Notable Cases

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Criminal

In *HKSAR v WONG Tak-keung* (FACC 8/2014), the appellant was convicted of conspiracy to traffic in 650 grammes of methamphetamine (commonly called "ice") from Hong Kong to Australia. A 15-year-old courier was involved in the plan. The appellant was sentenced to 19 years' imprisonment and he appealed against conviction. As jurisdiction of the offence was called into question, the Court of Final Appeal identified four categories of cases where the issue of jurisdiction might be raised. It is only in relation to the fourth category that controversy has arisen and the law has developed. This category involves cases where some of the constituent elements of the offence occur within the jurisdiction while other essential elements occur outside. The traditional view was that offences in this category were deemed to have been committed only in the place where the offence was completed. However, in recent English cases, a wider approach has been adopted whereby the substantive offence is held to be committed within the jurisdiction and thus justiciable by the English courts if "substantial activities constituting the crime" occurred within the jurisdiction but other essential elements of the offence occurred abroad. In the Canadian Supreme Court case of *Libman v R* (1985) 21 DLR (4th) 174, La Forest J in his dictum indicated that he preferred this wider approach to the earlier "terminatory" theory. The Court of Final Appeal found that the *Libman* decision had no application in the present case as the appellant's acts, even if properly regarded as something agreed upon by the conspirators in Hong Kong, were to take place only in Australia. The appellant's appeal was allowed and his conviction was accordingly quashed.

In *HKSAR v LEUNG Shing-chi & 2 Ors* (FACC 4/2014), the three appellants were Correctional Services Department officers. They were convicted of inflicting grievous bodily harm on a 33-year-old Taiwanese inmate who subsequently died. Each of them was sentenced to 16 months' imprisonment. They appealed on the sole ground on which leave was granted that their counsel was flagrantly incompetent because he had failed to give adequate or correct advice on whether or not they should testify and that he had given wrong advice on the basis of his misunderstanding of the law on joint enterprise. The Court of Final Appeal acknowledged that one of the most difficult tactical decisions encountered in the conduct of a defence is whether or not the defendants should testify. After reviewing

the evidence and the procedure at trial, the Court held that it could not reasonably be said that counsel was incompetent. There was no question of flagrant incompetence in this case. Nor could it be said that the appellants did not have a fair trial. The appeals were dismissed.

In *HKSAR v Koo Sze-yiu & Ma Wan-ki* (FAMC 40/2014), Koo and Ma were convicted of attempting to desecrate the regional flag contrary to section 7 of the Regional Flag and Regional Emblem Ordinance (RFREO) for trying to set fire to the regional flag of the HKSAR. Koo received four months' imprisonment (suspended for two years) whereas Ma was ordered to serve 230 hours' community service. On appeal, their convictions were upheld but their sentences were reduced to two months' imprisonment (suspended for one year) and 110 hours' community service respectively. They sought leave to appeal to the Court of Final Appeal against their conviction. The Appeal Committee held that there was no basis for revisiting or reversing the conclusion drawn by the Court of Final Appeal in *HKSAR v NG Kung-siu & another* (1999) 2 HKCFAR 442, namely, that section 7 of the RFREO was not unconstitutional. Their application was dismissed with costs awarded against them.

In *Secretary for Justice v Ip Hon-ming & Yeong Yun Hong Gary* (CAAR 3/2014), the Secretary for Justice applied for review of the sentences imposed upon Ip (a recovery agent) and Yeong (a solicitor) following their conviction of a total of 26 charges of champerty. Each charge concerned a different complainant in a personal injuries civil action. The trial judge sentenced Ip and Yeong to 12 months' and 15 months' imprisonment respectively and ordered those sentences to be suspended for 18 and 24 months respectively. The Secretary for Justice sought to review such sentences on the ground that they were manifestly inadequate and/or wrong in principle. The Court of Appeal found that the trial judge fell into error in the approach which she adopted in determining whether or not to impose a suspended sentence. Moreover, the sentences imposed on the respondents were both wrong in principle and unduly lenient. The Court of Appeal granted the Secretary for Justice's application and substituted a sentence of two years and two months' imprisonment for Ip and three years and two months' imprisonment for Yeong, both sentences to be served immediately.

In *HKSAR v Hui Rafael Junior & 4 others* (HCCC 98/2013), the former Chief Secretary for Administration, the vice-chairmen and managing directors of Sun Hung Kai Properties Limited (SHKP), an executive director of SHKP and the former chief operating officer (COO) of the Hong Kong Futures Exchange (HKFE) were charged with various offences including misconduct in public office (MIPO) and conspiracy to offer an advantage to a public servant.

After trial, Rafael Hui, the former Chief Secretary, was found guilty of one count of conspiracy to commit MIPO, three counts of MIPO and one count of bribery offence under the Prevention of Bribery Ordinance (Cap 201) (POBO). The vice chairman of SHKP, Kwok Ping-kwong, Thomas, was found guilty of one count of conspiracy to commit MIPO. Kwok's aide Chan Kui-yuen, Thomas, and the former COO of HKFE Kwan Hung-sang, Francis, were both convicted of one count of conspiracy to commit MIPO and a POBO offence.

Hui was sentenced to a total term of seven years and six months' imprisonment and ordered to pay the Government $11.182 million as restitution. Kwok was sentenced to five years' imprisonment and a fine of $500,000. Chan was sentenced to a total term of six years' imprisonment with a fine of $500,000. Both Kwok and Chan were disqualified from being company directors for five years and six years respectively. Each of them also had to pay $12.5 million

of the prosecution's costs. Kwan was sentenced to five years' imprisonment. All defendants have filed applications for leave to appeal.

