THE JUDGE OVER YOUR SHOULDER

A GUIDE TO JUDICIAL REVIEW
FOR ADMINISTRATORS

FOURTH EDITION

The Judge Over Your Shoulder

A Guide To Judicial Review For Administrators (4th Edition)

FOREWORD

A number of important judgments have been pronounced in the past three years, and that has prompted the Department of Justice to prepare and publish the fourth edition of Judge Over Your Shoulder. Just like the third edition, this edition is publicly available on the Department of Justice's website. I encourage the legal sector and the general public to refer to it so as to understand and to be kept abreast of the latest development in case law in the realm of judicial review.

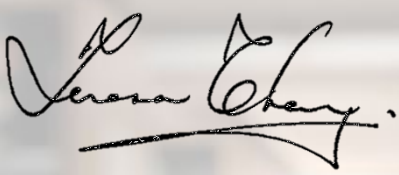
One of the matters addressed in this edition is the commonly seen phenomenon of abuse of process of judicial review applications. In this regard, it may be useful to be reminded of the procedures by which judicial review is typically conducted and its rationale. The relevant rule requires "the relief sought and the grounds on which it is sought" to be stated in the Form 86 and that an application for leave is to be heard ex parte where the applicant has a duty of full and frank disclosure. This screening process of an ex parte leave application has been introduced so that only meritorious and appropriate cases will be allowed to continue to the substantive stage whereby the administrative conduct and decision-making process of the Administration will be subjected to legal scrutiny by the independent court in the judicial review proper. The Form 86 therefore is an important document by which the applicant has to set out the grounds under a duty of full and frank disclosure and by which an ex parte screening process is to be conducted. The proposed respondents are not to be vexed unless leave is given. Exceptionally, the putative respondent may be asked to attend a leave hearing and sometimes to file an "initial response".

This important two-staged procedure serves to prevent an abuse of the judicial process by filtering out, at an early stage, unmeritorious or misconceived cases, and on the other hand, allow proper challenges to the conduct or decision making process of the Administration be subjected to review by an independent judiciary.

In addition, we have recently seen some important developments in the area of public law where the constitutional order of Hong Kong SAR is being considered. At the risk of stating the obvious, the National People's Congress ("NPC"), being the highest organ of state power in the People's Republic of China ("PRC"), enacted the Basic Law in accordance with the Constitution of the PRC, in particular Articles 31 and 62(14). The recent cases have confirmed that decisions of the NPC and its Standing Committee are binding on Hong Kong courts and not amenable to judicial review. This is an important recognition of the national constitutional order.

This year is the 25th anniversary of Hong Kong returning to the motherland. It is therefore timely for us to publish this fourth edition evidencing the development of judicial review under the Hong Kong common law jurisprudence with proper recognition of the constitutional order of Hong Kong SAR. Judicial review provides an important safeguard to ensure that the Administration properly exercise its powers in accordance with the law and hence will ensure that the constitutional order and principles laid down in the Basic Law are observed. This publication, we hope, will provide a good source book material for studying and understanding administrative law in the context of "one country, two systems". By so doing, not only will we continue to apply common law and holistically implement "one country, two systems" now and beyond 2047, we will also be able to maintain

the prosperity and stability of Hong Kong through the upholding of the rule of law.



Ms Teresa Cheng, GBM, GBS, SC, JP
Secretary for Justice

CONTENTS

List of Abbreviations

BL / Basic Law	The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
BL 8	Article 8 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
CAT	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CFA	The Court of Final Appeal of the Hong Kong Special Administrative Region of the People's Republic of China
CRC	The Convention on the Rights of the Child
HKBOR	The Hong Kong Bill of Rights as contained in section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383)
HKBORO	The Hong Kong Bill of Rights Ordinance (Cap. 383)
HKSAR / Hong Kong	The Hong Kong Special Administrative Region of the People's Republic of China
ICCPR	The International Covenant on Civil and Political Rights

ICESCR	The International Covenant on Economic, Social and Cultural Rights
LegCo	The Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China
PRC	People's Republic of China
SCNPC	The Standing Committee of the National People's Congress of the People's Republic of China
UNHCR	The United Nations High Commissioner for Refugees

1. This Guide

This Guide is intended to assist Government officials responsible for making decisions affecting the public. It highlights the main areas where decisions are susceptible to challenge in courts by way of the procedure known as the "application for judicial review". It examines in broad terms the process of judicial review. This Guide is not intended to be a substitute for seeking legal advice but it should assist in making lawful decisions. Apart from judicial review, there are other remedies available for challenging or seeking redress in relation to an administrative decision the overview of which is in Chapter 10.

1.1 The Nature of Judicial Review

1.1.1 Judicial review is the review by a judge of the Court of First Instance of any exercise, or any refusal to exercise, of any public decision-making powers and the legality of legislation. Its purpose is to determine whether that decision or piece of legislation is lawful and valid. It is thus a means by which the courts can supervise how Government officials or other public officers exercise their powers or carry out their duties. It plays an important part in the process of good administration, providing an effective means of ensuring that any improper exercise of power can be remedied and safeguarding individual interests against any administrative action which is illegal, irrational or taken without following proper procedures.

1.1.2 Although most administrative actions are based on the exercise of powers derived from legislation, judicial review may also cover other administrative actions that do not have a statutory basis, for example, deciding whether to make an ex gratia compensation or the Comprehensive Social Security Allowance.

1.1.3 Government officials and other public authorities (such as the Housing Authority and the Hospital Authority) performing public functions are the most common bodies whose decisions are challenged by judicial review. But any person exercising public power (including any statutory board or disciplinary panel of a professional body) may also be subject to judicial review.

1.2 Statistics

1.2.1 Below are statistics of judicial review in recent years. The table below shows the number of applications for leave to apply for judicial review filed in Court[1]. There has been a significant increase in the number of applications for leave for judicial review in recent years, mostly relating to non-refoulement claims which will be discussed in Chapter 8.

Application for leave to apply for Judicial Review

Year	Total no. of applications	Applications relating to non-refoulement claims
2015	259	103
2016	228	60
2017	1 146	1 006
2018	3 014	2 851
2019	3 889	3 727
2020	2 500	2 367

1.2.2 The table below shows the outcome of the judicial review applications which involve the Government. The relatively high

[1] The statistics are based on the Judiciary's written replies to the Legislative Council.

success rate shows that the Government has been committed to the observance of the public law principles when exercising its decision-making power and carrying out its public functions.

Outcome of Judicial Review in respect of cases involving Government

Year	Favourable to Government	Against Government
2015	56%	44%
2016	88%	12%
2017	85%	15%
2018	93%	7%
2019	95%	5%
2020	86%	14%

1.3 The Foundations of Judicial Review

1.3.1 In most cases the foundation or justification of judicial review is to be found in the basic proposition that a public official must not act beyond his legal powers ("ultra vires"), i.e. a decision is challenged on the ground that it is in excess of the authority conferred by law, and therefore invalid.

1.3.2 The "ultra vires doctrine" covers the validity of subsidiary or delegated legislation as well as the decisions of administrative boards or tribunals and the decisions of administrative bodies (such as those taken by public officers and public authorities). A decision-maker acts beyond his powers both when he goes beyond the powers expressly granted by the legislation but also when he ignores the limits laid down impliedly by the legislation. Thus even if the legislation does not expressly say that powers must be exercised in a procedurally fair manner,

this is "taken as read" and a decision-maker who adopts an unfair procedure will be found to have exceeded his powers.

1.3.3 Where there is no legislation involved (see para 1.1.2), the justification of judicial review is found in the "common law theory". Judicial review is justified by the inherent power of the courts to develop the common law. It is a judicial creation intended to apply the substantive values of fairness and justice inherent in the rule of law to the decisions of administrative authorities.

1.4 Review and Appeal

1.4.1 Judicial review is fundamentally different from an appeal. When hearing an appeal, the court is concerned with the merits of a decision. Was it a wise or an unwise decision? On judicial review, the court is only concerned with whether the relevant act or decision is lawful or unlawful in the public law sense. This is because the purpose of judicial review is to guide public authorities and ensure that they act lawfully in the performance of their public duties and functions. See *ZN v Secretary for Justice & Ors* [2017] 1 HKLRD 559, HCAL 15/2015 (23.12.2016). Further, rights of appeal are always statutory while judicial review is inherent in the common law.

1.5 Judicial Review and Good Governance

1.5.1 With the increasing number of applications and wide range of areas covered, it is inevitable that judicial review will create pressure on the Administration. As acknowledged by the Chief Justice Cheung at the Rule of Law Signature Engagement Event 2021, legal proceedings take time, and the holding of the government to legal accountability may inevitably reverse or substantially delay the implementation of government decisions,

policies or projects, no matter how important or desirable they may otherwise be for the public good. These challenges, however, help develop a culture on the part of the Government and public authorities in which they exercise their powers and formulate their legislative proposals and policies in compliance with the law. This is part and parcel of the Government's role in vigilantly upholding the rule of law and maintaining good administration.

1.5.2 Of course it is often inconvenient for the Government to lose a judicial review (especially when established procedures have to be changed as a result) and to have its conduct described as unlawful by the courts. But this only underscores the importance of public officers making decisions in accordance with the principles set out in this Guide, so that those decisions are less likely to be vulnerable to challenge in the courts. As mentioned by the former Chief Justice Ma at the Ceremonial Opening of the Legal Year 2016, "[a] decision of the court in public law litigation will often serve as a guide to good governance, whether looking at events in the past or perhaps more important, the future. Although there may occasionally be inconveniences, judicial review overall serves the public interest and facilitates the well-being of our society."

1.6 Role of the Court

1.6.1 The court has repeatedly emphasised that its role is solely to determine legal issues in accordance with the law and its spirit although judicial review proceedings may involve matters of considerable political, economic or social consequences.

1.6.2 Generally, the court is slow to review Government policies which are legitimately formulated. Judicial review is concerned with the question of legality and is not intended to

deprive authorities of their policy-making functions or to substitute the courts' decisions for those of policy-making bodies.

See **the speech by the former Chief Justice Ma at the Ceremonial Opening of the Legal Year 2017**.

> "The society in which we all live and work is a complex one. The complexities are reflected in the nature of the legal disputes that go before the courts for resolution. Some of these disputes I have referred to as high profile and may involve important political, economic or social consequences. This should, I reiterate, be seen in proper light. The courts deal with these types of case in precisely the same way as any other case: strictly in accordance with the law and legal principle."

See also **the speech by the Chief Justice Cheung at the Rule of Law Signature Engagement Event 2021**.

> "Over and over again, the courts have emphasised in public law cases that one must recognise the different constitutional roles played by the courts, the executive and the legislature. It is not the function of the courts under our constitutional setup to interfere with, still less to rewrite, government policies and decisions, or to disapply laws enacted by the legislature, save where that is the necessary result of upholding the provisions of the Basic Law or other overriding legal requirements. It should be remembered that court decisions are based on the relevant legal principles and the facts of individual cases. It is the courts' role to administer the law and decide legal issues; it is never their function to resolve any underlying political or social controversies. The courtroom is not the forum for the promotion or ventilation of political or other non-legal views."

Case Example

See ***Chu Yee Wah v Director of Environmental Protection* [2011] 3 HKC 227, HCAL 9/2010** (18.4.2011). The court held that it was not for the court to impose a new environmental policy on air quality as to do so would be to trespass on the balancing process which is the exclusive domain of the Executive.

1.7 Grounds for Judicial Review: An Overview

1.7.1 The three main grounds for judicial review are:

(a) Illegality;
(b) Irrationality; and
(c) Procedural Impropriety.

Case Example

In ***Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374** (HL) (22.11.1984) Lord Diplock said in words that have become very well known:

"Judicial review has I think developed to a stage today when … one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The **first** ground I would call 'illegality', the **second** 'irrationality' and the **third** 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds…"

By '**illegality**' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it …

By '**irrationality**' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it …

I have described the third head as '**procedural impropriety**' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instruments by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice." (per Lord Diplock at 410, 411) [emphasis added]

1.7.2 A more detailed analysis of the above three main grounds for judicial review will be provided in the chapters that follow. For some useful questions to ask yourself as a decision-maker, please refer to Annex II.

2. Is Judicial Review Available

In considering a potential case of judicial review, the first question is often this: is judicial review available? This chapter provides an overview of relevant key principles in considering this question. In addition, there are two flowcharts at Annex I which graphically summarise the key issues. You may wish to refer to the flowcharts after reading this Guide.

2.1 Constitutional Limits on Judicial Review

2.1.1 Under the Constitution of the PRC, the National People's Congress of the PRC is the highest organ of state power. Its permanent organ is the SCNPC. These two bodies exercise the legislative power of the state and make decisions, which can apply in the HKSAR. More specifically, the SCNPC is vested with various powers under the Basic Law including the power of returning any laws enacted by the Legislative Council which are not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities or regarding the relationship between the Central Authorities and the HKSAR (BL 17), the power to add to or delete from the list of laws in Annex III of the Basic Law (BL 18), the power to grant additional powers to the HKSAR (BL 20) and the power to interpret the Basic Law (BL 158).

2.1.2 As stated by the Court of Final Appeal in the landmark decision of *Ng Ka Ling v Director of Immigration (No 2)* (1999) 2 HKCFAR 141, FACV 16/1998 (26.2.1999), courts of the HKSAR cannot question the authority of the National People's Congress or the SCNPC to do any act which is in accordance with the

provisions of the BL and the procedure therein. Thus, decisions made by the National People's Congress and the SCNPC including legislative acts are not subject to judicial review on the basis of any alleged incompatibility with the Basic Law or otherwise. This has been reaffirmed by the Court of Final Appeal in a more recent decision, i.e. *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, FACC 1/2021 (9.2.2021), and consistently applied by the lower courts.

2.1.3 For a discussion regarding the amenability of the interpretation of the Basic Law by the SCNPC, please refer to Chapter 6.4.

Case Example

In ***HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33, [2021] HKCFA 3, FACC 1/2021** (9.2.2021), the Court of Final Appeal accepted that, in the light of *Ng Ka Ling v Director of Immigration (No 2)*, the legislative acts of the National People's Congress and the SCNPC leading to the promulgation of the National Security Law as a law of the HKSAR, done in accordance with the provisions of the Basic Law and the procedure therein, are not subject to review on the basis of any alleged incompatibility with the Basic Law or the ICCPR as applied to Hong Kong.

In ***Kwok Cheuk Kin v The Chief Executive of the HKSAR* [2021] HKCFI 1085, HCAL 542/2021** (27.4.2021), the Court of First Instance stated that the broad reasoning of the Court of Final Appeal in *HKSAR v Lai Chee Ying* would indicate that it is not open to courts of the HKSAR to review the constitutionality of a decision made by the National People's Congress or the SCNPC even assuming that they do not amount to "legislative acts".

In ***沈泰鋒 v Members of the LegCo & Anor*** **[2021] HKCFI 2259, HCAL 474/2021** (26.8.2021), adopting the same line of reasoning, the Court of First Instance held that it is not open for the court to review the constitutionality of the decision made by the SCNPC dated 11 August 2020 for the sixth-term Legislative Council to continue to discharge its duties for not less than one year until the seventh-term Legislative Council begins.

2.2 Procedural Exclusivity

2.2.1 An applicant for judicial review is in a different situation from a plaintiff who starts a private civil law action. A judicial review applicant needs first to obtain leave from the court, by satisfying the court of the various matters set out in this chapter, and that the grounds of the proposed judicial review are reasonably arguable (see Chapters 7.1 and 7.2). In order to prevent public law issues from becoming the subject of adjudication in private law proceedings where such hurdles do not exist, there is a rule requiring persons seeking to obtain public law remedies (see Chapter 7.7) to proceed by way of judicial review and not otherwise. It would as a general rule be an abuse of process for an applicant to seek redress for a public law wrong by means of a private civil law action for private law remedy (for example, to take out a private civil law action and applying for a declaration that a public authority's decision is unlawful). The rule is enforced by the court striking out proceedings that should have been commenced as a judicial review. In suitable cases, the court may order that judicial review proceedings continue as a private law action.

Case Example

In ***O'Reilly v Mackman*** **[1983] 2 AC 237** (HL) (25.11.1982), the plaintiffs, four inmates of Hull prison, commenced proceedings by private civil action disputing the validity of punishments awarded by the Board of Visitors of Hull Prison on the ground that such disciplinary awards were in breach of the prison rules and contravened the principles of natural justice. The House of Lords held that the proceedings should be struck out as an abuse of process of the court; and that since the case was a matter of public law the only available procedure was judicial review.

2.2.2 There are various exceptions to the rule. One is where the public law issues are collateral to the main issues in a private law claim. For example, a defendant in a private civil law action may defend himself by raising a public law issue. Similarly, defendants in criminal proceedings may, under some circumstances, be entitled to raise a defence in public law, such as a challenge against the legality of the offence-creating provision.

2.3 Timing

2.3.1 Generally, an application for leave to apply for judicial review must be made promptly and, in any event, within 3 months from when the grounds for judicial review first arose, unless time is extended by the court upon good reasons given. Leave may be refused if an application for leave is delayed or premature.

(a) Delay

2.3.2 Delay in making the application could result in refusal of leave or, if leave is granted, denial of the discretionary relief after the substantive hearing even if the ground of challenge is made out.

The court stressed that it was of obvious importance and in the interests of good public administration that all concerned should know where they stood as soon as possible so that the earliest opportunity for any challenge should be promptly taken. If not, the courts have the discretion to refuse relief. See *Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1, FACV 14/2003 (9.1.2004). For principles regarding extension of time to commence judicial review proceedings, see *AW v Director of Immigration & Anor* [2016] 2 HKC 393, CACV 63/2015 (3.11.2015).

(b) Prematurity

2.3.3 If an application for judicial review is premature, leave may be refused. The issue of prematurity may arise if, at the time when the application is made, the relevant legal or factual events to which the application relates have not yet occurred or if the application concerns an "intermediate" or "procedural" decision which does not give rise to any substantive consequence. Moreover, it is generally no part of a court's function to restrain the legislature from making laws, as distinct from declaring such laws unlawful after enactment. In spite of that, an application for judicial review may, in exceptional circumstances, be entertained even where it may otherwise be regarded as being premature.

Case Example

In ***Financial Secretary v Wong* (2003) 6 HKCFAR 476, FACV 5/2003** (26.11.2003), Litton NPJ expressed that judicial review was the means by which judicial control of administrative action could be exercised, and not every decision by a decision-maker was susceptible to review; the essential quality of a reviewable decision was that it was a substantive determination.

In ***郭卓堅 v 林鄭月娥特首連同行政會議成員*** **[2017] 5 HKC 579, HCAL 453, 455, 458 & 460/2017** (27.9.2017), the applicants sought leave to apply for judicial review against the putative respondent's decision endorsing the implementation of a proposed arrangement regarding Hong Kong and Mainland customs, immigration and quarantine procedures at the West Kowloon Station (i.e. the co-location arrangement). The court refused leave on the basis of prematurity as (i) the decision was an "intermediate" decision which did not give rise to any substantive determination touching on, or affecting, the rights or interests of the applicant; (ii) the factual and legal events relevant for determining legality had not yet occurred; and (iii) the challenge to the constitutionality or legality amounted to, or involved, a pre-enactment challenge of the local legislation which might be passed by the Legislative Council.

2.4 Subject Matter of Challenge

2.4.1 The nature of the decision in question will determine the extent to which it can be reviewed by the court. Where the impugned decision is non-justiciable (i.e. not capable of being adjudicated upon by a court), the court will not review the decision. Also, the court may exercise judicial restraint and avoid adjudicating on matters pertaining to policy solutions to complex social problems.

(a) Limits on judicial review by the Basic Law

2.4.2 BL 19(2) provides for the maintenance of restrictions on Hong Kong courts' jurisdiction imposed by the legal system and the principles previously in force in Hong Kong. Further, under BL 19(3), the HKSAR courts shall have no jurisdiction over acts of state such as defence and foreign affairs. BL 63 provides that the Department of Justice shall control criminal prosecutions free

from interference. The matters covered by such Basic Law provisions are generally not amenable to judicial review.

Case Example

See ***Re Leung Lai Fun*** **[2018] 1 HKLRD 523, CACV 183/2016** (23.1.2017). The Court of Appeal acknowledged that BL 63 includes the protection of the independence of the Department of Justice's control of criminal prosecutions from judicial encroachment barring those extremely rare situations, "such as where there is evidence proving that the Department of Justice has acted in obedience to political instruction when making the decision, or is acting in bad faith, such as to cause the court to find that the prosecutorial decision is unconstitutional".

In ***Tsang Kin Shing v Secretary for Justice*** **[2019] HKCFI 2215, HCAL 687/2019** (6.9.2019), the applicants sought to challenge the Secretary for Justice's decision not to prosecute the former Chief Executive of the Hong Kong SAR and another member of the Legislative Council for various alleged criminal offences. In refusing leave to apply for judicial review, the court reiterated three particular types of cases where the Secretary for Justice would be regarded as having acted outside the constitutional limits when making a prosecutorial decision such that such decision would be amenable to judicial review; it was also stressed that the prosecutorial independence of the Secretary for Justice should not be put on the same footing as an ordinary exercise of discretion by an administrator.

(b) Private vs public

2.4.3 The application for judicial review is confined to reviewing matters of a public nature as opposed to those of a purely private character. In exercising a purely commercial function, a public authority performs a "private" function governed by private and not public law. If the duty imposed on a body was a public duty and the body was exercising public law functions, that body's decision may be within the reach of judicial review. The courts usually regard the function being exercised by a public body, rather than the formal source of its power, as the touchstone for amenability to review.

Case Example

In ***Wan Yung Sang v Housing Authority*, unreported, HCAL 135/2009** (6.7.2011), a tenant of public housing estate challenged by way of an application for judicial review the Housing Authority's decisions in serving him a notice to quit and in confirming the same. The Court of First Instance held that the Housing Authority was not acting purely or predominantly as a private landlord but there were clearly sufficient public elements in managing the public housing estates via the tenancy agreements to render the Housing Authority's actions subject to judicial review.

(c) Prerogative powers

2.4.4 These comprise the wide range of non-statutory discretionary powers exercised by the Government. Examples include the grant of honours, the grant of mercy, the appointment of ministers and the making of treaties. These prerogative powers were previously said to confer discretion which no court could question. Today, those prerogatives do not as such confer

unreviewable discretion, but many of those powers are considered to be of a kind with which the courts will not concern themselves (i.e. not justiciable). Depending on the subject matter, the lawfulness of the decision making process may be subject to judicial review, while the merits of the decision will not be questioned.

Case Example

See ***Ch'ng Poh v Chief Executive of HKSAR*, unreported, HCAL 182/2002** (3.12.2003). The applicant for judicial review was convicted of fraud related offences. Following unsuccessful criminal appeals, the applicant petitioned to the then Chief Executive seeking the exercise of his prerogative for mercy under BL 48(12). On the issue of amenability to judicial review, it was held that "while the merits of any decision made by the Chief Executive pursuant to Article 48(12) are not subject to the review of the courts, the lawfulness of the process by which such a decision is made is open to review."

2.5 Alternative Remedy

2.5.1 Judicial review is a remedy of last resort and is always in the discretion of the court. It is a well-established general principle that an applicant should exhaust all appeal procedures or other alternative remedies before resorting to judicial review.

2.5.2 Where alternative remedies have not been exhausted, the court may refuse to grant leave to apply for judicial review. In some special or exceptional circumstances, the court may permit judicial review even if the applicant did not exhaust all appeal procedures or other alternative remedies. The test is whether the

interests of justice require the court to intervene in the dispute at that particular stage.

Case Example

See ***Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735, FACV 24, 25 & 27/2012, 1/2013** (11.7.2013). Mr Leung Chun Ying was declared the returned candidate in the election for the Chief Executive held on 25 March 2012. The applicant (Mr Ho Chun Yan Albert) challenged Mr Leung's election by way of election petition under section 32 of the Chief Executive Election Ordinance (Cap. 569) ("CEEO") and judicial review. The Court of Final Appeal held that where an election was questioned by persons eligible to lodge an election petition under section 33 of the CEEO, such challenge must be made by way of an election petition but not by way of judicial review.

2.6 Ouster Clause

2.6.1 There may be statutory provisions in various forms which seem to remove the court's jurisdiction in judicial review. Here are some examples.

(Section 19(3) of the Housing Ordinance (Cap. 283))

"No Court shall have jurisdiction to hear any application for relief by or on behalf of a person whose lease has been terminated under subsection (1) in connection with such termination." Subsection (1) provides for certain situations in which the Housing Authority may terminate a lease.

(Section 20 of the Protection of Wages on Insolvency Ordinance (Cap. 380))

"No decision of the Commissioner or the Board made in exercise of any discretion under this Part shall be challenged in any Court."

2.6.2 Ouster clauses are construed very strictly. There is a strong presumption against any restriction of the supervisory powers of the court. In general, ouster clauses may only protect a valid decision; where a decision is a nullity (and most decisions where there has been a legal error made will be nullities), it may not be caught by the ouster clause and the decision may be amenable to judicial review.

Case Example

In ***Anisminic v Foreign Compensation Commission*** **[1969] 2 AC 147** (HL) (17.12.1968), the appellants' challenge to a determination of the Foreign Compensation Commission seemed to be prevented by the ouster clause in section 4(4) of the Foreign Compensation Act 1950, which stated that no "determination of the commission ... shall ... be called into question in any court of law". The House of Lords nevertheless granted a declaration that the determination was ultra vires and a nullity. On the effectiveness of the ouster clause, the House of Lords held that it did not protect a nullity.

2.7 Standing of Applicant

2.7.1 The court shall not grant leave to apply for judicial review if the applicant does not have a sufficient interest in the matter to which the application relates. Someone who is not directly

affected by the decision sought to be impugned may have no sufficient interest. Standing goes to jurisdiction and it has to be considered in the legal and factual contexts of the whole case. Apart from merits, the court may take into account the following factors: the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, and the nature of the breach of duty against which relief is sought. The over-arching question is whether, in the particular context of the case, the preservation of the rule of law requires standing to be given to the applicant to ventilate the issues raised in the application in light of the interest he has, see *Kwok Cheuk Kin v President of Legislative Council* [2021] 1 HKLRD 1247, [2021] HKCA 169, CACV 320/2019 (11.2.2021). The Court of Final Appeal has stated a similar question, viz. whether the purpose of judicial review, and in particular the rule of law, will be best served by allowing the applicant to proceed, see *Kwok Cheuk Kin v Director of Lands* [2021] HKCFA 38, FACV 2, 3 & 4/2021 (5.11.2021).

Case Example

In ***Re Wong Chi Kin*, unreported, CACV 80/2014** (26.9.2014), the applicant, a former employee of the Marine Department, sought leave to challenge various parts of the Report of the Commission of Inquiry into the Collision of Vessels near Lamma Island on 1 October 2012 which, in his view, were erroneous and misleading. The Court of Appeal only granted leave for the applicant to challenge the parts of the report which concerned him personally. As regards the other parts of the report, the Court of Appeal did not regard the applicant as being directly affected by them and opined that the Marine Department and the named officers were in a better position than the applicant to challenge those findings.

