



## Summary of Judgment

### **Paulus Johannes Zimmerman, Vice-Chairman of the Southern District Council v The Secretary of the Southern District Council**

**HCAL 1827/2020; [2021] HKCFI 3030**

**Decision** : **No substantive order made**  
**Date of Hearing** : **16 July 2021**  
**Date of Judgment** : **19 October 2021**

### Background

1. This judicial review was originally brought by Mr Lo Kin Hei, the Former Chairman of the Southern District Council (“**SDC**”). Upon his application to the Court, on 16 July 2021, the Court made an order that Mr Paulus Johannes Zimmerman, the Vice-Chairman of the SDC be made a party to the proceedings and that the proceedings be carried on as if he had been substituted for the Former Chairman as the Applicant.
2. The background facts leading to this judicial review are briefly these. On 1 June 2020, there occurred a suspected case of assault and criminal damage in Tin Wan, Southern District. The arrested person was a mentally incapacitated person. Ms Tiffany Yuen (“**Ms Yuen**”), a SDC Councillor for the Tin Wan Constituency, received a request for assistance from the mother of the arrested person in respect of the manner in which her son was handled by the Police in the course of their investigation. The Arrested Person subsequently pleaded guilty to the relevant criminal charges.
3. Arising from the above matter, Ms Yuen became concerned about the handling of mentally incapacitated persons by frontline police officers in the course of their day-to-day work, and wished to raise the topic for discussion at a SDC meeting. As a result, she submitted an agenda item to the Secretary of the SDC for discussion at the Meeting on 2 July 2020 (“**Proposed Agenda Item**”). The following queries were intended to be discussed:
  - (i) Are there any guidelines for frontline police officers to identify MIPs as early as possible and communicate effectively with them?
  - (ii) How many Mentally Incapacitated Person-related cases were handled in the Southern District between 2019 and 2020?
  - (iii) How does the police guarantee that MIPs’ rights are protected after arrest?(hereinafter referred to as the “**1<sup>st</sup>** , **2<sup>nd</sup>** and **3<sup>rd</sup>** **Issues**” respectively)



4. The Government considered that the Proposed Agenda Item concerned a territory-wide issue which did not have any particular district angle, and therefore did not fall within the ambit of the functions of a District Council under section 61 of the District Council Ordinance, Cap. 547 (“**DCO**”) and was *ultra vires*. As such, the Secretary, who was a public officer within the Southern District Office of the Home Affairs Department, refused to circulate the papers and keep, record, prepare and upload the minutes and audio recordings of the Meeting in respect of the Proposed Agenda Item (“**Decision**”).
5. The Applicant challenged the Decision and claimed that the Secretary had acted in breach of various provisions of the SDC’s Standing Orders (“**SO**”). On 14 September 2020, the Applicant made the application for leave to apply for judicial review of the Decision on the following grounds:
  - (1) illegality or breach of statutory duty; or
  - (2) alternatively, irrationality or *Wednesbury* unreasonableness.
6. After an *inter-partes* hearing, leave to apply for judicial review was granted by the Court of First Instance (“**CFI**”) on 3 March 2021.<sup>1</sup> The substantive hearing was conducted on 16 July 2021. The CFI formed a provisional view of making no substantive order.

### **Issues in dispute**

7. The two principal issues considered before the CFI are:-
  - (1) The ambit of the advisory function of a District Council under section 61(a) of the DCO, and in particular, whether it includes discussion of territory-wide issues.
  - (2) Whether the Secretary has breached her duty in not circulating papers and keeping minutes etc in this case.

### **Department of Justice’s Summary of the Court’s rulings**

(Full text of the CFI’s judgment at

[https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2020/HCAL001827 B\\_2020.doc](https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2020/HCAL001827_B_2020.doc))

### *Legal Framework*

8. Article 97 of the Basic Law provides that: “District organizations which are

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<sup>1</sup> See [https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2020/HCAL001827\\_2020.doc](https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2020/HCAL001827_2020.doc)



not organs of political power may be established in the Hong Kong Special Administrative Region, to be consulted by the government of the Region on district administration and other affairs, or to be responsible for providing services in such fields as culture, recreation and environmental sanitation.”