In *HKSAR v Chow Chi-wai & Another* (HCCC 458/2013) - Chow and Lai, respectively the coxswains of two vessels Lamma IV (a passenger launch) and Sea Smooth (a high speed catamaran), were each charged with 39 counts of manslaughter and two counts (alternative to each other) of endangering the safety of others at sea. At the time of the offence, Sea Smooth was engaged in a scheduled service from Central to Yung Shue Wan, whilst Lamma IV was then carrying staff and family members of the Hong Kong Electric to the Victoria Harbour for viewing the National Day fireworks. Despite the fact that the weather was clear and that both vessels were equipped with a radar, they collided with each other, resulting in the rapid sinking of Lamma IV and the death of 39 passengers on board. After a 64-day trial in the Court of First Instance, Chow was found not guilty of the manslaughter charges but guilty of the endangering offence. He was sentenced to imprisonment for nine months. Lai was found guilty of all 39 counts of manslaughter and also of endangering. He was sentenced to imprisonment for a total of eight years' imprisonment. Lai has lodged an appeal against conviction and sentence.

In *HKSAR v Lin Kei-tat* (CACC 11/ 2013), the appellant, a self-confessed bookmaker, pleaded guilty to two counts of money laundering offences, for which he was sentenced to three years and six months' imprisonment. The value of the proceeds of crime was about $39 million. A confiscation order was made against the appellant pursuant to section 8 of the Organized and Serious Crimes Ordinance (Cap 455) (OSCO) in the sum of $10.3 million, which was the value of his realisable property. The appellant was ordered to serve a default term of imprisonment of five years, to be activated upon his failure to comply with the confiscation order before the deadline. The appellant appealed against the confiscation order, contending that according to *HKSAR v Li Kwok Cheung George* (2014) 17 HKCFAR 319, when the Court of Final Appeal held that proceeds of crime must be in the nature of reward, the recoverable amount should be the net profits gained from the relevant criminal conduct. The Court of Appeal held that the legislative intent of OSCO was to effectively combat organised and serious crimes by having draconian provisions to confiscate the proceeds of crime. The proceeds of an offence, as defined in OSCO, refer to any payments or other pecuniary advantage obtained in connection with commission of that offence, but not just to "profit". Confiscation is not restricted to "profit" after deduction of expenses. Also, in determining the imprisonment in default under section 13(1) of OCSO, the Court of Appeal held that the matter should not be approached on a simple arithmetical basis. The periods set out in the table under section 13(2) of OSCO are maximum periods and the court has the discretion to impose a period below the maximum. The normal procedure is for the court to impose a default sentence that falls between the maximum for the band immediately below and that for the band itself. The Court should not encourage a defendant in any way in his non-compliance with the order, and it should be made clear to the defendant that he has nothing to gain by non-compliance. In fixing such default imprisonment, it is not required to have regard to the totality principle in relation to the sentence imposed for the substantive offence. The appellant's appeal was dismissed.

In *HKSAR v Minney John Edwin* [2013] 6 HKC 10, the Court of Final Appeal confirmed that in sentencing a defendant charged with possession of dangerous drugs, the court is entitled to apply the latent risk principle which allows it to adopt a higher sentencing starting point than usual if the court considers that there is a real risk that some of those drugs might be redistributed to others. In this case, the appellant

pleaded guilty to two counts of possession of cocaine in small quantities. In sentencing, the trial judge applied the latent risk principle and increased the starting point by three months. The appellant challenged the constitutional validity of the principle but the Court of Final Appeal, in dismissing the appeal, confirmed that it did not contravene the presumption of innocence under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap 383).

In *HKSAR v Kulemesin Yuriy & Another* (FACC 6 & 7/2012), the appellants were the master (A1) and senior pilot (A2) of an oil rig supply vessel and a bulk carrier respectively. The two ships collided with each other in the North Coast of Lantau Island, resulting in 18 deaths. A1 and A2 were convicted of the offence of endangering the safety of others in the sea, contrary to section 72 of the Shipping and Port Control Ordinance (Cap 313). The Court of Final Appeal held that the lower courts had fallen into an error in treating section 72 to be an offence of absolute liability. After considering the legislative background of section 72, the seriousness of the offence and the wide range of situations covered by the section, the court determined that section 72 is a strict liability offence. However, if there is evidence capable of raising a reasonable doubt that a defendant may have acted or omitted to act in the honest belief on reasonable grounds that his conduct was not such as to cause danger to the safety of others, he should be acquitted unless the prosecution established beyond reasonable doubt that the defendant either did not have such belief or that his belief though honestly held was not based on reasonable grounds. In the end, A1's appeal was dismissed while A2 was acquitted. This is a landmark decision setting out the applicable principles on interpreting strict or absolute liability offences.

In *HKSAR v Francis Lee Kwok-wah* [2013] 2 HKLRD 1009, the Applicant appealed against his conviction and sentence for three counts of unlawful sexual intercourse with a girl under 16, one count of indecent assault, and one count of indecent conduct towards a child. He was sentenced to a total term of eight years' imprisonment. The victims were underage female orphans from an orphanage in Yunnan province operated by the Applicant, a HKSAR permanent resident. The Applicant contended, *inter alia*, that the extra-territorial effect of section 153P(1) of the Crimes Ordinance (Cap 200), in respect of a specified offence committed by a HKSAR permanent resident outside the HKSAR was incompatible with the principle of "equality before the law" under Article 22 of the Hong Kong Bill of Rights and Article 25 of the Basic Law, as non-HKSAR residents would not be so liable under section 153P(1). The Court of Appeal held that under the United Nations Convention on the Rights of the Child, it is necessary for the HKSAR to legislate provisions such as section 153P to protect children from crimes committed on them both within and outside the jurisdiction of the HKSAR. Section 153P is found to have complied with the rationality and proportionality test, and it therefore does not contravene the relevant articles of equality. The court also applied the Court of Final Appeal's ruling in *HKSAR v Lee Ming-tee & Another* (2001) 4 HKCFAR 133 on the impact of pre-trial publicity on the jury's ability to reach a fair verdict.

