Summary of Judgment

Kwok Cheuk Kin v
Director of Lands,
Secretary for Justice &
Heung Yee Kuk ("Interested Party")
FACV Nos. 2, 3 & 4 of 2021; [2021] HKCFA 38

Decision	:	**Appellant's appeal dismissed**
Date of Hearing	:	**11-12 October 2021**
Date of Judgment	:	**5 November 2021**

Background

1. The Small House Policy (**"SHP"**) is a policy allowing an eligible male indigenous inhabitant of the New Territories (**"NTII"**) to apply for permission to build for himself a small house once during his lifetime, by way of:

   i. a Free Building Licence ("**FBL**") on land owned by the applicant himself at nil premium;
   ii. a Private Treaty Grant ("**PTG**") of Government land at concessionary premium set at approximately two-thirds of the full market value; or
   iii. a Land Exchange ("**LE**") at nil premium for the private land portion and concessionary premium for the Government land portion.

2. The Appellant sought judicial review of the SHP on the ground that it is unconstitutional by being discriminatory on the basis of sex, birth, or social origin in contravention of Articles 25 and 39 of the Basic Law (**"BL 25"** and **"BL 39"**), and/or Article 22 of s.8 of the Bill of Rights (**"BOR 22"**).

3. The main question is whether the benefits conferred on NTIIs under the SHP fall within Article 40 of the Basic Law (**"BL 40"**), which provides that the lawful traditional rights and interests of the NTIIs shall be protected by the HKSAR.

4. By judgment dated 8 April 2019, the Court of First Instance (**"CFI"**) partially allowed the judicial review application as the Court found that one aspect of the SHP, viz FBL and LE (for private land) are constitutional whereas PTG and LE (for Government land) are unconstitutional. (Full text of the CFI's judgment at *https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=121196&QS=%2B&TP=JU*)

5. All parties appealed to the Court of Appeal (**"CA"**). By judgment dated 13 January 2021, the CA held that the SHP is constitutional in its entirety. On a proper construction of BL 40, the SHP falls within the NTIIs' lawful traditional rights and interests under BL 40 entitling them to the constitutional protection in full, despite their inherently discriminatory nature. In any event, the CA would have refused the grant of relief because the Appellant lacked standing to seek judicial review as he had no interest over and above that of an ordinary resident, and because of the lengthy and unexplained delay in bringing the

claim.
(Full text of the CA's judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132950&QS=%2B&TP=JU)

Questions for which leave is granted

6. On 29 April 2021, leave to appeal was granted to the Appellant in respect of the following four questions:

   i. Is the right of a NTII under the SHP a lawful traditional right or interest within the meaning of BL 40?
   ii. Does a person who is a victim of a discriminatory government policy have sufficient standing to challenge that policy by way of judicial review?
   iii. Where a government policy is an ongoing one and is held to be unconstitutional, should the court refuse relief on the ground of delay?
   iv. In a judicial review of an administrative policy, where the declaratory relief sought is limited to prospective relief only, is the court entitled to refuse such prospective relief on the ground of hardship, prejudice or detriment to good administration?

Department of Justice's Summary of the CFA's Judgment
(Full text of the CFA's judgment at **https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=139919&QS=%2B&TP=JU**)

Proper construction of BL 40

7. To start with, the CFA defines the right or interest under SHP as a right to have one's application dealt with in accordance with the criteria laid down in the government's statements of current policy, subject to the lawfully exercised discretion of the Lands Department. The CFA proceeded on the basis that the SHP may change, expressly stating that it was not deciding on the question whether the SHP was immutable. (paragraph 39)

8. The CFA found that BL 40 should be construed with regard to its purpose and context. BL 40 is not qualified or limited by the anti-discrimination provisions in BL 25 and BL 39 and BOR 22 for the reasons that (i) the purpose of BL 40 is to ensure continuous protection of an existing entitlement enjoyed by NTIIs; (ii) BL 40 is a specific provision that prevails over the general provisions on equality in the Basic Law and the Bill of Rights; (iii) the purpose of BL 40 is to justify the inherent discriminatory nature of SHP; and (iv) a coherent reading of BL 122 (which deals with rents payable on small houses) supports the BL drafters' intention for BL 40. (paragraphs 35, 43-44)

9. It is held that the SHP cannot be challenged on ground of the anti-discrimination provisions in BL 25, BL 39 and BOR 22, whose application is excluded by BL40 in the special context of indigenous rights. The word "lawful" in BL 40 goes to the lawfulness of the way that the discretion is exercised as a matter of public law. (paragraph 45)

10. As regards the "traditional" aspect, the CFA agreed with the CA that the word "traditional" in BL40 is to be determined by reference to the state of affairs in April 1990 when the Basic Law was promulgated. BL 40 does not require a protected right or interest to be "traceable" to (based on or capturing the essence of) those rights and interests enjoyed by NTII before the commencement of the New Territories Lease in 1898. (paragraphs 46-47)

Delay

11. The CFA reaffirmed the fundamental rules requiring judicial review to be brought promptly and allowing for refusal of relief for hardship, prejudice or detriment to good administration caused. The Court also stated that as applications for judicial review vary greatly in their nature and their potential consequences, the rule on delay is not absolute. In this case, given that the SHP raises a controversial constitutional issue of considerable public importance, the relief sought is entirely declaratory and no claim is made to disturb past grants, the CFA differed from the CA and considered the CFI's decision to grant relief (on the view it took of the merits) cannot be faulted in principle and was within its discretion. (paragraphs 53-55)

Standing

12. Where a judicial review challenge seeks to vindicate the rule of law by raising a general legal or constitutional issue, as a matter of general principle, the CFA held that the question of whether an applicant has a sufficient interest depends on the context adopting a holistic approach in a particular case. (paragraphs 59-61)

13. In this case, the CFA viewed that the decisive consideration is that other than the generality of the public, the actual or potential beneficiaries of the SHP will have no interest in challenging it. The Court differed from the CA and accepted that in order that the rule of law will be best served given the significance and controversial character of the issue involved, the Appellant should be allowed to proceed with the challenge. (paragraph 62)

14. The CFA made an order *nisi* that there be no order as to costs as between the Appellant and the Respondents, and as between the Appellant and the Interested Party.

Civil Division
Department of Justice
5 November 2021