinance to be triable either summarily or on indictment (or punishable on summary conviction or on indictment), then it can be tried either summarily (in the Magistrates Court) or on indictment (in the District Court or the Court of First Instance): section 14A(4) of the Criminal Procedure Ordinance. Where the offence is treason, or where the words "upon indictment" or "on indictment" appear and it is not further stated that the offence can be tried or is punishable either

summarily or on indictment, then the offence can *only* be tried on indictment: section 14A(2) of the Criminal Procedure Ordinance.

18. The Magistrates Ordinance contains detailed provisions regarding the trial of summary offences, the trial by Magistrates of indictable offences and the transfer or committal by the Magistrates Court of indictable offences to the District Court or the Court of First Instance. The sentencing jurisdiction of each of these levels of court are well-known. Only the Court of First Instance has unlimited jurisdiction in this respect (subject of course to the limits imposed by statute).

19. The offences with which the Applicant were charged, are all indictable offences. Accordingly, as Wright J pointed out in his judgment, they were first dealt with in the Magistrates Court in committal proceedings in accordance with the procedures laid down in Part III of the Magistrates Ordinance.

20. In terms of a transfer for trial (that is, ignoring the possibility of a guilty plea, a finding by the Magistrates Court that there is insufficient evidence to commit for trial or a summary trial), there are two possible venues: the District Court and the Court of First Instance.

21. We are concerned in the present case with a transfer for trial to the District Court. The relevant provisions are contained in Part IV of the Magistrates Ordinance, in particular section 88 : -

> "**88. Transfer of certain indictable offences**
>
> (1) Notwithstanding anything contained in any other provision of this Ordinance but subject to subsection (3), whenever any person is accused before a magistrate of any indictable offence not included in any of the categories specified in Part III of the

Second Schedule, the magistrate, upon application made by or on behalf of the Secretary for Justice -

(a) shall make an order transferring the charge or complaint in respect of the indictable offence to the District Court; and

(b) may, if the person is also accused of any offence triable summarily only, make an order transferring the charge or complaint in respect of the summary offence to the District Court.

(2) An application under subsection (1) may be made either orally in open court or in writing.

(3) Subsection (1) shall not apply in relation to any proceedings transferred to be dealt with summarily by a magistrate pursuant to section 65F of the Criminal Procedure Ordinance (Cap. 221) or section 77A of the District Court Ordinance (Cap. 336) or transferred for a preliminary inquiry pursuant to section 77A of the District Court Ordinance (Cap. 336)."

22. The effect of section 88, which was at the centre of the Applicant's submissions, is this: where the Secretary for Justice applies to a magistrate for the transfer of a charge or complaint made against an accused person to be dealt with in the District Court, the magistrate *must* make an order to this effect; in other words, there is no discretion to refuse an order for transfer.

23. The decision of the Court of Appeal in *David Lam Shu-Tsang v Attorney General*, unreported, CACV 42 and 43 of 1977, 7 November 1977 confirms that the machinery under section 88 is a mandatory one. As Pickering JA said at page 6 (when addressing the background and effect of that provision) : -

" When a community, through its Legislature, radically alters the structure of its Courts and, as a corollary to so doing, provides by a new section of an established enactment, the exclusive machinery whereby criminal cases shall reach a newly constituted Court itself obviously the subject of a wholly new contemporaneous enactment,

> it is idle to attempt to construe that transferal section of the existing enactment without reference to the all-pervading shift in juridical competence enshrined in the new legislation. The scheme of the legislation was clear and fragmentation of interpretation has no part in that scheme. That, I believe, must be the principle and applying it to the facts of the present case, whereas in 1953 the former Magistrate's Courts, the Supreme Court and the Full Court remained in existence there came into being, at a level between the Magistrate's Courts and the Supreme Court, a completely new jurisdictional tier in the form of the District Court in which, by the very constitution of the Court, there was no room for a jury. It was to this Court that transfer of cases from the Magistrate's Courts was contemplated and the section providing for mandatory transfer of indictable offences upon the application of the Attorney General contained no saving clause, nothing to the effect that the Attorney General must consult the wishes of the accused and nothing giving the accused any right of objection to the transfer. The discretion as to whether to apply for transfer was invested solely in the Attorney General and, upon his exercising that discretion by electing for transfer, the obligation to transfer lying upon the Magistrate was absolute. The scheme of the legislation was clear beyond a peradventure and it entailed, with equal clarity, the deprivation of the former common law right to trial by jury."

24. The final part of the quoted passage makes a reference to the right to trial by jury. There is no such right in Hong Kong and it was not contended on behalf of the Applicant that there was any right to a trial by jury that belonged to an accused.

25. The only reference to trial by jury in the Basic Law is Article 86 : -

> "**Article 86**
>
> The principle of trial by jury previously practised in Hong Kong shall be maintained."

In the court below, much time was devoted to the question of what was the "principle of trial by jury previously practised in Hong Kong". In view of the concession that there was no right to a jury trial in Hong Kong as such, it is unnecessary in the present appeals to go into this question.

26. I now deal with the two appeals.

B. *CACV 55 of 2009*

B1. *The challenge*

27. The relevant decision that was challenged in these judicial review proceedings was that contained in the letter dated 20 March 2008, namely the decision by the Respondent to have the criminal charges against the Applicant transferred to the District Court under section 88 of the Magistrates Ordinance.

28. In the Form 86A application in HCAL 42/2008, concessions were made narrowing the ambit of the judicial review challenge in the following way : -

> "**V GROUNDS OF REVIEW**
>
> 57. It is not the Applicant's case that she has an absolute right to jury trial. The "principle" referred to in Article 86 of Basic Law is to be understood as referring to a system in which a person accused of an indictable offence was liable to be tried on indictment, unless the Secretary for Justice intervened and required summary trial before a magistrate or District Judge.
>
> 58. It is not the Applicant's case that she cannot have a fair trial in the District Court. The right to a fair trial "by the judicial organs" of the HKSAR is expressly guaranteed by Article 87 of Basic Law. That means a fair trial before a magistrate, a District Judge or a judge of the Court of First Instance when sitting with a jury.
>
> 59. It is not the Applicant's case that there is necessarily something inherently and irredeemably unfair in giving the prosecution the right to decide where a case should be tried. In at least one jurisdiction, Scotland, the procurator fiscal, as "master of the instance", decides upon the venue of trial in a criminal justice system which allows for summary trial before a District Court (60 days imprisonment maximum) or

> before a sheriff (12 months' imprisonment maximum) or trial by "solemn procedure", i.e. with a jury, before a sheriff (5 years' imprisonment maximum) or before a judge of the High Court of Justiciary (jurisdiction limited only by offence).
>
> 60. It is the Applicant's case however that, unlike Scotland, or England & Wales for that matter, trial by jury has an entrenched constitutional value. There is, in addition, a legislative presumption that a person accused of an indictable offence is entitled, unless there is intervention by the prosecutor on behalf of the SJ, to go through committal proceedings and, if those proceedings succeed, will be entitled to be tried on indictment."

29. Given the concessions made by the Applicant in the Grounds of Review in the Form 86A as set out in the previous paragraph, it is clear that no constitutional challenge was made by the Applicant as to the legislative scheme under Part IV of the Magistrates Ordinance, and, in particular within that part, section 88. This is a point that assumes considerable importance when I come to deal with CACV 151/2009 and the question of abuse that arises in it.

30. Instead, the challenge was directed only at the decision by the Respondent. As Mr Johnny Mok, SC (who represented the Applicant in both appeals with Mr Hectar Pun) ultimately made clear, it was said that the decision was unreasonable in the Wednesbury sense; in other words, it was an irrational decision. Where a challenge is made on this basis (finding its origins in the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1KB 223), broadly speaking, it is necessary for an applicant to demonstrate, for example, that in arriving at the relevant decision, a decision-maker displayed bad faith, or took into account extraneous factors, or failed to take into account relevant ones or disregarded public policy. In the context of a prosecutor's decision-making powers, see also *David Lam* (in particular the decision of the Full Bench reported in

[1977] HKLR 393, at 402-3) and the decision of this court in *Re C (A Bankrupt)* [2006] 4 HKC 582, at 591 H-J (paragraph 20). Traditionally, a challenge on this basis has in practice involved a high hurdle to overcome.

B2. *The decision contained in the letter dated 20 March 2008*

31. It is accordingly in this context that I must now examine the letters dated 3 March 2008 (from FCLK to the Respondent) and dated 20 March 2008 (from the Respondent in reply) in greater detail.

32. It will be recalled that by the letter dated 29 February 2008 (see paragraphs 4 and 5 above), the prosecution informed the Applicant of two additional charges being laid and, more important for present purposes, that the Respondent would seek to have all five charges transferred so as to be dealt with in the District Court. It was in response to this letter that FCLK wrote to the Respondent on 3 March 2008.

33. In that letter, the following points were made on behalf of the Applicant to the Respondent to contend that she should be tried in front of a jury : -

(1) A historical background was provided which included references to Article 86 of the Basic Law and the case of *David Lam* (see paragraphs 23 and 25 above).