In *HKSAR v Tse Man-lai* [2013] 3 HKLRD 691, the Applicant was convicted of two counts of obtaining

access to a computer with a view to dishonest gain for himself or another, contrary to section 161(c) of the Crimes Ordinance (Cap 200). It was alleged that he had sent a large number of attacking packets (known as a Denial of Services Attack) from his computer to the website of HKExnews, a website set up by the Hong Kong Exchanges and Clearing Limited for disseminating information to the public in respect of stock transactions. As a result of the attacks, seven listed companies were forced to suspend from trading. The Applicant conducted the attacks in order to promote his computer software business. The Court of Appeal held that a person is to be regarded as obtaining access to a computer in respect of each separate discrete use of the computer and the law operates to catch a person who obtains access to a computer with a view to a dishonest gain, even in circumstances where the earlier access by that person to the computer had been entirely innocent.

In *HKSAR v Pang Hung-fai* (FACC 8/2013), the Court of Final Appeal revisited the established test in deciding the mens rea element of the offence of dealing with property known or believed to be proceeds of an indictable offence, contrary to section 25(1) of the Organized and Serious Crimes Ordinance (Cap 455) (commonly known as the money laundering offence). In approaching this element, the court considered that for the phrase of "knowing or having reasonable grounds to believe" - the two mental elements should be understood as if they read "knew or ought to have known" . References (as employed in the test in the past) to "objective" and "subjective" elements, to "reasonable person" (as opposed to focusing attention on the accused), to "first step" and "second step", and to "facts" known (as opposed to "grounds"), divert attention away from the proper test. On most occasions when an alternative formulation may assist a jury in its deliberations, the *Seng Yuet Fong* formulation will be all that is required:

"To convict, the jury had to find that the accused had grounds for believing; and there was the additional requirement that the grounds must be reasonable: That is, that anyone looking at those grounds objectively would so believe."

When assessing the whole of the evidence, the judge or jury can give such weight to an accused's belief, perception or prejudice as he/she believes is warranted. No doubt, in many cases, that decision maker will entirely discount such evidence of the accused. Nevertheless, they are "grounds" which stand or fall by the test of reasonableness.

In the HKSAR's first marked oil case, *HKSAR v Sze Meimun and 4 others* (2014) 3 HKLRD 452, the Hong Kong Customs and Excise Department restrained $240 million of crime proceeds under the Organized and Serious Crimes Ordinance (Cap 455). The proceeds came from a cross-boundary syndicate smuggling marked oil from the HKSAR to the Mainland. The case originated from a joint investigation between the Hong Kong Customs and Excise Department and the Customs of the People's Republic of China that had begun in late 2009. At trial, the prosecution called 47 witnesses among whom four were serving sentences in the Mainland. By way of Letters of Request made to the Mainland authorities, evidence-taking hearings had been carried out at the Shenzhen Municipal Intermediate People's Court. The evidence was subsequently received and accepted by the District Court. All five defendants were convicted of one count of conspiracy to export unmanifested cargo. In addition, they were also convicted either jointly or individually of charges of money laundering. They were sentenced to imprisonment terms ranging from four to six years. Most of their convictions were upheld by the Court of Appeal. Their sentences were also confirmed. Leave to appeal to the Court of Final Appeal was dismissed by the Appeal Committee. The confiscation application against the defendants

will be heard in due course.

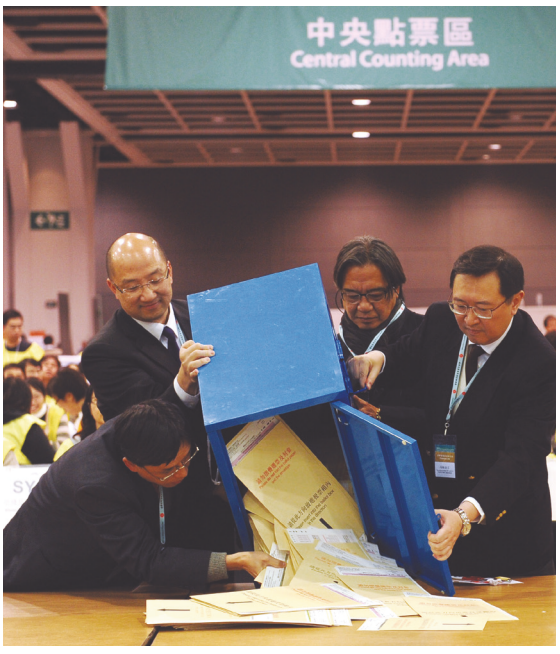
In *HKSAR v Mui Kwok-keung* (DCCC 890/2012), the defendant, a practising barrister, was convicted of five counts of champerty. He agreed with five clients to make personal injuries claims and would charge them legal fees by taking sums between 25 per cent and 30 per cent from the damages to be recovered in successful claims. He took over $1.6 million from four of his victims. Upon conviction, the defendant was sentenced to a total term of three and a half years' imprisonment. The defendant's subsequent appeal against conviction and sentence was dismissed by the Court of Appeal (CACC 133/2013).

In *HKSAR v Mak Chai-kwong & Tsang King-man* (DCCC 956/2012), Mak Chai-kwong, the former Secretary for Development; and Tsang King-man, an Assistant Director of the Highways Department, were jointly charged for having conspired to defraud the Government of the HKSAR in claiming and receiving Private Tenancy Allowance. It was alleged that they had made false representation by claiming that they had no financial interest in the flats that they respectively leased and that the leases were genuine ones. Both faced a further count of corruption offence, contrary to section 9(3) of the Prevention of Bribery Ordinance (Cap 201). Both defendants were convicted as charged and were sentenced to eight months' imprisonment suspended for two years. Their appeals against conviction were dismissed by the Court of Appeal (CACC 309/2013). An application for leave to appeal to the Court of Final Appeal was made but a hearing has not yet been fixed (FAMC 75/2014).

