Summary of Judicial Decision

Chan Ka Lam ("Applicant") v The Country and Marine Parks Authority ("Authority")
CACV 150/2017; [2019] HKCA 525

Decision	**:**	**Applicant's appeal dismissed**
Date of Hearing	**:**	**28 March 2019**
Date of Judgment/Decision	**:**	**14 May 2019**

Background

1. The Director of Agriculture, Fisheries and Conservation, designated as the Authority under the Country Parks Ordinance (Cap. 208) ("**Ordinance**"), has the duty, inter alia, to make recommendations to the Chief Executive for the designation of areas as country parks, to develop and manage country parks, and to protect their vegetation and wild life (section 4).

2. The Country and Marine Parks Board ("**Board**") is established pursuant to the Ordinance which shall, inter alia, act as a consultative body to advise the Authority upon any matter referred to it by the Authority; and to consider and to advise the Authority on, the policy and programmes prepared by the Authority in respect of country parks and special areas, including proposed country parks and special areas (section 5(1)(a) and (b)).

3. In around December 2013, in the process of assessing 54 country park enclaves which had not been covered by Outline Zoning Plans under the Town Planning Ordinance, the Authority decided **not** to recommend designating the enclaves of Hoi Ha, Pak Lap, To Kwa Peng, Pak Tam Au, So Lo Pun and Tin Fu Tsai ("**6 Enclaves**") as country parks, as they were assessed to be unsuitable for incorporation into the surrounding existing country parks.

4. By way of judicial review the Applicant challenged, inter alia, the decision of the Authority **not** to seek or consider the advice of the Board on the policy and programmes prepared by the Authority in respect of the 6 Enclaves ("**Decision**"). The Applicant argued that the Decision was unlawful since the Authority was legally obliged, but failed, to seek the advice of the Board under the Ordinance in relation to his non-recommendation decision concerning the 6 Enclaves.

5. The Applicant's challenge was partly dismissed (i.e. in relation to the Decision) by the Court of First Instance ("**CFI**"). The CFI held, inter alia, that the Decision was not policy or programmes in respect of country parks, or proposed country parks, but a matter in respect of how to best protect the natural landscape of the 54 country park enclaves (including the 6 Enclaves) assessed. The Authority was therefore not obliged to refer the Decision to the Board for consideration and advice. (Full text of the CFI's judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=109251&QS=%24%28HCAL%2C54%2F2014%29&TP=JU)

6. The Applicant lodged an appeal to the Court of Appeal ("**CA**") against the

judgment of the CFI in respect of the Decision. The Applicant argued that **(i)** the Decision did fall within the definition of the Authority's "programme" under section 5(1)(b) of the Ordinance, as it was part of a set or batch of decisions and/or a series or group of actions to be taken or not taken, prepared by the Authority in respect of country parks at issue on review; and **(ii)** the Authority's "programme" related directly and/or specifically to a potential expansion of the borders and boundaries of existing country parks by inclusion of one or more of the 6 Enclaves. By a Respondent's Notice, the Authority contended that the CFI's judgment should be affirmed on the additional ground that section 5(1)(b) does not oblige the Authority to refer his "policy" and "programmes" in respect of country parks to the Board for consideration and advice.

7. The Applicant's appeal to the Court of Appeal (**"CA"**) was heard on 28 March 2019. On 14 May 2019, CA **dismissed** the Applicant's appeal and **rejected** the Respondent's contention in the Respondent's Notice.

Issues in dispute

8. The appeal turns on the proper construction of section 5(1)(b) of the Ordinance. The main issues in dispute are:-

   (a) Whether there is a duty on the Authority to refer its policy and programmes in respect of country parks and special areas, including proposed country parks and special areas to the Board, for consideration and advice ("**Issue 1**"); and

   (b) Whether the Authority's Decision not to recommend designating the 6 Enclaves as county parks fall within the Authority's "policy" or "programmes" in respect of "country parks" and/or "proposed country parks" pursuant to section 5(1)(b) of the Ordinance ("**Issue 2**").

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

9. With regard to **Issue 1**, CA rejected the Authority's submissions and upheld CFI's construction that section 5(1)(b) should not be read subject to the requirement of referral by the Authority in section 5(1)(a). CA pointed out that there was no justification to hold that the requirement of referral under section 5(1)(a) should be construed as an overarching provision which governs the other sub-paragraphs of section 5(1). (paragraphs 31 to 33)

10. CA also rejected the Authority's submissions and confirmed the CFI's ruling that the Authority (being a member of the Board) must have an implied duty to consult the Board under section 5(1)(b) for the following reasons. First, in light of its legislative history, CA was of the view that each provision under section 5(1) is intended by the legislature to provide for a distinct and separate function of the Board. Hence section 5(1)(b) should not be mere surplusage to highlight the specific areas where the Authority may consider referring to the

Board for consultation and advice. (paragraphs 38 to 44) Second, as the Authority is responsible for the preparation of the relevant policies and programmes, it is a natural reading of the Ordinance that the Authority should forward his policies and programmes to the Board for consideration and advice. Otherwise the Board would not be able to perform its statutory function under section 5(1)(b). (paragraphs 46 to 47)

11. On **Issue 2**, CA held that the Authority's assessments and decisions in respect of the non-recommendation of the 6 Enclaves were **not** "policy" or "programmes" within the meaning of section 5(1)(b). The two subsidiary questions under this issue are: (i) are the assessments and recommendations by the Authority policies or programmes; (ii) if so, are the assessments and recommendations policies or programmes in respect of the country parks. (paragraphs 51 and 67)

12. CA was of the view that each of the assessments and recommendation was based on the specific facts, findings and circumstances of each enclave, and therefore they would not be qualified as "policy" in the context of the Ordinance. (paragraph 53)

13. CA disagreed with the Applicant's submissions that CFI erred in defining the meaning of "programmes" or failed to differentiate between "policy" and "programmes". CA agreed with CFI's ruling that in the context of section 5(1)(b), "policy" and "programmes" refer to the formulation of principles and the making of plan or scheme on a high level of generality respectively. Given the clear distinction between the formulation of policy and programme on one hand and their actual execution and implementation on the other, it could not be the legislative intention that the Board, playing its advisory role, should be involved in the execution or implementation of policy or programme. As such, CA held that consultation of executive acts in the form of assessments did not fall within the scope of section 5(1)(b). (paragraphs 56 to 61)

14. In light of the above conclusion, CA did not make any ruling in respect of the question (ii), i.e. whether the assessments were made in respect of a country park. (paragraph 68)

Civil Division
Department of Justice
May 2019