(2) The crimes with which the Applicant were charged were said to be serious ones, attracting a possible sentence of up to 51 years. The letter continued in this respect : -

> "Obviously, such a sentence will not be passed, but it is worth making the point that the offences are serious and that

> prosecutorial discretion about choice of venue should not be a vehicle for unwarranted and avoidable clemency at the hands of a judge who might, if sitting in another court, pass a different sentence."

(3) Trial by jury was referred to as a "Common Law right" and the "right to a jury trial" being a "fundamental right of a British subject in colonial days".

(4) It was said that the "right" to a jury trial had been taken away by the amendments introduced in 1953 which established the District Court as a venue for criminal cases and which also introduced the present section 88 of the Magistrates Ordinance (see the reference to this in the passage from *David Lam* as set out in paragraph 23 above). Even though it appears to have been accepted that the prosecution had the discretion to decide on the venue for trial (Article 63 of the Basic Law stating that the Department of Justice "shall control criminal prosecutions free from any interference" was also referred to), the Respondent was urged to take into account the fact that there were considerably more persons qualified to be jurors in Hong Kong now than in 1953. The Respondent was reminded that the prosecution policy regarding venue for trial had consequently to be continually kept under review.

(5) It was also said that insofar as any decision not to proceed by way of trial by jury might be dictated by resource constraints or implications imposed by other branches of Government, such a decision would have been tainted by some form of interference.

34. Before dealing with the reply of 20 March 2008, I ought just to make the following observations in respect of this letter from FCLK, for this will be of some relevance when I come to deal with the question of abuse arising in CACV 151/2009 : -

(1) It is clear from all the reference to the Basic Law that the Applicant could be taken to be fully aware of the constitutional considerations that arose in the context of a decision to have criminal proceedings transferred to be dealt with by the District Court (under section 88 of the Magistrates Ordinance).

(2) Although it seems to have been asserted that there was some form of Common Law right to a jury trial, on analysis, it was accepted by the Application that she had no such right once account was taken of the discretion belonging to the Respondent to decide the venue for trial under section 88 of the Magistrates Ordinance

35. The relevant part of the letter of 20 March 2008 from the Respondent to the FCLK stated as follows : -

> " Having carefully considered your letter, I maintain my decision that the District Court would be a proper venue for the trial in this case and that the trial should be held in the District Court. Should your client be convicted it is unlikely that her conduct would attract a sentence of imprisonment greater than the jurisdiction of the District Court. I note you have not referred to any matter peculiar to your client which would prevent her from receiving a fair trial in the District Court. I have no doubt that your client can and will receive a fair trial in the District Court and I see no good reason why her case should not be tried there. My decision was not affected in any way by resource constraints."

36. Four points made in this passage ought to be emphasized : -

(1) That the points made in the letter dated 3 March 2008 from FCLK had been "carefully considered".

(2) Emphasis was laid on the fact that the likely sentence that the Applicant would receive if found guilty would not exceed the jurisdiction of the District Court (namely 7 years imprisonment).

(3) Nothing had been referred to in the 3 March 2008 letter "peculiar to [the Applicant]" that would prevent a fair trial from taking place in the District Court.

(4) Resource constraints did not affect the decision to have the charges dealt with in the District Court.

37. Before us, Mr Mok emphasized time and again the importance of a trial by jury to an accused. Ultimately, although he had to shy away from any suggestion that there was any such right, it was nevertheless submitted that this was such an important factor that due, if not weighty, consideration had to be given to it by the Respondent in arriving at a decision whether or not to apply under section 88 of the Magistrates Ordinance for the transfer of criminal proceedings to the District Court. It was contended that the Respondent had not given any due (or even any) consideration to this aspect in arriving at the decision to apply for a transfer. Mr Mok pointed to the absence of any detailed reasons contained in the 20 March 2008 letter going to this aspect or even reasons dealing with those factors identified in the Statement of Prosecution Policy and Practice published by the Department of Justice. Criticism was made of the failure to weigh and evaluate the various

factors that had to be considered, and of the undue emphasis on the likely sentence that the Applicant would receive if she were convicted.

B3. *Analysis*

38. In my judgment, none of the criticisms made by the Applicant is enough, individually or cumulatively, to impugn the decision to apply to have the proceedings transferred to the District Court : -

(1) Insofar as the challenge was based on the decision being unreasonable in the Wednesbury sense, the Applicant has not gone anywhere far enough to succeed along this lines. There is nothing inherently unreasonable in a decision to apply for a transfer when the main reason is the likely sentence that might be imposed if a conviction were to materialize. As Wright J pointed out in his judgment, the Court of Appeal has in a number of cases emphasized the importance of taking into account the possible sentence when determining the venue for trial.

(2) Insofar as the challenge is based on a suggested failure to take into account relevant factors, the points made by the Applicant in the letter dated 3 March 2008 letter from FCLK (see paragraph 33 above) were stated in the 20 March 2008 letter (see paragraph 35 above) to have been "carefully considered". There was a faint suggestion made by Mr Mok that perhaps the points made by the Applicant should have been dealt with individually and in greater detail by the Respondent but, with respect, even

assuming there to be such a general obligation (which I doubt) the fact that they were not so dealt with does not equate to the decision being unreasonable, whether in the Wednesbury sense or otherwise. Furthermore, the fact that the Respondent might have addressed the points individually does not mean he did not address them.

(3) It is also important to highlight the point made in the 20 March 2008 letter that the Applicant had not referred to any aspect "peculiar" to her that would prevent a fair trial from taking place in the District Court. This was effectively emphasizing the fact that no factor had been identified by the Applicant to suggest that a jury trial would be, in her case, any fairer than a trial in the District Court. The only matters that perhaps could be said to be peculiar to the Applicant was her subjective desire to have a trial by jury and the fact that she was charged with serious offences that might attract long sentences were she to be convicted.

(4) Yet, the sentence aspect was already considered by the Respondent so there can really be no valid complaint here.

(5) As to the Applicant's subjective desire to have a trial by jury, while I acknowledge the importance of this as far as an accused is concerned, where, however, there is no constitutional right to a trial by jury and in the absence of any objective, peculiar and powerful features pointing to the desirability of a trial by jury rather than before a single

judge, it is difficult to see why this factor should be elevated into almost a paramount one, as the Applicant's submissions impliedly suggest. In any event, as shown above (see sub-paragraph (2)), it was duly considered by the Respondent. Mr Mok criticized the Statement of Prosecution Policy and Practice for omitting even to identify this desire as a factor to be taken into account, but this cannot mean that this factor was not in fact taken into account in the present case; it clearly was, since all the points made by the Applicant had been "carefully considered." I would also observe here that insofar as the Statement of Prosecution Policy and Practice is concerned, there is no challenge made to it in the present judicial review proceedings.

(6) As to the argument that the Respondent did not deal with each of the factors contained in the Statement of Prosecution Policy and Practice, I cannot agree with it. It is not for the Respondent to demonstrate that each factor has been considered in his decision; the burden is on the Applicant (as indeed it is incumbent on any applicant in judicial review proceedings) to demonstrate that the decision is flawed and provide details of this before a Respondent is required to answer them.

(7) Lastly, it is difficult to see how the Respondent could have dealt with the Applicant's letter dated 3 March 2008 in any greater detail or provide reasons in addition to those

provided, when the Applicant had provided no reason of her own as to why she preferred or desired a trial by jury.

B4. *Conclusion on CACV 55/2009*

39. For these reasons, the appeal in CACV 55/2009 is dismissed.

C. *CACV 151 of 2009*

C1. *The challenge*

40. It will be recalled in the above chronology of events that following the dismissal by Wright J of the 1st Judicial Review on 9 February 2009, the criminal proceedings against the Applicant were able to resume. On 16 March 2009, Ms Bina Chainrai made an order under section 88 of the Magistrates Ordinance transferring the five charges laid against the Applicant to be dealt with in the District Court. On 14 May 2009, two months later, the Applicant instituted the 2nd Judicial Review, this time challenging the decision of the 16 March 2009.

41. The application for leave to institute judicial review proceedings against this decision sought a declaration that "section 88 of the Magistrates Ordinance, Cap. 2 to 7 is inconsistent with Articles 2, 19(1), 80, 85 & 86 of the Basic Law …. and is unconstitutional". The argument was essentially this : -

(1) The effect of section 88 conferred on the Respondent a power to determine the venue for criminal cases and this was a power that was entirely within his discretion.

(2) The power to decide the proper venue for a criminal trial should, however, vest in the court. It is a judicial power and not an administrative one, and the exercise of judicial power belongs to the court. This, it is said, was the effect of the concept of the separation of powers contained in the Basic Law.

(3) Accordingly, the effect of section 88 being to take away the exercise of this judicial power from the court and instead vesting it in the Secretary for Justice, this provision thereby contravened the Basic Law, was unconstitutional and therefore had to be struck down.

42. In support of this position, reference was made by the Applicant to the position in various jurisdictions such as Canada, the United Kingdom and the United States. Two observations can be made in this context : -

(1) In these jurisdictions, there may indeed be entrenched rights to a jury trial given to an accused. By contrast, as mentioned above, there is no such absolute right in Hong Kong (although it should be pointed out that where the venue chosen is the Court of First Instance, there is in that instance a requirement for jury trial). This will not be too dissimilar to the position in some jurisdictions where certain offences (usually relatively minor offences) can be dealt with summarily without there being a right to a jury trial.