In ***803 Funds Ltd v Director of Buildings*** **[2021] 2 HKLRD 1274, [2021] HKCFI 1471, HCAL 2215/2020** (27.5.2021), the applicant being an incorporated company limited by guarantee had its object stated as "for the organisation and carrying out of activities to promote law and order and civic-minded activities, on a non-profit-making basis". It sought to challenge the Director's decision not to take any enforcement action in respect of certain unauthorised building works and/or change in use regarding the property of a Legislative Councillor's spouse. On standing, the court observed that the applicant did not have any special reputation, standing, history, knowledge or expertise regarding the subject matter; nor did any member of the Applicant claim to have any personal right or interest (financial, proprietary or otherwise) over and above that of the general public or a section of the public in the subject matter. There are *prima facie* other potential challengers who have a more direct or immediate interest to see enforcement actions being taken. The court thus held that the applicant does not have a sufficient interest in the matter.

2.8 Hypothetical or Academic Question

2.8.1 The court shall not grant leave to apply for judicial review if the question before the court is purely hypothetical or academic in the sense that there are simply no events that have occurred that form the basis for the question to be answered. However relevant or important the question may be, the court will not give an advisory opinion on hypothetical facts because, first, the court's function is to adjudicate on real disputes rather than imaginary ones and, secondly, to decide on points of law or principle when there are no facts before the court is undesirable for reasons such as misapplication of the decision in different contexts. On the other hand, sometimes the question before the court is said to be

hypothetical or academic only because the real dispute happens no longer to be in existence at the time of the hearing; in deciding whether to hear and determine the question in issue, the court will closely examine the relevance or utility of any decision.

Case Example

In ***Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465, CACV 142/2003** (9.1.2004), the Court of Appeal summarised the legal principles on determining whether the court should entertain a question that is academic or hypothetical and, in particular, held that the discretion to hear disputes in the area of public law must be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so; in addition, where the same point is likely or may well arise as between the same parties, this is an *a fortiori* situation for the court to proceed to determine the question in controversy.

2.9 Factual Disputes

2.9.1 An application for judicial review is inappropriate for resolving substantial disputes of facts, and should not be used for such purpose.

2.9.2 When dealing with an application for judicial review which involves numerous factual allegations, the Court of First Instance held in the case of *The Hong Kong Journalists Association v The Commissioner of Police & Anor* [2021] 1 HKLRD 427, [2020] HKCFI 3101, HCAL 2915/2019 (21.12.2020) that the suggestion of adopting an "assumed facts" approach should be rejected. In some cases, the court may exercise

discretion to allow the proceedings with substantial factual disputes to continue as if they had been begun by writ under Order 53, rule 9(5) of the Rules of the High Court (Cap. 4A).

Case Example

***Sham Tsz Kit & Anor v Commissioner of Police & Anor* [2021] HKCFI 746, HCAL 2670/19** (24.3.2021) is an example of the court considering the granting of leave to continue the judicial review as if begun by writ. The court considered that most of the applicants' case depends on the proper resolution of substantial disputes of facts, which was not possible to do on the basis of the existing affidavit evidence that have not been tested by cross-examination. The court did not dismiss the applicants' case but instead gave leave for the applicants to apply for an order that the proceedings shall continue as if they had been begun by writ, though the applicants did not take out such application and the claim was dismissed at the end.

In ***The Hong Kong Journalists Association v The Commissioner of Police & Anor* [2021] 1 HKLRD 427, [2020] HKCFI 3101, HCAL 2915/2019** (21.12.2020), the applicant challenged that the Police had failed to facilitate lawful journalistic activities in the course of public order events on and after 12.6.2019. The challenges raised by the applicant were based on numerous statements by journalists together with supporting evidence alleging a series of ill-treatment against journalists. In dealing with the issue as to whether the Police is under a legal duty to facilitate, and not to hinder, lawful journalistic activities in the course of public order events, the court rejected the suggestion of adopting an "assumed facts" approach for being unworkable and inappropriate for the reason (among others) that (i) the parties have not agreed on any assumed facts, or any issues of laws to be determined based on such assumed facts; and (ii) it served little or

no practical utility in granting the declarations sought as the validity of which is dependent on the truth of the "assumed facts".

2.10 Prevention of Abuse

2.10.1 The court can adopt various measures to stop persistent abuse of process by litigants in judicial review proceedings. For instance, it is within the inherent jurisdiction of the court to make an order prohibiting a specific litigant from making further applications to the court in existing proceedings without the leave of a judge (known as "restricted application orders" ("RAO")) or from commencing, without the leave of a judge, fresh proceedings which abuse the court's process by seeking to re-litigate proceedings which have already concluded (known as "restricted proceedings orders", "RPO"). The detailed guidance on how the court would exercise its power to impose an RAO / RPO is set out in Practice Direction 11.3 which can be found on the Judiciary's website.

2.10.2 Further, an application for an order under section 27 of the High Court Ordinance (Cap. 4) may be made against a person who has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings to prohibit such person from instituting new proceedings or continuing any legal proceedings instituted without the leave of the court.

Case Example

See ***Secretary for Justice v Ma Kwai Chun*** **[2006] 1 HKLRD 539, HCMP 1471/2005** (16.12.2005). The defendant had commenced 28 sets of High Court proceedings against various parties (including various public figures and judicial officers), made a

large number of unnecessary interlocutory applications in the proceedings and tended to exhaust every avenue of appeals. The court held that before a section 27 order can be granted, the requirement of proportionality should be satisfied: the court must weigh whether a less draconian measure was sufficient. The court was satisfied that an order under section 27 is a proportionate response to her litigious behaviour, and thus made the said order.

See ***Secretary for Justice & Anor v Yuen Oi Yee & Ors* [2006] 1 HKLRD 679, HCMP 1087/2005** (9.1.2006). The court granted an RAO and an RPO against the defendant as she had abused the legal process. The court also held that the terms of an RAO and RPO must be proportionate to the extent of vexation caused by that litigant. The tests were that: (a) the measures designed must be rationally connected to the vexation occasioned or likely to be occasioned by the litigious activities of the RPO litigant; and (b) the means used to impair the right of access to court must be no more than was necessary to accomplish the objective of curbing the vexatious litigation of the RPO litigant.

See ***Director of Immigration v Etik Iswanti*, [2021] HKCFI 1589, HCMP 602/2021** (9.6.2021), and ***Director of Immigration v MD Hasnain*, [2021] HKCFI 1610, HCMP 603/2021** (9.6.2021). The defendants are non-refoulement claimants. The court held that their original and subsequent non-refoulement claims, and their judicial review applications and appeals therefrom all relate to the same subject matter and are manifestly groundless. The history of their litigation constitutes an abuse of the court's process, and amounts to institution of vexatious legal proceedings on a habitual and persistent basis. Thus, the making of a section 27 order is a proportionate response. In the judgments, the court emphasised that repeated actions evidencing a calculated attempt by a litigant to delay an inevitable judgment or its execution, or a refusal to accept the unfavourable final result of a litigation, or seeking to re-

open matters already determined in a previous action, may be regarded as vexatious legal proceedings which would justify the making of a section 27 order.

See ***Wahyuni v Director of Immigration*** **[2021] HKCFI 1991, HCAL 442/2021** (6.7.2021). The applicant's original and subsequent non-refoulement claims and her judicial review applications and appeals therefrom all relate to the same subject matter and are all unsuccessful. The court considered that her repeated applications manifest a refusal to accept the unfavourable outcome of the rejection of her non-refoulement claim, manifests an attempt to relitigate her claim without viable grounds which has been finally and conclusively determined by CFA, and constitutes an abuse of court process. Thus the court imposed a RPO against the applicant.

3. Illegality

An administrative decision may be set aside by way of judicial review because of its illegality. The starting point is that the decision-maker must understand correctly the law that regulates his decision-making power and give effect to it.

3.1 Statutory Interpretation

3.1.1 Where the decision-making power is sourced from legislation, its exercise depends on the proper construction of the statute concerned. The modern approach to statutory interpretation is commonly referred to as the "purposive approach". The task is to ascertain the intention of the legislature as expressed in the language of the statute and adopt a purposive interpretation having regard to the context and purpose of the statute. The ascertainment of the intention of the legislature as expressed in the language of a statute is an objective exercise. Section 19 of the Interpretation and General Clauses Ordinance (Cap. 1) has been recognised by the courts as giving statutory recognition of the purposive approach.

Interpretation and General Clauses Ordinance (Cap. 1)
19. General principles of interpretation
An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.

3.1.2 The context of a statutory provision must be taken in its widest sense. Among other matters, the object or purpose of a

statute may be ascertained from the long title to the original bill and by reference to "legislative materials", such as the Explanatory Memorandum attached to the bill and the statements made by Government officials in the course of proceedings in the legislature. However, legislative materials are only admissible for identifying the purpose of the statutory provision, not for construing its words.

Case Example

See ***T v Commissioner of Police* (2014) 17 HKCFAR 593, FACV 3/2014** (10.9.2014). "The starting point in any exercise of statutory interpretation is to look at the context and purpose of the relevant provisions. As has been stated and reiterated in numerous recent decisions of this Court, it is to context and purpose that one looks first in examining the words under scrutiny. One does not begin by looking at what might be termed 'the natural and ordinary meaning', much less I would add a literal meaning, and then put the onus on anyone seeking to advance different meaning to establish some ground which compels acceptance of that different meaning. It is context and purpose that will, in the vast majority of cases, be determinative of the meaning of the words sought to be construed, rather than attempting as a starting point to look at words in a vacuum." (per Ma CJ, at para 4)

3.1.3 In case of any divergence in meaning between the Chinese and the English texts of an Ordinance, the Ordinance has to be construed in accordance with section 10B(3) of the Interpretation and General Clauses Ordinance (Cap. 1), i.e. adopting the meaning which best reconciles the texts, having regard to the object and purpose of the Ordinance.

3.1.4 More detailed discussion on the rules of statutory interpretation can be found in "Legislation about Legislation – a

general overview of Hong Kong's Interpretation and General Clauses Ordinance (Cap. 1)" published on the website of the Department of Justice[2].

3.2 Exercise of Discretion

3.2.1 Where the decision involves the exercise of discretionary power, it is a fundamental principle that such discretionary power should be exercised only by those to whom it is given and that they should retain it unhampered by improper constraints or restrictions. It should also be exercised reasonably, in good faith, on proper grounds and in accordance with the principles of natural justice. In other words, it must not be abused.

3.3 Grounds of Illegality

3.3.1 There are a number of grounds upon which a court might hold that a decision has been made illegally. These grounds include:

Grounds in relation to the basis of power:

(a) The empowering legislation is in contravention of the Basic Law;

(b) The subsidiary legislation which confers power on the decision-maker is ultra vires the primary legislation;

(c) The meaning of empowering subsidiary legislation cannot be ascertained;

[2] https://www.doj.gov.hk/en/publications/pdf/2010/ldd20101118e.pdf

(d) The decision-maker acts in excess of his power;

Grounds in relation to the manner in which the power is exercised:

(e) Power not exercised by the person entrusted with the power:

(i) The power conferred upon one authority is in substance exercised by another;

(ii) There is unlawful delegation of power;

(f) Errors:

(i) There is a decisive error of law;

(ii) The decision is materially influenced by a material error of facts;

(g) Irrelevant considerations:

(i) The decision-maker takes into account an irrelevant consideration or fails to take into account a relevant consideration;

(h) Failure to observe the non-fettering principle:

(i) The exercise of a discretion by the decision-maker is fettered as the decision-maker acts under dictation or applies the policy rigidly without regard to the merits of the particular case;

(ii) The decision-maker misinterprets or misapplies an established policy;

(i) Improper purposes and bad faith:

(i) The decision is motivated by an improper purpose;

(ii) The decision is made in bad faith; and

(iii) There is an inordinate delay for the decision-maker to make the decision

These grounds will be discussed below.

Grounds in relation to the basis of power

(a) Contravention of the Basic Law

3.3.2 Executive acts must not contravene the provisions of the Basic Law, including those concerning human rights. Any executive act which contravenes the Basic Law may be set aside in judicial review proceedings on grounds of illegality.

3.3.3 Details of constitutional challenges to legislation and executive acts are covered in Chapter 6 below.

(b) Ultra vires subsidiary legislation

3.3.4 The term "subsidiary legislation" or "subordinate legislation" is defined under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) as "any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect". It is common that powers exercised by public officers are derived from subordinate legislation.

3.3.5 It is a general principle that subsidiary legislation must be confined within the scope of the primary legislation, i.e. the Ordinance enacted by the Legislative Council under which the subsidiary legislation is made. It cannot contradict or enlarge the scope of authority conferred by the primary legislation.

3.3.6 The maker of a piece of subsidiary legislation acts "intra vires" if the effect of the legislation remains within the scope of the authority conferred by the primary legislation; and acts "ultra vires" if he ventures beyond the limits. In order to ascertain if a piece of subsidiary legislation is "ultra vires", it is necessary to construe: (1) the primary legislation which delegates the power to make law, and (2) the provision in the subsidiary legislation which is alleged to be beyond the power conferred.

3.3.7 Subsidiary legislation is susceptible to judicial review if it is ultra vires. It has been held that the courts of Hong Kong should adopt a benevolent construction of subsidiary legislation and there is a presumption against legislation being intended to provide what is inconvenient or unreasonable, see *Singway Co Ltd v AG* [1974] HKLR 275, HCA 3826/1973 (20.6.1974).

3.3.8 Subsidiary legislation may be enacted to stipulate the manner of exercise of the power in the primary legislation, which is legitimate and more often than not necessary and desirable. However, if the subsidiary legislation is inconsistent with the primary legislation by which the enabling power is conferred, it offends section 28(b) of the Interpretation and General Clauses Ordinance (Cap. 1) and is ultra vires. See *Cheung Yick Hung v The Law Society of Hong Kong* [2016] 5 HKLRD 466, HCMP 1304/2016 (5.10.2016).

3.3.9 As a general rule, a power to regulate an activity under the primary legislation does not prima facie give the maker of subsidiary legislation the power to prohibit the activity totally. Prohibition of an activity in part may, however, be needed for effective regulation and approved, see *Ng Enterprises Limited v The Urban Council* [1996] 2 HKLR 437 (29.7.1996).

(c) Uncertainty

3.3.10 Subsidiary legislation whose meaning cannot be ascertained with reasonable certainty is ultra vires and void.

See ***Wade & Forsyth, Administrative Law*, 11th edn, p 741**. "A regulation or byelaw whose meaning cannot be ascertained with reasonable certainty is ultra vires and void. Thus a local authority byelaw which ordained that 'no person shall wilfully annoy passengers in the streets' was struck down. And a byelaw forbidding the flying of hang-gliders over a pleasure ground without specifying the height below which the offence was committed was also invalid."

(d) Acting in excess of power

3.3.11 A decision-maker must act within the power conferred by the law. If a decision-maker does something for which no power has been granted or in excess of the conferred power, the decision is liable to be quashed by the court.

Case Example

In ***Wong Kam Kuen v The Commissioner for Television and Entertainment Licensing* [2003] 3 HKLRD 596, CACV 41/2003** (30.7.2003), the court held that it was ultra vires the powers of the Commissioner to impose his own views of indecency and obscenity in assessing whether a game installed by an amusement game licensee was in breach of a licensing condition because such matters fell within the purview of the Control of Obscene and Indecent Articles Ordinance (Cap. 390). If the Commissioner

considered that a game in question was obscene, he should submit the game to the Obscene Articles Tribunal for assessment.

3.3.12 Whether an incidental power should be inferred must be viewed in the context of the express power conferred by the statute to see whether the implied power is reasonably required for the effective exercise of that express power. A power would not be implied for reasons of convenience and desirability. Also, an act done in the public interest does not in itself confer the necessary jurisdiction on the decision-maker.

Case Example

In ***Man Hing Medical Suppliers (International) Ltd v The Director of Health* [2015] 3 HKLRD 224, HCAL 62/2014** (21.5.2015), the Director of Health ordered recall of a product that was suspected to be unregistered proprietary Chinese medicine. There was no express power under the Chinese Medicine Ordinance (Cap. 549) ("CMO") to order recall. The court found that the ordinary meaning of the words of the power to "seize, remove and detain" was different in nature from the meaning of "recall". It was held that a power to order recall was not reasonably necessary for the effective exercise of the power to seize, remove and detain under sections 146(2)(c) and (f) of the CMO. As a matter of principle the court should not imply a power for reasons of convenience and desirability.

Grounds in relation to the manner in which the power is exercised

(e) Power not exercised by the person entrusted with the power

(i) Power in the wrong hands

3.3.13 An arrangement by which a power conferred upon one authority is in substance exercised by another is unlawful and such exercise of power is invalid.

Case Example

See ***Re Hong Kong Hunters' Association Ltd*** **[1980] HKLR 179, HCMP 57/1980** (8.2.1980). The Director of Agriculture and Fisheries was the licensing authority for the issue of game licences under the repealed section 14 of the Wild Animals Protection Ordinance (Cap. 170). On 4 December 1979, the Executive Council advised and the Acting Governor ordered that game hunting should be prohibited and that appropriate amendments should be made to the Ordinance. Pursuant to that directive, the Director refused those applications without any explanation before the Ordinance was duly amended. The court held that the Director has failed to exercise his discretion under section 14 of the Ordinance thereby acting contrary to the provisions of the law. The court stated that, in his capacity as licensing authority, the Director must exercise his discretion independently and judicially to the best of his ability in accordance with the provisions of the Ordinance but not to have been fettered by the directive of the Executive Council.

(ii) Unlawful delegation of power

3.3.14 The presumed intention of the legislature is that discretionary power should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable.

3.3.15 Power to delegate will be construed by the courts in the same way as other powers, and will not extend to sub-delegation in the absence of some express or implied provision to that effect. In the case of judicial or disciplinary functions the courts may construe general powers of delegation restrictively.

Case Example

See ***Rowse v The Secretary for the Civil Service & Ors*** **[2008] 5 HKLRD 217, HCAL 41/2007** (4.7.2008). The applicant, a senior civil servant, was charged with misconduct in discharging his duties relating to the sponsorship of a festival of music for Hong Kong. Disciplinary proceedings were commenced. The various charges against him were either substantiated or partially substantiated. He appealed to the Chief Executive. The Chief Executive delegated his power to hear an appeal to the Chief Secretary for Administration who subsequently rejected the applicant's representations. The court held that the Chief Executive's delegation to the Chief Secretary was invalid, and it followed that the Chief Secretary's decision made pursuant to that delegation was also invalid. The court stated, "In all the circumstances, I am unable to find any convincing grounds for concluding that, despite the apparent contrary intention appearing in the Administration Order, the Order is to be read as giving an implied power to the Chief Executive to delegate his powers and

functions under section 20." (per Hartmann J (as he then was) at paras 231 & 232)

3.3.16 In practice, a great deal of delegation is required for the operation of the Government. This has to be authorised by statute, either expressly or impliedly. Under section 43 of the Interpretation and General Clauses Ordinance (Cap. 1), there is a wide general power of delegation that will allow delegation by specified public officers in many cases.

Case Example

In ***Ng Chi Keung v Secretary for Justice* [2016] 2 HKLRD 1330, HCAL 27/2013** (21.4.2016), it was held that the Secretary for Justice ("SJ") had the power to intervene under section 14(1) of the Magistrates Ordinance (Cap. 227). He had the power to delegate his duties to any legal officer under section 7 of the Legal Officers Ordinance (Cap. 87) and section 43 of the Interpretation and General Clauses Ordinance (Cap. 1). It was held that in the absence of evidence to the contrary, SJ must be deemed to have delegated the power to intervene the private prosecution to the Director of Public Prosecutions.

3.3.17 The person who made the delegation can always exercise the power himself or cancel or vary any delegation. See section 44 of the Interpretation and General Clauses Ordinance (Cap. 1).

3.3.18 Delegation should be distinguished from agency, although there are similarities between the two concepts. A public authority is at liberty to employ agents in the execution of its powers. It may thus employ lawyers in legal proceedings or consultants in construction projects. The important element is that

it should take its decisions of policy itself, and observe any statutory requirements scrupulously.

3.3.19 An unauthorised act of an agent may generally be ratified by the principal but the unauthorised act of the delegate, in the absence of statutory authority, cannot be ratified by the delegator. Public authorities are generally allowed to ratify the acts of their agents retrospectively, both under the ordinary rules of agency and under liberal interpretation of statutes. Occasionally the court may invoke the rules of agency to justify a questionable delegation.

3.3.20 In the context of government departments and bureaux, another relevant principle is the "Carltona principle". It is derived from the famous English Court of Appeal case (*Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 (6.10.1943)), and is the basis on which civil servants exercise their ministers' powers. As explained by Lord Greene MR in that case (at 563), it is widely recognised in many jurisdictions that the "functions which are given to ministers … are functions so multifarious that no minister could ever personally attend to them … The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case".

3.3.21 This is not considered true delegation because the official acts not as a delegate but in his minister's name. Legally and constitutionally the act of the official is the act of the minister, without any need for specific authorisation in advance or ratification afterwards. The minister is responsible for anything that his officials have done under his authority. Even where there are express statutory powers of delegation they are not in fact employed as between the minister and his own officials. The case

would be different where the official is to be empowered to act by way of delegation in his own name rather than the minister's.

3.3.22 There are limits to the applicability of the Carltona principle. It generally applies only to the departments of the Government, and not to other statutory bodies or executive agencies. It does not cover those situations in which the minister is expected to exercise a power personally and not through officials, such as hearing statutory appeals or petitions.

See ***Wade & Forsyth, Administrative Law, 11th edn, p 268***. "On this approach legal responsibility, not accountability to Parliament, determines the reach of the Carltona principle; and it thus extends beyond central government … (But) the application of the Carltona principle to executive agencies has been persuasively criticised on the ground that ministerial responsibility for such agencies is too weak to justify its application."

3.3.23 The Carltona principle is acknowledged in Hong Kong, but its application is relatively rare because of the wide general power of delegation already mentioned.

Case Example

See ***HKSAR v Lee Ming Tee & Anor* (2001) 4 HKCFAR 133, FACC 8/2000** (22.3.2001). The Financial Secretary appointed an inspector to undertake an investigation into the affairs of the defendant's companies. The inspector's work was monitored by the Steering Group chaired by the Deputy Secretary for Monetary Affairs ("DSMA") on behalf of the Financial Secretary. The CFA approved of the position that the DSMA was to be regarded as the Financial Secretary's representative, and stated by way of obiter

dicta that the Carltona principle applied to "a Secretary in the HKSAR Government". (per Ribeiro PJ at 153)

(f) Errors

(i) Decisive error of law

3.3.24 Apart from the example of a decision-maker making an error as to the meaning and scope of the relevant power-conferring law, a decision is also liable to be quashed if the decision-maker makes any other decisive error of law in the course of coming to the decision.

Case Example

See ***PCCW-HKT Telephone Ltd & Anor v The Secretary for Commerce and Economic Development & Anor* (2017) 20 HKCFAR 592, FACV 11/2017** (27.12.2017). This is a case of error of law on the interpretation of statutory provisions. It was held that it was an error of law to fail to construe the relevant provisions of the Telecommunication Ordinance (Cap. 106) and the Trading Funds Ordinance (Cap. 430). On proper construction, they did not permit the prescribing of a licence fee which included an element of what in substance was a tax upon the licensee nor permit the Office of the Telecommunications Authority to include the projections for notional tax or dividends as surplus funds in the budgets of its trading fund.

(ii) Material error of fact

3.3.25 Traditionally, the court's function in judicial review proceedings is limited to reviewing the legality of the decision-

making process and the courts have been reluctant to review the factual basis of decisions.

3.3.26 However, it is now recognised that a material error of fact may constitute a self-standing ground of review under the concept of illegality. It is based on the principle that it is unfair to leave an applicant with no remedy where a clear error of fact has had a material effect upon the decision or the action taken.

Case Example

In ***Smart Gain Investment Ltd v Town Planning Board & Anor*, unreported, HCAL 12/2006** (6.11.2007), the Applicant applied for judicial review against the decision of the Town Planning Board (the "Board") in relation to the Applicant's objections to include four pieces of agricultural land which it owned into a "Conservation Area" zone under the Draft Outline Zoning Plans. One of the reasons that the Town Planning Board dismissed the applicant's objections was that the sites "comprised wooded slopes and river valley", which the court found as plainly a mistake of fact based on evidence from a site visit. It was held that such mistake of fact gave rise to objective unfairness. The court allowed the application for judicial review, and quashed the Board's decision and remitted the decision to the Board for reconsideration.

(g) Irrelevant considerations

3.3.27 A decision-maker must consider all relevant factors in making the decision and ignore irrelevant ones. Normally relevant factors include: (i) statutory criteria and purpose; (ii) any relevant policies; and (iii) the merits of the individual case. In the meantime, a decision-maker must not take into account an irrelevant

consideration. Political factors are normally irrelevant, unless they are written into the statute.

Case Example

In ***Capital Rich Development Ltd & Anor v Town Planning Board* [2007] 2 HKLRD 155** (18.1.2007), the Court of Appeal held that the Town Planning Board ("TPB") had taken into account financial considerations in devising a redevelopment scheme to regenerate an area in Sheung Wan. Such consideration was held to be an irrelevant consideration and had a substantial or material influence upon TPB's decision. TPB's decision was thus quashed.

3.3.28 In a decision involving the weighing of many complex factors, it will always be possible to point to some factors which should arguably have been taken into account or left out of account; even if they should have been, the court should not intervene unless it is convinced that this would have resulted in the decision going the other way.

Case Example

In ***Kaisilk Development Ltd v Secretary for Planning, Environment and Lands*, unreported, HCAL 148/1999** (10.3.2000), one of the grounds relied on by the Applicant was the Secretary's failure to take into account a relevant consideration, namely, a valuation report prepared by the surveyor instructed by the Applicant. The court held that the report was a critique of the method of valuation adopted by the Land Development Corporation, which was based on historic data. Once the Secretary was satisfied that the assessment should be based on current market value rather than historic data, the report would not have

influenced him at all and thus this ground of judicial review did not succeed.

(h) Failure to observe the non-fettering principle

(i) Fettering discretion

3.3.29 When the legislature confers on a particular authority the discretion to make a decision, only that authority may exercise the discretion (subject to proper and lawful delegation). If the decision-maker allows his discretion to be fettered by: (a) acting under dictation; or (b) adopting an over-rigid policy, the decision is liable to be quashed.

3.3.30 Acting under dictation: An authority delegated with a statutory discretion must address the matter for consideration on its own. It cannot mechanically accept instructions from, or adopt the view of, another authority as to the manner of exercising its discretion in a particular case, unless that other authority has been expressly empowered to give such direction or unless the deciding authority or officer is a subordinate element in an administrative hierarchy within which instructions from above may properly be given on the question at issue. See para 3.3.13 above and *Re Hong Kong Hunters' Association Ltd* [1980] HKLR 179, HCMP 57/1980 (8.2.1980).

3.3.31 Adopting an over-rigid policy: Departmental policies and guidelines are legitimate provided that they do not contradict the aim of the legislation and are not followed so inflexibly that they fetter discretion. The general rule is that anyone who has a statutory discretion must not 'shut his ears to an application', see *British Oxygen Co Ltd v Board of Trade* [1971] AC 610 (15.7.1970). Each case must be considered on its own merits. An

authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance.