Civil

Elections

In *Charles Peter Mok v Tam Wai-ho, Vincent Fung Hao-yin and Secretary for Justice (for and on behalf of the Secretary for Constitutional and Mainland Affairs)* (FACV 8/2010), the petitioner, who was a candidate for the Legislative Council election for the information technology functional constituency held on 7 September 2008, challenged the result of the election on the ground that material irregularities had occurred in the election and that the first respondent had engaged in illegal and corrupt conduct. The petition was dismissed by the Court of First Instance on 9 April 2009. On 3 December 2009, the Court of Appeal dismissed the appeal. On 13 December 2010, the Court of Final Appeal allowed the appeal, holding that the finality provision failed to satisfy the proportionality test and thus was unconstitutional and invalid as being inconsistent with Article 82 of the Basic Law. The substantive appeal from the Court of First Instance's determination was remitted to the Court of Appeal for a re-hearing and was dismissed on 9 June 2011. On 6 January 2012, the petitioner obtained leave from the Appeal Committee to appeal to the Court of Final Appeal. On 24 May 2012, the Court of Final Appeal (FACV 2/2012) dismissed the appeal, holding that expenses are likely to qualify as "election expenses" if they have been incurred by or on behalf of a candidate for the purpose of promoting



the election of the relevant candidate or prejudicing the election of another candidate; the activities or matters to which the relevant expenses are incurred are referable to a specific election and go to the conduct or management of the election, in particular to the machinery of the election; and have taken place or occurred either during the election period or during the period when the relevant person was a candidate. Applying the aforesaid criteria, it was held that the expenses in the sum of $220,000 incurred on behalf of the first respondent in relation to the airtime given for the broadcast of videos on Cable Television between 30 May and 30 June 2008 before the public announcement made on 13 July 2008 of his intention to stand as a candidate for the 2008 Legislative Council Election were not election expenses.

In *Secretary for Justice v Ho Chun-yan, Albert and Others* (HCAL 83-85/2012, FAMV 21-22, 24-26, 32-34/2012, FACV 24-25 & 27/2012, FACV 1/2013), Albert Ho and K H Leung each applied for leave to apply for judicial review, seeking to declare that C Y Leung was not duly elected as the Chief Executive by reasons of matters relating to the unauthorised building works in his property. On 30 July 2012, the Court of First Instance handed down its judgment dismissing their applications with costs. Separately, Albert Ho lodged an election petition out of time to challenge the result of the 2012 Chief Executive election. In particular he challenged section 34(1) of the Chief Executive Election Ordinance (Cap 569) (CEEO), which requires an election petition to be lodged within seven working days after the result of the election is declared and without any provision for time extension as being inconsistent with Article 35 of the Basic Law which guarantees right to access to the courts. The Chief Executive applied to strike out the election petition which application was partially allowed by the Court of First Instance in its judgment dated 12 September 2012. On 5 October 2012, the Court of First Instance handed down a further judgment holding the seven-day time limit in section 34(1) of the CEEO to be unconstitutional but applying a remedial interpretation to save this provision by reading in a judicial power to extend the time for lodging an election petition. Albert Ho, K H Leung, the Chief Executive and the Secretary for Justice (as Intervener) each applied for leave to appeal to the Court of Final Appeal from the judgments of the Court of First Instance. On 13 November 2012, the Appeal Committee of the Court of Final Appeal granted leave for the parties to appeal. The substantive hearing was held before the Court of Final Appeal on 11 June 2013. On 11 July 2013, the Court of Final Appeal handed down its judgment, giving guidance on the relationship between judicial review and election petition in challenging the Chief Executive election; holding that the unextendable seven-day time limit is not unconstitutional; and substituting the Court of First Instance's costs order in respect of Albert Ho's application for leave to apply for judicial review with no order as to costs.

In *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (HCAL 72/2012), the Applicant challenged the constitutionality of section 39(2A) of the Legislative Council Ordinance (Cap 542) which was passed into law on 1 June 2012. In gist, section 39(2A) disqualifies a person from being nominated as a candidate at a by-election within six months of his resignation as a Legislative Council (LegCo) member. The Applicant argued that section 39(2A) is inconsistent with Article 26 of the Basic Law, Article 21 of the Hong Kong Bill of Rights and/or Article 25 of the International Covenant on Civil and Political Rights on the basis that it restricts the right to stand for election, and as such, fails to satisfy the proportionality test in particular when this right is a fundamental human right which the court should protect at all costs. The Respondent argued that section 39(2A) is constitutional as the restriction on the right to stand for election is a reasonable, necessary and proportionate measure in serving a legitimate purpose, namely to deter the practice of a LegCo member resigning in

order to trigger a by-election in which he intends to stand and seek to be re-elected. The substantive judicial review hearing took place on 10-11 December 2013. The Court of First Instance on 5 March 2014 dismissed the application for judicial review and held that (i) section 39(2A) is constitutional, (ii) the court should not interfere unless the restriction on the right to stand for election is "manifestly without reasonable foundation" and that (iii) section 39(2A) serves a legitimate aim and satisfies the proportionality test. The Applicant's appeal to the Court of Appeal is scheduled to be heard on 9 September 2015.

Health and social welfare

In *Kong Yunming v The Director of Social Welfare* (CACV 185/2009) and *Yao Man Fai v The Director of Social Welfare* (CACV 153/2010) (heard together), the applicants challenged the policy that a person aged 18 years or over was eligible for Comprehensive Social Security Assistance (CSSA) only if he/she had been a HKSAR resident for at least seven years and, further, had resided in the HKSAR continuously for at least one year immediately before the date of application.

In *Kong Yunming*, the applicant, being a HKSAR resident settled in the HKSAR in 2005 on strength of her one-way permit from the Mainland, challenged the constitutionality of the seven-year residence requirement for an applicant to receive assistance under the CSSA. In its judgment dated 17 February 2012, the Court of Appeal, upholding the judgment of the court below, held that such a policy was constitutional.

In *Yao Man Fai*, in its judgment of 17 February 2012, the Court of Appeal held that the requirement that, subject to a grace period of 56 days, an applicant for CSSA must have resided in the HKSAR continuously for at least one year immediately before the date of application constituted an unconstitutional and unlawful discrimination against those permanent residents who had been absent from the HKSAR for a total period of more than 56 days in the year immediately prior to their applications for CSSA and infringed their rights to travel. The Director of Social Welfare did not further appeal against this judgment.