(2) In those jurisdictions where there is a right to trial by jury, the choice belongs to an accused. There is generally no question of a court being asked to exercise a judicial power to determine whether a trial by jury should take place. In other words, in such jurisdictions, the choice of venue is then left to an accused rather than (as in Hong Kong) the prosecution. The court is simply not engaged in the question of deciding the venue for trial.

43. The focus then of the 2nd Judicial Review being a challenge on the power vested in the Respondent to determine the venue for trial in criminal proceedings, the inevitable question arises as to why this challenge was not made in the 1st Judicial Review. After all, the very legal basis for the challenge against the decision contained in the 20 March 2008 letter was that once the Respondent decided to apply under section 88 for a transfer of the proceedings to the District Court, this was inevitable and an order would have to be made by the committing magistrate. The Form 86A in HCAL 42/2008 made this abundantly clear when identifying the decision challenged in those proceedings: -

> "**Judgment, Order, Decision or other Proceeding in respect of which relief is sought**
>
> The decision of the Secretary for Justice contained in a letter dated 20 March 2008 refusing to continue the committal proceedings in ESCC 105/2008 against the Applicant under Part III of the Magistrates Ordinance ("the MO") but, instead, requiring the said proceedings to terminate with the transfer of the case to the District Court under section 88 of the MO."

44. By the time the 1st Judicial Review was launched on 5 May 2008, the Respondent had already (on 25 March 2008) applied to the court for a transfer under section 88 (see paragraph 7 above).

45. At the hearing of the application for leave before Wright J on 1 June 2009, it was contended by the Respondent that the application for judicial review constituted an abuse and leave therefore should be refused on this basis. The abuse alleged was that it had been entirely open to the Applicant to argue the same point in the 1st Judicial Review as was attempted to be pursued in the 2nd Judicial Review. Yet it was not; worse still, this was a point that had expressly been conceded in the earlier judicial review.

46. In his judgment of 1 June 2009 dismissing the application for leave, Wright J did not reach any conclusion on the abuse issue, although he did remark that no acceptable reason had been given as to why a declaration of unconstitutionality was not sought in the 1st Judicial Review. The Judge also found the submissions on abuse (from the Respondent) "attractive". Instead, the learned judge determined the constitutional issue and concluded it was not reasonably arguable.

47. For my part, it is first necessary to determine the abuse issue. If leave ought to have been refused on account of the proceedings constituting an abuse, then the court should not, as a matter of principle, deal with any other issue, even accepting (for present purposes) that the relevant issue may be one of importance. It would be wrong for a court to deal with other issues if it came to the conclusion that the proceedings were an abuse. To do so would largely play into the hands of the party in default and provide an unfortunate precedent whereby despite the existence of abuse, the court nevertheless continued with the proceedings as if the abuse never occurred. Such an approach would mean that the court might also be asked to adjudicate on the merits of a case in the hope, if not expectation, that if they were good, the abuse might somehow be overlooked when, as a matter of

principle, abuses ought not be. Obviously, circumstances may dictate a different approach but in the present case, it would have been more appropriate to have dealt with the abuse issue first.

48. In the appeal before us, both sides at first addressed only the merits of the application for leave to institute judicial proceedings (that is, the constitutional issue). It was only when the court raised with Mr Kevin Zervos, SC (for the Respondent) the issue of abuse that it came to be dealt with. For this purpose, leave had to be obtained to serve a Respondent's Notice raising the above issue. Leave was not resisted. The Applicant was, however, given leave to serve an affidavit from the solicitors seeking to explain why the constitutional argument was not raised in the previous judicial review proceedings. I shall in due course deal with this affidavit.

C2. *The legal approach*

49. Section 21K(3) of the High Court Ordinance, Cap. 4 states that no application for judicial review can be made unless leave has been obtained. This requirement is repeated in RHC Order 53 rule 3(1). For example, where a potential applicant has insufficient standing (see section 21K(3) and RHC Order 53 rule 3(7)) or has delayed his application for judicial review (see section 21K(6) and RHC Order 53 rule 4), leave may be refused.

50. The leave requirement is an important feature of judicial review. Given the impact that many decisions of a public nature have and therefore the need for certainty in decisions that can affect many people, the need to filter out unmeritorious applications assumes considerable importance. Even

where decisions may affect only a limited number of people, sometimes just one person, the public interest demands that decisions should be challenged in a timely manner and on proper basis. In *Po Fun Chan v Winnie Cheung* (a case involving a challenge to a decision of the governing body for accountants rejecting the applicant's application for reinstatement), the Court of Final Appeal emphasized the importance of expedition: Bokhary PJ said at 686G-H (paragraph 9) "the filtering out of unarguable judicial review cases is naturally conducive to according expedition to those arguable judicial review cases in particular need of being dealt with expeditiously"; Litton NPJ at 687E-F (paragraph 23) referred to the "just, expeditious and economical" disposal of grievances.

51. In the context of criminal charges and criminal trials, much has been said in recent times by the courts deprecating the trend of what are known as collateral challenges which delay or fragment the progress and timely disposal of criminal proceedings: see the comments of Sir Anthony Mason NPJ in *Yeung Chun Pong v Secretary for Justice* (2006) 9 HKCFAR 836, at 849C-D (paragraph 44). It goes without saying that the public interest is clearly in the efficient and expeditious disposal of criminal charges, and that unnecessary delays ought not to be permitted.

52. In this context, undue delay in instituting judicial review proceedings may be a reason to refuse leave. This is an aspect I shall elaborate on later in this judgment. So would an application which does not pass the arguability test (meaning reasonable arguability: a case than on the merits enjoys a realistic prospect of success) laid down in *Po Fun Chun v Winnie Cheung*.

53. In my judgment, it is clear that proceedings which constitute an abuse or are vexatious should be filtered out at the leave stage. The commentary at paragraph 53/14/15 of *Hong Kong Civil Procedure 2009* Volume 1 states as one of the purposes of the leave requirement "to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a later substantive hearing".

54. The abuse with which we are concerned is the bringing of judicial review proceedings on a basis that *could and should* have been brought in earlier judicial review proceedings. The additional feature in the present case is that the very point that was sought to be raised in the 2nd Judicial Review was one that was expressly conceded in the first.

55. In the submissions before us, there was some discussion as to whether the abuse that was alleged was some form of *res judicata* in the wider sense. In order just to identify this principle, I need only refer to two short passages contained in the judgment of Cheung JA in *Ngai Few Fung v Cheung Kwai Heung* [2008] 2 HKC 111 where at 115B-G (paragraphs 11-12), he said : -

> "***Henderson v Henderson***
>
> 11. This principle of estoppel can be found in the well-known case of Henderson v Henderson (1843) 3 Hare 100, where Wigram VC at 115 held that:
>
> > '… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in

> special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

Yat Tung Investment Co Ltd

> 12. This principle was approved by the Privy Council in an appeal from Hong Kong in the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581. Lord Kilbrandon at p 590 held that:
>
> > 'But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.'"

56. It is unnecessary for the purposes of the present appeal to go into the question whether *res judicata* in the *Henderson v Henderson* sense (that is, *res judicata* in the wider sense), strictly speaking, applies. I can envisage complex questions arising as to whether as a matter of law, the 1st and 2nd Judicial Reviews in the present case did actually involve the same parties. While in a sense the parties are indeed the same, yet the decision challenged in the 1st Judicial Review (that of the Respondent) is to be contrasted with the order challenged in the 2nd Judicial Review (that of the committing magistrate). The complexities increase when one enters into an examination of the extent to which *res judicata* applies in public law litigation in the first place.

57. It is unnecessary to dwell on these issues that arise on a consideration of the various facets of the doctrine of *res judicata* if one keeps firmly in mind the real issue that, in my view, has to be addressed, namely, the question of abuse arising from matters that ought properly have been litigated in previous proceedings. I emphasize here the existence of two

elements that have to be demonstrated by the part alleging abuse: that there exist matters that could *and* should have been litigated in earlier proceedings. I am aware that in *Yat Tung* (in the passage quoted in paragraph 55 above), Lord Kilbrandon did refer to "matters which could and *therefore* should have been litigated in earlier proceedings" (my emphasis). However, despite the reservations expressed by the court in *Chen Roy v Wan Ching Lam Anita* [2006] 1 HKC 454 on whether this represents the law on this topic in Hong Kong (see in particular 463F 464E (paragraphs 26 and 27)), I think it is now clear that just because a point *could* have been raised in earlier proceedings did not of itself mean that it *should* have been. This is consistent with the approach of this court in *Tsang Yu v Tai Sang Container Cold Storage and Wharf Limited* [2000] 1 HKLRD 780, at 784A-I and *Ngai Few Fong v Cheung Kwai Heung*. In *Johnson v Gore Wood & Co (a firm)* [2002] 2AC 1, Lord Bingham of Cornhill said at 31A-E : -

> " But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and

> private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

58. The starting point is a statement of general principle that the court must possess an inherent power to prevent abuse in situations that would be manifestly unfair or unjust to a party before it or would otherwise bring the administration of justice into disrepute. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Lord Diplock said in a well-known passage at 536B-D : -

> " My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied."