Case Example

In ***Wise Union Industries Ltd v Hong Kong Science and Technology Parks Corporation*** **[2009] 5 HKLRD 620, HCAL 12 & 13/2009** (13.10.2009), the court held that a decision-maker must not apply his policy blindly or rigidly and the policy it adopted must fairly admit of exceptions. Even if, on the face of it, a policy did not preclude the decision-maker from departing from it, an actual rigid implementation of the policy was still unacceptable.

3.3.32 However, the above rules ought not to be carried to the extreme of prohibiting a government department from consulting other authorities, or of preventing the Administration from devising its policy or acting in accordance with its policy. There is always a difference between seeking advice and then genuinely exercising one's own discretion and acting obediently or automatically under someone else's advice or directions. Similarly, a public authority may properly take into account any relevant government policy in its decisions, provided that it genuinely decides each case based on its own merits.

3.3.33 Contractual fetters on Discretion: An authority's powers may include the making of binding contracts. Like policies, contracts may be inconsistent with an authority's proper exercise of its discretion. In general, an authority may not by contract fetter itself so as to disable itself from exercising its discretion as required by law. Any such contract would be ultra vires, void and unenforceable in law. The prime duty of an authority is to preserve

its own freedom to decide in every case as the public interest requires at the time.

Case Example

See ***Fairland Overseas Development Co Ltd v Secretary for Justice* [2007] 4 HKLRD 949, HCA 2154/2005** (31.8.2007). The Government had agreed with the plaintiff that in return for the plaintiff withdrawing its objection to the proposed resumption of a small part of a private road for the construction of a new road, the Government would, upon the opening of the new road, erect traffic signs prohibiting container vehicles from entering the private road thus preserving the environmental amenity of the area. The court held that such contract was unenforceable in law as being ultra vires. "The Commissioner cannot divest himself of authority so as to become powerless to act. This contract would in substance have the effect of transferring the exercise of the statutory discretion from the Commissioner to the plaintiff – a type of unlawful subdelegation … The contract did not impair the Commissioner's discretion; it denied it… It was a dictation by the plaintiff and equally became an abdication by the Commissioner. Neither is allowed – here there was both."

3.3.34 However, it would be wrong to conclude that a public authority can always escape from its contractual obligations by contending that it fetters its discretion. There will often be situations where a public authority must be at liberty to bind itself for the very purpose of exercising its powers effectively. Expressly or impliedly LegCo grants contractual capacity to many public bodies in order that they can effectively fulfil their functions. Effectively entering into some contracts is part of many public bodies' statutory birthright. Since most contracts fetter freedom of action in some way, there may be difficult questions of degree in

determining how far the authority may legally commit itself for the future.

See ***Wade & Forsyth, Administrative Law, 11th edn, p 278***. "The important question is whether there is incompatibility between the purposes of the statutory powers and the purposes for which the contract is made. In cases where there is no commercial element the court is normally ready to condemn any restriction on a public authority's freedom to act in the public interest. Thus a planning authority cannot bind itself by contract either to grant or to refuse planning permission in the future. In one case (*Triggs v Staines Urban District Council* [1969] 1 Ch 10 (12.2.1968)) a local authority designated a sports ground as a proposed public open space, but made a formal agreement with the owner that this designation should cease to operate if the authority had not purchased the land by a certain time, that it would not purchase the land either voluntarily or compulsorily during a certain period, and that it would not make any claim for betterment. All these undertakings were void as clearly incompatible with the authority's duty to preserve its powers intact."

(ii) Misinterpretation or misapplication of established policy

3.3.35 It is essential that a policy which has been applied by a decision-maker is properly understood, interpreted and applied. If the decision-maker fails properly to understand the policy, the decision would be as defective as it would be if no regard had been paid to the policy.

Case Example

In ***Leung Kam Yung Ivy v Commissioner for Television and Entertainment Licensing & Anor*** **[2001] 2 HKC 555, HCAL 1986/2000** (30.3.2001), the Applicant held a licence for operating a mahjong parlour. The relevant policy statement indicated that a balanced view would be taken on the degree of public reaction to an application for licence and the general environment of the vicinity of the proposed gaming premises. Upon the surrender of tenancy at the existing premises, the Applicant's licence was suspended and her applications for relocation were rejected on the basis that "there was no cogent need" for gaming tables in the district. The court held that the Commissioner imported the word "cogent" into the consideration, which set a more stringent standard and distorted the policy. The evidence also showed the absence of balance in the overall consideration. The Commissioner's decision was quashed.

3.3.36 Policy statements must be read in their proper contexts and with common sense. They should be read in the way in which an educated person acquainted with the factual context would do so, giving it its plain and ordinary meaning.

Case Example

In ***Hong Kong Television Network Ltd v Chief Executive in Council*** **[2016] 2 HKLRD 1005, CACV 111/2015** (6.4.2016), the question is whether the "gradual and orderly approach" in granting additional free television licences adopted by the Chief Executive in Council ("CEIC") departed from the general policy statements which said: "There is no pre-set ceiling on the number of licences to be issued" was considered. It was held that policy statements

must be read in their proper contexts and with common sense. A policy statement must be read as a whole, and undue emphasis on individual expressions or passages in isolation is inappropriate. In all cases, one must bear firmly in mind the context and background, in order to have a full and complete understanding of the policy concerned (at para 55). It was held that by adopting the gradual and orderly approach, the CEIC was not departing from the general policy statements. He was simply adopting a particular mode or manner in which to implement the policy statements and achieve the policy objectives concerned. There was neither a misunderstanding of the relevant policy statements nor a departure from them (at para 76).

3.3.37 The ground that a decision-maker failed to follow, misinterpreted or misapplied an established policy can also be used to support a ground of review premised on irrationality (see Chapter 4 below for details) or failure to give effect to a procedural or substantive legitimate expectation (see Chapter 5 below for details).

(i) Improper purposes and bad faith

(i) Improper purposes

3.3.38 Where a statute confers a power on a decision-maker, he must use that power for a purpose intended by the statute (the *Padfield* principle). If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. Such an abuse of power may be manifested by an improper motive, and may equally be the result of an honest misunderstanding of the nature and extent of powers conferred upon a public authority. Where the purpose of a power is not spelt out in the statute, the

court will determine what, if any, the implied restrictions on its exercise should be.

Case Example

In ***The Incorporated Owners of Wah Kai Industrial Centre, Texaco Road & Ors v Secretary for Justice*** **[2000] 2 HKLRD 458, HCAL 120/1999** (1.3.2000), the court laid down the tests on whether an administrative act was done for an improper purpose (at pp 475I to 476H), which are summarised as follows:

(i) If the actor has in truth used his power for the purpose for which it was conferred, it is immaterial that he achieved as well a subsidiary object;

(ii) If the actor pursues more than one purpose, the legality of the act is determined by reference to the dominant purpose. A purpose is not dominant if the power would still have been exercised without regard to that purpose; and

(iii) Where an unauthorised purpose has in fact been pursued, the question is then whether the act had been significantly or substantially influenced by it. If the actor would have come to the same decision having regard to only the authorised purposes, the act can still be upheld.

(ii) Bad faith

3.3.39 A statutory power is exercised unlawfully if it is not exercised honestly and in good faith. Cases of bad faith are rare. In some cases this ground is applied alongside the ground of improper purposes.

(j) Inordinate delay

3.3.40 Inordinate delay in performing a legal duty such as determining an application for a licence or an objection may amount to an abuse and is susceptible to judicial review. See *Kong Tai Shoes Manufacturing Co Ltd v Commissioner of Inland Revenue* [2012] 4 HKLRD 780, HCAL 34/2011 (30.9.2011).

3.3.41 In the absence of a stated time limit, it would be necessary to seek assistance from section 70 of the Interpretation and General Clauses Ordinance (Cap. 1) which provides that: "Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."

3.4 Estoppel, Waiver, Consent and Discretion

3.4.1 Estoppel as a principle of law is, in essence, that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. In public law, the doctrine of estoppel cannot be invoked where its application is incompatible with the free and proper exercise of an authority's powers or the due performance of its duties in the public interest. Nor can estoppel be pleaded to justify action which is ultra vires.

3.4.2 Estoppels, however, have been allowed to operate against public authorities in minor matters of formality, where no question of ultra vires arises.

Case Example

See ***Wells v Minister of Housing and Local Government*** **[1967] 1 WLR 1000** (CA) (11.5.1967). In that case, the court held that it could ignore the fact that the proper statutory application had not been made before a planning authority's determination, since the authority itself had led the landowner to suppose that it was not required. The authority was thus estopped from taking the objection. "Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on technicalities." (per Lord Denning MR at 1007)

3.4.3 In a similar vein, no waiver or consent can legitimise action of an authority which is ultra vires.

See ***Wade and Forsyth, Administrative Law, 11th edn, pp 198-199***. "Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from it. But no rigid distinction need be made, since for present purposes the law is similar. The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again, the principle of ultra vires must prevail when it comes into conflict with the ordinary rules of law. A contrasting rule is that a public authority which has made some order or regulation is not normally at liberty to waive the observance of it by exercising a dispensing power. The principle here is that law which exists for the general public benefit may not be waived with the same freedom as the rights of a private person. In other cases, where neither of these rules is infringed, waiver and consent may operate in a normal way so as to modify rights and duties."

3.4.4 While the law in relation to contractual fetters on discretion, estoppel, waiver and consent may create injustice in certain circumstances where the person aggrieved might have relied upon an authority's undertaking, representation or misleading advice, the person aggrieved is not without redress. Where appropriate, the person may rely on the protection of legitimate expectation (see Chapter 5) which may have taken the place of estoppel. The private law action in negligent misstatement and other appropriate remedies detailed in Chapter 10 may also provide solutions. Such remedies are important points to be noted.

4. Irrationality

4.1 Wednesbury Unreasonableness

4.1.1 Discretionary powers of public authorities have to be exercised reasonably. This, however, does not mean a decision may be struck down simply because the judge thinks that it is unreasonable or had he been the decision-maker he would have made a different decision.

4.1.2 In judicial review, what is meant by "reasonable" is that the public authority's decision must not be "Wednesbury unreasonable" (or irrational). This term is derived from the case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (10.11.1947). It means the decision is so absurd that no sensible person could have properly made it. The test clearly requires a high degree of unreasonableness.

Case Example

See ***Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223** (10.11.1947). "… if a decision … is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. … but to prove a case of that kind would require something overwhelming …" "It is true the discretion must be exercised reasonably. … For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. … Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of

the authority. Warrington LJ in *Short v Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another." (per Lord Greene MR at 229, 230)

The principle was later articulated in ***Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374** (22.11.1984) by Lord Diplock that a decision is said to be "Wednesbury unreasonable" if it is "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it." (at 410)

4.1.3 Hong Kong courts have from time to time been invited to consider the doctrine of irrationality (especially in judicial reviews involving decisions made by tribunals), and have provided illustrations of where the line is to be drawn between reasonable and unreasonable decision-making. The above principle as articulated by Lord Diplock has been applied in, for instance, the Court of Appeal in *Chan Heung Mui & Ors v The Director of Immigration*, unreported, CACV 168/1992 (24.3.1993).

Case Example

In ***803 Funds Limited v Secretary for Education* [2021] 4 HKLRD 735, [2021] HKCFI 2874, HCAL 1969/2020** (28.9.2021), the Court of First Instance held that the question of whether more harm or prejudice than benefit would result from the disclosure of the information withheld is a matter for the Education Bureau to consider. The court took the view that "the threshold for

judicial review on the ground of Wednesbury unreasonableness is a high one, particularly in relation to a decision based on the weighing of conflicting public interests. There is not a simple, right or wrong, answer to the question of whether more harm or prejudice than benefit would result from the disclosure of the withheld information to the Applicant. The answer to such question is a matter of judgment and depends on a host of public policy considerations which fall within the province of EDB. EDB is in a much better position than the court to judge whether the harm or prejudice that would result from the disclosure of the withheld information would outweigh any benefit from such disclosure."

4.2 Proportionality and Fundamental Rights

4.2.1 In addition to Wednesbury unreasonableness, the principle of proportionality has emerged in the context of judicial scrutiny of public authorities' decisions affecting rights protected by the Basic Law or the Hong Kong Bill of Rights Ordinance (Cap. 383). The substantive review of administrative decisions affecting fundamental rights has developed under the influence of human rights law. You may wish to refer to Chapter 6.6 of this Guide for more detailed discussions.

5. Procedural Impropriety

5.1 Natural Justice

5.1.1 Practically any public officer who decides anything affecting the rights, interests or legitimate expectations of the public will be under a "duty to act fairly" or to obey the "rules of natural justice" (these two expressions being used interchangeably). Broadly speaking, this means that the decision-maker must be unbiased and that he must give an appropriate chance to make representations to those affected before he makes the decision.

5.1.2 The decision-maker who decides only after complying with the duty to act fairly will be better informed of the consequences and implications of his decision and thus tend to make a better decision.

Case Example

See ***Thapa Indra Bahadur v Secretary for Security*** **(1998-1999) 8 HKPLR 77, HCAL 18/1999** (21.10.1999), "… there is a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interest and legitimate expectations, subject only to clear manifestation of a contrary statutory intention." "… The reference to 'right or interest' … must be understood as relating to personal liberty, status, preservation of livelihood and reputation as well as to proprietary rights and interest."

5.1.3 The rules of natural justice are of varying contents. They are not written on "tablets of stone" but vary with the precise context. The underlying concept is that what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depend on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

5.1.4 The legislature is presumed to intend that the rules of natural justice are to be followed when it grants discretion to officials. Thus statutes will not be interpreted so as to exclude the rules unless the legislature intended to oust them in very clear terms. For example, in *Lau Ping v R* [1970] HKLR 343, CACC 120/1970 (6.6.1970), the Court of Appeal in the context of a detention of a vehicle pursuant to a regulation now repealed held that, in the absence of any express provision, the abrogation of the common law principle that no man should be deprived of his property without first being given an opportunity of being heard meant that such regulation was ultra vires.

5.1.5 Whether fairness is required in the performance of a public function and what is involved in order to achieve fairness is for the decision of the courts as a matter of law (see for example *Pearl Securities Ltd v Stock Exchange of Hong Kong Ltd* [1999] 2 HKLRD 243, HCAL 39/1998 (9.2.1999)).

5.1.6 The rules of natural justice require decision-makers to comply with procedural safeguards when making a decision which may have adverse effect on a person. The procedural safeguards include:

(a) Right to a fair hearing;
(b) Rule against bias; and
(c) Protection of legitimate expectation.

5.2 Right to a fair hearing

5.2.1 Fairness does not require an oral hearing in all cases. The obligation is to receive and consider representations which may be in writing. The essential trigger for an oral hearing is whether a dispute of fact arises that will only be able to be resolved by oral evidence. In *ST v Betty Kwan & Anor*, unreported, CACV 115/2013 (26.6.2014), the Court of Appeal set out the general principles on whether to hold an oral hearing i.e. the standards of fairness required, the nature of the decision-making process in question, the procedural history of the matter including whether there has been an oral hearing before, the interest at stake and the importance of the decision (in terms of its outcome and consequence), the issues involved, and how the presence or absence of an oral hearing would affect the quality of the opportunity to make worthwhile or effective representations.

5.2.2 The heart of a fair procedure and hearing is that there should be a reasonable opportunity for a person to know about and respond to adverse materials received by and relied on by the decision-maker. This generally requires disclosure of damaging or adverse materials to which the decision-maker has access. As explained by the Court of Appeal in *ATV v Communications Authority (No 2)* [2013] 3 HKLRD 618, CACV 258/2012 (15.5.2013), the details required of the disclosure must be such so as to enable the person to make "meaningful and focused representations". The extent of what fairness demands is dependent on the context of each case. This would depend, inter alia, on:

(a) The statute that creates the discretion;

(b) The prima facie relevance, credibility and significance of the evidence or materials vis-à-vis the decision which is to be made;

(c) The nature of the relevant decision and its objective significance to the affected person; and

(d) Whether there are countervailing factors against disclosure, such as: confidentiality for the protection of the witness from genuine fear of, say reprisal or harm, or national security.

5.2.3 If it is shown that, as a matter of fairness and natural justice, the documents or materials ought to have been disclosed by the decision-maker to the applicant so as to afford him an opportunity to respond to them, the court would proceed to the next stage to consider whether to exercise its discretion to quash the decision. One of the factors that the court would consider is whether there is any prejudice caused by the procedural unfairness.

5.2.4 The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice.

5.2.5 There is no general right to legal representation in administrative proceedings, though the authority has the discretion to permit legal representation if fairness requires it. How the discretion to allow legal representation is to be exercised will vary according to the circumstances of each case.

Case Example

In ***Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, FACV 9/2008** (26.3.2009), the appellant, an ex-police officer who was required to be compulsorily retired after convicted of a disciplinary charge, brought a constitutional challenge against the validity of a statutory bar to legal representation in disciplinary proceedings. The CFA held that by excluding the possibility of the tribunal exercising the discretion of allowing legal representation, the appellant was deprived of a fair hearing. The relevant

regulations were declared inconsistent with Article 10 of the HKBOR which provides, *inter alia*, that: "In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing …" The CFA held that whether legal representation should be permitted would depend on whether fairness so requires in all the circumstances. This would primarily be for the tribunal to assess, and no court would disturb such assessment except for plainly compelling reasons.

5.2.6 Where there is an oral hearing, the authority must allow witnesses to be questioned and allow comments on the whole case. Where there are factual disputes, the parties have a right to cross-examine witnesses, but there is no such right at informal inquiries.

Case Example

In ***Re Ngai Kin Wah* [1987] 1 HKC 236, HCMP 2911/1985** (27.3.1986), a customs officer challenged by judicial review the punishments imposed on him by an adjudicator upon a disciplinary hearing. During the disciplinary hearing, the adjudicator prevented the applicant from cross-examining a key factual witness on one of his statements. The court held that the adjudicator's failure to allow cross-examination deprived the applicant of an opportunity to elicit further useful evidence material to the charge and to undermine the credibility of the key witness. This failure amounted to procedural impropriety which was sufficiently serious to give rise to a substantial denial of natural justice.

5.2.7 Undue delay in disciplinary proceedings resulting in prejudice constitutes a breach of the fairness requirements. Thus, an unexplained lengthy delay in initiating police disciplinary proceedings could result in the quashing of the disciplinary

proceedings. But the court in *Leung Chun Yin v Secretary for Justice*, unreported, HCAL 66/2004 (17.6.2005) did not agree with the Applicant's allegation that there was undue delay in commencing the disciplinary proceedings against him, having regard to the large number of staff involved and the volume of evidence required to be examined.

5.2.8 Delegated hearing: The decision-maker need not conduct a hearing himself and may conduct a hearing through another body or person(s) to receive evidence and submissions from interested parties. In some cases, when issues of credibility of witnesses or other reasons pertaining to the proper assessment of a matter which requires the presence of the decision-maker are not engaged, provided that the decision-maker is fully informed of the evidence and submissions before making a decision, there is no breach of natural justice. For example, in *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 (13.10.1966), it was accepted that it is a matter of procedure for a decision-making body (e.g. a board) to appoint a person to hear and receive evidence and submissions from interested parties for the purpose of informing such decision-making body of the evidence and submissions, and if before its reaching of a decision it is fully informed of and considered such evidence and submissions, it cannot have been said not to have heard the interested parties and to have acted contrary to the principles of natural justice; but an accurate summary of the relevant evidence and submissions would also suffice.

Case Example

In ***R v The Town Planning Board & Anor* [1996] 2 HKLRD 267, HCMP 2457/1995** (8.6.1996), the applicant complained that the Secretary to the Board had earlier prepared and presented a paper to the Board for consideration in his absence. The court, deriving

assistance from *Jeffs*, held that the applicant's case had received full and fair consideration because all those of the Board who took part in making the decision on a later date were fully apprised of all the representations both oral and written which the Board had up to that time received in connection with the applicant's objection.

5.2.9 Ex post facto hearing: While a prior hearing may be better than a subsequent hearing, a subsequent hearing (e.g. on appeal) is better than no hearing at all. In some cases the courts have held that statutory provisions for an administrative appeal or even full judicial review on the merits are sufficient to negative the existence of any implied duty to have a hearing before the original decision is made. This approach may be acceptable where the original decision does not cause significant detriment to the person affected, or where there is also a paramount need for prompt action (e.g. matters affecting public health), or where it is otherwise impracticable to afford antecedent hearings.

5.2.10 A person who does not request a public hearing or to be allowed legal representation by reason that such request would be categorically denied cannot be considered to have waived his right to a public hearing or legal representation.

Case Example

In ***Lam Chi Pan v Commissioner of Police* [2010] 1 HKC 120, CACV 193/2008** (18.12.2009), the applicant was subjected to police disciplinary proceedings and was represented by a senior inspector in the proceedings. He was convicted of one charge and was dismissed from the police force. The Court of Appeal held that the right to legal representation was one aspect of the requirement of a fair hearing. Prior to the CFA decision in *Lam*

Siu Po, the Court of Appeal had consistently (though wrongly) held that the statutory bar to legal representation in police disciplinary proceedings was constitutional. It was unreal to say that the applicant had not been deprived of a fair hearing when he could not be expected to ask for legal representation. Nor was it right that since the applicant had not sought to challenge the constitutionality of the statutory bar to legal representation by judicial review, he could not complain that the disciplinary proceedings were unfair. It was clear that the applicant had not waived his right to legal representation.

5.3 Rule against bias, the requirement of impartiality and independence

5.3.1 The rule against bias stems from the common law principle that "justice should not only be done but should manifestly and undoubtedly be seen to be done" and that "no man is to be a judge in his own cause".

5.1.2 There are three types of bias:

(a) Actual bias;
(b) Presumed bias; and
(c) Apparent bias.

5.3.3 Actual bias: This covers the situation where the decision-maker has been influenced by partiality or prejudice in reaching his decision or where it has been demonstrated that the decision-maker is actually prejudiced in favour of or against a party (i.e. pre-determination). The decision-maker is automatically disqualified from determining the case. A decision maker forming a provisional and tentative view at various stages of evidence as long as it is not a concluded view is not improper because preconceived

opinions do not constitute bias – it does not follow that evidence will be disregarded. Cases involving actual bias are rare, difficult to prove and perhaps redundant given the other grounds of bad faith, improper motive and apparent bias.

5.3.4 Presumed bias: Bias is presumed and the decision-maker is automatically disqualified where he has a pecuniary or personal interest in the subject matter (e.g. close connection based on marriage, blood or friendship). For example, a law lord's shareholding in the appellant company which was worth several thousand pounds (back in the 1850s) disqualified him from hearing the appeal.

Case Example

In ***R v Bow Street Magistrate, ex p Pinochet (No. 2)*** **[2000] 1 AC 119** (15.1.1999), the House of Lords held that presumed bias would arise where the judge is closely associated with a party to the proceedings (one of the law lords was an unpaid director and chairperson of Amnesty International Charity Limited, a company under the control of Amnesty International which had been given leave to intervene in the proceedings before the House of Lords against a former head of state). The judge was automatically disqualified and the matter was reheard before a differently constituted Appeal Committee.

5.3.5 Apparent bias: This is a ground that is more often invoked than the ground for actual bias and presumed bias. Where there is automatic disqualification due to actual or presumed bias, a decision-maker may nevertheless have apparent bias in reaching his decision. The test for apparent bias, the "real possibility" test, is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real

possibility that the tribunal was biased" (*Porter v Magill* [2002] 2 AC 357, adopted in *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187). The House of Lords made clear in *Lawal* that the "fair-minded and informed observer" would adopt a "balanced approach" and was "neither complacent nor unduly sensitive or suspicious". The formulation for apparent bias is adopted by the CFA in *Deacons v White and Case* (2003) 6 HKCFAR 322, FAMV 22 & 23/2003 (6.8.2003); in considering whether the deputy judge who was a friend of a partner of the plaintiff law firm was biased, it was said, "... the view of the fair-minded and informed observer as to whether a reasonable apprehension of bias arises may differ from the reviewing court's own view, and that it is through the prism of such an observer's perception that the court should consider whether the case is one of apparent bias."

Case Example

In ***ZN v Secretary for Justice & Ors* [2016] 1 HKLRD 174, HCAL 15/2015** (13.11.2015), the Secretary for Justice made an application for Zervos J (as he then was) to recuse himself from hearing the application for judicial review involving an issue of human trafficking on the ground of apparent bias. During Zervos J's previous office as the Director of Public Prosecutions, he was involved in the formulation of new initiatives to address and combat human trafficking. In dismissing this application, Zervos J found that the fair-minded and informed observer would not conclude that there was a real possibility that the judge would be biased. The fair-minded observer would view his actions and statements in the past as being general in nature in relation to his previous office as DPP in addressing the problem of human trafficking. The fair-minded observer would also take into account that the issue to be decided upon in the present judicial review application was primarily a question of law concerning a determination of the duties and obligations of the HKSAR

government under Article 4 of the Bills of Rights and whether there has been any failure to fulfil such duties and obligations as determined to apply in the context of the present case.

5.3.6 A decision-maker who is biased cannot successfully argue that he tried not to let his bias influence his decision.

Case Example

In ***R v Ho Chiu Hung*** **[1996] 4 HKC 593, HCMA 359/1996** (21.6.1996), the magistrate who had convicted the defendant of a similar offence refused the defence counsel's application that the case be transferred to another magistrate. The appellant lodged an appeal against the conviction. It was held that the magistrate only considered whether he would be personally biased, but he had failed to consider all the circumstances including whether the circumstances dictated that no other magistrate could hear the case and the admission of knowledge by the appellant in his previous plea before him might have unconsciously influenced him in his findings against the appellant.

5.3.7 The rule against bias may be excluded by ordinance (e.g. section 52 of the Rating Ordinance (Cap. 116)), or the doctrine of necessity or waiver by the person affected. However, even if the common law rule against bias is excluded, Article 10 of the HKBOR (see para 5.3.10 below) would still need to be complied with unless it is excluded by law and the exclusion was justified on objective grounds related to the effective functioning of the State or some other public necessity which justified removal of the Article's protection. Further, the European Court of Human Rights has held that it is unlikely that the requirements of independence and impartiality can be waived, in view of their importance for confidence in the judicial system generally and that waiver "in so

far as it is permissible" must be established in an unequivocal manner (see *Oberschlick v Austria* (1995) 19 EHRR 389 (23.5.1991)).

Case Example

In ***Kwan Kong Co Ltd v Town Planning Board* [1996] 2 HKLR 363, CACV 194/1995** (11.7.1996), the appellant alleged that the decision of the Board violated his right to a fair hearing by a competent, independent and impartial tribunal guaranteed by HKBOR 10. This was on the ground that the vice-chairman and some members of the Board were public officers. The Court of Appeal held that HKBOR 10 was not engaged at all as any final "determination" of the appellant's rights and obligations in terms of Article 10 was made by the Governor-in-Council (now the Chief Executive-in-Council). It was difficult to see how the Board's function could properly be discharged without the presence of at least some of the officials or their representatives; and that the law must allow for the departmental bias which public officers were expected and required to have. The relevant question was whether, when the members of the Board came to make up their minds, they genuinely addressed themselves to the question with minds which were open to persuasion.