The *Kong Yunming* case went on appeal to the Court of Final Appeal (FACV 2/2013). In its judgment dated 17 December 2013, the Court of Final Appeal, while dismissing the arguments that the CSSA scheme was not "in accordance with law" (i.e. it had been effected without the backing of legislation), held that the seven-year residence requirement restricted rights to social welfare protected by

Article 36 of the Basic Law and was not rationally connected to the claimed legitimate aim of curbing expenditure so as to ensure the sustainability of the social security system. Alternatively, even if there was any rational connection, the restriction was wholly disproportionate and manifestly without reasonable foundation given its contradictory policy consequences and socially insubstantial benefits. The requirement was thereby held to be unconstitutional.

In *Suen Mo v Director of Social Welfare* (HCAL 117/2012), the applicant challenged by way of judicial review the policy of the Social Welfare Department in adjusting the level of maximum rent allowance (MRA) payable to CSSA recipients in accordance with the movement of the relevant consumer price index for private housing rentals. The applicant argued that such adjustment policy was unlawful as the Government had misinterpreted the applicable policy which was to adjust the MRA according to the actual rent paid by 90th percentile of the rent paying CSSA recipients (policy based on the 90th percentile objective). By its judgment of 11 June 2014, the Court of First Instance dismissed the judicial review and held, on the evidence, that the Government has never adopted any policy based on the 90th percentile objective. The applicant's appeal was dismissed on 17 December 2014 by consent.

Charities

In *The Secretary for Justice v Joseph Lo Kin Ching and Derek Lai Kar Yan, the Joint and Several Administrators of the Estate of Kung, Nina also known as Nina Kung and Nina T H Wang and Others* (HCMP 853/2012), the Secretary for Justice commenced proceedings (the Construction Proceedings) to seek guidance from the court on the construction of the will executed on 28 July 2002 (the Will) of the late Madam Nina Wang (Madam Wang), which had been declared as the only valid and authentic will of the late Madam Wang after contested probate proceedings. The Construction Proceedings were commenced by the Secretary for Justice in his capacity as *parens patriae* (the Protector of Charities) in discharge of his public duty to protect the charitable interest in the Estate of Madam Wang. The core question for the Court of First Instance's determination was whether, upon a true and proper construction of the Will, Chinachem Charitable Foundation Limited (the Foundation) held Madam Wang's Estate on trust for the charitable purposes specified in the Will or absolutely as beneficial owner. The Court of First Instance held on 22 February 2013 that the clear and imperative language used by Madam Wang in the Will evinced an intention to create a trust, and the trust was a charitable one. The Foundation's appeal (CACV 44/2013) was dismissed by the Court of Appeal on 11 April 2014. On 15 September 2014, the Court of Appeal granted leave to the Foundation to appeal to the Court of Final Appeal. The Foundation's appeal (FACV 9/2014) was heard on 21-23 April 2015 and by its judgment of 18 May 2015, the Court of Final Appeal unanimously dismissed the appeal.

Basic Law litigation

In *Vallejos Evangeline Banao v Commissioner of Registration and Another* (FACV 19/2012) and *Domingo Daniel L. v Commissioner of Registration and Another* (FACV 20/2012), the appellants challenged the constitutionality of section 2(4)(a)(vi) of the Immigration Ordinance (Cap 115), which deems a person's presence in the HKSAR when employed as a foreign domestic helper not to be ordinary residence, and hence prevented the appellants from acquiring the right of abode in the HKSAR. The Court of Final Appeal handed down its unanimous judgment on 25 March 2013, upholding the decision of the Court of Appeal and the constitutionality of the impugned provision (but for different reasons). (This case is also discussed at page 53 in a feature article "Advising on Right of Abode Issues".)

In *Gutierrez Joseph James v Commissioner of Registration and Another* (FACV 2/2014), the appellant (a minor born in Hong Kong to a foreign domestic helper) challenged the refusal of his application for Hong Kong permanent resident status under para. 2(d) of Schedule 1 to the Immigration Ordinance (Cap 115), arguing, *inter alia*, that the permanence requirement could be satisfied if one can show the maintenance of an ordinary or regular pattern of life in Hong Kong and there is a reasonable prospect of maintaining the same in Hong Kong. The Court of Final Appeal handed down its unanimous judgment on 18 September 2014, upholding the decision of the Court of Appeal and confirmed that the test for the permanence requirement previously laid down by the Court in *Prem Singh* applies to adults and children alike and is an additional element to the ordinary residence requirement, requiring objective evidence of "concrete steps" having been taken by or on behalf of the appellant at the time of the application to establish a permanent home in Hong Kong. The Court also held that on proper construction of the proviso to regulation 25 of the Registration of Persons Regulations (Cap 177A), the appellant cannot be treated as "persons qualified to obtain" a Hong Kong identity card under Article 24(4) of the Basic Law. Accordingly, the appellant is not a non-permanent resident and his absences during the seven-year period immediately before his application had also failed the ordinary residence requirement. The Court, however, left open the question of whether a foreign national child born in Hong Kong and permitted to remain on prolonged visitor status would necessarily be unable to build up ordinary residence here in order to invoke section 2(6) of the Immigration Ordinance to provide a basis for preventing interruption of continuity of ordinary residence.

In *W v The Registrar of Marriages* (FACV 4/2012), a post-operative male-to-female transsexual challenged the Registrar of Marriages' refusal to allow her to register a marriage with her male partner. Insofar as she was prohibited from marrying a man (as opposed to a woman), the applicant argued that the Registrar had misinterpreted the words "man" and "woman" and "male" and "female" in section 20(1)(d) of the Matrimonial Causes Ordinance (Cap 179) (MCO) and section 40 of the Marriage Ordinance (Cap 181) (MO), or, alternatively, that those provisions were inconsistent with Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights guaranteeing the right to marry. The Court of First Instance and the Court of Appeal ruled in favour of the Registrar of Marriages, holding that on a proper interpretation of the relevant provisions, "man" and "woman" and "male" and "female" did not cover post-operative transsexuals. Rather, their sex was to be determined for the purposes of those provisions according to their biological sex at birth. The courts further concluded that the relevant provisions did not infringe the right to marry guaranteed under Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights. Upon further appeal by the applicant, the Court of Final Appeal by its judgment dated 13 May 2013 unanimously upheld the lower courts' ruling on the construction ground, but by a majority allowed the appeal on the constitutional ground. By order dated 16 July 2013, the Court of Final Appeal granted declarations that (i) section 20(1)(d) of the MCO and section 40 of the MO must be read and given effect so as to include within the meaning of the words "woman" and "female" a post-operative male-to-female transsexual whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery; (ii) the applicant is in law entitled to be included as "a woman" within the aforesaid provisions and is accordingly eligible to marry a man; and (iii) the said declarations be suspended for 12 months from the date of the said order in order to allow time for the Government and the legislature to put in place a constitutionally compliant scheme which is capable of addressing the position of the broader classes of persons potentially affected by the judgment.