This inherent power existed in Hong Kong well before the innovations brought about by the Civil Justice Reform but it is all the more underlined by that Reform. The Underlying Objectives stated in RHC Order 1A rule 1(b) and (d) refer to the desirability of expedition and the necessity of ensuring fairness.

59. Apart from any question of *res judicata* (whether in the narrow or wider sense), abuse can arise in attempting to relitigate matters decided in previous rulings that were not strictly speaking binding on the party seeking to raise them in later proceedings: see, for example, *Ashmore v British Coal Corporation* [1990] 2 QB 338.

60. It is important to bear in mind that the roots of the doctrine of *res judicata* lie in the more general principle that the court's process must not be abused: see the decision of the Judicial Committee of the Privy Council in *Brisbane City Counsel v Attorney General* [1979] AC 411, at 425G-H per Lord Wilberforce. In *Johnson v Gore Wood*, Lord Millett said this at 59D-E : -

> " It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."

See also the judgment of Lord Bingham of Cornhill in the same case at 31A-E (set out in paragraph 57 above).

61. These passages emphasizing again the public interest were expressly approved by this court in *Ngai Few Fung v Cheung Kwai Heung*.

62. Much therefore depends in any given case on the precise circumstances as to whether or not the attempt to raise an issue for

determination in proceedings will constitute an abuse where such an issue could have been raised in previous proceedings. Where an issue *should* have been raised, it is likely that an abuse has occurred.

63. I am fully cognisant of the point made by Lord Millet in the passage quoted from *Johnson v Gore Wood* (see paragraph 60 above) that the denial of a person's right to litigate for the first time a matter not previously decided may constitute a denial of access to the court (see here Article 35 of the Basic Law). However, I would observe here that a number of seemingly contradictory principles or concepts can be involved when one is considering whether a party should be shut out from litigating an issue which could have been previously litigated, but has not. The key lies in determining whether an abuse has truly taken place and an examination of the public interest that is involved.

64. Before dealing with the facts of the present case, I ought to deal with an argument advanced by Mr Mok to the effect that the 2nd Judicial Review was different in nature to the 1st Judicial Review in that it involved a decision of the committing magistrate on 16 March 2009, a different decision to the one challenged in the 1st Judicial Review. Not only that, it was said this decision could not have been challenged in the 1st Judicial Review : it will be recalled that the hearing before Wright J in the 1st Judicial Review took place on 2 February 2009, with judgment handed down on 9 February 2009.

65. I have already mentioned RHC Order 53 rule 4 dealing with delay in judicial review proceedings. That Rule states : -

> "**Delay in applying for relief**
>
> 4.—(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
>
> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

66. Accordingly, it could be argued that as the application for leave in the 2nd Judicial Review was made on 14 May 2009, this was well within the 3 month period mentioned in Order 53 rule 4(1). And, as Order 53 rule 4(2) makes clear, the time when "grounds for the application first arose" would be the date of the Order of the 16 March 2009 (an order for certiorari was sought in the Form 86A against this Order).

67. I accept that superficially, these arguments carry some weight and in certain situations, will provide a complete answer enabling a second set of proceedings to continue. However, much again depends on the precise circumstances.

68. The critical issue with which we are concerned is still whether there existed an abuse in the institution of a later set of proceedings on a basis that could and should have been litigated in an earlier set of proceedings. The fact that the later set of proceedings involved a different decision or order is no doubt an important factor to be taken into account, but one must always look at the substance of the matter and not merely the form. In other words, as Lord Diplock implicitly recognized in the passage extracted from

Hunter v Chief Constable of the West Midlands Police (see paragraph 58 above), one must look at questions of abuse ("misuse" is the term he uses) even though what has been done may be consistent with the literal application of procedural rules.

69. Lastly, it was also submitted by Mr Mok that insofar as any abuse may be found to exist consequent upon a point not having been taken by a party in earlier proceedings, it would be a factor for the court's discretion to consider whether the failure was attributable to the legal advisers of that party. The argument was really that any default on the part of the legal advisers ought not be visited on the client. I am aware that in certain circumstances, this may be a factor to excuse a failure to comply with court orders (see for example RHC Order 2 rule 5(1)(f)), but where an abuse is found to exist, I find it difficult to conceive that the failure of a legal adviser can somehow excuse that abuse. The failure of one's legal adviser should hardly affect the question of whether there has been an abuse. The remedies of a party in such a situation lie elsewhere than in being permitted to proceed with a set of proceedings which constitute an abuse of the court's process.

70. With these principles in mind, I now analyse the facts in this appeal.

C3. *Was there an abuse in instituting the 2nd Judicial Review?*

71. In my judgment, it was clearly an abuse to seek to institute the 2nd Judicial Review, and Wright J was correct to refuse leave (albeit he did not do so on this basis).

72. It is first important to note that underlying the 1st Judicial Review was the assumption that under section 88 of the Magistrates

Ordinance, the decision as to the venue of trial in the District Court was left entirely to the discretion of the Respondent and that once a decision was made to seek a transfer, an order to this effect would be inevitable (see paragraph 43 above). Paragraphs 27 and 32 of the Form 86A in HCAL 42/2008 also made this clear : -

> "27. The effect of the enactment of the DCO in 1953 was to take away the benefit of trial by jury at the discretion of a magistrate by placing the decision regarding venue in the hands of the prosecutor. See *In an application by David Lam Shu-tsang & another for an Order of Certiorari* [1977] HKLR 393 and, on appeal, CACV's 42 and 43/1977, unreported, 7 November 1977."
>
> "32. Neither the magistrate nor the defendant can object to the request for a transfer by the prosecutor. Once the order for transfer is made, proceedings before the magistrate are stayed pursuant to section 89(1) of the MO and the magistrate's jurisdiction over the case ends for all practical purposes."

The reference to the enactment of the District Court Ordinance in 1953 is a reference to the legislative changes that year which is established the District Court (see in this context the passage from *David Lam* set out in paragraph 23 above).

73. I have already set out in paragraph 28 above paragraph 59 of the Form 86A in those proceedings, referring to the prosecutions "right to decide where a case should be tried".

74. It was on this underlying basis that the Applicant mounted her challenge in the 1st Judicial Review against the reasoning in the Respondent's decision contained in 20 March 2008 letter.

75. There can be no doubt in these circumstances that a constitutional challenge against section 88 of the Magistrates Ordinance on the basis that the power to determine the venue of trial is a judicial one and should therefore vest in the court rather than the Secretary for Justice, was a challenge that was clearly open to the Applicant to make in the 1st Judicial Review. Accordingly, this was a basis of challenge to the decision contained in the 20 March 2008 letter that *could* have been made in the 1st Judicial Review. The argument that could be mounted would have run something along the following lines: the decision could be impugned on the basis that the statutory vehicle by which an application for transfer could be made (section 88 of the Magistrates Ordinance) was not one that was permissible in law since that provision was unconstitutional in allowing the power to decide venue to be exercised by the prosecution instead of by the court.

76. The Applicant was clearly aware of the possibility of this argument. The concession made in paragraph 59 of the Form 86A (paragraph 28 above), which was repeated in the written submissions placed before Wright J as well as in oral submissions (see paragraph 11 of the judgment handed down on 9 February 2009), demonstrates this. The letter of 3 March 2008 from FCLK to the Respondent also indicated that the Applicant was aware of possible constitutional arguments (see paragraphs 33 and 34 above).

77. The remaining question then is whether this constitutional challenge was one that *should* have been made in the 1st Judicial Review. In my view, it ought to have been : -

(1) The event that triggers an order for the transfer of criminal proceedings to the District Court under section 88 of the

Magistrates Ordinance is an application by the Secretary for Justice for a transfer. Once an application is made, the process is an automatic one as we have seen : in other words, upon an application, the transfer order becomes an inevitability.

(2) Accordingly, in the present case, once the prosecution had stated (or rather, restated), its intention in the 20 March 2008 letter to apply for a transfer, an order under section 88 was bound to be made. In these circumstances, the principle decision as far as a transfer was concerned, must in reality have been the Respondent's decision to apply for a transfer, for this was the triggering event that would inevitably lead to a transfer. Clearly, the Applicant recognized this: hence the 1st Judicial Review being launched.

(3) If, as shown above, the underlying assumption of the 1st Judicial Review was the power given to the Respondent to determine venue, those proceedings were clearly the most appropriate proceedings to mount a constitutional challenge to that underlying assumption. It should be noted that by the time the 1st Judicial Review was heard by Wright J on 2 February 2009, the Respondent had by then (on 25 March 2008) already applied for a transfer under section 88, so that if the matter had come before a magistrate, it was even more inevitable that a transfer order would be made.

(4) Challenging the order made by the committing magistrate on 16 March 2009 in the 2nd Judicial Review amounted, in these circumstances, effectively to a collateral challenge on the original, and principal, decision, which was the very subject matter of the 1st Judicial Review. A collateral challenge can constitute an abuse and ought not be permitted (see the passage from the judgment of Lord Bingham of Cornhill in *Johnson v Gore Wood* set out in paragraph 57 above).