5.3.8 There is a distinction between pre-disposition and pre-determination. Administrative decision-makers will naturally approach their task with a legitimate pre-disposition to decide in accordance with their previously articulated views or policies. Where there is simply a pre-disposition to decide one way rather than the other in accordance with previous policies, there is no question of apparent bias. But the decision-maker must keep an open mind and not allow himself to slip from pre-disposition to pre-determination.

5.3.9 It is also self-evident that a ministerial or departmental policy cannot be regarded as disqualifying bias. An administrator's decision cannot be impugned on the ground that he has advocated a particular scheme or that he is known to support it as a matter of policy. The whole object of putting the power into his hands is that he may exercise it according to government policy.

Case Example

In ***PCCW-HKT Telephone Ltd v Telecommunications Authority* [2008] 2 HKLRD 282, CACV 60/2007** (18.9.2007), the applicant contended that the Telecommunications Authority was acting under a real likelihood of apparent pre-determination in a consultation exercise on a proposed policy change. It was held that no case was made out of apparent bias on the materials on which the applicant relied. The Court of Appeal endorsed the submissions of the Telecommunications Authority that the Authority as regulator should candidly articulate his thinking and provisional views; it was not only unobjectionable, it was good administrative practice. If the Authority held strong views regarding a proposal, the forcefulness of his views might well serve to elicit responses from person holding different views who might otherwise not be included to contribute to the debate.

5.3.10 It is fundamental in our law that a public tribunal which has the power to discipline an individual, and to make findings which will strip him of his livelihood, must be seen to be impartial. Article 10 of the HKBOR provides, inter alia, that "in the determination of rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…" An arrangement which satisfies the requirements of the common law will almost certainly conform with the fairness requirement of

Article 10 of the HKBOR (*Lam Siu Po v Commissioner of Police* (2009) 12 HKCFAR 237, FACV 9/2008 (26.3.2010), at para 137).

5.3.11 The courts have not insisted that the initial or primary administrative decision-maker, whether an individual or a tribunal, should comply with every aspect of Article 10. What the courts do insist upon is that the applicant aggrieved by the decision of the initial or primary decision-maker should be able to bring the dispute subsequently before a court of "full jurisdiction". By this, it means full jurisdiction to deal with the case as the nature of the decision requires. Availability of appeal or judicial review would generally be sufficient for the purpose of complying with Article 10 and curing the defect at first instance.

Case Example

In ***Wong Tak Wai v Commissioner of Correctional Services*, unreported, HCAL 64/2008** (31.8.2009), the Court of First Instance found that the hearing of prison disciplinary proceedings with punishment by a Superintendent charged with the administration of the penal institution and/or supervision of the reporting officer in question lacked the independence or impartiality for a fair hearing under HKBOR 10. The Court of Appeal subsequently allowed the Commissioner's appeal ([2010] 4 HKLRD 409, CACV 231/2009 (21.7.2010)) and held that given the wide power of the Commissioner (in determining an appeal by a prisoner against the decision of the Superintendent) to enquire into the merits fully and to hold a rehearing where the justice of the matters required, he was armed with full jurisdiction to deal with the case as the challenged decision required. The court held that the safeguards for a fair adjudication were met and that there was compliance with the requirements for a fair hearing through the appeal to the Commissioner.

5.4 Protection of legitimate expectations

5.4.1 The legitimate expectation doctrine holds that where a decision-maker leads a person affected by a decision legitimately to expect either that a particular procedure will be followed in reaching a decision or that a particular (and generally favourable) decision will be made (and such a decision would be within his powers), then, save where there is an overriding public interest, that legitimate expectation must be protected. The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry (see *AG v Ng Yuen Shiu* [1983] 2 AC 629, PCA 16/1982 (21.2.1983)).

5.4.2 There are two essential requirements for legitimate expectation:

(a) The expectation must be induced by the decision-maker either expressly (e.g. a promise or undertaking) or impliedly (e.g. past practice); and

(b) The representation must be clear, unambiguous and devoid of relevant qualification.

Case Example

In ***Lam Yuet Mei v Permanent Secretary for Education and Manpower of the Education and Manpower Bureau* [2004] 3 HKLRD 524, HCAL 36/2004** (9.8.2004), it was held that there was no factual basis for any expectation to arise on the applicant's part. The court stated that an expectation would not be regarded as reasonable or legitimate if the applicant could have foreseen that

the subject matter of the representation was likely to alter, or that it would not have been respected by the relevant agency, or that the applicant knew that the representor did not intend his statement to create an expectation. Detrimental reliance usually had to be established for a claim based on legitimate expectation to succeed.

5.4.3 Expectations are generally divided into two groups, i.e. procedural expectations and substantive expectations.

5.4.4 Procedural expectations: These are expectations that a particular procedure will be followed and they are protected simply by requiring that the promised procedure be followed. In very exceptional cases, a procedural legitimate expectation may arise even if there is no prior promise or existing policy. A duty to consult or give the person affected an opportunity to make representations before effecting the change in policy will arise where there was established a policy distinctly and substantially affecting a specific person or group who in the circumstances "was in reason entitled to rely on its continuance" and did so (see for example *U Storage Group Limited v Director of Fire Services & Anor*, unreported, HCAL 490/2019 (28.8.2020)).

Case Example

In ***AG v Ng Yuen Shiu* [1983] 2 AC 629** (21.2.1983), the Government announced that certain illegal immigrants who were liable to deportation would be interviewed individually and treated on their merits in each case. The Privy Council held that where a public authority has promised to follow certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The removal order was quashed

as the appellant had only been allowed to answer questions without being given an opportunity to state his own case.

5.4.5 Substantive legitimate expectation: this refers to a reasonable expectation of a favourable decision on the basis of a representation (or promise) or an established practice. Generally, substantive expectations are procedurally protected: the decision-maker will have to give the person affected an opportunity to make representations before the expectation is denied. But exceptionally, where the courts consider that the procedural protection may not be adequate to remedy the unfairness occasioned by the decision-maker's breach of promise or established practice, it may give substantive protection to legitimate expectation in an appropriate case.

Case Example

In ***Ng Siu Tung & Ors v Director of Immigration* (2002) 5 HKCFAR 1, FACV 1/2001** (10.1.2002), specific representations by way of *pro forma* replies were made to a group of applicants for legal aid that it was not necessary for them to join in the existing legal proceedings or to commence fresh proceedings as the Government would act in accordance with the court decisions of the two test cases. The CFA held that they had legitimate expectation to the same treatment as the parties to those two test cases.

5.4.6 Overriding public interest: Once a legitimate expectation has been established, the Administration may have good reasons to resile from its clear representation or promise previously made (e.g. policy changes). The onus is on the Administration to give good reasons why it has failed to give effect to the legitimate expectation

in any particular case. Overriding public interest would be accepted by the court as a good reason provided that the Administration can establish it. The court may demand cogent evidence in support and has taken the view that "the government or the relevant government agency must remain free to change its policy … But the adoption of a new policy does not relieve a decision-maker from his duty to take account of a legitimate expectation." (see *Ng Siu Tung & Ors v Director of Immigration* (2002) 5 HKCFAR 1, FACV 1/2001 (10.1.2002)).

Case Example

In ***Re Thomas Lai* [2014] 6 HKC 1, HCAL 150/2013** (28.2.2014), the court held that even where an applicant has a legitimate expectation, an application for judicial review may still fail if a decision was, with regard to all circumstances, justifiable. Therefore, even if the villager had a legitimate expectation that his village would remain an enclave outside of country park boundaries, ensuring his right to build a small house under the Small House Policy, the decision to incorporate his village's enclave into the country park was justifiable and not an abuse of power.

5.4.7 Revocation of legitimate expectation: A legitimate expectation can be cancelled in the following ways:

(a) Express representation (the statement issued must be clear and unambiguous and a fair hearing may have to be provided in certain circumstances);

(b) Implied representation (through an event or series of events); and

(c) Legislation (clear statutory provisions override any expectation however founded).

5.5 Exclusion of natural justice

5.5.1 The rules of natural justice may be excluded in the following situations:

(a) National security;

(b) Emergencies (most situations are covered by statutes); and

(c) Pure master and servant relationship.

Case Example

In ***Chu Woan Chyi & Ors v Director of Immigration*** **[2007] 3 HKC 168, HCAL 32/2003** (23.3.2007), four members of Falun Gong were refused entry to Hong Kong because it was believed that they presented a security risk, but the basis for such belief was not disclosed. The court held amongst other things that the issue of multiple entry permits to the four applicants did not vest them (being aliens) with any sort of legitimate expectation that they would be admitted into Hong Kong. The Director of Immigration was not obliged to give reasons or to allow representations, and was entitled to make such enquiries as he saw fit and was not under an obligation to provide a hearing in coming to such an administrative decision. (The subsequent appeal was dismissed.)

5.6 Duty to give reasons

5.6.1 There is no general common law rule which requires reasons to be given by an administrative tribunal or even a court of law for its decision. But it will generally be prudent for a decision-maker to give careful thought to whether reasons should be given.

5.6.2 Whether it is desirable or necessary to give reasons depends on the circumstances of the case. For instance, the court may infer that a decision is arbitrary and unreasonable if reasons are not given. In certain circumstances, reasons for an administration decision may be required where the decision appears aberrant, or where the decision engages an interest such as personal liberty that is so highly regarded by the law that fairness requires that reasons be given as of right (see *Lister Assets Ltd & Ors v The Chief Executive in Council*, unreported, CACV 172/2012 (25.4.2013)).

Case Example

In ***Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* (1997-1998) 1 HKCFAR 279, FACC 1/1998** (25.11.1998), the Court of Final Appeal observed that the duty to give reason may arise as a matter of statutory construction or under common law having regard to the following aspects: the character of the tribunal, the kind of decision it has to make and the statutory framework in which it operates, the requirements of fairness demand that the tribunal should give reasons, there be no contrary intention in the statute. The CFA agreed with the CA's ruling that whilst there was no express provision in the Control of Obscene and Indecent Articles Ordinance (Cap. 390) requiring the Obscene Articles Tribunal to give reasons for its decisions, it was not only desirable but necessary to know the reasons for a particular decision under

appeal. Accordingly, it was only right to imply a duty on the Tribunal to give reasons when it made a decision for an interim classification under section 15 and a determination under section 29 of the Ordinance.

5.6.3 How detailed the reasons should be would depend upon the circumstances of the particular case. The reasons given should show that the substantial issues were addressed and why the decision was reached, but there may not be the need to address every single issue (see for example *Law Wan Tung v The Director of Legal Aid* [2021] HKCFI 2238, HCAL 180/2021 (4.8.2021)). An outlined reason showing to what issues the decision-maker had directed his mind and the evidence upon which he had based his conclusion might be sufficient. The mere fact that the decision-maker copied the reasons/decisions supplied by other party would not be by itself objectionable as long as it could be seen that the decision-maker had independently considered the matter.

Case Example

In ***Dr Ip Kay Lo v Medical Council of Hong Kong* [2003] 3 HKLRD 851, CACV 295/2002** (28.7.2003), the court held that detailed decision was required where a medical doctor was found guilty of a serious professional misconduct of making fraudulent representation to another doctor given the complexity of the case and the serious consequences to his professional reputation and livelihood.

5.6.4 The court may, in appropriate and exceptional cases, admit ex post facto reasons but generally adopts a cautious approach. The relevant considerations are: (a) whether the new reasons are consistent with the original reasons; (b) whether it is

clear that the new reasons are indeed the original reasons; (c) whether there is a real risk that the later reasons have been composed subsequently in order to support the decision, or are a retrospective justification of the decision; (d) the delay before the later reasons were put forward; and (e) the circumstances in which the later reasons were put forward (reasons put forward after the commencement of proceedings must be treated especially carefully; reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly), see *R (Nash) v Chelsea College of Art and Design* [2001] EWHC Admin 538 (11.7.2001).

5.6.5 Some Ordinances contain express provisions providing for the duty to give reasons on the part of the decision maker. Examples are section 25 of the Administrative Appeals Board Ordinance (Cap. 442), section 15 of the Municipal Services Appeals Board Ordinance (Cap. 220), sections 3(7C) and 8(E) of the Buildings Ordinance (Cap. 123), section 5A(5) of the Societies Ordinance (Cap. 151) and section 22(7) of the Electronic Transactions Ordinance (Cap. 553)).

6. Constitutional Challenge

6.1 The Nature of Constitutional Challenge

6.1.1 A constitutional challenge is a challenge on the constitutionality of any executive act (e.g. a government policy or an administrative decision) in that such executive act is inconsistent with any constitutional instrument.

6.1.2 The applicants in judicial review applications may rely on the provisions of the Basic Law including those concerning human rights, to challenge an executive act.

6.2 The Nature of the Basic Law

6.2.1 The Basic Law is the constitutional document of the HKSAR. Given its constitutional status, any executive act inconsistent with any provision of the Basic Law shall be declared invalid.

6.2.2 The courts of Hong Kong have power to declare acts of the Government as contravening the Basic Law, if they are found to be inconsistent with the Basic Law.

Case Example

In ***Fok Chun Wa & Anor v The Hospital Authority & Anor* (2012) 15 HKCFAR 409, FACV 10/2011** (2.4.2012), the applicants were married women from Mainland who sought to challenge three administrative decisions which had the combined effect that the fees for obstetric services in public hospitals for non-Hong Kong

residents would be substantially higher than those for Hong Kong residents regardless of the husband's residence status. At para 66, the CFA affirmed the power to review the constitutionality of a policy, "... it would not usually be within the province of the courts to adjudicate on the merits or demerits of government socio-economic policies. That said, where appropriate ... the court will intervene, this being a part of its responsibility to ensure that any measure or policy is lawful and constitutional. This has been the consistent position of the courts."

6.3 The Interpretation of the Basic Law

6.3.1 Being an entrenched constitutional document, the Basic Law states general principles and expresses purposes without descending to particularities and details. Therefore, its provisions must be interpreted with a purposive approach, namely the gaps and ambiguities must be resolved to give effect to the principles and purposes ascertained from the language, the context and relevant extrinsic materials. The court also gives due regard to the historical context of the Basic Law, but is not unduly constricted by it; the Basic Law is always treated as a living norm, rooted in the past but intended to be responsive to contemporaneous needs and circumstances, and is given an interpretation that truly reflects firmly held modern views in the current social and legal landscape, see cases below.

6.3.2 It is a developed principle that the fundamental rights and freedoms guaranteed in the Basic Law must be interpreted generously. Moreover, restrictions to those rights and freedoms must be narrowly interpreted.

Case Example

The Applicant in ***Director of Immigration v Chong Fung Yuen* [2001] 4 HKCFAR 211, FACV 26/2000** (20.7.2001) the case concerns with the question of right of abode in Hong Kong under BL 24(2)(1). The CFA decided that a purposive approach must be adopted for the interpretation of the Basic Law provisions, and a literal, technical, narrow or rigid approach must be avoided. To assist in interpretation, the court should consider other provisions and the Preamble of the Basic Law as internal aids, and also extrinsic materials before the enactment of the Basic Law such as the Joint Declaration. The Court of Final Appeal also confirmed the principle established in *Ng Ka Ling* that a generous interpretation should be given to the constitutional guarantees of freedoms in the Basic Law. Having considered BL 24(2)(1) in its context and purpose, the Court of Final Appeal held that its clear meaning was that Chinese citizens born in Hong Kong before or after 1.7.1997 had the right of abode in Hong Kong irrespective of their parents' immigration status in Hong Kong at the time of birth.

In ***Kwok Cheuk Kin v Secretary for Justice* [2021] 3 HKLRD 140, [2021] HKCA 871, CACV8, 10, 87 & 88/2019** (11.6.2021), the Court of Appeal addressed the question whether the co-location arrangement as embodied in the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap. 632) was prohibited or excluded by the Basic Law. On the need to treat the Basic Law as a living instrument for dealing with changing needs and circumstances, the court observed, "[t]he Basic Law is accordingly drafted with an eye to the future. Its function is to provide a continuing constitutional framework for the Hong Kong system as prescribed to operate as long as Hong Kong remains a Special Administrative Region. Maintaining the Hong Kong system under the 'one country, two systems' principle, however,

does not mean stagnation. On the contrary, the Hong Kong system is expected to and indeed should continue to develop within the confines of the Basic Law to suit the contemporaneous needs and circumstances of our society, some of which may even be beyond the drafters' contemplation. Keeping in line with these objectives, the Basic Law adopts a language in ample and general terms to express statements of policies, principles and values without condescending to particularity or definition of terms. This enables the Basic Law to grow and develop at the same time as our society progresses so as to meet current social and political realities, including those which are not envisaged by its drafters. These considerations require the court to approach the Basic Law as a living instrument so that it will not be deprived of its vitality and adaptability to serve succeeding generations in the HKSAR." The court however remarked that it does not enable the courts to give free rein to whatever they consider should have been the views of the drafters; the fundamental principles and values in the Basic Law remain contained and expressed in its language.

6.4 The Effect of Interpretation of the Basic Law by SCNPC

6.4.1 Under the constitutional framework of the Hong Kong Special Administrative Region, the Basic Law is a national law of the PRC, having been enacted by the National People's Congress pursuant to Article 31 of the Constitution of the PRC.

6.4.2 The Hong Kong courts' jurisdiction to interpret the Basic Law under BL 158(2) and to declare executive acts unconstitutional by their inconsistency with the Basic Law provision in issue, is subject to:

(a) the free-standing power of interpretation of the Basic Law vested in the SCNPC under BL 158(1); and

(b) the SCNPC's power of interpretation of the Basic Law by reference from the Hong Kong courts under BL 158(3). Such reference under BL 158(3) shall only be made by the Hong Kong courts before making a final and unappealable judgment, and if such a judgment will be affected by the interpretation of a Basic Law provision which concerns either (i) affairs which are the responsibility of the Central People's Government, or (ii) the relationship between the Central Authorities and the Hong Kong Special Administrative Region.

6.4.3 The power of the SCNPC to interpret the Basic Law is derived from Article 67(4) of the Constitution of the PRC and is provided for expressly in the Basic Law in BL 158(1) and is in general and unqualified terms. An interpretation of the Basic Law issued by the SCNPC is binding on the courts of the Hong Kong Special Administrative Region. It declares what the law is and has always been since the coming into effect of the Basic Law on 1 July 1997. The Hong Kong courts shall follow the SCNPC's interpretation, but the SCNPC's interpretation will not affect judgments previously rendered.

Case Example

In ***Lau Kong Yung & Ors v Director of Immigration* (1999) 2 HKCFAR 300, FACV 10/1999** (3.12.1999), the CFA recognised that the SCNPC's power to interpret the Basic Law under BL 158(1), as a national law of the PRC, was general and unrestricted. The Hong Kong courts' power to interpret the Basic Law under BL 158(2) actually stems from such general power of interpretation of the SCNPC under BL 158(1). Further, the Hong Kong courts'

power to interpret the Basic Law in adjudicating cases is also subject to the SCNPC's power of interpretation under both BL 158(1) and (3).

6.5 Provisions of the ICCPR as applied to Hong Kong

6.5.1 In accordance with BL 39(2), restrictions of the rights and freedoms enjoyed by Hong Kong residents must be prescribed by law and shall not contravene the provisions of BL 39(1), which provides that the provisions of the ICCPR "as applied to Hong Kong" shall remain in force and shall be implemented through the laws of the HKSAR.

Case Example

In ***Chee Fei Ming & Anor v Director of Food and Environmental Hygiene & Ors*** **[2019] HKLRD 373, [2019] HKCA 1425, CACV 489 & 490/2018** (16.12.2019), it was the Applicant's challenge that section 104A of the Public Health and Municipal Services Ordinance (Cap. 132) which controls the display of bills or posters on Government land does not satisfy the "prescribed by law" requirement. The Court of Appeal repeated that the law must be adequately accessible and with sufficient precision. Notably, it was held that the statutory scheme which confers a discretion on the Director does not by itself infringe the "prescribed by law" requirement provided that the law indicates with sufficient clarity the scope of any such discretion, the manner of its exercise and provides adequate and effective safeguards against abuse; when examining the law, the court should also adopt a holistic approach and have regards not only to the statutory provision in question but also the common law and published policy and guidelines.

6.5.2 The provisions of the ICCPR "as applied to Hong Kong" have been incorporated into the law of Hong Kong by the HKBORO, and the Bill of Rights in Part II is subject to the exceptions in Part III of the HKBORO:

(i) Section 11 of the HKBORO provides for an exception, namely that the HKBORO does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of such legislation, as regards persons not having the right to enter and remain in Hong Kong (see *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, FACV 15/2011 (21.12.2012)).

(ii) Another exception can be found in section 9 of the HKBORO, namely "members of and persons serving with the armed forces of the government responsible for the foreign affairs of Hong Kong and persons lawfully detained in penal establishments of whatever character are subject to such restrictions as may from time to time be authorised by law for the preservation of service and custodial discipline".

6.6 The Proportionality Test applied in Constitutional Challenges

6.6.1 When a constitutional challenge involves a restriction of constitutionally guaranteed rights or freedoms, the court first has to identify whether the right or freedom in issue is absolute in nature such that no restrictions on the right are permissible. Absolute rights or freedoms, such as the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment under HKBOR 3, cannot be restricted under any circumstances.

6.6.2 Where other rights or freedoms are concerned, they are not absolute and may be subject to lawful restrictions. The court

adopts the proportionality test as an analytical tool to examine whether the restrictions of such rights are proportionate to the legitimate aim(s) sought to be achieved thereby. Most of the rights and freedoms are protected under Chapter III of the Basic Law[3] and the HKBOR.

6.6.3 Hong Kong courts adopt a four-step analysis when applying the proportionality test, which is typically formulated as follows:

(a) The restriction must pursue a legitimate aim;

(b) The restriction must be rationally connected to that legitimate aim;

(c) The restriction or limitation must, depending on the rights engaged, (i) be no more than is necessary to accomplish that legitimate aim; or (ii) not be manifestly without reasonable foundation (see para 6.7 below); and

(d) A reasonable balance has to be struck between the societal benefits of the encroachment and the inroads made into the constitutionally guaranteed rights of the individual, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.

6.6.4 Below are a few examples of how the proportionality test has been applied by the Hong Kong courts in constitutional

[3] Examples of constitutionally guaranteed rights and freedoms outside Chapter III are BL 6: Right of private ownership of property; BL 87: Rights previously enjoyed by parties to legal proceedings; BL 105: Right to compensation for deprivation of property; BL 136: Freedom to run educational undertakings; BL 137: Academic freedom; and BL 141: Freedom of religious belief.

challenges involving constitutionally guaranteed rights and freedoms:

Case Example

In ***Hysan Development Co Ltd & Ors v Town Planning Board* [2016] 19 HKCFAR 372, FACV 21 & 22/2015** (26.9.2016), the Appellants challenged a series of planning restrictions by the Town Planning Board, such as building height restrictions and non-building areas. The CFA decided that the restrictions engaged Articles 6 and 105 of the Basic Law, which expressly required the HKSAR to protect private property rights. Having considered a substantial body of overseas and local jurisprudence, the CFA explicitly added a fourth step to the proportionality analysis, which involved asking whether there was a reasonable balance struck between societal interest and the encroachment on constitutional rights of an individual (see para 6.6.3 above).

In ***Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 956, FACV 2/2013** (17.12.2013), the Appellant challenged that the seven-year residence requirement under the Comprehensive Social Security Assistance Scheme was inconsistent with "the right to social welfare in accordance with law" guaranteed by BL 36 and BL 145. Applying the proportionality test, the CFA found that the seven-year residence requirement conflicted with the Government's one-way permit family reunion policy and population policy aimed at rejuvenating the ageing population. Furthermore, as the introduction of the requirement achieved only an insignificant level of savings, it was not rationally connected to the declared aim.

In ***Kwok Wing Hang & 23 Ors v Chief Executive in Council & Anor* (2020) 23 HKCFAR 518, [2020] HKCFA 42, FACV 6-9/2020** (21.12.2020), the applicants sought to challenge whether

the restrictions imposed by sections 3(1)(b)-(d) of the Prohibition on Face Covering Regulation (Cap. 241K) prohibiting face covering at unauthorised assemblies as well as lawful public meetings and processions were proportionate. While acknowledging that such restrictions would affect the enjoyment of the freedom of assembly, procession and demonstration under BL 27 and HKBOR 17, the freedom of speech and expression under BL 27 and HKBOR 16 and the right of privacy under HKBOR 14, the Court of Final Appeal stated that none of these rights was absolute but might be subject to lawful restrictions. The court was satisfied that there were legitimate aims pursued and a rational connection between such restrictions and their legitimate aims, and reminded that the cardinal importance of the freedom of speech and peaceful assembly hinged on their peaceful exercise. Also adopting the "no more than reasonably necessary" standard for the third step, the CFA held that the use of facial coverings did not lie at the heart of the right of peaceful assembly, and upheld the proportionality of sections 3(1)(b)-(d).

6.7 Margin of Discretion

6.7.1 Typically, the courts apply a standard of reasonable necessity (i.e. no more than necessary for achieving the legitimate aim) when considering whether the measure which restricts fundamental rights satisfies the proportionality test; this involves a stricter judicial scrutiny of executive decisions than that applies under the Wednesbury doctrine. In other cases involving interferences with rights, the courts recognise that a wider margin of discretion should be accorded to the legislature or executive where difficult choices have to be made between the rights of the individual and the needs of society. The degree and extent of the margin of discretion that the court would accord to the relevant

authority is a spectrum and would depend on, for example, the subject matter under scrutiny. The scope of the margin of discretion in different contexts has been closely examined by the court in recent years.

Case Example

In ***Hysan Development Co Ltd & Ors v Town Planning Board* (2016) 19 HKCFAR 372, FACV 21 & 22/2015** (26.9.2016), certain planning restrictions laid down by the Town Planning Board were challenged on the basis that they were in violation of the protection of private property rights conferred by the Basic Law. It was held by the CFA that the scope of the margin of discretion may vary having regard to a number of factors, including: "(i) the significance of and degree of interference with the right in question; and (ii) the identity of the decision-maker as well as the nature and features of the encroaching measure relevant to setting the margin of discretion."

Ribeiro PJ further held that: "… a decision-maker's views resulting in the promulgation of the impugned measure may be given much weight and thus afforded a wide margin of discretion reflected by use of a 'manifest' standard where the decision-maker is likely to be better placed than the court to assess what is needed in the public interest. The court may for instance, be satisfied that he had special access to information; special expertise in its assessment; or an overview enabling him to assess competing and possibly prior claims for scarce resources. The court might also refrain from intervening because the measure reflects a predictive or judgmental decision which it was the institutional role of the decision-maker to take and as to which no single 'right answer' exists."

6.7.2 In dealing with matters involving socio-economic policy, the court will be less inclined to interfere and more ready to accord a wider margin of discretion to the authority concerned.

6.7.3 The Court of Final Appeal has considered the concept of margin of discretion in the context of the Government's socio-economic policies in a number of cases. The authorities show that where the impugned measures or decisions involve the implementation of the Government's socio-economic policies and limited public funds, the court will not usually put itself in the place of the executive or legislature to decide what is the best option unless the measures or decisions are "manifestly without reasonable justification."