In *Ubamaka Edward Wilson v Secretary for Security and Another* (FACV 15/2011), the appellant, a Nigerian national convicted of drug trafficking and having served his sentence in the HKSAR, appealed to the Court of Final Appeal challenging the deportation order issued against him. The appellant alleged that the intended deportation would result in his suffering from "double jeopardy" upon his return to Nigeria because of possible prosecution of offences arising from the same conduct resulting in his conviction in the HKSAR, thereby amounting to inhuman treatment. The Court of Final Appeal dismissed the appeal on the facts (i.e. the potential prosecution and conviction in Nigeria would not amount to inhuman treatment) but held that notwithstanding section 11 of the Hong Kong Bill of Rights Ordinance (Cap 383) (HKBORO) is constitutional and consistent with Article 39 of the Basic Law, it should be construed in its context, adopting a "generous and purposive approach". Accordingly, construed purposively, section 11 must be read as qualified by section 5 of the HKBORO and understood to exclude the application of the HKBORO and the Hong Kong Bill of Rights (BOR) in relation to the exercise of powers and enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in the HKSAR except insofar as non-derogable and absolute rights protected by Article 3 of the BOR are engaged. In other words, refoulement of a deportee to another country where that person faces a genuine and substantial risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment would be prohibited.

In *GA and Others v Director of Immigration* (FACV 7-10/2013), the appellants (mandated refugees and screened-in torture claimant) appealed to the Court of Final Appeal challenging the Director of Immigration's policy not to permit mandated refugees and screened-in torture claimants to take up paid employment in Hong Kong pending their resettlement save in exceptional circumstances. The Court of Final Appeal dismissed the appeal and unanimously held that mandated refugees and screened-in torture claimants do not have any right to work under Articles 3 and 14 of the BOR, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 33 of the Basic Law and common law while remaining in Hong Kong. In the light of the Court of Final Appeal's decision in *Ubamaka Edward Wilson* (FACV 15/2011), the Court held that if inhuman or degrading treatment (IDT) or a substantial and imminent risk of IDT can be shown, the Director must exercise his discretion to give permission to work.

In *Ghulam Rbani v Secretary for Justice for and on behalf of Director of Immigration* (FACV 15/2013), the appellant appealed to the Court of Final Appeal challenging the dismissal of his damages claim against the Director of Immigration on the ground that his 46-day detention under section 32(2A) of the Immigration Ordinance (Cap 115) was unlawful and arbitrary. The Court of Final Appeal allowed the appeal on the narrow factual basis that, given the application of the *Hardial Singh* principles to time-limited detention under section 32(2A) of the Immigration Ordinance, the entire removal process (consideration of issuing a removal order against the appellant) ought to have been completed some 10 days sooner and the appellant was awarded damages (HK$10,000) for false imprisonment for 10 days. The Court accepted that there is no public law duty requiring the Director to publish the policies setting out the criteria for exercising statutory discretionary powers and held that whether such duty to publish policies arises depends on the nature of the discretion in question and how it is to be exercised. The Court also considered *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 and remarked that the Court of Appeal in *A* did not lay down any obligation to make and publish policies. In the context of section 32(2A) detention, the Court held that a public law duty to publish policy could arise; but on the fact of this case, the appellant could not

have been in any doubt as to why and on what basis he was detained and so there was no breach of any duty to publish policies by the Director. By reason of section 11 of the HKBORO, the Court held that the appellant could not rely on Article 5 of BOR and Article 28 of the Basic Law.

In *T v Commissioner of Police* (FACV 3/2014), the applicant took part in an event which was held in a public pedestrian precinct and included a performance on a temporary stage involving music, chanting of slogans and dance. The performance was stopped after the organisers were informed by the Police that a licence under the Places of Public Entertainment Ordinance (Cap 172) (PPEO) was required. The applicant argued that the PPEO did not apply to the event or, alternatively, if it applied, sections 2 and 4 thereof were unconstitutional for infringing the freedoms of expression and assembly guaranteed under Articles 27 and 39 of the Basic Law and/or Articles 16(2) and 17 of the Hong Kong Bill of Rights. The Court of First Instance ruled in favour of the Police, but the Court of Appeal agreed with the applicant. By a judgment dated 10 September 2014, the Court of Final Appeal, by a majority of 3:2, dismissed the Police's appeal and held that the organisers were not required to obtain a licence under the PPEO. On the basis that "public entertainment" was defined as one "to which the general public is admitted", the requirement was that the public be admitted to the place of entertainment, and not merely to the entertainment. The majority held that the word "admitted" should be construed in an active sense and as requiring some form of control over the admission to the place. On the facts, it was held that the organisers of the event did not have the power to exclude other persons from the pedestrian precinct where the performance was presented or carried on. The public was therefore not admitted to the pedestrian precinct. Accordingly, the pedestrian precinct was not a place of public entertainment under the PPEO, and the organisers were not required to obtain a licence under the PPEO. As the majority found in favour of the applicant on the construction issue, it was not necessary to address the constitutional issue.