(5) Mounting a constitutional challenge in the 1st Judicial Review was not only open to the Applicant (and those proceedings were clearly the appropriate proceedings in which to do so), it would also have resulted in the least disruption and delay to the criminal proceedings against her. All issues which could have been dealt with, would then have been determined by the court at the same time instead of piecemeal in two sets of proceedings. The delay to and fragmentation of the criminal proceedings cannot be underestimated. The chronology of the present criminal proceedings against the Applicant outlined above demonstrates this. Basically, these proceedings have stopped since the two judicial reviews have been launched, and all this in relation to criminal charges that related to events dating back as far as 2001; the type of history with which the courts are all too familiar, especially in commercial crime cases. Were the 2nd Judicial Review permitted to continue, the proceedings would then revert to the Court of First Instance for the substantive hearing (it

will be remembered that the present appeal only concerns the question of whether leave should have been granted by the court below), and there may be possible consequent appeals as well.

(6) It is a point of some significance that the constitutional challenge sought to be raised in the 2nd Judicial Review was one that was expressly conceded by the Applicant in the 1st Judicial Review. I have already referred to paragraph 59 of the Form 86A in those proceedings.

78. On the point just made in paragraph 77(6) above, I would observe that there is something inherently unattractive in a party resiling from a position taken in earlier proceedings and then seeking to resurrect it in later proceedings. When one adds to this the delay and disruption that is caused where there are, as in the present case, underlying criminal proceedings, the position is very much aggravated. It would, in my view, be an affront to the administration of justice were this permitted to happen unless exceptional circumstances exist to justify such a situation. None, in my view, exists in the present case.

79. As to the relevant circumstances, Mr Mok's submissions here focused on the position of the legal advisers. The following matters are relevant in this context : -

(1) The Applicant engaged the same solicitors for both the 1st and 2nd Judicial Review, namely FCLK.

(2) In the 1st judicial review, three counsel were instructed; in the 2nd Judicial Review, three counsel were also instructed. One counsel was common to both proceedings.

(3) Before us, Mr Mok submitted that the former legal team for the Applicant (those engaged in the 1st Judicial Review) was not aware that a point could be taken that section 88 of the Magistrates Ordinance was unconstitutional and this was only "flagged" when Leading Counsel in London gave an advice subsequent to the judgment in the 1st Judicial Review. This statement of fact from the Bar table, which we wanted verified on oath, led to an affidavit from the partner of FCLK in charge of the case (Ms Barbara Chiu) being served. In it, she clarified what we were told by leading counsel : -

> "4. The former legal team who acted for the Applicant in the 1st JR was not aware that a *viable* point could be taken that s.88 of the Magistrates Ordinance, Cap. 227, is unconstitutional for being in breach of the principle of separation of powers enshrined in the Basic Law. This point was first flagged up when advice was given by Leading Counsel in London on the merits and grounds of appeal against the Judgment of the Honourable Mr. Justice Wright handed down on 9 February 2009 in the 1st JR.
>
> 5. In view of the above, it is not the case that the Applicant or the said legal team had withheld the said constitutional point during the course of the 1st JR and reserved it for argument in a subsequent judicial review application." (emphasis added)

80. From this affidavit, it can, on one view, be inferred that the Applicant's legal advisers must be taken to have been fully aware of the possibility of a constitutional challenge, only that it had not been regarded as

"viable". This view is reinforced by the express concession made in paragraph 59 of the Form 86A in the 1st judicial review (see paragraph 28 above). The change of position (as to whether this point was a viable one) came about, it would appear, when Leading Counsel in London took a different view of the merits.

81. These facts provide no basis whatsoever for justifying what appears *prima facie* to be an abuse of the court's process. Were every change of opinion on the legal merits by a party's legal advisers (or even the unawareness of a possible legal argument) to justify the proliferation of proceedings leading to delay and disruption, this would constitute an unmanageable, not to mention unjust, state of affairs in the administration of justice. The courts have to bear in mind the position of the parties, the public interest and its own resources having to be shared among all litigants who come before them.

82. In the end, Mr Mok submitted that any mistakes on the part of the Applicant's previous legal advisers ought not prejudice the Applicant. I repeat here the point (made in paragraph 69 above) that where there is found to be an abuse of the court's process, it is difficult to see how the failure of a party's legal advisers can provide an excuse. After all, it surely must go without saying that responsibility for the actions (or inaction) of a party's legal advisers must ultimately attach to that party; legal advisers do not enjoy an independent status. This is quite apart from the lack of any evidence to point to this conclusion in the present case: for example, the Applicant has not herself suggested this in any affidavit.

83. For the above reasons, I am of the view it was clearly an abuse bringing the 2nd Judicial Review and, in these circumstances, leave to

institute those proceedings ought not to be given. This is enough to dispose of the present appeal.

84. It is accordingly unnecessary to go into the substantive merits of the leave application. I realize that both parties have dealt with the constitutional challenge at length but, for the reasons stated in paragraph 47 above, it is inappropriate and undesirable to resolve this issue once a finding of abuse has been established. I have assumed for present purposes that the point sought to be raised by the Applicant is an arguable one. No doubt it is an interesting point, although it has to be put in proper context (see paragraph 42 above).

85. Underlying the Applicant's submissions to this court was a plea that somehow it would be unfair if she were deprived of the opportunity to make a constitutional challenge in the 2nd Judicial Review, particularly when under discussion was her desire to be tried by a jury. There are two answers to this : -

(1) First, there can be no unfairness when the 2nd Judicial Review constitutes, as I have found, an abuse of process on her part.

(2) Secondly, the assertion of unfairness must be put in context. The practical effect of the Applicant not succeeding in either of the present judicial reviews is that she will have to face trial in the District Court, a venue she has at no stage alleged to be incapable of providing her with a fair trial (see here the concession made in paragraph 58 of the Form 86A in the 1st judicial review (paragraph 28 above)).

D. *Conclusion*

86. For these reasons, both appeals are dismissed. I would also make a costs order *nisi* that the Respondent should have his costs in these appeals, such costs to be taxed if not agreed.

Hon Stock VP :

87. I agree.

Hon McMahon J :

88. I agree.

(Geoffrey Ma)	(Frank Stock)	(M.A. McMahon)
Chief Judge, High Court	Vice President	Judge of the Court of First Instance

Mr Johnny Mok, SC & Mr Hectar Pun, instructed by Messrs Fairbairn Catley Low & Kong for the Applicant

Mr Kevin P Zervos, SC & Mr Alex Lee of Department of Justice for the Respondent

Annex D

FAMC Nos 64 & 65 of 2009

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FAMC No. 64 of 2009

MISCELLANEOUS PROCEEDINGS NO. 64 OF 2009 (CRIMINAL)
(ON APPLICATION FOR LEAVE TO APPEAL
FROM CACV NO. 55 OF 2009)

Between:

CHIANG LILY **Applicant**

- and -

SECRETARY FOR JUSTICE **Respondent**

FAMC No. 65 of 2009

MISCELLANEOUS PROCEEDINGS NO. 65 OF 2009 (CRIMINAL)
(ON APPLICATION FOR LEAVE TO APPEAL
FROM CACV NO. 151 OF 2009)

Between:

CHIANG LILY **Applicant**

- and -

SECRETARY FOR JUSTICE **Respondent**

Appeal Committee: Chief Justice Li, Mr Justice Chan PJ and Mr Justice Ribeiro PJ

Date of Hearing: 26 March 2010

Date of Determination: 26 March 2010

D E T E R M I N A T I O N

Chief Justice Li:

1. The background to this matter is fully set out in the judgment of the Court of Appeal, [2009] 6 HKC 234 and it is unnecessary to set out the details here.

2. On 23 October 2007, the applicant was arrested by the ICAC. In January 2008, she was charged with two offences. Later, three further charges were added. All five charges relate to commercial crimes including conspiracy to defraud and offences under the Theft Ordinance and the Companies Ordinance.

3. In February 2008, the prosecution notified the applicant that it intended to seek an order for the trial to be transferred to the District Court under section 88 of the Magistrates Ordinance ("section 88"). The applicant objected and in a letter dated 3 March 2008, made representations for her case to be tried before a judge and jury in the Court of First Instance. The Secretary for Justice replied by letter dated 20 March 2008, maintaining his decision to apply for trial in the District Court and, in May 2008, the applicant obtained leave to apply for judicial review to challenge that decision ("the first application").

4. On 9 February 2009, Wright J dismissed the first application and on 16 March 2009, the Magistrate made an order for transfer under section 88. On 14 May 2009, the applicant sought leave to apply for judicial review of the Magistrate's decision of 16 March 2009 ("the second application").

5. On the second application, the applicant contends that section 88 is unconstitutional on the ground that the power to select the venue for a criminal trial is a judicial power, but that the effect of section 88 is to confer that power exclusively on the executive.

6. On 1 June 2009, after hearing the parties, Wright J dismissed the second application, holding that the reasonably arguable case threshold was not met. Consequently, he found it unnecessary to deal with the prosecution's contention that the second application was an abuse of process.

7. On 21 September 2009, the Court of Appeal dismissed the applicant's appeals against Wright J's decisions on both the first and second applications and, on 5 January 2010, it refused to certify various points of law. The applicant now seeks leave to appeal from the Court of Appeal's decision.