9. Article 98 states that the powers and functions of the district organizations and the method for their formation shall be prescribed by law.
10. The DCO, which was enacted pursuant to Basic Law Articles 97 and 98, prescribes the functions of District Council (“DC”) in section 61(a)<sup>2</sup>.

*District Council’s advisory functions confined to district affairs*

11. The CFI confirmed that the role of a District Council is a “consultative body”. Further, as evident from the wording of section 61(a) of the DCO, the CFI found it clear that a DC’s advisory functions are confined to “district affairs”. Each sub-section in section 61(a) refers to a function of a District Council to advise the Government on matters “in”, “for” or “within” the relevant District, or on the use of public funds allocated to the relevant District for “local” public works and community activities. (paragraph 38(2) and (6))
12. A District Council cannot use the mere fact that a territory-wide policy or practice of the Government is being applied to the District as a springboard to debate territory wide matters. (paragraph 38(9))
13. Whether any given item on an agenda for a District Council meeting is a district matter or a territory wide matter depends on the true nature of the matters proposed to be discussed under that agenda item. (paragraphs 37 and 8(10))
14. In this case, whether it is within SDC’s statutory functions to discuss the 1<sup>st</sup> Issue at the Meeting depends on the purpose for which the SDC sought the information referred to in that issue. The 2<sup>nd</sup> Issue, which raises a

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<sup>2</sup> “The functions of a District Council are-

(a) to advise the Government-

- (i) on matters affecting the well-being of the people in the District; and
- (ii) on the provision and use of public facilities and services within the District; and
- (iii) on the adequacy and priorities of Government programmes for the District; and
- (iv) on the use of public funds allocated to the District for local public works and community activities; and...”



straightforward statistical question, clearly falls within the SDC's functions under section 61(a) of the DCO. The 3<sup>rd</sup> Issue, which concerns generally how arrested MIPs' rights are guaranteed by the police, would *prima facie* fall outside the ambit of the SDC's functions under section 61(a) of the DCO. In sum, the CFI was of the view that some aspects of the proposed discussion would be within, while some aspects would be, or would likely be outside the functions of the SDC under section 61(a) of the DCO. (paragraphs 41-42)

15. Given that there were aspects of the intended discussion under the Proposed Agenda Item which would fall within (i.e. 2<sup>nd</sup> Issue) and other aspects which would, or would likely fall outside (i.e. 3<sup>rd</sup> Issue) the advisory functions of the SDC, it is not justifiable to grant a declaration in the general form sought by the Applicant. (paragraphs 20 and 44)

#### *Secretary's duty*

16. The Chairman of the SDC is not the final arbiter of the question whether a matter falls within the ambit of a District Council's advisory functions. If a matter falls outside the ambit of a District Council's advisory functions under section 61(a) of the DCO, the Secretary is not legally bound to act as if it were compatible with the functions of the DC. (paragraph 38(10)-(11)) In this regard, whether the Secretary had breached the duty to circulate papers and keep minutes in this case is a question of law. (paragraph 43)

#### *District Council's proactive advisory role within the ambit of "district affairs"*

17. The CFI took the view that a District Council is not a mere "passive" body which can only exercise its advisory functions when called upon to do so by the Government. Within the ambit of "district affairs", a District Council is entitled to pro-actively exercise its functions under section 61(a) of the DCO. (paragraph 38(2))
18. The CFI found it questionable whether it would serve any useful or practical purpose to grant any declaratory relief in this application. Hence, upon considering parties' submissions on the relief, the CFI made an order on 17 November 2021 to maintain its view that there be no substantive order on this application. (paragraph 44 )