Case Example

In ***Fok Chun Wa v Hospital Authority* [2012] 15 HKCFAR 409, FACV 10/2011** (2.4.2012), the main complaint was that the second Applicant (and other women who were similarly from the Mainland and had substantial connections with Hong Kong) had been unlawfully discriminated against in that the level of fees payable by them for obstetric services in public hospitals in Hong Kong were substantially higher than those payable by Hong Kong resident women. The Chief Justice commented that "(t)hese Decisions were made as part of the Government's socio-economic responsibilities and represent the implementation of policies in these areas. For my part, it is no part of the court's role to second-guess the wisdom of these policies and measures in the circumstances I have described above. Nor is it … the court's role in such matters of socio-economic policy to examine whether better alternative solutions could have been devised. It is sufficient to say in the present case that the line drawn by the respondents at residence status is entirely within the spectrum of

reasonableness. In my view, all three aspects of the justification test are satisfied."

In ***Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 956, FACV 2/2013** (17.12.2013), the Applicant challenged the Government's policy requiring all recipients of Comprehensive Social Security Assistance to have been a Hong Kong resident for at least seven years. The CFA said, "As this Court has recognised, some rights are non-derogable and absolute, in which case, no infringement is permitted and no question of proportionality arises (*Ubamaka Edward Wilson v Secretary for Security* (2012) 15 HKCFAR 743, FACV 15/2011 (21.12.2012)), involving, for example, the prohibition of torture and of cruel, inhuman or degrading treatment or punishment). But in other cases, it is well-established that the law may validly create restrictions on constitutionally protected rights provided that each such restriction can be justified on a proportionality analysis."

"Where the disputed measure involves implementation of the Government's socio-economic policy choices regarding the allocation of limited public funds without impinging upon fundamental rights or involving possible discrimination on inherently suspect grounds, the court has held that it has a duty to intervene only where the impugned measure is 'manifestly without reasonable justification'."

6.7.4 The degree of margin of discretion has also been considered in the context of election matters. The courts have recognised that in areas which involve political and policy considerations (such as election matters), the court in applying the proportionality test in the scrutiny of legislative restriction should accord a due margin of discretion to the legislature and the Government. In other words, the court should only interfere if it

finds that, upon scrutiny, the restriction is "manifestly without justifiable foundation".

Case Example

***Leung Chun Ying v Ho Chun Yan Albert & Anor* (2013) 16 HKCFAR 735, FACV 24, 25 & 27/2012** (11.7.2013) were appeals to the CFA concerning elections for the Chief Executive under the Chief Executive Election Ordinance (Cap. 569) ("the CEEO"). The challenges included the constitutionality of the absolute seven day time limit for lodging election petitions contained in section 34(1) of the CEEO which was said to contravene the right of access to the courts under BL 35. The Chief Justice considered the margin of appreciation which could be accorded by the court to the legislature and said "[i]n *Fok Chun Wa v Hospital Authority*, this Court emphasised the point that the concept of margin of appreciation reflected the different constitutional roles of the judiciary on the one hand, and the executive and legislature on the other. In the context of election law, this difference in roles must be borne in mind… Elections, however, also involve political and policy considerations and it is in these areas where the legislature is involved. The determination that seven days is the appropriate limit for the lodging of election petitions is one that does involve considerations other than legal ones… the right of access to the courts is not an unlimited one, particularly in the present context."

7. The Process of Judicial Review[4]

7.1 Application for leave

7.1.1 An application for judicial review can only be taken out with the leave of a judge of the High Court (namely, the Court of First Instance or, on appeal, the Court of Appeal). Subject to any statute which limits the time for bringing a leave application in any special circumstances[5], or unless time is extended by the court upon good reasons being shown, an application for leave must be made promptly and, in any event, within 3 months from when the grounds of the application first arose.

7.1.2 An application for leave (in Form 86) is made on an ex parte basis (without the proposed respondent being served with the application) and will be placed before the judge nominated by the Chief Justice to be in charge of the Constitutional and Administrative Law List or such other judge as may be assigned for determination.

7.1.3 The court imposes a heavy burden on an applicant to make full and frank disclosure of all material facts to the court where an ex parte application for leave is made to the court. Failure to comply with the duty may lead to refusal of leave for that reason alone.

[4] Cf. Annex I – Flow Chart on Procedure for Judicial Review.

[5] Cf. Section 39(1) of the Chief Executive Election Ordinance (Cap. 569), which provides for a 30-day time limit.

Case Example

See ***Kan Hung Cheung v The Director of Immigration*, unreported, HCAL 74/2007** (13.2.2008), the court held that the right test for the duty to make full and frank disclosure in all *ex parte* applications was that the court must be fully informed of all facts that were relevant to the weighing question which the court had to make in deciding whether or not to make the order. Material facts included not only facts known to the applicant but also any additional facts which should be known if proper enquiries were made. An applicant had a duty to inform the court as soon as he became aware that the court had been mis-informed or given incomplete information at the time of the *ex parte* application. There was also a duty to disclose any material change of circumstances while the proceedings remained on an *ex parte* basis.

7.2 Grant of Leave

7.2.1 The court shall not grant leave to apply for judicial review if the applicant does not have a sufficient interest in the matter to which the application relates (see Chapter 2.6).

7.2.2 Sufficient interest aside, an applicant must show that he has a "reasonably arguable" case which has a realistic prospect of success in respect of the relief sought in the application. The test is the same whether the issue is one of law or fact. See *Peter Po Fun Chan v Winnie CW Cheung & Anor* (2007) 10 HKCFAR 676, FACV 10/2007 (30.11.2007).

7.2.3 The court may refuse to grant leave if there is delay in making the application (para 7.1.1 above). The court may also

refuse leave if the applicant has not exhausted all appeal procedures or alternative remedies before resorting to judicial review (Chapter 2.3).

7.2.4 As provided under Order 53, rule 3(2), all applications for leave for judicial review must be made ex parte, i.e. without involving any proposed respondent or proposed interested party. This is an important screening process by the court such that only meritorious and appropriate cases would be allowed to continue. Exceptionally, the court may also direct an oral hearing to hear from the applicant only or, if appropriate, the proposed respondent as well on the court's own motion or upon the applicant's or the proposed respondent's request before deciding whether to grant or refuse leave. The court is not obliged to direct an oral hearing notwithstanding the applicant's request under Order 53, rule 3(3), in particular in a case where the leave application is clearly unmeritorious or misconceived. See *Re Bermudez Edna Labadchan* [2021] HKCA 1046, CACV 351/2020 (22.7.2021).

7.2.5 If leave is granted to the applicant by way of an order made ex parte, a person aggrieved (whether a respondent or interested party) may apply to set aside the order. The usual grounds for setting aside leave are material non-disclosure, abuse of process, delay, or lack of reasonable arguability, as the case may be.

7.3 Interim Relief

7.3.1 An applicant may find it necessary to seek an order for interim relief pending decision on leave to apply for judicial review, or if leave is granted for such interim relief until substantive determination in order to preserve the status quo. Such interim relief often takes the form of an order of stay (i.e. interim

injunction) of prospective execution or continued execution of the decision or act being impugned.

7.3.2 The court is slow to grant such interim relief before leave to judicial review is granted and before the court has heard both parties. The court may grant interim relief before leave is granted in cases of extreme urgency or where there would be irreversible harm otherwise.

7.3.3 The test on whether to grant an interim injunction is where the balance of convenience lies i.e. the inconvenience caused to the applicant if the injunction is not granted and the inconvenience caused to the respondent if the injunction is granted, and see which is greater. The courts have set out in the judgments the relevant legal principles in judicial review cases:-

(i) Where an interim injunction is sought to restrain a government from enforcing what is prima facie the law of the land, the applicant will normally need to establish a "strong prima facie case" that the law is invalid.

(ii) The court must take into account the public interest in the balancing exercise when considering the balance of convenience. The degree of importance attached to public interest would depend on the nature of decision under challenge.

(iii) Whether there are financial consequences and if so, whether compensation by damages is an alternative remedy. Although financial consequences are not to be ignored, they should not be regarded as the sole measure in assessing the balance of convenience.

(iv) Ultimately, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong".

(v) Save in exceptional circumstances, interim relief may only be granted if leave to apply for judicial review has been obtained.

(vi) Even where leave to apply for judicial review has been obtained, the existence of an early hearing date for the substantive application for judicial review is a good reason for the court to refuse to grant interim relief.

See for instance *梁頌恆 v 立法會主席; 郭卓堅 v 香港特首林鄭月娥* [2018] 5 HKC 138, [2018] HKCFI 1869, HCAL 1160 & 1165/2018 (14.8.2018), *Society for Protection of the Harbour Ltd v Chief Executive in Council & Ors* [2003] 3 HKLRD 960, HCAL 102/2003 (6.10.2003), and *Kwok Wing Hang & Ors v Chief Executive in Council & Ors* [2019] 5 HKLRD 173, [2019] HKCFI 2476, HCAL 2945/2019 (8.10.2019).

7.3.4 In addition or alternative to granting an interim injunction, the court may order an expedited substantive hearing with directions for abridgement of time for completing procedural steps. In which case, the parties (more often the respondent) will have less time to prepare for the evidence and the legal submissions to be lodged. See also Kwok Wing Hang & Ors v Chief Executive in Council & Ors [2019] 5 HKLRD 173, [2019] HKCFI 2476, HCAL 2945/2019 (8.10.2019) where the entire judicial review applications and appeals were resolved by the Court of Final Appeal within slightly over one year following its commencement.

7.4 Filing Substantive Application

7.4.1 Within 14 days after the grant of leave (notified by a CALL-1 Form), the applicant has to issue the formal application for judicial review (in Form 86A).

7.4.2 The applicant shall serve the Form 86A together with copy of the application for leave for judicial review (i.e. Form 86) and the supporting affidavit or affirmation (i.e. evidence) on all persons directly affected including the respondent.

7.4.3 The proper respondent to an application for judicial review, when the court's supervisory jurisdiction over criminal proceedings in an inferior court is invoked, is the other party to the proceedings in the inferior court, and not the inferior court itself.[6] These judicial review applications usually challenge the decisions made by the Judge in the course of a criminal proceeding e.g. decision to discharge himself from continuing to hear the criminal trial or decision not to recuse himself from hearing the case. See *Nattrass v AG* [1996] 1 HKC 480, HCMP 2337/1995 (19.12.1995).

7.4.4 In some judicial review applications, there will be an interested party in addition to the respondent. An interested party is one who may be affected by the outcome of judicial review. If an interested party decides to take part in the judicial review, the court may, as appropriate, give such directions on the service of papers, filing of evidence and the future conduct of the proceedings in addition to or in variation of what the rules of court provide. See *Cathay Pacific Airways Flight Attendants Union v Director-General of Civil Aviation*, unreported, HCAL 19/2005 (6.12.2005) where Cathay Pacific Airways Ltd was permitted to join as an interested party.

[6] Practice Direction SL3 (para 4).

7.5 Respondent and the Duty of Candour

7.5.1 Judicial review proceedings are predominantly conducted on the basis of affidavit or affirmation evidence which the parties choose to adduce before the court.

7.5.2 Any respondent who intends to use any affidavit or affirmation at the substantive hearing is required to file it in the Registry as soon as practicable and in any event, unless the court otherwise directs, within 56 days after service on him by the applicant of the Form 86A together with other relevant papers. An extension of time will only be granted by the court in exceptional circumstances.[7]

7.5.3 A respondent has to discharge fully his duty of candour to the court and the applicant in the proceedings once leave to apply for judicial review has been granted.

7.5.4 Thus, in the respondent affidavit or affirmation evidence, the respondent is required to make a full and frank disclosure of all relevant facts and documents which may relate to the actual reasons for the decision being impugned or to any other aspects which are relevant in the judicial review proceeding.

7.5.5 The duty of candour is an aspect of good governance and proper administration, in particular in judicial review applications most of which involve public interest. See Chu Woan-Chyi & Ors v Director of Immigration & Anor [2009] 6 HKC 77, CACV 119/2007 (4.9.2009). In any given situation, whether the duty of candour is discharged would depend on the facts, the issues before the court, and the basis of the challenge mounted. Put in another way, the question is whether the disclosure sought is "necessary for disposing fairly" of the issues before the court, or to "enable

[7] Practice Direction SL3 (para 14).

the court to deal justly" with the challenge mounted in the judicial review. Yet the applicant is not allowed to engage in fishing expeditions in the hope of unearthing material to enable a challenge to be mounted. See Hong Kong Telecommunications (HKT) Limited v Secretary for Commerce and Economic Development & Anor [2019] HKCA 44, CACV 532/2018 & CAMP 155/2018 (9.1.2019) per Kwan JA (as she then was) (paras 46-57).

7.5.6 In judicial review proceedings, the focus is usually on the legality of the decision that is impugned; factual issues requiring the court's consideration in any given case are often limited. The respondent is also well expected by the court to discharge fully the duty of candour. Mainly for these reasons, the court rules do not provide for automatic discovery of documents in judicial review as in a writ action. The necessity to call witnesses and deponents of affidavits or affirmations to have them examined or cross-examined is also much more limited and rarely will the court entertain such interlocutory applications. However, where the critical issue requires the court to be provided with adequate material or there are issues of fact to be resolved, the court will be inclined to make the necessary orders.

7.5.7 In performing any duty or engaging in any decision-making process, the respondent should act on the assumption that relevant communications, minutes of meetings and other records will generally be disclosed when the underlying act or decision is impugned in judicial review proceedings.

7.5.8 Immunity from disclosure may be claimed on grounds including legal professional privilege (subject to waiver or statutory abrogation) or public interest immunity (see 7.5.9 below) or any other valid grounds.

7.5.9 It is the usual practice for the Chief Secretary for Administration to sign a supporting certificate setting out the basis for the claim for public interest immunity. The balancing exercise is between the public interest of withholding disclosure (i.e. disclosure would be injurious to public interest) against that pertaining to full disclosure for the proper administration of justice in legal proceedings. If the former outweighs the latter, the court will order that disclosure need not be made. See *Conway v Rimmer* [1968] 1 All ER 874 (HL) (28.2.1968).

7.6 Substantive Hearing

7.6.1 The date for hearing the substantive application is fixed according to the state of the court's diary with discretion of the court to accommodate the availability of the parties' appearing counsel if requested by the parties and to the extent possible in the light of the degree of urgency of the application.

7.6.2 At the substantive hearing, the applicant for judicial review can only rely on the grounds and seek the relief set out in the Form 86 for which the court has granted leave unless any subsequent amendment is allowed by the court. See *Lau Kong Yung & Ors v The Director of Immigration* (1999) 2 HKCFAR 300, FACV 10 & 11/1999 (3.12.1999).

7.6.3 Notwithstanding leave to apply for judicial review having been granted, it is incumbent on the applicant as well as his counsel and solicitors to review the merits of the application once the respondent's evidence is received and to consider whether to proceed with the substantive hearing in the light of the evidence.[8]

[8] Practice Direction SL3 (para 17).

7.6.4 If the parties are agreed on the terms to dispose of the judicial review without the need of a substantive hearing but require an order of the court to put those terms into effect, they should file a draft consent order, together with a short statement signed by the parties' solicitors, setting out the matters relied upon as justifying the making of the order, and citing the relevant authorities and statutory provisions. The court, if satisfied that such an order can be made, will list the judicial review for hearing and announce the order in open court to which attendance of the parties or their legal representatives is excused. Otherwise, the proceedings will be listed for hearing in the normal way.[9]

7.6.5 The applicant, respondent and an interested person or intervener (if any) who is allowed or directed by the court to take part in the judicial review are formal parties to the proceedings and enjoy all the rights of a litigant including the right of appeal if aggrieved by any order of the court.

7.6.6 Whether an inferior court, appeal board or tribunal exercising judicial or quasi-judicial functions and properly named as a respondent in the judicial review as regards its decision should take any active role and be legally represented in the proceedings depends on the relevant statutory regime and factual circumstances, including the grounds on which the decision concerned is impugned. The practice is that they would take a neutral role and provide the court with relevant information so that a just result follow. See *Dato Tan Leong Min & Anor v The Insider Dealing Tribunal* [1999] 2 HKC 83, CACV 162/1998 (27.1.1999).

7.6.7 Where the judicial review concerns an issue or legal principle of importance and either or both of the applicant and the respondent will not be legally represented at the substantive

[9] Practice Direction SL3 (para 23(1)).

hearing, or the judicial review concerns a novel and important legal principle, the court may appoint an amicus curiae (a friend of the court) to present disinterested legal arguments in a fair and impartial manner to assist the court.

7.6.8 Apart from the formal parties to the proceedings and the amicus (if any), the court has the discretion to grant leave to any other proper person to file evidence or make representation, either orally or in writing, at the substantive hearing which may be in opposition to or in support of the application, as the case may be.

7.6.9 Unless otherwise directed by the court, the parties must follow the practice direction in filing skeleton arguments with the court before the commencement of the hearing (7 clear days for those in support and 3 clear days for those in opposition).[10]

7.7 Relief (other than Damages)

7.7.1 If an applicant succeeds in his application for judicial review, the court has the discretionary power to grant a form of final relief appropriate to the circumstances including an order of *mandamus* (to perform a duty), prohibition (to prevent an act) or *certiorari* (to bring up and quash a decision), an injunction, a declaration (as to legal rights) or an award of damages, as the case may be.

7.7.2 The court may withhold the grant to the successful applicant of the relief sought if there was undue delay on the part of the applicant in making the application for judicial review and/or the court considers that granting the relief would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good

[10] Practice Direction SL3 (para 21).

administration. In other words, the granting of relief remains a matter of the court's discretion. In *Kwok Cheuk Kin v President of Legislative Council* [2021] HKCFA 38, FACV 2, 3 & 4/2021 (5.11.2021), the court stressed that as applications for judicial review vary greatly in their nature and their potential consequences, the rule on delay is not absolute. Hardship or prejudice to individuals and disruption of good administration are more likely in cases where the relief would operate retrospectively to undo transactions on whose validity people will have relied. Where the object of the proceedings is to obtain the decision of the court on some general issue of legal or constitutional principle, these consequences are less likely and the public importance of having the issue resolved is greater. Delay is therefore likely to be a less significant factor.

7.7.3 Absent any issue of delay, the court is slow to deny relief for mere administrative inconvenience or a fear of a flood of similar cases in future – the "floodgates" argument.

Case Example

See ***Re Lee Ka Ming (a minor)*** **[1991] 1 HKLR 307, HCMP 1812 & 1828/1990** (24.8.1990), the court, in allowing the judicial review applications and granting relief to the applicant boy, rejected the Director of Immigration's arguments that a decision in favour of the boy would have the effect of opening "the floodgates". While this judgment was reversed on appeal by the Court of Appeal, unreported, CACV 162 & 163/1990 (22.3.1991), the "floodgates" argument did not arise during the appeal.

7.7.4 If the ground of procedural unfairness is established, the court will consider as a relevant factor whether there is any

prejudice to the applicant arising from the breach when deciding whether to exercise its discretion to quash the decision of the decision-making body below or grant some other appropriate relief, if any.

Case Example

See ***Leung Fuk Wah Oil v Commissioner of Police* [2002] 3 HKLRD 653, CACV 2744/2001** (28.3.2002), the Court of Appeal held that as judicial review is a discretionary remedy, the failure to observe the principle of fairness should not be a ground for quashing the decision when the applicant did not, as a matter of substance, suffer any prejudice; and thus held that the discretion was exercised against the granting of any relief.

7.7.5 If a decision is quashed on grounds of unlawfulness (due to unfairness or other procedural impropriety or otherwise) and is capable of being reconsidered by the decision-making body below, the court will generally make an order remitting the matter to that body for reconsideration in accordance with the law as pronounced in the judgment with any specific direction, if appropriate. See *Building Authority v Appeal Tribunal (Buildings) & Anor* [2014] 1 HKLRD 716, CACV 277/2012 (3.1.2014).

7.7.6 The court may make a declaration or grant an injunction if it would be just and convenient having regard to the nature of the matters, the nature of the persons and bodies against whom relief may be granted, and all the circumstances of the case concerned.

7.7.7 A declaration serves to pronounce authoritatively the meaning of any constitutional or statutory provision, the legality of any policy or non-statutory arrangement, the lawfulness of the exercise of any administrative or legislative power, or the legal

rights of parties to the judicial review, as the case may be, in the public law context. The court may make such declarations as a form of relief if warranted. See *Securities and Futures Commission v Tiger Asia Management LLC & Ors* (2013) 16 HKCFAR 324, FACV 10-13/2012 (10.5.2013).

7.7.8 When the court grants a declaration of unconstitutionality to the effect of striking down a practice, the court in *Vallejos Evangeline Banao v Commissioner of Registration & Anor* [2011] 6 HKC 469, HCAL 124/2010 (28.10.2011) sets out the following guidance:-

(i) The court recognises that the primary responsibility for administration falls on the Government.

(ii) In case the Government decides to appeal, it has to decide what policy to adopt in the interim pending outcome of the appeal.

(iii) If the Government decides to put on hold the implementation of the declaration pending appeal, provided that (1) the Government makes such decision in good faith, and (2) a party who is adversely affected retains the right to challenge such decisions by way of judicial review, the rule of law has not been compromised.

7.8 Damages

7.8.1 On an application for judicial review, the court may award damages to the applicant if such a claim is included in the application and the court is satisfied that, the claim could form a concomitant or distinct cause of action in private law such as tort or a right to compensation under statute. This reflects the current law which does not recognise a general right to claim damages for

losses caused by an unconstitutional or unlawful administrative action. See *A & Ors v Director of Immigration* [2008] 4 HKLRD 752, CACV 314-317/2007 (18.7.2008).

7.8.2 Where leave to apply for judicial review on public law grounds was refused to an applicant and he did not pursue an appeal or the appeal was dismissed, a subsequent private law action by the applicant seeking to argue the same grounds in substance albeit for different relief may amount to an abuse of the court process and be liable to be struck out.

Case Example

See ***何建民 v 香港警務處處長, Leung Fuk Wah Oil & Ors v Secretary for Justice for and on behalf of the Commissioner of Police* [2014] 3 HKLRD 478, CACV 175, 200, 228 & 229/2012** (26.5.2014). The plaintiffs, being former police officers, sued the Commissioner of Police for damages for wrongful termination of their services following disciplinary proceedings held against them in which they were allegedly wrongfully prohibited legal representation. Their earlier judicial review applications based on same allegations were dismissed. The Court of Appeal held that it was an abuse of process to advance those claims in the civil actions relying on the same constitutional challenge, which should have been advanced in the judicial review proceedings.

7.8.3 A brief overview of the other possible causes of action in tort for damages or statutory rights to compensation arising from administrative or judicial acts are covered in Chapter 10 on "Other Remedies".

7.9 Costs

7.9.1 The general rule that costs will be awarded in favour of the successful party ("costs following the event") in civil litigation applies equally to judicial review proceedings.

7.9.2 Public Interest Litigation: the court may depart from making the usual order of costs following the event by taking into consideration the public interest character of the judicial review as one of the factors relevant to the exercise of discretion as to costs. The overriding consideration is whether the applicant or the general public should bear the consequence in the failed public law challenge. The key considerations include:

(i) whether the applicant has properly brought proceedings to seek guidance from the court on a point of general public importance so that the litigation is for the benefit of the community as a whole to warrant the costs of the litigation be borne by the public purse as costs incidental to good public administration;

(ii) whether the judicial decision has contributed to the proper understanding of the law in question;

(iii) whether the applicant has any private gain in the outcome; and

(iv) whether the applicant's case has had any real prospect of success.

See *Chu Hoi Dick & Anor v Secretary for Home Affairs (No 2)* [2007] 4 HKC 428, HCAL 87/2007 (6.9.2007), *Kwok Wing Hang & 23 Ors v Chief Executive in Council & Anor* [2021] HKCFA 11, FACV 6-9/2020 (22.3.2021), and *Kwok Cheuk Kin & Anor v Director of Lands & Ors* [2021] 3 HKLRD 411, [2021] HKCA 915, CACV 234, 317 & 319/2019 (25.6.2021).

7.9.3 Costs in leave application for judicial review: since an application for leave to apply for judicial review is meant to be ex parte, the general proposition is that an applicant for judicial review who is refused leave would not be ordered to pay costs of a putative respondent or putative interested party save in special or unusual circumstances. The discretion to make such an award of costs should be sparingly exercised only for good reasons, which include the reason leading the opposing party to attend the hearing; whether that party's attendance has been of material benefit to the court; and the underlying lack of merits of the application, always bearing in mind the context that the court has refused to grant leave. See *Leung Kwok Hung v President of the Legislative Council* (2014) 17 HKCFAR 841, FACV 1/2014 (5.12.2014).

Case Example

In ***Cho Man Yee v Chief Executive of the HKSAR* [2021] HKCFI 1365, HCAL 2405/2020** (20.5.2021), notwithstanding the general proposition that an applicant for judicial review who is refused leave would not be ordered to pay costs, the Applicant was ordered to pay the HKSAR Government's costs for the reasons that (i) the application was obviously ill-conceived, (ii) the Putative Respondent had filed an initial response as directed which had provided material and helpful assistance, and (iii) the application was an abuse of process.

7.9.4 Protective Costs Order ("PCO"): in exceptional cases, the court may also make a PCO, that is, an order to the effect that for the party who is granted a PCO, if that party is unsuccessful in the judicial review, there will be no requirement for that unsuccessful party to pay costs to the successful party. Generally, a PCO may be made at any stage of the proceedings, on such

conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. If those acting for the applicant are doing so pro bono, this will be likely to enhance the merits of the application for a PCO. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above (*Designing Hong Kong Ltd v The Town Planning Board and Secretary for Justice* [2018] HKCFA 16, FACV 4/2018 (15.5.2018) applying *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600).

7.9.5 As for the quantum of costs, the court has power to order that the quantum of costs of the receiving party be assessed on a more generous basis (i.e. "on an indemnity basis") where the paying party has conducted the proceedings in an oppressive or otherwise unreasonable manner which does not meet with the court's approval.

7.10 Appeal

7.10.1 Where leave is refused to the applicant or is granted on terms at first instance, the applicant may appeal against the order to the Court of Appeal within 14 days after such order.

7.10.2 Where leave to apply for judicial review was brought out of time and the extension of time was refused by the Court of First

Instance, such refusal decision is part and parcel of a refusal to grant leave to apply for judicial review, thus the applicant may appeal against the refusal to grant extension of time within 14 days after such decision, in the same way as set out in 7.10.1 above. See *AH v Director of Immigration* [2020] 4 HKC 454, [2020] HKCFA 22, FACV 2/2020 (14.7.2020).

7.10.3 Where leave is granted and the judicial review is substantively determined, the losing party may appeal against the order to the Court of Appeal within 28 days from the date of the judgment, order or decision concerned.

7.10.4 A respondent who, having been served with a notice of appeal, desires to contend that (i) the decision of the court below should be varied, either in any event or in the event of the appeal being allowed in whole or in part, or (ii) the decision of the court below should be affirmed on grounds other than those relied upon by that court, or (iii) by way of cross-appeal, the decision of the court below was wrong in whole or in part, must issue and serve a Respondent's Notice.