8. In the first application, the argument before Wright J focused on whether the reasons given by the prosecution in its letter dated 20 March 2008 for maintaining its decision to apply for transfer to the District Court were adequate. The Court of Appeal agreed with Wright J that the reasons given were adequate. Before it, the argument centred on whether the prosecution's decision was irrational.

9. As is rightly accepted by the applicant, it is clear that there is no right to trial by jury in Hong Kong. Although the applicant's strong preference is for a jury trial, she has not suggested that she cannot have a fair trial in the District Court before a judge sitting alone. Indeed, such a suggestion cannot be responsibly made by any person facing trial in the District Court. There are plainly no grounds for holding the Secretary for Justice's decision to seek trial in that court to be irrational. In the circumstances, the Court of Appeal was plainly right to dismiss her appeal regarding the first application, and there are no reasonable grounds for the grant of leave to appeal from such dismissal.

10. As to the second application, the Court of Appeal held that it was clearly an abuse of the process since it considered that any challenge to the constitutionality of section 88 could and should have been made in the first application. It therefore did not proceed to deal with the merits of the section 88 argument.

11. There can be no doubt that the question of constitutionality could have been raised in the first judicial review application. It is also clear that, as the Court of Appeal pointed out, it should have been raised to avoid highly undesirable delays and disruption to the pending criminal proceedings.

12. The central argument upon which leave to appeal against the Court of Appeal's conclusion of abuse is sought involves the contention that the applicant should not be shut out from arguing a point of which she was herself previously unaware and which her then legal advisers either did not know about or did not consider to be viable, given that her present legal advisers now take a different view and consider it a worthwhile line to pursue. As was put by Mr Johnny Mok SC, who has said all that could be said on behalf of the applicant:

> "If (the original legal advisers) failed to appreciate a difficult or novel line of argument or that such argument is viable, the consequence of that failure should not be visited upon their lay client ..."

13. We do not accept that argument. The fact that a second or subsequent set of lawyers thinks of a new point which the earlier advisers did not consider or might have thought was unmeritorious cannot be a basis for effectively re-opening a matter where arguments then considered proper had been deployed and duly considered. If that were the applicable standard, there would never be finality in any court proceedings. As the Court stated in *Chong Ching Yuen v HKSAR* (2004) 7 HKCFAR 126, a person is generally bound by the way a matter is conducted by his or her counsel. The exception

is where the person in question can show that he or she was deprived of a fair trial because of the "flagrant incompetence" of counsel.

14. In considering whether there has been an abuse of process, all the relevant circumstances have to be considered. But on a leave application like the present, the applicant must show that it is at least reasonably arguable that a charge of flagrant incompetence can properly be made against the earlier advisers. No such allegation is or could possibly be made in the present case. A difference of view taken by counsel now instructed – on a point described as "novel" or "difficult" – falls far short of the applicable standard.

15. While the Court of Appeal declined to deal with the merits, it is in our view clear that the contention that section 88 is unconstitutional because it allocates a judicial function to the Secretary for Justice is not reasonably arguable. Choice of the venue for a prosecution is clearly a matter covered by Article 63 of the Basic Law which gives control of prosecutions to the Secretary for Justice without any external interference. Wright J's conclusion was plainly correct.

16. This becomes obvious once one considers the context and basis of any decision regarding venue. As to context, if selection of venue were a judicial function, the magistrate would have to hear submissions and take evidence bearing on that choice, looking in some detail at the alleged offence and the circumstances of the accused, turning the mere decision as to venue into a mini-trial. That cannot be the proper function of the magistrate.

17. Moreover, the basis of making the selection shows that the function is not judicial. In the Statement of Prosecution Policy and Practice (2009), guidance as to choice of venue is given as follows:

> "In the selection of venue, the sentence which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to examine. The

> prosecutor will also wish to consider the general circumstances of the case, the gravity of what is alleged, the antecedents of the accused and any aggravating factors." (para 14.1)

18. These are plainly matters that may properly guide the prosecutor but which it would be highly undesirable for a magistrate to explore before the trial. It would obviously be most inappropriate for there to be a debate as to likely sentence or antecedents or aggravating factors before the magistrate regarding a person fully entitled to the presumption of innocence. The present system avoids this by properly treating the question of venue as a prosecutorial choice with the transfer following on a mandatory basis.

19. We therefore consider both the complaint against the abuse of process conclusion and the arguments on the merits of the application to be without substance. Accordingly, the applications to certify various points of law and for leave are dismissed with costs.

(Andrew Li)	(Patrick Chan)	(R A V Ribeiro)
Chief Justice	Permanent Judge	Permanent Judge

Mr Johnny Mok SC and Mr Jeffrey Tam (instructed by Messrs Fairbairn Catley Low & Kong) for the applicant

Mr Kevin Zervos SC and Mr Alex Lee (of the Department of Justice) for the respondent

附件 E

立法局司法及法律事務委員會

資料文件

香港陪審團制度

引言

1. 立法局司法及法律事務委員會在 1997 年 3 月 10 日的會議上，要求當局提供一份載述香港陪審團制度的資料文件，大綱如下：

   a) 香港和英國陪審團制度比較，以及差別原因；

   b) 不把陪審團制度延用於地方法院的原因；對於該否最終把陪審團制度延用於地方法院一事，政府所持的立場；以及

   c) 律政司決定審訊法院的現行權力。

I. 香港和英國陪審團制度比較

項目	英國	香港	情況有別的原因
1. 歷史背景	英格蘭在 1066 年後設立陪審團制度。英格蘭的陪審團制度在中世紀經過一番改革：起初陪審員是鄰近地區的居民，他們憑自己對案件的認識來裁決；後來，陪審員是一些中立人士，純粹基於司法程序中各項呈堂證據來裁決。 有關的法例是《1974 年陪審團法令》。	香港於 1845 年首設陪審團制度，目前受《陪審團條例》(第 3 章)的管限。《陪審團條例》第 37 條規定，凡本條例未有規定的情況，英格蘭現行的有關法律均適用於香港(與死因研訊陪審團有關的條文除外)。	歷史原因。

項 目	英 國	香 港	情況有別的原因
2. 陪審團的職責	(請參看香港的一欄。)	香港與英國的情況一樣，陪審團在刑事審判中擔當以下重任： a) 首先，在設有陪審團的審訊中，陪審團斟酌各項事實，然後根據這些事實裁定被告人是否有罪。陪審團作出裁決前，必須考慮是否信納控方純粹是基於審訊中的呈堂證據確立指控，同時又必須遵照法官的法律指引。 b) 其次，陪審團作出一般裁決，確立了法律的施行。陪審團只裁定被告人有罪或無罪，沒有說明理由。陪審團的裁決是不容爭議的。 c) 陪審團審訊制度反映一項原則：由平民百姓作出判決。	無重大差別。

項目	英國	香港	情況有別的原因
3. 刑事審訊有否設立陪審團	在英國，裁判官審理大部分刑事案件，並且對簡易程序罪行擁有獨特的司法管轄權。列爲簡易程序罪行的案件不會設陪審團。涉及可循公訴程序審訊或循簡易程序審訊罪行的被告人，在大多數情況下，可以選擇接受簡易程序審訊(即不設陪審團)，或接受循公訴程序審訊(即設有陪審團)。法院可以下令有關案件循公訴程序審訊，但如被告人反對，則不能堅持進行簡易程序審訊。陪審團審訊在法院進行。皇家刑事審判委員會(1993年)建議限制被告人由陪審團審訊的權利：目前，若案件可以循上述其中一種程序審訊，被告人有權堅持在法院由陪審團審訊。委員會建議撤銷這項權利。	大部分刑事案件都是在裁判法院和地方法院審訊。常任裁判官最高可以對案中被告人判處3年分期執行的刑期，地方法院法官最高可以對被告人判監7年。至於列爲簡易程序罪行的案件，則不會由陪審團審訊。高等法院審理最嚴重的罪行，例如：謀殺和誤殺，因此設有陪審團審訊制度，有關罪行詳載於《裁判官條例》(第227章)附表2第III部(見附件)。	將案件區分爲簡易程序罪行或可公訴罪行作爲提交裁判法院和高等法院審理的根據，香港與英國的情況相似。香港設立地方法院，但地方法院不設陪審團，理由載於本文件第II部。

項 目	英 國	香 港	情況有別的原因
4. 出任陪審員的資格	在英國，陪審員人選必須符合下列資格： a) 年齡介乎 18 至 70 歲； b) 已經登記爲國會或地方政府選民；以及 c) 自 13 歲起已經通常在英國居住最少 5 年。 此外，上述人士不得屬於《1974 年陪審團法令》附表 I 所載喪失資格或不合資格人士的類別。 喪失資格的人士指： a. 不論何時，曾經在英國被判終生監禁或接受適用於青少年的監管，或被羈留聽候女皇發落； b. 在過去 10 年的任何時間內，在英國曾經服過任何部分的監禁刑期，或適用於青少年監管期或羈留期；或曾經被	在香港，任何人如符合《陪審團條例》第 4 條所列準則，均有資格及有法律責任出任陪審員；這些準則包括： a) 年齡在 21 及 65 歲之間； b) 精神健全而無失聰、失明或其他此類衰弱的情況； c) 行爲良好並有充分能力； d) 在香港居住；以及 e) 所具英語知識足以明白證人的證供、律師的陳詞及法官的總結。 《陪審團條例》第 5 條列出一些強制性豁免條款，豁免下列人士出任陪審員： a. 行政局、立法局、市政局及區域市政局議員； b. 太平紳士； c. 公職人員，如法官、政府律政人員、人民入境事務人員； d. 領事；	英國和香港均有制定喪失出任陪審員資格和不合資格的規定，目的如下： 首先，規定涉及司法公正工作的人員或與這些工作曾經有密切關係的人員不得成爲陪審員； 其次，規定那些明顯未能勝任的人不得出任陪審員。 有關法例最低限度隱含一項假定，即能夠出任陪審員執行各種職能者，必須具備基本的智能。 香港與英國在這方面的主要分別，在於香港設有關於英語知識的強制性規定。英國法院根據《陪審團法令》第 10 條授予的權力，可以因爲應傳召出任陪審員的人英語理解