In *Leung Kwok Hung v The President of the Legislative Council of the Hong Kong Special Administrative Region* (FACV 1/2014), the applicant, a member of the Legislative Council (LegCo), sought leave to apply for judicial review to challenge the ruling of the President of LegCo made pursuant to rule 92 of the Rules of Procedure of LegCo to close the debate of the Legislative Council (Amendment) Bill 2012, being proposed legislation prohibiting members of LegCo who resigned from office from being nominated as a candidate at a by-election if held within the six months ending on the date of the by-election. The Court of Final Appeal held that the purpose of Article 73(1) of the Basic Law is to confer certain powers and functions on the LegCo as a law-making body and is not directed to the powers or rights of individual members. The LegCo is to have exclusive authority in determining its procedure and the President of LegCo is to exercise his power to preside over meetings so as to ensure the orderly, efficient and fair disposition of LegCo's business. Article 73(1) of the Basic Law should be interpreted in the light of the relevant common law principles and policy considerations. The relevant common law principles include the doctrine of separation of powers and, within it, the established relationship between the legislature and the Courts. This relationship includes the principles that the Courts will recognise the exclusive authority of the legislature in managing its own internal process in conduct of its business, in particular its legislative process. The Courts will not intervene to rule on the regularity or irregularity of the internal process of the legislature but will leave it to determine exclusively for itself matters of this kind. While "legal procedures" in Article 73(1) of the Basic Law plainly include the Rules, it makes no attempt to address the question whether non-compliance with the Rules will result in invalidity of a law which

is subsequently enacted. In the opinion of the Court of Final Appeal, the provision of Article 73(1) are ambiguous on this point and it does not make compliance with the Rules essential to the validity of the enactment of a law by the LegCo. It is for the LegCo itself to determine its own rules of procedure and how they will be applied. In the present case, it is clear that the President has the power to set limits to terminate a debate, such power is inherent in, or incidental to, the power to preside over meetings under Article 72(1) of the Basic Law. As long as the President has this power, it is not for the Courts to consider whether or not the power was properly exercised and whether the President's decision to end the debate constituted an unauthorised making of a new rule of procedure.

In *Chee Fei Ming v Director of Food and Environmental Hygiene and Another* (HCAL 73/2013), and *Hung Shui Fung v Director of Food and Environmental Hygiene and Another* (HCAL 110/2013), the Applicants (who are Falun Gong practitioners) sought leave to apply for judicial review against the decision of the Director of Food and Environmental Hygiene (the Director) made in April and May 2013 to remove banners and placards placed by Falun Gong practitioners at various locations in Hong Kong pursuant to sections 104A and 104C of the Public Health and Municipal Services Ordinance (Cap 132) which prohibit the display of bills or posters on government land without permission. In its judgment of 15 October 2014, the Court of First Instance ruled that the challenges raised by the Applicants were not reasonably arguable, and therefore refused to grant leave for judicial review to the Applicants. The Court of First Instance held that restrictions under sections 104A and 104C are lawful and constitutional as they are prescribed by law, rationally connected to and no more than is necessary in serving a number of legitimate purposes including the protection and preservation of the cityscape of Hong Kong and the enjoyment of public places free of under interference.

Public international law

In *C and Others v Director of Immigration and Another* (FACV 18-20/2011), the appellants, being asylum seekers whose refugee claims were rejected by the United Nations High Commissioner for Refugees (UNHCR), appealed against the judgment of the Court of Appeal handed down on 21 July 2011. The Court of Final Appeal allowed the appeals on 25 March 2013 ruling that given the Director of Immigration's practice of (i) taking into account humanitarian considerations in deciding whether to exercise his power under the Immigration Ordinance (Cap 115) to remove or deport a person to a place of putative persecution; and (ii) taking a well-founded fear of persecution as a relevant humanitarian consideration, the Director is required to screen claims of persecution risks independently of the UNHCR in the context of considering whether to exercise his power of removal. Having reached such a conclusion, the Court of Final Appeal did not consider it necessary to make any ruling on the customary international law issues.

Commercial/Tax

In *Re Chang Hyun Chi* (HCB 5227/2006), the Bankrupt sought a declaration that section 30A(10)(a) of the Bankruptcy Ordinance (Cap 6) (the said section) was unconstitutional based on the Court of Final Appeal decision in *Chan Wing Hing* which struck down a similar provision (section 30A(10)(b)(i)). Under the said section, if a bankrupt has, before the commencement of bankruptcy, left the HKSAR and has not returned to the HKSAR, the relevant period of the bankruptcy shall not commence to run until such time as he returns to the HKSAR and notifies the trustee of his return. The Bankrupt argued that the said section infringed his right of freedom to travel under Article 8 of the Hong Kong Bill of Rights. On appeal to the Court of Appeal lodged by the Bankrupt, the appeal was allowed on 11 December 2014. The Court of Appeal held that the distinction

between the said section and section 30A(10)(b)(i), on analysis, could not provide a proper basis for upholding the proportionality requirement and that the reasoning of the Court of Final Appeal in *Chan Wing Hing* was applicable. The Court of Appeal therefore declared that the said section was unconstitutional but granted a stay of execution of the judgment upon an undertaking by the Official Receiver to apply for leave to appeal to the Court of Final Appeal. Such leave application has been made to the Court of Appeal and the decision is pending.

In *Aviation Fuel Supply Company v Commissioner of Inland Revenue* (FACV 14/13), the Commissioner of Inland Revenue appealed against the judgment of the Court of Appeal (CACV 150/11) which refused to vary the tax assessment to take into account balancing charges and/or deemed trading receipts and upheld the Court of First Instance's decision that the lump sum received by the taxpayer from the Airport Authority, which had the effect of expediting the transfer of an aviation facility provided by the taxpayer under a build-operate-transfer agreement back to the Airport Authority, was not chargeable to profits tax. By a judgment handed down on 15 December 2014, the Court of Final Appeal dismissed the Commissioner's appeal.