7.10.5 In exceptional cases, civil appeals may go directly from the Court of First Instance to the Court of Final Appeal (generally known as "leap-frog appeals"). A leap-frog appeal may be appropriate where the Court of First Instance and all the parties involved agree that a point of law of great general or public importance is involved, the case relates wholly or mainly to the construction of statute or the Basic Law, and the judge is bound by a decision of the Court of Appeal or the Court of Final Appeal in previous proceedings (*Town Planning Board v Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1, FACV 14/2003 (9.1.2004)).

7.10.6 A leap-frog appeal mechanism is also applicable to judicial review proceedings under the Chief Executive Election Ordinance (Cap. 569), subject to leave being granted by the Appeal Committee of the Court of Final Appeal (*Re Ho Chun Yan, Albert* (2012) 15 HKCFAR 686, FAMV 21-22, 24-26, 32-34/2012 (13.11.2012)).

7.11 Intervention

7.11.1 An application for leave to intervene in judicial review proceedings may be made to the court at any stage. Leave to intervene may be granted to a party who is "a proper person to be heard", considering the following primary questions: (1) whether the appeal involves primarily a question of general public importance; (2) whether the proposed intervener's fund of knowledge or particular point of view enables him to provide the court with a more rounded picture than the court would otherwise obtain; (3) conversely, whether the proposed intervener will merely repeat points that an existing party will be making; (4) overall, whether the intervention is likely to be helpful and appears justified; and (5) whether the intervention will cause any prejudice to the existing parties or the court. See *QT v Director of Immigration & Ors*, unreported, CACV 117/2016 (8.6.2017) and *W v Registrar of Marriages* [2010] 6 HKC 359, HCAL 120/2009 (5.10.2010)

7.12 Case Management

7.12.1 The conduct of judicial review proceedings is generally prescribed in Practice Direction SL3 which has been in effect since 2009. In May 2021, Practice Direction 26.1 on the Constitutional and Administrative Law List was introduced which provides (among other things) that the court may exercise tighter and closer

case management control of leave and substantive applications by making appropriate case management directions which may override the timetable as set out in Practice Direction SL3. In particular, it is provided that the court will at the conclusion of the hearing indicate the likely date on which the judgment will be handed down, and shall notify the parties of the new date if a postponement is required.

8. Judicial Review in Immigration Context (Immigration Matters)

8.1 Overview

8.1.1 In light of the unique circumstances of the HKSAR, the Immigration Department has to adopt stringent immigration control, and wide discretion has been given to the Director of Immigration ("the Director") on immigration matters, the exercise of which would not be lightly interfered with by the court. In this regard, BL 154(2) provides that the HKSAR may apply immigration control on entry into, stay in and departure from the HKSAR by persons from foreign states and regions. On the domestic level, the Director through the Immigration Ordinance (Cap. 115) implements and imposes such immigration control.

8.1.2 In exercising his immigration control power and wide discretion, the Director needs to observe the protection of fundamental rights under the BL, HKBORO and common law. Relevantly, BL 24 provides that residents of the HKSAR shall include permanent residents ("PRs") and non-permanent residents ("non-PRs"). BL 41 refers to persons in the HKSAR other than Hong Kong residents ("non-residents"), for instance, illegal immigrants and visitors. In gist, there are three different categories of persons who have different rights viz., PRs, non-PRs, and non-residents.

8.1.3 The court retains a supervisory jurisdiction in accordance with well-established public law principles by way of judicial review, which ensures that the Director's exercise of power does not contravene the legal rights of the persons protected by the BL, HKBOR and common law: See *BI & BH v Director of Immigration* [2016] HKLRD 520, CACV 9, 103 & 134/2015 (8.3.2016). In

particular, the court may be prepared to adopt an anxious scrutiny approach in examining the Director's decisions on foreigners, and their public law rights, especially where issues of fundamental rights are involved in the context of immigration matters: See *C & Ors v Director of Immigration* (2013) 16 HKCFAR 280, FACV 18/2011 (25.3.2013).

8.2 Right of Abode ("ROA")

8.2.1 The Immigration Ordinance first came into force on 1.4.1972. There was then no reference to "ROA" and "PR" in the statute. On 19.12.1984, the Chinese Government and the British Government signed the Sino-British Joint Declaration, Section XIV of Annex I to which elaborated the basic policies of the PRC concerning the categories of persons who shall have ROA in Hong Kong. The Immigration Ordinance then underwent major amendments in 1987, to provide statutory underpinning for the concepts of "ROA" and "PR". The BL was promulgated on 4.4.1990. The definition of "PR" in BL 24 mirrored Section XIV of Annex I to the Sino-British Joint Declaration and is reflected in Schedule 1 to the current Immigration Ordinance: See *Vallejos Evangeline Banao v Commissioner of Registration* [2011] 6 HKC 469, HCAL 124/2010 (30.9.2011).

8.2.2 A PR enjoys ROA in Hong Kong which, as defined in section 2A of the Immigration Ordinance, includes the right to land in Hong Kong, not to have imposed upon him any condition of stay and not to be deported or removed. A PR is entitled to obtain a Hong Kong permanent identity card which states his ROA.

8.2.3 A non-PR is qualified to obtain a Hong Kong identity card but has no ROA. He/she is not qualified to obtain a Hong Kong permanent identity card. Further, some fundamental rights are only enjoyed by PRs, such as the right to vote and the right to

stand for election under BL 26 and the right to participate in public life under HKBOR 21. That said, other fundamental rights guaranteed by Chapter III of the BL and HKBORO are enjoyed by all Hong Kong residents (whether permanent or non-permanent). By virtue of BL 41, non-residents shall, in accordance with law, enjoy the fundamental rights and freedom of Hong Kong residents prescribed in Chapter III of the BL: See *Kong Yunming v The Director of Social Welfare* (2013) 16 HKCFAR 985, FACV 2/2013 (17.12.2013), para 163.

8.2.4 Since the resumption of sovereignty on 1.7.1997, the ROA issue has given rise to a number of significant lawsuits. The earlier ROA disputes began with claims by children born in the Mainland China for ROA in Hong Kong under the BL.

See ***Ng Ka Ling & Ors v Director of Immigration (1999) 2 HKCFAR 4, FACV 14/1998*** (29.1.1999), and ***Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82, FACV 3/1998** (29.1.1999). The law is now well-settled:

An Interpretation was made by the NPCSC on BL 22(4) and BL 24(2)(3) on 26.6.1999. The Interpretation came into effect on 1.7.1997:

(a) under BL 22(4), persons from other parts of Mainland China including those persons within BL 24(2)(3), who wished to enter Hong Kong for whatever reason, had to apply to the relevant authorities for approval in accordance with the relevant national laws and administrative regulations and had to hold valid documents issued by the relevant authorities before they could enter Hong Kong; see *Ng Siu Tung & Ors v Director of Immigration* (2002) 5 HKCFAR 1, FACV 1, 2 & 3/2001 (10.1.2002); and

(b) to qualify as a PR under BL 24(2)(3), it was necessary that both parents or either parent of the person concerned had to be a PR within BL 24(2)(1) or BL 24(2)(2) at the time of birth of the person concerned: See *Lau Kong Yung & Ors v Director of Immigration* (1999) 2 HKCFAR 300, FACV 10 & 11/1999 (3.12.1999).

8.2.5 For non-PRs and non-residents of foreign nationality who wish to claim ROA in Hong Kong under BL 24(2)(4), they are required to satisfy the following requirements:

(a) Having entered Hong Kong with a valid travel document;

(b) Having ordinarily resided in Hong Kong for a continuous period of not less than seven years; and

(c) Having taken Hong Kong as their place of permanent residence.

8.2.6 Of the persons claiming ROA, some were foreign domestic helpers ("FDHs") who entered Hong Kong by way of their employment visas and their minor children who were born in Hong Kong. Pursuant to section 2(4)(a)(vi) of the Immigration Ordinance which provides that a person shall not be treated as ordinarily resident in Hong Kong while employed as a FDH, FDHs are not able to claim ROA as they would not be able to meet the ordinary residence requirement under BL 24(2)(4).

Case Example

In ***Vallejos and Domingo v Commissioner of Registration & Anor* (2013) 16 HKCFAR 45, FACV 19 & 20/2012** (25.3.2013), the applicants who were FDHs from the Philippines and had worked

in Hong Kong for more than 20 years contended that section 2(4)(a)(vi) of the Immigration Ordinance was inconsistent with BL 24(2)(4) and invalid. The CFA held that section 2(4)(a)(vi) was consistent with BL 24(2)(4) and in view of the restrictive nature of FDHs' stay for employment, their stay in Hong Kong did not qualify as ordinary residence for the purpose of claiming ROA.

8.2.7 In considering a minor's claim for ROA, the question of ordinary residence and place of permanent residence under BL 24(2(4) is highly fact-sensitive and depends on the parent's or guardian's position.

Case Example

In ***Gutierrez Joseph James, a minor v Commissioner of Registration & Anor* (2014) 17 HKCFAR 518, FACV 2/2014** (18.9.2014), the appellant had lived continuously in Hong Kong since birth for around 10 years with numerous visitor visa extensions and certain periods of absence while his mother was working as a FDH for various employers. It was held that the permanence requirement under BL 24(2)(4) required a child applicant for ROA to meet the criterion of having taken Hong Kong as his place of permanent residence, taking into account his individual circumstances, including any action taken or arrangements made by himself or by a parent or legal guardian on his behalf or for his benefit.

8.3 Other Fundamental Rights

8.3.1 As mentioned in para 8.2.3 above, non-PRs and non-residents enjoy all fundamental rights (save for a few) as enjoyed

by PRs. The Director's immigration control powers include powers to impose condition of stay and policy requirements for entry into Hong Kong and powers to remove or deport immigrants, which may touch upon fundamental rights and are subject to judicial review.

(a) Visa Policies

8.3.2 For non-residents seeking to enter and stay in Hong Kong, usual attacks are against the Director's decisions made under different entry visa policies, such as the employment policy and the dependant policy.

8.3.3 Non-residents may not be able to challenge an immigration policy relying on rights under HKBORO if such rights are subject to the immigration reservation provided in section 11 of the HKBORO. They may also not be able to rely on rights under an international treaty if it has not been incorporated into domestic law and if the relevant part of the treaty is subject to reservation.

Case Example

In ***Lubiano Nancy Almorin v Director of Immigration*** **[2020] 5 HKLRD 107, [2020] HKCA 782, CACV 112/2018** (21.9.2020), a FDH challenged the immigration and labour policy that the Director would only grant an employment visa to a FDH who undertook to abide by the requirement that she must reside at her employer's residence, relying on the right to adequate rest and limitation on working hours under ICESCR 7 and the argument that the requirement heightened the risk of violation of fundamental human rights of foreign domestic helpers in respect of ICESCR 7. The Court of Appeal held that a FDH was precluded from relying on the said right under ICESCR 7, which is a cognate right to the right against forced labour under BOR 4(3), and it fell

within the scope of the reservation of the Director's right to impose restrictions on the taking of employment in Hong Kong under ICESCR 6.

8.3.4 The Director is under no duty and hence not bound to take humanitarian considerations into account when applying immigration policies: See *Lau Kong Yung & Ors v Director of Immigration* (1999) 2 HKCFAR 300, FACV 10 & 11/1999 (3.12.1999) at 332G-H. In cases where the Director did give regard to humanitarian considerations, the court could intervene if there were unfairness in the process: See *BI & BH v Director of Immigration* [2016] HKLRD 520, CACV 9, 103 & 134/2015 (8.3.2016), paras 70-105.

8.3.5 There were cases where the Director refused to grant a dependant visa even when the spousal relationship between an applicant (foreigner) and a sponsor (PR or non-PR) was considered to be genuine.

Case Example

In ***H & AH v Director of Immigration* (2020) 23 HKCFAR 437, [2020] HKCFA 34, FAMV 415/2019 & 3/2020** (12.11.2020), the applicants in the two cases were both non-refoulement claimants. The applicant in H had a record of suspected offence whereas the applicant in AH had a conviction record. Their applications to remain as a dependant of their respective PR wives were refused by the Director. The CFA upheld that the dependant policy is not a family reunion policy and its requirement that there is no record to the detriment of the applicant is an eligibility criterion to be met for a dependant visa to be granted, which is not limited to conviction record of serious offences. See also *BI & BH*, ibid.

(b) Family Rights

8.3.6 On increasingly more occasions, foreigners have asserted a right to enter and stay in Hong Kong on the basis of the rights of their family members. It is now settled that a foreign national cannot rely on such rights.

Case Example

In ***Comilang & Ors v Director of Immigration*** **(2019) 22 HKCFAR 59, [2019] HKCFA 10, FACV 9 & 10/2018** (4.4.2019), two FDHs who have no ROA and no right to enter and remain in Hong Kong applied for permission to remain in Hong Kong to take care of their minor children who were PRs. Their applications were refused by the Director as they did not fall within any immigration policies and there were no exceptional circumstances for him to exercise his discretion to allow the applications. Upon their challenge against the Director's decisions by way of judicial review, the CFA held that the Director was not duty-bound to take into account the purported family rights under the relevant BL and HKBOR provisions (e.g. BL 24 and BOR 14). The CFA further held that when the Director was exercising his discretion to refuse the appellants' permission to stay, by section 11 of the HKBORO which was given constitutional force by BL 39, the appellants' reliance upon the relevant international treaty and convention (e.g. ICCPR 17 and ICCPR 23) were not engaged.

(c) Right to Work

8.3.7 Under the Immigration Ordinance, the Director is given the power to grant permission to work in Hong Kong to non-residents including successful non-refoulement claimants.

Case Example

In ***GA v Director of Immigration* (2014) 17 HKCFAR 60, FACV 7, 8, 9 & 10/2013** (18.2.2014), the Director refused to give permission to some mandated refugees and screened-in torture claimants to work in Hong Kong and they claimed that they had a constitutional right to work under BOR 14, ICESCR 6 and BL 33. The CFA, in dismissing their appeal, held that a discretion vested in the Director to determine whether or not persons in their position should be permitted to work came within the rubric of immigration control and is subject to the immigration reservation under section 11 of the HKBORO. The appellant could not rely on any right under ICESCR 6 as it is not domestic law and is subject to the UK reservation which applies to Hong Kong. Further, BL 33 does not refer to the right to work in general and only deals with the freedom of choice of occupation which is much narrower.

(d) Removal/Deportation

8.3.8 In considering the removal or deportation of foreign nationals who do not have any right to land or remain in Hong Kong, the Director will take into account the fundamental rights raised by them.

Case Example

In ***Sukhmander Singh v Permanent Secretary for Security*, unreported, CACV 370/2005** (20.7.2006), the applicant who was a non-permanent resident claimed that his life would be at risk if he was deported to India as he would, through lack of means, be compelled to live in the same village as his assailants. The CA held that any real risk to life, if demonstrated, is a factor that the

decision-maker cannot ignore and that the Permanent Secretary for Security failed to address the key question on the level of risk to the applicant if returned and the matter was remitted for fresh decision.

8.4 Non-Refoulement Claims

8.4.1 A non-refoulement claim ("NRC") is a claim for non-refoulement protection in Hong Kong against expulsion, return or surrender of a claimant to another country.

8.4.2 The genesis and the present position on the mechanism in processing NRCs is summarised as follows. Following the CFA judgment in *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKCFAR 187, FACV 16/2003 (8.6.2004), which required high standards of fairness to be applied when assessing torture claims, the Immigration Department introduced an administrative mechanism for the assessment of torture claims. The mechanism was further enhanced in December 2009 after the Court of First Instance's judgment in *FB & Ors v Director of Immigration* [2009] 2 HKLRD 346, HCAL 51, 105-7 & 125-6/2007 (5.12.2008), which held that free legal representation should be provided to a non-refoulement claimant in presenting his case to the Director ("Enhanced Administrative Mechanism"). The Enhanced Administrative Mechanism was subsequently underpinned in a statutory framework under Part VIIC of the Immigration Ordinance (introduced by the Immigration Amendment Ordinance 2012) that came into effect on 3.12.2012.

8.4.3 In addition, in the light of the CFA's rulings in *Ubamaka Edward Wilson v Secretary for Security* (2012) 15 HKCFAR 743, FACV 15/2011 (21.12.2012) and *C & Ors v Director of Immigration* (2013) 16 HKCFAR 280, FACV 18-20/2011 (25.3.2013) in December 2012 and March 2013 respectively, the

Unified Screening Mechanism ("USM") was introduced to screen NRCs on all applicable grounds, including risk of torture under the Immigration Ordinance; personal and substantial risk of absolute and non-derogable rights under the HKBOR being violated in another country; and risk of persecution in one go. Procedures of the USM follow those of the statutory torture claim screening mechanism to ensure that high standards of fairness are met in the screening of NRCs.

8.4.4 The screening of NRCs had been subjected to a number of judicial review challenges. The court has upheld, amongst others, the following legal principles:

(a) While a non-refoulement claimant is entitled to free legal representation in presenting his case to the Director, there is no authority that the claimant must have an absolute right to free legal representation at all stages of the proceedings: See *FB & Ors v Director of Immigration* [2009] 2 HKLRD 346, HCAL 51, 105-7 & 125-6/2007 (5.12.2008) and *Re Zunariyah* [2018] HKCA 14, CACV 195/2017 (11.1.2018).

(b) The nature of the appeal/petition of a NRC involves a rehearing of the claim. The Torture Claims Appeal Board/Non-refoulement Claims Petition Office will consider the claim afresh, can take fresh oral evidence, and can make findings of facts with or without regard of the findings of the Director: See *AM v Director of Immigration & William Lam, Adjudicator* [2014] 1 HKC 416, HCAL 102/2012 (20.11.2013).

(c) There is no absolute right to an oral hearing even in the context of NRCs. The ultimate question of whether to hold an oral hearing is one of fairness. The crux is to afford an opportunity to make worthwhile or effective representations

in appropriate circumstances: See *ST v Betty Kwan & Ors* [2014] 4 HKLRD 277, CACV 115/2013 (26.6.2014).

9. Judicial Review in Land, Environmental, Planning and Building Context

9.1 Introduction

9.1.1 In recent years, there has been a surge of judicial review cases in Hong Kong concerning land, environmental, planning and building matters. These cases feature a wide array of issues such as standing, justiciability and the different grounds for judicial review considered in the earlier chapters of this Guide.

9.2 Judicial Review concerning Land Matters

9.2.1 Under Article 7 of the Basic Law, the Government of the Hong Kong Special Administrative Region is responsible for the management, use and development of land and for granting leases to individuals, legal persons or organisations for the use or development of land. In practice, this power is delegated by the Chief Executive to the Secretary for Development, and then to the officers of the Lands Department, which is the Government's executive arm for land administration. Land-related judicial review usually arises out of the administrative decisions taken by the Director of Lands ("DL") during the process of land disposal and acquisition, and also in the context of enforcement of lease conditions.

9.2.2 One of the most central issues in land-related judicial review is whether the decision is susceptible to judicial review.

Case Example

***Hang Wah Chong Investment Co Ltd v Attorney General* [1981] 1 WLR 1141** (23.3.1981) was a landmark case which ruled on the justiciability of decisions taken by the DL. In this case, the applicant (a lessee of Government land) intended to erect buildings that were subject to the approval of the then Director of Public Works ("DPW"). The DPW granted approval conditional upon the payment of a premium, which was challenged by the applicant through judicial review proceedings. The Privy Council held that in demanding the premium, the DWP was merely acting as the Government's land agent and hence, the decision should be dealt with within the framework of private law, not public law. This led to the establishment of the broad principle that decisions made in relation to Government leases (i.e. where the official acts merely as the Government's land agent, taking care of the interests of the Government as a landlord) are not normally susceptible to judicial review.[11]

9.2.3 Judicial review cases in recent years suggest that certain decisions of the DL may be regarded by the courts as "public" in nature (i.e. affecting public law rights), despite the DL's role as the Government's land agent and the long-standing principle that decisions made by the DL in such a capacity should generally be dealt with within the framework of private law. The true question is whether the making of the decision amounted to the performance of a function within the public domain: see *Hong Kong and China*

[11] See Chapter 2.3.2 for limits on judicial review generally.

Gas Co Ltd v Director of Lands [1997] HKLRD 1291, HCAL 50/1997 (21.11.1997), adopted in *Kam Lan Koon & Ors v Secretary for Justice* [1999] 3 HKC 591; CACV 197/1998 (29.7.1999).

Case Example

In ***Chau Tam Yuet Ching v Director of Lands* [2013] 3 HKLRD 169, CACV 170/2012** (24.5.2013), the DL, amongst others, cancelled Government Land Licences held by the applicant in respect of land in the Sai Kung area pursuant to the power under section 5 of the Land (Miscellaneous Provisions) Ordinance (Cap. 28). The Court of Appeal considered both the authorities in which the DL's decisions were held to be judicially reviewable (including *Wong Wai Hing Christopher v Director of Lands* [2011] 1 HKLRD C2; HCAL 95, 97 & 98/2010 (24.9.2010)), and those in which they were held not. The court ultimately held that the mere presence of some public element in the decision by reason of the statutory power was not sufficient to transform it into a public law decision, and one should examine the statutory regime to see whether the regime instilled a sufficient public character into the decision to render it judicially reviewable. The court accepted that the DL was exercising the right as a licensor and was performing a private function in making the decision in question, which was thus a commercial decision and not amenable to judicial review.

9.2.4 In summary, the position now is that the courts will determine whether or not decisions of the DL are justiciable on a case-by-case basis. Even decisions concerned with the same policy may not carry the same degree of public character. For example, in *Koon Ping Leung v Director of Lands* [2012] 2 HKC 329; HCAL 14/2011 (26.1.2012), the DL's refusal to grant land for

building houses under the Small House Policy ("the Policy") was held to be judicially reviewable. But in *Hung Hing v Director of Lands* [2015] 5 HKLRD 516; CACV 118/2015 (17.9.2015), the Court of Appeal held that not each and every matter concerned with the Policy was judicially reviewable, and the DL's refusal to grant land for constructing vehicular access to houses built under the Policy was not. Therefore, in each case, the crucial question remains whether the role played or function performed by the Government official in making the decision in question is sufficiently public to render the decision amenable to judicial review.

9.3 Environmental Challenges

9.3.1 In the face of growing public concern about the state of the environment and the impact of environmental degradation on public health in Hong Kong, concerned citizens and interest groups have made applications for judicial review.

9.3.2 In the early-mid 2000s, the most significant environmental judicial review cases concerned the reclamation of the Victoria Harbour. The most notable challenges were brought by the Society for the Protection of the Harbour ("the Society"), a public interest organisation aiming at preventing excessive and/or unlawful reclamation of the Victoria Harbour.

Case Example

In ***Society for the Protection of the Harbour v Town Planning Board* (2004) 7 HKCFAR 1, FACV 14/2003** (9.1.2004), the Society challenged the decisions of the Town Planning Board ("the Board") in respect of amendments to the Wanchai North Outline Zoning Plan which would permit a reclamation project along the

Wanchai waterfront. The Society's main ground was that the Board erred in law in that it had misinterpreted section 3 of the Protection of the Harbour Ordinance (Cap. 531), under which the harbour was recognised as a special public asset and natural heritage of Hong Kong people and specified a "presumption against reclamation" in the harbour. The courts (at both the Court of First Instance and the Court of Final Appeal levels) accepted the Society's principal argument that section 3 required the Board to adopt the test of "overriding public need" i.e. there must be cogent and convincing materials before the Board that the overriding public need for reclamation rebutted the presumption against reclamation. Since the Board failed to adopt such a test, its decision was quashed for error of law and was remitted for reconsideration.

9.3.3 More recently, environmental challenges by way of judicial review mostly concerned decisions made under the Environmental Impact Assessment Ordinance (Cap. 499) ("the EIAO"). The EIAO is intended to provide for the protection of the environment and has introduced an environmental impact assessment ("the EIA") process for "designated projects" (i.e. projects which are likely to have a significant adverse impact on the environment unless properly studied and controlled). Under the EIA process, proponents of projects must prepare an EIA report which meets the requirements of the "Study Brief" ("the SB") (which is specific to the project) issued by the Director of Environmental Protection ("the DEP") and the "Technical Memorandum" ("the TM") (which sets out the more general principles, procedures, guidelines and criteria applicable to all projects) issued by the Secretary for the Environment. The judicial review cases mostly feature disputes over the interpretation of the requirements under the SB and the TM.

Case Example

In ***Shiu Wing Steel Ltd v Director of Protection and Airport Authority* (No. 2) (2006) 9 HKCFAR 478, FACV 28/2005** (17.7.2006), the applicant (a steel mill operator) challenged the DEP's decision to approve an EIA report prepared by the Airport Authority in respect of its proposed storage of aviation fuel by constructing a permanent air fuel farm next to the applicant's site. At issue was whether the EIA report failed to contain a Quantitative Risk Assessment ("QRA") embracing the scenario of a catastrophic failure of a fuel storage tank with an instantaneous or almost instantaneous loss of 100% of the tank's contents. The Court of Final Appeal (overruling the Court of First Instance and Court of Appeal's decisions) held that the meaning of the TM and the SB was a question of law for the court, and, adopting a purposive interpretation, that "consideration of the potential environmental impacts of a project cannot be complete if the methodology adopted for their prediction omits the consequences of possible scenarios which may cause fatalities unless the causes of the scenarios are expected or anticipated" (at para 64). It was thus held that the absence of QRA in the EIA report meant that there was an omission or deficiency that may affect the results and conclusions of the report. The DEP therefore had no power to approve the EIA report and his decision was quashed.

In ***Chu Yee Wah v Director of Environmental Protection* [2011] 5 HKLRD 469, CACV 84/2011** (27.9.2011), the applicant challenged that the DEP had no power to approve an EIA report relating to designated projects of the Hong Kong-Zhuhai-Macao Bridge, due to lack of compliance with the requirements of the TM and the SB. Specifically, the key issue in debate was whether the impact of the projects on air quality was properly assessed in the EIA report. The Court of Appeal (in allowing the DEP's appeal)

held that on the true construction of the TM and the SB, a "stand-alone" analysis was not required. Instead, it was deemed proper for the DEP to issue the environmental permit based on existing air quality objectives, which represented an acceptable environmental standard for measuring whether a designated project produced an environmental impact which was prejudicial to health. Notably, Tang VP (as he then was) observed that while it was a matter of construction for the court to decide what was required by the TM or the SB, "what information may be required by the DEP to make an informed decision may be and often is (also) a question of professional judgment" (at para 96).

9.3.4 Apart from taking up the role as the approving authority, the DEP, in certain circumstances, also acts as a proponent under the EIAO. Recently, the multiple roles of the DEP have been put into question.