項目	英國	香港	情況有別的原因
	判入獄，或接受羈留令但暫緩執行或曾經被判社會服務令； c. 在過去 5 年的任何時間內，在英國被判接受感化；或 d. 涉及刑事訴訟，但在保釋中。 以下 4 類人士被列爲不合資格出任陪審員： a) 司法機構人員； b) 其他涉及司法公正工作的人士，包括大律師(及其文員)、律師、見習律師、政府刑事檢控處職員、獲授權訟辯人或訴訟人、法院職員、監獄人員和監獄羈留所人員、警務人員和法醫科學家； c) 神職人員；及 d) 精神不健全人士。	e. 實際執業的大律師和律師，以及屬下文員； f. 註冊醫生及牙醫；以及 g. 每日出版報章的編輯、化驗師、牧師及領航員/飛行員。	能力不逮，不能勝任陪審員工作，從而撤銷傳召出任陪審員的傳票。關鍵之處始終在於出任陪審員的人能否充分理解當中的法律程序。 《1997 年陪審團(修訂)條例草案》已經於 1997 年初提交立法局審閱。這條例草案建議用新條文取代現有關於語言知識的規定，即“對在有關的法律程序進行時將予採用的語言所具有的知識，足以令他明白該等法律程序。”希望這條例草案能夠在本屆立法局內制定爲法例。

項 目	英 國	香 港	情況有別的原因
5. 陪審員人數	在英國，陪審團由12人組成。	《陪審員條例》第3條規定，所有陪審團(刑事或民事審訊)須由7人組成，除非法院或法官在審訊進行之前，特別命令陪審團須由9人組成。	在香港，每宗審訊的陪審員人數略少於英國，因爲香港合資格的陪審員人數有限。
6. 選出陪審團	在英國，入選出任陪審員的人士，會收到一份傳票，規定他們依時到刑事法院出庭。傳票夾附一份列表和一套註釋。列表載述不合資格或喪失資格的人物，註釋則闡釋陪審團的工作程序和陪審員的職責。若不依時到刑事法院出庭，可能會被罰款。到達後因爲飲酒或服用藥物以至不適宜出任陪審員，同樣也可能會被罰款。被傳召人可能會士組成一個陪審員小組，個別案件的陪審團成員，就是從這個小組挑選出來。這個小組可以按不同日期或審訊再分組。陪審員名單載有小組成員的姓名、地址以及出庭日期。涉案各方及其代	在香港，關於挑選和組成陪審員小組的程序，載於《陪審團條例》第13及17條，內容如下： a) 步驟一：由(最高法院)司法常務官從全港合資格的人當中選出一些人，編成一份普通陪審員名單。凡有需要召集一個陪審團，司法常務官會以隨機抽選或抽籤方式，從陪審員名單中選出由法官所指示人數的陪審員，組成一個小組(通常約有60人)。 b) 步驟二：由司法常務官向每位被選中的人發出傳票，規定他們按傳票指定的日期出庭。這些傳票，最少須在審訊展開之前4整天，以郵寄方式送達或由專人送達。 c) 司法常務官須在方便	英國與香港的挑選陪審員程序，並無重大分別。法院對於陪審團的組成和因爲證據的性質而豁免女性出任陪審員的特別權力，是香港獨有的。這多少也使法院對於陪審團的組成有較大的酌情決定權。

項目	英國	香港	情況有別的原因
	表律師有權在審訊進行之前或進行中，審閱這份名單。這些資料會有助律師決定是否有因由反對任何人出任陪審員。	情況下儘快安排編訂一份載有被傳召人士的姓名和地址的名單。辯護律師可以審閱這份名單，以便事先研究會否反對哪些人出任陪審員。 d) 陪審團的組成，是在反對階段之後，從小組中以抽籤方式選出 7 或 9 個人，擔任審訊某一宗案件的陪審員。 《陪審團條例》第 20 條授權法官，可以自行或應各方提出的申請，命令陪審團只由男性或只由女性組成。此外，在一名女性以審訊中的證據的性質爲理由，申請豁免出任陪審員時，法官可批准豁免。	

項 目	英 國	香 港	情況有別的原因
7. 抽籤、反對和宣誓	在英國，陪審團是在公開法庭上以抽籤方式從陪審員小組中挑選。法院書記備有陪審員小組全體成員的姓名，先把這些姓名寫在一疊卡紙上，以洗牌方式把卡紙疊在一起，然後按序讀出卡紙上的姓名。按這種方法，可從隨機方式組成的小組中，隨機挑選陪審員。 每名陪審員在進入陪審團席時，都可能受到控方或辯方的反對。與香港的情況不同，在英國，辯方只在有因由的情況下才可以提出反對。控方在有因由的情況下可以提出反對，也可以要求陪審員作爲後備(即政府可以無須提出任何理由而要求陪審員作爲後備，直至陪審員小組再無人選時才補上)。	在香港，通常在被告回答控罪後，便會立即傳召陪審員小組中大約 20 名成員上庭，稱爲"候任陪審團"。司法常務官會預先把各人的姓名分別印在卡紙上，並且放入箱內，然後由司法常務官或法院書記抽出卡紙，直至湊夠組成陪審團的人數爲止。如果陪審員人數不足，理論上法官可以着令執達主任在法院附近搜尋顯然合資格出任陪審員的人士。如果這些人士的姓名已經在陪審員名冊上，他們可以立即宣誓，出任陪審員。實際上，這種情況十分罕見。獲傳召的人士進入陪審團席時，司法常務官或法院書記會通知被告，將會讀出負責審訊的陪審員姓名。如果被告反對任何人士出任陪審員，必須在他們宣誓前提出。所有反對均在陪審員在陪審團席坐下和宣誓前提出。控方"如有因由"(即有合理的理由，例如有關人士不合資格、態度不客觀、令人有理由懷疑他偏頗、有利害關係或有偏見等)，可以反對任何人士出任陪審員，並且要求陪審員作爲後補。辯方可以無需因由	英國與香港的抽籤程序並無重大分別。至於在反對陪審員任命方面，香港的辯方可以毋需因由而反對不超過 5 名人士出任陪審員。英國已經藉《 1988 年刑事審判法令》廢除這項優先反對權。控辯雙方只能在有因由的情況下反對陪審員的任命。香港在 1971 年開始有這項優先反對權，被告可以無須提出任何理由而反對不超過 5 名人士出任陪審員。這項對《陪審團條例》作出的修訂，目的是令香港法例在刑事審訊程序方面，與英國法例一致。不過，當英國的 1988 年法令廢除這項優先反對權時，香港並無效法。被告因此在陪審團組成方面有較大

項 目	英 國	香 港	情況有別的原因
		而反對不超過 5 名人士出任陪審員，如有因由，則可以反對任何人士出任陪審員。	的保障。這項權利並無妨礙隨機挑選陪審員的原則，因爲被告不能挑選陪審員，只可以反對任命他們。

項目	英國	香港	情況有別的原因
8. 豁免辯解、酌情延遲及解除職責	在英國，陪審員小組的任何成員，都可能基於以往曾經出任陪審員、享有無須出任陪審員的權利或有充分理由而經適當人員酌情決定，獲豁免出任陪審員。 審訊開始後，解除陪審團或個別陪審員職責的司法權力，與有因由反對任命的權利關係密切。法官解除陪審團或個別陪審員職責的決定免受質疑，但如果法官決定不解除他們的職責，被告在針對判罪而提出的上訴中，可以基於這項不解除職責的決定，令判罪變得不可靠和不能令人滿意而質疑這項決定。如果陪審員身體傷殘或英語理解能力不足，令人懷疑他出任這職位的能力，則可能會遭解除職責。行使酌情權豁免陪審員的職責，在某些情況下也是合宜的，例如陪審員的配偶去世等。	在香港，根據《陪審團條例》第 25 及第 37 條，酌情豁免下述人士出任陪審員的範圍甚廣： a) 與當事人之間，涉及個人利益、利害關係或互相認識；或 b) 出任陪審員會令他們感到爲難。 法官可以解除其後發現不符資格的陪審員的職責，但如果在裁決登錄後始出現資格問題，則陪審員中有這名成員不可以作爲上訴理由。	在這些安排上，英國與香港並無重大分別。

