



Summary of Notable Judgment

Chan Ka Lam (Applicant)

v

The Country and Marine Parks Authority (Respondent)

FACV 5/2020; [2020] HKCFA 33

Decision : Applicant's appeal allowed
Date of Hearing : 4 September 2020
Date of Judgment : 12 October 2020

Background

1. Under the Country Parks Ordinance (Cap. 208) ("**Ordinance**"), the Country and Marine Parks Authority ("**Authority**") has control and management of country parks. It also has the duty of recommending areas to the Chief Executive for designation as country parks.
2. The Country and Marine Parks Board ("**Board**") is established under section 5 of the Ordinance. Under section 5(1)(a), the Board is to advise the Authority upon any matter referred to it by the Authority; under section 5(1)(b), the Board must be consulted to consider and advise the Authority on "*the policy and programmes prepared by the Authority in respect of country parks..., including proposed country parks...*".
3. In 2011, the Authority prepared a Working Paper WP/CMPB/6/2011 ("**Working Paper**") setting out the updated criteria for designation of new country parks or extending existing country parks. The Board, when being consulted, endorsed the updated criteria ("**2011 Criteria**").
4. In 2013, the Authority applied the 2011 Criteria in assessing 6 enclaves, namely Hoi Ha, Pak Lap, To Kwa Peng, Pak Tam Au, So Lo Pun and Tin Fu Tsai ("**6 Enclaves**") and decided they were unsuitable for incorporation into the surrounding country parks ("**Decision 1**"). In so deciding, the Authority did not consult the Board ("**Decision 2**").
5. By way of judicial review, the Applicant challenged the lawfulness of Decisions 1 and 2. In particular, the Applicant argued that Decision 2 was unlawful since the Authority was legally obliged, but failed, to seek the advice of the Board under section 5(1)(b) on not recommending the 6 Enclaves for incorporation.
6. On 27 April 2017, the Court of First Instance ("**CFI**") quashed Decision 1 and remitted the same for reassessment, and **dismissed** the Applicant's challenge on Decision 2. The CFI held, inter alia, that Decision 2 was not "policy" or "programmes", and the Authority was therefore not obliged to refer the non-recommendation 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)



7. On 14 May 2019, the Court of Appeal (“CA”) **dismissed** the Applicant’s appeal in relation to Decision 2. The CA **rejected** the Authority’s contention 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, and held that the Authority must have an implied duty to consult the Board. However, the CA found 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).
(Full text of the CA’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=121886&QS=%2B&TP=JU)
8. The Applicant’s application for leave to appeal to the Court of Final Appeal (“CFA”) was granted by the CFA on the basis of two questions of great general or public importance formulated by the CFA. The appeal was heard on 4 September 2020.

Issues in dispute

9. The two questions of great general or public importance were:-
 - (a) On the true construction of section 5(1)(b) of the Ordinance, in what circumstances does the Authority come under a duty to consult the Board, and thus to enable the Board to consider and advise the Authority, on the policy and programmes prepared by the Authority in respect of country parks, including proposed country parks?
 - (b) In particular, to what extent, if any, does the Authority come under a duty to consult the Board, and thus to enable the Board to consider and advise the Authority, regarding the Authority’s assessments and decisions regarding the suitability or otherwise of designating existing enclaves as country parks pursuant to the Working Paper?

Department of Justice’s Summary of the CFA’s Judgment

(Full text of the CFA’s judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=131255;

Press summary issued by the Judiciary at

https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2020/FACV000005_2020_files/FACV000005_2020ES.htm)

10. On question (a), the CFA held that section 5(1)(b) of the Ordinance must be interpreted by reference to its context and purpose. The respective functions of the Authority and the Board are clearly set out in the Ordinance and overlap in relation to the designation of areas as country parks. There exists a clear link between the duty of the Authority in



relation to the designation (and non-designation) of areas and the participation of the Board in this matter. These set the purpose and context of the Ordinance in interpreting section 5(1)(b). **(paragraphs 26-30)**

11. The word “policy” refers to a course or set of general principles that guides the way towards an objective. On the other hand, the word “programme” is more specific and connotes a plan of action, a project or scheme, or a series of intended activities, events or future actions to implement a policy, which is not limited to only a plan or outline of those matters. It is capable of referring to the intended activities or actions themselves and does not exclude executive acts to carry out the programme. Read together, “policy” and “programme” indicate the range of matters on which the Board must be consulted under section 5(1)(b). Whether something falls within a “policy” or “programme” depends on the facts of each case. **(paragraphs 34-36)**
12. Further, a policy or programme is “in respect of” country parks if it involves something to do with country parks, whether actual or proposed. **(paragraphs 42-43)**
13. The CFA also remarked in passing that the construction of the words “consider and to advise” under section 5(1)(b) provides discretion to the Board and its members to determine the extent of their involvement and their dealing with details in the course of considering and advising on policies and programmes, subject to their acting within acknowledged administrative law principles. **(paragraph 41)**
14. On question (b), the CFA held that the assessment of enclaves for the purposes of designation of country parks by reference to the 2011 Criteria set out in the Working Paper fell within the meaning of “policy”. The individual assessments of the enclaves that were to be made fell within the meaning of “programmes” under section 5(1)(b), as they formed part of an action plan to implement the policy protecting the enclaves, which is a programme “in respect of” the neighbouring country parks or proposed country parks. Accordingly, the Authority is required to consult the Board on whether or not to include the 6 Enclaves into their surrounding country parks. **(paragraphs 44-47)**

Civil Division
Department of Justice
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