Case Example

In ***Leung Hon Wai v Director of Environmental Protection* (2015) 18 HKCFAR 568, FACV 2/2015** (18.12.2015), the Infrastructure Planning Group ("the IPG") of the Environmental Protection Department ("the EPD"), as the proponent of a project to construct and operate a municipal waste incinerator on an artificial island near Shek Kwu Chau, made applications to the Environmental Assessment Division ("the EAD") of the EPD in the name of the DEP under the EIAO, resulting in the DEP's decisions to approve the EIA report and permit. The issue was whether the DEP, who headed the EPD, could be the named applicant while being the approving authority. The Court of Final Appeal held, upon the true construction of the EIAO, that the EPD (as headed by the DEP) could be an applicant seeking the DEP's approval, unless in

playing such a role, an inevitable conflict of interest must arise or did in fact arise. As the functions of the EAD and the IPG were clearly separated, and it was clearly envisaged by the legislature that the DEP, as waste disposal authority and proponent of waste disposal facilities, might apply for an environmental permit under the EIAO, there was no basis to exclude the EPD and the DEP as the project proponent in this case, and thus the appeal was dismissed in the DEP's favour.

9.4 Planning Cases

9.4.1 The Town Planning Ordinance (Cap. 131) ("the TPO") provides for the establishment of the Town Planning Board ("the Board") whose functions are prescribed by section 3, which, inter alia, requires the Board to "undertake the systematic preparation of draft plans for the lay-out of areas of Hong Kong as well as the types of building suitable for erection therein." The TPO also prescribes a public consultation procedure, whereby the Board must consider representations and comments on the draft plans from the public before submitting them to the Chief Executive in Council for approval. The plan-making process and the public consultation procedure affect people's rights and have been the subject of many judicial review applications. Many of the planning judicial review challenges have been brought out of a concern for negative impacts of the planning restrictions that might be imposed under the Draft Outline Zoning Plans ("DOZPs") on the permissible development intensity on the land.

9.4.2 One of the key challenges in judicial review concerns the scope of power of the Board.

Case Example

In ***Turbo Top Ltd v Town Planning Board*, unreported, HCAL 52/2011** (21.11.2011), the Board proposed amendments to the DOZP for the area where "Cheung Kong Centre" is situated, by rezoning the site as a "Commercial (1)" site and stipulating in the notes to the DOZP that the site should have a minimum of 800 public car parking spaces. The applicant contended that the decisions of the Board in respect of the amendments were *ultra vires* because they constituted impermissible "micro-managing" of the uses of a specific building rather than an area. At the Court of First Instance, Reyes J held that the decisions fell squarely within the functions of the Board as defined in the long title and sections 3 & 4 of the TPO. For the "convenience and general welfare" of the community, the Board designated the site as a Commercial (1) site and imposed a minimum number of car parking spaces.

9.4.3 There are many examples of judicial review challenges founded upon other grounds, including a material error of fact, e.g. *Smart Gain Investment Ltd v Town Planning Board & Anor*, unreported, HCAL 12/2007 (6.11.2007) (also in para 3.3.25 above).

9.4.4 There are also challenges alleging violations of constitutionally guaranteed rights in planning decisions. The most common rights being involved are the rights contained under Articles 6 and 105 of the Basic Law, which provide, respectively, that "The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law", and that "The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their

property…", see *Hysan Development Co Ltd & Ors v Town Planning Board* (2016) 19 HKCFAR 372, FACV 21 & 22/2015 (26.9.2016).

9.4.5 A draft or approved plan may provide for the grant of permission for certain purposes. In such circumstances, the Board is empowered to grant or refuse to grant such permission upon an application under section 16 of the TPO, and such a decision is subject to a review by the Board under section 17. Recently, the exact scope of the Board's power to review under section 17 was challenged.

Case Example

In ***Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196, FACV 8/2016** (16.2.2017), a permission under section 16 of the TPO, upon appeal, was granted by the Town Planning Appeal Board subject to certain conditions. However, during the course of implementation, the Board refused to grant approval for one of the conditions, and refused to review the refusal pursuant to section 17 of the TPO on the grounds that it had no power to do so. The majority (in the ratio of 4:1) of the Court of Final Appeal held, upon the true construction of section 17, that the review under section 17 was a narrow one, and it covered only a decision to refuse to grant permission or that to grant permission with conditions under section 16 of the TPO, but not every decision made in relation to section 16 regardless of its nature.

9.5 Building Cases

9.5.1 Apart from the general planning restrictions imposed by the Town Planning Board on the lay-out of areas and types of building in Hong Kong, a person seeking to erect a building or carry out building works is also subject to the Buildings Ordinance (Cap. 123) ("the BO") concerning a specific development. The Building Authority ("the BA") may, on the grounds stipulated under the BO, refuse to give approval of a plan of building works. In recent years, the proper interpretation of the statutory grounds of refusal under section 16 of the BO has been reviewed.

Case Example

In ***Building Authority v Appeal Tribunal (Buildings)*** **(2015) 18 HKCFAR 317, FACV 7/2014** (13.3.2015), the applicant submitted building plans for 39-storey buildings in replacement of 5-storey buildings, which were rejected by the BA on the grounds of, amongst others, section 16(1)(g) of the BO as the proposed buildings differed in height from buildings in the immediate neighbourhood, which would lead to increased density and in turn pose danger and / or inconvenience to traffic. The issue before the Court of Final Appeal was whether in the application of section 16(1)(g), consideration could be given to health, safety and other town planning aspects. The court, upon a purposive construction of section 16(1)(g), held that matters of health, safety and town planning would be relevant considerations provided that they were directly attributable (or in other words, causally related) to the difference identified under section 16(1)(g). As the role of the BA was different from that of the Town Planning Board, "height, design, type and intended use" of any proposed building set out under section 16(1)(g), while being town planning considerations, should be considered by the BA as they were specific to the

proposed development, but not "general" town planning considerations. It was thus correct for the BA to consider the increased density and adverse traffic impact as a result of the difference in height.

In ***Real Estate Developers Association of Hong Kong v Building Authority* (2016) 19 HKCFAR 243, FACV 19/2015** (19.5.2016), the BA's policy requiring particulars and proof of ownership or realistic prospects of ownership of the "site" in question be submitted with a general building plan of a proposed new building ("the Policy") was challenged. The Court of Final Appeal held that section 16 of the BO should be construed in the context of other provisions of the BO and the Building (Planning) Regulations (Cap. 123F) ("the BPR"). It was held that the concept of the "site" under the BPR could only include land that the applicant owned or had a realistic prospect of controlling, and on a purposive construction in the broader context of the BO, for land to qualify as a site, it must be land on which it was *bona fide* intended that the approved building would be built. Thus, the BA could require the provision of particulars of ownership or realistic prospects of control under section 16(1)(i) of the BO, and other provisions of section 16 would be engaged as well: "*under (1)(a), the plans could be refused approval because that did not relate to such a site; under (1)(c) because the application did not contain the particulars of ownership or realistic prospect of control required and under (1)(d) because only building works in relation to which plans had been properly approved could be built*" (at para 67).

9.5.2 The above cases highlight the importance for public officers to properly understand the interpretation and scope of any powers conferred on them by way of statutes before making decisions pursuant to such statutory powers.

10. Other Remedies

Apart from judicial review, there are other channels available for challenging an administrative decision or compensating a person's loss arising from maladministration. The main types are:

(a) Habeas Corpus;
(b) Private law actions for damages;
(c) Alternative Dispute Resolution;
(d) The Ombudsman;
(e) The Privacy Commissioner for Personal Data;
(f) Administrative Appeals Board and other tribunals and appeal boards
(g) Inquiries;
(h) Remedies under the HKBOR; and
(i) Ex gratia compensation.

10.1 Habeas Corpus

10.1.1 The writ of habeas corpus is a long-standing common law remedy which is to provide an effective means of securing immediate release from unlawful or unjustifiable detention and of overcoming evasion and abuse of orders meant to bring prisoners to the court. See, for example, *Harjang Singh v Secretary for Security & Anor* [2021] HKCFI 705, HCAL 224/2021 (19.3.2021) and *Syed Agha Raza Shah v The Director of Health* [2021] HKCFI 770, HCMP 468/2020 (13.5.2020).

10.2 Private law actions for damages

10.2.1 There are five main types of civil actions one may commence against the Administration for recovering losses, namely:

(a) Negligence;
(b) Breach of statutory duty;
(c) Misfeasance in public office;
(d) False imprisonment; and
(e) Malicious prosecution.

(a) Negligence

10.2.2 Government and other public authorities have no general immunity from claims in negligence. For a claimant to succeed in an action in negligence against a public authority, he must establish all the elements of the tort that would have to be established if a private body or person was being sued. The elements are, in essence, that the claimant should have suffered damage as a result of the defendant breaching a duty of care owed to the claimant. The liability is based on well-established principles of the tort of negligence laid down in *Donoghue v Stevenson* [1932] AC 562 (HL) (26.5.1932).

10.2.3. Damage suffered: In general the damage suffered is limited to personal injury or physical damage to property that was both reasonably foreseeable and proximately caused by careless acts or omissions. The common law develops incrementally from analogous precedents. There have been many attempts to extend the tort of negligence to cases where the only form of damage suffered was economic loss without physical damage or personal injury. In general there is no such liability. See, for example, *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL)

(26.7.1990) and *Yuen Kun Yeu v AG of Hong Kong* [1988] AC 175 (PC) (10.6.1987).

10.2.4 On the other hand, through incremental development of the law, there can be liability for economic loss caused by reliance upon negligent misstatements, but only where the maker has assumed or undertaken a responsibility towards the other who has relied on the statement. A duty of care may arise in such circumstances. See, for example, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) (28.5.1963).

10.2.5 Duty of care: Whether there was a duty of care is determined by whether the harm was reasonably foreseeable, whether the relationship between the parties was sufficiently "proximate" and whether the imposition of a duty of care was in the circumstances "fair, just and reasonable".

10.2.6 Issues of public policy may arise when a claimant alleges that a public authority has been negligent in the performance of its public functions or the exercise of its discretionary administrative powers.

See ***Wade & Forsyth, Administrative Law, 11th edn, p 656***. "Although important questions remain to be answered, there is a clear tendency, in England at least, against applying the ordinary law of negligence to discretionary administrative decisions. The decisions of licensing authorities, for example, may be held ultra vires and quashed if proper attention is not given to the case. But there is no indication that actions for damages will lie for any resulting loss, merely because negligence can be shown. The Court of Appeal (*Strable v Dartford BC* [1984] JPL 329 (CA) (1.1.1984)) has held that there is no liability in tort for the negligent handling of a planning application, even though this is plainly in the 'operational' class.

10.2.7 The court would thus be slow in applying the ordinary law of negligence to the performance of a public law function or the exercise of an administrative discretion. New duties of care are developed incrementally and by analogy with established categories of liability rather than by the application of abstract principle.

See ***Wade & Forsyth, Administrative Law, 11th edn, pp 649-650***. "It was not decided (in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) (26.7.1990)), however, whether negligence in administering building regulations or byelaws might entail liability in case of personal injury or impaired health or physical damage to some different property … It indicates also the House of Lords' preference for developing the categories of negligence 'incrementally by analogy with established categories' rather than by 'massive extension of a *prima facie* duty of care', and their recognition of the merits of a pragmatic policy in an area where general principles are elusive and indefinable".

10.2.8 The court may, however, in the light of the circumstances of a particular case, decide to effect an incremental extension of the law once it is satisfied that it would be "fair, just and reasonable" to impose a duty of care.

Case Example

See ***Pernett v Collins* [1999] PNLR 77** (CA) (22.5.1998). A passenger was injured when the plane crashed. The passenger alleged that the crash was caused by defects that the statutory inspector had carelessly failed to spot when inspecting the aircraft prior to issuing its certificate of airworthiness. The Court of Appeal held on a preliminary point of law that there was sufficient

proximity between the passenger and the statutory inspector to justify on a "fair just or reasonable" basis imposing a duty of care for personal injury. Liability for economic loss was distinguished from liability for personal injury.

(b) Breach of Statutory Duty

10.2.9 In general, a breach of statutory duty on the part of a public authority does not, by itself, give rise to any private law cause of action. However, it may give rise to a private law cause of action if, upon construction of the statute, it can be shown that the statutory duty was imposed for the protection of a limited class of the public and that the legislature intended to confer on that limited class a private right of action for breach of the duty.

10.2.10 It may not always be easy to ascertain whether there was such legislative intention. Factors to consider include the purpose of the statute, whether the loss is economic loss, whether there are other sanctions under the statute, and whether there are detailed provisions for the existence of detailed provisions for enforcement of the relevant duty. See, for example, *Digicel (St Lucia) Ltd (a company registered under the laws of St Lucia) & Ors v Cable & Wireless plc & Ors* [2010] EWHC 774 (Ch) (15.4.2010) and *Dah Sing Insurance Services Ltd v Gill Gurbux Singh* [2014] 1 HKLRD 691, CACV 255/2012 (23.12.2013).

10.2.11 Schemes of social welfare serving the general public interest are unlikely to create private rights of action for breach of statutory duty, particularly where discretion has to be exercised. See, for example, *So Yuk Kam v Liu, Chan & Lam (A Firm) & Anor*, unreported, DCCJ 1599/2012 (11.3.2014).

(c) Misfeasance in Public Office

10.2.12 Misfeasance in public office: Public authorities or officers may be liable in damages for malicious, deliberate or injurious wrongdoing. There is thus a tort described as "misfeasance in public office".

10.2.13 The law relating to the tort of misfeasance in public office has now been settled in the House of Lords' decision in the *Three Rivers case* (2003). The fundamental requirement is abuse of power, bad faith or improper purpose. It could not be committed negligently or inadvertently and the tort is one of misfeasance, not nonfeasance.

Case Example

In ***Three Rivers District Council v the Governors and Company of the Bank of England (No. 3)* [2003] 2 AC 1** (22.3.2001), Lord Steyn described the two varieties of the tort of misfeasance in public office:

- the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person;
- where a public officer acts knowing that he has no power to do the act complained of and the act will probably injure the plaintiff.

Both types involve bad faith on the part of the public officer.

In ***Tang Nin Mun v Secretary for Justice* [2000] 2 HKLRD 324, CACV 13/2000** (30.5.2000), the Court of Appeal, having considered the House of Lords' decision in the *Three Rivers* (the first hearing in 2000), held that a mental element of subjective knowledge on the part of the public officer that his actions would probably injure the plaintiff was required. There were three variants of subjective knowledge, namely where the officer:

- specifically intended to injure the plaintiff; or
- knew that in the ordinary course, injury to the plaintiff would follow, even though that was not his purpose; or
- was recklessly indifferent as to whether or not his actions would cause the injury.

(d) False Imprisonment

10.2.14 An action of false imprisonment lies at the suit of a person unlawfully arrested, detained or detained for a longer period than is justifiable or otherwise imprisoned. It is a tort of strict liability. A police officer acting in obedience to a warrant is not liable to be sued for false imprisonment. Various statutory provisions may also authorise a police officer or other law enforcement agents to make an arrest with or without a warrant. Further Article 5 of the HKBOR guarantees a person's right to liberty and security of person.

(e) Malicious Prosecution

10.2.15 In general there is no duty of care in negligence in relation to the initiation or conduct of prosecutions.[12] The tort of malicious prosecution provides a civil remedy for baseless and malicious prosecution. The burden which has to be undertaken by the plaintiff in a case of malicious prosecution is a heavy one.

Case Example

See ***Oh Jae-Hoon Eugene v Richdale* [2005] 2 HKLRD 285, CACV 105 & 162/2003** (21.10.2004). "There are 4 ingredients in the tort of malicious prosecution. These are identified in [pp 823-

[12] *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335 (CA) (16.11.1994)

824] para 16-06 of Clerk & Lindsell on Torts (18th edn [2000]) in a passage that was said by the House of Lords, correctly to state the law: see *Martin v Watson* [1996] 1 AC 74 at p 80: 'In action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the plaintiff.' This passage has also been referred to as representing the law in the decision of the House of Lords in *Gregory v Portsmouth City Council* [2000] 1 AC 419 (HL)." (per Ma CJHC (as he then was) at para 12)

10.2.16 The majority of actions for malicious prosecution are brought against the police, but a private person who sets the law in motion may also incur liability [13]. In the UK, malicious prosecution of civil proceedings is recognised as a viable tort at common law[14] and there may be an implicit acceptance that it is also a viable tort in Hong Kong (see *Chua Grace Gonzales v Sobrevilla Rhennie Boy Fernandez*, unreported, DCCJ 3750/2015 (24.8.2017), per Tsui DJ at para 96).

10.3 Alternative dispute resolution

10.3.1 Alternative Dispute Resolution ("ADR") refers to processes for settling disputes by methods other than litigation. The various types of ADR include negotiation, conciliation, mediation, collaborative practice and arbitration. In general, the

[13] *Martin v Watson* [1996] 1 AC 74 (HL) at 89

[14] *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366, and *Willers v Joyce* [2016] UKSC 43.

use of ADR promotes the early resolution of disputes. It provides a more flexible and less adversarial means to resolve disputes as compared with litigation. Parties are in better control of the outcome and may incur less cost in the process. In Hong Kong, mediation and arbitration are the more commonly used ADR processes.

10.3.2 Mediation: Mediation is a structured process in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties in identifying the issues in dispute, exploring options, communicating with one another and reaching an agreement regarding the resolution of the dispute. Parties enter into the mediation on a voluntary basis. The more common mode of mediation used in Hong Kong is facilitative mediation, but evaluative mediation is gaining interest amongst mediation practitioners and users.

10.3.3 As part of the Civil Justice Reform, the Judiciary issued Practice Direction 31 on Mediation, which first came into effect on 1 January 2010, to encourage parties to use mediation for early settlement. Practice Direction 31 applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ (except certain proceedings).

10.3.4 The Mediation Ordinance (Cap. 620) came into effect on 1 January 2013. The Mediation Ordinance aimed at providing a legal framework for the conduct of mediation without hampering the flexibility of the mediation process, and addressing some of the issues on which the then existing law was uncertain, such as confidentiality and the admissibility of mediation communications in evidence.

10.3.5 Can mediation be used in the area of public law or judicial review? It has been contended that mediation and judicial review

can and should co-exist[15]. There has not been any case in Hong Kong where courts expressly encourage parties to use or consider using mediation to resolve judicial review challenges. Whereas overseas experience (e.g. in the United Kingdom, Australia and Canada) shows measures, by way of statutes, practice directions and/or pre-action protocols, are adopted to encourage the use of mediation to avoid judicial review cases where appropriate.

Case Example

See ***R (on the application of Cowl) v Plymouth City Council* [2002] 1 WLR 803** (14.12.2001), a Court of Appeal case concerning the judicial review of the local authority's decision to close a residential care home. Lord Woolf CJ, giving the judgment of the Court, challenged in forceful terms the prevailing view that public law disputes were not suitable for resolution through ADR.

"The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress … The courts should then make appropriate use of their ample powers under the Civil Procedure Rules to ensure that the parties try to resolve the dispute with the minimum involvement of the courts" (at paras 1 and 2)

[15] Varda Bondy and Margaret Doyle, *Mediation in Judicial Review: A practical handbook for lawyers*, Public Law Project, Nuffield Foundation (2011), p.5.

"The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process." (at para 14)

See ***Edmunds v Legal Services Agency for Northern Ireland*** **[2019] NIQB 50** (15.5.2019). The claimant seeks judicial review against the Legal Services Agency's decision to deny her legal aid for mediation. The High Court of Justice in Northern Ireland stated that it will "in appropriate cases make such directions as it considers will facilitate the effective deployment of ADR" (at para 31). The court concluded that intra-litigation mediation is part and parcel of the proceedings and such mediation is covered by legal aid.

See the Australian case of ***Gardiner & Ors v Attorney-General (No 4)*** **[2021] VSC 290** (21.5.2021). The plaintiffs sought judicial review of the decision of the Attorney-General for the State of Victoria to enter into the Taungurung Recognition and Settlement Agreement. The plaintiffs were senior citizens and suffered from serious health issues and the proceedings had continued for more than 2 years. Having considered the age and circumstances of the plaintiffs and the evidence showing the harm it caused to the plaintiffs by delay in bringing the proceeding to finality, the Supreme Court of Victoria held that it would be unjust to further delay the resolution of this proceeding and referred the proceeding for judicial mediation.

10.3.6 Despite the above, the following categories of cases may present problems or appear unsuitable for mediation:

(a) cases requiring declarations of the court;
(b) cases on alleged ultra vires issues;

(c) cases where points of law need to be decided;
(d) cases raising issues of public interest;
(e) cases where vindication of rights are at issue; and
(f) cases concerning the requirement of proper and lawful decision making by public bodies[16].

10.3.7 Arbitration: Arbitration is a consensual process where parties agree to submit their disputes to be resolved by an impartial arbitral tribunal appointed by the parties. Arbitrations are commonly used to resolve constructions and commercial disputes. Parties in arbitration retain a high degree of autonomy in deciding how their disputes will be resolved, including the choice of arbitrators and arbitration procedures. Arbitration is also private and confidential. Subject to certain limited exceptions, information concerning both the arbitral proceedings and awards generally would not be divulged to a third party. Arbitral awards are final and binding; they may be set aside only on limited grounds.

10.3.8 The Arbitration Ordinance (Cap. 609) ("AO") provides for the procedural framework of arbitration seated in Hong Kong. It has come into operation since 2011 superseding the Arbitration Ordinance (Cap. 341) and is based on the United Nations Commission on International Trade Law UNCITRAL Model Law on International Commercial Arbitration. Arbitral awards made in Hong Kong can be enforced in over 160 Contracting States to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the Mainland China and Macao.

[16] Michael Supperstone QC, Daniel Stilitz and Clive Scheldon, '*ADR and public law*' [2006] Public Law, Summer: 299. See also Sophie Boyron, '*The Rise of Mediation in Administrative Law Disputes: Experiences from England, France and Germany*' [2006] Public Law, Summer: 320.

10.3.9 In Hong Kong, there are no case authorities or specific legislative provisions which provide a principled basis on which arbitration can be used to resolve public law disputes as an alternative to judicial review. However, arbitration is prescribed under certain legislation as the statutory mechanism to resolve or determine disputes with the government on the amount of compensation to be awarded. Examples are section 12 of the Prevention and Control of Disease Ordinance (Cap. 599) and section 5 of the Public Bus Services Ordinance (Cap. 230).

10.3.10 Generally speaking, cases which may be unsuitable for arbitration include:

(a) public law disputes pursuing remedies of (i) an order for mandamus, prohibition or certiorari or (ii) injunction under section 21J of the High Court Ordinance (Cap. 4) which restrains a person from acting in any office in which he is not entitled to act[17];
(b) disputes engaging civil rights or obligations[18];
(c) disputes involving criminal charges[19]; and
(d) disputes raising issues of public interests or public policy[20].

Case Example

In ***Fulham Football Club (1987) Ltd v Richards & Anor* [2012] Ch 333** (21.7.2011), the English Court of Appeal discussed the

[17] Order 53 Rule 1 of the Rules of the High Court (Cap. 4A) provides for the procedural exclusivity principle that public law disputes pursuing certain remedies must be resolved by way of judicial review (see more in Chapter 2.1 of this book).
[18] *De Smith's Judicial Review* (Sweet & Maxwell 2018), at para 16-024.
[19] *Ibid*.
[20] *Fulham Football Club (1987) Ltd v Richards & Anor* [2012] Ch 333 (21.7.2011), at para 40.

notion of non-arbitrability and held (at para 40) that "it is necessary to consider, in relation to the matters in dispute in each case, whether they engage third party rights or represent an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process."

10.3.11 Arbitral awards in cases involving public law disputes are unlikely to be susceptible to judicial review where the arbitration is or can be characterised as consensual and the source of power of the public body is contractual. In contrast, for arbitration in which a particular body is endowed by statute with jurisdiction to arbitrate certain types of disputes, it is arguable that the jurisdiction of the statutory tribunal or arbitrators is compulsory and parties may apply to the court to review the decision of the body.

Case Example

In ***Re Chan Yu Nam & Anor* [2006] 1 HKC 392, HCAL 77/2005** (24.8.2005), the applicants sought to challenge the arbitral awards made pursuant to the Eastern Harbour Crossing Ordinance ("EHCO") (now repealed) which permitted toll rise of the Eastern Harbour Tunnel. It was held that the grant of franchise is one of those commercial contracts the Government routinely enters into with private corporations. The arbitration in relation to the tolls charged under the franchise agreement pursuant to the EHCO is in distinction to a particular body endowed by statute with jurisdiction (possibly exclusive) to arbitrate certain types of dispute (for example, wage disputes) between particular parties. The application for leave for judicial review was dismissed.

In ***Pacific Century Insurance Company Limited v The Insurance Claims Complaints Bureau* [1999] 3 HKLRD 720, HCAL**

8/1999 (17.11.1999), the applicant was dissatisfied with the decision of the Complaints Board of the Insurance Claims Complains Bureau ("Bureau") on the compensation amount payable to the injured and instituted judicial review proceedings seeking an order of certiorari to quash such decision and an order of mandamus remitting the matter to the Bureau for reconsideration. It was held that the decision of the Bureau is amenable to judicial review. By its incorporation into a regulatory scheme underpinned by the Insurance Companies Ordinance, the Bureau had at all material times carried out a public function of conciliation and arbitration.

10.4 The Ombudsman

10.4.1 Since 2001 the Ombudsman (formerly the Commissioner for Administrative Complaints) has, under the Ombudsman Ordinance (Cap. 397) become a corporation sole and is given statutory backing for a complete "de-link" from the Administration, with the necessary powers for independent functioning.

10.4.2 The Ombudsman may investigate any action taken by or on behalf of an organisation (essentially government departments and statutory bodies such as the Hospital Authority and the Securities and Futures Commission) appearing in Part I of Schedule 1 in the exercise of its administrative functions in consequence of maladministration (section 7(1)). "Action" is defined to include "omission, recommendation or decision" (section 2(1)). "Maladministration" is widely defined as "inefficient, bad or improper administration". Unreasonable conduct, abuse of power, delay, discourtesy and lack of consideration are included (section 2(1)).

10.4.3 The Ombudsman may also investigate any action taken by an organisation appearing in Part II of Schedule 1 (e.g. Police, ICAC) in the exercise of its administrative functions in relation to the Code on Access to Information in consequence of maladministration (section 7(1)).

10.4.4 The Ombudsman may decide to deal with a complaint by mediation if the subject matter involves minor maladministration (section 11B).

10.4.5 If the complaint relates to any action in respect of which the complainant has judicial or tribunal remedies (other than judicial review), the Ombudsman must not undertake or continue an investigation unless he is satisfied that it would not be reasonable to expect the complainant to resort to such remedies (section 10(1)(e)).

10.4.6 The Ombudsman must not undertake or continue any investigation relating to any matter specified in Schedule 2 which includes the conduct of any legal proceedings, any action taken in respect of appointments, discipline or other personnel matters, and any action taken by the police or the ICAC in relation to the investigation of any crime.

10.5 The Privacy Commissioner for Personal Data

10.5.1 Like the Ombudsman, the Privacy Commissioner for Personal Data ("PCPD") is a corporation sole and given statutory backing to enforce the provisions in the Personal Data (Privacy) Ordinance (Cap. 486) ("PD(P)O"). The PCPD's functions include the monitoring and supervising compliance with those provisions and investigating suspected breaches of the requirements under the

PD(P)O. He may approve and issue codes of practice providing practical guidance for compliance with the statutory provisions.