項 目	英 國	香 港	情況有別的原因
9. 多數裁決	英國自 13 世紀以來，裁決必須一致的規定，已經藉《1967 年刑事審判法令》廢除。法令制定多數裁決。目前的規管條文是《1974 年陪審團法令》第 17 條："(1) ... 在刑事法院和高等法院訴訟中的陪審團裁決，如果屬下述情況，則無須一致 - a) 案件由不少於 11 名陪審員審訊，其中 10 名贊成有關裁決；以及 b) 案件由 10 名陪審員審訊，其中 9 名贊成有關裁決。	香港的所有刑事訴訟中，如果陪審團由 7 人組成，須由不少於 5 人的多數決定作爲裁決(不管陪審員人數由於陪審員去世或被正式解除職責而減爲 6 人)。如果陪審團的人數減爲 5 人，裁決仍須由 5 人作出，而且必須一致。如果陪審團由 9 名經宣誓的陪審員組成，則多數裁決爲不少於 7 人(除非陪審團的人數恰當地減爲 8 人，則多數裁決爲 6 人。如果陪審團的人數恰當地減爲 6 至 7 人，則多數裁決爲不少於 5 人)。如果陪審團的人數減爲 5 人，則裁決必須一致。陪審團未能達成一致裁決或多數裁決的情況是有可能出現的，若法院認爲有這種情況，法官必須解除陪審團，下令選任新陪審團，並且着令進行審訊，如同案件是初次審訊一樣。	在這些安排上，英國與香港並無重大分別。兩者的分別在於英國與香港的陪審團制度規定的陪審員人數不同。

II 地方法院不設陪審團

2. 建議成立地方法院的條例草案於1952年提交立法局，目的是在裁判法院和最高法院之間設立擁有有限民事和刑事司法管轄權的中級法院。當時，民事和刑事訴訟日多，令高院法官和裁判官應接不暇，未能儘速審結訟案。律政司在提出條例草案動議時指出，地方法院不設陪審團的理由是，

"在地方法院，被判觸犯一項或多項罪行的人最多只可以被判監禁5年，而[條例草案]還有其他判刑的限制。此外，條例草案又訂明，刑事訴訟各方都可以向合議庭提出上訴，而主審法官必須…撮要說明判決的理由，記錄在案。我們認爲，這些條文已經足以保障免致出現審判不公的情況。目前，可以出任陪審員的人選非常有限；如果在地方法院設立陪審團，陪審員不足的情況便會更加嚴重。要是准許被告人有權選擇審訊設有陪審團，即是賦予被告人一項從未有過的權利，極可能違背條例草案一項主要宗旨。"

3. 綜合以上各點，地方法院沒有設立陪審團的理由看來共有兩個：

a) 第一個理由是，條例草案的規定已經足以保障免致出現審判不公的情況；

b) 第二個較重要的理由是，當時沒有足夠的合資格人選出任地方法院陪審員。

4. 要決定是否在地方法院設有陪審團，就必須詳細研究上述因素。目前應該考慮的較重要事宜包括：

a) 是否有足夠人選出任陪審員；

b) 費用；

c) 對地方法院審訊時間和工作量的影響。

5. 在地方法院設有陪審團是一項重要的發展，不該單獨考慮，要一併考慮其他的相關問題，包括：

a) 是否應該在地方法院審理一切罪行時都設有陪審團，抑或應該保留地方法院部分簡易程序司法管轄權；

b) 是否應該修訂地方法院法官的判刑權，並授權地方法院法官將案件轉交高等法院判刑；

c) 在設有陪審團的聆訊中，是否應該規定地方法院法官具備的經驗；

d) 被告人是否應該有權選擇審訊形式，即是選擇是否設有陪審團；

e) 設有陪審團的地方法院聆訊，法院是否可以採用交付審判程序；以及

f) 設有陪審團的地方法院聆訊，律師是否有權出庭發言。

6. 從這些重要問題可見，要決定地方法院是否應該設有陪審團，就先要進行詳盡深入的研究，這研究除涉及英國外，還須包括其他司法區的刑事司法制度。

III 律政司決定審訊法院的權力

7. 律政司有權根據下述條文就任何罪行提出刑事訴訟：

a) 根據《裁判官條例》(第 227 章)第 12(a)條，律政司有“職責及酌情決定權”，就裁判官可審理的一切罪行提出檢控；

b) 根據《刑事訴訟程序條例》(第 221 章)第 14 條，“律政司如認爲適合，”便可以行使酌情決定權，在高等法院提出檢控；

c) 根據《地方法院條例》第 75 條，律政司可以就裁判法院或高等法院移交的法律程序所審理的罪行檢控被告人。

8. 此外，律政司可以向法院申請命令，要求

a) （根據《裁判官條例》第 88 條，）將裁判法院法律程序移交地方法院；

b) （根據《地方法院條例》第 77A 條，）將地方法院法律程序移交高等法院或裁判法院；

c) （根據《刑事訴訟程序條例》第 65F 條，）將高等法院法律程序移交裁判法院或地方法院。

9. 遇有律政司根據《裁判官條例》第 88 條提出移交申請，裁判官就必須發出移交令。如果律政司根據《地方法院條例》第 77A 條或《刑事訴訟程序條例》第 65F 條提出申請，符合公正的原則，法官便可以發出移交令。

10. 律政署出版的**刑事檢控政策一檢察官指引**(1993 年)(第 11 頁)列明，檢察官在決定審訊形式時要遵守下述指引：

> “如某宗案件被認爲是較爲嚴重，不宜在裁判法院審理，檢察官應小心考慮究竟審訊是否可恰當地在地方法院而不是在高等法院進行，須注意地方法院可判處的最高刑期是七年。如果檢察官認爲一旦審訊後罪名成立，判處的刑期相當可能會短過七年，便應將案件移交地方法院審訊。如果知道被告人會認罪，而刑期的起點相信不會超過七年，則有關案件應移交地方法院聆訊。”

"當然，絕對不可爲使案件可迅速獲得審理，而採取簡易審訊程序。然而，檢察官應可考慮到裁判法院的審訊幾乎肯定是較快及較省錢的。其他考慮因素，例如審訊時間長短或被告人認罪的可能性，亦有關係。"

律政署
1997年6月

PART III

[s. 88]

1. Any offence which is punishable with death.

2. Any offence which is punishable with imprisonment for life except an offence against section 37C, 37D, 37O or 37P of the Immigration Ordinance (Cap. 115), an offence against section 53 or 123 of the Crimes Ordinance (Cap. 200), an offence against Part VIII of the Crimes Ordinance (Cap. 200), an offence against section 4 or 6 of the Dangerous Drugs Ordinance (Cap. 134), an offence against section 10 or 12 of the Theft Ordinance (Cap. 210), section 17, 28 or 29 of the Offences against the Person Ordinance (Cap. 212) or section 16, 17 or 18 of the Firearms and Ammunition Ordinance (Cap. 238). *(Replaced 49 of 1965 s. 21. Amended L.N. 165 of 1967; 41 of 1968 s. 59; 21 of 1970 s. 35; 48 of 1972 s. 4; 25 of 1978 s. 6; 59 of 1980 s. 2; 68 of 1981 s. 56; 59 of 1984 s. 7; 52 of 1992 s. 11)*

3. Any offence against section 21 or 22 of the Crimes Ordinance (Cap. 200).

4. Misprision of treason.

5. Any offence against the Queen's title, prerogative, person or government.

6. Blasphemy and offences against religion.

7. Composing, printing or publishing blasphemous, seditious or defamatory libels.

8. Genocide and any conspiracy or incitement to commit genocide. *(Added 52 of 1969 s. 4)*

(Part III added 2 of 1953 s. 4)

(Second Schedule replaced 24 of 1949 Schedule)

第III部

〔第88條〕

1. 任何可處死刑的罪行。

2. 任何可處終身監禁的罪行，但以下罪行除外——

違反《人民入境條例》(第115章)第37C、37D、37O或37P條的罪行，違反《刑事罪行條例》(第200章)第53或123條的罪行，違反《刑事罪行條例》(第200章)第VIII部的罪行，違反《危險藥物條例》(第134章)第4或6條的罪行，違反《盜竊罪條例》(第210章)第10或12條的罪行，違反《侵害人身罪條例》(第212章)第17、28或29條的罪行，或違反《火器及彈藥條例》(第238章)第16、17或18條的罪行。 *(由1965年第49號第21條代替。由1967年第165號法律公告修訂；由1968年第41號第59條修訂；由1970年第21號第35條修訂；由1972年第48號第4條修訂；由1978年第25號第6條修訂；由1980年第59號第2條修訂；由1981年第68號第56條修訂；由1984年第59號第7條修訂；由1992年第52號第11條修訂)*

3. 違反《刑事罪行條例》(第200章)第21或22條的任何罪行。

4. 隱匿叛逆。

5. 對女皇陛下的稱號、特權、人身或政府所犯的任何罪行。

6. 褻瀆神明及宗教罪行。

7. 撰寫、印刷或出版褻瀆神明、煽動性或誹謗名譽的永久形式誹謗。

8. 危害種族罪及任何串謀或煽惑犯危害種族罪。 *(由1969年第52號第4條增補)*

(第III部由1953年第2號第4條增補)

(附表2由1949年第24號附表代替)