Town planning

In *Hysan Development Company Limited and Others v Town Planning Board* (HCAL 38/2011 & HCAL 57/2011, CACV 232/2012 & CACV 233/2012), the Applicants challenged the Town Planning Board's decisions not to propose or fully propose amendments to the Draft Outline Zoning Plans (DOZPs) for the Causeway Bay and Wan Chai areas in accordance with their representations seeking to relax planning restrictions such as building height, non-building areas, set back requirements and building gaps imposed on the Applicants' sites. The Applicants also challenged the procedures which the Town Planning Board adopted in reaching the said decisions. By the Court of Appeal's judgment of 13 November 2014, the Applicants' appeals against dismissal of their judicial review applications were allowed principally on grounds of breach of *Tameside Duty* by the Town Planning Board and procedural unfairness in its decision making process. As a result, the relevant decisions were quashed and the Town Planning Board was directed to reconsider the matters. Nonetheless, the Court of Appeal affirmed the power of the Town Planning Board to impose site specific restrictions. Both parties intend to seek leave to appeal to the Court of Final Appeal.

In *Oriental Generation Limited v Town Planning Board* (HCAL 62/2011, HCAL 109/2011 & HCAL 34/2012, CACV 127/2012 & CACV 129/2012), the Applicant challenged the Town Planning Board's decisions not to propose amendments to the Draft Ngau Tau Kok and Kowloon Bay Outline Zoning Plan in accordance with its representations/further representations seeking to relax the restrictions on building height, non-building area and building gap (the Restrictions)

imposed on the Applicant's "Kai Tak Mansion" site. By its judgment dated 11 May 2012, the Court of First Instance held that the Restrictions were imposed by the Town Planning Board arbitrarily. Specifically, there was, in the Court's view, insufficient evidence to demonstrate that the Applicant could fully utilise its permissible gross floor area given the building height restrictions imposed, or to justify the imposition of a building gap and a non-building area of specific dimensions. The Restrictions were therefore quashed by the Court of First Instance and the relevant matters were remitted to the Town Planning Board for reconsideration. The Town Planning Board's appeal was dismissed by the Court of Appeal on 13 November 2014. It is now seeking leave to appeal to the Court of Final Appeal.

Buildings

In *Building Authority v Appeal Tribunal (Buildings) (Interested Party: China Field Limited)* (HCAL 60/2011, CACV 277/2012, FACV 7/2014) arose out of the building appeal by the Interested Party in respect of its proposed development at Wang Fung Terrace, the Building Authority applied for judicial review against the decision of the Appeal Tribunal (Buildings) (Tribunal) to proceed with the rehearing on the basis that the question of section 16(1)(g) of the Buildings Ordinance (Cap 123) has not been remitted to it by the Court of Final Appeal in FACV 2/2009 for hearing and contended, *inter alia,* that the Tribunal misinterpreted section 16(1)(g) and failed to take into account relevant considerations. The Court of First Instance allowed the application on 19 November 2012. The Interested Party's appeal was dismissed by the Court of Appeal on 3 January 2014 and the matter was ordered to be remitted to the Tribunal for rehearing. The Interested Party obtained leave to appeal to the Court of Final Appeal on the question of *"in the exercise of the Building Authority's discretion under section 16(1)(g), whether consideration could be given to health, and safety issues, or town planning aspects, and the extent to which such considerations have any spatial or causal limitations"* . The appeal was heard on 23 February 2015 and by its judgment of 13 March 2015, the

Court of Final Appeal unanimously dismissed the appeal.

Environment

In *Leung Hon-wai v Director of Environmental Protection and Another* (HCAL 49/2012, CACV 176/2013), the Applicant challenged the decisions of the Director of Environmental Protection in approving an Environmental Impact Assessment Report and granting an environmental permit in relation to the proposed Integrated Waste Management Facilities to be constructed near Shek Kwu Chau as well as the Town Planning Board's decision in approving the Draft Shek Kwu Chau Outline Zoning Plan. The Applicant sought to challenge the decisions on the grounds that they were unlawful, Wednesbury unreasonable and/or made in breach of natural justice. The Court of First Instance handed down its judgment on 26 July 2013 rejecting all the grounds of challenge and dismissing the judicial review application. The Applicant's appeal was heard on 4 and 5 June 2014 and by its judgment of 2 September 2014, the Court of Appeal (by majority) dismissed his appeal. The Applicant has applied to the Court of Appeal for leave to appeal to the Court of Final Appeal on the questions regarding the Direction of Environmental Protection's dual role under the Environmental Impact Assessment Ordinance (Cap 499) and off-site mitigation measures.

In *Ho Loy v Director of Environmental Protection and Chief Executive in Council* (HCAL 100/2013, CACV 216/2014), the Applicant challenged the decisions of the Director of Environmental Protection and Chief Executive in Council not to exercise their respective powers under section 14(1) and 14(3) of the Environmental Impact Assessment Ordinance (Cap 499) to suspend or cancel the Environmental Permit issued for the project to develop to a bathing beach at Lung Mei, Tai Po. The Applicant's fundamental contention was that a specific ecological impact assessment in relation to spotted seahorses in the study area to assess the conservation value was mandatory, and failure to carry out such assessment rendered the Environmental Impact Assessment Report misleading, wrong, incomplete or false, thus justifying the Director's exercise of her power under section 14(1). The Applicant also contended that in view of the increase in the number of sighting of spotted seahorses, the continuation of the project is or is likely to be more prejudicial to the health and well-being of the fauna or ecosystem that expected at the time of issuance of the Environmental Permit, thus justifying the Chief Executive in Council's exercise of his power under section 14(3). In its judgment handed down on 12 August 2014, the Court of First Instance rejected all the Applicant's grounds of challenge and dismissed the judicial review application. The hearing of the Applicant's appeal is fixed for 23 and 24 February 2016.

Inquiry

On 22 October 2012, a Commission of Inquiry under the Commissions of Inquiry Ordinance (Cap 86) was set up to inquire into the collision of two vessels near Lamma Island on 1 October 2012. This Department represented the Director of Marine, the Director of Fire Services and the Commissioner of Police. The inquiry lasted 50 days and involved about 100 witnesses. On 30 April 2013, the Commission published its report consisting of 186 pages (only the redacted version was made available to the public). In the report, the Commission made certain findings concerning, *inter alia*, the work of the Marine Department and its officers. It also made recommendations on measures required for the prevention of the recurrence of similar incidents in future.