10.5.2 The PD(P)O, enacted on 3 August 1995, is intended to protect the privacy of individual in relation to personal data. It was substantially amended in 2012 to tighten regulation of corporate data users on the use of customers' personal data in direct marketing, to strengthen the PCPD's enforcement powers, to enable the PCPD to provide legal assistance to an aggrieved individual seeking compensation for damages suffered and to provide for new exemptions from the Data Protection Principles ("DPPs") or other requirements. Amendments were also made in 2021 to, among other matters, criminalise doxxing acts, empowering the PCPD to carry out criminal investigations and institute prosecutions, to demand the cessation of disclosure of doxxing messages and to apply for injunctions, etc.

10.5.3 The Ordinance covers the following main parts:

(a) 6 DPPs;
(b) Access to and Correction of Personal Data;
(c) Matching Procedures and Transfers of Personal Data;
(d) Use or Provision of Personal Data in Direct Marketing;
(e) Inspections, complaints and Investigations;
(f) Exemptions;
(g) Functions and Powers of the Privacy Commissioner;
(h) Offences and Compensation;
(i) Matters relating to offences for disclosing personal data without consent – Investigations and enforcement powers.

A summary of the 6 DPPs (Schedule I of PD(P)O)

DPP1: personal data shall be collected for a purpose directly related to a function and activity of the data user; lawful and fair

collection of adequate data; data subjects shall be informed of the purpose for which the data is collected and to be used.

DPP2: all practicable steps shall be taken to ensure the accuracy of personal data; data shall be deleted upon fulfillment of the purpose for which the data is or is to be used.

DPP3: unless the data subject has given prior consent, personal data shall be used for the purpose for which the data was originally collected or a directly related purpose.

DPP4: all practicable steps shall be taken to ensure that personal data are protected against unauthorised or accidental access, processing or erasure.

DPP5: formulates and provides policies and practices in relation to personal data.

DPP6: individuals have rights of access to and correction of their personal data. Data users should comply with data access or data correction request within the time limit, unless reasons for rejection prescribed in the Ordinance are applicable.

10.5.4 Offences: Contravention of a DPP does not by itself constitute an offence. However, contravention of certain provisions under the PD(P)O is an offence (for example, contravention of an enforcement notice or the direct marketing provisions, failure to erase personal data that is no longer required for the purpose for which it is used, offences relating to doxxing, and contravention of a cessation notice, etc.) (Parts 9 and 9A).

10.5.5 Compensation: An individual who suffers damage (including injury to feelings) by reason of a contravention of a

requirement under the PD(P)O by a data user relating to personal data of that individual is entitled to compensation. The PD(P)O provides for due diligence defence (section 66).

10.5.6 Exemptions: The PD(P)O provides for various exemptions from specified DPPs or other provisions. The exemptions include performance of judicial functions (section 51A), domestic purposes (section 52), employment–staff planning (section 53), relevant process (section 55), personal references (section 56), security (section 57), crime or malpractice (section 58), health (section 59), care and guardianship of minors (section 59A), legal professional privilege (section 60), self-incrimination (section 60A), legal proceedings (section 60B), news (section 61), statistics and research (section 62), human embryos (section 63A), due diligence exercise (section 63B), emergency situations (section 63C) and transfer of records to Government Records Service (section 63D).

10.6 Administrative Appeals Board and other Tribunal and Appeals Board

10.6.1 The Administrative Appeals Board ("AAB") is an independent statutory body established in July 1994 under the AAB Ordinance (Cap. 442) ("AABO"). The AAB will hear and determine appeals against certain administrative decisions which fall under its jurisdiction and as stipulated in the Schedule of the AABO, for example, certain decisions by the Privacy Commissioner for Personal Data and the Commissioner of Customs and Excise under the Duties Commodities Ordinance (Cap. 109).

10.6.2 Most AAB hearings are open to the public save for special circumstances when applications can be made by either party with justifications for anonymity or private hearing which is

subject to approval by the presiding chairman. The Board has the power to confirm, revoke or vary the decisions appealed from. It has informal procedures and rules of evidence do not apply. The Board will give reasons in writing for their decisions which will be served on the parties to the appeal (section 25 of AABO).

10.6.3 Appeals from decisions of the AAB go to the Court of Appeal and sometimes judicial review may be available.

10.6.4 There are also other tribunals that are established for specific purposes. For example, the Immigration Tribunal; Municipal Services Appeals Board; and various disciplinary tribunals and appeal boards for professionals, such as the Solicitors Disciplinary Tribunal and Electricity Ordinance Disciplinary Tribunal Panel. These tribunals and appeal boards are independent statutory bodies established to hear specific appeals as stipulated in the relevant ordinances.

10.7 Inquiries

10.7.1 Statutory or non-statutory inquiries may be conducted in relation to any particular matter or incident.

10.7.2 The Administration may appoint a non-statutory, administrative committee or inquiry to look into any particular matter or incident. Such committee or inquiry does not have power to summon witnesses or order the production of documents. Nor does it enjoy any immunity or protection against legal liabilities.

Previous non-statutory inquiries include:

- The Penny Stock Inquiry (July 2002)
- The SARS Inquiry (October 2003)
- The Harbour Fest Inquiry (May 2004)

- The Sai Wan Ho Development Inquiry (November 2005)

10.7.3 For statutory inquiries, the Chief Executive-in-Council may under the Commissions of Inquiry Ordinance (Cap. 86) appoint one or more Commissioners to inquire into the conduct of any public body, the conduct of any officer or into any matter which is in his opinion of public importance. The Commission enjoys statutory powers of investigation, including the power to summon any person to attend, to give evidence or to produce any document. Every inquiry held by a Commission shall be deemed to be a judicial proceeding. There are statutory provisions to protect the Commissioner and witnesses from suit or other proceedings for acts done or evidence given in the course of inquiries.

Statutory inquiries include:

- The Garley Building Fire Inquiry (December 1996)
- The New Airport Opening Inquiry (July 1998)
- The Allegations relating to the Hong Kong Institute of Education Inquiry (February 2007)
- The Collision of Vessels near Lamma Island Inquiry (October 2012)
- Excess Lead Found in Drink Water Inquiry (August 2015)
- Diaphragm Wall and Platform Slab Construction Works at the Hung-Hom Station Extension under the Shatin to Central Link Project of the MTRC Inquiry (July 2018)

10.7.4 The LegCo may, in exercise of its powers under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382), conduct an inquiry into any particular matter or incident. Normally, a committee or sub-committee would be set up and authorised by

resolution of the LegCo to conduct the inquiry. The committee or sub-committee may, in exercise of the powers under the Ordinance, order any person to attend before it and to give evidence or to produce any document relevant to the subject matter of the inquiry. Every person lawfully ordered to attend to give evidence or to produce any document is entitled to the same right or privilege as before a court of law (e.g. legal professional privilege and public interest immunity).

LegCo inquiries include:

- Inquiry into the building problems of Public Housing Units (January 2003)
- Inquiry into the handling of SARS outbreak by the Government and the Hospital Authority (July 2004)
- Inquiry into matters relating to the post-service work of Mr Leung Chin-man (December 2010)
- Inquiry into the issues arising from Lehman Brothers-related minibonds and structured financial products (Jun 2012)
- Study Mr Leung Chun-ying's involvement as a member of the jury in the West Kowloon Reclamation Concept Plan Competition and related issues (June 2012)
- Inquiry into matters about the Agreement between Mr Leung Chun-ying and the Australian Firm UGL Limited (set up in November 2016)

10.8 Remedies under the Hong Kong Bill of Rights Ordinance

Hong Kong Bill of Rights Ordinance (Cap. 383)

6. Remedies for contravention of Bill of Rights

(1) A court or tribunal –
(a) in proceedings within its jurisdiction in an action for breach of this Ordinance; and
(b) in other proceedings within its jurisdiction in which a violation or threatened violation of the Bill of Rights is relevant,
may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.

8. Hong Kong Bill of Rights
Article 5: Liberty and security of person
(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 11: Rights of persons charged with or convicted of criminal offence

(5) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

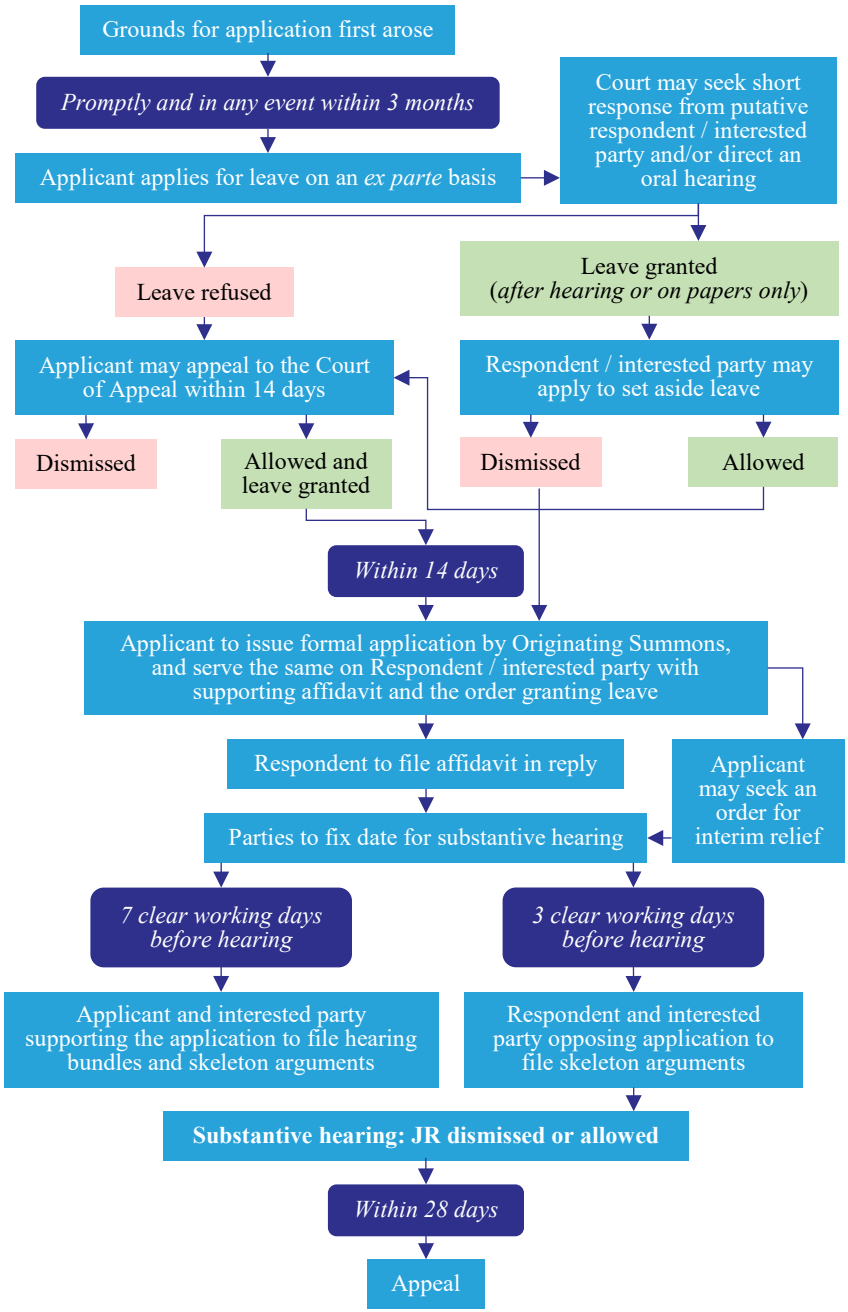
10.8.1 The United Nations Human Rights Committee in its General Comment No. 32, observed that the guarantee under Article 14(6) of the ICCPR (implemented by Article 11(5) of the HKBOR) does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused. Furthermore, no compensation is due if the

conviction is set aside upon appeal, i.e. before the judgment becomes final, or by a pardon that is humanitarian or discretionary in nature or motivated by considerations of equity, not implying that there has been a miscarriage of justice.

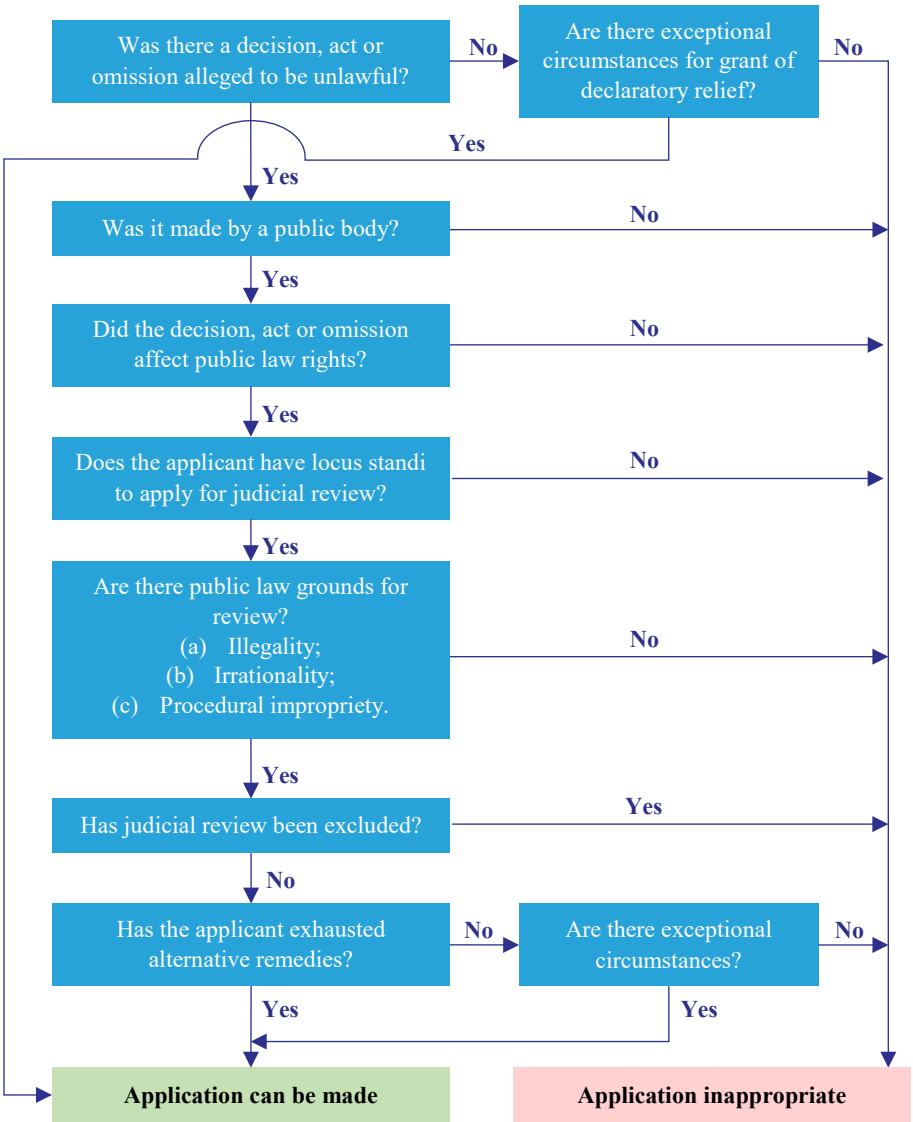
10.9 Ex gratia compensation

10.9.1 Ex gratia compensation is sometimes paid to persons who are the victims of miscarriage of justice to compensate them for resulting losses, e.g. loss of liberty, loss of earnings, etc. Compensation may also be payable where a person has suffered loss in connection with the administration of justice if the loss was caused by a serious default or misconduct of the police or other public authority. Ex gratia compensation may be refused if there is serious doubt as to the claimant's conduct.

The Stages of Judicial Review



Is judicial review available? (decision, act or omission)



17 Questions to Ask Yourself as a Decision-Maker

FIRST STEP – PREPARE:
Thinking through the bases for the use of power and decision

1. Have you got the power to act as intended? Are you acting within the power granted by the law?

- You (whether under delegated authority or otherwise) must have the relevant power to act, or otherwise your actions will be ultra vires (i.e. beyond your legal powers) and unlawful.

- Your source of power, unless derived from the common law (which is rare in judicial review cases), will usually be found in (a) primary legislation (an Ordinance), or (b) subsidiary legislation (for example: rules, regulations, orders, etc. made under an Ordinance).

2. Are you merely adopting a particular statutory interpretation which happens to suit what you want to do?

- If the administrative power is sourced from legislation, you may expect the court, if called upon to scrutinise its meaning, to apply formal "rules of statutory construction" to determine what the true statutory intent is.

- Usually words in a statute are given their plain meaning, you therefore will need to look at the words used to work out what can or cannot be done; you will also need to consider the general purpose of the legislation with reference, when appropriate, to the legislative history.

3. Are you exercising the power for the purpose for which it was given?

- Even if you have the power to act, you must use the power for a lawful purpose.

- Your action will be *ultra vires* and an abuse of power if you use the power to achieve a purpose that the power was not created to achieve.

4. Are you acting for the right reasons? Have you taken into account all relevant information and excluded irrelevant considerations?

- In order for your decision to be lawful, you must not:

  (a) exercise your discretion on the basis of irrelevant considerations; or

  (b) fail to take into account considerations that you are under a duty to consider.

- Generally, anything not identified expressly or impliedly by the power-giving legislation or relevant to the particular circumstances in which a power is exercised may be

irrelevant. A decision may be set aside if it can be shown that the influence of an irrelevant factor was material.

- You also need to be sure that the facts on which you base your decision are accurate.

5. Is there an applicable policy relevant to the present situation? If yes, is your decision in line with the policy; if not, is there a good basis for departing from the policy?

- You need to make sure that the decision is based on a proper application of the established policy read in the relevant contexts and with common sense.

- It may be prudent to give reasons if there is a deviation from the established policy.

6. Have you led anyone to suppose that you will be acting differently from what is now intended?

- Have you created a "legitimate expectation", giving rise to the need for fairness, by making an express or implied (e.g. from past practice) promise or representation that a person or class of persons will:

  (a) receive a particular benefit or continue to receive a particular or not substantially varied benefit; and

(b) be entitled to a hearing or other procedural safeguards before any decision is taken which may affect their rights or interests?

- Where a legitimate expectation has arisen, it must be taken into account in your decision making process, and generally speaking a public authority may only break its promise if an overriding public interest so requires it.

SECOND STEP – INVESTIGATE: Conducting investigations and considering how to make the decision

7. Have you followed the procedure, if any, provided for by the law which you are required to follow before making the decision?

- The legislation may have imposed express restrictions or requirements that the decision-maker "shall" or "shall not" do.

- Failure to satisfy statutory requirements may make the decision unlawful.

8. Are you acting properly yet timely?

- While you should go through these questions in your decision-making process, care should be taken to ensure that your decision is reached within any prescribed time limit or otherwise in a reasonably timely manner.

- Inordinate delay in reaching a particular decision may be considered as an abuse and challenged in court.

9. Will you hear and consider the point of view of people likely to be affected by the decision? Have they been put in the picture sufficiently so that they have a fair opportunity to make representations?

- Sometimes, permitting written representations may suffice for a fair and adequate "hearing" in order to afford those persons adversely affected an opportunity to be heard. At other times, an oral hearing may be necessary.

- Such an opportunity may not be meaningful unless you provide those persons with sufficient information so as to enable them to make focused and meaningful representations.

10. Have you allowed in your timetable sufficient time for consultation and representations?

- Where consultation is required by law or is undertaken anyway, it has to be conducted properly to satisfy the requirement for procedural fairness.

11. Have you made up your mind in advance or given that impression, e.g. have you merely blindly followed government policy without considering the circumstances of the particular case? If you propose to follow a general policy in a particular case should

you make it clear when communicating your decision that you have carefully considered the individual application to see whether it merited an exception being made?

- Procedural fairness demands that decision-makers do not "fetter" their discretion by adopting a policy which in effect has closed the decision-maker's mind to the possibility that a case might prove to be exceptional or that the policy itself should be changed.

- Put it another way, have you considered exercising residual discretion to give favourable consideration in an individual case even if it does not fall within any of your established policies? Policy may and should be departed from in suitable cases.

- In cases of reconsideration, have you carefully considered whether there is new information or change of circumstances warranting a different decision?

- A pre-determined policy on how a discretion will usually be exercised must not become *so rigid* that it prevents a decision-maker from responding to the merits of each case. However, you may have a pre-disposition because "keeping an open mind does not mean an empty mind".

- Public announcements, official guidelines and press statements, for example, must be carefully drafted to ensure the impression of a fetter or a closed mind is not mistakenly introduced.

12. Are there any grounds for thinking you might not be acting fairly?

- What fairness requires depends on the context and the circumstances of the particular case.
- Particular caution should be given in ensuring fairness in cases where fundamental human rights may be involved.

13. Do you or does anyone involved in making the decision have any conflicting interest which might lead someone to suppose that there is bias?

- The rule against bias ensures that the decision-making process is not a "sham" because the decision-maker's mind was always closed to the representations of particular parties.
- It does not just deal with actual bias, but the *appearance* of bias as well: "… justice must not only be done, but … be seen to be done."
- For example, decision-makers should not take part in deciding appeals against their own decisions unless that is authorised by statute.
- Apparent bias exists when the court considers that, in all the circumstances of a case, there appeared to be a "real danger of bias" to an informed and fair-minded observer.

THIRD STEP – DECIDE:
Making the decision

14. Have you got sufficient and correct reasons for your decision or action in case you are requested to explain it?

- Save in exceptional circumstances, you should be prepared to provide reasons for your decision as appropriate.
- Recording reasons:
  - (a) encourages careful decision-making;
  - (b) shows that you directed your mind to the relevant issues and followed the principles of good administration; and
  - (c) avoids triggering a presumption that a decision was "irrational".
- Your reasons must be at least intelligible and address the substance of the issues involved by:
  - (a) showing that the decision is within the scope of the relevant power or duty and hence lawful;
  - (b) setting out the material findings of fact;
  - (c) showing that all relevant matters have been considered and that no irrelevant ones have been taken into account; and

(d) noting that representations or consultation responses (if any) have been properly considered, addressed and taken into account.

- In the absence of contemporaneous records, subsequent reasons for the impugned decision may be regarded as *ex post facto* rationalisation (i.e. justifying the decision retrospectively) and may not be accepted in court.

15. Does the decision interfere with any fundamental right? If yes, does it pass the proportionality test?

- Certain rights and freedoms are absolute in nature and cannot be restricted on any grounds, such as the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment. No question of proportionality arises in the case of a restriction of absolute right.

- If the decision restricts a right that is not absolute, you may consider the following questions apart from ensuring that it is otherwise lawful:

  (a) Does the restriction pursue a legitimate aim?

  (b) Is the restriction rationally connected to achieving such aim?

  (c) Is the restriction no more than necessary to achieve such aim?

  (d) Has a reasonable balance been struck between the societal benefits and the encroachment into the rights of the individual, and whether it would result in an

unacceptably harsh burden upon the affected individual?

16. Do you propose to act in a way which a court may regard as abusing your power or generally so unreasonable that it is likely to find against you?

- You must not act in an "unreasonable" way either. You will be so regarded if your decision is *beyond the range of responses open to a reasonable decision-maker*.
- The courts will subject the reasonableness of the decision-maker's decision to more rigorous examination where a constitutional right is allegedly encroached.

17. Do you still have serious doubts on any of these questions before committing to a particular decision?

- Seek legal advice from the Department of Justice.

Glossary

ENGLISH	CHINESE
Acting in Excess of Power	超越其權利範圍行事
Acting Under Dictation	受主使而行事
Affidavit	誓章
Affirmation	非宗教式誓詞
Alternative Dispute Resolution	爭議解決替代方式
Appeal	上訴
Appellant	上訴人
Applicant	申請人
Bad Faith	不真誠
Basic Law	基本法
Bias (actual / apparent / presumed)	偏頗 (實質 / 表面 / 推定)
Breach of Statutory Duty	違反法定責任
Carltona Principle	放權原則
Certiorari	移審令
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約
Costs	訟費
Court of Appeal	上訴法庭
Court of Final Appeal	終審法院
Court of First Instance	原訟法庭
Cross-examination	盤問
Damages	損害賠償
Decision-maker	決策者
Declaration	宣告
Delegation	權力轉授
Deportation Order	遞解離境令
Discovery	文件披露

ENGLISH	CHINESE
Discretion	酌情權
Discrimination	歧視
Duty of Candour	坦誠責任
Duty to Give Reasons	提供理由的責任
Environmental Impact Assessment	環境影響評估
Equal Opportunities	平等機會
Equality	平等
Error of Law	法律上的錯誤
Ex Gratia Compensation	特惠補償
False Imprisonment	非法禁錮
Fettering Discretion	酌情權受到約束
Fundamental Rights and Freedom	基本權利和自由
Good Governance	良好管治
Government Land	政府土地
Hong Kong Bill of Rights (Ordinance)	香港人權法案(條例)
Human Rights	人權
Illegal Immigrants	非法入境者
Illegality	不合法
Immigration Control	入境管制
Impartiality	公正
Improper Purpose	不當的目的
Initial Response	初步回應書
Injunction	禁制令
Inordinate Delay	過份拖延
Inquir(ies)	調查研訊
Interested Part(ies)	有利害關係的一(各)方
Interim Relief	中期濟助
International Covenant on Civil and Political Rights	公民權利和政治權利國際公約

ENGLISH	CHINESE
Irrationality	不合理
(Ir)relevancy	(不)相關
(Ir)relevant Considerations	(不)相關因素
Judicial Review	司法覆核
Justiciable	可審理
Lease Conditions	租用條件
Leave (to apply for Judicial Review)	許可(提出司法覆核的)
Legitimate Aim	合法目的
Legitimate Expectation	合理期望
Mandamus	履行義務令
Margin of Appreciation	酌情衡量的空間
Material Error of Facts	重大的事實錯誤
Material Non-disclosure of Facts	未有披露關鍵的材料
Mediation	調解
Misfeasance in Public Office	公職人員濫用職權
Natural Justice	自然公義
Negligence	疏忽
Non-permanent Resident	非永久居民
Non-refoulement	免遣返保護
Non-resident	非居民
Ouster Clause	排除司法覆核的條款
Outline Zoning Plan	分區計畫大綱圖
Over-rigid Policy	僵化政策
Permanent Resident	永久居民
Planning	規劃
Prerogative Power	官方特權
Presumption against Reclamation	不准在海港內進行填海的推定
Primary Legislation	主體法例
Procedural Impropriety	程序不當

ENGLISH	CHINESE
Prohibition	禁止令
Proportionality	相稱原則
Putative Respondent	指認答辯人
Realistic Prospect of Success	實質的成功機會
Reasonably Arguable	可合理爭議
Removal Order	遣送離境令
Respondent	答辯人
Right of Abode	居留權
Right to Fair Hearing	獲得公平審訊的權利
Rule against Bias	針對偏頗的原則
Subsidiary Legislation	附屬法例
Substantive Application	實質申請
Technical Memorandum	技術備忘錄
The Ombudsman	申訴專員
Ultra Vires	越權
Uncertainty	不明確
Unconstitutional	不合憲
Uncontested Proceedings	無爭訟訴訟程序
United Nations High Commissioner for Refugees	聯合國難民公署
Wednesbury Unreasonableness	韋恩斯伯里式不合理